

United States District Court  
For the Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DEBRA GARCIA,

Plaintiff,

v.

WELLS FARGO BANK N.A., et al.,

Defendants.

No. C 13-3670 PJH

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION TO  
DISMISS**

Defendants’ motion to dismiss came on for hearing before this court on December 11, 2013. Plaintiff Debra Garcia (“plaintiff”) appeared through her counsel, Eunji Cho. Defendants Wells Fargo Bank, N.A. and U.S. Bank, N.A. (“defendants”) appeared through their counsel, Mary Kate Kamka. Having read the papers filed in conjunction with the motion and carefully considered the arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS in part and DENIES in part defendants’ motion to dismiss as follows.

**BACKGROUND**

This is a mortgage case. The parties present differing versions of the facts, so this order will first present defendants’ allegations (which reach back further in time), and then will present plaintiff’s factual allegations, which are more detailed as to the bases for her asserted causes of action.

According to defendants, plaintiff refinanced the subject property on October 13, 2004, through Wells Fargo. Dkt. 18 at 1. The amount of the refinance loan was \$399,000. Id. Plaintiff then refinanced the junior lien on her home in August 2005, in the amount of \$100,000. Id. Plaintiff then obtained another loan in February 2007, in the amount of

1 \$19,000. Id.

2 In January 2008, plaintiff first stopped making payments on her loans, resulting in a  
3 notice of default in April 2008, indicating \$20,631.44 in arrearage. Dkt. 18 at 1. Plaintiff  
4 ultimately cured this default, resulting in the rescission of the notice of default. Id.

5 Plaintiff again stopped making payments sometime later in 2008, resulting in a  
6 second notice of default in February 2009, indicating \$20,923.63 in arrearage. Dkt. 18 at 1-  
7 2. Plaintiff ultimately cured this default as well. Id. at 2.

8 Plaintiff again stopped making payments sometime in 2009, resulting in a third  
9 notice of default in August 2009, indicating \$19,198.26 in arrearage. Dkt. 18 at 2. Plaintiff  
10 ultimately cured this default. Id.

11 Plaintiff again stopped making payments (presumably, sometime in 2011, though  
12 defendants do not provide a date), resulting in a fourth notice of default in October 2011,  
13 indicating \$6,525.67 in arrearage. Dkt. 18 at 2. Again, plaintiff cured the default, though  
14 she did not cure it until February 2012, when the arrearage was \$22,269.77. Id.

15 After curing default for the fourth time, plaintiff did not make another payment,  
16 resulting in a fifth notice of default on April 5, 2013. Dkt. 18 at 2. According to defendants,  
17 plaintiff stopped making payments in March 2012, and was \$36,861.31 in arrears at the  
18 time of the notice of default. Id.

19 Plaintiff's operative first amended complaint ("FAC") does not discuss the first three  
20 notices of default (stating only that she "had reinstated her loan several times"), but does  
21 allege that, in July 2011, she contacted Wells Fargo to see if more favorable loan terms  
22 were possible. FAC, ¶ 13. She spoke to Herman Purewal, who identified himself as  
23 plaintiff's point of contact. Id. Plaintiff alleges that Purewal "told her very specifically that in  
24 order to be considered for a loan modification, she would have to be at least three months  
25 late on her mortgage payments." Id., ¶ 14. Plaintiff alleges that she was "uncomfortable"  
26 about missing payments, but that Purewal clearly told her that she needed to do so to be  
27 eligible for a modification, and that Wells Fargo had a policy not to foreclose on a property  
28 while a modification application was pending. Id. Plaintiff alleges that "Purewal promised

1 plaintiff that her property would not be foreclosed on while she was pursuing a  
2 modification.” Id.

3 Plaintiff alleges that she started missing payments in July 2011, as instructed, and  
4 after missing the third payment, she “contacted Wells Fargo to apply for a loan  
5 modification.” FAC, ¶ 15. After not being able to get in touch with Purewal at first, plaintiff  
6 did get in contact with Purewal (though it is not clear when), and submitted the loan  
7 modification paperwork. Id. Purewal told her that he would contact her with a decision by  
8 December 2011. Id.

9 During that time, Wells Fargo recorded a notice of default (in October 2011), and  
10 scheduled a trustee’s sale for February 9, 2012. FAC, ¶¶ 15-16. Plaintiff claims that she  
11 was anxious and fearful, and that she left “many messages” for Purewal, with no response.  
12 Id., ¶ 17. Then, “just a few days” before the trustee’s sale, Purewal called her back and  
13 told her that there was nothing that he could do. Id. Plaintiff ultimately paid the  
14 reinstatement amount of \$22,269.77 on February 7, 2012. Id., ¶ 18.

15 Plaintiff then alleges that she again contacted Purewal in January 2013 to “reinstate  
16 her loan as she had done in the past.” FAC, ¶ 19. She alleges that she was given a  
17 reinstatement amount of \$36,000, which she believed to be excessive. Id. Plaintiff alleges  
18 that “suspicion regarding the excessive reinstatement calculation was later confirmed  
19 when, on or about April 5, 2013, defendant caused to be recorded a notice of default” which  
20 indicated that “she was \$36,861.31 in arrears on her account, the same amount that she  
21 had been provided months earlier.” Id.

22 The FAC then includes a separate section on “facts regarding violation of Civil Code  
23 Section 2923.7,” which establishes Wells Fargo’s duty to designate a single point of contact  
24 upon a borrower’s request for a foreclosure prevention alternative. Plaintiff alleges that,  
25 starting in January 2013, she made several attempts to verify whether Purewal was her  
26 single point of contact. FAC, ¶ 22. However, plaintiff claims that he never returned her  
27 calls, and that she was given excuses for why Purewal could not take her call. Id., ¶ 23.  
28 After receiving notice, in February 2013, that her loan had been referred to outside counsel

1 to initiate foreclosure proceedings, plaintiff went to a Wells Fargo branch and spoke to a  
2 different mortgage specialist (Paul Gruber), and after discussions with him proved  
3 unsuccessful, she was assigned to a “preservation specialist” (Alexandra Dominguez) on  
4 June 17, 2013. Id., ¶¶ 27-30. Plaintiff alleges that this single point of contact should have  
5 been assigned in January 2013. Id., ¶ 30.

6 Plaintiff filed suit in this court on August 7, 2013, and after defendants filed a motion  
7 to dismiss the original complaint, plaintiff filed the operative FAC on September 26, 2013.  
8 The FAC alleges seven causes of action against Wells Fargo and U.S. Bank (which is  
9 alleged to be the current lender and owner of plaintiff’s note): (1) violation of Cal. Civ. Code  
10 §§ 2923.5 and 2923.7, (2) breach of contract, (3) breach of the implied covenant of good  
11 faith and fair dealing, (4) violation of Cal. Civ. Code § 2924c, (5) negligent  
12 misrepresentation, (6) fraud, and (7) unfair competition under Cal. Bus. & Prof. Code §  
13 17200.

#### 14 **DISCUSSION**

15 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the legal  
16 sufficiency of the claims alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d 1191,  
17 1199-1200 (9th Cir. 2003). Review is limited to the contents of the complaint. Allarcom  
18 Pay Television, Ltd. v. Gen. Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). To survive  
19 a motion to dismiss for failure to state a claim, a complaint generally must satisfy only the  
20 minimal notice pleading requirements of Federal Rule of Civil Procedure 8, which requires  
21 that a complaint include a “short and plain statement of the claim showing that the pleader  
22 is entitled to relief.” Fed. R. Civ. P. 8(a)(2).

23 A complaint may be dismissed under Rule 12(b)(6) for failure to state a claim if the  
24 plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support  
25 a cognizable legal theory. Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir.  
26 1990). The court is to “accept all factual allegations in the complaint as true and construe  
27 the pleadings in the light most favorable to the nonmoving party.” Outdoor Media Group,  
28 Inc. v. City of Beaumont, 506 F.3d 895, 899-900 (9th Cir. 2007).

1           However, legally conclusory statements, not supported by actual factual allegations,  
2 need not be accepted. Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). The allegations in  
3 the complaint “must be enough to raise a right to relief above the speculative level.” Bell  
4 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations and quotations omitted). A  
5 claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
6 draw the reasonable inference that the defendant is liable for the misconduct alleged.”  
7 Iqbal, 556 U.S. at 678 (citation omitted). “[W]here the well-pleaded facts do not permit the  
8 court to infer more than the mere possibility of misconduct, the complaint has alleged – but  
9 it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’” Id. at 679. In the event  
10 dismissal is warranted, it is generally without prejudice, unless it is clear the complaint  
11 cannot be saved by any amendment. See Sparling v. Daou, 411 F.3d 1006, 1013 (9th Cir.  
12 2005).

13           In addition, while the court generally may not consider material outside the pleadings  
14 when resolving a motion to dismiss for failure to state a claim, the court may consider  
15 matters that are properly the subject of judicial notice. Lee v. City of Los Angeles, 250 F.3d  
16 668, 688-89 (9th Cir. 2001); Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279,  
17 1282 (9th Cir. 1986). Additionally, the court may consider exhibits attached to the  
18 complaint, see Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555  
19 n.19 (9th Cir. 1989), as well as documents referenced extensively in the complaint and  
20 documents that form the basis of a the plaintiff’s claims. See No. 84 Employer–Teamster  
21 Joint Counsel Pension Trust Fund v. America West Holding Corp., 320 F.3d 920, 925 n.2  
22 (9th Cir. 2003).

23           Finally, in actions alleging fraud, “the circumstances constituting fraud or mistake  
24 shall be stated with particularity.” Fed. R. Civ. P. 9(b). Under Rule 9(b), falsity must be  
25 pled with specificity, including an account of the “time, place, and specific content of the  
26 false representations as well as the identities of the parties to the misrepresentations.”  
27 Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (citations omitted). “[A]llegations  
28 of fraud must be specific enough to give defendants notice of the particular misconduct

1 which is alleged to constitute the fraud charged so that they can defend against the charge  
2 and not just deny that they have done anything wrong.” Bly-Magee v. California, 236 F.3d  
3 1014, 1019 (9th Cir. 2001) (citation and quotations omitted). In addition, the plaintiff must  
4 do more than simply allege the neutral facts necessary to identify the transaction; he must  
5 also explain why the disputed statement was untrue or misleading at the time it was made.  
6 Yourish v. California Amplifier, 191 F.3d 983, 992-93 (9th Cir. 1999).

7 B. Legal Analysis

8 As an initial matter, the FAC makes no specific allegations against U.S. Bank, and  
9 none of the briefing discusses U.S. Bank’s role in any of the conduct underlying plaintiff’s  
10 claims. Thus, defendants’ motion to dismiss is GRANTED as to all asserted claims against  
11 U.S. Bank.

12 Turning to the merits of plaintiff’s claims, plaintiff’s first cause of action for wrongful  
13 foreclosure actually consists of two prongs – one for the alleged violation of Cal. Civil Code  
14 § 2923.5, and one for the alleged violation of Cal. Civil Code § 2923.7. This order will  
15 address them separately.

16 The first prong of plaintiff’s first cause of action alleges that Wells Fargo failed to  
17 contact plaintiff in person or by telephone in order to assess her financial situation and  
18 explore options for her to avoid foreclosure, as required by section 2923.5. Plaintiff further  
19 alleges that Wells Fargo did not advise her that she had the right to request a subsequent  
20 meeting to occur within 14 days, as required by section 2923.5. In response, Wells Fargo  
21 provides a declaration, dated February 21, 2013, stating that it had contacted plaintiff to  
22 assess her financial situation and explore foreclosure-avoidance options. See Dkt. 19, Ex.  
23 16. Wells Fargo further argues that plaintiff “has not provided any factual support to  
24 contradict the declaration.”

25 However, on this specific type of claim, there are not any “facts” for plaintiff to allege  
26 other than the negative statement that Wells Fargo did not actually contact plaintiff. And in  
27 the FAC, plaintiff does describe her contact with Wells Fargo in the relevant timeframe –  
28 alleging that, in March 2013, she spoke to an “executive mortgage specialist” (Paul Gruber)

1 who discussed with plaintiff the reinstatement amount on her loan. FAC, ¶¶ 27-29. Plaintiff  
2 asked Gruber if the amount of her monthly payment had been increased by mistake, and  
3 Gruber said that he would investigate and provide an answer within a week. Id., ¶ 28. Two  
4 weeks passed without an answer, so plaintiff called Gruber, who informed her that “private  
5 investigators who are holding the loan but whom Gruber would not identify were not willing  
6 to ‘negotiate’ the reinstatement amount or modify plaintiff’s loan.” Id., ¶ 29. It is unclear  
7 whether Wells Fargo is relying on this contact to support its declaration – but it is unlikely,  
8 given that the declaration was recorded on February 21, 2013, whereas plaintiff claims that  
9 her first contact with Gruber was not until March 2013. In short, the parties simply provide  
10 conflicting accounts of Wells Fargo’s contact with plaintiff, and because plaintiff’s  
11 allegations are to be taken as true at this stage of the case, the court finds that plaintiff has  
12 adequately alleged that Wells Fargo did not actually contact her 30 days (or more) before  
13 the date of the declaration. Wells Fargo’s motion to dismiss this prong of plaintiff’s first  
14 cause of action is thus DENIED.

15         The second prong of plaintiff’s first cause of action alleges that Wells Fargo did not  
16 promptly establish a single point of contact (“SPOC”) and provide to her one or more direct  
17 means of communication with the single point of contact, as required by section 2923.7. As  
18 explained above, plaintiff alleges that Purewal was initially assigned as her single point of  
19 contact, but plaintiff alleges that she attempted, on numerous occasions, to contact  
20 Purewal, and that he was unresponsive to her phone calls. Wells Fargo argues that the  
21 statute “does not define the frequency with which a SPOC must communicate with a  
22 borrower,” which is true, but would appear to allow a defendant to avoid liability simply by  
23 making a nominal “appointment” of a SPOC, even if that SPOC never communicates with  
24 the borrower ever again. And as plaintiff argues, the statute requires the SPOC to  
25 “adequately inform the borrower of the current status of the foreclosure prevention  
26 alternative” and to “ensur[e] that a borrower is considered for all foreclosure prevention  
27 alternatives offered by, or through, the mortgage servicer, if any.” Purewal’s failure to  
28 follow up on plaintiff’s loan modification request (made in October 2011, with a promised

1 response by December 2011) would, by itself, appear to be sufficient to state a claim under  
2 either of these two subsections. Thus, the court DENIES Wells Fargo’s motion to dismiss  
3 as to the second prong of plaintiff’s first cause of action.

4 The court will address plaintiff’s second cause of action (breach of contract) and  
5 third cause of action (breach of implied covenant of good faith and fair dealing) together,  
6 because they are based on the same underlying conduct. In general, plaintiff alleges that  
7 Wells Fargo breached her initial loan refinance agreement “when it demanded, as a  
8 condition of reinstatement, the fees it waived when it told her to stop making payments in  
9 July 2011.” However, as defendants point out, the loan agreement provided for the  
10 imposition of all of the complained-about fees. Thus, plaintiff cannot state a claim for  
11 breach of the loan agreement, and Wells Fargo’s motion to dismiss is GRANTED as to  
12 plaintiff’s second and third causes of action. However, plaintiff will be given leave to amend  
13 these claims, because plaintiff may be able to state a claim that she entered into an oral  
14 contract with Purewal (who was acting on behalf of Wells Fargo). In the FAC, plaintiff  
15 alleges that Purewal agreed to consider a loan modification (i.e., to either offer a loan  
16 modification, or to inform plaintiff if she were ineligible) if plaintiff missed three payments.  
17 Thus, if there was a breach of contract, it was not a breach of the loan agreement itself, it  
18 was a breach of an oral agreement between Purewal and plaintiff. See also Corvello v.  
19 Wells Fargo Bank, N.A., 728 F.3d 878, 884-85 (9th Cir. 2013). While the court does not  
20 opine on the merits of any claim for breach of an oral contract, it will allow plaintiff an  
21 opportunity to amend so that she may clarify her claims.

22 Plaintiff’s fourth cause of action alleges that Wells Fargo demanded funds from her  
23 in excess of the amount necessary to reinstate her loan, in violation of Cal. Civil Code §  
24 2924c. However, it appears that the allegedly excessive fees all stem from plaintiff’s failure  
25 to make payments on her loan, which, in turn, stems from Purewal’s representation to  
26 plaintiff that she would need to miss at least three payments in order to be eligible for a  
27 loan modification. Thus, while the “excessive” funds may provide a measure of damages  
28 for a contract claim, they do not appear to form the basis of a claim under section 2924c.



1 Wells Fargo's motion to dismiss plaintiff's fourth cause of action is therefore GRANTED,  
2 and while the court will allow plaintiff an opportunity to amend this claim, the court notes  
3 that plaintiff will need to more specifically describe why the fees charged were "excessive" if  
4 she wishes to maintain a viable claim under section 2924c.

5 Plaintiff's fifth cause of action (negligent misrepresentation) and sixth cause of action  
6 (fraud) are based on the same underlying conduct, so the court will address them together.  
7 Both claims are based on Purewal's alleged representation to plaintiff that she would need  
8 to miss at least three payments in order to be eligible for a loan modification, and that her  
9 property would not be foreclosed upon during the modification application process. The  
10 court agrees with Wells Fargo that any misrepresentation appears to have related to a  
11 future fact (i.e., the promise to either offer a modification or to inform plaintiff that she was  
12 ineligible, and/or not to foreclose on her home while the modification was being sought),  
13 and not to a past or existing fact. Thus, plaintiff's allegations appear to be more suited to a  
14 breach of contract claim than a fraud claim. However, if plaintiff can actually allege that  
15 Purewal's statements were untrue when made, then plaintiff would be able to state a claim  
16 on these fraud-type claims. Because Rule 9(b) requires claims of falsity to be pled with  
17 particularity, including an explanation of why the disputed statement was untrue or  
18 misleading at the time it was made, Wells Fargo's motion to dismiss plaintiff's fifth and sixth  
19 causes of action is GRANTED, with leave to amend.

20 Plaintiff's seventh cause of action alleges a violation of California's unfair  
21 competition law, and is premised on the various violations of California law that are alleged  
22 in the FAC. Because the fees triggered as a result of plaintiff's non-payment do establish  
23 standing, and because plaintiff has pled a viable cause of action at least as to her first  
24 cause of action, Wells Fargo's motion to dismiss plaintiff's seventh cause of action is  
25 DENIED.

26 Plaintiff shall have until **March 3, 2014** to file a second amended complaint in  
27 accordance with this order, and defendants shall have until **March 24, 2014** to answer or  
28 otherwise respond to the complaint. Despite the absence of allegations as to defendant

1 U.S. Bank, plaintiff shall have one opportunity to amend her claims against it. Any  
2 amendment must clearly set forth which claims are asserted against which defendant and  
3 what each defendant did to make them liable. Plaintiff may no longer simply lump all  
4 defendants together without delineating the wrongful acts committed by each. Also, no  
5 new parties may be added without leave of court, and no new claims may be added without  
6 leave of court or the agreement of the parties.

7 Finally, defendants' request for judicial notice is GRANTED.

8 **IT IS SO ORDERED.**

9 Dated: January 31, 2014



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PHYLLIS J. HAMILTON  
United States District Judge

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