

1 Wells Fargo representative regarding the options that may be available for a Loan Modification.”
2 (FAC ¶ 12.) After several months passed and many letters exchanged, Wells Fargo recorded a
3 Notice of Default on January 26, 2010. (FAC ¶ 19.) Plaintiffs continued to send letters,
4 attempting to work out a loan modification. (See FAC ¶¶ 20–24.) It was all for naught, as on
5 April 27, 2010, Plaintiffs received a Notice of Trustee’s Sale informing them that their home was
6 to be auctioned off. (*Id.* at ¶ 25.) This was the last straw, and Plaintiffs filed suit—ultimately
7 ending up before this Court.

8 On December 1, 2010, Plaintiffs filed their FAC, alleging four causes of action: 1) breach
9 of the implied duty of good faith and fair dealing; 2) negligent misrepresentation; 3) fraud and
10 deceit; and 4) declaratory relief. (Doc. No. 12 (FAC).) Faced with these allegations, Wells Fargo
11 responded with the present motion to dismiss. (Doc. No. 14 (Mot. to Dismiss).)

12 LEGAL STANDARD

13 Federal Rule of Civil Procedure 12(b)(6) allows a party to assert by motion the defense that
14 the complaint “fail[s] to state a claim upon which relief can be granted,” generally known as a
15 motion to dismiss. The Court evaluates whether a complaint states a cognizable legal theory and
16 sufficient facts in light of Federal Rule of Civil Procedure 8(a), which requires a “short and plain
17 statement of the claim” showing that the pleader is entitled to relief. Although Rule 8 “does not
18 require ‘detailed factual allegations,’ . . . it [does] demand[] more than an unadorned, the-
19 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, — U.S.—, 129 S. Ct. 1937,
20 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a
21 plaintiff’s obligation to provide the ‘grounds’ for his ‘entitle[ment] to relief’ requires more than
22 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
23 *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Nor does a
24 complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*,
25 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 557).

26 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
27 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*,
28 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible when the facts

1 **2. Negligent Misrepresentation of Facts**

2 Plaintiffs' second cause of action alleges negligent misrepresentation of facts by
3 Defendants Wells Fargo and LoanStar. Under California law, plaintiffs asserting negligent
4 misrepresentation claims must establish, among other things, that defendants misrepresented a past
5 or existing material fact. *DeLeon v. Wells Fargo Bank, N.A.*, 2011 WL 311376, at *9 (N.D. Cal.
6 Jan. 28, 2011) (citing *Nat'l Union Fire Ins. Co. v. Cambridge Integrated Servs.*, 89 Cal. Rptr. 3d
7 473, 483 (Cal. Ct. App. 2009)). Plaintiffs' claim here fails for want of this necessary element.

8 Plaintiffs do not allege any misrepresentations of a past or existing material fact. Instead,
9 Plaintiffs allege that Defendants stated they "1) would try to assist with Plaintiffs' efforts to obtain
10 a loan modification, 2) would provide Plaintiffs with information about loan modification
11 programs upon the Plaintiffs' providing to Defendants the requested financial and other
12 information, and 3) would attempt to help Plaintiffs keep their [h]ome." (FAC ¶ 40.) These
13 statements are prospective, however. They are promises of future conduct rather than
14 representations of past or existing facts. *See Stevens v. JPMorgan Chase Bank, N.A.*, 2010 WL
15 329963, at *7 (N.D. Cal. January 20, 2010) (citing *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2
16 Cal. Rptr. 2d 861, 863 (Cal. Ct. App. 1991). Based on these allegations, Plaintiffs cannot set forth
17 a claim for negligent misrepresentation. This claim is therefore **DISMISSED**.

18 **3. Fraud and Deceit - Intentional Misrepresentation and Concealment**

19 Plaintiffs' third cause of action is for fraud and deceit based on intentional
20 misrepresentation and concealment by Defendants. Defendants allegedly falsely represented that
21 they "1) would try to assist with Plaintiffs' efforts to obtain a loan modification, 2) would provide
22 Plaintiffs with information about loan modification programs upon the Plaintiffs' providing to
23 Defendants the requested financial and other information, and 3) would attempt to help Plaintiffs
24 keep their [h]ome." (FAC ¶ 45.)

25 Claims for fraud must meet the heightened pleading standard of Federal Rule of Civil
26 Procedure 9(b). *Neilson v. Union Bank, N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003).
27 Under this rule, Plaintiffs must "state with particularity the circumstances constituting fraud."
28 Fed. R. Civ. P. 9(b). The allegations of fraud must "be 'specific' enough to give defendants notice

1 of the particular misconduct . . . so that they can defend against the charge and not just deny that
2 they have done anything wrong.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir.
3 2003) (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)). Namely, these
4 allegations “must be accompanied by ‘the who, what, when, where, and how’ of the misconduct
5 charged.” *Id.* (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). “[A] plaintiff must
6 set forth more than the neutral facts necessary to identify the transaction. The plaintiff must set
7 forth what is false or misleading about a statement, and why it is false.” *Id.* (quoting *Decker v.*
8 *Glenfeld, Inc.*, 42 F.3d 1541, 1548 (9th Cir. 1994)).

9 Plaintiffs fail to allege the “who, what, where, when, and how” with sufficient particularity
10 as required by Rule 9(b). *See Vess*, 317 F.3d at 1106. Plaintiffs offer conclusory allegations that
11 Defendants collectively made intentional misrepresentations. (*See* FAC ¶ 45.) And to the extent
12 specific interactions and statements were alleged, Plaintiffs do not specifically identify what is
13 false or misleading about a particular statement and why it is false.

14 Even if misrepresentations were properly alleged, the fraud claim fails because there is no
15 causal connection between the misrepresentations and the damages. *See Serv. by Medallion, Inc.*
16 *v. Clorox Co.*, 44 Cal. App. 4th 1807, 1818 (Cal. Ct. App. 1996). Plaintiffs allege in their
17 complaint that Defendants misrepresented their intention to participate in loan modification
18 discussions and that “caus[ed] Plaintiffs to lose their home.” (FAC ¶ 47.) For a causal connection
19 to exist in this situation requires, at the very least, the assumption that Plaintiffs would ultimately
20 have received a loan modification. This is a significant assumption given Wells Fargo had no
21 obligation to grant one. Plaintiffs allege no reasonable basis for believing that a loan modification
22 would have been granted and foreclosure avoided.

23 Because Plaintiffs fail to allege fraudulent statements with particularity and fail to allege a
24 causal connection between any fraudulent statements and the damages suffered, Plaintiffs fraud
25 claim is **DISMISSED**.

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1 **4. Declaratory Relief**

2 Plaintiffs' fourth cause of action requests declaratory relief against all defendants.
3 Specifically, the claim seeks a declaration that "Defendants failed to act in good faith with
4 Plaintiffs with regard to Plaintiffs' requests for information." (FAC ¶ 60.)

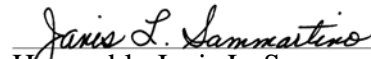
5 "A claim for declaratory relief is unnecessary where an adequate remedy exists under some
6 other cause of action." *Manown v. Cal-Western Reconveyance Corp.*, 2009 WL 2406335, at *6
7 (S.D. Cal. Aug. 4, 2009). Plaintiffs have sought adequate remedies under their other causes of
8 action. Accordingly Plaintiffs' fourth cause of action for declaratory relief is unnecessarily
9 duplicative and is **DISMISSED**.

10 **CONCLUSION**

11 The Court **GRANTS** Defendant's motion to dismiss in its entirety. Plaintiffs' breach of
12 the implied covenant of good faith and fair dealing claim is **DISMISSED WITH PREJUDICE**
13 insofar as it is based on alleged violations of § 2923.5. The other three claims are **DISMISSED**
14 **WITHOUT PREJUDICE**. If Plaintiffs wish, they may file a second amended complaint within
15 14 days of this Order being electronically docketed.

16 **IT IS SO ORDERED.**

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18 DATED: April 12, 2011

19 
20 Honorable Janis L. Sammartino
21 United States District Judge
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