

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEVIN E. GILMORE,

Plaintiff,

v.

WELLS FARGO BANK N.A., a national
bank; NDEX WEST LLC, a Delaware
limited liability company;

Defendants.

No. C 14-2389 CW

ORDER GRANTING IN
PART AND DENYING
IN PART WELLS
FARGO'S MOTION TO
DISMISS AND
GRANTING PLAINTIFF
LEAVE TO AMEND
(Docket No. 29)

_____ /

Plaintiff Kevin E. Gilmore asserts various mortgage-related claims against Defendants Wells Fargo Bank, NA and NDEX West, LLC.¹ Wells Fargo moves to dismiss Plaintiff's complaint. The Court took the motion under submission on the papers. Having considered the arguments presented by the parties, the Court GRANTS the motion in part and DENIES it in part and GRANTS Plaintiff leave to amend.

BACKGROUND

I. Request for Judicial Notice

Wells Fargo asks that the Court take judicial notice of several documents associated with Plaintiff's home loan. Wells

¹ In its August 28, 2014 order, the Court classified NDEX West a "nominal party to this action [that] is not required to actively participate in further proceedings and shall be treated as a nonparty for discovery purposes." Docket No. 52. Nevertheless, Plaintiff names NDEX West as a party in his first amended complaint.

1 Fargo's Request for Judicial Notice (RFJN) Exs. 1-9. "[A] court
2 may take judicial notice of matters of public record." Sami v.
3 Wells Fargo Bank, 2012 WL 967051, at *4 (N.D. Cal.) (citation
4 omitted). Although courts generally cannot consider documentary
5 evidence on a motion to dismiss, doing so is appropriate when the
6 pleadings refer to the documents, their authenticity is not in
7 question and there are no disputes over their relevance. Coto
8 Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010).
9

10 Plaintiff opposes the inclusion of Exhibit Nine, a May 28,
11 2014 letter from Wells Fargo to Plaintiff explaining that his loan
12 modification application has been pending for some time, is not
13 complete, and due to the incompleteness of the application, it is
14 unable to offer him assistance options. The Court takes judicial
15 notice of the fact that this letter was sent, although not of the
16 truth of the statements it contains. Accordingly, the Court takes
17 judicial notice of Exhibits One through Nine.
18

19 II. Facts

20 The following facts are taken from the first amended
21 complaint (1AC) and documents of which the Court takes judicial
22 notice.

23 In 2007, Plaintiff inherited from his grandfather the
24 property at issue, located at 9556 Virginia Street, Berkeley,
25 California. 1AC ¶ 11. He has lived in the home since he was a
26 child, and currently lives there with his family. Id. ¶ 12.
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1 On June 21, 2007, he took out a loan secured by a promissory
2 note in the principal sum of \$375,000 to World Savings Bank, FSB.
3 Id. ¶¶ 13-14. Through a series of mergers, the servicing of his
4 loan was transferred to Wachovia Bank and then to Wells Fargo.
5 Id. ¶ 16. According to the terms of the note, Plaintiff was
6 required to obtain hazard insurance. RFJN, Ex. 1. He alleges
7 that he provided proof of hazard insurance to his servicers
8 several times. 1AC ¶ 18. Due to the multiple changes in loan
9 servicers and lost paperwork, however, Plaintiff's loan servicer
10 automatically placed insurance on the property and required him to
11 pay, even though he had his own coverage. Id.

12
13 In 2010, due in part to the financial burdens of the
14 wrongfully placed insurance, as well as his other financial
15 obligations, Plaintiff became delinquent on his loan. Id. ¶ 19.
16 From 2011 to 2013, he submitted a number of applications seeking
17 loan modifications. Id. ¶ 21-26. Each one was denied, almost
18 always due to insufficient documents. Id. On or about March 21,
19 2012, Wells Fargo recorded and served a Notice of Default. Id.
20 ¶ 24. Around June 2013, Plaintiff received notice that his loan
21 modification application was rejected because he had excessive
22 financial obligations. Id. ¶ 25. In late 2013, another loan
23 modification was denied because Plaintiff had insufficient income.
24 Id. ¶ 26.

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26
27 In 2014, Plaintiff experienced a material change in his
28 financial circumstances; he alleges that his income increased to

1 \$5,400 a month and his financial obligations decreased by
2 approximately \$1,000 a month. Id. ¶ 27. On March 12, 2014, he
3 attended a home preservation workshop, sponsored by Wells Fargo,
4 where he submitted a loan modification application to one of Wells
5 Fargo's employees. Id. ¶¶ 28-30. Plaintiff alleges that in this
6 application, the change in his financial circumstances was
7 documented and submitted to Wells Fargo. Id. ¶ 35. The
8 representative told Plaintiff that his application was complete.
9 Id. ¶¶ 28-30.

11 On March 13, 2014, a notice of trustee's sale was placed on
12 the property. RFJN, Ex. 6. On March 24, 2014, Plaintiff received
13 a letter from Wells Fargo acknowledging receipt of the loan
14 modification application. 1AC, Ex. A. It stated, in relevant
15 part: "We will review the documentation you've submitted. Please
16 keep in mind, there may be additional documents required before we
17 can determine if you're eligible for mortgage assistance." Id.

19 On April 21, 2014, Plaintiff received a subsequent letter
20 from Wells Fargo in response to his request regarding the status
21 of his loan modification application. Id., Ex. B. The letter
22 stated, in relevant part:

23 As of the date of this letter, your mortgage loan is due for
24 the December 15, 2010, through April 15, 2014 monthly
25 installments. Foreclosure is active and a foreclosure sale
26 date is currently scheduled for May 19, 2014. However, your
27 mortgage loan is currently being reviewed for possible
28 payment assistance, and you will want to continue working
with Sarah Nuncio during the review process.

1 Id. (emphasis added). Plaintiff alleges that Wells Fargo has not
2 sent any written documentation explaining the additional documents
3 he needs to submit if the application is not complete. Id. ¶ 34.
4 He also alleges that Wells Fargo has not provided a written notice
5 stating that his most recent loan modification application has
6 been denied. Id. Plaintiff alleges that he wishes to obtain a
7 loan modification so he can become current on his loan payments
8 and keep his family in the home, but has not been given a fair
9 chance to do so. Id. ¶ 36.

11 Plaintiff's complaint consists of five causes of action:

12 (1) violation of the Homeowner Bill of Rights, codified at
13 California Civil Code section 2923.6 (HBOR); (2) request to void
14 the notice of trustee's sale; (3) negligence; (4) negligent
15 misrepresentation; and (5) fraud.

17 PROCEDURAL HISTORY

18 On June 5, 2014, this Court granted Plaintiff's application
19 for a temporary restraining order and ordered Wells Fargo to show
20 cause why a preliminary injunction should not issue. Wells Fargo
21 responded to the OSC and opposed the issuance of a preliminary
22 injunction. On June 18, 2014, the Court held a hearing and
23 granted a preliminary injunction. See Docket No. 23. Wells Fargo
24 has appealed the injunction to the Ninth Circuit. See Docket No.
25 34.
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LEGAL STANDARD

1
2 A complaint must contain a "short and plain statement of the
3 claim showing that the pleader is entitled to relief." Fed. R.
4 Civ. P. 8(a). The plaintiff must proffer "enough facts to state a
5 claim to relief that is plausible on its face." Ashcroft v.
6 Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v.
7 Twombly, 550 U.S. 544, 570 (2007)). On a motion under Rule
8 12(b)(6) for failure to state a claim, dismissal is appropriate
9 only when the complaint does not give the defendant fair notice of
10 a legally cognizable claim and the grounds on which it rests.
11 Twombly, 550 U.S. at 555. A claim is facially plausible "when the
12 plaintiff pleads factual content that allows the court to draw the
13 reasonable inference that the defendant is liable for the
14 misconduct alleged." Iqbal, 556 U.S. at 678.

15
16 In considering whether the complaint is sufficient to state a
17 claim, the court will take all material allegations as true and
18 construe them in the light most favorable to the plaintiff.
19 Metzler Inv. GMBH v. Corinthian Colls., Inc., 540 F.3d 1049, 1061
20 (9th Cir. 2008). The court's review is limited to the face of the
21 complaint, materials incorporated into the complaint by reference,
22 and facts of which the court may take judicial notice. Id. at
23 1061. However, the court need not accept legal conclusions,
24 including "threadbare recitals of the elements of a cause of
25 action, supported by mere conclusory statements." Iqbal, 556 U.S.
26 at 678 (citing Twombly, 550 U.S. at 555).

1 When granting a motion to dismiss, the court is generally
2 required to grant the plaintiff leave to amend, even if no request
3 to amend the pleading was made, unless amendment would be futile.
4 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
5 F.2d 242, 246-47 (9th Cir. 1990). In determining whether
6 amendment would be futile, the court examines whether the
7 complaint could be amended to cure the defect requiring dismissal
8 "without contradicting any of the allegations of [the] original
9 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
10 Cir. 1990).

12 DISCUSSION

13 Wells Fargo seeks to dismiss Plaintiff's complaint in its
14 entirety.

15 I. First Cause of Action: Violation of the Homeowner Bill of
16 Rights (HBOR), California Civil Code section 2923.6

17 Wells Fargo argues that Plaintiff's HBOR cause of action
18 fails for several reasons. First, it argues that its compliance
19 with the National Mortgage Settlement (NMS) immunizes it from
20 liability under California Civil Code section 2923.6. Second, it
21 argues that Plaintiff has not stated a claim upon which relief can
22 be granted.

23 A. National Mortgage Settlement (NMS) immunity

24 Wells Fargo argues that its compliance with the NMS shields
25 it from liability under the HBOR. This is the same argument the
26 Court addressed in its order granting Plaintiff a preliminary
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1 injunction against any further foreclosure actions by Wells Fargo.
2 The Court rejects the argument here for the same reasons it
3 rejected it in the previous order.

4 NMS is a settlement reached in United States of America v.
5 Bank of Am. Corp., Case No. 1:12-cv-00361 RMC, in the District
6 Court for the District of Columbia. The terms of the NMS were
7 memorialized in a Settlement Term Sheet, which imposes a number of
8 requirements on NMS signatories. The HBOR provides a safe harbor
9 provision insulating an NMS signatory from liability so long as
10 the signatory "is in compliance with the relevant terms of the
11 Settlement Term Sheet of that consent judgment with respect to the
12 borrower who brought an action pursuant to this section." Cal.
13 Civ. Code § 2924.12(g).

14
15 In its July 29, 2014 order granting a preliminary injunction,
16 the Court discussed, at length, Wells Fargo's safe harbor
17 argument. See July 29, 2014 Order, Docket No. 44. Ultimately,
18 after considering its arguments, the Court found Wells Fargo's
19 reasoning unpersuasive:
20

21 Section 2924.12(g) unequivocally and unambiguously states
22 that the compliance required for immunity from California's
23 HBOR statutory provisions is "with respect to the borrower
24 who brought an action pursuant to this section." . . . The
25 plain meaning of that phrase demonstrates that a defendant
26 must comply with the terms with respect to the borrower in
27 question, or else the borrower may sue under the HBOR. . . .
28 This does not invade the jurisdiction of the District of
Columbia court to enforce its own consent decree, monitoring
signatories according to its own provisions. Conversely, the
monitor in the District of Columbia court does not govern the
administration of California law. The California legislature
chose to incorporate the NMS' Settlement Term Sheet into the

1 safe harbor provision of the HBOR but did not delegate to the
2 NMS monitor the determination of the state's safe harbor
provision.

3 Id. at 7-8.

4 Accordingly, the Court declines to dismiss this cause of
5 action under the safe harbor provision of HBOR for the reasons
6 stated above and as stated in its July 29, 2014 order.

7
8 B. Failure to state a claim

9 Wells Fargo argues that even if Plaintiff's cause of action
10 for an HBOR violation did not fail due to NMS immunity, it would
11 fail because Plaintiff has not adequately articulated a violation
12 of section 2923.6.

13 "If a borrower submits a complete application for a first
14 lien loan modification offered by, or through, the borrower's
15 mortgage servicer, a mortgage servicer . . . or authorized agent
16 shall not record a notice of default or notice of sale, or conduct
17 a trustee's sale, while the complete first lien loan modification
18 application is pending." Cal. Civ. Code § 2923.6(c). Before
19 recording a notice of default or conducting a trustee's sale, the
20 mortgage servicer must first make a written determination that the
21 borrower is not eligible for a loan modification. Id. Denial of
22 the loan modification triggers a thirty-day appeal period. Id. at
23 § 2923.6(d). If a loan modification is offered, but the borrower
24 either rejects the offer or accepts the offer but breaches the
25 loan modification agreement, then the mortgage servicer may
26 initiate foreclosure proceedings. Id. at § 2923.6(c).
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1 According to the HBOR, a mortgage servicer is not required to
2 evaluate first lien loan modification applications from
3 borrowers who have already been evaluated or afforded a fair
4 opportunity to be evaluated for a first lien loan
5 modification . . . unless there has been a material change in
6 the borrower's financial circumstances since the date of the
7 borrower's previous application and that change is documented
8 by the borrower and submitted to the mortgage servicer.

9 Ware v. Bayview Loan Servicing, LLC, 2013 WL 6247236, at *5 (S.D.
10 Cal.).

11 At issue with regard to this cause of action is whether
12 (1) Plaintiff had a complete loan modification application pending
13 before Wells Fargo recorded the March 14, 2014 notice of sale; and
14 (2) in light of his prior loan modification denials, whether
15 Plaintiff had a material change in his financial circumstances
16 that was documented and submitted to Wells Fargo prior to the
17 recording of the notice of sale.

18 1. Complete loan application prior to recording of
19 notice of sale

20 Wells Fargo argues that Plaintiff's HBOR claim fails because
21 he did not have a complete application pending at the time of the
22 March 2014 notice of sale. Plaintiff alleges the opposite; in the
23 1AC he states: "After Plaintiff submitted a complete loan
24 modification application, Wells Fargo caused a Notice of Trustee's
25 Sale to be filed against the Property." 1AC ¶ 31.

26 Plaintiff has alleged facts sufficient to support the
27 inference that he submitted a complete application prior to the
28 March 2014 recording of the notice of sale. He alleges that,
prior to March 14, 2014, he attended a home preservation workshop

1 hosted by Wells Fargo. He alleges that he prepared all the
2 required loan modification documents prior to the workshop, in
3 accordance with a checklist promulgated by Wells Fargo.
4 Furthermore, he alleges that he spoke to Wells Fargo's employee
5 who both accepted the application and told him the application was
6 complete.

7
8 Thus, Plaintiff has alleged facts sufficient to support his
9 allegation that he had a complete loan modification application
10 pending before Wells Fargo recorded the March 2014 notice of sale.

11 2. Documented change in financial circumstances

12 Wells Fargo argues that even if Plaintiff submitted a
13 complete loan modification application prior to the March 2014
14 recording of the notice of sale, it had no obligation to consider
15 that application because Plaintiff had applied and been denied
16 before, and did not submit documentation of a material change in
17 his financial circumstances.
18

19 As stated above, a mortgage servicer is not obliged to
20 consider a loan modification application from a borrower who has
21 already been given a fair opportunity to be evaluated for a
22 modification "unless there has been a material change in the
23 borrower's financial circumstances since the date of the
24 borrower's previous application and that change is documented by
25 the borrower and submitted to the mortgage servicer." Cal. Civ.
26 Code § 2923.6.
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1 Plaintiff admits that his 2013 modification application was
2 denied due to insufficient income. However, he also alleges that
3 "in 2014, there was a material change in [his] financial
4 circumstances, including an increase in his income." 1AC ¶ 27.
5 Specifically, he alleges that his income increased to \$5,400 a
6 month and his financial obligations decreased by approximately
7 \$1,000 a month. Id. ¶ 27. Furthermore, he alleges that he
8 submitted documentation of this change in the application given to
9 the Wells Fargo representative, who told him the application was
10 complete.
11

12 Plaintiff argues that he need not allege any more than he has
13 in order for the Court to deny the motion to dismiss on these
14 grounds.
15

16 Plaintiff cites two cases in support of his assertion that
17 his allegation of a material change in financial circumstances is
18 sufficient. First, Plaintiff cites Vasquez v. Bank of Am., 2013
19 WL 6001924 (N.D. Cal.), claiming that in that case, "the plaintiff
20 alleged that, after experiencing an increase in her income, she
21 submitted a complete loan modification application to Bank of
22 America. This was sufficient to survive a motion to dismiss."
23 Docket No. 38 at 5. The Vasquez court stated, "Plaintiff has
24 alleged that, after gaining new employment with a higher income,
25 she . . . submitted a new loan modification application,
26 'including documentation of her increased income.'" 2013 WL
27 6001924 at *8. The plaintiff in Vasquez alleged that she had
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1 gained new employment with a higher income. So, here, too,
2 Plaintiff has alleged his increased income, that he submitted
3 documentation of this change to Wells Fargo, and that he was told
4 his application was complete.

5 Plaintiff also relies on Rosenfeld v. Nationstar Mortg., 2014
6 WL 457920 (C.D. Cal.). The Rosenfeld court stated, "The Court
7 finds that the [first amended complaint] states a claim for a
8 violation of Civil Code § 2923.6 because plaintiffs allege that
9 they notified Nationstar, by letter dated May 28, 2013, of a
10 material change in their financial circumstances, namely, Sally
11 Rosenfeld's elimination of her credit card debt." Id. at *4. The
12 Court there rejected the defendants assertion that the plaintiffs'
13 letter was not sufficiently detailed, concluding that "plaintiffs'
14 statement in the letter regarding their elimination of credit card
15 debt is sufficient to give rise to a reasonable inference of a
16 'material change in . . . financial circumstances.'" Rosenfeld,
17 2014 WL 457920, at *5. As in this case, the plaintiff in
18 Rosenfeld alleged a specific change in her financial
19 circumstances, and she alleged that she provided documentation of
20 the change to Nationstar.

21 Therefore, Plaintiff has alleged facts sufficient to support
22 his assertion that he had a change and that he submitted
23 documentation of that change in a complete loan modification
24 application.
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1 Relying on Ware, 2013 WL 6247236, Wells Fargo argues,
2 "Plaintiff's conclusory assertion of a material change in
3 circumstances is not sufficient to satisfy this requirement."
4 Docket No. 29 at 8-9. In Ware, the plaintiffs alleged a material
5 change in financial circumstances by submitting a letter that
6 states, "[B]orrowers' financial circumstances have materially
7 changed as their income and expenses have changed since they last
8 submitted an application for foreclosure alternatives.
9 Specifically, the borrowers' routine expenses have increased which
10 is a material change of circumstance." 2013 WL 6247236, at *5.
11 The court in Ware found this allegation insufficient to adequately
12 plead a material change in financial circumstances:
13

14 The Court finds that Plaintiffs' barebones letter does not
15 satisfy the requirements of § 2923.6(g), which requires the
16 borrowers to "document" and "submit" a material change in
17 circumstances. Plaintiffs' letter is bereft of any details
18 or documentation. To accept the letter as a valid notice of
19 material change would be at odds with the very purpose of
20 subsection, which is meant to relieve mortgage servicers from
21 evaluating multiple loan modification applications submitted
22 for the purpose of delay.

23 Id. at *6.

24 Here, however, Plaintiff has done more than allege a
25 "barebones" explanation of his material change in financial
26 circumstances. Plaintiff has alleged a specific increase in his
27 income to \$5,400 per month and a specific decrease in his expenses
28 by \$1,000 per month. His allegation is not "bereft of any details
or documentation." Hence, Wells Fargo's reliance on Ware, with
regard to this issue, is unpersuasive.

1 Accordingly, Plaintiff has stated facts sufficient to support
2 his allegation of a material change in financial circumstances
3 that was documented and provided to Wells Fargo. Thus, the Court
4 DENIES Wells Fargo's motion to dismiss this cause of action.

5 II. Second Cause of Action: Void Notice of Trustee's Sale

6 Plaintiff asserts that because Wells Fargo filed a notice of
7 sale while his loan modification application was pending, the
8 "notice of sale is therefore void and must be rescinded," in
9 compliance with the HBOR. 1AC ¶ 50-51. In the alternative,
10 Plaintiff alleges that the Court may cancel the notice of sale
11 pursuant to California Civil Code section 3412. Wells Fargo
12 argues that (1) rescission of a notice of sale is not a remedy
13 available under HBOR or under section 3412 and (2) Wells Fargo
14 need not cancel the notice of sale unless Plaintiff tenders
15 payment of his debt.
16

17 A. HBOR remedies

18 Upon finding a HBOR violation, and before a trustee's deed
19 upon sale has been recorded, "a borrower may bring an action for
20 injunctive relief to enjoin a material violation." Cal. Civ. Code
21 § 2924.12(a)(1).
22

23 Any injunction shall remain in place and any trustee's sale
24 shall be enjoined until the court determines that the
25 mortgage servicer . . . has corrected and remedied the
26 violation or violations giving rise to the action for
27 injunctive relief. An enjoined entity may move to dissolve
28 an injunction based on a showing that the material violation
has been corrected and remedied.

1 Cal. Civ. Code § 2924.12(a)(2). If the enjoined entity fails to
2 correct and remedy the violation, it may be liable for economic
3 damages incurred as a result of the violation. Id. at
4 § 2924.12(b).

5 Plaintiff argues that because HBOR explicitly prohibits Wells
6 Fargo from recording a notice of trustee's sale while a loan
7 modification application is pending, if he prevails on the merits
8 of his HBOR cause of action, the notice of sale is void and he is
9 entitled to have it rescinded. Plaintiff cites no authority,
10 however, to support his assertion that voiding and rescinding a
11 notice of trustee's sale is a remedy available under HBOR. What
12 is available, however, is injunctive relief to "enjoin a material
13 violation of the act prior to foreclosure and to assert a claim
14 for damages for a violation of the act following foreclosure."

15 Alvarez v. BAC Home Loans Servicing, L.P., 228 Cal. App. 4th 941,
16 951 (2014). In this case, if Plaintiff were to prevail on his
17 HBOR claim, the sale would be enjoined until Wells Fargo remedied
18 the violation. Once the violation is remedied, Wells Fargo would
19 be free to proceed with the foreclosure. If Wells Fargo did not
20 remedy the alleged violation, but proceeded to sell the property
21 anyway, Plaintiff would be entitled to monetary damages. See id.

22 Thus, even if Plaintiff were to prevail on the merits of his
23 HBOR cause of action, he would not be entitled to having that
24 notice of sale declared void and rescinded. He would, however, be
25 entitled to an injunction. Accordingly, the Court construes this
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1 cause of action as one for injunctive relief and as such DENIES
2 Wells Fargo's motion to dismiss it.

3 B. California Civil Code section 3412

4 "A written instrument, in respect to which there is a
5 reasonable apprehension that if left outstanding it may cause
6 serious injury to a person against whom it is void or voidable,
7 may, upon his application, be so adjudged, and ordered to be
8 delivered up or canceled." Cal. Civ. Code § 3412.
9

10 Plaintiff argues that, as an alternative to the remedies
11 available under HBOR, the Court can cancel the notice of sale in
12 light of California Civil Code section 3412. However, Plaintiff
13 bases his section 3412 claim on an alleged violation of HBOR. As
14 discussed above, Plaintiff would be entitled to an injunction if a
15 court finds that Wells Fargo violated HBOR, but not a
16 cancellation.
17

18 Accordingly, the Court GRANTS Wells Fargo's motion to dismiss
19 this cause of action. If Plaintiff can allege a non-HBOR theory
20 for why the notice of sale is void or voidable, he can do so in an
21 amended complaint.

22 C. Tender

23 Wells Fargo also argues that Plaintiff is attempting to state
24 a cause of action for quiet title. The Court disagrees.
25 Plaintiff has stated in his complaint that he "wants the chance to
26 become current on his loan to allow his family to stay in their
27 home." 1AC ¶ 35. He states that the "notice of sale is . . .
28

1 void and must be rescinded." Id. ¶ 51. Hence, he is not asking
2 to quiet title, only to have the notice of sale invalidated so
3 that he can attempt to resume payments and stay in his home.

4 III. Third Cause of Action: Negligence

5 Wells Fargo argues that Plaintiff's negligence claim fails
6 because he has not established that it owed him a duty of care.

7 "The elements of a cause of action for negligence are (1) a
8 legal duty to use reasonable care, (2) breach of that duty, and
9 (3) proximate cause between the breach and (4) the plaintiff's
10 injury." Mendoza v. City of L.A., 66 Cal. App. 4th 1333, 1339
11 (1998) (citation omitted). "The threshold element of a cause of
12 action for negligence is the existence of a duty to use due care."
13 Paz v. State of Cal., 22 Cal. 4th 550, 559 (2000) (citing Bily v.
14 Young & Co., 3 Cal. 4th 370, 397 (1992)).

16 A. Duty of care

17 Plaintiff alleges that Wells Fargo owed a duty of care in
18 processing his loan modification application.

19 As a general rule, under California law, a financial
20 institution owes no duty of care to a borrower when the
21 institution's involvement in the loan transaction does not
22 exceed the scope of its conventional role as a mere lender of
23 money. Liability to a borrower for negligence arises only
24 when the lender actively participates in the financed
25 enterprise beyond the domain of the usual money lender.

26 Inzerillo v. Green Tree Servicing LLC, 2014 WL 1347175, at * 5
27 (N.D. Cal.) (citing Nymark v. Heart Fed. Sav. & Loan Ass'n, 231
28 Cal. App. 3d 1089, 1095-96 (1991)). "Whether a duty of care
exists is a question of law to be determined on a case-by-case

1 basis.” Alvarez, 228 Cal. App. 4th at 944. The California
2 Supreme Court has provided the factors to be considered:

3 In California, the test for determining whether a financial
4 institution owes a duty of care to a borrower-client
5 involves the balancing of various factors, among which are
6 (1) the extent to which the transaction was intended to
7 affect the plaintiff, (2) the foreseeability of harm to him,
8 (3) the degree of certainty that the plaintiff suffered
9 injury, (4) the closeness of the connection between the
10 defendant’s conduct and the injury suffered, (5) the moral
11 blame attached to the defendant’s conduct, and (6) the policy
12 of preventing future harm.

13 Biakanja v. Irving, 49 Cal. 2d 647, 650 (1958).

14 Following these principles, some courts have held that when a
15 lender engages in loan modification negotiations there is no duty
16 of care. See, e.g., Badame v. JPMorgan Chase Bank, N.A., 2014 WL
17 585451, at *7 (C.D. Cal.) (holding that Chase had no duty of care
18 when considering plaintiffs’ loan modification applications
19 because “a loan modification is the renegotiation of loan terms,
20 which falls squarely within the scope of a lending institution’s
21 conventional role as a lender of money”) (citing Lueras v. BAC
22 Home Loans Servicing, LP, 221 Cal. App. 4th 49, 67 (2013)); Morgan
23 v. U.S. Bank Nat’l Ass’n, 2013 WL 684932, at *3 (N.D. Cal.) (“Some
24 courts have found that a lender undertakes a duty of care when it
25 offers a loan modification. The more persuasive reasoning,
26 however, is that, even where a lender offers a loan modification,
27 that is nothing more than a renegotiation of loan terms”);
28 Armstrong v. Chevy Chase Bank, FSB, 2012 WL 4747165, at *4 (N.D.
Cal.) (“a loan modification . . . is the same activity that

1 occurred when the loan was first originated; the only difference
2 being that the loan is already in existence"); Hosseini v. Wells
3 Fargo Bank, N.A., 2013 WL 4279632, at *7 (N.D. Cal.) (holding that
4 even though "Plaintiffs argue that by undertaking the loan
5 modification process and requesting and accepting documentation
6 from Plaintiffs Defendant undertook a duty of care, numerous cases
7 have characterized a loan modification as a traditional money
8 lending activity and concluded that a financial institution owes
9 no duty of care to a borrower in the loan modification process")
10 (quotation marks omitted).

11
12 However, other federal district court opinions in this
13 district and a recent California Court of Appeal opinion have held
14 that when a lender agrees to consider a borrower's loan
15 modification application, it then owes a duty of care in how it
16 processes that application.

17
18 In Alvarez, the court considered facts similar to this case
19 and held that, because "defendants allegedly agreed to consider
20 modification of the plaintiffs' loans, the Biakanja factors
21 clearly weigh in favor of a duty." Id. at 948. While the
22 defendants did not owe a duty of care to offer or approve a loan
23 modification, they did owe "a duty to exercise reasonable care in
24 the review of [the plaintiff's] loan modification applications
25 once they had agreed to consider them." Id. at 944. Similarly,
26 in Ansanelli v. JP Morgan Chase Bank, N.A., 2011 WL 1134451, at *7
27 (N.D. Cal.), the court stated, "[T]he complaint alleges that
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1 defendant went beyond its role as a silent lender and loan
2 servicer to offer an opportunity to plaintiffs for loan
3 modification and to engage with them concerning the trial period
4 plan. Contrary to defendant, this is precisely 'beyond the domain
5 of a usual money lender.'" Likewise, in Garcia v. Ocwen Loan
6 Servicing, LLC, 2010 WL 1881098, at *4 (N.D. Cal.), the court
7 found that "by asking Plaintiff to submit supporting
8 documentation, Defendant undertook the activity of processing
9 Plaintiff's loan modification request. Having undertaken that
10 task, it owed Plaintiff a duty to exercise ordinary care in
11 carrying out the task."

12
13 In the absence of Ninth Circuit authority with regard to this
14 issue, this Court, after considering the Biakanja factors, is
15 persuaded that Plaintiff has stated facts sufficient to support
16 the allegation that Wells Fargo owed him a duty to process his
17 loan modification with reasonable care. The loan modification
18 application process was intended to affect Plaintiff. It was
19 foreseeable that harm would occur to Plaintiff if his loan
20 modification materials and application were not properly routed.
21 Wells Fargo knew, with certainty, that if Plaintiff's application
22 was not properly handled, he would not receive a modification and,
23 thus, would lose his home. Furthermore, recent national and state
24 legislation proscribing dual-tracking and requiring standard
25 foreclosure procedures confirms that policy considerations weigh
26 toward ensuring that loan modification applications are processed
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1 with care prior to initiating foreclosure proceedings. Although
2 Plaintiff has not alleged facts to support imputing any moral
3 blame to Wells Fargo, the other factors weigh heavily toward
4 finding that Plaintiff has adequately alleged that Wells Fargo
5 owed him a duty of care in processing his loan modification
6 application.

7 B. Breach of duty

8 Wells Fargo does not directly address Plaintiff's allegations
9 with regard to breach of duty; instead it claims that "Plaintiff
10 does not and cannot allege that he is entitled . . . to have his
11 modification request processed at all." Docket No. 29 at 13.

12 However, as discussed above, Plaintiff has adequately alleged that
13 Well Fargo owed him a duty of care in processing his loan
14 modification application. Furthermore, Plaintiff alleges facts
15 sufficient to support his allegation that Wells Fargo breached its
16 duty to exercise ordinary care and due diligence "in negligently
17 processing his complete application; giving him inaccurate
18 information regarding the process, filing a notice of sale while
19 his application was pending, and; attempting to sell [his] home at
20 auction while his application was pending." 1AC ¶ 54.

21 Accordingly, the Court declines to dismiss this cause of action
22 for failure to allege a breach of duty.

23 C. Proximate cause between the breach and the injury

24 Wells Fargo argues that "the manner in which [it] processed a
25 gratuitous application to change the terms of his loans in a way
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1 that would only favor Plaintiff, did not cause him any harm.”

2 Docket No. 29 at 13.

3 In Alvarez, the court found that the plaintiffs had
4 adequately alleged proximate cause by claiming that “the improper
5 handling of their applications deprived them of the opportunity to
6 obtain loan modifications, which they allege they were qualified
7 to receive and would have received had their applications [been]
8 properly reviewed, and alternatively, that the delay in processing
9 deprived them of the opportunity to seek relief elsewhere.” 228
10 Cal. App. 4th at 951. Plaintiff alleges similar facts in this
11 case. Plaintiff alleges that Wells Fargo’s breach of duty
12 “contributed to and w[as] a substantial factor in causing [his]
13 damages, including but not limited to: Substantial emotional
14 distress regarding the potential loss of his childhood home, the
15 lost opportunity to find alternative ways to satisfy his mortgage
16 debt, the legal costs of enforcing his rights.” 1AC ¶ 55.
17 Contrary to Wells Fargo’s characterization, Plaintiff is not
18 alleging that his injury was the loss of his home or more
19 favorable loan terms. Instead, Plaintiff is alleging that,
20 because Wells Fargo did not take care in handling his application,
21 the delay made it difficult for him to seek alternative
22 assistance. Accordingly, the Court DENIES Wells Fargo’s motion to
23 dismiss this negligence cause of action.
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1 IV. Fourth Cause of Action: Negligent Misrepresentation

2 Plaintiff alleges that "after [he] submitted his complete
3 loan modification application . . . Wells Fargo made several
4 misrepresentations, false promises, and/or acts of concealment
5 concerning Plaintiff." 1AC ¶ 58. Wells Fargo argues that
6 Plaintiff's "negligent misrepresentation claim suffers from the
7 same defect as his negligence claim: the lack of a duty of care."
8 Docket No. 29 at 14. It also argues that Plaintiff's pleadings
9 are insufficient under the heightened pleading requirements of
10 Rule 9(b).

11 A. Duty of Care

12 "The elements of negligent misrepresentation are similar to
13 intentional fraud except for the requirement of scienter; in a
14 claim for negligent misrepresentation, the plaintiff need not
15 allege the Wells Fargo made an intentionally false statement, but
16 simply one as to which he or she lacked any reasonable ground for
17 believing the statement to be true." Charnay v. Cobert, 145 Cal.
18 App. 4th 170, 184-85 (2006) (citing Bily, 3 Cal. 4th 370 at 407-
19 408); see also Alliance Mortg. Co. v. Rothwell, 10 Cal. 4th 1226,
20 1239, fn.4 (1995) (negligent misrepresentation is a species of the
21 tort of deceit and like fraud, requires a misrepresentation,
22 justifiable reliance and damage).

23 Because negligent misrepresentation is a species of fraud,
24 and not common-law negligence, Plaintiff need not allege a duty of
25 care. In any case, as discussed above, Plaintiff has adequately
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1 alleged the existence of a duty of care. Accordingly, the Court
2 declines to dismiss this cause of action for this reason.
3 However, as discussed below, this cause of action must be
4 dismissed for other reasons.

5 B. Rule 9(b)

6 "The Ninth Circuit has not yet decided whether Rule 9(b)'s
7 heightened pleading standard applies to a claim for negligent
8 misrepresentation, but most district courts in California hold
9 that it does." Villegas v. Wells Fargo Bank, N.A., 2012 WL
10 4097747, at *7 (N.D. Cal.) See, e.g., Celebrity Chefs Tour, LLC
11 v. Macy's, Inc., 2014 WL 1660427, at *8 (S.D. Cal.) ("Because a
12 claim for misrepresentation sounds in fraud, the heightened
13 pleading standards of Federal Rule of Civil Procedure 9(b)
14 apply."); Errico v. Pac. Capital Bank, N.A., 753 F. Supp. 2d 1034,
15 1049 (N.D. Cal. 2010) ("[N]egligent misrepresentation 'sounds in
16 fraud' and is subject to Rule 9(b)'s heightened pleading
17 standard"); In re Easysaver Rewards Litig., 737 F. Supp. 2d 1159,
18 1176 (S.D. Cal. 2010); Neilson v. Union Bank of Cal., N.A., 290 F.
19 Supp. 2d 1101, 1141 (C.D. Cal. 2003); but see Petersen v. Allstate
20 Indem. Co., 281 F.R.D 413 (C.D. Cal. 2012) (finding that Rule 9(b)
21 does not apply to negligent misrepresentation claims); Howard v.
22 First Horizon Home Loan Corp., 2013 WL 6174920, at *5 (N.D. Cal.)
23 ("negligent misrepresentation requires a showing that a Wells
24 Fargo failed to use reasonable care - 'an objective standard
25 [that] does not result in the kind of harm that Rule 9(b) was
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1 designed to prevent'” (citing Petersen, 281 F.R.D. at 417-418));
2 Bernstein v. Vocus, Inc., 2014 WL 3673307, at *5 (N.D. Cal.) (“The
3 Court finds the reasoning of [Petersen and Howard] persuasive, and
4 joins in their holdings that negligent misrepresentation claims
5 are not subject to the heightened pleading standards of Rule
6 9(b)”).

7
8 The Court agrees with the line of cases that hold that
9 negligent misrepresentation is a species of fraud, and, hence,
10 must be plead in accordance with Rule 9(b). Accordingly,
11 Plaintiff is required to plead this cause of action with
12 particularity. Fed. R. Civ. P. 9(b). “For misrepresentation
13 claims, this standard is met when a party specifies the time,
14 place and specific content of the alleged fraudulent
15 representation; the identity of the person engaged in the fraud;
16 and the circumstances indicating falseness or the manner in which
17 [the] representations were false and misleading.” Celebrity Chefs
18 Tour, 2014 WL 1660427, at *8. “The requirement of specificity in
19 a fraud action against a corporation requires the plaintiff to
20 allege the names of the persons who made the allegedly fraudulent
21 representations, their authority to speak, to whom they spoke,
22 what they said or wrote, and when it was said or written.”
23 Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal. App. 4th 153,
24 157 (1991).

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27 In the 1AC, Plaintiff fails to plead his negligent
28 misrepresentation cause of action with the particularity required

1 by Rule 9(b). Plaintiff alleges that Wells Fargo's
2 misrepresentations included: "[t]elling Plaintiff that Wells Fargo
3 was giving him a meaningful opportunity to be reviewed for a loan
4 modification" and "[t]elling Plaintiff that Wells Fargo wanted to
5 help him avoid foreclosure." 1AC ¶ 58. These allegations are
6 vague and fail to state "the who, what, when, where, and how of
7 the misrepresentation." Cooper v. Pickett, 137 F.3d 616, 627 (9th
8 Cir. 1997).

9
10 In his Opposition to the Motion to Dismiss, however,
11 Plaintiff includes more specific allegations. While the Court
12 need not consider any additional allegations not found in the 1AC,
13 even if it were to consider these additional allegations,
14 Plaintiff's allegations still fail to comport with Rule 9(b).

15 In his Opposition, Plaintiff alleges that, at the home
16 preservation workshop sponsored by Wells Fargo, a representative
17 "accepted [his] complete loan modification application promising
18 to review it in good faith." Docket No. 38 at 15. Again,
19 however, Plaintiff fails to state any facts to support the
20 allegation that anything said by Wells Fargo's representative was
21 false, or that the representative lacked reasonable grounds for
22 believing his or her statement was true.
23

24 Accordingly, the Court GRANTS Wells Fargo's motion to dismiss
25 this cause of action for failure to state a claim. Plaintiff is
26 GRANTED leave to amend to remedy this deficiency if he can do so
27 truthfully and without contradicting the allegations in his prior
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1 pleadings. In any amended pleading, Plaintiff need not provide
2 the Wells Fargo's representative's name if he is unable to do so,
3 but he does need to provide sufficient details with regard to the
4 "time, place and specific content" of the misrepresentation, as
5 well as why the representation was false or misleading.

6 V. Fifth Cause of Action: Misrepresentation and Deceit

7 Plaintiff alleges that after "submit[ing] his complete loan
8 modification application to Wells Fargo, Wells Fargo made several
9 misrepresentations, false promises, and/or acts of concealment
10 concerning Plaintiff." 1AC ¶ 64.

11 The Court construes this claim as one of fraud because
12 "California law uses the words fraud and deceit interchangeably."
13 State ex rel. Wilson v. Superior Court, 227 Cal. App. 4th 579, 600
14 (2014). Thus, as explained above, this cause of action is subject
15 to the heightened pleading requirements of Rule 9(b).

16 "A cause of action for fraud contains the following elements:
17 (1) a knowingly false representation by the Wells Fargo; (2) an
18 intent to deceive or induce reliance; (3) justifiable reliance by
19 the plaintiff; and (4) resulting damages." Hasso v. Hapke, 227
20 Cal. App. 4th 107, 127 (2014). Plaintiff's allegations of
21 misrepresentations, false promises and acts of concealment are the
22 same allegations that support Plaintiff's negligent
23 misrepresentation cause of action. Consequently, as discussed
24 above, this cause of action fails for the same reasons the
25 negligent misrepresentation cause of action fails.

United States District Court
For the Northern District of California

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Accordingly, the Court GRANTS Wells Fargo's motion to dismiss this cause of action for failure to state a claim. Plaintiff is GRANTED leave to amend to remedy this deficiency if he can do so truthfully and without contradicting the allegations in his prior pleadings.

CONCLUSION

For the foregoing reasons, Wells Fargo's motion to dismiss (Docket No. 29) is GRANTED in part and DENIED in part, and the Court GRANTS Plaintiff leave to amend. Within fourteen days of the date of this order, Plaintiff may file an amended complaint to remedy the deficiencies identified above. He may not add further claims or allegations not authorized by this order.

If Plaintiff files an amended complaint, Wells Fargo shall respond to it within fourteen days after it is filed. If Wells Fargo files a motion to dismiss, Plaintiff shall respond to the motion within fourteen days after it is filed. Wells Fargo's reply, if necessary, shall be due seven days thereafter. Any motion to dismiss will be decided on the papers.

IT IS SO ORDERED.

Dated: December 16, 2014



CLAUDIA WILKEN
United States District Judge