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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TIMOTHY ALGAIER, and
DEBRA EDDY,

Plaintiffs,

v.

CMG MORTGAGE INC, a California Corporation doing business in Washington State; BANK OF AMERICA NA, a national bank doing business in Washington State; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC., a corporation doing business in Washington State; PACIFIC NORTHWEST TITLE COMPANY, a Trustee doing business in Washington state; FIRST AMERICAN TITLE COMPANY, successor in interest to Pacific Northwest Title Company, a Trustee, doing business in Washington state; DOES 1-100, inclusively and all persons unknown claiming any legal or equitable right, title, estate, lien or interest in the property described in the

NO: 13-CV-0380-TOR

ORDER RE DEFENDANTS' MOTION TO DISMISS AND PLAINTIFFS' MOTION TO REMAND

1 complaint adverse to Plaintiffs' title or
2 any cloud on plaintiffs' title thereto,

3 Defendants.

4 BEFORE THE COURT are Defendants Bank of American, N.A., and
5 Mortgage Electronic Registration Systems, Inc.'s Motion to Dismiss Plaintiffs'
6 Complaint (ECF No. 8); Plaintiffs' Motion to Remand (ECF No. 12); and
7 Plaintiffs' Motion to Expedite Hearing on Motion to Remand (ECF No. 11). This
8 matter was submitted for consideration without oral argument. The Court has
9 reviewed the briefing and the record and files herein, and is fully informed.

10 BACKGROUND

11 This case concerns a threatened nonjudicial foreclosure.

12 FACTS¹

13 Plaintiffs purchased property at 4416 N. Simpson Road in Otis Orchards,
14 Washington, on or about July 3, 2006. In 2009, Plaintiffs refinanced the property, a
15 single family dwelling they used as their primary residence, with CMG Mortgage,
16 Inc., a defendant in the instant lawsuit. The property was allegedly the security
17 under a deed of trust, and the loan was evidenced by a promissory note the current

18
19 ¹ These facts are taken from Plaintiffs' complaint and accepted as true for the
20 purposes of the motion to dismiss.

1 owner of which Plaintiffs claim “is yet a mystery and unknown.” Bank of America,
2 N.A. (“BANA”) is allegedly the loan servicer, though Plaintiff contests the
3 ownership of the note.

4 Plaintiffs made payments due on the loan through December 2011. On
5 December 5, 2011, Plaintiffs claim Anna Lopez, an agent of Defendant BANA,
6 contacted Plaintiffs offering a novation of the existing promissory note, reducing
7 monthly payments from \$1,872 to \$1,252. They claim that she told them:

8 If you stopped making payments under the Note for 3 consecutive months,
9 they would be ‘guaranteed’ to qualify for a new Note or modified term or
10 novation beneficially altering the current payment to a lower amount under
11 the existing Note. The new conditions would be implemented and terms
12 made known immediately so no default would be declared or foreclosure
13 brought into play.

14 They claim Lopez further told them on December 12, 2011, to “just stop paying
15 from January, 2012 through March 2012, and you will qualify, guaranteed.”
16 Plaintiff state that Lopez told them BANA would treat the December 2011
17 payment as “confirmation in lieu of any written contract in confirmation of this
18 new modification plan.”

19 Plaintiffs filed a lawsuit in Spokane County Superior Court, alleging 1)
20 negligence; 2) fraud and deceit; 3) violation of the Washington Foreclosure
Fairness Act (“FFA”); 4) equitable accounting; 5) breach of contract; 6) unjust
enrichment and promissory estoppel; 7) quiet title; 8) declaratory relief; and 9)

1 injunctive relief in the form of a temporary restraining order (“TRO”) and
2 preliminary injunction. The superior court entered a TRO postponing the sale.

3 DISCUSSION

4 **A. Plaintiffs’ Motion to Remand**

5 Plaintiffs, appearing *pro se*, move the Court to remand this matter back to
6 the state court, arguing that this Court lacks jurisdiction because not all Defendants
7 are diverse.

8 Defendants may remove any action filed in state court over which federal
9 district courts have original jurisdiction. 28 U.S.C. § 1441(a). The Court may
10 remand a case to state court when the Court finds it lacks subject matter
11 jurisdiction over the claims asserted. 28 U.S.C. § 1447(c). Subject matter
12 jurisdiction is established: (1) when there is diversity of citizenship under 28
13 U.S.C. § 1332; or (2) where a claim arises under federal law. 28 U.S.C. § 1441(c).
14 Removal based on diversity requires establishing the parties' diverse citizenship,
15 and an amount in controversy exceeding \$75,000. 28 U.S.C. § 1332(c). Diversity
16 jurisdiction under 28 U.S.C. § 1332 requires complete diversity. *Teledyne v. Kone*
17 *Corp.*, 892 F.2d 1404, 1408 (9th Cir. 1989).

18 For purposes of 28 U.S.C. 1332 and 28 U.S.C. 1441, “a corporation shall be
19 deemed to be a citizen of every state and foreign state by which it has been

1 incorporated and of the State or foreign state where it has its principal place of
2 business.” 28 U.S.C. 1332(c).

3 The removing party bears the burden to prove that removal is proper. *Gaus*
4 *v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). The defendant is obligated to do
5 so by a preponderance of the evidence. *Id.* at 567. Federal jurisdiction must be
6 rejected if there is any doubt as to the right of removal in the first instance. *Id.* at
7 566.

8 Plaintiffs specifically attack the citizenship of Defendants BANA and
9 Mortgage Electronic Registration Systems, Inc. (“MERS”), but because Plaintiffs
10 appear *pro se*, the Court construes their complaint and motion liberally. Plaintiffs
11 argue that “diversity required applies to ALL defendants, including those
12 unserved” and that “the citizenship of each member of an unincorporated
13 association or partnership must be considered in determining diversity.” ECF No.
14 12 at 5. Accordingly, the Court examines the citizenship of each Defendant in turn.

15 **a. BOA and MERS**

16 Plaintiffs argue that that the Court lacks jurisdiction over this matter because
17 BOA and MERS do business in Washington State, and thus there is not complete
18 diversity. ECF No. 12 at 5. Defendants contend that Plaintiffs have confused the
19 requirements for diversity jurisdiction and employ incorrect analysis. ECF No. 14
20 at 6.

1 Defendants are correct. Though somewhat unclear, Plaintiffs appear to argue
2 that the proper test for citizenship is where defendant is doing business, citing 28
3 U.S.C. § 1391, the statute on venue; *J.A. Olson Co. v. City of Winona, Miss.*, 818
4 F.2d 401, 405 (5th Cir. 1987); and *Co-Efficient Energy Systems v. CSL Industries,*
5 *Inc.* (9th Cir. 1987). However, the statute on venue is inapplicable to questions of
6 citizenship for diversity purposes, and the two circuit court cases cited are
7 overruled by the Supreme Court’s more recent ruling in *Hertz Corp. v. Friend*, 559
8 U.S. 77 (2010), as Defendants note. As *Hertz* makes clear, the phrase “principal
9 place of business” in the federal diversity jurisdiction statute refers to the “nerve
10 center” of the corporation, or “the place where a corporation’s officers direct,
11 control and coordinate the corporation’s activities.” *Hertz*, 559 U.S. at 92-93. The
12 nerve center is a single place. *Id.* at 93.

13 Here, Plaintiffs argue that BANA and MERS “cannot swear under oath that
14 they do not do business or have minimum contacts in Washington.” ECF No. 12 at
15 6. However, Plaintiffs do not appear to dispute that BANA and MERS are neither
16 incorporated in Washington nor that they do not have their principal place of
17 business in Washington—Defendants assert that MERS is a Delaware corporation
18 with its principal place of business in Virginia, and BANA is a citizen of North
19 Carolina. Accordingly, diversity jurisdiction is not destroyed by MERS or BANA.

20 //

1 **b. Does 1-100**

2 Plaintiffs have sued “inclusively and All persons Unknown Claiming Any
3 Legal or Equitable Right, Title, Estate, Lien, or Interest in the Property Described
4 in the Complaint Adverse to Plaintiff’s Title, Or Any Cloud on Plaintiff’s Title
5 Thereto,” collectively called “Does 1-100” in their complaint. They appear to
6 challenge the diversity of these Does by reference to “unserved” defendants. ECF
7 No. 12 at 5. However, “[i]n determining whether a civil action is removable on the
8 basis of the jurisdiction under section 1332(a) of this title, the citizenship of
9 defendants sued under fictitious names shall be disregarded.” 28 U.S.C. § 1441.
10 Thus, in the instant case, the citizenship of the unnamed Does is disregarded for
11 purposes of diversity jurisdiction under 28 U.S.C. 1332(a). Accordingly, the
12 unnamed defendants do not defeat diversity jurisdiction.

13 **c. The title companies**

14 Plaintiffs have also sued Northwest Trustee Services, Inc., a trustee doing
15 business in Washington State; Pacific Northwest Title Company, a trustee doing
16 business in Washington State; and First American Title Company, successor in
17 interest to Pacific Northwest Title Company. In their notice for removal, BOA and
18 MERS argue that, although these companies are alleged to be doing business in
19 Washington, they are nominal defendants that the Court should disregard for
20 purposes of determining diversity jurisdiction.

1 The issue of alignment for purposes of diversity jurisdiction requires a court
2 to “look beyond the pleadings” to the actual interests of the parties respecting the
3 subject matter of the lawsuit. *Prudential Real Estate Affiliates, Inc. v. PPR Realty,*
4 *Inc.*, 204 F.3d 867, 872 (9th Cir. 2000) (quoting *City of Indianapolis v. Chase Nat'l*
5 *Bank*, 314 U.S. 63, 69, 62 S.Ct. 15, 86 L.Ed. 47 (1941) (quotations omitted). The
6 Ninth Circuit has held that a nominal defendant is “a person who ‘holds the subject
7 matter of the litigation in a subordinate or possessory capacity and to which there
8 is no dispute.’” *S.E.C. v. Colello*, 139 F.3d 674, 676 (9th Cir. 1998) (quoting
9 *S.E.C. v. Cherif*, 933 F.2d 403, 414 (7th Cir. 1991)). “The paradigmatic nominal
10 defendant is ‘a trustee, agent, or depositary ... [who is] joined purely as a means of
11 facilitating collection.’” *Id.* (quoting *Cherif*, 933 F.2d at 414). A nominal
12 defendant's relation to an action is merely incidental and “it is of no moment [to
13 him] whether the one or the other side in [the] controversy succeed [s].” *Bacon v.*
14 *Rives*, 106 U.S. 99, 104, 1 S.Ct. 3, 6, 27 L.Ed. 69 (1882). “Because of the non-
15 interested status of the nominal defendant, there is no claim against him and it is
16 unnecessary to obtain subject matter jurisdiction over him once jurisdiction over
17 the defendant is established.” *Farmers' Bank v. Hayes*, 58 F.2d 34, 36 (6th Cir.
18 1932). *Cherif*, 933 F.2d at 414. *See also Prudential Real Estate Affiliates, Inc. v.*
19 *PPR Realty, Inc.*, 204 F.3d 867, 873 (9th Cir. 2000) (“We will ignore the
20 citizenship of nominal or formal parties who have no interest in the action, and are

1 merely joined to perform the ministerial act of conveying the title if adjudged to
2 the complainant.”) (citing 13B Charles Alan Wright, Arthur R. Miller, Edward H.
3 Cooper, Federal Practice and Procedure § 3606, at 409 & n. 2 (2d ed. 1984))
4 (internal quotations omitted).

5 The question here is whether Northwest Trustee Services, Pacific Northwest
6 Title Company, and First American Title Company are nominal parties. The Court
7 finds that Plaintiffs fails to make any valid substantive allegations against these
8 parties sufficient to make them more than nominal defendants, as they appear to be
9 title companies. Accordingly, their citizenship does not defeat diversity
10 jurisdiction.

11 Thus, Plaintiffs’ Motion to Remand is denied.

12 **B. Defendants Motion to Dismiss (ECF No. 8)**

13 Defendants BOA and MERS move to dismiss Plaintiffs’ claims without leave to
14 amend. They argue that (1) any alleged oral modification of Plaintiffs’ loan fails
15 under the Statute of Frauds; (2) fraud claims cannot be premised on promises of
16 future events; (3) Plaintiffs cannot support their negligence claim by showing that
17 any duty was owed or by providing factual support for their allegations regarding
18 payment application; (4) the FFA does not provide any private right of action; (5)
19 Plaintiffs have not shown that Defendants breached the loan contract or that they
20 are entitled to equitable relief; (6) the facts do not support an unjust enrichment

1 claim because Plaintiffs have been living rent-free on the property; (7) and that
2 Plaintiffs cannot seek to quiet title because they have not alleged that they are able
3 to pay the amount due and owing on their loan. ECF No. 8 at 3-4.²

4 1. Legal Standard

5 A motion to dismiss for failure to state a claim tests the legal sufficiency of the
6 plaintiff's claims. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To
7 withstand dismissal, a complaint must contain "enough facts to state a claim to
8 relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
9 (2007). "Naked assertion[s]," "labels and conclusions," or "formulaic recitation[s]
10 of the elements of a cause of action will not do." *Id.* at 555, 557. "A claim has
11 facial plausibility when the plaintiff pleads factual content that allows the court to
12 draw the reasonable inference that the defendant is liable for the misconduct
13 alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While a plaintiff need not
14 establish a probability of success on the merits, he or she must demonstrate "more
15 than a sheer possibility that a defendant has acted unlawfully." *Id.*

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18 ² Plaintiffs did not respond to Defendants' motion, but filed their motion to remand
19 after this motion was filed and requested it to be heard on an expedited basis, while
20 commenting on the motion to dismiss in their motion to remand.

1 A complaint must also contain a “short and plain statement of the claim
2 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). This
3 standard “does not require detailed factual allegations, but it demands more than an
4 unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at
5 678 (quoting *Twombly*, 550 U.S. at 555). In assessing whether Rule 8(a)(2) has
6 been satisfied, a court must first identify the elements of the plaintiff’s claim(s) and
7 then determine whether those elements could be proven on the facts pled. The
8 court should generally draw all reasonable inferences in the plaintiff’s favor, *see*
9 *Sheppard v. David Evans and Assocs.*, 694 F.3d 1045, 1051 (9th Cir. 2012), but it
10 need not accept “naked assertions devoid of further factual enhancement.” *Iqbal*,
11 556 U.S. at 678 (internal quotations and citation omitted).

12 In ruling upon a motion to dismiss, a court must accept all factual allegations
13 in the complaint as true and construe the pleadings in the light most favorable to
14 the party opposing the motion. *Sprewell v. Golden State Warriors*, 266 F.3d 979,
15 988 (9th Cir. 2001). The court may disregard allegations that are contradicted by
16 matters properly subject to judicial notice or by exhibit. *Id.* The court may also
17 disregard conclusory allegations and arguments which are not supported by
18 reasonable deductions and inferences. *Id.*

19 2. Whether MERS Should Be Dismissed as a Defendant

20 Defendants argue that Defendant MERS should be dismissed from this

1 action because the complaint fails to raise any allegations against or concerning
2 MERS. ECF No. 8 at 8. Defendants offer no legal basis for their demand that
3 MERS be dismissed, however. The Court notes that though MERS is not
4 mentioned specifically in the factual allegations of the complaint, Plaintiffs
5 generally allege that they “contest[] the ownership of the note,” whose ownership
6 is “yet a mystery and unknown.” ECF No. 1-1 at 2. Defendants are collectively
7 alleged to be “banks, lending institutions, loan originators, trustees and their
8 assignee, transferees and successors in interest of purported instruments of rights
9 including those inherent in a promissory note and deed of trust associated with the
10 subject property.” *Id.* Thus, Plaintiffs’ inclusion of defendant MERS appears to be
11 part of that collective alleged to have some stake in the promissory note and deed
12 of trust.

13 3. Whether Plaintiffs’ Negligence Claim Should Be Dismissed

14 Plaintiffs claim that the foreclosing defendants had a “duty under business
15 custom and usage and common business practices, state banking regulations, and
16 federal requirements...to exercise reasonable care and skill to maintain proper and
17 accurate loan records and to discharge and fulfill the other incidents attendant to
18 the maintenance, accounting and servicing of loan records, including, but not
19 limited [to] accurate crediting of payments made by Plaintiff to avoid errors in
20 accounting causing foreclosure...” ECF No. 1-1 at 6.

1 “The economic loss rule applies to hold parties to their contract remedies
2 when a loss potentially implicates both tort and contract relief” *Alejandre v. Bull*,
3 159 Wash.2d 674, 681 (2007). “Tort law has traditionally redressed injuries
4 properly classified as physical harm.” *Stuart v. Coldwell Banker Commercial*
5 *Group, Inc.*, 109 Wash.2d 406, 420 (1987). It “is concerned with the obligations
6 imposed by law rather than by bargain,” and carries out a “safety-insurance policy”
7 that requires that products and property that are sold do not “unreasonably
8 endanger the safety and health of the public.” *Id.* at 421, 420. Contract law, on the
9 other hand, carries out an “expectation-bargain protection policy” which “provides
10 an appropriate set of rules when an individual bargains for a product of particular
11 quality or for a particular use.” *Id.* at 420-421. “Where economic losses occur,
12 recovery is confined to contract ‘to ensure that the allocation of risk and the
13 determination of future liability is based on what the parties bargained for in the
14 contract....’” *Alejandre*, 159 Wash.2d at 682-83.

15 If the economic loss rule applies, the party will be held to contract remedies
16 regardless of how the plaintiff characterizes the claims. Washington law
17 consistently follows these principles. The key inquiry is the nature of the
18 loss and the manner in which it occurs, i.e., are the losses economic losses
19 with economic losses distinguished from personal injury or injury to other
20 property. If the claimed loss is an economic loss, and no exception applies to
the economic loss rule, then the parties will be limited to contractual
remedies.

Alejandre, 159 Wash.2d at 683-684.

1 Here, Plaintiffs claim no injury to themselves or their property other than
2 financial injury arising out of the alleged breach of contract. Their allegations of
3 negligence relate to Defendant's alleged duty to maintain their loan records, which
4 is a creature of their contractual relationship. *See* ECF No. 1-1 at 6 ("Foreclosing
5 Defendants all of which are allegedly acting as Plaintiff's lender and loan servicer,
6 had a duty under business custom and usage and common business practices...to
7 exercise reasonable care and skill to maintain proper and accurate loan
8 records..."). As such, the economic loss rule applies and the parties are held to
9 contract remedies. Accordingly, the Court grants Defendants' motion to dismiss
10 Plaintiffs' negligence claim.

11 4. Whether Plaintiffs' Fraud Claim Should Be Dismissed

12 **a. Whether Plaintiffs' Fraud Claim is Time Barred**

13 Defendants first argue that Plaintiffs' fraud claim is in part time-barred
14 because the statute of limitations is three years and the alleged misrepresentation of
15 loan terms occurred in 2009. ECF No. 8 at 10.

16 Under RCW § 4.16.080, actions for fraud must be commenced within three
17 years. However, the cause of action does not accrue "until the discovery by the
18 aggrieved party of the facts constituting the fraud." RCW § 4.16.080(4).

19 Defendants argue that "to the extent [the fraud claim] is premised on loan
20 origination allegations, the claim is time-barred and cannot be asserted against

1 BANA or MERS, who were not Plaintiffs’ original lender.” ECF No. 8 at 10. They
2 cite paragraph 40 of Plaintiffs’ complaint. However, paragraph 40 refers
3 specifically to the statements of Anna Lopez in December 2011. ECF No. 1-1 at 7-
4 8. Accordingly, Plaintiffs’ fraud claim does not appear to be time-barred, as the
5 three-year time limit on fraud actions would not expire until December 2014.

6 **b. Whether Plaintiffs’ Fraud Claim is Sufficiently Pleaded**

7 Defendants next argue that the fraud claim is insufficiently pleaded because
8 the purportedly false statements concern a future act, and because Plaintiffs cannot
9 plead justifiable reliance. ECF No. 8 at 10.

10 “In order to prove fraud, the plaintiff must establish each of the following
11 elements by clear, cogent, and convincing evidence: (1) A representation of an
12 existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its
13 falsity or ignorance of its truth; (5) his intent that it should be acted on by the
14 person to whom it is made; (6) ignorance of its falsity on the part of the person to
15 whom it is made; (7) the latter's reliance on the truth of the representation; (8) his
16 right to rely upon it; (9) his consequent damage.” *Kirkham v. Smith*, 106 Wash.
17 App. 177, 183, 23 P.3d 10, 13 (2001). “In alleging fraud...a party must state with
18 particularity the circumstances constituting fraud....” Fed. R. Civ. P. 9(b).

19 Here, drawing all inferences in the Plaintiffs’ favor, the Court finds that the
20 fraud allegations are sufficiently pleaded. Defendants first claim that Plaintiffs’

1 loan modification allegations cannot support a fraud claim because the purported
2 false statements were not concerning an existing fact but rather a future act that
3 Plaintiffs would be guaranteed a modification if they defaulted, ECF No. 8 at 11,
4 the Court notes that the complaint states that Defendant BANA's agent knew the
5 statement to be untrue at the time she made it. Defendants cite *Hoptowit v. Brown*,
6 115 Wash. 661, 667 (1921), for the proposition that such a statement of future
7 event cannot constitute the basis for a fraud claim. But *Hoptowit* explains:

8 **Nor is it the rule that all fraudulent misrepresentations of future events,**
9 or all fraudulent misrepresentations of law, where a person is deceived
10 thereby to his injury, **are nonactionable.** They are generally held so because
11 they are in their nature matters of opinion, of which the one party is
presumably as well informed as the other; but the exceptions are as well
defined as the rule itself, and circumstances such as are here shown are
generally held to constitute an exception.

12 *Hoptowit*, 115 Wash. at 667 (emphasis added). Defendants do not argue that the
13 statement was an opinion; the Court will not dismiss the claim only on the grounds
14 that it pertains to a future act.

15 Defendants next claim that Plaintiffs cannot claim justifiable reliance on any
16 purported promise insofar as they were obligated to make contractually obligated
17 payments on their loan. ECF No. 8 at 12. But Plaintiffs' claim is that the BANA
18 agent "guaranteed" that they could alter the loan agreement; thus, the very basis of
19 the fraud argument is that their belief in her alleged misrepresentation was
20 justified.

1 Accordingly, Defendants’ motion to dismiss this claim is denied.

2 5. Whether Plaintiffs’ Foreclosure Fairness Act Claim Should Be
3 Dismissed

4 Defendants argue that Plaintiffs’ claim under RCW 61.24.163 fails because
5 the statute relates to borrowers’ entitlement to request mediation prior to
6 foreclosure and does not include a private cause of action for damages. ECF No. 8
7 at 12.

8 Defendants argue that RCW 61.24.163 provides no private cause of action.
9 However, the Court notes that RCW 61.24.135 provides that violations of the duty
10 of good faith under RCW 61.24.163 constitute an unfair or deceptive act for
11 purposes of the Consumer Protection Act. Plaintiffs generally mention
12 Washington’s consumer protection acts as protecting against the foreclosure
13 actions they allege. Thus, Plaintiffs’ claim does not fail for lack of a private cause
14 of action.

15 Under the standard of the motion to dismiss, the Court must take the
16 Complaint at face value. Defendants cite a declaration for the fact that Plaintiffs
17 received notice of their right to request mediation in the Notice of Trustee’s Sale.
18 ECF no. 8 at 12 (citing Varallo Declaration). However, Plaintiffs claim that the
19 “right to mediation was not properly noticed at any time prior to the issuance of the
20 [Notice of Default] in violation of the Wa. Stats.” ECF No. 1-1 at 5. They also

1 allege that the Notice of Default was “issued prematurely and illegally making the
2 portent of foreclosure void as a matter of law.” *Id.* (emphasis in original). Thus,
3 this argument fails.

4 However, Defendants rightly note that RCW 61.24.163 relates to the
5 foreclosure mediation process. Plaintiffs have not alleged facts giving rise to a
6 finding that Defendants violated their duty to mediate in good faith as required
7 under the section. For example, they do not argue that Defendants “failed to timely
8 participate in mediation without good cause” or failed to “provide documentation
9 required before mediation or pursuant to the mediator’s instructions.” RCW
10 61.24.163(10). Thus, Defendant’s request that Plaintiffs’ claim under RCW
11 61.24.163 be dismissed is granted. However, this does not preclude recovery under
12 the other statutes generally cited as “Wash. State’s consumer protection acts
13 specifically protecting against illegal foreclosure actions.” ECF No. 1-1 at ¶ 11.

14 6. Whether Plaintiffs Are Entitled to an Accounting

15 Defendants allege that Plaintiffs have not demonstrated entitlement to an
16 accounting because they have not demonstrated that Defendants owe them any
17 duty, nor have they shown that the account is so complicated that the fiduciary
18 duty requirement be waived. ECF No. 8 at 13.

19 Actions for partnership accounting are now covered under statute in
20 Washington; actions for common-law accounting arise under case law. The

1 requisites for an accounting action are set forth in *Corbin v. Madison*, 12 Wash.
2 App. 318, 327 (1974), quoting with approval language from *Seattle Nat'l Bank v.*
3 *School Dist. 40*, 20 Wash. 368 (1898):

4 In general, a complaint for an accounting must show by specific averments
5 that there is a fiduciary relation existing between the parties, or that the
6 account is so complicated that it cannot conveniently be taken in an action at
7 law. And it must allege that the plaintiff has demanded an accounting from
8 the defendant, and the latter's refusal to render it, in order to state a cause of
9 action.

10 *Corbin*, 12 Wash. App. at 327 (quoting *Seattle Nat'l Bank*, 20 Wash. 368).

11 A fiduciary relationship arises as a matter of law between an attorney and
12 client, or a doctor and patient, for example. *Liebergesell v. Evans*, 93 Wash.2d 881,
13 890 (1980). However, a fiduciary relationship can also arise in fact regardless of
14 the legal relationship between the parties. *Id.* In some circumstances a fiduciary
15 relationship which allows an individual to relax his guard and repose his trust in
16 another may develop. *Id.* at 889. Such a fiduciary relationship is one in which one
17 party “occupies such a relation to the other party as to justify the latter in expecting
18 that his interests will be cared for. . . .” *Id.* at 889-90 (quoting Restatement
19 Contracts § 472(1)(c)) (sufficient evidence of fiduciary relationship to overcome
20 summary judgment where businessman induced a widowed school teacher to lend
 him money at 20 percent interest rate, even though he knew that rate was illegal).
 “The facts and circumstances must indicate that the one reposing the trust has
 foundation for his belief that the one giving advice or presenting arguments is

1 acting not in his own behalf, but in the interests of the other party.’’ *Goodyear Tire*
2 *& Rubber Co. v. Whiteman Tire, Inc.*, 86 Wash. App. 732, 742 (1997) (quoting
3 *Burwell v. South Carolina Nat'l Bank*, 340 S.E.2d 786, 790 (1986)). In other
4 words, the plaintiff must show some dependency on his or her part and some
5 undertaking by the defendant to advise, counsel and protect the weaker party. *Id.* In
6 *Goodyear*, the court found that counterclaim plaintiff had not created an issue of
7 fact sufficient to avoid summary judgment where, though tire dealer was
8 vulnerable, tire manufacturer was clearly interested in promoting itself as
9 demonstrated by its reservation of right to compete. *Id.* at 743 (“the existence of
10 conflicting profit incentives between a manufacturer and dealer is at odds with a
11 fiduciary relationship”).

12 Plaintiffs’ complaint does not allege any relationship between BANA and/or
13 MERS and Plaintiffs that could give rise to a fiduciary relationship. An
14 independent trustee in a nonjudicial foreclosure may owe a fiduciary duty to act
15 impartially to fairly respect the interests of both the lender and debtor. *See Klem v.*
16 *Washington Mutual Bank*, 176 Wash.2d 771, 790 (2013). But Plaintiff has not
17 alleged that either BANA or MERS are trustees meeting this requirement.

18 Accordingly, Plaintiffs’ claim for an equitable accounting is dismissed. However,
19 the Court grants Plaintiffs leave to amend their complaint, as explained below.

20 //

1 7. Whether Plaintiffs' Breach of Contract Claim Should Be Dismissed

2 Defendants argue that Plaintiffs' breach of contract claim should be
3 dismissed because Plaintiffs do not allege facts demonstrating the relevant terms of
4 the two purported contracts, nor do they allege facts demonstrating how
5 Defendants breached any provision or any resulting damages. ECF No. 8 at

6 Generally, a plaintiff in a contract action must prove (1) a valid contract
7 between the parties, (2) breach, and (3) resulting damage. *Lehrer v. State, Dep't of*
8 *Soc. & Health Servs.*, 101 Wash. App. 509, 516, 5 P.3d 722, 727 (2000).

9 Defendant cites RCW 64.04.010 for the proposition that the statute of frauds
10 requires that agreements relating to an interest in real property, including
11 mortgages, be in writing and signed by the party to be charged. ECF No. 8 at 15.

12 Every conveyance of real estate, or any interest therein, and every contract
13 creating or evidencing any encumbrance upon real estate, shall be by deed:
14 PROVIDED, That when real estate, or any interest therein, is held in trust,
15 the terms and conditions of which trust are of record, and the instrument
16 creating such trust authorizes the issuance of certificates or written evidence
17 of any interest in said real estate under said trust, and authorizes the transfer
18 thereof by a simple writing or by endorsement on the back of such certificate
19 or evidence of interest or delivery thereof to the vendee, such transfer shall
20 be valid, and all such assignments or transfers hereby authorized and
heretofore made in accordance with the provisions of this section are hereby
declared to be legal and valid.

RCW § 64.04.010. Washington's statute of frauds also provides that

In the following cases, specified in this section, any agreement, contract, and
promise shall be void, unless such agreement, contract, or promise, or some

1 note or memorandum thereof, be in writing, and signed by the party to be
2 charged therewith, or by some person thereunto by him or her lawfully
3 authorized, that is to say: (1) Every agreement that by its terms is not to be
4 performed in one year from the making thereof...

4 RCW § 19.36.010.

5 Here, Plaintiffs have not alleged facts indicating that the alleged loan
6 modification “guaranteed” by BANA’s agent Lopez was made in writing. Plaintiffs
7 indicate that Lopez made statements to them, but the complaint does not specify
8 whether those statements were verbal or in writing, and there is no indication that
9 any party signed such a modification. Plaintiffs do allege that the “offer was
10 accepted by reason of the cashing of the December 2011 payment cashed by
11 defendant acknowledging the new contract and superseding the existing former
12 Note and modifying same.” ECF No. 1-1 at 5. However, Plaintiffs offer no
13 explanation of why a check cashing constituted an acknowledgment of the new
14 contract, nor what the specific terms of the new contract might be. Accordingly,
15 based on their statute of frauds argument, Defendants’ motion to dismiss Plaintiffs’
16 breach of contract claim is granted.

17 8. Whether Plaintiffs’ Unjust Enrichment and Promissory Estoppel

18 Claims Should Be Dismissed

19 Defendants argue that Plaintiffs’ claims for unjust enrichment and
20 promissory estoppel fail because they cannot be asserted when there is an express

1 contract. ECF No. 8 at 16. They also argue that Plaintiffs’ do not allege to have
2 made a single modified payment to Defendants since January 2012, yet allege that
3 Defendants “misapplied” payments. Id.

4 Quasi contracts, or contracts implied by law, are founded on the equitable
5 principle of unjust enrichment that one should not be “unjustly enriched at the
6 expense of another.” *Lynch v. Deaconess Med. Ctr.*, 113 Wash.2d 162, 165, 776
7 P.2d 681 (1989) (quoting *Milone & Tucci, Inc. v. Bona Fide Builders, Inc.*, 49
8 Wash.2d 363, 367, 301 P.2d 759 (1956)). A person has been unjustly enriched
9 when he has profited or enriched himself at the expense of another contrary to
10 equity. *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wash.App. 719,
11 731–32, 741 P.2d 58 (1987). Under Washington law, “[a] party to a valid express
12 contract is bound by the provisions of that contract, and may not disregard the
13 same and bring an action on an implied contract relating to the same matter, in
14 contravention of the express contract.” *U.S. for Use and Benefit of Walton
15 Technology, Inc. v. Weststar Engineering, Inc.*, 290 F.3d 1199, 1204 (9th Cir.
16 2002) (dismissing unjust enrichment claim where Plaintiff had affirmed the
17 validity of the contract).

18 Here, because Plaintiffs entered an express contract with Defendant BANA
19 with respect to their loan agreement and allege that they had modified that
20

1 agreement via a verbal agreement with a loan agent, Plaintiffs' quasi contract claim
2 fails.

3 A party seeking recovery under a theory of promissory estoppel must prove
4 five prerequisites: (1) a promise that (2) the promisor should reasonably expect to
5 cause the promisee to change his position and (3) that does cause the promisee to
6 change his position (4) justifiably relying upon the promise, in such a manner that
7 (5) injustice can be avoided only by enforcement of the promise. *Kim v. Dean*, 133
8 Wash. App. 338, 348 (2006). Defendant cites *Hein v. Chrysler Corporation*, 45
9 Wn.2d 586 (1954) for the proposition that implied contract theories cannot be
10 asserted when there is an express contract. However, the Court cannot find express
11 support for the claim with respect to promissory estoppel.

12 Defendants also claim that Plaintiffs do not allege to have made a single
13 modified payment to Defendants since January 2012, "yet appear to allege that
14 Defendants 'misapplied' the very payments they did not make." ECF No. 8 at 16.
15 However, Plaintiffs claim that they "gave notice to defendants that a dispute
16 existed regarding the rejection of their tendered payments under a second
17 [modified] agreement to pay a lesser amount under the note." ECF No. 1-1 at 4.
18 This statement implies that Plaintiffs "tendered payments" that were then rejected.

19 Defendants next argue that Plaintiffs concede that they intentionally
20 defaulted on their loan, and claim that they cannot allege that BANA has acted

1 inequitably by enforcing its security interest under the deed of trust. But Plaintiffs
2 alleged reason for defaulting is that Defendants' agent orally modified the loan
3 agreement they relied on that oral modification in changing the amount of money
4 they paid or ceasing to pay altogether.

5 Accordingly, Plaintiffs' claim for promissory estoppel survives Defendants'
6 motion to dismiss.

7 9. Whether Plaintiffs' Claim for Quiet Title Should Be Dismissed

8 Here, Defendant cites an unpublished district court opinion, *Evans v. BAC*
9 *Home Loans Servicing, L.P.*, 2010 WL 5138394 (W.D. Wash. 2010), for the
10 proposition that the "law is clear that to maintain a quiet title action regarding a
11 mortgagee, a plaintiff must first pay the outstanding debt on which the mortgage is
12 based." ECF No. 8 at 17. Defendants allege that Plaintiffs have not alleged that
13 they have paid the amounts due under their loan, nor that they have the ability to
14 pay.

15 Washington law indicates that Plaintiff may not maintain an action to quiet
16 title where purchaser at no time offered to pay balance of purchase price and to
17 satisfy mortgage debts on land. *Littlejohn v. Miller*, 5 Wash. 399, 404 (1892)
18 ("However this may be, their indebtedness for the said portion of the purchase
19 price was concluded by this judgment, and they are in no position to question the
20 validity thereof; and they not having at any time offered to pay the balance of said

1 purchase price, and to satisfy said mortgage debts, the judgment rendered in their
2 favor in the court below must be reversed, and the cause is remanded with
3 instructions to the lower court to dismiss it.”).

4 Here, Plaintiffs’ complaint only alleges that they made payments and then
5 stopped making payments. There is no suggestion that Plaintiffs have paid off their
6 mortgage or offered to do so. Accordingly, their action for quiet title is dismissed.

7 10. Leave to Amend

8 The standard for granting leave to amend is generous. *See* Fed. R. Civ. P.
9 15(a)(2) (“The court should freely give leave when justice so requires.”).

10 “Dismissal of a pro se complaint without leave to amend is proper only if it is
11 absolutely clear that the deficiencies of the complaint could not be cured by
12 amendment.” *Schucker v. Rockwood*, 846 F.2d 1202, 1203–04 (9th Cir. 1988)
13 (internal quotation marks and citations omitted). The court considers five factors in
14 assessing the propriety of leave to amend: bad faith, undue delay, prejudice to the
15 opposing party, futility of amendment, and whether the plaintiff has previously
16 amended the complaint. *United States v. Corinthian Colleges*, 655 F.3d 984, 995
17 (9th Cir. 2011).

18 The Court finds no indication of bad faith, undue delay, or significant
19 prejudice to the opposing party; nor have Plaintiffs previously amended their
20 Complaint. The only factor remaining for the Court to weigh is whether an

1 amendment would be futile. Futility is established only if the complaint “could not
2 be saved by any amendment.” *Id.* (internal citations omitted); *see also Balistreri v.*
3 *Pacifica Police Dept.*, 901 F.2d 696, 701 (9th Cir. 1990) (as amended) (leave to
4 amend may be granted when the court can “conceive of facts” that would render
5 the plaintiff's claim viable). Here, the Court can conceive of facts that would render
6 Plaintiffs’ claims viable. Accordingly, it grants leave to amend.

7 Plaintiffs’ amended complaint shall consist of a **short** and **plain** statements
8 showing they are entitled to relief. Pursuant to Federal Rule of Civil Procedure
9 8(a), Plaintiffs shall allege with specificity the following:

- 10 1) a short and plain statement of the statute that gives this court
11 jurisdiction over the case,
- 12 2) a short and plain statement of the law or legal theory and facts
13 supporting each claim against each defendant which would entitle
14 Plaintiffs to relief, and
- 15 3) the relief requested from each defendant.

16 Plaintiffs must name all intended Defendants in the caption of their
17 complaint (an amended complaint supersedes the initial complaint). *See Ferdik v.*
18 *Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). Failing to name all Defendants in
19 the caption of their complaint denies the Court jurisdiction over the unnamed
20 Defendants. Fed. R. Civ. P. 10(a), *accord United States of America v. Tucson*

1 *Mechanical Contracting Inc.*, 921 F.2d 911, 914 (9th Cir. 1990). Plaintiffs must be
2 careful to list only those Defendants in the caption of their complaint who are the
3 subject of their claims. The use of “Doe” Defendants is not favored in the Ninth
4 Circuit. *See Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). For Plaintiffs
5 to properly name “John Doe” Defendants, they must provide all of the information
6 they would normally provide if they already knew each of the defendants’ names.
7 Plaintiff should identify “John Does” by their function, their actions, the dates
8 these actions occurred and most importantly, a short and plain statement of the law
9 or legal theory and facts supporting each claim against each defendant which
10 would entitle Plaintiffs to relief.

11 Furthermore, Plaintiffs shall again set forth their factual allegations in
12 separate numbered paragraphs. THIS AMENDED COMPLAINT WILL
13 OPERATE AS A COMPLETE SUBSTITUTE FOR (RATHER THAN A MERE
14 SUPPLEMENT TO) THE PRESENT COMPLAINT. The amended complaint
15 must be legibly rewritten or retyped in its entirety, should be an original and not a
16 copy, may not incorporate any part of the original complaint by reference, and

17 **MUST BE CLEARLY LABELED THE “FIRST AMENDED**
18 **COMPLAINT,” with case number 13-CV-0380-TOR written in the caption.**

19 //

20 //

1 **PLAINTIFFS ARE CAUTIONED IF THEY FAIL TO AMEND**
2 **WITHIN 30 DAYS AS DIRECTED, THE COURT WILL PROCEED ONLY**
3 **WITH THE ORIGINAL COMPLAINT, BUT WITHOUT THE CAUSES OF**
4 **ACTION THAT HAVE BEEN DISMISSED BY THIS ORDER.**

5
6 **3. Plaintiffs’ Motion to Expedite**

7 Plaintiffs seek to expedite their motion to remand. They appear to request
8 that the motion be heard before the motion to dismiss. The Court grants this motion
9 and has addressed the claims in Plaintiffs’ motion.

10 They also appear to move the court for an extension of time to respond to
11 Defendants’ motion to dismiss. Plaintiffs refer to it as a “stay or continuance of a
12 pending motion,” but the title states that it is a motion to “extend time to respond to
13 a pending motion to dismiss.” The court interprets this as a request for an extension
14 of time to file a response. Plaintiffs offer no good cause for not having the
15 response within the 30 days established by Local Rule 7.1(b)(2)(A), arguing that
16 they did not receive the motion until November 17, 2013. However, they did not
17 file the motion to dismiss or the motion to expedite until December 24, 2013.
18 Despite this, the Court’s rulings on the motion to dismiss are not fatal to their
19 complaint, as Plaintiffs will be granted leave to file an amended complaint.

20 //

1 **IT IS HEREBY ORDERED:**

- 2 1. Plaintiffs' Motion to Remand (ECF No. 12) is **DENIED**.
- 3 2. Defendants' Motion to Dismiss (ECF No. 8) is **DENIED** in part and
- 4 **GRANTED** in part.
- 5 a. Defendants' motion to dismiss MERS as a defendant is DENIED.
- 6 b. Plaintiffs' negligence claim is DISMISSED.
- 7 c. Defendants' motion to dismiss Plaintiffs' fraud claim is DENIED.
- 8 d. Plaintiffs' Foreclosure Fairness Act claim is DISMISSED, though
- 9 the Court notes that this does not resolve or preclude claims under
- 10 the other consumer protection statutes Plaintiffs reference in the
- 11 complaint.
- 12 e. Plaintiffs' claim for an accounting is DISMISSED.
- 13 f. Plaintiffs' breach of contract claim is DISMISSED.
- 14 g. Plaintiffs' unjust enrichment claim is DISMISSED; Plaintiffs'
- 15 claim for promissory estoppel survives.
- 16 h. Plaintiffs' quiet title cause of action is DISMISSED.
- 17 3. Plaintiffs are granted leave to amend their complaint. An amended
- 18 complaint, if any, shall be filed within 30 days of the filing of this order.
- 19 4. Plaintiffs' Motion to Expedite (ECF No. 11) is **GRANTED** in part. Their
- 20 motion to expedite is granted. Plaintiffs' request to stay or continuance

1 on motion to dismiss is **DENIED**. However, as stated above, Plaintiffs
2 are granted leave to amend their complaint.

3 The District Court Executive is hereby directed to enter this Order and
4 provide copies to the parties.

5 **DATED** January 14, 2013.



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Thomas O. Rice
THOMAS O. RICE
United States District Judge