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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

BRADLEY G. GRIEP and KIM J. GRIEP, Plaintiffs, vs. BAC HOME LOANS SERVICING, LP; and BANK OF AMERICA, N.A., Defendants.	No. 2:09-cv-02613 ROS **MOTION TO DISMISS**

Defendants Bank of America, N.A. and BAC Home Loans Servicing, L.P. (sometimes collectively referred to as "BOA") move to dismiss on the basis that plaintiffs have failed to state a claim against BOA. This Motion is based on the pleadings and papers on file herein and the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

This lawsuit arises out of plaintiffs' default on their loan obligations and resulting trustee's sale. In 2008, plaintiffs took out a loan from BOA and secured it with a deed of trust for the subject property. Plaintiffs now ask the Court to endorse their default and rescind BOA's contractual right to sell the property (likely at a substantial loss) to partially mitigate the default. Plaintiffs have decided they do not like the agreement they made and want the Court to re-write it. This is one of several recent lawsuits designed to avoid payment and stall a non-judicial foreclosure sale. Plaintiffs' Complaint is no

different than the dozens of others which courts, including this Court, have summarily dismissed over the past several months.

As discussed below, the Amended Complaint fails to state a claim upon which relief can be granted and is based on duties that do not exist under Arizona or federal law. This case should be dismissed.

II. FACTS

A. Plaintiffs borrowed $273,745.00 from BOA and secured the loan with a Deed of Trust.

According to the Amended Complaint, on March 6, 2008 plaintiffs took out a loan in the amount of $273,745.00 from BOA. (Amd. Compl. at 2, ¶ 7.) The loan is evidenced by a promissory note that plaintiffs executed, which is dated March 21, 2008. (*See* Promissory Note, attached as Exhibit A hereto.)[1] Plaintiffs secured the loan with a Deed of Trust in favor of the lender and its successors and assigns. (*See* Deed of Trust, attached as Exhibit 1 to the Complaint.)[2]

Through the Deed of Trust, plaintiffs vested the beneficiaries with the power of sale to secure repayment of the loan. The Deed of Trust defines Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary and nominee for the lender and its assigns. (*Id.* at 2 and ¶ E.) The Deed of Trust allows MERS to implement foreclosure proceedings should plaintiffs default on the note. (*Id.* at 3 ("Borrower [Bradley and Kim Griep] understands and agrees that . . . MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of [the] interests [granted by Borrower in the Deed of Trust], including, but not limited to, the right to foreclose and sell the Property . . . .").)

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[1] Because the promissory note is referred to in the Amended Complaint and is central to plaintiffs' claims, the Court may take judicial notice of the contents of the note without converting this Motion into a motion for summary judgment. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

[2] Because the Deed of Trust is referenced in the Amended Complaint and is central to plaintiffs' claims, the Court may take judicial notice of the contents of the note without converting this Motion into a motion for summary judgment. *See supra* note 1.

B. Plaintiffs stopped making payments, so foreclosure proceedings were initiated.

Sometime after origination, BOA began servicing the plaintiffs' loan. (*See* Amd. Compl. at 3, ¶ 11.) Plaintiffs stopped making payments in or about June 2009. (*See* Amd. Compl. at 3, ¶¶ 12–15.) As a result of plaintiffs' default, the foreclosure process was initiated. On September 17, 2009, MERS appointed Recontrust Company successor trustee under the Deed of Trust. (*See* Substitution of Trustee Arizona, attached as Exhibit B hereto.)[3] On September 18, 2009, Recontrust Company, as successor trustee, recorded a Notice of Trustee's Sale Arizona concerning the subject property. (*See* Amd. Compl. at 4, ¶ 17; Notice of Trustee's Sale, attached as Exhibit 2 to Complaint.)

A Trustee's Sale was scheduled for December 23, 2009. (Amd. Compl. at 4, ¶ 17.) On the same day, plaintiffs filed a voluntary petition for Chapter 13 bankruptcy. Plaintiffs' bankruptcy filing stayed the Trustee's Sale.

C. Plaintiffs filed a frivolous complaint several months after defaulting on their loan in an attempt to avoid their contractual obligations.

Several months after defaulting on their loan, plaintiffs filed their Complaint in this Court on or about December 16, 2009. Plaintiffs filed an Amended Complaint on the same day. The Amended Complaint contains an assortment of deficient and even frivolous causes of action:

> **Count One (Lack of Standing):** Plaintiffs make various allegations that MERS is unable to transfer interests granted in the Deed of Trust and that BOA lacks authority to foreclose on the property because it does not have an original copy of the note. Plaintiffs do not identify a cognizable cause of action based on these allegations. Plaintiffs expressly granted to MERS all interests conveyed by plaintiffs in the Deed of Trust, including the power of sale. Plaintiffs thus authorized MERS to assign the loan originator's rights to BOA. *See Blau v. America's Serv. Co.*, 2009 WL 3174823, at *8 (D. Ariz. 2009). In addition, this Court (joining numerous other courts) has routinely rejected the same kind of "show me the note" claims asserted by plaintiffs here. *Id.* at *6.

[3] Because the Substitution of Trustee Arizona is a matter of public record, the Court may take judicial notice of it. *Mack v. South Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) ("[O]n a motion to dismiss a court may properly look beyond the complaint to matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for summary judgment."), *overruled on other grounds by Astoria v. Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991).

Count Two (Violation of Truth in Lending Act and RESPA): Plaintiffs' Truth in Lending Act (TILA) claim is barred by the one year statute of limitations. 15 U.S.C. § 1640(e). Even if plaintiffs' TILA claim was not barred by the statute of limitations, it still fails. Plaintiffs assert that BOA violated the disclosure requirements of TILA. However, such allegations should be dismissed as to BOA because BOA is not the originator of the loan and is therefore not the entity required to make the disclosures. *See Blau*, 2009 WL 3174823, at *9.

Plaintiffs' Real Estate Settlement Procedures Act ("RESPA") claim fails because plaintiffs have not alleged a cognizable claim for violation of RESPA.

Count Three (Breach of Contract): Plaintiffs make various allegations concerning receipt of federal funds by BOA and conditions attached thereto. Plaintiffs claim that BOA failed to adhere to the terms of an agreement with the U.S. government. Plaintiffs' breach of contract claim fails because plaintiffs lack standing to enforce any agreements between BOA and the U.S. government. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 2000).

Count Four (Misrepresentation and Breach of Duty of Good Faith and Fair Dealing): Plaintiffs claim that BOA assumed a duty of good faith and fair dealing when it invited them to request a loan modification. At best, plaintiffs allege that BOA did not act in good faith in connection with negotiations that could lead to an agreement. The duty of good faith and fair dealing, however, does not attach until an agreement is formed. *See Budget Mktg., Inc. v. Centronics Corp.*, 927 F.2d 421 (8th Cir. 1991).

Plaintiffs further claim that BOA misrepresented its position as holder of the note and its ability to modify the note. As explained below, plaintiffs have not stated a claim for fraud.

Count Five (Fraud): Plaintiffs claim that BOA misrepresented that it owned the note and had the ability to modify the note. Plaintiffs' allegations are far too conclusory to satisfy the particularity standard for pleading fraud under federal law.

Count Six (Breach of Fiduciary Duties): Under Arizona law, the lender-borrower relationship is not fiduciary in nature. *See McAlister v. Citibank*, 171 Ariz. 207, 829 P.2d 1253, 1259 (1992). Plaintiffs' claim is meritless.

Count Seven (Conversion): Plaintiffs appear to claim that BOA converted the promissory note by using the note to create a security. Plaintiffs have the law of conversion backwards — the note evidences payment obligations owed by plaintiffs to the lender, not the other way around. Plaintiffs can have no claim for conversion with respect to the note because it does not represent an obligation owed to plaintiffs. *See* Restatement (Second) of Torts § 242.

Count Eight (Unfair and Deceptive Trade Practices): Plaintiffs claim that "conversion" of the note to an investment security harmed them by making it harder to renegotiate the note. Plaintiffs fail to state a claim. The terms of the note remain the same regardless of the transfer of the Lender's right to receive payment. Plaintiffs have no legal or contractual right to

attempt to renegotiate the note. Plaintiffs' alleged damages are also speculative.

Count Nine (Lack of Consideration): Plaintiffs claim that they received no consideration from the securitization of the note. Plaintiffs make the unsupported statement that BOA "obtained the note by fraud." Lack of consideration is not a cognizable cause of action under Arizona law.

Count Ten (RICO and Collusion): Plaintiffs claim that BOA colluded to convert the note into an investment security and to thereby profit. Plaintiffs identify no predicate act on which to base a RICO claim. Again, Plaintiffs gave the Lender the right to transfer the note, and any transfer by BOA of its rights to receive payment under the note was authorized by Plaintiffs.

Count Eleven (Unjust Enrichment): Plaintiffs claim BOA was unjustly enriched by securitizing the note. Plaintiffs fail to acknowledge the enormous loss BOA has incurred as a result of their default. Moreover, Plaintiffs gave the Lender the right to transfer the note, and any transfer by BOA of its rights to receive payment under the note were thereby authorized. Plaintiffs also fail to allege any enrichment, let alone unjust enrichment.

III. LEGAL ARGUMENT

A. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) authorizes this Court to dismiss the Complaint for failure to state a claim upon which relief can be granted. A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

To survive a motion to dismiss, plaintiffs must make allegations sufficient to show their entitlement to relief. This "requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Factual allegations must be enough to raise a claim above the speculative level. *Twombly*, 550 U.S. at 555 (citing 5 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1216, at 235–36 (3d ed. 2004)). The claim must be "plausible on its face[,]" meaning that the well-pleaded facts allow the Court to draw a "reasonable inference" that the defendant is liable for the alleged misconduct. *Iqbal*, 129 S. Ct. at 1949 (internal quotation omitted).

Only reasonable inferences arising from the pleading should be accepted by the court. The Court should not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). The Court also should not accept the truth of legal conclusions merely because they are cast in the form of factual allegations, *Warren v. Fox Family Worldwide, Inc*., 328 F.3d 1136, 1139 (9th Cir. 2003), or assume that Plaintiffs "can prove facts that [they have] not alleged or that the defendants have violated . . . laws in ways that have not been alleged." *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

Plaintiffs are required to give defendants notice of the nature and basis of their claims. The Amended Complaint here falls far short of even a liberal notice pleading standard because it fails to give BOA fair notice of the nature and basis of plaintiffs' claims and fails to make allegations sufficient to establish the elements of the causes of action they assert. Plaintiffs' Complaint should therefore be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

B. Plaintiffs' claim of "Lack of Standing" (Count One) is meritless and has been rejected by this Court and many others.

Plaintiffs claim in Count One that MERS lacks standing to initiate a non-judicial foreclosure on the subject property. Plaintiffs' proposition is contrary to all applicable legal authority. Indeed, as recently as December 1, 2009, this Court (Judge Snow) recognized the ability of MERS to appoint a successor trustee to execute the power of sale pursuant to the same authority granted to MERS by plaintiffs in the Deed of Trust here: "Plaintiff agreed to empower MERS to foreclose because the Deed of Trust designates MERS as the beneficiary and authorizes MERS to take any action to enforce the loan, including the right to foreclose and sell the property." *Silvas v. GMAC Mortgage*, 2009 WL 4573234, at *8 (D. Ariz. 2009). Despite overwhelming authority rejecting their theories, plaintiffs seek to undermine the purpose of Arizona's deed of trust statutes — "to bypass time-consuming and expensive judicial foreclosure by using the power of sale authority to sell property securing a delinquent loan after complying

with statutory procedural requirements"[4] — by forcing BOA to litigate a non-judicial process to which plaintiffs expressly agreed.

As set forth in the Amended Complaint, and the recorded Deed of Trust, the nominee beneficiary is MERS, BOA is the servicer of the loan, and Recontrust Company, N.A. is the successor trustee. The actions taken by these entities with regard to foreclosure are explicitly authorized by applicable Arizona law and the Deed of Trust. Plaintiffs' claim that the Deed of Trust is void because MERS holds no interest or authority to foreclose lacks any legal support and has been soundly and routinely rejected in similar cases by this Court and others.

As expressly stated on the Deed of Trust plaintiffs signed, MERS is the nominee beneficiary of that instrument. Plaintiffs unequivocally granted MERS authority to sell the subject property on behalf of the lender and its successors or assigns, including BOA: "Borrower understands and agrees that . . . MERS (as nominee for Lender and Lender's successors and assigns) has the right . . . to foreclose and sell the Property . . . ." Deed of Trust at 3, Ex. 1 to Compl.

This Court has uniformly rejected claims that MERS lacks authority to initiate power of sale procedures in several recent cases. For example, in *Blau v. America's Servicing Co.*, 2009 WL 3174823 (D. Ariz. 2009), the plaintiff (like plaintiffs here) argued that MERS lacked authority to assign the deed of trust because it "did not have a legally cognizable interest in the Deed of Trust." *Id.* at *5.[5] Quoting language in the deed of trust granting MERS authority to exercise the interests granted by the deed, which is almost exactly the language from our Deed of Trust quoted above, the Court held that MERS was authorized to act on behalf of, and exercise the rights of, the loan originator. *Id.* at *7–8. Accordingly, the Court dismissed the plaintiff's claims that the foreclosure proceedings were illegitimate, stating that they "lack merit and must be

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[4] *Contreras v. U.S. Bank*, 2009 WL 4827016, at *4 (D. Ariz. 2009).

[5] Plaintiff here alleges "MERS had no rights to assign the Deed of Trust to the Defendants." Amd. Compl. at 7, ¶ 13.

rejected." *Id.* at *8. This Court's holdings on this issue are in line with holdings from courts around the country.[6]

Plaintiffs' claim concerning MERS lacks merit and should be dismissed. *Cf. Cervantes v. Countrywide Home Loans, Inc.*, 2009 WL 3157160, at *11 (D. Ariz. 2009) (rejecting claim that MERS could not act as beneficiary under a deed of trust; "At most, Plaintiffs find the MERS system to be disagreeable and inconvenient to them as consumers. Such complaints, however, do not arise to the level of fraud, much less a conspiracy to commit fraud.")

C. Plaintiffs' TILA and RESPA claims (Count Two) are directed at the wrong entity, are time-barred, and fail to state a claim.

Plaintiffs fail to state a violation of the Truth in Lending Act ("TILA") against BOA. Under 15 U.S.C. § 1640(e), a civil claim brought pursuant to TILA must be filed within one year of the transaction. 15 U.S.C. § 1640(e) ("Any action under this section may be brought . . . within one year from the date of the occurrence of the violation."). As alleged in the Amended Complaint, the transaction at issue (origination of the loan) occurred on March 6, 2008. (Amd. Compl. at 2, ¶ 7.) Plaintiffs filed their Complaint on December 16, 2009 — more than a year and a half later. Accordingly, the action is barred by the statute of limitations. *See Countrywide*, 2009 WL 3157160, at *3–4 (dismissing TILA claims brought three years after loan obtained as time-barred).

With respect to the Real Estate Settlement Procedures Act ("RESPA"), plaintiffs allege that several documents were not provided to them, including a right to receive appraisal form, original good faith estimate, and original "Truth-In-Lending." (Amd. Compl. at 8, ¶¶ p–r.) Plaintiffs' claims are meritless. There is no requirement under

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[6] *See, e.g., Johnson v. Mortg. Elec. Registration Sys.*, 252 Fed. Appx. 293 (11th Cir. 2007) (affirming grant of summary judgment to MERS on its foreclosure of plaintiff's property); *Pfannenstiel v. MERS, Inc.*, 2009 WL 347716 (E.D. Cal. 2009) (rejecting plaintiff's claim that MERS lacked authority to commence foreclosure proceedings on plaintiff's property); *Trent v. MERS, Inc.*, 618 F. Supp. 2d 1356, (M.D. Fla. 2007) (granting MERS' motion to dismiss plaintiff's complaint challenging property foreclosure); *Smith v. Bank of N.Y.* (*In re* Smith), 366 B.R. 149 (D. Colo. Bankr. 2007) (holding that MERS, functioning as nominee for the lender and its assigns, had standing to conduct foreclosure on behalf of the beneficiary).

RESPA to inform borrowers of their right to receive a copy of an appraisal — plaintiffs are simply mistaken. The RESPA requirement that lenders provide a good faith estimate is set forth in 12 U.S.C. § 2604(c). However, "RESPA does not explicitly or implicitly provide a private right of action for a violation of § 2604(c) or any regulations relating to it." *Mitchell v. EMC Mortg. Corp.*, 2009 WL 3274407 (D. Ariz. 2009) (citing *Collins v. FMHA-USDA*, 105 F.3d 1366, 1368 (11th Cir.1997) (per curiam)). Finally, there is no requirement under RESPA to provide a "Truth-In-Lending." Again, plaintiffs are mistaken that their allegation states a RESPA violation. Accordingly, plaintiffs have failed to state a cognizable claim for violation of RESPA.

D. Plaintiffs' Breach of Contract Claim (Count Three) Fails Because Plaintiffs are not Parties to and Cannot Enforce the Alleged Agreement.

As an initial matter, plaintiffs fail to identify any provision of an enforceable agreement that has been breached. At best, plaintiffs identify advisory guidelines concerning a mortgage modification program developed by the U.S. Department of Treasury. Plaintiffs erroneously contend that these guidelines impose contractual requirements on BOA that can be enforced by plaintiffs. (*See* Amd. Compl. at 10–11, ¶¶ 5–10.) They cite no contract provision and provide no authority to support this unusual claim. *See Silvas*, 2009 WL 4573234, at *4 ("To state a breach of contract claim, 'the complaint must allege an agreement, the right to seek relief, and breach by the defendant.'" (quoting *Commercial Cornice & Millwork, Inc. v. Camel Constr. Servs. Corp.*, 154 Ariz. 34, 38, 739 P.2d 1351, 1355 (App. 1987)). Having failed to identify a contractual provision that has been breached, this claim must be dismissed. *See id.* at *5 (dismissing similar breach of contract claim for failing to identify contract provision that was breached).[7]

[7] Plaintiffs attach a Commitment to Purchase Financial Instrument and Servicer Participation Agreement in an attempt to make it seem as though plaintiffs have an enforceable agreement on which to base their claims. Plaintiffs are not parties to said agreement, and they make no allegations that would support a claim for breach of the agreement in this case.

Even if the Department of Treasury's guidelines imposed requirements on BOA, they would not be enforceable by plaintiffs. Contracts with the federal government are presumed not to be enforceable by third parties like plaintiffs here. *See Klamath Water*, 204 F.3d at 1211 ("Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary."). Plaintiffs' allegations are insufficient to overcome this important and well-established presumption.

E. Plaintiffs' Claim for Breach of Duty of Good Faith and Fair Dealing (Count Four) is Meritless.

Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing puts the cart before the horse. BOA could not have violated the implied covenant prior to forming a contract with plaintiffs or, in terms of plaintiffs' allegations, during the negotiations relating to the potential formation of a loan modification agreement. Prior to formation of a contract, there is no implied duty of good faith and fair dealing. *Norman v. State Farm Mut. Auto. Ins. Co.*, 201 Ariz. 196, 198, 33 P.3d 530, 532 (App. 2001) ("[W]e reiterate the well-settled principle that a contract must exist before there can be a breach of the covenants of good faith and fair dealing implied in every contract.").

Plaintiffs can prove no set of alleged facts that would entitle them to relief under this claim because no pre-contractual duty of good faith and fair dealing exists under Arizona law. Accordingly, Count Four of the Amended Complaint should be dismissed.

F. Plaintiffs' Claims for Fraud and Misrepresentation Fail for Lack of Particularity (Counts Four and Five)

To state a valid claim for fraud plaintiffs must allege: "1) a representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of the representation's falsity or ignorance of its truth; 5) the speaker's intent that it be acted upon by the recipient in the manner reasonably contemplated; 6) the hearer's ignorance of its falsity; 7) the hearer's reliance on its truth; 8) the right to rely on it; and 9) his consequent and proximate injury." *Silvas*, 2009 WL 4573234, at *7 (quoting *Echols v. Beauty Built Homes*, 132

Ariz. 498, 647 P.2d 629, 631 (1982)). The circumstances of the alleged fraud must be stated with particularity. Fed. R. Civ. P. 9(b). "A plaintiff 'must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Id.* (quoting *Schreiber Distrib. Co. v. ServWell Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

Plaintiffs' allegations fall far short of these pleading requirements. The only factual averments in support of these claims are that BOA represented that it was able to modify the loan (Amd. Compl. at 12, ¶ 4), misrepresented its position as holder of the note and its "ability to negotiate and/or modify the note" (Amd. Compl. at 12, ¶¶ 10–11), and represented that it "owned the note and/or that it had authority to modify the loan" (Amd. Compl. at 13, ¶ 2.). These vague and shifty allegations are deficient as follows:

- Time: Plaintiffs do not provide any information regarding the time of BOA's alleged misrepresentations.
- Place: Plaintiffs do not provide any information as to the place of BOA's supposed misrepresentations.
- Content: Plaintiffs' misrepresentation and fraud claims are so deficient that plaintiffs do not provide the specific content of the representations. Under Fed. R. Civ. P. 9(b), plaintiffs cannot simply provide general descriptions of supposedly false information, as they have done with this cause of action.
- Identity: Plaintiffs do not identify any person within BOA responsible for making any misrepresentations or that person's authority to make such representations.

Plaintiffs fail to provide sufficient notice to BOA as to the nature and basis of their claims for fraud and misrepresentation. Under well-established pleading standards, the Amended Complaint falls far short of stating claims for fraud and misrepresentation and should be dismissed.

G. Count Six (Breach of Fiduciary Duties) Fails to State a Claim Because the BOA is not a Fiduciary of Plaintiffs.

Plaintiffs' breach of fiduciary duty claim fails as a matter of law because BOA does not owe plaintiffs any fiduciary duty. Plaintiffs make the conclusory allegation that BOA owes fiduciary duties to plaintiffs "due to its position." (Amd. Compl. at 13, ¶ 5.) Plaintiffs fail to plead any facts that would satisfy the elements of a special relationship. Plaintiffs' claim fails as a matter of law because, making every possible inference in plaintiffs' favor, the complaint alleges nothing more than that BOA serviced the loan. Plaintiffs' allegations show that their relationship with BOA is similar to any other borrower-lender relationship. Lenders do not owe borrowers fiduciary duties. *McAlister v. Citibank*, 171 Ariz. 207, 829 P.2d 1253, 1259 (1992). Absent exceptional circumstances, the existence of which are not pled in the Amended Complaint, BOA does not owe plaintiffs any fiduciary duty. Thus, plaintiffs' claim for breach of fiduciary duty should be dismissed.

H. Plaintiffs' Claim for Conversion (Count Seven) is Frivolous.

Plaintiffs seem to claim that BOA converted the promissory note by using the note to create a security. (Amd. Compl. at 14, ¶ 7.) Plaintiffs misunderstand the law of conversion. "Conversion is an intentional exercise of dominion or control over a *chattel* which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the *chattel*." *Miller v. Hehlen*, 104 P.3d 193, 203 (Ariz. App. 2003) (emphasis added). A note may be considered chattel if it represents an obligation owed to the holder of the note. *See* Restatement (Second) of Torts § 242. As it relates to plaintiffs, however, the note represents an obligation to pay, not receive payment. There is no basis under Arizona law to hold a party liable for conversion of an obligation to pay. Accordingly, plaintiffs fail to state a claim under Arizona law, and Count Seven must be dismissed. *Cf. Countrywide*, 2009 WL 3157160, at *8–9 (dismissing claims for conversion and conspiracy to commit conversion).

I. Plaintiffs Fail to State a Claim Under Count Eight (Unfair and Deceptive Trade Practices).

Plaintiffs' claim for unfair and deceptive trade practices is based on conduct that is not unlawful. Plaintiffs claim "defendants have colluded to convert the note on the Plaintiffs' property into an investment security." (Amd. Compl. at 14, ¶ 2) As explained above, even assuming plaintiffs' allegations to be true, the "conversion" of the note into a security instrument is not unlawful. Accordingly, any claim that the defendants unlawfully colluded to do so is baseless.

In addition, plaintiffs allege in most conclusory fashion possible that the conduct of BOA violates unidentified Arizona and federal statutes requiring disclosures and fair trade practices. (Amd. Compl. at 15, ¶ 8) Without identifying the alleged statutes that BOA is claimed to have violated, BOA is unable to respond to these allegations. Accordingly, plaintiffs have failed to state a proper claim, and Count Eight of the Amended Complaint should be dismissed.

J. Count Nine (Lack of Consideration) is not a Cognizable Cause of Action Under Arizona law.

There is no affirmative claim under Arizona law for lack of consideration. Plaintiffs purport to base their claim on allegations that BOA profited from using the note in a securitized investment instrument. Plaintiffs claim to have been damaged because they received no consideration for BOA's use of the note. Again, plaintiffs misunderstand their position with respect to the note. The note represents a payment obligation by the plaintiffs. Moreover, plaintiffs expressly authorized the transfer of the note (*see* Ex. A, Promissory Note, at 1 ("I understand that the Lender may transfer this Note."), which is precisely what plaintiffs allege here. Plaintiffs have alleged no conduct that is contrary to the terms of the note. This claim should be dismissed.

K. Count Ten (RICO and Collusion) Fails Because the Alleged Conduct is Lawful.

The elements of a civil RICO claim are "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to the plaintiff's 'business or property.'" *Lacy v. County of Maricopa*, 2008 WL

312095, at * 2 (D. Ariz. 2008). To state a claim under RICO, the allegations must comply with the specificity requirements of Rule 9(b). *See Schriber Distributing Co.*, 807 F.2d at 1400–01.

Plaintiffs' Amended Complaint falls far short of stating a RICO claim. The allegations purporting to support the RICO claim are generalized assertions concerning conduct by BOA not necessarily relating to the plaintiffs in this case. (*See* Amd. Compl. at 16–17, ¶ 6–12 ("These actions by the Defendants are continuous and ongoing, involving thousands of home mortgages across the United States.")). Plaintiffs fail to identify a single predicate act that would form the basis of a RICO claim. *See* 18 U.S.C. § 1961(1) (defining "racketeering activities"). Moreover, plaintiffs fail to state how the alleged conduct caused injury to their business or property.

Plaintiffs have failed to state a RICO claim under a liberal pleading standard, much less the heightened standard required by Fed. R. Civ. P. 9(b). This cause of action should be dismissed.

L. Count Eleven (Unjust Enrichment) Fails Because Plaintiffs Expressly Authorized Transfers of the Note.

Plaintiffs fail to state a claim for unjust enrichment. To prevail on an unjust enrichment claim, plaintiffs must show "(1) an enrichment, (2) an impoverishment, (3) a connection between the two, (4) the absence of justification for the enrichment and impoverishment and (5) the absence of any remedy at law." *Mousa v. Saba*, 222 Ariz. 581, 218 P.3d 1038, 1045 (App. 2009).

Plaintiffs' allegations under this count exemplify the frivolousness of their claims. They contend that BOA has been unjustly enriched by being "permitted to create a [mortgage backed security], receiving the profits from such investment vehicle and additionally receiving TARP funds and foreclosed-upon properties to resell." (Amd. Compl. at 18, ¶ 8.) Plaintiffs further contend that they have been harmed because they may suffer economic losses as a result of the alleged conduct. (Amd. Compl. at 18, ¶ 5.) Even assuming plaintiffs' allegations to be true, they do not show a connection between the alleged impoverishment and the alleged enrichment — a necessary element

for an unjust enrichment claim. It is beyond dispute that plaintiffs defaulted on their loan and that the trustee's sale is a result of their default and not any use of the note by BOA. Plaintiffs' claim for unjust enrichment must be dismissed.

M. Plaintiffs Lack Standing Due To Their Failure To Tender.

Counts One, Three, and Eleven of the Amended Complaint all seek to invoke the Court's equitable powers. Counts One and Three seek to set aside the trustee's sale and quiet title. Count Eleven seeks to recover under an unjust enrichment theory. Each of these claims fails as a matter of law for the additional reason that plaintiffs did not tender the amount of their indebtedness, which is a condition precedent to the relief they seek under each claim.

It is well established in Arizona and elsewhere that as a precondition to asking the Court to set aside the trustee's sale, plaintiffs must tender the full amount of the indebtedness to BOA. *See, e.g.*, *Young Minds Co. v. Sevringhaus*, 38 Ariz. 160, 298 P. 628 (1931). *Young Minds* involved a proceeding to set aside a sheriff's sale following default on a mortgage note. *Id.* at 161–63, 298 P. at 629. The Arizona Supreme Court stated succinctly the equitable principle involved:

> Prominent among the[] rules [of equity] is the familiar one that he who seeks equity must do equity. It is not disputed that defendant is both legally and morally indebted to plaintiff for the amount of the judgment for which the property was sold. It is but equitable and the rule sustained by the weight of authority that, as a condition precedent to the setting aside of the sale, defendant should tender to plaintiff the amount of the judgment with costs and interest.

Id. at 166–67, 298 P. at 360.

Courts in Arizona and elsewhere have routinely applied this principle (commonly known as the "tender rule") to prevent debtors' failure to make a full tender from setting aside judicial and non-judicial property sales. *See, e.g.*, *Cagoe v Carlson*, 146 Ariz. 292, 705 P.2d 1343 (App. 1985) (upholding summary judgment against a debtor who failed to tender the full amount due prior to asking the court to set aside the sale); *see also Shapiro v. Goldberg*, 192 U.S. 232 (1903) (stating that he who seeks equity must do equity, and cannot set aside the proceedings for collection of a debt without tendering the amount

due). The principle applies generally to claims seeking to invoke a court's equity power. *See Canton v. Monaco P'ship*, 156 Ariz. 468, 753 P.2d 158 (App. 1987) ("Because equity will not undertake to do a vain and useless thing, specific performance will not be awarded against a seller in a land contract when the seller has no title to the land he contracted to convey.").

Plaintiffs failed to satisfy the tender rule. There is no allegation that plaintiffs tendered the full amount of the debt to BOA before filing this action. Nor is it reasonable to infer that they could have as plaintiffs filed for bankruptcy on the date set for the trustee's sale. Because plaintiffs did not satisfy the tender requirement, they cannot seek to invoke the Court's equity powers. Accordingly, Counts One, Three, and Eleven of the Amended Complaint should be dismissed for this additional reason.

IV. CONCLUSION

For these reasons, the Amended Complaint fails to state a claim upon which relief can be granted and should be dismissed with prejudice.

DATED this 26th day of January, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2010, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and e-mailed a copy of this document to:

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