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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Patrick S. Hunter; Linda M. Hunter, )

CV 11-01549-PHX-FJM

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Plaintiffs, )

**ORDER**

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vs. )

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CitiMortgage, Inc.; Federal Home Loan  
Mortgage Corp. also known as Freddie  
Mac, )

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Defendants. )

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The court has before it defendants' motion to dismiss (doc. 6), plaintiffs' response (doc. 11), and defendants' reply (doc. 12).

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**I**

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In January 2005, plaintiffs obtained a loan from Homeowners Financial Group USA, LLC secured by a Deed of Trust ("DOT") on their home. Mot. to Dismiss, ex. A.<sup>1</sup> The loan was later serviced by defendant CitiMortgage ("Citi"). In November 2008, plaintiffs contacted defendant Citi regarding a possible loan modification. Up until this point plaintiffs had made all their mortgage payments, but were experiencing financial struggles due to a job loss. A Citi representative told plaintiffs they needed to be at least sixty days late on their payments to be considered for a loan modification. Plaintiffs stopped making payments. A

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<sup>1</sup> In their complaint, plaintiffs reference a loan secured in 2002 from Spectrum Financial Group. However, the loan that resulted in a trustee sale was the 2005 loan originally secured by Homeowners Financial Group. We may take judicial notice of documents that are central to plaintiff's claims on a motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P. Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006).

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1 Notice of Trustee's Sale was issued on January 5, 2009.<sup>2</sup> Mot. to Dismiss, ex. C.

2 In May 2009, plaintiffs applied for a loan modification. According to plaintiffs, Citi  
3 represented that the trustee sale would be postponed while plaintiffs attempted to modify  
4 their loan. Plaintiffs began making payments pursuant to their Home Affordable  
5 Modification Program's ("HAMP") trial payment plan in October 2009. The final payment  
6 was made in December 2009, however the payment was returned due to insufficient funds  
7 in plaintiffs' account. Plaintiffs immediately contacted defendant Citi to make arrangements  
8 for payment. Citi refused to accept payment, indicating that plaintiffs had failed to comply  
9 with HAMP. Plaintiffs tried again in January 2010 to rehabilitate their HAMP modification,  
10 however their request was denied. Citi started to work with plaintiffs to see if they would  
11 qualify for a private investor loan modification. Over the next seven months, plaintiffs  
12 cooperated with Citi and provided the requested documentation. In the meantime, plaintiffs'  
13 property was sold at a trustee sale on May 12, 2010.

14 Citi ultimately approved plaintiffs' private investor modification application, and sent  
15 plaintiffs a letter dated July 30, 2010 that included a permanent loan modification with an  
16 effective date of September 1, 2010. Plaintiffs immediately executed the permanent  
17 modification agreement and sent it to Citi in August 2010. Because plaintiffs did not hear  
18 from Citi after sending the executed agreement, plaintiffs contacted Citi in mid-September  
19 to confirm whether Citi had received the documents. Plaintiffs were informed that Citi had  
20 not received them, and so would have to reissue and send a new set. Plaintiffs were in  
21 contact with Citi throughout October and November 2010 regarding the status of the  
22 modification documents. Plaintiffs were told each time they spoke with Citi representatives  
23 that the new modification paperwork would arrive in thirty to forty-five days. Plaintiffs  
24 continued to wait.

25 On January 20, 2011, plaintiffs were contacted by an employee of defendant Federal  
26 Home Loan Corporation ("Freddie Mac") who notified them that their home had been sold

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28 <sup>2</sup> We take judicial notice of this document. Marder, 450 F.3d at 448.

1 at a trustee sale. Plaintiffs were contacted again on February 21, 2011, and were told they  
2 must vacate the property by March 22, 2011 or face eviction. Plaintiffs called Citi to find  
3 out what was happening, and were told that Citi had no record of the signed permanent loan  
4 modification documents being received, and no record of a new set being mailed to plaintiffs.  
5 Defendant Freddie Mac obtained a judgment of forcible detainer against the plaintiffs in  
6 April 2011, and plaintiffs were evicted on July 7, 2011.

7 Plaintiffs originally filed this action on July 21, 2011 in the Superior Court of Arizona  
8 in Maricopa County seeking relief for five counts: (1) breach of contract, (2) breach of  
9 fiduciary duty, (3) declaratory judgment, (4) quiet title, and (5) fraud and negligent  
10 misrepresentation. Defendants removed to this court on August 8, 2011. On August 15,  
11 2011, defendants moved to dismiss all five counts pursuant to Rules 12(b)(6) and 9(b), Fed.  
12 R. Civ. P. (doc. 6).

## 13 II

14 This action was filed more than one year after the trustee sale was held. Plaintiffs do  
15 not allege that they were unaware that a trustee sale had been noticed. Instead, plaintiffs  
16 contend that Citi "fail[ed] to notify the Plaintiffs that the trustee sale date that had been  
17 scheduled would proceed and. . . fail[ed] to postpone the trustee sale pursuant to [its]  
18 commitments and contractual obligations to do so." Compl. at 6. Under A.R.S. § 33-  
19 811(C),

20 [t]he trustor . . . shall waive all defenses and objections to the sale not raised  
21 in an action that results in the issuance of a court order granting relief pursuant  
22 to rule 65, Arizona rules of civil procedure, entered before 5:00 p.m. mountain  
standard time on the last business day before the scheduled date of the sale.

23 Plaintiffs did not file a motion in state or federal court or seek an injunction prior to the May  
24 2010 trustee sale. Because plaintiffs in this case did not seek legal intervention in time, they  
25 have waived any objections or defenses to the sale. Accordingly, plaintiffs' claims seeking  
26 a declaratory judgment to invalidate the trustee sale (count three) and quieting of title to the  
27 property (count four) are dismissed.

## 28 III

1 Section 33-811(C) does not prevent plaintiffs from asserting claims for relief  
2 independent of voiding the trustee sale. See Woods v. BAC Home Loans Servicing LP, CV-  
3 10-723-PHX-GMS, 2011 WL 2746310 at \*2 (D. Ariz. July 15, 2011). We therefore turn to  
4 plaintiffs' remaining claims in counts one, two, and five. Plaintiffs first allege in count one  
5 that defendants breached the terms of the DOT and the implied covenant of good faith and  
6 fair dealing by conducting a trustee sale after "wrongfully declining" plaintiffs' loan  
7 modification under HAMP. Compl. at 5. Plaintiffs also allege that defendant Citi breached  
8 its contractual duties under HAMP by failing to accept the third trial payment. Finally,  
9 plaintiffs allege that Citi promised plaintiffs that it was sending new permanent loan  
10 modification documents, and promised that the pending trustee sale would be postponed until  
11 plaintiffs received and signed these new documents. Citi allegedly breached these promises  
12 by failing to postpone the trustee sale.

13 "To prevail on a claim for breach of contract, the plaintiff must prove the existence  
14 of a contract between the plaintiff and defendant, a breach of the contract by the defendant,  
15 and resulting damage to the plaintiff." Frank Lloyd Wright Found. v. Kroeter, 697 F. Supp.  
16 2d 1118, 1125 (D. Ariz. 2010). Plaintiffs cannot pursue any claims premised on defendants'  
17 violation of HAMP. HAMP does not contain a private right of action. See Puzz v. Chase  
18 Home Fin., 763 F. Supp. 2d.1116, 1122 (D. Ariz. 2011). Moreover, plaintiffs are not third  
19 party beneficiaries of HAMP. See Astra USA, Inc. v. Santa Clara Cnty., \_\_ U.S. \_\_, 131  
20 S.Ct. 1342, 1348 (2011) ("[t]he absence of a private right to enforce the statutory [ ]  
21 obligations. . . would be rendered meaningless if [ ] entities could overcome that obstacle  
22 by suing to enforce the contract. . .instead."); Wright v. Chase Home Fin. LLC, No. CV-11-  
23 0095-PHX-FJM, 2011 WL 2173906, at \*2 (D. Ariz. June 2, 2011). To the extent that count  
24 one alleges HAMP violations, we dismiss these claims.

25 Next, plaintiffs aver that once defendants started negotiating a possible loan  
26 modification, they owed a duty of good faith and fair dealing, which they breached by failing  
27 to postpone the trustee sale. "The law implies a covenant of good faith and fair dealing in  
28 every contract," which requires that "neither party will act to impair the right of the other to

1 receive the benefits which flow from their agreement." Rawlings v. Apodaca, 151 Ariz. 149,  
2 153, 726 P.2d 565, 569 (1986). If no contract is alleged, however, no implied covenant of  
3 good faith and fair dealing exists. Narramore v. HSBC Bank USA, N.A., No. 09-CV-635-  
4 TUC-CKJ, 2010 WL 2732815, at \*6 (D. Ariz. July 7, 2010).

5 Plaintiffs point to Citi's failure to adhere to HAMP guidelines while engaging in loan  
6 modification negotiations as evidence of Citi's breach of the covenant of good faith and fair  
7 dealing "which is a part of the Deed of Trust." Response at 4. As we have already stated,  
8 plaintiffs cannot assert claims premised on HAMP violations. Plaintiffs have not pled the  
9 existence of a separate enforceable contract to negotiate for a loan modification in good faith,  
10 and thus any claims alleging a violation of good faith and fair dealing arising from the loan  
11 modification negotiations fail. Finally, plaintiffs' claim that Citi breached its duty by  
12 executing the trustee sale after representing it would postpone the sale is also unavailing. By  
13 signing the DOT, plaintiffs agreed that if they defaulted on their loan obligations, which they  
14 admit occurred, a trustee sale could proceed. Mot. to Dismiss, ex. A at ¶ 22. Plaintiffs have  
15 not alleged that they entered into a separate contract with Citi to postpone the sale. For all  
16 of these reasons, we dismiss count one.

#### 17 IV

18 Plaintiffs allege in count two that defendant Citi breached its fiduciary duty by failing  
19 to negotiate the loan modification in good faith, failing to accept the third trial payment,  
20 failing to send new permanent loan modification documents as requested, and failing to  
21 postpone the trustee sale as promised. In Arizona it is "well settled" that, absent special  
22 agreement, the relationship between a bank and its customer is that of lender and borrower  
23 and is not a fiduciary relationship. McAlister v. Citibank (Arizona), 171 Ariz. 207, 212, 829  
24 P.2d 1253, 1258 (Ct. App. 1992). Taking out a mortgage loan with a bank and engaging in  
25 loan modification negotiations represents "nothing more than an ordinary banking  
26 relationship." Bowman v. Wells Fargo Bank, N.A., CV-09-271-PHX-DGC, 2010 WL  
27 1408893, at \*3 (D. Ariz. Apr. 7, 2010). Plaintiffs have not pled any facts suggesting that  
28 their relationship with Citi was anything more than that of borrower and lender. Without the

1 existence of a fiduciary duty, there can be no breach. Count two is dismissed.

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3 Finally, we address plaintiffs' claims in count five of fraud and negligent  
4 misrepresentation. Plaintiffs allege that Citi actively represented that the trustee sale would  
5 be postponed both during the HAMP loan modification process and during the time that  
6 plaintiffs were awaiting their approved private investor permanent loan modification  
7 documents. According to plaintiffs, defendants failed to notify plaintiffs that the trustee sale  
8 would proceed and did so with the intent to deprive plaintiffs of their home. Plaintiffs  
9 detrimentally relied on defendants' representations by failing to take actions to forestall the  
10 sale. Defendants move to dismiss both claims under Rule 9(b), Fed. R. Civ. P., and to  
11 dismiss the negligent misrepresentation allegation for failure to state a claim.

12 We first address the negligent misrepresentation claim. In Arizona, "[a] promise of  
13 future conduct is not a statement of fact capable of supporting a claim of negligent  
14 misrepresentation." McAlister, 171 Ariz. at 215; 829 P.2d at 1261. Here, plaintiffs allege  
15 that Citi stated it would postpone the trustee sale and that it would resend the permanent loan  
16 modification documentation. These allegations relate to promises of future conduct and are  
17 not statements of past or existing fact. Therefore, we dismiss the negligent misrepresentation  
18 claim in count five for failure to state a claim.

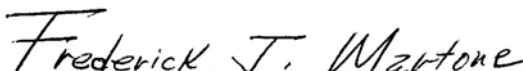
19 We now turn to plaintiffs' fraud claim. Defendants first argue this is barred by the  
20 statute of frauds. In Arizona, mortgage loan agreements are interests in real property.  
21 According to the statute of frauds, they must be in writing to be enforceable. Fremming  
22 Const. Co. v. Security Sav. & Loan Assn., 115 Ariz. 514, 516, 566 P.2d 315, 317 (Ct. App.  
23 1977). Modifications to contracts falling within the statute of frauds must also be in writing.  
24 Best v. Edwards, 217 Ariz. 497, 501-02, 176 P.3d 695, 699-700 (Ct. App. 2008). Defendants  
25 argue that Citi's alleged promise to stall the trustee sale amounted to a modification of the  
26 DOT. Thus, according to defendants plaintiffs' fraud claim must fail because it is based on  
27 an allegedly oral agreement to alter a DOT, a modification which must be in writing. We  
28 disagree. Viewing the complaint in the light most favorable to the plaintiffs, the complaint

1 does not allege that the postponement of the trustee sale amounted to a modification of the  
2 DOT. Plaintiffs are not alleging that Citi's representations were an agreement never to  
3 proceed with a trustee sale in the future. Instead, plaintiffs allege that Citi represented that  
4 it would not enforce its rights under the DOT while the loan modification process was  
5 pending, and plaintiffs relied on this representation to their detriment. Consequently, the  
6 statute of frauds does not bar plaintiffs' fraud claim.

7 Alternatively, defendants argue that the fraud claim lacks particularity. When alleging  
8 claims of fraud, a party "must state with particularity the circumstances constituting fraud or  
9 mistake." Fed. R. Civ. P. 9(b). Allegations of fraud must be specific enough to give  
10 defendants notice of specific misconduct, including the "who, what, when, where, and how"  
11 of the challenged conduct. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir.  
12 2003) (quoting Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)). Plaintiffs generally  
13 allege that Citi represented it would postpone the trustee sale. These statements were  
14 apparently made by Citi representatives to plaintiffs at some point during the loan  
15 modification process. However, the complaint does not include facts illuminating, among  
16 other things, the conditions under which defendants promised to postpone the sale (the  
17 "what"), when the postponement of the sale was first proposed (the "when"), who at Citi  
18 promised to postpone the sale (the "who"), and the means in which this promise was  
19 communicated (the "how" and "where"). Even construing the complaint in the light most  
20 favorable to the plaintiff, it is not possible to ascertain with sufficient particularity the  
21 specific misconduct that Citi, or Freddie Mac, or both, committed. We thus dismiss the fraud  
22 claim in count five under Rule 9(b), Fed. R. Civ. P.

23 **VI**

24 Therefore, **IT IS ORDERED GRANTING** defendants' motion to dismiss (doc. 6).  
25 DATED this 4<sup>th</sup> day of October, 2011.

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Frederick J. Martone  
United States District Judge