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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

**MANUEL LAZO; ORALIA LAZO F/K/A
ORIALIA PABLO,**

Plaintiffs,

vs.

**CALIBER HOME LOANS, INC.;
VERICREST OPPORTUNITY LOAN
TRUST 2011-NPL1; SUMMIT
MANAGEMENT COMPANY, LLC A/K/A
SUMMIT MANAGEMENT COMPANY,
LLC, an unknown entity; and DOES 1
through 100, inclusive,**

Defendants.

1:13-cv-2015 AWI JLT

**MEMORANDUM OPINION AND
ORDER ON DEFENDANTS' MOTION
TO DISMISS**

Doc. # 31

This is an action for damages and injunctive relief by plaintiffs Manuel and Oralia Lazo (“Plaintiffs”) against defendants Caliber Home Loans, Inc. (“Caliber”), Vericrest Opportunity Loan Trust 2011-NPL1 (“Vericrest”) and Summit Management Company (“Summit”) (collectively, “Defendants”). The currently-operative First Amended Complaint (“FAC”) was filed on September 8, 2014. The instant motion to dismiss was filed on September 25, 2014. Federal subject matter jurisdiction exists pursuant to 28 U.S.C. § 1331. Venue is proper in this court.

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PROCEDURAL HISTORY

Plaintiffs’ original complaint was filed on December 10, 2013, and alleged a total of twenty-one claims for relief. Defendants’ motion to dismiss the complaint was referred to the Magistrate Judge, who issued Findings and Recommendations (“F&R’s”) on July 9, 2014. Doc. # 25. The F&R’s recommended that Plaintiffs’ claims for quiet title, wrongful foreclosure, RICO, breach of contract based on the Servicer Participation Agreement, Fair Debt Collection Practices act violation, slander of title, and civil conspiracy be dismissed with prejudice. The F&R’s also recommended that claims alleged in the original complaint for violation of California’s Rosenthal Act, breach of contract related to the Trial Payment Plan, promissory estoppel, three counts of fraud and violation of California’s Fair Business Practices Act, Cal. Bus. Prof. Code § 17200 be dismissed with leave to amend. The F&R’s were adopted in full on July 9, 2014. Doc. # 26. The currently-operative First Amended Complaint (“FAC”) was filed by Plaintiffs on September 8, 2014. Defendants’ instant motion to dismiss the FAC was filed on September 25, 2014. No opposition to Defendants’ motion to dismiss has been filed as of this writing.

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FACTUAL BACKGROUND

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The factual background for this action was reviewed in considerable detail in the Magistrate Judge’s F&R’s and that factual review is incorporated hereby reference. Basically, Plaintiffs allege two areas of conduct by Defendants that give rise to the claims alleged in the FAC. First, Plaintiffs allege facts that challenge the legality and validity of Defendants’ status as servicers of the mortgage entered into by Plaintiffs and challenge the legality of Defendants’ efforts to enforce the terms of the promissory note by commencing foreclosure proceedings. Second, Plaintiffs allege facts that, taken together, challenge the legality of Defendants conduct in permitting Plaintiffs to apply for a loan modification and participate in a period of trial payments and, after the trial period was successfully completed, denying Plaintiffs a permanent restructuring of their home mortgage. The seven claims for relief alleged in the FAC are identical to the seven claims for relief pled in the original complaint that were dismissed with

1
2 leave to amend pursuant to the Magistrate Judge's F&R's. So far as the court can tell, the
3 factual background portion of the FAC is identical to that alleged in the original complaint. To
4 the extent the factual basis for the seven claims alleged in the FAC has been supplemented in
5 Plaintiffs' FAC, the supplementation has occurred in the restatement of the claims themselves.
6 Additional facts, if any, that have been alleged in the FAC in connection with specific claims
7 will be set forth in the following discussions of Defendants' motion to dismiss those claims.

8 **JUDICIAL NOTICE**

9 Defendants request that the court take judicial notice of a number of documents that have
10 previously been judicially noticed by the Magistrate Judge's F&R's. These documents include:

- 11 1. Deed of trust which was recorded in the official records of Kern County as Instrument
12 No. 0205303251;
 - 13 2. Assignment of Deed of Trust recorded in the official records of Kern County as
14 Instrument No. 020609970;
 - 15 3. Letter to Plaintiffs dated June 11, 2008, attached as an exhibit to Plaintiffs' complaint.
 - 16 4. Letter to Plaintiffs dated October 20, 2010, attached as an exhibit to Plaintiffs'
17 complaint.
 - 18 5. Notice of Default recorded in the official records of Kern County as Instrument No.
19 0211055277;
 - 20 6. Notice of Default recorded in the official records of Kern County as Instrument No.
21 0211061330;
 - 22 7. Notice of Trustee's Sale recorded in the official records of Kern County as Instrument
23 No. 02111043032;
 - 24 8. Trustee's Deed Upon Sale recorded in the official records of Kern County as
25 Instrument No. 00211130634;
 - 26 9. Substitution of Trustee recorded in the official records of Kern County as Instrument
27 No. 211104031.
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2 As noted in the Magistrate Judge’s F&Rs, “The Court may take judicial notice of a fact
3 that ‘is not subject to reasonable dispute because it (1) is generally known within the trial court’s
4 territorial jurisdiction; or (2) can be accurately and readily [be] determined from sources whose
5 accuracy cannot be reasonably be questioned.’ Fed. R. Evid. 201. In addition, the Court also
6 may take judicial notice of material incorporated by reference into the complaint without
7 converting the motion to dismiss into a motion for summary judgment. [Citations.]” Doc. # 25
8 at 6:26-7:5. Because the same documents have been previously judicially noticed and because
9 there are no objections to the request for judicial notice, Defendants’ request for judicial notice is
10 GRANTED for the reasons set forth in the Magistrate Judge’s F&R’s.

11 LEGAL STANDARD

12 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure
13 can be based on the failure to allege a cognizable legal theory or the failure to allege sufficient
14 facts under a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530,
15 533-34 (9th Cir.1984). To withstand a motion to dismiss pursuant to Rule 12(b)(6), a complaint
16 must set forth factual allegations sufficient “to raise a right to relief above the speculative level.”
17 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (“Twombly”). While a court
18 considering a motion to dismiss must accept as true the allegations of the complaint in question,
19 Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976), and must construe the
20 pleading in the light most favorable to the party opposing the motion, and resolve factual
21 disputes in the pleader's favor, Jenkins v. McKeithen, 395 U.S. 411, 421, reh'g denied, 396 U.S.
22 869 (1969), the allegations must be factual in nature. See Twombly, 550 U.S. at 555 (“a
23 plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than
24 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not
25 do”). The pleading standard set by Rule 8 of the Federal Rules of Civil Procedure “does not
26 require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-
27 unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (“Iqbal”).
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2 The Ninth Circuit follows the methodological approach set forth in Iqbal for the
3 assessment of a plaintiff’s complaint:

4 “[A] court considering a motion to dismiss can choose to begin by identifying
5 pleadings that, because they are no more than conclusions, are not entitled to the
6 assumption of truth. While legal conclusions can provide the framework of a
7 complaint, they must be supported by factual allegations. When there are well-
8 pleaded factual allegations, a court should assume their veracity and then
9 determine whether they plausibly give rise to an entitlement to relief.”

10 Moss v. U.S. Secret Service, 572 F.3d 962, 970 (9th Cir. 2009) (quoting Iqbal, 129 S.Ct. at
11 1950).

12 **DISCUSSION**

13 **I. General Considerations**

14 As noted above Plaintiffs’ seven claims for relief allege those claims based on two
15 separate categories of alleged misconduct by Defendants; (1) attempting to collect on a mortgage
16 where the assignments of rights under the Deed of Trust are alleged to have been unlawful or
17 incomplete, and (2) failing to finalize and make permanent a modified payment schedule
18 pursuant to the Home Affordable Modification Act (“HAMP”) where Plaintiffs successfully
19 completed a Trial Payment Period (“TPP”) and submitted all requested information for a
20 permanent loan modification. Before undertaking analysis of Defendants’ motion to dismiss
21 with regard to Plaintiffs’ individual claims, the court will first address the issue of the extent to
22 which liability can be alleged under each of the two aforementioned theories.

23 ***A. Unlawful, Ineffective or False Transfer of Beneficial and/or Trustee Rights --*** 24 ***Standing***

25 Courts in this circuit have consistently held that “borrowers who were not parties to the
26 assignment of their deed—and whose rights were not affected by it—lacked standing to
27 challenge the assignment's validity because they had not alleged a concrete and particularized
28 injury that is fairly traceable to the challenged assignment.” Marques v. Fed. Home Loan Mortg.
Corp., No. 12–cv–1873–IEG, 2012 WL 6091412, at *4 (S.D.Cal. Dec.6, 2012. Stated another
way, a party that executes a mortgage deed of trust and promissory note is obliged under those

1 documents to make payments in an amount and on the schedule specified in the documents and
2 to pay all contractually agreed to fees and penalties but lacks standing to challenge *who* is
3 entitled to receive the payments or *who* is empowered to enforce the terms of the documents.
4

5 The “tender rule” is similarly a rule of standing where the borrower seeks to challenge
6 the legitimacy of a foreclosure proceeding instituted pursuant to California’s comprehensive
7 non-judicial foreclosure statute. As Defendants correctly note, in order to have standing to
8 challenge any proceedings related to the foreclosure sale or the issuance of deed after sale,
9 Plaintiffs must allege tender of the full undisputed amount of the loan. Karlsen v. American
10 Savings & Loan Ass’n, 15 Cal.App.3d 117-118 (1971). As Defendants correctly note, “tender”
11 in this context means the demonstration of the present ability and willingness to pay the entire
12 amount due. See id. at 118-120 (complicated scheme that depended on lenders willingness to
13 release part of the property and that certain entities would be willing to refinance the balance
14 was not sufficient to constitute “tender”). This requirement extends to all causes of action
15 arising directly from an allegedly unlawful foreclosure proceeding. Id. at 117.

16 Thus, to the extent Plaintiffs’ FAC attempts to allege claims arising from alleged
17 technical irregularities in the assignment of rights or benefits under the Deed of Trust or
18 Promissory Note, or claims based on enforcement of the terms of those documents, including the
19 foreclosure and sale of the property, Plaintiffs’ ability to assert such claims is barred for lack of
20 standing except to the extent Plaintiffs have alleged tender. Plaintiffs have not alleged tender in
21 their FAC. Rather, they allege their willingness and ability to abide by the terms of what they
22 presume would be the payment schedule under the continuation of the payment schedule set up
23 during the Trial Period Plan (“TPP”) that was instituted on February 2, 2010. This falls fall short
24 of full “tender” as required by Karlsen.

25 Although Plaintiffs have filed no opposition to the instant motion to dismiss, the court
26 notes that the FAC alleges in some detail the facts supporting their contention that, due to several
27 technical deficiencies in the several transfers and assignments of rights under the Deed of Trust,
28 the Trustee’s notice of sale, sale after foreclosure and issuance of the Trustee’s Deed Upon Sale

1 were all void, rather than voidable. The court presumes that it would be Plaintiffs' intention to
2 rely here, as they did in their opposition to the motion to dismiss the original complaint, on the
3 holding of the California Fifth District Court of Appeal in Glaski v. Bank of America, 218
4 Cal.App.4th 1079 (5th Dist. 2013). In Glaski, the California appellate court held that, while
5 California law is clear that a borrower lacks standing to challenge a trustee's sale after
6 foreclosure where the sale is voidable, a technical defect in the transfer of the trust under state
7 law may make the sale void rather than voidable; and in such a situation the borrower may have
8 standing to challenge the foreclosure sale based on the failure of authority to foreclose to
9 successfully be transferred to the foreclosing trustee. See id. at 1094-1095.

10 The Magistrate Judge's F&R's contain a through examination of the applicability of
11 Glaski to challenges in federal courts to foreclosure sales where the foreclosure sale was
12 undertaken by a successor trustee or trustee's nominee following a technically deficient transfer
13 or assignment. The extensive analysis in the F&R's notes that "a majority of California courts
14 have declined to follow *Glaski*, and have instead followed the Fourth District Court of Appeals'
15 conclusion that a borrower is 'an unrelated third party to the alleged securitization and any other
16 subsequent transfers of the beneficial interest under [a] promissory note' and as such 'lacks
17 standing to enforce any agreements.' *Jenkins v. J.P. Morgan Chase Bank, N.A.*, 216
18 Cal.App.4th 497, 515 (2013)." Doc. # 25 at 10:10-13. This court has reviewed the Magistrate
19 Judge's discussion in the F&R's, the cited authority and such authority as this court finds
20 appropriate, and concludes that the Magistrate Judge's determination that Plaintiffs lack standing
21 to challenge the transfer of beneficial interest in the Deed of Trust or Note and are therefore
22 required to allege full tender is correct in all respects. This court also finds that Plaintiffs'
23 attempt to overcome their failure to allege tender by bolstering the facts supporting their
24 contention of ineffective or false transfer of beneficial interest in the trust deed is unavailing.

25
26 ***B. Claims for Violation of HAMP***

27 As the Magistrate Judge's F&R's correctly noted, "courts have determined that HAMP
28 does not authorize a private right of action against participating lenders." Doc. # 25 at 27:2-3

1 (citing Dodd v. Fed. Home Loan Mortg. Corp., 2011 WL 6370032 (E.D. Cal. 2011) at *12). To
2 date, the only claim arising from HAMP that has been recognized by the Ninth Circuit is a claim
3 for breach of the agreement between a borrower and lender to participate in a TPP under HAMP.
4 In Corvello v. Wells Fargo Bank, 728 F.3d 878 (9th Cir. 2013), the appellate court reversed the
5 district court's grant of a motion to dismiss a claim for breach where the borrower had fulfilled
6 all obligations set forth in the lender-drafted TPP agreement and the lender failed to perform its
7 obligation to permanently restructure the loan. Id. at 884-885. The holding in Corvello is
8 intensely fact-dependent and this court has been careful to not apply its holding where the facts
9 are distinguishable. See, e.g., Sholiay v. Fed. Nat'l Mortgage Ass'n., 2013 WL 5569988 (E.D.
10 Cal. Oct. 2013) at *5 (noting that the holding in Corvello is dependent on the existence of a TPP,
11 and does not apply where no TPP was offered). In short, the holding in Corvello, stands for the
12 proposition that, while HAMP authorizes no private right of action, a TPP Agreement offered
13 pursuant to HAMP is a contract, and a party to that contract may sue for breach if the lender
14 violates a term contained within the four corners of the TPP.
15

16 In dismissing Plaintiffs' claim for breach of the TPP as alleged in the original complaint,
17 the Magistrate Judge observed:

18 Plaintiffs allege that they entered a TPP with CitiMortgage, under which
19 they made the required payments. [Citation.] However, CitiMortgage
20 "failed to provide a loan modification and transferred the servicing rights
21 to Defendant Caliber. [Citation.] Plaintiffs allege that "Caliber failed to
22 honor the completed TPP and offer a permanent loan modification."
23 According to Plaintiffs, [Plaintiffs] submitted "at least three separate and
24 complete loan modification packages" to Caliber in late 2010 and 2011,
25 each of which was denied.

26 From the facts alleged, it is not clear that Plaintiffs had a TPP with
27 Caliber. Further, although Plaintiffs allege they made the payments
28 required under the TPP, they do not allege that they fulfilled *all* of the
obligations under the TPP with CitiMortgage. The TPP was conditioned
on being qualified for a HAMP loan, which was denied by Caliber. Thus,
the facts presented differ from those in Corvello, where the borrowers
alleged they completed their TPP but Wells Fargo never told them
whether they qualified for a loan modification. See Corvello 728 F.3d at
881.

Doc. # 25 at 27:18-28:2.

1 The facts alleged by Plaintiffs in their FAC remain troublingly ambiguous with regard to
2 Defendants' conduct with regard to the TPP, the following facts are clarified:

- 3
- 4 1. In their claim for breach, Plaintiffs make clear that the basis for their claim for relief is
5 the TPP dated February 1, 2010, which is attached to Plaintiff's FAC as Exhibit 21.
- 6 2. The TPP at issue was offered by CitiMortgage and signed by CitiMortgage's
7 representative on January 23, 2010. The TPP specified that the trial period would require
8 three monthly payments of \$791.74, each with payment due on the first day of each
9 month beginning February 1, 2010.
- 10 3. The TPP defined the "Trial Period" as "commencing on the Trial Period Effective Date
11 [which is specified as February 2, 2010], and ending on the earlier of: (i) the first day of
12 the month following the month in which the last Trial Period Payment is due (the
13 "Modification Effective Date") or (ii) termination of this Plan." Doc 30-1 at 64.
- 14
- 15 4. The TPP further provides, in pertinent part, that:

16

17 F. If prior to the Modification Effective Date, (i) the Lender does
18 not provide me a fully executed copy of this Plan and the
19 Modification Agreement; (ii) I have not make the Trial Period
20 payments required under Section 2 of this Plan; (iii) the Lender
21 Determines that any of my representations in Section 1 were not
22 true and correct as of the date I signed this Plan or are no longer
23 true and correct at any time during the Trial Period; or (iv) I do not
24 provide all information and documentation required by Lender, the
25 Loan Documents will not be modified and this Plan will terminate.
26 In this event, the Lender will have all of the rights and remedies
27 provided by the Loan Documents, and any payment I make under
28 this Plan shall be applied to amounts I owe under the Load
Documents and shall not be refunded to me; and

24 G. I understand that this Plan is not a modification of the Loan
25 Documents and that the Loan Documents will not be modified
26 unless and until (i) I meet all of the conditions required for
27 modification, (ii) I receive a fully executed copy of a Modification
28 Agreement, and (iii) the Modification Effective Date has passed. I
further understand and agree that the Lender will not be obligated
or bound to make any modification of the Loan Documents if the
Lender determines that I do not qualify or if I fail to meet any One
of the requirements under this Plan.

1 Doc, # 30-1 at 65.
2

- 3 5. Pursuant to the terms of the TPP, the Modification Effective Date was May 1, 2010.
4 Plaintiffs do not allege that they received a “fully executed” Modification Agreement by
5 that date.
6
- 7 6. In the second paragraph, the TPP also stated, “I understand that after I sign and return
8 two copies of this [Trial Period] Plan to the Lender, the Lender will send me a signed
9 copy of this Plan if I qualify for the Offer *or will send me written notice that I do not*
10 *qualify for the Offer.*” Doc. # 30-1 at 63 (italics added).
11
- 12 7. Defendant Vericrest Financial, Inc. provided notice to Plaintiffs on October 20, 2010,
13 that the servicing of Plaintiffs’ loan had been transferred from CitiMortgage to Vericrest.
14 The notice informed Plaintiffs that the transfer would not affect “any term of condition of
15 the mortgage instruments.” Doc. # 30 at 7:7:17-18.
16
- 17 8. On February 21, 2011, Plaintiffs received from Vericrest what appears to be a proposal
18 for modification of the loan. Among other provisions, the communication from Vericrest
19 stated Plaintiffs’ “request for modification will be approved, if Vericrest receives from
20 you the following **on or before March 3, 2011**: (1) A good faith payment in the form of
21 **certified funds** in the amount of **\$6,120.20**, which will be applied to your loan as a
22 payment upon completion of the modification.” Doc. # 30-1 at 68 (bold and underlines
23 in original). The “Modification Agreement” is attached to the communication from
24 Vericrest.
25
- 26 9. The reference in the communication from Vericrest to “Your Request for a modification”
27 is ambiguous in that there is no reference to any prior TPP Agreement or payments made
28 thereunder, nor is there any reference to procedures under HAMP or Plaintiffs’ prior

1 dealings with CitiMortgage. In their FAC, Plaintiff's claim for breach alleges that
2 Plaintiffs "did engage in subsequent loan modification submission, also wrongly denied,"
3 apparently in addition to the TPP. The court presumes that the Letter from Vericrest
4 represents the outcome of a "subsequent loan modification submission." Doc. # 30 at
5 28:10-11.
6

7 10. Plaintiffs do not allege they executed the Modification Agreement offered by Vericrest
8 and contend that the required "good faith payment" is unlawful under HAMP.

9 Of some significance, the TPP at issue in this action appears identical in every respect to the
10 TPP at issue in Corvello. The facts alleged by Plaintiffs differ from those alleged in Corvello in
11 one significant particular. In Corvello, the TTP was originated by the lender (Wells Fargo Bank)
12 and the party that was sued by the borrowers was Wells Fargo Bank, whom the plaintiffs
13 accused of breach because the bank had not affirmatively informed the plaintiffs that they did
14 not qualify for permanent loan modification nor had the bank offered a permanent modification.
15 See Corvello, 728 F.3d at 883 (rejecting Wells Fargo's contention that they could discharge their
16 duties under the TPP by merely failing to return an executed Modification Agreement). In
17 Corvello the time period between the Modification Effective Date and the institution of the
18 plaintiffs' actions for breach is not stated. It is clear, however, that in Corvello, unlike the case
19 at bar, there was no intervening transfer of servicing or beneficial rights.
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22 As noted above, the TTP terminated by its own terms on the Modification Effective Date,
23 which, in Plaintiffs' case, was May 1, 2010. The court notes that Plaintiffs allege they were not
24 notified in writing of the denial of the modification application by CitiMortgage at any time.
25 Assuming, for purposes of this analysis, that CitiMortgage did not affirmatively notify Plaintiffs
26 in writing that they did not qualify for loan modification, CitiMortgage would have been in
27 breach of the TPP as of that date. Plaintiffs allege that CitiMortgage represented to Plaintiffs
28

1 that the determination of Plaintiff's Modification Application rested with loan servicer,
2 Vericrest. Based on the foregoing, it is this court's opinion that the TPP was breached, if at all,
3 by CitiMortgage, a non-party to this case; and that the breach occurred before the transfer of
4 servicing rights to Vericrest some six months after the termination of the Trial Period.
5

6 With the foregoing in mind, the court will proceed to decide whether Defendants are entitled
7 to dismissal of Plaintiffs' individual claims against them.

8 **II. Plaintiffs' Individual Claims for Relief**

9 As an initial matter, the court notes that the Magistrate Judge's F&R's considered the
10 contentions of the parties as to whether the heightened pleading standards under F.R.C.P. 9(b)
11 are applicable to Plaintiffs' claims. The Magistrate Judge concluded that the heightened
12 pleading standards are applicable to Plaintiffs' claims under the Rosenthal Act, and for violation
13 of Cal. Bus. Code § 17200, as well as for Plaintiffs' fraud claims. This court incorporates the
14 Magistrate Judge's determination here by reference as to those claims as alleged in Plaintiffs'
15 FAC. As the F&R's noted "[t]o avoid dismissal for failure to meet the heightened pleading
16 standards under Rule 9(b). '[a] complaint would need to state the time, place, and specific
17 content to the false representations as well as the identities of the parties to the
18 misrepresentation.' *Edwards v. Martin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004). 'For
19 corporate defendants a plaintiff must allege the names of the persons who made the allegedly
20 fraudulent representations, their authority to speak, to whom they spoke, what they said or
21 wrote, and when it was said or written.' *Flowers v. Wells Fargo Bank, N.A.*, 2012 WL 2748650
22 at *6 (N.D. Cal. July 13, 2011)" Doc. # 25 at 8:14-20.
23
24

25 **A. Violation of the Rosenthal Fair Debt Collection Practices Act**

26 The Magistrate Judge's F&R's noted the following in recommending dismissal of the
27 claim with leave to amend:
28

1 Plaintiffs allege Defendants violated the Rosenthal Act by “calling . . . and
2 threatening to take [their] home, falsely stating the amount of debt;
3 increasing the amount of debt by including amounts that are not permitted
4 by law or contract; and using unfair and unconscionably means in an
5 attempt to collect a debt.” (Doc. # 1 at 35-36 ¶ 143.) These general
6 allegations are insufficient to give Defendants fair notice of the wrongful
7 acts. Further, to the extent Plaintiffs allege fraudulent activity by falsely
8 stating the amount of the debt, the allegations are insufficient to meet the
9 pleading standards of rule 9(b). Plaintiffs fail to allege which Defendant
10 contacted them and when, who falsely stated the amount of debt and
11 when, how the debt was increased, or what “unfair and unconscionable
12 means” were used in the course of debt collection.”

13 Doc. # 25 at 22:19-27.

14 Plaintiffs’ FAC adds detail to the allegations originally made by alleging that Defendant
15 Caliber used unlawful means to collect on the loan “when it attempted to collect on the original
16 amount due under the promissory note [. . .] after completed modification packets had been
17 submitted despite representing that it would not collect or foreclose until a determination of
18 eligibility was completed or the amounts of claim to be due were validated.” Doc. # 30 at 226-
19 10. It is apparently Plaintiffs’ contention that Defendant Caliber is liable for misrepresentations
20 made when “Caliber’s predecessor provided a [HAMP TPP] with an effective date of February
21 1, 2010, [. . .] which Plaintiff[s] fully complied with, [. . .] but then resumed collection activity
22 and continued that collection activity through the filing of the Complaint.” Doc. # 30 at 22:11-
23 15. Plaintiffs’ allegations with regard to the unlawful acts of Defendant Vericrest are the same
24 as those alleged against Caliber, except that Plaintiffs’ allege that Vericrest also made false
25 statements by claiming “daily damages of \$50 through its agent Randall Naiman when he did not
26 have the right to make such a demand.” Doc. # 30 at 25:3-5.

27 To the extent Plaintiffs’ claim under the Rosenthal Act can be interpreted as based on
28 statements made in connection with the HAMP TPP, that claim fails because there is no
evidence that the named Defendants were parties to any plan. As the court determined above,
the TPP that Plaintiffs did enter into was terminated, whether by breach or by its own terms, as

1 of May 1, 2010. Plaintiff's reference to Defendants' "predecessor" (CitiMortgage) is unavailing
2 because the plan had terminated at least five months before servicing rights passed from
3 CitiMortgage to the assignee. Plaintiff has presented no legal basis for the court to pass liability
4 for a breach that was committed, if at all, by Defendants' predecessor on to the Defendants.
5

6 To the extent Plaintiffs' claim for violation of the Rosenthal Act can be interpreted to be
7 based on the illegality of the transfer of servicing authority to the Defendants or on the actual
8 conduct of the Defendants in the calls or representations that were made to Plaintiffs, such claim
9 fails because, as noted in the F&R's, Plaintiffs lack standing to challenge the assignment or
10 assignments of servicing rights and, to the extent Plaintiffs' claim rests on the conduct of
11 Defendants during the calls, Plaintiffs' FAC displays the same lack of specificity as was evident
12 in the original complaint.
13

14 The court concludes Defendants are entitled to the dismissal of Plaintiffs' claim under the
15 Rosenthal Act.

16 ***B. Plaintiffs' Claim for Breach of Contract***

17 Plaintiffs second claim for relief alleges a claim for breach of contract and breach of the
18 duty of good faith and fair dealing with respect to the TPP agreement. With regard to the breach
19 of contract portion of the claim, the F&R's observed that "it is not clear that Plaintiffs had a TPP
20 with Caliber." Doc. # 25 at 27:24-25. As discussed above, the court has concluded that, based
21 on the documents appended to the FAC and based on the allegations contained within the FAC,
22 the TPP was begun *and concluded* while non-party CitiMortgage was servicing the loan. There
23 is no evidence of a separate TPP agreement with any of the named Defendants and there is no
24 legal basis presented to support the proposition that a TPP contract that was begun *and*
25 *concluded* by a non-party can be the basis for liability against the assignee of the loan after the
26 termination of the contract Trial Period. Whether CitiMortgage breached the terms of the TPP is
27
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1 not before the court as CitiMortgage is not a defendant in this action. Further, Plaintiffs allege
2 no factual basis to find that the Loan Modification Offer that was extended by Defendant
3 Vericrest was extended pursuant to the TPP with CitiMortgage other than the mere assertion that
4 CitiMortgage was the “predecessor” of the named Defendants. As noted above, Plaintiffs have
5 failed to establish that there was a TPP agreement between the named Defendants and Plaintiffs.
6 Plaintiffs’ claim of breach of contract therefore fails.
7

8 Plaintiffs’ claim for breach of implied covenant of good faith and fair dealing fails for
9 essentially the same reason. As noted in the F&R’s, the first element of a claim of breach of the
10 implied covenant is that “the parties entered into a contract.” Doc. # 25 at 28:5 (quoting
11 Rosenfeld v. JP Morgan Chase Bank, N.A., 732 F.Supp.2d 952, 968 (N.D. Cal. 2012). As
12 discussed above, Plaintiffs have failed to show that they and Defendants entered into a contract.
13

14 The court concludes Defendants are entitled to dismissal of Plaintiffs’ second claim for
15 relief.

16 ***C. Plaintiffs’ Claim for Promissory Estoppel***

17 Plaintiffs’ third claim for relief alleges promissory estoppel against Defendant Caliber.
18 The Magistrate Judge noted the elements of promissory estoppel as “(1) a promise that is clear
19 and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3)
20 reliance [that is] reasonable and foreseeable; and (4) the party asserting the estoppel must be
21 injured by his reliance.’ Lacks v. Coast Fed. Sav. & Loan Assn. 60 Cal.App.3d 885, 890
22 (1976).” Doc. # 25 at 28:24-27. The F&R’s granted Defendants’ motion to dismiss because
23 “[t]he allegation that Caliber and CitiMortgage made representations to Plaintiffs regarding the
24 TPP is not “clear and unambiguous.” Id. at 29:4. The claim against Caliber as expressed in the
25 FAC differs from the claim alleged in the original complaint only in that identifies the TPP
26 agreement between CitiMortgage and Plaintiffs as the legal basis for the claim. The FAC
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1 alleges:
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3 Defendant Caliber, through its predecessor and itself, and by way of its
4 February 1, 2010, TPP Agreement (Exhibit “21”) made representations to
5 Plaintiff that if Plaintiff returned the TPP Agreement executed and with
6 supporting documentation, and made the TPP payments, and otherwise
7 fully complied with all condition, Plaintiff would receive permanent
8 HAMP modification.”

9 Doc. # 30 at 29:28-30:4.

10 As the court has noted, the term “Defendant Caliber through its predecessor and itself” is
11 at best legally ambiguous and factually unsupported. There is no allegation, so far as the court
12 can determine, of a separate set of promises made by Defendant Caliber. Also as noted, there is
13 no legal support for the legal proposition that any responsibility under HAMP passed from
14 CitiMortgage to Caliber after the term of the TPP had expired. Plaintiffs allege that they
15 submitted three sets of modification packages to Caliber, but there is no allegation the court can
16 find of a separate promise made to Plaintiffs by Caliber, much less the actual terms of such
17 promise. The court therefore finds Defendants are entitled to dismissal of Plaintiffs’ third claim
18 for relief.

19 ***D. Plaintiffs’ Claims for Intentional Fraud***

20 Plaintiffs fourth, fifth and sixth claims for relief allege intentional fraud. The fourth
21 claim for relief is alleged against Defendant Caliber for false or fraudulent assignment of the
22 trust to Vericrest on October 6, 2011. Plaintiffs’ fifth claim for relief is alleged against
23 Defendants Summit and Caliber for issuance of a Notice of Default on April 28, 2011, that
24 violated the terms of Cal. Civ. Code § 2923.5 in that the Defendants “knew that there had been
25 not [sic] purported assignment of the Property to Vericrest that would allow Defendant Summit
26 and Defendant Caliber to make claims on behalf of the purported beneficiary, Defendant
27 Vericrest.” Doc. 30 at 34:5-7. Plaintiffs’ sixth claim for relief alleges intentional fraud against
28 Defendants Summit and Caliber based on the second notice of default which was filed on May

1 11, 2011. Plaintiffs contend the May 11 notice of default was fraudulent for the same reason as
2 the April 28 notice.

3
4 The Magistrate Judge's F&R's discussed the requirement for tender with regard to any
5 claim arising from a foreclosure, but did not specifically comment on the requirement for tender
6 with regard to Plaintiffs' fraud claims. Each of Plaintiffs' fraud claims is based on the contention
7 that rights under the Trust Deed and Promissory Note were not effectively passed from
8 Vericrest to Wells Fargo Bank because of defects in the assignment including irregularities with
9 both required signatures and notarization of the signatures. Plaintiffs state they "relied upon the
10 assignment as valid and did not take action to undo the fraudulent assignment earlier, continued
11 to communicate with Defendants about the loan modifications believing the Defendants had the
12 property authority to deal with Plaintiff under the assignment, and Plaintiff [sic] spent countless
13 hours working toward securing loss mitigation from Defendants to no avail." Doc. # 30 at
14 32:17-21. Plaintiffs' fifth and sixth claims for relief similarly allege that there was reliance
15 because Plaintiff went along with the authority asserted in the notices of default even though the
16 Defendants lacked authority to declare default because of the defective transfer.

17
18 The court notes that Plaintiffs' contentions regarding the assignment of rights of
19 foreclosure are somewhat confusing and difficult to follow in the exhibits. However, it is clear
20 that Plaintiffs' allegations of fraud are all ultimately predicated on the contention that
21 somewhere along the line of transfers and assignments, the right to issue a notice of foreclosure
22 and to carry out the subsequent foreclosure sale was not legally transferred because of issues
23 relating to the identities of the individuals signing the documents, when they were signed, and
24 when the signatures were authenticated. As discussed above, a borrower lacks standing to
25 challenge the validity of intermediate transfers of authority under a note or deed of trust because
26 the borrower is not a party to the transfer. In the context of Plaintiffs' claims of fraud, the legal
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1 fact of Plaintiffs’ lack of standing to challenge the validity of the transfers or assignments means
2 Plaintiffs cannot allege reliance on their validity. Stated another way, Plaintiffs cannot allege
3 they relied on the validity of Defendants’ transfer or assignment of rights because such reliance
4 is immaterial to any harm to Plaintiff. Plaintiffs cannot claim they were harmed because they
5 “did not take action to undo the fraudulent transfer earlier,” because they could not have
6 challenged the fraudulent transfer in any event because they lacked standing. Because each of
7 Plaintiffs’ claims for fraud are predicated on the same contention – that the Defendants lacked
8 legal authority to issue notices of foreclosure or deeds of sale upon foreclosure – the claims each
9 fail because Plaintiffs could not have reasonably relied on Defendants’ false claims of authority
10 under the Note or Deed of Trust. Defendants are therefore entitled to dismissal of Plaintiffs
11 fourth, fifth and sixth claims for relief.
12
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14 ***E. Plaintiff’s Claim for Violation of California’s Unfair Competition Law***

15 California’s Unfair Competition Law (“UCL”), Cal. Bus & Prof. Code § 17200, prohibits
16 unfair business practices that are “unlawful, unfair, or fraudulent.” *Id.* As the F&R’s noted, the
17 categories of unfair competition are listed as disjunctive so a violation of the UCL may be found
18 were a business practice is included within one of the three categories. See Daro v. Superior
19 Court, 151 Cal.App.4th 1079, 1093 (2007). Plaintiffs allege Defendants’ conduct was unlawful
20 in that it violated the Rosenthal Act. Since the court has found that the FAC does not adequately
21 allege a violation of the Rosenthal Act against Defendants, Plaintiffs’ allegation of violation the
22 UCL under the unlawful prong fails.
23

24 Plaintiffs allege five areas of conduct in which Defendants violated the UCL under the
25 “unfair” prong. See Doc. # 30 at ¶ 153. This allegation seems somewhat odd in that the bulk of
26 the conduct alleged by Plaintiffs appears to fit more easily within the deceptive or fraudulent
27 prong than under the unfair prong which, as the F&R’s note, “requires ‘conduct threatening
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1 incipient violation of antitrust laws, or violates the policy or spirit of those laws . . . , or
2 otherwise significantly threatens or harms competition.’ Cal.Tech Communications, Inc. v. Los
3 Angeles Cellular Telephone Co., 20 Cal.4th 163, 187 (1999). “ Doc. # 25 at 30:11-14. The
4 court has examined the alleged conduct and frankly is at a loss to see any connection between
5 the conduct and any “threat or harm” to competition.
6

7 Presuming for the sake of completeness that Plaintiffs meant to allege the five categories
8 set forth in Paragraph 153 under the “fraudulent” prong of the UCL, the court concludes that the
9 claims nonetheless fail to state a violation. Plaintiffs’ first two examples of allegedly violative
10 conduct pertain to the fact that Plaintiffs were denied a permanent loan modification despite
11 having fulfilled all the requirements of HAMP application and the TPP. As discussed above,
12 these examples of conduct may or may not allege a violation of California’s UCL, but Plaintiffs
13 have not alleged the claim against CitiMortgage, the entity that committed the alleged acts and
14 was, so far as the court can tell, solely responsible for conduct that may have breached the TPP
15 Agreement.
16

17 Plaintiffs’ third and fourth examples of conduct in alleged violation of the UCL refer to
18 Plaintiffs’ allegations of recording fraudulent notices of default and failing to “properly
19 consider[] applicable trial payment plans before demanding or collecting amounts due.” Doc. #
20 30 at 38:27-28. As discussed above, Plaintiffs lack standing to challenge the authority of
21 Defendants to act under the Deed of Trust or Promissory Note because they have not alleged
22 tender. Similarly, the court had determined that Plaintiffs have failed to allege that the named
23 Defendants were under any duty to “consider applicable trial payment plans” because the named
24 Defendants were not parties to the TPP Agreement.
25

26 Plaintiffs’ fifth and final example of Defendant conduct in violation of the UCL is
27 indecipherable. It states that Defendants’ conduct was unfair because Defendants:
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1 Failed to investigate claims of loss mitigation approvals or defects with
2 the foreclosing documents or appropriateness of the parties foreclosing
3 and in doing so such activity provides the basis for an “unfair” inquiry and
4 could deceive the public because it place [sic] burdensome requirements
on Plaintiff and the public that served no purpose but to provide for the
unlawful foreclosure activity to continue.

5 Doc. # 30 at 39:1-6.

6 The court has read this paragraph several times and remains unclear as to what conduct is
7 alleged to have been either unfair or deceptive. It appears to the court that the foregoing
8 paragraph is a more convoluted restatement of prior allegations that Defendants wrongfully
9 denied Plaintiffs’ HAMP application following their successful completion of the TPP and
10 wasted Plaintiffs’ time by repetitively requesting borrower information for a loan modification
11 that would not be granted. The conduct alleged fails to state a claim for relief under the UCL
12 because it does not allege conduct that is unlawful, deceitful or unfair within the meaning of the
13 UCL.
14

15 The court concludes that Defendants are entitled to dismissal of all claims in Plaintiffs’
16 FAC. Defendants urge the court to dismiss the claims with prejudice because further
17 amendment would be futile. Plaintiffs, as noted, have filed no opposition. As the court has
18 discussed, Plaintiffs lack standing to assert any claim predicated on alleged defects in the
19 transfers or assignments of rights under the Deed of Trust or the Promissory Note. That being
20 the case, the only claims Plaintiffs could foreseeably assert are claims relating to breach of the
21 TPP. Whether Plaintiffs could, at this point, assert a claim for breach of the TPP against
22 CitiMortgage is not before the court and the court will decline to speculate on the matter. The
23 court must presume that, had there been any basis in law or fact for the contention that
24 CitiMortgage passed along the responsibility to perform under an agreement that had expired by
25 its own terms months before there was an assignment of rights under the Note or Deed of Trust,
26 Plaintiffs would have made such law or facts explicit. They have not. The court therefore
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concludes that the Plaintiffs' FAC should be dismissed with prejudice as to the named Defendants.

THEREFORE, for the reasons discussed above, it is hereby ORDERED that Plaintiffs' FAC is hereby DISMISSED in its entirety as to all Defendants with prejudice. The clerk of the court shall CLOSE the case.

IT IS SO ORDERED.

Dated: February 11, 2015



SENIOR DISTRICT JUDGE