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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHARLES S. JACKSON and LUCILLE
JACKSON,

No. 2:10-cv-00711-MCE-GGH

Plaintiffs,

v.

MEMORANDUM AND ORDER

OCWEN LOAN SERVICING, LLC., a
Delaware corporation,

Defendant.

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Plaintiffs Charles and Lucille Jackson ("Plaintiffs") seek redress from Defendant Ocwen Loan Servicing, LLC ("Defendant") based on claims of breach of contract, breach of the implied covenant of good faith and fair dealing, slander of title, unfair business practice in violation of California Business and Professions Code § 17200 ("UCL"), misrepresentation and fraud in violation of California Business and Professions Code § 17500 ("False Advertising Law"), unjust enrichment, and infliction of emotional distress. Plaintiffs have a Notice of Action Pending ("Lis Pendens") on their residence at 2444 Oceanic Drive, Fairfield, CA 94533.

1 Presently before the Court is a Motion by Defendant to
2 Dismiss Plaintiffs' First Amended Complaint for failure to state
3 a claim upon which relief may be granted pursuant to Federal Rule
4 of Civil Procedure 12(b)(6). Defendant also moves to Expunge the
5 Lis Pendens recorded against Plaintiffs' residence. For the
6 reasons set forth below, Defendant's Motion to Dismiss and Motion
7 to Expunge are granted.

8
9 **BACKGROUND¹**

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11 This action arises out of activity surrounding a residential
12 loan transaction for Plaintiffs' property located in the City of
13 Fairfield, County of Solano, California. On July 18, 2006,
14 Plaintiffs entered into a mortgage loan for \$380,700. Defendant
15 was the servicer of Plaintiffs' mortgage.

16 In July 2009, Plaintiffs entered into a written agreement
17 with Defendant, the Home Affordable Modification Trial Period
18 Plan ("HAMP"). Plaintiffs incorrectly sent the first trial
19 period payment under the HAMP to the wrong address. Plaintiffs
20 later corrected their mistake and sent payment to the correct
21 address, but Defendant refused payment as being late. Plaintiffs
22 were advised by Defendant to reapply for the HAMP, but chose not
23 to do so.

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¹ The factual assertions in this section are based on the
28 allegations in Plaintiffs' First Amended Complaint unless
otherwise specified.

1 Defendant then proceeded with foreclosure on the residence
2 and recorded a Notice of Default in the Official Records of
3 Solano County on August 17, 2009.² Defendant indicates that
4 Plaintiffs were \$23,356.90 behind on their mortgage payments as
5 of August 14, 2009. Defendant recorded the Notice of Trustee's
6 Sale in the Official Records of Solano County on December 23,
7 2009. The foreclosure sale was initially scheduled for
8 January 11, 2010 and has been rescheduled on several occasions.
9 On January 11, 2010, Plaintiffs filed the present lawsuit against
10 Defendant and recorded a Lis Pendens on the property.

11
12 **STANDARD**

13 **A. Motion to Dismiss**

14
15 On a motion to dismiss for failure to state a claim under
16 Rule 12(b)(6), all allegations of material fact must be accepted
17 as true and construed in the light most favorable to the
18 nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336,
19 337-38 (9th Cir. 1996). Rule 8(a)(2) requires only "a short and
20 plain statement of the claim showing that the pleader is entitled
21 to relief" in order to "give the defendant fair notice of what
22 the...claim is and the grounds upon which it rests". Bell Atl.
23 Corp. v. Twombly, 127 S. Ct. 1955, 1964 (2007) (quoting Conley v.
24 Gibson, 78 S. Ct. 99, 103 (1957)).

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28 ² The factual assertions in this paragraph come from
Defendant's Motion to Dismiss unless otherwise specified.

1 While a complaint attacked by a Rule 12(b)(6) motion to dismiss
2 does not need detailed factual allegations, a plaintiff's
3 obligation to provide the "grounds" of his "entitlement to
4 relief" requires more than labels and conclusions, and a
5 formulaic recitation of the elements of a cause of action will
6 not do. Id. at 1964-65 (internal citations omitted). Factual
7 allegations must be enough to raise a right to relief above the
8 speculative level. Id. at 1965 (citing 5 C. Wright & A. Miller,
9 Federal Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004)
10 ("The pleading must contain something more...than...a statement
11 of facts that merely creates a suspicion [of] a legally
12 cognizable right of action")).

13 "Rule 8(a)(2)...requires a 'showing,' rather than a blanket
14 assertion of entitlement to relief. Without some factual
15 allegation in the complaint, it is hard to see how a claimant
16 could satisfy the requirements of providing not only 'fair
17 notice' of the nature of the claim, but also 'grounds' on which
18 the claim rests". Twombly, 550 U.S. at 556 n.3. A pleading must
19 contain "only enough facts to state a claim to relief that is
20 plausible on its face". Id. at 570. If the "plaintiffs...have
21 not nudged their claims across the line from conceivable to
22 plausible, their complaint must be dismissed". Id.
23 Nevertheless, "[a] well-pleaded complaint may proceed even if it
24 strikes a savvy judge that actual proof of those facts is
25 improbable, and 'that a recovery is very remote and unlikely.'" Id.
26 at 556.

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1 A court granting a motion to dismiss a complaint must then
2 decide whether to grant leave to amend. A court should "freely
3 give" leave to amend when there is no "undue delay, bad faith[,]
4 dilatory motive on the part of the movant,...undue prejudice to
5 the opposing party by virtue of...the amendment, [or] futility of
6 the amendment...". Fed. R. Civ. P. 15(a); Foman v. Davis, 371
7 U.S. 178, 182 (1962). Generally, leave to amend is denied only
8 when it is clear the deficiencies of the complaint cannot be
9 cured by amendment. DeSoto v. Yellow Freight Sys., Inc., 957
10 F.2d 655, 658 (9th Cir. 1992).

11
12 **B. Motion to Expunge Lis Pendens**

13
14 "A Lis Pendens is recorded by someone asserting a real
15 property claim, to give notice that a lawsuit has been filed
16 which may, if that person prevails, affect title to possession of
17 the real property described in the notice". Fed. Deposit Ins.
18 Corp. v. Charlton, 17 Cal. App. 4th 1066, 1069 (1993) (citing
19 Cal. Civ. Proc. Code §§ 405.2, 405.4, 405.20). A Lis Pendens,
20 once filed prevents that property's transfer until the Lis
21 Pendens is expunged or the litigation is resolved. BGJ Assoc.,
22 LLC v. Super. Ct. of L.A., 75 Cal. App. 4th 952, 966-67 (1999).
23 The Lis Pendens is expunged if the pleading on which the Lis
24 Pendens is based does not contain a real property claim, or if
25 the evidence fails to establish the probable validity of the real
26 property claims. Orange Cnty. v. H.K. and Shanghai Banking Corp.
27 Ltd., 52 F.3d 821, 823-24 (9th Cir. 1995).

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1 To constitute a "real property claim", the cause of action, if
2 meritorious, must affect the right of possession of specific real
3 property or affect the title to the specific real property. Cal.
4 Civ. Proc. Code § 405.4. The "probable validity" standard means
5 "it is more likely than not that the claimant will obtain a
6 judgment against the defendant on the claim". Id. at § 405.3.

8 ANALYSIS

9 A. Motion to Dismiss

10 1. Breach of Contract

11
12 Under California law, to state a claim for breach of
13 contract, the plaintiff must plead: 1) existence of the contract;
14 2) plaintiff's performance or excuse for nonperformance of the
15 contract; 3) defendant's breach of the contract; and 4) resulting
16 damages. Armstrong Petrol. Corp. V. Tri Valley Oil & Gas Co.,
17 116 Cal. App. 4th 1375, 1391 n. 6 (2004).

18 Plaintiffs and Defendant disagree on whether the HAMP is a
19 contract under the law. However, even assuming, *arguendo*, that
20 the HAMP constitutes a contract, Plaintiffs have still failed to
21 sufficiently allege each element necessary for successfully
22 pleading a breach of contract claim.

23 Plaintiffs allege that they have suffered the irreparable
24 harm of the loss of their home, an investment of \$199,803.70, "as
25 a result of Defendant's breach". However, the HAMP expressly
26 provides that it did not alter the terms of Plaintiffs' loan, but
27 instead altered the amount of Plaintiffs' mortgage payments for a
28 three-month trial period.

1 The mortgage would only be permanently modified if and when
2 Plaintiffs: 1) met all of the conditions necessary for
3 modification; 2) received a "fully executed copy of a
4 Modification Agreement"; and 3) the Modification Effective Date
5 (November 1, 2009 in Plaintiffs' case) had passed. HAMP, § 2,
6 ¶ G. The HAMP also states that "any pending foreclosure action
7 will not be dismissed and may be immediately resumed from the
8 point at which it was suspended if this Plan terminates". Id. at
9 § 2, ¶ B. Thus, Defendant maintained its rights under the
10 original mortgage loan to foreclose on Plaintiffs' property in
11 the event of default. Defendant's execution of this right cannot
12 be said to constitute a breach under the HAMP.

13 A breach of contract claim rests upon the actual terms of
14 the contract; however, Plaintiffs fail to allege any breach of
15 the express provisions of the HAMP. Therefore, Plaintiffs have
16 not sufficiently alleged a breach of contract. Defendant's
17 Motion to Dismiss Plaintiffs' breach of contract claim is
18 granted.

19
20 **2. Breach of Good Faith and Fair Dealing**

21
22 To the extent that Plaintiffs also bring a claim for breach
23 of the implied covenant of good faith and fair dealing,
24 Plaintiffs' pleading is insufficient. In addition to failing to
25 formally style their claim for breach as a named cause of action,
26 Plaintiffs have failed to sufficiently allege a breach of
27 contract.

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1 Supposing that the HAMP is a contract, the implied covenant of
2 good faith and fair dealing "cannot impose substantive duties or
3 limits on the contracting parties beyond those incorporated in
4 the specific terms of their agreement". Guz v. Bectel Nat'l,
5 Inc., 24 Cal. 4th 317, 349-50 (2000). The implied covenant of
6 good faith and fair dealing rests upon the existence of some
7 specific contractual obligation. Foley v. Interactive Data
8 Corp., 7 Cal. 3d 654, 683-84 (1998). The covenant of good faith
9 is read into contracts to protect the express covenants or
10 promises of the contract, not to protect some general public
11 policy interest that is not directly tied to the contract's
12 purpose. Id. at 690.

13 Here, the HAMP did not alter the terms of Plaintiffs' loan,
14 and reserved the Defendant's right to continue with foreclosure
15 proceedings. Plaintiffs have not sufficiently asserted which
16 terms, if any, of any existing contract, were frustrated by
17 Defendant's conduct, and therefore have failed to sufficiently
18 plead a breach of the implied covenant of good faith and fair
19 dealing. Thus, Defendant's Motion to Dismiss Plaintiffs' breach
20 of good faith and fair dealing claim is granted.

21 22 **3. Slander of Title**

23
24 Under California law, to state a claim for slander of title,
25 the plaintiff must establish: 1) a publication; 2) which is
26 without privilege or justification; 3) which is false; and
27 4) which causes direct and immediate pecuniary loss.

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1 Manhattan Loft, LLC V. Mercury Liquors, Inc., 173 Cal. App. 4th
2 1040, 1050-51 (2009) (citing Howard v. Schaniel, 113 Cal. App. 3d
3 256, 263-64 (1980)).

4 Privileged publications include those made in any "official
5 proceeding authorized by law". Cal. Civ. Code § 47(b).
6 According to Cal. Civ. Code §§ 2924(a)(1), 2924(a)(3), notices of
7 default and sale must be filed in each county where some of the
8 mortgaged property is located. The law expressly provides that
9 "[t]he mailing, publication, and delivery of notices as required
10 by []section [2924]" constitute privileged communication. Id. at
11 § 2924(d)(1).

12 The Notices of Default and Trustee's Sale filed by Defendant
13 in the County of Solano are privileged publications because their
14 filings were required by California law. Because Defendant's
15 publications are privileged, Plaintiffs fail to sufficiently
16 allege slander of title. Defendant's Motion to Dismiss
17 Plaintiffs' slander of title claim is granted.

18 19 **4. California's UCL**

20
21 California's Business and Professions Code § 17200, *et seq.*,
22 more commonly known as California's Unfair Competition Law
23 ("UCL") defines unfair competition as "any unlawful, unfair or
24 fraudulent business act or practice". "Unlawful" practices are
25 practices "forbidden by law, be it civil or criminal, federal,
26 state, or municipal, statutory, regulation, or court-made".

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1 Saunders v. Super. Ct. of L.A. Cnty., 27 Cal. App. 4th 832,
2 838-39 (1994) (citing People v. McKale, 25 Cal. 3d 626, 632
3 (1979)). To state a cause of action based on an "unlawful"
4 business act or practice under the UCL, a plaintiff must allege
5 facts sufficient to show a violation of some underlying law.
6 McKale, 25 Cal. 3d at 635.

7 A "fraudulent" business act or practice is one in which
8 members of the public are likely to be deceived. Hall v. Time,
9 Inc., 158 Cal. App. 4th 847, 849 (2008); Olsen v. Breeze, Inc.,
10 48 Cal. App. 4th 608, 618 (1996) ("does not refer to the common
11 law tort of fraud but only requires a showing [that] members of
12 the public 'are likely to be deceived'"). Thus, to state a cause
13 of action based on a "fraudulent" business act or practice, the
14 plaintiff must allege that consumers are likely to be deceived by
15 the defendant's conduct. Comm. on Children's Television, Inc. v.
16 Gen. Foods Corp., 35 Cal. 3d 197, 212 (1983).

17 A business act or practice is "unfair" when the conduct
18 "threatens an incipient violation of an antitrust law, or
19 violates the policy or spirit of one of those laws because its
20 effects are comparable to a violation of the law, or that
21 otherwise significantly threatens or harms competition".
22 Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th
23 163, 187 (1999). To sufficiently plead an action based on an
24 "unfair" business act or practice, a plaintiff must allege facts
25 showing the "unfair" nature of the conduct and that the harm
26 caused by the conduct outweighs any benefits that the conduct may
27 have. Motors, Inc. v. Times Mirror Co., 102 Cal. App. 3d 735,
28 740 (1980).

1 Furthermore, a plaintiff alleging unfair business practices under
2 the UCL "must state with reasonable particularity the facts
3 supporting the statutory elements of the violation." Khoury v.
4 Maly's of California, Inc., 14 Cal. App. 4th 612, 619 (1993).

5 In alleging violation of the UCL, Plaintiffs incorporate by
6 reference all prior causes of actions; however, none of those
7 claims have been sufficiently pled to survive a motion to
8 dismiss. Plaintiffs therefore lack a predicate "unlawful" action
9 to underlie their UCL claim.

10 Similarly Plaintiffs fail to allege with reasonable
11 particularity "unfair" or "fraudulent" behavior by Defendant.
12 Plaintiffs assert that Defendant "engaged in a sophisticated
13 scheme to illegally seize [Plaintiffs'] property" and "took a
14 grossly oppressive and unfair advantage over Plaintiffs";
15 however, Plaintiffs do not identify which specific behaviors they
16 believe are punishable under the UCL. To the extent to which
17 they may be referring to all alleged wrongful conduct listed in
18 the Complaint, Plaintiffs still fail to state why such behavior
19 is "unfair" or "fraudulent" as defined by the statute. Due to
20 Plaintiffs' failure to sufficiently plead unlawful, unfair or
21 fraudulent behaviors, Defendant's Motion to Dismiss Plaintiffs'
22 UCL claim is granted.

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1 **5. California's False Advertising Law**

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3 California's Business and Professions Code § 17500, *et seq.*,

4 more commonly known as California's False Advertising Law,

5 prohibits the dissemination of "any statement, concerning [] real

6 or personal property or [] services...which is untrue or

7 misleading". To state a cause of action based on the False

8 Advertising Law, a plaintiff must allege that "members of the

9 public are likely to be deceived" by the defendant's conduct.

10 Comm. on Children's Television, 35 Cal. 3d at 211.

11 Plaintiffs allege that Defendant "never intended to provide

12 [them with] a loan modification", and that they "were

13 intentionally misled and induced to enter into an agreement".

14 However, Plaintiffs fail to provide factual support for their

15 belief that Defendant never intended to provide a loan

16 modification. "Threadbare recitals of the elements of a cause of

17 action, supported by mere conclusory statements" are insufficient

18 for a pleading. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)

19 (citing Twombly, 127 S. Ct. at 1964-65). Plaintiffs also fail to

20 identify how other readers of the HAMP would likely be deceived

21 by the agreement, or by any other statements made by Defendant.

22 Therefore, Plaintiffs fail to sufficiently plead a claim under

23 California's False Advertising Law. Defendant's Motion to

24 Dismiss Plaintiffs' False Advertising Law claim is granted.

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1 **6. Unjust Enrichment**

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3 Under California law, to state a claim for unjust
4 enrichment, a plaintiff must plead "receipt [by defendant] of a
5 benefit and unjust retention of the benefit at the expense of
6 another". Lectrodryer v. Seoulbank, 77 Cal. App. 4th 723, 726
7 (2000) (citing First Nationwide Sav. v. Perry, 11 Cal. App. 4th
8 1657, 1663 (1992)).

9 Plaintiff alleges that Defendant "unjustly enriched [itself]
10 at the expense of Plaintiffs' investment of \$199,803.70 and the
11 loss of their home", and that Defendant "reaped substantial
12 profits". As addressed above, Defendant was legally entitled to
13 foreclosure rights. Furthermore, Defendant is the servicer of
14 Plaintiffs' loan, not the beneficiary of the Note or Deed of
15 Trust. Plaintiffs fail to sufficiently plead unjust enrichment.
16 Defendant's Motion to Dismiss Plaintiffs' unjust enrichment claim
17 is granted.

18
19 **7. Infliction of Emotional Distress**

20
21 Under California law, to state a claim for infliction of
22 emotional distress, the plaintiff must plead: 1) extreme and
23 outrageous conduct by the defendant with the intention of
24 causing, or reckless disregard of the probability of causing,
25 emotional distress; 2) the plaintiff's suffering severe or
26 extreme emotional distress; and 3) actual and proximate causation
27 of the emotional distress by the defendant's outrageous conduct.

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1 Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 1001
2 (1993) (quoting Christensen v. Super. Ct. of L.A. Cnty., 54 Cal.
3 3d 868, 903 (1991) (internal citations omitted)). For “[c]onduct
4 to be outrageous[, it] must be so extreme as to exceed all bounds
5 of that usually tolerated in a civilized community”. Id.
6 Furthermore, the defendant’s conduct must be “intended to inflict
7 injury or engaged in with the realization that injury will
8 result”. Id. To plead intentional infliction of emotional
9 distress, the defendant’s conduct must also be “directed at the
10 plaintiff, or occur in the presence of a plaintiff of whom the
11 defendant is aware”. Id. at 1002 (emphasis in original omitted).

12 Plaintiffs allege that Defendant’s conduct was “extreme and
13 outrageous”, and that Defendant “intentionally confused
14 Plaintiffs in order to not perform the term[s] of the [HAMP]
15 agreement”. Additionally, Plaintiffs claim that Defendant’s
16 actions “caused Plaintiffs...torment, anxiety, chagrin and
17 embarrassment accompanied with severe physical and emotional
18 distress as a result of the loss of their home and the loss of
19 the large amount of money invested in their home”. However,
20 Plaintiffs fail to sufficiently plead infliction of emotional
21 distress because they do not provide any factual support for
22 their allegations that Defendant’s conduct was “extreme and
23 outrageous.” They also fail to give factual support for their
24 assertion that Defendant acted to intentionally harm Plaintiffs.
25 Therefore, Defendant’s Motion to Dismiss Plaintiffs’ infliction
26 of emotional distress claim is granted.

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1 **B. Motion to Expunge Lis Pendens**

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3 A recorded Lis Pendens may only be expunged if the pleading
4 on which the Lis Pendens is based does not contain a real
5 property claim, or if the evidence fails to establish the
6 probable validity of the real property claims. Orange Cnty.,
7 52 F.3d at 823-24. Plaintiffs' breach of contract and breach of
8 good faith and fair dealing claims are the only causes of action
9 which might constitute "real property claim[s]", as their
10 validity may affect the right of possession or title to the
11 property.

12 The Court finds that at the motion to dismiss stage, when
13 Plaintiffs' allegations of fact must be accepted as true, it is
14 not yet possible to make a finding by a preponderance of the
15 evidence that Plaintiffs' real property claims are probably valid
16 or not. Regardless of whether these claims are ultimately
17 meritorious, there is an action currently pending which might
18 affect title to the real property. A lis pendens, being a
19 "notice of pending action", is primarily there as a signal to the
20 world that a suit has been filed regarding the property so that
21 there will not be a bona fide purchaser for value without notice.
22 A ruling that would expunge such notification necessarily
23 requires further litigation than has presently transpired.

24 Accordingly, Defendant's Motion to Expunge Lis Pendens is
25 denied without prejudice. Defendant is free to re-file said
26 motion as circumstances merit.

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1 **CONCLUSION**

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3 For the reasons set forth above, Defendant's Motion to
4 Dismiss Plaintiffs' First Amended Complaint (Docket No. 8) is
5 GRANTED with leave to amend. Defendant's Motion to Expunge the
6 Lis Pendens is DENIED without prejudice.

7 Plaintiffs may file an amended complaint not later than
8 twenty (20) days after the date this Memorandum and Order is
9 filed electronically. If no amended complaint is filed within
10 said twenty (20)-day period, without further notice, Plaintiffs'
11 claims will be dismissed without leave to amend.

12 IT IS SO ORDERED.

13 Dated: August 20, 2010

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16 MORRISON C. ENGLAND, JR.
17 UNITED STATES DISTRICT JUDGE
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