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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, promissory estoppel, unfair business practice, fraudulent business practice, declaratory relief for unlawful foreclosure, and financial abuse of an elder. Plaintiffs have a Notice of Action Pending ("Lis Pendens") on their former residence at 2444 Oceanic Drive, Fairfield, CA 94533.

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1 Presently before the Court is a Motion by Defendant to  
2 Dismiss Plaintiffs' Second 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)<sup>1</sup>. Defendant also moves to Expunge  
5 the Lis Pendens recorded against Plaintiffs' residence. For the  
6 reasons set forth below, Defendant's Motions to Dismiss and  
7 Expunge are granted in part and denied in part.<sup>2</sup>

8  
9 **BACKGROUND**<sup>3</sup>

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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"). The HAMP is a home loan modification program that  
19 amends mortgages for homeowners who certify that they are unable  
20 to afford mortgage payments on their principal residence.

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24 <sup>1</sup> Unless otherwise noted, all further references to Rule or  
Rules are to the Federal Rules of Civil Procedure.

25 <sup>2</sup> Because oral argument will not be of material assistance,  
26 the Court deemed this matter suitable for decision without oral  
argument. E.D. Cal. Local Rule 230(g).

27 <sup>3</sup> The factual assertions in this section are based on the  
28 allegations in Plaintiffs' Second Amended Complaint unless  
otherwise specified.

1 In order to receive the modification agreement, homeowners must  
2 first pass through the HAMP's "trial period" of three months  
3 where they are required to make regular and timely mortgage  
4 payments, and during which time the terms of the original loan  
5 remain in place. Plaintiffs incorrectly sent their first trial  
6 period payment to the wrong address. Plaintiffs later corrected  
7 their mistake and sent payment to the correct address, but  
8 Defendant refused the payment as late, thereby causing Plaintiffs  
9 to fail the trial period and be denied the modification  
10 agreement. Plaintiffs were advised by Defendant to reapply for  
11 the HAMP, but chose not to do so.

12 Defendant proceeded with foreclosure on the residence and  
13 recorded a Notice of Default in the Official Records of Solano  
14 County on August 17, 2009.<sup>4</sup> Defendant indicates that Plaintiffs  
15 were \$23,356.90 behind on their mortgage payments as of  
16 August 14, 2009. Defendant recorded the Notice of Trustee's Sale  
17 in the Official Records of Solano County on December 23, 2009.  
18 The foreclosure sale was initially scheduled for January 11,  
19 2010, but was rescheduled on several occasions until it was  
20 eventually sold to a third party on July 27, 2010. Plaintiffs  
21 filed the present lawsuit against Defendant on January 11, 2010,  
22 and recorded a Lis Pendens on the property.

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28 <sup>4</sup> The factual assertions in this paragraph come from  
Defendant's Motion to Dismiss unless otherwise specified.



1 Further, "Rule 8(a)(2)...requires a 'showing,' rather than a  
2 blanket assertion, of entitlement to relief. Without some  
3 factual allegation in the complaint, it is hard to see how a  
4 claimant could satisfy the requirements of providing...grounds on  
5 which the claim rests." Twombly, 550 U.S. at 555 n.3 (internal  
6 citations omitted). A pleading must then contain "only enough  
7 facts to state a claim to relief that is plausible on its face."  
8 Id. at 570. If the "plaintiffs...have not nudged their claims  
9 across the line from conceivable to plausible, their complaint  
10 must be dismissed." Id.

11 Once the court grants a motion to dismiss, they must then  
12 decide whether to grant a plaintiff leave to amend. Rule 15(a)  
13 authorizes the court to freely grant leave to amend when there is  
14 no "undue delay, bad faith, or dilatory motive on the part of the  
15 movant." Foman v. Davis, 371 U.S. 178, 182 (1962). In fact,  
16 leave to amend is generally only denied when it is clear that the  
17 deficiencies of the complaint cannot possibly be cured by an  
18 amended version. See DeSoto v. Yellow Freight Sys., Inc., 957  
19 F.2d 655, 658 (9th Cir. 1992); Balistieri v. Pacifica Police  
20 Dept., 901 F. 2d 696, 699 (9th Cir. 1990) ("A complaint should  
21 not be dismissed under Rule 12(b)(6) unless it appears beyond  
22 doubt that the plaintiff can prove no set of facts in support of  
23 his claim which would entitle him to relief.") (internal  
24 citations omitted).

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

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3           “A Lis Pendens is recorded by someone asserting a real

4 property claim, to give notice that a lawsuit has been filed

5 which may, if that person prevails, affect title to possession of

6 the real property described in the notice.” Fed. Deposit Ins.

7 Corp. v. Charlton, 17 Cal. App. 4th 1066, 1069 (1993) (citing

8 Cal. Civ. Proc. Code §§ 405.2, 405.4, and 405.20). A Lis

9 Pendens, once filed, prevents the property’s transfer until the

10 Lis Pendens is expunged or the litigation is resolved. BGJ

11 Assoc., LLC v. Super. Ct. Of L.A., 75 Cal. App. 4th 952, 966-67

12 (1999). The Lis Pendens is expunged if the pleading on which the

13 Lis Pendens is based does not contain a real property claim, or

14 if the evidence fails to establish the probable validity of the

15 real property claims. Orange Cnty. v. H.K. and Shanghai Banking

16 Corp. Ltd., 52 F.3d 821, 823-24 (9th Cir. 1995). To constitute a

17 “real property claim,” the cause of action, if meritorious, must

18 affect the right of possession of specific real property or

19 affect the title to the specific real property. Cal. Civ. Proc.

20 Code § 405.4. The “probable validity” standard means “it is more

21 likely than not that the claimant will obtain a judgment against

22 the defendant on the claim.” Id. at § 405.3.

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1 **ANALYSIS**

2 **A. Motion to Dismiss**

3 **1. Breach of Contract**

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5 Under California law, to state a claim for breach of  
6 contract, a plaintiff must plead: (1) existence of the contract;  
7 (2) plaintiff's performance or excuse for nonperformance of the  
8 contract; (3) defendant's breach of the contract; and  
9 (4) resulting damages. Armstrong Petrol. Corp. v. Tri Valley Oil  
10 & Gas Co., 116 Cal. App. 4th 1375, 1391 n.6 (2004).

11 Plaintiffs and Defendant disagree on whether the HAMP is a  
12 contract under law. Because the Court reviews this claim on a  
13 motion to dismiss standard, Plaintiffs need only allege  
14 sufficient facts to raise their breach of contract claim above  
15 mere speculation. Plaintiffs have pled enough facts under this  
16 standard to fairly argue that the HAMP is an enforceable  
17 contract, that they had performed contractual obligations under  
18 the HAMP, and that Defendant subsequently refused to perform.  
19 Defendant's Motion to Dismiss Plaintiffs' first claim for breach  
20 of contract is denied.

21  
22 **2. Breach of Good Faith and Fair Dealing**

23  
24 The implied covenant of good faith and fair dealing rests  
25 upon the existence of some specific contractual obligation.  
26 Foley v. Interactive Data Corp., 47 Cal. 3d 654, 683-84 (1998).  
27 The covenant of good faith is read into contracts to protect the  
28 express terms or promises of the contract. Id. at 690.

1 This covenant is particularly well-suited to situations where one  
2 party has discretionary power affecting the rights of another.  
3 Carma Developers Cal., Inc. v. Marathon Dev. Cal., Inc., 2 Cal.  
4 4th 342, 372 (1992).

5 Assuming the HAMP even constitutes a binding contract,  
6 Plaintiffs' claim for breach of good faith and fair dealing is  
7 sufficient to withstand a motion to dismiss. Plaintiffs allege  
8 that Defendant acted in bad faith by refusing to accept their  
9 first payment, which would have ensured their compliance with the  
10 HAMP. Further, this payment was delayed as a direct result of  
11 Defendant's omission of information necessary for Plaintiffs to  
12 successfully perform their obligations. Thus, Defendant's Motion  
13 to Dismiss Plaintiffs' second claim for breach of good faith and  
14 fair dealing is denied.

### 15 16 **3. Promissory Estoppel**

17  
18 Promissory estoppel makes a "promise binding under certain  
19 circumstances, without consideration in the usual sense of  
20 something bargained for and something given in exchange." Garcia  
21 v. WorldSav., FSB, 183 Cal. App. 4th 1037, 1040-41 (2010) (citing  
22 Youngman v. Nev. Irrigation Dist., 70 Cal. 2d 240, 249 (1969)).  
23 If, by language or conduct, an individual leads another to do  
24 what he otherwise would not have done, then he should not be  
25 denied the "expectations upon which he acted." Id. Absence of  
26 consideration does not defeat a claim based on promissory  
27 estoppel. Id.

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1 The required elements are: (1) a clear and unambiguous promise in  
2 its terms; (2) reliance that is reasonable and foreseeable; and  
3 (3) an injury that results from reliance. Laks v. Coast Fed.  
4 Sav. & Loan Assn., 60 Cal. App. 3d. 885, 890 (1976).

5 Plaintiffs have properly pled the elements for a promissory  
6 estoppel claim. They allege that Defendant promised to provide  
7 to them a loan modification upon completion of their obligations  
8 under the HAMP. This promise is clear and unambiguous from the  
9 written document provided. And because this document was in a  
10 writing signed by both parties, Plaintiffs' reliance on that  
11 promise was reasonably foreseeable as they acted in conformity  
12 with the express terms of the writing. Defendant's Motion to  
13 Dismiss Plaintiffs' third claim for promissory estoppel is  
14 denied.

15  
16 **4. Unfair Business Practice under California law**  
17

18 California Business and Professions Code § 17200, *et seq.*,  
19 more commonly known as California's Unfair Competition Law  
20 ("UCL"), defines unfair competition as "any unlawful, unfair or  
21 fraudulent business act or practice". A claim for "unfair"  
22 business practices under the UCL requires a plaintiff to "tether"  
23 its allegation to a constitutional or statutory provision or a  
24 regulation carrying out statutory policy. Webb v. Smart Document  
25 Solutions, LLC, 499 F.3d 1078, 1082-83 (9th Cir. 2007).

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1 See also Ferrington v. McAfee, Inc., No. 10-01455, 2010 WL  
2 3910169 at \*11-13 (N.D. Cal., Oct. 5, 2010), Buller v. Sutter  
3 Health, 160 Cal. App. 4th 981, 991 (2008) (citing Belton v.  
4 Comcast Cable Holdings, LLC., 151 Cal. App. 4th 1224, 1239-40  
5 (2007)).<sup>5</sup>

6 Plaintiffs provide no facts indicating that a constitutional  
7 or statutory policy prohibits the actions allegedly taken by  
8 Defendant. Since Plaintiffs have not tethered their allegations  
9 to any constitutional or statutory provision as required, their  
10 claim for unfair business practices is insufficient to withstand  
11 dismissal. Defendant's Motion to Dismiss Plaintiffs' fourth  
12 claim for unfair business practices is granted.

13  
14 **5. Fraudulent business practices under California law**

15  
16 A "fraudulent" business act or practice claim under the UCL  
17 requires a plaintiff to allege that consumers are likely to be  
18 deceived by the defendant's conduct. Comm. on Children's  
19 Television, Inc. v. Gen. Foods Corp., 35 Cal. 3d 197, 212 (1983).  
20 Under the heightened pleading standard of Rule 9(b), when  
21 alleging fraud, a plaintiff must state with particularity  
22 specific facts or circumstances constituting fraud.

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26 <sup>5</sup> California courts are split as to the appropriate test for  
27 finding business practices "unfair" under the UCL as they pertain  
28 to consumers as opposed to direct competitors. Ninth Circuit  
courts have ruled that either standard will be upheld. Therefore,  
the Court need not address the dispute. Lozano v. AT&T Wireless  
Services, Inc., 504 F.3d 718, 736-37 (9th Cir. 2007).

1 Plaintiffs have properly alleged that consumers are likely  
2 to be deceived by Defendant's omission of the correct address in  
3 the HAMP. However, they have failed to plead any facts or  
4 circumstances indicating why Defendant's failure to act rises to  
5 the level of fraud. Plaintiffs bear the burden of demonstrating  
6 Defendant's conduct was not mere omission, but an actual  
7 fraudulent business practice. Plaintiffs' own conclusion that  
8 the conduct amounts to fraud is insufficient under the heightened  
9 pleading standard of Rule 9(b). Defendant's Motion to Dismiss  
10 Plaintiffs' fifth claim for fraudulent business practices is  
11 granted.

12  
13 **6. Unlawful foreclosure/Request for declaratory**  
14 **relief**

15 California Civil Code § 2923.5 precludes lenders in  
16 California from filing a notice of default to begin foreclosure  
17 until thirty days after making initial contact with the  
18 homeowners, and satisfying certain due diligence requirements as  
19 detailed in the statute. Courts have found this statute to  
20 create a private right of action, however, the right is limited  
21 to preventing an impending foreclosure. Mabry v. Superior Court,  
22 185 Cal. App. 4th 208, 214-15 (2010). If the foreclosure sale  
23 has already been completed, a plaintiff has no right to further  
24 legal action under this section, regardless of the lender's  
25 failure to comply with the statutory requirements. Id.

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1           Because the sale of Plaintiffs' home was completed in July  
2 2010, we do not reach a judgment as to whether Defendant violated  
3 § 2923.5. Plaintiffs have no valid claim under Cal. Civ. Code  
4 § 2923.5. Defendant's Motion to Dismiss Plaintiffs' sixth claim  
5 for declaratory relief is granted.

6  
7           **7. Financial abuse of an elder**  
8

9           California Welfare and Institutions Code § 15610.30  
10 prohibits financial abuse of an elder. An "elder" is defined as  
11 a person over the age of 65. Cal. Welfare & Inst. Code  
12 § 15610.27. A defendant violates this statute if the defendant  
13 himself, or in assistance of another, takes, secretes,  
14 appropriates, obtains, or retains real or personal property of an  
15 elder for a wrongful use, with intent to defraud, or by undue  
16 influence. Cal. Welfare & Inst. Code § 15610.30.

17           Plaintiff Mrs. Jackson was not over 65 at the time of the  
18 alleged violation and, as such, lacks standing to bring this  
19 claim. Plaintiff Mr. Jackson does meet the age requirement,  
20 however, he does not plead sufficient facts to suggest Defendant  
21 forced him, with intent to defraud or by undue influence, to send  
22 his payment to a different address, or to somehow become late on  
23 payments thereby causing him to lose his property. Nor does the  
24 complaint demonstrate that Defendant took his property for a  
25 wrongful use. Thus, Defendant's Motion to Dismiss Plaintiffs'  
26 seventh claim for financial abuse of an elder 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 claim. Orange Cnty. v.  
7 H.K. and Shanghai Banking Corp. Ltd., 52 F.3d 821, 823-24 (9th  
8 Cir. 1995); see supra.

9           The Court finds that at this stage of the litigation, when  
10 Plaintiffs' allegations of fact must be accepted as true, it is  
11 not yet possible to make a finding by a preponderance of the  
12 evidence that Plaintiffs' real property claims are valid.  
13 Regardless of whether these claims are ultimately meritorious,  
14 there is an action currently pending which may affect title to  
15 the real property. As a notice of pending action, a Lis Pendens,  
16 is primarily recorded as a signal to the world that a suit has  
17 been filed regarding the property so that there will not be a  
18 bona fide purchaser for value without notice. A ruling that  
19 would expunge such notification necessarily requires further  
20 litigation than has presently transpired. Accordingly,  
21 Defendant's Motion to Expunge Lis Pendens is denied without  
22 prejudice.

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1 **CONCLUSION**

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3 As a matter of law, and for the reasons set forth above,

4 Defendant's Motion to Dismiss Plaintiffs' Second Amended

5 Complaint (ECF No. 24) is GRANTED without further leave to amend

6 as to Claims 4, 5, 6 and 7, and DENIED as to Claims 1, 2, and 3.


7 Defendant's Motion to Expunge the Lis Pendens is DENIED without

8 prejudice. The parties are to file a joint status report within

9 30 days of this Order being electronically filed.

10 IT IS SO ORDERED.

11 Dated: February 8, 2011

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14 MORRISON C. ENGLAND, JR.  
15 UNITED STATES DISTRICT JUDGE

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