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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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SCOTT PAULHUS and LYNETTE
PAULHUS,

 Plaintiffs,

 v.

FAY SERVICING, LLC; CALIBER
HOME LOANS, INC., formerly
known as VERICREST FINANCIAL,
INC.; SUMMIT MANAGEMENT
COMPANY, LLC; and DOES 1
through 20, inclusive,

 Defendants.

CIV. NO. 2:14-736 WBS AC

MEMORANDUM AND ORDER RE: MOTION
TO DISMISS

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Plaintiffs Scott Paulhus and Lynette Paulhus brought
this action against defendants Fay Servicing, LLC ("Fay"),
Caliber Home Loans, Inc., formerly known as Vericrest Financial,
Inc. ("Vericrest"), and Summit Management Company, LLC
("Summit"), arising out of the foreclosure of plaintiffs' home.
Defendants now move to dismiss the Complaint pursuant to Federal
Rule of Civil Procedure 12(b)(6) for failure to state a claim

1 upon which relief can be granted.

2 I. Factual & Procedural History

3 In 2004, plaintiffs entered into a mortgage loan for
4 \$850,000, which was secured by a Deed of Trust to their home in
5 Granite Bay, California. (Compl. ¶ 17 (Docket No. 1-1).) A
6 Substitution of Trustee recorded in December 2011 indicates that
7 Summit is the current trustee under the Deed of Trust.

8 (Vericrest Req. for Judicial Notice¹ ("Vericrest RJN") Ex. C.)
9 Plaintiff alleges that Fay is the current mortgage servicer and
10 that it assumed servicing rights to the loan from Vericrest in
11 2013. (Compl. ¶ 18.)

12 On December 14, 2011, Summit recorded a Notice of
13 Default reflecting that plaintiffs were \$16,384.82 in arrears on
14 their loan. (Vericrest RJN Ex. D.) Summit subsequently
15 rescinded the Notice of Default on February 17, 2012. (Vericrest
16 RJN Ex. E.) Although plaintiffs allege throughout the Complaint
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18 ¹ Although a court generally may not consider items
19 outside the pleadings when deciding a motion to dismiss, it may
20 consider items of which it can take judicial notice, Barron v.
21 Reich, 13 F.3d 1370, 1377 (9th Cir. 1994), including matters of
22 public record, MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504
23 (9th Cir. 1986).

24 Both Vericrest and Fay request that the court
25 judicially notice several recorded documents pertaining to
26 plaintiff's property. (Docket Nos. 21, 24.) Those items include
27 the Deed of Trust, (Vericrest RJN Ex. A (Docket No. 24-1)), the
28 Assignment of Deed of Trust, (id. Ex. B. (Docket No. 24-2)), the
Substitution of Trustee, (id. Ex. C (Docket No. 24-3)), a Notice
of Default, (id. Ex. D (Docket No. 24-4)), a Rescission of Notice
of Default, (id. Ex. E. (Docket No. 24-5)), and an Assignment of
Mortgage/Deed of Trust, (id. Ex. F (Docket No. 24-6)). The court
will take judicial notice of these documents, since they are
matters of public record whose accuracy cannot be questioned.
See Fed. R. Evid. 201; Lee v. City of Los Angeles, 250 F.3d 668,
689 (9th Cir. 2001).

1 that they were "forced into default," (Compl. ¶ 23), they do not
2 allege that they received this or any other Notice of Default.

3 On March 16, 2012, plaintiffs allegedly received a
4 monthly statement from Vericrest for \$5,993.27 instead of their
5 usual payment of \$3,973.16 per month. (Id. ¶ 19.) Plaintiffs
6 subsequently contacted Vericrest to inform them that the amount
7 stated was "unjustified and erroneous." (Id.) The next month,
8 plaintiffs received a billing statement for \$4,020.01, and
9 concluded that Vericrest had amended the statement to reflect the
10 amount that was actually due. (Id. ¶ 20.) Plaintiffs allege
11 that they paid that amount each month for over a year and that
12 Vericrest continued to accept their payments. (Id.)

13 On September 1, 2013, Fay sent plaintiffs a billing
14 statement for \$5,513.13. (Id. ¶ 21.) Plaintiffs allege that
15 they contacted Fay to correct the bill, and that Fay informed
16 them that they did not have their complete loan file because of
17 the "servicer change." (Id.) Plaintiffs also allege that they
18 spoke to a Fay employee on December 3, 2013, who represented that
19 plaintiffs would not be considered in default if they submitted
20 proof of income and two payments for \$3973.16. (Id.) When
21 Plaintiffs submitted those payments, Fay allegedly rejected them
22 and stated that they were insufficient to satisfy the full amount
23 owed. (Id. ¶ 22.) As a result, plaintiffs allege, they were
24 "forced into default." (Id. ¶ 23.)

25 Plaintiffs brought this action in Placer County
26 Superior Court on February 18, 2014, alleging five claims: (1)
27 breach of the covenant of good faith and fair dealing; (2)
28 violations of section 2937 of the California Civil Code; (3)

1 unfair business practices in violation of California's Unfair
2 Competition Law ("UCL"), Cal. Bus. & Profs. Code §§ 17200 et
3 seq.; (4) violations of California Civil Code section 2924.17;
4 and (5) injunctive relief pursuant to California Civil Code
5 section 2924.12. (Docket No. 1.) Defendants removed to this
6 court on the basis of diversity jurisdiction, 28 U.S.C. § 1332,
7 and now move to dismiss plaintiffs' Complaint pursuant to Rule
8 12(b)(6) for failure to state a claim upon which relief can be
9 granted. (Docket Nos. 20, 23.)

10 II. Discussion

11 On a motion to dismiss, the court must accept the
12 allegations in the complaint as true and draw all reasonable
13 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
14 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
15 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
16 (1972). To survive a motion to dismiss, a plaintiff needs to
17 plead "only enough facts to state a claim to relief that is
18 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S.
19 544, 570 (2007). This "plausibility standard," however, "asks
20 for more than a sheer possibility that a defendant has acted
21 unlawfully," and where a complaint pleads facts that are "merely
22 consistent with" a defendant's liability, it "stops short of the
23 line between possibility and plausibility." Ashcroft v. Iqbal,
24 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 556-57).

25 A. Breach of Covenant of Good Faith and Fair Dealing

26 California, like the majority of states, recognizes an
27 implied covenant of good faith and fair dealing. Foley v.
28 Interactive Data Corp., 47 Cal. 3d 654, 683 (1988) (citing

1 Restatement of Contracts (2d) § 205). It is not clear whether
2 plaintiffs' claim for breach of the implied covenant of good
3 faith and fair dealing sounds in contract or tort. Cf. Spencer
4 v. DHI Mortg. Co., 642 F.2d 1153, 1165 (E.D. Cal. 2009) (O'Neill,
5 J.) (recognizing "uncertainty whether the claim proceeds under
6 contract or tort law.").

7 To the extent that a claim for breach of the implied
8 covenant of good faith and fair dealing sounds in contract, it
9 applies only to promises "arising out of the contract itself."
10 Foley, 47 Cal. 3d at 690; accord Racine & Laramie, Ltd. v. Dep't
11 of Parks & Recreation, 11 Cal. App. 4th 1026, 1031 (4th Dist.
12 1992) ("The implied covenant of good faith and fair dealing rests
13 upon the existence of some specific contractual obligation."). A
14 corollary to this rule is that a claim for breach of the implied
15 covenant of good faith and fair dealing requires a plaintiff to
16 identify a contract to which both he and the defendant were
17 parties. See Champlaie v. BAC Home Loan Servicing, LP, 706 F.
18 Supp. 2d 1029, 1063 (E.D. Cal. 2009) (Karlton, J.).

19 Although plaintiffs' claim for breach of the implied
20 covenant of good faith and fair dealing is premised on the
21 allegation that Vericrest and Fay mishandled their mortgage
22 payments, plaintiffs do not identify any contract to which either
23 Vericrest or Fay is a party. Even if the court could infer the
24 existence of such a contract, plaintiffs do not allege that they
25 were a party to that contract² or identify a specific contractual

26 ² Nor have plaintiffs alleged any facts that would permit
27 the court to infer the existence of a contract of which they were
28 intended third-party beneficiaries. See Klamath Water Users
Protective Ass'n v. Patterson, 204 F.3d 1206, 1210 (9th Cir.

1 provision that could serve as a basis for their claim. See
2 Racine & Laramie, 11 Cal. App. 4th at 1031. As a result,
3 plaintiffs have not stated a contract claim for breach of the
4 implied covenant of good faith and fair dealing. See Champlaie,
5 705 F. Supp. 2d at 1063-64 (dismissing claim for breach of
6 implied covenant of good faith and fair dealing where plaintiff
7 failed to allege the existence of a contract with the defendant
8 loan servicer or foreclosure trustee).

9 California has also recognized a tort claim for breach
10 of the implied covenant of good faith and fair dealing. Foley,
11 47 Cal. 3d at 682. A tort claim for breach of the implied
12 covenant of good faith and fair dealing does not arise in the
13 context of an arms-length transaction between contracting
14 parties. See, e.g., Pension Trust Fund For Operating Eng'rs. v.
15 Fed. Ins. Co., 307 F.3d 944, 955 (9th Cir. 2002); Mitsui Mfrs.
16 Bank v. Superior Court, 212 Cal. App. 3d 726, 730 (4th Dist.
17 1989). Rather, it arises only in "limited circumstances"
18 involving a "special relationship" between those parties.
19 Bionghi v. Metro. Water Dist. of S. Cal., 70 Cal. App. 4th 1358,
20 1370 (2d Dist. 1999); accord Spencer, 642 F. Supp. 2d at 1165.

21 Plaintiffs contend that such a "special relationship
22 does exist" because Fay and its predecessor, Vericrest, entered
23 into a contract with the lender or its successor-in-interest to
24 service plaintiffs' loan. (Pls.' Opp'n at 3:5-9 (Docket No. 25.)
25 Although plaintiffs refer to such a contract in their Opposition,
26
27 1999) ("Before a third party can recover under a contract, it
28 must show that the contract was made for its direct benefit--that
it was an intended beneficiary of the contract.").

1 they do not allege its existence in the Complaint. Even if they
2 had, a lending relationship of the sort plaintiffs allude to is
3 not the type of "special relationship" required to state a tort
4 claim for breach of the implied covenant of good faith and fair
5 dealing. See Spencer, 642 F. Supp. 2d at 1165 (quoting Pension
6 Trust Fund, 307 F.3d at 955).

7 Accordingly, because plaintiffs have not stated a claim
8 for breach of the implied covenant of good faith and fair dealing
9 under either a contract or tort theory, the court must grant
10 defendants' motion to dismiss this claim.

11 B. California Civil Code Section 2937

12 Section 2937 of the California Civil Code requires a
13 loan servicer to provide written notice before transferring
14 servicing responsibilities to a new mortgage servicer. Cal. Civ.
15 Code § 2937(b). The statute also provides that a loan servicer
16 may not hold a borrower liable for payments made to a previous
17 servicer or late charges arising out of such payments if those
18 payments were made prior to the borrower's receipt of the notice
19 required by section 2937(b). Cal. Civ. Code § 2937(g). In order
20 to state a claim for a violation of section 2397, a plaintiff
21 must allege that the harm he suffered resulted from that
22 statutory violation. See Amaral v. Wachovia Mortg. Corp., Civ.
23 No. 1:09-937 OWW GSA, 2011 WL 1205250, at *3 (E.D. Cal. Mar. 29,
24 2011) (citing Faria v. San Jacinto Unified Sch. Dist., 50 Cal.
25 App. 4th 1939, 1947 (4th Dist. 1996)).

26 Plaintiffs allege that Vericrest failed to notify him
27 that it was transferring servicing responsibilities to Fay and
28 that, "[a]s a result of [d]efendants' failure to abide by the

1 requirements of Civil Code § 2937," they were "subject to unfair
2 and unlawful business practices" (Compl. ¶¶ 38-39.) But
3 even if plaintiffs have sufficiently alleged that Vericrest and
4 Fay failed to comply with section 2937, they have not alleged any
5 facts to support their allegation that they suffered harm as a
6 result. Plaintiffs allege only that Fay requested an excessive
7 monthly payment because it miscalculated the escrow amount due,
8 that it rejected plaintiffs' purportedly inadequate payments, and
9 that plaintiffs "fell into default" because Vericrest and Fay
10 "mishandl[ed]" their loan and "fail[ed] to accurately account for
11 [plaintiffs'] loan terms." (Id. ¶ 23, 33.) By their own terms,
12 these allegations establish that plaintiffs' default resulted
13 from Fay's miscalculation of the amount due on the loan, not from
14 Vericrest's failure to inform plaintiffs that it was transferring
15 servicing responsibilities to Fay.

16 Plaintiffs also allege that after they contacted Fay
17 about their September 2013 billing statement, they were "shuffled
18 from one person to another" for several months because Fay did
19 not have plaintiffs' complete loan file. (Id. ¶¶ 21, 31.) To
20 the extent that plaintiffs allege any harm as a result, their
21 allegations establish that the harm occurred "due to the servicer
22 change," (id. ¶¶ 21, 31), not due to Vericrest's failure to
23 notify them of the servicer change. Accordingly, because
24 plaintiffs have not alleged any causal connection between the
25 harm they alleged and defendants' purported violations of section
26 2937, the court must grant defendants' motion to dismiss this
27 claim.

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1 C. California Civil Code Section 2924

2 Section 2924.17 of the California Civil Code requires
3 that any notice of default filed and recorded by a mortgage
4 servicer must be accurate, complete, and supported by competent
5 and reliable evidence. Cal. Civ. Code § 2924.17(a). The statute
6 further provides that a servicer must ensure that it has reviewed
7 competent and reliable evidence, including the borrower's loan
8 status and loan information, before filing and recording a notice
9 of default. Id. § 2924.17(b). Sections 2924.12 and 2924.19 of
10 the California Civil Code authorize a court to remedy a violation
11 of section 2924.17 by enjoining a foreclosure sale until the
12 violation is cured. Cal. Civ. Code. §§ 2924.12, 2924.19.

13 Section 2924.17 is part of the Homeowner's Bill of
14 Rights, which "took effect on January 1, 2013." Rockridge Trust
15 v. Wells Fargo, N.A., --- F. Supp. 2d ----, ----, Civ. No.
16 13:1457 JCS, 2013 WL 5428722, at *28 (N.D. Cal. Sep. 25, 2013).
17 "California courts comply with the legal principle that unless
18 there is an express retroactivity provision, a statute will not
19 be applied retroactively unless it is very clear from extrinsic
20 sources that the Legislature . . . must have intended a
21 retroactive application." Myers v. Philip Morris Cos., 28 Cal.
22 4th 828, 841 (2002). To the extent that plaintiffs' claim under
23 section 2924.17 is premised on the Notice of Default recorded in
24 2011, (see Vericrest RJN Ex. C), plaintiffs cannot state a claim
25 because section 2924.17 does not apply retroactively to Notices
26 of Default recorded before 2013. See, e.g., Rose v. J.P. Morgan
27 Chase, N.A., Civ. No. 2:12-225 WBS CMK, 2014 WL 546584, at *8
28 (E.D. Cal. Feb. 11, 2014); Emick v. JP Morgan Chase Bank, Civ.

1 No. 2:13-340 JAM AC, 2013 WL 3804039, at *3 (E.D. Cal. July 19,
2 2013); Rockridge Trust, 2013 WL 5428722, at *28.

3 While plaintiffs allege that they “fell into default”
4 in 2013, (Compl. § 50), they do not allege that any defendant
5 filed or recorded any Notice of Default against them in 2013, let
6 alone that any such notice failed to comply with section 2924.17.
7 In their Opposition, plaintiffs contend that defendants have
8 “continued [to] use a false declaration . . . as a basis for
9 moving forward on non-judicial foreclosure proceedings” in 2013.
10 (Pls.’ Opp’n at 5:28-6:2.) Even if the court could infer from
11 this statement that defendants filed and recorded one or more
12 defective notices of default in 2013, the court cannot consider
13 that statement on a motion to dismiss because it does not appear
14 in the Complaint itself. See Butler v. Los Angeles County, 617
15 F. Supp. 2d 994, 999 (C.D. Cal. 2008) (“On a motion to dismiss .
16 . . the Court must limit its review to the four corners of the
17 operative complaint, and may not consider facts presented in
18 briefs or extrinsic evidence.” (emphasis added)); William W.
19 Schwarzer, A. Wallace Tashima & James M. Wagstaffe, Federal Civil
20 Procedure Before Trial § 9:211 (2014) (same).

21 Accordingly, because plaintiffs do not allege that any
22 Notice of Default was filed against their property after the date
23 on which section 2924.17 took effect, the court must grant
24 defendants’ motion to dismiss plaintiffs’ claim under section
25 2924.17 and their claims for injunctive relief under sections
26 2924.12 and 2924.19.

27 D. Unfair Competition Law

28 The UCL prohibits unfair competition, which includes

1 "any unlawful, unfair, or fraudulent business act or practice."
2 Cal. Bus. & Profs. Code § 17200. A UCL claim may only be brought
3 "by a person who has suffered injury in fact and has lost money
4 or property as a result of the unfair competition." Cal. Bus. &
5 Profs. Code § 17204; Kwikset Corp. v. Superior Court, 51 Cal. 4th
6 310, 320-21 (2011).

7 Here, plaintiffs allege only that they were "forced
8 into default" as a result of defendants' allegedly unfair
9 business practices. (Compl. ¶ 50.) They do not allege that they
10 have lost their home, that they paid foreclosure-related fees, or
11 that they incurred any other economic injury as a result of
12 defendants' actions. In fact, notwithstanding any factual
13 statements made in their Opposition, plaintiffs do not even
14 allege that defendants have initiated foreclosure proceedings.


15 Absent allegations that plaintiffs have actually
16 suffered economic injury as a result of foreclosure proceedings,
17 the possibility that their purported "default" may result in the
18 foreclosure of their home is insufficient to establish that they
19 have lost money or property. See, e.g., Jensen v. Quality Loan
20 Serv. Corp., 702 F. Supp. 2d 1183, 1199 (E.D. Cal. 2010) (Wanger,
21 J.) (holding that plaintiff's allegation that "he 'will' lose his
22 personal residence if a non-judicial foreclosure occurs" was
23 insufficient to allege that plaintiff had lost money or
24 property); Jurewitz v. Bank of Am., N.A., 930 F. Supp. 2d 994,
25 999-1000 (S.D. Cal. 2013) (holding that plaintiff had not alleged
26 that he lost money or property, even though "a foreclosure sale
27 was scheduled," because he had not lost his home or suffered
28 other economic injury). Accordingly, because plaintiffs have not

1 alleged that they "lost money or property" as a result of
2 defendants' allegedly unfair business practices, see Cal. Bus. &
3 Profs. Code § 17204, the court must grant defendants' motion to
4 dismiss this claim.

5 IT IS THEREFORE ORDERED that defendants' motion to
6 dismiss be, and the same hereby is, GRANTED.

7 Plaintiffs have twenty days from the date this Order is
8 signed to file an amended complaint, if they can do so consistent
9 with this Order.

10 Dated: May 29, 2014

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12 WILLIAM B. SHUBB
13 UNITED STATES DISTRICT JUDGE
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