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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHARLES GABRIS and MARLENE
GABRIS,

Plaintiffs,

v.

AURORA LOAN SERVICES LLC;
AURORA BANK, FSB; CITIBANK,
N.A., as Trustee in Trust for
the Benefit of the Holders of
Structured Asset Securities
Corporation, Mortgage Pass-
Through Certificates, Series
2004-23XS; CAL-WESTERN
RECONVEYANCE CORP.; MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS, INC., and DOES 1
through 50, inclusive,

Defendants.

No. 2:14-cv-01759-JAM-KJN

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

Defendants Aurora Loan Services LLC ("Aurora Services");
Aurora Bank, FSB; Citibank, N.A. ("Citibank"); Cal Western
Reconveyance Corporation; and Mortgage Electronic Registration
Systems, Inc. ("MERS") (collectively "Defendants") move to
dismiss (Doc. #4) all seven causes of action in Plaintiffs
Charles and Marlene Gabris' (collectively "Plaintiffs") Complaint

1 (Doc. #1-1, Exh. 1).¹ The action arises out of a dispute over
2 the foreclosure and sale of a property previously belonging to
3 Plaintiffs and the loan modification negotiations preceding that
4 sale.

5
6 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

7 In September 2004, Plaintiffs obtained a loan in the amount
8 of \$226,000 ("the Loan"). Request for Judicial Notice, Exh. 1.
9 The Loan was secured by a deed of trust recorded against property
10 located at 11529 Mother Lode Circle, Rancho Cordova, California
11 95670 ("the Property"). The deed of trust indicates the Lender
12 was Vitek Real Estate Industries Group, Inc. d/b/a Vitek Mortgage
13 Group ("Vitek"), the Trustee was Chicago Title Company (CTC) and
14 MERS was the beneficiary as well as the nominee for the lender
15 and its successors and assigns.

16 Plaintiffs allege that in December 2009 they applied to
17 Aurora Services for a Home Affordable Modification Program
18 ("HAMP") loan modification through the Neighborhood Assistance
19 Corporation of America ("NACA"). Comp. ¶ 19. Plaintiffs allege
20 they sent in all required financial documentation, and Aurora
21 Services acknowledged receipt of those documents and requested
22 additional documents. By April 2010, Plaintiffs were
23 approximately two months behind in their loan payments.

24 In May 2010, Plaintiffs enlisted an individual named Lou
25 Dedier to negotiate with Aurora Services on their behalf. Comp

26
27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled
for September 17, 2014.

1 ¶ 23. Shortly thereafter, Aurora Services acknowledged receipt
2 of another package of financial documents regarding a HAMP
3 modification request, but again requested more information,
4 providing Plaintiffs thirty days to provide the aforementioned
5 information. However, Plaintiffs received a letter five days
6 later informing them their modification request was denied for
7 failing to provide the documents requested.

8 Plaintiffs allege in June 2010 Aurora Services verbally
9 agreed to extend Plaintiffs a trial payment plan thereby reducing
10 their monthly payments from \$1130 to \$912. Comp. ¶ 24. While
11 making these modified trial payments, Plaintiffs allege they
12 continued to seek a permanent loan modification, but the attempts
13 were repeatedly denied based on Aurora Services' false
14 representations that Plaintiffs failed to provide necessary
15 documents. Comp. ¶ 25. Plaintiffs allege they always provided
16 Aurora Services the documents requested.

17 In October 2010, Aurora Services increased the monthly
18 payment from \$1130 to \$1715.43, which was indicated on the
19 monthly statements sent to Plaintiffs. Comp. ¶ 27. However,
20 Plaintiffs continued to make the lower payments under the belief
21 they were still performing under the trial payment plan. When
22 they attempted a "normal unmodified payment" of \$1130 in June
23 2011, the payment was returned to them. Comp. ¶ 32. Plaintiffs
24 allege the loan was referred to foreclosure at this time.

25 In February 2011 and again in March 2011, Aurora Services
26 denied Plaintiffs a HAMP modification on the grounds that a
27 modification was not justified given the net present value
28 ("NPV") calculations. Comp. ¶ 29.

1 After additional failed attempts to secure a loan
2 modification, Aurora Services recorded a notice of default in
3 June 2011 and notified Plaintiffs of a trustee's sale in July
4 2011. Comp. ¶¶ 35-36. After a failed short sale attempt and
5 another failed application for a loan modification, the property
6 was sold at a foreclosure sale in December 2011. Comp. ¶¶ 37-38,
7 40-42.

8 Plaintiffs plead seven causes of action in their Complaint:
9 (1) Intentional Misrepresentation; (2) Negligent
10 Misrepresentation; (3) Wrongful Foreclosure; (4) Conversion;
11 (5) Violation of California Business and Professions Code § 17200
12 ("§17200"); (6) Equitable Accounting; and (7) Unjust Enrichment.
13 Defendants removed the matter to this Court and filed the present
14 motion.

15 II. OPINION

16 A. Request for Judicial Notice

17 Defendants request the Court take judicial notice (Doc. #5)
18 of nine exhibits in support of their motion to dismiss.

19 Generally, the Court may not consider material beyond the
20 pleadings in ruling on a motion to dismiss for failure to state a
21 claim. The exceptions are material attached to, or relied on by,
22 the complaint so long as authenticity is not disputed, or matters
23 of public record, provided that they are not subject to
24 reasonable dispute. E.g., Sherman v. Stryker Corp., 2009 WL
25 2241664, at *2 (C.D. Cal. 2009) (citing Lee v. City of Los
26 Angeles, 250 F.3d 668, 688 (9th Cir. 2001) and Fed. R. Evid.
27 201).
28

1 The Court takes judicial notice of all nine exhibits as each
2 is a public record not subject to reasonable dispute and is
3 relied on by the Complaint. Each document is also relevant to
4 either the ownership of the property or the status of the Loan
5 underlying Plaintiffs' claims. Therefore, Defendants' request
6 for judicial notice is GRANTED in its entirety.

7 B. Discussion

8 1. Initial Arguments

9 Defendants initially contend Plaintiffs cannot seek return
10 of the property for failure to tender and based on the doctrine
11 of laches. MTD at pp. 6-7. In their response, Plaintiffs have
12 clarified the Complaint does not seek a return of the property,
13 and so, the Court disregards these arguments.

14 2. Negligent and Intentional Misrepresentations

15 Defendants contend Plaintiffs' claims for negligent and
16 intentional misrepresentation fail on the merits. MTD at pp. 9-
17 10.

18 The essential elements of a claim for intentional
19 misrepresentation are (1) a misrepresentation; (2) knowledge of
20 falsity; (3) intent to induce reliance; (4) actual and
21 justifiable reliance; and (5) resulting damage. Lazar v.
22 Superior Court, 12 Cal. 4th 631, 638 (1996). "The essential
23 elements of a count for negligent misrepresentation are the same
24 except that it does not require knowledge of falsity, but instead
25 requires a misrepresentation of fact by a person who has no
26 reasonable grounds for believing it to be true." Chapman v.
27 Skype Inc., 220 Cal.App.4th 217, 230-31 (2013). A plaintiff's
28 claim for fraud must also satisfy the heightened requirements of

1 Federal Rule of Civil Procedure 9(b):

2 Rule 9(b) demands that, when averments of fraud are
3 made, the circumstances constituting the alleged fraud
4 "be 'specific enough to give defendants notice of the
5 particular misconduct . . . so that they can defend
6 against the charge and not just deny that they have
7 done anything wrong.'" Bly-Magee [v. California], 236
8 F.3d [1014,] 1019 [(9th Cir. 2001)] (quoting Neubronner
9 v. Milken, 6 F.3d 666, 672 (9th Cir. 1993)). Averments
10 of fraud must be accompanied by "the who, what, when,
11 where, and how" of the misconduct charged. Cooper v.
12 Pickett, 137 F.3d 616, 627 (9th Cir. 1997). "[A]
13 plaintiff must set forth more than the neutral facts
14 necessary to identify the transaction. The plaintiff
15 must set forth what is false or misleading about a
16 statement, and why it is false." Decker v. GlenFed,
17 Inc. (In re GlenFed, Inc. Sec. Litig.), 42 F.3d 1541,
18 1548 (9th Cir. 1994).

19 Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir.
20 2003).

21 Plaintiffs base these two claims on allegations that Aurora
22 Services continually denied them a loan modification on false
23 grounds, had no intention of ever granting a loan modification,
24 and were involved in a "conspiracy to deceive and victimize
25 Plaintiffs" with the other Defendants. Comp. ¶¶ 63-66, 70-75.
26 Plaintiffs allege they would have cured their default with the
27 help of a friend if they knew they were not going to get a loan
28 modification.

29 First, Plaintiffs' allegations regarding the involvement of
30 all Defendants other than Aurora Services fail to meet the
31 heightened pleading standard for fraud. The only allegations
32 regarding the other Defendants is that they conspired with Aurora
33 Services in a scheme to defraud Plaintiffs. These conclusory
34 allegations are insufficient. As for the negligent

1 misrepresentation claim, Plaintiffs have failed to properly plead
2 facts which demonstrate how exactly the other Defendants are to
3 be held responsible for the negligent representations allegedly
4 made by Aurora Services. The Court grants the motion to dismiss
5 the claims for intentional and negligent misrepresentations as to
6 all Defendants other than Aurora Services on this ground.

7 As for Aurora Services, notwithstanding other possible
8 defects in these claims, the Court finds Plaintiffs have failed
9 to adequately allege justifiable reliance or damages as a result
10 against this Defendant. There are no allegations that any
11 Defendant ever promised Plaintiffs that they would receive a loan
12 modification. Plaintiffs' Complaint makes clear that they had
13 the ability to cure their arrearage but decided to continue to
14 apply for loan modifications despite being repeatedly rejected by
15 Aurora Services.

16 Plaintiffs were already contractually obligated to make loan
17 payments and were aware of the consequences of failing to do so,
18 default and foreclosure. Other courts facing similar claims have
19 granted motions to dismiss on these grounds. See Newgent v.
20 Wells Fargo Bank, N.A., 09CV1525 WQH, 2010 WL 761236, at *6-7
21 (S.D. Cal. 2010) (finding that because the "Plaintiff was already
22 legally obligated to make payments on her mortgage . . . the
23 payment in reliance on the promise that Wells Fargo would delay
24 the trustee's sale was not detrimental).

25 In Morgan v. Aurora Loan Servs., LLC, CV 12-4350-CAS MRWX,
26 2013 WL 3448552, at *5-6 (C.D. Cal. 2013), the plaintiff brought
27 a claim for intentional misrepresentation on the basis that the
28 defendants represented to her that she would be reviewed for a

1 loan modification but never intended to do so. The plaintiff
2 alleged the defendants' true intention was to take more of her
3 money before foreclosing on her property. Id. The plaintiff
4 alleged that she relied on those statements by continuing to make
5 payments under a payment plan agreement while seeking a
6 modification. Id. The court found that, in addition to other
7 deficiencies, the plaintiff was "unable to allege that she
8 justifiably relied on defendants['] statements to her detriment,
9 as she was already contractually obligated to make loan
10 payments." Id. The court reasoned that "[e]ven if defendants
11 somehow fraudulently induced plaintiff to make additional
12 payments with the promise of a potential permanent loan
13 modification, these payments were made pursuant to preexisting
14 contractual duties." Id.

15 Similarly, in Zierolf v. Wachovia Mortgage, C-12-3461 EMC,
16 2012 WL 6161352, at *5-7 (N.D. Cal. 2012), appeal dismissed (July
17 31, 2013), the court found that the plaintiff did not demonstrate
18 that "any damages resulted from his apparent reliance on Wells
19 Fargo's alleged promises to process his loan modification"
20 because he "had an existing obligation to make his mortgage
21 payments or risk default and foreclosure." The court reasoned
22 that "[t]he risk that one's home loan could go into default and
23 one's home be sold at a foreclosure auction for nonpayment is a
24 remedy provided in the loan agreement itself, not a consequence
25 of allegedly relying on promises to process a loan modification."
26 Id.

27 The Court notes that Plaintiffs do allege that there was
28 some "verbal agreement" to enter into a trial payment plan.

1 Comp. ¶ 24. However, the claims brought in the Complaint sound
2 in tort, and Plaintiffs have not alleged that Defendants were
3 contractually obligated to provide a loan modification as a
4 result of a verbal agreement. See generally, Sholiay v. Fed.
5 Nat. Mortgage Ass'n, CIV 2:13-00958, 2013 WL 5569988, at *3-6
6 (E.D. Cal. 2013); Corvello v. Wells Fargo Bank, NA, 728 F.3d 878,
7 884 (9th Cir. 2013), as amended on reh'g in part (Sept. 23,
8 2013); see also Hoffman v. Bank of Am., N.A., C 10-2171 SI, 2010
9 WL 2635773, at *5 (N.D. Cal. 2010) (concluding that "lenders are
10 not required to make loan modifications for borrowers that
11 qualify under HAMP nor does the servicer's agreement confer an
12 enforceable right on the borrower").

13 For all the reasons discussed above, the Court grants
14 Defendants' motion to dismiss Plaintiffs' first and second causes
15 of action for intentional and negligent misrepresentations. While
16 leave to amend must be freely given, the Court is not required to
17 allow futile amendments. See DeSoto v. Yellow Freight Sys., Inc.,
18 957 F.2d 655, 658 (9th Cir. 1992); Dick v. Am. Home Mortgage
19 Servicing, Inc., CIV. 2:13-00201 WBS, 2013 WL 5299180, at *6
20 (E.D. Cal. 2013). Because it is not clear to the Court that
21 amendment of these claims would be futile, leave to amend is
22 granted, but "plaintiffs are admonished that failure to cure the
23 defects identified in this Order will be grounds for dismissal
24 without further leave to amend." Dick, at *6.

25 Having granted the motion on these grounds, the Court need
26 not, and does not, address the statute of limitations arguments
27 proffered by Defendants.

28

1 3. Wrongful Foreclosure

2 Defendants contend Plaintiffs have failed to plead a valid
3 cause of action for wrongful foreclosure in the third cause of
4 action. MTD at pp. 11-13. The Complaint sets forth in detail
5 the defects that Plaintiffs allege were involved in the
6 securitization of the Loan and which serve as the basis for this
7 claim. Comp. ¶¶ 43-49, 79-86. Defendants argue Plaintiffs have
8 no standing to challenge the securitization or assignment of the
9 Loan, and even if standing were established, Plaintiffs cannot
10 prove any prejudice occurred as a result.

11 “Many courts have aborted homeowners' lawsuits following
12 foreclosure, holding that the homeowners did not have standing to
13 challenge a vast array of irregularities in the transfer of
14 rights and obligations under assignments and substitutions.”
15 Mendoza v. JPMorgan Chase Bank, N.A., 228 Cal.App.4th 1020, 1030-
16 31 (2014), review filed (Sept. 23, 2014); see also Jenkins v. JP
17 Morgan Chase Bank, N.A., 216 Cal.App.4th 497, 513 (2013).
18 Similarly, the position taken by many District Courts in the
19 Ninth Circuit is that a homeowner plaintiff lacks standing to
20 challenge the securitization of his or her loan. Mendoza, at
21 1031; Aniel v. GMAC Mortgage, LLC, C 12-04201 SBA, 2012 WL
22 5389706, at *4 (N.D. Cal. 2012).

23 The Court finds that Plaintiffs have not properly alleged a
24 basis for standing to challenge the securitization of the Loan in
25 their wrongful foreclosure claim. However, even if standing were
26 found, Plaintiffs fail to properly allege prejudice as a result.

27 “[A] plaintiff in a suit for wrongful foreclosure has
28 generally been required to demonstrate the alleged imperfection

1 in the foreclosure process was prejudicial to the plaintiff's
2 interests." Fontenot v. Wells Fargo Bank, N.A., 198 Cal.App.4th
3 256, 272 (2011). "California courts find a lack of prejudice
4 when a borrower is in default and cannot show that the allegedly
5 improper assignment interfered with the borrower's ability to pay
6 or that the original lender would not have foreclosed under the
7 circumstances." Dick, 2013 WL 5299180, at *2-3.

8 The issues here are analogous to those in Siliga v. Mortgage
9 Elec. Registration Sys., Inc., 219 Cal.App.4th 75, 85 (2013).

10 The Siliga court found that despite the issue regarding standing,
11 the plaintiffs failed "to allege any facts showing that they
12 suffered prejudice as a result of any lack of authority of the
13 parties participating in the foreclosure process." Id. The
14 court reasoned:

15 The [plaintiffs] do not dispute that they are in
16 default under the note. The assignment of the deed of
17 trust and the note did not change the plaintiffs'
18 obligations under the note, and there is no reason to
19 believe that . . . the original lender would have
20 refrained from foreclosure in these circumstances.
21 Absent any prejudice, the [plaintiffs] have no standing
22 to complain about any alleged lack of authority or
23 defective assignment.

24 Id.

25 The Court finds Plaintiffs have failed to properly allege
26 any prejudice as a result of the securitization or foreclosure
27 process, and so, the Court GRANTS Defendants' motion to dismiss
28 the third cause of action for wrongful foreclosure. The motion
is granted without leave to amend, as Plaintiffs cannot properly
make out a wrongful foreclosure claim based on an improper
securitization under the circumstances alleged.

1 4. Conversion and Unjust Enrichment

2 The fourth and seventh causes of action for conversion and
3 unjust enrichment rely on allegations of a faulty securitization
4 and misrepresentations regarding modification of the Loan that
5 have been discussed and rejected above.

6 The alleged securitization deficiencies cannot serve as the
7 basis for the conversion or unjust enrichment claims because
8 Plaintiffs were under an obligation to make the payments
9 underlying the claims as already discussed. Similarly, the
10 alleged misrepresentations did not result in an unjust enrichment
11 of Defendants. Again, Plaintiffs were under an obligation to
12 make payments on the Loan provided and serviced by Defendants.
13 The Court finds these claims are not viable, and so GRANTS
14 Defendants' motion to dismiss the fourth and seventh causes of
15 action. The dismissal of these claims is with leave to amend
16 since it is not clear that further amendment would be futile.
17 See generally, Reade v. CitiMortgage, Inc., 13CV404 L WVG, 2013
18 WL 5964611, at *4 (S.D. Cal. 2013) (finding a borrower's
19 obligations are not excused because of an improper
20 securitization); see also Marty v. Wells Fargo Bank, CIV S-10-
21 0555 GEB, 2011 WL 1103405, at *7 (E.D. Cal. 2011).

22 5. Unfair Competition

23 Plaintiffs' fifth cause of action alleges a violation of
24 §17200. Because the Court has found Plaintiffs have not
25 adequately alleged damages or injury as a result of Defendants'
26 conduct, the claim must fail. Cal. Bus. & Prof. Code § 17204;
27 Kwikset Corporation v. Superior Court of Orange County, 51
28 Cal.4th 310, 320-21 (2011) (finding that private standing is

1 limited to any person who has suffered injury in fact and has
2 lost money or property as a result of alleged unfair or unlawful
3 conduct). Defendants' motion to dismiss the fifth cause of
4 action is GRANTED with leave to amend.

5 6. Equitable Accounting

6 Defendants contend Plaintiffs have failed to state a valid
7 claim for equitable accounting. MTD at p. 15-16. Plaintiffs
8 argue that because Defendants unjustly enriched themselves
9 through a modification process tainted with fraud it is owed an
10 accounting. Opp. at p. 19.

11 "An accounting cause of action is equitable and may be
12 sought where the accounts are so complicated that an ordinary
13 legal action demanding a fixed sum is impracticable." Herrejon
14 v. Ocwen Loan Servicing, LLC, 980 F. Supp. 2d 1186, 1207 (E.D.
15 Cal. 2013). "A right to an accounting is derivative; it must be
16 based on other claims." Janis v. California State Lottery Com.,
17 68 Cal.App.4th 824, 833 (1998).

18 Plaintiffs base their cause of action for an equitable
19 accounting on Defendants' "indebtedness" arising from the
20 payments made by Plaintiffs during the loan modification process.
21 The court in Herrejon dismissed a similar claim finding:

22 The complaint lacks facts to support an accounting,
23 especially given the dismissal of the complaint's other
24 claims from which to derive an accounting. There are
25 no facts to support complicated accounts, and
26 presumably plaintiffs have the ability to ascertain
what they allegedly paid to defendants. The complaint
fails to invoke equity for an accounting, and the
accounting claim is subject to dismissal.

27 Herrejon, 980 F. Supp. 2d at 1208; see also Janis, 68 Cal.App.4th
28 at 833.

1 Applying Herrejon to the instant case, the Court GRANTS
2 Defendants' motion to dismiss the sixth cause of action for an
3 equitable accounting. As the Court is not convinced that
4 amendment would be futile given that leave to amend other claims
5 has been granted, the Court grants leave to amend this cause of
6 action as well.

7 7. Defendants Aurora Bank FSB and Citibank

8 Defendants contend the complaint should be dismissed against
9 Defendants Aurora Commercial Corp. (alleged to be the successor
10 entity of Defendant Aurora Bank FSB) and Citibank as there are no
11 direct allegations of their involvement in the conduct underlying
12 Plaintiffs' claims. MTD at pp. 5-6. As the Court has already
13 dismissed each of the causes of action in the Complaint as
14 against all Defendants, the Court need not address these
15 arguments specifically.

16
17 III. ORDER

18 For the reasons set forth above, the Court GRANTS
19 Defendants' motion to dismiss the third cause of action for
20 wrongful foreclosure WITHOUT LEAVE TO AMEND, and GRANTS the
21 motion as to the other six counts WITH LEAVE TO AMEND. If
22 Plaintiffs wish to submit an amended complaint, it must be filed
23 within twenty (20) days from the date of this Order. Defendants'
24 responsive pleading is due within twenty (20) days thereafter.

25 IT IS SO ORDERED.

26 Dated: October 29, 2014

27
28 
JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE