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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**

Plaintiffs Charles and Marlene Gabris ("Plaintiffs") bring claims against 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") arising from the residential mortgage loan modification

1 transactions between the parties. Plaintiffs' original complaint
2 (Doc. #1-1, Exh. 1) was dismissed in its entirety by this Court
3 (Doc. #10) on Defendants' previous motion to dismiss (Doc. #4),
4 with leave to amend granted on some claims. Plaintiffs then
5 filed the first amended complaint ("FAC") (Doc. #11), and
6 Defendants have again moved to dismiss (Doc. #14) Plaintiffs'
7 claims. A hearing was held in which both parties expanded upon
8 the arguments in their briefs; thereafter, the motion was
9 submitted. After considering the written and oral arguments of
10 both parties, the Court hereby GRANTS the motion to dismiss in
11 its entirety for the reasons that follow.

12
13 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

14 The FAC states six causes of action against Defendants:
15 (1) Intentional Misrepresentation; (2) Negligent
16 Misrepresentation; (3) Conversion; (4) Violation of California
17 Business and Professions Code § 17200 ("UCL"); (5) Equitable
18 Accounting; and (6) Unjust Enrichment.

19 Plaintiffs entered into a loan with Aurora Services in 2004.
20 In 2009, Plaintiffs applied for a loan modification. Over the
21 following years, Plaintiffs continued to go back and forth with
22 Aurora Services regarding the modification. Plaintiffs allege
23 that Aurora Services never intended to modify their loan during
24 this period, but rather was "inducing" them into an "incurable
25 default."

26 Meanwhile, in 2010, Aurora Services agreed to enter into a
27 trial payment plan ("TPP") with Plaintiffs, reducing their
28 monthly payment. Plaintiffs paid regularly on the TPP initially.

1 However, Aurora Services eventually had to raise the monthly
2 payment amount in order to cover escrow costs. Although Aurora
3 Services sent monthly statements indicating the new payment
4 amount, Plaintiffs continued to pay the older, lower amount.
5 Eventually, Aurora Services referred the loan for foreclosure.

6 Plaintiffs were continually denied a loan modification over
7 this period for what they allege were false grounds. They allege
8 that had "Aurora [Services] told Plaintiffs that they would never
9 qualify for a loan modification, Plaintiffs had alternative means
10 to pay back their arrears and keep the loan current, including
11 borrowing money from a family friend." Plaintiffs do not allege
12 they attempted to cure the arrearages at any point. After
13 receiving the notice of default, they unsuccessfully attempted a
14 short sale of the property securing the loan. Defendants then
15 sold the property at a foreclosure sale to Aurora Services and
16 eventually Aurora Services sold it to another party.

17 18 II. OPINION

19 A. Request for Judicial Notice

20 Defendants request the Court take judicial notice (Doc. #15)
21 of nine exhibits in support of their motion to dismiss.

22 Generally, the Court may not consider material beyond the
23 pleadings in ruling on a motion to dismiss for failure to state a
24 claim. The exceptions are material attached to, or relied on by,
25 the complaint so long as authenticity is not disputed, or matters
26 of public record, provided that they are not subject to
27 reasonable dispute. E.g., Sherman v. Stryker Corp., 2009 WL
28 2241664, at *2 (C.D. Cal. 2009) (citing Lee v. City of Los

1 Angeles, 250 F.3d 668, 688 (9th Cir. 2001) and Fed. R. Evid.
2 201).

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

9 B. Intentional & Negligent Misrepresentation Claims

10 Defendants contend Plaintiffs' claims for intentional and
11 negligent misrepresentation should be dismissed for failure to
12 state a claim.

13 The essential elements of a claim for intentional
14 misrepresentation are (1) a misrepresentation; (2) knowledge of
15 falsity; (3) intent to induce reliance; (4) actual and
16 justifiable reliance; and (5) resulting damage. Lazar v.
17 Superior Court, 12 Cal.4th 631, 638 (1996). "The essential
18 elements of a count for negligent misrepresentation are the same
19 except that it does not require knowledge of falsity, but instead
20 requires a misrepresentation of fact by a person who has no
21 reasonable grounds for believing it to be true." Chapman v.
22 Skype Inc., 220 Cal.App.4th 217, 230-31 (2013). A plaintiff's
23 claim for fraud must also satisfy the heightened requirements of
24 Federal Rule of Civil Procedure 9(b):

25 Rule 9(b) demands that, when averments of fraud are
26 made, the circumstances constituting the alleged fraud
27 "be 'specific enough to give defendants notice of the
28 particular misconduct . . . so that they can defend
against the charge and not just deny that they have
done anything wrong.'" Bly-Magee [v. California], 236
F.3d [1014,] 1019 [(9th Cir.2001)] (quoting Neubronner

1 v. Milken, 6 F.3d 666, 672 (9th Cir. 1993)). Averments
2 of fraud must be accompanied by "the who, what, when,
3 where, and how" of the misconduct charged. Cooper v.
4 Pickett, 137 F.3d 616, 627 (9th Cir. 1997). "[A]
5 plaintiff must set forth more than the neutral facts
6 necessary to identify the transaction. The plaintiff
7 must set forth what is false or misleading about a
8 statement, and why it is false." Decker v. GlenFed,
9 Inc. (In re GlenFed, Inc. Sec. Litig.), 42 F.3d 1541,
10 1548 (9th Cir.1994).

11 Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir.
12 2003).

13 Plaintiffs claim they have sufficiently pleaded intentional
14 and negligent misrepresentation in the FAC. They point to the
15 misrepresentations listed in the FAC that Aurora Services
16 allegedly made to them. They argue Defendants attempted to keep
17 them in a "perpetual modification review." They assert that had
18 they known Defendants really had no intention to grant a loan
19 modification they would have cured any arrearages by borrowing
20 from a friend. Plaintiffs argue that although Defendants never
21 promised a loan modification or absolved them of their
22 obligations under the loan itself, Defendants' misrepresentations
23 during the modification negotiations "induc[ed] Plaintiffs into a
24 practically incurable default."

25 As the Court discussed in its earlier order, Plaintiffs had
26 an obligation under the terms of the loan to make payments and
27 were clearly put on notice of the consequences for failing to do
28 so. Plaintiffs have modified some of the language in these
claims for relief, but the preexisting obligation to stay current
on their loan remains, despite their misconceptions of what might
have resulted from the loan modification process. The Court
concludes Plaintiffs have again failed to connect Aurora

1 Services' alleged misrepresentations regarding a possible
2 modification, which was never promised to them, to their failure
3 to cure their arrearages and their eventual default on the loan.

4 Plaintiffs cite to a series of cases they argue support
5 their contentions. However, as pointed out by Defendants in
6 their reply (Doc. #17), those cases involve materially different
7 factual circumstances and claims. Plaintiffs first point to
8 Chavez v. IndyMac Mortgage Services, 219 Cal.App.4th 1052 (2013)
9 for support. In Chavez, the lender mailed a homeowner a loan
10 modification agreement that the homeowner signed, returned and
11 performed under. Id. at 1055. The lender, however, never mailed
12 the homeowner a signed copy of the loan modification agreement
13 and then attempted to rely on the statute of frauds defense to
14 renege on the deal. Id. The Chavez court found the homeowner
15 alleged viable claims for breach of contract and wrongful
16 foreclosure. Id. at 1060-64.

17 These facts are entirely distinct from those alleged by
18 Plaintiffs. Defendants never entered into a contract with
19 Plaintiffs that they did not perform on, or make promises they
20 did not keep. The two agreements involved, the original loan
21 agreement and the TPP, were both breached by Plaintiffs when they
22 failed to properly make payments under them. The Court finds
23 Plaintiffs' reliance on Chavez unpersuasive.

24 Plaintiffs next rely on Fleet v. Bank of America N.A., 229
25 Cal.App.4th 1403 (2014). In Fleet, Bank of America agreed to
26 enter into a TPP with the plaintiffs. Id. at 1406. Bank of
27 America specifically told the plaintiffs that if they made three
28 payments under the TPP their mortgage would be "permanently

1 modified." Id. at 1405, 1409. Bank of America even went so far
2 as to tell them that they would get monthly statements to pay a
3 higher amount, but to ignore those and pay the previously agreed
4 to amounts. Id. at 1412. After the plaintiffs made the first
5 two payments as agreed, Bank of America reneged on its promises
6 and foreclosed on the plaintiffs' property. Id. at 1406-07.
7 During this time, several Bank of America representatives spoke
8 directly with the plaintiffs, assuring them the TPP was still in
9 full effect and telling them to ignore demands for payment. Id.
10 at 1412.

11 The Fleet court found the agreement between the parties
12 "guaranteed a modification of the [plaintiffs'] mortgage" upon
13 the plaintiffs' satisfaction of certain conditions, but Bank of
14 America foreclosed on the loan despite the plaintiffs' adequate
15 payment on the TPP. Id. at 1410. The court found this
16 sufficiently supported a claim for breach of contract, or in the
17 alternative a claim for promissory estoppel. Id. at 1409-10,
18 1412-13. It also found Bank of America improperly broke its
19 "promise" of a loan modification, supporting a claim for
20 promissory fraud. Id. at 1411-12. Further, the direct
21 misrepresentations of the representatives supported a claim for
22 fraudulent misrepresentation, as the representatives explicitly
23 told the plaintiffs to ignore payment demands and assured them
24 the TPP was still in effect and would shield them from
25 foreclosure. Id.

26 Again, these facts can be easily distinguished from those
27 alleged by Plaintiffs here. Defendants never made any promises
28 to Plaintiffs that they would receive a loan modification or that

1 they should ignore the payment demands. Plaintiffs do not allege
2 they were assured their payments under the TPP were sufficient.
3 Plaintiffs' reliance on Fleet is misplaced.

4 Plaintiffs rely on Bushell v. JPMorgan Chase Bank, N.A., 220
5 Cal.App.4th 915 (2013) for additional support. In Bushell, Chase
6 Bank entered into a TPP with the plaintiffs. Id. at 919-21. It
7 sent a letter to them specifically assuring them that if they
8 make all three TPP payments on time they will receive a permanent
9 modification of the loan terms. Id. Despite making a series of
10 payments in full under the TPP, the plaintiffs were told they
11 were being denied a modification. Id. Then, when the plaintiffs
12 called for an explanation, they were told by Chase Bank that they
13 should stop making payments altogether while it was "crunching
14 the numbers." Id. Chase Bank then started the foreclosure
15 process. Id. The Bushell court found the plaintiffs' claims
16 were viable because they had performed all obligations under the
17 TPP and were due the modification. Id. at 926-31.

18 Here, Plaintiffs point out that the FAC specifically alleges
19 the TPP constituted a false promise and as in Bushell, their
20 claims should be found viable. However, this legal conclusion is
21 without support. Plaintiffs concede in the FAC that, unlike the
22 Bushell plaintiffs, they failed to make full payments under the
23 TPP as clearly requested by Defendants. Bushell does not,
24 therefore, rescue Plaintiffs' claims in this case.

25 Despite Plaintiffs' counsel's vigorous oral argument, the
26 factual allegations involved in the case at hand do not support
27 his theories. Unlike the cases cited in Plaintiffs' brief,
28 Defendants did not make any promises regarding the loan

1 modification process, the TPP or the underlying mortgage
2 agreement that they did not fulfill. In addition, many of the
3 cases cited by Plaintiffs involved plaintiffs that entered into
4 TPPs and successfully performed under their terms. Here,
5 Plaintiffs admit they failed to make the full payments required
6 under the TPP despite receiving communications from Aurora
7 Services of the amounts due. Defendants' motion to dismiss the
8 claims for intentional and negligent misrepresentation is,
9 therefore GRANTED. Because these grounds are dispositive of the
10 motion, the Court does not address Defendants' remaining
11 arguments.

12 C. Conversion

13 Defendants next move to dismiss Plaintiffs' conversion
14 claim. As the Court previously discussed in its Order on
15 Defendants' first motion to dismiss, Plaintiffs are attempting to
16 challenge the securitization of the loan. However, as the Court
17 previously stated: "The alleged securitization deficiencies
18 cannot serve as the basis for the conversion [claim]
19 Again, Plaintiffs were under an obligation to make payments on
20 the Loan provided and serviced by Defendants."

21 As the minimal alterations in the FAC fail to cure the
22 deficiencies previously discussed, the Court again finds this
23 claim is not viable, and GRANTS Defendants' motion to dismiss the
24 fourth cause of action for conversion. See generally, Reade v.
25 CitiMortgage, Inc., 13CV404 L WVG, 2013 WL 5964611, at *4 (S.D.
26 Cal. 2013) (finding a borrower's obligations are not excused
27 because of an improper securitization); see also Marty v. Wells
28 Fargo Bank, CIV S-100555 GEB, 2011 WL 1103405, at *7 (E.D. Cal.

1 2011).

2 D. Equitable Accounting and Unjust Enrichment

3 Plaintiffs have reasserted causes of action for equitable
4 accounting and unjust enrichment. The cause of action for unjust
5 enrichment in the FAC adds only one paragraph (FAC ¶ 108) to the
6 original statement of the claim. In it, Plaintiffs allege
7 Defendants had a scheme to "induce Plaintiffs to fall further
8 into default by inducing Plaintiffs to believe they were making
9 full payments under the TPP." However, as discussed above and as
10 is clearly set forth in the FAC, Defendants sent them notices of
11 their required payments, and Plaintiffs admittedly failed to pay
12 the full amounts. The Court finds the additional allegations in
13 the claim unpersuasive, unsupported by the facts, and ineffective
14 in saving the cause of action. The Court GRANTS Defendants'
15 motion to dismiss this cause of action for unjust enrichment.

16 The FAC fails to make any changes to the cause of action for
17 equitable accounting. The motion will therefore be granted as to
18 this claim, especially given there are no underlying claims left
19 to support what is more aptly described as a remedy rather than a
20 stand-alone cause of action.

21 E. UCL Claim

22 Defendants next move to dismiss Plaintiffs' fifth cause of
23 action alleging a violation of California's UCL, Business and
24 Professions Code § 17200. Because Plaintiffs have not adequately
25 alleged damages or injury as a result of Defendants' conduct, the
26 claim must fail. Cal. Bus. & Prof. Code § 17204; Kwikset
27 Corporation v. Superior Court of Orange County, 51 Cal.4th 310,
28 320-21 (2011) (finding private standing is limited to any person

1 who has suffered injury in fact and has lost money or property as
2 a result of alleged unfair or unlawful conduct). The Court
3 GRANTS Defendants' motion to dismiss the fifth cause of action.

4 F. Leave to Amend

5 The Court finds Plaintiffs have failed to show they can
6 properly allege any of these claims and any further attempt would
7 be futile. Accordingly, Defendants' motion to dismiss the FAC is
8 granted in its entirety WITHOUT LEAVE TO AMEND.

9

10 III. ORDER

11 For the reasons set forth above, the Court GRANTS the motion
12 to dismiss WITHOUT LEAVE TO AMEND.

13 IT IS SO ORDERED.

14 Dated: March 6, 2015

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JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

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