UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN BROOKS, et al.,

Plaintiffs,

v.

FCI LENDER SERVICES, INC., et al.,

Defendants.

No. 2:16-cv-2598-KJM-KJN PS

ORDER

Presently before the court is defendant FCI Lender Services, Inc.'s ("FCI") motion to dismiss the claims asserted against it in plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), or, in the alternative, for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e). (ECF No. 8.) Also before the court is FCI's motion to strike certain portions of the complaint pursuant to Federal Rule of Civil Procedure 12(f). (ECF No. 9.) Plaintiffs filed an opposition to the motions, and FCI filed a reply. (ECF Nos. 15, 25, 26.) The court heard this matter on its January 19, 2017 law and motion calendar. Plaintiff John Brooks appeared on his own behalf, but plaintiff Laura Brooks failed to make an appearance.[1] Attorney

[1] While the court did not discuss this with John Brooks during the hearing on this matter, plaintiffs are cautioned that because they are both currently proceeding pro se in this matter, they must both appear at any hearings scheduled in this action on their own behalf. As he is not an attorney, John Brooks may not appear on Laura Brooks' behalf. Similarly, Laura Brooks may not make an appearance on behalf of John Brooks. The fact that plaintiffs may be married or have

Fred Hickman appeared telephonically on behalf of FCI.[2] The undersigned has fully considered the parties' briefs, the parties' oral arguments, and appropriate portions of the record. For the reasons that follow, the court grants FCI's motion to dismiss, with leave to amend as to some claims, and without leave to amend as to others, as specified below. Furthermore, FCI's motion to strike is denied.

I. Relevant Allegations of the Complaint

Plaintiffs allege in their complaint that they are the owners of real property located at 1682 Chilton Dr. Roseville, CA 95747 (the "Property"). (ECF No. 1 at 10.) Plaintiffs allege that they took out a "second Deed of Trust" ("Second DOT") on the Property on an unspecified date, which was originally held by defendant Homecoming Financial, LLC, and was subsequently transferred numerous times. (Id.) "At some point in or around 2013, Defendant Ocwen Loan Servicing serviced the loan on behalf of whichever entity held the [Second DOT] at that time." (Id.) Plaintiffs allege further that "[o]n February 20, 2008, Plaintiffs filed for Chapter 7 Bankruptcy in the Eastern District of California," which discharged the loan held by Homecoming Financial, LLC. (Id. at 11.)[3]

Plaintiffs also allege that "[i]n or around April 2015, the [Second DOT] was held by Defendant Bucks [Financial, LLC]" ("Bucks"). (Id. at 10.) They allege further that "[o]n or about April 13, 2015, Plaintiffs and Bucks reached a settlement/accord and satisfaction, in which Plaintiffs agreed to pay and Bucks agreed to accept the sum of Five Thousand Dollars and no cents ($5,000.00) as full and final settlement of the Second DOT." (Id.) Plaintiffs allege that "[t]his agreement was confirmed in writing."[4] (Id.) Plaintiffs allege further that "[w]ithin days of

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some other familial connection is not sufficient to permit either plaintiff to represent the other plaintiff.

[2] Counsel for defendants Ocwen Loan Servicing and SN Servicing Corporation also appeared telephonically at the hearing for purposes of monitoring the proceedings.

[3] However, at the hearing, plaintiffs conceded that the loan was not discharged in the bankruptcy.

[4] Plaintiffs also allege that a "true and correct copy" of the written contract is attached to the complaint, but no such document is attached to the copy of the complaint attached to defendants' notice of removal. (See ECF No. 1, Exhibit A.)

sending the confirming letter/contract, and prior to Plaintiffs' receipt of said letter, a representative from Bucks contacted Plaintiffs by phone to inform them that Bucks was breaching the agreement." (Id. at 11.) Plaintiffs allege that they offered to send the agreed-upon amount of money to Bucks forthwith, but "Bucks specifically refused Plaintiffs' tender of performance." (Id.)

Plaintiffs allege that Bucks sold the Second DOT to defendant MDJ Properties, LLC ("MDJ") "[i]n or around June 2015," and that MDJ is the current holder of that loan. (Id. at 10-11.) Plaintiffs allege further that defendant FCI is servicing the loan on MDJ's behalf. (Id. at 11.) Plaintiffs also allege that they have attempted to meet and confer with both FCI and MDJ regarding the purported contract plaintiffs had entered into with Bucks, but that both defendants "have refused to acknowledge the settlement/contract." (Id.) Plaintiffs allege that FCI, acting through defendant California TD Specialists, recorded a Notice of Default ("NOD") on the Property on July 5, 2016, and indicated that it will record a Notice of Trustee's Sale. (Id.) Finally, plaintiffs allege that "[a]t all times relevant, including after Plaintiffs filing for Chapter 7 Bankruptcy protection, defendants, and each of them, notified all 3 credit reporting agencies, TransUnion, Equifax, and Experian, that Plaintiffs were delinquent on the payments on the Second DOT." (Id.)

Based on these factual allegations, plaintiffs assert the following 15 causes of action against all defendants: (1) breach of contract and the implied covenant of good faith and fair dealing; (2) fraudulent inducement to contract; (3) common law restitution/unjust enrichment; (4) specific performance; (5) accounting; (6) declaratory judgment and injunctive relief; (7) bad faith denial of contract; (8) violation of bankruptcy discharge injunction; (9) violation of the Fair Debt Collections Practices Act, 15 U.S.C. §§ 1601, 1692 et seq.; (10) violation of the California Fair Debt Collections Practices Act, California Civil Code §§ 1788 et seq.; (11) violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq.; (12) violation of the California Consumer Credit Reporting Act, California Civil Code § 1785.10 et seq.; (13) fraud and conspiracy to commit fraud; (14) unlawful business practices in violation of [California] Business & Professions Code Section 17200; and (15) fraudulent business practices in violation of

[California] Business & Professions Code Section 17200. (Id. at 12-25.)

II. Legal Standards

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the sufficiency of the pleadings set forth in the complaint. Vega v. JPMorgan Chase Bank, N.A., 654 F. Supp. 2d 1104, 1109 (E.D. Cal. 2009). Under the "notice pleading" standard of the Federal Rules of Civil Procedure, a plaintiff's complaint must provide, in part, a "short and plain statement" of plaintiff's claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); see also Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

In considering a motion to dismiss for failure to state a claim, the court accepts all of the facts alleged in the complaint as true and construes them in the light most favorable to the plaintiff. Corrie v. Caterpillar, Inc., 503 F.3d 974, 977 (9th Cir. 2007). The court is "not, however, required to accept as true conclusory allegations that are contradicted by documents referred to in the complaint, and [the court does] not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." Paulsen, 559 F.3d at 1071. The court must construe a pro se pleading liberally to determine if it states a claim and, prior to dismissal, tell a plaintiff of deficiencies in his complaint and give plaintiff an opportunity to cure them if it appears at all possible that the plaintiff can correct the defect. See Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000) (en banc); accord Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990) (stating that "pro se pleadings are liberally construed, particularly where civil rights claims are involved"); see also Hebbe v. Pliler, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (stating that courts continue to construe pro se filings liberally even when evaluating them under the standard announced in Iqbal).

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In ruling on a motion to dismiss filed pursuant to Rule 12(b)(6), the court "may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks omitted). Although the court may not consider a memorandum in opposition to a defendant's motion to dismiss to determine the propriety of a Rule 12(b)(6) motion, see Schneider v. Cal. Dep't of Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998), it may consider allegations raised in opposition papers in deciding whether to grant leave to amend, see, e.g., Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003).

III. Parties' Requests for Judicial Notice

As an initial matter, both plaintiffs and FCI request that the court take judicial notice of certain documents purportedly related to the allegations of the complaint, or to this action more generally. (ECF Nos. 10, 15-1.)[5] While the court recognizes that many of the documents for which the parties seek judicial notice are properly noticeable, the court declines to notice them at this juncture as none of these documents alter or assist in the court's analysis of FCI's motions set forth below.

IV. Discussion

A. Breach of Contract and the Covenant of Good Faith and Fair Dealing

For their first cause of action, plaintiffs claim that they entered into a valid written contract with defendant Bucks to fully settle the debt they owed under the Second DOT, which was alleged to be in excess of $70,000, for a total of $5,000, but that Bucks repudiated that

[5] Specifically, plaintiffs request that the court take judicial notice of: (1) the contract document they allegedly entered into with defendant Bucks referenced in the allegations of their complaint; (2) plaintiffs' ex parte application for a temporary restraining order ("TRO") filed in the present action in the Placer County Superior Court prior to defendants' removal of this action; and (3) the Placer County Superior Court's order granting plaintiffs' motion for a TRO. (ECF No. 15-1.) FCI requests that the court take judicial notice of: (1) a Home Equity Line of Credit and Promissory Note dated June 17, 2005; (2) a Deed of Trust dated June 17, 2005 and recorded in the official records of the Placer County Recorder's Office on June 28, 2005 as DOC-2005-0083060; and (3) the court docket of the U.S. Bankruptcy Court Eastern District of California, Case No.: 08-21985. (ECF No. 10.)

agreement when plaintiffs attempted to tender performance pursuant to its terms. Plaintiffs allege further that the terms of the alleged contract subsequently became binding on defendants FCI and MDJ when MDJ purchased Bucks' rights under the Second DOT and FCI took over the role as servicer under that note, but that both of those defendants refused to acknowledge the terms of that agreement. Based on these allegations, plaintiffs contend that "[d]efendants breached the contract and their duties of good faith and fair dealing . . . insofar as they refused to honor their contractual obligations." (ECF No. 1 at 12.)

To state a claim for breach of contract under California law, plaintiffs must allege (1) the existence of a contract; (2) plaintiff's performance; (3) defendant's breach of the contract; and (4) damages flowing from the breach. CDF Firefighters v. Maldonado, 158 Cal. App. 4th 1226, 1239 (Cal. Ct. App. 2008). In California, every contract also carries with it an implied covenant of good faith and fair dealing. Wilson v. 21st Century Ins. Co., 42 Cal. 4th 713, 720 (2007) ("The law implies in every contract . . . a covenant of good faith and fair dealing"); Freeman & Mills, Inc. v. Belcher Oil Co., 11 Cal. 4th 85, 91 (1995) ("It is well settled that, in California, the law implies in *every* contract a covenant of good faith and fair dealing.") (emphasis in original). "A typical formulation of the burden imposed by the implied covenant of good faith and fair dealing is 'that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.'" Andrews v. Mobile Aire Estates, 125 Cal. App. 4th 578, 5892 (Cal. Ct. App. 2005) (quoting Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 573 (1973)). However, "[t]he implied covenant of good faith and fair dealing 'cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.'" Lane v. Vitek Real Estate Indus. Grp., 713 F. Supp. 2d 1092, 1102 (E.D. Cal. 2010) (quoting Agosta v. Astor, 120 Cal. App. 4th 596, 607 (Cal. Ct. App. 2004)). "Absent [a] contractual right ... the implied covenant has nothing upon which to act as a supplement, and should not be endowed with an existence independent of its contractual underpinnings." Waller v. Truck Ins. Exchange, Inc., 11 Cal. 4th 1, 36 (1995) (internal citations omitted).

With regard to defendant FCI, the complaint fails to allege facts sufficient to state a claim for breach of contract. While plaintiffs allege in a conclusory fashion that the terms of the

contract at issue were "subsequently binding upon . . . FCI and MDJ" because they were Bucks' successors in interest under the Second DOT, (ECF No. 1 at 12), plaintiffs fail to plausibly allege that any obligations Bucks would have had under the purported contract were actually assigned to or assumed by FCI or MJD through MJD's alleged purchase of the loan from Bucks. "Where the subject matter of the assignment (e.g., a bilateral contract) involves reciprocal rights and duties, the assignor may transfer the *benefits*, i.e., the assignor may transfer his or her rights, but cannot escape the *burden* of his or her obligation by a mere assignment. The assignor still remains liable to the promisee." 1 Witkin, Summary 10th Contracts § 730 (2005) (emphasis added). "Even if the assignee assumes the obligation, i.e., agrees to perform it, the assignor still remains secondarily liable as a surety or guarantor, unless the promisee releases him or her or the parties execute a complete novation." Id. (citing Cutting Packing Co. v. Packers Exchange of Calif., 86 Cal. 574, 576(1890); Fenn v. Pickwick Corp., 117 Cal. App. 236, 639 (Cal. Ct. App. 1931)).

Nothing in the complaint indicates that either FCI agreed to assume the obligation to accept $5000.00 as complete satisfaction of plaintiffs' payment obligations under the mortgage. Indeed, the allegations establish that FCI explicitly "refused to acknowledge or honor the settlement/contract." (ECF No. 1 at 11.) Nor are there any allegations indicating that the parties executed a valid novation under which FCI agreed to consider a $5000.00 payment as complete satisfaction of plaintiffs' payment obligations under the note. Accordingly, plaintiffs' claim that FCI breached its contractual obligations by refusing to honor the alleged settlement payment is without merit as a matter of law. Similarly, their claim for breach of the covenant of good faith and fair dealing lacks merit because it is premised on the same purported contractual underpinnings as plaintiffs' breach of contract claim. Therefore, plaintiffs' first cause of action is dismissed without leave to amend insofar as it is asserted against FCI.

B. Fraud-based Claims

Plaintiffs' second and thirteenth causes of action are premised on fraud. Specifically, plaintiffs contend in their second cause of action that defendant Bucks induced plaintiffs into an agreement to settle the debt owed under the Second DOT without any intent to actually perform its end of the bargain. In their thirteenth cause of action, plaintiffs similarly allege that Bucks

induced plaintiffs into the settlement contract based on unspecified false representations and without an intent to be bound. Plaintiffs allege further that FCI and MDJ "knew or should have known" that plaintiffs had entered into the settlement contract with Bucks at the time they purchased Bucks' interest under the Second DOT without "perform[ing] their due diligence" and "with the intent, or with reckless disregard, to foreclose on the property and refuse to honor [the settlement] contract." (ECF No. 1 at 23.) Plaintiffs also nebulously allege that all defendants engaged in a "conspiracy to commit fraud." (Id.)

The elements of a fraud claim under California law are: (1) misrepresentation (false representation, concealment or nondisclosure); (2) knowledge of the falsity (or "scienter"); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. Lazar v. Superior Court, 12 Cal. 4th 631, 638 (1996). "[T]o establish a cause of action for fraud a plaintiff must plead and prove in full, factually and specifically, all of the elements of the cause of action." Conrad v. Bank of America, 45 Cal. App. 4th 133, 156 (Cal. Ct. App. 1996). "The absence of any one of these required elements will preclude recovery." Wilhelm v. Pray, Price, Williams & Russell, 186 Cal. App. 3d 1324, 1332 (Cal. Ct. App. 1986). To establish fraud through concealment, a plaintiff must show that the defendant had a duty to disclose the concealed facts. OCM Principal Opportunities Fund v. CIBC World Mkts. Corp.,157 Cal. App. 4th 835, 845 (Cal. Ct. App. 2007). "In addition, for a viable cause of action for fraud, the pleading must show a cause and effect relationship between the fraud and damages sought; otherwise no cause of action is stated." Nagy v. Nagy, 210 Cal. App. 3d 1262, 1269 (Cal. Ct. App. 1989); Zumbrun v. University of Southern California, 25 Cal. App. 3d 1, 12 (Cal. Ct. App. 1972). There is no separate cause of action for "conspiracy to commit fraud." Rather, "[c]onspiracy only serves as a theory of liability for claims of fraud." Lane, 713 F. Supp. 2d at 1103, n.1 (citing Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 511 (1994)).

Federal Rule of Civil Procedure 9(b), which provides a heightened pleading standard for fraud claims, states: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). These circumstances include the

"'time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.'" Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (per curiam) (quoting Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004)); see also Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009) ("Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged"). "Rule 9(b) demands that the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." Kearns, 567 F.3d at 1124.

With regard to plaintiffs' second cause of action, it appears that plaintiffs name all defendants to this claim despite only alleging that it was defendant Bucks that entered into the purported contract with plaintiffs without an intent to perform its end of the bargain. Nothing in the complaint's allegations suggest that FCI was initially a party to this agreement or somehow fraudulently induced plaintiffs into entering that arrangement. To the contrary, the allegations show that FCI merely acted as mortgage servicer under the Second DOT after Bucks had sold its interest to defendant MJD and had attempted to foreclose under that note after stepping into that role. Because the allegations establish that FCI did not fraudulently induce plaintiffs into the contract alleged in the complaint, plaintiffs' second cause of action is dismissed without leave to amend insofar as it is asserted against that defendant.

With regard to plaintiffs' thirteenth cause of action, plaintiffs allege that "[d]efendants FCI and MDJ, at the time of purchasing the note from their predecessors in interest, knew or should have known that the . . . contract [between Bucks and plaintiffs] had been entered into, yet purchased the loan with the intent, or with reckless disregard, to foreclose on the property and refuse to honor this contract." (ECF No. 1 at 23.) Plaintiffs allege further that "[h]ad Defendants done their due diligence when purchasing this debt, they would have honored the terms of the binding contract, or they would have chosen to not purchase the debt." (Id.)

Plaintiffs' fraud allegations with regard to FCI do not come remotely close to stating a cognizable fraud claim against that defendant. Plaintiffs do not allege that FCI made a false representation of fact, or concealed or did not disclose material facts. Instead, plaintiffs merely

allege that FCI was the loan servicer for MDJ after MDJ had entered into a contract with defendant Bucks to purchase Bucks' interest under the Second DOT, and that FCI refused to honor the terms of a separate alleged agreement that plaintiff had entered into with Bucks regarding payment of the loan secured by the Second DOT prior to MDJ's purchase. Nothing in these allegations remotely suggests that FCI made an actionable misrepresentation to plaintiffs in connection with its actions relating to its servicing under the Second DOT, and subsequent attempts to foreclose under that note.

As explained above, the allegations establish that FCI was not bound by the alleged obligations of the contract plaintiffs purportedly entered into with Bucks, and the complaint does not contain any allegations suggesting that FCI made some form of false representation that they would honor the terms of that agreement when they actually intended to not do so. Instead, the complaint makes it clear that FCI represented to plaintiffs upfront that it did not agree to assume any obligations Bucks may have had under that agreement. (See ECF No. 1 at 11.) Accordingly, plaintiffs' fraud-based claims against FCI are dismissed without leave to amend.

C. Restitution/Unjust Enrichment

Third, plaintiffs claim that they are entitled to restitution and disgorgement of any unjustly retained profits defendants have obtained through their alleged conduct. Unjust enrichment is not an independent cause of action under California law. See, e.g., Jogani v. Superior Court, 165 Cal. App. 4th 901, 911 (Cal. Ct. App. 2008) ("[U]njust enrichment is not a cause of action . . . . Rather, it is a general principle underlying various doctrines and remedies, including quasi-contract.") (internal citation omitted); McBride v. Boughton, 123 Cal. App. 4th 379, 387 (Cal. Ct. App. 2004) ("Unjust enrichment is not a cause of action, however, or even a remedy, but rather a general principle, underlying various legal doctrines and remedies.") (internal citations and quotations omitted); Yates v. Aurora Loan Servs., LLC, 2011 WL 2429376, at *9 (N.D. Cal. June 13, 2011) (citing Melchior v. New Line Productions, Inc., 106 Cal. App. 4th 779, 793 (Cal. Ct. App. 2003) ("There is no claim for unjust enrichment in California, rather it is an equitable remedy."). Accordingly, plaintiffs' third cause of action against FCI is dismissed without leave to amend.

D. Specific Performance

For their fourth cause of action, plaintiffs assert that they are entitled to specific performance of the purported contract they entered into with Bucks, the terms of which required the acceptance of $5,000.00 as full satisfaction of plaintiffs' payment obligations under the mortgage at issue.

In order to seek specific performance of a contract under California law, plaintiffs must be able to allege the following: "(1) a contract sufficiently definite and certain in its terms to be enforced; (2) that the contract was just and reasonable; (3) that [plaintiffs] ha[ve] performed [their] side of the bargain; (4) that the promisor has failed to perform; . . . (5) that the contract was supported by adequate consideration[; and] . . . (6) that [their] remedy at law is inadequate." Porporato v. Devincenzi, 261 Cal. App. 2d 670, 674 (Cal. Ct. App. 1968) (internal citations omitted). It has long been recognized that "specific performance will be granted only where the legal remedy is inadequate." Eagle Rock Entm't, Inc. v. Coming Home Prods., Inc., 2004 WL 5642002, at *17 (C.D. Cal. Sept. 1, 2004) (citing Morrison v. Land, 169 Cal. 580 (1915)). In Morrison, the California Supreme Court noted that "the exclusive jurisdiction of equity to grant relief by way of specific performance of a contract will be exercised only in those cases where the legal remedy of compensatory damages is insufficient under the circumstances of the case . . . to do complete justice between the parties." 169 Cal. at 586. Applying this principle, courts have generally found damages to be inadequate only in cases where the services rendered pursuant to the contract at issue were "peculiar, extraordinary, or unique," such as contracts for the transfer of real property. Kennedy v. Bank of America, 237 Cal. App. 2d 637, 647 (Cal. Ct. App. 1965) (citing Morrison, 169 Cal. at 586-87); see also Porporato, 261 Cal. App. 2d at 677. Furthermore, "the fact that damages may be difficult to prove or ascertain does not require that specific performance be granted." Eagle Rock Entm't, Inc., 2004 WL 5642002, at *17 (citing Wooley v. Embassy Suites, Inc., 227 Cal. App. 3d 1520, 1535 (Cal. Ct. App. 1991).

Here, the alleged contract at issue is the one allegedly entered into with Bucks under which Bucks would accept plaintiffs' payment of $5,000.00 as full satisfaction of their payment obligations under their mortgage. Plaintiffs attempt to assert that Bucks' alleged obligation to

accept that amount as full settlement was assigned to defendants FCI and MDJ when MDJ purchased the loan from Bucks, and FCI became the loan's servicer under the Second DOT. However, as discussed above with regard to plaintiffs' first cause of action for breach of contract, the allegations demonstrate that FCI did not assume the obligation to accept $5,000.00 as full satisfaction of the loan; nor did it enter into a valid novation with plaintiffs creating such an obligation. Accordingly, plaintiffs cannot assert a valid action for specific performance against FCI as that defendant was not bound by the contractual obligation plaintiffs seek to enforce through their specific performance claim. Furthermore, nothing in the allegations indicates that the alleged contract at issue required the provision of peculiar, extraordinary, or unique services such that a legal remedy would be inadequate to compensate plaintiffs for their alleged losses. Indeed, any losses plaintiffs may have suffered as a result of the alleged breach of contract would be purely pecuniary in nature and, therefore, could be recovered through an adequate damages remedy. Accordingly, plaintiffs' allegations fail to state a claim for specific performance against FCI and their fourth cause of action against that defendant is dismissed without leave to amend.

E. Accounting

Fifth, plaintiffs assert an action for accounting. Specific to this claim, they allege that all defendants have unjustly retained profits from their alleged actions that are "unknown to Plaintiffs and cannot be ascertained without an accounting of the business of Defendants from 2008 to present." (ECF No. 1 at 14-15.)

"An action for an accounting may be brought to compel the defendant to account to the plaintiff for money or property (1) where a fiduciary relationship exists between the parties, or (2) where, even though no fiduciary relationship exists, the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable." Jolley v. Chase Home Fin., LLC, 213 Cal. App. 4th 872, 910 (Cal. Ct. App. 2013). "An action for accounting is not available where the plaintiff alleges the right to recover a sum certain or a sum that can be made certain by calculation." Teselle v. McLoughlin, 173 Cal. App. 4th 156, 179 (Cal. Ct. App. 2009); see also St. James Church of Christ Holiness v. Superior Court In & For Los Angeles Cty., 135 Cal. App. 2d 352, 359 (1955) (citing Kinley v. Thelen, 158 Cal. 175, 182 (1910)) ("An accounting will not

be accorded with respect to a sum that a plaintiff seeks to recover and alleges in his complaint to be a sum certain.").

Nothing in the complaint here hints at the existence of a fiduciary relationship between plaintiffs and FCI giving rise to a right by plaintiffs to seek the accounting they request. Moreover, plaintiffs allege that "[d]efendants allege that Plaintiffs owe in excess of $70,000 on the note," the purported contract between plaintiffs and Bucks stated that plaintiffs were to pay Bucks $5,000.00 "as full and final settlement of the Second DOT," and plaintiffs seek damages for either sums certain or sums that can be made certain by calculation. (See ECF No. 1 at 10, 26-27.) Accordingly, the allegations show that there was neither a fiduciary relationship between plaintiffs and FCI, nor a specification of amounts due so complicated that they cannot be determined in a legal action for damages. Therefore, plaintiffs' cause of action for accounting against FCI is dismissed without leave to amend.

F. Declaratory Judgment and Injunctive Relief

For their sixth cause of action, plaintiffs assert a claim for declaratory judgment and injunctive relief. Declaratory relief and injunctive relief are not independent claims, but are instead forms of relief that may be requested in conjunction with a cognizable cause of action that permits a court to grant such relief. Santos v. Countrywide Home Loans, 2009 WL 3756337, at *5 (E.D. Cal. Nov. 6, 2009) ("Declaratory and injunctive relief are not independent claims, rather they are forms of relief."). Accordingly, plaintiffs' sixth cause of action against FCI is dismissed without leave to amend insofar as it seeks to obtain declaratory and injunctive relief independent of any of plaintiffs' other claims.

G. Bad Faith Denial of Contract

In their seventh cause of action, plaintiffs assert that defendants are liable for their "bad faith denial of contract."

No cause of action exists under California law for a bad faith denial of contract except in cases involving an insurance contract. In Freeman & Mills, Inc. v. Belcher Oil Co., 11 Cal. 4th 85, 103 (1995), the California Supreme Court overruled its prior holding in Seaman's Direct Buying Service, Inc. v. Standard Oil Co., 36 Cal. 3d 752 (1984), and adopted "a general rule

precluding tort recovery for noninsurance contract breach, at least in the absence of violation of an independent duty arising from principles of tort law . . . other than the bad faith denial of the existence of, or liability under, the breached contract."

Here, plaintiffs allege that "[d]efendants FCI and Bucks previously acknowledged in writing the existence of the settlement agreement/contract but continue to refuse to honor its terms." (ECF No. 1 at 16.) Under the California Supreme Court's ruling in Freeman & Mills, Inc., no such tort claim exists as a matter of law as this action does not involve an insurance contract, and plaintiffs' allegations make it clear that FCI did not violate an independent duty arising from tort law. See Zender v. Vlasic Foods, Inc., 91 F.3d 158 (9th Cir. 1996) (affirming judgment dismissing claim for bad faith breach of contract sounding in tort based on the California Supreme Court's decision in Freeman & Mills, Inc. and noting that "[t]he remedy, if any, [for such a claim] is for breach of contract"). Rather, it is clear that plaintiffs' bad faith denial of contract claim is little more than a restyling of their breach of contract claim under a different name. Accordingly, plaintiffs' bad faith denial of contract claim against FCI is dismissed without leave to amend.

H. Violation of Bankruptcy Discharge Injunction

For their eighth cause of action, plaintiffs assert, pursuant to 11 U.S.C. § 524, that defendants violated the injunction put in place by the court in plaintiffs' alleged bankruptcy action against plaintiffs' creditors from seeking to collect any debts discharged in that action. However, a debtor cannot assert an action against creditors pursuant to 11 U.S.C. § 524, as no private right of action exists under that statute. Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 510 (9th Cir. 2002) ("[W]e cannot say that Congress intended to create a private right of action under [11 U.S.C.] § 524, and we shall not imply one."). Therefore, plaintiffs' eighth cause of action against FCI is dismissed without leave to amend.

I. Claims for Violation of the Fair Debt Collections Practices Act and California Fair Debt Collections Practices Act

For their ninth and tenth causes of action, plaintiffs assert that defendants violated the Fair Debt Collections Practices Act ("FDCPA") and California's Rosenthal Fair Debt Collections

Practices Act ("RFDCPA").[6]

"The [FDCPA] prohibits 'debt collector[s]' from making false or misleading representations and from engaging in various abusive and unfair practices." Heintz v. Jenkins, 514 U.S. 291, 292 (1995). Similarly, the RFDCPA "prohibits a host of unfair and oppressive methods of collecting debt." Castaneda v. Saxon Mortg. Servs., Inc., 687 F. Supp. 2d 1191, 1197 (E.D. Cal. 2009). "To be liable for a violation of the FDCPA or the RFDCPA, the defendant must—as a threshold requirement—be a '*debt collector*' within the meaning of the Acts." Putkkuri v. Reconstruct Co., 2009 WL 32567, at *7 (S.D. Cal. Jan.5, 2009) (emphasis added); see also 15 U.S.C. § 1692a(6); Cal. Civ. Code § 1788.2(c). "The law is well settled that FDCPA's definition of debt collector does not include the consumer's creditors, a *mortgage servicing company*, or any assignee of the debt." Lal v. Am. Home Servicing, Inc., 680 F. Supp. 2d 1218, 1224 (E.D. Cal. 2010) (citing Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985)) (emphasis added); see also Angulo v. Countrywide Home Loans, Inc., 2009 WL 3427179, at *5 (E.D. Cal. October 26, 2009); Nera v. Am. Home Mortg. Servicing, Inc., 2009 WL 2423109, at *4 (N.D. Cal. Aug. 5, 2009); Pineda v. Saxon Mortg. Servs., 2008 WL 5187813, at *3 (C.D. Cal. Dec. 10, 2008). Similarly, mortgage servicing companies do not fall within the definition of "debt collector" under the RFDCPA. Mannello v. Residential Credit Sols., Inc., 2016 WL 94236, at *4 (C.D. Cal. Jan. 7, 2016) (internal citations and quotation marks omitted) ("The law is well settled that FDCPA's definition of debt collector does not include the consumer's creditors, a mortgage servicing company, or any assignee of the debt. . . . The same is true of the Rosenthal Act."); Lal, 680 F. Supp. 2d at 1224 ("[T]he RFDCPA does in fact mirror in the FDCPA, their intentions were the same and exclusive, and, as such, a loan servicer is not a debt collector under these acts."). Furthermore, "the law is clear that foreclosing on a property pursuant to a deed of trust is not a debt collection within the meaning of the RFDCPA or the FDC[P]A." Gamboa v. Tr. Corps & Cent. Mortg. Loan Servicing Co., 2009 WL 656285, at *4 (N.D. Cal. Mar. 12, 2009); Tapia v. Aurora Loan Servs., LLC, 2009 WL 2705853 (E.D. Cal. Aug. 25, 2009); Ricon v.

[6] Plaintiffs refer to the RFDCPA as the "California Fair Debt Collection Practices Act" in their complaint. (ECF No. 1 at 19.)

Recontrust Co., 2009 WL 2407396 (S.D. Cal. Aug. 4, 2009).

Here, plaintiffs allege that FCI is the current mortgage servicer under the Second DOT, attempted to foreclose on the Property, and refused to acknowledge plaintiffs' alleged settlement contract that plaintiffs allegedly entered into with defendant Bucks. Such allegations establish that plaintiffs cannot sustain a claim against FCI under the FDPCA or the RFDCPA because FCI is not a "debt collector" and did not engage in "debt collection" within the meaning those Acts. Accordingly, plaintiffs' FDPCA or the RFDCPA against FCI are dismissed without leave to amend.

J. Violations of the Fair Credit Reporting Act and California's Consumer Credit Reporting Act

For their eleventh and twelfth causes of action, plaintiffs claim that defendants violated the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681, et seq., and California's Consumer Credit Reporting Act ("CCRA"), California Civil Code §§ 1785.10, et seq. Plaintiffs allege with respect to both claims that defendants failed to respond to objections plaintiffs provided them regarding the validity of the debt under the mortgage at issue and failed to provide notice to the credit reporting agencies that plaintiffs disputed the validity of the information they furnished to those agencies regarding that debt.

Under the FCRA, "[l]iability on a furnisher [of information to a credit reporting agency ("CRA")] is limited in that an individual consumer cannot state an FCRA claim against a furnisher unless the furnisher receives notice of the disputed information *from the CRA* and fails to comply with its duties." Johnson v. Wells Fargo Home Mortg., Inc., 558 F. Supp. 2d 1114, 1120 (D. Nev. 2008) (citing Nelson v. Chase Manhattan Mortgage Corp., 282 F.3d 1057, 1060(9th Cir. 2002)) (emphasis added). "The Ninth Circuit has specifically held that the furnisher's . . . duty to investigate is triggered *only after the consumer notifies the CRA*, and the CRA then notifies the furnisher of credit." Nelson v. Equifax Info. Servs., LLC, 522 F. Supp. 2d 1222, 1231 (C.D. Cal. 2007) (citing Nelson, 282 F.3d at 1060) (emphasis added). It is insufficient to sustain a claim under the FCRA based on a furnisher's failure to investigate the accuracy of credit information it provides to a CRA when the furnisher's only notice that the

accuracy of that information is disputed comes from the consumer. See Sanai v. Saltz, 170 Cal. App. 4th 746, 765 (Cal. Ct. App. 2009) (dismissing FCRA claim because the only notice defendant received that the information it provided to Experian was inaccurate came from the plaintiff, not Experian).

In their opposition to FCI's motion, plaintiffs acknowledge that they have not yet notified the CRAs of their belief that the information defendants provided to those agencies was inaccurate, thereby making their FCRA and CCRA claims premature. Accordingly, plaintiffs request that the court dismiss those claims, but grant plaintiffs leave to amend their complaint to re-assert them once they have provided notice to the CRAs, and the CRAs, in turn, have provided notice to defendants. FCI appears to not object to plaintiffs' request with regard to their FCRA claim. Therefore, plaintiffs' eleventh cause of action under the FCRA is dismissed with regard to FCI, but with leave to amend. [7]

FCI argues in its motion that plaintiffs' CCRA claim should be dismissed without leave to amend as it is preempted by the FCRA. However, while claims under many of the CCRA's provisions are preempted by the FCRA, see 15 U.S.C. § 1681t(b)(1)(F), the FCRA "expressly saves from preemption 'section 1785.25(a) of the California Civil Code,'" which is a provision of the CCRA. Carvalho v. Equifax Info. Servs., LLC, 629 F.3d 876, 888 (9th Cir. 2010) (quoting 15 U.S.C. § 1681t(b)(1)(F)(ii)). Section 1785.25(a) provides that "[a] person shall not furnish information on a specific transaction or experience to any consumer credit reporting agency if the person knows or should know the information is incomplete or inaccurate." Here, it is not presently clear from the allegations of the complaint whether plaintiffs would be able to state a claim under Section 1785.25(a), or any other provision of the CCRA that has not been preempted by the FCRA. Accordingly, plaintiffs' twelfth cause of action under the CCRA is dismissed, but with leave to amend despite FCI's well-taken argument that many of the provisions of that Act are preempted by the FCRA. Nevertheless, plaintiffs are cautioned that if they decide to later

[7] Nevertheless, plaintiffs are cautioned that if they later amend their complaint to re-state a claim under the FCRA, they must clearly identify each defendant against whom they are asserting that claim and provide factual allegations specific to each defendant against whom that claim is brought that demonstrate how that defendant is liable under the FCRA.

amend their complaint to re-assert their CCRA claim, such a claim must be asserted only under the provisions of that Act that have not been preempted by the FCRA.

K. Claims Under California Business & Professions Code Section 17200, et seq.

Finally, for their fourteenth and fifteenth causes of action, plaintiffs claim that all defendants engaged in fraudulent and unlawful business practices in violation of California's unfair competition law ("UCL"), California Business & Professions Code §§ 17200, et seq.

To prove a claim under the UCL, a plaintiff must show "that the defendant committed a business act that is either fraudulent, unlawful, or unfair." Levine v. Blue Shield of California, 189 Cal. App. 4th 1117, 1136 (2010). "A defendant cannot be liable under § 17200 for committing 'unlawful business practices' without having violated another law." Ingels v. Westwood One Broad. Servs., Inc., 129 Cal. App. 4th 1050, 1060 (Cal. Ct. App. 2005). Accordingly, a UCL claim based on such an allegation must rest on a violation of some independent substantive statute, regulation or case law. See Farmers Ins. Exch. v. Superior Court, 2 Cal. 4th 377, 383 (1992) (action under section 17200 borrows violations of other laws). Business conduct is "unfair" under the UCL, when it "offends an established public policy or . . . is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." People v. Casa Blanca Convalescent Homes, Inc., 159 Cal. App. 3d 509, 530 (Cal. Ct. App. 1984). A business act is "fraudulent" within the meaning of the UCL if it is "likely to deceive the public." McKell v. Washington Mutual, Inc., 142 Cal. App. 4th 1457, 1471 (Cal. Ct. App. 2006). In asserting a claim under the UCL's "fraudulent" prong in federal court, a plaintiff must plead facts that meet the particularity requirements of Federal Rule of Civil Procedure 9(b). See Kearns v. Ford Motor Co., 567 F.3d 1120, 1127 (9th Cir. 2009).

Because plaintiffs' UCL claim against FCI based on a theory of unlawful business practices is predicated on the same conduct giving rise to plaintiffs' other causes of action against that defendant and the complaint fails to state a cognizable cause of action with regard to any of those claims for the reasons discussed above, plaintiffs' UCL claim against FCI is not cognizable as a matter of law insofar as it is based on an unlawful business practice. However, because it may still be possible for plaintiffs to allege a violation of another law against FCI if given an

opportunity to amend their complaint, their UCL claim premised on unlawful business practices is dismissed with leave to amend.

Similarly, with regard to plaintiffs' UCL claim premised on fraudulent business practices, the complaint fails to allege facts indicating that FCI engaged in any fraudulent conduct for the reasons discussed above with regard to plaintiffs' causes of action premised on fraud. Furthermore, nothing in the complaint suggests that FCI's alleged conduct is "likely to deceive the public" as the allegations do not establish that it engaged in a deceptive practice with regard to acting in its role as servicer under the Second DOT. However, while the court is skeptical that plaintiffs can state facts giving rise to a cognizable UCL claim for fraudulent business practices against FCI, plaintiffs' fifteenth cause of action is dismissed with leave to amend as it may be possible for them to amend their complaint to state such a claim against that defendant based on the other causes of action for which they are granted leave to amend.

V. Motion to Strike

Defendant FCI also filed a motion to strike certain portions of plaintiffs' complaint pursuant to Federal Rule of Civil Procedure Rule 12(f).

Rule 12(f) permits the court to strike any "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "Motions to strike are a drastic remedy and generally disfavored." Ricon v. Recontrust Co., 2009 WL 2407396, at *2 (S.D. Cal. Aug. 4, 2009). "A matter is impertinent if the statements do not pertain, and are not necessary, to the issues in question." Id. (citing Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other grounds, 510 U.S. 517 (1994)). "'Scandalous' matters 'casts a cruelly derogatory light on a party or other person.'" Ricon, 2009 WL 2407396, at *2 (quoting In re 2TheMart.com, Inc. Sec. Litig., 114 F. Supp. 2d 955, 965 (C.D. Cal.2000). "'Motions to strike affirmative defenses are generally disfavored, but the court may properly grant them when the defense is insufficient as a matter of law.'" Ricon, 2009 WL 2407396, at *2 (quoting Multimedia Patent Trust v. Microsoft Corporation, 525 F. Supp. 2d 1200, 1211 (S.D. Cal. 2007)).

FCI's motion to strike is directed toward specific allegations in the complaint relating to the existence of an agency relationship among defendants and exemplary damages. None of these

allegations constitute an insufficient defense, or a redundant, immaterial, impertinent or scandalous allegation of the sort covered by Rule 12(f). See Drewett v. Aetna Cas. & Sur. Co., 405 F. Supp. 877, 878 (W.D. La. 1975) (denying Rule 12(f) motion to strike directed toward allegations in the complaint relating to the plaintiffs' demand for penalties and attorneys' fees because such allegations do not fall within the scope of Rule 12(f)). Furthermore, FCI's arguments in support of its request to strike these portions of the complaint are based on the assertion that the targeted allegations are conclusory in nature and, therefore, insufficient to support the legal conclusions plaintiffs attempt to draw from them. Such arguments appear to be more appropriately directed through a motion to dismiss pursuant to Rule 12(b)(6), which FCI has also filed, rather than a motion to strike. Accordingly, FCI's motion to strike is denied.

VI. Conclusion

For the reasons discussed above, plaintiffs' complaint fails to provide allegations sufficient to state a cognizable claim against defendant FCI. Furthermore, the allegations of the complaint make it clear that many of plaintiffs' claims asserted against that defendant are not cognizable as a matter of law. Therefore, plaintiffs should not be granted leave to amend as to those claims against FCI as amendment would be futile. See Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 339 (9th Cir. 1996). However, with regard to plaintiffs' other claims against FCI, specifically their eleventh, twelfth, fourteenth, and fifteenth causes of action, it is conceivable that plaintiffs could state a cognizable claim if given the opportunity to amend. Accordingly, FCI's motion to dismiss is also granted as to those claims, but with leave to amend.

The court notes that the reasons for dismissing many of plaintiffs' claims asserted against FCI are likely equally applicable to some or all of the similar claims plaintiffs assert against other defendants named in this action. However, instead of also dismissing plaintiffs' claims against these other non-moving defendants at this juncture, see Silverton v. Dep't of Treasury, 644 F.2d 1341, 1345 (9th Cir. 1981) ("A District Court may properly on its own motion dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of moving defendants or where claims against such defendants are integrally related."), the court finds it to be more beneficial to all parties involved to provide plaintiffs an opportunity to

amend their complaint, reassess their claims against each defendant in light of this order, and determine whether there exists a good faith basis to support each of their claims currently asserted against those defendants. Accordingly, plaintiffs shall file a first amended complaint in accordance with this order.[8]

With regard to the first amended complaint, plaintiffs are cautioned that they cannot continue to assert any claims against FCI that have been dismissed without leave to amend. Furthermore, for each claim, plaintiffs must clearly identify the defendant or defendants against whom that claim is specifically asserted and provide factual allegations sufficient to demonstrate a cognizable cause of action with respect to each of those defendants. More importantly, plaintiffs must have a good faith basis for making such allegations. See Fed. R. Civ. P. 11(b). If plaintiffs determine that they cannot in good faith allege facts that would support a particular claim against a particular defendant, then they may wish to omit that claim from their amended complaint as failure to make allegations on a good faith basis may be grounds for the imposition of sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 11(c).

If plaintiffs decide to file an amended complaint, it shall be captioned "First Amended Complaint" and shall not exceed 40 pages, including attachments.[9] Plaintiffs shall file their First Amended Complaint within 45 days from the date of this order. Plaintiffs are informed that the court cannot refer to the original complaint, briefs, exhibits, or other filings to make their amended complaint complete. Local Rule 220 requires that an amended complaint be complete in itself without reference to any prior pleading. Thus, once an amended complaint is filed, it supersedes the original complaint, which no longer serves any function in the case.

Plaintiffs are further informed that they are not required to file an amended complaint. If plaintiffs determine that they do not wish to pursue the action at this juncture or that they cannot

[8] Because plaintiffs are directed to file an amended complaint, defendant SN Servicing Corporation's pending motion to dismiss the original complaint (ECF No. 20) is denied as moot.

[9] As the court noted during the hearing, plaintiffs should attach to their First Amended Complaint any operative document(s) they allege form the basis of the purported contract between defendant Bucks and themselves.

in good faith allege any facts asserting cognizable claims against any defendant, they may instead file a request for voluntary dismissal of the action without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i).

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Defendant FCI's motion to dismiss (ECF No. 8) is granted in the following manner:
    a. Plaintiffs' first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and thirteenth causes of action are dismissed without leave to amend to the extent they are asserted against defendant FCI.
    b. Plaintiffs' eleventh, twelfth, fourteenth, and fifteenth causes of action are dismissed with leave to amend insofar as they are asserted against defendant FCI.
2. Within 45 days of the date of this order, plaintiffs shall file either an amended complaint in accordance with this order or a request for voluntary dismissal of this action pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i).
3. Defendant FCI's motion to strike (ECF No. 9) is denied.
4. Defendant SN Servicing Corporation's motion to dismiss the complaint (ECF No. 20) is denied as moot.
5. The March 16, 2017 initial scheduling conference is vacated. The court will reschedule this conference at a later date if the court deems it necessary.

IT IS SO ORDERED.

Dated: January 23, 2017

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE