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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

FOTI BURTZOS, et al.,

Plaintiffs,

v.

COUNTRYWIDE HOME LOANS,

Defendant.

CASE No: 09-CV-2027W (WMc)

**ORDER GRANTING
DEFENDANT’S MOTION TO
DISMISS [DOC. 12]**

On September 16, 2009, Plaintiffs Foti Burtzos and Belinda Burtzos, filed this lawsuit against Defendant Countrywide Home Loans. On January 15, 2010, Defendant moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs have opposed the motion.

The Court decides the matter on the papers submitted and without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the following reasons, the Court **GRANTS** Defendant’s motion to dismiss.

I. BACKGROUND

In April 2006, Plaintiffs obtained two mortgage loans from Defendant to refinance real property located at 319 Highland Oaks Courts, Fallbrook, California. (*Not. of*

1 *Removal (NOR)* [Doc. 1¹] at 8-9; see also *Mt. to Dismiss (MTD)* [Doc. 12-1] at 6.) In
2 December 2008, Plaintiffs began having difficulty making payments and approached
3 Defendant requesting to modify the loans. Defendant declined to modify the loans, and
4 on May 7, 2009, Defendant served Plaintiffs with a “Notice of Default And Election to
5 Sell Under Deed of Trust.” (*Jud. Not. for MTD* [Doc. 12-2] at 62.)

6 On April 17, 2009, Defendant entered into a Servicer Participation Agreement
7 (“Servicer Agreement”) with the U.S. Treasury Department as part of the *Home*
8 *Affordable Modification Program*. (MTD at 6:15; see also *NOR* at 9:16) On August 28,
9 2009, Plaintiffs filed a civil action in the Superior Court of California (Case No. 37-
10 2009-00097163-CU-BC-CTL) alleging that Defendant—in refusing to modify the
11 loans—has breached the terms of the Servicer Agreement and that Plaintiffs pray for
12 damages as intended third-party beneficiaries.

13 On September 16, 2009, Defendant removed the case to this Court based upon
14 federal question jurisdiction. On January 15, 2010, Defendant moved to dismiss.

15
16 **II. LEGAL STANDARD**

17 The court must dismiss a cause of action for failure to state a claim upon which
18 relief can be granted. Fed.R.Civ.P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)
19 tests the complaint’s sufficiency. See North Star Int’l v. Arizona Corp. Comm’n., 720
20 F.2d 578, 581 (9th Cir. 1983). All material allegations in the complaint, “even if
21 doubtful in fact,” are assumed to be true. Id. The court must assume the truth of all
22 factual allegations and must “construe them in light most favorable to the nonmoving
23 party.” Gompper v. VISX, Inc., 298 F.3d 893, 895 (9th Cir. 2002); see also Walleri v.
24 Fed. Home Loan Bank of Seattle, 83 F.3d 1575, 1580 (9th Cir. 1996).

25 As the Supreme Court recently explained, “[w]hile a complaint attacked by a
26 Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s
27 obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels

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¹All docket references refer to Case No. 09-CV-2027W (WMc)

1 and conclusions, and a formulaic recitation of the elements of a cause of action will not
2 do.” Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1964 (2007). Instead, the
3 allegations in the complaint “must be enough to raise a right to relief above the
4 speculative level.” Id. at 1964-65. A complaint may be dismissed as a matter of law
5 either for lack of a cognizable legal theory or for insufficient facts under a cognizable
6 theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984).

7 Generally, courts may not consider material outside the complaint when ruling
8 on a motion to dismiss. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d
9 1542, 1555 n.19 (9th Cir. 1990). However, courts may consider documents specifically
10 identified in the complaint whose authenticity is not questioned by parties. Fecht v.
11 Price Co., 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (superceded by statutes on other
12 grounds). Moreover, courts may consider the full text of those documents, even when
13 the complaint quotes only selected portions. Id. Courts may also consider material
14 properly subject to judicial notice without converting the motion into one for summary
15 judgment. Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994) (citing Mack v. South
16 Bay Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986); *abrogated on other grounds*
17 *by* Astoria Federal Savings and Loan Ass’n v. Solimino, 501 U.S. 104 (1991)).

18 19 **III. DISCUSSION**

20 Plaintiffs attempt to sue on the Servicer Agreement as third-party beneficiaries.
21 Defendant argues that Plaintiffs lack standing to sue because they are not intended
22 third-party beneficiaries as defined by the Ninth Circuit. For the following reasons, the
23 Court agrees.

24 In Klamath Water Users Protective Ass’n v. Patterson, 204 F.3d 1206 (9th Cir.
25 1999), the Ninth Circuit held that “the intended beneficiary need not be specifically or
26 individually identified in the contract, but must fall within a class clearly intended by the
27 parties to benefit from the contract.” Id. at 1211. In order to ascertain such an intent,
28 the Court must ask whether the beneficiaries would be “reasonable in relying on the

1 promise as manifesting an intention to confer a right on him or her.” Id. Furthermore,
2 the Ninth Circuit cautions, “Parties that benefit from a government contract are
3 generally assumed to be incidental beneficiaries, and may not enforce the contract
4 absent a clear intent to the contrary.” Id.

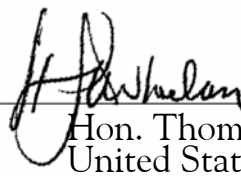
5 In the present case, the Servicer Agreement was entered into, in part, for the
6 benefit of qualified borrowers. However, qualified borrowers—including Plaintiffs
7 —cannot reasonably rely on a manifested intention to confer a right upon them because
8 the Servicer Agreement does not *require* Defendant to modify eligible loans. See
9 Escobedo v. Countrywide Home Loans, Inc., No. 09cv1557BTM, 2009 WL 4981618,
10 *3 (S.D.Cal. Dec. 19, 2009). The guidelines set forth within the agreement state:
11 “Participating servicers are required to *consider* all eligible loans under the program
12 guidelines.” (NOR at 44 (emphasis added).) Nowhere does it state that Defendant must
13 modify all mortgages that meet the eligibility requirements. Thus, borrowers such as the
14 Plaintiffs are incidental, but not intended, beneficiaries and, therefore, lack standing to
15 sue for an alleged breach of the Servicer Agreement. Escobedo, 2009 WL 4981618 at
16 3.

17
18 **IV. CONCLUSION AND ORDER**

19 In light of the foregoing, the Court **GRANTS** Defendant’s motion to dismiss.
20 (Doc. 12). Because the Court finds Plaintiffs lack standing to sue under the Servicer
21 Agreement, leave to amend in not warranted in this case.²

22 **IT IS SO ORDERED.**

23
24 DATED: June 1, 2010

25 
26 Hon. Thomas J. Whelan
27 United States District Judge

28 ²The Court recognizes that Plaintiffs requested leave to amend, however, they failed to explain how an amended complaint would remedy their current lack of standing.