

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 CARLOS NIETO, et al.,)
4)
5 Plaintiffs,) Case No.: 2:10-cv-00223-GMN-GWF
6 vs.)
7) ORDER
8 LITTON LOAN SERVICING, LP, et al.,)
9)
10 Defendants.)

10 Plaintiffs Carlos Nieto and Estella Gil ("Plaintiffs")--who are husband and wife--have
11 sued Defendant Litton Loan Servicing ("Defendant") on multiple causes of action related to
12 the foreclosure of the mortgage on their second home. Pending before the Court is
13 Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (ECF
14 No. 7). The Motion is fully briefed and ripe for ruling. The Court will grant the Motion and
15 dismiss the first, third, and fifth causes of action and deny the Motion as to the second and
16 fourth causes of action.

17 I. FACTS AND PROCEDURAL HISTORY

18 On or about June 29, 2004, Plaintiffs jointly purchased a second home located at 5500
19 Fire Island Dr., Las Vegas, NV 89120 (the "Property") for \$456,750. (ECF No. 7, Ex. C, at
20 1-3, 16.)¹ The deed of trust identifies the lender as New Century Mortgage Corp. ("New
21 Century") and the trustee as Fidelity National Title ("Fidelity"). (Id., Ex. C, at 1-2.)
22 Plaintiffs admit default, (see Compl. ¶ 4), but allege that they are currently in modification
23 negotiations with the loan servicer, Defendant Litton, (id. ¶ 5). Defendant has not yet agreed

24
25 ¹ The Court will take judicial notice of the public records adduced by Defendants. See Mack v. S. Bay Beer Distribs., 798 F.2d 1279, 1282 (9th Cir. 1986).

1 to modify the loan, (*id.* ¶ 7), and Plaintiffs fear an impending foreclosure, (*id.* ¶ 8), despite
2 assurances from Defendant there will be no foreclosure, (*id.* ¶ 9).

3 Plaintiffs sued Defendant in the Clark County District Court on January 29, 2010 on
4 five causes of action: (1) Promissory Estoppel; (2) Wrongful Foreclosure/Quiet Title;
5 (3) “Tortious” Misrepresentation; (4) Preliminary and Permanent Injunctive Relief; and
6 (5) Violation of Chapter 598D of the Nevada Revised Statutes (“NRS”). Defendant removed
7 and filed the present motion.

8 II. LEGAL STANDARDS

9 A. Rule 12(b)(6)

10 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of
11 the claim showing that the pleader is entitled to relief” in order to “give the defendant fair
12 notice of what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355
13 U.S. 41, 47 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a
14 cause of action that fails to state a claim upon which relief can be granted. A motion to
15 dismiss under Rule 12(b)(6) tests the complaint’s sufficiency. *See North Star Int’l. v. Arizona*
16 *Corp. Comm’n.*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss
17 under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the
18 complaint does not give the defendant fair notice of a legally cognizable claim and the
19 grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In
20 considering whether the complaint is sufficient to state a claim, the Court will take all
21 material allegations as true and construe them in the light most favorable to the plaintiff. *See*
22 *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The Court, however, is not
23 required to accept as true allegations that are merely conclusory, unwarranted deductions of
24 fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988
25 (9th Cir. 2001). A formulaic recitation of a cause of action with conclusory allegations is not

1 sufficient; a plaintiff must plead facts showing that a violation is plausible, not just possible.
2 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly v. Bell Atl. Corp.*, 550 U.S.
3 554, 555 (2007)).

4 “Generally, a district court may not consider any material beyond the pleadings in
5 ruling on a Rule 12(b)(6) motion However, material which is properly submitted as part
6 of the complaint may be considered on a motion to dismiss. *Hal Roach Studios, Inc. v.*
7 *Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted).
8 Similarly, “documents whose contents are alleged in a complaint and whose authenticity no
9 party questions, but which are not physically attached to the pleading, may be considered in
10 ruling on a Rule 12(b)(6) motion to dismiss” without converting the motion to dismiss into a
11 motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994).
12 Moreover, under Federal Rule of Evidence 201, a court may take judicial notice of “matters
13 of public record.” *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986).
14 Otherwise, if the district court considers materials outside of the pleadings, the motion to
15 dismiss is converted into a motion for summary judgment. *See Arpin v. Santa Clara Valley*
16 *Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

17 **B. Rule 56(c)**

18 The Federal Rules of Civil Procedure provide for summary adjudication when “the
19 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
20 affidavits, if any, show that there is no genuine issue as to any material fact and that the party
21 is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). Material facts are those
22 which may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S.
23 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for
24 a reasonable jury to return a verdict for the nonmoving party. *See id.* “Summary judgment is
25 inappropriate if reasonable jurors, drawing all inferences in favor of the nonmoving party,

1 could return a verdict in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*,
2 521 F.3d 1201, 1207 (9th Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–
3 04 (9th Cir. 1999)). A principal purpose of summary judgment is “to isolate and dispose of
4 factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

5 In determining summary judgment, a court applies a burden-shifting analysis. “When
6 the party moving for summary judgment would bear the burden of proof at trial, it must
7 come forward with evidence which would entitle it to a directed verdict if the evidence went
8 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
9 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*
10 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).
11 In contrast, when the nonmoving party bears the burden of proving the claim or defense, the
12 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
13 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
14 party failed to make a showing sufficient to establish an element essential to that party’s case
15 on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–
16 24. If the moving party fails to meet its initial burden, summary judgment must be denied
17 and the court need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress &*
18 *Co.*, 398 U.S. 144, 159–60 (1970).

19 If the moving party satisfies its initial burden, the burden then shifts to the opposing
20 party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co.*
21 *v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual
22 dispute, the opposing party need not establish a material issue of fact conclusively in its
23 favor. It is sufficient that “the claimed factual dispute be shown to require a jury or judge to
24 resolve the parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pacific*
25 *Elec. Contractors Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving

1 party cannot avoid summary judgment by relying solely on conclusory allegations that are
2 unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).
3 Instead, the opposition must go beyond the assertions and allegations of the pleadings and set
4 forth specific facts by producing competent evidence that shows a genuine issue for trial. *See*
5 *Fed. R. Civ. P. 56(e); Celotex Corp.*, 477 U.S. at 324.

6 At summary judgment, a court’s function is not to weigh the evidence and determine
7 the truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S.
8 at 249. The evidence of the nonmovant is “to be believed, and all justifiable inferences are
9 to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely
10 colorable or is not significantly probative, summary judgment may be granted. *See id.* at
11 249–50.

12 **III. ANALYSIS**

13 **A. First Cause of Action - Promissory Estoppel**

14 Promissory estoppel is an equitable doctrine whereby a party who reasonably relies to
15 his detriment on the promise of another may enforce a verbal contract against the other party,
16 though the other party has given no consideration; it is a substitute for consideration. *See,*
17 *e.g., Pink v. Busch*, 691 P.2d 456, 459 (Nev. 1984); Restatement (Second) of Contracts § 90
18 (1981). A prima facie case of promissory estoppel has four elements in Nevada: “(1) the
19 party to be estopped must be apprised of the true facts; (2) he must intend that his conduct
20 shall be acted upon, or must so act that the party asserting estoppel has the right to believe it
21 was so intended; (3) the party asserting the estoppel must be ignorant of the true state of
22 facts; (4) he must have relied to his detriment on the conduct of the party to be estopped.
23 *Pink*, 691 P.2d at 459 (quoting *Cheger, Inc. v. Painters & Decorators Joint Comm., Inc.*, 655
24 P.2d 996, 998–99 (Nev. 1982)).

25 Promissory estoppel is a common law exception to the common law element of

1 consideration normally required in a contract, but it is not generally an exception to the
2 statute of frauds, except in very particular circumstances. *See, e.g., Heyman v. Adeack*
3 *Realty, Inc.*, 228 A.2d 578, 580 (R.I. 1967); *Bank of Texas, N.A. v. Gaubert*, 286 S.W.3d
4 546, 554 (Tex. App. 2009) (citation omitted); *Shore Holdings, Inc. v. Seagate Beach*
5 *Quarters, Inc.*, 842 So. 2d 1010, 1012–13 (Fla. Dist. Ct. App. 2003). In some states, partial
6 performance of a real estate contract, in conjunction with an oral promise, can defeat the
7 statute of frauds. *See, e.g., Kolkman v. Roth*, 656 N.W.2d 148, 152 (Iowa 2003). Promissory
8 estoppel can also defeat the statute of frauds where the alleged promise is not a promise to
9 perform, but a promise to sign a document that itself complies with the statute of frauds. *See,*
10 *e.g., Ortiz v. Collins*, 203 S.W.3d 414, 424 (Tex. App. 2006). Here, Plaintiffs make no claim
11 that they partially performed the alleged contract or that the agreement was one to sign an
12 existing document. Plaintiffs allege that Defendant made a promise to perform: to modify
13 the existing promissory note in an unspecified manner.

14 The Restatement also indicates that the statute of frauds can be overcome by
15 promissory estoppel where necessary to avoid injustice. Restatement (Second) of Contracts §
16 139. The law surrounding the Nevada statute of frauds is strict. An oral agreement
17 concerning real estate that is not in writing is void. *Dolge v. Masek*, 268 P.2d 919 (Nev.
18 1954). It is, however, possible to avoid the statute of frauds with respect to a transaction
19 involving an interest in land in Nevada, but “[t]o avoid the Nevada Statute of Frauds in a
20 transaction involving land, a party must prove estoppel or part performance by an
21 ‘extraordinary measure . . . of evidence.’” *Waters v. Weyerhaeuser Mortgage Co.*, 582 F.2d
22 503, 506 (Nev. 1978) (citations omitted). Plaintiffs have not met this burden.

23 Plaintiffs’ argument that they “would have taken other alternatives such as filing a
24 bankruptcy or filing this underlying action prior to the foreclosure in order to thwart a
25 foreclosure,” (Compl. ¶ 14), is not enough to survive summary judgment in the context of a

1 promissory estoppel claim concerning a land transaction. Even under a promissory estoppel
2 theory, a contract cannot be created by one party's subjective expectations. *Vancheri v.*
3 *GNLV Corp.*, 777 P.2d 366, 369 (Nev. 1989) (employment contract). Reasonable reliance
4 means objectively reasonable reliance, and an invitation to negotiate is not an offer. *See State*
5 *v. Delaney*, 598 A.2d 138, 142 (Vt. 1991); *Chang v. First Colonial Savs. Bank*, 410 S.E.2d
6 928, 930 (Va. 1991). Plaintiffs admit default and cannot have reasonably relied by foregoing
7 the opportunity to file an unmeritorious and improper stalling action in the face of
8 foreclosure. Moreover, Plaintiffs allege that by relying on Defendant's promise, they lost the
9 ability to file the action "prior to a foreclosure." But no foreclosure appears to have occurred
10 in this case, suggesting that the present complaint is a poorly edited form complaint that is
11 inconsistent with the facts. Also, Plaintiffs cannot have "reasonably" relied by allegedly
12 foregoing a bankruptcy filing, because such a filing could not have cured the default. It
13 would only delay a foreclosure sale, and likely for no longer than the present action has
14 already done; it would not have affected Plaintiffs' equitable interest in the Property.

15 Furthermore, the second element of promissory estoppel is lacking supporting
16 evidence. Plaintiffs do not claim that Defendant "intend[ed] that his conduct shall be acted
17 upon, or [acted such] that the party asserting estoppel has the right to believe it was so
18 intended." *Pink*, 691 P.2d at 459 (quoting *Cheger*, 655 P.2d at 999). There is certainly no
19 "extraordinary evidence" of this.

20 Defendant has shown that a reasonable jury could not find that Plaintiffs have met
21 their burden of proof on the promissory estoppel claim, and Plaintiffs have not met their
22 shifted burden to establish a genuine issue of material fact. Plaintiffs' evidence is limited to
23 a declaration in a verified complaint that a promise was made. This is not an "extraordinary
24 measure or quantum of evidence" of the elements of promissory estoppel. *Zunino v.*
25 *Paramore*, 435 P.2d 196, 197 (Nev. 1967). No witnesses provide affidavits to corroborate

1 any promise, there is no evidence of any document prepared for signature, and there is no
2 other evidence of an offer. Plaintiffs have not met their shifted burden to show a genuine
3 issue of material fact. The Court will grant the Motion for Summary Judgment (ECF No. 7)
4 as to the first cause of action.

5 **B. Second Cause of Action - Wrongful Foreclosure/Quiet Title**

6 A lender generally owes no duty of care to its borrower. *See Nymark v. Heart Fed.*
7 *Sav. & Loan*, 231 Cal. App. 3d 1089, 1096 (1991). But this is only true in a lender's
8 "conventional role as a mere lender of money." *Id.* It does not indicate that in California (or
9 Nevada) lenders (or others) have no duty of care in foreclosing proceedings. The United
10 States District Court for the Northern District of California has ruled that a foreclosure
11 trustee has a duty of care to a trustor, but that the scope of the duty is circumscribed by the
12 statutes governing foreclosures. *Hendrickson v. Popular Mortgage Servicing, Inc.*, No. 09-
13 00472-CW, 2009 WL 1455491, at *7 (N.D. Cal. May 21, 2009) ("[T]he scope and nature of
14 the trustee's duties in a nonjudicial foreclosure 'are exclusively defined by the deed of trust
15 and the governing statutes. No other common law duties exist.'" (quoting *Pro Value Props.,*
16 *Inc. v. Quality Loan Serv. Corp.*, 88 Cal. Rptr. 3d 381[, 384] (2009))).

17 Therefore, there is no general duty of care, but there is a duty of care as defined by the
18 Nevada foreclosure statutes, assuming the Nevada Supreme Court would hold as the
19 California Supreme Court did in *Pro Value Props., Inc.* The statutes governing foreclosures
20 in Nevada are Nev. Rev. Stat. §§ 107.080–.100. Therefore, these statutes set the floor of the
21 duty of care for a foreclosing entity. *See Hendrickson*, 2009 WL 1455491, at *7. Under
22 these statutes, the beneficiary, his successor in interest, or the trustee under a deed of trust (or
23 their agents), must record a notice of default and election to sell before a trustee sale may
24 occur. Nev. Rev. Stat. § 107.080(2)(c).

25 Plaintiffs allege wrongful foreclosure based on Defendant's failure to consummate an

1 alleged oral promise to modify the loan and Plaintiffs' anticipation of foreclosure. This will
2 not support a wrongful foreclosure claim, but a statutory defect in foreclosure will.
3 Defendant argues that, as a threshold matter, the wrongful foreclosure claim is unripe
4 because the foreclosure process has not yet begun. However, this does not actually seem to
5 be true in this case. The Clark County Recorder's Index available online indicates that
6 National Default Servicing Co. did record a notice of default against Plaintiffs with respect
7 to parcel 162-25-810-008 on June 4, 2009. (<http://recorder.co.clark.nv.us/>). This matches the
8 parcel number on the deed of trust. (*See* ECF No.7, Ex. C, at 3.) On September 9, 2009,
9 Deutsche Bank National Trust Co. substituted National Default Servicing Co. as trustee,
10 which then recorded a notice of trustee sale. It is not clear who owned the promissory note
11 at that time, or what party caused these entities to record the notices.

12 In summary, not only does foreclosure appear imminent, but there may be potential
13 statutory defects in the foreclosure here. To obtain summary judgment on this claim,
14 Defendant need only provide evidence showing either that it did not cause the foreclosure at
15 all, or if it did, that it has the interest in the underlying loan and caused the entities identified
16 above to record these documents, or that the beneficiary or trustee, if not Defendant, caused
17 Defendant to cause the recordings. As it stands now however, there is a genuine issue of
18 material fact as to wrongful foreclosure, and the Court will deny summary judgment on this
19 cause of action.

20 **C. Third Cause of Action - "Tortious" Misrepresentation**

21 There are at least three kinds of tortious misrepresentation. In most states, such as
22 Nevada, the torts of negligent misrepresentation and intentional misrepresentation (common
23 law fraud) are recognized. *See, e.g., G.K. Las Vegas Ltd. P'ship v. Simon Prop. Group, Inc.*,
24 460 F. Supp. 2d 1246, 1262 (D. Nev. 2006) (negligent); *Bulbman, Inc. v. Nev. Bell*, 825 P.2d
25 588, 592 (Nev. 1992) (intentional). In one state, a cause of action may also lie for "strict

1 responsibility misrepresentation.” See *Van Lare v. Vogt, Inc.*, 683 N.W.2d 46, 54 (Wis.
2 2004). The third cause of action here potentially implicates intentional misrepresentation
3 (fraud) and negligent misrepresentation. The elements of intentional misrepresentation in
4 Nevada are:

- 5 1. A false representation made by the defendant;
- 6 2. Defendant’s knowledge or belief that the representation is false (or
7 insufficient basis for making the representation);
- 8 3. Defendant’s intention to induce the plaintiff to act or to refrain from
9 acting in reliance upon the misrepresentation;
- 10 4. Plaintiff’s justifiable reliance upon the misrepresentation; and
- 11 5. Damage to the plaintiff resulting from such reliance.

12 *Bulbman*, 825 P.2d at 592.

13 Under Rule 9(b), circumstances constituting fraud or mistake must be stated with
14 particularity. Fed. R. Civ. P. 9(b). This has been construed to require a plaintiff to “state
15 precisely the time, place and nature of the misleading statements, misrepresentations and
16 specific acts of fraud.” *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994). A plaintiff must
17 plead facts such as “he bought a house from defendant, that the defendant assured him that it
18 was in perfect shape, and that in fact the house turned out to be built on a landfill”
19 *Warshaw v. Xoma Corp.*, 74 F.3d 955, 960 (9th Cir 1996) (quoting *In re GlenFed, Inc. Sec.*
20 *Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc)). The plaintiff must also “set forth an
21 explanation as to why the statement or omission complained of was false and misleading.” *In*
22 *re GlenFed Sec. Litig.*, 42 F.3d at 1548. Next, a claim for negligent misrepresentation
23 requires a plaintiff to plead: 1) a representation that is false; 2) that the representation was
24 made in the course of the defendant’s business or in any action in which he has a pecuniary
25 interest; 3) the representation was for the guidance of others in their business transactions;

1 4) the representation was justifiably relied upon; 5) that such reliance resulted in pecuniary
2 loss to the relying party; and 6) that the defendant failed to exercise reasonable care or
3 competence in obtaining or communicating the information. *G.K. Las Vegas Ltd. P'ship*, 460
4 F. Supp. 2d at 1262. Negligent misrepresentation must also be pled with particularity. Fed.
5 R. Civ. P. 9(b). It is not clear whether intentional or negligent misrepresentation is intended
6 to be pled, but, regardless, neither claim is sufficiently pled. There is no allegation of any
7 misrepresentation of past or present facts. The third cause of action is essentially the
8 promissory estoppel claim recast as "misrepresentation." No misrepresentation claim, either
9 intentional or negligent, lies from a false promise to perform in the future. Plaintiffs conflate
10 misrepresentation with promissory estoppel; the former is based on a misrepresentation of an
11 existing fact, whereas the latter is based on a misstatement of future intentions. *See, e.g.,*
12 *Corbett v. Firstline Sec., Inc.*, No. 08-cv-5124 (ADS)(WDW), 2009 WL 4643391, at *6
13 (E.D.N.Y. Dec. 9, 2009); *Deutsche Bank Nat'l Trust Co. v. Sinclair*, 2009 WL 485 6409, at
14 *2 (N.Y. App. Div. 2009). The later action has been separately pled. The Court will
15 therefore grant the Motion to Dismiss (ECF No.7) as to the third cause of action for tortious
16 misrepresentation.

17 **D. Fourth Cause of Action - Injunctive Relief**

18 The Ninth Circuit in the past used two separate sets of criteria for determining
19 whether to grant preliminary injunctive relief. Under the traditional test, a plaintiff must
20 show: (1) a strong likelihood of success on the merits; (2) the possibility of irreparable injury
21 to plaintiff if preliminary relief is not granted; (3) a balance of hardships favoring the
22 plaintiff; and (4) advancement of the public interest (in certain cases). *Taylor v. Westly*, 488
23 F.3d 1197, 1200 (9th Cir. 2007). The alternative test requires that a plaintiff demonstrate
24 either a combination of probable success on the merits and the possibility of irreparable
25 injury or that serious questions are raised and the balance of hardships tips sharply in his

1 favor. *Id.* “These two formulations represent two points on a sliding scale in which the
2 required degree of irreparable harm increases as the probability of success decreases.” *Id.*
3 The Supreme Court recently reiterated, however, that a plaintiff seeking an injunction must
4 demonstrate that irreparable harm is “*likely*,” not just possible. *Winter v. NRDC*, 129 S. Ct.
5 365, 374–76 (2008) (rejecting the Ninth Circuit’s alternative “sliding scale” test).

6 The Ninth Circuit has explicitly recognized that its alternative test was overruled by
7 *Winter*, and that “[t]he proper legal standard for preliminary injunctive relief requires a party
8 to demonstrate ‘that he is likely to succeed on the merits, that he is likely to suffer irreparable
9 harm in the absence of preliminary relief, that the balance of equities tips in his favor, and
10 that an injunction is in the public interest.’” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127
11 (9th Cir. 2009) (quoting *Winter*, 129 S. Ct. at 374).

12 Here, the Plaintiffs have not made a sufficient showing of likelihood of success on the
13 merits, as they have not affirmatively demonstrated that there actually was a defect in the
14 initiation of the foreclosure proceedings, so a preliminary injunction will not be entered or
15 granted at this time. However, their request for injunctive relief will not be dismissed while the
16 wrongful foreclosure cause of action is still pending. Accordingly, the Court will deny
17 Defendant’s Motion to dismiss the request for injunctive relief styled as Plaintiffs’ fourth
18 cause of action.

19 **E. Fifth Cause of Action - Chapter 598D**

20 Plaintiff entered into the present mortgage on June 29, 2004. (ECF No.7, Ex. C, at 1.)
21 Nev. Rev. Stat. § 598D.100 was amended in 2007, with an effective date of June 13, 2007.
22 See 2007 Nev. Stat. §§ 2844–46. It is the pre-2007 version of the statute that applies to the
23 present case. That version of statute prohibited a lender from making “a home loan to a
24 borrower based solely upon the equity of the borrower in the home property and without
25 determining that the borrower has the ability to repay the home loan from other assets”

1 Nev. Rev. Stat. § 598D.100 (2006).²

2 Moreover, section 598D.100 has only ever applied to “home loan[s],” and the pre-
3 2007 version of the statute required loans to qualify as “a mortgage under § 152 of the Home
4 Ownership and Equity Protection Act of 1994 (‘HOEPA’), 15 U.S.C. § 1602(aa)” in
5 order to qualify as a “home loan” under Nev. Rev. Stat. § 598D.040. *Id.* HOEPA § 152
6 excludes “residential mortgage transactions” from coverage. 15 U.S.C. § 1602(aa)(1).
7 “Residential mortgage transaction[s]” include those where a deed of trust is created or
8 retained against the consumer’s dwelling to finance its acquisition or construction. 15 U.S.C.
9 § 1602(w). In other words, HOEPA applies to credit transactions where a person secures a
10 debt obligation with a security interest against his existing “principal dwelling,” but it
11 excludes “residential mortgage transaction[s]” otherwise known as purchase money
12 mortgages. *McAnaney v. Astoria Fin. Corp.*, No. 04-CV-1101 (JFB)(WDW), 2009 WL 315
13 0430, at *16 (E.D.N.Y. Sept. 29, 2009); *Llaban v. Carrington Mortgage Servs., LLC*, No.
14 09-CV-1667-HPOR, 2009 WL 2870154, at *5 (S.D. Cal. Sept. 3, 2009). Therefore, even the
15 pre-2007 version of the statute is inapplicable in the present case as a purchase money
16 mortgage is at issue here. Moreover, the three-year statute of limitations expired on this
17 cause of action on June 28, 2007, over two years before the Complaint was filed on January

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

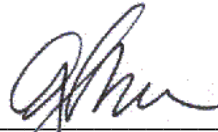
24
25 ² The new statute broadens the protection given to consumers by making it actionable when a lender knowingly or intentionally makes “a home loan . . . without determining, using any commercially reasonable means or mechanism, that the borrower has the ability to repay the home loan.” § 598D.100 (2009).

1 28, 2010. *See* Nev. Rev. Stat. § 11.190(3)(a). The Court will dismiss this cause of action.

2 **CONCLUSION**

3 IT IS HEREBY ORDERED that Defendant's Motion to Dismiss or, in the
4 Alternative, for Summary Judgment (ECF No. 7) is GRANTED as to the first, third, and fifth
5 causes of action in Plaintiffs' Complaint and DENIED as to the second and fourth causes of
6 action.

7 DATED this 23rd day of February, 2011.

8 

9 _____
10 Gloria M. Navarro
11 United States District Judge