

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 GERARDO HERRERA, et al.,)
4)
5 Plaintiffs,)
6 vs.)
7 NATIONSTAR MORTGAGE, LLC, et al.,)
8 Defendants.)

Case No.: 2:16-cv-01043-GMN-GWF

ORDER

9
10 Pending before the Court is the Motion to Dismiss, (ECF No. 30), filed by Defendant
11 Nationstar Mortgage, LLC (“Nationstar”) and joined by Defendant Quality Loan Service, Corp.
12 (“Quality Loan”) (collectively “Defendants”). Plaintiffs Gerardo Herrera and Estate of Genny
13 Herrera (collectively “Plaintiffs”) filed a Response, (ECF No. 33),¹ and Defendants did not file
14 a Reply. For the reasons set forth herein, Defendants’ Motion to Dismiss is GRANTED in
15 part and DENIED in part.

16 I. BACKGROUND

17 This case concerns a dispute over a loan agreement and the potential foreclosure of the
18 real property located at 586 Jackson Drive, Henderson, NV 89014 (“the Property”). Plaintiffs
19 first acquired the Property in February 2005. (Compl. ¶ 12, ECF No. 1). To secure payment for
20 the Property, Plaintiffs executed a Promissory Note (the “Note”) and Deed of Trust (“Deed of
21 Trust”) (collectively “the loan agreement”). (Id. ¶ 14). Thereafter, Plaintiffs allegedly
22 “experienced a major reduction in income,” which Plaintiffs claim made it difficult to make
23 monthly payments on the loan agreement. (Id. ¶¶ 15, 16). As a result, Plaintiffs applied for the

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25 ¹ In light of Plaintiffs’ status as pro se litigants, the Court has liberally construed their filings, holding them to
standards less stringent than formal pleadings drafted by attorneys. See Erickson v. Pardus, 551 U.S. 89, 94
(2007).

1 Home Affordable Modification Program (“HAMP”), expecting that a loan modification would
2 provide relief from a pending foreclosure. (Id. ¶ 17). After submitting financial statements and
3 hardship letters, Plaintiffs allegedly were told that the application “was still in review and no
4 documents were being requested.” (Id. ¶ 20). On August 30, 2015, Plaintiffs received notice
5 from Quality Loan that the loan agreement was in default. (Id. ¶ 21). After following up with
6 Nationstar, Plaintiffs allegedly were informed that the property faced foreclosure. (Id.).

7 On May 9, 2016, Plaintiffs filed a Complaint and Application for Temporary Restraining
8 Order, alleging over a dozen claims against Defendants. On August 12, 2016, Nationstar filed
9 the instant Motion, seeking dismissal on Plaintiffs’ claims with prejudice.

10 **II. LEGAL STANDARD**

11 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon
12 which relief can be granted. Fed. R. Civ. P. 12(b)(6); Bell Atl. Corp. v. Twombly, 550 U.S. 544,
13 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on
14 which it rests, and although a court must take all factual allegations as true, legal conclusions
15 couched as a factual allegation are insufficient. Twombly, 550 U.S. at 555. Accordingly, Rule
16 12(b)(6) requires “more than labels and conclusions, and a formulaic recitation of the elements
17 of a cause of action will not do.” Id.

18 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
19 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556
20 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 555). “A claim has facial plausibility
21 when the plaintiff pleads factual content that allows the court to draw the reasonable inference
22 that the defendant is liable for the misconduct alleged.” Id. This standard “asks for more than a
23 sheer possibility that a defendant has acted unlawfully.” Id.

24 “Generally, a district court may not consider any material beyond the pleadings in ruling
25 on a Rule 12(b)(6) motion.” Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542,

1 1555 n.19 (9th Cir. 1990). “However, material which is properly submitted as part of the
2 complaint may be considered.” Id. Similarly, “documents whose contents are alleged in a
3 complaint and whose authenticity no party questions, but which are not physically attached to
4 the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss” without
5 converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14
6 F.3d 449, 454 (9th Cir. 1994). On a motion to dismiss, a court may also take judicial notice of
7 “matters of public record.” *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986).
8 Otherwise, if a court considers materials outside of the pleadings, the motion to dismiss is
9 converted into a motion for summary judgment. Fed. R. Civ. P. 12(d).

10 If the court grants a motion to dismiss for failure to state a claim, leave to amend should
11 be granted unless it is clear that the deficiencies of the complaint cannot be cured by
12 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant
13 to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in
14 the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the
15 movant, repeated failure to cure deficiencies by amendments previously allowed, undue
16 prejudice to the opposing party by virtue of allowance of the amendment, futility of the
17 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

18 **III. DISCUSSION**

19 **a. General Deficiencies in the Complaint**

20 As a preliminary matter, Quality Loan correctly notes that the Complaint fails to provide
21 adequate notice as to which specific allegations pertain to which defendants. (See Joinder to
22 Mot. to Dismiss 3:16–17, ECF No. 32). As stated above, a pleading must give “fair notice of a
23 legally cognizable claim and the grounds on which it rests.” *Twombly*, 550 U.S. at 555; see also
24 Fed. R. Civ. P. 8(a). The purpose of this requirement is not only to provide defendants with a
25 fair opportunity to respond to allegations, but also to ensure the effective use of the Court’s

1 resources. See *McHenry v. Renne*, 84 F.3d 1172, 1179-80 (9th Cir. 1996) (finding dismissal
2 appropriate under Federal Rule of Civil Procedure 8 because “[p]roliferating, confusing complaints . .
3 . . . impose unfair burdens on litigants and judges.”).

4 Here, the Complaint’s factual background implies that the majority of claims apply to
5 Nationstar; however, the Complaint does not actually differentiate between Defendants.
6 Rather, each claim (and many of the facts) reference only a collective “Defendants” without
7 detailing how each individual Defendant is implicated. (See Compl.). Moreover, the facts in
8 the Complaint are predominantly vague statements and largely amount to mere legal
9 conclusions. Adding to the confusion, the Complaint also includes two separate sections of
10 claims, which are divided by Plaintiff’s “Application for Temporary and Permanent
11 Injunction.” (Id. ¶¶ 27–100).² The Court therefore finds that the Complaint falls short of the
12 pleading requirements and should be dismissed with leave to amend. In the interest of
13 efficiency, however, the Court will still address Defendants’ remaining challenges to the
14 individual claims.

15 **b. Breach of Contract**

16 To establish a breach of contract claim, a plaintiff must show that: (1) there was a valid
17 contract; (2) the defendant breached the terms of the contract; and (3) the plaintiff suffered
18 damages as a result of the breach. See *Brown v. Kinross Gold U.S.A., Inc.*, 531 F.Supp.2d 1234,
19 1240 (D. Nev. 2008).

20 Plaintiffs allege a breach of contract claim against Defendants based on the February
21 2005 loan agreement. (Compl. ¶ 28). Specifically, Plaintiffs allege that Defendants breached
22 the agreement by “charging Plaintiffs marked-up fees for late charges, escrow, and failing to
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24 ² Plaintiffs filed their Complaint in the same document as the “Application for Temporary and Permanent
25 Injunction.” The filing includes a number of claims intermixed sporadically. The Court notes that in any
subsequent amendments, the Complaint itself should include a full and consistent list of all the causes of action
that Plaintiffs are asserting.

1 disclose the actual costs to [Plaintiffs] for these services.” (Id. ¶ 30). Plaintiffs also allege that
2 Defendants violated the Nevada Constitution and Nevada Property Code and therefore have no
3 right to foreclosure. (Id. ¶ 31). Lastly, Plaintiffs allege that Defendants repeatedly promised
4 Plaintiffs that “they would modify the [loan agreement],” but failed to do so. (Id. ¶ 33)

5 In its motion to dismiss, Nationstar argues that the Complaint fails to state a claim for
6 breach of contract because it does not “identify which provision of which contract Nationstar
7 violated.” (Mot. to Dismiss 6:10–12, ECF No. 30). Nationstar is correct. Here, the Complaint
8 does not reference any specific provision in the loan agreement that Defendants allegedly
9 breached. Absent such information, Defendants cannot accurately determine which “marked-
10 up fees” or modification provisions are at issue. Therefore, the Court finds that Plaintiffs have
11 failed to satisfy the second prong of the breach of contract analysis and will grant dismissal
12 without prejudice as to this claim.

13 **c. California Consumer Credit Code and Federal Debt Collection Practices Act**

14 Plaintiffs allege that Defendants violated the California Consumer Credit Code, noting
15 that the loan documents were initiated in California. (Compl. ¶ 37). However, Plaintiffs fail to
16 demonstrate that California law applies. To the contrary, both Plaintiffs and the property at
17 issue reside in Nevada, and Plaintiffs initiated the case in Nevada. (Id. ¶ 12). Furthermore, the
18 deed of trust indicates that the applicable law is that of the “jurisdiction in which the Property is
19 located.” (Deed of Trust, Ex. A to Compl.). Accordingly, the Court will dismiss Plaintiffs’
20 claim under the California Consumer Credit Code with prejudice.

21 Plaintiffs also bring a claim under the Federal Debt Collection Practices Act pursuant to
22 15 U.S.C 1692e(2)(A). Specifically, Plaintiffs allege that Defendants: (1) misrepresented the
23 character, extent, or amount of a consumer debt; (2) wrongfully accelerated the loan; and (3)
24 imposed wrongful charges against Plaintiffs. (Compl. ¶ 36). In response, Nationstar argues that
25 “there is no detail to identify how Nationstar committed these alleged violations.” (Mot. to

1 Dismiss 7:5). Upon review, the Court agrees that the Complaint fails to provide sufficient
2 details as to which aspects of Plaintiffs' debt were "misrepresented" or "wrongfully imposed."
3 As alleged, Plaintiffs' claim under the Federal Debt Collection Practices Act essentially
4 amounts to nothing more than labels and conclusions. See *Twombly*, 550 U.S. at 555. The
5 Court therefore will grant dismissal without prejudice on this claim.

6 **d. Common Law Tort of Unreasonable Collection Efforts**

7 Plaintiffs allege that Defendants violated the "Tort of Unreasonable Collection Efforts"
8 under Nevada common law. (Compl. ¶ 43). Plaintiffs fail to provide any legal or factual basis
9 for this alleged common law claim. Accordingly, the Court will dismiss this claim without
10 prejudice.

11 **e. Negligent Misrepresentation**

12 Plaintiffs allege a claim of negligent misrepresentation based on Defendants' false
13 representations "regarding [Plaintiffs'] mortgage account and a foreclosure sale." (Id. ¶ 45).
14 Specifically, Plaintiffs assert that "Defendants failed to use reasonable care in communicating
15 the correct status of the Plaintiffs' mortgage loan" and "Plaintiffs relied on the representations
16 to their detriment." (Id. ¶ 46).

17 Nevada has adopted the Restatement (Second) of Torts § 552 definition of negligent
18 misrepresentation. This section provides:

19 "One who, in the course of his business, profession or employment,
20 or in any other action in which he has a pecuniary interest, supplies
21 false information for the guidance of others in their business
22 transactions, is subject to liability for pecuniary loss caused to them
23 by their justifiable reliance upon the information, if he fails to
exercise reasonable care or competence in obtaining or
communicating the information."

24 *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 302 P.3d 1148, 1153 (Nev. 2013). Claims of negligent
25 misrepresentation must be pled with particularity pursuant to Fed. R. Civ. P. 9(b). See *G.K. Las
Vegas Limited Partnership v. Simon Property Group, Inc.*, 460 F.Supp.2d 1246, 1262 (D. Nev.

1 2006). To satisfy this requirement, the Complaint must plead with particularity “averments to
2 the time, the place, the identity of the parties involved, and the nature of the fraud or mistake.”
3 *Brown v. Kellar*, 636 P.2d 874 (Nev. 1981); see also *Allwaste, Inc. v. Hecht*, 65 F.3d 1523 (9th
4 Cir. 1995).

5 Here, Plaintiffs fail to plead their negligent misrepresentation claim with the required
6 particularity. Specifically, Plaintiffs fail to identify the person making the alleged
7 misrepresentation, the place where it was made, the time that it was made, or the nature of the
8 misrepresentation. Accordingly, the Court will dismiss this claim without prejudice.

9 **f. Mortgage Electronic Registrations Systems, Inc. (“MERS”)**

10 Plaintiffs include in the Complaint a lengthy series of allegations regarding MERS. (See
11 Compl. ¶¶ 47–55). As alleged, these statements do not set forth a cognizable legal claim and
12 are accordingly dismissed without prejudice.

13 **g. Accounting**

14 Plaintiffs allege a claim for accounting. (*Id.* ¶ 56). Before a claim for accounting can be
15 pursued, Nevada law requires that the parties to such a claim must first and foremost be
16 partners. See *State v. Elsbury*, 175 P.2d 430, 433 (Nev. 1946). Here, Plaintiffs have not alleged
17 that they are partners with Defendants in any venture. Accordingly, the Court will dismiss this
18 claim without prejudice.

19 **h. Declaratory Judgment**

20 Plaintiffs allege a claim for declaratory judgment pursuant to Section 1780 of the
21 California Civil Code. (See Compl. ¶¶ 47–55). As explained above, California law is
22 inapplicable in this action. Moreover, declaratory relief is merely a remedy, not a stand-alone
23 cause of action. See *Antaredjo v. Nationstar Mortg.*, 2:13-cv-1532-JCM-CWH, 2014 WL
24 298810, at *3 (D. Nev. Jan. 27, 2014); *Nguyen v. Washington Mut. Bank, N.A.*, 2:11-cv-1799–
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1 LRH–NJK, 2013 WL 3864110, at *2 (D. Nev. July 24, 2013). The Court therefore will dismiss
2 this claim with prejudice.

3 **i. Negligence**

4 Plaintiffs allege a claim for negligence, stating that “Defendants owed a common law
5 and a statutory duty of care to the Plaintiffs to ensure that Plaintiff’s contractual rights would be
6 protected, and specifically that the borrowers would be eligible for the HAMP program.”
7 (Compl. ¶ 60).

8 To establish a claim of negligence, Plaintiff must demonstrate that: (1) Defendants owed
9 Plaintiff a duty of care; (2) Defendants breached that duty; (3) Defendants’ breach of duty was
10 a legal cause of Plaintiff’s injuries; and (4) Plaintiff suffered damages. See *DeBoer v. Sr.*
11 *Bridges of Sparks Fam. Hosp.*, 282 P.3d 727, 732 (Nev. 2012).

12 Here, beyond a conclusory assertion, Plaintiffs fail to provide a legal or factual basis that
13 Defendants owed Plaintiffs a duty regarding their “contractual rights.” The Court therefore will
14 dismiss this claim without prejudice.

15 **j. Wrongful Foreclosure and Sale of Property**

16 Plaintiffs allege a claim for wrongful foreclosure under Section 2924 of the California
17 Civil Code. (Compl. ¶¶ 84, 85). As explained above, California law does not apply to the
18 foreclosure or sale of this Property. The Court therefore will dismiss this claim with prejudice.

19 **k. Negligent and Intentional Infliction of Emotional Anguish**

20 Plaintiffs allege a claim for both negligent and intentional infliction of emotional
21 anguish. (Id. ¶¶ 86–96). Specifically, Plaintiffs claim they have suffered “extreme anxiety and
22 mental anguish” from Defendants’ actions. (Id. ¶ 89).³ Defendants argue that neither claim can
23 survive because Plaintiffs have failed to allege: (1) physical impact, or (2) proof of serious
24 emotional distress causing physical injury or illness. (See Mot to Dismiss 9:26–10:1).

25 _____
³ The Court notes that Plaintiff Estate of Genny Herrera, as an estate, cannot suffer emotional distress.

1 Defendants are correct with respect to the negligent infliction of emotional distress
2 claim. See *Barmettler v. Reno Air, Inc.*, 956 P.2d 1382, 1387 (Nev. 1998) (“[I]n cases where
3 emotional distress damages are not secondary to physical injuries, but rather, precipitate
4 physical symptoms, either a physical impact must have occurred or, in the absence of physical
5 impact, proof of ‘serious emotional distress’ causing physical injury or illness must be
6 presented.”). However, with respect to intentional infliction of emotional distress, a physical
7 injury or illness is not necessarily required. See *Nelson v. City of Las Vegas*, 665 P.2d 1141,
8 1145 (Nev. 1983) (“The less extreme the outrage, the more appropriate it is to require evidence
9 of physical injury or illness from the emotional distress.”). Nonetheless, the factual allegations
10 in the Complaint are currently insufficient to sustain either cause of action. Accordingly, the
11 Court will dismiss these claims without prejudice.


12 **IV. CONCLUSION**

13 **IT IS HEREBY ORDERED** that Defendants’ Motion to Dismiss, (ECF No. 30), is
14 **GRANTED in part and DENIED in part.**

15 **IT IS FURTHER ORDERED** that Plaintiffs’ claims based on California law and
16 Plaintiffs’ claim for declaratory relief are dismissed **with prejudice.**

17 **IT IS FURTHER ORDERED** that the remainder of Plaintiffs’ claims are dismissed
18 **without prejudice.** The Court grants Plaintiffs leave to file an amended complaint by **April**
19 **10, 2017**, in which Plaintiffs may cure, if possible, the deficiencies in these claims. Failure to
20 file an amended complaint by this date shall result in the Court dismissing these claims with
21 prejudice.

22 **DATED** this 22 day of March, 2017.

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Gloria M. Navarro, Chief Judge
United States District Judge