

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

6 JOSE CAMACHO-VILLA and MICHELLE) 3:10-CV-210-ECR-VPC
7 CAMACHO-VILLA,)
8 Plaintiffs,)
9 vs.) **Order**
10 GREAT WESTERN HOME LOANS, a California)
11 Corporation; FIRST AMERICAN TITLE)
12 COMPANY; MORTGAGE ELECTRONIC)
13 REGISTRATION SYSTEM, INC., a)
14 subsidiary of MERSCORP, INC., a)
15 Delaware corporation, [MERS], MTDS,)
16 INC., a California Corporation DBA)
17 MERIDIAN TRUST DEED SERVICE; MERIDIAN)
FORECLOSURE SERVICE, a California)
Corporation; INDYMAC MORTGAGE SERVICES,)
a division of ONEWEST BANK, FBS; and)
DOES and ROES 1-25 Individuals,)
Partnerships, or anyone claiming any)
interest to the property described in)
the action)
17)

Plaintiffs are homeowners who allege that they are the victims of a predatory lending scheme perpetuated by Defendants. Plaintiffs assert causes of action for (i) injunctive relief; (ii) declaratory relief; (iii) violations of the Federal Fair Debt Collection Practice Act and the Nevada Fair Debt Collection law; (iv) unfair and deceptive trade practices; (v) unfair lending practices; (vi) violation of the covenant of good faith and fair dealing; (vii) wrongful foreclosure; (viii) quiet title; (ix) fraud through omission; (x) fraud in the inducement; (xi) conspiracy to commit fraud and conversion; (xii) civil conspiracy; (xiii) racketeering;

1 and (xiv) unjust enrichment. Now pending are a Motion to Dismiss
2 First Amended Complaint (#27) filed by Defendant Indymac Mortgage
3 Services ("Indymac"); a Motion to Dismiss First Amended Complaint
4 (#29) filed by Defendant Mortgage Electronic Registration System,
5 Inc. ("MERS"); a Second Motion to Remand (#31) filed by Plaintiff
6 Jose Camacho-Villa; and a Motion to Stay All Proceedings Pending
7 Decision on Motion to Remand (#37) filed by Defendant MERS. The
8 motions are ripe, and we now rule on them.

9

10 **I. Factual Background**

11 Plaintiffs allege that on or about December 14, 2006,
12 Plaintiffs Jose Camacho-Villa and Michelle Camacho-Villa executed a
13 note in the amount of \$214,400 in favor of lender Great Western Home
14 Loans (the "Mortgage Note") and a deed of trust (the "Deed of
15 Trust") with respect to real property located at 7322 Warhol Drive,
16 Sun Valley, Nevada 89433 (the "Property"). (Am. Compl. ¶ 3 (#26).)
17 Plaintiffs contend that they made several attempts to modify their
18 loan (the "Loan") through Indymac, believed to be the Loan servicer,
19 but were not able to contact the holder of the note directly. (Id.
20 at ¶34.) A notice of default with respect to the Loan was recorded
21 on September 23, 2009 by Defendant Meridian Trust Deed Service. Id.
22 On December 28, 2009, MTDS, Inc. recorded a Notice of Trustee's sale
23 with respect to the Property.

24

25 **II. Procedural Background**

26 On March 8, 2010, Plaintiffs Jose Camacho-Villa and Michelle
27 Camacho-Villa filed a "Complaint Quiet Title and Other Equitable

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1 Remedies" (#1 Ex. 1) in the Second Judicial District Court of the
2 State of Nevada in and for the County of Washoe. On April 13, 2010,
3 Defendants MERS and Indymac filed a Petition for Removal (#1) to the
4 United States District Court for the District of Nevada. Also on
5 April 13, 2010, Plaintiff Jose Camacho-Villa filed a Motion to
6 Remand to State Court (#2). Defendant Indymac filed a Response (#7)
7 to Motion to Remand to State Court (#2) and a Motion to Dismiss (#8)
8 on April 30, 2010. Defendant MERS filed a Motion to Dismiss (#12)
9 on May 3, 2010.

10 Pursuant to a June 3, 2010 Conditional Transfer Order (#20),
11 the claims in this case related to the formation and/or operation of
12 MERS were transferred by the United States District Panel on
13 Multidistrict Litigation to the District of Arizona. The claims
14 unrelated to the formation and/or operation of MERS were
15 simultaneously remanded to this Court.

16 On July 12, 2010, the Court granted Plaintiffs leave to amend
17 their complaint and denied Plaintiffs' Motion to Remand (#2),
18 Defendant Indymac's Motion to Dismiss (#8) and Defendant MERS's
19 Motion to Dismiss (#12) as moot.

20 Plaintiffs filed their amended complaint (#26) on July 19,
21 2010. Defendant Indymac filed a Motion to Dismiss First Amended
22 Complaint (#27) on August 3, 2010. Defendant MERS filed a Motion to
23 Dismiss First Amended Complaint (#29) on August 5, 2010. Plaintiff
24 Jose Camacho-Villa filed a Second Motion to Remand (#31) on August
25 23, 2010. Defendant MERS filed a Motion to Stay All Proceedings
26 Pending Decision on Motion to Remand (#37) on September 13, 2010.
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III. Motion to Dismiss Standard

3 Federal Rule of Civil Procedure 12(b)(6) mandates that a court
4 dismiss a cause of action that fails to state a claim upon which
5 relief can be granted. Courts engage in a two-step analysis in
6 ruling on a motion to dismiss. Ashcroft v. Iqbal, 129 S. Ct. 1937
7 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). First,
8 courts accept only non-conclusory allegations as true. Iqbal, 129 S.
9 Ct. at 1949. "Threadbare recitals of the elements of a cause of
10 action, supported by mere conclusory statements, do not suffice."
11 Id. (citing Twombly, 550 U.S. at 555). Federal Rule of Civil
12 Procedure 8 "demands more than an unadorned, the-defendant-
13 unlawfully-harmed-me accusation." Id. Federal Rule of Civil
14 Procedure 8 "does not unlock the doors of discovery for a plaintiff
15 armed with nothing more than conclusions." Id. at 1950. The Court
16 must draw all reasonable inferences in favor of the plaintiff. See
17 Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 949 (9th Cir.
18 2009).

19 After accepting as true all non-conclusory allegations and
20 drawing all reasonable inferences in favor of the plaintiff, the
21 Court must then determine whether the complaint "states a plausible
22 claim for relief." Iqbal, 129 S. Ct. at 1949. (citing Twombly, 550
23 U.S. at 555). "A claim has facial plausibility when the plaintiff
24 pleads factual content that allows the court to draw the reasonable
25 inference that the defendant is liable for the misconduct alleged."
26 Id. at 1949 (citing Twombly, 550 U.S. at 556). This plausibility
27 standard "is not akin to a 'probability requirement,' but it asks

1 for more than a sheer possibility that a defendant has acted
2 unlawfully." Id. A complaint that "pleads facts that are 'merely
3 consistent with' a defendant's liability..." stops short of the line
4 between possibility and plausibility of 'entitlement to relief.'"
5 Id. (citing Twombly, 550 U.S. at 557).

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7 **IV. Plaintiffs' Motion to Remand (#31) and Defendant MERS's Motion**
8 **to Stay Proceedings (#37)**

9 Pursuant to a June 3, 2010 Conditional Transfer Order (#20),
10 the claims in this case related to the formation and/or operation of
11 MERS were transferred by the United States District Panel on
12 Multidistrict Litigation to the District of Arizona. The claims
13 unrelated to the formation and/or operation of MERS were
14 simultaneously remanded to this Court. Thus, we do not have
15 jurisdiction over the entirety of this lawsuit, and cannot, at this
16 time, remand it. Therefore, Plaintiffs' Motion to Remand (#31) will
17 be denied. Plaintiffs may renew their motion to remand or file
18 another motion to remand after the District of Arizona has completed
19 pretrial proceedings and transferred any remaining MERS-related
20 claims back to this court. As Plaintiffs' Motion to Remand (#31)
21 will be denied, Defendant MERS's Motion to Stay Proceedings Pending
22 Decision on Motion to Remand will therefore be denied as moot.

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24 **V. Defendant Indymac's Motion to Dismiss First Amended Complaint**
25 **(#27)**

26 Defendant Indymac filed a Motion to Dismiss (#27) Plaintiffs'
27 First Amended Complaint (#22) pursuant to Federal Rule of Civil

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1 Procedure 12(b)(6) on August 3, 2010. Defendant Indymac alleges (i)
2 that Plaintiffs' first cause of action, for injunctive relief, must
3 be dismissed because it fails to state facts sufficient to
4 constitute a cause of action against Indymac; (ii) that Plaintiffs'
5 second cause of action, for declaratory relief, must be dismissed
6 because it fails to state facts sufficient to constitute a cause of
7 action against Indymac; (iii) that Plaintiffs' third cause of
8 action, a claim for abusive debt collection practices, must be
9 dismissed because Indymac is not a debt collector; (iv) that
10 Plaintiffs' fourth cause of action, alleging unfair and deceptive
11 trade practices, must be dismissed because Indymac is not a debt
12 collector; (v) that Plaintiffs' fifth cause of action, for violation
13 of unfair lending practices, must be dismissed because Indymac is
14 not a lender; (vi) that Plaintiffs' sixth cause of action, alleging
15 breach of the implied covenant of good faith and fair dealing, must
16 be dismissed because Indymac is not a party to the Loan contract;
17 (vii) that Plaintiffs' seventh cause of action for wrongful
18 disclosure must be dismissed because Indymac did not record any
19 documents on title with respect to the Property; (viii) that
20 Plaintiffs' eighth cause of action for quiet title must be dismissed
21 because Indymac did not cause a cloud on title to the Property; (ix)
22 that Plaintiffs' ninth and tenth causes of action for fraud through
23 omission and fraud in the inducement must be dismissed because they
24 fail to state facts sufficient to sustain a cause of action against
25 Indymac; and (x) that Plaintiffs' fourteenth cause of action unjust
26 enrichment must be dismissed because it fails to state facts
27 sufficient to constitute a cause of action against Indymac.

1 A. Plaintiffs' First Cause of Action Must be Dismissed
2 Because It Fails to State Facts Sufficient to Constitute a Cause of
3 Action for Injunctive Relief as to Defendant Indymac.

4 Plaintiffs' first cause of action seeks injunctive relief to
5 enjoin Defendants from proceeding with a foreclosure sale with
6 respect to the Property. (Am. Compl. ¶ 48 (#26).) This cause of
7 action is based upon Plaintiffs' claim that the Notice of Default
8 and Election to Sell Under Deed of Trust and the Notice of Trustee's
9 Sale were improperly recorded on title to the subject property.
10 Defendant Indymac contends that it had no involvement in the
11 foreclosure of the Property, and so this cause of action must be
12 dismissed.

13 Plaintiffs contend generally that "the continued deception
14 exists by all the present Defendants, participating in the
15 transaction, assuming either the servicing rights or accepting the
16 note," but Plaintiffs do not allege any specific wrongdoing on the
17 part of Indymac with respect to the recording of the Notice of
18 Default and Election to Sell Under Deed of Trust and the Notice of
19 Trustee's Sale. (*Id.* ¶ 45.) We therefore find that Plaintiffs'
20 first cause of action is too vague to survive a motion to dismiss.
21 Claims that fail to identify which defendant is responsible for what
22 alleged injury do not adequately place defendants on notice of the
23 claim or claims being asserted against them. See Fortaleza, 642 F.
24 Supp. 2d at 1022.

25 B. Plaintiffs' Second Cause of Action Must be Dismissed
26 Because It Fails to State Facts Sufficient to Constitute a Cause of
27 Action for Declaratory Relief as to Defendant Indymac.

1 Plaintiffs' second cause of action for declaratory relief seeks
2 a judicial declaration that the recording of the Notice of Default
3 and Election to Sell Under Deed of Trust and the Notice of Trustee's
4 Sale was unlawful and created a cloud on title to the Property. (Am.
5 Compl. ¶ 55 (#26).)

6 As stated above, Plaintiffs do not allege any specific
7 wrongdoing on the part of Indymac with respect to the recording of
8 the Notice of Default and Election to Sell Under Deed of Trust and
9 the Notice of Trustee's Sale. (Id. ¶ 45.) We therefore find that
10 Plaintiffs' second cause of action is too vague to survive a motion
11 to dismiss. Claims that fail to identify which defendant is
12 responsible for what alleged injury do not adequately place
13 defendants on notice of the claim or claims being asserted against
14 them. See Fortaleza, 642 F. Supp. 2d at 1022.

15 **C. Plaintiffs' Third Cause of Action for Abusive Debt
16 Collection Practices Must be Dismissed Because Defendant Indymac is
17 Not a Debt Collector for Purposes of the FDCPA.**

18 Defendant Indymac argues that Plaintiffs' third cause of
19 action, alleging a claim for abusive debt collection practices, must
20 be dismissed because Indymac is not a debt collector. Plaintiffs
21 allege that the Notice of Default with respect to the Loan violates
22 The Federal Debt Collection Practices Act ("FDCPA") 15 U.S.C. §
23 1692. (Am. Compl. ¶ 60-66 (#26).) The FDCPA regulates "debt
24 collectors," and defines "debt collector" as "any person who uses
25 any instrumentality of interstate commerce or the mails in any
26 business the principal purpose of which is the collection of any
27 debts, or who regularly collects or attempts to collect, directly or

1 indirectly, debts owed or due or asserted to be owed or due
2 another." 15 U.S.C. § 1692a(6). The statute's definition of "debt
3 collector" does not include a person who collects a debt "to the
4 extent such activity...(ii) concerns debt which was originated by
5 such person; [or] (iii) concerns a debt which is not in default at
6 the time it is obtained by such person." 15 U.S.C. § 1692a(6)(F).

7 Foreclosure pursuant to a deed of trust does not constitute
8 debt collection under the FDCPA. Hulse v. Ocwen Fed. Bank, FSB, 195
9 F. Supp. 2d 1188, 1204 (D. Or. 2002); Izenberg v. ETS Servs., LLC,
10 589 F. Supp. 2d 1193 (C.D. Cal. 2008). See also Heinemann v. Jim
11 Walter Homes, Inc., 47 F. Supp. 2d 716, 722 (N.D.W. Va. 1998).
12 Further, the FDCPA's definition of "debt collector" does not
13 "include the consumer's creditors, a mortgage servicing company, or
14 any assignee of the debt, so long as the debt was not in default at
15 the time it was assigned." Croce v. Trinity Mortg. Assur. Corp.,
16 2009 U.S. Dist. LEXIS 89808 (D. Nev. Sept. 28, 2009). See also S.
17 Rep. No. 95-382, 95th Cong., 1st Sess. 3, reprinted in 1977 U.S.
18 Code Cong. & Ad. News 1695, 1698.

19 As a mortgage servicing company, therefore, Indymac will not be
20 considered a "debt collector" under the FDCPA. Further, Plaintiffs
21 do not allege any facts to show that Indymac engaged in any conduct
22 that would violate fair debt collection statutes. Plaintiffs allege
23 that Indymac violated the FDCPA and Nevada debt collection statutes
24 by recording a Notice of Default and Election to Sell that did not
25 contain language mandated by 15 U.S.C. § 1692e(11) and 15 U.S.C. §
26 1692g(a)(1)-(5). (Am. Compl. ¶ 61-62 (#26).) Plaintiffs' Amended
27 Complaint (#26), however, alleges that Defendant MTDS, Inc., as
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1 opposed to Indymac, filed the Notice of Default and Election to
2 Sell, and does not allege any further facts indicating that Indymac
3 violated federal or state fair debt collection statutes. Id. ¶¶ 5,
4 28.

5 We therefore find that as a mortgage servicing company, Indymac
6 does not fit the FDCPA's definition of "debt collector." We further
7 find that Plaintiffs have failed to allege facts sufficient to
8 sustain a claim that Indymac violated the FDCPA and Nevada debt
9 collection statutes. Therefore, Plaintiffs' third cause of action
10 must be dismissed as to Defendant Indymac.

11 **D. Plaintiffs' Fourth Cause of Action, Alleging Unfair and
12 Deceptive Trade Practices, Must be Dismissed Because Defendant
13 Indymac is Not a Debt Collector for Purposes of the FDCPA.**

14 Defendant Indymac contends that Plaintiffs' fourth cause of
15 action must be dismissed because Indymac is not a debt collector for
16 purposes of the FDCPA. Plaintiffs contend that Defendants violated
17 the Nevada Unfair and Deceptive Trade Practices Act because they did
18 not have the required foreign collector's license when they sent the
19 Notice of Default and Election to Sell in violation of Nev. Rev.
20 Stat. § 649.370 and the FDCPA.

21 As stated above, the FDCPA regulates "debt collectors." Nev.
22 Rev. Stat. § 649.370 codifies the FDCPA as part of Nevada state law,
23 providing that "a violation of any provision of the federal Fair
24 Debt Collection Practices Act...or any regulation pursuant thereto,
25 shall be deemed a violation of this chapter." As such, Nev. Rev.
26 Stat. § 649.370 regulates "debt collectors" as defined by the FDCPA.
27 We found above that Indymac is not a debt collector for purposes of
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1 the FDCPA. It therefore follows that Indymac is not a debt
2 collector for purposes of Nev. Rev. Stat. § 649.370.

3 Because Indymac is not a debt collector for purposes of FDCPA
4 and Nev. Rev. Stat. § 649.370, we find that Plaintiffs' fourth cause
5 of action for violation of the Nevada Unfair and Deceptive Trade
6 Practices Act must be dismissed as to Defendant Indymac.

7 **E. Plaintiffs' Fifth Cause of Action for Unfair Lending
8 Practices Must be Dismissed Because Defendant Indymac is Not a
9 Lender with respect to the Loan.**

10 Defendant Indymac argues that Plaintiffs' fifth cause of action
11 for unfair lending practices under Nev. Rev. Stat. § 598D, must be
12 dismissed because Indymac is not a lender with respect to the Loan.
13 (Am. Compl. ¶ 78 (#26).) Nev. Rev. Stat. § 598D.050 defines
14 "Lender" as a "mortgagee, beneficiary of a deed of trust or other
15 creditor who holds a mortgage, deed of trust or other instrument
16 that encumbers home property as security for the repayment of a home
17 loan."

18 Here, the parties do not dispute that Indymac was not the
19 original lender with respect to the Loan. Plaintiffs' Amended
20 Complaint (#26) explicitly states that Great Western Home Loans was
21 the lender with respect to the Loan. *Id.* ¶ 3. Further, the Deed of
22 Trust identifies Great Western Homes as the lender with respect to
23 the Loan. The Ninth Circuit Court of Appeals has held that
24 "documents whose contents are alleged in a complaint and whose
25 authenticity no party questions, but which are not physically
26 attached to the pleading, may be considered in ruling on a Rule
27 12(b)(6) motion to dismiss" without converting the motion to dismiss

1 into a motion for summary judgment. Branch v. Tunnell, 14 F.3d 449,
2 454 (9th Cir. 1994).

3 Plaintiffs claim that as a loan servicer, Indymac "steps into
4 the shoes of the originator" and so is subject to Plaintiffs' claims
5 because the servicer has the right to collect on the debt. (P.'s
6 Resp. at 3 (#32)). Specifically, Plaintiffs claim that either the
7 original lender, Great Western Home Loans, established a
8 relationship with Indymac as loan servicer, or, in the alternative,
9 that the Note was endorsed by the payee-mortgagee and physically
10 delivered to Indymac as the new holder. Id. Plaintiffs do not
11 provide, nor have we discovered, any authority for this position.
12 On the contrary, we have held that a loan servicer that is not
13 involved in the origination of a loan will not be subject to an
14 unfair lending practices claim under Nev. Rev. Stat. § 598D.
15 Contreras v. Master Fin., Inc., 2010 U.S. Dist. LEXIS 118017 (D.
16 Nev. Nov. 4, 2010); Hasan v. Ocwen Loan Servicing, LLC, 2010 U.S.
17 Dist. LEXIS 69634 (D. Nev. July 12, 2010); Freeto v. Litton Loan
18 Servicing LP, 2010 U.S. Dist. LEXIS 78869 (D. Nev. July 7, 2010).

19 We therefore find that Indymac was not a lender with respect to
20 the Loan, and so no cause of action may be asserted against Indymac
21 under Nev. Rev. Stat. § 598D. Therefore, on the foregoing basis,
22 Plaintiffs' fifth cause of action must be dismissed as to Defendant
23 Indymac.

24 **F. Plaintiffs' Sixth Cause of Action for Violation of the
25 Covenant of Good Faith and Fair Dealing Must be Dismissed Because
26 Defendant Indymac was Not a Party to the Loan Contract.**

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1 In their sixth cause of action, Plaintiffs assert a violation
2 of the covenant of good faith and fair dealing. Specifically,
3 Plaintiffs allege that Defendant Great Western Home Loans, as
4 lender, breached the covenant of good faith and fair dealing when it
5 "offered the Plaintiffs consideration for a loan modification, told
6 them that the foreclosure would be postponed and then invited them
7 to have their denial reconsidered" after the property was foreclosed
8 upon. (Am. Compl. ¶ 83 (#26)).

9 Under Nevada law, "[e]very contract imposes upon each party a
10 duty of good faith and fair dealing in its performance and
11 execution." A.C. Shaw Constr. v. Washoe County, 105 Nev. 913, 914
12 (Nev. 1989)(quoting Restatement (Second) of Contracts § 205). This
13 duty requires each party not to do anything to destroy or otherwise
14 injure the rights of the other to receive the benefits of the
15 contract. Hilton Hotels Corp. v. Butch Lewis Productions, Inc., 107
16 Nev. 226, 234 (1991). To prevail on a cause of action for breach of
17 the implied covenant of good faith and fair dealing, a plaintiff
18 must show: (i) the existence of a valid, enforceable contract; (ii)
19 the defendant's performance in a manner that is unfaithful to the
20 purpose of the contract and the justified expectations of the
21 plaintiff; and (iii) resulting damages sustained by the plaintiff.
22 Perry v. Jordan, 111 Nev. 943, 948 (1995). It therefore follows
23 that the implied covenant of good faith and fair dealing only
24 extends to parties to the contract. Contreras v. Master Fin., Inc.,
25 2011 U.S. Dist. LEXIS 996 at *7-8 (D. Nev. Jan. 4, 2011); Bhadra v.
26 State Farm Fire & Cas. Co., 2010 U.S. Dist. LEXIS 64618 at *10 (D.

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1 Nev. June 1, 2010); Vargas v. California State Auto. Ass'n Inter-
2 Insurance Bureau, 788 F. Supp. 462, 465 (D. Nev. Mar. 12, 1992).

3 Plaintiffs contend that as a mortgage servicing company,
4 Indymac "steps into the shoes of the originator" and so "is subject
5 to all [of Plaintiffs'] claims." (Response at 3 (#32).) However, we
6 have not discovered, nor have Plaintiffs provided, any authority to
7 indicate that Indymac could be held liable for breach of the implied
8 covenant of good faith and fair dealing where Indymac was not a
9 party to the Loan contract.

10 We therefore find that Plaintiffs' sixth cause of action,
11 alleging breach of the implied duty of good faith and fair dealing,
12 must be dismissed as to Defendant Indymac.

13 **G. Plaintiffs' Seventh Cause of Action for Wrongful
14 Disclosure Must be Dismissed Because Defendant Indymac Did Not
15 Record any Documents on Title with Respect to the Property.**

16 In their seventh cause of action, Plaintiffs assert that
17 Defendants wrongfully initiated foreclosure on the Property.
18 Plaintiffs allege that Defendant MTDS, Inc., as agent for the
19 original or substituted trustee, caused a Notice of Default and
20 Election to Sell Under Deed of Trust to be recorded on September 23,
21 2009. On December 28, 2009, Defendant Documents Processing
22 Solutions caused a Notice of Trustee's Sale to be recorded. (Am.
23 Compl. ¶ 90 (#26).) Indymac contends that it should be dismissed
24 from Plaintiffs' wrongful foreclosure action because Indymac was not
25 involved with the recording of the Notice of Default or the Election
26 to Sell Under Deed of Trust or the Notice of Trustee's Sale with
27 respect to the Property.

1 An action for wrongful foreclosure requires that, at the time
2 of the foreclosure sale, the plaintiff was not in breach of the
3 mortgage contract. Ellifritz v. Netbank, 2010 U.S. Dist. LEXIS
4 139065 (D. Nev. Dec. 28, 2010); Haley v. Elegen Home Lending, LP,
5 2010 U.S. Dist. LEXIS 24590 (D. Nev. Mar. 15, 2010); Collins v.
6 Union Federal Sav. & Loan Ass'n, 662 P.2d 610, 623 (D. Nev. 1983).
7 Here, Plaintiffs admit that they were in default on their mortgage
8 obligation. (Am. Compl. ¶ 50 (#26).) As such, there can be no
9 sustainable action for wrongful foreclosure.

10 Furthermore, a claim for wrongful foreclosure does not arise
11 until the power of sale is exercised. Haley, 2010 U.S. Dist. LEXIS
12 24590 at *4; Collins, 662 P.2d at 623. Plaintiffs filed both their
13 original (#1) and amended (#26) complaints before the Property was
14 sold. As such, Plaintiffs' claim for wrongful foreclosure is
15 premature and not actionable.

16 **H. Plaintiffs' Eighth Cause of Action for Quiet Title**
17 **Must be Dismissed Because Defendant Indymac Did Not Cause a Cloud on**
18 **Title to the Property by Recording the Deed of Trust, Notice of**
19 **Default, Election to Sell Under Deed of Trust or Notice of Trustee's**
20 **Sale with Respect to the Property.**

21 Plaintiffs' eighth cause of action is for quiet title. Under
22 Nevada law, a quiet title action may be brought by a party who
23 claims an adverse interest in the subject property. NEV. REV. STAT. §
24 40.010. A quiet title claim requires a plaintiff to allege that the
25 defendant is unlawfully asserting an adverse claim to title to real
26 property. Union Mill v. Mining Co. v. Warren, 82 F. 519, 520
27 (C.C.D. Nev. 1897); Clay v. Cheeline Banking & Trust Co., 159 P.

1 1081, 1082 (Nev. 1916). Plaintiffs allege that Defendants caused a
2 cloud on title to the Property by recording a Deed of Trust, Notice
3 of Default, Election to Sell Under Deed of Trust and/or Notice of
4 Trustee's Sale (Am. Compl. ¶ 102, 106 (#26).)

5 Plaintiffs acknowledge that the Deed of Trust on the Property
6 was recorded by the lender, Defendant Great Western Home Loans (Id.
7 ¶ 3.) The Notice of Default, Election to Sell Under Deed of Trust
8 and Notice of Trustee's Sale indicate on their faces that they were
9 recorded by Defendant MTDS, Inc. (Request for Judicial Notice, Ex. 2
10 and 3.) Plaintiffs do not allege any facts that would indicate that
11 Defendant Indymac was involved in the filing of these documents,
12 which caused a cloud on title to the Property. We therefore find
13 that Plaintiffs provide no viable legal or factual justification for
14 their quiet title claim as to Defendant Indymac, and so it will be
15 dismissed.

16 **I. Plaintiffs' Ninth and Tenth Causes of Action for Fraud
17 Through Omission and Fraud in the Inducement Must be Dismissed
18 Because it Fails to State Facts Sufficient to Constitute a Cause of
19 Action for Injunctive Relief as to Defendant Indymac.**

20 Under Nevada law, a claim for fraud in the inducement requires
21 a party to prove each of the following elements: (1) a false
22 representation; (2) knowledge or belief that the representation was
23 false (or knowledge that the defendant had an insufficient basis for
24 making the representation); (3) intent to induce the plaintiff to
25 consent to the contract's formation; (4) justifiable reliance upon
26 the misrepresentation; and (5) damage resulting from such reliance.

27 J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc., 89 P.3d 1009,

1 1017 (Nev. 2004). A claim for fraudulent concealment requires that
2 the "defendant must have been under a duty to disclose the fact to
3 the plaintiff." Nev. Power Co. v. Monsanto Co., 891 F. Supp. 1406,
4 1415 (D. Nev. 1995).

5 "In alleging fraud or mistake, a party must state with
6 particularity the circumstances constituting fraud or mistake." FED.
7 R. Civ. P. 9(b). In order to meet the heightened pleading
8 requirements, a plaintiff must specify the time, place and content
9 of the misrepresentation as well as the names of the parties
10 involved. See Yourish v. Cal. Amplifier, 191 F.3d 983, 993 n. 10
11 (9th Cir. 1999). In a case with multiple defendants, "Rule 9(b)"
12 does not allow a complaint to merely lump multiple defendants
13 together but requires plaintiffs to differentiate their allegations
14 when suing more than one defendant and inform each defendant
15 separately of the allegations surrounding his alleged participation
16 in the fraud." Swartz v. KPMG LLP, 476 F.3d 756, 764-65 (9th Cir.
17 2007) (internal quotation marks and citation omitted).

18 Plaintiffs' claims fail to satisfy the heightened pleading
19 standard of Rule 9(b). Plaintiffs' allegations in support of these
20 claims are vague and conclusory. Indeed, Plaintiffs do not provide
21 information related to the content and context of the alleged
22 misrepresentation. Plaintiffs' ninth and tenth claims for relief
23 thus fail to satisfy the requirements of Rule 9(b) and will be
24 dismissed.

25 **J. Plaintiffs' Fourteenth Cause of Action for Unjust
26 Enrichment Must be Dismissed Because There was a Written Contract
27 Regarding the Mortgage on the Property.**

1 Plaintiffs allege, generally, that Defendants have been
2 unjustly enriched by virtue of their "unethical, unsound lending
3 practices." (Am. Compl. ¶ 117 (#26).) To set forth a claim for
4 unjust enrichment, a plaintiff must allege that a defendant unjustly
5 retained money or property of another against fundamental principles
6 of equity. Contreras v. Master Fin., Inc., 2011 U.S. Dist LEXIS 996
7 at *10 (Jan. 4. 2011). See also Asphalt Prods. Corp. v. All Star
8 Ready Mix, 898 P.2d 699, 700 (Nev. 1995). However, an action for
9 unjust enrichment cannot stand when there is an express written
10 contract which guides the activities of the parties. LeasePartners
11 Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975, 942 P.2d 182,
12 187 (Nev. 1997).

13 Here, Plaintiffs entered into a written contract with respect
14 to the mortgage on the Property, namely, the Deed of Trust and the
15 Mortgage Note. These documents guided the interactions, obligations
16 and rights of the parties. As such, Plaintiffs cannot make a claim
17 for unjust enrichment with respect to actions that are controlled by
18 a contract to which Plaintiffs are parties. Contreras v. Master
19 Fin., Inc., 2011 U.S. Dist. LEXIS 996 at *10. See also LeasePartners
20 Corp., 942 P.2d at 187-88. Plaintiffs' claim for unjust enrichment
21 will therefore be dismissed.

22

23 **VI. Defendant MERS's Motion to Dismiss First Amended Complaint (#29)**

24 Defendant MERS filed a Motion to Dismiss (#29) Plaintiffs'
25 First Amended Complaint (#22) pursuant to Federal Rule of Civil
26 Procedure 12(b)(6) on August 5, 2010.

27

28

1 As stated above, pursuant to a June 3, 2010 Conditional
2 Transfer Order (#20), the claims in this case related to the
3 formation and/or operation of MERS were transferred by the United
4 States District Panel on Multidistrict Litigation to the District of
5 Arizona (the "MDL court"). The claims unrelated to the formation
6 and/or operation of MERS were simultaneously remanded to this Court.
7 Defendant MERS's motion to dismiss (#29) states claims that may be
8 within the jurisdiction of the MDL court. As such, MERS's Motion to
9 Dismiss (#29) will be denied without prejudice insofar as it is
10 addressed to this Court.

VII. Leave to Amend

Under Federal Rule of Civil Procedure 15(a), leave to amend is to be "freely given when justice so requires." In general, amendment should be allowed with "extreme liberality." Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001) (quoting Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990)). If factors such as undue delay, bad faith, dilatory motive, undue prejudice or futility of amendment are present, leave to amend may properly be denied in the district court's discretion. Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051-52 (9th Cir. 2003).

23 Here, we previously granted Plaintiffs leave to amend their
24 original complaint (#1 Ex. 1) in our minute order (#25) of July 12,
25 2010. We find that Plaintiffs should not be granted another
26 opportunity to amend their complaint. There is no reason why
27 Plaintiffs could not have cured the deficiencies we have noted here.

1 in their first amended complaint (#26). As such, we are be forced
2 to conclude that leave to further amend would be futile.

3

4 **VIII. Conclusion**

5 Plaintiffs have failed to state a claim upon which relief could
6 be granted with respect to their claims against Defendant Indymac.
7 Plaintiffs will not be given leave to amend. Defendant MERS's
8 Motion to Dismiss (#29) appears to relate to claims under the
9 jurisdiction of the MDL court and will be dismissed without
10 prejudice insofar as it is addressed to this Court. Defendant Jose
11 Camacho-Villa's Second Motion (#31) to Remand is denied. Defendant
12 MERS's Motion (#37) to Stay all proceedings is therefore rendered
13 moot, and will be denied on that basis.

14

15 **IT IS, THEREFORE, HEREBY ORDERED** that Defendant Indymac's
16 motion to dismiss (#27) is **GRANTED**. All of Plaintiffs' claims
17 against Indymac that are under our jurisdiction are dismissed. This
18 Order is not intended to refer to or rule upon any claim under the
19 jurisdiction of the MDL court.

20 **IT IS HEREBY FURTHER ORDERED** that Defendant MERS's motion to
21 dismiss (#29) is **DENIED** without prejudice insofar as it is addressed
22 to this Court. This Order is not intended to refer to or rule upon
23 any claim under the jurisdiction of the MDL court.

24 **IT IS HEREBY FURTHER ORDERED** that Plaintiff Jose Camacho-
25 Villa's Second Motion to Remand (#31) is **DENIED**.

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1 IT IS HEREBY FURTHER ORDERED that Defendant MERS's Motion to
2 Stay All Proceedings Pending Decision on Motion to Remand (#37) is
3 DENIED as moot.

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5 DATED: March 23rd 2011.

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Edward C. Reed.

UNITED STATES DISTRICT JUDGE