

1 THE HONORABLE JOHN C. COUGHENOUR

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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 NIKOLAY KAUTSMAN, *et al.*,

10 Plaintiffs,

11 v.

12 CARRINGTON MORTGAGE SERVICES,  
13 LLC, *et al.*,

14 Defendants.

CASE NO. C16-1940-JCC

ORDER GRANTING MOTION TO  
DISMISS AND DISMISSING  
MOTION FOR CLASS  
CERTIFICATION

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16 This matter comes before the Court on Defendant Carrington Mortgage Services, LLC's  
17 ("CMS") motion to dismiss (Dkt. No. 32) and Plaintiffs motion for class certification (Dkt. No.  
18 34). Having considered the parties' briefing and the relevant record, the Court GRANTS CMS's  
19 motion to dismiss and DISMISSES as moot Plaintiffs' motion for class certification for the  
20 reasons explained herein.

21 **I. BACKGROUND**

22 Plaintiffs are the fee title owners of a single family residence in Redmond, Washington. (Dkt.  
23 No. 44 at 6.) Wilmington Trust ("Wilmington"), is the lender of record, beneficiary of the Deed of  
24 Trust, and holder of a related Secured Promissory Note. (*Id.* at 7.) CMS services the Note for  
25 Wilmington. (Dkt. No. 44 at 7-8.) The Deed of Trust contains a provision allowing the lender to do  
26 whatever is "reasonable and appropriate to protect the lender's interest" in Plaintiffs' residence and

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1 secure it if Plaintiffs “fail[] to perform the covenants and agreements contained in this Security  
2 Instrument” or “abandon[] the Property.” (*Id.* at 7.) The covenants referenced above include  
3 Plaintiffs’ agreement to make the timely payment of principal, interest, and late charges. (Dkt. No.  
4 44-2 at 3.)

5 Plaintiffs assert CMS directed a related entity, Defendant Carrington Home Solutions L.P.  
6 (“CHS”), to enter onto their property and inspect the exterior of the residence without Plaintiffs’  
7 permission. (Dkt. No. 44 at 9.) Plaintiffs further assert that after erroneously determining that the  
8 property was vacant, CHS broke in, rekeyed the lock, winterized the property, and generally took  
9 possession of it. (*Id.*) All of this occurred despite clear signs that the property was not vacant. (*Id.*)  
10 Plaintiffs further allege that CMS charged them for the inspection and resulting fees by adding the  
11 fees to the balance of Plaintiffs’ loan. (*Id.* at 10.) Plaintiffs allege this is a common practice by CMS  
12 and, as such, bring this suit as a class action. (Dkt. Nos. 34 at 1–4, 44 at 2–3.)

13 Plaintiffs brought suit in state court for breach of contract, violations of the duty of good faith  
14 and fair dealing, violations of Washington’s Consumer Protection Act (“WCPA”), Revised Code of  
15 Washington § 19.86, and negligent supervision. (Dkt. No. 1-2.) CMS removed to this Court and  
16 moved for partial judgment on the pleadings under Federal Rule of Civil Procedure 12(c). The Court  
17 granted the motion, dismissing some of Plaintiffs’ claims without prejudice. (Dkt. No. 26.)

18 Plaintiffs since filed a second amended class action complaint (Dkt. No. 44).<sup>1</sup> The complaint  
19 includes additional claims for unjust enrichment and, for the first time, names CHS as Defendant in  
20 some of the claims. (*Id.*) It also alleges additional facts to support previously-asserted claims. (*Id.*)  
21 Lastly, Plaintiffs dropped their negligent supervision claim. The current claims are as follows: breach  
22 of contract by CMS (Claim #1); violations of the implied duty of good faith and fair dealing by CMS  
23 (Claim #2) (*Id.* at 8, 16–17); a WCPA violation by CMS and CHS (Claim #3) (*Id.* at 18–19); another  
24 WCPA violation solely by CMS (Claim #4) (*Id.* at 19); and two instances of unjust enrichment by

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25 <sup>1</sup> Any amendment to a complaint supersedes prior complaints. *Lacey v. Maricopa Cnty.*,  
26 693 F.3d 896, 925 (9th Cir. 2012). Therefore, this Court will only consider the current complaint.

1 CMS and CHS (Claims #5 and #6) (*Id.* at 19–21). Plaintiffs assert the following damages: fees CMS  
2 charged against their loan, costs Plaintiffs incurred to replace the lock and reverse CHS’s  
3 winterization efforts, and legal consultation fees. (*Id.* at 10.)

4 Plaintiffs move to certify the matter as a class action pursuant to Federal Rule of Civil  
5 Procedure 23(b)(3). (Dkt. No. 34 at 12.) They seek to certify two classes. Plaintiffs define Class I  
6 as borrowers for whom CMS or their agents inspected their homes, deemed them to be vacant,  
7 engaged in preservation services, such as rekeying and winterization, and charged resulting fees  
8 against borrowers’ loans. (*Id.* at 1.) Plaintiffs define Class II as borrowers for whom CMS or  
9 their agents inspected their homes and did not engage in further preservation services, but  
10 charged resulting inspection fees against their loans. (*Id.*) Plaintiffs move to be appointed as class  
11 representatives and their counsel as class counsel for each class. (*Id.* at 1–2.) Defendants oppose  
12 certification. (Dkt. No. 49.)

## 13 **II. DISCUSSION**

### 14 **A. Motion to Dismiss**

15 Only CMS moves to dismiss Plaintiffs’ claims. (Dkt. No. 32.) But “[a] [d]istrict [c]ourt  
16 may properly on its own motion dismiss an action as to defendants who have not moved to  
17 dismiss where such defendants are in a position similar to that of moving defendants.” *Abagninin*  
18 *v. AMVAC Chem. Corp.*, 545 F.3d 733, 743 (9th Cir. 2008) (internal quotations omitted).  
19 Therefore, to the extent CMS raises arguments that would also apply to CHS, the Court will  
20 consider dismissing claims against CHS.

#### 21 1. Legal Standard: Motion to Dismiss

22 A defendant may move for dismissal when a plaintiff “fails to state a claim upon which  
23 relief can be granted.” Fed. R. Civ. P. 12(b)(6). Under Rule 12(b)(6), the Court accepts all  
24 factual allegations in the complaint as true and construes them in the light most favorable to the  
25 nonmoving party. *Vasquez v. L.A. County*, 487 F.3d 1246, 1249 (9th Cir. 2007). However, to  
26 survive a motion to dismiss, a plaintiff must cite facts supporting a “plausible” cause of action.

1 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). A claim has “facial plausibility”  
2 when the party seeking relief “pleads factual content that allows the Court to draw the reasonable  
3 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S.  
4 662, 672 (2009) (internal quotations omitted). Although the Court must accept as true a  
5 complaint’s well-pleaded facts, “conclusory allegations of law and unwarranted inferences will  
6 not defeat an otherwise proper motion to dismiss.” *Vasquez*, 487 F.3d at 1249 (quotation  
7 omitted). “Dismissal for failure to state a claim is appropriate only if it appears beyond doubt  
8 that the non-moving party can prove no set of facts in support of his claim which would entitle  
9 him to relief.” *Id.* (quotation omitted).

10 2. Claims #1 and #2: Breach of Contract and Violations of the Implied Duty  
11 of Good Faith and Fair Dealing

12 Plaintiffs allege that when CHS, on CMS’s behalf, entered their property and took  
13 possession, CMS breached its contract and violated its implied duty of good faith and fair  
14 dealing with Plaintiffs. (Dkt. No. 44 at 15–17.) As a threshold matter, in order to bring contract-  
15 based claims, Plaintiffs must plausibly allege privity between themselves and CMS. *N.W. Indep.*  
16 *Forest Mfrs. v. Dept. of Lab. and Industries*, 899 P.2d 6, 9 (Wash. App. 1995). Wilmington is the  
17 lender of record. (*Id.* at 7.) Nevertheless, Plaintiffs argue they have alleged sufficient facts to  
18 survive a 12(b)(6) motion. (Dkt. No. 47 at 3–5.)

19 Plaintiffs’ theory of privity is that CMS, as a result of the compensation arrangement  
20 between Wilmington and CMS, holds a portion of Wilmington’s Note as an assignee. (Dkt. No.  
21 44 at 8, 15-16; Dkt. No. 47 at 3–4.) Because CMS retains various rights to modification fees,  
22 mortgagor-contracted fees, and float on payments it collects on Wilmington’s behalf, it is “an  
23 assignee of a portion of the Loan.” (Dkt. No. 47 at 3.) The Court disagrees. Even if CMS were an  
24 assignee, that assignment would relate only to the relevant portion of the Note—the holder’s  
25 right to payments. (Dkt. No. 44 at 6–7, 16–17.) The preservation rights described in the Deed of  
26 Trust are separate from any right to payment that may have been assigned to CMS. *See*

1 *Architectural Woods, Inc. v. State*, 562 P.2d 248, 248 (Wash. 1977) (allowing for partial  
2 assignment of contract rights). And Plaintiffs fail to plead sufficient facts to support assignment  
3 of the Deed of Trust. Nor do they provide other legal authority supporting privity with  
4 Defendants. Therefore, they fail to satisfy the pleading standard under *Iqbal*. 556 U.S. at 681.

5 The Court GRANTS CMS’s motion to dismiss Claims #1 and #2. The dismissal is  
6 without prejudice. Plaintiff may again attempt to plead sufficient facts to demonstrate privity.  
7 *See Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (“court should grant leave to amend . . .  
8 unless it determines that the pleading could not possibly be cured by the allegation of other  
9 facts.”).

10 3. Claims #3 and #4: Violations of the WCPA

11 Plaintiffs next allege that when CMS instructed CHS to inspect their property, CMS did  
12 so with the ultimate intent to deceive Plaintiffs into believing that they were rightfully  
13 dispossessed of their property (Claim #4). (Dkt. No. 44 at 19.) They further assert this was a  
14 “common practice” of CMS resulting from a “policy . . . devised at the highest level of  
15 management and ownership.” (*Id.* at 10.) Plaintiffs also assert that when CHS changed the lock  
16 and winterized Plaintiffs’ property, both CMS and CHS attempted to unlawfully deceive  
17 Plaintiffs into believing they were rightfully dispossessed (Claim #3). (*Id.* at 18–19.) Plaintiffs  
18 allege these practices violate the WCPA. (*Id.*)

19 A properly plead WCPA violation requires facts demonstrating the following elements:  
20 (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) that impacts the  
21 public interest, (4) that causes injury to the Plaintiffs’ business or property, and (5) causation.  
22 *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 719 P.2d 531, 533 (Wash. 1986). CMS  
23 asserts Plaintiffs failed to adequately plead the first element for Claims #3 and #4—an unfair or  
24 deceptive act or practice. (Dkt. No. 32 at 9–12.)

25 An act is per se unfair or deceptive if it violates a statute that declares the conduct at issue

1 to be unfair or deceptive. *Hangman Ridge*, 719 P.2d at 535. Otherwise, “a plaintiff must show  
2 the conduct is ‘unfair’ or ‘deceptive’ under a case-specific analysis of those terms.” *Mellon v.*  
3 *Regl. Tr. Services Corp.*, 334 P.3d 1120, 1126 (Wash. App. 2014). For claims of deception, this  
4 requires showing “a ‘representation, omission or practice that is likely to mislead’ a reasonable  
5 consumer.” *Panag v. Farmers Ins. Co. of Wash.*, 204 P.3d 885, 895 (Wash. 2009) (quoting *Sw.*  
6 *Sunsites, Inc. v. Fed. Trade Comm’n*, 785 F.2d 1431, 1435 (9th Cir.1986)).

7 CMS asserts that Plaintiffs allege neither a per se violation nor a factually deceptive  
8 practice for either WCPA claim. (Dkt. No. 32 at 10–11.) Plaintiffs respond that the conduct at  
9 issue for both claims is factually deceptive. (Dkt. No. 47 at 6–7.) Plaintiffs rely in part on *Jordan*  
10 *v. Nationstar Mortg., LLC*, 374 P.3d 1195, 1200–02 (Wash. 2016). In *Jordan*, the court held that  
11 entry provisions contained in a Deed of Trust allowing a lender to take possession prior to  
12 completing a foreclosure action were counter to state law and, therefore, unenforceable. *Id.* at  
13 1202. As a result, changing the locks on a home and forcing the homeowner to contact the loan  
14 service provider for a lockbox code in order to gain entry amounted to unlawful possession by  
15 the loan servicer. *Id.* at 1201. While *Jordan* supports the notion that some of Defendants’  
16 activities were unlawful, it does not necessarily support a claim based on a WCPA violation. A  
17 WCPA violation requires an *unfair* or *deceptive* practice, not simply an impermissible one. Had  
18 Plaintiffs alleged trespass, for instance, *Jordan* would be more useful.

19 Plaintiffs allege that by rekeying and winterizing the residence, CMS and CHS could  
20 have deceived Plaintiffs into believing they no longer had rightful possession of the property,  
21 even though foreclosure proceedings had not been completed (Claim #3). (Dkt. No. 44 at 9–10,  
22 18.) The contention is implausible, in light of the language in the Deed of Trust indicating that  
23 the holder retains the right, not conditioned on commencing foreclosure proceedings, to protect  
24 its investment in the case of default. (Dkt. No. 44-2 at 6.) Specifically-authorized actions include  
25 “entering the Property to . . . change the locks . . . drain water from pipes . . .” (Dkt. No. 44-2 at  
26 6.) Similarly, if the Deed of Trust put Plaintiffs on notice that the holder could *enter* the property,

1 it provided Plaintiffs notice that the holder may first *inspect* the property to determine its  
2 condition (Claim #4). Nor do Plaintiffs make any other allegations containing specific facts to  
3 support an inference of deceptive or unfair conduct. Instead, they make conclusory allegations  
4 insufficient to meet their pleading standard under *Iqbal*, 556 U.S. at 681. (See Dkt. No. 44 at 18)  
5 (suggesting that “Defendants’ acts or practices are unfair and deceptive, and have the capacity to  
6 be deceptive, though both misrepresentations and withholding of material information” yet  
7 failing to include *any* misrepresentations or withholding of information by Defendants).

8 The Court GRANTS CMS’s motion to dismiss Claims #3 and #4. The claims are  
9 dismissed as to both CMS and CHS without prejudice.

10 4. Claims #5 and #6: Unjust Enrichment

11 Finally, Plaintiffs allege that CMS and CHS were unjustly enriched when CMS charged  
12 property inspection fees (Claim #6) and any other fees it paid to CHS for lock rekeying,  
13 winterization, and other services (Claim #5). (*Id.* at 19–20.) “Three elements must be established  
14 for unjust enrichment: (1) there must be a benefit conferred on one party by another; (2) the party  
15 receiving the benefit must have an appreciation or knowledge of the benefit; and (3) the  
16 receiving party must accept or retain the benefit under circumstances that make it inequitable for  
17 the receiving party to retain the benefit without paying its value.” *Dragt v. Dragt/DeTray, LLC*,  
18 161 P.3d 473, 482 (Wash. App. 2007).

19 CMS asserts Plaintiffs neither establish conferment of a benefit nor a resulting inequity.  
20 (Dkt. No. 32 at 8–9.) As to the claims against CMS, the Court agrees and resolves the issue  
21 based solely upon whether a benefit was conferred. Plaintiffs have plead that the fees at issue  
22 were added to the outstanding loan balance, but have not asserted they ever paid these amounts  
23 to CMS. (Dkt. No. 44 at 19–21.) Therefore, Plaintiffs fail to adequately plead that they conferred  
24 a benefit to CMS. As to the claims against CHS, Plaintiffs did plead that payment was made by  
25 CMS to CHS for rekeying, winterization, and other services (Claim #5). But Plaintiffs fail to  
26

1 allege that it would be inequitable for CHS to retain the payments from CMS. The Court cannot  
2 plausibly infer, even construing the facts presented in the complaint in the most favorable light to  
3 Plaintiffs, that the compensation arrangement between CMS and CHS is inequitable. Therefore,  
4 Plaintiffs fail to satisfy the relevant pleading standard. *Iqbal*, 556 U.S. at 681.

5 The Court GRANTS CMS's motion to dismiss Claims #5 and #6. The claims are  
6 dismissed as to both CMS and CHS without prejudice.

7 **III. CONCLUSION**

8 For the foregoing reasons, Defendant CMS's motion to dismiss (Dkt. No. 32) is  
9 GRANTED and Plaintiffs' motion for class certification (Dkt. No. 34) is DISMISSED as moot.  
10 The Court grants Plaintiffs leave to amend their complaint to address the deficiencies identified  
11 above. If Plaintiffs choose to do so, they must do so within thirty (30) days of the date of this  
12 Order.

13 DATED this 2nd day of October 2017.

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17 John C. Coughenour  
18 UNITED STATES DISTRICT JUDGE  
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