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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MONTY AND MICHELLE
COORDES, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.,

Defendant.

NO. 2:19-CV-0052-TOR

ORDER GRANTING IN PART
DEFENDANT’S MOTION TO
DISMISS AND DENYING
DEFENDANT’S MOTION TO
STRIKE CLASS ACTION
COMPLAINT

BEFORE THE COURT is Defendant’s Motion to Dismiss and Strike Amended Class Action Complaint (ECF No. 26). This matter was heard with oral argument on October 18, 2019. Gretchen F. Cappio and Matthew J. Preusch appeared on behalf of Plaintiffs. Amanda L. Groves and Rudy A. Englund appeared on behalf of Defendant. The Court has reviewed the record and files herein and considered the parties’ oral arguments, and is fully informed. For the reasons discussed below, the Court **GRANTS IN PART** Defendant’s Motion to

ORDER GRANTING IN PART DEFENDANT’S MOTION TO DISMISS
AND DENYING DEFENDANT’S MOTION TO STRIKE CLASS ACTION
COMPLAINT ~ 1

1 Dismiss and **DENIES** Defendant’s Motion to Strike Amended Class Action
2 Complaint (ECF No. 26).

3 **BACKGROUND**

4 This case arises out of Defendant Wells Fargo N.A.’s (“Wells Fargo”) use of
5 flawed software to deny Plaintiffs’ request for a mortgage modification in
6 connection with a federal program created in the aftermath of the 2008 financial
7 crisis. The following facts are drawn from Plaintiffs’ Amended Complaint and
8 construed in the light most favorable to Plaintiffs. *Schwarz v. United States*, 234
9 F.3d 428, 436 (9th Cir. 2000).

10 In 2005, Plaintiffs Monty and Michelle Coordes built a new home in
11 Spokane Valley, Washington, secured by a mortgage serviced and later acquired
12 by Defendant. ECF No. 25 at 2, ¶ 1. In early 2010, as a result of the economic
13 downturn, Mr. Coordes became temporarily unemployed. *Id.* at ¶ 2. In March
14 2010, Plaintiffs contacted Defendant to seek assistance making their mortgage
15 payments and to request relief in the form of a mortgage loan modification. *Id.* In
16 July 2010, Mr. Coordes obtained full-time employment. ECF No. 25 at 2, ¶ 3. In
17 August 2010, Plaintiffs were offered a trial modification, which would have
18 required Plaintiffs to pay back payments and penalties that Plaintiffs could not
19 afford. *Id.*

1 In January 2011, Plaintiffs filed for Chapter 13 bankruptcy and their
2 bankruptcy plan was approved in May. ECF No. 25 at 2, ¶ 4. In July 2011,
3 Plaintiffs again sought a mortgage modification from Defendant. *Id.* In December
4 2011, Defendant rejected Plaintiffs’ mortgage modification application. ECF No.
5 25 at 3, ¶ 6. In January 2012, Plaintiffs lost their home in a foreclosure sale. *Id.*

6 In August 2018, Defendant disclosed that a calculation error in its internal
7 mortgage loan modification underwriting software resulted in the improper denial
8 of approximately 625 modification applications that should have been granted.
9 ECF No. 25 at 3, ¶ 7. Defendant discovered this software error as early as 2015.
10 ECF No. 25 at 4, ¶ 9. The error was reported to be an “automated miscalculation
11 of attorneys’ fees that were included for purposes of determining whether a
12 customer qualified for a mortgage loan modification pursuant to the requirements
13 of government-sponsored enterprises....” ECF No. 25 at 7, ¶ 26. In November
14 2018, Defendant disclosed that the number of wrongful denials had been updated
15 to 870. ECF No. 25 at 3, ¶ 7.

16 In a notice dated September 11, 2018, Defendant contacted Plaintiffs to
17 inform them that their mortgage loan modification was erroneously denied based
18 on the calculation error. ECF No. 25 at 12, ¶ 46. Attached to the letter was a
19 check for \$15,000. ECF No. 25 at 12, ¶ 47. In November 2018, Plaintiffs

1 undertook mediation with Defendant and were awarded an additional \$25,000.
2 ECF No. 25 at 12, ¶ 48.

3 On July 19, 2019, Plaintiffs filed an Amended Complaint against Defendant
4 claiming violation of the Washington Consumer Protection Act (“CPA”) and
5 unjust enrichment. ECF No. 25 at 17-20, ¶¶ 69-87. On August 9, 2019, Defendant
6 filed the instant Motion to Dismiss and Strike Class Action Complaint.¹ ECF No.
7 26.

8 DISCUSSION

9 A. Motion to Dismiss Standard

10 A motion to dismiss for failure to state a claim “tests the legal sufficiency”
11 of the plaintiff’s claims. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To
12 withstand dismissal, a complaint must contain “enough facts to state a claim to
13 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
14 (2007). “A claim has facial plausibility when the plaintiff pleads factual content
15 that allows the court to draw the reasonable inference that the defendant is liable
16 for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation

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18 ¹ Defendant’s first Motion to Dismiss and Strike Class Action Complaint
19 (ECF No. 20) is based on Plaintiff’s original complaint and is therefore denied as
20 moot.

1 omitted). This requires the plaintiff to provide “more than labels and conclusions,
2 and a formulaic recitation of the elements.” *Twombly*, 550 U.S. at 555. While a
3 plaintiff need not establish a probability of success on the merits, he or she must
4 demonstrate “more than a sheer possibility that a defendant has acted unlawfully.”
5 *Iqbal*, 556 U.S. at 678.

6 When analyzing whether a claim has been stated, the Court may consider the
7 “complaint, materials incorporated into the complaint by reference, and matters of
8 which the court may take judicial notice.” *Metzler Inv. GMBH v. Corinthian*
9 *Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008) (citing *Tellabs, Inc. v. Makor*
10 *Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). A complaint must contain “a
11 short and plain statement of the claim showing that the pleader is entitled to relief.”
12 Fed. R. Civ. P. 8(a)(2). A plaintiff’s “allegations of material fact are taken as true
13 and construed in the light most favorable to the plaintiff[,]” however “conclusory
14 allegations of law and unwarranted inferences are insufficient to defeat a motion to
15 dismiss for failure to state a claim.” *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399,
16 1403 (9th Cir. 1996) (citation and brackets omitted).

17 In assessing whether Rule 8(a)(2) has been satisfied, a court must first
18 identify the elements of the plaintiff’s claim(s) and then determine whether those
19 elements could be proven on the facts pled. The court may disregard allegations
20 that are contradicted by matters properly subject to judicial notice or by exhibit.

1 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). The court
2 may also disregard conclusory allegations and arguments which are not supported
3 by reasonable deductions and inferences. *Id.*

4 The Court “does not require detailed factual allegations, but it demands
5 more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*,
6 556 U.S. at 662. “To survive a motion to dismiss, a complaint must contain
7 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible
8 on its face.’” *Id.* at 678 (citation omitted). A claim may be dismissed only if “it
9 appears beyond doubt that the plaintiff can prove no set of facts in support of his
10 claim which would entitle him to relief.” *Navarro*, 250 F.3d at 732.

11 **B. Consideration of Supporting Exhibits**

12 In support of their briefing on the pending motion to dismiss, both sides
13 submitted substantial supporting exhibits and requested the Court take judicial
14 notice of these documents. ECF Nos. 26-2, 33, 35-1.

15 “Review [of a motion to dismiss] is limited to the complaint.” *Cervantes v.*
16 *City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993). “Generally, district courts
17 may not consider material outside the pleadings when assessing” a Rule 12(b)(6)
18 motion. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018).
19 “When ruling on a Rule 12(b)(6) motion to dismiss, if a district court considers
20 evidence outside the pleadings, it must normally convert the 12(b)(6) motion into a

1 Rule 56 motion for summary judgment, and it must give the nonmoving party an
2 opportunity to respond.” *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir.
3 2003).

4 However, in considering a motion to dismiss, the Court may consider the
5 “complaint, materials incorporated into the complaint by reference, and matters of
6 which the court may take judicial notice.” *Metzler Inv.*, 540 F.3d at 1061 (*citing*
7 *Tellabs*, 551 U.S. at 322). The Court may take judicial notice of “matters of public
8 record.” *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (quoting
9 *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986)). This
10 includes “records and reports of administrative bodies.” *Ritchie*, 342 F.3d at 909
11 (quoting *Interstate Nat. Gas Co. v. S. Cal. Gas Co.*, 209 F.2d 380, 385 (9th Cir.
12 1953)). While the Court has discretion to take notice of certain materials, “the
13 unscrupulous use of extrinsic documents to resolve competing theories against the
14 complaint risks premature dismissals of plausible claims that may turn out to be
15 valid after discovery.” *Khoja*, 899 F.3d at 998. “Submitting documents not
16 mentioned in the complaint to create a defense is nothing more than another way of
17 disputing the factual allegations in the complaint.” *Id.* at 1003.

18 *1. Plaintiffs’ Supporting Exhibits*

19 Plaintiffs request the Court take judicial notice of four consent orders from
20 the United States Department of the Treasury, Comptroller of the Currency; a court

1 order and two filings from *Hernandez v. Wells Fargo Bank, N.A.*, No. 3:18-cv-
2 07354-WHA, in the Northern District of California (“the *Hernandez* documents”);
3 and a copy of the September 11, 2018 letter Plaintiffs received from Defendant
4 notifying Plaintiffs of the calculation error. ECF No. 33.

5 First, Plaintiffs argue that the consent orders are subject to notice as agency
6 records. ECF No. 33 at 4. Plaintiffs’ brief refers to these orders as evidence of
7 “relevant information, context, and background regarding Wells Fargo’s
8 concealment of its wrongful foreclosure of Plaintiffs’ home and those of other
9 class members.” ECF No. 32 at 18. Plaintiffs do not identify “discrete facts” of
10 which they seek the Court’s notice from these orders, so the Court construes these
11 exhibits as a request for notice of “a number of whole documents.” *See Crawford*
12 *v. Countrywide Home Loans, Inc.*, 647 F.3d 642, 649-50 (7th Cir. 2011). Even if
13 these orders are public agency documents, Plaintiffs appear to offer these orders to
14 generally bolster their claims made in the complaint. Because the Court’s inquiry
15 at this stage in the proceedings is to consider the merits of the complaint on its
16 face, the Court declines to take judicial notice of the consent orders at this time to

1 establish general background about the alleged misconduct.² *See Twombly*, 550
2 U.S. at 570.

3 Second, Plaintiffs argue the *Hernandez* documents are subject to judicial
4 notice as court filings from a proceeding with a direct relation to matters at issue in
5 the present case. ECF No. 33 at 4. A court “may take notice of proceedings in
6 other courts, both within and without the federal judicial system, if those
7 proceedings have a direct relation to matters at issue.” *United States ex rel.*
8 *Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir.
9 1992) (quoting *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th
10 Cir. 1979)). The attached *Hernandez* Second Amended Complaint similarly
11 alleges Wells Fargo wrongfully foreclosed on customers’ homes based on a
12 software error and seeks relief as a class. ECF No. 33-1. Because *Hernandez*
13 deals with similar conduct by the same Defendant as in this case, the Court takes
14 judicial notice of the *Hernandez* filings.

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17 ² This holding does not extend to the April 13, 2011 Consent Order, Docket
18 No. 11-025-B-HC, which is attached as an exhibit to Plaintiffs’ Amended
19 Complaint at ECF No. 25-1 and is therefore subject to consideration at this stage.
20 *See Metzler Inv.*, 540 F.3d at 1061.

1 Third, Plaintiffs urge the Court to take judicial notice of the September 11,
2 2018 letter from Defendant notifying Plaintiffs of the error in Defendant's denial
3 of Plaintiffs' loan modification application. ECF No. 33 at 4. A court may take
4 judicial notice of a document that has been incorporated by reference into the
5 complaint, meaning the plaintiff refers extensively to the document in the
6 complaint or the document forms the basis of the plaintiff's claim. *Ritchie*, 342
7 F.3d at 908. Here, the notification letter is referenced throughout Plaintiffs'
8 Amended Complaint, including an excerpt of the letter's body. ECF No. 25 at 11-
9 12, ¶¶ 45-46. Because the notification letter is incorporated into the Amended
10 Complaint by reference, it is properly subject to judicial notice.

11 *2. Defendant's Supporting Exhibits*

12 Defendant requests the Court take judicial notice of the deed of trust
13 governing Plaintiffs' mortgage and a motion to dismiss and declaration filed in
14 *Hernandez*. ECF Nos. 26-2, 35-1.

15 First, Defendant argues the deed of trust is subject to notice because it is
16 both a matter of public record and incorporated by reference into the Amended
17 Complaint. ECF no. 26-2 at 2. Although the Amended Complaint does not
18 discuss the deed of trust by name, it does allege Plaintiffs built a new home that
19 was secured by a mortgage serviced by Defendant. ECF No. 25 at 8, ¶ 32.

1 Moreover, the deed of trust is a matter of public record. *Lee*, 250 F.3d at 688-89.

2 Accordingly, the Court takes judicial notice of the deed of trust.

3 Second, Defendant argues that Defendant's Motion to Dismiss First
4 Amended Class Action Complaint and supporting declaration filed in *Hernandez*
5 are subject to judicial notice for the same reasons as Plaintiffs' *Hernandez*
6 documents. ECF No. 35-1 at 1-3. The Motion to Dismiss is a proceeding in
7 another federal district with a direct relation to the matters at issue in this case.
8 *Robinson Rancheria*, 971 F.2d at 248. Therefore, the motion and its supporting
9 legal arguments are subject to judicial notice.

10 The declaration of Robert Ferguson in support of the motion, however,
11 differs from both parties' other *Hernandez* exhibits in that the Ferguson declaration
12 seeks to establish disputed facts rather than to apprise this Court the similar legal
13 arguments made in the Northern District of California. ECF No. 35-3 at 2-33. The
14 Ferguson declaration purports to identify the loans that were potentially impacted
15 by the calculation error at issue in this case. ECF No. 35-3 at 3. This information
16 is not "generally known," nor can it be "accurately and readily determined from
17 sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).
18 Moreover, a court "may not, on the basis of evidence outside of the Complaint,
19 take judicial notice of facts favorable to Defendants that could reasonably be
20 disputed." *United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir.

1 2011). Accordingly, the Ferguson declaration is not subject to judicial notice.

2 **C. Washington Consumer Protection Act**

3 Defendant moves to dismiss Plaintiffs' CPA claim for failure to state a
4 claim. ECF No. 26 at 15-19. Specifically, Defendant argues Plaintiffs' CPA claim
5 is an impermissible attempt to enforce the federal Home Affordable Modification
6 Program ("HAMP"), which creates no private right of action. ECF No. 26 at 15-
7 16.

8 To withstand dismissal, a complaint must contain "enough facts to state a
9 claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim
10 has facial plausibility when the plaintiff pleads factual content that allows the court
11 to draw the reasonable inference that the defendant is liable for the misconduct
12 alleged." *Iqbal*, 556 U.S. at 678 (citation omitted). The elements of a CPA claim
13 are: "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3)
14 public interest impact; (4) injury to plaintiff in his or her business or property; (5)
15 causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719
16 P.2d 531, 533 (Wash. 1986). "[A]n act or practice can be unfair without being
17 deceptive" *Klem v. Wash. Mut. Bank*, 295 P.3d 1179, 1187 (Wash. Ct. App.
18 2013). Here, Plaintiffs have alleged that Defendant unfairly denied Plaintiffs'
19 request for a mortgage modification, based on an error in Defendant's software that
20 impacted hundreds of consumers in a similar way, resulting in the ultimate

1 foreclosure of Plaintiffs' home and associated financial consequences. ECF No. 25
2 at 5-12, ¶¶ 19-48. Construing the factual allegations in the light most favorable to
3 Plaintiffs, these allegations are sufficient to state a plausible claim for relief.
4 *Twombly*, 550 U.S. at 570.

5 Defendant argues that Plaintiffs' CPA claim is precluded because it is
6 merely an attempt to enforce HAMP. ECF No. 26 at 16-18. In 2009, the Treasury
7 Department "started the HAMP program to incentivize banks to refinance
8 mortgages of distressed homeowners so they could stay in their homes. Home loan
9 servicers ... signed Servicer Participation Agreements with Treasury that entitled
10 them to \$1,000 for each permanent modification they made, but required them to
11 follow Treasury guidelines and procedures." *Corvello v. Wells Fargo Bank, NA*,
12 728 F.3d 878, 880 (9th Cir. 2013), *as amended on reh'g in part* (Sept. 23, 2013).
13 Plaintiffs agree with Defendant's argument that HAMP does not itself create a
14 federal cause of action. ECF No. 32 at 15-16.

15 However, "[t]he absence of a private right of action from a federal statute
16 provides no reason to dismiss a claim under a state law just because it refers to or
17 incorporates some element of the federal law." *Wigod v. Wells Fargo Bank, N.A.*,
18 673 F.3d 547, 581 (7th Cir. 2012); *Corvello*, 728 F.3d at 883-84 (approving of
19 *Wigod's* reasoning to allow California state law contract claim over HAMP
20 violation to proceed). As the Western District of Washington explained in another

1 case involving a CPA claim over HAMP-related conduct, “the alleged FHA-
2 HAMP violations are a ‘component’ of the CPA claim ... but the CPA is
3 ultimately its own statutory cause of action.” *Syed v. Bank of America, N.A.*, No.
4 C16-1183-JCC, 2016 WL 9175632, at *4 (W.D. Wash. Nov. 22, 2016); *see also*
5 *Hernandez v. Wells Fargo & Co.*, No. C18-07354 WHA, 2019 WL 2359198, at *6
6 (N.D. Cal. June 3, 2019) (finding HAMP did not preclude state law claims alleging
7 unfair and misleading business practices surrounding Wells Fargo’s mortgage
8 modification software). Plaintiffs’ claim for relief similarly involves conduct
9 related to Defendant’s participation in HAMP but seeks to enforce a separate state
10 cause of action rather than the actual terms of Defendant’s HAMP agreement.

11 In support of its argument, Defendant cites a series of district cases in this
12 circuit and one unpublished circuit opinion to demonstrate that HAMP does not
13 create a private right of action. ECF No. 26 at 16. However, these cases are
14 distinguishable as attempts to enforce HAMP itself despite HAMP not providing a
15 private right of action. *See, e.g., Velasquez v. Chase Home Fin. LLC*, 588 F.
16 App’x 676, 677 (9th Cir. 2014) (affirming dismissal of wrongful foreclosure claim
17 brought under HAMP); *McMillan v. Wells Fargo Bank*, No. CV-12-01921-PHX-
18 NVW, 2013 WL 11522057, at *6 (D. Ariz. Apr. 11, 2013) (“Plaintiffs therefore
19 cannot state a claim based on Wells Fargo’s alleged failure to comply with HAMP
20 or modify Plaintiffs’ loan based on their participation in a [HAMP trial period

1 plan].”), *overruled by Corvello*, 728 F.3d at 883-84 (allowing contract claims to
2 proceed over Wells Fargo’s noncompliance with HAMP trial period plan
3 requirements). In this case, Plaintiffs allege Defendant wrongfully denied their
4 mortgage modification application and failed to disclose for three years the
5 software error that caused the wrongful application denial. ECF No. 25 at ¶¶ 77-
6 78.³ Although this conduct is related to Defendant’s HAMP participation,
7 Plaintiffs do not seek to enforce HAMP. Instead, Plaintiffs allege this conduct
8 constitutes unfair or deceptive conduct in violation of the CPA. *Id.* HAMP is
9 involved in this case as a “component” of the CPA claim. *Syed*, 2016 WL
10 9175632, at *4. Accordingly, Plaintiffs’ claim is not an improper attempt to
11 enforce Defendant’s HAMP agreement. Construing the allegations in Plaintiffs’
12 favor, Plaintiffs have alleged “enough facts to state a claim to relief that is
13 plausible on its face.” *Twombly*, 550 U.S. at 570. Defendant’s motion to dismiss
14 on this ground is DENIED.

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16 ³ The Court notes that Plaintiffs’ response brief further alleges Defendant’s
17 failure to properly test, monitor, and modify its software; failure to utilize accurate
18 tools to process mortgage modification applications; and misrepresentations
19 regarding the same also constitute unfair practices in violation of the CPA. ECF
20 No. 32 at 14-15. These allegations are absent from the complaint.

1 **D. Unjust Enrichment**

2 Defendant moves to dismiss Plaintiffs’ unjust enrichment claim on the
3 grounds that the existence of an express contract between the parties precludes a
4 quasi-contract claim. ECF No. 26 at 12-15.

5 “Unjust enrichment is the method of recovery for the value of the benefit
6 retained absent any contractual relationship because notions of fairness and justice
7 require it.” *Young v. Young*, 191 P.3d 1258, 1262 (Wash. 2008). The elements of
8 an implied contract unjust enrichment claim are “(1) the defendant receives a
9 benefit, (2) the received benefit is at the plaintiff’s expense, and (3) the
10 circumstances make it unjust of the defendant to retain the benefit without
11 payment.” *Id.* However, “[a] party to a valid express contract is bound by the
12 provisions of that contract, and may not disregard the same and bring an action on
13 an implied contract relating to the same matter, in contravention of the express
14 contract.” *Chandler v. Wash. Toll Bridge Auth.*, 137 P.2d 97, 103 (Wash. 1943).

15 Here, Plaintiffs allege Defendant was unjustly enriched when Plaintiffs
16 conferred the benefits of penalties, fees, foreclosed property, and back payments
17 upon Defendant. ECF No. 25 at 19-20, ¶ 84. However, Defendant accurately
18 notes that the relationship between Plaintiffs and Defendant were governed by
19 contract through the deed of trust, and that the contract’s terms govern loan
20 payments, fees, past due amounts, and foreclosure proceedings. ECF No. 26 at 14;

1 *see* ECF No. 26-4 at 4-13, ¶¶ 1-2, 14, 22. Unlike the cases Plaintiffs cite, Plaintiffs
2 have not alleged facts in the complaint to indicate that the benefits conferred to
3 Defendant were sufficiently separate from the terms of the written contract so as to
4 support a quasi-contract claim. *See, e.g., Gerber v. First Horizon Home Loans*
5 *Corp.*, No. C05-1554P, 2006 WL 581082, at *3 (W.D. Wash. Mar. 8, 2006)
6 (allowing unjust enrichment claim to proceed where plaintiff alleged defendant
7 “conditioned its performance on payments to which it is *not* entitled under the
8 contract”) (emphasis in original); *Beyer v. Countrywide Home Loans Servicing LP*,
9 No. C07-1512MJP, 2008 WL 1791506, at *11 (W.D. Wash. Apr. 18, 2008), *aff’d*,
10 359 F. App’x 701 (9th Cir. 2009) (same). Because the benefits alleged to be the
11 subject of the unjust enrichment are governed by the parties’ express contract,
12 Plaintiffs are not able to maintain their unjust enrichment claim. *Chandler*, 137
13 P.2d at 103. Defendant’s motion to dismiss the unjust enrichment claim is
14 GRANTED.

15 Plaintiffs request leave to amend their complaint to alternatively plead
16 claims for breach of contract and breach of the covenant of good faith and fair
17 dealing. ECF No. 32 at 19. Plaintiffs imply that they brought quasi-contract
18 claims in reliance on arguments Defendant made in a similar case in the Northern
19 District of California. *Id.*; *see Hernandez*, 2019 WL 2359198, at *8-9. Although
20 Plaintiffs imply bad faith in Defendant’s allegedly inconsistent positions about

1 whether contract terms govern the relationships in *Hernandez* and this case, the
2 Court does not find Defendant's arguments to be inconsistent. Regardless, leave to
3 amend should be freely given when justice so requires. Fed. R. Civ. P. 15(a)(2).
4 Here, where Defendant has allegedly already conceded error in its denial of
5 Plaintiffs' loan modification application, justice requires such leave.

6 **E. Motion to Strike Class Action Allegations**

7 Defendant moves to strike Plaintiffs' class action allegations. ECF No. 26 at
8 19-24. "[I]n the context of a motion to *strike* class allegations, in particular where
9 such a motion is brought in advance of the close of class discovery, it is properly
10 the defendant who must bear the burden of proving that the class is *not* certifiable."
11 *Bates v. Bankers Life and Cas. Co.*, 993 F. Supp. 2d 1318, 1340-41 (D. Or. 2014)
12 (emphasis in original).

13 As a threshold matter, the Court must determine the scope of the class
14 allegations at issue. The Amended Complaint alleges a nationwide class of "[a]ll
15 persons who sought a mortgage modification from Wells Fargo between April 13,
16 2010, and October 20, 2015, and were denied due to an error Wells Fargo
17 acknowledged in its mortgage underwriting software." ECF No. 25 at 12-13, ¶ 49.
18 Plaintiffs' CPA claim is brought on Plaintiffs' own behalf and on behalf of each
19 Washington member of the class. ECF No. 25 at 17, ¶ 70. Plaintiffs' unjust
20 enrichment claim is brought on Plaintiffs' own behalf and on behalf of the

1 nationwide class. ECF No. 25 at 19, ¶ 82. Because the Court dismissed Plaintiffs’
2 unjust enrichment claim *supra*, Plaintiffs no longer have standing to assert that
3 claim on behalf of a class. *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (“[E]ven
4 named plaintiffs who represent a class ‘must allege and show they have been
5 personally injured...’”) (citation omitted). Defendant’s arguments regarding the
6 nationwide class are therefore moot.⁴ Accordingly, the relevant inquiry for
7 Defendant’s Motion to Strike now becomes Plaintiffs’ CPA claim on behalf of
8 Washington members of the class.

9 Defendant argues that Plaintiffs do not and cannot allege that a Washington
10 class is sufficiently numerous to sustain a class action. ECF No. 26 at 24. A class
11 action may proceed only if “the class is so numerous that joinder of all members is
12 impracticable.” Fed. R. Civ. P. 23(a)(1). Fifteen class members is not sufficiently
13 numerous. *Harik v. Cal. Teachers Ass’n*, 326 F.3d 1042, 1051 (9th Cir. 2003)
14 (citing *Gen. Tel. Co. v. EEOC*, 445 U.S. 318, 330 (1980)). “Generally, 40 or more
15 members will satisfy the numerosity requirement.” *Garrison v. Asotin Cty.*, 251
16 F.R.D. 566, 569 (E.D. Wash. 2008) (citing *Consol. Rail Corp. v. Town of Hyde
17 Park*, 47 F.3d 473, 483 (2d Cir. 1995)). Here, Defendant cites to the Ferguson

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19 ⁴ Should Plaintiffs file a second amended complaint asserting different claims
20 on behalf of a nationwide class, Defendant may renew its arguments.

1 declaration, which the Court declined to notice, to argue that the *Hernandez* case
2 puts Plaintiffs on notice that only 14 Washington borrowers were potentially
3 affected by the calculation error. ECF No. 35 at 14. Plaintiffs argue the size of the
4 class is unknown because Defendant continues to investigate the matter. ECF No.
5 32 at 26. This disputed issue of fact indicates that the motion to dismiss stage is
6 too early to determine whether a Washington class is sufficiently numerous to
7 sustain a class action. Defendant's motion to strike Plaintiffs' class action
8 allegations is DENIED.

9 **ACCORDINGLY, IT IS HEREBY ORDERED:**

10 1. Defendant's Motion to Dismiss and Strike Amended Class Action

11 Complaint (**ECF No. 26**) is **GRANTED in part and DENIED in part.**

12 2. Defendant's original Motion to Dismiss and Strike Class Action

13 Complaint (**ECF No. 20**) is **DENIED as moot.**

14 3. Plaintiff is granted leave to file a Second Amended Class Action

15 Complaint within 14-days of this Order.

16 The District Court Executive is directed to enter this Order and furnish
17 copies to counsel.

18 **DATED** October 18, 2019.



Thomas O. Rice

THOMAS O. RICE

Chief United States District Judge

ORDER GRANTING IN PART DEFENDANT'S MOTION TO DISMISS
AND DENYING DEFENDANT'S MOTION TO STRIKE CLASS ACTION
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