

1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF CALIFORNIA
3

4 SAMUEL S. ZENDEJAS, JR. & MARIA
5 ZENDEJAS,

6 Plaintiffs,

7 v.

8 GMAC WHOLESALE MORTGAGE CORP.,
9 et al.,

10 Defendants.

1:10-CV-00184 OWW GSA

MEMORANDUM DECISION RE
DEFENDANTS' MOTIONS TO
DISMISS (DOC. 9) AND
STRIKE (DOC. 11).

11 I. INTRODUCTION

12 GMAC Mortgage, LLC (named as "Wholesale Mortgage
13 Corp.") ("GMAC"), ETS Services, LLC (named as "Executive
14 Trustee Services, LLC"), and Federal National Mortgage
15 Association ("FNMA") (collectively "Defendants") move to
16 dismiss and strike Samuel S. Zendejas, Jr. and Maria
17 Zendejas' complaint pursuant to Federal Rules of Civil
18 procedure 12(b)(6) and 12(f).
19

20 II. FACTUAL BACKGROUND

21 This action concerns deeds of trust encumbering the
22 real property located at 2644 East Seeger Avenue,
23 Visalia, California 93292 ("Property"). Plaintiffs admit
24 that on or about March 30, 2007 they borrowed \$220,500.00
25 from GMAC to refinance previous loans on the Property
26 ("Loan"). Complaint, Doc. 1, ¶16. Plaintiffs defaulted
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28

1 on the Loan based on personal hardships. *Id.* ¶¶ 9, 18.
2 Plaintiffs allege that they contacted GMAC and requested
3 a loan modification. *Id.* ¶11. GMAC failed to offer
4 Plaintiffs and "acceptable loan modification" in light of
5 Plaintiffs' declining income. *Id.* ¶11. Plaintiffs
6 further allege they continued to work with GMAC for a
7 loan modification but that GMAC failed to offer
8 Plaintiffs other options. *Id.* ¶11.

10 Plaintiffs admit that due to their default, non-
11 judicial foreclosure proceedings were commenced and
12 completed. The real property was sold at a trustee's
13 sale on October 23, 2009. *Id.* ¶¶ 21-23.

15 III. STANDARD OF DECISION

16 A. Rule 12(f) Motion to Strike.

17 Under Rule 12(f), a court may strike from a pleading
18 "an insufficient defense or any redundant, immaterial,
19 impertinent, or scandalous matter." Fed. R. Civ. P.
20 12(f). "The function of a 12(f) motion to strike is to
21 avoid the expenditure of time and money that must arise
22 from litigating spurious issues by dispensing with those
23 issues prior to trial." *Sidney-Vinsein v. A.H. Robins*
24 *Co.*, 697 F.2d 880, 885 (9th Cir. 1983). A motion to
25 strike should not be granted unless it is clear that the
26 matter to be stricken could have no possible bearing on
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28

1 the subject matter of the litigation. *Neveu v. City of*
2 *Fresno*, 392 F.Supp.2d 1159, 1170 (E.D. Cal. 2005).

3
4 B. Rule 12(b)(6) Motion to Dismiss.

5 A motion to dismiss brought under Federal Rule of
6 Civil Procedure 12(b)(6) "tests the legal sufficiency of
7 a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.
8 2001). In deciding whether to grant a motion to dismiss,
9 the court "accept [s] all factual allegations of the
10 complaint as true and draw[s] all reasonable inferences"
11 in the light most favorable to the nonmoving party.
12 *Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9th Cir.
13 2002). To survive a motion to dismiss, a complaint must
14 "contain sufficient factual matter, accepted as true, to
15 'state a claim to relief that is plausible on its face.'"
16 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (May 18, 2009)
17 (quoting *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570
18 (2007)).

19
20
21 A claim has facial plausibility when the
22 plaintiff pleads factual content that allows the
23 court to draw the reasonable inference that the
24 defendant is liable for the misconduct alleged.
25 The plausibility standard is not akin to a
26 "probability requirement," but it asks for more
27 than a sheer possibility that defendant has
28 acted unlawfully. Where a complaint pleads facts
that are "merely consistent with" a defendant's
liability, it "stops short of the line between
possibility and plausibility of 'entitlement to
relief.'"

Id. (citing *Twombly*, 550 U.S. 556-57). Dismissal also

1 can be based on the lack of a cognizable legal theory.
2 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699
3 (9th Cir. 1990).
4

5 IV. DISCUSSION

6 A. Motion to Strike.

7 1. Punitive Damages.

8 The right to recover punitive damages is governed by
9 California Civil Code section 3294 which states in
10 relevant part that:

11 (a) In an action for the breach of an obligation
12 not arising from contract, where it is proven by
13 clear and convincing evidence that the defendant
14 has been guilty of oppression, fraud or malice,
the plaintiff, in addition to the actual
damages, may recover damages for the sake of
example and by way of punishing the defendant.

15 ***

16 (c) As used in this section, the following
definitions shall apply:

17 (1) "Malice" means conduct, which is
intended by the defendant to cause injury to
18 the plaintiff or despicable conduct, which
is carried on by the defendant with a
19 willful and conscious disregard for the
rights or safety of others.

20 (2) "Oppression" means despicable conduct
21 that subjects a person to cruel and unjust
hardship in conscious disregard of that
22 persons' rights.

23 (3) "Fraud" means an intentional
misrepresentation, deceit, or concealment of
24 a material fact known to the defendant with
the intention on the part of the defendant
25 of thereby depriving a person of property or
legal rights or otherwise causing injury.

26 Cal. Civ. Code § 3294. Unless a defendant is found
27 guilty of "oppression, fraud, or malice," rising to the
28

1 level of despicable conduct, punitive damages cannot be
2 recovered by the plaintiff. *Gaffney v. Downey Savings &*
3 *Loan Assn.*, 200 Cal. App. 3d 1154, 1169 (1988).

4 Conclusory allegations of fraud, misrepresentation, bad
5 faith, oppression, malice and the like are insufficient.
6 *Lavine v. Jessup*, 161 Cal. App. 2d 59, 69 (1958).

7
8 Plaintiffs' prayer for punitive damages is wholly
9 unsupported by any factual allegations. Plaintiffs do
10 not oppose Defendants' motion to strike the punitive
11 damages prayer.

12 The motion to strike the punitive damages prayer is
13 GRANTED.

14
15 2. Pre-Judgment Interest.

16 Pre-judgment interest is only authorized when the
17 damages are "certain, or capable of being made certain by
18 calculation." Cal. Civ. Code. § 3287. Plaintiffs assert
19 no facts to support any "certain" request for damages,
20 nor are damages for such claims capable of being made
21 certain by calculation. Plaintiffs do not oppose
22 Defendants' motion to strike the pre-judgment interest
23 prayer.

24
25 The motion to strike the pre-judgment interest prayer
26 is GRANTED.

1 3. Attorneys' Fees.

2 In the absence of a statute, or a contractual
3 provision for the recovery of attorneys' fees, attorneys'
4 fees are not recoverable as an element of damages in an
5 ordinary civil action. Cal. Code Civ. Pro. § 1021.
6 California applies the American Rule that attorney's fees
7 are generally not taxable as costs against a losing
8 party. *Young v. Redman*, 55 Cal. App. 3d 827, 834-835
9 (1976).
10

11 Ordinarily, a deed of trust and primary note contain
12 attorney's fees provisions. Under California Civil Code
13 § 1717, even if an attorney's fees clause purports to
14 give a unilateral right to one party to recover
15 attorney's fees, the right is interpreted as reciprocal.
16 Plaintiffs do not allege the existence of any written
17 agreement between them and any of the Defendants on which
18 an award of attorney's fees can be based. Nor do
19 Plaintiffs cite any statute to support a claim for
20 attorney's fees. Plaintiffs do not oppose Defendants'
21 motion to strike the pre-judgment interest prayer.
22

23 The motion to strike the attorney's fees prayer is
24 GRANTED.
25

1 **B. Motion to Dismiss.**

2 1. **Plaintiffs Have No Standing To Assert HAMP.**

3 The Home Affordable Modification Program ("HAMP") was
4 created by Congress under the authority of the Emergency
5 Economic Stabilization Act of 2008, Pub. L. 110-343.
6 Pursuant to this program, various mortgage loan
7 servicers, including GMAC, entered into Servicer
8 Participation Agreements that require the servicer to
9 perform certain loan modification and foreclosure
10 prevention services described in the agreement and in
11 program guidelines and procedures issued by the
12 Department of the Treasury. See *Escobedo v. Countrywide*
13 *Home Loans, Inc.*, 2009 WL 4981618, *1 (S.D. Cal. 2009);
14 Compl. ¶25. Among other things, participating servicers
15 are required to consider all loans eligible under the
16 program, but are not required to modify mortgages. See
17 *Escobedo*, 2009 WL 4981618, *2. The HAMP program itself
18 is not codified as a public law.

19 Although Plaintiffs do not separately identify any of
20 their claims as arising under HAMP, Plaintiffs make
21 numerous references to the program as a basis for their
22 claims. For example, Plaintiffs allege that Defendants
23 failed to conform to the provisions of HAMP, Compl. ¶13a;
24 that they are willing to enter into a HAMP modification
25 that they can afford, *id.* at ¶20; and that GMAC's failure
26 27 28

1 to review Plaintiffs' eligibility for the HAMP program is
2 a violation of its participation agreement, *id.* at ¶25.

3 Plaintiffs are not direct beneficiaries of the HAMP
4 program, and can only have standing as third party
5 beneficiaries. However, to sue as a third party
6 beneficiary, the third party must show that the contract
7 reflects the express or implied intention of the parties
8 to the contract to benefit the third party. *Escobedo*,
9 2009 WL 4981618, *2 (citing *Klamath Water Users*
10 *Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210-11
11 (9th Cir. 2000)). Parties that benefit from a government
12 contract are generally assumed to be incidental
13 beneficiaries, and may not enforce the contract absent a
14 clear intent to the contrary. *Id.* Furthermore, a
15 qualified borrower to a HAMP agreement "would not be
16 reasonable in relying on the Agreement as manifesting an
17 intention to confer a right on him because the Agreement
18 does not require [a servicer] modify eligible loans."
19 *Id.* at *3. Therefore, "qualified borrowers are
20 incidental beneficiaries of the Agreement and do not have
21 enforceable rights under the contract. [citation
22 omitted]. Thus, a Plaintiff lacks standing to sue for an
23 alleged breach of the Agreement." *Id.*

24 Plaintiffs' opposition merely directs the Court's
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1 attention to the same HAMP guidelines and directives
2 cited in the complaint. Plaintiffs do not address the
3 issue of standing. At oral argument, Plaintiffs' counsel
4 requested leave to amend.

5 Defendants' motion to dismiss any claims based on
6 HAMP for lack of standing is GRANTED WITH LEAVE TO AMEND
7 consistent with Rule 11.
8

9
10 2. No Private Right of Action Under 12 U.S.C. §
1701x(c)(5).

11 Plaintiffs allege that Defendants failed to comply
12 with the notice requirements of 12 U.S.C. § 1701x(c)(5),
13 a provision in the National Housing Act which requires
14 private lenders servicing non-federally insured home
15 loans to advise borrowers of any home ownership
16 counseling they or the United States Department of
17 Housing and Urban Development ("HUD") may offer. Compl.
18 ¶32. *Gaitan v. Mortgage Electronic Registration Systems*,
19 2009 WL 3244729, *10 (C.D. Cal. 2009), held that section
20 1701x(c)(5) does not create a private right of action:
21

22 "The question whether a statute creates a cause
23 of action, either expressly or by implication,
24 is basically a matter of statutory
25 construction." *Opera Plaza Residential Parcel*
26 *Homeowners Ass'n v. Hoang*, 376 F.3d 831 (9th
27 Cir. 2004). By its structure, the National
28 Housing Act "govern[s] relations between the
mortgagee and the government, and give[s] the
mortgagor no claim for duty owed or for the
mortgagee's failure to follow" the statute or
its implementing regulations. *Mitchell v. Chase*
Home Finance LLC, No. 3:06-CV-2099-K, 2008 WL

1 623395, at *3 (N.D. Tex. Mar. 4, 2008). As such,
2 courts have held that the National Housing Act
3 generally does not contain a private right of
4 action. See *City of Rohnert Park v. Harris*, 601
5 F.2d 1040, 1046-47 (9th Cir.1979); *Saratoga Sav.
6 & Loan Ass'n v. Fed. Home Loan Bank of San
7 Francisco*, 724 F.Supp. 683, 690 (N.D. Cal.
8 1989); *Mitchell*, at *3; *Fantroy v. Countrywide
9 Home Loans, Inc.*, 2007 WL 2254941, No. 3:06-CV-
10 1889-K, at *2 (N.D. Tex. July 24, 2007); *Goss v.
11 Fairfield Housing Authority*, No.
12 3:03CV0935(WIG), 2006 WL 1272623, at *3 (D.Conn.
13 Mar. 14, 2006). The provision asserted by
14 Plaintiff is no exception. See *Fouche' v.
15 Shapiro & Massey L.L.P.*, 575 F.Supp.2d 776, 780
16 n. 7 (S.D. Miss. 2008).

17 The reasoning of *Gaitan* is sound. Plaintiffs fail to
18 cite any contrary authority.

19 Defendants' motion to dismiss the claim brought under
20 28 U.S.C. § 1701x(c)(5) claim is GRANTED WITHOUT LEAVE TO
21 AMEND.

22 3. No Private Right of Action Under California to
23 Civil Code §§ 2923.5 and 2923.6.

24 Plaintiffs allege that GMAC failed to comply with
25 California Civil Code §§ 2923.5 (requiring lenders to
26 contact borrower prior to filing notice of default) and
27 2923.6 (requiring certain waiting periods prior to giving
28 notice of sale). Compl. ¶ 13(b). There is no private
right of action under either provision. *Gaitan*, 2009 WL
3244729, *7, succinctly summarized the state of the law
and the relevant analysis:

Under California law, a statute will only be
deemed to contain a private right of action if
the Legislature has manifested an intent to
create such a right. *Moradi-Shalal v. Fireman's*

1 ***Fund Ins. Companies*, 46 Cal.3d 287, 305 (1988).**

2 **The Perata Mortgage Relief Act was enacted**
3 **relatively recently, and thus California courts**
4 **have had little chance to examine its**
5 **provisions. Nevertheless, section 2923.6, passed**
6 **along with section 2923.5, clearly does not**
7 **create a private right of action. That section**
8 **solely "creat[es] a duty between a loan servicer**
9 **and a loan pool member. The statute in no way**
10 **confers standing on a borrower to contest a**
11 **breach of that duty." *Farner v. Countrywide Home***
12 ***Loans*, No. 08cv2193 BTM (AJB), 2009 WL 189025,**
13 **at *2 (S.D.Cal. Jan. 26, 2009). Other courts to**
14 **consider this question have agreed unanimously**
15 **with the Farner court. See *Tapia v. Aurora Loan***
16 ***Servs., LLC*, No. 1:09-cv-01143 AWI (GSA), 2009**
17 **WL 2705853, at *1 (E.D.Cal. Aug. 25, 2009);**
18 ***Anaya v. Advisors Lending Group*, No. CV F 09-**
19 **1191 LJO DLB, 2009 WL 2424037, at *8 (E.D.Cal.**
20 **Aug. 5, 2009); *Pantoja v. Countrywide Home***
21 ***Loans, Inc.*, ---F.Supp.2d ----, No. C 09-01615**
22 **JW, 2009 WL 2423703, at *7 (N.D.Cal. July 9,**
23 **2009); *Connors v. Home Loan Corp.*, No. 08cv1134-**
24 **L (LSP), 2009 WL 1615989, at *7 (S.D. Cal. June**
25 **9, 2009).**

26 **Whether or not section 2923.5 creates a private**
27 **right of action, however, has not been the**
28 **subject of unanimity among the courts. Only two**
29 **courts have considered this question, and they**
30 **have reached inconsistent results. See *Yulaeva***
31 ***v. Greenpoint Mortgage Funding, Inc.*, No. CIV.**
32 **S-09-1504 LKK/KJM, 2009 WL 2880393, at *11**
33 **(E.D.Cal. Sept. 03, 2009) (assuming without**
34 **deciding that section 2923.5 does not provide a**
35 **private right of action); *Ortiz v. Accredited***
36 ***Home Lenders, Inc.*, --- F.Supp.2d ----, No. 09**
37 **CV 0461 JM (CAB), 2009 WL 2058784, at *5**
38 **(S.D.Cal. Jul. 13, 2009) (finding section 2923.5**
39 **does contain a private right of action, as "the**
40 **California legislature would not have enacted**
41 **this 'urgency' legislation, intended to curb**
42 **high foreclosure rates in the state, without any**
43 **accompanying enforcement mechanism.").**

44 **Under California law, "courts are not at liberty**
45 **to impute a particular intention to the**
46 **Legislature when nothing in the language of the**
47 **statute implies such an intention." *Dunn-Edwards***
48 ***Corp. v. Bay Area Air Quality Management Dist.*,**
49 **9 Cal.App. 4th 644, 658 (1992). Thus, "if the**
50 **Legislature intends to create a private cause of**
51 **action, we generally assume it will do so**
52 **directly, in clear, understandable, unmistakable**

1 terms." *Vicko Ins. Servs., Inc. v. Ohio*
2 *Indemnity Co.*, 70 Cal.App. 4th 55, 62-63 (1999),
3 quoting *Moradi-Shalal*, 46 Cal.3d at 294-295
(internal marks omitted).

4 Section 2923.5 contains no language that
5 indicates any intent whatsoever to create a
6 private right of action.

7 Neither section 2923.5 or 2923.6 create a private right
8 of action. Plaintiffs offer no contrary authority or
9 argument.

10 Defendants' motion to dismiss the claims brought
11 under California Civil Code Sections 2923.5 and 2923.6 is
12 GRANTED WITHOUT LEAVE TO AMEND.

13 4. TILA is Inapplicable to Defendants.

14 Plaintiffs allege that by "failing to follow
15 compulsory guidelines in foreclosure actions" GMAC has
16 committed a violation of 15 U.S.C. § 1601. That
17 provision is part of Truth In Lending Act ("TILA"), which
18 mandates "meaningful disclosure" of credit terms at the
19 time of loan initiation. *Id.* § 1601. It does not
20 regulate the foreclosure processes. Plaintiffs do not
21 oppose dismissal.
22

23 Defendants' motion to dismiss the TILA claim is
24 GRANTED WITH LEAVE TO AMEND.

1 5. California Business and Professions Code §
2 17200.

3 Plaintiffs allege that Defendants are liable under
4 California Business and Professions Code § 17200 because
5 of GMAC's failure "to determine [Plaintiffs'] eligibility
6 for a loan modification... and [failure to comply with
7 HAMP." Compl. ¶40. Plaintiffs allege that as a result
8 of the conduct they have "lost equity in their home" and
9 are in danger of losing their home. *Id.* ¶43. Plaintiffs
10 seek equitable relief. Compl. ¶44.

11 Section 17200 prohibits any "unlawful, unfair or
12 fraudulent business act or practice." See *Berryman v.*
13 *Merit Property Management, Inc.*, 152 Cal. App. 4th 1544,
14 1554 (2007). An action brought under the "unlawful"
15 prong of this statute "borrows" violations of other laws
16 when committed pursuant to business activity. *Farmers*
17 *Ins. Exchange v. Superior Court*, 2 Cal. 4th 377, 383
18 (1992). A practice may otherwise be prohibited if it is
19 "unfair" or "deceptive," even if not "unlawful. *Cal-Tech*
20 *Communications v. L.A. Cellular Tel. Co.*, 20 Cal. 4th
21 163, 180 (1999). Here, Plaintiffs have failed to state
22 facts to show how any of the purported conduct was
23 unlawful, unfair, or fraudulent. That is, Plaintiffs'
24 entire cause of action is based on Defendants purported
25 failure to provide Plaintiffs a loan modification. No
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1 law provides such a duty and Plaintiffs have not alleged
2 that this failure is otherwise unfair. Plaintiffs admit
3 they worked with GMAC to explore a loan modification but
4 ultimately admit they did not receive one because of
5 their decreasing income. HAMP does not require GMAC to
6 enter into loan modifications. Nothing in the complaint
7 suggests GMAC acted unlawfully or even unfairly.
8

9 Defendants' motion to dismiss the \$ 17200 claim is
10 GRANTED WITHOUT LEAVE TO AMEND.
11

12 6. Breach of Covenant of Good Faith and Fair
13 Dealing.

14 Plaintiffs allege that Defendants "initiated
15 foreclosure on the subject property without legal standing
16 to do so" and failed to determine that Plaintiffs were
17 eligible pursuant to HAMP, all in breach of the covenant
18 of good faith and fair dealing. Compl. ¶47. Plaintiffs
19 further claim that they were denied the benefits under
20 the loan documents because the documents were confusing.
21 *Id.* ¶49.

22 A covenant of good faith and fair dealing exists in
23 every contract, requiring each party to act in good faith
24 and fair dealing in its performance not to deny the
25 opposing party the benefit of the bargain. See *Carma*
26 *Developers, Inc. v. Marathon Development California,*
27 *Inc.*, 2 Cal. 4th 342, 371 (1992). A prerequisite for any
28

1 action for breach of this covenant is the existence of a
2 contractual relationship between the parties, because the
3 covenant is an implied term in the contract. *Smith v.*
4 *San Francisco*, 225 Cal. App. 3d 38, 49, (1990).

5 Defendants argue that Plaintiffs have failed to identify
6 the contract giving rise to the covenant. Their
7 opposition simply asserts that "[t]he failure to
8 negotiate or delay the foreclosure was a breach of the
9 implied covenant," citing *Storek & Storek, Inc. v.*
10 *Citicorp Real Estate, Inc.*, 100 Cal. App. 4th 44 (2002).
11 But, *Storek* does not stand for this proposition at all.¹

12 In *Storek*, a lender refused to continue financing a
13 failing development project. The investors sued,
14 alleging breach of the implied covenant of good faith and
15 fair dealing. *Storek* ultimately held that the lender had
16 no duty to act in good faith in determining whether a
17 condition precedent to its performance of the loan
18 agreement had been fulfilled. *Id.* at 62. How Plaintiffs
19 counsel gleaned from this case the proposition that
20 "[t]he failure to negotiate or delay the foreclosure was
21 a breach of the implied covenant" is a complete mystery.
22 Plaintiffs present no other evidence or authority in
23 opposition.
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27
28 ¹ Perhaps recognizing this failure, Plaintiffs' counsel does not
provide a pincite.

1 Defendants' motion to dismiss the claim of breach of
2 the covenant of good faith and fair dealing is GRANTED
3 WITHOUT LEAVE TO AMEND.
4

5 7. Cancellation of Instrument.

6 Plaintiffs allege in their Cancellation of Instrument
7 claim that the Notice of Default, Notice of Trustee's
8 Sale and Trustee's Deed are invalid because Defendants
9 purportedly did not have the right to foreclose. Compl.
10 ¶¶ 57-58. To plead a cause of action for cancellation of
11 instrument, plaintiff must show that he will be injured
12 or prejudiced if the instrument is not cancelled, and
13 that such instrument is void or voidable. Cal. Civ. Code
14 § 3412. Plaintiffs fail to allege any valid reason why
15 the instruments in question are void or voidable.
16 Plaintiffs do not address this failure in their
17 opposition. Defendants' motion to dismiss the
18 cancellation of instrument claim is GRANTED WITHOUT LEAVE
19 TO AMEND.
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22 8. Quiet Title.
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24 Plaintiffs seek to quiet title to the Property,
25 alleging Defendants do not have any "right, title,
26 interest, or estate" in the Property. Compl. ¶64. To
27 state a claim for quiet title plaintiff's complaint must
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1 be verified and must include (1) a description of the
2 property including both its legal description and its
3 street address or common designation; (2) plaintiff's
4 title and the basis upon which it is asserted; (3) that
5 adverse claims as against which a determination is
6 sought; (4) the date as of which a determination is
7 sought and, if other than the date the complaint is
8 filed, a statement why the determination is sought as of
9 that date; and (5) a prayer for determination of
10 plaintiff's title against the adverse claims. See Cal.
11 Code Civ. Pro. § 761.020. The purpose of a quiet title
12 action is to settle all conflicting claims to the
13 property and to declare each interest or estate to which
14 the parties are entitled. *Newman v. Cornelius*, 3 Cal.
15 App. 3d. 279, 284 (1970).

16
17
18 In addition to the required elements for a quiet
19 title action, a borrower cannot quiet title to a Property
20 without discharging any debt owed. See *Distor v. U.S.*
21 *Bank, NA*, 2009 WL 3429700 *6 (N.D. Cal. Oct. 22, 2009);
22 see also *Aguilar v. Bocci*, 39 Cal. App. 3d 475, 477
23 (1974). Plaintiffs have not alleged that they discharged
24 the debt and are therefore the rightful owners of the
25 Property. In fact, Plaintiffs admit they have not and
26 cannot discharge the debt. As such, Plaintiffs have not
27
28

1 stated a claim for Quiet Title.

2 Plaintiffs cite *Kelly v. Mortgage Electric*
3 *Registration Systems, Inc.*, 642 F. Supp. 1048 (N.D. Cal.
4 2009), again with no pincite, for the proposition that
5 their quiet title claim should survive because Plaintiffs
6 were once the rightful owners of the property and were
7 seeking a loan modification prior to the foreclosure
8 sale. *Kelly* does not support this proposition at all.
9 Rather, *Kelly* dismissed a quiet title claim because the
10 plaintiffs did not allege that they satisfied their
11 obligations under the deed of trust. *Id.* at *7.

12 Defendants' motion to dismiss the quiet title claim
13 is GRANTED WITHOUT LEAVE TO AMEND.
14

15
16 9. Accounting.

17 Plaintiffs allege they are entitled to an accounting
18 and for a return of all of the payments they made on the
19 Loan under 15 U.S.C. § 1635(b) and 12 U.S.C. § 2605.
20 Compl. ¶67. Title 15, United States Code section 1635(b)
21 provides for a right of rescission under certain
22 circumstances where there has been a violation of TILA.
23 As discussed above, TILA is inapplicable to the facts of
24 this case. Accordingly, Plaintiffs would not be eligible
25 for rescission under section 1635(b). Likewise, Title 12
26 United States Code, section 2605, which imposes upon a
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1 loan servicer an obligation to respond to borrower
2 inquiries, does not provide for an accounting.
3 To the extent Plaintiffs assert a claim for an accounting
4 under state law, this claim fails as well. To state a
5 cause of action for accounting, plaintiff must plead the
6 existence of a relationship that requires and accounting,
7 and that the balance due from the defendants can only be
8 ascertained by an accounting. *Teselle v. McLoughlin*, 173
9 Cal. App. 4th 156, 179 (2009). Here, Plaintiffs asserts
10 that they owe a balance to Defendants on the Loan. They
11 are not entitled to an accounting as a matter of law.
12 See *Pantoja v. Countrywide Home Loans, Inc.*, 640 F. Supp.
13 2d 1177, 1191-92 (N.D. Cal 2009) (dismissing claim for
14 accounting because: (1) plaintiff did not claim he was
15 owed anything; and (2) it was not difficult to calculate
16 what the plaintiff owed the defendant because the notice
17 of default set forth any arrearages due).

20 Defendants' motion to dismiss the accounting claim is
21 GRANTED WITHOUT LEAVE TO AMEND.

22
23 10. Rescission.

24 Plaintiffs allege that the loan transaction is
25 voidable. Compl. ¶70. To the extent Plaintiffs seek
26 rescission under TILA, 15 U.S.C. § 1635(b), TILA is
27 inapplicable to the facts of this case.
28

1 California Civil Code Section 1689 permits rescission
2 "if the consent of the party rescinding ... was given by
3 mistake, or obtained through ... fraud." Cal. Civ. Code.
4 § 1689(b)(1)). To obtain rescission, plaintiff must
5 restore or offer to restore to the other party everything
6 of value they received under the contract. Cal. Civ.
7 Code § 1691(b). Here, Plaintiffs fail to offer to
8 restore to Defendants the benefit of the Loan conferred
9 on them. Rather, Plaintiffs allege a "substitute
10 tender." Compl. ¶ 72. Plaintiffs fail to identify what
11 the substitute tender is and whether it is in the amount
12 of the benefit of the Loan conferred on them. Moreover,
13 Plaintiffs fail to allege that the loan itself was
14 founded upon fraud or was entered into by mistake.
15 Plaintiffs' fail to state a claim for rescission.

16
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18 Defendants' motion to dismiss the rescission claim is
19 GRANTED WITHOUT LEAVE TO AMEND.

20
21 11. Declaratory Relief

22 Plaintiffs seek a declaration that that the loan
23 and foreclosure are invalid. Compl. ¶¶ 85, 88-89. As
24 this request is based entirely on their other
25 allegations, all of which have been dismissed, there is
26 no basis for declaratory relief. Defendants' motion to
27 dismiss the rescission claim is.

1 12. Injunctive Relief.

2 The Complaint contains a separate claim for
3 injunctive relief. As Plaintiffs cannot prevail on any
4 of their legal claims, they are not entitled to
5 injunctive relief. See *San Francisco Newspaper Printing*
6 *Co., Inc. v. Superior Court*, 170 Cal. App. 3d 438, 442
7 (1985).
8

9 Defendants' motion to dismiss the rescission claim is
10 GRANTED.

11
12 V. CONCLUSION

13 For the reasons set forth above, Defendants motions
14 to strike and to dismiss are GRANTED IN THEIR ENTIRETY.
15 Except as otherwise noted, the dismissal is WITHOUT LEAVE
16 TO AMEND.

17 Defendants shall file a form of order consistent with
18 this memorandum decision within five (5) days of
19 electronic service.

20 Plaintiffs shall have fifteen (15) days from service
21 of the signed order to file an amended complaint.
22

23 SO ORDERED
24 DATED: JUNE 15, 2010

25 /s/ Oliver W. Wanger
26 Oliver W. Wanger
27 United States District Judge
28