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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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ROBERT ASH and KATHLEEN ASH,

NO. 2:09-cv-00974-FCD/DAD

Plaintiffs,

v.

MEMORANDUM AND ORDER

ONEWEST BANK, FSB as successor
by acquisition of Indymac
Federal Bank and LENDER DOE,

Defendants.

_____ /

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This matter is before the court on the motion of defendant OneWest Bank, FSB ("OneWest") to dismiss plaintiffs Robert Ash and Kathleen Ash's ("plaintiffs") First Amended Complaint pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6). Plaintiffs oppose the motion. For the reasons set forth below,¹ defendant's motion is GRANTED.

¹ Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. L.R. 230(g).

1 **BACKGROUND**

2 Plaintiffs brought this action against OneWest for conduct
3 arising out of a loan and subsequent foreclosure activity.

4 (Pls.' First Am. Complaint ("Compl."), filed Sept. 11, 2009, ¶

5 1.) On or about January 26, 2007,² plaintiffs entered into two
6 concurrent consumer credit transactions, totaling \$1,092,250,

7 with MILA, Inc., dba Mortgage Investment Lending Associates,

8 Inc., ("MILA"). (Id. ¶ 14.) Plaintiffs allege that MILA failed

9 to provide them with the proper copies of the Notice of Right to

10 Cancel at the time of signing as required by the Federal Truth in

11 Lending Act ("TILA"), giving plaintiffs up to three years to

12 rescind the loans. (Id. ¶ 43).

13 The loans were initially serviced by IndyMac Bank, FSB. (Id.

14 ¶ 38). On July 11, 2008, IndyMac Bank was placed into

15 receivership by the Office of Thrift Supervision, and a new bank,

16 IndyMac Federal Bank, FSB ("Indymac"), was created under the

17 conservatorship of the Federal Deposit Insurance Corporation

18 ("FDIC"). (OneWest's ex. 6). At some point, the loans were

19 transferred to OneWest as successor in interest to Indymac.

20 (Compl. ¶ 12.)

21 On December 31, 2008, plaintiffs sent a letter to Indymac

22 and MILA, which they allege was a Qualified Written Request

23 ("QWR") under the Real Estate Settlement Procedures Act

24 ("RESPA"), 12 U.S.C. § 2601 *et seq.*, and a valid rescission under

25 TILA. Plaintiffs contend that Indymac, and OneWest, as successor

26
27 ² While the complaint alleges that the transaction
28 occurred "[o]n or about January 26, 2007," plaintiffs' TILA claim
is based on their contention that the transaction occurred on
January 27, 2007. (See Compl. Ex. C; Ex. B to Compl. Ex. C).

1 in interest, engaged in misconduct by failing to respond to this
2 letter and continuing with foreclosure of plaintiffs' property.
3 (Compl. ¶ 38-39.)

4 In their First Amended Complaint, plaintiffs assert claims
5 for 1) violation of TILA, 15 U.S.C. §§ 1601 *et seq.*, 2) violation
6 of RESPA, 12 U.S.C. §§ 2601 *et seq.*, 3) violation of the
7 Rosenthal Fair Debt Collection Practices Act ("RFDCPA"),
8 California Civil Code §§ 1788 *et seq.*, 4) violation of California
9 Business and Professions Code § 17200, 5) wrongful foreclosure,
10 6) slander of title, and 7) slander of credit. (Compl.) OneWest
11 moves to dismiss plaintiffs' complaint for failure to state
12 cognizable claims.

13 **STANDARDS**

14 Under Federal Rule of Civil Procedure 8(a), a pleading must
15 contain "a short and plain statement of the claim showing that
16 the pleader is entitled to relief." See Ashcroft v. Iqbal, 129
17 S. Ct. 1937, 1949 (2009). Under notice pleading in federal
18 court, the complaint must "give the defendant fair notice of what
19 the claim is and the grounds upon which it rests." Bell Atlantic
20 v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations
21 omitted). "This simplified notice pleading standard relies on
22 liberal discovery rules and summary judgment motions to define
23 disputed facts and issues and to dispose of unmeritorious
24 claims." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).

25 On a motion to dismiss, the factual allegations of the
26 complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319,
27 322 (1972). The court is bound to give plaintiff the benefit of
28 every reasonable inference to be drawn from the "well-pleaded"

1 allegations of the complaint. Retail Clerks Int'l Ass'n v.
2 Schermerhorn, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not
3 allege "'specific facts' beyond those necessary to state his
4 claim and the grounds showing entitlement to relief." Twombly,
5 550 U.S. at 570. "A claim has facial plausibility when the
6 plaintiff pleads factual content that allows the court to draw
7 the reasonable inference that the defendant is liable for the
8 misconduct alleged." Iqbal, 129 S. Ct. at 1949.

9 Nevertheless, the court "need not assume the truth of legal
10 conclusions cast in the form of factual allegations." United
11 States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th
12 Cir. 1986). While Rule 8(a) does not require detailed factual
13 allegations, "it demands more than an unadorned, the defendant-
14 unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at 1949. A
15 pleading is insufficient if it offers mere "labels and
16 conclusions" or "a formulaic recitation of the elements of a
17 cause of action." Twombly, 550 U.S. at 555; Iqbal, 129 S. Ct. at
18 1950 ("Threadbare recitals of the elements of a cause of action,
19 supported by mere conclusory statements, do not suffice.").
20 Moreover, it is inappropriate to assume that the plaintiff "can
21 prove facts which it has not alleged or that the defendants have
22 violated the . . . laws in ways that have not been alleged."
23 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council
24 of Carpenters, 459 U.S. 519, 526 (1983).

25 Ultimately, the court may not dismiss a complaint in which
26 the plaintiff has alleged "enough facts to state a claim to
27 relief that is plausible on its face." Iqbal, 129 S. Ct. at 1949
28 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 570

1 (2007)). Only where a plaintiff has failed to "nudge [his or
2 her] claims across the line from conceivable to plausible," is
3 the complaint properly dismissed. Id. at 1952. While the
4 plausibility requirement is not akin to a probability
5 requirement, it demands more than "a sheer possibility that a
6 defendant has acted unlawfully." Id. at 1949. This plausibility
7 inquiry is "a context-specific task that requires the reviewing
8 court to draw on its judicial experience and common sense." Id.
9 at 1950.

10 In ruling upon a motion to dismiss, the court may consider
11 only the complaint, any exhibits thereto, and matters which may
12 be judicially noticed pursuant to Federal Rule of Evidence 201.
13 See Mir v. Little Co. Of Mary Hospital, 844 F.2d 646, 649 (9th
14 Cir. 1988); Isuzu Motors Ltd. V. Consumers Union of United
15 States, Inc., 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998).

16 ANALYSIS

17 A. OneWest's Exhibits

18 In ruling upon a motion to dismiss, the court may consider
19 matters which may be judicially noticed pursuant to Federal Rule
20 of Evidence 201. See Mir v. Little Co. of Mary Hospital, 844
21 F.2d 646, 649 (9th Cir. 1988); Isuzu Motors Ltd. v. Consumers
22 Union of United States, Inc., 12 F. Supp. 2d 1035, 1042 (C.D.
23 Cal. 1998). Rule 201 permits a court to take judicial notice of
24 an adjudicative fact "not subject to reasonable dispute" because
25 the fact is either "(1) generally known within the territorial
26 jurisdiction of the trial court or (2) capable of accurate and
27 ready determination by resort to sources whose accuracy cannot
28 reasonably be questioned." Fed. R. Evid. 201(b). The court can

1 take judicial notice of matters of public record, such as
2 pleadings in another action and records and reports of
3 administrative bodies. See Emrich v. Touche Ross & Co., 846 F.2d
4 1190, 1198 (9th Cir. 1988).

5 "Even if a document is not attached to a complaint, it may
6 be incorporated by reference into a complaint if the plaintiff
7 refers extensively to the document or the document forms the
8 basis of the plaintiff's claim." United States v. Ritchie, 342
9 F.3d 903, 908 (9th Cir. 2003). "The defendant may offer such a
10 document, and the district court may treat such a document as
11 part of the complaint, and thus may assume that its contents are
12 true for purposes of a motion to dismiss under Rule 12(b)(6)."
13 Id. The policy concern underlying the rule is to prevent
14 plaintiffs "from surviving a Rule 12(b)(6) motion by deliberately
15 omitting references to documents upon which their claims are
16 based." Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998).

17 Plaintiffs' complaint alleges several causes of action that
18 are premised on (1) defendant OneWest's predecessor's failure to
19 provide the disclosures and number of copies of the Notice of
20 Right to Cancel; and (2) plaintiffs' ability to tender payment.
21 (Compl. ¶ 43, 48.) Defendants request Judicial Notice of the
22 Deeds of Trust recorded with the El Dorado County Recorder as
23 well as a copy of the Voluntary Petition for Chapter 13
24 bankruptcy filed by plaintiffs. Plaintiffs do not oppose the
25 requests. Accordingly, because the loan documents form the basis
26 of the relevant causes of action and the bankruptcy filings are
27 public documents filed under penalty of perjury, the court
28 considers them for the purpose of defendant's motion to dismiss.

1 **B. TILA**

2 Plaintiffs' first claim for relief alleges that defendant
3 OneWest violated TILA by failing to provide the required
4 disclosures to plaintiffs at the time of closing. (Compl. ¶ 43.)
5 OneWest moves to dismiss the count on grounds that the claim for
6 rescission must fail because OneWest is only a loan "servicer"
7 and not a "creditor" as required under TILA and that
8 "[p]laintiffs have not and cannot allege they are able to repay
9 [{"tender"}] the loan proceeds." (Def.'s Mot. to Dismiss ("MTD"),
10 filed Oct. 9, 2009, 6:26-27.)

11 **1. OneWest is not a "creditor"**

12 The purpose of TILA is to "assure a meaningful disclosure of
13 credit terms so that the consumer will be able to compare more
14 readily the various credit terms available to him and avoid the
15 uninformed use of credit, and to protect the consumer against
16 inaccurate and unfair credit billing and credit card practices."
17 15 U.S.C. § 1601(a). TILA and its regulations, issued by the
18 Federal Reserve System, 12 C.F.R. §§ 226.1-.29 ("Reg Z"), contain
19 detailed disclosure requirements for consumer loans. Semar v.
20 Platte Valley Fed. Sav. & Loan Ass'n., 791 F.2d 699, 703-04 (9th
21 Cir. 1986).

22 Civil liability under TILA applies to creditors. See 15
23 U.S.C. § 1640(a) (2009) (establishing civil liability for "any
24 creditor" for failure to comply with any requirement of "[15
25 U.S.C. §§ 1631 *et seq.*], including any requirement under section
26 125 [15 U.S.C. § 1635]"). Title 15 U.S.C. § 1641 provides that
27 any TILA action, including a rescission claim, which may be
28 brought against a creditor may also be brought against the

1 assignee of a creditor.

2 TILA defines creditor as referring only to a person who
3 both:

4 (1) regularly extends, whether in connection with
5 loans, sales of property or services, or otherwise,
6 consumer credit which is payable by agreement in more
7 than four installments or for which the payment of a
8 finance charge is or may be required, and

9 (2) is the person to whom the debt arising from the
10 consumer credit transaction is initially payable on the
11 face of the evidence of indebtedness or, if there is no
12 such evidence of indebtedness, by agreement. . . .

13 15 U.S.C. § 1602(f).

14 TILA also contemplates that a court can levy damages
15 against assignees if the disclosure violations made by the
16 original lender are "apparent on the face of the disclosure
17 statement." 15 U.S.C. § 1641(a). However, under § 1641, loan
18 servicers "shall not be treated as an assignee of [a consumer]
19 obligation for purposes of this section unless the servicer is or
20 was the owner of the obligation." 15 U.S.C. § 1641(f) (2009).
21 See also Marks v. Ocwen Loan Servicing, 2008 U.S. Dist. LEXIS
22 12175, at *4-5, 2008 WL 344210 (N.D. Cal. Feb. 6, 2008)
23 ("Although TILA provides that assignees of a loan may be liable
24 for TILA violations, loan servicers are not liable under TILA as
25 assignees unless the loan servicer owned the loan obligation at
26 some point.")

27 Plaintiffs concede that they believe that OneWest "was
28 merely a servicing agent" and that "a servicing agent does not
have liability under [TILA]." (Compl. ¶¶ 37, 40.) However,
plaintiffs contend that OneWest should be liable under principles
of agency because OneWest is "intentionally withholding the

1 identity of their principal thereby rendering themselves liable
2 for their acts." (Id. ¶ 40.) However, Plaintiffs have provided
3 no authority to support their position that common law rules of
4 agency apply to TILA claims. To the contrary, Congress placed a
5 section in the Act which specifically states that servicers are
6 not liable under TILA. 15 U.S.C. § 1641(f). Because OneWest is
7 a loan servicer, and not a creditor, plaintiffs have failed to
8 state a claim under TILA against OneWest.

9 **2. Inability to Tender**

10 The Ninth Circuit has held that rescission under TILA
11 "*should* be conditioned on repayment of the amounts advanced by
12 the lender." Yamamoto v. Bank of N.Y., 329 F. 3d 1167, 1170 (9th
13 Cir. 2003) (emphasis in original). District courts in this
14 circuit have dismissed rescission claims under TILA at the
15 pleading stage based upon the plaintiff's failure to allege an
16 ability to tender loan proceeds. See, e.g., Garza v. Am. Home
17 Mortgage, 2009 U.S. Dist. LEXIS 7448, at *15 (E.D. Cal. Jan. 27,
18 2009) (stating that "rescission is an empty remedy without [the
19 borrower's] ability to pay back what she has received"); Ibarra
20 v. Plaza Home Mortgage, 2009 U.S. Dist. LEXIS 80581, at *22 (S.D.
21 Cal. Sept. 4, 2009); Carnero v. Weaver, 2009 U.S. Dist. LEXIS
22 62665, at *8 (N.D. Cal. July 20, 2009); Pesayco v. World Sav.,
23 Inc., 2009 U.S. Dist. LEXIS 73299, at *4 (C.D. Cal. July 29,
24 2009); Ing Bank v. Korn, 2009 U.S. Dist. LEXIS 73329, at *7 (W.D.
25 Wash. May 22, 2009).

26 In this case, plaintiffs allege that they were prepared to
27 offer tender at some point, but were denied rescission and
28 damaged under 15 U.S.C. § 1640 by defendant's failure to engage

1 in the process. (Compl. ¶ 48 (emphasis added).) In their
2 opposition, plaintiffs also assert that they "are prepared to
3 tender once ONEWEST removes all of the impediments and harms they
4 have put in the way." (Pl.'s Opp'n Mot. Dismiss ("Pl.'s Opp'n"),
5 filed Nov. 24, 2009, 18:5-7)

6 However, neither plaintiffs' reference to a past ability to
7 tender in their complaint nor their conclusory statement in their
8 opposition allows the court to make a reasonable inference that
9 plaintiffs would be able to offer tender or should be excused
10 from doing so prior to rescission. Further, plaintiffs'
11 conclusory assertions are not supported by other portions of the
12 complaint or documents which the court takes judicial notice of.
13 As of February 20, 2009, plaintiffs were in default on one of the
14 loans in the amount of \$17,687.07. On June 12, 2009, plaintiffs
15 filed a voluntary petition for Chapter 13 bankruptcy in which
16 they estimated their assets as between \$500,001.00 and \$1 million
17 and their liabilities as between \$1 million and \$10 million.
18 (OneWest's Ex. 1, 4.) Moreover, by plaintiffs' own assessment
19 set forth in their letter to Indymac in December 2008, the
20 present fair market value of the property was \$700,000. (Compl.
21 Ex. C.) In order to rescind the loans, plaintiffs would be
22 required to tender more than \$300,000 in addition to this alleged
23 value of the property.³ Accordingly, plaintiffs' assertion that
24 they could refinance the property in order to tender payment is
25 not supported by their factual allegations.

26
27 ³ Plaintiffs assert that the Notice of Default and
28 bankruptcy filing should not be considered because they were the
result of defendant's failure to follow the rescission procedure.

1 Accordingly, OneWest's motion to dismiss plaintiffs' claim
2 under TILA is GRANTED.

3 **B. RESPA Violation**

4 Plaintiffs' second claim for relief alleges that OneWest
5 violated 12 U.S.C. § 2605 by failing to provide a written
6 explanation in response to plaintiffs' alleged Qualified Written
7 Request ("QWR"), which was sent to Indymac and dated December 31,
8 2008. (Compl. ¶ 81-84.) OneWest moves to dismiss this claim on
9 the basis that the QWR was sent not to OneWest, but to Indymac,
10 who was operating under the FDIC as conservator. (MTD, 10:1-5.)
11 The defendant also contends that plaintiffs have failed to plead
12 actual damages as required by RESPA. (Id. 9-11.)

13 **1. Indymac was not a "Servicer"**

14 Section 2605 of RESPA requires a loan servicer to provide
15 disclosures relating to the assignment, sale, or transfer of loan
16 servicing to a potential or actual borrower: (1) at the time of
17 the loan application, and (2) at the time of transfer. 12 U.S.C.
18 § 2605. The loan servicer also has a duty to respond to a
19 borrower's inquiry or "qualified written request." 12 U.S.C. §
20 2605(e).

21 A qualified written request is a written correspondence that
22 enables the servicer to identify the name and account of the
23 borrower. 12 U.S.C. § 2605(e)(1). It also either includes a
24 statement describing why the borrower believes that the account
25 is in error or provides sufficient detail to the servicer
26 regarding other information sought by the borrower. Id. The
27 loan servicer is required to respond by making appropriate
28 corrections to the borrower's account, if necessary and, after

1 conducting an investigation, by providing the borrower with a
2 written clarification or explanation. 12 U.S.C. § 2605(e)(2).
3 The statute of limitation to bring an action for a Section 2605
4 violation is three years. 12 U.S.C. § 2614.

5 Section 2605 defines a "servicer" as "the person responsible
6 for servicing the loan." 12 U.S.C. § 2605(i)(2). However,
7 section 2605(i)(2)(A) provides that the term "servicer" does not
8 include "the Federal Deposit Insurance Corporation . . . as
9 receiver or conservator of an insured depository institution."
10 12 U.S.C. § 2605(i)(2)(A); Ibarra v. Plaza Home Mortgage, 2009 WL
11 2901637 *4 (S.D. Cal. 2009) (granting FDIC motion for judgment on
12 the pleadings, as receiver for Indymac, with respect to RESPA
13 claim based on alleged qualified written request).

14 Plaintiffs admit in their complaint that at the time they
15 sent the QWR, Indymac "was under receivership"⁴ by the FDIC and
16 "under the management and control of the FDIC." (Compl. ¶ 38.)
17 The court also takes judicial notice of an order from the
18 Director of Thrift Supervision, dated July 11, 2009, in which
19 Indymac was placed under conservatorship of the FDIC. (OneWest's
20 Ex. 6.) Because RESPA specifically excludes the FDIC in its role
21 as conservator from its definition of servicer, Indymac was under
22 no obligation to respond to the alleged QWR and could not have
23 transferred this responsibility to OneWest. See Fullmer v.

24
25 ⁴ While the plaintiffs use the term "receivership"
26 Indymac Federal Bank, FSB was under a "conservatorship." On July
27 11, 2008 the Director of the Office of Thrift Supervision
28 determined that grounds existed for appointment of the FDIC as
receiver for IndyMac Bank, FSB. (OneWest's Ex. 6.) In the same
order, the Director created IndyMac Federal Bank, FSB which would
take over the assets and liabilities of IndyMac Bank and
appointed the FDIC as conservator of the new bank. (Id.)

1 JPMorgan Chase Bank, N.A., 2:09-cv-1037, 2010 WL 95206, at * 5
2 (E.D. Cal. Jan. 6, 2010) (rejecting the "plaintiff's efforts to
3 hold [the] defendants vicariously liable for the QWR sent to
4 IndyMac Federal Bank, FSB"); Ibarra, 2009 WL 2901637, at *4.

5 **2. Damages**

6 A claim for a RESPA violation cannot survive a motion to
7 dismiss when the plaintiff does not plead facts showing how the
8 plaintiff suffered actual harm due to the defendant's failure to
9 respond to a qualified written response. See Benham v. Aurora
10 Loan Servs., 2009 U.S. Dist. LEXIS 91287, at *10-11 (N.D. Cal.
11 Oct. 1, 2009); Singh v. Wash. Mut. Bank, 2009 U.S. Dist. LEXIS
12 73315, at *16 (N.D. Cal. Aug. 19, 2009). While courts interpret
13 this requirement liberally, the plaintiff must at least allege
14 what or how the plaintiff suffered the pecuniary loss. See
15 Yulaeva v. Greenpoint Mortgage Funding, Inc., 2009 U.S. Dist.
16 LEXIS 79094, at *44 (E.D. Cal. Sept. 3, 2009) (holding that the
17 plaintiff's claim was sufficient to survive a motion to dismiss
18 because the plaintiff alleged that she was made to pay a referral
19 fee that was prohibited by RESPA); Hutchinson v. Del. Sav. Bank
20 FSB, 410 F.Supp.2d 374, 383 (D.N.J. 2006) (holding that the
21 plaintiffs adequately pled actual damages when they alleged that
22 they suffered "negative credit ratings on their credit reports
23 [and] the inability to obtain and borrow another mortgage loan
24 and other financing").

25 Here, plaintiffs' vague claim that they suffered harm
26 because they were unable to name the real party in interest to
27 this suit is insufficient to demonstrate that they suffered
28 actual damages as a result of defendant's failure to respond to

1 the QWR. (Compl. ¶ 89.) Therefore, plaintiffs have not
2 sufficiently pled facts showing a cognizable RESPA violation.

3 Accordingly, OneWest's motion to dismiss plaintiffs' second
4 claim for relief for violations of RESPA is GRANTED.

5 **C. RFDCPA Violation**

6 Plaintiffs' third claim for relief alleges violation of
7 California's Rosenthal Fair Debt Collection Practices Act
8 ("RFDCPA"). OneWest moves to dismiss this claim as a conclusory
9 allegation that lacks the factual allegations necessary to
10 survive a motion to dismiss. (MTD, 11:6-7, 22-28.)

11 The RFDCPA precludes a debt collector from collecting or
12 attempting to collect from a debtor on a consumer debt in a
13 threatening or harassing manner. See Cal. Civ. Code § 1788, *et*
14 *seq.* (West 2010). Specifically, the RFDCPA prohibits threats,
15 obscenity, misleading or false communications, and overreaching.
16 Cal. Civ. Code § 1788.10-.12; 1788.14-.16.

17 Plaintiffs allege that OneWest repeatedly contacted them in
18 an attempt to collect the debt through "a high volume of phone
19 calls and written correspondence." (Compl. ¶ 94.) While the
20 federal rules contemplate a short and plain statement of the
21 factual basis for a plaintiff's claims, the allegations must be
22 sufficiently pled (1) to allow the court to determine whether the
23 conduct violates the statute, and (2) to enable defendants to
24 respond. See Twombly, 550 U.S. at 555; Iqbal, 129 S. Ct. at
25 1950. A "high volume of phone calls and written correspondence"
26 does not by itself constitute a violation of the RFDCPA. See
27 Fullmer, 2010 WL 95206, at *7.

28 /////

1 Accordingly, OneWest's motion to dismiss plaintiffs' third
2 claim for relief for violations of RFDCPA is GRANTED.

3 **D. Violation of California Business & Professions Code § 17200**

4 Plaintiffs' fourth claim asserts that OneWest violated
5 Section 17200 of the California Business & Professions Code by
6 engaging in unlawful, unfair, and fraudulent business practices.
7 (Compl. ¶ 102.) Plaintiffs predicate this claim on defendant's
8 alleged violation of TILA, RESPA, and RFDCPA. (Compl. ¶ 107.)

9 The Unfair Competition Law ("UCL"), California Business and
10 Professions Code §§ 17200, *et seq.*, forbids acts of unfair
11 competition, which includes "any unlawful, unfair or fraudulent
12 business act or practice." Cal. Bus. & Prof. Code § 17200. "The
13 UCL is broad in scope, embracing anything that can properly be
14 called a business practice and that at the same time is forbidden
15 by law." People ex rel. Gallegos v. Pacific Lumber Co., 158 Cal.
16 App. 4th 950, 959 (2008) (internal citations omitted).

17 Because plaintiffs' UCL claim against OneWest is predicated
18 upon defendant's alleged violations of TILA, RESPA, and RFDCPA,
19 for the reasons set forth above, plaintiffs' allegations
20 regarding their UCL claim similarly fails to state a basis for
21 relief.

22 Accordingly, OneWest's motion to dismiss the fourth claim in
23 the complaint for violation of UCL is GRANTED.

24 **E. Wrongful Foreclosure**

25 Plaintiffs' fifth claim for relief alleges a wrongful
26 foreclosure claim against OneWest. (Compl. 113-15.) Defendant
27 contends that plaintiffs' wrongful foreclosure claim fails
28 because plaintiff has not alleged ability to tender the borrowed

1 funds to the lender. (MTD, 15:7-9.)

2 "A valid and viable tender of payment of the indebtedness
3 owing is essential to an action to cancel a voidable sale under a
4 deed of trust." Karlsen v. American Sav. & Loan Assn., 15 Cal.
5 App. 3d 112, 117 (Cal. App. 2d Dist. 1971). The majority of
6 California district courts utilize the Karlsen rationale in
7 examining wrongful foreclosure claims. Anaya v. Advisors Lending
8 Group, 2009 U.S. Dist. LEXIS 68373 (E.D. Cal. Aug. 3, 2009)
9 ("Plaintiff offers nothing to indicate that she is able to tender
10 her debt to warrant disruption of non-judicial foreclosure");
11 Alicea v. GE Money Bank, 2009 U.S. Dist. LEXIS 60813 (N.D. Cal.
12 July 16, 2009) ("When a debtor is in default of a home mortgage
13 loan, and a foreclosure is either pending or has taken place, the
14 debtor must allege a credible tender of the amount of the secured
15 debt to maintain any cause of action for foreclosure."); Montoya
16 v. Countrywide Bank, 2009 U.S. Dist. LEXIS 53920 (N.D. Cal. June
17 25, 2009) ("Under California law, the "tender rule" requires that
18 as a precondition to challenging a foreclosure sale, or any cause
19 of action implicitly integrated to the sale, the borrower must
20 make a valid and viable tender of payment of the secured debt").
21 The application of the "tender rule" prevents "a court from
22 uselessly setting aside a foreclosure sale on a technical ground
23 when the party making the challenge has not established his
24 ability to purchase the property." Williams v. Countrywide Home
25 Loans, 1999 U.S. Dist. LEXIS 14550 (N.D. Cal. Sept. 15, 1999).

26 As set forth above in the court's analysis of plaintiffs'
27 TILA claim, plaintiffs have not alleged any facts supporting
28 their ability to tender payment. Accordingly, OneWest's motion

1 to dismiss plaintiffs' fifth claim for relief for wrongful
2 foreclosure is GRANTED.

3 **F. Slander of Title and Slander of Credit⁵**

4 Plaintiffs' sixth and seventh claims for relief are based on
5 claims for slander of title and slander of credit. (Compl. ¶¶
6 116-19.) Plaintiffs allege that defendant "has caused to be
7 recorded various documents including a Notice of Default which
8 has impaired the Plaintiffs [sic] title which constitutes slander
9 of title." (Compl. 117.) The complaint also alleges that "the
10 actions and inactions of the Defendants have impaired their
11 credit history causing them to lose the ability to have good
12 credit." (Compl. 119.)

13 Plaintiffs' allegations that this conduct "constitutes
14 slander of title" or "slander of credit" are conclusory
15 assertions barren of any factual support. See United States ex
16 rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th Cir. 1986).
17 Plaintiffs have failed to allege any facts or provide any
18 information regarding as to how the Notice of Default amounts to
19 slander or how plaintiffs' credit history has been affected by
20 the actions of OneWest.

21 Accordingly, OneWest's motion to dismiss the plaintiffs'
22 sixth and seventh claims for relief for slander of title and
23 slander of credit are GRANTED.

24 /////

25 /////

26
27 ⁵ To the extent that these claims are based on the
28 alleged violations of TILA, RESPA, RFDCPA, and wrongful
foreclosure, for the reasons set forth above, the allegations in
the complaint are insufficient to state a claim.

1 **CONCLUSION**

2 For the foregoing reasons, OneWest's motion to dismiss is
3 GRANTED. Plaintiffs are granted fifteen (15) days from the date
4 of this order to file a second amended complaint in accordance
5 with this order. Defendant is granted thirty (30) days from the
6 date of service of plaintiffs' second amended complaint to file a
7 response thereto.

8 IT IS SO ORDERED.

9 DATED: January 25, 2010.



10 FRANK C. DAMRELL, JR.
11 UNITED STATES DISTRICT JUDGE
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