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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

ROBERT DESTFINO, et al.,
Plaintiffs,

v.

WILLIAM KENNEDY, et al.,
Defendants.

CASE NO. CV-F-08-1269 LJO DLB

**ORDER ON DEFENDANTS' SECOND
MOTION TO DISMISS**

Defendants Glen Berteau, Debbie Berteau, Darryl Turner, Michael Williams, Robert Jones, Robert Ona, Jeremy Johnson and Calvary Tempt Worship Center move pursuant to Rule 9(b) and 12(b)(6) to dismiss the plaintiffs' First Amended Complaint. While defendants' notice of motion is not specific as to the causes of action at issue in the First Amended Complaint, the motion argues the same grounds as in defendants' initial motion as to the original complaint. That motion challenged the fraud causes of action in the First, Second, Third, Fourth and Fifth Causes of action and the Eighth, Ninth, Tenth, Eleventh causes of action and the Fifteen cause of action for harassment. Defendants also move for a more definite statement under Fed.R.Civ.P. 12(e). Other of the defendants have joined in the motion. Plaintiff filed oppositions to the motion and the joinders on December 30, 2008. Movants filed a reply on December 31, 2008. Pursuant to Local Rule 78-230(h), this matter is submitted on the pleadings without oral argument. Therefore, the hearing set for January 12, 2009 is VACATED. Having considered the moving, opposition, and reply papers, as well as the Court's file, the Court issues the following order.

1 **FACTUAL AND PROCEDURAL BACKGROUND**

2 **A. Factual Background**

3 This action involves claims of fraudulent activity related to representations of financing for
4 homes and automobiles. The First Amended Complaint (“FAC”) alleges that the defendants made
5 misrepresentations to induce plaintiffs to enter into loans for either mortgages or car loans, or both.

6 The Complaint was originally filed in Stanislaus County Superior Court on May 2, 2008 and
7 removed to this Court on August 26, 2008. Following a motion to dismiss and for more definite
8 statement by these same defendants, plaintiffs filed a First Amended Complaint (“FAC”) on November
9 26, 2008. The Complaint contains 179 paragraphs. (Doc. 83, FAC.) The complaint alleges claims
10 against 29 individuals, 10 business entities and a church. In the first 49 “general allegations,” plaintiffs
11 set out the capacity and residence of each defendant. In paragraph 50 of the Complaint, plaintiffs
12 incorporate by reference all preceding paragraphs of the complaint. Plaintiffs categorize all plaintiffs
13 as the “Home Mortgage Plaintiffs.” (Doc. 83, FAC ¶51.) Next, plaintiff categories the “Home Mortgage
14 Defendants” as collectively, each named defendant.¹ (Doc. 83, FAC ¶52.) Thereafter, conduct in the
15 complaint is referred to as conduct by “Home Mortgage Defendants” against the “Home Mortgage
16 Plaintiffs.” The plaintiffs and defendants who were involved in car loans are categorized differently.²
17 The complaint alleges fifteen claims for relief. At issue in this motion are the following claims:

- 18 -- First - Fraud in Home Mortgages
- 19 -- Second - Fraud in Automobile loans
- 20 -- Third - Unfair Business practices for the home mortgages and automobile loans
- 21 -- Fourth - Fraud in the Inducement in the home mortgages and automobile loans (or in the
22 creation of Corporation Sole)

23 ¹ The “Home Mortgage Plaintiffs” are all the plaintiffs. (Doc. 83, FAC ¶51.) The “Home Mortgage Defendants”
24 are defendants Kennedy, American Legal Services, the Ear of Malchus, The Lost Sheep, Davies, Financial Wellbeing
25 Solutions, K. Reiswig, E. Reiswig, The Silver Trumpets, R. Johnson, Her Copyright, Roderick Sese, Gentry Group, K.
26 S. Kim, SKM Debt Services, Lalonde, Lebarthe, WB, Wee, Klausner, Financial Title, and Cook. (Doc. 83, FAC ¶52.)

27 ² The “Car Loan Plaintiffs” are plaintiffs Michael Tavarez and Shawn Tavarez. The “Car Loan Defendants” are
28 Kennedy, The EAR of Malchus, American Legal Services, the Lost Sheep, Financial Freedom First, Davies, Financial
Wellbeing Solutions, K. Reiswig, E. Reiswig, The Silver Trumpets, Courtesy Automotive Center, Group, Wells, Ault, Sing,
P. Kim, S. Kim, SKM Debt Services Group. (Doc. 83, FAC ¶¶79, 80.)

- 1 -- Fifth - Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §1964(c))
- 2 -- Ninth - Conspiracy to Commit Fraud
- 3 -- Tenth - Intentional Misrepresentation
- 4 -- Eleventh - Negligent Misrepresentation
- 5 -- Fifteenth - Stalking.

6

7 **B. Procedural History**

8 These moving defendants previously moved to dismiss and for a more definite statement on
9 September 16, 2008 on the same grounds as in this current motion. (Doc. 9.) In the earlier motion,
10 defendants argued that the Complaint’s “General Allegations” are incorporated by reference into each
11 cause of action so that each defendant is accused of uttering each misstatement set out in the complaint,
12 leaving them with no means of determining exactly what each of them is charged with saying or doing.
13 Defendants also argued that all the claims, which are based on alleged fraudulent conduct, are not plead
14 with particularity as required by Fed.R.Civ.P. 9.

15 This Court granted the motion to dismiss and for a more definite statement. The Court ruled that
16 incorporation by reference of each allegation into subsequent causes of action was impermissible “shot
17 gun pleading.” (Doc. 64, November 3, 2008 Order, pp. 5-6.) In addition, the Court granted the motions
18 for failure to plead fraud with particularity as required by Rule 9. The Court found that different
19 representations were made by different persons to different people at different times. The Court ruled
20 the Complaint was deficient because the fraud allegations grouped all of the defendants together without
21 specifying which defendants engaged in which conduct.

22 Finally, the Court ruled on the fifteenth cause of action for harassment. The Court partially
23 granted and partially denied the motion because the conduct alleging harassment alleged conduct both
24 outside and within ecclesiastical matters. The First Amendment’s free exercise clause prohibits courts
25 from interfering in disputes about the governance and operation of church matters. These allegations
26 are therefore barred by the establishment and free exercise clauses of the First Amendment.

27 Plaintiffs filed their FAC on November 26, 2008. Defendant argues that the FAC fails to address
28 and correct the improper shot gun pleading criticized by this Court with respect to the original complaint.

1 Defendant also argues that the FAC fails to comply with the Court’s order to allege fraud with
2 particularity and to eliminate the nonjudicable allegations from the fifteenth cause of action.

3 **ANALYSIS AND DISCUSSION**

4 **A. Motion To Dismiss Standards**

5 **1. Rule 12(b)(6)**

6 A motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) (for failure to state a claim upon which
7 relief can be granted) is a challenge to the sufficiency of the pleadings set forth in the complaint. A
8 motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that
9 plaintiff can prove no set of facts in support of the claim that would entitle him to relief. *See Hishon v.*
10 *King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229 (1984)(citing *Conley v. Gibson*, 355 U.S. 41, 45-46,
11 78 S.Ct. 99 (1957)); *see also Palmer v. Roosevelt Lake Log Owners Ass’n*, 651 F.2d 1289, 1294 (9th Cir.
12 1981). A Fed.R.Civ.P. 12(b)(6) dismissal is proper where there is either a “lack of a cognizable legal
13 theory” or “the absence of sufficient facts alleged under a cognizable legal theory.” *Balisteri v. Pacifica*
14 *Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

15 In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most
16 favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine
17 whether plaintiff can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty*
18 *Mut. Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996).

19 **2. Rule 12(e)**

20 A Rule 12(e) motion for more definite statement is proper when the complaint is so vague and
21 ambiguous that defendant cannot be reasonably required to frame a responsive pleading. A Rule 12(e)
22 motion is proper only where the complaint is so indefinite that the defendant cannot ascertain the nature
23 of the claim being asserted. Motions for more definite statement are viewed with disfavor, and are rarely
24 granted. *In re American Int’l Airways, Inc.*, 66 B.R. 642, 645 (ED PA 1986).

25 **B. Fraud Claims**

26 **1. Standards of Pleading**

27 Fed.R.Civ.P. 8(a)(2) requires a complaint to contain “a short plain statement of the claim
28 showing that the pleader is entitled to relief.” To comply with F.R.Civ.P. 8(a)(2), a plaintiff “must plead

1 a short and plain statement of the elements of his or her claim, identifying the transactions or occurrence
2 giving rise to the claim and the elements of the prima facie case.” *Bautista v. Los Angeles County*, 216
3 F.3d 837, 840 (9th Cir. 2000). Although F.R.Civ.P. 8 “encourages brevity, the complaint must say
4 enough to give the defendant ‘fair notice of what the plaintiff’s claim is and the grounds upon which it
5 rests.’” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, __ U.S. __, 127 S.Ct. 2499, 2507 (2007) (quoting
6 *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346, 125 S.Ct. 1627 (2005)).

7 The FAC alleges causes of action based upon fraud. In all averments of fraud or mistake, the
8 circumstances constituting fraud or mistake shall be stated “with particularity.” Fed.R.Civ.P. 9(b). By
9 requiring the plaintiff to allege the who, what, where, and when of the alleged fraud, the rule requires
10 the plaintiff to conduct a precomplaint investigation in sufficient depth to assure that the charge of fraud
11 is responsible and supported, rather than defamatory and extortionate.” *Ackerman v. Northwestern Mut.*
12 *Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir.) (the particularity requirement is satisfied if the pleading
13 “identifies the circumstances constituting fraud (or mistake) so that the defendant can prepare an
14 adequate answer from the allegations.”), *cert. denied*, 528 U.S. 874 (1999); *Moore v. Kayport Package*
15 *Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). The allegations must be “specific enough to give
16 defendants notice of the particular misconduct which is alleged to constitute the fraud (or mistake) ...
17 so that they can defend against the charge and not just deny that they have done anything wrong.”
18 *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). This heightened pleading standard “requires
19 a pleader of fraud to detail with particularity the time, place, and manner of each act of fraud, plus the
20 role of each defendant in each scheme.” *Lancaster Cmtv Hosp. v. Antelope Valley Dist.*, 940 F.2d 397,
21 405 (9th Cir. 1991), *cert. denied*, 501 U.S. 1094 (1992). Thus, “allegations of fraud must be specific
22 enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud
23 charged so that they can defend against the charge and not just deny that they have done anything
24 wrong.” *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (citation and internal quotations
25 omitted).³

26
27 ³The third and fifth claims for relief allege violations under the California Unfair Competition law and the federal
28 RICO law. Defendant argues that plaintiffs’ claims for violation of the California Unfair Competition Law and RICO are
wholly dependent on their defectively pled fraud claims. As a threshold matter, Rule 9(b) applies to RICO fraud allegations,

1 A heightened pleading standard is not an invitation to disregard's Rule 8's requirement of
2 simplicity, directness, and clarity. *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996). “If the
3 pleading contains prolix evidentiary averments, largely irrelevant or of slight relevance, rather than clear
4 and concise averments stating which defendants are liable to plaintiffs for which wrongs, based on the
5 evidence, then this purpose is defeated.” *Id.* A complaint may state fraud claims with specificity and
6 comply with Rule 8's requirement of simplicity, directness and clarity.

7 **2. Failure to Comply with the Pleading Standards**

8 Defendants argue that the FAC continues to accuse the eight moving defendants, among others,
9 of perpetrating one or more frauds against plaintiffs through various acts. Defendants argue that the
10 FAC’s “General Allegations” of 49 paragraphs are incorporated by reference into each cause of action.
11 In addition, each and every allegations of fraudulent conduct, fraudulent statements and fraudulent
12 conspiracy (FAC ¶¶50-70) are incorporated into each cause of action. (See Doc. 83, FAC ¶¶96, 101,
13 107, 114, 117, 122, 127, 132, 137 and 146.) Defendants argue that these allegations continue to leave
14 them with no means of determining exactly what each of them is charged with saying or doing.

15 Plaintiffs argue that the FAC alleges a series of fraudulent acts - a scheme. Plaintiffs argue that
16 for each cause of action, plaintiffs reduced the incorporations by reference by including only specific
17 paragraphs of other violations relevant to that cause of action, or basic background information which
18 would be both burdensome and cumbersome to include in repetition. (Doc. 95, Opposition p. 5.)

19 As noted by the Court in its prior order, not all incorporation of prior allegations by reference
20 is unwarranted. It is common practice to incorporate by reference in later claims for relief various
21 allegations made in earlier claims (typically allegations as to jurisdiction, venue, parties, sequence of
22 events). Properly used, such incorporation promotes simple, concise pleadings. *Fontana v. Haskin*, 262
23 F.3d 871, 877 (9th Cir. 2001).

24 Allegations, however, which incorporate each preceding paragraph, regardless of relevancy, are
25 not permitted. This practice has been harshly criticized as a form of “shotgun pleading” that violates

26 _____
27 including mail fraud. *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir. 1989); *Alan Neuman Prods.,*
28 *Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir.), *cert. denied*, 493 U.S. 858 (1989). Accordingly, these claims are not
separately addressed and are included in the Court’s discussion of the fraud claims.

1 Rule 8's requirement of a "short and plain statement" and interferes with the court's ability to administer
2 justice. *Byrne v. Nezhat*, 261 F.3d 1075, 1129–1130 (11th Cir. 2001). In attacking such pleading,
3 defendant has an obligation to move for a more definitive statement. *Anderson v. District Bd. of*
4 *Trustees of Cent. Florida Community College*, 77 F.3d 364, 366 (11th Cir. 1996) (Under the Federal
5 Rules of Civil Procedure, a defendant faced with a complaint which incorporates each preceding
6 paragraph, whether relevant or not, is not expected to frame a responsive pleading. Rather, the defendant
7 is expected to move the court, pursuant to Rule 12(e), to require the plaintiff to file a more definite
8 statement.)

9 Here, the FAC modifies the incorporation by reference from the allegations of the original
10 complaint. In the original complaint, each of plaintiffs' claims for relief incorporated by reference each
11 and all of the preceding allegations, whether the allegations were relevant or not. Basically, the original
12 complaint incorporated all paragraphs which preceded each claim. In the FAC, however, plaintiffs
13 marginally reduced the incorporations by reference. For instance, the Second Claim for Relief, Fraud
14 in the Car Loans, incorporates by reference the background allegations, ¶¶1-49. (Doc. 83, FAC ¶77.)
15 The Fourth Cause of Action, for fraud in the inducement, incorporates paragraphs 1 through 70, which
16 includes the general allegations and all of the alleged fraudulent statements and conduct related to the
17 home loans. Each subsequent cause of action also incorporates paragraphs 78 through 90, which are the
18 fraudulent statements and conducts in the car loans. In the other causes of action, the incorporations by
19 reference are similarly stated. Each cause of action incorporates the background allegations and the
20 fraudulent statements and conduct. Unlike the original complaint, the FAC attempts to incorporate by
21 reference only the factual basis for the cause of action, and not each and every preceding allegation.
22 *Strategic Income Fund, LLC v. Spear, Leeds, & Kellogg Corp.*, 305 F.3d 1293, 1295 (11th Cir. 2002)
23 (A typical "shotgun" pleading "contains several counts, each one incorporating by reference the
24 allegations of its predecessors, leading to a situation where most of the counts (i.e., all but the first)
25 contain irrelevant factual allegations and legal conclusions.") Thus, the FAC incorporates the parties
26 capacities and the factual basis for the fraud into each cause of action.

27 Defendants Glen Berteau argue that the FAC is nonetheless a shotgun pleading because each
28 defendant is named in the "general allegations," which are incorporated into each cause of action, and

1 as such, are “shot gunned’ into every cause of action. (Doc. 86-2, p.4.)

2 Plaintiff argues that each defendant is alleged to have made each and every statement. Plaintiff
3 argues that this allegation cures any deficiency in the pleading because each defendant knows he/she/it
4 made each false statement. For instance, the FAC alleges that “the representations made by each of the
5 Home Mortgage Defendants to each of the Home Mortgage Plaintiffs was identical or substantially
6 similar.”⁴ (Doc. 83, FAC ¶61(emphasis added).)

7 Defendants’ argument, however, has merit. Each defendant is named in each cause of action.
8 Each defendant is alleged to have engaged in the every fraudulent activity. Every fraudulent activity is
9 incorporated into every cause of action. Thus, plaintiffs allege that each defendant did everything. While
10 naming each defendant in the cause of action does not create lack of specificity, each defendant is
11 alleged to have engaged in each and every fraudulent conduct and to have uttered each and every
12 fraudulent statement. It is difficult if not impossible to determine which false statements and fraudulent
13 conduct are attributed to any particular defendant.

14 Pleading of this “shotgun” nature fails to comply with Rule 8. In *Magluta v. Samples*, 256 F.3d
15 1282, 1284 (11th Cir. 2001), the Court identified a shotgun complaint as one ignoring the “short and
16 plain statement” requirement by identifying multiple defendants and charging all defendants in each
17 count. In *Magluta*, the complaint alleged four causes of action against fourteen defendants who were
18 charged in each cause of action. The Court held that indiscriminately charging each defendant fails to
19 comply with Rule 8. “The complaint is replete with allegations that “the defendants” engaged in certain
20 conduct, making no distinction among the fourteen defendants charged.” As stated by the Court, a
21 shotgun complaint “is replete with allegations that ‘the defendants’ engaged in certain conduct, making
22 no distinction among the [various] defendants charged, though geographic and temporal realities make
23 it plain that all of the defendants could not have participated in every act complained of.” *Id.* (Emphasis
24 added.)

25 This case is a prime example of a variation of shotgun pleading. Here, plaintiffs argue in their

26 ⁴ Plaintiff argues that all that is required is that a pleading need only give a defendant sufficient notice to
27 answer the complaint, citing *Qwest Communications Corp. v. Herakles, LLC*, 2008 WL 783343, 3 (E.D.Cal. 2008). *Qwest*,
28 however, did not deal with shotgun pleading. Thus, *Qwest* is not persuasive.

1 oppositions and allege in the FAC that every defendant did the exact same conduct and said the exact
2 same misrepresentations. However, plaintiffs' very allegations belie the possibility of such similarity
3 of conduct. The FAC alleges a complicated scheme of fraudulent activity of creating a "shell" tax
4 shelter corporation to hold plaintiffs' properties and inducing plaintiffs to participate in the scheme. In
5 furtherance of the scheme, plaintiffs were induced to transfer their property to the shell corporation.
6 Legal documentation was prepared, tax advice given, mortgage and loan documentation prepared, and
7 church encouragement given, among other activities, in furtherance of the fraudulent scheme. The
8 named defendants run the gambit from church elders to tax advisors to mortgage consultants to car
9 dealers and brokers. Some of the defendants reside inside California and some of the defendants outside
10 of California. Some of the defendants are natural persons and others are associations or corporations.
11 The scheme occurred over an extended, three year period. As noted by *Magluta*, geographic and
12 temporal realities make it plain that all of the defendants could not have participated in every act
13 complained of. Thus, due to the complexity of the scheme, the varying roles of the defendants, the
14 longevity of the scheme, the Court finds it is not possible that every defendant engaged in every
15 fraudulent statement and every fraudulent alleged act.

16 **3. Effect of Shotgun Pleadings and Lack of Specificity**

17 Such pleading is not only unhelpful and poorly drafted, but, as admonished by the Eleventh
18 Circuit, should be avoided because "[e]xperience teaches that, unless cases are pled clearly and precisely,
19 issues are not joined, discovery is not controlled, the trial court's docket becomes unmanageable, the
20 litigants suffer, and society loses confidence in the court's ability to administer justice." *Anderson v.*
21 *District Bd. of Trustees of Cent. Florida Community College*, 77 F.3d 364, 367 (11th Cir.1996); *Abrams*
22 *v. CIBA Specialty Chemicals Corp.*, 2008 WL 4183344, 4 (S.D.Ala. 2008) ("Simply put, then, the
23 problem with a shotgun pleading is that it prevents the parties and the court from understanding what
24 the case is really about because the pleadings are cluttered with irrelevant and unrelated facts. The
25 consequence is that discovery becomes a fool's errand in which parties seek out facts relating to claims
26 whose parameters are so fuzzy, amorphous and ill-defined as to be utterly indeterminate."). It is not just
27 for the parties that shotgun pleadings are onerous. *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d
28 1273, 1279 (11th Cir.2006) ("shotgun pleadings wreak havoc on the judicial system"); *Davis v.*

1 *Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 981 (11th Cir. 2008) (shotgun pleadings inexorably
2 broadens the scope of discovery; shotgun pleadings lessen the time and resources the court has available
3 to reach and dispose of the cases, among other problems).

4 In facts very similar to this case, *Ackerman v. Northwestern Mut. Life Ins. Co.*, 172 F.3d 467 (7th
5 Cir.), *cert. denied*, 528 U.S. 874 (1999), the court dismissed a complaint for failure to fraud with
6 sufficient particularity. In *Ackerman*, the court held that Rule 9(b)'s requirements were not met in an
7 action in which several hundred policyholders of an insurance company alleged that the company's
8 insurance agents persuaded them to use the cash values of their existing policies to pay premiums for
9 new, larger policies. 172 F.3d at 469. In order to make a complaint with hundreds of plaintiffs
10 manageable, the plaintiffs' lawyers grouped the plaintiffs according to the particular insurance agent with
11 whom each dealt. However, the complaint neither provided any dates on which any of the fraudulent
12 misrepresentations or omissions were made nor revealed exactly what each agent said to each plaintiff.
13 The Court found this pleading deficit: "Although the complaint alleges in general terms that the
14 defendants inspired, encouraged, and condoned [the fraudulent activities], it neither associates a
15 particular defendant with a particular set of statements (oral or written) ... nor specifies the contents of
16 those statements." 172 F.3d at 471. The court held that "plaintiffs were required to specify which
17 defendants said what to whom and when." *Id.* Thus, fraud was not pled with sufficient particularity,
18 noting, *inter alia*, that the plaintiffs were not entitled to assume "that the agents' spiel was fraudulent in
19 every instance in which it was given." *Id.* at 470. "[Y]ou can't get around the requirements of the Rule
20 just by joining a lot of separate cases into one." *Ackerman*, 172 F.3d at 469-70.

21 Here, plaintiffs argue that the FAC alleges that the exact same misrepresentations were made by
22 each defendant. The FAC states: "The representations made by each of the Home Mortgage Defendants
23 to each of the Home Mortgage Plaintiffs was identical or substantially similar." (Doc. 83, FAC ¶61.)
24 Plaintiffs argue that "there is no functional difference between alleging the misrepresentations and steps
25 of the scheme and listing the Defendants who made the misrepresentations, versus restating the same
26 misrepresentation separately again and again for each defendant." (Doc. 94, Opposition p. 7:19.)

27 As this Court has noted before and now finds, this is a case where different representations were
28 made by different persons to different people at different times. Yet, the fraud allegations group all of

1 the defendants together without specifying which defendants engaged in which conduct. Here, the
2 complaint groups all plaintiffs into the “Home Mortgage Plaintiffs,” and groups some or all of the
3 defendants into the “Home Mortgage Defendants.”⁵ In each claim for relief, the “Home Mortgage
4 Defendants” engaged in wrongful conduct to the “Home Mortgage Plaintiffs.” Alternatively, the “Car
5 Loan Defendants” engaged in wrongful conduct against that “Car Loan Plaintiffs.”⁶ The pleadings do
6 not specifically identify which defendant engaged in what in the fraudulent schemes.

7 Each plaintiff is required to plead the elements of his or her claims. See *Bautista v. Los Angeles*
8 *County*, 216 F.3d 837, 840 (9th Cir. 2000). In *Bautista*, fifty-one plaintiffs alleged they had been
9 discriminated in employment. The complaint alleged three claims for relief based on three types of
10 discrimination. The plaintiffs collectively alleged that they were qualified for their positions and were
11 discriminated against by their employee, but the complaint did not set forth facts of each individual’s
12 claim. After permitting one amendment, the court dismissed the complaint without leave to amend. On
13 appeal, the Ninth Circuit upheld the finding that the complaint was deficient, but reversed the dismissal
14 because an another amendment may have cured the pleading deficiency. The pleading deficiency was
15 that plaintiff’s individual right to relief “depends upon proof of the operative facts giving rise to an
16 enforceable right in favor of that plaintiff.” *Id.*

17 As set out *supra*, a plaintiff alleging fraud “must state the time, place, and specific content of the
18 false representations *as well as the identities of the parties to the misrepresentation.*” *Schreiber Distrib.*
19 *Co. v. Serv-Well Furniture, Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986) (emphasis added). While the
20 conduct alleged states the time, place and content of some of the alleged false representations and the
21 conspiracy, the identities of the parties, and their individual role in the fraud and the conspiracy, are not
22 alleged with clarity or specificity.

23 Accordingly, the motion to dismiss will be granted. Plaintiffs request leave to amend. Leave
24 to amend is freely given under the Rule 15. Pursuant to Fed. R. Civ. P. 15, this Court “should freely give
25 leave when just so requires.” The Court recognizes the expense involved to the parties just at this, the

27 ⁵ See Footnote number 1.

28 ⁶ See Footnote number 2.

1 pleadings stage. This Court, reluctantly, but at the suggestion of case precedent, will grant one last
2 opportunity to amend the complaint consistent with Rule 8 and Rule 9, as outlined by this order. *See*
3 *McHenry v. Renne*, 84 F.3d 1172, 1176 (9th Cir. 1996) (court may give notice of final amendment and
4 require detail the court deems appropriate). A proper complaint states clearly how each and every
5 defendant is alleged to have violated plaintiffs' legal rights. For instance, at a minimum, paragraphs 57
6 (overview of the scheme), 59 (statements and conduct constituting the fraud), 60 (representations of
7 truth) and 66 must set out which of the defendants made which of the fraudulent statements/conduct.⁷
8 Wholesale “everyone did everything” fails to comply with the Rules.

9 **C. Fifteenth Cause of Action for Harassment**

10 Defendants renew the arguments that Fifteenth cause of action must be dismissed because it
11 continues to contain allegations the Court cannot adjudicate under the First Amendment. Specifically,
12 defendants argue that the allegations of supervision and training of church personnel and harassment as
13 to a church ministry remain in the complaint. (Doc. 83, FAC ¶¶171-173.) Defendants argue that under
14 the First Amendment’s Free Exercise clause, this Court does not have jurisdiction to adjudicate disputes
15 over a church’s operation or its decision to expel a member or to excommunicate a person from its
16 ministry.

17 The First Amendment's freedom of religion clauses bar civil courts from exercising jurisdiction
18 in cases involving a church's governance of “religious” or “ecclesiastical” matters. “These constitutional
19 concepts of religious autonomy which assure both free exercise and nonestablishment apply to state as
20 well as federal action through the incorporation of their principles into the Fourteenth Amendment due
21 process clause.” *Schmoll v. Chapman Univ.* 70 Cal.App. 4th 1434, 1438, 83 Cal.Rptr.2d 426, 429, fn.
22 3 (1999).

23 In *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir.2006), the court held that the
24 music director of a Catholic church could not maintain an age-discrimination suit against the church
25 because it was apparent that the church's defense would be that it had fired him not because of his age

27 ⁷ Plaintiffs must make similar, more specific allegations changes in the remaining causes of
28 action.

1 but because of disagreement over the religious propriety of his musical choices. To evaluate such a
2 defense--to determine, that is, whether it was sincere or pretextual--would require a court to weigh in
3 on issues of Catholic doctrine and practice. "Even if the suit does not involve an issue of religious
4 doctrine, but concerns merely the governance structure of the church, the courts will not assume
5 jurisdiction if doing so would interfere with the church's management." *Id.* at 1038.

6 Plaintiffs argue that the allegations of the Church operations are not offered to show how the
7 Church should have operated, but are "offered to knowledge of the Church of activities giving rise to
8 the harassment." (Doc. 94, Opposition p. 10-11.)

9 Plaintiffs allege that when plaintiffs Tararez found out the debt elimination program was a fraud,
10 they reported it to the church elders and clergy, who told them to remain silent. (¶168.) They were then
11 harassed and threatened by defendants, and told their son that he could not participate in Church
12 ministry. Plaintiffs Tavarez also allege that defendant had a duty "to hire and train and to supervise
13 personnel" to protect plaintiff and persons were improperly trained to protect plaintiffs. (¶172-173.)
14 Plaintiffs allege that they have been harmed by severe emotional distress. (¶174.)

15 Contrary to plaintiffs' argument, these allegations are more than background allegations. The
16 FAC seeks damages for the conduct: "[a]s a direct, legal and proximate cause of the conduct by
17 Defendants and each of them, Defendants hurt and injured in their health, strength and activity,
18 sustaining severe emotional distress . . ." (Doc. 83, FAC ¶174.) Thus, these allegations are
19 nonjudicable.

20 This Court has already ruled, in the prior Order on the motion to dismiss, that the allegations
21 which address the governance and operation of church matters are barred by the establishment clause.
22 (Doc. 64, November 3, 2008 Order p.12.) As alleged, these matters address the governance and
23 operation of church matters. The allegations are barred by the establishment and free exercise clauses
24 of the First Amendment. Courts have also recognized a constitutional constraint on interference with
25 employment decisions related to selection and termination of clergy or ecclesiastical leadership. *See Silo*
26 *v. CHW Medical Foundation* 27 Cal.4th 1097, 1107, 119 Cal.Rptr.2d 698, 705 (2002), and cases cited
27 therein.

28 Pursuant to Rule 12(f), a court "may act on its own" to strike allegations. As these allegations

1 are nonjudicable, the Court strikes ¶172 and 173 and the allegation that “defendants confronted and
2 harassed plaintiffs Tavaréz son, Keith Tavaréz, in 2007 by informing him that Keith would never be able
3 to participate in ministry work anywhere else.”

4 **CONCLUSION**

5 For the foregoing reasons, the Court Orders as follows:

- 6 1. Plaintiffs' First Amended Complaint does not provide defendants with a fair opportunity
7 to frame a responsive pleading, and therefore, defendants' motion to dismiss is
8 GRANTED.
- 9 2. The Court, sua sponte, STRIKES ¶172 and ¶173 of the First Amended Complaint and
10 STRIKES the allegation that “defendants confronted and harassed plaintiffs Tavaréz son,
11 Keith Tavaréz, in 2007 by informing him that Keith would never be able to participate
12 in ministry work anywhere else.”
- 13 3. Plaintiffs, no later than February 9, 2009, to file a second amended complaint consistent
14 with and in compliance with this Order.

15
16
17
18 IT IS SO ORDERED.

19 **Dated: January 7, 2009**

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE