

1 § 2923.6; (3) the federal Fair Debt Collection Practices Act
2 ("FDCPA"), 15 U.S.C. §§ 1692, *et seq.*; (4) California's Rosenthal
3 Fair Debt Collection Practices Act ("RFDCPA"), Cal. Civ. Code
4 §§ 1788 *et seq.*; (5) various predatory lending/ fraud statutes
5 and regulations, including TILA, 12 C.F.R. § 226.32 (part of
6 "Regulation Z"), Cal. Fin. Code § 4970, and Cal. Civ. Code
7 § 1930; (6) fraud; (7) unfair business practices, Cal. Bus Prof.
8 Code §§ 17200, *et seq.*; (8) breach of fiduciary duty; (9) for
9 quiet title; and (1) for breach of the implied covenant of good
10 faith and fair dealing. Doc. 1.

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12 On May 19, 2009, Defendant removed the action to federal
13 court pursuant to 28 U.S.C. §§ 1331, 1441 based on federal
14 question jurisdiction. *Id.* On June 2, 2009, Defendant moved to
15 dismiss all of the claims in the case. Doc. 5. Plaintiff
16 opposes dismissal of the TILA, California Civil Code § 2923.6,
17 FDCPA, RFDCPA, fraud, unfair business practices, and quiet title
18 claims. Doc. 9, filed June 19, 2009. Defendant replied. Doc.
19 11, filed August 25, 2009.
20

21 22 II. LEGAL STANDARD

23 A. Rule 12(b)(6) Motion to Dismiss.

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

10 A claim has facial plausibility when the plaintiff
11 pleads factual content that allows the court to draw
12 the reasonable inference that the defendant is liable
13 for the misconduct alleged. The plausibility standard
14 is not akin to a "probability requirement," but it asks
15 for more than a sheer possibility that defendant has
acted unlawfully. Where a complaint pleads facts that
16 are "merely consistent with" a defendant's liability,
17 it "stops short of the line between possibility and
18 plausibility of 'entitlement to relief.'"

19 *Id.* (citing *Twombly*, 550 U.S. 556-57). Dismissal also can be
20 based on the lack of a cognizable legal theory. *Balistreri v.*
21 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

22 III. BACKGROUND

23 On or about May 11, 2006, Plaintiff refinanced the purchase
24 of a residential property located at 5799 West Cromwell Avenue,
25 Fresno, California ("Subject Property") in the amount of
26 \$397,500.00, at an initial interest rate of 8.180 percent,
27 adjusting after two years, never to exceed 15.180 percent
28 ("Subject Loan"). Compl. ¶¶ 5, 16. Mr. Nool was involved in an
automobile accident, rendering Plaintiffs unable to pay their

1 mortgage. *Id.* at ¶2.

2 Plaintiffs allege that Defendants "work[ed] in concert [and]
3 conspired to place borrowers, such as Plaintiffs ..., in the
4 worst possible home loans for the borrowers, but the most
5 profitable loans for them." *Id.* at ¶1. Plaintiffs further
6 allege that Defendants engaged in wrongful conduct related to its
7 loan practices, including failing to provide mandated disclosures
8 in a clear and conspicuous way; materially misstating other
9 disclosures, such as the actual interest rate on the note;
10 failing to adequately provide adequate notice of the right to
11 rescind; and failing to determine and disclose that Plaintiffs
12 did not qualify to obtain the loan. *Id.* at ¶3. Plaintiffs
13 request rescission of the Subject Loan, damages, and injunctive
14 and declaratory relief.
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17 IV. ANALYSIS

18 A. TILA.

19 Plaintiffs allege that Defendants failed to make certain
20 "cost of credit" disclosures to them before closing the loan in
21 violation of TILA and Regulation Z, 12 C.F.R. § 226, *et seq.*¹
22 Compl. ¶23. There are two types of remedies available under TILA
23 and Regulation Z: statutory damages and rescission. 15 U.S.C. §§
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26 ¹ Regulation Z, 12 C.F.R. § 226.4(c)(2), interprets TILA by
27 defining terms such as "finance charge." Claims brought under
28 Regulation Z are subject to TILA's statute of limitations. *See, e.g., Diessner v. Mortgage Elec. Registration Sys.*, 618 F. Supp. 2d 1184, 1190-91 (2009).

1 1635(f), 1640(a). The statute of limitations for bringing a
2 claim for statutory damages is one year from the date of the
3 occurrence of the violation. § 1640(e).

4 Here, Plaintiffs entered into the challenged loan
5 transaction on May 11, 2006. There is no allegation in the
6 complaint suggesting that any TILA violation would have accrued
7 on a later date. Therefore, the statute of limitations for any
8 statutory damages claim expired on May 11, 2007. Plaintiffs did
9 not file this lawsuit until May 4, 2009, almost two years later.
10 Any damages claims under TILA are barred.
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12 In addition to damages, rescission is available under TILA
13 in some circumstances. 15 U.S.C. § 1635; 12 C.F.R. § 226.23.
14 The consumer's right to rescission is absolute only for a period
15 of three days after the loan is consummated, 15 U.S.C. § 1635(a);
16 12 C.F.R. § 226.23(a)(3), unless the lender fails to provide
17 "material disclosures" at the closing, in which case the period
18 is extended to three years, 15 U.S.C. § 1635(f); 12 C.F.R. §
19 226.23(a)(3). Here, there is an allegation in complaint that the
20 lender failed to make "material disclosures," and Plaintiffs did
21 initiate this lawsuit within the three year time period.
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23 However, the property has been sold at a foreclosure
24 auction, which terminates any right of rescission under TILA.
25 15 U.S.C. § 1635(f) provides that "an obligor's right of
26 rescission shall expire three years after the date of
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1 consummation of the transaction or upon the sale of the property,
2 whichever occurs first...." See also *Hallas v. Ameriquest*
3 *Mortg'g Co.*, 406 F. Supp. 2d 1176, 1183 (D. Or. 2005); *Worthy v.*
4 *World Wide Fin. Servs. Inc.*, 347 F. Supp. 2d 502, 507 (E.D. Mich.
5 2004).

6 Plaintiffs' TILA claim is DISMISSED WITHOUT LEAVE TO AMEND.
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8 B. Cal. Civ. Code § 2923.6.

9 Plaintiffs next claim that California Civil Code § 2923.6
10 mandates that loan servicers, such as Defendant, attempt to
11 negotiate a loan modification with the borrower. Compl. ¶130.
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13 Section 2923.6 provides in pertinent part:

14 (a) The Legislature finds and declares that any duty
15 servicers may have to maximize net present value under
16 their pooling and servicing agreements is owed to all
17 parties in a loan pool, not to any particular parties,
18 and that a servicer acts in the best interests of all
19 parties if it agrees to or implements a loan
20 modification or workout plan for which both of the
21 following apply:

18 (1) The loan is in payment default, or payment
19 default is reasonably foreseeable.

20 (2) Anticipated recovery under the loan
21 modification or workout plan exceeds the
22 anticipated recovery through foreclosure on a net
23 present value basis.

24 (b) It is the intent of the Legislature that the
25 mortgagee, beneficiary, or authorized agent offer the
26 borrower a loan modification or workout plan if such a
27 modification or plan is consistent with its contractual
28 or other authority.

25 This legislation was recently enacted, and there is little
26 authority interpreting it. Section (a) provides that modifying
27 individual loans within a loan pool does not violate the
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1 servicer's duty to maximize net present value under their
2 pooling/servicing agreements, so long as the modified loan was at
3 risk of default. This section is not applicable here. See
4 *Pittman v. Barclays Capital Real Estate, Inc.*, 2009 WL 1108889,
5 at *3 (S.D. Cal. Apr. 24, 2009) ("[T]he cited statute clearly
6 addresses this concern by creating a duty between a loan servicer
7 and a loan pool member. The statute in no way confers standing on
8 a borrower to contest a breach of that duty.").

10 Some courts have suggested that section (b) imposes a duty
11 upon lenders to negotiate loan modifications. See *In re Morgan-*
12 *Austin*, No. 08-40399, 2009 WL 780457, at *3 (Bankr. N.D.Cal. Feb.
13 14, 2009) ("Because of the national epidemic of foreclosures on
14 home mortgages, in July 2008, the California legislature enacted
15 emergency legislation, requiring lenders to attempt to negotiate
16 workout agreements on loan defaults before commencing or
17 continuing foreclosure proceedings.") (applying Cal. Civ. Code §§
18 2923.5, 2923.6, 2924.8, and 2929.3.). However, the language of
19 section (b) belies the imposition of any duty to engage in loan
20 modification discussions, as the provision merely expresses
21 legislative "intent" that the mortgagee, beneficiary, or
22 authorized agent offer the borrower a loan modification if doing
23 so is consistent with its authority. *Pantoja v. Countrywide Home*
24 *Loans, Inc.*, --- F. Supp. 2d ---, 2009 WL 2423707 (N.D. Cal.
25 2009); see also *Farner v. Countrywide Home Loans*, 2009 WL 189025,
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1 at *2 (S.D. Cal. Jan. 26, 2009) (“[N]othing in Cal. Civ. Code §
2 2923.6 imposes a duty on servicers of loans to modify the terms
3 of loans or creates a private right of action for borrowers.”).²

4 Plaintiffs request leave to amend to assert a claim under
5 sections 2923.5 and 2923.6. The California Civil Code § 2923.6
6 claim is DISMISSED WITH LEAVE TO AMEND, but Plaintiffs’ counsel
7 is reminded of his obligations under Federal Rule of Civil
8 Procedure 11 to only assert claims for which there are colorable
9 bases in law and fact after reasonable investigation.
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12 C. FDCPA/RFDCPA.

13 The Complaint next alleges that Defendants engaged in
14 abusive debt collection practices in violation of federal and
15 state laws regulating debt collection. Compl. ¶¶ 34-49. FDCPA
16 regulates only “debt collectors.” See 15 U.S.C. §§ 1692(e)-(f).
17 “Debt collector” is defined as “any person who uses any
18 instrumentality of interstate commerce or the mails in any
19 business the principal purpose of which is the collection of any
20 debts, or who regularly collects or attempts to collect, directly
21 or indirectly, debts owed or due or asserted to be owed or due
22 another.” § 1692a(6). “Debt Collector” does not include persons
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25 ² There is no authority that supports a private right of action directly under
26 this statute. *Anaya v. Advisors Lending Group*, 2009 WL 2424037 (E.D. Cal.
27 Aug. 5, 2009); *Grodenski v. Artichoke Joe’s Casino*, 171 Cal. App. 4th 1399,
28 1420 (2009) (“A statute creates a private right of action only if the enacting
body so intended.”). However, if there was a duty to negotiate a loan
modification, Plaintiffs could have brought such an action under California
Business and Professions Code section 17200 which supports a private right of
action for “any practices forbidden by law....” *Sunders v. Superior Court*, 27
Cal. App. 4th 832, 838-39 (1994).

1 who collect debt "to the extent such activity ... (ii) concerns a
2 debt which was originated by such person; [or] (iii) concerns a
3 debt which was not in default at the time it was obtained by such
4 person...." § 1692a(6)(F). FDCPA's definition of debt collector
5 "does not include the consumer's creditors, a mortgage servicing
6 company, or any assignee of the debt, so long as the debt was not
7 in default at the time it was assigned." *Perry v. Stewart Title*
8 *Co.*, 756 F. 2d 1197, 1208 (5th Cir. 1985). Nothing in the
9 complaint suggests that Barclays is a "debt collector."

10 Therefore, the FDCPA is not triggered by Plaintiff's allegations.

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12 The absence of a violation of FDCPA results in failure of
13 Plaintiff's California RFDCPA claim, as the scope of California's
14 law mirrors the federal statute. *See* Cal. Civil Code, § 1788, *et*
15 *seq.* Moreover, California Civil Code 2924(b) exempts the
16 trustees' acts of recording and servicing the required notice of
17 default and notice of sale from RFDCPA's scope.

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19 In the context of their unfair debt collection claims,
20 Plaintiffs also allege that "none of Defendants have legal
21 authority to enforce or collect on the Loan, as LENDER is not the
22 note holder of said debt and can therefore not authorize TURSTEE
23 or any one else to enforce or collect thereon." Compl. ¶43.
24 This is a blatant misrepresentation of the law. It is well-
25 established that non-judicial foreclosures can be commenced
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1 without producing the original promissory note.³ Non-judicial
2 foreclosure under deeds of trust is governed by California Civil
3 Code section 2924, *et seq.* Section 2924(a)(1) provides that a
4 "trustee, mortgagee or beneficiary or any of their authorized
5 agents" may conduct the foreclosure process. California courts
6 have held that the Civil Code Provisions "cover every aspect" of
7 the foreclosure process, *I.E. Assoc. v Safeco Title Ins. Co.*, 39
8 Cal. 3d 281, 285 (1985), and are "intended to be exhaustive,"
9 *Moeller v. Lien*, 25 Cal. App. 4th 822, 834 (1994). There is no
10 requirement that the party initiating foreclosure be in
11 possession of the original note. *See, e.g., Candelo v. NDEX*
12 *West, LLC*, 2008 WL 5382259, at *4 (E.D. Cal. Dec. 23, 2008) ("No
13 requirement exists under statutory framework to produce the
14 original note to initiate non-judicial foreclosure."); *Putkkuri*
15 *v. ReconTrust Co.*, 2009 WL 32567, *2 (S.D. Cal. Jan 5, 2009)
16 ("Production of the original note is not required to proceed with
17 a non-judicial foreclosure."); *see also Vargas v. Reconstruction*
18 *Co.*, 2008 U.S. Dist. LEXIS 100115, at *8-9 (E.D. Cal. Dec. 1,
19 2008).

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22 Plaintiffs' FDCPA and RFDCPA claims are DISMISSED WITHOUT
23 LEAVE TO AMEND.
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28 ³ In support of the proposition that foreclosure is not available in the
absence of the underlying note, Plaintiffs cite cases from other states
concerning judicial, rather than non-judicial foreclosure. *See* Doc. 9 at 5.

1 D. Predatory Lending/Fraud Claims under TILA, Regulation Z,
2 Cal. Fin Code § 4970, and Cal. Civ. Code § 1930.

3 1. Plaintiff's TILA & Regulation Z Claims.

4 Plaintiffs allege that Defendant engaged in predatory
5 lending/fraud in violation of TILA and Regulation Z. These
6 allegations are not cognizable because the statute of limitations
7 under TILA and Regulation Z has expired. *See supra* Part. IV.A.

8 2. Cal. Fin. Code § 4973.

9 Plaintiffs also allege that Defendants engaged in predatory
10 lending/fraud in violation of California Financial Code § 4973.
11 Compl. ¶52. Section 4972 prohibits specific acts in connection
12 with "covered loans." A "Covered loan" is:

13 A consumer loan in which the original principal balance
14 of the loan does not exceed the most current conforming
15 loan limit for a single-family first mortgage loan
16 established by the Federal National Mortgage
17 Association in the case of a mortgage or deed of trust,
and where one of the following conditions are met:

18 (1) For a mortgage or deed of trust, the annual
19 percentage rate at consummation of the transaction will
20 exceed by more than eight percentage points the yield
21 on Treasury securities having comparable periods of
22 maturity on the 15th day of the month immediately
preceding the month in which the application for the
extension of credit is received by the creditor.

23 (2) The total points and fees payable by the consumer
24 at or before closing for a mortgage or deed of trust
will exceed 6 percent of the total loan amount.

25 Cal. Fin. Code § 4970(b). The most current conforming loan limit
26 for a single family mortgage loan established by the Federal
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1 National Mortgage Association is \$417,000.00.⁴ Plaintiffs
2 alleges that the principal of his loan is \$343,200.00, but does
3 not allege either that the annual percentage rate at consummation
4 of the transaction exceeded the Treasury securities rate by more
5 than eight percentage points or that the total points and fees
6 paid by the consumer at or before closing exceeded six percent of
7 the total loan amount.
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9 Defendant's motion to dismiss the California Civil Code
10 § 4970 claim is GRANTED WITHOUT LEAVE TO AMEND.
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12 a. Cal. Civ. Code § 1920.

13 California Civil Code § 1920 provides, in its entirety:

14 Any mortgage instrument that is made pursuant to the
15 provisions of this chapter shall meet the following
requirements:

16 (a) Standards for the adjustment of interest rates or
17 monthly payments shall consider factors which can
reasonably be deemed to affect the ability of borrowers
to meet their mortgage obligations.

18 (b) No change in interest provided for in any provision
19 for a variable interest rate contained in a security
document, or evidence of debt issued in connection
20 therewith, shall be valid unless the provision is set
forth in the security document, and in any evidence of
21 debt issued in connection therewith, and the document
or documents contain the following provisions:

22 (1) A statement attached to the security document
23 and to any evidence of debt issued in connection
therewith printed or written in a size equal to at
24 least 10-point bold type, consisting of language
authorized by the secretary or the secretary's
25 designee notifying the borrower that the mortgage
may provide for changes in interest, principal
26 loan balance, payment, or the loan term.

27 ⁴ See Fannie Mae, About Fannie Mae: Loan Limits, available at:
28 <http://www.fanniemae.com/aboutfm/loanlimits.jhtml> (last visited August 7,
2009.)

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2 (2) Before the due date of the first monthly
3 installment following each change in the interest
4 rate, notice shall be mailed to the borrower of
5 the following:

6 (A) The base index.

7 (B) The most recently published index at the
8 date of the change in the rate.

9 (C) The interest rate in effect as a result
10 of the change.

11 (D) Any change in the monthly installment.

12 (E) The amount of the unpaid principal
13 balance.

14 (F) If the interest scheduled to be paid on
15 the due date exceeds the amount of the
16 installment, a statement to that effect and
17 the amount of the excess, and the address and
18 telephone number of the office of the lender
19 to which inquiries may be made.

20 (c) The borrower is permitted to prepay the loan in
21 whole or in part without a prepayment charge at any
22 time, and no fee or other charge may be required by the
23 lender of the borrower as a result of any change in the
24 interest rate, the payment, the outstanding principal
25 loan balance, or the loan term.

26 (d) Changes in the rate of interest on the loan shall
27 reflect the movement of an index, which shall be
28 authorized by the secretary or the secretary's
designee.

(e) To the extent that any monthly installment is less
than the amount of interest accrued during the month
with respect to which the installment is payable, the
borrower shall be notified of such instance in a form
and manner prescribed by the secretary or the
secretary's designee. Such notice shall include, but
not be limited to, the amount of interest exceeding the
monthly installment, and any borrower options under
these circumstances.

(f) The lender shall provide to the borrower, prior to
the execution by the borrower of any mortgage payment
instrument authorized pursuant to this chapter, full
and complete disclosure, as specified by the secretary
or the secretary's designee, of the nature and effect
of the mortgage payment instrument, and all costs or
savings attributed to the mortgage instrument.

1 Plaintiffs allege that Defendants "failed to consider, let alone
2 make a rudimentary effort to verify, the ability of Plaintiff[s]
3 to repay the Loan. Indeed, [Defendants] steered Plaintiff[s]
4 into a "high cost" loan, or a more expensive loan with greater
5 indebtedness, by grossly overestimate[ing] and falsifying,
6 without Plaintiff's knowledge or participation, Plaintiff's
7 income." Compl. at ¶55. These allegations arguably state a
8 claim for violating these provisions which would be judicially
9 reviewable under California Business and Professions Code §
10 17200.⁵ However, section 1920 imposes duties on the lender, not
11 the loan servicer. Barclays, erroneously sued as HomeQ, is the
12 loan servicer. Barclays is entitled to dismissal on this ground.
13 Plaintiffs did not request leave to amend this claim.

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17 b. Fraud Aspect of the Predatory Lending Claim.

18 Plaintiffs entitle their predatory lending claim "Predatory
19 Lending/Fraud." To the extent that Plaintiffs are trying to
20 assert a claim for fraud, they have failed to comply with Federal
21 Rule of Civil Procedure 9(b), which requires that Plaintiffs
22 clearly set forth the "who, what, when, where, and how"
23 concerning their fraud allegations. *Vess v. Ciba Geigy Corp.*

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26 ⁵ There is no authority that supports a private right of action directly under
27 this statute. *Marks v. Chicoine*, 2007 WL 1056779 (N.D. Cal. Apr. 06 2007);
28 *Grodenski v. Artichoke Joe's Casino*, 171 Cal. App. 4th 1399, 1420 (2009) ("A
statute creates a private right of action only if the enacting body so
intended."). However, California Business and Professions Code section 17200
supports a private right of action for "any practices forbidden by law...."
Sunders, 27 Cal. App. 4th 832, 838-39 (1994).

1 USA, 317 F.3d 1097, 1106 (9th Cir. 2003).

2 Plaintiffs' entire predatory lending/fraud claim is
3 DISMISSED WITHOUT LEAVE TO AMEND.
4

5 E. Fraud.

6 Plaintiffs alleges in a separate cause of action that
7 Defendants committed fraud on the ground that:

8 Lender is not the true holder of the note or named on a
9 deed of trust by virtue of the note, and thus have no
10 authority to enforce, or authorize anyone else to
11 enforce, the indebtedness. Nevertheless, and with
12 knowledge of this fact, LENDER and TRUSTEE are
13 attempting to collect money from Plaintiff[s] toward
14 said note. TRUSTEE has a duty to Plaintiff[s] in not
15 foreclosing without the authority to do so, and that
16 duty was breached when foreclosure proceedings were
17 initiated against Home.

18 There are no other fraud theories alleged in the complaint. As
19 discussed above, there is nothing unlawful, improper or
20 fraudulent about enforcing a mortgage note if you are not
21 actually in physical possession of the note.

22 Plaintiffs' fraud claim is DISMISSED WITHOUT LEAVE TO AMEND.
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24 F. Unfair Business Practices.

25 The viability of a claim under California Business and
26 Professions Code § 17200, et seq., depends on the viability of an
27 underlying claim of unlawful conduct. *Ingels v. Westwood One*
28 *Broadcasting Servs., Inc.*, 129 Cal. App. 4th 1050, 1060 (2005).
Here, Plaintiffs' § 17200 claim depends on the six causes of
action discussed above. Because none of them are viable, the §
17200 claim fails. However, because Plaintiffs have been granted

1 leave to amend their California Civil Code § 2923.6 claim, they
2 may amend this claim as well, should they choose to do so.

3 The section 17200 claim is DISMISSED WITH LEAVE TO AMEND.
4

5 G. Breach of Fiduciary Duty.

6 As a general rule, a financial institution owes no duty of
7 care to a borrower where the institution's involvement in the
8 loan transaction does not exceed the scope of its conventional
9 role as a lender of money. *Nymark v. Hart Fed. Savings & Loan*
10 *Assn.*, 231 Cal. App. 3d 1089, 1096 (1991). There is no fiduciary
11 relationship between Plaintiffs and any defendant. Plaintiffs do
12 not dispute this. Accordingly, Plaintiffs breach of fiduciary
13 duty claim is DISMISSED WITHOUT LEAVE TO AMEND.
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15 H. Quiet Title.

16 "[A] mortgagor of real property cannot, without paying his
17 debt, quiet his title against the mortgagee." *Miller v. Provost*,
18 26 Cal. App. 4th 1703, 1707 (1994) (citations omitted). Here,
19 Plaintiffs defaulted on the Subject Loan, and do not allege that
20 they have since paid the outstanding balance.
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22 Defendant's motion to dismiss the fourth cause of action is
23 GRANTED WITHOUT LEAVE TO AMEND.

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I. Breach of the Implied Covenant of Good Faith and Fair Dealing.

The tort of beach of the covenant of good faith and fair dealing is limited to situations in which a fiduciary relationship exists. *Mitsui Manuf. Bank v. Superior Court*, 212 Cal. App. 3d 726, 730 (1989). As no fiduciary relationship exists here, this claim is DISMISSED WITHOUT LEAVE TO AMEND.

V. CONCLUSION

For the reasons set forth above, Defendant's motion to dismiss is GRANTED in its entirety. Except with respect to the California Civil Code § 2923.6 and California Business and Professions Code § 17200 for which LEAVE TO AMEND has been granted, this dismissal is WITHOUT LEAVE TO AMEND.

SO ORDERED

Dated: September 3, 2009

/s/ Oliver W. Wanger
Oliver W. Wanger
United States District Judge