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

EDUARDO M. SMALL, et al.,

Plaintiffs,

No. 2:09-cv-0458 GEB DAD PS

v.

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,
et al.,

Defendants.

EDUARDO M. SMALL, et al.,

Plaintiffs,

No. 2:10-cv-0342 GEB DAD PS

v.

COUNTRYWIDE HOME LOANS,
et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

Plaintiffs Eduardo M. Small and Katrina M. Small are proceeding pro se in two cases in this court. Plaintiffs' foreclosure action, case No. 2:09-cv-0458, came before the court on October 30, 2009, for hearing on defendants' motion to dismiss plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 14). Brian J. Recor, Esq. appeared

1 telephonically for the ten moving defendants. Plaintiffs appeared in court on their own behalf.

2 After the parties' arguments were heard, defendants' motion to dismiss was submitted.

3 Plaintiffs' quiet title action, case No. 2:10-cv-0342, came before the court on
4 March 26, 2010 for hearing on defendant Countrywide Home Loans, Inc.'s motion to dismiss
5 plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 9.) Brian
6 J. Recor, Esq. appeared telephonically for the moving defendant. Plaintiffs appeared in court on
7 their own behalf. After the parties' arguments were heard, defendant's motion was submitted.

8 Upon consideration of all written materials filed in connection with the motions in
9 both cases, the parties' arguments at both of the hearings, and the court files, the undersigned
10 recommends that defendants' motions be granted and both cases be dismissed in their entirety.

11 **BACKGROUND**

12 I. Foreclosure Case

13 Plaintiffs filed their foreclosure action in this court on February 17, 2009, naming
14 three entities and two individuals as defendants, and alleging causes of action for unlawful
15 foreclosure and unlawful eviction. On May 6, 2009, plaintiffs filed an amended complaint
16 naming three entities and eleven individuals as defendants, and alleging causes of action for
17 unlawful foreclosure, unlawful eviction, and fraud. (Doc. No. 5.) On June 5, 2009, plaintiffs
18 filed a second amended complaint to include exhibits not attached to their May 6, 2009 pleading.
19 (Doc. No. 10.) The second amended complaint is the operative pleading before the court.

20 The United States Marshal filed returns of service unexecuted for defendants
21 Kristi Brockman, Nelson A. Hernandez, Carlos Sotelo, and Elizavet Meza. (Docs. No. 19 & 33.)
22 These four defendants have not appeared in the case.

23 On September 14, 2009, the three entity defendants and seven of the individual
24 defendants – Mortgage Electronic Registration Systems, Inc., Countrywide Home Loans, Inc.,
25 Recontrust Company, N.A., Regina Myles, Abraham Bartamian, Paula Franklin, Alberta
26 Kossakowski, Veronica Vega, Lorrie Matheson, and Stacy O'Neal Haggard – filed their motion

1 to dismiss plaintiffs' second amended complaint. (Doc. No. 14.) The motion was fully briefed
2 and, as noted above was argued and submitted on October 30, 2009.

3 II. Quiet Title Case

4 On October 14, 2009, after defendants had moved to dismiss plaintiffs'
5 foreclosure case but before their motion was heard, plaintiffs filed a quiet title action in the Sutter
6 County Superior Court. (See Doc. No. 2, Def't's Notice of Removal at 2 & Ex. A.) On February
7 9, 2010, defendant Countrywide Home Loans, Inc. removed that state court action to federal
8 court pursuant to 28 U.S.C. § 1441(b) on the basis of federal question jurisdiction, contending
9 that plaintiffs' quiet title complaint asserts claims that necessitate the adjudication of substantial
10 disputed questions of federal law. Defendant characterized plaintiffs' state court complaint as a
11 duplicate of the plaintiff's federal foreclosure case. (Id. at 3.)

12 On February 16, 2010, defendant Countrywide Home Loans, Inc. filed a motion to
13 dismiss plaintiffs' quiet title complaint. (Doc. No. 9.) The motion was fully briefed and, as
14 noted above, was argued and submitted on March 26, 2010.

15 III. Related Case Order

16 On February 9, 2010, counsel for defendants filed a notice of related case in
17 plaintiffs' quiet title action and on April 1, 2010, a notice of related case was filed in plaintiff's
18 foreclosure case. (Doc. No. 3 in Case No. 2:10-cv-0342; Doc. No. 34 in Case No. 2:09-cv-
19 0458.) By order filed April 8, 2010, the two cases were related and appropriate reassignments
20 were made so that both cases are assigned to the same district judge and the same magistrate
21 judge. (Doc. No. 16 in Case No. 2:10-cv-0342; Doc. No. 35 in Case No. 2:09-cv-0458.)

22 **PLAINTIFFS' CLAIMS**

23 I. The Foreclosure Case (2:09-cv-0458 GEB DAD PS)

24 Plaintiffs' factual allegations and prayer for relief in this action are set forth in the
25 first 36 pages of their 166-page second amended complaint. Factual allegations are few and are
26 obscured by conclusory assertions and argument.

1 Plaintiffs' exhibits reveal that they purchased a home located at 641 Falling Rock
2 Court in Yuba City, California on May 20, 2004. They financed the purchase through a thirty-
3 year fixed rate V.A. mortgage loan in the amount of \$261,865 secured by a First Deed of Trust
4 on the subject property and arranged through non-defendant RBC Mortgage Company. (Doc. 10,
5 Second Amended Compl., Ex. A.) On August 13, 2008, a Notice of Default and Election to Sell
6 Under Deed of Trust was issued by defendant Recontrust Company as trustee and agent for
7 beneficiary First American Title Insurance Company. (Id., Ex. B.) On November 15, 2008,
8 defendant Recontrust Company issued a Notice of Trustee's Sale setting the sale for January 20,
9 2009; a second notice was issued on December 30, 2008. (Id., Exs. C & D.) In a reinstatement
10 calculation dated January 3, 2009, defendant Countrywide Home Loans advised plaintiffs that
11 they could reinstate their loan and prevent foreclosure by paying the net amount of \$26,978.88 by
12 January 14, 2009. (Id., Ex. F.) At the request of defendant Recontrust Company, a trustee's deed
13 upon sale and an assignment of deed of trust were recorded on March 6, 2009, showing transfer
14 of plaintiffs' property to defendant Countrywide for \$237,545.94. (Id., Exs. R & S.) On March
15 12, 2009, the trustee's deed upon sale was rescinded by defendant Countrywide on the ground
16 that the foreclosure sale had been conducted in error due to failure to communicate timely notice
17 of conditions which would have warranted a cancellation of the foreclosure sale that occurred on
18 February 27, 2009. (Id., Ex. T.) A second Notice of Trustee's Sale was issued by defendant
19 Recontrust Company on March 20, 2009, setting the sale for April 9, 2009. (Id., Ex. Y.) A
20 second Trustee's Deed Upon Sale was recorded on April 22, 2009, showing transfer of plaintiff's
21 property to defendant Countrywide for \$189,479.50. (Id., Ex. Z3.)

22 The caption of plaintiffs' second amended complaint includes a list of twelve
23 entries composed of citations to twelve federal statutes and six state statutes. (Id. at 1-4.) In the
24 pleading, plaintiffs assert three causes of action: (1) illegal foreclosure (id. ¶¶ 63-138); (2) illegal
25 eviction (id. ¶¶ 139-164); and (3) fraud (id. ¶¶ 165-186). In their prayer for relief, plaintiffs
26 request a court order compelling defendants to "surrender" to them (1) "261.865.00 in gold

1 bullion for failing to produce the ‘Original Deed of Trust’ signed May 20th 2004”; (2) the same
2 amount in the same form “for failing to generate the ‘Assignment of Deed/Mortgage’ evidencing
3 lawful conveyance from RBC Mortgage to Countrywide Home Loans in the Office of the
4 Recorder Country [sic] of Sutter”; (3) “the value of all Mortgage Payments made by Plaintiff in
5 gold bullion”; and (4) “full satisfaction of the Note and Mortgage.” Plaintiffs also seek
6 “dismissal” of the foreclosure and an order requiring defendants to produce certain documents
7 and the names of all mortgage brokers, real estate brokers, developers, appraisers, mortgage
8 aggregators, investors, and other sellers of security instruments who allege an interest in the deed
9 of trust dated May 20, 2004 and recorded on May 27, 2004 as Instrument No. 2004-0014020.

10 II. The Quiet Title Action (2:10-cv-0342 GEB DAD PS)

11 In their complaint for quiet title, plaintiffs name Countrywide Home Loans as the
12 sole defendant and allege as follows. They are now the owners by adverse possession of the real
13 property located at 641 Falling Rock Court, in Yuba City, California. They have possessed the
14 property by actual, open, hostile, continuous, and exclusive possession since May 30, 2004. The
15 property is protected by a substantial enclosure, has been improved by plaintiffs, and has been
16 occupied by the plaintiffs continuously for over five years, adverse to defendant Countrywide
17 Home Loans and all other persons. Plaintiffs’ adverse possession cures any defects in the deed
18 of trust pursuant to which they initially occupied the property in May 2004. They have paid for
19 all maintenance, improvements, utilities, and waste disposal assessments that have been assessed
20 against the property and intend to pay all future taxes levied or assessed against the property.
21 Defendant Countrywide Home Loans abandoned its case for taking possession of the property
22 when it requested dismissal of a state court suit and sought dismissal of plaintiffs’ complaint in
23 case No. CIV S-09-0458 GEB DAD PS. Plaintiffs seek to quiet title because they are unable to
24 seek modification, sell, do a short sale, or refinance because they do not know who is authorized
25 to sign a satisfaction of mortgage or a release and reconveyance, and do not know who the real
26 lender is and what the real balance is on the deed of trust recorded on the property in May 2004.

1 Plaintiffs seek a judgment that they are the fee simple owners of all rights, title,
2 and interest to the property at issue and that defendant Countrywide Home Loans does not have
3 any rights, title, estate, or interest to, or lien on, the property.

4 **ARGUMENTS OF THE PARTIES**

5 I. The Foreclosure Case (2:09-cv-0458 GEB DAD PS)

6 A. Defendants' Arguments

7 Defendants seek dismissal of plaintiffs' complaint in this action pursuant to
8 Federal Rule of Civil Procedure 12(b)(6) on the grounds that plaintiffs have failed to state any
9 cognizable claim. Specifically, defendants argue that the twelve claims listed in the caption of
10 plaintiffs' second amended complaint fail to state a claim upon which relief may be granted
11 because: (1) there is no private right of action against defendants under "H.R. 1424 T.A.R.P.,"
12 12 U.S.C. § 5201, et seq.; (2) there is no private right of action to enforce criminal statute 18
13 U.S.C. § 666; (3) there is no private right of action to enforce criminal statute 18 U.S.C. § 1344;
14 (4) plaintiffs have failed to allege sufficient or plausible facts to state a claim under 42 U.S.C. §§
15 1981 and 1982; (5) plaintiffs have failed to allege sufficient or plausible facts to state a claim
16 under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691 and 1692; (6) there is no
17 private right of action to enforce criminal statute 18 U.S.C. §§ 1341 and 1343; (7) plaintiffs have
18 failed to allege sufficient or plausible facts to state a claim under 15 U.S.C. § 1125; (8) there is
19 no private right of action to enforce criminal statute 26 U.S.C. §§ 7201 and 7203; (9) there is no
20 private right of action to enforce criminal statute California Penal Code § 422; (10) plaintiffs
21 have failed to allege facts sufficient to state a claim under California Code of Civil Procedure §
22 512.10 because they have failed to allege tender, the "personal property" is unidentified, and the
23 exhibits to plaintiffs' second amended complaint show that the April 2009 Trustee's Sale was
24 proper; (11) plaintiffs have failed to allege facts sufficient to state a claim under California Code
25 of Civil Procedure §§ 1161 and 1162 because they have not alleged tender and the exhibits to
26 their second amended complaint show that the April 2009 Trustee's Sale was proper; and (12)

1 plaintiffs have failed to allege facts sufficient to state a claim under California Code of Civil
2 Procedure §§ 2924f and 2934 because they have not alleged tender and the exhibits to plaintiffs'
3 second amended complaint show that the April 2009 Trustee's Sale was proper.

4 B. Plaintiffs' Arguments

5 Plaintiffs' timely opposition to defendants' motion consists of a short
6 memorandum of points and authorities and two copies of an "affidavit." (Docs. No. 21, 22, 23.)
7 Defendants' arguments for dismissal are not addressed in these filings.

8 In reply to plaintiffs' opposition, defendants note that plaintiffs accuse counsel of
9 perjury and demand affidavits in support of the motion to dismiss. Defendants correctly observe
10 that affidavits would be improper under Rule 12 and emphasize that it is plaintiffs' burden to
11 plead sufficient facts to state claims for relief. Defendants assert that plaintiffs' opposition
12 makes no attempt to support the claims brought pursuant to 12 U.S.C. § 5201, et seq.; 18 U.S.C.
13 §666; 18 U.S.C. § 1344; 18 U.S.C. §§ 1341 and 1343; 26 U.S.C. §§ 7201 and 7203; TILA, 15
14 U.S.C. § 1601 et seq.; and California Business & Professions Code § 17200, et seq. Defendants
15 request that the court dismiss all of these claims and the claim brought by plaintiffs under
16 California Penal Code § 422 with prejudice. Defendants also note that plaintiffs offer no support
17 for their claims of racial discrimination, fail to demonstrate that defendants were required to
18 modify plaintiffs' loan, do not address the tender requirement, and appear to base their
19 foreclosure claims on a belief that the grantee has to be physically present at the trustee's sale.
20 Defendants argue that all eleven individual defendants should be dismissed because plaintiffs'
21 opposition fails to suggest that any additional facts could be alleged to support the claims against
22 the individuals, four of whom have not been served and three of whom are not subject to this
23 court's personal jurisdiction. Defendants request that the second amended complaint be
24 dismissed in its entirety, with prejudice.

25 After defendants filed their reply to plaintiffs' opposition, plaintiffs filed an
26 unauthorized sur-reply that was entered on the court's docket just three days prior to the hearing

1 of the motion. In their belated and unauthorized filing, plaintiffs argue that the tender
2 requirement does not apply to them and that every mortgage assignment must be recorded. In
3 support of the latter assertion, plaintiffs cite California Civil Code § 2934. However, § 2934
4 provides only that any assignment of a mortgage and any assignment of the beneficial interest
5 under a deed of trust “may be recorded” and, if recorded, the recording of the assignment serves
6 as constructive notice of the contents of the recorded document. Plaintiffs argue nonetheless that
7 no effective mortgage assignment occurred prior to either of defendants’ foreclosure sale and that
8 therefore defendant Recontrust never had possession of the mortgage note and had no right to
9 proceed with either sale.

10 Plaintiffs also dispute defendants’ argument that their racial discrimination
11 allegations lack plausible supporting facts. Plaintiffs contend that racial discrimination is evident
12 from their allegation that persons were sent to evict them through threats and intimidation.
13 Plaintiffs argue that such an action is “consistent with the trickery, extortion, and intimidation
14 commonly associated with racial discrimination levied against vulnerable persons of color” and
15 that racial discrimination “is a plausible explanation” for a national company’s use of “dirty,
16 underhanded, and intimidating measures” to “retaliate” against buyers in default on their
17 mortgage loans. (Doc. No. 30, Pls.’ Sur-reply at 3.)

18 In addition, plaintiffs object to defendants’ argument that their fraud allegations
19 are based on an erroneous belief that the grantee must be physically present to have the highest
20 bid at a trustee’s foreclosure sale. Plaintiffs deny that characterization of their claim but then
21 assert that “for an individual to have participated in a ‘public auction’ (aka foreclosure sale), that
22 individual must have been physically present in order to make a ‘bid’ and ‘tender money’ to
23 consummate the ‘sale’; otherwise the requirement of a ‘public auction’ would be unnecessary
24 and not required by CA Civil statutes.” (Id. at 4.) Plaintiffs cite the definitions of “bid” and
25 “absentee bid” from the web site of an auctioneers’ organization and argue that defendants failed
26 to correctly identify themselves in the record as absentee bidders. (Id. at 5.) Plaintiffs conclude

1 that, even if physical presence at a public auction is not required, defendants' use of the words
2 "at sale" in various documents is "blatant fraud" and "outright perjury." (Id.)

3 Intermingled with plaintiffs' exhibits are additional points and authorities in
4 which plaintiffs cite cases that do not appear to be applicable and request sanctions against
5 defendants under Rules 11 and 60 of the Federal Rules of Civil Procedure.

6 II. The Quiet Title Action (2:10-cv-0342 GEB DAD PS)

7 Defendant Countrywide seeks dismissal of the quiet title action for failure to state
8 a claim on which relief may be granted. Defendant argues that plaintiffs have failed to allege the
9 elements of a quiet title claim, have offered implausible allegations of adverse possession, and
10 have failed to allege tender of the loan proceeds.

11 Plaintiffs' timely opposition to defendant's motion does not address the elements
12 of a quiet title claim or provide support for their allegations of adverse possession. Plaintiffs
13 criticize California's non-judicial foreclosure process and reiterate arguments advanced in their
14 opposition to the motion to dismiss their foreclosure action. Plaintiffs attack defendants' counsel
15 and assert evidentiary arguments. Plaintiffs argue that they are not required to allege tender of
16 the loan proceeds and instead seek leave to proceed with discovery.

17 In reply, defendant observes that plaintiffs fail to address defendant's arguments
18 in support of dismissing the quiet title action. Defendant argues that plaintiffs' failure to allege
19 tender or even the ability to tender the loan proceeds dooms their complaint for quiet title.
20 Defendant requests that the court grant its motion and dismiss the complaint with prejudice.

21 **LEGAL STANDARDS APPLICABLE TO DEFENDANTS' MOTIONS**

22 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal
23 sufficiency of the complaint. N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 581 (9th Cir.
24 1983). "Dismissal can be based on the lack of a cognizable legal theory or the absence of
25 sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901
26 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege "enough facts to state a claim to

1 relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Thus,
2 a defendant’s Rule 12(b)(6) motion challenges the court’s ability to grant any relief on the
3 plaintiff’s claims, even if the plaintiff’s allegations are true.

4 In determining whether a complaint states a claim on which relief may be granted,
5 the court accepts as true the allegations in the complaint and construes the allegations in the light
6 most favorable to the plaintiff. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Love v.
7 United States, 915 F.2d 1242, 1245 (9th Cir. 1989). In general, pro se complaints are held to less
8 stringent standards than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519,
9 520-21 (1972). However, the court need not assume the truth of legal conclusions cast in the
10 form of factual allegations. W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

11 With regard to claims of fraud, “the circumstances constituting fraud . . . shall be
12 stated with particularity.” Fed. R. Civ. P. 9(b). “Rule 9(b) serves not only to give notice to
13 defendants of the specific fraudulent conduct against which they must defend, but also ‘to deter
14 the filing of complaints as a pretext for the discovery of unknown wrongs, to protect [defendants]
15 from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from
16 unilaterally imposing upon the court, the parties and society enormous social and economic costs
17 absent some factual basis.’” Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001)
18 (quoting In re Stac Elec. Sec. Litig., 89 F.3d 1399, 1405 (9th Cir. 1996)). Thus, pursuant to Rule
19 9(b), a plaintiff alleging fraud at a minimum must plead evidentiary facts such as the time, place,
20 persons, statements and explanations of why allegedly misleading statements are misleading. In
21 re GlenFed, Inc. Sec. Litig., 42 F. 3d 1541, 1547 n.7 (9th Cir. 1994); see also Vess v. Ciba-Geigy
22 Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003); Fecht v. Price Co., 70 F.3d 1078, 1082 (9th
23 Cir. 1995).¹

24
25 ¹ “Under California law, the ‘indispensable elements of a fraud claim include a false
26 representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages.”
Vess, 317 F.3d at 1105 (quoting Moore v. Brewster, 96 F.3d 1240, 1245 (9th Cir. 1996)).

1 ANALYSIS

2 At the outset, the court addresses defendants’ requests for judicial notice of
3 documents related to the matters at issue. In both cases, defendants request that the court take
4 judicial notice of the following documents recorded in the official records of the Sutter County
5 Recorder’s Office: (1) the Deed of Trust re: plaintiffs’ \$261,865 loan, including Department of
6 Veterans Affairs Guaranteed Loan and Assumption Policy Rider, recorded May 27, 2004; (2) the
7 Notice of Default of plaintiffs’ loan, recorded August 14, 2008; (3) the Notice of Trustee’s Sale
8 set for April 9, 2009 re: plaintiffs’ loan, recorded March 24, 2009; (4) the Trustee’s Deed Upon
9 Sale on April 9, 2009, recorded April 22, 2009; and (5) the Corporation Grant Deed and U.S.
10 Department of Veterans Affairs Certificate of Acceptance following April 9, 2009 Trustee’s Sale
11 re: plaintiffs’ loan, recorded April 22, 2009. (Case No. 09-cv-0458, Doc. No. 15, Req. Judicial
12 Notice, Exs. A-E; Case No. 10-cv-0342, Doc. No. 10, Req. Judicial Notice, Exs. A-E.)

13 In the quiet title action, defendant requests judicial notice of six documents filed
14 in plaintiffs’ foreclosure case: (1) plaintiffs’ second amended complaint; (2) defendants’ motion
15 to dismiss; (3) plaintiffs’ filings in opposition to defendants’ motion to dismiss; (4) defendants’
16 reply to plaintiffs’ opposition; (5) plaintiffs’ sur-reply to defendants’ reply; and (6) the court’s
17 minute order taking defendants’ motion to dismiss under submission after hearing on October 30,
18 2009. (Case No. 10-cv-0342, Doc. No. 10, Req. Judicial Notice, Exs. F-K.)

19 On a motion to dismiss, the court may consider matters of public record. Lee v.
20 City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001); MGIC Indem. Corp. v. Weisman,
21 803 F.2d 500, 504 (9th Cir. 1986). A court may take judicial notice of its own files and
22 documents filed in other courts. Reyn’s Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746
23 n.6 (9th Cir. 2006) (taking judicial notice of documents related to a settlement in another case
24 that bore on whether the plaintiff was still able to assert its claims in the pending case); Burbank-
25 Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1364 (9th Cir. 1998)
26 (taking judicial notice of court filings in a state court case where the same plaintiff asserted

1 similar and related claims). Accordingly, defendants' requests for judicial notice of official
2 records, including court records, are granted.

3 I. The Foreclosure Action (2:09-cv-0458 GEB DAD PS)

4 A. Lack of Standing

5 Defendants argue that plaintiffs lack standing to sue on eight of their claims: the
6 claim for denial of a "mortgage workout" pursuant to TARP,² 12 U.S.C. § 5201, et seq. (count 1,
7 denial of workout) and the claims brought pursuant to criminal statutes 18 U.S.C. § 666 (count 2,
8 theft of federal funds); 18 U.S.C. § 1344 (count 3, frauds and swindles); 18 U.S.C. §§ 1341 and
9 1343 (count 6, wire fraud); 26 U.S.C. §§ 7201 and 7203 (count 8, tax evasion); and California
10 Penal Code § 422 (count 9, death threats). The court agrees.

11 "The fact that a federal statute has been violated and some person harmed does
12 not automatically give rise to a private right of action." Touche Ross & Co. v. Redington, 442
13 U.S. 560, 568 (1979). "Instead, the statute must either explicitly create a right of action or
14 implicitly contain one." Diaz v. Davis (In re Digimarc Corp. Derivative Litig.), 549 F.3d 1223,
15 1230 (9th Cir. 2008).

16 In creating TARP, Congress expressly provided for judicial review of the actions
17 of the Secretary of the Treasury, thus granting a private right of action against the Secretary for
18 persons or entities harmed by the Secretary's actions. See 12 U.S.C. § 5229. The judicial review
19 section of the Act contains no mention of a right of action against non-governmental entities,
20 such as the financial institutions that receive TARP funds. Thus, no express right of action was
21 created. See Gardner v. American Home Mortgage Servicing, Inc., 691 F. Supp. 2d 1192, 1203-
22 04 (E.D. Cal. 2010); Pantoja v. Countrywide Home Loans, Inc., 640 F. Supp. 2d 1177, 1185
23 (N.D. Cal. 2009). See also Manabat v. Sierra Pacific Mortgage Co., Inc., No. CV F 10-1018 LJO

24
25 ² Defendants erroneously describe TARP as the "Temporary Asset Redistribution
26 Program." (Doc. No. 14, Def'ts' Mot. to Dismiss, at 10.) The acronym stands for Troubled
Asset Relief Program (TARP), codified as the Emergency Economic Stabilization Act of 2008,
12 U.S.C. § 5201. See Historical & Statutory Notes foll. 12 U.S.C. § 5201.

1 JLT, 2010 WL 2574161, at *11 (E.D. Cal. June 25, 2010); Robinson v. Wells Fargo Bank, N.A.,
2 No. CV 09-2066-PHX-JAT, 2010 WL 2534192, at *6 (D. Ariz. June 18, 2010); Logan v. U.S.
3 Bank N.A., No. CV 09-08950 MMM (PLAx), 2010 WL 1444878, at *8-9 (C.D. Cal. Apr. 12,
4 2010). In the absence of any indication that Congress intended to create an implied right of
5 action against recipients of TARP funds, courts in this circuit have declined to find an implied
6 right of action for individuals who wish to sue financial institutions. See Pantoja, 640 F. Supp. at
7 1185; Manabat, 2010 WL 2574161, at *11; Robinson, 2010 WL 2534192, at **6-7; Logan, 2010
8 WL 1444878, at *9-10. See also Wilder v. Virginia Hosp. Ass’n, 496 U.S. 498, 509 n.9 (1990)
9 (noting that courts must proceed with caution in deciding whether a statute provides an implied
10 private right of action because Congress, rather than the courts, controls the availability of
11 remedies for violation of federal statutes).

12 In general, criminal statutes do not provide a private cause of action or a basis for
13 civil liability. See Ellis v. City of San Diego, 176 F.3d 1183, 1189 (9th Cir. 1999) (affirming
14 district court’s dismissal of sixteen claims based on California Penal Code sections because
15 “these code sections do not create enforceable individual rights”); Aldabe v. Aldabe, 616 F.2d
16 1089, 1092 (9th Cir. 1980) (holding that criminal statutes 18 U.S.C. §§ 241 and 242 “provide no
17 basis for civil liability”). While the provision of a criminal penalty does not necessarily preclude
18 implication of a private cause of action, there must be “at least a statutory basis for inferring that
19 a civil cause of action of some sort lay in favor of someone.” Chrysler Corp. v. Brown, 441
20 U.S. 281, 316 (1979) (quoting Cort v. Ash, 422 U.S. 66, 79 (1975)). See also Central Bank of
21 Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 190-91 (1994) (“We have
22 been quite reluctant to infer a private right of action from a criminal prohibition alone . . . and
23 have not suggested that a private right of action exists for all injuries caused by violations of
24 criminal prohibitions.”). Here, plaintiffs have not argued that a private cause of action is implied
25 in any criminal statute they rely upon.

26 ////

1 The court finds no statutory basis for inferring civil causes of action from TARP
2 or the criminal statutes cited by plaintiffs. Accordingly, plaintiffs' claims alleged under TARP,
3 12 U.S.C. § 5201 (denial of mortgage workout); 18 U.S.C. § 666 (theft of federal funds); 18
4 U.S.C. § 1344 (frauds and swindles); 18 U.S.C. §§ 1341 and 1343 (wire fraud); 26 U.S.C. §§
5 7201 and 7203 (tax evasion); and California Penal Code § 422 (death threats) should all be
6 dismissed with prejudice.

7 B. Failure to Allege Sufficient or Plausible Facts to State a Claim

8 1. Civil Rights Claims Under 42 U.S.C. §§ 1981 and 1982

9 After careful consideration of plaintiff's allegations of discrimination, the court
10 agrees with defendants that plaintiffs have failed to allege a plausible claim of racial
11 discrimination under the civil rights statutes relied upon.

12 Section 1981 provides that

13 [a]ll persons within the jurisdiction of the United States shall have
14 the same right in every State and Territory to make and enforce
15 contracts, to sue, be parties, give evidence, and to the full and equal
16 benefit of all laws and proceedings for the security of persons and
property as is enjoyed by white citizens, and shall be subject to like
punishment, pains, penalties, taxes, licenses, and exactions of
every kind, and to no other.

17 42 U.S.C. § 1981(a). The phrase "make and enforce contracts" is defined as including "the
18 making, performance, modification, and termination of contracts, and the enjoyment of all
19 benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).
20 The rights protected by § 1981 are protected against impairment by non-governmental
21 discrimination as well as impairment under color of State law. 42 U.S.C. § 1981(c). Section
22 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State
23 and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and
24 convey real and personal property." 42 U.S.C. § 1982.

25 By its terms, § 1981 protect the plaintiffs, who allege that Mr. Small is Hispanic
26 and Mrs. Small is African-American, in the making and enforcement of contracts, as defined by

1 the statute, with the defendants, who are non-governmental entities and individuals. However,
2 plaintiffs allege only that they “were denied privileges to do a ‘mortgage workout’ under HR
3 1424 TARP as a proximate result of discrimination based on Race compared to similarly situated
4 Caucasians.” (Doc. 10, Pls.’ Second Amended Compl. ¶ 3.) Plaintiffs’ unauthorized sur-reply
5 demonstrates that plaintiffs are unable to present factual allegations that support their claim of
6 racial discrimination. Plaintiffs merely argue that their attempted eviction in January 2009 by use
7 of threats, vandalism, and terror is evidence of racial discrimination because such acts are
8 “consistent with the trickery, extortion, and intimidation commonly associated with racial
9 discrimination levied against vulnerable people of color.” (Doc. 30, Pls.’ Unauthorized Sur-reply
10 at 3.) Plaintiffs argue further that the acts of defendants “suggest to a reasonable person that
11 racial discrimination is a plausible explanation.” (Id.)

12 The court finds that plaintiffs’ second amended complaint is devoid of factual
13 allegations that support their claims of racial discrimination and that plaintiffs are unable to
14 allege facts that would state a plausible claim upon which relief can be granted. The claim or
15 claims of racial discrimination should be dismissed for failure to state a claim.

16 2. Equal Credit Violations Under 15 U.S.C. §§ 1691 and 1692

17 Plaintiffs’ allegation that defendants violated the Equal Credit Opportunity Act
18 (ECOA), 15 U.S.C. § 1691, et seq. is based on the same conclusory assertion of racial
19 discrimination discussed above. The statute, which is pending amendment, provided at the
20 relevant times that it is “unlawful for any creditor to discriminate against any applicant, with
21 respect to any aspect of a credit transaction – (1) on the basis of race” 15 U.S.C. § 1691(a).
22 Section 1692 defines various terms used in the ECOA.

23 Circuit courts that have considered the standards for stating a claim under ECOA
24 have developed a four-element test to determine whether a plaintiff has properly pleaded an
25 ECOA claim. Hafiz v. Greenpoint Mortgage Funding, Inc., 652 F. Supp. 2d 1039, 1045 (N.D.
26 Cal. 2009). To satisfy the test, plaintiffs must allege that: (1) they are members of a protected

1 class; (2) they applied for credit with defendants; (3) they qualified for credit; and (4) they were
2 denied credit, despite being qualified. Id. (citing decisions of the Third, Fifth, and Tenth
3 Circuits).

4 Here, as defendants point out, plaintiffs obviously did obtain credit in the form of
5 a VA-guaranteed mortgage loan in 2004, and they have not alleged that they applied for credit
6 with any defendant, that they qualified for credit from any defendant, or that any defendant
7 denied them credit. In their opposition to defendants' motion, plaintiffs have failed to show that
8 they can allege all four elements of an ECOA claim that they were denied an equal opportunity to
9 obtain credit in 2004 or at the time of their demand for a loan modification. Plaintiffs' ECOA
10 claim should therefore be dismissed without leave to amend.

11 3. False Designation of Origin Under 15 U.S.C. § 1125

12 Plaintiffs' Second Amended Complaint refers to "false designation of origin" at
13 least ten times, citing 15 U.S.C. § 1125. The Lanham Act, which concerns trademarks, provides
14 for a private right of action by any person who believes he or she is likely to be damaged by a
15 person who, in connection with any goods or services, uses in commerce "any false designation
16 of origin" that is likely to cause confusion or mistake or deceive as to the origin of his or her
17 goods or services. 15 U.S.C. § 1125(a)(1). This provision does not appear to have any
18 application in the mortgage context. Moreover, plaintiffs have failed to address this issue in their
19 opposition or their unauthorized sur-reply. The court finds that plaintiffs have failed to state a
20 plausible Lanham Act claim on which relief may be granted. Accordingly, plaintiffs' claim of
21 false designation of origin under 15 U.S.C. § 1125 should be dismissed without leave to amend.

22 4. Violations of the Truth in Lending Act (TILA), 15 U.S.C. § 1601

23 Plaintiffs' Second Amended Complaint does not include 15 U.S.C. § 1601, et seq.
24 in the list of statutes contained in the caption. However, plaintiffs' cause of action for illegal
25 foreclosure concludes with allegations that defendant Countrywide Home Loans is subject to the
26 Truth in Lending Act, is a creditor within the meaning of the Act, and owes damages and

1 unspecified injunctive relief to plaintiffs as a result of TILA violations that are not described.
2 (Doc. No. 10, Second Amended Compl. ¶¶ 133-138.)

3 The court finds it impossible to ascertain with any degree of particularity the
4 conduct of defendants being alleged by plaintiffs as TILA violations. As such, plaintiffs have
5 failed to place defendants on notice of the claims being asserted against them. Plaintiffs' wholly
6 conclusory allegations fail to state a cognizable claim.

7 Moreover, any TILA claim for damages is barred because such a suit for damages
8 must be filed within one year following the alleged violation. 15 U.S.C. § 1640(e). The failure
9 to make required disclosures for purposes of a damages claim under TILA occurs on the date
10 loan documents are signed, because on that date the buyers are in possession of all information
11 relevant to the buyers' discovery of the TILA violation and the basis for a damages claim. Meyer
12 v. Ameriquest Mortgage Co., 342 F.3d 899, 902 (9th Cir. 2003). Here, plaintiffs commenced
13 this suit almost five years after the mortgage loan was made and any TILA violations could have
14 occurred, and almost four years after the statute of limitations expired.

15 If plaintiffs' assertion of entitlement to injunctive relief under TILA is a demand
16 for rescission, any such claim would fail for several reasons. To state a claim for rescission
17 under TILA, the plaintiffs must allege that they are able to tender the proceeds of their loan. See
18 Yamamoto v. Bank of New York, 329 F.3d 1167, 1171 (9th Cir. 2003) (holding that rescission
19 under TILA "*should* be conditioned on repayment of the amounts advanced by the lender" and
20 explaining that, because rescission is a remedy that restores the status quo ante, a borrower
21 seeking rescission is required to allege ability to tender the loan proceeds). There are no such
22 allegations in plaintiffs' complaint. Moreover, any claim for rescission under TILA would also
23 be time-barred, since such claims are governed by "a three-year absolute limitation on rescission
24 actions." 15 U.S.C. § 1635(f). See also King v. State of California, 784 F.2d 910, 913 (9th Cir.
25 1986). The three years begin to run upon the consummation of the credit transaction or upon the
26 sale of the property, whichever occurs first. King, 784 F.2d at 913. Plaintiffs filed this action

1 more than three years after the consummation of the loan, which occurred prior to the foreclosure
2 sale of the property.

3 Plaintiffs' TILA claims fail to state claims upon which relief may be granted, and
4 it is evident that any TILA claim plaintiffs might allege is barred by the applicable statute of
5 limitations. Plaintiffs cannot cure the fundamental defects of their TILA claims.

6 5. Unfair Competition Under Cal. Bus. & Prof. Code § 17200

7 Plaintiffs' Second Amended Complaint does not include California Business and
8 Professions Code § 17200 in the list of statutes contained in the caption, but the pleading
9 contains references to this statute. (See Doc. No. 10, Second Amended Compl. ¶¶ 3, 12.)
10 Defendants argue that plaintiffs' cursory reference to the unfair competition law is not supported
11 by the allegation of any predicate act and fails to allege how plaintiffs lost any money or property
12 as a result of any alleged act. Defendants argue further that, to the extent that plaintiffs would
13 base an unfair competition claim on fraud, there is a complete lack of specificity for such a claim.

14 In order to bring a claim under § 17200, a plaintiff must have "suffered injury in
15 fact and . . . lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code
16 § 17204. This statutory limitation requires that a plaintiff show he has suffered losses capable of
17 restitution. Buckland v. Threshold Enters., Ltd., 155 Cal. App.4th 798, 817 (2007). Restitution
18 is only possible if the § 17200 action can "restore to any person any money or property, real or
19 personal, which may have been acquired by means of such unfair competition." Cal. Bus. &
20 Prof. Code § 17203. Here, plaintiffs have failed to state a claim for damages under another
21 statute which would provide a basis for pursuing a claim under § 17200. See Kariguddaiah v.
22 Wells Fargo Bank, N.A., No. C 09-5716 MHP, 2010 WL 2650492, at *7 (N.D. Cal. July 1, 2010)
23 (dismissing § 17200 claim due to plaintiff's failure to state a claim for either breach of contract
24 or wrongful foreclosure upon which the § 17200 claim was based); Powell v. Residential
25 Mortgage Capital, No. C 09-04928 JF (PVT), 2010 WL 2133011, at * 9 (N.D. Cal. May 24,
26 2010) (same); see also Berryman v. Merit Property Mgmt. Inc., 152 Cal. App. 4th 1544, 1554

1 (2007) (“Thus, a violation of another law is a predicate for stating a cause of action under” §
2 17200); Lazar v. Hertz Corp., 69 Cal. App. 4th 1494, 1505 (1999) (§ 17200 “borrows violations
3 of other laws . . . and makes those unlawful practices actionable”). Nor have plaintiffs stated a
4 claim of any other unfair or fraudulent conduct on the part of defendants that could give rise to a
5 claim under this provision. See Chavez v. Bank of America, N.A., No. CV-F-09-2133
6 OWW/SKO, 2010 WL 1854087, at *19-20 (E.D. Cal. May 6, 2010) (discussing the “unfairness,”
7 as opposed to “unlawful,” prong of § 17200, et seq.)

8 The court finds that plaintiffs have failed to state a plausible claim for relief under
9 California Business and Professional Code § 17200, et seq. Because there is no indication that
10 plaintiffs can allege the elements of such a claim, the claim should be dismissed with prejudice.

11 6. Fraud

12 Plaintiffs’ third cause of action alleges fraud. Defendants argue that plaintiffs’
13 bald allegation of fraud fails to satisfy the requirements of Rule 9(b) and should be dismissed.

14 As noted above, Rule 9 provides that “the circumstances constituting fraud . . .
15 shall be stated with particularity.” Fed. R. Civ. P. 9(b). This requirement ensures that the
16 plaintiff gives notice to each defendant of the specific fraudulent conduct against which he or she
17 must defend, deters plaintiffs from filing complaints as a pretext for discovery of unknown
18 wrongs, protects defendants from the harm that comes from being subject to fraud charges, and
19 prohibits plaintiffs from unilaterally imposing on the court, parties, and society enormous social
20 and economic costs without any factual basis. Bly-Magee, 236 F.3d at 1018.

21 At the very least, a plaintiff alleging fraud must plead evidentiary facts such as the
22 time, place, persons, statements, and explanations of why allegedly misleading statements were
23 misleading. In re GlenFed, Inc. Sec. Litig., 42 F.3d at 1547 n.7. The Ninth Circuit has
24 “interpreted Rule 9(b) to mean that the pleader must state the time, place and specific content of
25 the false representations as well as the identities of the parties to the misrepresentation.” Alan
26 Neuman Prods., Inc. v. Albright, 862 F.2d 1388, 1393 (9th Cir.1988). See also Cooper v.

1 Pickett, 137 F.3d 616, 627 (9th Cir. 1997) (“fraud allegations must be accompanied by ‘the who,
2 what, when, where, and how’ of the misconduct alleged”). When asserting a fraud claim against
3 a corporation, “the plaintiff’s burden . . . is even greater. . . . The plaintiff must ‘allege the names
4 of the persons who made the allegedly fraudulent representations, their authority to speak, to
5 whom they spoke, what they said or wrote, and when it was said or written.’” Lazar, 12 Cal. 4th
6 at 645 (quoting Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal. App. 4th 153, 157 (1991)).
7 See also Spencer v. DHI Mortgage Co., No. CV F 09-0925 LJO DLB, 2009 WL 1930161, at *6
8 (E.D. Cal. June 30, 2009).

9 Under California law, a claim of fraud must establish the following elements: “(a)
10 a misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of
11 falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e)
12 resulting damage.” In re Estate of Young, 160 Cal. App. 4th 62, 79 (2008) (quoting Lazar v.
13 Superior Court, 12 Cal.4th 631, 638 (1996) (internal quotation marks omitted). See also Vess,
14 317 F.3d at 1105.

15 Dismissal of a fraud claim is appropriate when its allegations fail to meet the
16 required pleading standards. Vess, 317 F.3d at 1107. Plaintiffs’ fraud claim fails to plead even
17 minimal evidentiary facts, and plaintiffs have not demonstrated that they can allege such facts
18 against any defendant. Defendants’ motion to dismiss plaintiffs’ fraud cause of action for failure
19 to state a claim should be granted and plaintiffs’ fraud cause of action should be dismissed.

20 C. Failure to Allege Tender of Loan Amount

21 Defendants argue that the last three of plaintiffs’ twelve enumerated claims,
22 alleging wrongful foreclosure under California Code of Civil Procedure §§ 512.010,³ 1161, and
23 1162, and California Civil Code §§ 2924f and 2934, should be dismissed because plaintiffs have
24 not alleged their ability to tender the entire loan amount to the lender.

25 ³ In the caption of plaintiffs’ second amended complaint, the statute is cited as § 512.10.
26 Within the pleading, however, the statute is cited as § 512.010.

1 “A valid and viable tender of payment of the indebtedness
2 owing is essential to an action to cancel a voidable sale under a
3 deed of trust.” Karlsen v. American Sav. & Loan Assn., 15 Cal.
4 App. 3d 112,117 (Cal. App. 2d Dist. 1971). The overwhelming
5 majority of California district courts utilize the Karlsen rationale in
6 examining wrongful foreclosure claims. Anaya v. Advisors
7 Lending Group, 2009 U.S. Dist. LEXIS 68373, 2009 WL 2424037
8 (E.D. Cal. August 3, 2009) (“Plaintiff offers nothing to indicate
9 that she is able to tender her debt to warrant disruption of non-
10 judicial foreclosure”); Alicea v. GE Money Bank, 2009 U.S. Dist.
11 LEXIS 60813, 2009 WL 2136969 (N.D. Cal. July 16, 2009)
12 (“When a debtor is in default of a home mortgage loan, and a
13 foreclosure is either pending or has taken place, the debtor must
14 allege a credible tender of the amount of the secured debt to
15 maintain any cause of action for foreclosure.”); Montoya v.
16 Countrywide Bank, 2009 U.S. Dist. LEXIS 53920, 2009 WL
17 1813973 (N.D. Cal. June 25, 2009) (“Under California law, the
18 “tender rule” requires that as a precondition to challenging a
19 foreclosure sale, or any cause of action implicitly integrated to the
20 sale, the borrower must make a valid and viable tender of payment
21 of the secured debt”). The application of the “tender rule” prevents
22 “a court from uselessly setting aside a foreclosure sale on a
23 technical ground when the party making the challenge has not
24 established his ability to purchase the property.” Williams v.
25 Countrywide Home Loans, 1999 U.S. Dist. LEXIS 14550, 1999
26 WL 740375 (N.D. Cal. Sept. 15, 1999).

15 Somera v. Indymac Fed. Bank, FSB, No. 2:09-cv-1947-FCD-DAD, 2010 WL 761221, at *8
16 (E.D. Cal. Mar. 3, 2010). See also Yamamoto, 329 F.3d at 1171-73 (holding that rescission
17 under TILA “*should be* conditioned on repayment of the amounts advanced by the lender” and
18 explaining that, because rescission is a remedy that restores the status quo ante, a borrower
19 seeking rescission is required to allege ability to tender the loan proceeds).

20 Although plaintiffs’ second amended complaint does not contain the word
21 “rescission” in the prayer for relief, plaintiffs request that the court compel defendants to
22 surrender to them full satisfaction of the note and mortgage and that the court dismiss with
23 prejudice defendants’ efforts to foreclose. Plaintiffs seek to be awarded ownership of the subject
24 property without paying any additional money, with a full refund of the mortgage payments they
25 made before defaulting on their loan, and with approximately half a million dollars in damages as
26 a bonus. Plaintiffs have not alleged tender or ability to tender in their pleading and have not

1 alleged any willingness to tender the required amount.

2 Plaintiffs' claims under California Code of Civil Procedure § 512.10, California
3 Code of Civil Procedure §§ 1161 and 1162, and California Civil Code §§ 2924f and 2934 are
4 wrongful foreclosure claims. Under California law, plaintiffs "are required to allege tender of the
5 amount of [defendant's] secured indebtedness in order to maintain any cause of action for
6 irregularity in the sale procedure." Abdallah v. United Sav. Bank, 43 Cal. App. 4th 1101, 1109
7 (Cal. App. 1st Dist. 1996). See also Grant v. Aurora Loan Servs., Inc., ___ F. Supp. 2d ___, ___,
8 No. CV 09-08174 MM(CTx), 2010 WL 3517399, at *8 (C.D. Cal. Sept. 10, 2010); Saldate v.
9 Wilshire Credit Corp., 268 F.R.D. 87, 104-05 (E.D. Cal. 2010); Labra v. Cal-Western
10 Reconveyance Corp., No. C 09-2537 PJH, 2010 WL 889537, at *9 (N.D. Cal. Mar. 11, 2010).
11 The plaintiff must demonstrate both a willingness to pay and the ability to pay. In re Worcester,
12 811 F.2d 1224, 1231 (9th Cir. 1987).

13 Plaintiffs have not alleged facts that warrant "dismissal" of the foreclosure sale,
14 but even if they had alleged such facts, they have not alleged tender or the ability to offer tender.
15 Accordingly, defendants' motion to dismiss plaintiffs' state law claims of wrongful disclosure
16 should be granted, and those claims should be dismissed with prejudice.

17 II. The Quiet Title Action (2:10-cv-0342 GEB DAD PS)

18 Defendant Countrywide's arguments in favor of dismissal of plaintiffs' quiet title
19 action are persuasive. Plaintiffs' complaint plainly fails to allege the elements of a quiet title
20 claim, and the pleading fails to allege facts stating a plausible claim of adverse possession.
21 Moreover, plaintiffs have admittedly not paid the debt owed, and therefore cannot quiet title. In
22 this regard, "a mortgagor cannot quiet his title against the mortgagee without paying the debt
23 secured." Shimpones v. Stickney, 219 Cal. 637, 649 (1934). See also Aguilar v. Bocci, 39 Cal.
24 App. 3d 475, 477 (1974); Kelley v. Mortgage Electronic Registration, 642 F. Supp. 2d 1048,
25 1057 (N.D. Cal. 2009) ("Plaintiffs have not alleged . . . that they have satisfied their obligation
26 under the Deed of Trust. As such, they have not stated a claim to quiet title."). As discussed in

1 detail above, plaintiffs' quiet title complaint does not allege that plaintiffs have tendered, or are
2 able and willing to tender, the debt secured by the subject property. As such, plaintiffs cannot
3 state a cognizable claim for quiet title. Accordingly, plaintiffs' quiet title action should also be
4 dismissed with prejudice.

5 III. Defendants Who Have Not Been Served

6 For the reasons set forth above, the undersigned has determined that defendants'
7 motions to dismiss should be granted and that all claims against the moving defendants in both
8 actions should be dismissed.

9 The claims against the four non-appearing defendants in plaintiffs' foreclosure
10 action should also be dismissed for two reasons. First, "[a] District Court may properly on its
11 own motion dismiss an action as to defendants who have not moved to dismiss where such
12 defendants are in a position similar to that of moving defendants or where claims against such
13 defendants are integrally related." Silverton v. Dep't of Treasury, 644 F.2d 1341, 1345 (9th Cir.
14 1981). "Such a dismissal may be made without notice where the [plaintiffs] cannot possibly win
15 relief." Omar v. Sea-Land Serv., Inc., 813 F.2d 986, 991 (9th Cir. 1987). The court's authority
16 in this regard includes sua sponte dismissal as to defendants who have not been served and
17 defendants who have not yet answered or appeared. Columbia Steel Fabricators, Inc. v.
18 Ahlstrom Recovery, 44 F.3d 800, 802 (9th Cir. 1995) ("We have upheld dismissal with prejudice
19 in favor of a party which had not yet appeared, on the basis of facts presented by other defendants
20 which had appeared."). See also Bach v. Mason, 190 F.R.D. 567, 571 (D. Idaho 1999); Ricotta
21 v. California, 4 F. Supp. 2d 961, 978-79 (S.D. Cal. 1998). Here, the four non-appearing
22 defendants are in a position similar to that of the seven individual defendants who have moved
23 for dismissal of plaintiffs' foreclosure action, and the claims of all eleven individuals and the
24 three entity defendants are integrally related.

25 Second, the four non-appearing defendants should be dismissed pursuant to
26 Federal Rule of Civil Procedure 4(m), which provides that, absent a showing of good cause, the

1 court must dismiss the action without prejudice against any defendant who was not served with a
2 summons and complaint within 120 days after the complaint was filed. Plaintiffs have failed to
3 make a showing of good cause for their failure to locate the four unserved defendants for service
4 of process.

5 Accordingly, the undersigned will recommend that all claims against defendants
6 Kristi Brockman, Nelson A. Hernandez, Carlos Sotelo, and Elizavet Meza be dismissed along
7 with all claims against the moving defendants.

8 IV. Whether Leave to Amend Would Be Futile

9 The undersigned has carefully considered whether plaintiffs may be able to amend
10 their second amended complaint to state any claim upon which relief can be granted. “Valid
11 reasons for denying leave to amend include undue delay, bad faith, prejudice, and futility.”
12 California Architectural Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1472 (9th Cir.
13 1988). See also Klamath-Lake Pharm. Ass’n v. Klamath Med. Serv. Bureau, 701 F.2d 1276,
14 1293 (9th Cir. 1983) (holding that while leave to amend shall be freely given, the court does not
15 have to allow futile amendments). In this case, plaintiffs have already amended their pleading
16 and filing a third amended complaint would be futile, given the fundamental deficiencies in
17 plaintiffs’ second amended complaint as addressed above. Accordingly, the undersigned will
18 recommend that both of plaintiffs’ actions be dismissed with prejudice.

19 CONCLUSION

20 For the reasons set forth above, IT IS RECOMMENDED that:

21 1. Defendants’ motion to dismiss (Doc. No. 14) filed September 14, 2009 in case
22 No. 2:09-cv-0458 GEB DAD PS, be granted in its entirety pursuant to Federal Rule of Civil
23 Procedure 12(b)(6);

24 2. Defendant’s motion to dismiss (Doc. No. 9) filed February 16, 2010 in case
25 No. 2:10-cv-0342 GEB DAD PS be granted in its entirety pursuant to Federal Rule of Civil
26 Procedure 12(b)(6); and

1 3. Plaintiffs' second amended complaint in case No. 2:09-cv-0458 and plaintiffs'
2 complaint in case No. 2:10-cv-0342 be dismissed with prejudice and both cases be closed.

3 These findings and recommendations will be submitted to the United States
4 District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
5 fourteen days after being served with these findings and recommendations, any party may file
6 and serve written objections with the court. A document containing objections should be titled
7 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to objections
8 shall be filed and served within seven days after the objections are served. The parties are
9 advised that failure to file objections within the specified time may, under certain circumstances,
10 waive the right to appeal the District Court's order. See Martinez v. Ylst, 951 F.2d 1153 (9th
11 Cir. 1991).

12 DATED: September 15, 2010.

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15 _____
DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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