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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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CESAR CASTANEDA and SUZZANNE
CASTANEDA,

NO. CIV. 2:09-01124 WBS DAD

Plaintiffs,

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS

v.

SAXON MORTGAGE SERVICES, INC.,
NOVASTAR MORTGAGE, INC.,
QUALITY LOAN SERVICE CORP.,
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,
SYNERGY FINANCIAL MANAGEMENT
dba DIRECT LENDER.COM, LOUIS
LEON PACIFIC, MICHAEL
TIMOSHUCK, IVETTE CAMPOS, and
DOES 1-20, inclusive,

Defendants.

_____ /

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Plaintiffs Cesar and Suzanne Castaneda filed this
action against defendants Saxon Mortgage Services, Inc.
("Saxon"), Novastar Mortgage, Inc. ("Novastar"), Quality Loan
Service Corp. ("Quality Loan"), Mortgage Electronic Registration

1 Systems, Inc. ("MERS"), Synergy Financial Managment, d/b/a Direct
2 Lender.com ("Synergy"), Louis Leon Pacific, Michael Timoshuck,
3 and Ivette Campos, alleging various state and federal claims
4 relating to a loan they obtained to refinance their home in
5 Sacramento, California. Saxon and MERS move to dismiss
6 plaintiffs' First Amended Complaint ("FAC") pursuant to Federal
7 Rule of Civil Procedure 12(b)(6) for failure to state a claim
8 upon which relief can be granted. Novastar subsequently joined
9 Saxon and MERS's motion.¹

10 I. Factual and Procedural Background

11 On May 17, 2005, plaintiffs obtained a loan from

12
13 ¹ Novastar filed an answer to plaintiffs' FAC on August
14 14, 2009, and filed its notice of joinder in MERS and Saxon's
15 Rule 12(b)(6) motion to dismiss on September 2, 2009. (Docket
16 Nos. 22, 29.) Plaintiffs object that Novastar should not be able
17 to join this motion, as its joinder was untimely under Federal
18 Rule of Civil Procedure 12(b) because Novastar filed an answer
19 before moving to dismiss plaintiffs' claims. (Am. Opp'n 2:8-20.)
20 While Rule 12(b) states that a motion for any of its several
21 defenses "shall be made before pleading if a further pleading is
22 permitted," the Ninth Circuit has held that when a defendant
23 moves to dismiss for failure to state a claim after filing an
24 answer defendant's motion should be construed as a Rule 12(c)
25 motion for judgment on the pleadings rather than barred as
26 untimely. Hoelt v. Tucson Unified School Dist., 967 F.2d 1298,
27 1301 (9th Cir. 1992); Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th
28 Cir. 1980).

21 Judgment on the pleadings is appropriate after the
22 pleadings have closed when, on the face of those pleadings,
23 accepting the allegations of the non-moving party as true, no
24 material issue of fact remains to be resolved. See Fed. R. Civ.
25 P. 12(c); Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.,
26 896 F.2d 1542, 1550 (9th Cir. 1990). A Rule 12(c) motion is
27 essentially equivalent to a Rule 12(b)(6) motion to dismiss and
28 consequently, a district court may "dispos[e] of the motion by
dismissal rather than judgment." Sprint Telephony PCS, L.P. v. County of San Diego, 311 F. Supp. 2d 898, 902-03 (S.D. Cal. 2004). In the interest of efficiency, the court will evaluate Novastar's joinder as a motion for judgment on the pleadings, and evaluate the arguments in MERS and Saxon's motion to dismiss as they apply to Novastar, since the standard for a motion for judgment on the pleadings and a Rule 12(b)(6) motion to dismiss are virtually identical.

1 Novastar to refinance their home, located at 2600 Andrade Way,
2 Sacramento, California.² (FAC ¶ 7; Pls.' Am. Request for
3 Judicial Notice ("RJN") Ex. A.) This loan was secured by a Deed
4 of Trust on the property. (FAC ¶ 34.) Plaintiffs claim that they
5 were channeled into this allegedly unaffordable loan through the
6 conduct of mortgage brokers Campos and Timoshuck, who allegedly
7 exaggerated plaintiffs' earnings and failed to provide loan
8 documents to plaintiffs in Spanish despite their limited
9 understanding of English. (Id. ¶¶ 27-31.) Chicago Title Company
10 was listed as trustee and Novastar was listed as lender on the
11 loan documents. (Id.) The Deed of Trust identified MERS as the
12 nominee for the lender and lender's successors and assigns, and
13 as the beneficiary. (Id. ¶ 35.)

14 MERS facilitates the transfer of mortgage interests by
15 providing an electronic tracking system for the mortgage
16 interests registered in its system.³ (See Id. ¶¶ 10, 35.) To do
17 this, MERS is the beneficiary of record in a "nominee" capacity
18 for the mortgage lender on all security instruments in its
19 system. (Id. ¶ 9.) When the lender assigns its beneficial

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21 ² While plaintiffs allege in their complaint that the
22 loan was consummated on May 19, 2009, the Deed of Trust supplied
23 by plaintiffs with their amended request for judicial notice
24 indicates that the loan was obtained on May 17, 2009.

25 ³ Plaintiff argues in his opposition that MERS is not
26 licensed to conduct business in California. However, MERS is
27 statutorily exempted from the requirement to obtain a certificate
28 of qualification to conduct business in California. MERS
registered as a Delaware corporation, which is a foreign
corporation under California law. Cal. Corp. Code §§ 167, 171.
MERS is not required to obtain a certificate of qualification
from the Secretary of State because it does not "transact
intrastate business" within the meaning of the statute. See
Lomboy v. SCME Mortgage Bankers, No. C-091160 SC, 2009 WL
1457738, at *3 (N.D. Cal. May 26, 2009).

1 interest to another entity within MERS's electronic system, MERS
2 remains the beneficiary of record for that instrument by serving
3 as nominee for the new beneficial interest holder. MERS remains
4 the beneficiary of record on the Deed of Trust or mortgage even
5 as the beneficial interest is assigned repeatedly within MERS's
6 electronic system.

7 MERS allegedly assigned the Deed of Trust for
8 plaintiff's loan to the Bank of New York Mellon on November 19,
9 2008, and the assignment was recorded on January 21, 2009. (Pls.'
10 Am. RJN Ex. B.) Plaintiffs eventually defaulted on their loan,
11 and a Notice of Default and Election to Sell Under Deed of Trust
12 was filed in Sacramento County by Quality Loan on December 16,
13 2008. (FAC ¶ 46.) Plaintiffs allegedly were sent notice of a
14 trustee sale by Quality Loan on March 18, 2009. (Id. ¶ 47.) On
15 March 31, 2009, plaintiffs allegedly sent a Qualified Written
16 Request ("QWR") under the Real Estate Settlement Procedures Act
17 ("RESPA"), 12 U.S.C. §§ 2601-2617, to Saxon that included a
18 demand to rescind their loan under the Truth in Lending Act
19 ("TILA"), 15 U.S.C. §§ 1601-1667f. (Id. ¶ 36.)

20 In their FAC, plaintiffs assert eleven causes of action
21 against eight defendants. MERS and Saxon's motion to dismiss,
22 which Novastar joins, challenges only the causes of action that
23 apply to MERS and Saxon. The FAC alleges causes of action
24 against Novastar for violations of TILA, the Rosenthal Fair Debt
25 Collection Practices Act ("RFDCPA"), Cal. Civ. Code §§ 1788.1-
26 1788.33, RESPA, California's Unfair Competition Law ("UCL"), Cal.
27 Bus. & Prof. Code §§ 17200-17210, and California Civil Code
28 section 1632, as well as common law claims for negligence, breach

1 of fiduciary duty, fraud, breach of contract, and breach of the
2 covenant of good faith and fair dealing. MERS and Saxon only
3 move to dismiss plaintiffs' RFDCPA, negligence, RESPA, fraud,
4 UCL, section 1632, and wrongful foreclosure claims. Accordingly,
5 the court will consider Novastar's joinder as a motion to dismiss
6 only those claims challenged by MERS and Saxon.

7 II. Discussion

8 On a motion to dismiss, the court must accept the
9 allegations in the complaint as true and draw all reasonable
10 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
11 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
12 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
13 (1972). To survive a motion to dismiss, a plaintiff needs to
14 plead "only enough facts to state a claim to relief that is
15 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S.
16 544, 570 (2007). This "plausibility standard," however, "asks
17 for more than a sheer possibility that a defendant has acted
18 unlawfully," and where a complaint pleads facts that are "merely
19 consistent with" a defendant's liability, it "stops short of the
20 line between possibility and plausibility." Ashcroft v. Iqbal,
21 129 S. Ct. 1937, 1949 (2009)(quoting Twombly, 550 U.S. at 556-
22 57).

23 In general a court may not consider items outside the
24 pleadings upon deciding a motion to dismiss, but may consider
25 items of which it can take judicial notice. Barron v. Reich, 13
26 F.3d 1370, 1377 (9th Cir. 1994). A court may take judicial
27 notice of facts "not subject to reasonable dispute" because they
28 are either "(1) generally known within the territorial

1 jurisdiction of the trial court or (2) capable of accurate and
2 ready determination by resort to sources whose accuracy cannot
3 reasonably be questioned." Fed. R. Evid. 201.

4 Plaintiffs filed an amended RJN in opposition to MERS
5 and Saxon's motion to dismiss. (Docket No. 38.) Plaintiffs'
6 amended RJN consists of three exhibits: (1) a copy of the Deed of
7 Trust, recorded in Sacramento County on May 20, 2005; (2) a copy
8 of an Assignment of Deed of Trust from MERS to the Bank of New
9 York Mellon, recorded in Sacramento County on January 21, 2009;
10 and (3) an unpublished article entitled "Foreclosure, Subprime
11 Mortgage Lending, and the Mortgage Electronic Registration
12 System."⁴ (Pls.' Am. RJN.) MERS and Saxon also submitted a RJN
13 in support of their motion to dismiss which contains two
14 exhibits: (1) a copy of the Deed of Trust and accompanying riders
15 executed by plaintiffs, recorded in Sacramento County on May 20,
16 2005; and (2) a copy of the Notice of Default and Election to
17 Sell Under Deed of Trust, recorded in Sacramento County on
18 December 16, 2008.

19 The court will take judicial notice of the first and
20 second exhibits of plaintiff's amended RJN and all exhibits in
21 MERS and Saxon's RJN, as they are matters of public record whose
22 accuracy cannot be questioned. See Lee v. City of Los Angeles,
23 250 F.3d 668, 689 (9th Cir. 2001). However, the court denies
24

25 ⁴ While plaintiffs' amended RJN additionally requests for
26 the court to take judicial notice of an article entitled "The
27 MERS Fifty Million Mortgage Meltdown" from Home Loan News, a copy
28 of this article was not supplied to the court by plaintiffs.
Instead, plaintiffs submitted two copies of the third exhibit in
their RJN. Accordingly, the court will not consider plaintiffs'
request for judicial notice of this document.

1 plaintiff's RJN of the article entitled "Foreclosure, Subprime
2 Mortgage Lending, and the Mortgage Electronic Registration
3 System," because it asks for notice of an unpublished article
4 which expresses opinions of the author that may reasonably be
5 questioned.

6 A. California Rosenthal Fair Debt Collection Practices Act

7 Plaintiffs' second cause of action alleges that Saxon,
8 MERS, and Novastar violated the RFDCPA. The RFDCPA prohibits a
9 host of unfair and oppressive methods of collecting debt, but to
10 be liable under the RFDCPA a defendant must fall under its
11 definition of "debt collector." Izenberg v. ETS Svcs., LLC, 589
12 F. Supp. 2d 1193, 1199 (C.D. Cal. 2008). A "debt collector"
13 under the RFDCPA is "any person who, in the ordinary course of
14 business, regularly, on behalf of himself or herself or others,
15 engages in debt collection." Cal. Civ. Code § 1788.2(c) (2008).

16 Plaintiffs do not identify in their FAC the sections of
17 the RFDCPA that Saxon, MERS and Novastar allegedly violated, and
18 fail to allege facts that would support the inference that Saxon
19 or MERS is a "debt collector" under the RFDCPA. Instead, the FAC
20 contains only a conclusory restatement of the definition of "debt
21 collector" under the RFDCPA, (FAC ¶ 72.), and fails to allege
22 other essential elements of the statute necessary to establish
23 liability as a "debt collector," namely that the deed of trust
24 memorializes a "consumer credit transaction" and that the amount
25 owed under the deed of trust is a "consumer debt" according to
26 the RFDCPA. See Cal. Civ. Code § 1788.2(b)-(f). Such broad
27 allegations, without even identifying what part of the RFDCPA
28 MERS, Saxon, or Novastar violated, are insufficient to survive a

1 motion to dismiss. See Rosal v. First Fed. Bank of Cal., No. 09-
2 1276, 2009 WL 2136777, at * 18 (N.D. Cal. July 15, 2009).

3 Additionally, foreclosure pursuant to a deed of trust
4 does not constitute debt collection under the RFDCPA. See
5 Izenberg, 589 F. Supp. 2d at 1199; see also Rosal, 2009 WL
6 2136777, at *18 (dismissing RFDCPA claim as to all defendants in
7 foreclosure case); Ricon v. Recontrust Co., No. 09-937, 2009 WL
8 2407396, at *4 (S.D. Cal. Aug. 4, 2009) (dismissing with
9 prejudice plaintiff's unfair debt collection claims in
10 foreclosure case); Pittman v. Barclays Capital Real Estate, Inc.,
11 No. 09-0241, 2009 WL 1108889, at *3 (S.D. Cal. Apr. 24, 2009)
12 (dismissing with prejudice plaintiff's Rosenthal Act claim in
13 foreclosure case because a "residential mortgage loan does not
14 qualify as a 'debt' under the statute"); Gallegos v. Recontrust
15 Co., No. 08-2245, 2009 WL 215406, at *3 (S.D. Cal. Jan. 28, 2009)
16 (dismissing RFDCPA claim in foreclosure case). Since residential
17 mortgage loans do not fall within the RFDCPA, the court must
18 grant defendants' motion to dismiss plaintiff's cause of action
19 under the RFDCPA against MERS, Saxon, and Novastar.

20 B. Negligence

21 To prove a cause of action for negligence, plaintiff
22 must show "(1) a legal duty to use reasonable care; (2) breach of
23 that duty, and (3) proximate [or legal] cause between the breach
24 and (4) the plaintiff injury." Mendoza v. City of Los Angeles,
25 66 Cal. App. 4th 1333, 1339 (1998) (citation omitted). "The
26 existence of a legal duty to use reasonable care in a particular
27 factual situation is a question of law for the court to decide."
28 Vasquez v. Residential Invs., Inc., 118 Cal. App. 4th 269, 278

1 (2004). Plaintiff argues that MERS, Saxon, and Novastar owed a
2 duty to "perform acts in such a manner as to not cause
3 [p]laintiffs harm." (FAC ¶ 80.) Plaintiffs argue that this duty
4 was breached when "[d]efendants . . . failed to maintain the
5 original Mortgage Note, failed to properly create original
6 documents, and failed to make the required disclosures to the
7 [p]laintiffs." (Id.) Plaintiffs further contend that MERS,
8 Saxon, and Novastar also breached their duties of care when they
9 took payments to which they were not entitled, charged fees they
10 were not entitled to charge, and made or authorized negative
11 reports of plaintiff's creditworthiness to credit bureaus. (Id.
12 ¶ 81.)

13 Plaintiffs cite no authority for the proposition that
14 MERS, Saxson, or Novastar owed a duty to not cause plaintiffs
15 harm in their capacities as lender, nominal beneficiary, and loan
16 servicer. Generally, "[a]bsent 'special circumstances' a loan
17 transaction 'is at arms-length'" and no duties arise from the
18 loan transaction outside of those in the agreement. Rangel v.
19 DHI Mortgage Co., Ltd., No. CV F 09-1035 LJO GSA, 2009 WL
20 2190210, at *3 (E.D. Cal. July 21, 2009) (quoting Oaks Management
21 Corp. v. Superior Court, 145 Cal. App. 4th 453, 466 (2006)).
22 Absent contrary authority, a pleading of an assumption of duty by
23 MERS, Saxon, or Novastar, or a special relationship, plaintiff
24 cannot establish MERS, Saxon, or Novastar owed a duty of care.
25 See Hardy v. Indymac Federal Bank, --- F.R.D. ---, No. CV F 09-
26 935 LJO SMS, 2009 WL 2985446, at *7 (E.D. Cal. Sept. 15, 2009);
27 Bentham v. Aurora Loan Servs., No. C-09-2059 SC, 2009 WL 2880232,
28 at *2-3 (N.D. Cal. Sept. 1, 2009).

1 As the listed nominee and beneficiary under the Deed of
2 Trust, MERS had authority to assign its beneficial interest to
3 another party. See Cal. Civ. Code § 1934 ("Any assignment of a
4 mortgage and any assignment of the beneficial interest under a
5 deed of trust may be recorded, and from the time the same is
6 filed for record operates as constructive notice of the contents
7 thereof to all persons."); Bentham, 2009 WL 2880232 at *3. MERS
8 could not have breached a duty to plaintiffs by simply assigning
9 its beneficial interest under the Deed of Trust. As the servicer
10 of the loan, Saxon does not owe a duty to the borrowers of the
11 loans it services. See Watts v. Decision One Mortg. Co., No. 09-
12 43, 2009 U.S. Dist. LEXIS 59694 (S.D. Cal. July 13, 2009); Marks
13 v. Ocwen Loan Servicing, No. 07-2133, 2009 WL 975792, at *7 (N.D.
14 Cal. Apr. 10, 2009) ("[A] loan servicer does not owe a fiduciary
15 duty to a borrower beyond the duties set forth in the loan
16 contract.")

17 Additionally, the FAC does not indicate which breaches
18 of this alleged duty apply to MERS, Saxon, or Novastar. (FAC ¶
19 80.) Defendants should not be forced to guess how their conduct
20 was allegedly negligent. See Associated Gen. Contractors of
21 Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526
22 (1983); Gauvin v. Trombatore, 682 F. Supp. 1067, 1071 (N.D. Cal.
23 1988). Although plaintiffs offer more details about MERS and
24 Saxons's alleged breaches in their opposition, the court cannot
25 consider materials outside of the complaint on a Rule 12(b)(6)
26 motion to dismiss. Anderson v. Angelone, 86 F.3d 932, 934 (9th
27
28

1 Cir. 1996).⁵ The FAC groups together accusations against all
2 defendants, and is completely unclear as to how MERS, Saxson, or
3 Novastar somehow breached a duty to create loan documents and
4 provide disclosures to plaintiffs. The FAC fails to state that
5 MERS, Saxon, or Novastar have breached a cognizable legal duty,
6 and accordingly the court will grant defendants' motion to
7 dismiss plaintiffs' cause of action for negligence against MERS,
8 Saxon, and Novastar.

9 C. Real Estate Settlement Procedures Act

10 RESPA provides that borrowers must be provided certain
11 disclosures relating to the mortgage loan settlement process.
12 See 12 U.S.C. § 2601. § 2605 of RESPA relates to the disclosures
13 and communications required regarding the servicing of mortgage
14 loans, and provides that loan servicers have a duty to respond to
15 QWRs from borrowers asking for information relating to the
16 servicing of their loan. See 12 U.S.C. § 2605(e). Under RESPA
17 lenders of federally related mortgage loans must disclose whether
18 servicing of a loan may be assigned, sold or transferred to loan
19 applicants. 12 U.S.C. § 2605(a). Plaintiffs allege that
20 Novastar failed to comply with these disclosure requirements.
21 (FAC ¶ 87.) Additionally, borrowers may send QWRs under RESPA to
22 loan servicers for information relating to the servicing of their
23 loan. 12 U.S.C. § 26055(e)(1). Loan servicers have 60 days
24

25 ⁵ One such allegation is that Saxon's alleged violation
26 of 12 U.S.C. § 2605(e) establishes negligence per se. This
27 argument appears nowhere in the FAC, and is questionable given
28 plaintiff's failure demonstrate any underlying duty owed by Saxon
to plaintiffs. See California Service Station and Auto. Repair
Ass'n v. American Home Assur. Co., 62 Cal. App. 4th, 1166, 1178
(1998).

1 after the receipt of a QWR to respond to the borrower inquiry.
2 12 U.S.C. § 2605(e)(2). Plaintiffs allege that they mailed a QWR
3 to Saxon on March 31, 2009, which included a demand to rescind
4 the loan under TILA, and that Saxon has not responded to the
5 request as required by the statute. (FAC ¶ 36.)

6 Plaintiffs however, fail to allege that Saxon is a
7 servicer at all, or that it ever serviced plaintiffs' loan. In
8 fact, plaintiffs allege that they "are not certain at this time
9 exactly which of [d]efendants was actually the servicer of the
10 loan at any given time." (Id. ¶ 86.) Without alleging that
11 Saxon is a "loan servicer" under RESPA plaintiffs cannot show
12 that Saxon owed any duty to respond to their QWR, and accordingly
13 plaintiffs' RESPA claim against Saxon must be dismissed. See
14 Izenberg v. ETS Services, LLC, 589 F. Supp. 2d 1193, 1199-2000
15 (C.D. Cal. 2008) (dismissing plaintiffs' RESPA because it failed
16 to allege defendant was a loan servicer); Lopez v. GMAC Mortg.
17 Corp., No. C 07-3911 CW, 2007 WL 3232448, at *3 (N.D. Cal. Nov.
18 1, 2007) (dismissing RESPA claim because plaintiff alleged
19 defendant was a trustee, not loan servicer).

20 Novastar, on the other hand, has not provided legal
21 argument to the court as to why the court should dismiss
22 plaintiffs' RESPA claim as to it. Novastar simply joined the
23 motion to dismiss of Saxon and MERS without so much as supplying
24 any additional briefing. While arguments made by Saxon and MERS
25 often apply to plaintiffs' claims against Novastar, in this case
26 Saxon and MERS's motion only attacks the QWR-related claims made
27 against Saxon, and not does not address the initial disclosures
28 which are the basis of plaintiffs' RESPA claim against Novastar.

1 (See FAC ¶ 87; Mot. Dismiss 13:5-28, 14-15.) Since Novastar has
2 presented no legal argument as to why the RESPA claim against it
3 should be dismissed, the court will not dismiss plaintiffs' RESPA
4 claim against Novastar.

5 D. Fraud

6 In California, the essential elements of a claim for
7 fraud are "(a) a misrepresentation (false representation,
8 concealment, or nondisclosure); (b) knowledge of falsity (or
9 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d)
10 justifiable reliance; and (e) resulting damage." In re Estate of
11 Young, 160 Cal. App. 4th 62, 79 (2008). Under the heightened
12 pleading requirements for claims of fraud under Federal Rule of
13 Civil Procedure 9(b), "a party must state with particularity the
14 circumstances constituting the fraud." Fed. R. Civ. P. 9(b).
15 The plaintiffs must include the "who, what, when, where, and how"
16 of the fraud. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106
17 (9th Cir. 2003) (citation omitted); Decker v. Glenfed, Inc., 42
18 F.3d 1541, 1548 (9th Cir. 1994). Additionally, "[w]here multiple
19 defendants are asked to respond to allegations of fraud, the
20 complaint must inform each defendant of his alleged participation
21 in the fraud." Ricon v. Reconstruct Co., No. 09-937, 2009 WL
22 2407396, at *3 (S.D. Cal. Aug. 4, 2009) (quoting DiVittorio v.
23 Equidyne Extractive Indus., 822 F.2d 1242, 1247 (2d Cir. 1987)).

24 Plaintiffs' fraud allegations do not even come close to
25 surviving a motion to dismiss. Plaintiffs simply allege that
26 "[d]efendants, and each of them, have made several
27 representations to [p]laintiffs with regard to material facts"
28 and that these were false. (FAC ¶¶ 103-105.) Plaintiffs go on

1 to simply state the elements of a cause of action for fraud
2 without even once pointing to one specific representation made by
3 any defendant at any time. (See Id. ¶¶ 105-108.) Plaintiffs'
4 conclusory statements do not identify with any specificity what,
5 if any, representations were made, when they were made, who made
6 them, or why they were false. These sort of conclusory
7 statements come nowhere close to meeting the pleading standard
8 generally required under Rule 8, let alone the heightened
9 pleading standard of Rule 9(b). See Iqbal, 129 S. Ct. at 1949;
10 Vess, 317 F.3d at 1006. Accordingly, the court will grant
11 defendants' motion to dismiss plaintiffs' fraud cause of action
12 against MERS, Saxon, and Novastar.

13 E. California Civil Code Section 1632

14 Plaintiffs allege that they are primarily Spanish
15 speakers and have limited understanding of English, and that
16 although negotiations over their loan were translated into
17 Spanish, no documents provided to plaintiffs were translated into
18 Spanish in violation of California Civil Code section 1632. (FAC
19 ¶ 131.) California Code section 1632 requires a person in a
20 business who negotiates primarily in Spanish during contract
21 negotiations to provide a translation of the contract or
22 agreement in Spanish for a "loan or extension of credit for use
23 primarily for personal, family or household purposes where the
24 loan or extension of credit is subject to the provisions of
25 Article 7 (commencing with Section 10240)." Cal. Civ. Code. §
26 1632(b)(4). Section 10204 applies to real estate loans secured
27 by real property which are exclusively negotiated by a real
28 estate broker. Cal. Bus. & Prof. Code § 10204. Plaintiffs do

1 not allege that MERS, Saxon, or Novastar are real estate brokers.
2 These parties therefore cannot be liable for disclosure
3 violations at the time of loan origination. Delino v. Platinum
4 Cnty. Bank, 628 F. Supp. 2d 1226, 1234 (S.D. Cal. 2009).

5 Furthermore, plaintiffs fail to so much as specify who
6 they allege their section 1632 claim against. Rather, the
7 Complaint makes general allegations against all defendants
8 without specifying acts by any particular defendant that violated
9 the statute. (See FAC ¶ 132.) MERS, Saxon, and Novastar should
10 not be forced to guess whether they are individually liable for
11 this conduct, and accordingly the court will dismiss plaintiffs'
12 cause of action for violation of section 1632. See Gauvin, 682
13 F. Supp. at 1071. The court also notes that plaintiffs' claim
14 may be time barred by the applicable statute of limitations and
15 that plaintiffs have not alleged that they can tender sufficient
16 funds to effectuate rescission of the loan, as required by section
17 1632(k). See Cal. Code Civ. Pro. § 340(a); Cal Civ. Code §§
18 1632(k), 1691(b); Delino, 628 F. Supp. 2d at 1234.⁶

19 F. Wrongful Foreclosure

20 Plaintiffs' FAC purports to state a claim for "wrongful
21 foreclosure" against Saxon. Plaintiffs have failed to produce
22 any common law rule or authority providing for a claim for
23 "wrongful foreclosure" at law. See Fortaleza v. PNC Fin. Servs.
24 Group, Inc., --- F.Supp.2d ---, No. C 09-2004 PJH, 2009 WL
25 2246212, at *11 (N.D. Cal. July 27, 2009). Wrongful foreclosure

26 _____
27 ⁶ The court finds it unnecessary to resolve MERS and
28 Saxon's argument that plaintiffs' failure to tender the price of
the loan defeats all of plaintiffs' demands for equitable relief,
as all causes of action against MERS and Saxon will be dismissed.

1 is an action in equity, where a plaintiff seeks to set aside a
2 foreclosure sale. See Abdallah v. United Sav. Bank, 43 Cal. App.
3 4th 1101, 1009 (1996); Karlsen v. American Sav. & Loan Assn., 15
4 Cal. App. 3d 112, 117 (1971).

5 Plaintiffs attempt to base this claim first on
6 California Commercial Code section 3301, alleging that Saxon and
7 MERS were not in possession of the Note, and are not
8 beneficiaries, assignees or employees of the entity in possession
9 of the note, and are therefore not "person[s] entitled to
10 enforce" the security interest on the property in accordance with
11 section 3301. However, section 3301 reflects California's
12 adoption of the Uniform Commercial Code, and does not govern non-
13 judicial foreclosures, which is governed by California Civil Code
14 section 2924. See Gaitan v. Mortgage Elec. Registration Sys.,
15 No. EDCV 09-1009 VAP (MANx), 2009 WL 3244729, at *10 (C.D. Cal.
16 Oct. 5, 2009). "The comprehensive statutory framework
17 established to govern nonjudicial foreclosure sales is intended
18 to be exhaustive." Moeller v. Lien, 25 Cal. App. 4th 822, 834
19 (1994). Under California law, there is no requirement for the
20 production of the original note to initiate a non-judicial
21 foreclosure. Oliver v. Countrywide Home Loans, Inc., No. CIV S-
22 0-1381 FCD GGH, 2009 WL 3122573, at *3 (E.D. Cal. Sept. 29, 2009)
23 (citing Alvara v. Aurora Loan Servs., No. C-0-1512 SC, 2009 WL
24 1689640, at *6 (N.D. Cal. Jun. 16, 2009)); Kamp v. Aurora Loan
25 Servs., No. SACV 09-00844-CJC(RNBx), 2009 WL 3177636, at *4,
26 (C.D. Cal. Oct. 1, 2009); Putkkuri v. Recontrust Co., No. 08cv1919
27 WQH (AJB), 2009 WL 32567, at *2 (S.D. Cal. Jan. 5, 2009).
28 Therefore, plaintiffs cannot assert a claim based on Saxon's

1 failure to comply with an inapplicable commercial code when
2 defendants are not required to "produce the note" according to
3 California law.

4 Plaintiffs also base their wrongful foreclosure action
5 on the basis of California Civil Code section 2923.5, arguing
6 that "[d]efendants failed to properly record and give proper
7 notice of the Notice of Default" on their property. (FAC ¶ 138.)
8 The FAC does not indicate whether Saxon failed to properly give
9 notice, and simply makes a general allegation as to all
10 defendants. This general allegation gives Saxon insufficient
11 notice of whether it has committed any conduct that violates
12 section 2923.5, and Saxon should not be forced to guess whether
13 it is individually liable for this conduct. See Gauvin, 682 F.
14 Supp. at 1071.

15 Plaintiffs finally claim that defendants wrongfully
16 foreclosed on plaintiffs' property because they received money
17 from the Troubled Asset Relief Program ("TARP") under the
18 Emergency Economic Stabilization Act ("EESA"), Pub. L. No. 110-
19 343, 122 Stat. 3765 (Oct. 3, 2008), and are therefore subject to
20 the Department of Treasury's guidelines for the Making Homes
21 Affordable Program, H.R. 142 Title I § 109-110, which requires
22 TARP recipients to suspend foreclosures and consider alternative
23 foreclosure prevention options. (FAC ¶¶ 141-143.) However,
24 plaintiffs have not alleged that Saxon received TARP funds,
25 simply pleading that "some or all of the [d]efendants" received
26 such funds. (Id. ¶ 142.) This is insufficient and forces Saxon
27 to guess as to its liability. See Gauvin, 682 F. Supp. at 1071.
28 Accordingly, plaintiffs cannot state a claim upon which relief

1 can be granted and the court will grant Saxon's motion to dismiss
2 plaintiffs' wrongful foreclosure cause of action.

3 H. California's UCL

4 California's UCL, prohibits "any unlawful, unfair, or
5 fraudulent business act or practice." Cal-Tech Commc'ns, Inc. v.
6 L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999). This cause
7 of action is generally derivative of some other illegal conduct
8 or fraud committed by a defendant, and "[a] plaintiff must state
9 with reasonable particularity the facts supporting the statutory
10 elements of the violation." Khoury v. Maly's of Cal., Inc., 14
11 Cal. App. 4th 612, 619 (1993).

12 Plaintiffs' claim under the UCL is vague and
13 conclusory, simply alleging that "[d]efendants' acts as alleged
14 herein constitute unlawful, unfair, and/or fraudulent business
15 practices." (FAC ¶ 111.) Plaintiffs identify no specific
16 practices of MERS or Saxon that they find to be "unfair" or
17 "deceptive" in their cause of action. The court has already
18 indicated it will dismiss plaintiffs' other causes of action for
19 violations of the RFDCPA, RESPA, and section 1632 and negligence,
20 fraud, and wrongful foreclosure against MERS and Saxon for
21 failure to state a claim. Since plaintiffs have failed to state
22 a claim on any of these grounds, and because these grounds appear
23 to be the sole basis for plaintiffs' UCL claim, they by necessity
24 have failed to state a claim against MERS or Saxon under the UCL.
25 However, plaintiffs still have surviving statutory claims against
26 Novastar for violations of TILA and RESPA, which provide a
27 statutory hook for their UCL claim. Accordingly, the court will
28 grant MERS and Saxon's motion to dismiss plaintiffs' UCL cause of

1 action against MERS and Saxson, but will not dismiss the claim
2 against Novastar.

3 IT IS THEREFORE ORDERED that MERS and Saxon's motion to
4 dismiss plaintiffs' claims against MERS and Saxon be, and the
5 same hereby is, GRANTED.

6 IT IS FURTHER ORDERED that Novastar's motion to dismiss
7 plaintiffs' claims against Novastar be, and the same hereby is,
8 GRANTED as to plaintiffs' claims for violation of the RFDCPA,
9 negligence, and violation of California Civil Code section 1632,
10 and DENIED in all other respects.

11 Plaintiffs have twenty days from the date of this Order
12 to file an amended complaint, if they can do so consistent with
13 this Order.

14 DATED: December 2, 2009

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16 WILLIAM B. SHUBB
17 UNITED STATES DISTRICT JUDGE
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