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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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RODOLFO B. BAISA and BELLA G.
BAISA,

NO. CIV. 09-1464 WBS JMF

Plaintiffs,

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS

v.

INDYMAC FEDERAL BANK; MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS, INC.; TRUSTEE CORPS;
BALDWIN MORTGAGE, INC.; ORHAN
TOLU; MYRNA D. BAESA and DOES
1-20 inclusive,

Defendants.

_____ /

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Plaintiffs Rodolfo B. and Bella G Baisa ("the Baisas")
filed this action against Indymac Federal Bank ("Indymac"),¹

¹While "Indymac Federal Bank" was listed as a defendant in
and served with plaintiff's initial complaint, plaintiffs changed
to calling defendant "Indymac Federal Reserve" in their First
Amended Complaint and subsequent filings. In their most recent
filings to this court, plaintiffs revert back to using the name
"Indymac Federal Bank." The court directs all parties to

1 Mortgage Electronic Registration Systems, Inc. ("MERS"), Trustee
2 Corps, Baldwin Mortgage, Inc., C21 Funding, Inc.,² Orhan Tolu,
3 and Myrna D. Baesa alleging various state and federal claims
4 relating to loans they obtained to refinance their home in Fair
5 Oaks, California. MERS moves to dismiss plaintiff's First
6 Amended Complaint ("FAC") pursuant to Federal Rule of Civil
7 Procedure 12(b)(6) for failure to state a claim upon which relief
8 can be granted.³

9 I. Factual and Procedural Background

10 On February 6, 2007, plaintiffs obtained two loans from
11 AEGIS Wholesale Corp. ("AEGIS") to refinance their home. (FAC ¶
12 33; plaintiff's Req. Judicial Notice ("RJN") Ex. 2-3.)⁴ These
13

14 strictly comply with Federal Rule of Civil Procedure 10(a)
15 regarding the proper naming of parties.

16 ²Plaintiffs voluntarily dismissed C21 Funding, Inc. from
17 this action on October 9, 2009. (Docket No. 46.)

18 ³On October 14, 2009, this court requested briefing on the
19 effect of the IndyMac Bancorp, Inc. bankruptcy and the closure of
20 IndyMac Bank, F.S.B., Pasadena, CA by the Office of Thrift
21 Supervision. (Docket No. 48.) After reviewing the briefs, the
22 court has determined that Indymac Federal Bank is unrelated to
23 IndyMac Bancorp, Inc., and that no stay of the proceedings is
24 necessary as to non-bankrupt parties.

25 ⁴Plaintiffs submitted a request for judicial notice in
26 support of the Opposition to the Motion to Dismiss. (Docket No.
27 20.) The request includes copies of the Deed of Trust, Second
28 Deed of Trust, Assignment of Deed, Notice of Default, Notice of
Trustee Sale, and Trustee's Deed Upon Sale. These documents were
recorded in the Sacramento County Recorder's Office. All of
these items are public records and properly subject to judicial
notice. See Hotel Employees & Rest. Employees Local 2 v. Vista
Inn Mgmt. Co., 393 F. Supp. 2d 972, 978 (N.D. Cal. 2005). With
respect to Exhibits 1 and 4-copies of an article titled "The MERS
Fifty Million Mortgage Meltdown" and Indymac's mortgage statement
referencing Loan No. 3002669228-neither of these are matters of
public record suitable for judicial notice. See Fed. R. Evid.
201(b).

1 loans were secured by deeds of trust on the property. ((FAC ¶ 33;
2 RJN Ex. 2-3.) On both loans, Commonwealth Land Title
3 ("Commonwealth") was listed as trustee and AEGIS was listed as
4 Lender. (FAC ¶ 33; RJN Ex. 2-3.) Both Deeds of Trust identified
5 MERS as the nominee for the Lender and Lender's successors and
6 assigns, and as the beneficiary. (FAC ¶ 34; RJN Ex. 2, 3.)

7 MERS facilitates the transfer of mortgage interests by
8 providing an electronic tracking system for the mortgage
9 interests registered in its system. (Opp. Mot. to Dismiss 1: 24-
10 26.) To do this, MERS is the beneficiary of record in a
11 "nominee" capacity for the mortgage lender on all security
12 instruments in its system. (FAC ¶ 10.) When the lender assigns
13 its beneficial interest to another entity within MERS's
14 electronic system, MERS remains the beneficiary of record for
15 that instrument by serving as nominee for the new beneficial
16 interest holder. (Opp. Mot. to Dismiss 6.) MERS remains the
17 beneficiary of record on the deed of trust or mortgage even as
18 the beneficial interest is assigned repeatedly within MERS's
19 electronic system.

20 Approximately two years after they obtained their
21 loans, plaintiffs defaulted, and a Notice of Default and Election
22 to Sell Under Deed of Trust was recorded on April 17, 2009. (FAC
23 ¶ 45; RJN Ex. 6.) MERS allegedly assigned the Note and Deed of
24 Trust for plaintiffs' first loan to Indymac on April 15, 2009,
25 and the assignment was recorded on August 28, 2009 (RJN Ex. 5). A
26 Notice of Trustee's Sale was recorded on August 5, 2009 by
27 Trustee Corps, and a Trustee's Deed Upon Sale was recorded by
28 Trustee Corps on August 28, 2009. (RJN Ex. 7, 8.)

1 In their FAC, plaintiffs assert nine causes of action
2 against seven defendants. MERS's Motion to Dismiss challenges
3 only the causes of action that apply to MERS. (Mot. to Dismiss at
4 1-2.)

5 II. Discussion

6 On a motion to dismiss, the court must accept the
7 allegations in the complaint as true and draw all reasonable
8 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
9 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
10 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
11 (1972). To survive a motion to dismiss, a plaintiff needs to
12 plead "only enough facts to state a claim to relief that is
13 plausible on its face." Bell Atl. Corp. v. Twombly, 127 S. Ct.
14 1955, 1974 (2007). This "plausibility standard," however, "asks
15 for more than a sheer possibility that a defendant has acted
16 unlawfully," and where a complaint pleads facts that are "merely
17 consistent with" a defendant's liability, it "stops short of the
18 line between possibility and plausibility." Ashcroft v. Iqbal,
19 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at
20 556-57).

21 A. Rosenthal Fair Debt Collection Practices Act

22 Plaintiff's first cause of action alleges that MERS and
23 other defendants violated the Rosenthal Fair Debt Collection
24 Practices Act ("RFDCPA" or "Rosenthal Act"), 1 Cal. Civ. Code §§
25 1788 et seq. (FAC 10.) The RFDCPA prohibits a host of unfair and
26 oppressive methods of collecting debt, but to be liable under the
27 RFDCPA a defendant must fall under its definition of "debt
28 collector." Izenberg v. ETS Svcs., LLC, 589 F. Supp. 2d 1193,

1 1199 (C.D. Cal. 2008). A "debt collector" under the RFDCPA is
2 "any person who, in the ordinary course of business, regularly,
3 on behalf of himself or herself or others, engages in debt
4 collection." Cal. Civ. Code § 1788.2(c) (2008).

5 Plaintiffs do not identify in their FAC the sections of
6 the RFDCPA that MERS has allegedly violated and fail to allege
7 facts that would support the inference that MERS is a "debt
8 collector" under the RFDCPA. Instead, their FAC contains only a
9 conclusory restatement of the definition of "debt collector"
10 under the RFDCPA, (FAC ¶ 53.), and lumps MERS, Indymac, and
11 Trustee Corps as "defendants" who threatened to (1) collect on a
12 debt not owed to them, (2) make false reports to credit reporting
13 agencies, (3) foreclose upon a void security interest, (4)
14 foreclose upon a note that they did not possess, (5) falsely
15 state the amount of a debt, (6) increase the amount of a debt by
16 including amounts not permitted by law or contract, and (7) use
17 unfair and unconscionable means to collect a debt. (FAC ¶ 54.)

18 In their Opposition, plaintiffs allege that MERS is a
19 debt collector by virtue of assigning plaintiff's Note and Deed
20 of Trust to Indymac, (Opp. Mot. to Dismiss 12:4-5.), and that
21 their illegal act was participating in a "civil conspiracy" with
22 Indymac by enabling them to collect a debt from plaintiffs. (Id.
23 12:6, :14-17.) Plaintiffs fail to explain how assigning the Deed
24 of Trust constitutes "debt collection" under the RFDCPA.
25 Plaintiffs have therefore failed to plead facts sufficient under
26 Federal Rule of Civil Procedure 8(a)(2) to survive a motion to
27 dismiss. MERS's Motion to Dismiss plaintiffs' cause of action
28 for RFDCPA violations is granted with leave to amend.

1 B. Negligence

2 To prove a cause of action for negligence, plaintiffs
3 must show "(1) a legal duty to use reasonable care; (2) breach of
4 that duty, and (3) proximate [or legal] cause between the breach
5 and (4) the plaintiff[s'] injur[ies]." Mendoza v. City of Los
6 Angeles, 66 Cal. App. 4th 1333, 1339 (Ct. App. 1998) (citation
7 omitted). "The existence of a legal duty to use reasonable care
8 in a particular factual situation is a question of law for the
9 court to decide." Vasquez v. Residential Invs., Inc., 118 Cal.
10 App. 4th 269, 278 (2004). Plaintiffs contend that "[d]efendants
11 breached their duty of care to [p]laintiffs when they failed to
12 maintain the original Mortgage Note, failed to properly create
13 original documents, and failed to make the required disclosures
14 to [p]laintiffs." (FAC ¶ 61.)

15 Plaintiffs' cite no authority for the proposition that
16 MERS owed plaintiffs a duty to maintain documents, perform its
17 administrative duties, or not transfer its interest in the note
18 without proper authority. Absent such authority, a pleading of
19 an assumption of duty by MERS, or a special relationship,
20 plaintiff cannot establish MERS owed a duty of care. See Hardy
21 v. Indymac Federal Bank, No. 09-935, 2009 WL 2985446, at *7 (E.D.
22 Cal. Sept. 15, 2009); Bentham v. Aurora Loan Servs., No. 09-2059,
23 2009 WL 2880232, at *3 (N.D. Cal. Sept. 1, 2009). As the listed
24 nominee and beneficiary under the Deed of Trust, MERS had
25 authority to assign its beneficial interest to another party.
26 See Cal. Civ. Code § 1934 ("Any assignment of a mortgage and any
27 assignment of the beneficial interest under a deed of trust may
28 be recorded, and from the time the same is filed for record

1 operates as constructive notice of the contents thereof to all
2 persons."); Bentham, 2009 WL 2880232 at *3.

3 Additionally, the FAC does not indicate which of the
4 actions apply to MERS. (FAC ¶ 61.) Defendant should not be
5 forced to guess how its conduct was allegedly negligent. See
6 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council
7 of Carpenters, 459 U.S. 519, 526 (1983). While plaintiffs allege
8 more details in their Opposition to the motion to dismiss, the
9 court cannot consider material outside of the complaint on a Rule
10 12(b)(6) motion to dismiss. Anderson v. Angelone, 86 F.3d 932,
11 935 (9th Cir. 1996).

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13 C. Fraud

14 In California, the essential elements of a claim for
15 fraud are "(a) a misrepresentation (false representation,
16 concealment, or nondisclosure); (b) knowledge of falsity (or
17 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d)
18 justifiable reliance; and (e) resulting damage." In re Estate of
19 Young, 160 Cal. App. 4th 62, 79 (2008). Under the heightened
20 pleading requirements for claims of fraud under Federal Rule of
21 Civil Procedure 9(b), "a party must state with particularity the
22 circumstances constituting the fraud." Fed. R. Civ. P. 9(b).
23 The plaintiffs must include the "who, what, when, where, and how"
24 of the fraud. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1006
25 (9th Cir. 2003) (citation omitted). "The plaintiff must set
26 forth what is false or misleading about a statement, and why it
27 is false." Decker v. Glenfed, Inc., 42 F.3d 1541, 1548 (9th Cir.
28 1994). Additionally, "[w]here multiple defendants are asked to

1 respond to allegations of fraud, the complaint must inform each
2 defendant of his alleged participation in the fraud." Ricon v.
3 Reconstrust Co., No. 09cv937, 2009 WL 2407396, at *3 (S.D. Cal.
4 Aug. 4, 2009) (quoting DiVittorio v. Equidyne Extractive Indus.,
5 822 F.2d 1242, 1247 (2d Cir. 1987)).

6 Plaintiffs' fraud allegations do not even come close to
7 surviving a motion to dismiss. Plaintiffs simply allege that
8 "Defendants, and each of them, have made several
9 misrepresentations to Plaintiffs with regard to material facts."
10 (FAC ¶ 83.) Even though plaintiffs reincorporate their earlier
11 allegations to this cause of action, this conclusory statement
12 does not identify with specificity what representations MERS
13 specifically made, when they were made, who made them, or why
14 they were false.

15 The FAC also fails to spell out how MERS participated
16 in the fraud, and instead makes a vague blanket statement that
17 all defendants are made "several misrepresentations" to
18 plaintiff. (Id.) The contention that MERS engaged in a
19 misrepresentation to plaintiffs when it allegedly "illegally
20 assigned [p]laintiffs' Note and Deed to [d]efendant Indymac," is
21 incomprehensible. (Opposition 15:1-2.) It is unclear why such
22 an action is a misrepresentation at all. Indeed, as the listed
23 beneficiary as nominee on the Deed of Trust, MERS had the right
24 to assign its beneficial interest to a third party. Supra
25 section II.B. Second, the conclusory allegations that MERS
26 played a key part in a scheme where loans were pooled, put into
27 trusts, and had securities sold off of them by enabling members
28 to disregard legal requirements for the transfer of an interest

1 in real property are "mere labels and conclusions" that are
2 prohibited by Federal Rule of Civil Procedure 8(a)(2). Bell
3 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). Other
4 courts have summarily rejected the argument that companies like
5 MERS lose their power of sale pursuant to the deed of trust when
6 the original promissory note is assigned to a trust pool. See,
7 e.g., Hafiz v. Greenpoint Mortgage Funding, Inc., No. 09-1729,
8 2009 WL 2137393, at *2 (N.D. Cal. July 16, 2009). "Rule 9(b)
9 does not allow a complaint merely to lump multiple defendants
10 together but require(s) [p]laintiff to differentiate the
11 allegations when suing more than one defendant . . . and inform
12 each defendant separately of the allegations surrounding his
13 alleged participation in the fraud." Swartz v. KPMG, LLP, 476
14 F.3d 756, 764-765 (9th Cir. 2007)(citation omitted).

15 Plaintiffs also do not state how MERS's alleged
16 misrepresentation of its rights as a beneficiary on the deed
17 harmed them. Instead plaintiffs make the conclusory statement
18 that "they were harmed and suffered damages." (FAC ¶ 88.) At
19 the pleading stage, the complaint "must show a cause and effect
20 relationship between the fraud and damages sought; otherwise no
21 cause of action is stated." Small v. Fritz Companies, 30 Cal.
22 4th 167, 202 (2003)(citations omitted). Without such information
23 it is impossible for the court to determine if plaintiffs cannot
24 state a cause of action for fraud because "the damages sustained
25 were otherwise inevitable or due to unrelated causes." Goehring
26 v. Chapman Univ., 121 Cal. App. 4th 353, 365 (2004). Without
27 pleading facts to explain this causal connection, plaintiffs'
28 cause of action must fail. See Iqbal, 129 S. Ct at 1949.

1 Accordingly, plaintiffs' sweeping allegations fail to
2 meet Rule 9(b)'s heightened pleading standard, and MERS's Motion
3 to Dismiss plaintiffs' fraud cause of action is granted with
4 leave to amend.

5 D. California Business & Professions Code § 17200

6 California's Unfair Competition Law ("UCL"), Cal. Bus.
7 & Prof. Code §§ 17200-17210, prohibits "any unlawful, unfair, or
8 fraudulent business act or practice." Cal-Tech Communic'ns, Inc.
9 v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999).

10 "By proscribing 'any unlawful' business practice, section 17200
11 'borrows' violations of other laws and treats them as unlawful
12 practices that the unfair competition law makes independently
13 actionable." Id. (citation omitted). This cause of action is
14 generally derivative of some other illegal conduct or fraud
15 committed by a defendant, and "[a] plaintiff must state with
16 reasonable particularity the facts supporting the statutory
17 elements of the violation." Khoury v. Maly's of Cal., Inc., 14
18 Cal. App. 4th 612, 619 (1993).

19 Plaintiffs' claims under the UCL are vague and
20 conclusory, simply alleging that "[d]efendants acts as alleged
21 herein constitute unlawful, unfair, and/or fraudulent business
22 practices." (FAC ¶ 91.) The court has already indicated it will
23 dismiss plaintiffs' other causes of action for violation of the
24 Rosenthal Act, negligence, and fraud against MERS for failure to
25 state a claim. Since plaintiffs have failed to state a claim on
26 any of these other grounds, and since those appear to be the sole
27 basis for plaintiffs' UCL claim, they by necessity have failed to
28 state a claim under the UCL. Accordingly, MERS's motion to

1 dismiss plaintiffs' UCL cause of action is granted with leave to
2 amend.

3 IT IS THEREFORE ORDERED that defendant MERS's motion to
4 dismiss plaintiffs' First Amended Complaint as against defendant
5 MERS be, and the same hereby is, GRANTED.

6 Plaintiffs have thirty days from the date of this Order
7 to file an amended complaint, if they can do so consistent with
8 this Order.

9 DATED: November 5, 2009

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11 WILLIAM B. SHUBB
12 UNITED STATES DISTRICT JUDGE
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