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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. 2:09-1464 WBS JMF

Plaintiffs,

v.

MEMORANDUM AND ORDER RE:  
MOTION TO DISMISS

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"),  
Mortgage Electronic Registration Systems, Inc. ("MERS"), Trustee  
Corps, Baldwin Mortgage, Inc., Orhan Tolu, and Myrna D. Baesa  
alleging various state and federal claims relating to loans they  
obtained to refinance their home in Fair Oaks, California. In

1 their SAC, plaintiffs assert nine causes of action against six  
2 defendants.

3 MERS moves to dismiss plaintiffs' Second Amended  
4 Complaint ("SAC") pursuant to Federal Rule of Civil Procedure  
5 12(b)(6) for failure to state a claim upon which relief can be  
6 granted. MERS's Motion to Dismiss challenges only the causes of  
7 action that apply to MERS. (Mot. to Dismiss at 1.) Plaintiffs  
8 did not oppose the motion. Nor did plaintiffs file a statement  
9 of non-opposition pursuant to Eastern District Local Rule 230(c).  
10 Therefore, the hearing date of February 1, 2010 is VACATED  
11 pursuant to Eastern District Local Rule 230(c), and the court  
12 takes defendant's motion to dismiss under submission without oral  
13 argument.

14 On a motion to dismiss, the court must accept the  
15 allegations in the complaint as true and draw all reasonable  
16 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416  
17 U.S. 232, 236 (1974), overruled on other grounds by Davis v.  
18 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322  
19 (1972). To survive a motion to dismiss, a plaintiff needs to  
20 plead "only enough facts to state a claim to relief that is  
21 plausible on its face." Bell Atl. Corp. v. Twombly, 127 S. Ct.  
22 1955, 1974 (2007). This "plausibility standard," however, "asks  
23 for more than a sheer possibility that a defendant has acted  
24 unlawfully," and where a complaint pleads facts that are "merely  
25 consistent with" a defendant's liability, it "stops short of the  
26 line between possibility and plausibility." Ashcroft v. Iqbal,  
27 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at  
28 556-57).

1           A.     Rosenthal Fair Debt Collection Practices Act

2           Plaintiff's first cause of action alleges that MERS and  
3 other defendants violated the Rosenthal Fair Debt Collection  
4 Practices Act ("RFDCPA" or "Rosenthal Act"), 1 Cal. Civ. Code §§  
5 1788 et seq. (SAC 9.) This cause of action, however, continues  
6 to suffer from the same shortfalls this court identified in its  
7 November 6, 2009 Order granting defendants' motion to dismiss.  
8 (See Docket No. 61 at 4-5.) Plaintiffs do not plead facts  
9 necessary to support the inference that MERS is a "debt  
10 collector" under the RFDCPA; specifically, that MERS engages in  
11 "debt collection," that the deed of trust memorializes a  
12 "consumer credit transaction," and that the amount owed under the  
13 deed of trust is a "consumer debt" according to the RFDCPA. See  
14 Cal. Civ. Code § 1788.2(b)-(f); Izenberg v. ETS Svcs., LLC, 589  
15 F. Supp. 2d 1193, 1199 (C.D. Cal. 2008) ("Because foreclosure  
16 does not constitute debt collection under the RFDCPA, it does not  
17 appear that plaintiff can cure this deficiency."); see also Ines  
18 v. Countrywide Home Loans, Inc., No. 08-1267, 2009 WL 4791863, at  
19 \*2 (S.D. Cal. Nov. 3, 2008) ("Mortgage companies collecting debts  
20 are not 'debt collectors'") (quoting Williams v. Countrywide Home  
21 Loans, Inc., 504 F. Supp. 2d 176, 190 (S.D. Tex. 2007)).

22           Plaintiffs also continue to impermissibly lump MERS and  
23 other defendants together when outlining alleged Rosenthal Act  
24 violations. (See SAC ¶ 54.) Plaintiffs have amended their  
25 Rosenthal Act claim to include the arguments originally in their  
26 Opposition to MERS's first motion to dismiss, and allege that  
27 MERS is not a beneficiary under the deed of trust as a matter of  
28 law, exceeded its powers by assigning its beneficial interest to

1 Indymac, failed to perform its "duties" to plaintiffs in a  
2 reasonable manner. None of these activities are even remotely  
3 related to the prohibited acts of "debt collection" under the  
4 RFDCPA. Plaintiffs vaguely assert that MERS's actions were "in  
5 furtherance of" a course of conduct constituting debt collection.  
6 The sections of the California Civil Code cited by plaintiffs in  
7 their SAC as RFDCPA sections allegedly violated by MERS merely  
8 recite legislative findings regarding the need to legislate  
9 against unfair debt collection practices. See Cal. Civ. Code §  
10 1788.1(a)(1)-(2). Such vague allegations fail to state a claim  
11 under the Rosenthal Act and are insufficient to survive a motion  
12 to dismiss.

13 B. Negligence

14 To prove a cause of action for negligence, plaintiffs  
15 must show "(1) a legal duty to use reasonable care; (2) breach of  
16 that duty, and (3) proximate [or legal] cause between the breach  
17 and (4) the plaintiff[s'] injur[ies]." Mendoza v. City of Los  
18 Angeles, 66 Cal. App. 4th 1333, 1339 (Ct. App. 1998) (citation  
19 omitted). "The existence of a legal duty to use reasonable care  
20 in a particular factual situation is a question of law for the  
21 court to decide." Vasquez v. Residential Invs., Inc., 118 Cal.  
22 App. 4th 269, 278 (2004).

23 This court's November 6, 2009 Order stated that  
24 plaintiffs must establish that MERS owed them a duty of care by  
25 showing MERS owed plaintiffs a duty of care, an assumption of  
26 duty by MERS, or a special relationship. (See Docket No. 61 at  
27 6.) Instead of remedying this failure in their SAC, plaintiffs  
28 again simply assert that MERS owed them a duty of care. (SAC ¶

1 61.) Plaintiffs also continue to assert, contrary to this  
2 court's November 6, 2009 Order, that MERS lacked authority to  
3 assign its beneficial interest to Indymac. (Id.; see Docket No.  
4 61 at 6.) Finally, plaintiffs continue to improperly allege  
5 facts as against all defendants, forcing MERS to guess how its  
6 conduct was allegedly negligent. (SAC ¶ 21.) Plaintiffs have  
7 clearly failed to correct the deficiencies of this cause of  
8 action that the court outlined in its prior order, and this cause  
9 of action cannot survive a motion to dismiss.

10 C. California Business & Professions Code § 17200

11 California's Unfair Competition Law ("UCL"), Cal. Bus.  
12 & Prof. Code §§ 17200-17210, prohibits "any unlawful, unfair, or  
13 fraudulent business act or practice." Cal-Tech Communic'ns, Inc.  
14 v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999).  
15 "By proscribing 'any unlawful' business practice, section 17200  
16 'borrows' violations of other laws and treats them as unlawful  
17 practices that the unfair competition law makes independently  
18 actionable." Id. (citation omitted). This cause of action is  
19 generally derivative of some other illegal conduct or fraud  
20 committed by a defendant, and "[a] plaintiff must state with  
21 reasonable particularity the facts supporting the statutory  
22 elements of the violation." Khoury v. Maly's of Cal., Inc., 14  
23 Cal. App. 4th 612, 619 (1993).

24 Plaintiffs' UCL claim contains the same vague  
25 allegations that were present in their FAC. (FAC ¶ 91.) The  
26 court has already indicated it will dismiss plaintiffs' other  
27 causes of action for violation of the Rosenthal Act, and  
28 negligence against MERS for failure to state a claim. Since

1 plaintiffs have failed to state a claim on any of these other  
2 grounds, and since those appear to be the sole basis for  
3 plaintiffs' UCL claim, they by necessity have failed to state a  
4 claim under the UCL. Accordingly, defendant MERS's motion to  
5 dismiss plaintiffs' UCL cause of action will be granted.

6 D. Leave To Amend

7 Counsel for plaintiffs has failed to comply with  
8 Eastern District Local Rule 230(c) by filing neither an  
9 opposition nor a notice of non-opposition to defendants' motion  
10 to dismiss the SAC with prejudice. "Valid reasons for denying  
11 leave to amend include undue delay, bad faith, prejudice, and  
12 futility." Cal. Architectural Bldg. Prods. v. Franciscan  
13 Ceramics, 818 F.2d 1466, 1472 (9th Cir. 1988). Furthermore,  
14 while leave to amend must be freely given, the court is not  
15 required to allow futile amendments. See DeSoto v. Yellow  
16 Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992);  
17 Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau, 701 F.2d  
18 1276, 1293 (9th Cir. 1983); see also Reddy v. Litton Indus.,  
19 Inc., 912 F.2d 291, 296-97 (9th Cir. 1990); Rutman Wine Co. v. E.  
20 & J. Gallo Winery, 829 F.2d 729, 738 (9th Cir. 1987). The  
21 court's November 6, 2009 Order specifically advised plaintiffs of  
22 the pleading defects and what plaintiff needed to plead to  
23 rectify them, and gave plaintiff the opportunity to file the SAC.  
24 As explained above, plaintiffs SAC fails to correct any of these  
25 defects.

26 It is clear that further amendment will not help  
27 plaintiffs adequately plead their causes of action against MERS.  
28 Since the deficiencies which the court pointed out in its

1 November 6, 2009 Order have not been corrected, the court can  
2 only conclude that plaintiffs are either unwilling or unable to  
3 properly plead claims for Rosenthal Act and UCL violations and  
4 for negligence. Cf. Garcia ex rel. Marin v. Clovis Unified  
5 School Dist., No. 08-1924, 2009 WL 2982900, at \*9 (E.D. Cal.  
6 Sept. 14, 2009). Dismissal without leave to amend is therefore  
7 appropriate.

8 E. Sanctions

9 If plaintiff's attorney could not draft a complaint  
10 that contained a single claim upon which relief could be granted  
11 against MERS, he could have at least complied with Local Rule  
12 230(c) and told the court he had no opposition to the granting of  
13 defendant's motion. Instead, as he has done before,<sup>1</sup> he ignored  
14 the Local Rule and did nothing in response to the motion to  
15 dismiss plaintiffs' complaint. Counsel's failure to comply with  
16 Local Rule 230(c) and timely file any response to MERS's motion  
17 to dismiss is inexcusable, and has inconvenienced the court by  
18 forcing it to nevertheless examine the motion on the merits.

19 Local Rule 110 authorizes the court to impose sanctions  
20 for "[f]ailure of counsel or of a party to comply with these  
21 Rules." Therefore, the court will sanction plaintiff's counsel,  
22 Michael J.M. Brook, \$200.00 payable to the Clerk of the Court  
23 within ten days from the date of this Order, unless he shows good  
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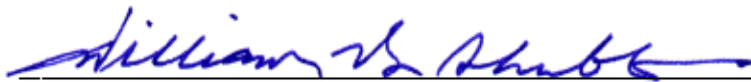
25 <sup>1</sup> This is not the first time Mr. Brook has failed to  
26 comply with the Local Rules. In Raya v. Wachovia Mortgage et  
27 al., No. 2:09-1325 (E.D. Cal.) (Docket No. 14), and in Bledea v.  
28 Wash. Mut. Home Loans et al., No. 2:09-1490 (E.D. Cal.) (Docket  
No. 24), Mr. Brook failed to timely file an opposition or notice  
of non-opposition to motions to dismiss. Such repeated disregard  
for the Local Rules should not go unsanctioned.

1 cause for his failure to comply with the Local Rules.

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

5 IT IS FURTHER ORDERED that within ten days of the date  
6 of this Order Michael J.M. Brook shall either (1) pay sanctions  
7 of \$200.00 to the Clerk of the Court, or (2) submit a statement  
8 of good cause explaining his failure to comply with Local Rule  
9 230(c).

10 DATED: February 2, 2010

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12 WILLIAM B. SHUBB  
13 UNITED STATES DISTRICT JUDGE  
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