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

CAROLINA JOHNSON and CLAUDE	)	2:10-cv-02567-GEB-KJM
COLWELL,	)	
	)	
Plaintiffs,	)	<u>ORDER GRANTING IN PART AND</u>
	)	<u>DENYING IN PART BANK UNITED'S</u>
v.	)	<u>MOTION TO DISMISS FIRST</u>
	)	<u>AMENDED COMPLAINT AND DENYING</u>
BANK UNITED,	)	<u>MOTION FOR A MORE DEFINITE</u>
	)	<u>STATEMENT</u>
Defendant.	)	
_____	)	

Defendant Bank United ("Bank United") moves for dismissal of Plaintiffs' First Amended Complaint ("FAC") under Federal Rule of Civil Procedure ("Rule") 12(b)(6), arguing it fails to state a claim upon which relief can be granted. Bank United seeks in the alternative a more definite statement of the allegations in the FAC under Rule 12(e). However, because of the rulings below, only the 12(b)(6) motion is addressed since only Plaintiff's violation of California Civil Code section 2923.5 claim survives Bank United's 12(b)(6) motion and, as to that claim, Defendant has not shown a more definite statement is required. Therefore, Defendant's motion for a more definite statement is denied.

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## I. LEGAL STANDARD

To avoid having a complaint dismissed under Rule 12(b)(6), a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, --- U.S. ----, 129 S. Ct. 1937, 1949 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Moss v. United States Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal, 129 S. Ct. at 1951).

When determining whether a claim has facial plausibility, "[w]e accept as true all well-pleaded allegations of material fact, and construe them in the light most favorable to the non-moving party." Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010). However, this "tenet . . . is inapplicable to legal conclusions." Iqbal, 129 S. Ct. at 1949. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Id. (quoting Twombly, 550 U.S. at 555, 557).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss, 572 F.3d at 969 (quoting Twombly, 550 U.S. at 557).

1 **II. REQUEST FOR JUDICIAL NOTICE**

2 Bank United seeks to support its dismissal motion with the  
3 following documents of which it requests judicial notice be taken of the  
4 following bankruptcy court documents: Plaintiff's Chapter 13 Bankruptcy  
5 Petition, which was filed on October 13, 2010 in the United State  
6 Bankruptcy Court, Eastern District of California, and a copy of the  
7 docket for that action which was printed on February 28, 2011. (Def.'s  
8 Req. for Judicial Notice ("RJN") Ex. 11.) This request is granted.

9 Bank United also requests that judicial notice be taken of  
10 five documents recorded with the El Dorado County Recorder: a Deed of  
11 Trust recorded on December 15, 2005; an Assignment of Deed of Trust  
12 recorded on February 8, 2010; a Substitution of Trustee recorded on  
13 February 8, 2010; a Notice of Default and Election to Sell under Deed of  
14 Trust, recorded on February 8, 2010; and a Notice of Trustee's Sale  
15 recorded on August 9, 2010. (Mot. 9:3-9; ECF No. 4, Exs. 3, 6-9.) Since  
16 these documents are publically recorded, they may be judicially noticed  
17 and the request is granted. See W. Fed. Sav. & Loan Ass'n v. Heflin  
18 Corp., 797 F. Supp. 790, 792 (1992) (taking judicial notice of documents  
19 in a county's public record, including deeds of trust).

20 **III. BACKGROUND**

21 Plaintiffs allege in their FAC that they are "the owners and  
22 purchasers of real property located at 4100[ B]estafa Court,  
23 Placerville, California[.]" (FAC ¶ 1.) They purchased their home in or  
24 about 1999, and "refinance[d] their home" with Bank United F.S.B. in  
25 2005 (the "subject loan"). Id. ¶¶ 14-17; ECF No. 4, Ex. 3. The subject  
26 loan was memorialized in a Promissory Note secured by a Deed of Trust on  
27 the property. (ECF No. 4, Ex. 3.) This Deed of Trust identified Bank  
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1 United F.S.B. as the lender and Esther Santos, SR VP of National Bank  
2 Operations, Bank United F.S.B., as the trustee. Id.

3 An Assignment of Deed of Trust dated January 8, 2010, assigned  
4 and transferred to Bank United "all beneficial interest under [the] Deed  
5 of Trust dated 12-06-2005, executed by [Plaintiffs] Claude Colwell and  
6 Carolina Johnson[.]" Id. Ex. 6. Bank United substituted Robert E. Weiss,  
7 Incorporated, as trustee of the Deed of Trust on February 3, 2010. Id.  
8 Ex. 7. Both the Assignment of the Deed of Trust and Substitution of  
9 Trustee were recorded with the El Dorado County Recorder on February 8,  
10 2010. Id. Exs. 6-7.

11 Plaintiffs allege Bank United improperly initiated foreclosure  
12 activities against them when it did not have the power and right to  
13 foreclose on their property and "Plaintiff cannot ascertain who is the  
14 true 'beneficiary' and proper 'enforcer' of the rights claimed under the  
15 Note." Id. ¶¶ 53, 69-70, 83.

#### 16 IV. DISCUSSION

17 Plaintiffs' FAC is comprised of six state claims, five of  
18 which are alleged against Bank United; the claim not alleged against the  
19 movant is Plaintiffs' fourth claim, which is a negligence claim alleged  
20 only against dismissed Defendants Bank United F.S.B. and Freestand  
21 Financial. (FAC ¶¶ 92-99.)

##### 22 A. Deceit, Fraud, and Constructive Fraud

23 Bank United seeks dismissal of Plaintiffs' deceit, fraud, and  
24 constructive fraud claims, arguing they fail to comply with Rule 9(b)'s  
25 heightened pleading standard. (Mot. 14:16-15:9.)

26 This standard applies to "averments of fraud" in all civil  
27 cases, regardless of whether or not "fraud" is an essential element of  
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1 a claim. Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1103-1105 (9th Cir.  
2 2003).

3 In cases where fraud is not a necessary  
4 element of a claim, a plaintiff may choose  
5 nonetheless to allege in the complaint that the  
6 defendant has engaged in fraudulent conduct. In  
7 some cases, the plaintiff may allege a unified  
8 course of fraudulent conduct and rely entirely on  
9 that course of conduct as the basis of a claim. In  
10 that event, the claim is said to be "grounded in  
11 fraud" or to "sound in fraud," and the pleading of  
12 that claim as a whole must satisfy the  
13 particularity requirement of Rule 9(b).

14 In other cases, however, a plaintiff may  
15 choose not to allege a unified course of fraudulent  
16 conduct in support of a claim, but rather to allege  
17 some fraudulent and some non-fraudulent conduct. In  
18 such cases, only the allegations of fraud are  
19 subject to Rule 9(b)'s heightened pleading  
20 requirements.

21 Id. (citations omitted).

22 Rule 9(b) provides that "[i]n alleging fraud or mistake, a  
23 party must state with particularity the circumstances constituting fraud  
24 or mistake." The required specificity includes the "time, place, and  
25 specific content of the false representations as well as the identities  
26 of the parties to the misrepresentations." Swartz v. KPMG LLP, 476 F.3d  
27 756, 764 (9th Cir. 2007) (quotation omitted).

28 Plaintiffs' deceit claim is premised on the following  
allegations:

[Defendant] knew Plaintiffs were unaware of,  
and could not reasonably have discovered, material  
information about the right of foreclosure because  
only [Defendant] and the Note holder have knowledge  
of the whereabouts of the original Note.

[Defendant's] assertions of the power to  
foreclose deceived Plaintiffs and, as such,  
[Defendant] was under a duty to inform Plaintiffs  
of the true facts.

(FAC ¶¶ 69-70.)

1 Plaintiffs' fraud and constructive fraud claims are premised  
2 on the following allegations:

3 The suppression of the facts surrounding  
4 [Defendant's] lack of the right to foreclose was  
likely to, and did, mislead Plaintiffs . . . .

5 Plaintiffs, at the time of these  
6 misrepresentations, failures to disclose  
information, and suppression of information . . .  
7 were ignorant of the facts [Defendant] suppressed  
and failed to disclose. If Plaintiffs had been  
8 aware of such facts, Plaintiffs would not have . .  
justifiably rel[ied] on [Defendant's]  
9 representations and refuse[d] to oppose  
[Defendant's] Notice of Default and claim to  
10 foreclose.

11 Id. ¶¶ 83, 85, 89-90.

12 These "averments of fraud" do not provide the specificity  
13 required by Rule 9(b) since they do not provide Bank United with  
14 sufficient detail concerning the time, date, and place of the alleged  
15 misrepresentations and the identity of who made the alleged  
16 misrepresentations. See Kearns v. Ford Motor Co., 567 F.3d 1120, 1125-27  
17 (9th Cir. 2009) (holding allegations concerning false representations  
18 and non-disclosures "are grounded in fraud" and are subject to Rule  
19 9(b)). Therefore, Plaintiffs' deceit, fraud, and constructive fraud  
20 claims against Bank United are dismissed.

21 **B. California Business & Professions Code section 17200**

22 Bank United also seeks dismissal of Plaintiffs' California  
23 Business and Professions Code section 17200 ("section 17200") claim,  
24 arguing "Plaintiffs have not alleged any 'unfair' business practice."  
(Mot. 16:6-7.)

25 California's Unfair Competition Law, section 17200, prohibits  
26 "unlawful, unfair or fraudulent business" acts and practices. CAL. BUS.  
27 & PROF. CODE § 17200. Plaintiffs allege in their section 17200 claim that  
28 "Defendants' acts . . . constitute unlawful, unfair and/or fraudulent

1 business practices, as defined by [section 17200]." (FAC ¶ 128.)  
2 Plaintiffs further allege that "[a]s a result of Defendants' wrongful  
3 conduct, Plaintiffs have suffered and continue to suffer damages and  
4 injuries in an amount subject to proof at trial." Id. ¶ 129.

5 These allegations are vague and conclusory. Further, these  
6 allegations do not differentiate between the actions of Bank United and  
7 the dismissed Defendants. Therefore this claim is dismissed.

8 **C. California Civil Code section 2923.5**

9 Bank United also seeks dismissal of Plaintiffs' California  
10 Civil Code section 2923.5 ("section 2923.5") claim. (Mot. 18:19-22.)  
11 Plaintiffs allege in this claim: "[p]rior to 30 days before the . . .  
12 Notice of Default was filed[,] plaintiffs were never contacted in person  
13 or by telephone . . . [to] assess their financial situation[ and] . . .  
14 explore options to avoid foreclosure[,] and "defendant did not conduct  
15 due diligence in attempting to contact plaintiff as required by section  
16 2923.5(g) [.]" (FAC ¶¶ 134, 136.)

17 Section 2923.5 prescribes: "[a] mortgagee, trustee,  
18 beneficiary, or authorized agent may not file a notice of default . . .  
19 until 30 days after initial contact is made as required by paragraph (2)  
20 or 30 days after satisfying the due diligence requirements as described  
21 in subdivision (g)." CAL. CIV. CODE Section 2923.5(a)(1). However, this  
22 contact requirement does not apply if "[a] case has been filed by the  
23 borrower under Chapter 7, 11, 12, or 13 of Title 11 of the United States  
24 Code and the bankruptcy court has not entered an order closing or  
25 dismissing the bankruptcy case, or granting relief from a stay of  
26 foreclosure." CAL. CIV. CODE § 2923.5(h)(3).

27 Bank United argues that while Plaintiffs' bankruptcy is  
28 pending, "the provisions of [section 2923.5] do not apply." (Mot. 17:20-

1 22.) Bank United also argues "Plaintiffs have elected the bankruptcy  
2 code protection for avoidance of the foreclosure sale and Plaintiffs no  
3 longer have standing to assert the private right of action under section  
4 2923.5." (Reply 3:25-27.) Plaintiffs counter that "[t]he fact that a  
5 foreclosure is not taking place because . . . [Plaintiffs' bankruptcy  
6 is] still pending does not detract from the cause of action that 2923.5  
7 was violated." (Opp'n 2:13-14.)

8 Plaintiffs filed for bankruptcy after the Notice of Default  
9 was filed. (RJN Ex. 11; ECF No. 4, Ex. 8.) Therefore, Bank United has  
10 not shown the inapplicability of the notice requirement prescribed in  
11 section 2923.5(a)(1), and this portion of the dismissal motion is  
12 denied.

13 **D. Leave to Amend**

14 Bank United argues that all of Plaintiffs' dismissed claims  
15 should "be dismissed with prejudice." (Reply 5:9-12.) Plaintiffs do not  
16 request leave to amend; however, if a Rule 12(b)(6) motion is granted,  
17 the "district court should grant leave to amend even if no request to  
18 amend the pleadings is made, unless it determines that the pleading  
19 could not possibly be cured by the allegation of other facts.'" Lopez v.  
20 Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting Doe v. U.S., 58 F.3d  
21 484, 497 (9th Cir. 1995)).

22 Plaintiffs indicate in their opposition that they could  
23 adequately plead their deceit and fraud claims; therefore, Plaintiffs  
24 are granted leave to amend these three claims. However, the Court  
25 previously dismissed Plaintiffs' section 17200 claim for the same  
26 reasons stated in this Order, and it is clear "any amendment would be  
27 futile, [and] there [is] no need to prolong the litigation by permitting  
28 further amendment." Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1039



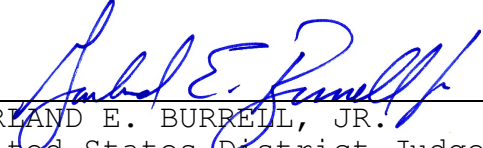
1 (9th Cir. 2002). Therefore, Plaintiffs' claim for violation of  
2 California Business and Professions Code section 17200 is dismissed with  
3 prejudice.

4 **V. CONCLUSION**

5 For the stated reasons, Bank United's motion to dismiss is  
6 GRANTED IN PART AND DENIED IN PART and its motion for a more definite  
7 statement is DENIED. Plaintiffs are granted fourteen (14) days from the  
8 date on which this order is filed to file a Second Amended Complaint  
9 addressing the deficiencies of any claim dismissed without prejudice.

10 Further, Plaintiffs are notified that any dismissed claim may  
11 be dismissed with prejudice under Federal Rule of Civil Procedure 41(b)  
12 if Plaintiffs fail to file an amended complaint within the prescribed  
13 time period.

14 Dated: October 7, 2011

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GARLAND E. BURRELL, JR.  
United States District Judge