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

Carolina Johnson and Claude Colwell,	)	
	)	2:10-cv-02567-GEB-KJM
Plaintiffs,	)	
	)	<u>ORDER GRANTING MOTION TO DISMISS AND DENYING MOTION FOR A MORE DEFINITE STATEMENT*</u>
v.	)	
Bank United F.S.B., Bank United, Freestand Financial, and Does 1-50, inclusive,	)	
	)	
Defendants.	)	
_____	)	

Defendant Bank United ("Defendant") moves for dismissal of Plaintiffs' Complaint under Federal Rule of Civil Procedure ("Rule") 12(b)(6), arguing the Complaint fails to state a claim upon which relief can be granted. In the alternative, Defendant moves for a more definite statement under Rule 12(e).

**I. PLAINTIFFS' RESPONSE TO ORDER TO SHOW CAUSE**

Plaintiffs did not file an opposition or statement of non-opposition in response to Defendant's motion as required by Local Rule 230(c). Therefore, an order issued on November 12, 2010, continuing the hearing on the motion and requiring Plaintiffs "to file an opposition or

\_\_\_\_\_

\* This matter is deemed suitable for decision without oral argument. E.D. Cal. R. 230(g).

1 statement of non-opposition" and to show cause why sanctions should not  
2 be imposed for failing to respond to the motion. (ECF No. 5.)

3 Plaintiffs filed both an opposition to Defendant's motion and  
4 a "Response to Order to Show Cause." (ECF Nos. 6, 7.)

## 5 II. LEGAL STANDARD

6 A Rule 12(b)(6) dismissal motion tests the legal sufficiency  
7 of the claims alleged in the complaint. Novarro v. Black, 250 F.3d 729,  
8 732 (9th Cir. 2001). A pleading must contain "a short and plain  
9 statement of the claim showing that the pleader is entitled to relief  
10 . . . ." Fed. R. Civ. P. 8(a)(2). The complaint must "give the  
11 defendant fair notice of what the [plaintiff's] claim is and the grounds  
12 upon which relief rests . . . ." Bell Atlantic Corp. v. Twombly, 550  
13 U.S. 544, 555 (2007).

14 Dismissal of a claim under Rule 12(b)(6) is appropriate only  
15 where the complaint either 1) lacks a cognizable legal theory, or 2)  
16 lacks factual allegations sufficient to support a cognizable legal  
17 theory. Balistreri v. Pacific Police Dept., 901 F.2d 696, 699 (9th Cir.  
18 1988). To avoid dismissal, a plaintiff must allege "only enough facts  
19 to state a claim to relief that is plausible on its face." Twombly, 550  
20 U.S. at 547.

21 In deciding a Rule 12(b)(6) motion, the material allegations  
22 of the complaint are accepted as true and all reasonable inferences are  
23 drawn in favor of the plaintiff. See al-Kidd v. Ashcroft, 580 F.3d 949,  
24 956 (9th Cir. 2009). However, conclusory statements and legal  
25 conclusions are not entitled to a presumption of truth. See Ashcroft v.  
26 Iqbal, 129 S. Ct. 1937, 1949-50 (2009); Twombly, 550 U.S. at 555. "In  
27 sum, for a complaint to survive a motion to dismiss, the nonconclusory  
28 'factual content,' and reasonable inferences from that content, must be

1 plausibly suggestive of a claim entitling the plaintiff to relief." Moss  
2 v. United States Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009).

### 3 **III. REQUEST FOR JUDICIAL NOTICE**

4 Defendant's motion includes a request that the Court take  
5 judicial notice of a number of documents recorded with the El Dorado  
6 County Recorder: a Deed of Trust recorded on December 15, 2005; an  
7 Assignment of Deed of Trust recorded on February 8, 2010; a Substitution  
8 of Trustee recorded on February 8, 2010; a Notice of Default and  
9 Election to Sell under Deed of Trust, recorded on February 8, 2010; and  
10 a Notice of Trustee's Sale recorded on August 9, 2010. (Def.'s Req. for  
11 Judicial Notice ("RJN") Exs. 3, 6-9.)

12 "As a general rule, a district court may not consider any  
13 material beyond the pleadings in ruling on a Rule 12(b)(6) motion." Lee  
14 v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001) (quotations  
15 and citation omitted). However, a court may consider matters properly  
16 subject to judicial notice. Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th  
17 Cir. 2007). A matter may be judicially noticed if it is either  
18 "generally known within the territorial jurisdiction of the trial court"  
19 or "capable of accurate and ready determination by resort to sources  
20 whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

21 Since these five documents are publically recorded, they are  
22 capable of accurate determination and may be judicially noticed. See W.  
23 Fed. Sav. & Loan Ass'n v. Heflin Corp., 797 F. Supp. 790, 792 (1992)  
24 (taking judicial notice of documents in a county's public record,  
25 including deeds of trust). Therefore, this judicial notice request is  
26 granted.<sup>1</sup>

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27  
28 <sup>1</sup> Defendant requested other documents be judicially noticed.  
(continued...)

1 **IV. BACKGROUND**

2 Plaintiffs are "the owners and purchasers of real property  
3 located at 4100 Bestafa Court, Placerville, CA." (Compl. ¶ 1.) They  
4 purchased their home in or about 1999, and "refinance[d] their home"  
5 with Defendant Bank United F.S.B. in 2005. Id. ¶¶ 42, 44, RJN, Ex. 3.  
6 The 2005 loan (the "subject loan") was memorialized in a Promissory Note  
7 secured by a Deed of Trust on the property. (RJN, Ex. 3.) The Deed of  
8 Trust on the subject loan identified Bank United F.S.B. as the lender  
9 and Esther Santos, SR VP of National Bank Operations, Bank United  
10 F.S.B., as the trustee. Id.

11 An Assignment of Deed of Trust dated January 8, 2010, assigned  
12 and transferred to Defendant "all beneficial interest under [the] Deed  
13 of Trust dated 12-06-2005, executed by [Plaintiffs] Claude Colwell and  
14 Carolina Johnson . . . ." (RJN, Ex. 6.) Defendant substituted Robert E.  
15 Weiss, Incorporated, as trustee of the Deed of Trust on February 3,  
16 2010. (RJN 7.) Both the Assignment of Deed of Trust and Substitution of  
17 Trustee were recorded with the El Dorado County Recorder on February 8,  
18 2010. (RJN 6-7.)

19 Plaintiffs allege that the lender, Bank United F.S.B., and the  
20 mortgage broker, Freestand Financial, engaged in a "predatory lending  
21 scheme" in originating the subject loan. (Compl. ¶ 12.) For example,  
22 Plaintiffs allege the broker knowingly overstated their income in the  
23 loan application; Defendants were aware that the subject loan "was  
24 against [Plaintiffs'] interests[;]" and Defendants failed to disclose a  
25 number of the subject loan's terms, such as its interest rate, the  
26

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27 <sup>1</sup>(...continued)

28 However, since Defendant has failed to show how these documents are relevant to its motion, this portion of the request is denied.

1 prepayment penalties and the maximum amount to which the loan could  
2 rise. Id. ¶¶ 46, 50, 52. Plaintiffs also allege Defendant improperly  
3 initiated foreclosure activities against them when it did not have the  
4 power and right to foreclose on their property. Id. ¶¶ 98, 114, 151-52,  
5 167-69.

## 6 **V. DISCUSSION**

7 Plaintiffs allege ten state claims in their Complaint, nine of  
8 which are alleged against Defendant. Defendant challenges the  
9 sufficiency of every claim alleged against it.

### 10 **A. Deceit, Fraud, Constructive Fraud and Conspiracy to Defraud**

11 Defendant seeks dismissal of Plaintiffs' first four claims, in  
12 which Plaintiffs allege deceit, fraud, constructive fraud, and civil  
13 conspiracy to defraud, arguing they fail to comply with Rule 9(b)'s  
14 heightened pleading standard. (Mot. 12:1-3, 12:23-24, 13:6-7.)

15 Rule 9(b)'s heightened pleading standard applies to "averments  
16 of fraud" in all civil cases, regardless of whether or not "fraud" is an  
17 essential element of the claim. Vess v. Ciba-Geigy Corp., 317 F.3d  
18 1097, 1103-1105 (9th Cir. 2003). As explained by the Ninth Circuit in  
19 Vess:

20 In cases where fraud is not a necessary  
21 element of a claim, a plaintiff may choose  
22 nonetheless to allege in the complaint that the  
23 defendant has engaged in fraudulent conduct. In  
24 some cases, the plaintiff may allege a unified  
25 course of fraudulent conduct and rely entirely on  
26 that course of conduct as the basis of a claim. In  
27 that event, the claim is said to be "grounded in  
28 fraud" or to "sound in fraud," and the pleading of  
that claim as a whole must satisfy the  
particularity requirement of Rule 9(b).

In other cases, however, a plaintiff may  
choose not to allege a unified course of fraudulent  
conduct in support of a claim, but rather to allege  
some fraudulent and some non-fraudulent conduct. In  
such cases, only the allegations of fraud are

1 subject to Rule 9(b)'s heightened pleading  
2 requirements.

3 Id. (citations omitted).

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

10 Plaintiffs' claims for deceit, fraud, constructive fraud and  
11 civil conspiracy to defraud against Defendant are based upon the  
12 following allegations:

13 [Defendant] falsely represented to Plaintiffs  
14 that [it] had the power and right to foreclose on  
15 the Subject Property and concealed that they did  
16 not have the power and right to foreclose on the  
17 Subject Property.

18 On February 3, 2010, [Defendant] claimed to  
19 have the power to foreclose on the Subject Property  
20 and on February 8, 2010, filed and served a Notice  
21 of Default asserting the right to foreclose.

22 (Compl. ¶¶ 98-99, 114-115, 123, 126-127, 132.)

23 These "averments of fraud" do not provide the specificity  
24 required by Rule 9(b). See Kearns v. Ford Motor Co., 567 F.3d 1120,  
25 1125-27 (9th Cir. 2009) (holding allegations concerning false  
26 representations and non-disclosures "are grounded in fraud" and are  
27 subject to Rule 9(b)). They do not provide sufficient detail concerning  
28 the time, date, and place of the alleged misrepresentations or the  
identity of who made them. Therefore, Plaintiffs' claims against  
Defendant alleging deceit, fraud, constructive fraud and civil  
conspiracy to defraud are dismissed.

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

2           Defendant also seeks dismissal of Plaintiffs' California  
3 Business and Professions Code section 17200 ("§ 17200") claim, arguing  
4 "Plaintiffs have not alleged any 'unfair' business practice." (Mot.  
5 14:26-27.) Plaintiffs counter that they have alleged predicate  
6 "unlawful," "unfair," and "fraudulent" conduct by Defendant, sufficient  
7 to state a § 17200 claim. (Opp'n 11:1-3, 12:2, 12:9-10.)

8           California's Unfair Competition Law, § 17200, prohibits  
9 "unlawful, unfair or fraudulent" business acts and practices. Since  
10 "unfair competition" is defined in the disjunctive, the statute  
11 establishes three separate types of actionable conduct, prohibiting  
12 practices that are either "unfair," "unlawful," or "fraudulent." Cel-  
13 Tech Communic'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th  
14 163, 180 (1999).

15           Plaintiffs allege in support of their § 17200 claim that  
16 "Defendants' acts . . . constitute unlawful, unfair and/or fraudulent  
17 business practices, as defined by [§ 17200]." (Compl. ¶ 143.) Plaintiffs  
18 further allege that "[a]s a result of Defendants' wrongful conduct,  
19 Plaintiffs have suffered and continue to suffer damages and injuries in  
20 an amount subject to proof at trial." Id. ¶ 144.

21           These allegations are vague and conclusory, and do not  
22 differentiate between the conduct of Defendant and the other defendants.  
23 Since Plaintiffs' § 17200 claim has not been pled with the requisite  
24 particularity, it is dismissed against Defendant.

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

26           Defendant also seeks dismissal of Plaintiffs' California Civil  
27 Code section 2923.5 ("§ 2923.5") claim, which is based upon Plaintiffs'  
28 allegation that they "were never contacted in person or by telephone to

1 assess their financial situation and explore options to avoid  
2 foreclosure prior to the date of the Notice fo Default's filing."  
3 (Compl. ¶ 151.) Defendant argues § 2923.5 "does not require the lender  
4 to contact the borrower in person or by phone but requires due diligence  
5 to attempt such contact[,]” and Plaintiffs’ § 2923.5 claim is  
6 “conspicuously absent of any allegation that [Defendant] did not . . .  
7 complete the due diligence required by statute.” (Mot. 15:19-20.)

8 Section 2923.5 requires “a mortgagee, trustee, beneficiary, or  
9 authorized agent” to “contact the borrower in person or by telephone in  
10 order to assess the borrower’s financial situation and explore options  
11 for the borrower to avoid foreclosure” or show “due diligence” in  
12 attempting to contact the borrower at least thirty days prior to filing  
13 a Notice of Default. Cal. Civ. Code § 2923.5(a)(1) and (2), (g). The  
14 statute also requires the Notice of Default to “include a declaration  
15 that the mortgagee, beneficiary, or authorized agent has contacted the  
16 borrower, has tried with due diligence to contact the borrower . . . or  
17 that no contact was required.” Id. § 2923.5(b). Section 2923.5 does not  
18 require actual personal or telephone contact; attempted contact may be  
19 sufficient.

20 The declaration filed with the Notice of Default states:

21 The mortgagee, beneficiary or authorized agent has  
22 tried with due diligence, but has been unable to  
23 contact the borrower to discuss the borrower’s  
24 financial situation and to explore options for the  
25 borrower to avoid foreclosure. The diligent efforts  
26 have included correspondence by first class mail,  
certified mail, return receipt requested, and by  
attempted telephone contact. Thirty days or more  
have elapsed since these diligent efforts were  
completed.

27 (RJN 8, at 3.) Therefore, Plaintiffs’ § 2923.5 allegations fail to state  
28 a plausible claim, and the § 2923.5 claim is dismissed. See Curtis v.



1 Option One Mortgage Corp., No. 1:09-cv-0982 AWI SMS, 2010 WL 1729770, at  
2 \*7 (E.D. Cal. April 28, 2010) (dismissing § 2923.5 claim "in light of  
3 the [due diligence] statements in the Notices of Default and Plaintiff's  
4 lack of allegations to the contrary).

5 **D. Wrongful Foreclosure**

6 Defendant also seeks dismissal of Plaintiffs' California Civil  
7 Code section 2924 ("§ 2924") wrongful foreclosure claim, arguing, *inter*  
8 *alia*, Plaintiffs are making "the common and unmeritorious 'produce the  
9 note' claim[,] " which is "insufficient to state a [wrongful foreclosure]  
10 claim." (Mot. 16:6-7.) Plaintiffs do not address Defendant's challenge  
11 to their wrongful foreclosure claim in their Opposition.

12 This claim is premised upon a wrongful foreclosure having  
13 already occurred. Foster v. SCME Mortgage Bankers, Inc., No. CIV 2:10-  
14 518-WBS GGH, 2010 WL 1408108, at \*4 (E.D. Cal. 2010) ("Wrongful  
15 foreclosure is an action in equity, where a plaintiff seeks to set aside  
16 a foreclosure sale that has already occurred.") However, Plaintiffs'  
17 allegations reveal there has been no foreclosure of their property.  
18 (Compl. ¶¶ 82, 176, 208.) Therefore, "this claim is not ripe for  
19 review" and is dismissed. See Boles v. Merscorp, Inc., No. CV 08-1989  
20 PSG (Ex), 2009 WL 734133, at \*6 (C.D. Cal. Mar. 18, 2009) (dismissing  
21 wrongful disclosure claim *sua sponte* when foreclosure had not yet  
22 occurred).

23 **E. Restitution and Rescission, Declaratory and Injunctive Relief**

24 Lastly, Defendants seek dismissal of Plaintiffs' ninth claim  
25 for "restitution and rescission" and Plaintiffs' tenth claim for  
26 "declaratory and injunctive relief." Defendants argue, *inter alia*, that  
27 these claims fail because they are predicated on Plaintiffs' other  
28 claims for relief, and "all of Plaintiffs' underlying claims fail."

1 (Mot. 18:5-7, 18:10-11; 19:24-20:2.) Plaintiffs rejoin that "although  
2 [the tenth claim] is entitled 'declaratory and injunctive relief' and is  
3 a remedy, the allegations for this cause of action state an appropriate  
4 cause of action because it restates all of the prior allegations and  
5 requests declaratory and injunctive relief thereon." (Opp'n 14:3-5.)  
6 Plaintiffs do not discuss their ninth claim for "restitution and  
7 rescission" in their Opposition.

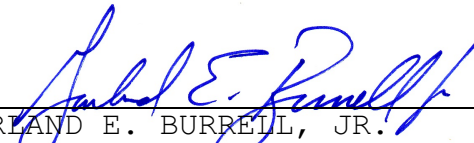
8 Plaintiffs' premise both their ninth and tenth claims against  
9 Defendant upon their earlier allegations that Defendant did not have the  
10 right to foreclose on their property. (Compl. ¶¶ 177, 182, 186-206.)  
11 However, since Plaintiffs have failed to state an underlying claim  
12 against Defendant, these claims fail as well. See Ozuna v. Home Capital  
13 Funding, No. 08-CV-2367-IEG (AJB), 2009 WL 4544131, at \*11 (S.D. Cal.  
14 Dec. 1, 2009) (holding "rescission is not a cause of action, but a  
15 remedy" and dismissing rescission claim when no underlying cause of  
16 action was stated against the defendant) (citations omitted); Marcelos  
17 v. Dominguez, No. C 08-00056 WHA, 2008 WL 1820683, at \*11 (N.D. Cal.  
18 April 21, 2008) (dismissing claim for rescission and restitution on the  
19 ground that "it is not a claim for relief, but rather a remedy"); Lane  
20 v. Vitek Real Estate Industries Group, 713 F. Supp. 2d at 1104  
21 (dismissing claim for "declaratory and injunctive relief" where  
22 plaintiffs' other claims were dismissed since "declaratory and  
23 injunctive relief are not causes of action in and of themselves").  
24 Therefore, Plaintiffs' "restitution and rescission" claim and  
25 "declaratory and injunctive relief" claim are dismissed against  
26 Defendant.

1 **VI. CONCLUSION**

2 For the stated reasons, Defendant's motion to dismiss is  
3 GRANTED. Since all claims alleged against Defendant are dismissed,  
4 Defendant's motion for a more definite statement is DENIED as moot.  
5 Plaintiffs are granted fourteen (14) days from the date on which this  
6 order is filed to file a First Amended Complaint.

7 This action may be dismissed with prejudice against the movant  
8 under Federal Rule of Civil Procedure 41(b) if Plaintiffs fail to file  
9 an amended complaint within the prescribed time period.

10 Dated: December 16, 2010

11   
12 \_\_\_\_\_  
13 GARLAND E. BURRELL, JR.  
14 United States District Judge