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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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SUNIL WADHWA and LYNN LORI
WADHWA,

NO. CIV. 2:10-3361 WBS DAD

Plaintiffs,

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS

v.

AURORA LOAN SERVICES, LLC, a
subsidiary of AURORA BANK,
FSB; GREENPOINT MORTGAGE
FUNDING, INC.; MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS, INC.; MARIN
CONVEYANCING CORPORATION; and
DOES 1-10, inclusive,

Defendants.

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Plaintiffs Sunil Wadhwa and Lynn Lori Wadhwa brought
this action against defendants Aurora Loan Services, LLC, a
subsidiary of Aurora Bank, FSB ("Aurora"), Greenpoint Mortgage
Funding, Inc., Mortgage Electronic Registration Systems, Inc.
("MERS"), and Marin Conveyancing Corporation, arising out of
defendants' allegedly wrongful conduct relating to a loan

1 transaction and subsequent foreclosure on plaintiffs' home.
2 Presently before the court is Aurora and MERS' motion to dismiss
3 plaintiffs' Complaint pursuant to Federal Rule of Civil Procedure
4 12(b)(6) for failure to state a claim upon which relief can be
5 granted. Plaintiffs have filed no opposition to the motion.

6 I. Factual and Procedural Background

7 On or about November 28, 2006, plaintiffs obtained a
8 \$734,900 loan from Greenpoint Mortgage Funding, Inc., secured by
9 their property located at 3055 Orbetello Way in El Dorado Hills,
10 California. (Compl. ¶ 19, Ex. B (Docket No. 2).) Plaintiffs
11 defaulted on the loan, and a Notice of Default was recorded in El
12 Dorado County on October 15, 2009. (Id. ¶ 22, Ex. C.) A Notice
13 of Trustee's Sale was recorded on January 21, 2010. (Id. ¶ 24,
14 Ex. E.) The property was sold to Aurora at a trustee's sale on
15 October 18, 2010. (Id. ¶ 25, Ex. F.)

16 On December 17, 2010, plaintiffs filed their Complaint
17 in this action, alleging claims under the Home Ownership and
18 Equity Protection Act ("HOEPA"), 15 U.S.C. § 1639, Real Estate
19 Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601-2617,
20 Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1667f, and Fair
21 Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681-1681x, as well
22 as claims for fraudulent misrepresentation, breach of fiduciary
23 duties, unjust enrichment, civil conspiracy, civil violations of
24 the Racketeer Influenced and Corrupt Organizations Act ("RICO"),
25 18 U.S.C. §§ 1961-1968, quiet title, usury and fraud, and
26 wrongful foreclosure.

27 II. Discussion

28 On a motion to dismiss, the court must accept the

1 allegations in the complaint as true and draw all reasonable
2 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
3 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
4 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
5 (1972). "To survive a motion to dismiss, a complaint must
6 contain sufficient factual matter, accepted as true, to 'state a
7 claim to relief that is plausible on its face.'" Ashcroft v.
8 Iqbal, --- U.S. ----, ----, 129 S. Ct. 1937, 1949 (2009) (quoting
9 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). This
10 "plausibility standard," however, "asks for more than a sheer
11 possibility that a defendant has acted unlawfully," and where a
12 complaint pleads facts that are "merely consistent with" a
13 defendant's liability, it "stops short of the line between
14 possibility and plausibility." Iqbal, 129 S. Ct. at 1949
15 (quoting Twombly, 550 U.S. at 556-57) (internal quotation mark
16 omitted).

17 A. TILA, HOEPA, and RESPA Claims: Statutes of Limitations

18 Plaintiffs bring several claims relating to the
19 origination of their loan, including violations of TILA, HOEPA,
20 and RESPA.

21 The statute of limitations for a TILA damages claim is
22 one year from the occurrence of a violation. 15 U.S.C. §
23 1640(e). The "limitations period in [s]ection 1640(e) runs from
24 the date of consummation of the transaction" King v.
25 State of Cal., 784 F.2d 910, 915 (9th Cir. 1986). Here, the
26 alleged failure to provide plaintiffs with adequate TILA
27 disclosures occurred at the signing of the loan in November of
28 2006, and plaintiffs filed the Complaint in December of 2010.

1 "[T]he doctrine of equitable tolling may, in the
2 appropriate circumstances, suspend the limitations period until
3 the borrower discovers or had reasonable opportunity to discover
4 the fraud or nondisclosures that form the basis of the TILA
5 action." Id. While the applicability of the equitable tolling
6 doctrine often depends on matters outside the pleadings,
7 Supermail Cargo, Inc. v. United States, 68 F.3d 1204, 1206 (9th
8 Cir. 1995), dismissal may be appropriate when a plaintiff fails
9 to allege facts suggesting that he did not have a reasonable
10 opportunity to discover the violation. See Meyer v. Ameriquest
11 Mortg. Co., 342 F.3d 899, 902-03 (9th Cir. 2003); Hubbard v.
12 Fidelity Fed. Bank, 91 F.3d 75, 79 (9th Cir. 1996). Here,
13 plaintiffs have alleged no facts to suggest that they did not
14 have a reasonable opportunity to discover the alleged TILA
15 violations.

16 Because over one year has run, plaintiffs' TILA claim
17 for damages must be dismissed as to Aurora and MERS. HOEPA,
18 which is an amendment to TILA, is also subject to the one-year
19 statute of limitations, 15 U.S.C. § 1640(e), and that claim must
20 be dismissed as well. See Hamilton v. Bank of Blue Valley, ---
21 F. Supp. 2d ----, ----, 2010 WL 4222724, at *15 (E.D. Cal. 2010)
22 ("HOEPA is an amendment of TILA, and therefore is governed by the
23 same remedial scheme and statutes of limitations as TILA.")
24 (internal quotation marks omitted).

25 A borrower's right to rescind a transaction under TILA
26 expires three years after the closing date. 15 U.S.C. § 1635(f).
27 "[Section] 1635(f) completely extinguishes the right of
28 rescission at the end of the 3-year period," which cannot be

1 tolled. Beach v. Ocwen Fed. Bank, 523 U.S. 410, 412 (1998); see
2 also Miguel v. Country Funding Corp., 309 F.3d 1161, 1164 (9th
3 Cir. 2002) (“[S]ection 1635(f) represents an ‘absolute limitation
4 on rescission actions’ which bars any claims filed more than
5 three years after the consummation of the transaction.” (quoting
6 King, 784 F.2d at 913)). Since more than three years have passed
7 since the closing date, plaintiffs’ claim for rescission under
8 TILA must be dismissed as to Aurora and MERS.

9 As to plaintiffs’ RESPA claim, depending on which
10 specific provision of the statute is asserted, a RESPA claim must
11 be made within one to three years after consummation of the loan.
12 12 U.S.C. § 2614. “The RESPA statute of limitations generally
13 begins to run no later than the date of actual disclosure of
14 actions constituting an alleged violation. Typically, in cases
15 involving loan documents, the statute begins to run when the
16 documents are signed unless evidence is presented to override
17 this assumption.” Metcalf v. Drexel Lending Grp., No. 08-CV-
18 00731, 2008 WL 4748134, at *3 (S.D. Cal. Oct. 29, 2008). More
19 than four years have passed since the signing of the loan
20 documents, and plaintiffs have not alleged any facts to support
21 tolling. Thus, plaintiffs’ RESPA cause of action is time-barred
22 and the court will dismiss the claim as to Aurora and MERS.

23 B. FCRA Claim

24 Plaintiffs allege that defendants violated the FCRA by
25 wrongfully reporting negative information about plaintiffs to one
26 or more credit reporting agencies. (Compl. ¶ 92.) Section
27 1681s-2(a) imposes duties on furnishers of information to credit
28 reporting agencies to ensure that the information provided is

1 accurate, but here is no private right of action for violations.
2 15 U.S.C. § 1681s-2(d); Nelson v. Chase Manhattan Mortg. Corp.,
3 282 F.3d 1057, 1059 (9th Cir. 2002). However, there is a private
4 right of action for violations of § 1681s-2(b), which imposes a
5 duty of reinvestigation on furnishers of information upon notice
6 of a dispute regarding the information. 15 U.S.C. § 1681s-2(d);
7 Nelson, 282 F.3d at 1059-60. To succeed on such a claim,
8 plaintiffs must allege that they had a dispute with a credit
9 reporting agency regarding the accuracy of an account, that the
10 credit reporting agency notified the furnisher of the
11 information, and that the furnisher failed to take the remedial
12 measures outlined in the statute. 15 U.S.C. § 1681s-2(b).
13 Plaintiffs have failed to allege any of these facts. Plaintiffs'
14 claim for a violation of the FCRA must therefore be dismissed as
15 to Aurora and MERS.

16 C. Fraudulent Misrepresentation and Usury/Fraud Claims

17 In California, the essential elements of a claim for
18 fraud are "(a) a misrepresentation (false representation,
19 concealment, or nondisclosure); (b) knowledge of falsity (or
20 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d)
21 justifiable reliance; and (e) resulting damage." In re Estate of
22 Young, 160 Cal. App. 4th 62, 79 (4th Dist. 2008). Under the
23 heightened pleading requirements for claims of fraud, "a party
24 must state with particularity the circumstances constituting
25 fraud or mistake." Fed. R. Civ. P. 9(b). A plaintiff must
26 include the "who, what, when, where, and how" of the fraud. Vess
27 v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)
28 (citation omitted). The allegations must be "specific enough to

1 give defendants notice of the particular misconduct which is
2 alleged to constitute the fraud charged so that they can defend
3 against the charge and not just deny that they have done anything
4 wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985).

5 In addition to the "time, place and content of an alleged
6 misrepresentation," a complaint "must set forth what is false or
7 misleading about a statement, and . . . an explanation as to why
8 the statement or omission complained of was false or misleading."

9 Yourish v. Cal. Amplifier, 191 F.3d 983, 993, n.10 (9th Cir.

10 1999) (internal quotation mark omitted).

11 Plaintiffs have completely failed to allege fraud with
12 the requisite particularity. Defendants allegedly "concealed
13 material information," failed to disclose that plaintiffs were
14 given a "predatory loan," and failed to inform plaintiffs that
15 the Note had been assigned. (Compl. ¶¶ 96-97.) Nothing is
16 alleged regarding the circumstances of the fraudulent statements
17 or omissions, what was actually false or misleading about the
18 statements, or anything else that could assist defendants in
19 defending against charges of fraud. Accordingly, plaintiffs'
20 claim for fraudulent misrepresentation must be dismissed as to
21 Aurora and MERS.

22 To the extent plaintiffs attempt to state a claim for
23 "usury and fraud," the claim also fails. The elements of a claim
24 for usury are: "(1) The transaction must be a loan or
25 forbearance; (2) the interest to be paid must exceed the
26 statutory maximum; (3) the loan and interest must be absolutely
27 repayable by the borrower; and (4) the lender must have a willful
28 intent to enter into a usurious transaction." Ghirardo v.

1 Antonioli, 8 Cal. 4th 791, 798 (1994). Here, plaintiffs do not
2 make any allegations about the loan's actual interest rate. They
3 allege that the "'formula break' . . . was exceeded by a factor
4 in excess of 10" (Compl. ¶ 140.) Plaintiffs, however,
5 fail to sufficiently allege how the interest actually received by
6 defendants exceeded the statutory maximum rate. Accordingly,
7 plaintiffs' claim for usury and fraud will be dismissed as to
8 Aurora and MERS.

9 D. Breach of Fiduciary Duty Claim

10 The elements of a breach of fiduciary duty claim are
11 (1) existence of a fiduciary relationship; (2) breach of the
12 fiduciary duty; and (3) damage proximately caused by that breach.
13 Roberts v. Lomanto, 112 Cal. App. 4th 1553, 1562 (3d Dist. 2003).
14 "Absent 'special circumstances' a loan transaction 'is at
15 arms-length and there is no fiduciary relationship between the
16 borrower and lender.'" Rangel v. DHI Mortgage Co., No. CV F
17 09-1035 LJO GSA, 2009 WL 2190210, at *3 (E.D. Cal. July 21, 2009)
18 (quoting Oaks Mgmt. Corp. v. Super. Ct., 145 Cal. App. 4th 453,
19 466 (4th Dist. 2006)). Plaintiffs have not alleged that any
20 special circumstances existed. Since plaintiffs have not pled
21 the existence of a fiduciary relationship, the court will grant
22 the motion to dismiss the breach of fiduciary duty claim as to
23 Aurora and MERS.

24 E. Unjust Enrichment Claim

25 Unjust enrichment is not itself an independent claim
26 for relief. McKell v. Wash. Mut., Inc., 142 Cal. App. 4th 1457,
27 1490 (2d Dist. 2006). The court therefore construes plaintiffs'
28 purported claim for unjust enrichment as an attempt to plead a

1 claim for relief giving rise to a right of restitution. A party
2 is required to make restitution "if he or she is unjustly
3 enriched at the expense of another. A person is enriched if the
4 person receives a benefit at another's expense." McBride v.
5 Boughton, 123 Cal. App. 4th 379, 389 (1st Dist. 2004) (internal
6 citations and quotation marks omitted). Because plaintiffs fail
7 to adequately plead facts showing that any enrichment of
8 defendants was unjust as to them, their claim for unjust
9 enrichment must be dismissed as to Aurora and MERS.

10 F. Civil Conspiracy Claim

11 Civil conspiracy itself is not an independent claim for
12 relief. Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal.
13 4th 503, 510-11 (1994). Rather, civil conspiracy is a "legal
14 doctrine that imposes liability on persons who, although not
15 actually committing a tort themselves, share with the immediate
16 tortfeasors a common plan or design in its perpetration." Id.

17 Plaintiffs fail to sufficiently plead a claim for
18 relief for civil conspiracy. Plaintiffs merely recite the
19 elements of civil conspiracy: (1) the formation and operation of
20 the conspiracy, (2) wrongful conduct in furtherance of the
21 conspiracy, and (3) damages arising from the wrongful conduct.
22 Kidron v. Movie Acquisition Corp., 40 Cal. App. 4th 1571, 1581
23 (2d Dist. 1995). Because plaintiffs fail to allege facts
24 sufficient to support a claim for conspiracy, their civil
25 conspiracy claim must be dismissed as to Aurora and MERS.

26 G. RICO Claim

27 To state a claim under RICO, a plaintiff must allege
28 the existence of a RICO enterprise, the existence of a pattern of

1 racketeering activity, a nexus between the defendant and either
2 the pattern of racketeering activity or the RICO enterprise, and
3 resulting injury to the plaintiff. Occupational-Urgent Care
4 Health Sys., Inc. v. Sutro & Co., 711 F. Supp. 1016, 1021 (E.D.
5 Cal. 1989). To allege a pattern of racketeering activity, a
6 plaintiff must allege two or more predicate acts. Sun Sav. &
7 Loan Ass'n v. Dierdorff, 825 F.2d 187, 193 (9th Cir. 1987). When
8 the alleged racketeering activity sounds in fraud, as here, the
9 complaint must "state with particularity the circumstances
10 constituting fraud or mistake." In re Countrywide Fin. Corp.
11 Mortg. Mktg. & Sales Prac. Lit., 601 F. Supp. 2d 1201, 1215 (S.D.
12 Cal. 2009) (quoting Fed. R. Civ. P. 9(b)). To satisfy Rule 9(b)
13 in this context, the plaintiff must "state the time, place, and
14 specific content of the false representations as well as the
15 identities of the parties to the misrepresentation." Id.
16 (internal quotation marks omitted). Plaintiffs do not
17 sufficiently plead the existence of a pattern of racketeering
18 activity, nor do they sufficiently plead the existence of an
19 enterprise under 18 U.S.C. § 1961(4). Plaintiffs' civil RICO
20 claim will therefore be dismissed as to Aurora and MERS.

21 H. Quiet Title Claim

22 The purpose of a quiet title action is to establish
23 one's title against adverse claims to real property. A basic
24 requirement of an action to quiet title is an allegation that
25 plaintiffs "are the rightful owners of the property, i.e., that
26 they have satisfied their obligations under the Deed of Trust."
27 Kelley v. Mortg. Elec. Registration Sys., Inc., 642 F. Supp. 2d
28 1048, 1057 (N.D. Cal. 2009). California Code of Civil Procedure

1 section 761.020 states that a claim to quiet title requires: (1)
2 a verified complaint, (2) a description of the property, (3) the
3 title for which a determination is sought, (4) the adverse claims
4 to the title against which a determination is sought, (5) the
5 date as of which the determination is sought, and (6) a prayer
6 for the determination of the title. Cal. Code Civ. Proc. §
7 761.020. Plaintiffs allege "each of the Defendants' [sic] claim
8 an interest in the property." (Compl. ¶ 133.) Plaintiffs,
9 however, fail to allege the nature of the adverse claims and fail
10 to identify the date as of which the determination is sought.
11 Accordingly, plaintiffs' claim to quiet title will be dismissed
12 as to Aurora and MERS.

13 I. Wrongful Foreclosure Claim


14 Plaintiffs claim defendants were not authorized to
15 foreclose upon the subject property or to sell the subject
16 property pursuant to a foreclosure sale. (Id. ¶¶ 144-149.)
17 Plaintiffs allege that defendants were not entitled to foreclose
18 upon their property because they cannot show a full chain of
19 title. (Id. ¶ 149.) Plaintiffs' claim, however, is belied by
20 the language of their Deed of Trust and California's foreclosure
21 statutes. (See id. Ex. B.) California Civil Code § 2924 sets
22 forth the requirements for conducting non-judicial foreclosure
23 proceedings and is intended to be exhaustive. See Moeller v.
24 Lien, 25 Cal. App. 4th 822, 830 (2d Dist. 1994); Homestead Sav.
25 v. Darmiento, 230 Cal. App. 3d 424, 432-33 (2d Dist. 1991). A
26 trustee has authority to conduct a non-judicial foreclosure
27 proceeding. Cal. Civ. Code § 2924(a)(1). Furthermore, it is
28 well-settled that California law does not require production of

1 the note as a condition to proceeding with a non-judicial
2 foreclosure proceeding. See id.; Arvizu v. GMAC Mortg., LLC, No.
3 1:10-cv-00990 OWW JLT, 2010 WL 3958666, at *5 (E.D. Cal. Oct. 8,
4 2010); Castaneda v. Saxon Mortg. Servs., Inc., 687 F. Supp. 2d
5 1191, 1201 (E.D. Cal. 2009) ("Under California law, there is no
6 requirement for the production of the original note to initiate a
7 non-judicial foreclosure."). Accordingly, plaintiffs' claim for
8 wrongful foreclosure will be dismissed as to Aurora and MERS.

9 IT IS THEREFORE ORDERED that Aurora and MERS' motion to
10 dismiss plaintiffs' Complaint be, and the same hereby is,
11 GRANTED.

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

15 DATED: February 9, 2011

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18 WILLIAM B. SHUBB
19 UNITED STATES DISTRICT JUDGE
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