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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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DENNIS ALAN NEAL AND  
JACQUELINE DIANNE NEAL

Plaintiffs,

v.

E-TRADE BANK, E-TRADE  
FINANCIAL CORPORATION, GMAC  
MORTGAGE, LLC, MORTGAGE  
ELECTRONIC REGISTRATION  
SYSTEM., INC. ETS SERVICES,  
LLC and DOES 1 through 100,  
inclusive

Defendants.

Civ. No. S-11-0954 FCD/GGH

MEMORANDUM AND ORDER

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This matter is before the court on the motions of defendants  
E-Trade Bank, E-Trade Financial Services, GMAC Mortgage, LLC  
("GMAC"), Mortgage Electronic Registration System, Inc.,  
("MERS"), and ETS Services, LLC ("ETS") (collectively,  
"defendants"), to dismiss plaintiffs Dennis Alan Neal and  
Jacqueline Dianne Neal's ("plaintiffs") complaint pursuant to

1 Federal Rule of Civil Procedure ("FRCP") 12(b)(6).<sup>1</sup>

2 **BACKGROUND**

3 Plaintiff originally brought this action against defendants  
4 in California State Superior Court for the County of Yuba,  
5 alleging violations of procedural due process under the Fifth  
6 Amendment of the United States Constitution, the Federal Fair  
7 Debt Collection Practices Act ("FDCPA"), and a number of  
8 corollary state law claims. (See Pls.' Compl. ["Compl."], filed  
9 Feb. 24, 2011, [Docket #11, Ex. A].) Defendants timely removed  
10 the case to this court pursuant to 28 U.S.C. § 1441(c) based on  
11 plaintiffs' federal claims under the FDCPA and the Fifth  
12 Amendment of the United States Constitution. (Defs.' Not. of  
13 Removal, filed Apr. 11, 2011, [Docket #1].)

14 Plaintiffs' claims are based upon a residential home loan  
15 transaction and the subsequent foreclosure of plaintiffs' home.  
16 (Compl. ¶¶ 11, 28-30.) Plaintiffs base the majority of their  
17 claims on the federal Home Affordable Modification Program  
18 ("HAMP"). Plaintiffs allege that defendants made material  
19 misrepresentations regarding a potential remodification of their  
20 home loan. (Id. ¶¶ 11-32.) Additionally, plaintiffs claim that  
21 defendants improperly went forward with foreclosure without any  
22 good faith attempt to negotiate with plaintiffs. (Id. ¶ 29.)  
23 All defendants have moved to dismiss the action for failing to  
24 state any claims upon which relief can be granted.

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27 <sup>1</sup> Because oral argument will not be of material  
28 assistance, the court orders these matters submitted on the  
briefs. E.D. Cal. L.R. 230(g).

1 **STANDARD**

2 Under Federal Rule of Civil Procedure 8(a), a pleading must  
3 contain "a short and plain statement of the claim showing that  
4 the pleader is entitled to relief." See Ashcroft v. Iqbal, 129  
5 S. Ct. 1937, 1949 (2009). Under notice pleading in federal  
6 court, the complaint must "give the defendant fair notice of what  
7 the claim is and the grounds upon which it rests." Bell Atlantic  
8 v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations  
9 omitted). "This simplified notice pleading standard relies on  
10 liberal discovery rules and summary judgment motions to define  
11 disputed facts and issues and to dispose of unmeritorious  
12 claims." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).

13 On a motion to dismiss, the factual allegations of the  
14 complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319,  
15 322 (1972). The court is bound to give plaintiff the benefit of  
16 every reasonable inference to be drawn from the "well-pleaded"  
17 allegations of the complaint. Retail Clerks Int'l Ass'n v.  
18 Schermerhorn, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not  
19 allege "'specific facts' beyond those necessary to state his  
20 claim and the grounds showing entitlement to relief." Twombly,  
21 550 U.S. at 570. "A claim has facial plausibility when the  
22 plaintiff pleads factual content that allows the court to draw  
23 the reasonable inference that the defendant is liable for the  
24 misconduct alleged." Iqbal, 129 S. Ct. at 1949.

25 Nevertheless, the court "need not assume the truth of legal  
26 conclusions cast in the form of factual allegations." United  
27 States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th  
28 Cir. 1986). While Rule 8(a) does not require detailed factual

1 allegations, "it demands more than an unadorned, the defendant-  
2 unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at 1949. A  
3 pleading is insufficient if it offers mere "labels and  
4 conclusions" or "a formulaic recitation of the elements of a  
5 cause of action." Twombly, 550 U.S. at 555; Iqbal, 129 S. Ct. at  
6 1950 ("Threadbare recitals of the elements of a cause of action,  
7 supported by mere conclusory statements, do not suffice.").  
8 Moreover, it is inappropriate to assume that the plaintiff "can  
9 prove facts which it has not alleged or that the defendants have  
10 violated the . . . laws in ways that have not been alleged."  
11 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council  
12 of Carpenters, 459 U.S. 519, 526 (1983).

13 Ultimately, the court may not dismiss a complaint in which  
14 the plaintiff has alleged "enough facts to state a claim to  
15 relief that is plausible on its face." Iqbal, 129 S. Ct. at 1949  
16 (citing Twombly, 550 U.S. at 570). Only where a plaintiff has  
17 failed to "nudge [his or her] claims across the line from  
18 conceivable to plausible," is the complaint properly dismissed.  
19 Id. at 1952. While the plausibility requirement is not akin to a  
20 probability requirement, it demands more than "a sheer  
21 possibility that a defendant has acted unlawfully." Id. at 1949.  
22 This plausibility inquiry is "a context-specific task that  
23 requires the reviewing court to draw on its judicial experience  
24 and common sense." Id. at 1950.

25 In ruling upon a motion to dismiss, the court may consider  
26 only the complaint, any exhibits thereto, and matters which may  
27 be judicially noticed pursuant to Federal Rule of Evidence 201.  
28 See Mir v. Little Co. Of Mary Hospital, 844 F.2d 646, 649 (9th

1 Cir. 1988); Isuzu Motors Ltd. v. Consumers Union of United  
2 States, Inc., 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998).

3 **ANALYSIS**

4 **A. Federal Fair Debt Collection Practices Act**

5 Plaintiffs' fourth claim for relief alleges violation of the  
6 Federal Fair Debt Collection Practices Act ("FDCPA").

7 (Compl. ¶¶ 58-65.) Defendants move to dismiss plaintiffs' claim  
8 under the FDCPA, asserting they have failed to allege any facts  
9 which could constitute a violation of the FDCPA. More  
10 specifically, defendants contend that plaintiff cannot state a  
11 claim because foreclosure does not constitute debt collection  
12 under the FDCPA. (MTD at 10:5-15.)

13 Plaintiffs have failed to allege any facts which could  
14 constitute unfair debt collection. In plaintiffs' opposition to  
15 the motion to dismiss, they contend that defendants violated  
16 California and federal debt collection laws by "using  
17 unconscionable means in an attempt to collect a debt." (Pls.'  
18 Opp'n., at 6:17-18.) More specifically, plaintiffs argue that  
19 defendants violated the statute when they "proceeded to collect a  
20 debt from plaintiff by means of an 'end-run' or 'sneak'  
21 foreclosure." (Compl. ¶ 62.) These allegations are simply  
22 conclusions of law which need not be accepted as true by this  
23 court. See United States ex. rel. Chunie v. Ringrose, 788 F.2d  
24 638, 643 n.2 (9th Cir. 1986). The only allegation which  
25 plaintiffs make which could be construed as a debt collection  
26 practice is defendants' threatened foreclosure of plaintiff's  
27 home. (Compl. ¶ 62.) However, "foreclosing on [a] property  
28 pursuant to a deed of trust is not the collection of a debt

1 within the meaning of the FDCPA." Izenberg v. ETS Services, LLC,  
2 589 F. Supp. 1193, 1199 (C.D. Cal. 2008) (quoting Ines v.  
3 Countrywide Home Loans, 2008 WL 4791863, at \*2 (S.D. Cal. Nov. 3,  
4 2008)).

5 As such, defendants' motion to dismiss plaintiffs' claim for  
6 unfair debt collection under the FDCPA is GRANTED without leave  
7 to amend.

#### 8 **B. Procedural Due Process**

9 Plaintiffs contend that defendants violated their federal  
10 due process rights because "[t]hey engaged in a process for a  
11 HAMP loan modification with the expectation that defendants would  
12 follow and comply with the federal guidelines in place for HAMP."  
13 (Compl. ¶ 49.) Moreover, Plaintiffs maintain that "[d]efendants  
14 are liable as state actors because their particular actions are  
15 'inextricably intertwined' with those of the government in the  
16 administration of HAMP." (Id. ¶ 48.)

17 Here, plaintiffs' attempt to bootstrap HAMP to a procedural  
18 due process claim asserted against exclusively private entities  
19 is ineffectual. Indeed, plaintiffs, in their opposition, fail to  
20 address defendants' contention that plaintiff cannot state a  
21 viable due process claim. On that basis alone, the court could  
22 grant the motion in defendants' favor; the court nonetheless  
23 discusses its findings.

24 In order to state a claim under the Due Process Clause, a  
25 claimant must show that some *government action* deprived him or  
26 her of life, liberty or property. See Lugar v. Edmondson Oil  
27 Co., Inc., 457 U.S. 922, 937 (requiring that the allegedly  
28 offending person is a state actor, either "because he is a state

1 official, because he has acted together with or has obtained  
2 significant aid from state officials, or because his conduct is  
3 otherwise chargeable to the state.") "In order to apply the  
4 proscriptions of the Fifth Amendment to private actors there must  
5 exist a sufficiently close nexus between the government and the  
6 challenged action of the private entity so that the action of the  
7 latter may be fairly treated as that of the government itself."  
8 Rank v. Nimmo, 677 F.2d 692, 701 (9th Cir. 1982) (internal  
9 quotations omitted).

10 Plaintiffs' procedural due process claim falls short of  
11 permitting the court to infer a plausible connection among the  
12 private defendants and a government agency or official such that  
13 the private actions would constitute state action. The mere  
14 existence of a regulatory scheme which these private defendants  
15 must comply with cannot convert them into state actors. Such an  
16 analysis is inimical to the Due Process Clause. See Lugar, 457  
17 U.S. at 936 ("As a matter of substantive constitutional law the  
18 state-action requirement reflects judicial recognition of the  
19 fact that most rights secured by the Constitution are protected  
20 only against infringement by governments.") (internal quotations  
21 omitted) Indeed, the Supreme Court has explicitly held that  
22 "[t]he mere fact that a business is subject to state regulation  
23 does not by itself convert its action into that of the State for  
24 purpose of the Fourteenth Amendment." Jackson v. Metro. Edison  
25 Co., 419 U.S. 345, 350 (1974); see also Rank, 677 F.2d at 702  
26 ("foreclosure by a private lender of a mortgage in a federal  
27 mortgage guaranty program does not involve federal action  
28 sufficient to invoke the due process clause of the Fifth

1 Amendment.")

2 Since plaintiffs cannot establish the requisite state action  
3 element, their second claim for relief under the Due Process  
4 Clause of the Fifth Amendment is dismissed without leave to  
5 amend.

6 **C. Subject Matter Jurisdiction**

7 Jurisdiction is a threshold inquiry before the adjudication  
8 of any case before the court. See Morongo Band of Mission  
9 Indians v. Cal. State Bd. of Equalization, 858 F.2d 1376, 1380  
10 (9th Cir. 1988). Without jurisdiction, this court cannot  
11 adjudicate the merits of this case or order any relief. See id.  
12 ("If the district court had no jurisdiction over the subject  
13 matter, the action should have been dismissed, regardless of the  
14 parties' preference of an adjudication in federal court.").

15 On April 11, 2011, defendants removed this case to the  
16 United States District Court for the Eastern District of  
17 California under 28 U.S.C. §§ 1441(c) based on federal question  
18 jurisdiction. (Defs.' Not. of Removal, filed Apr. 1, 2011,  
19 [Docket # 1].) Plaintiffs' complaint alleges two federal claims:  
20 (1) violation of the Due Process Clause of the Fifth Amendment  
21 and (2) violation of the FDCPA. (Compl. ¶¶ 47-52, 58-65.)  
22 However, as set forth above, these claims are properly dismissed  
23 without leave to amend. Dismissal of these claims leaves the  
24 complaint devoid of any federal claims. The remaining claims are  
25 state law claims for violation of California Business and  
26 Professions Code § 17200 et seq., the California Fair Debt  
27 Collection Practice Act, wrongful foreclosure, cancellation of  
28 deed, breach of contract, breach of the implied covenant of good



1 faith and fair dealing, negligence, fraud, and quiet title.  
2 (Compl. ¶¶ 35-46, 53-103.)

3 Subject to the conditions set forth in 28 U.S.C. § 1367(c),  
4 district courts may decline to exercise supplemental jurisdiction  
5 over state law claims. See Acri v. Varian Assoc., Inc., 114  
6 F.3d 999, 1000 (9th Cir. 1997) (en banc). The court's decision  
7 whether to exercise supplemental jurisdiction should be informed  
8 by values of "economy, convenience, fairness, and comity." Id.  
9 at 1001 (citations omitted). Further, primary responsibility for  
10 developing and applying state law rests with the state courts.  
11 Therefore, when federal claims are eliminated before trial,  
12 district courts should usually decline to exercise supplemental  
13 jurisdiction. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343,  
14 350 (1988); Gini v. Las Vegas Metro. Police Dept., 40 F.3d 1041,  
15 1046 (9th Cir. 1994) ("In the usual case in which federal-law  
16 claims are eliminated before trial, the balance of factors . . .  
17 will point toward declining to exercise jurisdiction over the  
18 remaining state law claims.") (internal quotations and citations  
19 omitted). As such, the court declines to exercise supplemental  
20 jurisdiction over plaintiffs' remaining state law claims.

21 Accordingly, plaintiffs' complaint is REMANDED to the  
22 Superior Court of the State of California for the County of Yuba.

### 23 CONCLUSION

24 Plaintiffs' second and fourth claims for violation the Due  
25 Process Clause of the Fifth Amendment and the FDCPA are DISMISSED  
26 without leave to amend. Plaintiffs' state law claims are  
27 REMANDED to the Superior Court of the State of California for the  
28 County of Yuba.

IT IS SO ORDERED.

DATED: August 25, 2011



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FRANK C. DAMRELL, JR.  
UNITED STATES DISTRICT JUDGE

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