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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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CONNIE CHERRONE, RICARDO DOMINGUEZ, DENISE ELLIS, THOMAS HOOVER, HAZEL SARMIENTO, THELMA KNIGHTON, HENRY KNIGHTON, VICENT MACIAS, SHAHANNY MACIAS, TRAVIS MARTIN, KATIE MARTIN, DUC TAN NGUYEN, STEPHEN ORTEGA, DALE RISENHOOVER, KRISTA REGO, and JARED STERRITT,

Plaintiffs,

v.

FLORSHEIM DEVELOPMENT, a California Corporation; FLORSHEIM PROPERTIES, a California Corporation; ROSE PETALS, LLC, a California Limited Liability Company; ROSE PARK, LLC, a California Limited Liability Company; and DOES 1-300 inclusive,

Defendants.

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Plaintiff homeowners brought this action against

1 defendants Florsheim Development, Florsheim Properties, Rose
2 Petals, LLC, and Rose Park, LLC, arising from defendants'
3 allegedly wrongful conduct relating to the development and sale
4 of homes within a housing subdivision. Plaintiffs' general
5 allegations have been previously set out in the court's December
6 5, 2012 Order, (Docket No. 21), and will not be repeated here.
7 In that Order, the court dismissed plaintiffs' federal claims in
8 the First Amended Complaint ("FAC") with leave to amend and
9 declined to exercise supplemental jurisdiction over plaintiffs'
10 remaining state law claims. (Dec. 5, 2012 Order at 6-13.)
11 Plaintiffs filed their Second Amended Complaint ("SAC") on
12 December 21, 2012, bringing the same claims as brought in the
13 FAC. (Docket No. 22.) Currently before the court is defendants'
14 motion to dismiss the SAC under Federal Rule of Civil Procedure
15 12(b)(6) for failure to state a claim upon which relief can be
16 granted.

17 I. Discussion

18 A. Interstate Land Sales Full Disclosure Act
19 ("ILSFDA")

20 As explained in the December 5, 2012 Order, plaintiffs'
21 claim alleging violations of the ILSFDA, 15 U.S.C. § 1703(a)(2),
22 sounds in fraud and must be pled with particularity under Federal
23 Rule of Civil Procedure 9(b). See Kearns v. Ford Motor Co., 567
24 F.3d 1120, 1124 (9th Cir. 2009); Vess v. Ciba-Geigy Corp. USA,
25 317 F.3d 1097, 1103-04 (9th Cir. 2003); Degirmenci v. Sapphire-
26 Fort Lauderdale, LLLP, 693 F. Supp. 2d 1325, 1341-43 (S.D. Fla.
27 2010). In that Order, the court dismissed plaintiffs' claim
28 because "plaintiffs failed to identify which defendant made the

1 allegedly false statements, the time and place of the statements,
2 and the specifics of the statements.” (Dec. 5, 2012 Order at 8.)

3 Plaintiffs now allege that defendants, from 2008 to
4 2010 as “An Anniversary Gift to You,” made false promises to
5 refund the difference in price between a home at purchase and at
6 the year’s end. (SAC ¶ 35.) Defendants allegedly made this
7 promise through unidentified “website, brochure, press release,
8 radio and television,” and by banners hanging across the entrance
9 to the subdivisions. (Id.) Defendants also allegedly failed to
10 disclose that prices of the homes were artificially increased,
11 failed to disclose the sales agents’ “dual agency relationships,”
12 and misrepresented aspects of the development of the
13 neighborhood, such as the building of a park, through undisclosed
14 “map layouts,” “Subdivision maps,” “brochure and signage,” “the
15 public record,” and “verbal representation from the Florsheim
16 Homes sales representatives.” (Id. ¶¶ 30, 41, 42, 47, 52, 54.)
17 Plaintiffs further allege a fraudulent “scheme” to artificially
18 bolster home prices through the use of “captive” lenders and
19 appraisers. (Id. ¶¶ 24, 29, 31, 51(b).) Sales agents Mattie
20 Zedlitz and Tiffany Leon, along with the alleged president of
21 Florsheim Homes, Joseph Anfuso, are alleged to have “fully
22 participat[ed] in all activities” related to the fraud. (Id. ¶
23 5.)

24 Plaintiffs again fail to plead fraud with sufficient
25 particularity. Plaintiffs do not identify a specific statement
26 or omission, let alone the person or marketing material making
27 the misrepresentation. They refer to a broad array of
28 advertising material without identifying a specific brochure or

1 advertisement, nor do they explain how each of the plaintiffs
2 encountered the alleged misrepresentations.¹ Furthermore, to the
3 extent plaintiffs rely upon a generalized fraudulent scheme to
4 raise housing prices by false appraisals, plaintiffs fail to
5 adequately allege any specifics of the scheme, including the
6 offending appraisers and each participant's role in the scheme.

7 At the hearing on defendants' motion, counsel for
8 plaintiffs argued that the SAC adequately alleges
9 misrepresentations by Mattie Zedlitz and Tiffany Leon,
10 defendants' sales agents, when the sales agents distributed
11 brochures which falsely promised to refund the difference between
12 the home price at sale and at the year's end. The SAC, however,
13 does not include any such allegation. Rather, the SAC only
14 alleges that the sales agents distributed lists of preferred
15 lenders at model home showings between 2006 and 2011. (SAC ¶¶
16 25-26.) Nowhere does the SAC allege that these brochures
17 included promises to refund the difference in the home's price at
18 the year end.

19 Overall, as in the FAC, plaintiffs' allegations are not
20 "specific enough to give defendants notice of the particular
21 misconduct . . . so that they can defend against the charge and
22

23 ¹ Plaintiffs' argue that they have met the particularity
24 requirement by identifying relevant corporate officers and
25 alleging facts to show alter-ego or single-enterprise liability.
26 While "instances of corporate fraud may [] make it difficult to
27 attribute fraudulent conduct to each defendant," a plaintiff must
28 nonetheless "include the misrepresentations themselves with
particularity and, where possible, the roles of the individual
defendants in the misrepresentations." Moore v. Kayport Package
Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989). Plaintiffs'
failure to plead particular misrepresentations is therefore fatal
to their claim.

1 not just deny that they have done anything wrong.'" Kearns, 567
2 F.3d at 1124 (quoting Bly-Magee v. California, 236 F.3d 1014,
3 1019 (9th Cir. 2001)). Plaintiffs' ILSFDA claim will therefore
4 be dismissed.

5 B. Sherman Act

6 In the December 5, 2012 Order, the court dismissed
7 plaintiffs' claim under § 1 of the Sherman Act, 15 U.S.C. § 1,
8 because plaintiffs failed to sufficiently plead that defendants
9 tied home sales to financing under the first prong of a per se
10 tying violation. (Dec. 5, 2012 Order at 12.) To state a claim
11 for a per se tying violation, the plaintiff must allege: "(1)
12 that the defendant tied together the sale of two distinct
13 products or services; (2) that the defendant possesses enough
14 economic power in the tying product market to coerce its
15 customers into purchasing the tied product, and (3) that the
16 tying arrangement affects a not insubstantial volume of commerce
17 in the tied product market.'" Rick-Mik Enters., Inc. v. Equilon
18 Enters. LLC, 532 F.3d 963, 971 (9th Cir. 2008) (quoting Cascade
19 Health Solutions v. PeaceHealth, 515 F.3d 883, 912 (9th Cir.
20 2008)) (internal quotation marks omitted).

21 "The essential characteristic of an invalid tying
22 arrangement lies in the seller's exploitation of its control over
23 the tying product to force the buyer into purchase of a tied
24 product that the buyer either did not want at all, or might have
25 preferred to purchase elsewhere on different terms." Jefferson
26 Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984),
27 overruled on other grounds by Illinois Tool Works Inc. v. Indep.
28 Ink, 547 U.S. 28 (2006). If a defendant lacks market power in

1 the relevant tying product market, there can be no cognizable
2 tying claim because the defendant "has no power to force,
3 exploit, or coerce" the plaintiff to purchase a tied product or
4 to affect competition in the tied-product market. Rick-Mik, 532
5 F.3d at 972. "A failure to allege power in the relevant market
6 is a sufficient ground to dismiss an antitrust complaint." Id.

7 In Rick-Mik, the Ninth Circuit reviewed a district
8 court's dismissal of a Sherman Act tying claim for failure to
9 state a claim upon which relief can be granted. See id. at 970.
10 The plaintiff alleged that Equilon, which does business as Shell
11 Oil Products, required the plaintiff to use its credit-card
12 processing services (the tied product) when the plaintiff
13 obtained a retail gasoline franchise (the tying product). Id. at
14 972. While the plaintiff alleged specific facts as to Equilon's
15 power in the retail gasoline market, the plaintiff failed to
16 adequately allege market power in the relevant market for the
17 tying product--the retail gasoline franchise market--because the
18 complaint failed to include relevant factual allegations such as
19 "what percentage of gasoline franchises are Equilon's
20 (Shell/Texaco) as compared to other franchises[,] . . . the
21 percentage of gasoline retail sales that are made through non-
22 franchise outlets[,] . . . the amount of power or control that
23 Equilon has over prospective franchisees[,] . . . [or] the
24 relative difficulty of a franchisee to switch franchise brands."
25 Id.

26 Even assuming, without deciding, that plaintiffs'
27 amended allegations can be read to indicate a tying arrangement,
28 plaintiffs here, like the plaintiff in Rick-Mik, fail to allege

1 defendants' market power in the relevant market. While the
2 plaintiffs allege that Florsheim Homes built "literally
3 thousands" of homes between 2006 and 2011, (SAC ¶ 33), the SAC
4 lacks any factual allegations as to the percentage of homes in
5 the relevant market built by Florsheim compared to other
6 builders, the percentage of home sales by non-Florsheim
7 developers in the relevant market, or the relative difficulty of
8 obtaining a comparable home in the relevant market. See Rick-
9 Mik, 532 F.3d at 972.²

10 Plaintiffs rely on Northern Pacific Railway Company v.
11 United States, 356 U.S. 1 (1958). There, the Court found an
12 illegal tying arrangement based on the extensive landholdings of
13 the defendant railroad. See N. Pac. Ry. Co., 356 U.S. at 7
14 (noting that the railroad "possessed substantial economic power
15 by virtue of its extensive landholdings"). Here, however,
16 plaintiffs fail to adequately allege the extent of defendants'
17 holdings or power in the relevant market. To the extent
18 plaintiffs wish the court to apply any kind of presumption of
19 market power due to the unique nature of property or homes, the
20 Supreme Court, in overruling its case law holding that a patent
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22 ² Defendants further argue that any market power obtained
23 by defendants is based on the contractual arrangement between the
24 parties and therefore cannot satisfy the second prong of a per se
25 illegal tying arrangement. See Rick-Mik, 532 F.3d at 973 ("A
26 tying claim generally requires that the defendant's economic
27 power be derived from the market, not from a contractual
28 relationship that the plaintiff has entered into voluntarily).
Since plaintiffs have failed to adequately allege market power in
the relevant market, the court declines to address whether that
alleged market power is derived from a voluntary contractual
relationship.

The court also need not address whether plaintiffs have
satisfied the third prong of a per se illegal tying arrangement.

1 on the tying product creates a presumption of market power, has
2 explicitly held that "in all cases involving a tying arrangement,
3 the plaintiff must prove that the defendant has market power in
4 the tying product." Ill. Tool Works, 547 U.S. at 46 (emphasis
5 added). The court, therefore, will not apply any such
6 presumption.

7 Under the standard for a motion to dismiss laid out in
8 Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft
9 v. Iqubal, 556 U.S. 662 (2009), the SAC fails to satisfy the
10 second prong of a per se illegal tying arrangement because it
11 does not include factual allegations of market power in the
12 relevant market. Plaintiffs' claim under the Sherman Act will be
13 therefore be dismissed.³

14 C. Remaining State Law Claims and Leave to Amend

15 Because plaintiffs' federal claims will be dismissed
16 and no unusual circumstances suggest that the court should retain
17 jurisdiction over plaintiffs' state law claims, the court again
18 declines to exert supplemental jurisdiction over plaintiffs'
19 remaining state law claims and those claims will be dismissed.
20 See 28 U.S.C § 1367(c) (providing that a district court may

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22 ³ To the extent the SAC could be read to allege a
23 violation of the Sherman Act under the "rule of reason," see
24 Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir.
25 2012), plaintiffs' allegations again fall short. Plaintiffs
26 allege that defendants colluded with appraisers and lenders to
27 artificially inflate prices of homes, (SAC ¶¶ 24, 29), and allege
28 that this scheme is shown by unspecified "greater than average
sums" and "non-typical fees" paid to the preferred lenders at
closings of escrow, (id. ¶ 30). These vague allegations,
however, do not provide "enough factual matter (taken as true) to
suggest that an agreement was made," nor do they create a context
that suggests a preceding agreement, rather than "parallel
conduct that could just as well be independent action." See
Twombly, 550 U.S. at 556-57.

1 decline to exercise supplemental jurisdiction if "the district
2 court has dismissed all claims over which it has original
3 jurisdiction"); see also Reynolds v. County of San Diego, 84 F.3d
4 1162, 1171 (9th Cir. 1996) ("[I]n the usual case in which federal
5 law claims are eliminated before trial, the balance of factors
6 [outlined in 28 U.S.C. § 1367(c)] . . . will point toward
7 declining to exercise jurisdiction over the remaining state law
8 claims.") overruled on other grounds by Acri v. Varian Assocs.,
9 Inc., 114 F.3d 999, 1000 (9th Cir. 1997).⁴

10 Plaintiffs have now been permitted to amend their
11 complaint twice. The court previously dismissed plaintiffs'
12 federal claims under the Sherman Act and the ILSFDA for failing
13 to adequately allege subject matter jurisdiction, (Oct. 12, 2012
14 Order at 6, 8 (Docket No. 12)), and for failing to state a claim
15 upon which relief can be granted, (Dec. 5, 2012 Order at 9, 12).
16 While leave to amend must be freely given, the court is not
17 required to permit futile amendments. See DeSoto v. Yellow
18 Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992); Reddy v.
19 Litton Indus., Inc., 912 F.2d 291, 296-97 (9th Cir. 1990); Rutman
20 Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 738 (9th Cir.
21 1987); Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau,
22 701 F.2d 1276, 1293 (9th Cir. 1983).

23 Since the court has already found plaintiffs'
24 allegations lacking on these very same federal claims twice
25 before and plaintiffs' allegations remain insufficient, the court
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27 ⁴ Since the court will dismiss the entire SAC, the court
28 makes no finding as to whether plaintiffs have failed to join a
necessary party under Federal Rule of Civil Procedure 19.

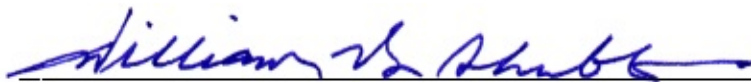
1 must assume that plaintiffs can do no better and will dismiss the
2 SAC without leave to amend.

3 The court, however, has consistently declined to
4 exercise jurisdiction over plaintiffs' state law claims on the
5 grounds that their federal claims were deficient. (Oct. 12, 2012
6 Order at 9; Dec. 5, 2012 Order at 13). As in the court's prior
7 orders, the court makes no finding as to the sufficiency of
8 plaintiffs' state law claims and will dismiss those claims
9 without prejudice. Plaintiffs will be free to bring those claims
10 in the state court.

11 IT IS THEREFORE ORDERED that defendants' motion to
12 dismiss be, and the same hereby is, GRANTED. Plaintiffs' first
13 claim under the ILSFDA and fifth claim under the Sherman Act are
14 DISMISSED with prejudice. Plaintiffs' remaining claims under
15 state law are DISMISSED without prejudice.

16 The Clerk of the Court is directed to enter judgment of
17 dismissal and close this file.

18 DATED: February 27, 2013

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21 WILLIAM B. SHUBB
22 UNITED STATES DISTRICT JUDGE
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