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

DANNY McBRIDE, et al.,

No. 2:14-cv-0776-JAM-CMK

Plaintiffs,

vs.

FINDINGS AND RECOMMENDATION

FANNIE MAE, et al.,

Defendants.

\_\_\_\_\_/

Plaintiffs, proceeding pro se, bring this civil action. Pending before the court is plaintiffs' complaint (Doc. 1) and motion for injunctive relief (Doc. 8).

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). The court is also required to screen complaints brought by litigants who have been granted leave to proceed in forma pauperis. See 28 U.S.C. § 1915(e)(2). Under these screening provisions, the court must dismiss a complaint or portion thereof if it: (1) is frivolous or malicious; (2) fails to state a claim upon which relief can be granted; or (3) seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. §§ 1915(e)(2)(A), (B) and 1915A(b)(1), (2). Moreover, pursuant to Federal Rule of Civil Procedure 12(h)(3), this court

1 must dismiss an action if the court determined that it lacks subject matter jurisdiction. Because  
2 plaintiff, who is not a prisoner, has been granted leave to proceed in forma pauperis, the court  
3 will screen the complaint pursuant to § 1915(e)(2). Pursuant to Rule 12(h), the court will also  
4 consider as a threshold matter whether it has subject-matter jurisdiction.  
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## 6 I. PLAINTIFF'S COMPLAINT

7 Plaintiffs, Danny and Pamela McBride, bring this action in an attempt to  
8 challenge the foreclosure of their home. Plaintiffs state this action is for quiet title, conspiracy,  
9 breach of contract, racketeering, negligence, defamation, fraud, intentional distress, unjust  
10 enrichment, tortuous interference, reckless misconduct, unlawful eviction, and unlawful entry.  
11 Plaintiffs allege that Pamela's parents owned a home in Paradise, California, which Pamela was  
12 the sole beneficiary of upon her parents' death. Prior to their death, Pamela's parents entered  
13 into a reverse mortgage contract with defendant California Reverse Mortgage Company.  
14 However, the loan documents were not signed or notarized, and her parents were never in  
15 possession of signed copies. Upon Pamela's mother's death, plaintiffs contacted defendant  
16 Financial Freedom and requested a payoff demand. Plaintiffs disputed the payoff amount, and  
17 they requested an accounting of the entire account. This request was not complied with. The  
18 property was then foreclosed upon, and apparently sold through an auction which plaintiffs claim  
19 did not occur properly.  
20

## 21 II. DISCUSSION

22 In order for this case to proceed, the court must have subject-matter jurisdiction.  
23 Federal courts are courts of limited jurisdiction. This court only has jurisdiction to adjudicate  
24 those cases which involve either diversity of citizenship (citizens of different states) or a federal  
25 question (such as a constitutional claim). See Kokkonen v. Guardian Life Ins. Co. of Am., 511  
26 U.S. 375, 380-81 (1994); 28 U.S.C. § 1330 *et seq.* The burden of establishing federal

1 jurisdiction lies on the party asserting such jurisdiction. See Kokkonen, 511 U.S. at 377; see also  
2 Miguel v. Country Funding Corp., 309 F.3d 1161, 1164 (9th Cir. 2004).

3 Here, plaintiffs do not specify which theory they are proceeding on, federal  
4 question or diversity jurisdiction. On the civil cover sheet, plaintiffs indicate that 28 U.S.C. §  
5 1332 applies. Diversity jurisdiction is only applicable where there is complete diversity, where  
6 “the citizenship of each plaintiff is diverse from the citizenship of each defendant.” Caterpillar  
7 Inc. v. Lewis, 519 U.S. 61, 68 (1996). However, in the complaint, plaintiffs acknowledge that  
8 they are California citizens and allege that several of the defendants are California citizens.  
9 Thus, there is no complete diversity, and this action cannot proceed under § 1332.

10 To the extent plaintiffs are attempting to proceed on federal question jurisdiction,  
11 general federal question jurisdiction under 28 U.S.C. § 1331 exists only “when the plaintiff sues  
12 under a federal statute that creates a right of action in federal court.” Williams v. United  
13 Airlines, Inc., 500 F.3d 1019, 1022 (9th Cir. 2007). “[A] complaint alleging a violation of a  
14 federal statute as an element of a state cause of action, when Congress has determine that there  
15 should be no private, federal cause of action for the violation, does not state a claim ‘arising  
16 under the Constitution, laws, or treaties of the United States.’” Merrell Dow Pharms. Inc. v.  
17 Thompson, 478 U.S. 804, 817 (1986) (quoting 28 U.S.C. § 1331). In order for a violation of a  
18 federal statute to give rise to a private cause of action, the statute must create such a right, either  
19 explicitly or implicitly. See Diaz v. Davis (In re Diqimarc Corp. Derivative Litiq.), 549 F.2d  
20 1223, 1229-30 (9th Cir. 2008).

21 Here, plaintiffs raise two claims they state are federal claims: quiet title under 28  
22 U.S.C. § 1402(d) and the Federal Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692.  
23 The remainder of the claims raised in the complaint appear to be based on state law. Neither of  
24 plaintiffs’ purportedly federal claims provide subject matter jurisdiction for this action. 28  
25 U.S.C. § 1402(d) provides:

26 ///

1 Any civil action under section 2409a to quiet title to an estate or  
2 interest in real property in which an interest is claimed by the  
3 United States shall be brought in the district court of the district  
where the property is located or, if located in different districts, in  
any of such districts.

4 Section 1402 is only applicable where the United States is a party to the action. Here, the United  
5 States is not a party, so § 1402 is not applicable.

6 Similarly, courts within this Circuit have concluded a non-judicial foreclosure  
7 does not constitute “debt collection” under the FDCPA, and therefore does not apply to a non-  
8 judicial foreclosure of real property. See Diessher v. Mortg. Elec. Regs. Sys., Inc., 618  
9 F.Supp.2d 1184, 1188 (D. Ariz. 2009) *aff’d* 2010 WL 2464899 (9th Cir. Jun. 17, 2010); Hale v.  
10 World Sav. Bank, 2012 WL 4675561, at 5-6 (E.D. Cal. Oct. 1, 2012).

11 Plaintiffs’ complaint otherwise fails to state a claim. Despite the flexible pleading  
12 policy of the Federal Rules of Civil Procedure, a complaint must give fair notice and state the  
13 elements of a claim plainly and succinctly. See Jones v. Community Redev. Agency, 733 F.2d  
14 464, 649 (9th Cir. 1984). Federal Rule of Civil Procedure 8 requires a plaintiff to “plead a short  
15 and plain statement of the elements of his or her claim, identifying the transaction or occurrence  
16 giving rise to the claim and the elements of the prima facie case.” Bautista v. Los Angeles  
17 County, 216 F.3d 837, 840 (9th Cir. 2000). Rule 8(d)(1) requires each allegation to be “simple,  
18 concise, and direct.” A plaintiff must allege with at least some degree of particularity overt facts  
19 which the defendant engaged in to support plaintiff’s claim. See Jones, 733 F.2d at 649. A  
20 complaint does not suffice “if it tenders ‘naked assertion[s]’ devoid of ‘further factual  
21 enhancement.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

22 The U.S. Supreme Court has explained:

23 While, for most types of cases, the Federal Rules eliminated the  
24 cumbersome requirement that a claimant “set out in detail the facts  
25 upon which he bases his claim,” Conley v. Gibson, 355 U.S. 41, 47  
(1957), Rule 8(a)(2) still requires a “showing,” rather than a  
26 blanket assertion, of entitlement to relief. Without some factual

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1 allegation in the complaint, it is hard to see how a claimant could  
2 satisfy the requirement of providing not only “fair notice” of the  
nature of the claim, but also “grounds on which the claim rests.

3 Bell Atl. Corp. v. Twombly, 550 U.S. 554, 556, n.3 (2007).

4 The complaint in this action fails to satisfy Rule 8. The complaint lacks factual  
5 allegations setting forth defendants’ specific wrongdoing to provide fair notice as to what each  
6 defendant is to defend. Overall, the complaint lacks cognizable claims or legal theories upon  
7 which to support defendants’ liability and rests on over broad conclusions that defendants are  
8 prohibited from foreclosing on the property. The complaint makes passing conclusions without  
9 supporting facts as to, *inter alia*, fraud, misrepresentations, racketeering, unjust enrichment,  
10 breach of contract, and unlawful eviction.

11 The complaint lumps defendants together and fails to distinguish adequately  
12 claims and alleged wrongs among defendants. A plaintiff suing multiple defendants must allege  
13 the basis of his claim against each defendant to satisfy Rule 8(a)(2). See Gauvin v. Trombatore,  
14 682 F.Supp. 1067, 1071 (N.D. Cal. 1988). The complaint lacks specific, clearly defined factual  
15 allegations of each defendant’s alleged wrongs to give fair notice of claims plainly and succinctly  
16 to warrant dismissal of this action.

17 Addressing the possible federal claims the court is able to decipher, the complaint  
18 is simply inadequate to state a claim. Within the plaintiffs’ second claim, which includes the  
19 FDCPA claim, they also mention racketeering. The undersigned assumes they are attempting to  
20 state a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.  
21 §§ 1961-1968. However, this claim is not articulated in the complaint. To state a claim under  
22 RICO, a plaintiff must allege the existence of a RICO enterprise, the existence of a pattern of  
23 racketeering activity, a nexus between the defendant and either the pattern of racketeering  
24 activity or the RICO enterprise, and a resulting injury to the plaintiff. See Occupational-Urgent  
25 Care Health Sys., Inc. v. Sutro & Co., 711 F. Supp. 1016, 1021 (E.D. Cal. 1989). To allege a  
26 pattern of racketeering activity, a plaintiff must allege two or more predicate acts. See Sun Sav.

1 & Loan Ass'n v. Dierdorff, 825 F.2d 187, 193 (9th Cir. 1987). When the alleged racketeering  
2 activity sounds in fraud, the complaint must “state with particularity the circumstances  
3 constituting fraud or mistake.” In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Prac. Lit., 601  
4 F. Supp. 2d 1201, 1215 (S.D. Cal. 2009) (quoting Fed. R. Civ. P. 9(b)) (internal quotation mark  
5 omitted). Here, plaintiffs fail to articulate any such activity, against any of the defendants.

6           The only other potential federal claim raised in the complaint is plaintiffs’ claim  
7 for fraud. It appears plaintiffs are attempting to raise a state law claim for fraud. However, as no  
8 other federal claim is present, this action can only survive if it is a federal claim for fraud.  
9 Regardless, the claim is not sufficiently plead for the court to find it sufficient to state such a  
10 claim, either federal or state. There are no actual allegations as to how any of the defendants  
11 perpetuated fraud on the plaintiff.

12           The elements of a California fraud claim are: (1) misrepresentation (false  
13 representation, concealment or nondisclosure); (2) knowledge of the falsity (or “scienter”); (3)  
14 intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. Lazar  
15 v. Superior Court, 49 Cal. Rptr. 2d 377, 380-81 (Cal. 1996). In addition, Federal Rule of Civil  
16 Procedure 9(b) requires that “the circumstances constituting fraud or mistake shall be stated with  
17 particularity.” This heightened pleading standard “requires a pleader of fraud to detail with  
18 particularity the time, place, and manner of each act of fraud, plus the role of each defendant in  
19 each scheme.” Lancaster Cmty. Hosp. v. Antelope Valley Dist., 940 F.2d 397, 405 (9th Cir.  
20 1991). Thus, “allegations of fraud must be specific enough to give defendants notice of the  
21 particular misconduct which is alleged to constitute the fraud charged so that they can defend  
22 against the charge and not just deny that they have done anything wrong.” Bly-Magee v.  
23 California, 236 F.3d 1014, 1019 (9th Cir. 2001) (citation and internal quotations omitted).

24           Rule 9(b)’s heightened pleading standard “is not an invitation to disregard Rule  
25 8’s requirement of simplicity, directness, and clarity” and “has among its purposes the avoidance  
26 of unnecessary discovery.” McHenry v. Renne, 84 F.3d 1172, 1178 (9th Cir. 1996). “A pleading

1 is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the  
2 defendant can prepare an adequate answer from the allegations.” Neubronner v. Milken, 6 F.3d  
3 666, 671-672 (9th Cir. 1993) (internal quotations omitted; citing Gottreich v. San Francisco Inv.  
4 Corp., 552 F.2d 866, 866 (9th Cir. 1997)). The Ninth Circuit Court of Appeals has explained:

5 Rule 9(b) requires particularized allegations of the circumstances  
6 *constituting* fraud. The time, place and content of an alleged  
7 misrepresentation may identify the statement or the omission  
8 complained of, but these circumstances do not “constitute” fraud.  
9 The statement in question must be false to be fraudulent.  
10 Accordingly, our cases have consistently required that  
11 circumstances indicating falseness be set forth. . . . [W]e [have]  
12 observed that plaintiff must include statements regarding the time,  
13 place, and *nature* of the alleged fraudulent activities, and that  
14 “mere conclusory allegations of fraud are insufficient.” . . . The  
15 plaintiff must set forth what is false or misleading about a  
16 statement, and why it is false. In other words, the plaintiff must set  
17 forth an explanation as to why the statement or omission  
18 complained of was false or misleading. . . . In certain cases, to be  
19 sure, the requisite particularity might be supplied with great  
20 simplicity.

21 In Re Glenfed, Inc. Sec. Litig., 42 F.3d 1541, 1547-1548 (9th Cir. 1994) (en banc) (italics in  
22 original) *superseded by statute on other grounds as stated in* Marksman Partners, L.P. v. Chantal  
23 Pharm. Corp., 927 F. Supp. 1297 (C.D. Cal. 1996); *see* Cooper v. Pickett, 137 F.3d 616, 627 (9th  
24 Cir. 1997) (fraud allegations must be accompanied by “the who, what, when, where, and how” of  
25 the misconduct charged).

26 Here, although plaintiffs state the defendants have committed fraud, they fail to  
allege any facts showing how such fraud was committed, much less meet the heightened pleading  
standard of Rule 9. It is difficult for the undersigned to determine where the allegation of fraud  
could have arisen based on the limited facts the plaintiffs have plead. The only factual  
allegations relating to fraud in the complaint appears to be that Financial Freedom breached the  
terms of the Deed of Trust by commencing foreclosure proceedings and substitution of trustee  
without proper service. However, there are no facts alleged that any of the defendants nor any of  
the defendants’ agents or representatives “intended to induce the plaintiff to act to his detriment

1 in reliance upon the false representation” and “that the plaintiff actually and justifiably relied  
2 upon the defendant’s misrepresentation in acting to his detriment.” Conrad v. Bank of America,  
3 45 Cal.App.4th 133, 156, 53 Cal.Rptr.2d 336 (1996). The undersigned fails see a connection  
4 between the defendants pursuing a non-judicial foreclosure, even if done with procedural errors as  
5 plaintiffs appear to allege, and an intentional misrepresentation the plaintiffs relied upon to their  
6 detriment. There is simply no indication that the defendants made any actual fraudulent  
7 misrepresentation.

8           Finally, to the extent plaintiffs are attempting to challenge the foreclosure of the  
9 property, they fail to allege tender, or even ability to tender, the amount owing on the loan. “A  
10 tender is an offer of performance made with the intent to extinguish the obligation.” Arnolds  
11 Management Corp. v. Eischen, 158 Cal.App.3d 575, 580, 205 Cal.Rptr. 15 (1984) (citing Cal.  
12 Civ. Code § 1485). A defaulted borrower is “required to allege tender of the amount of [the  
13 lender’s secured indebtedness in order to maintain any cause of action for irregularity in the sale  
14 procedure.” Abdallah v. United Savings Bank, 43 Cal.App.4th 1101, 1109, 51 Cal.Rptr.2d 286  
15 (1996). “A party may not without payment of the debt, enjoin a sale by a trustee under a power  
16 conferred by a deed of trust, or have his title quieted against the purchaser at such a sale, even  
17 though the statute of limitations has run against the indebtedness.” Sipe v. McKenna, 88  
18 Cal.App.2d 1001, 1006, 200 P.2d 61 (1948). An action to set aside a foreclosure sale,  
19 unaccompanied by an offer to redeem, does not state a cause of action which a court of equity  
20 recognizes. See Karlsen v. American Sav. & Loan Assn., 15 Cal.App.3d 112, 117, 92  
21 Cal.Rptr.851 (1971). “It would be futile to set aside a foreclosure sale on the technical ground  
22 that notice was improper, if the party making the challenge did not first make full tender and  
23 thereby establish his ability to purchase the property.” United States Cold Storage v. Great  
24 Western Savings & Loan Assn., 165 Cal.App.3d 1214, 1224, 212 Cal.Rptr 232 (1985). “It is  
25 settled in California that a mortgagor cannot quiet his title against the mortgagee without paying  
26 the debt secured.” Shimpones v. Stickney, 219 Cal. 637, 649, 28 P.2d 673 (1934).





1 that a “clear showing” of success on the merits has been made. See Winter, 129 S. Ct. at 375-76.  
2 With dismissal of the complaint, plaintiffs are unable to show success on the merits. In addition,  
3 based on the discussion above, without the ability to tender the outstanding amounts owned,  
4 plaintiffs fail to establish they are entitled to prevent property foreclosure. Even if they were,  
5 “[e]conomic damages are not traditionally considered irreparable because the injury can later be  
6 remedied by a damage award.” Cal. Pharmacists Ass’n v. Maxwell-Jolly, 563 F.2d 847, 852 (9th  
7 Cir. 2009). Plaintiffs also fail to demonstrate the balance of equities merits injunctive relief or  
8 that public interest supports injunctive relief. Rather, it appears that plaintiffs are simply  
9 attempting to extend their possession of the property without paying the outstanding amounts  
10 owed, and granting injunctive relief would be a disservice to public interest by allowing plaintiffs  
11 to preclude foreclosure after default without legitimate tender of outstanding amounts owned.

### 12 13 **III. CONCLUSION**

14 Plaintiffs’ complaint fails to state a claim in which to provide this court with  
15 subject matter jurisdiction over this action. Neither 28 U.S.C. § 1402(d) nor 15 U.S.C. §  
16 1692 apply to this action, and the complaint is otherwise insufficient to state any claims for  
17 relief. In addition, as plaintiffs’ complaint fails to survive screening, plaintiffs’ motion for  
18 injunctive relief should be denied.

19 Based on the foregoing, the undersigned recommends that:

- 20 1. Plaintiffs’ complaint be dismissed for failure to allege this court has  
21 subject matter jurisdiction over the claims raised and for failure to state a claim;
- 22 2. Plaintiffs’ motion for preliminary injunction (Doc. 8) be denied; and
- 23 2. The Clerk of the Court be directed to enter judgment and close this case.

24 These findings and recommendations are submitted to the United States District  
25 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 20 days  
26 after being served with these findings and recommendations, any party may file written

1 objections with the court. The document should be captioned “Objections to Magistrate Judge's  
2 Findings and Recommendations.” Failure to file objections within the specified time may waive  
3 the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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6 DATED: May 26, 2016

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8 **CRAIG M. KELLISON**  
9 UNITED STATES MAGISTRATE JUDGE  
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