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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JUNG HYUN CHO, et al.,
Plaintiff,
v.
SELECT PORTFOLIO SERVICING,
INC., et al.,
Defendant.

No. 2:17-cv-01073-KJM-CKD (PS)

FINDINGS AND RECOMMENDATIONS

Plaintiffs, who proceed pro se, commenced this action on May 22, 2017, alleging various claims related to two mortgages obtained in 2004 and subsequent foreclosure proceedings.¹ (ECF No. 1.) Defendants have filed numerous motions to dismiss and motions for more definite statement. (ECF Nos. 17, 19, 22, 23, 30, 32.) Plaintiffs have since filed numerous other motions. (ECF Nos. 43, 44, 47, 79.) These motions came on regularly for hearing on August 23, 2017 at 10:00 am. (ECF No 80.) Present at the hearing were pro se plaintiffs Jung Hyun Cho, Kyu Hwang Cho, and Eun Sook Cho; plaintiff Eui Hyun Cho did not appear. Present for defendants were Raymond Bangle for Solano County Tax Assessor (“Solano County”) and Joe Aguilar for

¹ While all appearing parties have consented to the jurisdiction of the United States Magistrate Judge (see ECF Nos. 7–10, 15, 18, 20, 46, 64), defendant Ronald Lee, who has been served, has neither appeared nor consented. Thus, the undersigned proceeds pursuant to Local Rules 302(c)(21) and 304. (See ECF No. 82.)

1 Select Portfolio Servicing, Inc. (“SPS”) and Deutsche Bank National Trust Company
2 (“Deutsche”). Appearing telephonically for defendants were Joel Spann for Bank of America
3 (“BOA”), Jamie Ackerman for WMC Mortgage LLC (“WMC”), and Christine Howson for The
4 Wolf Firm. Upon review of the documents in support and opposition, upon hearing the
5 arguments of counsel, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

6 I. BACKGROUND

7 On September 14, 2004, plaintiff Jung Hyun Cho obtained two loans from WMC for
8 \$472,000 and \$118,000, to acquire the property located at 681 Tuscany Court, Fairfield,
9 California 94534.² (ECF No. 33 at 5–21, 23–33.) Notices of Default were recorded on
10 September 11, 2009 (ECF No. 24 at 23–25), March 21, 2012 (ECF No. 24 at 29–32), and August
11 28, 2014 (ECF Nos. 24 at 36–39). On October 31, 2016, Deutsche purchased the property at 681
12 Tuscany Court through a trustee’s sale. (See ECF Nos. 24 at 41–42; 33 at 43–45.)

13 Deutsche subsequently filed an action for unlawful detainer against the Chos on April 6,
14 2017 in state court, based upon their failure to vacate the property after allegedly receiving a 90
15 day Notice to Quit. (Solano Cty. Super. Ct. FCM154163, Complaint.) On July 5, 2017, the Chos
16 attempted to remove the case to federal court. (E.D. Cal.) 2:17-cv-01357-MCE-DB, Notice of
17 Removal. However, United States District Judge Morrison C. England, Jr. remanded the matter
18 to Solano County Superior Court for lack of federal subject matter jurisdiction. Id., Order dated
19

20 ² In ruling on a motion to dismiss pursuant to Rule 12(b), the court “may generally consider only
21 allegations contained in the pleadings, exhibits attached to the complaint, and matters properly
22 subject to judicial notice.” Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 899
23 (9th Cir. 2007). “The court may judicially notice a fact that is not subject to reasonable dispute
24 because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be
accurately and readily determined from sources whose accuracy cannot reasonably be
questioned.” Fed. R. Evid. 201(b).

25 Defendants BOA and WMC have requested judicial notice of certain documents related to
26 the mortgages at issue in this case. (See ECF Nos. 24, 33.) At the same time, defendants SPS
27 and Deutsche have requested judicial notice of the August 3, 2017 order granting summary
28 judgment in Solano County Superior Court. (See ECF No. 56.) These requests are granted
because each document is “accurately and readily determined from sources whose accuracy
cannot reasonably be questioned,” because each was either recorded in the official records for the
County of Solano or is part of a verified state court action. Fed. R. Evid. 201(b).

1 July 11, 2017. After remand, on August 3, 2017, the Solano County Superior Court granted
2 summary judgment in favor of Deutsche and against the Chos. (ECF No. 56-1.)

3 Plaintiffs filed the complaint before this court on May 22, 2017. (ECF No. 1.) Liberally
4 construed, plaintiffs' complaint appears to raise the following claims against defendants: (1)
5 violation of plaintiffs' civil rights against discrimination in housing and unreasonable searches
6 and seizures; (2) violation of the Racketeering Influenced and Corruption Organizations Act
7 ("RICO"); (3) violation of the Home Affordable Modification Program ("HAMP"); (4) violations
8 of the False Claims Act (FCA); (5) violation of California Civil Code § 2923.7; (6) wrongful
9 foreclosure; (7) improperly assessing property tax; (8) unfair business practices; (9) breach of
10 contract; (10) breach of fiduciary duty; (11) fraud; (12) undue influence; (13) negligence; (14)
11 negligent infliction of emotional distress; (15) intentional infliction of emotional distress; (16)
12 invasion of privacy; (17) vandalism/theft; and (18) trespass. (See Id. at 4–20.)

13 By June 23, 2017, each defendant, except for Ronald Lee, had filed a motion to dismiss.
14 (See ECF Nos. 17, 19, 23, 30, 32.) BOA had also filed a separate motion for a more definite
15 statement. (ECF No. 22.) Plaintiffs subsequently filed a motion for judgment on the pleadings
16 (ECF No. 43), a motion to strike (ECF No. 44), and a motion for preliminary injunction (ECF No.
17 47). Defendants filed various oppositions. (See ECF Nos. 52, 53, 54, 55, 57, 58, 59, 60.) Each of
18 these motions was set for hearing on August 23, 2017 at 10:00 am.

19 Meanwhile, on August 11, 2017, plaintiffs filed a motion for emergency temporary
20 restraining order and preliminary injunction, to prevent defendants from enforcing the August 3,
21 2017 state court order granting summary judgment against the Chos. (See ECF No. 61.) On
22 August 15, 2017, the court denied plaintiffs' motion without prejudice, as procedurally defective.
23 (See ECF No. 70.) The court also ordered plaintiffs to show cause why this case should not be
24 dismissed due to lack of subject matter jurisdiction. (Id. at 5.) On August 22, 2017, plaintiffs
25 moved for reconsideration of the order and order to show cause. (ECF No. 79.)

26 On August 23, 2017, all of the pending motions were heard before the undersigned. (ECF
27 No. 80.) During the hearing, plaintiffs admitted that they have vacated the property at 681
28 Tuscany Court, as a result of the state court unlawful detainer judgment. (Solano Cty. Super. Ct.

1 FCM154163.) Speaking on behalf of plaintiffs, Kyu Hwang Cho asserted that, if granted leave
2 to amend their complaint, plaintiffs can state claims under federal question subject matter
3 jurisdiction.

4 For the foregoing reasons, the undersigned recommends defendants' motions to dismiss
5 be GRANTED; plaintiffs' complaint be DISMISSED WITHOUT LEAVE TO AMEND; and
6 plaintiffs' remaining motions be DENIED AS MOOT.

7 II. LEGAL STANDARDS

8 Federal Rule of Civil Procedure 12(b)(1) allows a defendant to raise the defense, by
9 motion, that the court lacks jurisdiction over the subject matter of an entire action or of specific
10 claims alleged in the action. A federal court has an independent duty to assess whether federal
11 subject matter jurisdiction exists, whether or not the parties raise the issue. See United Investors
12 Life Ins. Co. v. Waddell & Reed Inc., 360 F.3d 960, 967 (9th Cir. 2004) (stating that "the district
13 court had a duty to establish subject matter jurisdiction over the removed action *sua sponte*,
14 whether the parties raised the issue or not"); accord Rains v. Criterion Sys., Inc., 80 F.3d 339, 342
15 (9th Cir. 1996). The court must *sua sponte* dismiss the case if, at any time, it determines that it
16 lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3).

17 A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6)
18 challenges the sufficiency of the pleadings set forth in the complaint. Vega v. JPMorgan Chase
19 Bank, N.A., 654 F. Supp. 2d 1104, 1109 (E.D. Cal. 2009). Under the "notice pleading" standard
20 of the Federal Rules of Civil Procedure, a plaintiff's complaint must provide, in part, a "short and
21 plain statement" of plaintiff's claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); see
22 also Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). "To survive a motion to dismiss,
23 a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that
24 is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v.
25 Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads
26 factual content that allows the court to draw the reasonable inference that the defendant is liable
27 for the misconduct alleged." Id.

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1 In considering a motion to dismiss for failure to state a claim, the court accepts all of the
2 well-pled factual allegations in the complaint as true and construes them in the light most
3 favorable to the plaintiff. Corrie v. Caterpillar, Inc., 503 F.3d 974, 977 (9th Cir. 2007). The court
4 is “not, however, required to accept as true conclusory allegations that are contradicted by
5 documents referred to in the complaint, and [the court does] not necessarily assume the truth of
6 legal conclusions merely because they are cast in the form of factual allegations.” Paulsen, 559
7 F.3d at 1071.

8 III. DISCUSSION

9 A. Jurisdictional Threshold

10 The federal courts are courts of limited jurisdiction. See U.S. Const. art. III, § 2, cl. 1. In
11 the absence of a basis for federal jurisdiction, plaintiffs’ claims cannot proceed in this venue.

12 1. *Standing*

13 “Lack of standing deprives this court of Article III jurisdiction.” Ctr. for Biological
14 Diversity v. Mattis, No. 15-15695, 2017 WL 3585638, at *6 (9th Cir. Aug. 21, 2017) (citing Steel
15 Co. v. Citizens for a Better Env’t, 523 U.S. 83, 103–04 (1998)). Because the question of standing
16 is a threshold jurisdictional issue, federal courts have a duty to examine it. D’Lil v. Best Western
17 Encina Lodge & Suites, 538 F.3d 1031, 1035 (9th Cir. 2008).

18 Plaintiffs have the burden of establishing Article III standing. Colwell v. Dep’t of Health
19 and Human Servs., 558 F.3d 1112, 1121 (9th Cir.2009). To meet that burden, they “must
20 establish ‘the irreducible constitutional minimum of standing,’ consisting of three elements:
21 injury in fact, causation, and a likelihood that a favorable decision will redress the plaintiff’s
22 alleged injury.” Lopez v. Candaele, 630 F.3d 775, 785 (9th Cir. 2010) (quoting Lujan v.
23 Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)). To establish an injury in fact, they must
24 show that they have suffered “an invasion of a legally protected interest which is (a) concrete and
25 particularized, and (b) actual or imminent, not conjectural or hypothetical.” Lujan, 504 U.S. at
26 560.

27 Generally, “[a] person who is not a party to a contract does not have standing either to
28 seek its enforcement or to bring tort claims based on the contractual relationship.” Ambers v.

1 Wells Fargo Bank, N.A., 2014 WL 883752, at *4 (N.D. Cal. Mar. 3, 2014) (citing Mega Life &
2 Health Ins. Co. v. Super. Ct., 172 Cal. App. 4th 1522, 1528–32 (Cal. Ct. App. 2009)). As a result,
3 courts have found that persons who are not parties to mortgage loans lack standing to bring
4 foreclosure related claims such as: civil RICO claims, negligent misrepresentation, fraud,
5 wrongful foreclosures, quiet title, and injunctive relief. See Green v. Central Mortgage Co., 2015
6 WL 5157479, at *4 (N.D. Cal. Sept. 2, 2015) (collecting case authorities).

7 Here, Jung Hyun Cho is the only plaintiff listed as a borrower on the mortgages at the
8 heart of plaintiffs’ complaint. (See ECF No. 33 at 5–21, 23–33.) Plaintiffs Kyu Hwang Cho, Eun
9 Sook Cho, and Eui Hyun Cho are not parties to these mortgages. (Id.) Therefore, at a minimum,
10 Kyu Hwang Cho, Eun Sook Cho, and Eui Hyun Cho lack standing to bring claims two through
11 six, and eight through thirteen—RICO violations; HAMP violations; FCA violations; violation of
12 California Civil Code § 2923.7; wrongful foreclosure; unfair business practices; breach of
13 contract; breach of fiduciary duty; fraud; undue influence; and negligence—because each relates
14 to the servicing of the mortgages in question. Green, 2015 WL 5157479, at *4.

15 2. *Jurisdiction Explicitly Deprived by Congress*

16 One of plaintiffs’ central allegations is that the “Solano County Tax Assessor[]
17 outrageously overrated Plaintiff’s property tax to almost double of that for the very next door
18 neighbor . . . [i]ntentionally or negligently . . . [causing] a huge blow to the loan modification
19 process so as to lead up to a wrongful foreclosure.” (ECF No. 1 at 19.)

20 Congress has explicitly provided that federal courts generally lack jurisdiction over local
21 tax assessments, with very few exceptions. See 28 U.S.C. § 1341 (“The district courts shall not
22 enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a
23 plain, speedy and efficient remedy may be had in the courts of such State.”). The Ninth Circuit
24 has explained:

25 By its plain language, [28 U.S.C. § 1341] deprives federal district
26 courts of subject matter jurisdiction over actions for injunctive
27 relief from state taxation schemes. [. . .] Actions for declaratory
28 relief present similar considerations as claims for injunctive relief,
and therefore are also precluded from review by federal courts. [...] Further, federal courts have generally dismissed cases in which plaintiffs have sought both injunctive or declaratory relief and a

1 refund or damages.

2 Marvin F. Poer & Co. v. Ctys. of Alameda, 725 F.2d 1234, 1235 (9th Cir. 1984) (citations
3 omitted).

4 Moreover, plaintiffs cannot challenge the assessment of a local tax in federal court unless
5 they first demonstrate that they do not have a “plain, speedy and efficient remedy” in state court.
6 28 U.S.C. § 1341; see also Mandel v. Hutchinson, 494 F.2d 364, 367 (9th Cir. 1974) (“For a state
7 remedy to be ‘adequate’ under 28 U.S.C. § 1341 it need not necessarily be ‘the best remedy
8 available or even equal to or better than the remedy which might be available in the federal
9 courts.’”).

10 Here plaintiffs have not surmounted the high bar set by 28 U.S.C. § 1341 to establish
11 federal jurisdiction over this claim. First, plaintiffs’ allegations regarding Solano County’s tax
12 assessment are conclusory and vague. Notwithstanding the assertions that other properties have
13 received lower tax assessments (ECF No. 1 at 19), plaintiffs have failed to allege sufficient facts
14 under any valid legal theory to explain how their tax was improperly assessed. Second, while
15 plaintiffs allege that “numerous review requests were declined unfairly,” they have failed to
16 explain how the available state remedy is not plain, speedy, and efficient. (Id.) Nor have
17 plaintiffs indicated whether they exhausted administrative and judicial remedies on the state level.
18 Thus, the undersigned finds that this court lacks jurisdiction over plaintiffs’ claim that Solano
19 County improperly assessed their property tax.

20 3. *Subject Matter Jurisdiction*

21 A federal district court generally has original jurisdiction over a civil action when: (1) a
22 federal question is presented in an action “arising under the Constitution, laws, or treaties of the
23 United States” or (2) there is complete diversity of citizenship and the amount in controversy
24 exceeds \$75,000. See 28 U.S.C. §§ 1331, 1332(a).

25 In the August 15, 2017 order and order to show cause, the court put plaintiffs on notice
26 that their complaint fails to establish subject matter jurisdiction:

27 Here, plaintiffs’ sole listed basis for subject matter jurisdiction is
28 diversity of citizenship. (ECF No 61 at 2–3.) However, plaintiffs’
complaint lacks diversity jurisdiction on its face because all

1 plaintiffs and two named defendants are citizens of the State of
2 California. See 28 U.S.C. § 1332; In re Digimarc Corp., 549 F.3d
3 at 1234. Moreover, plaintiffs appear to have failed to state any
4 claim that would justify federal question jurisdiction. 28 U.S.C. §
5 1331.

6 (ECF No. 70 at 5.)

7 Because the complaint lacks complete diversity between all plaintiffs and all defendants,
8 plaintiffs have failed to establish diversity subject matter jurisdiction for their state law claims
9 five, six, and eight through eighteen: violation of California Civil Code § 2923.7; wrongful
10 foreclosure; unfair business practices; breach of contract; breach of fiduciary duty; fraud; undue
11 influence; negligence; negligent infliction of emotional distress; intentional infliction of
12 emotional distress; invasion of privacy; vandalism/theft; and trespass. See 28 U.S.C. § 1332(a).

13 In the absence of complete diversity, a federal court may assert supplemental jurisdiction
14 over a plaintiff's related state law claims, provided that federal question jurisdiction has been
15 established. See 28 U.S.C. § 1367. Supplemental jurisdiction is not available here because, for
16 the reasons explained below, the undersigned finds that plaintiffs have failed to establish federal
17 question jurisdiction on the face of their complaint.

18 **B. Sufficiency of Federal Claims**

19 The court must construe a pro se pleading liberally to determine if it states a claim and,
20 prior to dismissal, tell a plaintiff of deficiencies in his complaint and give plaintiff an opportunity
21 to cure them if it appears at all possible that the plaintiff can correct the defect. See Lopez v.
22 Smith, 203 F.3d 1122, 1130–31 (9th Cir. 2000) (en banc); see also Hebbe v. Pliler, 627 F.3d 338,
23 342 & n.7 (9th Cir. 2010) (stating that courts continue to construe pro se filings liberally even
24 when evaluating them under the standard announced in Iqbal). Liberally construing plaintiffs'
25 complaint, it appears to raise four claims under federal law.

26 **1. Civil Rights Claims under 42 U.S.C. § 1983**

27 Plaintiffs allege that their “civil rights to be free from unequal treatment [i]n housing and
28 [their] civil liberties guaranteed to enjoy privacy and freedom from unreasonable searches and/or
trespassing of their home have been severely violated by a multitude of RICO enterprises formed
by Defendants comprised of” BOA, Deutsche, SPS, and WMC. (ECF No 1. At 18.)

1 To the extent that plaintiffs allege that their civil rights were violated, they appear to bring
2 claims under 42 U.S.C. § 1983 based upon alleged racial discrimination in violation of either the
3 Fifth or Fourteenth Amendment and alleged unlawful search and seizure in violation of the
4 Fourth Amendment.

5 “To state a claim for relief under section 1983, the Plaintiffs must plead two essential
6 elements: 1) that the Defendants acted under color of state law; and 2) that the Defendants caused
7 them to be deprived of a right secured by the Constitution and laws of the United States.”
8 Johnson v. Knowles, 113 F.3d 1114, 1117 (9th Cir. 1997). The first element requires that
9 defendants have “exercised power ‘possessed by virtue of state law and made possible only
10 because [they are] clothed with the authority of state law’ . . . [or that defendants’] conduct
11 satisfies the state-action requirement of the Fourteenth Amendment.” West v. Atkins, 487 U.S.
12 42, 49 (U.S. 1988) (citations omitted).

13 “While generally not applicable to private parties, a § 1983 action can lie against a private
14 party when ‘he is a willful participant in joint action with the State or its agents.’” Kirtley v.
15 Rainey, 326 F.3d 1088, 1092 (9th Cir. 2003). Courts “recognize at least four different criteria, or
16 tests, used to identify state action: ‘(1) public function; (2) joint action; (3) governmental
17 compulsion or coercion; and (4) governmental nexus.’” Id.

18 Importantly, plaintiffs only bring their § 1983 claims against defendants BOA, Deutsche,
19 SPS, and WMC, each of which is a private party. While the mortgages in question were certainly
20 regulated by state and federal law, issuing and servicing mortgage loans does not constitute state
21 action. In the normal course of business, a mortgage is a contract between private parties. There
22 is nothing about this process to suggest that banks and mortgage companies are willful
23 participants in joint action with the state every time they issue or service mortgage loans.

24 Further, plaintiffs have failed to allege any facts to suggest that there were unique
25 circumstances that demonstrate that BOA, Deutsche, SPS, or WMC was acting under the color of
26 state law when issuing or servicing the mortgages in question. The only traditional state actor
27 named as a defendant in this matter is Solano County, which is alleged to have improperly
28 assessed property taxes on the property in question. (See ECF No. 1 at 17–18.) Plaintiffs allege

1 that the actions by Solano County created a “major stumbling block” for plaintiffs’ attempts at
2 loan modification, and that the “County Tax Assessor unfairly adopted a redlining practice
3 individually targeted at Plaintiff, in cooperation with SPS.” (ECF No. 1 at 18.) However, this
4 statement is conclusory and unsupported by any factual allegations that demonstrate cooperation
5 between Solano County and SPS. The court need not accept such bald assertions as true. See
6 Paulsen, 559 F.3d at 1071.

7 Therefore, plaintiffs have failed to state a claim under 42 U.S.C. § 1983 because they have
8 failed to allege any facts that demonstrate that defendants BOA, Deutsche, SPS, or WMC acted
9 under color of state law.

10 2. *RICO Claim*

11 Plaintiffs claim that defendants were involved in a RICO enterprise to violate their civil
12 rights. (ECF No 1. At 18.) “To prevail under RICO, a plaintiff must establish a ‘pattern of
13 criminal activity.’ [. . .] At a minimum, a ‘pattern’ requires that the predicate criminal acts be
14 ‘related’ and ‘continuous.’” Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1527 (9th Cir. 1995) (citing
15 H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 239 (1989)). RICO violations are
16 either a pattern of racketeering activity or the collection of an unlawful debt, or a conspiracy to
17 commit either. See 18 U.S.C. §1962; H.J. Inc., 492 U.S. at 232. A pattern of racketeering activity
18 requires at least two acts committed within 10 years of each other that are related, along with a
19 threat of continuing activity. See 18 U.S.C § 1961(5); H.J. Inc., 492 U.S. at 239.

20 Here plaintiffs continually refer to defendants’ activities as a “RICO enterprise” (See ECF
21 No. 1 at 2, 4, 18), but they fail to identify any conduct that would constitute a RICO violation.
22 Plaintiffs admit that Jung Hyun Cho obtained two legitimate loans in 2004³ (id. at 2), but they
23 allege that the loans were placed “into a racially bracketed dead-end mortgage securitization trust
24 in a fraudulent scheme to permanently block better terms for qualified but troubled homeowners

25
26 ³ Plaintiffs do allege that these loans were “predatory subprime loans.” (ECF No. 1 at 1.)
27 However, plaintiffs do not provide any factual assertions to suggest that the loans were illicitly
28 issued from the onset. For example, plaintiffs do not challenge the validity of either mortgage
instrument that was recorded in Solano County. Rather, the focus of plaintiffs’ complaint is on
what occurred to these loans after they were issued. (See Id.)

1 to seek long-term predatory profit.” (*Id.* at 4.) These conclusory assertions are not supported by
2 factual allegations that demonstrate that defendants were engaged in a pattern of racketeering
3 activity or that the loans were illegal. The court need not accept such bald assertions as true. *See*
4 *Paulsen*, 559 F.3d at 1071.

5 Therefore, plaintiffs have failed to state a claim under RICO because they have failed to
6 sufficiently allege that defendants were engaged in conduct that violates RICO. *See* 18 U.S.C. §
7 1962. Nor could plaintiffs state a claim under RICO, if granted leave to amend, because the
8 servicing of legitimate mortgage loans does not constitute a pattern of racketeering activity.

9 3. *HAMP Claim*

10 Plaintiffs also appear to bring a claim against defendants for alleged violations of HAMP.
11 Allegedly, “SPS has used a bait-and-switch gimmick to trick Plaintiff into a more affordable
12 modification package under HAMP in order to outbid state and federal injunctions under
13 HAMP.” (*See* ECF No. 1 at 2.)

14 HAMP was created during the recent subprime mortgage crisis, in an attempt to
15 encourage loan modifications to underwater mortgages:

16 In March 2009, the United States Department of Treasury
17 announced the details of the Home Affordable Modification
18 Program as part of the Making Home Affordable Program. Under
19 HAMP, individual loan servicers voluntarily enter into contracts
with Fannie Mae, acting as the financial agent of the United States,
to perform loan modification services in exchange for certain
financial incentives.

20 *Newell v. Wells Fargo Bank, N.A.*, 2012 WL 27783, at *1 (N.D. Cal. Jan. 5, 2012). As explained
21 above, plaintiffs Kyu Hwang Cho, Eun Sook Cho, and Eui Hyun Cho each lack standing to bring
22 claims related to the servicing of the mortgage loans in this matter, such as a claim under HAMP.
23 What is more, HAMP does not include a private right of action for mortgagees, who may be
24 incidental beneficiaries of a HAMP agreement between a financial institution and the federal
25 government. *Id.* at *6. Thus, plaintiff Jung Hyun Cho also lacks standing under HAMP, as an
26 incidental beneficiary to any HAMP agreement that may exist between defendants and the
27 government. As a result, plaintiffs’ HAMP claim must be dismissed because plaintiffs lack
28 standing to bring a private right of action under HAMP. *Id.*

1 4. *FCA Claim*

2 According to plaintiffs, the “FERA [Fraud Enforcement and Recovery Act] of 2009 may
3 hold WMC and [Deutsche] liable for this mortgage fraud committed against Plaintiff.” (ECF No.
4 1 at 7.) By referencing the FERA, it appears that plaintiffs are claiming that WMC and Deutsche
5 committed mortgage fraud in violation of 31 U.S.C. § 3729, et seq, also known as the FCA.⁴

6 The purpose of the FCA is “to discourage fraud against the
7 government.” [. . .] The FCA imposes civil liability on any person
8 who knowingly uses a “false record or statement to get a false or
9 fraudulent claim paid or approved by the Government,” [. . .] and
10 any person who “conspires to defraud the Government by getting a
false or fraudulent claim allowed or paid.” [. . .] To encourage the
disclosure of potential fraud, under the qui tam provisions of the
FCA, relators may “bring a civil action for a violation of [§]3729
for the person and for the United States Government.”

11 Cell Therapeutics, Inc. v. Lash Grp., Inc., 586 F.3d 1204, 1205–06 (9th Cir. 2009), as amended
12 on denial of reh’g and reh’g en banc (Jan. 6, 2010) (citations omitted). Thus, under the FCA, a
13 private citizen may bring an action on behalf of the government as a whistle blower. 31 U.S.C. §
14 3730(b).

15 Here, plaintiffs do not bring any action on behalf of the government. Rather, they allege
16 that defendants defrauded plaintiffs. Therefore, plaintiffs have failed to state a claim under the
17 FCA. See 31 U.S.C. § 3730(b).

18 IV. CONCLUSION

19 Based on the forgoing, there are numerous grounds to dismiss plaintiffs’ complaint. Three
20 out of the four plaintiffs lack standing to raise any claims related to the mortgage loans in
21 question. This court lacks jurisdiction to review a local tax assessed by Solano County.
22 Furthermore, plaintiffs lack complete diversity with defendants and they have failed to state a
23 claim under federal law on the face of their complaint.

24 The court has carefully considered whether plaintiffs should be provided with an
25 opportunity to amend their complaint, especially in light of their pro se status. The court
26

27 ⁴ The FERA of 2009 amended and strengthened the FCA. See 31 U.S.C. § 3729, et seq; Elspeth
28 England, The Government Upgrades the False Claims Act: Implications for Federal Construction
Contracting, Constr. Law., Winter 2012.

1 concludes that further leave to amend would be futile. Plaintiffs' only response to the court's
2 order to show cause, regarding a lack of subject matter jurisdiction (ECF No. 70), was to assert at
3 the hearing that they could state valid federal claims, if granted leave to amend. They did not
4 assert that they could cure the lack of diversity, however. As such, whether to grant leave to
5 amend rests upon whether plaintiffs could plead a plausible federal claim in an amended
6 complaint. Yet, there are no set of facts that plaintiffs could allege, consistent with their current
7 allegations, in support of federal claims under 42 U.S.C. § 1983, RICO, HAMP, or the FCA that
8 would entitle them to relief. See Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–39 (9th Cir.
9 1996). As explained, plaintiffs cannot allege that BOA, Deutsche, SPS, and WMC were acting
10 under the color of state law when they serviced legitimate mortgage loans. Nor can they provide
11 any allegations consistent with their current factual allegations that demonstrate defendants were
12 involved in a pattern of racketeering or collecting on an illegal loan. Moreover, plaintiffs may not
13 bring claims on their own behalf under HAMP or the FCA.⁵

14 Accordingly, IT IS HEREBY RECOMMENDED that:

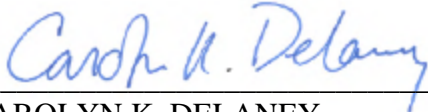
- 15 1. Defendants' motions to dismiss (ECF Nos. 17, 19, 23, 30, 32) be GRANTED.
- 16 2. Plaintiffs' complaint (ECF No. 1) be DISMISSED, WITHOUT LEAVE TO
17 AMEND, for lack of subject matter jurisdiction, but without prejudice as to the
18 state law claims, so that plaintiffs may pursue those claims in state court if
19 appropriate.
- 20 3. Defendants' motion for more definite statement (ECF No. 22), as well as
21 Plaintiffs' motion for judgment on the pleadings (ECF No. 43), motion to strike
22 (ECF No. 44), motion for preliminary injunction (ECF No. 47), and motion for
23 reconsideration of order and order to show cause (ECF No. 79) be DENIED AS
24 MOOT.
- 25 4. The Clerk of Court be directed to close this case.

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27 ⁵ The court need not consider plaintiffs' pending motions (ECF No. 43, 44, 47, 79) because they
28 are moot with the dismissal of this action and with plaintiffs' admission that they have already
vacated the property in question, pursuant to the state court action plaintiffs had sought to enjoin.

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These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections within the specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: September 6, 2017



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

14/ps.17-1073.Cho.F&R MTD