

1 Lakes Educational Loan Services, Inc. (“Great Lakes”) – which services their loans – from
2 collecting the loans or reporting the loan balances to credit reporting agencies.

3 Plaintiffs instituted this putative class action in Alameda County Superior Court on
4 May 12, 2008, against KeyBank and Great Lakes. Student Loan Xpress, Inc. (“SLX”) and
5 American Education Services (“AES”) – which allegedly made and serviced loans to Silver
6 State students – were added as defendants in a First Amended Complaint filed four days
7 later. After Plaintiffs filed a Second Amended Complaint (“SAC”), KeyBank removed the
8 action to federal court, and a settlement with SLX led to its and AES’s dismissal on October
9 27, 2009.

10 After an unsuccessful mediation, KeyBank and Great Lakes (collectively
11 “Defendants”) responded to the SAC on April 24, 2009 by moving to dismiss and to compel
12 arbitration. The Court denied the motion to compel arbitration on July 8, 2009 – a ruling
13 Defendants have appealed to the Ninth Circuit – and continued the motion to dismiss. On
14 August 17, 2009, this matter was stayed except for document discovery and the motion to
15 dismiss. Defendants filed a new motion to dismiss on October 5, 2009, in response to which
16 Plaintiffs amended the complaint. Defendants moved to dismiss the Third Amended
17 Complaint (“TAC”) pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(3) on
18 January 11, 2010. Plaintiffs opposed the motion.

19

20 **LEGAL STANDARD**

21 Dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(6) when a
22 plaintiff’s allegations fail “to state a claim upon which relief can be granted.” In ruling on a
23 motion to dismiss, the Court must “accept all material allegations of fact as true and construe
24 the complaint in a light most favorable to the non-moving party.” *Vasquez v. L.A. County*,
25 487 F.3d 1246, 1249 (9th Cir. 2007). Courts are not, however, “bound to accept as true a
26 legal conclusion couched as a factual allegation.” *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct.
27 1937, 1949-50 (2009).

28

1 A complaint must contain “a short and plain statement of the claim showing that the
2 pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), in order to ““give the defendant fair
3 notice of what the . . . claim is and the grounds upon which it rests.”” *Bell Atlantic Corp. v.*
4 *Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A
5 Rule 12(b)(6) dismissal “can be based on the lack of a cognizable legal theory or the absence
6 of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police*
7 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). To survive a motion to dismiss, a plaintiff must
8 plead “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S.
9 at 570. Plausibility does not equate to probability, but it requires “more than a sheer
10 possibility that a defendant has acted unlawfully.” *Iqbal*, 129 S. Ct. at 1499. “A claim has
11 facial plausibility when the plaintiff pleads factual content that allows the court to draw the
12 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Dismissal
13 of claims that fail to meet this standard should be with leave to amend unless it is clear that
14 amendment could not possibly cure the complaint’s deficiencies. *Steckman v. Hart Brewing,*
15 *Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998).

16 Rule 12(b)(3) governs a motion to dismiss for improper venue. When “resolving
17 motions to dismiss based on a forum selection clause, the pleadings are not accepted as true,
18 as would be required under a Rule 12(b)(6) analysis.” *Argueta v. Banco Mexicano, S.A.*, 87
19 F.3d 320, 324 (9th Cir. 1996). To the contrary, it “is consistent with the Supreme Court
20 standard for resolving forum selection clause cases” for “the district court to consider facts
21 outside of the pleadings.” *Id.*

22

23 **DISCUSSION**

24 Plaintiffs bring six causes of actions under California’s Unfair Competition Law
25 (“UCL”), Cal. Bus. & Prof. Code § 17200. The claims are all premised on the Federal Trade
26 Commission’s “Holder Rule,” 16 C.F.R. § 433.2, which “requires purchase money loan
27 agreements (loans supplying money for the purchase of goods or services) arranged by
28 sellers to contain a notice to all loan holders that preserves the borrower’s ability to raise

1 claims and defenses against the lender arising from the seller’s misconduct.” *Armstrong v.*
2 *Accrediting Council for Continuing Educ. & Training, Inc.*, 168 F.3d 1362, 1365 (D.C. Cir.
3 1999). Defendants argue that all six of Plaintiffs’ causes of action fail to state a claim for
4 relief, and are preempted by the National Bank Act. They also urge the Court to dismiss
5 pursuant to a forum selection clause that calls for an Ohio venue, and argue that Plaintiffs’
6 claims are barred by the economic loss doctrine.

7 The Court begins by examining the Holder Rule and determining whether any of
8 Plaintiffs’ six causes of action state plausible claims for relief under the Rule 12(b)(6)
9 standard. For any claims that overcome that hurdle, the Court will then assess whether they
10 must nevertheless be dismissed due to federal preemption. Since the Court finds that all of
11 Plaintiffs’ causes of action falter at one of those two steps, it is unnecessary to address
12 KeyBank’s other arguments.¹

13
14 **I. Plaintiffs’ Claims Under the Holder Rule and California’s Unfair Competition**
15 **Law**

16 The so-called “Holder Rule” was adopted by the Federal Trade Commission (“FTC”)
17 in 1975 to stem the “unfair practice” of separating “the buyer’s duty to pay for goods or
18 services from the seller’s reciprocal duty to perform as promised” in the financing of
19 consumer sales. 40 Fed. Reg. 53,522 (Nov. 18, 1975). The Rule makes it an “unfair or
20 deceptive act or practice” under section 5 of the FTC Act “for a seller, directly or indirectly,
21 to”:

- 22 (a) Take or receive a consumer credit contract which fails to
23 contain the [Holder Notice], or,
24 (b) Accept, as full or partial payment for such sale or lease, the
25 proceeds of any purchase money loan (as purchase money loan is
26 defined herein), unless any consumer credit contract made in
27 connection with such purchase money loan contains the [Holder
28 Notice].

¹ Defendants also argue that Great Lakes must be dismissed because Plaintiffs fail to allege any facts concerning it. The Court need not address this argument as all claims are to be dismissed on other grounds.

1 16 C.F.R. § 433.2.² The “Holder Notice” must be written “in at least ten point, bold face,
2 type” and read as follows:

3 ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT
4 IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH
5 THE DEBTOR COULD ASSERT AGAINST THE SELLER OF
6 GOODS OR SERVICES OBTAINED [PURSUANT HERETO
OR] WITH THE PROCEEDS HEREOF. RECOVERY
HEREUNDER BY THE DEBTOR SHALL NOT EXCEED
AMOUNTS PAID BY THE DEBTOR HEREUNDER.³

7 *Id.* The onus is therefore placed on the seller to ensure the Holder Notice’s inclusion in
8 consumer credit contracts, either by refusing a contract that omits the Notice, or by refusing
9 proceeds of a loan made pursuant to such a contract.⁴ When the Holder Notice appears in a
10 consumer credit contract, a debtor can assert the same defenses against his lender as he could
11 against the seller. “For example, if a used car dealer who fraudulently sells a lemon also
12 arranges the buyer’s financing through a bank, the buyer may rely on the dealer’s fraud as a
13 defense against repaying the bank loan.” *Armstrong*, 168 F.3d at 1365. No private right of
14 action exists to enforce the Holder Rule, violations of which can only be pursued by the FTC.
15 *See* 15 U.S.C. § 45(a)(2) (section 5 of the FTC Act, empowering the FTC “to prevent
16 persons, partnerships, or corporations . . . from using unfair methods of competition in or
17 affecting commerce and unfair or deceptive acts or practices in or affecting commerce”);

18
19 ² A “seller” is a “person who, in the ordinary course of business, sells or leases goods
20 or services to consumers,” 16 C.F.R. § 433.1(j), and a “consumer credit contract” is any
21 “instrument which evidences or embodies a debt arising from a ‘Purchase Money Loan’
22 transaction or a ‘financed sale’ as defined in paragraphs (d) and (e) of this section,” *id.*
23 § 433.1(i). A “purchase money loan” is a “cash advance which is received by a consumer in
24 return for a ‘Finance Charge’ within the meaning of the Truth in Lending Act and Regulation
Z, which is applied, in whole or substantial part, to a purchase of goods or services from a
seller who (1) refers consumers to the creditor or (2) is affiliated with the creditor by
common control, contract, or business arrangement.” *Id.* § 433.1(d). “Financing a sale”
means “[e]xtending credit to a consumer in connection with a ‘Credit Sale’ within the
meaning of the Truth in Lending Act and Regulation Z.” *Id.* § 433.1(e).

25 ³ The bracketed language – “pursuant hereto or” – appears only in the Holder Notice
26 required by 16 C.F.R. § 433.2(a), but not in § 433.2(b). Aside from that difference, the
language required by subsections (a) and (b) is identical.

27 ⁴ On the same day the Holder Rule was officially promulgated, the FTC also proposed
28 an amendment that would have applied the rule to lenders, as well. *See Heastie v. Cmty.*
Bank of Greater Peoria, 727 F. Supp. 1133, 1137 (N.D. Ill. 1989) (reviewing history of
amendment). However, the proposed amendment was never adopted.

1 *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 987 (D.C. Cir. 1973) (“[P]rivate actions to
2 vindicate rights asserted under the Federal Trade Commission Act may not be maintained.”).

3 Plaintiffs allege that they and every member of the proposed class executed a “service
4 contract” with Silver State, in which the school “agreed to provide specific education and
5 training for each student to become a commercial helicopter pilot within a specified period of
6 time.” TAC ¶ 9. Class members financed all or part of Silver State’s nearly \$60,000 per-
7 student tuition by executing promissory notes with KeyBank. Silver State filed for
8 bankruptcy and shuttered before any of them had completed their promised training, but after
9 KeyBank had disbursed their loans in their entirety. Plaintiffs contend that the service
10 contracts and the promissory notes are both “consumer credit contracts” under the Holder
11 Rule, and that Silver State was a “seller” required to comply with the Rule. However, neither
12 the service contracts nor the promissory notes included the Holder Notice, an omission that
13 underlies this action.

14 As the Holder Rule provides no private right of action, Plaintiffs bring their claims
15 under the UCL, which characterizes “any unlawful, unfair or fraudulent business act or
16 practice” as “unfair competition.” Cal. Bus. & Prof. Code § 17200. The statute’s coverage is
17 “sweeping, embracing ‘anything that can properly be called a business practice and that at
18 the same time is forbidden by law.’” *Rubin v. Green*, 4 Cal. 4th 1187, 1200 (1993) (quoting
19 *Barquis v. Merchants Collection Ass’n*, 7 Cal. 3d 94, 113 (1972)). The UCL allows civil
20 actions for injunctions to be brought by any “person who has suffered injury in fact and has
21 lost money or property as a result of the unfair competition,” Cal. Bus. & Prof. Code
22 § 17204, against “[a]ny person who engages, has engaged, or proposes to engage in unfair
23 competition,” *id.* § 17203. Available relief “may include orders necessary ‘to restore to any
24 person in interest any money or property ... acquired by means of such unfair competition.’”
25 *Wells v. One2One Learning Found.*, 39 Cal. 4th 1164, 1189 (2006) (quoting Cal. Bus. &
26 Prof. Code § 17203).

27 Since section 17200 is “written in the disjunctive,” it “establishes three varieties of
28 unfair competition – acts or practices which are unlawful, or unfair, or fraudulent.” *Podolsky*

1 v. *First Healthcare Corp.*, 50 Cal. App. 4th 632, 647 (1996). Plaintiffs bring claims under
2 each of the prongs. They claim that KeyBank directly violated both parts of the Holder Rule
3 by omitting the Holder Notice from their promissory notes (Claims 1 and 2), and that it is
4 also liable for aiding and abetting Silver State’s violation of the Rule (Claims 3 and 4).
5 Plaintiffs’ last two causes of action invoke the unfair and fraudulent prongs of the UCL.
6 Defendants argue that none of the six causes of action succeed in stating a claim.

7
8 **A. “Unlawful” Prong: Direct Violation of the Holder Rule**

9 “By proscribing ‘any unlawful’ business practice, section 17200 ‘borrows’ violations
10 of other laws and treats them as unlawful practices that the unfair competition law makes
11 independently actionable.” *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tele. Co.*, 20 Cal. 4th
12 163, 180 (1999) (internal citations and quotation marks omitted). “Violations of federal as
13 well as state and local law may serve as the predicate for an unlawful practice claim under”
14 section 17200. *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 676 (2009). Plaintiffs contend
15 that KeyBank breached both parts of the Holder Rule, by “taking” the promissory notes that
16 omitted the Holder Notice, 16 C.F.R. § 433.2(a), and by providing Silver State with purchase
17 money loan proceeds despite that omission from the notes and service contracts, *id.*
18 § 433.2(b). Defendants respond that KeyBank cannot have directly violated the Holder Rule,
19 which applies only to “sellers.”

20 The Holder Rule has never been subject to close scrutiny by the Ninth Circuit, and
21 other circuits have likewise had little opportunity to explore its scope. As a result, both
22 parties draw support from opinions by federal district and state courts outside the Ninth
23 Circuit, none of which are binding on this Court. Plaintiffs rely on *Gonzalez v. Old Kent*
24 *Mortgage Co.*, where a court in the Eastern District of Pennsylvania – after concluding that
25 “contract terms may be implied where public policy so requires” – read the Holder Notice
26 into a contract that omitted it. No. 99-5959, 2000 U.S. Dist. Lexis 14530, at *13 (E.D. Pa.
27 Sept. 19, 2000). The court found that “it would turn the law on its head to allow [the
28 defendant mortgage company] to avoid the consequences of [the Holder Notice] by its own

1 failure” to include the notice in its loan documents. *Id.* However, the *Gonzalez* court did not
2 acknowledge that the Holder Rule, by its own language, makes only sellers responsible for
3 the inclusion of the notice in contracts. The court also never concluded that the defendant
4 mortgage company’s failure to include the notice was unlawful; it only decided to proceed as
5 though the Holder Notice had been included in the loan documents. *Gonzalez* is therefore
6 not only unpersuasive, but also unsupportive of Plaintiffs’ position.

7 Plaintiffs’ other authorities fare no better. The Common Pleas Court of Allegheny
8 County, Pennsylvania, recognized that the creditor bank had committed “no violation” of the
9 Holder Rule because “the rule, as presently drafted, places a duty only on the seller to insure
10 that the preservation of defenses provisions is included within the loan agreement.” *Iron &*
11 *Glass Bank v. Franz*, 9 Pa. D. & C. 3d 419, 427 (Pa. C.P. 1978). Although the court still
12 refused to insulate the creditor “from the seller’s wrongdoing,” it did so despite its
13 conclusion that no direct violation of the Holder Rule had occurred. *Id.* *Heastie v.*
14 *Community Bank of Greater Peoria* suffers the same infirmity: the court acknowledged that
15 “part 433 does not apply by its terms to lenders,” but found that a lender’s addition of a non-
16 responsibility provision contrary to the Holder Notice – which was included in the contract –
17 could be an unfair or deceptive practice under Illinois’ Consumer Fraud Act. 727 F. Supp.
18 1133, 1138 (N.D. Ill. 1989). *Heastie* does not demonstrate that KeyBank’s conduct was
19 unlawful.

20 The Holder Rule imposes obligations only on the seller. Its language is “explicit in
21 stating the consequences of a failure to include the notice and notably incur a penalty is
22 solely visited upon the seller.” *In re Vincent Crisomia, Sr.*, No. 00-35085DWS, 2001 Bankr.
23 Lexis 1469, at *11 (E.D. Pa. Bankr. 2001). “[T]he clear and unambiguous language
24 contained in the regulation places no liability on the part of a lender for failing to include the
25 term in its loan documents.” *Abel v. KeyBank USA, N.A.*, No. 1:03 CV 524, 2003 U.S. Dist.
26 Lexis 27175, at *26-27 (N.D. Ohio Sept. 24, 2003). Although a seller violates the Holder
27 Rule by taking a consumer credit contract – or by accepting proceeds of a purchase money
28 loan made pursuant to a contract – that omits the notice, the same cannot be said of a lender

1 or creditor. With no obligation to include the Holder Notice in its promissory notes,
2 KeyBank has not contravened any law. KeyBank’s actions therefore cannot, by themselves,
3 satisfy the “unlawful” prong of the UCL. These claims are DISMISSED without leave to
4 amend, as Plaintiffs cannot – as a matter of law – allege that KeyBank directly violated the
5 Holder Rule.

6
7 **B. “Unlawful” Prong: Aiding and Abetting Silver State’s Violation of the Holder**
8 **Rule**

9 Plaintiffs’ third and fourth claims are also brought under the UCL’s “unlawful” prong,
10 but the Holder Rule violation alleged is that of Silver State, with KeyBank’s liability
11 premised on aiding and abetting that violation. Defendants contend – incorrectly – that
12 California law precludes actions for “aiding and abetting” under section 17200. California
13 courts have held only that a section 17200 claim “cannot be predicated on *vicarious*
14 *liability*,” which is based on an agency relationship. *Emery v. Visa Int’l Serv. Ass’n*, 95 Cal.
15 App. 4th 952, 960 (2002) (emphasis added). Aiding and abetting a section 17200 violation is
16 actionable and assessed using the same standard for aiding and abetting an intentional tort.
17 *Schulz v. Neovi Data Corp.*, 152 Cal. App. 4th 86, 93 (2007). Liability may be imposed if
18 the defendant “‘knows the other’s conduct constitutes a breach . . . and gives substantial
19 assistance or encouragement to the other to so act.’” *Id.* (quoting *Fiol v. Doellstedt*, 50 Cal.
20 App. 4th 1318, 1325 (1996)).

21 Plaintiffs allege that Silver State violated both parts of the Holder Rule by receiving
22 the service contracts and accepting the proceeds of KeyBank’s loans when neither the service
23 contracts nor the promissory notes included the Holder Notice. *See* 16 C.F.R. § 433.2(a)-(b).
24 Violations of federal regulations may constitute “unlawful” activity under the UCL. *Smith v.*
25 *Wells Fargo Bank, N.A.*, 135 Cal. App. 1463, 1480 (2005). For KeyBank to be liable on an
26 aiding and abetting theory, it must have not only known about the alleged Holder Rule
27 violations, but also provided substantial assistance or encouragement. First, however,
28 Plaintiffs must have stated a plausible claim that *Silver State* violated the Holder Rule –

1 which they do. The TAC alleges that the Plaintiffs’ service contracts with Silver State, and
2 their promissory notes with KeyBank, are both “consumer credit contracts” – defined by
3 regulation as “[a]ny instrument which evidences or embodies a debt arising from a ‘Purchase
4 Money Loan’ transaction,” 16 C.F.R. § 433.1(i) – and that the Holder Notice was omitted
5 from both.⁵ Silver State therefore would have violated the Holder Rule by receiving the
6 service contracts, and by accepting the proceeds of KeyBank’s purchase money loans. *See*
7 *id.* § 433.2(a)-(b).

8 The Court therefore turns its attention to whether KeyBank’s conduct, as alleged,
9 meets the standard for aiding and abetting. In *Schulz*, the California Court of Appeal ruled
10 that a plaintiff had properly pleaded an aiding and abetting claim under section 17200. 152
11 Cal. App. 4th at 88. The *Schulz* plaintiff alleged that two defendants aided and abetted an
12 illegal online lottery by performing credit card processing and billing services for its
13 operator. The court found the knowledge requirement satisfied by the allegations that the
14 defendants had “reviewed EZ’s Web site and ‘recognized that the site was an illegal lottery,
15 but also realized that it generated substantial revenue and could be very profitable for
16 [them].’” *Id.* at 94. The defendants also provided “substantial assistance or encouragement”
17 by authorizing “EZ to configure its site to display their respective logos so that consumers
18 could link directly to their sites to process credit card payments.” *Id.* The complaint alleged
19 that the defendants realized their participation would not only enable “more persons . . . to
20 participate in the illegal lottery” – thus increasing their revenue – but that it would also “lend
21 an aura of respectability and further encourage participation.” *Id.*

22
23
24 ⁵ Defendants argued for the first time at hearing that Silver State’s service contracts
25 are not consumer credit contracts. At the motion to dismiss stage, the Court finds Plaintiffs’
26 allegation that the service contracts constitute consumer credit contracts to be sufficient
27 without examining the contract to determine whether it “evidences or embodies a debt.” 16
28 C.F.R. § 433.1(j). Defendants also asserted – for the first time – that KeyBank’s promissory
notes are not consumer credit contracts, because education loans above \$25,000 were exempt
from the Truth in Lending Act (“TILA”) and Regulation Z at the time Plaintiffs’ loans were
made. *See* 15 U.S.C. § 1603(3). The Court agrees with Plaintiffs that the Holder Rule
merely borrows the definitions of “finance charge” and “credit sale” from TILA and
Regulation Z; it does not import the restrictions to which Defendants refer. *See* note 2, *supra*
(quoting provisions of OCC regulations).

1 Plaintiffs' allegations meet *Schulz's* threshold for pleading an aiding and abetting
2 claim under the UCL. The TAC alleges that KeyBank was "keenly aware that . . . if it
3 permitted the Holder Rule Notice to be included in the consumer credit transaction
4 documentation, KeyBank would be unable to sell the loans into the secondary market and
5 would necessarily be obligated to return those unused funds to the students if the school
6 closed prior to the students obtaining all of the promised education." TAC ¶ 27. Plaintiffs
7 characterize KeyBank as a sophisticated player, well aware of the Holder Rule and
8 consciously seeking to avoid it. They claim that KeyBank developed strategies to enhance
9 "its ability to aggressively pursue collection of loans made to students scammed by
10 vocational schools," such as "omitting the Holder Rule Notice from its promissory notes"
11 and "ensuring that the contracts between the vocational school partner and its students
12 omitted" the notice. *Id.* ¶ 25. KeyBank had specific knowledge of Silver State's violations
13 because, according to the TAC, it reviewed and approved exemplar copies of its service
14 contract, and disbursed loans to Silver State despite the omission of the Holder Notice. The
15 knowledge requirement is therefore satisfied.

16 As for substantial assistance, the TAC alleges that KeyBank was Silver State's
17 "preferred lender," and that "KeyBank's marketing and sales personnel helped create,
18 review, approve and ratify [Silver State's] marketing and sales presentation, at least as it
19 related to KeyBank's Key Alternative Loan program." TAC ¶ 32. Silver State could not
20 have violated section 433.2(b) – accepting loan funds despite omission of the Holder Notice
21 – had KeyBank not disbursed the loans. The TAC likewise alleges that KeyBank encouraged
22 the violation of section 433.2(a), by reviewing and approving exemplar copies of the service
23 contract, and ensuring the Holder Rule's omission. TAC ¶¶ 25, 49. The pleading establishes
24 substantial assistance or encouragement.

25 By alleging that KeyBank knew of and encouraged Silver State's violations of the
26 Holder Rule, Plaintiffs have stated plausible claims for aiding and abetting Silver State's
27 "unlawful" activity under the UCL.
28

1 **C. “Unfair” Prong**

2 Plaintiffs allege, in their fifth claim, that KeyBank violated the “unfair” prong of the
3 UCL by omitting the Holder Notice from its own promissory notes, by facilitating Silver
4 State’s violation of the Holder Rule, and by partnering with Silver State despite numerous
5 red flags about the school’s viability. Defendants argue that KeyBank’s conduct cannot
6 satisfy the unfair prong because it did not violate the provisions of any statute, regulation, or
7 case law.

8 The parties advance different standards for determining what is unfair, a discrepancy
9 arising from conflicting California authority on this question. Recognizing the difficulty of
10 determining “whether the challenged conduct is unfair within the meaning of the unfair
11 competition law,” the California Supreme Court devised a “more precise test” to avoid
12 reliance on “purely subjective notions of fairness.” *Cel-Tech Commc’ns, Inc. v. L.A. Cellular*
13 *Tele. Co.*, 20 Cal. 4th 163, 184-85 (1999). The court drew guidance from section 5 of the
14 FTC Act, 15 U.S.C. § 45(a), based on “the similarity of language and obvious identity of
15 purpose” between that statute and the UCL. *Cel-Tech*, 20 Cal. 4th at 185. Requiring “that
16 any finding of unfairness to competitors under section 17200 be tethered to some
17 legislatively declared policy or proof of some actual or threatened impact on competition,”
18 the court found conduct to be “unfair” if it “threatens an incipient violation of an antitrust
19 law, or violates the policy or spirit of one of those laws because its effects are comparable to
20 or the same as a violation of the law, or otherwise significantly threatens or harms
21 competition.” *Id.* at 186-87. In a footnote, however, the court limited the application of its
22 test to actions “by a competitor alleging anticompetitive practices.” *Id.* at 187 n.12. Its
23 newly articulated standard expressly did not relate “to actions by consumers or by
24 competitors alleging other kinds of violations of the unfair competition law.” *Id.*

25 *Cel-Tech* has produced confusion among the California appellate courts over whether
26 the clarified definition of “unfair” is properly applied to *consumer* cases. *Compare Gregory*
27 *v. Albertson’s, Inc.*, 104 Cal. App. 4th 845, 854 (Cal. App. 1st Dist. 2002) (reading *Cel-Tech*
28 “to require that the public policy which is a predicate to the action must be ‘tethered’ to

1 specific constitutional, statutory or regulatory provisions” in consumer cases), *with Smith v.*
2 *State Farm Mut. Auto. Ins. Co.*, 93 Cal. App. 4th 700, 720 n.23 (Cal. App. 2d Dist. 2001)
3 (“[W]e are not to read *Cel-Tech* as suggesting that such a restrictive definition of ‘unfair’
4 should be applied in the case of an alleged *consumer* injury[.]”). Since the test *Cel-Tech*
5 prescribed was, by the California Supreme Court’s own admission, not intended for
6 consumer actions, the natural question was what test to apply in such cases.

7 To resolve the conflict, the Second Appellate Division turned to section 5 of the FTC
8 Act – which the California Supreme Court had identified in *Cel-Tech* as a source of guidance
9 for interpreting the UCL – and adopted its three-factor test for determining unfairness. For
10 conduct to be unfair under the UCL, “(1) [t]he consumer injury must be substantial; (2) the
11 injury must not be outweighed by any countervailing benefits to consumers or competition;
12 and (3) it must be an injury that consumers themselves could not reasonably have avoided.”
13 *Camacho v. Auto. Club of S. Cal.*, 142 Cal. App. 4th 1394, 1403 (Cal. App. 2d Dist. 2006).
14 The California Court of Appeal has continued to endorse that standard since its first
15 articulation in *Camacho*, see *Davis v. Ford Motor Credit Co.*, 179 Cal. App. 4th 581, 596-98
16 (Cal. App. 2d Dist. 2009), and this is the standard advanced by Plaintiffs. Defendants seek to
17 apply the *Cel-Tech* standard, arguing that unfair conduct must be tethered to a specific
18 statutory, regulatory, or case authority. Since the California Supreme Court declared that its
19 *Cel-Tech* standard does not apply in consumer actions, this Court will follow the Court of
20 Appeal’s approach in *Camacho*.

21 Plaintiffs are able to satisfy this standard. Their injury is substantial: Plaintiffs owe
22 tens of thousands of dollars to KeyBank but, due to the omission of the Holder Notice,
23 cannot assert Silver State’s failure to provide the bargained-for education as a defense to the
24 collection of their debt. On oral argument, Defendants suggested that requiring lenders to
25 include the Holder Notice would cause lenders to exit the student loan market for vocational
26 schools and limit the availability of credit to Plaintiffs and similarly situated individuals.
27 Under Defendants’ theory, KeyBank’s conduct offers a countervailing benefit by making
28 credit more available. However, the Court cannot conclude on motion to dismiss that such a

1 benefit *outweighs* Plaintiffs' injury. Finally, Plaintiffs could not have reasonably done
2 anything to avoid this injury, which was brought on by Silver State's closure – a turn of
3 events they could not have anticipated. Plaintiffs therefore state a plausible claim under the
4 unfair prong of the UCL.

5
6 **D. "Fraud" Prong**

7 Plaintiffs' sixth and final cause of action alleges a violation of the "fraud" prong of
8 section 17200 based on KeyBank's failure to disclose material facts about Silver State's risk
9 of failure. Plaintiffs allege that KeyBank intentionally concealed information from loan
10 customers because it relied on the Silver State loans to offset losses from other failed partner
11 schools and to create publicly offered securities backed by education loans. Defendants
12 argue that Plaintiffs fail to state a claim because KeyBank had no duty to disclose, and the
13 "facts" that went undisclosed were not material.

14 "The fraudulent business practice prong of the UCL has been understood to be distinct
15 from common law fraud." *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009). A UCL
16 claim need not plead the elements of common law fraudulent deception, which "must be
17 actually false, known to be false by the perpetrator and reasonably relied upon by a victim
18 who incurs damages." *Id.* What does need to be pled is the existence of a duty to disclose.
19 "Absent a duty to disclose, the failure to do so does not support a claim under the fraudulent
20 prong of the UCL." *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1557
21 (2007). There are four circumstances under which "[n]ondisclosure or concealment may
22 constitute actionable fraud":

23 (1) when the defendant is in a fiduciary relationship with the
24 plaintiff; (2) when the defendant had exclusive knowledge of
25 material facts not known to the plaintiff; (3) when the defendant
26 actively conceals a material fact from the plaintiff; and (4) when
the defendant makes partial representations but also suppresses
some material facts.

27 *Heliotis v. Schuman*, 181 Cal. App. 3d 646, 651 (1986).

28 Plaintiffs do not contend that they and KeyBank had any type of fiduciary
relationship. Even under the remaining three circumstances that may constitute fraud, "some

1 relationship” must exist “between the parties [to] give[] rise to a duty to disclose such known
2 facts.” *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 337 (1997). Such a relationship “can only
3 come into being as a result of some sort of transaction between the parties.” *Id.* Plaintiffs
4 and KeyBank, as “parties entering into [a] contractual agreement,” had such a relationship.
5 *Id.* Plaintiffs’ theory is that material facts about the viability of Silver State were in
6 KeyBank’s exclusive knowledge, thereby triggering KeyBank’s obligation to disclose them.

7 This claim falters on two fronts. First, none of the facts that Plaintiffs allege as the
8 basis for fraud could plausibly have been in the “exclusive knowledge” of KeyBank. Such
9 “red flags” as Silver State’s lack of affiliation with a college or university, its failure to
10 obtain certification from the Federal Aviation Administration, or its relatively recent
11 founding are not facts known only to KeyBank. Plaintiffs had a relationship with Silver
12 State itself, which could have disclosed such details or responded to inquiries by Plaintiffs.
13 Nor is it plausible that Silver State and KeyBank were the only sources of this information.
14 Such basic facts as the existence of government certifications or the date a corporation began
15 operating are matters of public record. Although the Court recognizes that KeyBank is the
16 more sophisticated party, Plaintiffs cannot establish fraud by alleging facts that could not
17 plausibly have been in KeyBank’s exclusive knowledge.

18 Second, other “facts” on which Plaintiffs premise their fraud allegations are not facts
19 at all, but rather opinions about Silver State’s viability. For example, Plaintiffs allege that
20 KeyBank was aware that an aviation school expert had predicted Silver State’s failure.
21 “[P]redictions as to future events are ordinarily non-actionable expressions of opinion under
22 basic principles of the tort of fraudulent misrepresentation.” *Bayview Hunters Point Cmty.*
23 *Advocates v. Metro. Transp. Comm’n*, 366 F.3d 692, 698 (9th Cir. 2004). The failure to
24 disclose predictions or other opinions about Silver State’s viability cannot be actionable
25 because they are not facts and therefore do not trigger a duty to disclose. Plaintiffs therefore
26 fail to state a claim under the UCL’s fraud prong, which is DISMISSED. As Plaintiffs
27 previously augmented their fraud allegations in response to Defendants’ prior motion to
28

1 dismiss, the Court concludes that further amendment would be futile and denies leave to
2 amend.

3 4 **II. Preemption by the National Bank Act**

5 Three of Plaintiffs' six causes of action – two claims for aiding and abetting under the
6 UCL's "unlawful" prong, and one claim under the "unfair" prong – state plausible claims
7 under the Rule 12(b)(6) standard. However, Defendants further argue that those claims must
8 be dismissed as preempted by federal law, which exclusively governs the terms of credit
9 extended by a national bank such as KeyBank. Plaintiffs respond that preemption does not
10 reach as far as KeyBank suggests, as laws of general application – like those invoked here –
11 are not preempted by federal law.

12 KeyBank is a national bank created and operated under the National Bank Act
13 ("NBA"), 12 U.S.C. § 1 *et seq.* Congress enacted the NBA in 1864, "establishing the system
14 of national banking still in place today." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 10
15 (2007). "The Act vested in nationally chartered banks enumerated powers and 'all such
16 incidental powers as shall be necessary to carry on the business of banking.'" *Id.* at 11
17 (quoting 12 U.S.C. § 24 (Seventh)). The Supreme Court has, in "the years since the NBA's
18 enactment, . . . repeatedly made clear that federal control shields national banking from
19 unduly burdensome and duplicative state regulation." *Id.* While states "are permitted to
20 regulate the activities of national banks where doing so does not prevent or significantly
21 interfere with the national bank's or the national bank regulator's exercise of its powers,"
22 state regulations "must give way" when "state prescriptions significantly impair the exercise
23 of authority, enumerated or incidental under the NBA." *Id.* at 12. Among their incidental
24 powers, national banks are charged with "discounting and negotiating promissory notes,
25 drafts, bills of exchange, and other evidences of debt." 12 U.S.C. § 24 (Seventh).

26 At issue here is whether Plaintiffs' state law claims would "significantly impair"
27 KeyBank's exercise of its "enumerated or incidental" powers under the NBA. If that is so,
28 state law must give way to federal, because the Supremacy Clause enshrines the

1 “Constitution, and the Laws of the United States,” as “the supreme Law of the Land.” U.S.
2 Const. art. VI, cl. 2. “In determining whether a state statute is pre-empted by federal law and
3 therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain
4 the intent of Congress.” *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 280 (1987).
5 If Congress, in enacting a federal statute, intended “to exercise its constitutionally delegated
6 authority to set aside the laws of a State,” then “the Supremacy Clause requires courts to
7 follow federal, not state, law.” *Barnett Bank of Marion County, N. A. v. Nelson*, 517 U.S. 25,
8 30 (1996).

9 State law can be preempted by federal law in three contexts: where “(1) Congress
10 enacts a statute that explicitly preempts state law; (2) state law actually conflicts with federal
11 law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to
12 conclude that Congress left no room for state regulation in that field.” *Engine Mfrs. Ass’n v.*
13 *S. Coast Air Quality Maint. Dist.*, 498 F.3d 1031, 1039 (9th Cir. 2007). The parties agree
14 that only conflict preemption is in play here: whether federal and state law are “in
15 ‘irreconcilable conflict.’” *Barnett Bank*, 517 U.S. at 31 (quoting *Rice v. Norman Williams*
16 *Co.*, 458 U.S. 654, 659 (1982)). Such a conflict may arise where compliance with both
17 statutes is a “‘physical impossibility,’” *id.* (quoting *Florida Lime & Avocado Growers, Inc. v.*
18 *Paul*, 373 U.S. 132, 142-43 (1963)), or where the state law “‘stand[s] as an obstacle to the
19 accomplishment and execution of the full purposes and objectives of Congress,’” *id.* (quoting
20 *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

21 The Office of the Comptroller of the Currency (“OCC”), as “the agency charged by
22 Congress with supervision of the NBA,” “oversees the operations of national banks and their
23 interactions with customers.” *Watters*, 550 U.S. at 6. In its regulations, the OCC attempts to
24 delineate the boundaries of NBA preemption.⁶ “[S]tate laws that obstruct, impair, or
25 condition a national bank’s ability to fully exercise its Federally authorized non-real estate
26 lending powers are not applicable to national banks.” 12 C.F.R. § 7.4008(d)(1).

27 ⁶ “Federal regulations have no less pre-emptive effect than federal statutes.”
28 *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982). That preemptive
effect may only be disturbed if the regulation “is not one that Congress would have
sanctioned.” *Id.* at 154. Neither party disputes the force of the OCC regulations here.

1 Specifically, a “national bank may make non-real estate loans without regard to state law
2 limitations concerning . . . [t]he terms of credit, including the schedule for repayment of
3 principal and interest, . . . payments due, minimum payments, or terms to maturity of the
4 loan[.]” *Id.* § 7.4008(d)(2)(iv). However, the regulations are explicit that state laws
5 governing contracts, torts, and criminal activity are *not* preempted, nor are state laws whose
6 effects are “incidental to the non-real estate lending operations of national banks.” *Id.*
7 § 7.4008(e). National banks are expressly barred from engaging in “unfair or deceptive
8 practices within the meaning of section 5” of the FTC Act. *Id.* § 7.4008(c).

9 The broad contours of NBA preemption are not in dispute. States have “the power to
10 regulate national banks” where “doing so does not prevent or significantly interfere with the
11 national bank’s exercise of its powers.” *Barnett Bank*, 517 U.S. at 33; *see also Bank of Am.*
12 *v. City & County of San Francisco*, 309 F.3d 551, 558-59 (9th Cir. 2002) (“[S]tates retain
13 some power to regulate national banks in areas such as contracts, debt collection, acquisition
14 and transfer of property, and taxation, zoning, criminal, and tort law.”). States cannot, on the
15 other hand, “significantly impair” a national bank’s “exercise of authority, enumerated or
16 incidental under the NBA.” *Watters*, 550 U.S. at 12. “[G]rants of both enumerated and
17 incidental ‘powers’ to national banks” are “grants of authority not normally limited by, but
18 rather ordinarily preempting, contrary state law.” *Barnett Bank*, 517 U.S. at 32.

19 Defendants do not contend that California’s UCL is preempted by the NBA. As this
20 Court has previously noted, “California courts have long held that consumer protection laws
21 of general application are not preempted by federal banking laws.” *Jefferson v. Chase Home*
22 *Finance*, No. C06-6510 TEH, 2008 U.S. Dist. Lexis 101031, at *29 (N.D. Cal. April 29,
23 2008). Rather, Defendants argue that Plaintiffs’ *application* of the UCL – which they are
24 wielding to “modify federal law” and “impose a non-existent obligation on KeyBank with
25 regard to the FTC Holder Notice” – is preempted. Defs.’ Mot. at 17. The injunctive relief
26 demanded by Plaintiffs would effectively read the Holder Notice into KeyBank’s promissory
27 notes, thereby – according to Defendants – imposing a “state law limitation[.]” on its “terms
28 of credit.” 12 C.F.R. § 7.4008(d)(2)(iv). Plaintiffs respond that they are simply predicating

1 the violation of “a state consumer protection statute of general application” on “a federal
2 consumer protection regulation of general application,” neither of which are preempted. Pls.’
3 Opp’n at 20.

4 The Court has already concluded that the Holder Rule does not directly apply to
5 KeyBank; the regulation provides only that a *seller* commits an unfair business practice by
6 omitting the Holder Notice from a consumer credit contract, or by accepting loan proceeds
7 made pursuant to such a contract. KeyBank was not required to include the Holder Notice in
8 its promissory notes. However, Plaintiffs’ surviving claims – which are all premised on
9 KeyBank’s complicity in Silver State’s alleged Holder Rule violation – would compel
10 KeyBank to add the Holder Notice to its consumer credit contracts. For example, Plaintiffs
11 allege that KeyBank aided and abetted Silver State’s violation by dispersing loan funds to
12 Silver State – which was therefore “[a]ccept[ing] . . . the proceeds of a[] purchase money
13 loan” made pursuant to a “consumer credit contract” that did not contain the Holder Notice.
14 16 C.F.R. § 433.2(b). KeyBank could only avoid aiding and abetting liability under that
15 theory by including the Holder Notice in its promissory notes, or by not making the loan in
16 the first place.

17 The *relief* Plaintiffs request would also, in effect, read the Holder Notice into
18 KeyBank’s promissory notes. Plaintiffs seek to enjoin KeyBank from enforcing its
19 promissory notes with Plaintiffs, or from reporting Plaintiffs to credit reporting agencies.
20 Had KeyBank included the Holder Notice in its promissory notes, Plaintiffs could have
21 defended against KeyBank’s collection efforts by claiming Silver State had breached their
22 contract – as inclusion of the Holder Notice “preserves the borrower’s ability to raise claims
23 and defenses against the lender arising from the seller’s misconduct.” *Armstrong v.*
24 *Accrediting Council for Continuing Educ. & Training, Inc.*, 168 F.3d 1362, 1365 (D.C. Cir.
25 1999). The basis for Plaintiffs’ claims is their obligation to pay KeyBank for an education
26 that Silver State never delivered. Enjoining KeyBank from collecting on Plaintiffs’ loans
27 would impose on KeyBank a remedy premised on Silver State’s failure to perform – which,
28 again, amounts to reading the Holder Notice into KeyBank’s promissory notes. A

1 consumer's rights "come into existence only when the [Holder Notice] is in fact included in
2 the consumer credit contract." *Vietnam Veterans of Am., Inc. v. Guerdon Indus., Inc.*, 644 F.
3 Supp. 951, 964 (D. Del. 1986). Although the Holder Notice was not in KeyBank's
4 promissory notes, Plaintiffs demand a remedy that would grant them the same rights as if it
5 had been.

6 State law cannot obstruct or impair "a national bank's ability to fully exercise its
7 Federally authorized non-real estate lending powers." 12 C.F.R. § 7.4008(d)(1). States are
8 explicitly barred from imposing limits on the "terms of credit" extended by a national bank.
9 *Id.* § 7.4008(d)(2)(iv). KeyBank's promissory notes embody the terms of credit extended to
10 Plaintiffs to finance their education at Silver State. Plaintiffs' theory would deploy state law
11 to alter those terms of credit and bar KeyBank from collecting on Plaintiffs' debts. It is
12 difficult to conceive how Plaintiffs' action can survive in light of its clear interference with
13 powers conferred on KeyBank by federal law.

14 Plaintiffs contend that this Court's decision in *Jefferson v. Chase Home Finance*, No.
15 C06-6510 TEH, 2008 U.S. Dist. LEXIS 101031 (N.D. Cal. April 29, 2008), dictates that
16 there is no preemption here.⁷ The plaintiff in *Jefferson* alleged that Chase Home Finance,
17 which serviced the loan he obtained to refinance his home, had misrepresented how it would
18 credit prepayments to his account. Although Chase stated on its payment coupons that
19 undesignated funds would "first pay outstanding late charges and fees, then principal," Chase
20 consistently failed to apply Jefferson's prepayments to the loan principal, placing the prepaid
21 amount instead in "suspense." *Id.* at *5-6. Jefferson asserted, among other causes of action,
22 that Chase's misrepresentation violated all three prongs of the UCL. Chase argued that

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24 ⁷ Plaintiffs also contend that the Supreme Court's decision in *Cuomo v. Clearing*
25 *House Ass'n*, --- U.S. ---, 129 S. Ct. 2710 (2009), is supportive. However, the Court in
26 *Cuomo* addressed an unrelated provision of the National Bank Act, which provides that "[n]o
27 national bank shall be subject to any visitorial powers except as authorized by Federal law"
28 and other limited circumstances. 12 U.S.C. § 484(A). The Court found only that the OCC
erred in "extending the definition of 'visitorial powers' to include 'prosecuting enforcement
actions' in state courts." 129 S. Ct. at 2721 (quoting 12 C.F.R. § 7.4000). The term properly
refers, the Court held, "to a sovereign's supervisory powers over corporations," including
"any form of administrative oversight that allows a sovereign to inspect books and records."
Id. Since a state's visitorial powers are not at issue here, this Court does not see how *Cuomo*
is controlling or even relevant.

1 Jefferson’s claims were preempted by the NBA, relying on OCC regulations that permit
2 banks to “make real estate loans without [regard to] state law limitations [concern]ing terms
3 of credit, disclosure and advertising, processing and servicing of mortgages, repayments, and
4 rates of interest on loans.” *Id.* at *28-29 (citing 12 C.F.R. § 34.4(a)(4), (9), (10), (11), and
5 (12)).

6 The Court found that the plaintiff’s claims were not preempted, holding that “laws of
7 general application, which merely require all businesses (including banks) to refrain from
8 misrepresentations and abide by contracts and representations to customers do not impair a
9 bank’s ability to exercise its lending powers.” *Id.* at *29. In reaching that conclusion, the
10 Court observed that “California courts have long held that consumer protection laws of
11 general application are not preempted by federal banking laws.” *Id.* at *29. Plaintiffs
12 highlight this language to argue that their claims – brought under the UCL, a “consumer
13 protection law[] of general application” – cannot be preempted.

14 However, the result in *Jefferson* hinged on the nature of the claim asserted:
15 misrepresentation. “The duty to refrain from misrepresentation falls on all businesses.” *Id.*
16 at *37. Barring a national bank from making misrepresentations to customers does not in any
17 way impair the exercise of its enumerated or implied powers; rather, it is precisely the kind
18 of generally applicable duty that cannot be preempted. Indeed, the Court contrasted the
19 misrepresentation claim from others that *would be preempted*:

20 Plaintiff does not claim that California consumer protection laws
21 require Chase to service or process loans, include specific content
22 in its disclosures, or handle repayment of loans in any particular
23 manner – requirements that would be preempted. *See* 12 C.F.R.
§ 34.4(a). Instead Plaintiff claims that the laws require Chase to
refrain from misrepresenting the manner in which it *does* service
loans.

24 *Id.* at *36. The hypothetical claims that this Court suggested would be preempted – those
25 requiring that “specific content” be included, or that repayment be handled in a “specific
26 manner” – look remarkably similar to the claims Plaintiffs are now asserting.

27 In *Martinez v. Wells Fargo Bank, N.A.*, a sister court dismissed the plaintiffs’ section
28 17200 claims alleging improprieties in the fees charged by a national bank for the plaintiffs’

1 home mortgage refinancing. No. C06-03327 RMW, 2007 U.S. Dist. LEXIS 58758 (N.D.
2 Cal. July 31, 2007). The court found that determinations of charges and fees were
3 “incidental powers to the express power of engaging in real estate lending” conferred by the
4 NBA, and that claims challenging such fees were therefore preempted. *Id.* at *10, 16.
5 Allowing the section 17200 claims to advance “would essentially be allowing the
6 superimposition of state law requirements upon the OCC’s exclusive superintendence of [the
7 national bank’s] exercise of its federally-conferred powers.” *Id.* at *16. The court stressed
8 that it was not concluding “that § 17200 claims are per se preempted by the NBA and
9 regulations thereunder,” but found preemption only “to the extent a § 17200 claim seeks to
10 contest the exercise of a national bank’s enumerated or incidental authority.” *Id.* at *16-17
11 n.6.

12 That is precisely the type of claim before this Court. Plaintiffs are not asking that
13 KeyBank be held liable for defying its own contracts or committing a tort, nor are they
14 alleging the violation of a state law that directly infringes on its powers as a national bank.
15 Rather, Plaintiffs’ theory would deploy the UCL to require KeyBank to comply with a
16 federal regulation that does not itself require KeyBank’s compliance. Abiding by the Holder
17 Rule would directly affect the terms of credit extended by KeyBank, infringing on a power
18 that national banks are meant to exercise free from state authority. The Court therefore
19 concludes that Plaintiffs’ remaining claims are preempted by the National Bank Act. The
20 remaining causes of action are DISMISSED without leave to amend, as Plaintiffs cannot
21 plead around federal preemption.

22

23 CONCLUSION

24 Defendants’ motion to dismiss is GRANTED. Plaintiffs’ first, second, and sixth
25 causes of action are dismissed for failure to state a claim, and their third, fourth, and fifth

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1 claims are dismissed based on federal preemption. The TAC is DISMISSED without leave
2 to amend.

3 The Clerk shall enter judgment and close the file.
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5 **IT IS SO ORDERED.**
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8 Dated: 4/12/10



THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT

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