

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALEX GULDBECK and KIMBERLY A
ANDERSON,

No C 09-cv-05733 VRW

Plaintiffs,

ORDER

v

BNC MORTGAGE INC, CHASE HOME
FINANCE LLC, FIRST AMERICAN
LOANSTAR TRUSTEE SERVICES,
MORTGAGE ELECTRONIC REGISTRATIONS
SYSTEMS INC, VOORHEES VENTURES
INC, and DOES 1-100,

Defendants.

Plaintiffs Alex Guldbeck and Kimberly A Anderson filed
this action on September 28, 2009 in San Mateo County superior
court. Doc #1. Defendant Voorhees Ventures Inc ("Voorhees")
removed the action on December 7, 2009. Id.

The complaint alleges twenty-four causes of action
associated with the 2006 mortgage loan and the 2009 non-judicial
foreclosure of plaintiffs' home at 1096 Barcelona Drive, Pacifica,

1 CA 94044, Doc #1-1 Exh A at 7 (Compl), and names five defendants:
2 Voorhees, Chase Home Finance LLC ("Chase"), First American Loanstar
3 Trustee Services ("Loanstar"), Mortgage Electronic Registrations
4 Systems Inc ("MERS") and BNC Mortgage Inc. Id. Plaintiffs
5 dismissed BNC Mortgage as a defendant pursuant to FRCP 41(a)(2).
6 Doc #17. Each remaining defendant moves to dismiss pursuant to
7 FRCP 12(b)(6). Doc ##5, 10, 12.

8
9 I

10 On a FRCP 12(b) motion to dismiss, all well-pleaded
11 allegations of material fact are taken as true and construed in a
12 light most favorable to the non-moving party. General Conference
13 Corp of Seventh-Day Adventists v Seventh-Day Adventist
14 Congregational Church, 887 F2d 228, 230 (9th Cir 1989).
15 Accordingly, what follows is drawn from plaintiffs' complaint
16 taking their allegations as true.

17
18 A

19 On November 21, 2006 plaintiffs executed and delivered to
20 BNC Mortgage a promissory note in the amount of \$736,250 with a
21 monthly payment amount of \$5,075.22 for a fully amortizing 30 year
22 term at a 6.725 percent rate. Compl ¶16. As part of the same
23 transaction, plaintiffs executed and delivered to MERS, as
24 beneficiary, a Deed of Trust, by the terms of which the plaintiffs
25 conveyed to T D Service Company, as trustee, the real property at
26 issue. Id ¶14. On March 27, 2009 Loanstar caused to be recorded a
27 Notice of Default and Election to Sell Under Deed of Trust Notice
28 to plaintiffs, alleging that plaintiffs were in default by an

1 amount of \$18,834.86 as of March 27, 2009. Id ¶21, p77. Loanstar
2 further informed plaintiffs that it, as beneficiary, would sell or
3 cause to be sold plaintiffs' property to satisfy that obligation.
4 Id at 77. The March 27, 2009 actions constituted a non-judicial
5 foreclosure. On May 4, 2009 a Substitution of Trustee was
6 recorded, whereby the original trustee, T D Service, substituted
7 Loanstar as the new trustee of the 1096 Barcelona Drive property.
8 Doc #11 at 30. On May 13, 2009 an Assignment of Deed of Trust was
9 recorded, whereby MERS assigned all beneficial interest under the
10 deed to Wells Fargo Bank. Id at 33. On July 1, 2009 Loanstar
11 recorded a Notice of Trustee Sale, whereby the plaintiffs were
12 informed that the 1096 Barcelona Drive property would be sold at
13 public auction to the highest bidder. Id at 35. On August 17,
14 2009 plaintiffs mailed a rescission letter pursuant to the Truth
15 and Lending Act to Loanstar. Compl ¶18. To date, the defendants
16 have not removed the recorded Notice of Default under the Note.
17 Id ¶22.

18
19 B

20 A motion to dismiss under FRCP 12(b)(6) for failure to
21 state a claim upon which relief can be granted "tests the legal
22 sufficiency of a claim." Navarro v Block, 250 F3d 729, 732
23 (9th Cir 2001). Because FRCP 12(b)(6) focuses on the sufficiency
24 of a claim — and not the claim's substantive merits —
25 "[o]rordinarily[] a court may look only at the face of the complaint
26 to decide a motion to dismiss." Van Buskirk v Cable News Network,
27 Inc, 284 F3d 977, 980 (9th Cir 2002).

28 //

1 Dismissal can be based on the lack of a cognizable legal
2 theory or the absence of sufficient facts alleged under a
3 cognizable legal theory. Balistreri v Pacifica Police Dep't, 901
4 F2d 696, 699 (9th Cir 1990). Allegations of material fact are
5 taken as true and construed in the light most favorable to the
6 nonmoving party. Cahill v Liberty Mutual Ins Co, 80 F3d 336,
7 337-38 (9th Cir 1996). The court need not, however, accept as true
8 allegations that are conclusory, legal conclusions, unwarranted
9 deductions of fact or unreasonable inferences. See Sprewell v
10 Golden State Warriors, 266 F3d 979, 988 (9th Cir 2001). "In sum,
11 for a complaint to survive a motion to dismiss, the non-conclusory
12 factual content, and reasonable inferences from that content must
13 be plausibly suggestive of a claim entitling the pleader to
14 relief." Moss v US Secret Service, 572 F3d 962, 969
15 (9th Cir 2009).

16
17 II

18 Collectively, defendants argue that claims seven, eleven,
19 fourteen, eighteen, nineteen, twenty-two and twenty-three are all
20 time-barred. The court rules that the applicable statutes of
21 limitations are not equitably tolled; claims seven, eleven, and
22 twenty-two are time-barred; claims eighteen and nineteen are
23 partially time-barred; and claims fourteen and twenty-three are not
24 time-barred.

25
26 A

27 Claim seven alleges three separate violations of the Real
28 Estate Settlement Procedures Act ("RESPA"). Plaintiffs allege that

1 (1) they tendered the full amount under the note (2) Loanstar
2 failed to comply with RESPA by not responding to plaintiffs' Notice
3 of Dispute and Request for Accounting notices (3) defendants are
4 not entitled to continue with said foreclosure because of an
5 improper statutory execution of the Deed of Trust. Compl ¶¶40-42.

6 Claim eleven alleges that defendants violated the Truth
7 in Lending Act ("TILA") by using the word "fixed rate" for an
8 adjustable rate mortgage, thereby violating TILA disclosure
9 requirements of material loan terms. Id ¶¶180-182. Plaintiffs
10 further allege that defendants' disclosure violations "were
11 apparent on the face of the Note, HUD-1 Disclosure Statement, Truth
12 in Lending Disclosure Statement, Notice of Right to Cancel, and
13 other loan documentation." Id ¶183.

14 Plaintiffs bring three separate tort claims, including
15 claim eighteen for intentional infliction of emotional distress,
16 claim nineteen for negligent infliction of emotional distress and
17 claim twenty-two for negligence per se. Both claims for emotional
18 distress draw on facts associated with defendants' conduct during
19 "the negotiations and execution of the subject Note, and the
20 recordation of the Notice of Default and Notice of Trustee Sale."
21 Id ¶224. Plaintiffs' negligence per se claim alleges that the
22 defendants are required, pursuant to Cal Civ Code §2923.6, to make
23 "loan modifications with borrowers, if doing so would maximize the
24 net present value of return-on-investment in comparison to the
25 likely return from a foreclosure sale." Id ¶236.

26 In response to defendants' timeliness motions, plaintiffs
27 assert that the statutory periods should be equitably tolled for
28 each of the claims except claim seven, for which plaintiffs fail to

1 address the timeliness issue. The court finds no grounds for the
2 plaintiffs' request for equitable tolling.

3
4 B

5 The doctrine of equitable tolling extends the statutory
6 period only where, "despite all due diligence, a plaintiff is
7 unable to obtain vital information bearing on the existence of his
8 claim." Santa Maria v Pac Bell, 202 F3d 1170, 1178 (9th Cir 2000).
9 Equitable tolling "focuses on whether there was excusable delay by
10 the plaintiff," and "does not depend on any wrongful conduct by the
11 defendant to prevent the plaintiff from suing." *Id.*

12 Plaintiffs oppose the defendants' timeliness motions with
13 a single argument found in the Voorhees opposition:

14 In this case, Plaintiffs pled that their broker
15 deceived them not only as to the true terms of
16 the alleged agreement, but also so that he would
17 not conduct further investigation at the time.
18 Plaintiffs did not know the true terms of the
19 loan until they hired counsel. Therefore,
20 Plaintiffs qualify for equitable tolling of all
21 applicable statutes of limitations. It is not
22 fair to hold the Plaintiffs accountable to
23 discover wrongs which were impossible for them to
24 discover, and which were concealed by Defendant's
25 own wrongdoings.

26 Doc #19 at 2-3.

27 TILA claims must be brought "within one year from the
28 date of the occurrence of the violation." 15 USC § 1640(e). RESPA
claims must be brought "1 year in the case of a violation of
section 2607 or 2608 of this title from the date of the occurrence
of the violation." 12 USC § 2614. Plaintiffs' TILA and RESPA
claims must be equitably tolled to survive dismissal because the
alleged violations of both statutes occurred in 2006. Plaintiffs

1 have not alleged facts showing that they were denied any "vital
2 information bearing on the existence" of their TILA or RESPA
3 claims. Santa Maria, 202 F3d at 1178. Indeed, even if plaintiffs
4 were misled as to the mortgage loan amount, they were certainly put
5 on notice of the actual amount at the time of their first, second
6 and tenth mortgage payments.

7 Second, even if plaintiffs could truthfully plead that
8 they were denied vital information, they have failed to provide
9 reasons for "excusable delay" in bringing this action. *Id.* The
10 only reason the plaintiffs offer for filing this lawsuit long after
11 the end of the statutory period is that "their broker deceived
12 them" and "they did not know the true terms of the loan until they
13 hired counsel." Doc #19 at 3.

14 Plaintiffs do not plead facts showing how the broker
15 "deceived" them or what attempts they made to uncover the allegedly
16 concealed "true terms of the loan." In other words, they have not
17 offered any allegations indicating that they acted with "due
18 diligence" or with "excusable delay" in bringing this action.
19 Santa Maria, 202 F3d at 1178; see also O'Connor v Boeing N Am, Inc.,
20 311 F3d 1139, 1157-58 (9th Cir 2002) (a plaintiff relying on
21 delayed discovery or fraudulent concealment to toll limitations
22 period must plead when and how she discovered her claim so the
23 court can judge whether information triggering her filing had been
24 available earlier). Plaintiffs clearly state that the TILA
25 violations were "apparent on the face" of every relevant loan
26 document. Compl ¶183. If defendants' disclosure violations were
27 so apparent, plaintiffs certainly could have brought their RESPA
28 and TILA claims in a timely manner. Although the "true terms" may

1 not have been discoverable until they hired counsel, plaintiffs
2 fail to inform the court when they hired counsel or when their
3 attorney discovered the alleged TILA or RESPA violation.
4 Plaintiffs' arguments in favor of tolling fail to present non-
5 conclusory factual content. Accordingly, defendants' motions to
6 dismiss claims seven and eleven are GRANTED without leave to amend.

7 Plaintiffs present no additional facts, law, or argument
8 regarding the timeliness of their intentional infliction of
9 emotional distress, negligent infliction of emotional distress or
10 negligence per se claims. Tortuous claims brought in California
11 require a filing within two years of the alleged violation. Cal
12 Rule Civ Proc § 335.1. Because there is no further argument in the
13 oppositions to support plaintiffs' tolling argument, claim twenty-
14 two is time-barred and claims eighteen and nineteen are time-barred
15 with regard to any alleged tortuous conduct during the formation
16 and execution of the mortgage loan in 2006. Accordingly,
17 defendants' motions to dismiss claim twenty-two are GRANTED without
18 leave to amend, and defendants' motions to dismiss claims eighteen
19 and nineteen are GRANTED IN PART without leave to amend as to
20 conduct in 2006. Construing the facts in the most favorable light
21 and giving plaintiffs the benefit of the doubt, claims eighteen and
22 nineteen for intentional and negligent infliction of emotional
23 distress are not time-barred to the extent they allege conduct
24 associated with the 2009 non-judicial foreclosure, but are
25 dismissed on other grounds with leave to amend, *infra*.

26 Plaintiffs' unfair debt collection claims, claims
27 fourteen and twenty-three, are not, however, time-barred. The
28 relevant federal statutory provision states that "[a]n action to

1 enforce any liability created by this subchapter may be brought
2 * * * within one year from the date on which the violation occurs.”
3 15 USC § 1692k. The relevant California provision states that
4 “[a]ny action under this section may be brought * * * within one
5 year from the date of the occurrence of the violation.” Cal Civ
6 Code § 1788.30(f). Although meritless, the alleged debt collection
7 violations occurred in March 2009, less than one year before
8 plaintiffs filed the complaint.

9
10 C

11 Plaintiffs’ remaining claims all require a showing of
12 sufficient facts under a cognizable legal theory that defendants’
13 actions concerning either the 2009 non-judicial foreclosure or the
14 formation and execution of the 2006 mortgage loan were improper.
15 Plaintiffs fail to make this required showing, therefore
16 defendants’ motions to dismiss the remaining claims are GRANTED.

17
18 1

19 The claims for quiet title (claim three), breach of the
20 duty to disclose (claim nine), slander of title (claim sixteen),
21 intentional infliction of emotional distress (claim eighteen),
22 negligent infliction of emotional distress (claim nineteen) and
23 unfair debt collection pursuant to 15 USC § 1692 and Cal Civ Code
24 § 1788.17 (claims fourteen and twenty-four) each require a showing
25 that the 2009 non-judicial foreclosure was improper. Plaintiffs
26 allege that “Defendants were not in possession of the Note, and
27 were not either holders in due course of the Note, or non-holders
28 entitled to payment * * * Defendants were proceeding to foreclose

1 non-judicially without right under the law." Compl ¶44.

2 Plaintiffs further allege that the loan

3 was unconscionable and unenforceable in that the
4 payments exceeded Plaintiffs' income; that
5 Defendants * * * did not disclose to Plaintiff
6 the terms and conditions of the loan; that
7 subsequent holders of the Notes executed by
8 Plaintiff, including but not limited to Chase
Home Finance, LLC, were not and are not lawful
holders in due course of the Note and Deed of
Trust. Further, Plaintiff contends that
Defendants, and each of them, had no right to
foreclose on Plaintiff's Note and Deed of Trust.

9 Id ¶74. Plaintiffs articulate the thrust of their twenty-four
10 claims in stating that "[s]ince there is no right to enforce the
11 negotiable instrument, the Notice of Default * * * and Notice of
12 Sale * * * were likewise never complied with, and there is no
13 subsequent incidental right to enforce any deed of trust and
14 conduct a non-judicial foreclosure." Id ¶86.

15 Under California law, a "trustee, mortgagee or
16 beneficiary or any of their authorized agents" may conduct a non-
17 judicial foreclosure process. Cal Civ Code § 2924(a)(1).

18 California Civil Code § 2924b(b)4, defines a
19 "person authorized to record the notice of
20 default or the notice of sale" as "an agent for
21 the mortgagee or beneficiary, an agent of the
22 named trustee, any person designated in an
23 executed substitution of trustee, or an agent of
that substituted trustee." Cal Civ Code
§ 2924b(b)(4). California law does not require
that the original note be in the possession of
the party initiating non-judicial foreclosure.

24 Gonzalez v Wells Fargo Bank, 2009 WL 3572118 at *5 (ND Cal 2009)
25 (internal quotes omitted).

26 Because California law does not require the original note
27 to be in the possession of the party initiating non-judicial
28 foreclosure and each relevant legal transfer, assignment or notice

1 was in accordance with a contractual provision in the bargained for
2 contract, plaintiffs fail to present a cognizable legal argument
3 with regard to the validity of (1) the March 27, 2009 Notice of
4 Default and Election to Sell Under Deed of Trust Notice (2) the May
5 4, 2009 Substitution of Trustee (3) the May 13, 2009 Assignment of
6 Deed of Trust or (4) the July 1, 2009 Notice of Trustee Sale.

7 Claims fourteen and twenty-three allege violations of the
8 federal and California unfair debt collection statutes, 15 USC
9 § 1692 and Cal Civ Code § 1788.17. Plaintiffs allege that they
10 were subject to "harassment," "unconscionable means to collect or
11 attempt to collect debt" and "deceptive means to collect or attempt
12 to collect a debt from the Plaintiffs." Compl ¶1249. Defendants
13 argue that they are not debt collectors as defined by either
14 statute because a non-judicial foreclosure is not a collection of
15 debt. Doc #10 at 36, Doc #18 at 13-14. Even assuming that the
16 statutes are applicable, plaintiffs fail to present non-conclusory
17 factual allegations of prohibited conduct by defendants. A
18 determination of each defendant's status as a debt collector within
19 the terms of the state or federal statute is unnecessary because
20 the facts do not sufficiently allege an improper non-judicial
21 foreclosure. Plaintiffs' failure to sufficiently plead evidence
22 indicating an improper non-judicial foreclosure renders the unfair
23 debt collection claims moot. Defendants' motions to dismiss claims
24 fourteen and twenty-three are GRANTED with leave to amend.

25 Similarly, plaintiffs fail to present a legally
26 cognizable argument with respect to their slander of title claim
27 (claim sixteen). At the core of plaintiffs' argument is that the
28 Notice of Default was executed or recorded without privilege.

1 Id ¶213. Pursuant to the court's determination above that the
2 Notice was correctly executed, the argument is without merit, and
3 the determination of whether or not the Notice was a privileged
4 communication under Cal Civ Code § 2924 is moot. Defendants'
5 motions to dismiss claim sixteen are GRANTED with leave to amend.

6 Claim nine alleges that Voorhees breached the broker's
7 duty to disclose the material terms of the Note and Deed of Trust,
8 thereby rendering the 2009 non-judicial foreclosure unenforceable.
9 Id ¶¶166-172. As stated above, plaintiffs fail to present facts
10 that suggest imperfections in the execution of the Note or Deed of
11 Trust. Voorhees' motion to dismiss claim nine is GRANTED with
12 leave to amend.

13 The non-time-barred portions of plaintiffs' claims for
14 intentional and negligent infliction of emotional distress (claims
15 eighteen and nineteen) require a showing that the 2009 non-judicial
16 foreclosure was improper. Having failed to present non-conclusory
17 facts or a cognizable legal argument with regard to the validity of
18 (1) the March 27, 2009 Notice of Default and Election to Sell Under
19 Deed of Trust Notice (2) the May 4, 2009 Substitution of Trustee
20 (3) the May 13, 2009 Assignment of Deed of Trust or (4) the July 1,
21 2009 Notice of Trustee Sale, defendants' motions to dismiss claims
22 eighteen and nineteen are GRANTED with leave to amend.

23 Having failed to oppose defendants' Request for Judicial
24 Notice, and having failed to demonstrate that defendants did not
25 comply with California or federal law in commencing the foreclosure
26 process, plaintiffs cannot state a claim under any theory based on
27 purported "failures" in the process. Defendants' motions to
28 dismiss claims three, nine, fourteen, sixteen, eighteen, nineteen
and twenty-three are GRANTED with leave to amend.

1
2 Plaintiffs allege fraud (claim five), constructive fraud
3 (claim six) and actual fraud pursuant to Cal Civ Code § 1572 (claim
4 twenty-four). Specifically plaintiffs allege that the "Broker had
5 plaintiffs sign a blank application and then filled in the
6 information fraudulently. On information and belief, broker was
7 coached by Lender on how to do so." Id ¶108. Plaintiffs further
8 allege that although they were qualified for a prime loan
9 "Defendants ushered Plaintiff into a subprime loan" that was
10 "foreseeably doomed to fail." Id ¶112. Plaintiffs allege that the
11 loan agreement was "a contract of adhesion" and that "no
12 negotiations were possible." Id ¶123. Plaintiffs also allege that
13 defendants, collectively, effectuated a fraudulent scheme intended
14 to convert plaintiffs' right, title and interest to the defendants.
15 Id ¶120.

16 Construing the facts in the light most favorable to the
17 plaintiffs, the allegations concerning the blank loan application
18 are the only facts that are pled with additional particularity.
19 While these allegations provide increased specificity, plaintiffs
20 fail to describe what in the application was fraudulently completed
21 by Voorhees as the Broker, when these acts occurred, and how the
22 plaintiffs were specifically injured as a result of the defendants'
23 allegedly fraudulent acts. Similarly, plaintiffs fail to allege
24 specific facts that describe how and which defendants ushered them
25 into signing the subprime loan over the prime loan. Nor do the
26 plaintiffs present facts that support or demonstrate that the
27 mortgage loan was nonnegotiable.

28 Plaintiffs argue that "[a]n exception to the strict
pleading standard for fraud is recognized when it appears the facts

1 lie more within the Defendant's knowledge than Plaintiffs." Doc
2 #18 at 10. Yet, plaintiffs bring no facts to the attention of the
3 court which could plausibly indicate that defendants have access to
4 any additionally relevant information. Plaintiffs' suit concerns
5 notices, assignments, notes and deeds that are all within the
6 possession of both parties and before the court. There are no
7 other facts or documents that could change the dynamics of the
8 dispute or enhance the veracity of these claims.

9 The court notes that defendant Voorhees failed to include
10 the forty-first page of plaintiffs' complaint, which undoubtedly
11 includes allegations regarding the twenty-fourth cause of action
12 for actual fraud and the first two prayers for relief. A claim for
13 actual fraud in California requires a showing that defendants made
14 knowing misrepresentations with an intent to deceive or induce
15 plaintiffs into signing the mortgage loan. Cal Civ Code § 1572.
16 For the reasons stated above, regarding claims for fraud and
17 constructive fraud, the plaintiffs fail to plead adequate facts
18 alleging deceptive behavior by defendants. Although no party
19 brings the missing page of the complaint to the court's attention,
20 none of the factual allegations alleged in the first forty pages of
21 the complaint suggest any facts sufficient to support a claim of
22 actual fraud that would overcome the defendants' motions to
23 dismiss. Defendants' motions to dismiss plaintiffs' claims for
24 fraud, constructive fraud and actual fraud, claims five, six and
25 twenty-four, are GRANTED with leave to amend.

26
27 3

28 Claims one, two, ten, twelve, thirteen and seventeen
allege statutory violations of California or federal law. For the

1 following reasons plaintiffs' remaining statutory claims are
2 dismissed without prejudice.

3 Claim one alleges a violation of Cal Rev & Tax Code
4 §§ 23304, 23305a, seeking a cancellation of a voidable contract.
5 Defendants claim that MERS is exempt from California registration
6 requirements because it does not transact business in the state
7 under Cal Corp Code § 191 which exempts corporations for "the
8 enforcement of any loans by trustee's sale." Id § 191(d)(3).
9 Plaintiffs allege that MERS "is in the business of operating a
10 database and serving as a straw man for banks," but the facts as
11 alleged fail to demonstrate that MERS performed actions outside of
12 the enforcement of loans by trustee's sale. The May 13, 2009
13 Assignment of Deed of Trust, whereby MERS assigned all beneficial
14 interest under the deed to Wells Fargo Bank, is the only specific
15 action by MERS that plaintiffs expressly allege in their complaint.
16 Compl ¶51, Doc #11 at 30. The MERS assignment is the type of act
17 explicitly exempted by section 191(d)(3), and plaintiffs fail to
18 allege any other actions by MERS beyond this exempted assignment.
19 Defendants' motions to dismiss claim one are GRANTED with leave to
20 amend.

21 Claim two alleges a violation of Cal Civ Code § 1189,
22 seeking expungement of the Substitution of Trustee and the
23 Assignment of Deed of Trust. Compl ¶¶56-59. Although plaintiffs
24 allege that this is a strict compliance statute, Doc #18 at 6, the
25 statute states that "any certificate of acknowledgment taken in
26 another place shall be sufficient in this state if it is taken in
27 accordance with the laws of the place where the acknowledgment is
28 made." Cal Civ Code § 1189(b). The Court takes judicial notice
that the Substitution of Trustee and Assignment of Deed of Trust

1 appear to have been taken in Texas. Doc #11 Exs 3 and 4.
2 Plaintiffs fail to allege how either document was not in accordance
3 with the laws of Texas. Defendants' motions to dismiss claim two
4 are GRANTED with leave to amend.

5 Claim ten alleges a violation of the California Legal
6 Remedies Act ("CLRA"), Cal Civ Code § 1770. Plaintiffs and
7 defendants dispute the applicability of CLRA to real property and
8 the mortgage loans that accompany the sale of real property. The
9 court declines the parties' invitation to rule on this undecided
10 question of California law because the plaintiffs fail to allege
11 facts that establish an actual violation of CLRA. Although the
12 plaintiffs purport to identify twelve separate violations of CLRA,
13 Compl ¶¶29-30, they fail to present non-conclusory factual
14 allegations, therefore defendants' motions to dismiss claim ten are
15 GRANTED with leave to amend.

16 Claims twelve and thirteen allege violations of
17 California's Unfair Competition Laws ("UCL"), Cal Bus & Profs Code
18 §§ 17500, 17200. Plaintiffs claim that defendants have engaged in
19 advertising that was inherently deceptive for the purpose of
20 inducing members of the public to enter into misleading mortgage
21 loans. Compl ¶187. Plaintiffs claim that "the loan titles were
22 inherently deceptive as to the true nature of the loan by, for
23 example, using the word 'fixed' to describe a variable rate loan
24 which is only fixed for an introductory period." Id ¶189.
25 Sections 17200 and 17500 require showings of fact that demonstrate,
26 at very least, "unlawful conduct." UCL § 17200 et seq. The only
27 fact alleged is that the word "fixed" is used to describe a
28 variable rate loan, but plaintiffs fail to plead this fact with any
particularity. Plaintiffs fail to allege how this statement is

1 contrary to public policy, likely to mislead the public or how the
2 term was misleading to the plaintiffs. Plaintiffs fail to
3 establish where the alleged advertisements were published or in
4 what context the term "fixed" was even used by defendants.
5 Plaintiffs fail to sufficiently allege facts that any of the
6 defendants made misrepresentations regarding the formation of the
7 mortgage loan or any point thereafter, therefore defendants'
8 motions to dismiss claims twelve and thirteen are GRANTED with
9 leave to amend.

10 Claim seventeen alleges a violation of the Racketeer
11 Influences and Corrupt Organizations Act ("RICO"), 18 USC § 1961 et
12 seq. Plaintiffs allege that defendants were effectuating a
13 fraudulent scheme to take title of their property from the
14 inception of the mortgage loan agreement. Compl ¶120. Plaintiffs
15 further allege that "Defendants and each of them participated in a
16 scheme of racketeering as that terms [sic] is defined in the
17 Racketeer Influenced and Corrupt Organizations Act." Id ¶218.
18 This is a legal conclusion and not a specifically pled fact or a
19 cognizable legal theory. Plaintiffs fail to make a single factual
20 allegation that identifies an illicit enterprise as defined by the
21 RICO act, which is a pleading burden expressly required by the
22 statute. 18 USC § 1962(a-d). Defendants' motions to dismiss claim
23 seventeen are GRANTED with leave to amend.

24 Plaintiffs fail to state a substantive claim upon which
25 relief can be granted, thereby rendering moot their remedial claims
26 for an accounting (claim four), reformation (claim eight),
27 declaratory relief (claim fifteen), rescission (claim twenty) and
28 injunctive relief (claim twenty-one). Defendants' motions to

1 dismiss claims four, eight, fifteen, twenty and twenty-one are
2 GRANTED without prejudice.

3
4 III

5 For the reasons stated herein, defendants' motions to
6 dismiss claims seven, eleven, eighteen, nineteen and twenty-two are
7 GRANTED without leave to amend except those portions of claims
8 eighteen and nineteen for intentional and negligent infliction of
9 emotional distress to the extent based upon the 2009 non-judicial
10 foreclosure which are dismissed with leave to amend, as hereafter
11 provided.

12 Defendants' motions to dismiss claims one, two, three,
13 four, five, six, eight, nine, ten, twelve, thirteen, fourteen,
14 fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-
15 one, twenty-three and twenty-four are GRANTED with leave to amend.
16 As directed by the court at the hearing, plaintiffs must plead
17 additional facts with enhanced particularity and explicitly
18 identify which defendants are implicated in each individual claim.
19 Plaintiffs must file an amended complaint on or before March 22,
20 2010. If plaintiffs fail to file a timely amended complaint, the
21 court will dismiss all the claims with prejudice and enter judgment
22 for defendants.

23
24 IT IS SO ORDERED.

25
26 

27 VAUGHN R WALKER
28 United States District Chief Judge