UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

GRACHIAN L. SMITH, et al.,
Plaintiffs,
v.
YGRENE ENERGY FUND, INC., et al.,
Defendants.

Case No. 17-cv-01258-LB

ORDER ON MOTION TO DISMISS

Re: ECF No. 34

INTRODUCTION

This is a fraud suit over home-improvement loans. The plaintiffs allege that the defendants falsely told them that the loans would attach to their properties (like property taxes) and, correspondingly, failed to reveal that the loans would have to be repaid when a property was sold or refinanced. The plaintiffs claim that, contrary to the defendants' representations, they indeed had to repay the loans when they sold or refinanced their homes — at which point they incurred prepayment penalties. The plaintiffs also claim that the defendants charged them various improper fees.

The defendants now move to dismiss the complaint.[1] They mainly argue that the plaintiffs' fraud claims do not meet the "heightened pleading" standard of Federal Rule of Civil Procedure

[1] ECF No. 34. The operative complaint is the Amended Complaint (ECF No. 24). Record citations refer to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page

9(b). They make additional arguments against certain claims. The parties have consented to magistrate jurisdiction. *See* 28 U.S.C. § 636(c).[2] The court can decide this issue without a hearing. *See* Civil L.R. 7-1(b). For the reasons given below, and as more specifically described below, the court now partly grants the defendants' motion.

STATEMENT[3]

1. The Parties and Jurisdiction

The named plaintiffs are California or Florida residents and homeowners.[4] They sue on their own behalf and on behalf of national classes and California and Florida subclasses. Defendant Ygrene Energy Fund, Inc. is alleged to be a Delaware corporation with its headquarters in Sonoma County, California; defendant Ygrene Energy Fund Florida, LLC, a limited-liability company headquartered in Tampa, Florida.[5] The plaintiffs allege that at least one member of a proposed national class, a class "numbering in the tens of thousands," will be from a state "different . . . [from] that of Defendants." They also allege an amount in controversy exceeding $5 million.[6] The court thus has subject-matter jurisdiction of this dispute under the "minimal diversity" rule of the Class Action Fairness Act. 28 U.S.C. § 1332(d)(2).

2. PACE Loans

The subject of this dispute are "Property Assessed Clean Energy" (PACE) loans. ¶ 19. These are home-improvement loans that finance environmental upgrades to residential properties (such

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numbers at the top of documents.

[2] ECF Nos. 13, 18.

[3] Because this is a motion to dismiss, the court accepts the facts as pleaded in the Amended Complaint. See, e.g., LSO, Ltd. v. Stroh, 205 F.3d 1146, 1150 n. 2 (9th Cir. 2000); Shwarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000).

[4] The Florida plaintiffs are: Lt. Joseph J. Galaska; George W. and Tammy S. Woolley; Michael G. Pekel; and Grachian L. and Mary Jane Smith. The California plaintiffs are: Anthony Look, Jr. and Kimberly Look; and Alejandro and Felicia Marcey. Am. Compl. – ECF No. 24 at 2–3 (¶¶ 1–10).

[5] Id. at 3 (¶¶ 11–12). The court sometimes refers to the defendants collectively as "Ygrene."

[6] Id. at 3–4 (¶ 15).

as solar panels or better windows).[7] PACE loans take an unusual form. Unlike traditional loans, PACE loans do not involve a straightforward extension of credit from a lender, who then receives periodic repayments directly from the borrower. Instead, PACE loans are created as tax liens on the given property; homeowners then repay the loan as a special tax assessment.

PACE loans reflect a partnership between state or local governments, on the one hand, and private finance companies, like Ygrene, on the other. The government creates a special tax-assessment district in which PACE loans will be made. The plaintiffs explain:

> [R]esidential property owners are permitted to opt into a special assessment district to receive financing for energy improvements and retrofits on their homes. The loans are repaid through an annual assessment on the owner's property tax bill. A lien in the amount of the loan is placed on the home."[8]

In the end, "PACE loans are no different than private loans except that the terms are less favorable when compared to conventional loans, and instead of a monthly billing statement, borrowers receive an annual tax assessment."[9]

The defendants market and administer PACE programs, provide "initial funding" for PACE loans, and ultimately receive the homeowners' payments.[10] They also securitize the bonds that result from individual loans and sell these securities to investors. As the plaintiffs more fully describe matters:

> Ygrene is the nation's leading, multi-state provider of residential and commercial . . . [PACE] financing.[11]
>
> . . . .
>
> Ygrene acts as a lender by using private capital to provide financing to property owners in the PACE districts it administers. Ygrene's capital sources and structure include a $100 million revolving line of credit for the initial funding of PACE loans.[12]

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[7] PACE loans are also made on commercial real estate but this case involves only residential properties. See id. at 18, 42 (¶¶ 78, 209–10).

[8] Id. at 5 (¶ 20).

[9] Id. at 19 (¶ 80).

[10] See, e.g., id. at 5, 18–19 (¶¶ 20, 77, 81–82).

[11] Id. at 19 (¶ 79).

[12] Id. (¶ 81).

> Funding for a specific project is accomplished by the special PACE district's . . . issuing revenue bonds secured by special tax liens. . . . As part of the agreement between the district and Ygrene, the district sells and assigns all of its rights to receive the special tax revenues to Ygrene.[13]
>
> More specifically, the district issues a revenue bond to fund the PACE program. The bond is privately placed with Ygrene and issued as a single drawdown bond. Ygrene funds the purchase price of the bond by making advances. Each advance is considered a "sub-series bond" of the drawdown bond.[14]
>
> The drawdown bond is in the form of a revolving line of credit, allowing for the repayments of amounts drawn and the re-borrowing of such repaid amounts. Each advance is secured by a Financing Agreement and a senior priority assessment lien on the property.[15]
>
> Each individual property owner within the district desiring to finance an energy improvement enters into a Financing Agreement with the district under which the property owner agrees to the district's imposition of a non-ad valorem assessment on the property.[16]
>
> Each sub-series bond is secured solely by its own collateral, consisting of the Financing Agreement (evidencing the assessment lien) and a revenue account.[17]
>
> When it holds a sufficient amount of sub-series bonds, Ygrene securitizes the bonds and sells them to private investors.[18]

"As part of its services," the plaintiffs write, "Ygrene provides program design, marketing, administrative duties, origination, application processing, and ongoing reporting services."[19] "Most importantly, Ygrene is solely responsible for developing loan documents and disclosures that are provided to consumers."[20]

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[13] Id. (¶ 82).
[14] Id. (¶ 83).
[15] Id. (¶ 84).
[16] Id. at 19–20 (¶ 85).
[17] Id. at 20 (¶ 86).
[18] Id. (¶ 87).
[19] Id. at 21 (¶ 98).
[20] Id. (¶ 100).

3. The Dispute

The plaintiffs' main grievance concerns whether, and to what extent, PACE liens are attached to the property. More exactly, the plaintiffs complain that Ygrene falsely told them that the PACE loans would not have to be repaid when a borrower sold or refinanced her home. Through various channels, the plaintiffs claim, the defendants told them that the PACE liens would be transferred with the property to new owners (much like regular property taxes), so that, when the plaintiffs sold or refinanced their homes, they would not have to repay whatever balance remained on the PACE loan.

As it happens, PACE loans "do not travel with the home — in fact, they make it impossible or nearly impossible for consumers to sell their homes without first paying off the loan and incurring a large prepayment penalty. This is because conventional lenders refuse to provide loans on properties encumbered by . . . PACE loans, which benefit from superpriority status."[21] "[O]n at least three occasions since 2010," the plaintiffs recount, the Federal Housing Finance Agency (FHFA) "has made clear that . . . Fannie Mae and Freddie Mac should neither purchase nor refinance mortgages with PACE loans attached."[22] As a result of the FHFA's position, PACE loan borrowers have been unable to sell their homes without first satisfying their PACE loans.[23]

Contrary to the defendants' alleged representations, then, plaintiffs would have to repay the entire remaining PACE loan (and a prepayment penalty) when they sold or refinanced their homes. The plaintiffs thus see deception in the defendants' repeated warning that PACE loans "may" not transfer with the property. As the plaintiffs describe the situation, if it is possible in principle that PACE loans will transfer with the property, in practice it is virtually certain that PACE debt must be fully repaid on sale or refinance. *See* ¶¶ 30–31.

The plaintiffs locate falsehoods in a number of places. The most specifically identified misstatements lie in two written loan disclosures: the "Universal Approval Agreement" (UAA)

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[21] Id. at 7 (¶ 27).

[22] Id. at 6–7, 13–15 (¶¶ 30–31, 55–59).

[23] See id. at 15 (¶ 62).

that was used for California transactions; and the "Financing Agreement" (FA) used in Florida. According to the plaintiffs, the UAA and FA both

> misrepresent[] the nature of PACE loans by saying only that: (1) "certain" lenders desire to comply with FHFA guidance (when virtually all do); (2) the FHFA "appears to have instructed" lenders not to purchase loans with attached PACE loans (when both the FHFA and other agencies repeatedly stated this fact with certainty); and (3) that "you may" need to pay off the PACE loan if a homeowner wanted to sell or refinance (when a homeowner would definitely need to do so) . . . .[24]

The plaintiffs also allege that they "reviewed and relied upon Ygrene's website and promotional materials, all of which similarly represented that Ygrene liens are transferable with the property in the event of a sale or refinance."[25] They claim that emails and phone calls with the defendants' employees and "representatives" yielded these same untruths.[26] Finally, they allege that Ygrene maintains a "network" of thousands of third-party building contractors (the contractors who will install the PACE-funded home improvements). These contractors allegedly promote and "sell" the defendants' PACE loans to homeowners; they are trained by Ygrene and, armed with false information, they wrongly tell consumers that the PACE loans will transfer with the property and will not need to be repaid on sale or refinance.[27]

The plaintiffs also challenge several fees as improper. They point to "fees assessed by Ygrene to avoid . . . prepayment penalties," "payoff statement fees," and "unreasonable administrative fees."[28] They claim that at least some of these fees were never disclosed — or were inadequately disclosed — in their loan agreements.[29]

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[24] Id. at 27, 29 (¶¶ 118, 124).

[25] E.g., id. at 32 (¶ 138).

[26] E.g., id. at 26, 32, 37 (¶¶ 113, 139, 178).

[27] See, e.g., id. at 4–6, 21–22, 27, 39 (¶¶ 19–21, 101–04, 115, 190).

[28] E.g., id. at 5, 8 (¶¶ 20, 33–34).

[29] Id. at 28–29 (¶¶ 120–23).

5. The Proposed Classes

The named plaintiffs sue for themselves and for 12 proposed classes: 4 national classes; 4 California subclasses; and 4 Florida subclasses. These classes are distributed equally among four topics: "Prepayment Penalty"; "Prepayment Waiver Fee"; "Prepayment Penalty – Paid"; and "Payoff and Administrative Fee."[30]

6. The Claims

The plaintiffs bring nine claims:

1. California Unfair Competition Law (UCL) (Cal. Bus. & Profs. Code § 17200) (unfair prong);
2. UCL (fraudulent prong);
3. California Consumer Legal Remedies Act (CLRA) (Cal. Civ. Code § 1770(a));
4. Florida Deceptive and Unfair Trade Practices Act (FDUTPA) (Fla. Stat. § 501.201 *et seq.*);
5. tortious interference with contract;
6. fraudulent inducement;
7. negligent misrepresentation;
8. unjust enrichment; and
9. negligence

The defendants move to dismiss all these claims under Rules 9(b) and 12(b)(6).

GOVERNING LAW

1. Rules 12(b)(6) and 9(b)

A Rule 12(b)(6) motion to dismiss for failure to state a claim tests the legal sufficiency of a complaint. *Navarro v. Block,* 250 F.3d 729, 732 (9th Cir. 2001). A claim will normally survive a motion to dismiss if it offers a "short and plain statement . . . showing that the pleader is entitled to relief." *See* Fed. R. Civ. P. 8(a)(2). This statement "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial

[30] Id. at 42–44 (¶¶ 209–10).

plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a mere possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.''" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

When considering a Rule 12(b)(6) motion, the court must accept as true all factual allegations in the complaint as well as all reasonable inferences that may be drawn from such allegations. *LSO, Ltd. v. Stroh,* 205 F.3d 1146, 1150 n. 2 (9th Cir. 2000). Such allegations must be construed in the light most favorable to the nonmoving party. *Shwarz,* 234 F.3d at 435.

Fraud allegations elicit a more demanding standard. Rule 9(b) provides: "In alleging fraud . . . , a party must state with particularity the circumstances constituting fraud . . . . Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). This means that "[a]verments of fraud must be accompanied by the 'who, what, when, where, and how' of the misconduct charged." *Vess v. Ciba–Geigy Corp. USA,* 317 F.3d 1097, 1106 (9th Cir. 2003). Like the basic "notice pleading" demands of Rule 8, a driving concern of Rule 9(b) is that defendants be given fair notice of the charges against them. *See, e.g., In re Lui*, 646 F. App'x 571, 573 (9th Cir. 2016) ("Rule 9(b) demands that allegations of fraud be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.") (quotation omitted); *Odom v. Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir. 2007) (Rule 9(b) requires particularity "so that the defendant can prepare an adequate answer"). This heightened-pleading standard can apply even to claims that do not innately require proof of fraud. *E.g., Vess*, 317 F.3d at 1103–05. If such a claim nonetheless avers fraudulent conduct, then at least those averments must satisfy Rule 9(b); and, if a claim rests "entirely" on a "unified course of fraudulent conduct," then "the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b)." *Id.* at 1103–04. Finally, "[a] motion to dismiss a complaint or claim 'grounded in fraud' under Rule 9(b) for failure to plead with particularity is the functional equivalent of a motion to dismiss under Rule 12(b)(6) for failure to state a claim." *Id.* at 1107.

ANALYSIS

1. The Plaintiffs' Allegations Partially Satisfy Rule 9(b)

1.1 Statements in the Unanimous Approval Agreement and Financing Agreement

The representations contained in the UAA and FA meet Rule 9(b)'s demands. They are definite statements making specific representations.[31] Presumably, too, the plaintiffs would have been given these documents when they applied for or closed their loan — in any case, they must have been given the documents at a definite time and place. The statements allegedly made in the UAA and FA are adequately specific for Rule 9(b) purposes.

1.2 Other Statements

The rest of the alleged representations, however, are not sufficiently pleaded. The plaintiffs point vaguely to the defendants' "website," to an unidentified "promotional video" and other generic "promotional materials," to unidentified "email" or phone calls with unnamed "agents" and "representative[s]," and to unspecified statements made by unnamed third-party "contractors" — with none of this linked to identifiable people, dates, or places. All this falls short of Rule 9(b). These allegations do "not specify when and where [the misrepresentations] occurred." *Vess*, 317 F.3d at 1107. Nor do they "identify the [defendants'] employees," or the "certified" contractors, who made the false statements, except in the most generic way. *Id.* They do not "provide any dates, times, or places" where such statements were made. *Id.* (quoting *United States ex rel. Lee v. SmithKline Beecham, Inc.,* 245 F.3d 1048, 1051 (9th Cir. 2001)). These allegations may satisfy Rule 8(a)(1)'s more basic notice test; they do convey the plaintiff's grievance. But they embody exactly the sort of generic identification of fraud that Rule 9(b)'s more rigorous demand is meant to winnow out.

[31] See id. at 27–30, (¶¶ 118–21, 124, 126) (UAA and FA excerpts).

These allegations are not significantly different from those that the Ninth Circuit rejected in *Kearns.* That case thus controls this analysis. The *Kearns* plaintiff claimed that the defendants (a car manufacturer and a dealership) made "false and misleading statements" to "increase sales" of their "Certified Pre-Owned ('CPO')" vehicles. *Id.* at 1122–23. Like the plaintiffs here, the *Kearns* plaintiff sued under California's CLRA and UCL. *Id.* at 1122. He claimed that "he was exposed to" misrepresentations in the manufacturer's "national marketing campaign"; in "sales materials" at the dealership where he bought his car; and in statements made by the dealership's "sales personnel." *Id.* at 1125–26.

The Ninth Circuit held that he had not adequately specified the offending representations. In language that applies here, the Ninth Circuit explained:

> Kearns fails to allege . . . the particular circumstances surrounding such representations. Nowhere . . . does Kearns specify what the television advertisements or other sales material specifically stated. Nor did Kearns specify when he was exposed to them or which ones he found material. Kearns also failed to specify which sales material he relied upon in making his decision to buy a CPO vehicle. Kearns does allege that he was specifically told "CPO vehicles were the best used vehicles available as they were individually hand-picked and rigorously inspected used vehicles with a Ford-backed extended warranty." Kearns does not, however, specify who made this statement or when this statement was made. Kearns failed to articulate the who, what, when, where, and how of the misconduct alleged. The pleading of these neutral facts fails to give [the defendants] the opportunity to respond to the alleged misconduct.

Id. at 1126. His allegations thus failed to satisfy Rule 9(b). *Id.* The Ninth Circuit upheld the complaint's dismissal. *Id.*

Essentially the same failings mark the plaintiff's allegations here. The same result — a Rule 9(b) dismissal — must obtain.

1.3 The Complaint Alleges a "Unified Course of Fraudulent Conduct"

Furthermore, the plaintiffs allege a "unified course of fraudulent conduct" within the meaning of Ninth Circuit precedent. *See, e.g., Vess*, 317 F.3d at 1103–05. The vast bulk of the complaint, in other words, "sounds in fraud." *See id.* at 1103–04. A different conclusion is hard to reach. The complaint is overwhelmingly a story of alleged fraud — in particular, about how the defendants falsely claimed that PACE liens would transfer with the plaintiffs' properties on sale or refinance. And, conversely, about how the defendants failed to disclose that, upon such an event, the plaintiffs were virtually certain to have to repay the PACE loan and would suffer a prepayment penalty. Almost every claim in the complaint expressly alleges fraud. Almost every claim, in other words, expressly grounds itself in fraud. If these allegations and claims do not depict a "unified course of fraudulent conduct," then it is hard to see the case that would. All the claims that are "grounded in fraud" must therefore "as a whole" exhibit Rule 9(b) specificity. *Id.* The upshot of this holding is that Rule 9(b) thus applies to claims that are not innately grounded in fraud. The CLRA claim and the UCL "unfair"-prong claim do not have fraud as necessary elements. Here, though, they advance nothing but fraud. And so they must be pleaded with heightened particularity. *Id.*[32]

Very little in the complaint steps outside the "unified course" of allegedly fraudulent conduct. Very few claims partly avoid Rule 9(b) because they partly rest on "some non-fraudulent conduct." *See id.* at 1104.

The only "non-fraudulent" factual allegations (that the court can see) involve fees. In addition to the alleged fraud related to whether the PACE liens would transfer with the property, the plaintiffs also make the ancillary claim that Ygrene charged them various fees that did not appear, or were inadequately disclosed, in their loan documents.[33] Such fees may be wrongful, not because they were fraudulent (in the technical sense of involving a false statement, reliance, and so on), but for some other reason (perhaps by violating a lending law). This improper-fee allegation provides an alternate basis for claims that are not uniquely grounded in fraud. The court can discern four such claims. The unjust-enrichment claim may envelop the non-fraudulent fee allegation. That

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[32] All that said, it is not clear that this "unified course of fraudulent conduct" holding is of much practical consequence. At least not in this case. Even if the court decided that the complaint did not allege a unitary course of fraud, "all averments of fraud" in any given claim would still have to be specifically pleaded. See Fed. R. Civ. P. 9(b) ("all averments"); Vess, 317 F.3d at 1104. Here, though, almost all the claims are built of nothing but "averments of fraud." The major part of the complaint would still have to satisfy Rule 9(b).

[33] See Am. Compl. – ECF No. 24 at 5, 8, 28–29 (¶¶ 20, 33–34, 120–23).

claim does not explicitly mention fraud. Nor is it linked to only fraudulent conduct.[34] It instead points to all the underlying factual allegations.[35] To the extent that the unjust-enrichment claim embraces the underlying allegations of fraud, then it fails under Rule 9(b); to the extent that it embraces the "non-fraudulent" improper-fee allegations, it survives.[36]

The California CLRA claim, as well, is expressly based on both "false representations" and on unspecified "unconscionable provisions" in the plaintiffs' contracts.[37] The Florida FDUTPA claim also complains of "unconscionable" conduct. Finally, the tortious-interference claims seem to rest on allegedly "unreasonable" charges.[38] To the extent that these claims rest on "non-fraudulent" conduct — which, again, appears to mean certain improper fees — they are not subject to a Rule 9(b) analysis.[39] That said, the court does not now decide whether any claims rest on non-fraudulent conduct because the likely non-fraudulent allegations are intertwined with allegations of fraud and are not obviously separate grounds for claims. Wherever the plaintiffs rest a claim on non-fraudulent conduct, the next iteration of their complaint should more clearly name the wrongful acts that underlie that claim, and, in so doing, should distinguish between the fraud and the other grounds that support the claim.

Finally, the plaintiffs insist that their improper-training allegations elude Rule 9(b).[40] It is hard to see how — at least in any way that is of practical consequence, that leaves a viable, training-based claim intact. The complaint clearly alleges that the third-party building contractors were "ill-trained" *in that Ygrene gave them false information to pass on to consumers* about the PACE

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[34] See id. at 55 (¶¶ 285–91).

[35] Id. (¶ 285).

[36] Other aspects of the unjust-enrichment claim are discussed below. Infra, Part 4.

[37] Id. at 49 (¶ 235).

[38] See id. at 52 (¶¶ 258–59).

[39] This is giving the non-movant plaintiffs the benefit of every doubt. Strictly speaking, it is not clear to what the plaintiffs refer when they discuss "unconscionable provisions" (in the CLRA claim) or "unconscionable . . . practices" (in the FDUTPA claim). If these point to something other than the underlying fraud allegations, their referent is unclear. In other words, these claims don't specify what is unconscionable apart from fraud. The complaint's underlying factual allegations do not use the term "unconscionable."

[40] Pl. Opp. – ECF No. 37 at 6–7, 12.

loans.[41] That is the only concrete way in which (according to the plaintiffs) the defendants' training was deficient. If the insufficiently pleaded fraud component is "stripped from" the rest of the training allegations and "disregarded," *see Vess*, 317 F.3d at 1104–05,[42] it is hard to see what remains of a training claim that is even intelligible, much less legally viable.

1.4 Enumerating the Fraud-Based Claims

The court concludes that the following claims are directly for fraud or are grounded in fraud and are thus subject to Rule 9(b):

- First Cause of Action – UCL (unfair prong);[43]
- Second Cause of Action – UCL (fraudulent prong);
- Third Cause of Action – CLRA;
- Fourth Cause of Action – FDUTPA;
- Sixth Cause of Action – Fraudulent Inducement;
- Seventh Cause of Action – Negligent Misrepresentation;
- Eighth Cause of Action – Unjust Enrichment (to the extent based on underlying factual allegations of fraud); and
- Ninth Cause of Action – Negligence

Insofar as they rest on the insufficient allegations just discussed — which, again, are essentially all the fraud allegations other than those involving the UAA and FA — these claims fail to state a viable claim. The underlying allegations must be re-pleaded, to meet Rule 9(b)'s heightened-specificity demand, or these claims will go forward resting on only the statements in the UAA and FA.

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[41] See Am. Compl. – ECF No. 24 at 4–5 (¶¶ 19, 21) ("The training materials . . . contain misleading and incorrect statements about [the] PACE loans that are then passed on to consumers.").

[42] The Vess court explained:

> Where averments of fraud are made in a claim in which fraud is not an element, . . . [t]he proper route is to disregard averments of fraud not meeting Rule 9(b)'s standard and then ask whether a claim has been stated. . . . The . . . consequence . . . would be that any allegations of fraud would be stripped from the claim.

Vess, 317 F.3d at 1105 (quoting *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001) and Carlon v. Thaman (In re NationsMart Corp. Secs. Litig.), 130 F.3d 309, 315 (8th Cir. 1997)) (emphases in Vess).

[43] The plaintiffs allege: "Defendant[s] violated the 'unfair' prong of the UCL through [their] affirmative misrepresentations, omissions, and practices described herein." Am. Compl. – ECF No. 24 at 47 (¶ 220).

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2. The CLRA Does Not Apply to the PACE Loans

The defendants make an additional argument against the California plaintiffs' CLRA claim. Apart from failing under Rule 9(b), the defendants contend, the CLRA claim also fails because PACE loans are "intangible" financial products to which the CLRA does not apply.[44] The plaintiffs respond that the CLRA applies because the defendants did more than just provide a financial product. They suggest that the defendants' "interaction with the borrower[s]" went "*beyond* a contract to exten[d] credit."[45] Specifically, they allege that Ygrene "market[ed]" and "service[ed]" the PACE contracts.[46] In this vein, the defendants "serve[d] as program administrators and intermediaries between the special districts and borrower"; "prepare[d] loan applications and documents"; "conduct[ed] the 'closing' on the loans"; and "facilitate[d] the funding of individual homeowner projects."[47] These are all "services" within the meaning of the CLRA, the plaintiff's reason, so that their claim under that statute survives.

The court disagrees. The California Supreme Court, and federal courts in California, have held that the CLRA does not apply to intangible financial products like the PACE loans. They have also held that such loans do not fall into the CLRA whenever a defendant provides "ancillary services" in connection with a loan.

Consider the statutory text. The CLRA makes "unlawful" certain "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or [that] results in the sale or lease of goods or services to any consumer." *Becker v. Wells Fargo Bank, N.A.,* 2011 WL 1103439, *12 (E.D. Cal. Mar. 22, 2011) (quoting Cal. Civ. Code § 1770(a)). "Goods" are defined as "tangible chattels bought or leased for use primarily for personal, family, or household purposes." Cal. Civ. Code § 1761(a). "Services" are "work,

44 ECF No. 34 at 25–26.

45 ECF No. 37 at 20 (quoting Rex v. Chase Home Fin. LLC, 905 F. Supp. 2d 1111, 1156 (C.D. Cal. 2012)) (emphasis in Rex).

46 Id. at 21.

47 Id.

labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." Cal. Civ. Code § 1761(b).

The PACE loans are intangible financial products. They are not a "good" or "service" under the CLRA; and the PACE-related "services" that Ygrene allegedly provided do not bring the PACE loans into the statute's coverage.

The seminal case is *Fairbanks v. Super. Ct.*, 46 Cal. 4th 56 (2009). The Supreme Court of California there held, unanimously, that the CLRA does not apply to life-insurance policies. *Id.* at 61–65. Such policies are "intangible goods" outside the CLRA's scope. *See id.* at 64–65. The *Fairbanks* court also held that normal "ancillary services" do not bring insurance policies into the CLRA's fold. *Id.* at 65. The *Fairbanks* plaintiffs had pointed to the fact that insurance agents "help[] consumers select policies that meet their needs, . . . assist[] policyholders to keep their policies in force, and . . . process[] claims" for their customers. *Id.* The California high court decided that these services were not "sufficient to bring life insurance within the reach of the" CLRA. *Id.* The court explained:

> [A]ncillary services are provided by the sellers of virtually all intangible goods — investment securities, bank deposit accounts and ***loans***, and so forth. The sellers of virtually all these intangible items assist prospective customers in selecting products that suit their needs, and they often provide additional customer services related to the maintenance, value, use, redemption, resale, or repayment of the intangible item. Using the existence of these ancillary services to bring intangible goods within the coverage of the Consumers Legal Remedies Act would defeat the apparent legislative intent in limiting the definition of "goods" to include only "tangible chattels." We conclude, accordingly, that the ancillary services that insurers provide to actual and prospective purchasers of life insurance do not bring the policies within the coverage of the Consumers Legal Remedies Act.

Id. (citation omitted) (emphasis added). The *Fairbanks* court thus upheld a judgment on the pleadings against the CLRA claim. *Id.* at 59–60, 65.

Following *Fairbanks*, federal courts have held that "mortgage loans" fall outside the CLRA and that normal "ancillary services" do not bring such loans inside the statute. *See Becker*, 2011 WL 1103439 at *13 ("[T]he California Supreme Court [has] clarified that ancillary loan 'servicing' does not bring a loan within the scope of the CLRA . . . ."); *Justo v. IndyMac Bancorp*, 2010 WL 623715, *3–4 (C.D. Cal. Feb. 19, 2010) (mortgage-loan modification); *Reynoso v. Paul*

Fin., LLC, 2009 WL 3833298, *9 (N.D. Cal. Nov. 16, 2009) (mortgage loan); *Consumer Solutions REO, LLC v. Hillery,* 658 F. Supp. 2d 1002, 1015–16 (N.D. Cal. 2009) (same). These cases all dismissed CLRA claims with prejudice.

The PACE loans, too, are "intangible [financial] goods" that fall outside the express scope of the CLRA. Nothing in the complaint suggests that the defendants engaged in anything more than "ancillary services" in connection with the plaintiffs' loans. Nothing in the complaint suggests that the defendants did anything that would bring the PACE contracts inside the bounds of the CLRA. The CLRA claim is thus dismissed with prejudice.

3. Tortious Interference — The Defendants Were Not "Strangers to the Contract"

The plaintiffs also claim that the defendants "tortiously interfered with the performance of" their PACE loans.[48] The interference seems to consist in the defendants' charging allegedly "unreasonable penalties and fees."[49] The defendants argue that they were not "strangers" to the PACE-loan contracts and so, as a matter of law, cannot have interfered with those contracts. The defendants are partially correct. Their interest in the plaintiffs' contracts means that they cannot be liable for interference under Florida law. It is not clear whether California law yields the same result. The court dismisses the Florida interference claim with prejudice, for the reasons given below, but declines to dismiss the California claim.

3.1 The Basic Requirements of Tortious Interference

The basic elements of tortious interference are alike in Florida and California law. As the plaintiffs explain:

> To state a claim for tortious interference under Florida law, a plaintiff must allege: "(1) the existence of a business relationship under which claimant has rights; (2) the defendant's knowledge of the relationship, (3) an intentional and unjustified interference with the relationship, and (4) damage to the claimant caused by the interference." *Kennedy v. Deschenes*, [2017 WL 2223050, *6] (S.D. Fla. May 19,

[48] Am. Compl. – ECF No. 24 at 52 (¶ 260).

[49] Id. at 52 (¶¶ 258–59).

2017) (citing *Tamiami Trail Tours, Inc. v. Cotton,* 463 So. 2d 1126, 1127 (Fla. 1985)).[50]

"The elements of tortious interference under California law," the plaintiffs rightly say, are "almost identical to the Florida elements."[51] Certainly, they differ in no way that matters here. *See, e.g., Pac. Gas & Elec. Co. v. Bear Stearns & Co.,* 50 Cal. 3d 1118, 1126 (1990) (elements).

3.2 "Strangers to the Contract" 1 — Florida

The two states differ over whether a third party with some interest in a contract can culpably interfere with that contract. In Florida law, an interested party cannot interfere: "For the interference to be unjustified, the interfering defendant must be a third party, a stranger to the business relationship." *Kennedy*, 2017 WL 2223050 at *6 (quoting *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So. 2d 381, 385–86 (Fla. App. 1999)).[52] One is a stranger to a Florida contract "unless it has a 'supervisory interest in how the relationship is conducted or a potential financial interest in how a contract is performed.'"[53]

As a matter of Florida law, the defendants were not strangers to the plaintiffs' contracts. They thus cannot be liable for interfering with those contracts. The plaintiffs' own allegations show that the defendants had "supervisory" and "financial" interests in these loans. First, the plaintiffs allege that the defendants were primarily responsible for administering the PACE loans. They describe the defendants as "program administrators and intermediaries between" the local governments and borrowers.[54] They "provide[] program design, marketing, administrative duties, origination, application processing, and ongoing reporting services."[55] "Most importantly," as administration goes, the defendants are "solely responsible for developing [the] loan documents and disclosures

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[50] Pl. Opp. – ECF No. 37 at 21.

[51] Id. at 22.

[52] Id. at 21.

[53] Id. (quoting A&E Auto Body, Inc. v. 21st Century Centennial Ins. Co., 2015 WL 5604786, *8 (M.D. Fla. Sept. 23, 2015) (quoting in turn *Palm Beach County Health Care Dist. v. Prof'l Med. Educ., Inc.*, 13 So. 3d 1090, 1094 (Fla. App. 2009)).

[54] Am. Compl. – ECF No. 24 at 11 (¶ 48).

[55] Id. at 21 (¶ 98).

that are provided to consumers."[56] The plaintiffs also allege that the defendants collect prepayment penalties and other fees from their contracts.[57] Finally, according to the complaint, the defendants provide the motive financing behind PACE projects — or, at least, along with the governmental bonds, they are one of the twin engines of PACE lending.[58] Thus, say the plaintiffs, the defendants "act[] as a lender by using private capital to provide financing to property owners in the PACE districts [they] administer[]."[59] Their "capital sources and structure include a $100 million revolving line of credit for the initial funding of PACE loans."[60] "As part of the agreement" between Ygrene and the local governments (who *are* parties to the PACE loans), moreover, the local government "sells and assigns" to Ygrene "all . . . rights to receive the special [PACE] tax revenues" — *i.e.,* the plaintiffs' payments. The plaintiffs' loans become embodied in "sub-series bonds" that Ygrene eventually securitizes and sells to private investors.[61] All of which gives the defendants a real and innate economic interest in the PACE loans.

This scotches the Florida interference claim. The defendants cannot have played the role that the plaintiffs allege and yet been "strangers" to the PACE loans under Florida law. Indeed, given the situation that the plaintiffs describe — again, focusing on the role that they ascribe to the defendants — the Florida interference claim cannot plausibly be amended to be made viable. The court therefore dismisses it with prejudice.

3.3 "Strangers to the Contract" 2 — California

The question is more complicated in California law. "It has long been held that *a stranger to a contract* may be liable in tort for intentionally interfering with the performance of the contract." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 513 (1994) (emphasis in

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[56] Id. (¶ 100).

[57] Id. at 7–8, 21 (¶¶ 31, 94).

[58] See id. at 19–20 (¶¶ 79–83, 87).

[59] Id. at 19 (¶ 81).

[60] Id.

[61] Id. at 19–20 (¶¶ 83, 86–87).

original). It is equally clear that "the tort cause of action for interference with contract does not lie against a party to the contract." *Id.* (citing cases). What is less certain is the middle case. What is uncertain, that is, is whether and when interference will lie against one who is neither a party nor a complete stranger to the contract. Someone who has a "direct interest and involvement" in the contract; this may be a "financial interest" or significant control or oversight" of part of the contractual arrangement.[62]

The Ninth Circuit has observed that "the 'not-a-stranger' principle . . . is in a state of flux" in California. *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1127 (9th Cir. 2014). That same court has reasoned that the California rule may *permit* interference liability against those who have an "economic interest" in the subject contract. *United Nat'l Maint., Inc. v. San Diego Convention Ctr., Inc.*, 766 F.3d 1002, 1007 (9th Cir. 2014). Closely analyzing this aspect of California interference law, the Ninth Circuit wrote in *United National*:

> To shield parties with an economic interest in the contract from potential liability would create an undesirable lacuna in the law between the respective domains of tort and contract. A party with an economic interest in a contractual relationship could interfere without risk of facing either tort or contract liability. This result is particularly perverse as it is those parties with some type of economic interest in a contract whom would have the greatest incentive to interfere with it. Such a result would hardly serve the established goal of protecting "a formally cemented economic relationship . . . from interference by a stranger to the agreement." *Della Penna [v. Toyota Motor Sales, U.S.A., Inc.,* 11 Cal. 4th 376, 392 (1995)].

United National, 766 F.3d at 1007. The Ninth Circuit anchored its conclusion by observing that, "California courts have repeatedly held that parties with an economic interest in a contractual relationship may be liable for intentional interference with that contract." *Id.* at 1008.

The parties have not addressed this nuance in California law. The court is hesitant to go further in this vein without the benefit of the parties' input as to whether — despite their financial interest in and supervision of the plaintiffs' PACE loans — the defendants can be liable for tortiously

[62] See Marin Tug & Barge, Inc. v. Westport Petroleum, Inc., 271 F.3d 825, 832 (9th Cir. 2001) ("an entity with a direct interest or involvement in [a contractual] relationship is not usually liable for harm caused by pursuit of its interests"); Integrated Storage Consulting Servs., Inc. v. NetApp, Inc., 2014 WL 3372583, at *11 (N.D. Cal. July 9, 2014) ("control or oversight"); Curley v. Wells Fargo & Co., 2014 WL 2187037, at *4 (N.D. Cal. May 23, 2014) (discussing "financial interests" in interference doctrine).

interfering with those loans under California law. The most the court can say at this juncture is that the defendants' arguments do not justify dismissing the California interference claim. Their motion to dismiss is to this extent denied. The court can address the California-interference issue in any new motion to dismiss.

4. Unjust Enrichment

Finally, the defendants move to dismiss the plaintiffs' unjust-enrichment claim. The court concludes that the California unjust-enrichment claim must be dismissed, but that the Florida claim survives.

4.1 California

The California unjust-enrichment claim must be dismissed because it is merely "superfluous" of the plaintiffs' other statutory and tort claims. As Judge Seeborg of this court has explained: "California law does not uniformly recognize unjust enrichment as a cause of action; rather, courts typically consider it as a principle that gives rise to restitution in order to avoid permitting a defendant to benefit unjustly where no valid contract exists." *Top Agent Network, Inc. v. Zillow, Inc.*, 2015 WL 7709655, at *8 (N.D. Cal. Apr. 13, 2015) (citing *McBride v. Boughton,* 123 Cal. App. 4th 379, 388 (2004)).

More operatively — and in language that applies here — Judge Seeborg held that a redundant unjust-enrichment claim had to be dismissed. *Id.* After recasting that claim as one for restitution (not an uncommon adjustment in California case law), Judge Seeborg reasoned:

> Restitution may be awarded . . . where a defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct, ***but the plaintiff has chosen not to sue in tort***. [*McBride,* 123 Cal. App. 4th at 388]; *see also Paracor Fin. v. General Elec. Capital Corp.,* 96 F.3d 1151, 1167 (9th Cir. 1996). Thus, "***a claim for restitution is inconsistent and incompatible with*** a related claim for breach of contract or ***a claim in tort***." *Rosal v. First Federal Bank of America,* 671 F. Supp.2d 1111, 1133 (N.D. Cal. 2009). . . . [H]ere, . . . [the plaintiff] alleges several statutory and tort claims — all based on the same underlying conduct. Given that its cursorily-pleaded unjust enrichment theory rests on allegations covered by other claims that provide for legal remedies, this claim is superfluous

> and, accordingly, dismissed. *See In re Ford Tailgate Litigation,* 2014 WL 3899545, at *3–4 (N.D. Cal. Aug. 8, 2014).

Top Agent, 2015 WL 7709655 at *8 (emphases added).

Because, in this case, the plaintiffs' unjust-enrichment claim is based on the same conduct as the statutory and tort claims through which they seek relief, the unjust-enrichment claim is superfluous and must be dismissed.

Furthermore, under California law, it is doubtful whether an unjust-enrichment claim can lie where an express contract covers the same subject matter — even if that contract is not strictly between the litigants. *See Paracor,* 96 F.3d at 1167. The PACE contracts here may have been between the plaintiffs and the governments, on the one side, and, on the other, between the governments and Ygrene. But those contracts were part of one overall transaction; they were mutually necessary to the transactions happening at all; they must have been in the parties' (real or constructive) contemplation; and, maybe most important, they in fact defined the parties' respective obligations. The express contracts leave no space for an unjust-enrichment claim. *See id.*

For both these reasons, the California plaintiffs' unjust-enrichment claim is dismissed with prejudice.

4.2 Florida

The outcome is different in Florida law. There, the "express contract" rule appears to bar unjust-enrichment claims only where that contract is strictly between the litigants. *See, e.g., Diamond "S" Dev. Corp. v. Mercantile Bank,* 989 So. 2d 696, 697 (Fla. App. 2008) (an "unjust enrichment claim [is] precluded by the existence of an express contract *between the parties* concerning the same subject matter") (emphasis added); *Degutis v. Fin. Freedom, LLC*, 978 F. Supp. 2d 1243, 1266 (M.D. Fla. 2013) (express contract "between the Parties" defeated unjust-enrichment claim). Moreover, under Florida law, an unjust-enrichment claim can coexist with other tort claims covering the same subject matter. *Harris v. Nordyne, LLC*, 2014 WL 12516076, *7 (S.D. Fla. Nov. 14, 2014). The *Harris* court thus concluded:

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> [T]o the extent that a plaintiff has adequate legal remedies under theories of liability other than a claim of breach of an express contract, ***those remedies do not bar an unjust enrichment claim***. Thus, the availability of Plaintiffs' FDUTPA claim does not require dismissal of its unjust enrichment claim.

Id. (quotations, citations, and footnotes omitted) (emphasis added).

The court denies the motion to dismiss the Florida plaintiffs' unjust-enrichment claim.

CONCLUSION

The court reaches the following conclusions. The CLRA claim, the Florida tortious-interference claim, and the California unjust-enrichment claim are dismissed with prejudice. The motion to dismiss is denied with respect to the California tortious-interference claim and the Florida unjust-enrichment claim. All the claims that the court has identified as being directly for fraud or grounded in fraud[63] survive insofar as they are based on representations in the Unanimous Approval Agreements and Financing Agreements; to the extent that the fraud claims rest on other alleged representations, they are dismissed under Rule 9(b). The plaintiff may amend the latter allegations to satisfy Rule 9(b). Any amended complaint must be filed within 30 days of this order. If the plaintiffs do not file an amended complaint by then, their fraud-based claims will proceed based only upon the representations contained in the Unanimous Approval Agreements and Financing Agreements. Any claims that the court has identified as being based partly on non-fraudulent conduct survive to that extent.

IT IS SO ORDERED.

Dated: July 26, 2017

LAUREL BEELER
United States Magistrate Judge

[63] See supra, Part 1.4.