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 19 GREENPOINT MORTGAGE FUNDING, INC.

20 **UNITED STATES DISTRICT COURT**
 21 **NORTHERN DISTRICT OF CALIFORNIA**

22 JOHN NAULTY, CAROL NAULTY,
 23
 24 Plaintiffs,

Case No.: CV-09-1542 MEJ
 Hon. Maria Elena James
 Ctrm B - San Francisco

25 vs.

**GREENPOINT MORTGAGE
 FUNDING, INC.'S NOTICE OF
 MOTION AND MOTION TO
 DISMISS; MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT THEREOF**

26 GREENPOINT MORTGAGE
 27 FUNDING, INC.; AMERICAN
 28 CAPITAL FINANCIAL SERVICES;
 JAMES NAULTY; GMAC
 MORTGAGE LLC; WACHOVIA
 MORTGAGE FSB; MORTGAGE
 ELECTRONIC REGISTRATION
 SYSTEMS, INC., all persons currently
 unknown claiming any legal or
 equitable interest in the Trust Property,
 and DOES ONE through ONE
 HUNDRED, inclusive,

[Filed concurrently with Request for
 Judicial Notice]

DATE: May 28, 2009
 TIME: 10:00 a.m.
 DEPT: B

Defendants.

Complaint filed: February 4, 2009

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1 PLEASE TAKE NOTICE that on May 28, 2009, at 10:00 a.m., or as soon
2 thereafter as counsel may be heard in Courtroom B of the above-entitled Court
3 located at 450 Golden Gate Avenue, San Francisco, California, Defendant
4 GREENPOINT MORTGAGE FUNDING, INC., will and hereby does move to
5 dismiss plaintiffs' complaint. At the same time and place, Defendants will move for
6 a more definite statement of any claim which is not dismissed.

7 This motion is made under Federal Rule of Civil Procedure 12(b)(6). The
8 motion is based on this notice of motion, the accompanying memorandum of points
9 and authorities, the accompanying request for judicial notice, the complaint, and all
10 other papers on file in this action.

11 DATED: April 28, 2009

SEVERSON & WERSON
A Professional Corporation

12
13
14 By: /s/Jarlath M. Curran
JARLATH M. CURRAN II
Attorneys for Defendant
GREENPOINT MORTGAGE
15 FUNDING, INC.
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Plaintiffs' complaint alleges broad and conclusory allegations about the
4 defendants without sufficiently tailoring a majority of allegations to the facts that
5 pertain to Plaintiffs. Plaintiffs also fail to provide sufficient particulars with respect
6 to the individual loan transactions between Plaintiffs and Defendants. The reason
7 being is that a majority of the first 54 paragraphs of the complaint are ripped
8 directly from a separate and unrelated lawsuit filed by the California attorney
9 general's office against Countrywide Financial Corporation.¹ Countrywide is not a
10 party to this action and it is improper for Plaintiffs to simply copy those allegations
11 and present them as "valid" claims here.

12 The remainder of Plaintiffs' complaint fails no better. Plaintiffs assert
13 several claims based in both statutory and common law. However, Plaintiffs'
14 claims contradict well established law, fail to provide even a single fact to support
15 the claim or are time barred. Therefore, Defendant Greenpoint Mortgage Funding
16 requests that the Court grant this motion to dismiss.

17 **II. STATEMENT OF FACTS**

18 In or about May 2003, Plaintiffs John and Carol Naulty ("Plaintiffs")
19 purchased the real property located at 315 Wildberry Drive, Brentwood, California
20 (the "Property.") (Compl., 57.) To finance this purchase, Plaintiffs obtained a
21 \$271,000.00 loan from PCFS Mortgage Resources ("PCFS"). Plaintiffs allege that,
22 at this time, they were financially stable and could afford their mortgage with
23 PCFS.

24
25
26 ¹ A large number of Plaintiffs' allegations are identical to those set forth in the complaint filed in *People of*
27 *State of California v. Countrywide Financial Corporation, et al*, Superior Court of the State of California, County of
28 Los Angeles, Case No. LC081846. For example, paragraphs 23-28, 29-32, 41-49 and 51 of Plaintiffs' complaint are
similar, if not identical to paragraphs 42-48, 78-82, 85-95 and 103 of the complaint against Countrywide,
respectively. A copy of the complaint is attached as Exhibit A to the Request for Judicial Notice filed concurrently
herewith.

1 In or about October 2004, Plaintiffs sought the assistance of Defendant James
2 Naulty (“Naulty”) to refinance their existing loan with PCFS. On October 8, 2004,
3 Plaintiffs obtained a \$314,400 loan from World Savings Bank, FSB (“World
4 Savings”). This loan was evidenced by a note, secured by a deed of trust recorded
5 against the Property and used to refinance Plaintiffs’ prior loan with PCFS.
6 (Compl., ¶¶63-65, Exs. A-1, A-2.)

7 Less than a year later, in June 2005, Plaintiffs obtained another refinance
8 loan with the assistance of Mr. Naulty. (Compl., ¶¶63-65.) This second refinance
9 was again funded by World Savings Bank – this time with a principal amount of
10 \$371,000 – and was secured by a deed of trust recorded against the Property. (Id.,
11 Exs. A-3, A-4.)

12 In April 2006, Plaintiffs obtained a refinance loan from Defendant
13 Greenpoint Mortgage Funding, Inc. (“Greenpoint”) in the amount of \$416,000 (the
14 “Loan”). The Loan was used to refinance Plaintiff’s June 2005 loan with World
15 Savings. (Compl., ¶67.) The Loan is evidenced by a note and secured by a deed of
16 trust recorded against the Property (“Deed of Trust”). (Compl., ¶69, Exs. B1, B2;
17 Deed of Trust, Request for Judicial Notice filed concurrently herewith (“RJN”), Ex.
18 B.)

19 Due to Plaintiffs’ failure to make the required payments due under the Loan,
20 foreclosure proceedings were initiated. As a result, a notice of default and notice of
21 trustee’s sale were recorded against the Property on October 16, 2008 and January
22 21, 2009, respectively. (Compl., ¶80; Notice of Default, RJN, Ex. C; Notice of
23 Trustee’s Sale, RJN, Ex. D.)

24 Plaintiffs’ complaint alleges that, in funding the Loan to Plaintiffs,
25 Greenpoint failed to provide certain disclosures, mislead Plaintiffs ability to pay the
26 monthly amounts due on the loan, grossly misstating Plaintiffs’ income on the loan
27 documents and failing to inform Plaintiffs of their intent to securitize the loan.
28 (Compl., ¶¶68, 75.) Plaintiffs also allege that Greenpoint is not the holder of the

1 promissory note and, therefore, has no right to initiate foreclosure. (Compl., ¶¶81,
2 83.)

3 Based on these allegations, Plaintiffs have filed the current action alleging,
4 among other things, negligence, breach of contract, fraud, violations of the Truth in
5 Lending Act (“TILA”), Home Ownership and Equity Protection Act (“HOEPA”),
6 the Real Estate Settlement Procedures Act (“RESPA”) and Bus. & Prof. Code
7 sections 17200 and 17500, as well as several other common law claims.

8 **III. PLAINTIFFS’ COMPLAINT IS SUBJECT TO A MOTION TO**
9 **DISMISS**

10 On a motion to dismiss, the court accepts as true the facts properly pleaded in
11 the complaint, but not conclusions of law. *Alperin v. Vatican Bank*, 410 F.3d 532,
12 541 (9th Cir. 2005); *In re Verifone Secs. Litig.*, 11 F.3d 865, 868 (9th Cir. 1993). In
13 resolving a motion to dismiss, the court generally accepts as true all material
14 allegations in the complaint, as well as reasonable inferences to be drawn from
15 them. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). The court, however,
16 need not accept as true any unreasonable inferences, unwarranted deductions of
17 fact, or conclusory legal allegations cast in the form of factual allegations. *Western*
18 *Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

19 A motion to dismiss tests the legal sufficiency of the claims alleged in the
20 complaint. *Cairns v. Franklin Mint Co.*, 24 F.Supp.2d 1013, 1023 (C.D. Cal.
21 1998). A claim is properly dismissed for “lack of a cognizable legal theory,”
22 “absence of sufficient facts alleged under a cognizable legal theory,” or seeking
23 remedies to which plaintiff is not entitled as a matter of law. *Balistreri v. Pacifica*
24 *Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988); *King v. California*, 784 F.2d 910,
25 913 (9th Cir. 1986).

26 Contents of documents on which plaintiff’s claim depends, that are
27 mentioned in the complaint and whose authenticity no party questions, may also be
28 considered even if the documents are not attached to the complaint. *Knieval v.*

1 *ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). Also, “it is proper for the district court
2 to ‘take judicial notice of matters of public record outside the pleadings’ and
3 consider them for purposes of the motion to dismiss.” *Mir v. Little Co. of Mary*
4 *Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988).

5 **IV. LENDERS ARE NOT REQUIRED TO PRODUCE THE ORIGINAL**
6 **NOTE**

7 Plaintiffs make the unsubstantiated claim that Greenpoint is not the holder in
8 due course of the original promissory note and, therefore, is not entitled to enforce
9 the provisions of the Deed of Trust and foreclose on the Property. (Compl, ¶¶81,
10 83.) This misguided claim is incorporated into each of Plaintiffs’ causes of action.
11 It fails for several reasons.

12 First, Plaintiffs admit that they originated the Loan with Greenpoint.
13 (Compl., ¶67.) Plaintiffs do not allege that Greenpoint later assigned the Loan or
14 transferred its interest to a third-party. Thus, they have no factual basis for their
15 claim that Greenpoint is not a holder in due course.

16 Furthermore, there is no requirement that a lender produce the promissory
17 note prior to initiating non-judicial foreclosure sales. The “produce the note”
18 theory spawned in Florida² and has made the headlines on the cable news channels
19 as an effective means to delay foreclosure. Those news stories, however, do not
20 describe anything relevant to California law since they are all based on a *Florida*
21 *law* requirement.

22 California law is different. In California, a lender does not need to produce
23 the original note to foreclose. The authority on point is overwhelming. *Putkkuri v.*
24 *ReconTrust Co.*, 2009 WL 32567, at *2 (S.D. Cal. 2009) (“Pursuant to section
25 2924(a)(1) of the California Civil Code, the trustee of a Deed of Trust has the right
26 to initiate the foreclosure process. Cal. Civ. Code § 2924(a). Production of the
27

28 ² See <http://www.theledger.com/article/20090405/NEWS/904055015/1001?Title=Lawyer-s-Crusade-To-Save-Homes-From-Foreclosure>

1 original note is not required to proceed with a non-judicial foreclosure.”); *Candelo*
2 *v. NDex West, LLC*, 2008 WL 5382259, at *4 (E.D. Cal. 2008) (“No requirement
3 exists under the statutory framework to produce the original note to initiate non-
4 judicial foreclosure.”); *San Diego Home Solutions, Inc. v. ReconTrust Co.*, 2008
5 WL 5209972, at *2 (S.D. Cal. 2008) (“California law does not require that the
6 original note be in the possession of the party initiating non-judicial foreclosure.”);
7 *Tina v Countrywide*, 2008 WL 4790906, at *8 (“Cal. Civ. Code § 2924 outlines the
8 requirements for nonjudicial foreclosures in California, and does not include
9 providing the original note prior to the sale.”); *Neal v. Juarez*, 2007 WL 2140640,
10 at *8 (S.D. Cal. 2007) (an “allegation that the trustee did not have the original note
11 or had not received it is insufficient to render the foreclosure proceeding invalid”).

12 In California, a lender does not need to produce the original note to foreclose.
13 Period. Accordingly, this theory cannot support a claim of any kind.

14 **V. PLAINTIFFS CANNOT STATE A CLAIM FOR NEGLIGENCE**

15 Plaintiffs allege that Greenpoint was negligent in knowingly funding a loan
16 to Plaintiffs that Plaintiffs could not afford.³ (Compl., ¶89.) Even if this allegation
17 is assumed to be true, Plaintiffs still cannot state a claim for negligence as
18 Greenpoint does not owe Plaintiffs a duty of care.

19 “The existence of a duty of care . . . is the essential prerequisite to a
20 negligence cause of action, determined as a matter of law by the court.” *Nymark v.*
21 *Heart Federal Savings & Loan Assn.*, 231 Cal.App.3d 1089, 1095 (1991).
22 However, “as a general rule, a financial institution owes no duty of care to a
23 borrower when the institution’s involvement in the loan transaction does not exceed
24 the scope of its conventional role as a mere lender of money.” *Id.* at 1096. Here, it
25 cannot be disputed that Greenpoint’s involvement in this action was nothing more
26

27 ³ Plaintiffs’ negligence claim is also based on the purported breach of Cal. Civ. Code section 1916.7, TILA,
28 HOEPA and RESPA. (Compl., ¶91.) The deficiencies in Plaintiffs’ claims under those statutes are fully discussed in
Section IX of this memorandum.

1 than a mere money lender. (Compl., ¶67, Exs. B-1, B-2; Deed of Trust, RJN, Ex.
2 B.) Therefore, Greenpoint does not owe Plaintiffs a duty of care.

3 Furthermore, the statute of limitations for professional negligence is two
4 years. Code Civ. Proc. § 335.1. When claims are based on allegations showing a
5 failure to meet a standard of reasonable care which results in the tortious invasion
6 of a property right, the essence of the cause of action is negligence. *Smyth v. USAA*
7 *Property and Casualty Ins. Co* (1992) 5 Cal.App.4th 1470, 1476. The essence of
8 Plaintiffs' claim is that the Greenpoint made a loan to Plaintiffs without properly
9 ascertaining Plaintiffs' financial wherewithal and ability to repay the loans.
10 However, Plaintiffs' loan was originated on April 19, 2006. This action was not
11 filed until February 4, 2009. Therefore, this claim is barred by the two-year statute
12 of limitations.

13 **VI. PLAINTIFFS HAVE FAILED TO PROPERLY PLEAD A**
14 **CONTRACT CLAIM**

15 In order to prevail on his cause of action for breach of contract, plaintiff must
16 show the existence of a valid contract, his performance or excuse for non-
17 performance under the contract, defendant's breach, and resulting damage.
18 *McDonald v. John P. Scripps Newspaper*, 210 Cal.App.3d 100, 104 (1989). Thus,
19 the proper way to "plead the contract" is to either quote the relevant contractual
20 language verbatim in the complaint, or attach a copy of the contract itself. 4
21 Witkin, Cal Procedure (4th ed. 1997) Pleading § 479, 480 pp. 572-573.

22 Here, Plaintiffs do attach a copy of Greenpoint's promissory note to the
23 complaint. (Compl., Ex. B-1.) However, Plaintiffs identify no provision of this
24 contract that was breached and fail to allege any facts that show how Greenpoint
25 breached any of the terms of this contract. Instead, Plaintiffs claim that Greenpoint
26 violated the agreement by "committing the conduct outlined above." (Compl.,
27 ¶94.) As Plaintiffs have failed to properly claim a breach of contract claim, their
28 second cause of action should be dismissed.

1 **VII. GREENPOINT DOES NOT OWE PLAINTIFFS A FIDUCIARY DUTY**

2 “It has long been regarded as ‘axiomatic that the relationship between a bank
3 and its depositor arising out of a general deposit is that of a debtor and creditor.’ . . .
4 ‘A debt is not a trust and there is not a fiduciary relation between debtor and
5 creditor as such.’ . . . The same principle should apply with even greater clarity to
6 the relationship between a bank and its loan customers.” *Price v. Wells Fargo*
7 *Bank*, 213 Cal.App.3d 465, 476 (1989).

8 “The relationship between a lending institution and its borrower-client is not
9 fiduciary in nature. A commercial lender is entitled to pursue its own economic
10 interests in a loan transaction. This right is inconsistent with the obligations of a
11 fiduciary which require that the fiduciary knowingly agree to subordinate its
12 interests to act on behalf of and for the benefit of another.” *Nymark v. Heart*
13 *Federal Savings & Loan Assn.*, 231 Cal.App.3d 1089, 1093, fn. 1 (1991).

14 Moreover, “a commercial lender is not to be regarded as the guarantor of a
15 borrower’s success and is not liable for the hardships which may befall a borrower.
16 It is simply not tortious for a commercial lender to lend money, take collateral, or to
17 foreclose on collateral when a debt is not paid.” *Sierra-Bay Federal Land Bank*
18 *Ass’n v. Superior Court*, 227 Cal.App.3d 318, 334 (1991).

19 Plaintiffs’ third cause of action broadly claims that Greenpoint owes
20 Plaintiffs a fiduciary duty “with respect to the mortgage loan transactions and
21 related title activities involving the Trust Property.” (Compl., ¶99.) But, as a
22 matter of law, a commercial lender, such as Greenpoint, does not owe a fiduciary
23 duty to Plaintiffs. Therefore, Plaintiffs breach of fiduciary duty cause of action
24 should be dismissed.

25 **VIII. PLAINTIFFS CANNOT SUPPORT THEIR CLAIM FOR**
26 **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

27 The elements of a claim for intentional infliction of emotional distress are:

28 (1) extreme and outrageous conduct by the defendant with the intention of causing,

1 or reckless disregard of the probability of causing, emotional distress; (2) the
2 plaintiff suffered severe or extreme emotional distress; and (3) the plaintiff's
3 injuries were actually and proximately caused by the defendant's outrageous
4 conduct. *Christensen v. Super. Ct.*, 54 Cal.3d 868, 903 (1991); *Berkley v. Dowds*,
5 152 Cal.App.4th 518, 533 (2007).

6 To support the first requirement, the plaintiff must produce facts which show
7 extreme and outrageous conduct by the defendant. *Nally v. Grace Community*
8 *Church*, 47 Cal.3d 278, 300 (1988). Liability is imposed "only where the conduct
9 has been so outrageous in character, and so extreme in degree, as to go beyond all
10 possible bounds of decency, and to be regarded as atrocious, and utterly intolerable
11 in a civilized community." *Cantu v. Resolution Trust Corp.*, 4 Cal.App.4th 857,
12 888 (1992). "Tortious or even criminal conduct that would give rise to punitive
13 damages for another tort" is often insufficient. *Id.*, at 888, fn. 14. This first
14 requirement is a question of law to be determined by the court. *Berkley v. Dowds*,
15 152 Cal.App.4th 518, 534 (2007)

16 Here, Plaintiffs do not allege any conduct by Greenpoint that is so extreme or
17 outrageous as to meet the first requirement. The limited and vague allegation
18 against Greenpoint is that it "knew that [its] conduct would cause Plaintiffs to
19 suffer severe emotional distress, or acted in conscious and/or reckless disregard of
20 the probability that such distress would occur." (Compl., 105.) This is insufficient
21 to meet the rigid standards of an emotional distress claim.

22 Further, Greenpoint's alleged outrageous "conduct" consists only of pursuing
23 a non-judicial foreclosure that Plaintiffs' mistakenly allege was improper. (Compl.,
24 ¶83.) But, "[a] party is not subject to liability for infliction of emotional distress
25 when it has merely pursued its own economic interests and properly asserted its
26 legal rights." *Kruse v. Bank of America* 202 Cal.App.3d 38, 67 citing *Fletcher v.*
27 *Western National Life Ins. Co.*, 10 Cal.App.3d 376, 395 (1970). Therefore, neither
28

1 lenders nor their agents can be liable for intentional infliction for emotional distress
2 because of the foreclosure.

3 Moreover, Plaintiffs do not state a cause of action because Plaintiffs must
4 specifically set forth facts indicating the nature or extent of mental suffering
5 incurred as a result of a defendant's conduct to state a cause of action for intentional
6 infliction of emotional distress. *See Michaelian v. State Compensation Ins. Fund*,
7 50 Cal.App.4th 1093, 1114 (1996); *Bogard v. Employers Cas. Co.*, 164 Cal.App.3d
8 602, 617 (1985). Plaintiffs fail to do so. They aver only the conclusion that the
9 acts of the defendants resulted in "injuries to [Plaintiffs'] mental and emotional
10 health and strength..." (Compl., ¶84). No substantiating details of the nature or
11 extent of this emotional distress are given. This is insufficient to plead a cause of
12 action for intentional infliction of emotional distress.

13 For these reasons, Plaintiffs' cause of action for intentional infliction of
14 emotional distress should be dismissed.

15 **IX. PLAINTIFFS' FRAUD CLAIM LACK SPECIFICITY**

16 Allegations of fraud must meet the heightened pleading standards of Fed. R.
17 Civ. P. 9(b), which requires allegation of "particular facts going to the
18 circumstances of the fraud, including time, place, persons, statements made and an
19 explanation of how or why such statements are false or misleading." *Morris v.*
20 *BMW of N. Am., LLC*, 2007 WL 3342612 at *3 (N.D. Cal. 2007), citing *In re*
21 *Glenfed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547-48 n. 7 (9th Cir.1994) (en banc). And
22 when there are multiple parties, a plaintiff must identify the specific role of each
23 defendant allegedly involved in the fraud. *Swartz v. KPMG LLP*, 476 F.3d 756,
24 765 (9th Cir. 2007).

25 Fed. R. Civ. P. 9(b) applies to statutory claims based on misrepresentation
26 even if the statute eliminates some traditional elements of fraud, such as reliance.
27 Also, Rule 9(b)'s particularity requirement applies to any averments of fraud even
28 in claims for which fraud is not an essential element. Where a plaintiff alleges a

1 uniform course of fraudulent conduct and relies on that conduct as the basis of a
2 claim, the claim “sounds in fraud” and the plaintiff must plead the whole claim with
3 particularity. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th
4 Cir.2003).

5 Plaintiffs’ complaint alleges only broad categories of misrepresentation.
6 Specifically, Plaintiffs allege that the defendants misrepresented Plaintiffs’ ability
7 to subsequently refinance the Property, the Property’s future-market value and
8 whether Plaintiffs’ can afford their loan payments. (Comp., ¶110.) Plaintiffs do
9 not, however, allege a single fact supporting the time, place, persons, statements
10 made and an explanation of how or why such statements are false or misleading.
11 Therefore, Plaintiffs’ fraud claim fails to meet the standards of Fed. R. Civ. P. 9(b).

12 Furthermore, “[t]he law is quite clear that expressions of opinion are not
13 generally treated as representations of fact, and thus are not grounds for a
14 misrepresentation cause of action.” *Neu-Visions Sports, Inc. v.*
15 *Soren/McAdam/Bartells*, 86 Cal.App.4th 303, 308 (2000); citations omitted. “It is
16 hornbook law that an actionable misrepresentation must be made about past or
17 existing facts; statements regarding future events are merely deemed opinions.” *Id.*,
18 at pp. 309-310; citations omitted. Here, each of the purported misrepresentations is
19 in regard to future events, i.e., Plaintiffs’ ability to subsequently refinance their
20 loan, the market value of the Property in the future and that Plaintiff could afford⁴
21 the loans. (Compl., ¶110.) Thus, even if Plaintiffs’ claims are assumed to be true,
22 these statements concerning future events are not, as a matter of law, actionable
23 misrepresentations.

24 Finally, to the extent Plaintiffs’ claim Greenpoint failed to disclose material
25 facts regarding the loan (Compl., ¶114), Plaintiffs cannot state a claim against
26 Greenpoint as Greenpoint does not owe Plaintiffs a duty to disclose. “[T]he

27 ⁴ Ability to afford an adjustable rate mortgage, in particular, is an opinion about future facts because the
28 future mortgage payments are heavily influenced by market rates of interest, which fluctuate over time in a manner
that is hard for even the most knowledgeable financial institutions to predict.

1 elements of an action for fraud and deceit based on concealment are: (1) the
2 defendant must have concealed or suppressed a material fact, (2) the defendant
3 must have been under a duty to disclose the fact to the plaintiff, (3) the defendant
4 must have intentionally concealed or suppressed the fact with the intent to defraud
5 the plaintiff, (4) the plaintiff must have been unaware of the fact and would not
6 have acted as he did if he had known of the concealed or suppressed fact, and (5) as
7 a result of the concealment or suppression of the fact, the plaintiff must have
8 sustained damage.” *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.*, 6
9 Cal.App.4th 603, 612-613. A duty to disclose material facts normally only arises
10 where a confidential relationship exists or special circumstances require disclosure.
11 *Cicone v. URS Corporation*, 183 Cal.App.3d 194, 201 (1986).

12 Here, Greenpoint relationship with Plaintiffs is nothing more than that of a
13 lender/borrower. (Compl., ¶67, Exs. B-1, B-2; Deed of Trust, RJN, Ex. B.) Thus,
14 as noted above, Greenpoint neither owes Plaintiffs a duty or care nor a fiduciary
15 duty. As such, Greenpoint does not owe Plaintiffs a duty to disclose.

16 **X. PLAINTIFFS FAIL TO ALLEGE A VIOLATION OF STATE OR**
17 **FEDERAL LAW**

18 Plaintiffs’ sixth cause of action claims that Greenpoint’s allegedly-improper
19 conduct violated Cal. Civ. Code section 1916.7, TILA, HOEPA and RESPA. But,
20 Plaintiffs cannot state a cause of action under any of those statutes.

21 **A. Cal. Civ. Code §1916.7 is Preempted by Federal Law**

22 It is well established that, “federal legislation, if enacted pursuant to
23 Congress’ constitutionally delegated authority, can nullify conflicting state or local
24 actions.” *National Home Equity Mortgage Assn. v. Face* (“Face”), 239 F.3d 633,
25 637 (4th Cir. 2001). “Even when Congress’ intent is unclear, state law must
26 nevertheless yield when it conflicts with federal law. In making the determination
27 of whether state law conflicts with federal law, the test to apply is whether ‘it is
28 impossible to comply with both state and federal law’ or whether ‘the state law

1 stands as an obstacle to the accomplishment of the full purposes and objectives' of
2 the relevant federal law.” *Id.* citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238,
3 248, 104 S.Ct. 615 (1984).

4 The Alternative Mortgage Transaction Parity Act (“AMTPA”) was enacted
5 specifically to create parity between state and federally chartered lenders making
6 variable rate mortgage loans. 12 U.S.C. §§ 3801-3803. “In enacting the Parity Act,
7 Congress clearly intended to preempt state law to the extent it authorized non-
8 federally chartered housing creditors to take advantage of the federal regulations for
9 alternative mortgage transactions that govern federally chartered lending
10 institutions.” *Face, supra*, 239 F.3d at p. 637.

11 In fact, the AMPTA implementing regulations⁵ specifically state that lenders
12 making alternative mortgage (i.e., adjustable rate loans) need not comply with any
13 State disclosure laws.

14 Section 560.210(a) states that, if a lender complies with the regulations
15 identified in Section 560.210(b), then said lender need not comply with any State
16 law governing that area:

17
18 (a) *Applicable housing creditors.* A housing creditor that
19 is not a commercial bank, a credit union, or a federal
20 savings association, may make an alternative mortgage
21 transaction as defined at 12 U.S.C. 3802(1), by following
22 the regulations identified in *paragraph (b)* of this section,
23 ***notwithstanding any state constitution, law, or***
24 ***regulation.***

25 12 C.F.R. § 560.210(a) (emphasis added).

26 Section 560.210(b) identifies Section 560.210 as one of the federal
27 regulations available for lenders to follow: “(b) *Applicable regulations.* OTS
28 identifies §§560.35 and **560.210** as appropriate and applicable for state housing
29 creditors. 12 C.F.R. § 560.210(b) (emphasis added).

⁵ “Federal regulations have no less pre-emptive effect than federal statutes.” *Fidelity Federal Sav. & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 153 (1982).

1 And Section 560.210 covers the disclosures a lender must provide in
2 adjustable rate loans: “A savings association must provide the initial disclosures
3 described at 12 CFR 226.19(b) and the adjustment notices described at 12 CFR
4 226.20(c) for variable rate transactions, as described in those regulations.” 12
5 C.F.R. § 560.210.

6 Given the above, there can be no question that the AMPTA preempts the
7 disclosure requirements in California’s Civil Code section 1916.7.⁶ Plaintiffs’
8 claim under Section 1916.7 therefore conflict with, run afoul of, and hence are
9 preempted by the AMTPA and should be dismissed.

10 **B. Plaintiffs Cannot Obtain Relief under TILA**

11 Plaintiffs claim that Greenpoint violated TILA by, among other things,
12 “filing to provide all of the statutorily mandated disclosures required” by TILA.
13 (Compl., ¶117.)⁷ Based on this claim, Plaintiffs seek both rescission and statutory
14 damages. (Compl., Prayer, ¶¶1, 4, 7.) However, Plaintiffs are not entitled to such
15 relief.

16 **(1) Plaintiffs’ Statutory Damage Claim Is Time Barred**

17 15 U.S.C. section 1640(a)(1) states that a creditor who fails to comply with
18 TILA is liable to the consumer for, among other things, actual damages, costs of the
19 litigation and finance charges. 15 U.S.C. § 1640(a)(1). However, Section 1640(e)
20 states, in pertinent part: “Any action under this section may be brought in any
21 United States district court, or in any other court of competent jurisdiction, within
22 one year from the date of the occurrence of the violation.”

23
24
25 ⁶ Indeed, when one reads these sections closely, it clear that California State law treats adjustable rate loans
26 very differently. For example, under Civil Code section 1916.7(b), a lender may not adjust the interest rate without
27 at least 60 days notice and a borrower can unilaterally extend the term of his/her ARM loan by up to ten years.
28 Under Federal regulations (e.g., 12 CFR 226.20(c)), a lender only has to give 25 days notice, and borrowers cannot
unilaterally extend their loan terms.

⁷ Plaintiffs also allege that Greenpoint violated TILA by issuing its loan to Plaintiffs without regard to their
income and paying unlawful yield spread premiums to brokers. Neither of these purported actions is relevant to the
disclosure requirements under TILA.

1 Here, Plaintiffs' claim for damages as to Greenpoint accrued on or about
2 April 19, 2006 when the Loan was consummated. (Compl., ¶67, Exs. B-1, B-2.)
3 Thus, the limitations period for any damage claim Plaintiffs may have under
4 Section 1640 expired in April 2007. Plaintiffs did not file the current action until
5 February 4, 2009. As such, Plaintiffs cannot seek statutory damages.

6 **(2) Plaintiffs' TILA Rescission Claim is Time-Barred**

7 The consumer's right to rescind the underlying loan is absolute only for a
8 period of three days after the loan is consummated. 15 U.S.C. § 1635(a). However,
9 if the lender fails to provide "material disclosures" at the closing of the loan, this
10 three-day period can be extended to the earlier of (1) three years after
11 consummation of the of the loan transaction; (2) the transfer of the consumer's
12 interest in the property; or (3) the sale of the property. 15 U.S.C. § 1635(f). The
13 term "material disclosures" includes the annual percentage rate, the method of
14 determining the finance charge and the balance upon which it will be charged, the
15 amount of the finance charge, the total number of payments, the number and
16 amount of payments, the due dates, and disclosures required under 15 U.S.C.
17 section 1635. 15 U.S.C. § 1602(f).

18 Here, Plaintiffs fail to identify any "material" disclosures that were not made.
19 (Compl., ¶117.) Instead, Plaintiffs make the broad allegation that the defendants
20 failed to provide the "statutory mandated disclosures." (Compl., ¶117.) This
21 ambiguous allegation is neither sufficient to support a TILA claim nor is it enough
22 to plead around TILA's three-day-right-of-rescission provision.

23 **(3) Plaintiffs Cannot Rescind Under TILA Absent Tender**

24 Lastly, to seek rescission under TILA, the plaintiff must return to the lender
25 the principal of the mortgage loan minus all interest and fees paid to the creditor
26 and all third parties at closing, and any fees paid to the creditor after closing (the
27 "Rescission Balance"). *Semar v. Platte Valley Federal Savings and Loan*, 791 F.2d
28 699 (9th Cir. 1986). Thus, Plaintiffs must allege that they have tendered the

1 Rescission Balance or are financially capable of doing so as a prerequisite to a
2 TILA claim.

3 Under the literal language of 15 U.S.C. section 1635(b), when the consumer
4 exercises the right of rescission, the security interest becomes void. Within 20 days
5 of receipt of a rescission demand, the creditor is required to terminate the security
6 interest. 15 U.S.C. §1635(a). The consumer is not required to return the principal
7 of the loan to the creditor until the creditor has released the security interest. 15
8 U.S.C. §1635(b). In effect, the creditor would be left unsecured if the consumer
9 failed to return the principal balance.

10 However, the final sentence of Section 1635(b) has been interpreted to allow
11 courts the right to demand that the borrower return the loan's principal balance to
12 the creditor as a prerequisite to rescinding that loan. This sentence states that "the
13 procedures prescribed by this subsection shall apply except when otherwise ordered
14 by a court." In applying this sentence, federal courts have used equitable principles
15 to benefit a mortgage lender in a rescission claim that could otherwise lead to
16 inequitable consequences.

17 The Ninth Circuit has ruled that a plaintiff cannot effectuate rescission unless
18 they can return the principal amounts borrowed as required by Reg Z. *Yamamoto v.*
19 *Bank of New York*, 329 F.3d 1167, 1171 (9th Cir. 2003) (courts have the power to
20 confirm that the borrower "could repay the loan proceeds before going through the
21 empty (and expensive) exercise of a trial on the merits").

22 Based on the foregoing, Plaintiffs TILA claims fail.

23 **C. Plaintiffs' HOEPA Claims are Barred**

24 HOEPA amended TILA by adding section 129 of TILA – 15 U.S.C. section
25 1639 – and has been implemented by Regulation Z. (12 C.F.R. §§ 226.31, 226.32.)
26 HOEPA provides added protection to borrowers for loans in which "the total points
27 and fees payable by the consumer at or before the closing will exceed the greater of
28 – (i) 8 percent of the total loan amount; or (ii) 400." (15 U.S.C. §§ 1602(aa)(1)(B),

1 1639(a)(1).) If the underlying loan falls into this category, lenders are required to
2 provide four additional disclosures under 15 U.S.C. section 1639(a)(1)-(2). Here,
3 Plaintiffs' HOEPA claim fails for two reasons.

4 First, as HOEPA is a subsection of TILA, it is subject to the same one year
5 limitations period prescribed under 12 C.F.R. section 226.23(f)(1) and 15 U.S.C.
6 §§1602(aa)(1), 1640(e) and the same limitations applied to a consumer's right to
7 rescind under 15 U.S.C. section 1635(a). Therefore, Plaintiffs' HOEPA claim is
8 time barred.

9 Second, Plaintiffs do not allege that Greenpoint failed to provide any
10 additional disclosures required by HOEPA. (15 U.S.C. §§1639(a)-(b).) Plaintiffs
11 do not even allege that the Loan falls into category of loans that are covered by
12 HOEPA. (15 U.S.C. §§ 1602(aa)(1)(B).)

13 Therefore, Plaintiffs' HOEPA claim should be dismissed.

14 **D. Plaintiffs Cannot Allege a RESPA Violation**

15 Plaintiffs' sixth cause of action claims that Greenpoint violated RESPA by
16 paying unlawful yield spread premiums. (Compl., ¶117.) This allegation is
17 insufficient to state a claim under RESPA.

18 RESPA is, among other things, an anti-kickback statute prohibiting payments
19 to others for undisclosed and unlawful referrals. 12 U.S.C. §2607(a). However,
20 yield spread premiums ("YSPs") are "used as a *method to compensate mortgage*
21 *brokers* for services provided to borrowers and the lender." *Byars v. SCME*
22 *Mortgage*, 109 Cal.App.4th 1134, 1149 (2003) (emphasis added); 66 Fed. Reg.
23 53052, 53054. Of necessity, a yield spread premium is not a kickback in violation
24 of RESPA. In addition, Plaintiffs fail to identify how such fees were excessive or
25 unlawful, who made the payment or received it, or when, where or why.

26 More importantly, similar to TILA, the statute of limitations on a RESPA
27 claim is one year. 12 U.S.C. § 2614. As noted above, this claim was filed almost
28

1 three years after the Loan closed and any loan fees were incurred. Thus, any
2 RESPA claim related to the imposition of a yield spread premium is time-barred.

3 **XI. PLAINTIFFS HAVE NO CLAIM UNDER RICO**

4 Without providing a single specific fact to support their eighth cause of
5 action, Plaintiffs claim that the defendants were involved in an “unlawful
6 Racketeering Enterprise,” which Plaintiffs refer to as the “Wachovia Predatory
7 Lending Scheme.” (Compl., ¶124.) Plaintiffs further claim that that the Defendants
8 violated, 18 U.S.C. §§1952, 1956, 1957 and 1961-1962. (Compl., ¶¶127-128.)
9 This broad allegation is far from sufficient to state a RICO claim.

10 “To state a civil claim under RICO, a plaintiff must plead two main
11 allegations: (1) that the defendant violated the Act, and (2) that the plaintiff was
12 injured as a result of the violation. The first of these two pleading burdens has
13 seven elements. . . . [T]hey are as follows: ‘(1) the defendant (2) through the
14 commission of two or more acts, (3) constituting a “pattern” (4) of “racketeering
15 activity” (5) directly or indirectly invests in, or maintains an interest in, or
16 participates in (6) an “enterprise” (7) the activities of which affect interstate or
17 foreign commerce’ or has conspired to do so.” 5 Wright & Miller, *Federal*
18 *Practice and Procedure* (2d ed. 1990) § 1251.1

19 Plaintiffs have not properly alleged any of the seven elements required to
20 state a RICO claim. First, Plaintiffs fail to allege any specific nexus between
21 Greenpoint and the elements of a RICO claim, let alone with the required
22 “particularity and specificity.” In order to properly state a claim, Plaintiffs must
23 allege that Greenpoint, not a co-defendant or third party, through the commission of
24 two or more acts, constituting a pattern of racketeering activity, directly or
25 indirectly invested in, or maintained an interest in, or participated in an enterprise
26 affecting interstate commerce. See *Rae v. Union Bank*, 725 F.2d 478 (9th Cir.
27 1984) (complaint against foreclosing bank and others failed to state claim in the
28 absence of allegations defendants were associated with or employed by an

1 enterprise, in the absence of allegations of a pattern of racketeering activity, and in
2 the absence of identification of a predicate offense). Plaintiffs have not done so
3 here.

4 Second, Plaintiffs have failed to allege the commission of two or more
5 predicate acts. Plaintiffs merely regurgitate RICO sections verbatim and claim
6 defendants violated those sections without providing a single specific fact to
7 support such a claim. (Compl., ¶¶127-129.) This does not constitute the predicate
8 acts required for violation of RICO. Thus, “[t]he allegations of predicate acts in the
9 complaint concerning those elements of RICO are entirely general; no specifics of
10 time, place, or nature of the alleged communications are pleaded. This is a fatal
11 defect under Fed. R. Civ. P. 9(b), which requires that circumstances constituting
12 fraud be stated with particularity.” *Alan Neuman Productions, Inc. v. Albright*, 862
13 F.2d 1388, 1391 (9th Cir. 1989).

14 Third, Plaintiffs have failed to allege the required “pattern.” A “pattern of
15 racketeering activity” is defined as (1) at least two acts of racketeering activity;
16 (2) one of which occurred after 1970; and, (3) the last of which occurred within ten
17 years of a prior act. 18 U.S.C. § 1961(5). “It must also be shown that the
18 predicates themselves amount to, or that they otherwise constitute a threat of,
19 continuing racketeering activity.” *H. J. Inc. v. Northwestern Bell Telephone Co.*,
20 492 U.S. 229, 240, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). Predicate acts
21 extending over a few weeks or months and threatening no future criminal conduct
22 do not satisfy the continuity requirement. In enacting RICO, Congress was
23 concerned only with “long term criminal conduct” or conduct demonstrating a
24 threat of continuity. *Id.* at 242. Plaintiffs have not, and cannot, allege long term
25 continuing conduct. Where, as here, there is a single alleged victim, a single
26 alleged fraudulent scheme and a single purported injury to the victim, the Ninth
27 Circuit has never found the continuity requirement satisfied; or in other words,
28

1 never found a pattern. D. Smith & T. Reed, *Civil Rico* (2001) ¶4.04[3], p. 4-40-4-
2 41.

3 Fourth, Plaintiffs have provided no facts to support their allegation that
4 Greenpoint conducted “racketeering activity” or the means in which Greenpoint
5 violated RICO. RICO provides a laundry list of offenses which constitute
6 “racketeering activities” and four separate ways in which an entity can violate
7 RICO. 18 U.S.C. §§1961(1)(D), 1962(a)-(d). No offense can be a part of a RICO
8 pattern of racketeering activity unless it is expressly included within section
9 1961(1). The listed crimes are usually referred to as “predicate” offenses because
10 they constitute the predicate for a RICO violation. Although Plaintiffs have made a
11 vague reference to certain “predicate” offenses, Plaintiffs have not alleged any
12 specific facts or conduct by Greenpoint. (Compl., ¶¶127-128.) Furthermore,
13 Plaintiffs fail to identify which of the four subdivisions of Section 1692 that
14 Greenpoint purportedly violated.

15 Fifth, Plaintiffs have entirely failed to identify the “enterprise.” The RICO
16 Act defines “enterprise” as “any individual, partnership, corporation, association
17 (legal or in fact).” 18 U.S.C. § 1961(4). Here, Plaintiffs allege only that defendants
18 were involved in an “unlawful Racketeering Enterprise.” (Compl., ¶124.)
19 Plaintiffs make no attempt to allege what the enterprise is.

20 For these reasons, Plaintiffs’ eighth cause of action should be dismissed with
21 prejudice.

22 **XII. PLAINTIFFS CANNOT QUIET TITLE WITHOUT TENDERING** 23 **PAYMENT**

24 Plaintiffs’ twelfth cause of action purports to state a cause of action to quiet
25 title. It does not. Plaintiffs allege that the Defendants are improperly pursuing a
26 foreclosure sale and Plaintiffs now seek quiet title to “forestall” those attempts.
27 (Compl., ¶144.) The obvious defect with Plaintiffs’ claim is the missing averment
28

1 of tender or even the promise of tender of the amounts that Plaintiffs admit they
2 borrowed.

3 A trustor cannot “quiet title without discharging their debt. The cloud upon
4 their title persists until the debt is paid.” *Aguilar v. Bocci*, 39 Cal.App.3d 475, 477
5 (1974); citation omitted. Here, Plaintiffs have not alleged that they repaid their
6 debt. Thus, for this, and the reasons stated in the remainder of this motion,
7 Plaintiffs’ quiet title claim fails and should be dismissed.

8 **XIII. PLAINTIFFS CANNOT SEEK AN ACCOUNTING**

9 An accounting claim is equitable in nature and may be brought to compel the
10 defendant to account to the plaintiff for money (1) where a fiduciary duty exists; or
11 (2) where no fiduciary duty exists, the accounts evidencing the balance due from
12 the defendant to the plaintiff are so complicated that an ordinary legal action
13 demanding a fixed sum is impractical. 5 Witkin, Cal. Procedure, Pleading, §819, p.
14 236 (4th ed. 1997). Plaintiffs cannot satisfy either of these requirements.

15 First, as noted above, Greenpoint does not owe Plaintiffs a fiduciary duty.
16 (See Section V, *supra*.)

17 Second, an accounting is available from a non-fiduciary where there is a
18 balance *due from the defendant to the plaintiff*. *St. James Church of Christ*
19 *Holiness v. Superior Court*, 135 Cal.App.2d 352, 359 (1955). Here, however,
20 Plaintiffs seek an accounting of “the amount of money *Plaintiffs owe*, if any, to
21 [Greenpoint].” (Compl., ¶147.) As there are no amounts due from Greenpoint to
22 Plaintiff, there can be no accounting claim.

23 Finally, the loan at issues includes a fixed principal amount, interest rate and
24 schedule with respect to late charges, fees, etc. Therefore, it cannot be said that the
25 accounts are “so complicated that an ordinary legal action demanding a fixed sum is
26 impracticable.” 5 Witkin, Cal. Procedure, *supra*, at §819, p. 236.

27 Therefore, Plaintiffs accounting cause of action should be dismissed.
28

1 **XIV. PLAINTIFFS UNFAIR BUSINESS PRACTICES CLAIM FAILS**

2 Plaintiffs' seventh cause of action is based on purported violations of 15
3 U.S.C. §45 and Bus. & Prof. Code §§17200, 17500. But, Plaintiffs cannot state a
4 claim under any of those statutory provisions.

5 **A. There is No Private Right of Action Under 15 U.S.C. §45**

6 15 U.S.C. section 45 empowers the Federal Trade Commission to prevent
7 individuals and certain entities from using unfair methods of competition in or
8 affecting commerce. 15 U.S.C. §45(a)(2). However, there is no private right of
9 action under Section 45. *Dreisbach v. Murphy*, 658 F.2d 720 (9th Cir. 1981).
10 Therefore, Plaintiffs cannot base their claims under the requirements of 15 U.S.C.
11 section 45.

12 **B. Greenpoint's Actions Were Not Unlawful**

13 The Unfair Competition Law ("UCL") makes unlawful business practices or
14 acts actionable under section 17200. *See, Lazar v. Hertz Corp.*, 69 Cal.App.4th
15 1494, 1505 (1999). Because section 17200 requires an underlying violation of law,
16 a defense to the predicate claim is a defense to the alleged violation of the UCL.
17 *See, Krantz v. BT Visual Images, L.L.C.*, 89 Cal.App.4th 164, 178 (2001) (the
18 viability of a UCL claim stands or falls with the antecedent substantive causes of
19 action); *People v. Duz-Mor Diagnostic Lab., Inc.*, 68 Cal.App.4th 654, 673 (1998)
20 (a defense to the underlying offense is a defense under the UCL); *see also Glenn K.*
21 *Jackson Inc. v. Roe*, 273 F.3d 1192, 1203 (9th Cir. 2001) (dismissing section 17200
22 claim where underlying negligence and fraud claims were insufficient as a matter of
23 law.)

24 Here, Plaintiffs make the broad allegation that Greenpoint has carried on its
25 business enterprise in violation of Section 17200. (Compl., ¶120.) Plaintiffs do not
26 identify an underlying law or any facts to support how Greenpoint purportedly
27 violated the law. Furthermore, the remainder of Plaintiffs' complaint fails to state
28

1 in a single viable claim against Greenpoint. As Plaintiffs have failed to allege a
2 requisite violation of law, their UCL claim fails.

3 **C. Greenpoint Has Not Engaged in False Advertising**

4 A defendant violates section 17500 only if he knows the advertisement is
5 false or misleading or, in the exercise of reasonable care, should know it to be false
6 or misleading. *People v. Forest E. Olson, Inc.*, 137 Cal.App.3d 137, 139-140
7 (1982). Section 17500 prohibits the use of any untrue or misleading statements in
8 selling real or personal property or personal services. Arguably, “[t]he prohibition
9 extends to the use of false or misleading oral statements.” *People v. Dollar Rent-A-*
10 *Car Systems, Inc.*, 211 Cal.App.3d 119, 128 (1989); citing *People v. Bestline*
11 *Products, Inc.*, 61 Cal.App.3d 879, 906-909 (1976). “In order to recover under that
12 section, it is necessary to show only that members of the public are likely to be
13 deceived.” *People v. Dollar Rent-A-Car Systems, Inc*, *supra*, 211 Cal.App.3d at
14 129; see also, *Lavie v. Proctor and Gamble Co.*, 105 Cal.App.4th 496, 507 (2003).

15 The prove a Section 17500 violation, the plaintiff must show that defendants
16 intended to dispose of real or personal property or perform services and either (a)
17 publicly disseminate advertising that defendant knew contained untrue or
18 misleading statements; (b) publicly disseminate advertising with the intent not to
19 sell the property or services at the price advertised; or (c) the plaintiff suffered
20 injury in fact or has lost money or property as a result of the advertising. 4 Stern,
21 Bus. & Prof. C., Law of False Advertising, §4:3 (The Rutter Group 2009); *citing*
22 *Buckland v. Threshold Enterprises, Ltd*, 155 Cal.App.4th 798, 819 (2007).

23 Plaintiffs do not state a single fact to support the allegation that Greenpoint
24 violated Section 17500. Plaintiffs do not identify a publicly disseminated
25 advertisement that was untrue or misleading, fail to identify what property or
26 service Greenpoint sold at a price different from the advertisement, and fail to state
27 how Plaintiffs were personally injured by the purported violation. Therefore,
28

1 Plaintiffs cannot support a cause of action based on Bus. & Prof. Code section
2 17500.

3 **XV. PLAINTIFFS' REMAINING CLAIMS ARE NOT CAUSES OF**
4 **ACTION**

5 Plaintiffs' remaining four "causes of action" are merely requests for relief;
6 they are not independently viable claims. Moreover, for all of the reasons discussed
7 in connection with Plaintiffs' prior claims, there is no substantive basis on which to
8 base any of these requests for relief.

9 **A. Injunctive Relief**

10 As its name implies, injunctive relief is a remedy not an independent cause of
11 action. As a remedy, injunctive relief may be awarded only when the complaint
12 otherwise states a breach by the defendant of a duty it owes the plaintiff. See
13 *McDowell v. Watson*, 59 Cal.App.4th 1155, 1159 (1997); *Shell Oil v. Richter*, 52
14 Cal.App.2d 164, 168 (1942).

15 Plaintiffs' "cause of action" does not purport to allege either duty or breach.
16 The rest of their complaint fails to do so for reasons explained in this memorandum.

17 **B. Declaratory Relief**

18 Declaratory relief also is not an independent cause of action, but instead a
19 form of equitable relief. *Batt v. City and County of San Francisco*, 155
20 Cal.App.4th 65, 82 (2007); see also, *Dills v. Delira Corp.*, 145 Cal.App.2d 124, 129
21 (1956). Equitable remedies "are dependent upon a substantive basis for liability,
22 [and] they have no separate viability" if all the plaintiff's other claims fail. *Glue-*
23 *Fold, Inc. v. Slautterback Corp.*, 82 Cal.App.4th 1018, 1023, n. 3 (2000).

24 Here Plaintiffs' declaratory relief claim is wholly derivative of other non-
25 viable claims. Declaratory relief is not appropriate where the controversy is
26 hypothetical or where the actual controversy has become moot. See *Seelers v.*
27 *Regents of the Univ. of Cal.*, 432 F.2d 493, 499-500 (9th Cir. 1990). As such the
28

1 declaratory relief claim must be dismissed because the resolution of the Plaintiffs'
2 substantive claims will render declaratory relief moot.

3 **C. Rescission**

4 Rescission and restitution are not a causes of action, or even remedies. (*See*,
5 *McBride v. Boughton*, 123 Cal.App.4th 379, 387 (2004). They are, rather, general
6 principles that underlie various legal doctrines and remedies. *See, Melchior v. New*
7 *Line Prods., Inc.*, 106 Cal.App.4th 779, 793 (2003); citations omitted. Thus,
8 Plaintiffs cannot state a separate cause of action for “rescission.”

9 Furthermore, in order to effect rescission each party must restore all
10 consideration received by them. Miller & Starr, California Real Estate, Judicial
11 Remedies, § 34 (3rd ed. 2008); citing Cal. Civ. Code § 1692. Plaintiffs ask that all
12 such payments under the subject loans be returned to them. (Compl., ¶141.)
13 However, they do not, for their part, offer to return the proceeds of their \$416,000
14 loan to Greenpoint.

15 **D. Punitive Damages**

16 Plaintiffs’ final “cause of action” is for punitive damages. Punitive damages
17 are a remedy recoverable if the plaintiff can allege and prove facts showing that the
18 defendants acted with oppression, fraud or malice. *G. D. Searle & Co. V. Superior*
19 *Court*, 49 Cal.App.3d 22, 29 (1975). It is not a separate cause of action.

20 Furthermore, Plaintiffs fail support a punitive damages request. Plaintiffs’
21 punitive damages request is based on a broad statement that Greenpoint’s actions
22 were oppressive. This simply is not enough. Not only must the plaintiff show
23 circumstances of oppression, fraud or malice, but **facts** must be alleged in the
24 pleading to support such a claim. *See G. D. Searle & Co. v. Superior Court*, 49
25 Cal.App.3d 22, 29 (1975); see also *Grieves v. Superior Court*, 157 Cal.App.3d 159,
26 163 (1984). Plaintiffs provide no such facts here.

27 Furthermore, a corporate defendant, such as Greenpoint, cannot be liable for
28 punitive damages based upon the acts of its employees unless it had advance

1 knowledge of the unfitness of the employee and employed him or her with a
2 conscious disregard of the rights of others, or authorized or ratified the wrongful
3 conduct for which punitive damages were awarded. Also, the advance knowledge
4 and conscious disregard, authorization, ratification or acts must be on the part of an
5 officer, director or managing agent of the corporation. (Civ. Code § 3294 (b).)
6 Specifically, principal liability for punitive damages does not depend on an
7 employees' managerial level, "but on the extent to which they exercise substantial
8 discretionary authority over decisions that ultimately determine corporate policy.
9 Thus, supervisors who have broad discretionary powers and exercise substantial
10 discretionary authority in the corporation could be managing agents. Conversely,
11 supervisors who have no discretionary authority over decisions that ultimately
12 determine corporate policy would not be considered managing agents even though
13 they may have the ability to hire or fire other employees." (*White v. Ultramar, Inc.*
14 (1999) 21 Cal.4th 563, 576-577.)

15 Here, Plaintiffs failed to allege any facts supporting Greenpoint's advance
16 knowledge of an employee's fitness and ratification of the employee's purportedly
17 wrongful actions. Therefore, Plaintiffs have not support their claim for punitive
18 damages.

19 **XVI. CONCLUSION**

20 Based on the foregoing, Greenpoint respectfully request that the Court grant
21 is motion to dismiss the complaint due to Plaintiffs' failure to state a claim.

22
23 DATED: April 28, 2009

SEVERSON & WERSON
A Professional Corporation

24
25 By: /s/Jarlath M. Curran
26 JARLATH M. CURRAN II
27 Attorneys for Defendant
GREENPOINT MORTGAGE
28 FUNDING, INC.

1 CERTIFICATE OF SERVICE

2 I, the undersigned, declare that I am over the page of 18 and am not a party to
3 this action. I am employed in the City of Irvine, California. My business address is
4 Severson & Werson, 19100 Von Karman Avenue, Suite 700, Irvine, California
92612.

5 On the date below I served the within document(s) described as:
6 GREENPOINT MORTGAGE FUNDING, INC.'S NOTICE OF MOTION AND
7 MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES
8 IN SUPPORT THEREOF [Filed concurrently with Request for Judicial Notice] on
the interested parties in this action:

9 by placing the original true copy(ies) thereof enclosed in sealed
envelope(s) addressed as follows: address as stated on the attached
10 mailing list.

11 John & Carol Naulty Plaintiffs in pro per
315 Wildberry Lane
12 Brentwood CA 94513

13 Marc A. Caraska, Esq. Attorney for Defendant JAMES
655 University Avenue, Suite 230 NAULTY
14 Sacramento CA 95825

15 **BY MAIL** (C.C.P. § 1013(a)) - I deposited such envelope(s) for processing
16 in the mail room in our offices. I am "readily familiar" with the firm's
17 practice of collection and processing correspondence for mailing. It is
18 deposited with the U.S. Postal Service on that same day with postage thereon
19 fully prepaid at Irvine, California, in the ordinary course of business. I am
20 aware that on motion of a party served, service is presumed invalid if postal
cancellation date or postage meter date is more than one day after the date of
deposit for mailing in affidavit.

21 **(BY ELECTRONIC SERVICE)** Pursuant to CM/ECF System, registration
22 as a CM/ECF user constitutes consent to electronic service through the
23 Court's transmission facilities. The Court's CM/ECF system sends an e-mail
notification of the filing to the parties and counsel of record listed above who
are registered with the Court's EC/ECF system.

24 **FEDERAL** - I declare that I am employed in the office of a member of the
25 bar of this Court at whose direction the service was made.

26 Executed on April 28, 2009, at Irvine, California.

27 By: 
28 LINDA D. OWEN