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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ROSARIO NATIVI, JOSE PEREZ,  
Plaintiff,  
v.  
DEUTSCHE BANK NATIONAL TRUST  
COMPANY, its assignees and successors;  
DOES (1-10),  
Defendant.

Case No. 09-06096 PVT

**ORDER GRANTING IN PART  
DEFENDANT’S MOTION TO DISMISS  
PLAINTIFFS’ FIRST AMENDED  
COMPLAINT OR, IN THE  
ALTERNATIVE, FOR A MORE  
DEFINITE STATEMENT; AND  
REMANDING REMAINING STATE  
LAW CLAIMS TO STATE COURT**

**I. INTRODUCTION**

On April 13, 2010, the parties appeared for a hearing on Defendant’s motion to dismiss Plaintiffs’ first amended complaint, or in the alternative, for a more definite statement. Having reviewed the papers and considered the arguments of counsel,

IT IS HEREBY ORDERED that Defendant’s motion to dismiss Plaintiffs’ first amended complaint, or in the alternative, for a more definite statement, is GRANTED IN PART because the Protecting Tenants at Foreclosure Act (“PTFA”) does not provide for an implied private right of action.

IT IS FURTHER ORDERED that the remainder of the action is REMANDED to the Superior Court of California, County of Santa Clara.

**II. BACKGROUND**

Plaintiffs Rosario Nativi and Jose Perez are tenants who rented a unit in a home located in

1 Sunnyvale, California.<sup>1</sup> Their most recent year to year lease commenced on June 1, 2009 and is set  
2 to end on June 1, 2010.

3 In or around August 2009, Deutsche Bank foreclosed on the property and hired XL Advisors  
4 Inc. (dba Advisors Real Estate Group) to assist the bank with the foreclosure. Plaintiffs informed the  
5 realtor about their tenancy and year long lease but never received any written notice of foreclosure or  
6 new ownership.

7 Plaintiffs left for a trip. When Plaintiff Jose Perez returned at the end of September, 2009, he  
8 tried to enter his unit. XL Advisors Inc.'s representative called the police and instructed them to bar  
9 Perez from the property. Plaintiff Perez found that his and Plaintiff Nativi's belongings had been  
10 collected and deposited outside of the unit while they were away, where they had been subsequently  
11 damaged.

12 On November 25, 2009, Plaintiffs filed a complaint in the Superior Court of the County of  
13 Santa Clara seeking possession of their home, other injunctive relief, and monetary damages.  
14 Plaintiffs' First Amended Complaint, filed on February 1, 2010, alleged a claim arising under the  
15 federal PTFA. Defendant removed the action to federal court on December 31, 2009, on the basis of  
16 federal question jurisdiction, 28 U.S.C. § 1331.

### 17 **III. LEGAL STANDARD**

18 In evaluating a Rule 12(b)(6) motion, courts must accept all material allegations in the  
19 complaint as true and construe them in the light most favorable to the non-moving party. *See Barron*  
20 *v. Reich*, 13 F.3d 1370, 1374 (9th Cir.1994). Unless a court converts a Rule 12(b)(6) motion into a  
21 motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts  
22 presented in briefs, affidavits, or discovery materials). *See Levine v. Diamantheset, Inc.*, 950 F.2d  
23 1478, 1483 (9th Cir. 1991), disapproved on other grounds, *In re ZZZZ Best Sec. Litig.*, 864 F. Supp.  
24 960, 967 (C.D. Cal. 1994).

25 The court is not required to accept "conclusory legal allegations cast in the form of factual  
26 allegations if those conclusions cannot reasonably be drawn from the facts alleged." *See Clegg v.*  
27 *Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir.1994). Further, the court need not accept as

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28 <sup>1</sup> Facts are taken as pled in the First Amended Complaint ("FAC").

1 true allegations that contradict facts that have been judicially noticed. *See Employers Ins. v. Musick,*  
2 *Peeler, & Garrett*, 871 F. Supp. 381, 386 (S.D. Cal.1994).

3 Legal conclusions need not be taken as true merely because they are cast in the form of  
4 factual allegations. *See Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). Legal  
5 conclusions are also not entitled to a presumption of truth, whereas factual allegations are. *See*  
6 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009). The plaintiff must “plead[] factual content that  
7 allows the court to draw the reasonable inference that the defendant is liable for the misconduct  
8 alleged.” *See id.* Additionally, the factual content must provide “more than a sheer possibility that a  
9 defendant has acted unlawfully.” *See id.*

#### 11 IV. DISCUSSION

12 Defendant moves to dismiss Plaintiffs’ seventh and ninth causes of action. The seventh  
13 cause of action alleges Defendant violated the PTFA and the ninth cause of action alleges  
14 conversion. (*See* Docket No. 8.)

##### 15 A. Private right of action under the PTFA

16 Defendant moves to dismiss Plaintiffs’ seventh cause of action on grounds that the PTFA  
17 does not allow for a private right of action. Plaintiffs contend that the factual allegations, as pled,  
18 make out a permissible private right of action. It is undisputed that whether the PTFA allows for a  
19 private right of action is a question of first impression not yet addressed by the circuit courts.<sup>2</sup>

20 The Protecting Tenants at Foreclosure Act of 2009 states that:

21 . . . In the case of any foreclosure on a federally-related mortgage loan or on any  
22 dwelling or residential real property after the date of enactment of this title, any  
23 immediate successor in interest in such property pursuant to the foreclosure shall  
assume such interest subject to –

24 (1) the provision, by such successor in interest of a notice to vacate to any bona fide  
tenant at least 90 days before the effective date of such notice; and

25 (2) the rights of any bona fide tenant, as of the date of each notice of foreclosure –

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27 <sup>2</sup> An Arizona district court has dealt with a similar issue regarding the Emergency Economic  
28 Stabilization Act (“ EESA”). *See Mangosing v. Wells Fargo Bank, N.A.*, 2009 WL 1456783 (Ariz.  
Dist. Ct., May 22, 2009). In *Mangosing*, the court found no private right of action under the EESA.  
*See id.*

1 (A) under any bona fide lease entered into before the notice of foreclosure to  
2 occupy the premises until the end of the remaining term of the lease . . .

3 See 123 Stat. 1632, 1660 (2009).

4 The Supreme Court in *Cort v. Ash* set forth a four-factor test for evaluating whether a federal  
5 statute creates a right of action that may be enforced by private parties in federal court. See *Cort v.*  
6 *Ash*, 422 U.S. 66, 78 (1975). Those factors are (1) whether the plaintiff is “one of the class for  
7 whose especial benefit the statute was enacted;” (2) whether “there [is] any indication of legislative  
8 intent, explicit or implicit, either to create such a remedy or to deny one;” (3) whether it is  
9 “consistent with the underlying purposes of the legislative scheme to imply such a remedy for the  
10 plaintiff;” and (4) whether the “cause of action [is] one traditionally relegated to state law, in an area  
11 basically the concern of the States, so that it would be inappropriate to infer a cause of action based  
12 solely on federal law.” See *id.* Generally, “. . . the first three factors . . . are the ones traditionally  
13 relied upon in determining legislative intent.” See *Touche Ross & Co. v. Redington*, 442 U.S. 560,  
14 575-76 (1979). In weighing the four factors used by *Cort*, the Supreme Court has emphasized that  
15 intent is the most important element in the analysis. See *Thompson v. Thompson*, 484 U.S. 174, 179  
16 (1988) (“The intent of Congress remains the ultimate issue”).

17 **1. The statute was enacted to benefit tenants**

18 The first factor of *Cort* asks whether the plaintiff is “one of the class for whose especial  
19 benefit the statute was enacted.” See *Cort*, 422 U.S. at 78. Here, plaintiffs are part of the class of  
20 tenants that are affected by the foreclosure crisis.

21 The PTFA protects tenants who are the victims of the foreclosure crisis. See 155 CONG. REC.  
22 S5096-7 (daily ed. May 5, 2009) (statement of Sen. Gillibrand). Included in the Act is a right for the  
23 tenant to occupy the premises until the end of the lease, as well as a right to receive a notice to vacate  
24 90 days before the effective date. See 123 Stat. 1632, 1660 (2009). “The objective of these new  
25 tenant protections is to ensure that tenants receive appropriate notice of foreclosure and are not  
26 abruptly displaced.” See *Protecting Tenants at Foreclosure: Notice of Responsibilities Placed on*  
27 *Immediate Successors in Interest Pursuant to Foreclosure of Residential Property*, 74 Fed. Reg. at  
28 30106. Plaintiffs belong to the class the statute was intended to benefit—they were evicted as a result

1 of the home being foreclosed.

2 **2. The Legislative has indicated its intent not to create a remedy**

3 The second factor of *Cort* asks whether “there [is] any indication of legislative intent, explicit  
4 or implicit, either to create such a remedy or to deny one.” *See Cort*, 422 U.S. at 78.

5 On its face, the statute does not explicitly state whether Congress intended PTFA to include  
6 private rights of action. The statute does state that tenants would be granted a right to remain in their  
7 homes for “at least 90 days.” *See* 123 Stat. 1632, 1660 (2009). Review of the Congressional Record  
8 indicates that Congress intended tenants to have protection to deal with the foreclosure crisis:

9  
10 A landlord should not be allowed to come in, change the locks, and force out tenants  
11 who were there completely legitimately, with an expectation that they were coming  
home to their same old home . . .

12 *See* 155 CONG. REC. S5110-5111 (daily ed. May 5, 2009) (statement of Sen. Kerry).

13 Although the framers of the statute indicated granting rights to tenants, they did not indicate  
14 an intent to create a remedy. In fact, the Congressional Record emphasizes that the remedy should  
15 not come from the federal court but rather from the state court:

16 Congress and the administration have taken a number of actions to help our  
17 homeowners weather this housing crisis. We have worked to expand forecloure  
18 counseling services, provide homeowners with incentives to write down their debts,  
and to give *local governments and States* the tools they need to tackle this housing  
crisis.

19 *See* 155 CONG. REC. S5096-7 (daily ed. May 5, 2009) (statement of Sen. Gillibrand) (emphasis  
20 added). Senator Kerry, in discussing the eviction policies of states, said, “[s]o what we believe is  
21 that this [Act] provides an appropriate level of protection.” *See id.* at S5111 (statement of Sen.  
22 Kerry). Senator Kerry went on to state an incident of a “45-year-old former factory worker from  
23 China” who was evicted and “ended up on the street with all of her possessions.” *See id.* In this  
24 incident, the remedy for the tenant came not from the federal court but rather from the state court,  
25 which issued an order that allowed her to move back. *See Ric Kahn, Foreclosing Costs, THE*  
26 *BOSTON GLOBE*, March 9, 2008. The PTFA was intended to allow tenants who are victims of the  
27 foreclosing crisis a protection that can be used in the state courts to combat unlawful evictions. *See*  
28 155 CONG. REC. S5111 (daily ed. May 5, 2009) (statement of Sen. Kerry). Such was the case

1 recently in *Bank of Am., N.A. v. Owens*, where the PTFA was used to give greater protection to  
2 tenants. See *Bank of Am., N.A. v. Owens*, 2010 N.Y. Misc. LEXIS 954 (N.Y. Sup. Ct. May 4, 2010).

3 Because Congress intended the PTFA to be used for protection in state court, a private right  
4 of action is not found to exist under the PTFA. Although it is not necessary to analyze the remaining  
5 two *Cort* factors, for sake of completeness, they will be briefly discussed.

### 6 **3. The remedy is not consistent with the legislative scheme**

7 The third factor of *Cort* asks whether a private right of action is “consistent with the  
8 underlying purposes of the legislative scheme to imply such a remedy for the plaintiff.” See *Cort*,  
9 422 U.S. at 78. A federal private right of action would not be consistent with the underlying  
10 purposes of the legislative scheme. Congress discussed the rights of the PTFA within the framework  
11 of the state judicial system. See 155 CONG. REC. S5096-7 (daily ed. May 5, 2009) (statement of Sen.  
12 Gillibrand). To now read a private right of action remedy into the Statute would be contrary to the  
13 intent of Congress.

### 14 **4. The cause of action is not one traditionally relegated to state law**

15 The fourth factor of *Cort* asks whether the “cause of action [is] one traditionally relegated to  
16 state law, in an area basically the concern of the States, so that it would be inappropriate to infer a  
17 cause of action based solely on federal law.” See *Cort*, 422 U.S. at 78. The cause of action here is  
18 based on unlawful eviction—an area traditionally relegated to state law. It would therefore be  
19 inappropriate to infer a cause of action based solely on federal law.

### 20 **5. A private right of action is not implied under the PTFA**

21 As a general rule, the Supreme Court does not like to grant non-explicit private right of  
22 actions. See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-72 (1979). As stated above,  
23 Congress did not intend to create a private right of action remedy, but rather intended to provide  
24 tenants additional rights which could be used in state court proceedings. Additionally, three out of  
25 the four *Cort* factors, including the most important ‘intent’ factor, do not support finding an implied  
26 right of action. As such, a private right of action is not found to be implied under the PTFA.

### 27 **B. Remand is warranted as to all state claims**

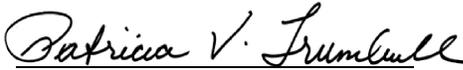
28 All remaining claims at issue in the First Amended Complaint are state law claims. Having

1 dismissed Plaintiffs' claims under the PTFA, the court declines to exercise supplemental jurisdiction  
2 over the state law claims and remands the case to state court. *See* 28 U.S.C. § 1367(c)(3); *see also*,  
3 *Foster v. Wilson*, 504 F.3d 1046, 1051-52 (9th Cir. 2007) (“The decision whether to continue to  
4 exercise supplemental jurisdiction over state law claims after all federal claims have been dismissed  
5 lies within the district court’s discretion”). The bulk of the court’s work on this case has been  
6 directed to the federal cause of action. Under all of the circumstances, the court finds it appropriate  
7 to decline supplemental jurisdiction.

8 **V. CONCLUSION**

9 Because the PTFA does not provide a private right of action, dismissal of the seventh cause  
10 of action is warranted. The court declines to exercise supplemental jurisdiction over the remaining  
11 state law claims. The clerk of the court shall transfer the file to the Superior Court of California,  
12 County of Santa Clara.

13 Dated: 5/24/10

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15 PATRICIA V. TRUMBULL  
16 United States Magistrate Judge  
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