UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES URIBE, *et al.*, Plaintiffs, v. COUNTRYWIDE FINANCIAL, *et al.*, Defendants.	Civil No. 08cv1982 L(NLS) **ORDER GRANTING MOTION TO DISMISS FIRST AMENDED COMPLAINT [doc. #21] and TO EXPUNGE LIS PENDENS [doc. #24]; DIRECTING ENTRY OF JUDGMENT**

Defendants Countrywide Financial Corporation, Countrywide Home Loans, Inc., Bank of America, N.A., Mortgage Electronic Registration Systems, Inc. and Deutsche Bank-Harborview 04-11 (collectively "defendants") filed a motion to dismiss the first amended complaint ("FAC") and a motion to expunge lis pendens or alternatively to require plaintiffs to post a bond. The motions have been fully brief and are considered without oral argument under Civil Local Rule 7.1(d)(1).

Background

This action was removed from the California Superior Court, County of San Diego on October 27, 2008. Thereafter, defendants moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(6). Under the Civil Local Rules, plaintiffs were required to respond to defendants motion by a certain date but plaintiffs neither filed a response nor sought additional time in which to file a response to defendants' motion. In its Order granting defendants' motion

to dismiss, the Court noted that "[w]hen an opposing party does not file papers in the manner required by Civil Local Rule 7.1(e.2), the Court may deem the failure to "constitute a consent to the granting of a motion or other request for ruling by the court." CIV. L.R. 7.1(f.3.c). Notwithstanding plaintiffs' failure to file an opposition, the Court reviewed the motion on the merits to determine whether any legal issue existed that would preclude the granting of defendants' motion to dismiss.

The Court dismissed plaintiffs' claims as follows: the RICO and fraud causes of action were dismissed without prejudice for failure to meet Rule 9(b)'s particularity requirement; the TILA and RESPA claims were barred by the applicable statutes of limitation; the negligent infliction of emotional distress claim was dismissed with prejudice because plaintiffs did not and could not allege an independent duty imposed by law, assumed by defendants, or created by a special relationship between the parties that proximately caused plaintiffs' emotional distress; the quiet title claim was dismissed without prejudice because plaintiffs did not allege tender or offer of tender of the amounts admittedly borrowed; slander of title claim was dismissed with prejudice because defendants' conduct was privileged; the cancellation of plaintiffs' trust deeds and notes claims were dismissed with prejudice because the property had been foreclosed.

Notwithstanding plaintiffs' failure to respond to the motion to dismiss or to request leave to amend, the Court permitted the filing of a FAC.

Plaintiffs filed a massive 318-page, 62-count FAC.[1] The FAC alleged claims under RICO, 18 U.S.C. §§ 1961, 1962(a), (b), (c), (d), 1964(a), (b) and (c); the "Ku Klux Klan Act of 1871", 42 U.S.C. § 1981 *et seq.*; the Equal Credit Opportunity Act of 1974 ("ECOA"), 15 U.S.C. § 1691; the Fair Housing Act of 1968 ("FHA"), 42 U.S.C. § §3601; Declaratory Judgment Act of 1940, 28 U.S.C. §§ 2201-2202; common-law fraud; constructive fraud; promissory fraud; and conspiracy to commit fraud; breach of fiduciary duty; breach of implied covenant of good faith

[1] The Court notes that attorney Dean Browning Webb signed both the FAC and the opposition to defendants' motion to dismiss the FAC. Mr. Webb provided a pro hac vice application that the Court denied on February 18, 2009. [doc. #12] Accordingly, Mr. Webb is not and has not been permitted to appear and participate in this case. Because this action is being dismissed with prejudice, the Court will not order Mr. Webb to show cause why sanctions should not be imposed.

and fair dealing; negligence; Consumer Legal Remedies Act ("CLRA"); and California Business & Professions Codes 17200 and 17500.

Defendants move for dismissal of the FAC under Federal Rule of Civil Procedure 12(b)(6).

MOTION TO DISMISS THE FAC

1. Legal Standard

a. Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6)

"The focus of any Rule 12(b)(6) dismissal . . . is the complaint." *Schneider v. California Dept. of Corrections,* 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint. *Novarro v. Black*, 250 F.3d 729, 732 (9th Cir. 2001). "A district court should grant a motion to dismiss if plaintiffs have not pled 'enough facts to state a claim to relief that is plausible on its face.'" *Williams ex rel. Tabiu v. Gerber Products Co.*, 523 F.3d 934, 938 (9th Cir. 2008)(quoting *Bell Atlantic Corp. v. Twombley*, 127 S. Ct. 1955, 1974 (2007)). "'Factual allegations must be enough to raise a right to relief above the speculative level.'" *Id.* "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombley*, 127 S. Ct. at 1964-1965. Dismissal of a claim under Rule 12(b)(6) is appropriate only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable legal theory or where the complaint presents a cognizable legal theory yet fails to plead essential facts under that theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the truth of all factual allegations and must construe all inferences from them in the light most favorable to the nonmoving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002). But legal conclusions need not be taken as true merely because they are cast in the form of factual

allegations. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003). Finally, in determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint for additional facts, *e.g.*, facts presented in plaintiff's memorandum in opposition to a defendant's motion to dismiss or other submissions. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998); *see also* 2 MOORE'S FEDERAL PRACTICE, § 12.34[2] (Matthew Bender 3d ed.) ("The court may not . . . take into account additional facts asserted in a memorandum opposing the motion to dismiss, because such memoranda do not constitute pleadings under Rule 7(a)."). But in addition to the facts alleged in the complaint, the Court may consider documents attached to the complaint, documents relied upon but not attached to the complaint when authenticity is not contested, and matters of which the court takes judicial notice. *Parrino*, 146 F.3d at 705-706.

b. Federal Rule of Civil Procedure 8

When plaintiffs were given leave to file an amended complaint that corrected the deficiencies the Court had previously discussed, they filed a behemoth pleading that fails to comply with Rule 8. Rule 8 sets forth general rules of notice pleading in the Federal Courts. *See Swierkiewicz v. Sorema*, 534 U.S. 506 (2002). Complaints are required to set forth (1) the grounds upon which the court's jurisdiction rests, (2) a short and plain statement of the claim showing entitlement to relief; and (3) a demand for the relief plaintiff seeks. Rule 8 requires "sufficient allegations to put defendants fairly on notice of the claims against them." *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991). When a plaintiff's allegations are too vague and broad-sweeping to put defendants fairly on notice of the claims against them, the notice requirement of Rule 8 is not satisfied. See *Conley*, 355 U.S. at 47.

Even if the factual elements of the cause of action are present, but are scattered throughout the complaint and are not organized into a "short and plain statement of the claim," dismissal for failure to satisfy Rule 8(a)(2) is proper. *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996) (stating that a complaint should set forth "who is being sued, for what relief, and on what theory, with enough detail to guide discovery" (emphasis added)). A complaint that fails to comply with rules 8(a) and 8(e) may be dismissed with prejudice pursuant to Federal

Rule of Civil Procedure 41(b). *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 673 (9th Cir.1981)). Further, "[t]he propriety of dismissal for failure to comply with Rule 8 does not depend on whether the complaint is wholly without merit," *McHenry* 84 F.3d at 1179.

Plaintiffs' FAC does not comply with Rule 8(a) as it fails to give each defendant a short and plain statement as to plaintiffs' claims and factual basis against each defendant. Indeed, the FAC, which was prepared and filed by counsel, is prolix, replete with redundancy and most importantly, fails to perform the essential functions of a complaint. *McHenry*, 84 F.3d at 1179-80. As filed, the FAC imposes unfair burdens on defendants and the Court. Defendants have a right to be free from costly and harassing litigation. *Von Poppenheim v. Portland Boxing & Wrestling Comm'n*, 442 F.2d 1047, 1054 (9th Cir. 1971). Plaintiffs' failure to comply with Rule 8 has impeded the expeditious resolution of the present litigation, has burdened the court's docket and consumed scarce judicial resources in addressing litigation that has little basis for success.

Plaintiffs had an opportunity to respond to defendants' initial motion to dismiss but failed to do so[2] which imposed a burden on the Court to review the complaint and defendants' motion on the merits without plaintiffs' input. When given the opportunity to file an amended complaint that addressed the deficiencies found in the original complaint, plaintiffs again burdened the Court with a pleading that is onerous at best. The filing of the FAC that remains deficient, as discussed below, and is grossly excessive in size appears to have been made in bad faith and with the intent to unduly delay the litigation and to harass defendants.

Based on the foregoing, the Court will dismiss plaintiffs' FAC with prejudice for failure

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[2] Plaintiffs' counsel has developed a habit of not responding to motions to dismiss in cases that he files that are similar to the present case. *See, Bartolome v. Downey Savings & Loan*, 08cv1777 LAB(WMC); *Uribe v. MorgageIT*, 08cv1983 L (NLS); *Ajero v. Aegis Wholesale Corp.*, 08cv2002 W (JMA); *Bantog v. Downey Savings & Loan*, 08cv2212 MMA (POR); *Cataulin v. Washington Mutual Bank*, 08cv2419 JM (NLS); *Silva v. US Bank*, 09cv36 JAH (BLM); *Rosales v. Downey Savings & Loan*, 09cv39 WQH (AJB); *Hernandez v. Downey Savings & Loan*, 09cv40 JAH (JMA); *Floyd v. Millennium Mortgage Corp.*, 09cv115 BEN (NLS); *Locsin v. Quick Loan Funding*, 09cv153 L (RBB); *Andrade v. Wachovia Mortgage*, 09cv377 JM (WMC). In each of these 11 cases, the court was put to the task of reviewing the complaint and a motion to dismiss without an opposition from plaintiff. Counsel, as an officer of the court, is admonished that he has an obligation to the court to avoid frivolous filings and to follow the Federal Rules of Civil Procedure, particularly Rule 11, and the Civil Local Rules.

to comply with Federal Rule of Civil Procedure 8.

2. Discussion

Notwithstanding dismissal of the FAC under Rule 8, the Court will consider defendants' motion to dismiss on the merits.

a. Fraud

As discussed in the Court's Order dismissing plaintiffs' initial complaint, Federal Rule of Civil Procedure 9(b) requires that fraud, whether based on federal or state law, be alleged with particularity. To comply with rule 9(b), "the circumstances constituting fraud . . . shall be stated with particularity." "A pleading is sufficient under rule 9(b) if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations." *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). In this regard, it is sufficient to plead items such as the time, place and nature of the alleged fraudulent activities. *Id*.

Generally, Rule 9(b) requires a plaintiff to attribute particular fraudulent statements or acts to individual defendants. *Id*. However, in this case, no individual defendants are named.

> [T]he rule may be relaxed as to matters within the opposing party's knowledge. For example, in cases of corporate fraud, plaintiffs will not have personal knowledge of all the underlying facts. . . . Instances of corporate fraud may also make it difficult to attribute particular fraudulent conduct to each defendant as an individual. To overcome such difficulties in cases of corporate fraud, the allegations should include the misrepresentations themselves with particularity and, where possible, the roles of the individual defendants in the misrepresentations.

Id.

Just as the fraud claims in the original complaint failed to comply with Rule 9(b), the FAC is also deficient in alleging fraud with particularity. Plaintiffs again do not identify the individuals making the allegedly false statements or make disclosures by alleging, where possible, the role of the individuals in the misrepresentations or non-disclosures. Further, there are no allegation of time, place and nature of the alleged fraudulent activities. The fraud claims will be dismissed.

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b. RICO

The essential elements of a civil RICO violation under 18 U.S.C. § 1962(c) are: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985); *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 620 (9th Cir.2004). "'Racketeering activity' is defined in 18 U.S.C. § 1961(1)(B) as including any act 'indictable' under certain enumerated federal criminal statutes listed in 18 U.S.C. § 1961(5), including 18 U.S.C. § 1341, which makes mail fraud a criminal offense, and 18 U.S.C. § 1343, which makes wire fraud a crime." *Schreiber Distrib. Co. v. ServWell Furniture Co.*, 806 F.2d 1393, 1399 (9th Cir. 1986)). A "pattern of racketeering activity" means at least two acts of racketeering activity. Thus, in order to state a RICO cause of action, plaintiffs are required to allege, at a minimum, that defendants participated in two predicate offenses of racketeering listed in 18 U.S.C. § 1961(1)(B).

Defendants contend that plaintiffs have not alleged a pattern of racketeering activity or any conduct constituting racketeering activity, *i.e.*, criminal acts found in 18 U.S.C. § 1961(1)(B) that would serve as predicate offenses. In so arguing, defendants point to the FAC at ¶¶ 70-72 in which plaintiffs "allege that defendants engaged in the above activities and/or conduct that constitutes the following form of 'racketeering activity,' as that term is defined pursuant to Title 18 United States Code § 1961(1)." (FAC ¶ 72.) The "above activities and/or conduct" noted in paragraph 72 apparently are intended to function as predicate offenses. Plaintiffs' purported two predicate offenses are: (1) that defendants misrepresented the availability of mortgage payment relief and plaintiffs "were deprived and/or denied obtaining mortgage payment relief" by defendants (FAC ¶70) and (2) after the mortgage was defaulted upon, the defendants transferred the mortgages "to a corporate affiliate for sale, without prior written notification served upon" the borrowers. (FAC ¶ 71.)

Plaintiffs' first predicate offense appears to allege common-law fraud. When a RICO claim is based on the predicate offense of fraud, the "circumstances constituting fraud . . . shall be stated with particularity." FED. R. CIV. P. 9(b). As discussed above, for acts of fraud, "the pleader must state the time, place, and specific content of the false representations as well as the

identities of the parties to the misrepresentation." *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392-93 (9th Cir. 1989) (quoting *Schreiber Distrib. Co.*, 806 F.2d at 1401). The particularity requirement is satisfied if the complaint "identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations." *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir.1989); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) ("Rule 9(b) demands that, when averments of fraud are made, the circumstances constituting the alleged 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.") (internal quotation marks and citations omitted). Here, plaintiffs have not alleged fraud sufficiently to constitute a predicate offense under RICO.

The second purported predicate offense, that defendants transferred the mortgages without notice to plaintiffs, is not a criminal act and is not listed in 18 U.S.C. § 1961(1). As a result, it cannot function as a predicate offense under RICO.

Accordingly, plaintiffs have not alleged two predicate offenses as required under the RICO statute. Plaintiffs may have intended, however, to allege wire and mail fraud as predicate offenses. Defendants contend that plaintiffs have failed to allege sufficient predicate acts of wire and mail fraud to establish a pattern and that the allegations are "legally insufficient" within the meaning of Rule 9(b). To allege a violation of mail fraud under section 1341, "it is necessary to show that (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud." *Miller*, 358 F.3d at 620 (citing *Schreiber Distrib. Co.*, 806 F.2d at 1400). To be considered part of the fraud, the use of the mails need not be an essential element of the scheme. *Schmuck v. United States*, 489 U.S. 705, 710 (1989). "It is sufficient for the mailing to be 'incident to an essential part of the scheme' or 'a step in [the] plot.'" *Id.* (citing *Badders v. United States*, 240 U.S. 391, 394 (1916)). "Similarly, a wire fraud violation consists of (1) the formation of a scheme or artifice to defraud (2) the use of the United States wires or causing a use of the United States wires in

furtherance of the scheme; and (3) specific intent to deceive or defraud." *Schreiber Distrib. Co.*, 806 F.2d at 1400. To establish specific intent for either mail or wire fraud, the pleader must show "the existence of a scheme which was 'reasonably calculated to deceive persons of ordinary prudence and comprehension ....' " *Id.* (citations omitted).

Here, the FAC fails to properly allege a claim for violation of RICO based on the predicate offenses of mail and wire fraud. The allegations of predicate acts in the FAC concerning those elements of RICO are entirely general with no specifics concerning the time, place, or nature of the alleged communications. This is a fatal defect under Federal Rule of Civil Procedure 9(b), which requires that circumstances constituting fraud be stated with particularity.

Because plaintiffs had two opportunities to allege a RICO claim or claims and did not properly allege fraud, mail fraud or wire fraud as predicate offenses – a foundational element for any RICO claim – all of the RICO claims found in the FAC are dismissed with prejudice.

c. ECOA, FHA and § 1981

Defendants contend that plaintiffs' ECOA, FHA and § 1981 claims are time barred. The Court concurs. Plaintiffs' first loan was consummated on October 4, 2004 and the second loan on June 20, 2006. (FAC ¶¶ 21, 23, 48.) This action was filed on September 9, 2008.

A claim brought under § 1981 must be brought within one-year of the alleged discrimination. A two-year limitations period under ECOA begins to run on the date of the occurrence of the allegedly intentional discriminatory violation. The FHA has a two year statute of limitations, beginning at the occurrence or termination of an alleged discriminatory housing practice. *See* 42 U.S.C. § 3613(a)(1)(A). Plaintiffs' claims were filed beyond the applicable statutes of limitations and therefore, are subject to dismissal. In their opposition, plaintiffs contend that the claims are not time-barred because plaintiffs sought mortgage modification relief in 2008 and were refused. The FAC unmistakably is directed to the 2004 and 2006 mortgage loans and not to any loan modifications that plaintiffs suggest they sought.

Additionally, plaintiffs have not alleged that they are members of a protected class – an essential element of each of these claims. As a result of this omission, these claims are also subject to dismissal.

Based on the running of the limitations periods, plaintiff's ECOA, FHA and § 1981 claims are dismissed with prejudice.

d. California Statutory and Common Law Claims

Defendants assert a variety of reasons why plaintiffs' state statutory and common law claims must be dismissed. Rather than address defendants' arguments, plaintiffs state that their causes of action for "[n]egligence, restitution, fraud, unjust enrichment, and remaining common law claims, are sufficiently pleaded." (Opp. at 41.) Plaintiffs chose not to address defendants' detailed contentions concerning the appropriateness of dismissal of these claims and as a result, plaintiffs have waived any opposition they may have to those arguments. *See, e.g., City of Arcadia v. E.P.A.*, 265 F. Supp.2d 1142. 1154. n. 16 (N.D. Cal. 2003). Accordingly, the California statutory and common law claims plaintiffs have asserted in the FAC are dismissed.

3. Leave to Amend

The Court's discretion to deny leave to amend is particularly broad where plaintiff has previously been permitted to amend his complaint. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996). Failure to cure deficiencies by previous amendment is one of the factors to be considered in deciding whether justice requires granting leave to amend. *Moore*, 885 F.2d at 538. A bad faith motive and undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment are other factors to consider. *Schlacter-Jones v. General Telephone of California*, 936 F.2d 435, 443 (9th Cir. 1991).

Plaintiffs, who are represented by counsel, have made two efforts to provide a feasible complaint. Rather than file a FAC that met appropriate pleading standards, plaintiffs' counsel filed a pleading gargantuan in size but severely lacking in basic facts and allegations. Because counsel has been unable to properly allege viable causes of action in two attempts, the Court has no reason to believe plaintiffs would be able to correct the many remaining deficiencies in a second amended complaint. Therefore, the Court, in its discretion, will not grant plaintiffs further leave to amend and will dismiss the FAC with prejudice.

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Motion to Expunge Lis Pendens

Defendants also move for expungement of the lis pendens pursuant to Cal. Civ.Code §§ 405.31 and 405.32 that plaintiffs recorded. A lis pendens effectively prevents a sale or encumbrance of the property until litigation is resolved or the lis pendens is expunged. *See Kirkeby v. Superior Court*, 33 Cal. 4th 642. 651 (2004). In other words, a lis pendens prevents the resale of the property to recoup any of the losses caused by plaintiffs' default.

A court "shall order the notice [of pendency] expunged if . . . the pleading on which the notice is based does not contain a real property claim." CAL. CIV. CODE § 405.31. A "real property claim" is defined, *inter alia*, as a cause of action "which would, if meritorious, affect . . . title to, or the right to possession of, specific real property...." CAL. CIV. CODE § 405.4. Plaintiff bears the burden of establishing by a preponderance of the evidence, the probable validity of the claims.

Because plaintiffs have alleged no "real property claim" or any viable claim, defendants' motion to expunge lis pendens will be granted.

Accordingly, **IT IS HEREBY ORDERED**:

1. Defendants' motion to dismiss the FAC is **GRANTED WITH PREJUDICE**;
2. Defendants' motion to expunge lis pendens is **GRANTED**;
3. The Clerk of the Court is directed to enter judgment in defendants' favor and against plaintiffs.

IT IS SO ORDERED.

DATED: July 7, 2009

M. James Lorenz
United States District Court Judge

COPY TO:

HON. NITA L. STORMES
UNITED STATES MAGISTRATE JUDGE

ALL PARTIES/COUNSEL

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