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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

DENISE GALLEGOS AND ADRIANA  
ALVAREZ,

Plaintiffs,

vs.

RECONTRUST COMPANY;  
COUNTRYWIDE HOME LOANS, INC.;  
and DOES 1-50, inclusive,

Defendants.

CASE NO. 08cv2245 WQH (LSP)

**ORDER**

HAYES, Judge:

The matter before the Court is the Motion to Dismiss Complaint or, in the Alternative, for a More Definite Statement (Doc. #4).

**Background**

On November 4, 2008, Plaintiffs initiated this action by filing a Complaint in the Superior Court of California, County of San Diego. *Not. of Removal*, p. 2. On December 8, 2008, Defendants Recontrust Company (“Recontrust”) and Countrywide Home Loans, Inc. (“Countrywide”) removed the Complaint to this Court (Doc. #1). The Complaint alleges that Plaintiffs own real property in Oceanside, CA (the “Property”). The Complaint alleges that Plaintiffs have a residential loan for the Property secured by a Deed of Trust. The Complaint alleges that Recontrust is the appointed trustee to the Deed of Trust. The Complaint alleges that Defendants Countrywide and Does 1-50 “are proceeding toward a Trustee’s sale of” the Property. The Complaint alleges that Countrywide is not the “holder of the note identified in

1 the [Deed of Trust].” *Complaint*, ¶ 7. The Complaint alleges:

2 Country has no present right to initiate foreclosure under the [Deed of Trust]  
3 identified in the Notice of Sale . . . , nor does it have the right to direct the  
4 Recontrust Company to foreclose and sell the subject real property owned by  
5 Plaintiffs. Defendant Recontrust Company has been put on notice of Plaintiffs’  
6 claim in this regard, and demand has been made of Recontrust Company to  
7 suspend any foreclosure sale unless and until it has obtained proof that  
Countrywide actually has in its possession the original note properly endorsed  
to it or assigned to it as of a date preceding the notice of default recorded by  
Recontrust Company. Defendant Recontrust Company has failed and refused  
to suspend the sale of the property or to provide proof of the basis of the right  
of Countrywide to initiate foreclosure under the [Deed of Trust].

8 *Id.*, ¶ 8. The Complaint alleges that Plaintiffs demanded written proof of Defendants’ right to  
9 proceed in foreclosure, and that no such proof has been offered. The Complaint alleges that  
10 Defendants have “engaged in a pattern and practice of utilizing the non-judicial foreclosure  
11 procedures of this State to foreclose on properties when they do not, in fact, have the right to  
12 do so,” and have used the United States mail in furtherance of their conspiracy. *Id.*, ¶¶ 9, 13.  
13 The Complaint alleges that in pursuing non-judicial foreclosure, Defendants falsely  
14 represented that they had a right to payment under Plaintiffs’ residential loan, which was  
15 secured by the Deed of Trust.

16 The Complaint alleges causes of action for “Unfair Debt Collection Practices;”  
17 “Predatory Lending Practices;” and “RICO.” *Complaint*, p. 4-6. In support of the cause of  
18 action for Unfair Debt Collection Practices, the Complaint alleges that Defendants “have acted  
19 as a debt collector,” and “have violated provisions of California’s Rosenthal Fair Debt  
20 Collection Practices Act, including but not limited to Civil Code § 1788(e) and (f),”  
21 (“RFDCPA”), “the Federal Fair Debt Collections Act, 15 U.S.C., Title 41, Subchap. V, §§  
22 1692, *et seq.*” (“FDCPA”), “and the Real Estate Settlement Procedures Act . . . , 12 U.S.C. §§  
23 2601-2617” (“RESPA”). *Id.*, ¶¶ 19-21. In support of the cause of action for Predatory  
24 Lending Practices, the Complaint alleges that “[a]ssuming arguendo that Defendant,  
25 Countrywide does have the right . . . to initiate foreclosure . . . then Defendant, Countrywide  
26 is subject to defenses that would have been available against Countrywide the initial Lender  
27 identified in the” Deed of Trust. *Id.*, ¶ 23. The Complaint alleges that Countrywide “has  
28 engaged in predatory lending practices with respect to Plaintiffs . . . the specifics of which are

1 unknown,” in violation of the Home Ownership and Equity Protection Act, 15 U.S.C. §§ 1637  
2 (“HOEPA”), the Truth in Lending, 15 U.S.C. § 1601 (“TILA”), Regulation Z, 12 C.F.R. 226,  
3 and the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (“FTC Act”). *Id.*, ¶ 24. In support  
4 of the cause of action for RICO, the Complaint alleges that “Defendants and each of them were  
5 participating in and have participated in a scheme of racketeering as that term is defined in the  
6 Federal Racketeer Influenced and Corrupt Organizations (“RICO”), 18 U.S.C. §§ 1961, *et*  
7 *seq.*” *Id.*, ¶ 27.

8 On December 11, 2008, ReconTrust and Countrywide filed the Motion to Dismiss for  
9 failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.  
10 Plaintiffs have not filed an opposition to the Motion to Dismiss.

### 11 **Standard of Review**

12 A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests  
13 the legal sufficiency of the pleadings. *See De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir.  
14 1978). A complaint may be dismissed for failure to state a claim under Rule 12(b)(6) where  
15 the factual allegations do not raise the right to relief above the speculative level. *See Bell*  
16 *Atlantic v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Conversely, a complaint may not be  
17 dismissed for failure to state a claim where the allegations plausibly show that the pleader is  
18 entitled to relief. *See id.* (citing Fed R. Civ. P. 8(a)(2)). In ruling on a motion pursuant to Rule  
19 12(b)(6), a court must construe the pleadings in the light most favorable to the plaintiff, and  
20 must accept as true all material allegations in the complaint, as well as any reasonable  
21 inferences to be drawn therefrom. *See Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003);  
22 *see also Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996).

### 23 **Analysis**

#### 24 A. **Defendants’ Right to Initiate the Foreclosure Process**

25 Defendants contend that “ReconTrust has the statutory right, as trustee under Plaintiffs’  
26 Deed of Trust, to initiate the foreclosure process on behalf of their lender and the owners of  
27 the note.” *Mot. to Dismiss*, p. 6. Defendants contend that California law does not require  
28 production of the original note to proceed with a non-judicial foreclosure. Defendants

1 therefore contend that “Plaintiffs’ allegation that Defendants have no right to foreclose on their  
2 property is incorrect.” *Id.*

3 Pursuant to section 2924(a)(1) of the California Civil Code, the trustee of a Deed of  
4 Trust has the right to initiate the foreclosure process. Cal. Civ. Code § 2924(a). Production  
5 of the original note is not required to proceed with a non-judicial foreclosure. *Id.* Viewing the  
6 allegations in the light most favorable to Plaintiffs, the Complaint does not establish that  
7 Defendants lack the right to initiate the foreclosure process.

8 B. Cause of Action for Unfair Debt Collection Practices

9 Defendants contend that the Complaint fails to state a claim under the RFDCPA or the  
10 FDCPA because the Complaint does not allege that Defendants engaged in any harassment or  
11 abuse; that the Defendants used false or misleading representations; or that Defendants  
12 engaged in any unfair practices. Recontrust contends that the Complaint fails to state a claim  
13 under the RESPA because “Plaintiffs do not allege any improper kickbacks in violation of 12  
14 U.S.C. § 2607,” and “[t]o the extent that Plaintiffs claim disclosure-related violations, the  
15 claims must be dismissed because there is no private right of action under the disclosure rules  
16 of RESPA.” *Mot. to Dismiss*, p. 7.

17 To be liable for a violation of the FDCPA or the RFDCPA, the defendant must - as a  
18 threshold requirement - be a “debt collector” within the meaning of the Acts. *Heintz v.*  
19 *Jenkins*, 514 U.S. 291, 294 (1995); Cal. Civ. Code § 1788.2(c). The “activity of foreclosing  
20 on [a] property pursuant to a deed of trust is not the collection of a debt within the meaning of  
21 the” FDCPA. *Hulse v. Ocwen Fed. Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002)  
22 (holding that the plaintiff improperly brought a claim challenging the lawfulness of foreclosure  
23 proceedings pursuant to a deed of trust under the FDCPA). This action challenges the  
24 lawfulness of foreclosure proceedings on the Property pursuant to the Deed of Trust, which  
25 is not the collection of a debt within the meaning of the RFDCPA or the FDCPA.  
26 Furthermore, aside from the conclusory allegation that “Defendants and each of them . . . have  
27 acted as a debt collector,” *Complaint*, ¶ 20, the Court finds that the Complaint does not allege  
28 facts to support the allegation that Defendants are debt collectors within the meaning of the

1 RFDCPA or the FDCPA.

2 The Complaint does not identify the provisions of the RESPA that Defendants violated.  
3 The Complaint does not allege improper kickbacks in violation of 12 U.S.C. 2607, or that  
4 Recontrust was a “loan servicer” as required for a violation of 12 U.S.C. section 2605. To the  
5 extent the Plaintiffs are attempting to assert disclosure-related violations, there is no private  
6 right of action under the disclosure rules of the RESPA. *Bloom v. Martin*, 865 F. Supp. 1377,  
7 1384-85 (N.D. Cal. 1994). The Court concludes that the Complaint fails to state a claim under  
8 the RESPA.

9 C. Cause of Action for Predatory Lending Practices

10 Defendants contend that the Complaint fails to state an actionable wrongdoing under  
11 the HOEPA, TILA, Regulation Z or the FTC Act because Plaintiffs have not adequately  
12 alleged that Defendants engaged in any deceptive practices.

13 In support of the cause of action for Predatory Lending Practices, the Complaint alleges  
14 that Countrywide “has engaged in predatory lending practices” in violation of the HOEPA,  
15 TILE, Regulation Z and the FTC Act, “the specifics of which are unknown.” *Complaint*, ¶ 24.  
16 The Complaint alleges that Countrywide committed unspecified acts which violated  
17 unspecified provisions of federal law. These “conclusory allegations of law and unwarranted  
18 inferences are not sufficient to defeat a motion to dismiss.” *Associated Gen. Contrs. of*  
19 *America v. Metro Water Dist.*, 159 F.3d 1178, 1181 (1998). The Court concludes that the  
20 Complaint fails to state a claim for predatory lending practices because the Complaint’s  
21 allegations are speculative.

22 D. Cause of Action for RICO


23 Defendants contend that the cause of action for RICO fails because “Plaintiffs’  
24 Complaint does not contain the required allegations.” *Mot. to Dismiss*, p. 8. Defendants  
25 contend that the Complaint does not allege that Plaintiffs’ loan constitutes an “unlawful debt;”  
26 or that Defendants engaged in “any indictable acts punishable by a year or more in prison, let  
27 alone the two or more criminal acts required to show a ‘pattern of racketeering activity’ under  
28 18 U.S.C. §§ 1961(5) and 1962.” *Id.*, p. 8.

1 To state a RICO claim, the plaintiff must allege the existence of an “enterprise” and the  
2 connected “pattern of racketeering activity.” 18 U.S.C. § 1962; *United States v. Turkette*, 452  
3 U.S. 576, 582 (1981). “The Ninth Circuit has held that allegations of predicate acts under  
4 RICO must comply with Rule 9(b)’s specificity requirements.” *U.S. Concord, Inc. v. Harris*  
5 *Graphics Corp.*, 757 F. Supp. 1053, 1061 (N.D. Cal. 1991) (citing *Schreiber Distributing Co.*  
6 *v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1400-01) (9th Cir. 1986). A RICO plaintiff must  
7 allege the time, place and manner of each act of fraud, and the role of each defendant in the  
8 fraud. *Lancaster Community Hospital v. Antelope Valley Hospital Dist.*, 940 F.2d 397, 405  
9 (9th Cir. 1991). Aside from the conclusory allegation that “Defendants and each of them were  
10 participating in and have participated in a scheme of racketeering as that term is defined in  
11 [RICO] 18 U.S.C. §§ 1961, *et seq.*” Plaintiffs fail to allege with any specificity the existence  
12 of a RICO enterprise, or the conduct of a pattern of racketeering. The Court concludes that the  
13 Complaint fails to state a claim under RICO.

14 Conclusion

15 The Motion to Dismiss (Doc. # 4) is **GRANTED**. The above-captioned action is  
16 **DISMISSED**.

17  
18 DATED: January 29, 2009

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20 **WILLIAM Q. HAYES**  
21 United States District Judge  
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