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

SANDRA GALE MARTINO; RONALD ANTHONY VANSTRALENDORFF,

Plaintiff,

vs.

GAP FUND, LLC; FCI LENDER SERVICES, INC.; FKA FCI NATIONAL LENDER SERVICES; SEASIDE LENDING, INC.,

Defendants.

CASE NO. 09cv2064 JM(BLM)

ORDER GRANTING MOTION TO DISMISS; REMANDING ACTION TO SUPERIOR COURT

Defendant Gap Fund, LLC (“GAP”) moves to dismiss the removed complaint for failure to state a claim. Plaintiffs Sandra Gale Martin and Ronald Anthony Vanstralendorff, represented by counsel, did not file an opposition nor a statement of non-opposition as required by Local Rule 7.1(e)(2). Furthermore, no other Defendant filed a response to the motion.¹ Pursuant to Local Rule 7.1(d)(1), this matter is appropriate for resolution without oral argument. For the reasons set forth below, the court grants the motion to dismiss and sua sponte remands the action to the Superior Court of California San Diego County - North District.

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¹ The court notes that GAP appears to be the only defendant served with process in this action. (Notice of Removal ¶8, Docket No. 1).

1 **BACKGROUND**

2 On September 21, 2009, GAP removed this action from the Superior Court for the County of
3 San Diego based upon federal question jurisdiction. (Docket No. 1). Plaintiff Martino generally
4 alleges that she was contacted by Defendant Seaside Lending, Inc. (“Seaside”) in July 2007 about
5 refinancing the mortgage on her home, located in Oceanside, California. (Compl. ¶14). Plaintiff
6 Martino alleges that her income was about \$2,100 per month, she informed Seaside of her income, and
7 Seaside increased her income to \$9,000 per month on the loan application. Plaintiff Martino also took
8 out an additional \$18,000 to supplement her income. (Compl. ¶14). Plaintiff subsequently defaulted
9 on the loan and, on November 5, 2009, the property was sold at a trustee’s sale. Thereafter, an
10 unlawful detainer action was commenced against Plaintiffs and judgment was entered against them.
11 (Compl. ¶18).

12 Based upon this generally described conduct, Plaintiffs allege three federal claims for violation
13 of the Truth in Lending Act (“TILA”), 15 U.S.C. §1601 et seq., the Real Estate Settlement Procedures
14 Act (“RESPA”), 12 U.S.C. §2601 et seq., and the Racketeer Influenced and Corrupt Organizations
15 Act (“RICO”), 18 U.S.C. §1961 et seq. Plaintiffs also allege 13 state law claims for injunctive relief,
16 breach of fiduciary duty, fraud, negligent infliction of emotional distress, negligence, cancellation
17 based on fraud, demand for accounting, rescission, reformation, unfair and unlawful business practices
18 in violation of Bus. and Prof. §17200, breach of the covenant of good faith and fair dealing, unfair
19 debt collection practices, and predatory lending practices.

20 **DISCUSSION**

21 **Legal Standards**

22 Federal Rule of Civil Procedure 12(b)(6) dismissal is proper only in "extraordinary" cases.
23 United States v. Redwood City, 640 F.2d 963, 966 (9th Cir. 1981). Courts should grant 12(b)(6) relief
24 only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient facts to support a
25 cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). Courts
26 should dismiss a complaint for failure to state a claim when the factual allegations are insufficient “to
27 raise a right to relief above the speculative level.” Bell Atlantic Corp v. Twombly, __ 550 U.S. __, 127
28 S.Ct. 1555 (2007) (the complaint’s allegations must “plausibly suggest[]” that the pleader is entitled

1 to relief); Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009) (under Rule 8(a), well-pleaded facts must do more
2 than permit the court to infer the mere possibility of misconduct). “The plausibility standard is not
3 akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has
4 acted unlawfully.” Id. at 1949. Thus, “threadbare recitals of the elements of a cause of action,
5 supported by mere conclusory statements, do not suffice.” Id. The defect must appear on the face of
6 the complaint itself. Thus, courts may not consider extraneous material in testing its legal adequacy.
7 Levine v. Diamantheset, Inc., 950 F.2d 1478, 1482 (9th Cir. 1991). The courts may, however,
8 consider material properly submitted as part of the complaint. Hal Roach Studios, Inc. v. Richard
9 Feiner and Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989).

10 Finally, courts must construe the complaint in the light most favorable to the plaintiff. Concha
11 v. London, 62 F.3d 1493, 1500 (9th Cir. 1995), cert. dismissed, 116 S. Ct. 1710 (1996). Accordingly,
12 courts must accept as true all material allegations in the complaint, as well as reasonable inferences
13 to be drawn from them. Holden v. Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992). However,
14 conclusory allegations of law and unwarranted inferences are insufficient to defeat a Rule 12(b)(6)
15 motion. In Re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996).

16 **The Motion to Dismiss**

17 GAP argues that the complaint is deficient under Rules 8 and 12(b)(6) because the complaint
18 is largely based upon vague generalities and conclusions violative of the pleading standards articulated
19 in Twombly and Iqbal. This argument has merit. For example, Plaintiffs allege that all “Defendants”
20 engaged in certain conduct without specifying which Defendant engaged in the challenged conduct.
21 Further, Plaintiffs fail to identify whether GAP was the loan servicer or the lender for the challenged
22 transaction and, with respect to the federal RESPA and TILA claims, the court notes that any claim
23 for monetary damages must be brought within one year from the date of the alleged violation. 15
24 U.S.C. §1640(e). As the loan transaction at issue allegedly occurred in July 2007, the filing of the
25 state court complaint on May 26, 2009, absent equitable tolling, appears to bar such RESPA and TILA

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1 claims.² Furthermore, the claims themselves allege only conclusions: the TILA claim alleges that all
2 “Defendants” violated Regulation Z and failed “to properly make the required material disclosures
3 of the terms of said loans including but not limited to, Annual Percentage Rate, Finance Charge, and
4 Total Payments etc. to Plaintiffs.” (Compl. ¶¶63, 71(RESPA claim)). Plaintiffs fail to allege the
5 disclosed terms of the loan or to allege how the disclosures did not comply with TILA or RESPA. Id.
6 As in Iqbal, such “threadbare recitals of the elements of a cause of action, supported by mere
7 conclusory statements, do not suffice” to state a claim. Iqbal, 129 S.Ct. at 1949.

8 The court further notes that the RICO claim is similarly vague and conclusory. Moreover, the
9 type of tort allegations set forth in the complaint do not appear to constitute the type of wrongful
10 conduct targeted by RICO. Congress enacted the Racketeer Influenced and Corrupt Organizations
11 Act (“RICO”) with the specific intent to “thwart the organized criminal invasion and acquisition of
12 legitimate business enterprises and property.” Oscar v. University Students Co-Operative Ass’n, 965
13 F.2d 783, 786 (9th Cir.), cert. denied, 506 U.S. 1020 (1992). To that end, Section 1964(c) provides
14 that:

15 [a]ny person injured in his business or property by reason of a violation of
16 section 1962 of this chapter may sue therefor in any appropriate United States district
17 court and shall recover threefold the damages he sustains and the cost of the suit,
including reasonable attorney’s fees.

18 18 U.S.C. §1964(c).

19 The substantive provision of RICO, §1962, describes the prohibited activities. Plaintiff’s
20 RICO claims are brought under §§1962(c) and 1962(d). Section 1962(c) provides, in pertinent part,
21 that:

22 [i]t shall be unlawful for any person employed by or associated with any enterprise
23 engaged in, or the activities of which affect, interstate or foreign commerce, to conduct
or participate, directly or indirectly, in the conduct of such enterprise’s affairs through
a pattern of racketeering activity or collection of unlawful debt.

24 18 U.S.C. §1962(c). Section 1962(d) provides that it is unlawful to conspire to commit a violation
25 of, among other things, section 1962(c). In the present case, the existence of a §1962(d) claim
26 depends on a viable §1962(c) claim. See Edwards v. First Nat. Bank, 872 F.2d 347, 352 (10th Cir.

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28 ² The court notes that the claim for rescission appears to fail as well because the property at
issue has been sold and the sale or transfer of a consumer’s property interests extinguishes the right
of rescission. See 15 U.S.C. §1635(f).

1 1989).

2 Here, the complaint falls woefully short of satisfying Rule 9(b). Rule 9(b) requires that
3 Plaintiffs plead with detail “the time, place, and manner of each act of fraud, plus the role of each
4 defendant in each scheme.” Lancaster Com. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 405
5 (9th Cir. 1991). In the context of civil RICO where the predicate acts are based on mail and wire
6 fraud, like those alleged herein, (Compl. ¶53), the policies underlying Rule 9(b) are “especially
7 important in RICO cases because of the harm to a person’s reputation that allegations of ‘racketeering’
8 may do.” In re Crazy Eddie Secs. Litig., 714 F.Supp. 1285, 1292-93 (E.D.N.Y. 1989). The
9 allegations of fraud must include the time, place, and specific content of the false representation. See
10 Miscellaneous Service Workers, Drivers & Helpers v. Philco-Ford Corp., 661 F.2d 776, 782 (9th Cir.
11 1981). Courts have also phrased the heightened pleading standard as requiring “the who, what, when,
12 where, and how of the misconduct charged.” Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1106 (9th
13 Cir. 2003). Here, the RICO claim simply fails to set forth sufficient, if any, particulars of Plaintiffs’
14 claim.

15 In sum, the court dismisses all federal claims.

16 **Motion to Remand**

17 The court sua sponte remands this action to state court. See Maniar v. FDIC, 979 F.2d 782,
18 785 (9th Cir. 1992) (the court may sua sponte remand an action to state court). Federal courts are
19 courts of limited jurisdiction. “Without jurisdiction the court cannot proceed at all in any cause.
20 Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to
21 the court is that of announcing the fact and dismissing the cause.” Steel Co. v. Citizens for a Better
22 Environment, 523 U.S. 83, 94 (1998) (quoting Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514, 19
23 L.Ed. 264 (1868)). Accordingly, federal courts are under a continuing duty to confirm their
24 jurisdictional power and are even “obliged to inquire sua sponte whenever a doubt arises as to [its]
25 existence. . . .” Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977) (citations
26 omitted).


27 In light of the dismissal of all federal claims and the absence of any other party asserting
28 federal question jurisdiction, the court concludes that it lacks subject matter jurisdiction under 28

1 U.S.C. §1331 to entertain Plaintiffs' state law claims. Defendant GAP, as the party who invoked
2 federal removal jurisdiction, has the burden of demonstrating the existence of federal jurisdiction,
3 see Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992); B., Inc. v. Miller Brewing Co., 663 F.2d
4 545 (5th Cir. 1981). Here, GAP has demonstrated a lack of federal question jurisdiction. Further, any
5 doubt regarding removal jurisdiction is construed in favor of remanding the case to state court. See
6 Gaus, 980 F.2d at 566. Here, there is no federal claim over which the court has original jurisdiction
7 and the court declines to exercise supplemental jurisdiction over the state law claims. See 28 U.S.C.
8 §1367(c)(3). Consequently, the court lacks subject matter jurisdiction and remands this action to the
9 Superior Court for the County of San Diego - North District.

10 In sum, the court grants GAP's motion to dismiss all federal claims and remands the action to
11 the Superior Court for the County of San Diego - North District.

12 **IT IS SO ORDERED.**

13 DATED: February 5, 2010

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16 Hon. Jeffrey T. Miller
17 United States District Judge

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