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

GEORGE J. GEHRON; CHERYL L.  
GEHRON,  
  
Plaintiffs,  
  
vs.  
  
BEST REWARD CREDIT UNION, f/k/a  
Vantage Federal Credit Union, f/k/a Reward  
One, f/k/a Best Employees Federal Credit  
Union; JOHN J. SHIRILLA; CUMANET;  
ASSURED LENDER SERVICES, INC.;  
MERS (Mortgage Electronic Registration  
Systems, Inc.),  
  
Defendants.

CASE NO. 10cv2051 - IEG (BLM)

**ORDER GRANTING  
DEFENDANTS’ MOTIONS TO  
DISMISS AMENDED  
COMPLAINT AND DENYING AS  
MOOT MOTION TO STRIKE  
AMENDED COMPLAINT**

[Doc. No. 27, 33, 34]

In their amended complaint, Plaintiffs assert eight claims arising from Defendants’ alleged securitization and sale of their mortgage loans. Presently before the Court is a motion to dismiss and a motion to strike the amended complaint brought by Defendants Best Reward Credit Union (“Best”) and John J. Shirilla (Doc. Nos. 33, 34) and a motion to dismiss the amended complaint brought by Defendant CUMANET (Doc. No. 27). For the reasons stated herein, the Court **GRANTS** Defendants’ motions to dismiss and **DENIES AS MOOT** the motion to strike.

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1 **BACKGROUND**

2 Plaintiffs’ amended complaint has been copied more or less wholesale from a complaint  
3 filed in a number of unrelated cases. See Def. Best’s Mot. at 1.<sup>1</sup> As another Court noted, the  
4 complaint is “chockablock with vague and conclusory allegations, and the Court doubts it even  
5 complies with the requirements of Rule 8 that a complaint contain a ‘short and plain statement of  
6 the claim showing that the pleader is entitled to relief.’”<sup>2</sup> Gervais v. Am. Express Centurion Bank,  
7 2010 WL 4929077, at \*2 (S.D. Cal. Nov. 30, 2010). Nevertheless, the Court discerns the  
8 following allegations from Plaintiffs’ amended complaint.

9 Plaintiffs appear to allege that on or about October 17, 2003 and May 4, 2004, they  
10 obtained mortgages on some property. (Id. ¶¶ 32-33.) Defendants then sold Plaintiffs’ mortgages  
11 “to New York Stock Exchange,” and the mortgages ended up being pooled and traded by “Fidelity  
12 Funds” or “Fidelity Investment.” (Id. ¶¶ 19, 34-35.) On September 10, 2010, one or more of the  
13 Defendants “filed a foreclosure action against the Plaintiff on the property . . .” (Id. ¶ 17.)

14 Plaintiffs filed their original complaint in this Court on October 1, 2010. (Doc. No. 1.)  
15 Certain Defendants moved to dismiss the original complaint, and Plaintiffs responded by filing an  
16 amended complaint on December 8, 2010. (Doc. Nos. 12, 16.) Defendant CUMANET filed a  
17 motion to dismiss the amended complaint on December 22, 2010, and Defendants Best and John J.  
18 Shirilla filed a motion to dismiss and a motion to strike the amended complaint on January 6, 2011.  
19 (Doc. Nos. 27, 33-34.) Plaintiffs filed an opposition and Defendants filed replies. (Doc. Nos. 41,  
20 43-44.) The Court vacated a hearing scheduled for February 24, 2011, electing instead to take the  
21 matter under submission pursuant to Local Civil Rule 7.1(d). (Doc. No. 47.)

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26 <sup>1</sup> See also Bowler v. Green Tree Servicing, LLC, 2011 WL 320398 (E.D. Cal. Jan. 28, 2011);  
27 Bello v. Chase Home Finance, 2011 WL 133351 (S.D. Cal. Jan. 14, 2011); Gervais v. Am. Express  
Centurion Bank, 2010 WL 4929077 (S.D. Cal. Nov. 30, 2010).

28 <sup>2</sup> Prior to delving into any specific allegations, for example, the amended complaint contains  
a “History on Securitization.” See Am. Compl. ¶¶ 10-14.

1 **DISCUSSION**

2 **I. Legal Standard for a Rule 12(b)(6) Motion to Dismiss**

3 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests  
4 the legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); Navarro v.  
5 Block, 250 F.3d 729, 731 (9th Cir. 2001). The court must accept all factual allegations pled in the  
6 complaint as true, and must construe them and draw all reasonable inferences from them in favor  
7 of the nonmoving party. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996).  
8 To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual allegations,  
9 rather, it must plead “enough facts to state a claim to relief that is plausible on its face.” Bell Atl.  
10 Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has “facial plausibility when the plaintiff  
11 pleads factual content that allows the court to draw the reasonable inference that the defendant is  
12 liable for the misconduct alleged.” Ashcroft v. Iqbal, --- U.S. ---, 129 S.Ct. 1937, 1949 (2009)  
13 (citing Twombly, 550 U.S. at 556).

14 However, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’  
15 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of  
16 action will not do.” Twombly, 550 U.S. at 555 (citation omitted). A court need not accept “legal  
17 conclusions” as true. Ashcroft v. Iqbal, --- U.S. ---, 129 S.Ct. 1937, 1949 (2009). In spite of the  
18 deference the court is bound to pay to the plaintiff’s allegations, it is not proper for the court to  
19 assume that “the [plaintiff] can prove facts that [he or she] has not alleged or that defendants have  
20 violated the . . . laws in ways that have not been alleged.” Associated Gen. Contractors of Cal.,  
21 Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983).

22 **II. Analysis**

23 **A. The Banking Act of 1933**

24 The Banking Act of 1933, also known as the Glass-Steagall Act, established the Federal  
25 Deposit Insurance Corporation and separated commercial banking from investment banking,  
26 prohibiting commercial banks from speculating in securities. See P.L. 73-66, 48 Stat. 162. The  
27 subheading to Count I of Plaintiffs’ amended complaint is “Glass-Steagall Request for  
28 Reinstatement of Repealed Parts.” Plaintiffs allege that the “Act provides strict policies preventing

1 investment banking activities of commercial banks and forces them to withdraw completely from  
2 important segments of the investment banking business.” See Am. Compl. ¶ 62. Plaintiff appears  
3 to be asserting rights under sections of the Banking Act of 1933 (sections 20 and 32) that were  
4 repealed on November 12, 1999, when the Gramm-Leach-Bliley Act was signed into law. See P.L.  
5 106-102, 113 Stat. 1338. The Gramm-Leach-Bliley Act specifically allowed affiliations between  
6 commercial banks and securities firms. See id. To the extent that Plaintiffs seek reinstatement of  
7 repealed parts, the Court is unable to provide the requested relief. See U.S. Const. art. I, § 1 (“All  
8 legislative Powers herein granted shall be vested in a Congress of the United States, which shall  
9 consist of a Senate and House of Representatives.”). Based on Plaintiffs’ allegations, and because  
10 Plaintiffs cannot assert a right to relief under the Banking Act of 1933, the Court **DISMISSES**  
11 **WITH PREJUDICE** Count I of Plaintiffs’ amended complaint.

12 **B. The Gramm-Leach-Bliley Act**

13 In Count II, Plaintiffs allege securities fraud under the Gramm-Leach-Bliley Act, 15 U.S.C.  
14 § 6801. The Gramm-Leach-Bliley Act prohibits financial institutions’ disclosure of non-public  
15 personal information. There is no private right of action under 15 U.S.C. § 6801. See 15 U.S.C. §  
16 6805(a) (“This subchapter and the regulations prescribed thereunder shall be enforced by the  
17 Federal functional regulators, the State insurance authorities, and the Federal Trade Commission  
18 with respect to the financial institutions and other persons subject to their jurisdiction . . .”).  
19 Accordingly, the Court **DISMISSES WITH PREJUDICE** Count II of Plaintiffs’ amended  
20 complaint.

21 **C. Section 10(b) of the Securities and Exchange Act of 1934**

22 In Count III, Plaintiffs allege securities fraud under section 10(b) of the Securities  
23 Exchange Act of 1934. Section 10(b) of the Act and Rule 10b-5, promulgated by the Securities  
24 and Exchange Commission, prohibit certain institutions from engaging in manipulative or  
25 deceptive practices in connection with the sale of securities. To state a claim under Section 10(b)  
26 and Rule 10b-5, a plaintiff must plead: (1) a material misrepresentation or omission; (2) scienter;  
27 (3) in connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6)  
28 loss causation. See Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341-42 (2005). The limitations  
period for bringing securities claims under the Act is two years from the date of discovery of a

1 violation, but no longer than five years from the alleged violation. 28 U.S.C. § 1658.

2 Plaintiffs' allegation, that Defendants securitized and sold Plaintiffs' mortgage, see Am.  
3 Compl. ¶¶ 17-19, does not make Plaintiffs purchasers of securities. See Bello v. Chase Home  
4 Finance, 2011 WL 133351, at \*1 (S.D. Cal. Jan. 14, 2011) (citing Harms v. Recontrust Co., 2010  
5 WL 2573144, at \* 2 (N.D. Cal. June 24, 2010) and Bukhari v. T.D. Serv. Co., 2010 WL 2762794,  
6 at \* 5 (D. Nev. July 13, 2010)). Because Plaintiffs' amended complaint does not contain any  
7 credible allegations that Plaintiffs were purchasers of securities, Plaintiffs lack standing to sue for  
8 securities fraud. See Binder v. Gillespie, 184 F.3d 1059, 1067 (9th Cir. 1999) ("Only a purchaser  
9 or seller of securities has standing to bring an action under section 10(b) and Rule 10b-5."). In  
10 addition, as Defendants note, Plaintiffs allege that the violations occurred in 2003 and 2004, more  
11 than five years prior to the date Plaintiffs filed their original complaint in this Court on October 3,  
12 2010. Accordingly, Count III is time barred. In any event, Plaintiffs' amended complaint falls far  
13 short of meeting the special pleading requirements of Rule 9(b) of the Federal Rules of Civil  
14 Procedure. See Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with  
15 particularity the circumstances constituting fraud or mistake."). Based on the foregoing, the Court  
16 **DISMISSES WITH PREJUDICE** Count III of Plaintiffs' amended complaint.

17 **D. The Trust Indenture Act of 1939, 15 U.S.C. § 77aaa – 15 U.S.C. § 77bbbb**

18 The Trust Indenture Act ("TIA") supplements the Securities Act of 1933 and requires the  
19 appointment of a qualified trustee to act for the benefit of the holders of securities. See In re  
20 Nucorp Energy Securities Litigation, 772 F.2d 1486, 1489 (9th Cir. 1985). The TIA regulates  
21 corporate debt securities offered for sale in interstate commerce. Plaintiffs state only conclusory  
22 allegations and fail entirely to state any material facts that would support this claim. See generally  
23 Am. Compl. The Court need not accept legal conclusions as true, Iqbal, 129 S.Ct. at 1949, and  
24 therefore the Court **DISMISSES WITH PREJUDICE** Count IV of Plaintiffs' amended  
25 complaint.

26 **E. Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 78I**

27 In Count V, Plaintiffs allege Defendants violated section 12 of the Securities Exchange Act  
28 of 1934. However, there is no private right of action under Section 12 of the Securities and  
Exchange Act of 1934. Gervais v. American Express Centurion Bank, 2020 WL 4929077, at \*1

1 (S.D. Cal. Nov. 30, 2010). Even if there were a private right of action under Section 12, Count V  
2 would be time barred, as described above in Part II-C. Accordingly, the Court **DISMISSES**  
3 **WITH PREJUDICE** Count V of Plaintiffs' amended complaint.

4 **F. Civil Conspiracy**

5 Plaintiffs allege a civil conspiracy in Count VI. There is no private right of action under 18  
6 U.S.C. § 371, which is a criminal statute. Rapoport v. Republic of Mexico, 619 F. Supp. 1476,  
7 1480 (D.D.C. 1985) (holding "it is clear that no private right of action can exist under 18 U.S.C. §  
8 371."). The Court therefore **DISMISSES WITH PREJUDICE** Count VI of Plaintiffs' amended  
9 complaint.

10 **G. Rescission**

11 Count VII is for rescission. Defendants move to dismiss, arguing that Plaintiff has failed to  
12 allege tender. Whether or not Plaintiffs alleged tender, rescission is not an independent cause of  
13 action, but rather a remedy. See Jozinovich v. JP Morgan Chase Bank, N.A., 2010 WL 234895, at  
14 \*7 (N.D. Cal. Jan.14, 2010); see also Leisher v. Wachovia Mortgage, Inc., 2011 WL 98575, at \*11  
15 (S.D. Cal. Jan. 12, 2011). The Court has dismissed all counts in the amended complaint, and  
16 therefore there can be no claim for rescission. The Court **DISMISSES WITH PREJUDICE**  
17 Count VII of plaintiffs' amended complaint.

18 **H. Scienter**

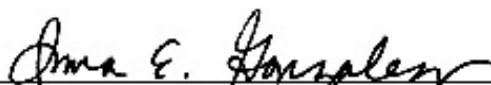
19 In Count VIII, Plaintiffs allege scienter. Because there is no cognizable cause of action for  
20 scienter, the Court **DISMISSES WITH PREJUDICE** Count VIII of Plaintiffs' amended  
21 complaint.

22 **CONCLUSION**

23 For the foregoing reasons, the Court **GRANTS** the motions to dismiss in their entirety and  
24 **DISMISSES WITH PREJUDICE** all counts in Plaintiffs' amended complaint. As a result, the  
25 Court **DENIES AS MOOT** the motion to strike.

26 **IT IS SO ORDERED.**

27 **DATED: March 15, 2011**

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IRMA E. GONZALEZ, Chief Judge  
United States District Court