

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

TAI-SI KIM and JIN-SUNG HONG,

Plaintiffs,

v.

ADAM B. KEARNEY, et al.,

Defendants.

2:09-CV-02008-PMP-PAL

ORDER

Presently before the Court is Defendant Alverson, Taylor, Mortensen & Sanders' Motion to Strike Plaintiffs' First Amended Complaint (Doc. #37), filed on March 15, 2010. Plaintiffs filed an Opposition (Doc. #50) on April 1, 2010. Defendant filed a Reply (Doc. #56) on April 12, 2010.

Also before the Court is Defendant First American Title Insurance Company's Motion to Strike First Amended Complaint (Doc. #38), filed on March 15, 2010. Plaintiffs filed an Opposition (Doc. #51) on April 1, 2010. Defendant filed a Reply (Doc. #54) on April 9, 2010.

Also before the Court is proposed defendant Valley Foreclosure Services' Motion for Summary Judgment (Doc. #45/#46), filed on March 29, 2010. Plaintiffs filed an Opposition (Doc. #72) on May 11, 2010. Proposed defendant Valley Foreclosure Services did not file a reply.

Also before the Court is Plaintiffs' Motion for Leave to File First Amended Complaint and to Add Parties (Doc. #55), filed on April 9, 2010. Defendant Alverson, Taylor, Mortensen & Sanders filed an Opposition (Doc. #63) on April 26, 2010. Defendant

1 First American Title Insurance Company filed an Opposition (Doc. #64) on April 26, 2010.
2 Plaintiffs filed Replies (Doc. #70, #71) on May 6, 2010.

3 Also before the Court is proposed defendant Cumorah Credit Union's Motion to
4 Dismiss (Doc. #57) and Motion to Strike Plaintiffs' Claims for Punitive Damages (Doc.
5 #59), filed on April 12, 2010. Plaintiffs Filed an Opposition (Doc. #73) on May 14, 2010.
6 Proposed defendant Cumorah Credit Union filed a Reply (Doc. #74) on May 24, 2010.

7 **I. BACKGROUND**

8 The Court set forth the factual predicate for this action in another Order filed
9 contemporaneously herewith, and the Court will not repeat the facts here except where
10 necessary. Generally, Plaintiffs' claims arise out of a real estate transaction in which
11 Plaintiffs contend they were duped into paying for an investment property ("the Property")
12 which Defendant Adam Kearney ("Kearney") encumbered with a loan by proposed
13 defendant Cumorah Credit Union ("Cumorah"). Kearney was to have turned over the
14 Property to Plaintiffs free and clear of any liens, including the Cumorah lien, upon Plaintiffs
15 exercising an option to buy the Property. Kearney initially did not transfer the Property to
16 Plaintiffs despite taking Plaintiffs' payment in cash, and did not pay off the Cumorah loan
17 even after he transferred the Property to Plaintiffs. Cumorah eventually foreclosed on the
18 Property, leaving Plaintiffs without the Property and without the cash they invested therein.

19 Plaintiffs filed suit in this Court on October 15, 2009, asserting claims against
20 Kearney and others involved in the transaction and its aftermath. Several Defendants
21 moved to dismiss the claims against them. Plaintiffs subsequently filed a First Amended
22 Complaint (Doc. #29) without leave of the Court, adding several new Defendants and
23 clarifying allegations against the original Defendants. Defendants Alverson, Taylor,
24 Mortensen & Sanders ("ATM&S") and First American Title Insurance Company ("First
25 American") filed motions to strike the First Amended Complaint. In the meantime, one of
26 the new proposed defendants, Valley Foreclosure Services ("VFS"), moved for summary

1 judgment on the First Amended Complaint's claims against it. Plaintiffs thereafter filed a
2 motion for leave to amend the Complaint in response to the motions to strike. Following
3 Plaintiffs' motion to amend, proposed new defendant Cumorah filed a motion to dismiss
4 and to strike aimed at the proposed First Amended Complaint. Given the procedural
5 posture, the Court will deny the motions to strike filed by Defendants ATM&S and First
6 American as moot, and will treat the motions by VFS and Cumorah as oppositions to
7 Plaintiffs' motion to amend on the grounds of futility.

8 **I. LEGAL STANDARD**

9 Generally, a plaintiff may amend his or her complaint once "as a matter of
10 course" within twenty-one days after serving it, or twenty-one days after service of a
11 responsive pleading or motion. Fed. R. Civ. P. 15(a)(1). In all other cases, a party may
12 amend its pleading only by leave of court or by written consent of the adverse party. Fed.
13 R. Civ. P. 15(a)(2). "The court should freely give leave when justice so requires." Id.; see
14 also Foman v. Davis, 371 U.S. 178, 182 (1962) ("Rule 15(a) declares that leave to amend
15 'shall be freely given when justice so requires'; this mandate is to be heeded."). The Court
16 considers five factors in deciding whether to grant leave to amend: "(1) bad faith, (2) undue
17 delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether
18 plaintiff has previously amended his complaint." Allen v. City of Beverly Hills, 911 F.2d
19 367, 373 (9th Cir. 1990) (citing Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160
20 (9th Cir. 1989)). The futility analysis determines whether the proposed amendment would
21 survive a challenge of legal insufficiency under Federal Rule of Civil Procedure 12(b)(6).
22 Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988).

23 In considering a motion to dismiss, "all well-pleaded allegations of material fact
24 are taken as true and construed in a light most favorable to the non-moving party." Wylor
25 Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation
26 omitted). However, the Court does not necessarily assume the truth of legal conclusions

1 merely because they are cast in the form of factual allegations in the plaintiff's complaint.
2 See Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). There is a
3 strong presumption against dismissing an action for failure to state a claim. Ileto v. Glock
4 Inc., 349 F.3d 1191, 1200 (9th Cir. 2003). A plaintiff must make sufficient factual
5 allegations to establish a plausible entitlement to relief. Bell Atl. Corp. v Twombly, 550
6 U.S. 544, 556 (2007). Such allegations must amount to "more than labels and conclusions,
7 [or] a formulaic recitation of the elements of a cause of action." Id. at 555. However, a
8 complaint "need not identify the statutory or constitutional source of the claim raised in
9 order to survive a motion to dismiss." Alvarez v. Hill, 518 F.3d 1152, 1157 (9th Cir. 2008).

10 **A. Alverson, Taylor, Mortensen & Sanders**

11 Defendant ATM&S opposes Plaintiffs' motion to amend, arguing that Plaintiffs
12 knew the facts supporting their amendment when they filed the original Complaint.
13 Additionally, ATM&S contends that the new allegations demonstrate ATM&S did not
14 proximately cause Plaintiffs' injuries because Plaintiffs hired counsel after ATM&S
15 provided services, and his alleged negligence is a superseding cause of Plaintiffs' injuries.

16 Plaintiffs respond that they did not know some of the facts supporting
17 amendment until First American Title Insurance Company filed its motion to dismiss,
18 which caused Plaintiffs to investigate their claims further. Plaintiffs further contend that
19 they also in good faith addressed some of the concerns Defendants raised in prior motions
20 to dismiss.

21 The Court will not deny leave to amend based on the argument that Plaintiffs
22 should have known about the facts supporting amendment previously. Plaintiffs have
23 indicated that Defendants' motions to dismiss alerted Plaintiffs to facts which they
24 subsequently investigated to support the new claims against the new proposed Defendants.
25 Plaintiffs also explain that they made clarifying allegations in response to Defendants'
26 motions.

1 As to whether Plaintiffs' allegations regarding the negligence of Plaintiffs'
2 subsequent attorney is a superseding cause relieving ATM&S of liability as a matter of law,
3 the Court will not deny amendment. Which Defendants proximately caused Plaintiffs'
4 injuries is a question of fact not suitable to resolution at this stage of the proceedings.
5 Plaintiffs may plead their claims against ATM&S and the subsequently-retained counsel in
6 the alternative. Fed. R. Civ. P. 8(d).

7 **B. First American Title Insurance Company**

8 Defendant First American Title Insurance Company ("First American") opposes
9 Plaintiffs' motion to amend, arguing that Plaintiffs have not cured the deficiencies First
10 American identified in relation to Plaintiffs' claims other than to add a factual allegation in
11 relation to the alleged misrepresentation made by First American employee, Defendant Gina
12 Thomas. First American argues that because some of the claims are futile and subject to a
13 motion to dismiss, the Court should not allow amendment until it first addresses First
14 American's motion to dismiss the original Complaint.

15 Plaintiffs respond that they did not know some of the facts supporting
16 amendment until First American filed its motion to dismiss, which caused Plaintiffs to
17 investigate their claims further. Plaintiffs further contend that they also in good faith
18 addressed some of the concerns Defendants raised in prior motions to dismiss.

19 As just discussed, Plaintiffs have indicated that Defendants' motions to dismiss
20 alerted Plaintiffs to facts which they subsequently investigated to support the new claims
21 against the new proposed Defendants. Plaintiffs also explain that they made clarifying
22 allegations in response to Defendants' motions. However, Defendant First American is
23 correct that Plaintiffs have not cured the deficiencies associated with several causes of
24 action against Defendant First American. The Court will not deny Plaintiffs leave to file the
25 proposed first amended complaint as it stands. However, if Plaintiffs file the proposed first
26 amended complaint as it stands, the Court will deny amendment as to those claims which

1 the Court identified as deficient in the Order filed contemporaneously herewith, and will
2 grant dismissal of those claims with prejudice. If Plaintiffs still seek to preserve those
3 claims, Plaintiffs must file a second amended complaint within thirty (30) days of the date
4 of this Order which cures the deficiencies identified in the Court's other Order.

5 **C. VFS**

6 Proposed defendant VFS moves for summary judgment, and thus opposes
7 amendment, on the four counts asserted against it: counts thirty-six (wrongful foreclosure),
8 thirty-seven (conversion), thirty-nine (slander of title), and forty (quiet title). VFS argues
9 that Plaintiffs' wrongful foreclosure claim is untimely under the relevant statute, and in any
10 event, Cumorah was entitled to foreclose because Kearney defaulted on the loan. VFS
11 contends a conversion claim only applies to personal property, not real property. As to
12 slander of title, VFS argues Plaintiffs were aware of the Cumorah lien and Cumorah had a
13 valid deed trust on the Property, and thus there was no false utterance regarding the
14 Property. As to the quiet title claim, VFS argues that although the claim's caption identifies
15 VFS as a defendant on this claim, VFS does not claim title to the Property, as the trustee's
16 deed grants title only to Cumorah.

17 Plaintiffs respond that VFS was not entitled to exercise any powers under the
18 applicable statutory authority because Plaintiffs owned the Property free and clear of
19 Cumorah's lien when they took the Property without notice of Cumorah's lien in June 2006.
20 Plaintiffs contend that when an alleged trustee lacks authorization to conduct a sale, the
21 trustee is not entitled to a statute of limitations defense. As to conversion, Plaintiffs
22 respond that if VFS disposed of personal property, such as fixtures, VFS is liable for
23 conversion, and Plaintiffs need to depose VFS and Cumorah to make this determination.
24 As to slander of title Plaintiffs contend a genuine issue of fact remains as to whether
25 Plaintiffs were bone fide purchasers who took without notice of Cumorah's pending lien.
26 As to the quiet title claim, Plaintiffs agree to dismiss this claim against VFS if VFS claims

1 no rights in the Property. Plaintiffs further argue that VFS's motion is premature because
2 Plaintiffs need discovery to determine whether it was VFS or Cumorah which induced
3 Plaintiffs' prior counsel to drop them as defendants from a prior complaint.

4 1. Wrongful Foreclosure

5 Under Nevada law, a plaintiff successfully pleads a wrongful foreclosure claim if
6 he alleges "that at the time the power of sale was exercised or the foreclosure occurred, no
7 breach of condition or failure of performance existed on the mortgagor's or trustor's part
8 which would have authorized the foreclosure or exercise of the power of sale." Collins v.
9 Union Fed. Sav. & Loan Ass'n, 662 P.2d 610, 623 (Nev. 1983). Under the relevant
10 statutory authority, a court may declare a foreclosure sale void under certain conditions, but
11 any action to void the sale must be brought either within 90 days after the date of the sale
12 for persons with notice of the foreclosure, or within 120 days after the date on which the
13 person received actual notice of the sale if proper notice was not provided pursuant to the
14 statute. Nev. Rev. Stat. § 107.080(5), (6).

15 Plaintiffs do not dispute that they had notice of the foreclosure sale and did not
16 bring their lawsuit against VFS within ninety days of the sale. Plaintiffs provide no
17 authority for the proposition that a trustee who lacks authorization to exercise a power of
18 sale is not entitled to a statute of limitations defense. The Court therefore will deny
19 Plaintiffs leave to amend to add a wrongful foreclosure claim against VFS.

20 2. Conversion

21 In Nevada, conversion is "a distinct act of dominion wrongfully exerted over
22 another's personal property in denial of, or inconsistent with his title or rights therein or in
23 derogation, exclusion, or defiance of such title or rights." Evans v. Dean Witter Reynolds,
24 Inc., 5 P.3d 1043, 1048 (Nev. 2000) (quotation omitted). Whether the defendant converted
25 the plaintiff's property generally is a question of fact. Id.

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1 Plaintiffs do not dispute that conversion applies only to personal property, not
2 real property. However, Plaintiffs contend VFS may have converted Plaintiffs' personal
3 property located on the real property when it was sold. Plaintiffs have not made any factual
4 allegations supporting this claim. Although Plaintiffs contend they need to depose VFS and
5 Cumorah to determine whether either entity converted Plaintiffs' property, Plaintiffs should
6 be aware of facts regarding whether they had any personal property on their real property
7 when it was sold. The Court therefore will deny Plaintiffs leave to amend to add this claim
8 as it stands in the proposed first amended complaint, but will grant leave to amend to add
9 factual allegations in support of this claim. If Plaintiffs still seek to preserve this claim,
10 Plaintiffs must file a second amended complaint within thirty (30) days of the date of this
11 Order which cures the deficiencies identified in this Order.

12 3. Slander of Title

13 In Nevada, to allege a slander of title claim, the plaintiff must allege that "the
14 words spoken were false, that they were maliciously spoken, and that the plaintiff sustained
15 some special pecuniary damages as a direct and natural result of their having been spoken."
16 Summa Corp. v. Greenspun, 607 P.2d 569, 573 (Nev. 1980). Recording a false document
17 satisfies the first element, and "a deed of trust which should have been cancelled is such a
18 false document." Id. Allegations that the defendant knew the statement was false or acted
19 in reckless disregard of its truth or falsity will satisfy the malice requirement. Rowland v.
20 Lepire, 662 P.2d 1332, 1335 (Nev. 1983). "The special pecuniary damage is that which
21 directly and immediately results from the impairment of the vendability of the land caused
22 by the publication of the disparaging matter." Summa Corp., 607 P.2d at 573.

23 Plaintiffs allege the Cumorah's deed of trust identified the wrong property, both
24 by the metes and bounds description and by parcel number, and Plaintiffs affirmatively
25 were told that the Cumorah lien had been satisfied. Plaintiffs thus assert they took the
26 Property as bona fide purchasers without notice. Plaintiffs also allege VFS and Cumorah

1 were aware of the potential for a mistake regarding the lien's status with respect to the
2 Property, because Cumorah recorded a corrected version of its lien after Plaintiffs acquired
3 the Property, yet VFS and Cumorah forged ahead with the foreclosure, and Plaintiffs
4 suffered damages as a result. Plaintiffs adequately have alleged a slander of title claim, and
5 the Court will grant leave to amend to add this claim.

6 4. Quiet Title

7 Plaintiffs have agreed not to assert this claim against VFS, as VFS has disclaimed
8 it asserts an interest in the Property. The Court therefore will deny leave to amend to add
9 this claim against VFS.

10 **D. Cumorah**

11 Proposed defendant Cumorah moves to dismiss, and thus opposes amendment, as
12 to counts thirty-six (wrongful foreclosure), thirty-seven (conversion), thirty-nine (slander of
13 title), and forty (quiet title). Cumorah argues Plaintiffs' wrongful foreclosure claim is
14 untimely. Cumorah further argues that even if this claim were timely, Cumorah was
15 entitled to foreclose because Kearney did not perform his obligations on the loan. Cumorah
16 also argues Cumorah's conduct was not the proximate cause of Plaintiffs' injuries for its
17 wrongful foreclosure, slander of title, and quiet title claims. Cumorah further argues the
18 conversion claim fails because conversion applies only to personal property, not real
19 property. Finally, Cumorah argues Plaintiffs' allegations do not support a request for
20 punitive damages as against Cumorah.

21 Plaintiffs respond that Plaintiffs are bona fide purchasers who have owned the
22 Property since they took it without notice of Cumorah's continuing lien on the Property in
23 June 2006. Plaintiffs further contend that because Cumorah ignored warning signs that it
24 may have lost its foreclosure rights due to its failure to record its deed of trust with an
25 accurate description of the Property, Plaintiffs have alleged facts supporting punitive
26 damages. As to their claims for slander of title and quiet title, Plaintiffs argue that Cumorah

1 did not make any arguments as to why these two claims should be dismissed other than to
2 argue that because the wrongful foreclosure claim must be dismissed, so must these two
3 claims. Finally, as to conversion, Plaintiffs argue that if Cumorah disposed of any of
4 Plaintiffs' personal property, such as fixtures, then Plaintiffs have a viable conversion
5 claim. Plaintiffs contend they need to depose VFS and Cumorah to make this
6 determination.

7 1. Wrongful Foreclosure

8 As discussed above, this claim is untimely. The Court therefore will deny leave
9 to amend to add this claim against Cumorah.

10 2. Conversion

11 As discussed above, Plaintiffs do not dispute that conversion applies only to
12 personal property, not real property. However, Plaintiffs contend Cumorah may have
13 converted Plaintiffs' personal property located on the real property when it was sold.
14 Plaintiffs have not made any factual allegations supporting this claim. Although Plaintiffs
15 contend they need to depose VFS and Cumorah to determine whether either of these entities
16 converted Plaintiffs' property, Plaintiffs should be aware of facts regarding whether they
17 had any personal property on their real property when it was sold. The Court therefore will
18 deny Plaintiffs leave to amend to add this claim as it stands in the proposed first amended
19 complaint, but will grant leave to amend to add factual allegations in support of this claim.
20 If Plaintiffs still seek to preserve this claim, Plaintiffs must file a second amended
21 complaint within thirty (30) days of the date of this Order which cures the deficiencies
22 identified in this Order.

23 3. Slander of Title

24 As set forth above, Plaintiffs have alleged a slander of title claim. The Court
25 therefore will grant Plaintiffs leave to amend to add this claim.

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4. Quiet Title

A plaintiff asserting a quiet title claim must allege that the defendant is unlawfully asserting an adverse claim to title to real property. Union Mill v. Mining Co. v. Warren, 82 F. 519, 520 (D. Nev. 1897); Clay v. Cheeline Banking & Trust Co., 159 P. 1081 (Nev. 1916). To prevail in a quiet title action, the plaintiff must establish “good title in himself.” Breliant v. Preferred Equities Corp., 918 P.2d 314, 318 (Nev. 1996).

Under Nevada law, “[e]very conveyance of real property within this State . . . which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly recorded.” Nev. Rev. Stat. § 111.325. A bona fide purchaser is under a duty of inquiry when “the circumstances are such that a purchaser is in possession of facts which would lead a reasonable man in his position to make an investigation that would advise him of the existence of prior unrecorded rights.” Berge v. Fredericks, 591 P.2d 246, 249 (Nev. 1979).

Cumorah argues that because it was entitled to foreclose after Kearney failed to pay off the loan, Plaintiffs have no wrongful foreclosure claim and thus no right to a quiet title claim. However, Plaintiffs allege they are bona fide purchasers who were unaware of the Cumorah loan. Although Cumorah argues Plaintiffs’ own allegations show they had actual notice of the Cumorah lien, Plaintiffs contend they did not have notice that the Cumorah loan had not been repaid, and in fact had been assured the loan was satisfied and the lien no longer encumbered the Property. Cumorah contends Plaintiffs were aware or should have been aware that the lien still encumbered the Property because they did not receive a payoff statement at escrow. Whether Plaintiffs actually were on notice or should have investigated further are questions not suitable for resolution at this stage of the proceedings. Plaintiffs have alleged facts supporting a quiet title claim and the Court

1 therefore will grant Plaintiffs leave to amend to add this claim.¹

2 5. Motion to Strike Punitive Damages

3 Cumorah moves to strike Plaintiffs' request for punitive damages. Evidence that
4 a defendant ignored warning signs of a potential mistake regarding its ability to foreclose
5 and proceeded with the foreclosure in the face of those warning signs may suffice to
6 support punitive damages. Countrywide Home Loans, Inc. v. Thitchener, 192 P.3d 243,
7 255 (Nev. 2008). Here, Plaintiffs allege Cumorah had warning signs that it did not have
8 authority to foreclose on the Property due to errors in the recorded deed of trust, yet it
9 proceeded with the foreclosure anyway. Given these allegations, the Court will not strike
10 the request for punitive damages at this stage of the proceedings.

11 **V. CONCLUSION**

12 IT IS THEREFORE ORDERED that Defendant Alverson, Taylor, Mortensen &
13 Sanders' Motion to Strike Plaintiffs' First Amended Complaint (Doc. #37) is hereby
14 DENIED as moot.

15 IT IS FURTHER ORDERED that Defendant First American Title Insurance
16 Company's Motion to Strike First Amended Complaint (Doc. #38) is hereby DENIED as
17 moot.

18 IT IS FURTHER ORDERED that proposed defendant Valley Foreclosure
19 Services' Motion for Summary Judgment (Doc. #45/#46) is hereby GRANTED in part and
20 DENIED in part. The motion is granted in that the Court will (1) deny Plaintiffs leave to
21 amend to add a wrongful foreclosure claim against Valley Foreclosure Services, (2) deny
22 Plaintiffs leave to amend to add a quiet title claim against Valley Foreclosure Services, and
23 (3) deny Plaintiffs leave to amend to add the conversion claim as it presently is stated. The

24 ¹ Defendant Cumorah argues for the first time in reply that because the wrongful foreclosure
25 claim is untimely, so are Plaintiffs' other claims related to the foreclosure. The Court declines to
26 consider this argument raised for the first time in the reply brief, as Plaintiffs have not had an
opportunity to respond. Carstarphen v. Milsner, 594 F. Supp. 2d 1201, 1204 n.1 (D. Nev. 2009).


1 motion is denied in that the Court will (1) grant Plaintiffs leave to amend to add the slander
2 of title claim as stated in the proposed first amended complaint, and (2) grant Plaintiffs
3 leave to file a second amended complaint adding factual allegations to support a conversion
4 claim.

5 IT IS FURTHER ORDERED that proposed defendant Cumorah Credit Union's
6 Motion to Dismiss (Doc. #57) is hereby GRANTED in part and DENIED in part. The
7 motion is granted in that the Court will (1) deny Plaintiffs leave to amend to add a wrongful
8 foreclosure claim against Cumorah Credit Union, and (2) deny Plaintiffs leave to amend to
9 add the conversion claim as it presently is stated. The motion is denied in that the Court
10 will (1) grant Plaintiffs leave to amend to add the slander of title and quiet title claims as
11 stated in the proposed first amended complaint, and (2) grant Plaintiffs leave to file a
12 second amended complaint adding factual allegations to support a conversion claim.

13 IT IS FURTHER ORDERED that proposed defendant Cumorah Credit Union's
14 Motion to Strike Plaintiffs' Claims for Punitive Damages (Doc. #59) is hereby DENIED.

15 IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File First
16 Amended Complaint and to Add Parties (Doc. #55) is hereby GRANTED in part and
17 DENIED part. Plaintiffs may elect to stand on the proposed first amended complaint.
18 Alternatively, Plaintiffs may file a second amended complaint within thirty (30) days of the
19 date of this Order correcting the deficiencies identified in this Order and the Order filed
20 contemporaneously herewith.

21
22 DATED: August 29, 2010

23 
24 PHILIP M. PRO
25 United States District Judge
26