DOCKET NO. 09-17678

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SALMA MERRITT and DAVID MERRITT,
Plaintiffs-Appellants,

vs.

COUNTRYWIDE FINANCIAL CORPORATION; COUNTRYWIDE HOME LOANS, INC.; ANGELO MOZILO; DAVID SAMBOL; MICHAEL COLYER, BANK OF AMERICA; KEN LEWIS; WELLS FARGO; JOHN STUMPF; JOHNNY CHEN; JOHN BENSON; DOE 1; DOES 2-100,
Defendants-Appellees.

Appeal From District Court Case No. C09-01179 JW (Consolidated)
The Honorable James Ware Presiding

OPENING BRIEF OF COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE FINANCIAL CORPORATION, BANK OF AMERICA CORPORATION, MICHAEL COLYER, DAVID SAMBOL, and KENNETH LEWIS

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CORPORATE DISCLOSURE STATEMENT

[Fed. R. App. P. 26.1]

Bank of America Corporation is publicly traded on the New York Stock Exchange (ticker symbol "BAC"). Bank of America owns 100% of Countrywide Financial Corporation, which, in turn, owns 100% percent of Countrywide Home Loans, Inc.

EXCERPTS OF RECORD

[Fed R. App. P. 30; 9th Circuit Rule 30-1]

Appellants did not file an Appendix or Excerpts of Record. Appellees have ordered a certified reporter's transcript and have requested, by separate pleading, permission to defer the filing of Supplement Excerpts of Record until June 21, 2010. This Opposition Brief cites those Supplemental Excerpts by District Court document/docket entry number ("DE").

JURISDICTIONAL STATEMENT

[Fed. R. App. P. 28(a)(4)]

The District Court asserted federal question jurisdiction. 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1292(a).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[Fed. R. App. P. 28(a)(5)]

Whether the District Court properly dismissed Appellants' Second Amended Complaint because its federal claims failed as a matter of law and because further amendment would be futile.

INTRODUCTION

This is a case about borrowers who fell on hard times during a steep decline in the housing market. In 2006, Appellants David and Salma Merritt bought a residence in Sunnyvale, California, for $729,000. To finance the purchase, Appellants obtained a loan and a home equity line of credit from Countrywide Home Loans, with the terms fully disclosed to them. After making monthly payments for 30 months, Appellants suffered a financial reversal. They stopped making loan payments in September 2008, but continue to live in the house.

By 2009, the house's market value allegedly had declined by $200,000. In February 2009, Countrywide modified Appellants' loans to reduce their monthly payments. Appellants continued to default. Although Countrywide did not exercise its right to foreclose, Appellants brought this lawsuit in March 2009, seeking to rescind the loans and recover $200,000 in loan payments.

Their pro se Complaint, as twice amended and once revised, presents the conclusory, self-contradictory, and odious theory that eleven named defendants, including Countrywide Home Loans, created a nationwide criminal enterprise to defraud African-Americans and (to quote Appellants) other "less educated" homebuyers. Appellants' eleven causes of actions range from racial discrimination and civil RICO to violation of the Truth in Lending Act, the Real Estate Settlement Procedures Act, and the Lanham Act. These claims center on Countrywide's alleged failure to disclose at closing that Appellants' residential loan was a variable rate loan with interest-only payments for the first five years and Countrywide's.

After amending and revising their Complaint three times, Appellants alleged no facts that would give merit to their claims. The District Court dismissed Appellants' federal claims with prejudice and declined to exercise supplemental jurisdiction over their state law claims.

This Court should affirm.

STATEMENT OF THE FACTS AND THE CASE

[Fed. R. App. P. 28(a)(6) and (7)]

Appellants' 68-page Second Amended Complaint ("SAC") contains 398 numbered paragraphs plus a 14-paragraph prayer for relief (DE-59). The District Court found its text "mostly unintelligible" (DE-125 at 1). Despite its many words, the SAC avoids factuality, particularly when discussing documents said to support Appellants' claims.

The Defendants. Appellants contend that eleven parties as disparate as the seller of their residence and the CEO of Wells Fargo Financial participated in a Bank of America-led conspiracy and criminal enterprise:

- the seller of the property at issue, Johnny Chen;
- the appraiser of the property, John Benson;
- Appellants' lender, Countrywide Home Loans ("Countrywide");
- a Countrywide branch manager, Michael Colyer;
- Countrywide's former President, David Sambol;
- Countrywide's parent, Countrywide Financial Corporation ("CFC");
- the former Chairman and CEO of CFC, Angelo Mozilo;
- CFC's parent since 2008, Bank of America Corporation;
- the former CEO of Bank of America, Kenneth Lewis;
- Wells Fargo Financial, which has no corporate affiliation with Countrywide or Bank of America; and
- the CEO of Wells Fargo, John Stumpf (DE-59 at 2-4 ¶¶ 2-15).[1/]

[1/] This Opposition is filed on behalf of Countrywide, CFC, Bank of America, and Messrs. Colyer, Sambol, and Lewis. To promote clarity in the face of Appellants' blurred allegations, the Opposition focuses on Countrywide; but its arguments apply with equal force to the other five defendants, who have discrete additional defenses that the District Court did not need to reach (see pp. 31-32).

The SAC obliterates all personal, corporate, contractual, employment, and other distinctions among these parties by referring repeatedly to "Defendants" and making kitchen-sink allegations of alter ego and successor liability, agency/joint venture, aiding and abetting, and conspiracy (DE-59 at 4-5 ¶¶ 16-21).

The Allegations. Appellants' allegations are "based on information and belief" and also made "hypothetically, in regard to those areas which are particularly within the control and care of defendants" (DE-59 at 5 ¶ 23). Appellants do not identify their "hypothetical" allegations, but the SAC spins tales of cross-country travel and face-to-face meetings between conspiring corporate executives (e.g., DE-59 at 9-11, 24-25, 26, 29-30 ¶¶ 40-54. 149-52, 160, 181-83) and quotes imaginary conversations (e.g., Id. at 15 ¶¶ 79). There are sprawling allegations about loan practices not at issue (Id. at 5-7 ¶¶ 26-31); other complaints and lawsuits (Id. at 8, 11, 25 ¶¶ 34, 56, 152, 185-188); and a 2002 Bank of America collection action against Appellants (Id. at 19-20, 62-63 ¶¶ 109-16, 367-72).

From this stew of mostly irrelevant, self-contradictory, and fanciful prose, Appellants ladle legal conclusions that lack supporting factual allegations and, indeed, artfully ignore or bury crucial facts and documents. At Countrywide's request, the District Court took judicial notice of Appellants' loan documents "because the documents are referenced in the Second Amended Complaint and Plaintiffs do not question their authenticity" (DE-125 at 3 n.5, citing Branch v. Tunnell, 14 F.3d 449, 453-54 (1994), overruled on other grounds, Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002)). These documents refute Appellants' theories at every turn.[2/]

[2/] In one of many attempts to revise history on appeal, Appellants' Opening Brief says that Appellants "dispute[d] the authenticity of documents" below (Opg. Br. at 8). They did not (see DE-125 at 3 n.5).

According to the SAC, Appellants agreed to buy a residential property from Mr. Chen for $729,000 and entered escrow in February 2006 (DE-59 at 13-16 ¶¶ 65, 75, 91). Appellants planned to finance the purchase and certain improvements by obtaining a $739,000 loan through their real estate agent (Id. at 13-14 ¶¶ 68, 75). When that fell through, they applied to Wells Fargo (Id. at 14 ¶¶ 76-77). Wells Fargo referred Appellants to Countrywide (Id. at 14-15 ¶¶ 77-82).

A Countrywide loan officer, Mr. Colyer, proposed a $591,200 residential loan "fixed for five years at about $3,200 monthly" and a $147,800 home equity line of credit ("HELOC") "for about $1,200" monthly (DE-59 at 21 ¶ 131). He allegedly opined that the value of Appellants' house would increase, allowing them to refinance at a lower interest rate within one year (Id. at 24 ¶¶ 144-46, 48 ¶ 296).

Appellants signed the final loan documents on or about March 27, 2006 (DE-59 at 23 ¶¶ 141-42). One year later, Appellants tried to refinance by contacting Mr. Colyer as well as Mr. Sambol, Mr. Mozilo, and Wells Fargo's CEO, Mr. Stumpf (DE-59 at 25 ¶ 153). "Defendants" did not fulfill these requests (Id.).

Mr. Colyer also allegedly said that Appellants would "always" be able to draw on the HELOC (DE-59 at 26 ¶ 159). In 2008, however, checks drawn on their HELOC were rejected due to insufficient funds (Id. ¶ 163). Mr. Colyer advised Appellants that their HELOC "would not be unfrozen unless Appellants proved that their property had not fallen below 5% of what was owed" (Id. ¶ 164).

Appellants then suffered a financial reversal and could not make their loan payments: "During August 2008, Appellants' [sic] lost disability payments from Metlife which severed their income in half, with their living expenses being between 2 to 4 thousand per month and their mortgage above $4,000. And so they could no longer afford to make their mortgage payments…. From September 2008 to May 2009, Appellants' [sic] have failed to make payments…." (DE-59 at 28 ¶¶ 175-76).

In February 2009, Appellants notified "Defendants" that "they were exercising their right to rescind and requested the more than $200,000" paid on their loans (DE-59 at 30-31 ¶ 190). "Defendants" "ignored their notice by trying to modify [their] loan with other predatory loans" and ignored all further communications about refinancing (Id. ¶¶ 190-93, 201).

As of March 2009, the market value of Appellants' home had declined from its purchase price by more than $200,000 (DE-59 at 30 ¶ 184).

The Loan Documents. Appellants' claims center on a contention that "Defendants" did not disclose that Appellants' monthly payments on the loan were at a variable rate and interest-only for the first five years and that "Defendants" did not provide other required disclosures (e.g., DE-59 at 23 ¶ 142, 25 ¶ 155).

Appellants' loan documents tell a different story. On March 27, 2006, Appellants signed and, in many instances, initialed the following documents to secure the residential loan and HELOC from Countrywide:

- An "Interest Only Adjustable Rate Note" whose first paragraph contains the bold-faced statement that "THIS NOTE CONTAINS PROVISIONS ALLOWING FOR A CHANGE IN MY FIXED INTEREST RATE TO AN ADJUSTABLE INTEREST RATE AND FOR CHANGES IN MY MONTHLY PAYMENT" (DE-69-2 at 2);
- The "Interest Only Adjustable Rate Note" also specifies the initial monthly payment on the first page and states that this payment is subject to change (Id. at 2-3 ¶¶ 2-4);
- A "Deed of Trust" with an "Adjustable Rate Rider" (Id. at 8).
- An "Interest-Only Feature Disclosure" that states: "You have applied for a loan that provides for monthly payments of interest-only during the first 5 years, followed by monthly payments of principal and interest for the remaining years of the loan" (Id. at 24).

- The "Interest-Only Feature Disclosure" warns: "During the interest-only period, the monthly payment will not reduce the principal balance that is outstanding on your loan. After the interest-only period, your monthly payment will be higher during the remaining 25 year term of the loan to cover principal and interest" (Id).
- A "Truth In Lending Disclosure Statement" for the loan that states that Appellants' monthly payments will be $3,203.33 for the first five years and $4,320.96 for the next 25 years – and that states: "Interest Only" and "This loan has a variable rate feature" (Id. at 26).
- A "Home Equity Credit Line Agreement and Disclosure Statement" that warns (among other things) that Countrywide may suspend further loans or reduce Appellants' credit limit if "the value of the Property declines significantly below its appraised value" or if Appellants are "in default of any material obligation of this Agreement" (Id. at 35 ¶ 12(A)(1), (3)).
- A "Notice of Right to Cancel" the Home Equity Line of Credit advising Appellants that they have until midnight on March 30, 2006, to rescind cancel that Line of Credit (Id. at 53).

To attempt to sidestep the indisputable fact that they received and signed the loan documents at closing, Appellants contend that they did not retain "filled-in" copies of the documents (DE-59 at 24 ¶ 146).

On February 24, 2009, Appellants and Countrywide entered into loan modification agreements (DE-69-2 at 55, 60). The agreements reduced Appellants' loan obligation to fixed 4.5% interest-only payments of $2,261.36 for three years, followed by principal and fixed 6.5% interest payments of $4,134.09 for the remainder of the loan (Id. at 55 ¶ 2) and also eliminated the 3% margin used to calculate Appellants' annual percentage rate for the HELOC (Id. at 60 ¶ 5).

THE ORDER AT ISSUE

Appellants filed their Complaint on March 18, 2009 (DE-1). On May 22, 2009, Appellants filed a First Amended Complaint, adding Mr. Stumpf and Mr. Chen as defendants and two new causes of action (DE-26). On May 26, 2009, Appellants "revised" their First Amended Complaint, adding Mr. Benson as a defendant and three new causes of action (DE-34).

The varied Defendants filed motions to dismiss (DE-47, DE-49, DE-54, DE-55). On June 9, 2009, Appellants sought leave to file a Second Amended Complaint (DE-52, DE-53), which the District Court granted (DE-57; see DE-59).

The varied Defendants then moved to dismiss the SAC (DE-69, SE-70, DE-81, DE-84). Appellants opposed the motions, but did not file a discrete opposition to Countrywide's Motion (see DE-93, DE-109).

"In light of Plaintiffs' pro se status," the District Court "liberally construe[d]" the Complaint and discerned seven federal claims. Because these claims provided its subject matter jurisdiction, the District Court considered their merits first. It held that all federal claims failed and dismissed those claims with prejudice (DE-125 at 3-12). Appellants challenge some, but not all, of these rulings on appeal.

Because Appellants had no viable federal claims, the District Court declined to exercise supplemental jurisdiction over Appellants' state law claims (DE-125 at 12-13). Appellants do not challenge that ruling.[3/]

[3/] A district court may "decline to exercise supplemental jurisdiction over a claim … if … the district court has dismissed all claims over which it has original jurisdiction…." 28 U.S.C. § 1367(c). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors … will point toward declining to exercise jurisdiction over the remaining state-law claims." Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 n.7 (1988); see also Acri v. Varian Assocs., Inc., 114 F.3d 999, 1001 (9th Cir. 1997).

STANDARD OF REVIEW

[Fed. R. App. P. 28(a)(9)(B))]

In evaluating a Rule 12(b)(6) motion to dismiss, the District Court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). "The court need not accept as true, however, allegations that contradict facts that may be judicially noticed by the court, and may consider documents that are referred to in the complaint whose authenticity no party questions." Shwarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000) (citations omitted); see Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

To withstand a Rule 12(b)(6) motion, plaintiffs must plead enough facts to "nudge[] their claims across the line from conceivable to plausible." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007); see Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 1949. Thus, "for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. United States Secret Service, 572 F.3d 962, 969 (9th Cir. 2009).

"Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 129 S. Ct. at 1950.

The District Court may dismiss a complaint without leave to amend if plaintiff cannot cure the defect by amendment or amendment would be futile. Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000); Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1298 (9th Cir. 1998).

ARGUMENT

I. THE DISCLOSURE CLAIMS FAIL AS A MATTER OF LAW

(A) The Truth in Lending Act

Appellants contend that "Defendants" violated the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et seq., by failing to inform Appellants of their right to rescind and about finance charges; failing to deliver a "filled-in" copy of their right to rescind; and providing unspecified "false and misleading information during the course of the consumer credit transaction" (DE-59 at 53 ¶¶ 322-27).

(1) Appellants Cannot Seek Rescission of Their Residential Loan

The TILA right of rescission does not extend to "residential mortgage transactions." 15 U.S.C. § 1635(e). Because Appellants obtained their loan to purchase a house (DE-59 at 13 ¶¶ 64-77), the District Court held that Appellants "have no right to rescind the Note under TILA" (DE-125 at 4).

Appellants do not challenge this ruling on appeal.

(2) Appellants Failed To Allege Tender

The District Court held that "Plaintiffs' rescission claim as to the Home Equity Line of Credit fails because Plaintiffs did not tender the value of the Home Equity Line of Credit to [Countrywide] when Plaintiffs sought rescission" (DE-125 at 4). Appellants do not challenge this ruling on appeal.

The purpose of TILA rescission is to return both parties to the status quo ante. Yamamoto v. Bank of New York, 329 F.3d 1167, 1171 (9th Cir. 2003). Although TILA discusses the borrower's "return of money or property following rescission," 15 U.S.C. § 1635(b), the district courts have discretion to "modify the sequence of rescission events" to require the borrower to allege tender prior to rescission. Yamamoto, 329 F.3d at 1170; see also LaGrone v. Johnson, 534 F.2d 1360, 1362 (9th Cir. 1976) (conditioning loan rescission on the borrower's tender of advanced funds).

The tender requirement "comports with congressional intent that 'the courts, at any time during the rescission process, may impose equitable conditions to insure that the consumer meets his obligations after the creditor has performed his obligations as required by the Act." Yamamoto, 329 F.3d at 1173, citing S. Rep. No. 368, 96th Cong., 2d Sess. 29 (1980), reprinted in 1980 U.S.C.C.A.N. 236, 265). If Appellants cannot fulfill their rescission obligations, then trial of TILA claims is meaningless and wasteful. See Yamamoto, 329 F.3d at 1171-73.

Guided by this Court's reasoning, the district courts regularly dismiss TILA claims when plaintiffs, like Appellants, fail to allege tender or acknowledge inability to tender in their complaint. E.g., Sitanggang v. IndyMac Bank, FSB, 2009 WL 1286484, at *5 (E.D. Cal. Mar. 6, 2009) ("[t]he absence of a sufficiently alleged … tender of loan proceeds dooms plaintiff's TILA rescission claim to warrant its dismissal"); Garza v. American Home Mortg., 2009 WL 188604, at *4 (E.D. Cal. Jan. 27, 2009); Guerrero v. City Residential Lending, Inc., 2009 WL 926973, at *8 (E.D. Cal. Apr. 3, 2009); Edelman v. Bank of America Corp., 2009 WL 1285858, at *2 (C.D. Cal. Apr. 17, 2009).

Given Appellants' failure to allege tender of the HELOC proceeds – and their admitted inability to make any loan payments since 2008 (DE-59 at 28 ¶¶ 175-76) – application of the tender requirement here was warranted to prevent "the empty (and expensive) exercise of a trial on the merits." Yamamoto, 329 F.3d at 1173.

(3) Appellants' Claims Are Time-Barred

Damages Claim. A TILA damages claim must be brought within one year "from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). Appellants obtained their loans on March 27, 2006 (DE-59 at 23 ¶¶ 141-42; DE-69-2 at 2, 29). They filed this action nearly three years later, on March 18, 2009 (DE-1). The District Court thus held that the damages claim was time-barred (DE-125 at 5).

Rescission Claim. Under TILA, a borrower has three business days following the consummation of a loan transaction to rescind the transaction. 15 U.S.C. § 1635(a). Appellants signed and initialed the Notice of Right to Cancel on March 27, 2006, acknowledging receipt of two complete copies of the Notice (DE-69-2 at 53). Appellants concede that they did not attempt to rescind the loan within three days, but instead waited until February 2009 (DE-59 at 53-54 ¶ 329). Because the District Court held that Appellants could not rescind their residential loan and that Appellants' failure to tender barred rescission of the HELOC, it did not reach Countrywide's statute of limitations defense to rescission.

(4) There Is No Justification for Tolling

Appellants seek equitable tolling of the statutes of limitation (Opg. Br. 5-10). Because Appellants do not challenge the District Court's dismissal of their rescission claims, their tolling argument concerns TILA's one-year statute of limitation for damages. As an alternative ground for affirmance, however, Countrywide will also discuss the three-year statute of limitation for rescission.

Damages Claim. "[A]llegations of fraudulent concealment, which toll the statute of limitations, must meet the requirements of Fed. R. Civ. P. 9(b). Thus, a plaintiff must plead with particularity the facts giving rise to the fraudulent concealment claim and must establish that they used due diligence in trying to uncover the facts." Larson v. Northrop Corp., 21 F.3d 1164, 1173 (D.C. Cir. 1994) (internal citations and quotes omitted), cited favorably in Wasco Products, Inc. v. Southwall Tech., Inc., 435 F.3d 989, 991 (9th Cir. 2006); see Conerly v. Westinghouse Elec. Corp., 623 F.2d 117, 120 (9th Cir. 1980).

Because Appellants received and signed the disclosures that form the basis for their TILA claim, Appellants cannot show ignorance of the facts said to support this claim. As the District Court held, the "contention … that Plaintiffs obtained certain loan documents from Defendants in 2009 falls short of showing how

Plaintiffs are entitled to any tolling. To the contrary, the TILA disclosure executed by Plaintiffs shows that the payment schedule was disclosed to Plaintiffs on the date of their loan" (DE-125 at 5).

Rescission Claim. The three-day period for TILA rescission cannot be "tolled," but will extend to three years if the lender fails to deliver to the borrower (1) "all material disclosures" or (2) "two copies of the notice of the right to rescind." 12 C.F.R. § 226.23(a)(3), (b)(1).

Appellants cannot show that Countrywide failed to provide any "material" disclosure. "The term 'material disclosures' means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in §§ 226.32(c) and (d)." 12 C.F.R. § 226.23(a)(3) n.48. The only other disclosure that TILA requires for a variable-rate loan is that the "loan contain[s] a variable-rate feature." Jordan v. Paul Financial, LLC, 644 F. Supp. 2d 1156, 1164 (N.D. Cal. 2009). Appellants' loan documents contain all of these disclosures (DE-69-2).

Appellants do not allege that Countrywide failed to deliver any TILA disclosures, including the Notice of Right to Cancel. Appellants do not contend they didn't see the completed disclosures. Appellants do not contend they didn't sign the disclosures. Instead, Appellants claim that, until February 2009, they possessed only blank, unsigned copies of certain documents (Opg. Br. at 8; see DE-59 at 53 ¶ 327) and that "defendants had and kept full, absolute control over the only completed loan documents" (Opg. Br. at 5).

Written acknowledgment of the receipt of required TILA disclosures creates a rebuttable presumption of delivery. 15 U.S.C. § 1635(c). "A disclosure statement's signed acknowledgment that plaintiff borrowers … received a fully completed copy of the disclosure statement in the absence of dispute as to the document's authenticity 'constitutes prima facie proof of delivery.'" Garza v.

American Home Mort., 2009 WL 1139594, at *3 (E.D. Cal., April 28, 2009), citing Whitlock v. Midwest Acceptance Corp., 575 F.2d 652, 653 (8th Cir. 1978). In taking judicial notice of Appellants' loan documents, the District Court noted that Appellants did not contest their authenticity (DE-125 at 3 n.5). "Confronted with a prima facie case, [plaintiff-borrowers] [must not] rest on their complaint's allegation and are 'required to offer some evidence in support of the allegation.'" Garza, 2009 WL 1139594 at *3; see Basham v. Finance America Corp., 583 F.2d 918, 929 (7th Cir. 1978).

If Appellants' rescission claim based on the HELOC did not fail for lack of tender, then it failed because Appellants' allege nothing to show a lack of delivery.

(5) Appellants Do Not Show that Countrywide Failed to Fulfill TILA

Even if Countrywide had no other defenses, the signed loan documents refute Appellants' vague allegations of a failure to make TILA disclosures. Appellants executed an FDIC-approved "Truth In Lending Disclosure Statement" that provides all "material disclosures" and, for example, identifies Appellants' monthly payments for the residential loan as $3,203.33 for the first five years and $4,320.96 for the next 25 years – and also states: "Interest Only" and "This loan has a variable rate feature" (DE-69-2 at 26).

Appellants executed an "Interest-Only Feature Disclosure" for the loan that confirms that the monthly payments are "interest-only during the first 5 years, followed by monthly payments of principal and interest for the remaining years of the loan" and that "[d]uring the interest-only period, the monthly payment will not reduce the principal balance that is outstanding on your loan" (DE-69-2 at 24).

Appellants also executed a disclosure for the HELOC of information required for an "open-end" consumer credit plan (DE-69-2 at 29). See 15 U.S.C. § 1637(a).

Appellants do not identify any disclosed information that was erroneous.

(6) There Are No Allegations of Actual Damages

Appellants' TILA claim also fails because there is no viable allegation of harm. "[I]n order to receive actual damages for a TILA violation, i.e., 'an amount awarded to a complainant to compensate for a proven injury or loss,' a borrower must establish detrimental reliance." In re Smith, 289 F.3d 1155, 1157 (9th Cir. 2002) (citations omitted). Because Appellants do not allege that they "would have either gotten a better interest rate or foregone the loan completely, then no actual loss is suffered." Id. Indeed, Appellants' allegations show that at least one other loan company denied them a loan (DE-59 at 14 ¶ 76).[4/]

[4/] Appellants' Ninth Cause of Action revisited TILA, urging that "Defendants" "knowingly and willingly withheld certain key documents or information which should have been filled in documents" in violation of 12 C.F.R. § 226.23(a)(3), FDIC 6500 226.19, and 15 U.S.C. § 1601 (DE-59 at 63 ¶¶ 374, 376).

15 U.S.C. § 1601 is TILA's Congressional Findings and Statement of Purpose. As discussed above, 12 C.F.R. § 226.23(a)(3) extends the three-day statute of limitations for rescission to three years. Appellants allege no facts to invoke FDIC 6500 226.19(a), which requires a lender to make certain disclosures within three days of receiving a mortgage application. As the District Court held:

> To the extent that there were other disclosures that Defendants were allegedly required to make upon receipt of Plaintiffs' application, the 398 paragraph Second Amended Complaint fails to make any comprehensible allegation to that effect. Thus, Plaintiffs fail to state a claim regarding failure to provide disclosures under 12 C.F.R. § 226.23(a)(3), 6500 FDIC § 226.19, and 15 U.S.C. § 1601 (DE-125 at 10-11).

(B) The Real Estate Settlement Procedures Act

(1) The Section 8 and 9 Claims Fail as a Matter of Law

Appellants allege that "Defendants" violated RESPA Sections 8 and 9, 12 U.S.C. §§ 2607-08, by "failing to disclose TILA and other documents"; "hid[ing] the fact that Plaintiffs would have to pay more that the amount showed on their payment statements in order to pay their principle [sic]"; "not disclosing right to review HUD statement"; charging inappropriate finance charges; forcing Appellants to purchase title insurance from "Defendants'" chosen provider; and wrongfully splitting fees and paying kickbacks to Bank of America and Wells Fargo for customer referrals to Countrywide (DE-59 at 54-55 ¶¶ 334-37, 339).

RESPA remedies few of these supposed wrongs. Section 8 prohibits giving or receiving referral fees or kickbacks as part of a real estate settlement service. 12 U.S.C. § 2607. Section 9 prohibits a seller of property purchased with a federally related mortgage loan from requiring the buyer to purchase title insurance from any particular title company. 12 U.S.C. § 2608.

Statute of Limitations. Assuming that one or more of Appellants' blast of conclusory allegations included factual support sufficient to trigger RESPA, Section 8 or 9 claims must be brought within one year of the "occurrence." 12 U.S.C. § 2614. This period begins to run on the date of the closing. Snow v. First Am. Title Ins. Co., 332 F.3d 356, 359 (5th Cir. 2003).

Appellants' loans closed on March 27, 2006. The statute of limitation period expired on March 27, 2007. Appellants did not file their Complaint until March 18, 2009 (DE-1).

Appellants allege nothing to justify equitable tolling. As discussed above, Appellants saw and signed their loan documents on March 27, 2006. Appellants' nebulous allegations fail to identify any fees required by RESPA that were not properly disclosed. Appellants knew, at the time of closing, the finance charges

they had to pay (DE-69-2 at 2, 24, 29). Appellants knew, at the time of closing, whether they had been "forced" to purchase title insurance from Countrywide's chosen provider. Appellants provide no factual allegations to support their conclusory assertions that inappropriate charges, fee-splitting, and kick backs occurred as part of their loan transaction – and thus fail, for example, to- identify any specific fee or kickback that Countrywide gave or received. Appellants allege no facts they subsequently discovered that demonstrate a basis for tolling. "Absent factual enhancement of Plaintiff['s] conclusory allegations, … Plaintiff['s] cause of action for violation of [RESPA] is time barred." Permpoon v. Wells Fargo Bank Natl. Ass'n, 2009 WL 3214321, at *10 (S.D. Cal. Sept. 29, 2009).

(B) The Section 6 Claim Fails as a Matter of Law

RESPA also requires servicers of federally regulated mortgage loans to respond to borrowers who make "a qualified written request … for information relating to the servicing of" a loan. 12 U.S.C. § 2605(c)(1). RESPA defines a "qualified written request" as:

> written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that-- (i) includes … the name and account of the borrower; and (ii) includes a statement of the reasons for the belief of the borrower … that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

12 U.S.C. § 2605(e)(1)(B).

The request must relate to "servicing"; thus, "correspondence about the validity of a loan does not constitute a qualified written request." Kee v. Fifth Third Bank, 2009 WL 735048, at *6 (D. Utah Mar. 18, 2009); see MorEquity, Inc. v. Naeem, 118 F. Supp. 2d 885, 901 (N.D. Ill. 2000).

A "qualified written request" must include "a statement of the reasons that the borrower believes the account is in error, if applicable" or provide "sufficient

detail to the servicer regarding information relating to the servicing of the loan sought by the borrower." 24 C.F.R. § 3500.21(e)(2)(i); see Harris v. Am. Gen. Fin., Inc., 2007 WL 4393818, at *1 (10th Cir. Dec. 18, 2007); Walker v. Equity 1 Lenders Group, 2009 WL 1364430, at *4-5 (S.D. Cal. May 14, 2009); Morilus v. Countrywide Home Loans, Inc., 2007 WL 1810676, at *3 (E.D. Pa. June 20, 2007); Pettie v. Saxon Mortg. Serv., 2009 WL 1325947, at *2 n.3 (W.D. Wash. May 12, 2009).

Appellants' Section 6 claim is governed by a three-year statute of limitation. 12 U.S.C. § 2614. As the District Court found, however, the SAC does not show that Appellants made a "qualified written request" to Countrywide (DE-125 at 6).

The SAC alleges that "communiqués" were sent to Messrs. Colyer and Sambol at Countrywide, as well as to Mr. Mozilo at CFC, Mr. Lewis at Bank of America, and Mr. Stumpf at Wells Fargo (DE-59 at 31 ¶¶ 192-93). A "qualified written request" could be sent only to the loan servicer – which Appellants allege is Countrywide (Id. at 24 ¶ 148) – not CFC, Bank of America, or Wells Fargo.

Appellants' Opening Brief says that their "communiqués" "cited names, loan numbers and detailed issues" (Opg. Br. at 10), but the SAC does not identify the content of any "communiqué" sent to Countrywide and does not allege that any "communiqué" included Appellants' name, account number, and "detailed issues" (see DE-59 at 54-55 ¶¶ 333-40). The SAC likewise alleges nothing to show that Appellants' "communiqués" to Messrs. Colyer and Sambol at Countrywide involved loan servicing. The SAC says that one "communiqué" sought rescission under TILA (which does not involve loan servicing and is not a "qualified written request"); Appellants are silent on the content of other "communiqués" (DE-59 at 30-31 ¶¶ 190-92).

Appellants' Opening Brief also says that "only a few out of more than 2 dozen ["communiqués"] were submitted to court" (Opg. Br. at 10), but Appellants

provided no documents to the District Court. Appellants attached none of their "communiqués" to the SAC and provided none in opposition to the Motions.

The SAC later alleges that "Defendants" failed to respond to "requests about [Appellants'] loan such as providing documents as well as disputing why Defendants were not living up to their promise to refinance, and disputing why their payments were not being applied to the principle [sic] of the loan" (DE-59 at 55 ¶ 338); but Appellants do not allege to which "Defendant" these "requests" were sent and when. Even assuming that Appellants sent these "requests" to Countrywide, they are not "qualified written requests" under RESPA. None involves loan servicing. None seeks correction of an account error; for example, requesting that Countrywide give Appellants credit for "any scheduled periodic payments." 12 U.S.C. § 2605(i)(3). Instead, accepting their allegations as true – and assuming the requests were sent to Countrywide – Appellants requested information about the validity of the loan, a supposed promise to enter into a new loan agreement, and loan documents created before servicing even commenced.

(3) There Are No Allegations of Actual Damages

RESPA requires "actual damages to the borrower as a result of the failure [to comply with RESPA requirements]." 12 U.S.C. § 2605(f)(1)(A). "[A]lleging a breach of RESPA duties alone does not state a claim…. Plaintiff[s] must, at a minimum, also allege that the breach resulted in actual damages." Pok v. Am. Home Mortgage Servicing, Inc., 2010 WL 476674, at *5 (E.D. Cal. Feb. 3, 2010), quoting Hutchinson v. Del. Sav. Bank FSB, 410 F. Supp. 2d 374, 383 (D.N.J. 2006). "Absent factual allegations suggesting that Plaintiffs suffered actual damages, Plaintiffs' RESPA claim is insufficiently pled and subject to dismissal." Amaral v. Wachovia Mortg. Corp., 2010 WL 618282, at *5 (E.D. Cal. Feb. 17, 2010); see Lal v. Am. Home Servicing, Inc., 680 F. Supp. 2d 1218, 1223 (E.D. Cal. 2010) (RESPA claim must allege a loss related to the alleged violation); Allen v.

United Fin. Mortgage Corp., 660 F. Supp. 2d 1089, 1097 (N.D. Cal. 2009) (requiring allegation of pecuniary loss to state RESPA claim for actual damages); Singh v. Washington Mut. Bank, 2009 WL 2588885, at *5 (N.D. Cal. Aug. 19, 2009) (dismissing RESPA claim because "plaintiffs have failed to allege they suffered any actual damages as a result" of RESPA violation).

II. THE LANHAM ACT CLAIMS FAIL AS A MATTER OF LAW

Appellants' Fourth and Sixth Causes of Action allege violation of the Lanham Act, 15 U.S.C. § 1125, in addition to state law claims (DE-59 at 56-57 ¶¶ 349-53; 59-61 ¶¶ 358-61). The SAC did not allege which provision of 15 U.S.C. § 1125 was violated, but argued that the claim charged "defendants Mozilo, Sambol, Lewis, Stump[f] and CHL for … false advertisements" (DE-93 at 24). Even liberally construing these causes of action to allege false advertising under the Lanham Act, the claims fail for multiple reasons.

There Is No False Advertising. Appellants' Fourth and Sixth Causes of Action list the alleged misconduct by "Defendants." The supposed wrongs fall into three categories. Only the third category implicates the Lanham Act.

15 U.S.C. § 1125(a)(1) provides:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

See POM Wonderful LLC v. Purely Juice, Inc., 2008 WL 4222045, at *10 (C.D. Cal. July 17, 2008), aff'd, 2009 WL 5184233 (9th Cir. Dec. 28, 2009).

Subparagraphs 360 (a), (g)-(l) of the SAC allege no representations, let alone misrepresentations, and instead consist of unsupported assertions that "Defendants" schemed to cheat the public and the government.

Subparagraphs 350 (b)-(e) and 360 (b)-(i) allege statements that Mr. Colyer, the Countrywide loan officer, made to Appellants that (for example) "obfuscated" payment terms, made the loan terms difficult to understand, and promised refinancing at a better interest rate in one year (DE-59 at 57 ¶ 350 (b)-(d)). These person-to-person statements do not involve "commercial advertising or promotion" and thus fall outside the reach of 15 U.S.C. § 1125.

Subparagraphs 350(a) and 360(b) allege that "Defendants" represented that Countrywide "was a mortgage loan expert that could be trusted to help borrowers obtain loans that were appropriate to their financial circumstances" (DE-59 at 58 ¶ 350(a); 59 ¶ 360(b); see 45 ¶ 277). Appellants allegedly received these representations in 2005 and 2006 mailings (Id. at 12 ¶ 61, 45 ¶ 278).

Although this last category of representations theoretically falls within the ambit of 15 U.S.C. § 1125, puffery is not actionable under the Lanham Act. See TYR Sport Inc. v. Warnaco Swimwear Inc., 679 F. Supp. 2d 1120, 1138 (C.D. Cal. 2009).

The Representations Are Not Actionable. As the District Court held:

> Here, Plaintiffs have alleged puffery as the basis for their false advertising claim. For example, Plaintiffs allege that Countrywide advertised that it could be "trusted" as a lender and that it had "industry leading expertise." (SAC ¶¶ 277, 350, 360.) Such general claims not directed at a specific product or service provided by Countrywide is puffery…. Thus, Plaintiffs fail to state a claim for false advertising under 15 U.S.C. § 1125 (DE-125 at 8-9).

"Generalized, vague, and unspecified assertions constitute 'mere puffery' upon which a reasonable consumer could not rely, and hence are not actionable."

Anunziato v. eMachines, Inc., 402 F. Supp. 2d 1133, 1139 (C.D. Cal. 2005) (holding that "quality," "reliability," "performance," "latest technology," and "high-quality" are non-actionable puffery). This Court wrote in Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1053 (9th Cir. 2008) (citation omitted):

> [A] statement that is quantifiable, that makes a claim as to the "specific or absolute characteristics of a product," may be an actionable statement of fact while a general, subjective claim about a product is non-actionable puffery. In this case, statement (a) is not a quantifiable claim and does not describe (or misdescribe) any specific or absolute characteristic of IKON's service. Rather, it is a general assertion that IKON provides its customers with low costs and with flexibility. That kind of general assertion is classic puffery.

Appellants do not allege that Countrywide published "commercial advertising or promotion" that made quantifiable statements about its products or services and thus cannot pursue a claim under 15 U.S.C. § 1125.[5/]

There Is No Deception. Moreover, the SAC shows on its face that Appellants were not deceived by the alleged false advertisements and that those advertisements did not cause Appellants to apply to Countrywide for a loan.

[5/] The SAC challenged advertisements that Countrywide "was a mortgage loan expert that could be trusted to help borrowers obtain loans that were appropriate to their financial circumstances" (DE-59 at 56 ¶ 350(a), 59 ¶ 360(b)). Appellants now argue that the District Court, who pointed to this statement as an "example" (DE-125 at 8) should have considered references elsewhere in the SAC and in unsubmitted "evidence" to "advertisements promising home mortgage for '1 to 3% interest rates'; '30-year fixed home mortgage'; CHL home loans are the lowest in the nation; 'pay no closing costs' and more" (Opg. Br. at 12). Appellants waived this argument by not presenting it below. In any event, the alleged advertisements are not false for two reasons: "lowest in the nation" is not actionable, and there is no deceit, reliance, or injury. Before agreeing to their loan, Appellants knew their interest rate was higher than 3%, their mortgage was not 30-year fixed, and they would pay closing costs (DE-59 at 23 ¶ 141-42; DE-69-2 at 2, 24, 26, 29).

According to the SAC, Appellants agreed to purchase their residence before approaching anyone about the possibility of a loan (DE-59 at 13 ¶ 64-65). Appellants told the seller that "they were planning to get financing through their agent … providing a lender that he worked with," not Countrywide (Id. at 13 ¶ 68). Appellants sought that financing, but it fell through (Id. at 14 ¶ 76). Appellants then approached Wells Fargo, not Countrywide (Id. at 14-15 ¶¶ 77-80). Wells Fargo's referral, not Countrywide's mailings, took Appellants to Countrywide (Id. at 14-15 ¶ 78-82).

III. THE RACIAL DISCRIMINATION AND RICO CLAIMS FAIL AS A MATTER OF LAW

The SAC imagines that "Defendants" – ranging from the seller and appraiser of the house to the CEO of Wells Fargo – form part of a vast conspiracy and criminal enterprise that (1) "targeted African-Americans, certain females and others with predatory loan products they knew to be inferior to those loan products that they designated for more educated White Americans" in violation of the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981 (DE-59 at 55 ¶ 342); and (2) deceived Plaintiffs and other Americans through mail and wire fraud "to obtain equity and property for their gain" in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq. (DE 59 at 65 ¶ 390). The District Court properly held that Appellants failed to "state a claim to relief that is plausible on its face" (DE-125 at 7, 12):

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged…. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of "entitlement to relief."
>
> …

> [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not "show[n]" – "that the pleader is entitled to relief." In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.

Iqbal, 129 S.Ct. at 1949-50 (citations omitted).

Appellants' contention that "the plausibility [pleading] standard does not apply to race discrimination . . . actions" (Opg. Br. at 16) is wrong. See Twombly, 550 U.S. at 569-70.

(A) Discrimination under the Civil Rights Act

42 U.S.C. § 1981 provides all persons with "the same right … to make and enforce contracts … and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens …." The Act provides a cause of action for race discrimination, not gender or age discrimination. See Johnson v. Riverside Healthcare System, LP, 534 F.3d 1116, 1123 (9th Cir. 2008); Jones v. Bechtel, 788 F.2d 571, 574 (9th Cir. 1986) ("It is clear that section 1981 does not provide a cause of action based on sex discrimination."); Sherlock v. Montefiore Medical Center, 84 F.3d 522, 527 (2d Cir. 1996) (affirming dismissal of age discrimination claim as improper under section 1981).

To state a section 1981 claim, Appellants must allege facts showing that (1) they are "a member of a protected class"; (2) they "attempted to contract for certain services"; (3) they were "denied the right to contract for those services"; and (4) a similarly situated group of individuals outside the protected class was offered that right. Lindsey v. SLT Los Angeles, LLC, 447 F.3d 1138, 1145 (9th Cir. 2006).

Appellants' claim fails for multiple independent reasons: First, although Appellants are African-American and Pakistani-American, the SAC alleges a

conspiracy to deprive rights not based on race, but based on education and class. In Appellants' own words, the supposed conspiracy is color-blind. Appellants allege that "Defendants" plotted their conspiracy against "uneducated Whites" (DE-59 at 8 ¶ 37); "minorities and less educated Whites" (Id. at 10 ¶ 46, 21 ¶126, 25 ¶ 150); "certain minorities and uneducated Whites … due to their class or race (sic)" (Id. at 11 ¶54); "minorities and others not educated in real estate dealings" (Id. at 17 ¶ 92); "minorities or those not likely to know or exercise their contractual rights in regard to HELOCs" (Id. at 26 ¶ 160); "minorities and others who would probably not contest them in court" (Id. ¶ 162); the "elderly" (Id. at 49 ¶ 299, 51 ¶ 309); "those with less education in the real estate market" (Id. at 50-51 ¶ 309); and "certain women" (Id.). Thus, accepting Appellants' fantasies as true – including the vile subtext that minorities are "less educated" and "not likely to know" things – the conspiracy is not racially-based but education-based, targeting "whites" as well as minorities.

Second, the SAC shows on its face that Countrywide did not deny Appellants any right. Appellants' specific discrimination theory is that "Defendants" denied Appellants "their right to enforce contracts as White Americans enjoy, when they prevented them access to their HELOC funds…." (DE-59 at 56 ¶ 345). Yet Appellants' factual allegations do not push this allegation across the line from merely possible to plausible discrimination – particularly in a context where Appellants, the supposed victims of discrimination, received the benefits of modifications to their loan and HELOC in 2009 (DE-69-2 at 55, 60).

Appellants' ability to access HELOC funds was defined by the HELOC (DE-69-2 at 29). The HELOC provides that, in the event "the value of the Property declines significantly below its appraised value," Countrywide may "refuse to make any additional loans or reduce [Appellants'] credit limit or do

both" (Id. at 35 ¶ 12(A)). The SAC alleges that, in 2008, Countrywide refused to make additional loans to Appellants because, as Mr. Colyer advised Appellants, their property had decreased in value by 5% or more (DE-59 at 26 ¶ 164). Appellants allege that the property did not decline in value more than 5% (Id. at 26 ¶ 161); yet elsewhere in the SAC, Appellants assert that the property, which they purchased for $729,000 and was worth $690,000 in 2006 (Id. at 16, 17 ¶¶ 91, 97), had decreased in value by $200,000, i.e., between 27% and 29% (DE-59 at 17, 26, 30 ¶¶ 97, 98, 161, 184).

Appellants' own allegations thus show that Countrywide "froze" the HELOC on the race-neutral basis that the property value had declined. Appellants cannot plausibly allege that race, rather than contract, motivated Countrywide's refusal to allow Appellants to draw further on the line of credit. See Iqbal, 129 S. Ct. at 1950; see also Rodriguez v. Bear Stearns Cos., 2008 WL 4831421, at *3-4 (D. Conn. Nov. 5, 2008).

Third, Appellants offer only conclusory and implausible allegations of discrimination: that the CEOs of Countrywide, Well Fargo, and Bank of America (long prior to its acquisition of Countrywide's parent, CFC) met to hatch and implement a plot to subject minority borrowers to "predatory loans." Despite hundreds of paragraphs of allegations, Appellants provide no facts that show Countrywide purposefully denied Appellants, on the basis of their race, access to non-"predatory" loans available to similarly situated "whites" – and, indeed, Appellants expressly allege that Countrywide denied similarly situated (in Appellants' words) "uneducated whites" access to non-"predatory" loans.

As the District Court found: "Even accepting Plaintiffs' allegation that at no time the value of their home had fallen by at least 5%, Plaintiffs still fail to allege any plausible connection between their race and Defendants' freezing the Home Equity Line of Credit" (DE-125 at 7).

(B) The Racketeer Influenced and Corrupt Organizations Act

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 (known as 'predicate acts') (5) causing injury to plaintiff's 'business or property.'" Living Designs, Inc. v. E.I. Dupont de Nemours & Co., 431 F.3d 353, 361 (9th Cir. 2005); see Occupational-Urgent Care Health Sys., Inc. v. Sutro & Co., 711 F. Supp. 1016, 1021 (E.D. Cal. 1989).

Appellants contend that all eleven "Defendants" comprise a "Bank of America criminal enterprise" (DE-59 at 64 ¶ 383). This "BofA Enterprise" allegedly used mail and wire fraud, 18 U.S.C. §§ 1341, 1343, as the predicate acts for Appellants' RICO claim (Id. at 65 ¶¶ 386-89, 392; see Opg. Br. 18).

There Is No Plausible RICO Claim. The District Court found that "Plaintiffs' vague and conclusory allegations do not cross the line from a merely possible RICO claim to a plausible RICO claim" (DE-125 at 12). For example, the broad conclusion that "Defendants" "conducted and participated in the affairs of 'BofA Enterprise'" (DE-59 at 66¶ 395) fails, absent supporting factual allegations, to cross the plausibility threshold.

"The strict pleading requirements of Fed. R. Civ. P. 9(b) apply to civil RICO fraud claims." Farmer v. Countrywide Fin. Corp., 2009 WL 1530973, at *3 (C.D. Cal. May 18, 2009), citing Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004); see Blake v. Dierdorff, 856 F.2d 1365, 1368 (9th Cir. 1988). Although "[p]ro se complaints are held to less stringent standards than formal pleadings drafted by lawyers," Jackson v. Carey, 353 F.3d 750, 757 (9th Cir. 2003), "pro se parties [must] follow the same rules of procedure that govern other litigants" – including Rule 9(b). Hall v. Witteman, 584 F.3d 859, 863-64 (10th Cir. 2009) (dismissing pro se RICO claims); see Tate v. Stanton, 2009 WL 5196064, at *1 (9th Cir. Dec. 29, 2009) (dismissing pro se RICO claim); Wisdom v. Katz, 308

Fed. Appx. 120, 121 (9th Cir. 2009) (even "[c]onstruing . . . pro se complaint liberally," district court did not err in dismissing RICO claims); Marangos v. Swett, 341 Fed. Appx. 752, 756-57 (3rd Cir. 2009) (dismissing pro se RICO claims for failure to meet Rule 9(b)'s particularity requirements).

Rule 9(b) requires allegations of fraud to be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." Neubronner v. Milken, 6 F.3d 666, 671 (9th Cir. 1993), quoting Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985) (quotations omitted). A "complaint must specify such facts as the times, dates, places, benefits received, and other details of the alleged fraudulent activity." Id. at 672. "By requiring the plaintiff to allege the who, what, where, and when of the alleged fraud, the rule requires the plaintiff to conduct a precomplaint investigation in sufficient depth to assure that the charge of fraud is responsible and supported, rather than defamatory and extortionate." Ackerman v. Nw. Mut. Life Ins. Co., 172 F.3d 467, 469 (7th Cir. 1999); see Bonavitacola Elec. Contr., Inc. v. Boro Developers, Inc., 2003 WL 329145 (E.D. Pa. Feb. 12, 2003), aff'd, 87 Fed. Appx. 227 (3d Cir. 2003).

Appellants did not allege the contents of alleged fraudulent mailings or wires beyond the non-actionable representations said to support their Lanham Act claims, and made only vague and conclusory allegations about how the statements were false or misleading; the dates of the mailings or wires; by and to whom they were sent; how the statements contributed to the alleged fraudulent scheme; and how the statements caused injury to Appellants.

The District Court's observations deserve repetition here:

> Among the insufficiencies are general allegations that Defendants had face to face or telephone meetings and instructed "employees" and "unnamed staff" to falsify loan documents, advertise that Defendants were "trustworthy" lenders, steer minority borrowers with low credit scores to Countrywide, offer minority borrowers adjustable rate loans rather than prime rate loans, "withhold key disclosures" from borrowers, freeze the home equity lines of credit of minority borrowers, deceive borrowers by sending them "bill which only cited interest only payments in order to discourage the paying down of the loans (sic) principle (sic) amount due," to ease underwriting standards, and to continue "predatory loan practices" after Bank of America purchased Countrywide (¶¶ 26-31, 36-54, 59, 160, 162, 179-83, 202-15, 259-62, 385.) These allegations are too general to adequately state the requisite predicate acts of fraud by Defendants.

(DE-125 at 12).

There Is No Fraud. Even if Appellants could allege the predicates of a plausible RICO fraud claim, the "marketing materials" at the heart of that claim are the advertisements that the District Court found non-actionable under the Lanham Act; for the same reasons, they cannot form the basis of a legitimate fraud claim (see pp. 21-22 above).

Moreover, Appellants contend that Countrywide's "marketing materials" and other acts of mail and wire fraud induced and misled them "to buy Countrywide subprime loan products against their self-interests" (Opg. Br. at 18). The SAC tells a different story: Appellants agreed to purchase their residence before approaching anyone (Countrywide included) about the possibility of a loan (DE-59 at 13¶ 65). Appellants told the seller that "they were planning to get financing through their agent … [and] a lender that he worked with," not Countrywide (Id. at 13 ¶ 68). Appellants sought financing through their agent, but failed to secure a loan (Id. at 14 ¶ 76). Appellants then approached Wells Fargo, not Countrywide, for a loan (Id. at 14-15 ¶¶ 77-80). A referral by Wells Fargo, not

Countrywide's "marketing materials," brought Appellants to Countrywide (Id. at 14-15 ¶¶ 78-81).

These allegations negate any causal link between the imagined criminal enterprise and Appellants' supposed damages.

There Are No Damages. Appellants seek to recover $200,000 in loan payments made through August 2008, when they stopped making payments but continued living in the house. Appellants do not allege that they suffered a monetary injury to their business or property "by reason of a violation of section 1962 of this chapter." 18 U.S.C. § 1964(c). Apellants do not allege that, absent Countrywide's alleged misconduct, they could and would have received a loan with better terms. Indeed, they allege that at least one other lender refused them a loan (DE-59 at 14-15 ¶¶ 77-78).

Appellants also cannot show that any supposed misconduct caused their default. The SAC concedes that the default is the result of lost income: "During August 2008, Appellants' [sic] lost disability payments from Metlife which severed their income in half, with their living expenses being between 2 to 4 thousand per month and their mortgage above $4,000. And so they could no longer afford to make their mortgage payments…." (DE-59 at 28 ¶¶ 175-76).

Finally, Appellants concede that the market, not Countrywide, caused their house to lose $200,000 in market value (DE-59 at 28 ¶¶ 175-76).

Appellants' "injury" is the admitted result of lost income and market forces. Their RICO claim, like their other federal claims, fails as a matter of law.

IV. DISCRETE DEFENSES AVAILABLE TO SPECIFIC DEFENDANTS

In addition to these defenses, which apply to all Countrywide and Bank of America defendants, there are discrete defenses available to Mr. Colyer, Mr. Lewis, and Mr. Sambol, as well as Bank of America and CFC. Although this Court, like the District Court, need not reach these defenses, we review them briefly here:

TILA. The TILA claim fails because none of these parties is a creditor, i.e., "the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness." 15 U.S.C. § 1602(f); see In re First Alliance Morg. Co., 280 B.R. 246 (C.D. Cal. 2002) (dismissing TILA claim against mortgage company CEO because the CEO is not the creditor).

RESPA. The RESPA Section 6 claim fails because none of these parties is a loan servicer, i.e., "the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan)." 12 U.S.C. § 2605(i)(2). The Section 8 claim fails because Appellants do not allege that Messrs. Colyer, Sambol, Lewis or CFC gave or received any portion of any charge made in connection with their loans – and because Appellants do not provide factual allegations to support the bare conclusion that Bank of America did so. See Marcelos v. Dominguez, 2008 WL 1820683, at *7 (N.D. Cal. April 21, 2008). The Section 9 claim fails because Appellants do not allege that any of these parties required Appellants to use a particular title company.

Lanham Act. The Lanham Act claim fails because the SAC does not allege that any of these parties published "commercial advertising or promotion" in connection with Countrywide's products and services. 15 U.S.C. § 1125(a)(1)(B).

Civil Rights Act. The discrimination claim fails because there is no allegation that any of these parties entered into a contract with, denied a contract

to, or performed (or declined to perform) services for Appellants. 42 U.S.C. § 1981.

RICO. The civil RICO claim fails because there is no factual or plausible allegation that any of these parties engaged in a criminal enterprise or an act of mail fraud or wire fraud or other racketeering activity directed at Appellants.

Corporate Veil. Appellants' boilerplate allegations (DE-59 at 4-5 ¶¶ 16-21), are not sufficient to pierce the corporate veil between Countrywide and either CFC or Bank of America. Appellants allege no facts showing that CFC or Bank of America completely controls Countrywide or that the separate identity of each company is a sham. Appellants allege nothing to justify treating Countrywide and CFC or Bank of America as alter egos. See generally Sonora Diamond Corp. v. Superior Court, 99 Cal. Rprt. 2d 824, 835 (Cal. App. 2000); Laird v. Capital Cities/ABC, 80 Cal. Rptr. 2d 454, 463 (Cal. App. 1998).

CONCLUSION AND REQUEST FOR RELIEF

[Fed. R. App. P. 28(a)(10)]

The District Court found that, given the multiple defects in Appellants' federal claims, the SAC could not be cured by yet another amendment. The District Court properly dismissed all federal claims with prejudice, declined to assert secondary jurisdiction over the state law claims, and dismissed the SAC.

This Court should affirm the District Court's Order.

STATEMENT OF RELATED CASES

[9th Cir. Rule 28-2.6]

Countrywide is not aware of any related cases.

Dated: June 4, 2010

Respectfully submitted,

By: /s/ Douglas E. Winter

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CERTIFICATE OF COMPLIANCE

[Fed. R. App. P. 32(a)(7)(C) and 9th Circuit Rule 32-1]

I certify that this Opening Brief was prepared using Times New Roman font in a 14 point typeface and contains a total of 9,924 proportionally spaced words, including its title page, but not its tables of contents and authorities (as calculated by the word processing software used to create the Opening Brief).

Date: June 4, 2010 By: /s/ Douglas E. Winter

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CERTIFICATE OF SERVICE

I certify that, on June 4, 2010, I served this Opening Brief by ECF/ Electronic Filing on Appellants and on counsel of record for all other Appellees.

By: /s/ Douglas E. Winter