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RECONTRUST COMPANY, N.A.
8 (erroneously sued as "Recontrust Company")
and COUNTRYWIDE HOME LOANS, INC.
9

10
11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**
13

14 DENISE GALLEGOS AND ADRIANA
ALVAREZ,

15 Plaintiffs,

16 vs.

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

19 Defendants.
20

Case No.: 08CV 2245 H LSP

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION BY DEFENDANTS
RECONTRUST COMPANY, N.A.
AND COUNTRYWIDE HOME
LOANS, INC., TO DISMISS
COMPLAINT OR, IN THE
ALTERNATIVE, FOR MORE
DEFINITE STATEMENT**

Hearing

Date: January 12, 2009

Time: 10:30 a.m.

Courtroom: 13

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1 **I. INTRODUCTION**

2 Plaintiffs Denise Gallegos and Adriana Alvarez (“Plaintiffs”) seek to avoid
3 foreclosure and have filed this lawsuit as a means to that end. Their Complaint
4 alleges no facts that would give rise to a right to such relief. Their Complaint is
5 filled with boilerplate allegations and generalized contentions, with no regard to
6 their truth or falsity, and no relation to their own facts and circumstances. Plaintiffs
7 admit they do not know the facts which give rise to many of the legal claims they
8 assert.

9 Plaintiffs’ pleading does not meet the minimal pleading requirements of either
10 California or federal law, including Rule 8 of the Federal Rules of Civil Procedure,
11 which requires them to plead “enough facts to state a claim to relief that is *plausible*
12 *on its face*” and “above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 127
13 S. Ct. 1955, 1965, 1974, 167 L. Ed. 2d 929 (2007) (emphasis added).

14 Plaintiffs admit they are in default on their loan (*see* Complaint ¶ 8), but
15 allege that the unnamed noteholder may not have the original endorsed note, or, in
16 the alternative, that Plaintiffs’ lender is charging improper, but unspecified, costs
17 and fees on Plaintiffs’ loan. (*Id.* ¶ 17.)

18 No requirement exists under California law that the original of the promissory
19 note be produced by anyone as a condition to conducting a non-judicial foreclosure.
20 Nor do Plaintiffs identify the fees and costs that they claim are objectionable.

21 Plaintiffs’ claims are not supported by the scant facts alleged in the
22 Complaint. Plaintiffs’ claims should be dismissed.

23 **II. SUMMARY OF PLAINTIFFS’ ALLEGATIONS AND PROCEDURAL**
24 **HISTORY**

25 Plaintiffs are in default on a residential loan secured by a Deed of Trust. The
26 Deed of Trust appoints Defendant ReconTrust Company, N.A. (“ReconTrust”) as
27 Trustee. (*See* Complaint, ¶¶ 2 and 5, Exh. 1.) Plaintiffs name Defendant
28 Countrywide Home Loans, Inc. (“Countrywide”) as “the natural person or business

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1 entity that has directed and is directing said Trustee [ReconTrust] to proceed under a
2 power of sale to foreclose” on Plaintiffs’ property. (*Id.* ¶ 2.)

3 Plaintiffs allege that Countrywide “is not in possession of the note properly
4 endorsed to it, nor is it otherwise entitled by law in this State to initiate foreclosure
5 under the security instrument identified in Exhibit 1.” (*Id.* ¶ 7.) Plaintiffs further
6 allege that “assuming, *arguendo* that [defendants] do have the right to proceed to
7 foreclose under the note” that defendants conspired “to profit from those actions in
8 amounts greater than their rights under the note to do so,” and that they “added costs
9 and charges to the payoff amount of the note that were not justified and proper
10 under the terms of the note or the law.” (*Id.* ¶¶ 13, 17.) Plaintiffs do not identify the
11 charges, fees, or other sums that Plaintiffs contend are improper.

12 Plaintiffs assert three causes of action seeking relief under various federal
13 statutes, together with a prayer for injunctive relief. Plaintiffs’ Complaint sets forth
14 an alphabet soup of federal statutes that Plaintiffs contend were violated by
15 ReconTrust and Countrywide, including the federal Fair Debt Collections Act
16 (“FDCA”), 15 U.S.C. § 1692 et seq.; Real Estate Settlement Procedures Act
17 (“RESPA”), 12 U.S.C. §§ 2601-2617; Home Ownership and Equity Protection Act
18 (“HOEPA”), 15 U.S.C. § 1637; Truth In Lending Act (“TILA”),
19 15 U.S.C. § 1601 et seq.; Regulation Z, 12 C.F.R. § 226 et seq.; Federal Trade
20 Commission Act (“FTC Act”), 15 U.S.C. §§ 41-58; and the Racketeer Influenced
21 and Corrupt Organizations law (“RICO”), 18 U.S.C. § 1961 et seq. (*See* Complaint
22 ¶¶ 21, 24, 27.) Plaintiffs also assert derivative claims under California’s Fair Debt
23 Collection Practices Act, Cal. Civil Code § 1788(e) and (f). (*Id.* ¶ 20.)

24 Plaintiffs do not identify which portions of these various laws they contend
25 were violated by ReconTrust, Countrywide, or any other defendant, or the conduct
26 that resulted in the claimed violations. Instead, Plaintiffs allege that there were
27 various statutory violations, “the specifics of which are unknown, but which are
28 subject to discovery and with respect to which the specifics will be alleged by

1 amendment to this complaint when ascertained.” (*Id.* ¶ 24.)

2 Defendants personally received a copy of Plaintiffs’ Complaint on November
3 5, 2008. The Complaint bears a stamp indicating that it was filed on November 4,
4 2008 in the San Diego County Superior Court.

5 On December 4, 2008, within 30 days of Defendants’ first receipt of
6 Plaintiffs’ initial pleading, Defendants caused this action to be removed to the
7 United States District Court, Southern District of California, because federal
8 questions are framed by the pleading.

9 Defendants now respectfully request that the Court dismiss Plaintiffs’ claims
10 pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

11 **III. LEGAL STANDARDS APPLICABLE TO A MOTION TO DISMISS**
12 **PURSUANT TO RULE 12(B)(6)**

13 To state a claim for relief in compliance with Rule 8 of the Federal Rules of
14 Civil Procedure, “each plaintiff must plead a short and plain statement of the
15 elements of his or her claim, identifying the transaction or occurrence giving rise to
16 the claim and the elements of the prima facie case.” *Bautista v. Los Angeles County*,
17 216 F.3d 837, 840 (9th Cir. 2000). The United States Supreme Court has tightened
18 the pleading standards under Rule 8 and has held that a plaintiff must allege
19 “enough facts to state a claim to relief that is *plausible on its face*.” *Bell Atlantic*
20 *Corp. v. Twombly*, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (emphasis added).

21 The Court explained:

22 While a complaint attacked by a Rule 12(b)(6) motion to
23 dismiss does not need detailed factual allegations . . . a
24 plaintiff’s obligation to provide the “grounds” of his
25 “entitle[ment] to relief” requires more than labels and
26 conclusions, and a formulaic recitation of the elements of
27 a cause of actions will not do. . . . Factual allegations must
28 be enough to raise a right to relief *above the speculative*

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1 level.

2 *Id.* at 1964-65 (emphasis added, internal citations omitted).

3 A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the claims
4 asserted in the complaint. *Cairns v. Franklin Mint Co.*, 24 F. Supp. 2d 1013, 1023
5 (C.D. Cal. 1998). Dismissal under Rule 12(b)(6) may be based either on the “lack
6 of a cognizable legal theory” or on “the absence of sufficient facts alleged under a
7 cognizable legal theory.” *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th
8 Cir. 1988). A motion to dismiss is also proper when Plaintiff seeks remedies to
9 which Plaintiff is not entitled as a matter of law. *See, e.g., King v. California*, 784
10 F.2d 910 (9th Cir. 1986), cert. denied, 484 U.S. 802 (1987).

11 Although the Court must construe the facts in the light most favorable to the
12 non-moving party, “conclusory allegations of law and unwarranted inferences are
13 not sufficient to defeat a motion to dismiss.” *Associated Gen. Contrs. of Am. v.*
14 *Metropolitan Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998) (citation omitted).
15 “[T]he court is not required to accept legal conclusions cast in the form of factual
16 allegations if those conclusions cannot reasonably be drawn from the facts alleged.”
17 *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

18 The Court may also consider on this Motion to Dismiss the Notice of
19 Trustee’s Sale attached as an exhibit to Plaintiffs’ complaint as well as any other
20 matters that may be judicially noticed. *See Sumner Peck Ranch v. Bureau of*
21 *Reclamation*, 823 F. Supp. 715, 720 (E.D. Cal. 1993) (holding that the Court “may
22 disregard allegations in the complaint if contradicted by facts established by exhibits
23 attached to the complaint” or by documents referred to in the complaint). *See also*
24 *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994) (holding that a document not
25 attached to the complaint whose contents are alleged in the complaint and whose
26 authenticity is not questioned may be considered on a Rule 12(b)(6) motion to
27 dismiss); *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 n.3 (9th Cir. 1998) (documents
28 integral to a plaintiff’s claims may be attached to a motion to dismiss, because the

1 plaintiff is obviously aware of contents).

2 **IV. THE COMPLAINT DOES NOT ALLEGE FACTS ESTABLISHING**
3 **WRONGDOING BY DEFENDANTS**

4 As a threshold matter, Plaintiffs’ claims against Defendants should be
5 dismissed because the Complaint fails to allege any actionable wrongdoing under
6 the various federal and state statutes identified in the Complaint, including FDCA,
7 RESPA, TILA, Regulation Z, HOEPA, FTC Act, or RICO. To state a claim for
8 relief in compliance with Rule 8 of the Federal Rules of Civil Procedure, Plaintiffs
9 “must plead a short and plain statement of the elements of [his] claim, identifying
10 the transaction or occurrence giving rise to the claim and the elements of the prima
11 facie case.” *Bautista*, 216 F.3d at 840.

12 Plaintiffs also must not allege mere “labels and conclusions,” but rather
13 “enough facts to state a claim to relief that is *plausible on its face*.” *Bell Atlantic*
14 *Corp. v. Twombly*, 127 S. Ct. at 1964-1965, 1974. Plaintiffs have failed to satisfy
15 this burden with respect to their claims against Defendants because they are based
16 on “conclusory allegations of law and unwarranted inferences,” which, under the
17 applicable pleading rules, “are not sufficient to defeat a motion to dismiss.”
18 *Associated Gen. Contrs. of Am.*, 159 F.3d at 1181.

19 **A. Defendants’ Actions Are In Accordance With Applicable Law And**
20 **Plaintiffs’ Deed Of Trust.**

21 Defendants have acted in accordance with applicable law, as set forth in Cal.
22 Civil Code §§ 2924-2924i and the loan documents signed by Plaintiffs. Sections
23 2924-2924i set forth the requirements for conducting a non-judicial foreclosure.

24 This comprehensive statutory framework established to govern
25 trustee sales is intended to be exhaustive. *Homestead Savings v.*
26 *Darmiento* (1991) 234 Cal.App.3d 424, 432-433. It includes a
27 myriad of rules relating to standing, notice and right to cure. It
28 is inconsistent with the comprehensive and exhaustive statutory

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1 scheme regulating trustee sales to incorporate other unrelated
2 provisions into the proceeds.

3 *Moeller v. Lien*, 25 Cal. App. 4th 822, 834 (1994). *See also I. E. Associates v.*
4 *Safeco Title Insurance*, 39 Cal. 3d 281, 288 (1985) (holding the nonjudicial
5 foreclosure statute supplants common law as to the rights and duties of the parties to
6 a deed of trust).

7 Plaintiffs' allegation that Defendants have no right to foreclose on their
8 property is incorrect. The California statutory scheme allows for the foreclosure
9 process to be conducted by the "trustee, mortgagee or beneficiary or any of their
10 authorized agents." Cal. Civ. Code § 2924(a)(1). ReconTrust has the statutory
11 right, as trustee under Plaintiffs' Deed of Trust, to initiate the foreclosure process on
12 behalf of their lender and the owners of the note. Plaintiffs' allegations to the
13 contrary lack any legal basis. Similarly, Plaintiffs' assertion that Defendants cannot
14 produce their original note also has no basis in law or fact. California law does not
15 require production of the original note in order to proceed with a nonjudicial
16 foreclosure. Cal. Civ. Code § 2924(a) et seq.

17 Because Plaintiffs do not allege a violation of applicable law or Plaintiffs'
18 loan agreements, the Complaint fails to establish that Defendants lack the right to
19 foreclose. Defendants acted properly under the terms of Plaintiffs' loan agreements
20 and the law. Plaintiffs' Complaint should be dismissed.

21 **B. Plaintiffs' Unfair Debt Collection Practices Claim Should Be**
22 **Dismissed Because It Is Based On Conclusory And**
23 **Unsubstantiated Allegations.**

24 Plaintiffs allege "Unfair Debt Collection Practices." Plaintiffs do not allege
25 that Defendants engaged in any harassment or abuse, as defined in 15 U.S.C.
26 § 1692d, that it used any false or misleading representations in violation of
27 15 U.S.C. § 1692e, or that it used any unfair practices in violation of 15 U.S.C.
28 § 1692f. The absence of these allegations also results in the failure of Plaintiffs'

1 unfair debt collection claim under California Civil Code § 1788 et seq., California's
2 Fair Debt Collection Practices Act.

3 Plaintiffs instead allege that the unnamed noteholder does not, in fact, hold
4 the note. (*See* Complaint ¶ 17.) California law does not require possession of the
5 original note as a condition to proceeding with a non-judicial foreclosure. Nor is
6 there an obligation to produce originals of either the promissory note or the deed of
7 trust. In California, a lender is only obligated to provide a *copy* of the promissory
8 note twenty-one days after a homeowner provides an adequate request. Cal. Civil
9 Code § 2934(b)(1).

10 Plaintiffs also predicate their Unfair Debt Collection Practices claim on
11 alleged RESPA violations, but fail to identify the provisions of RESPA that were
12 violated. (*See* Complaint ¶ 21.) Plaintiffs do not allege any improper kickbacks in
13 violation of 12 U.S.C. § 2607. To the extent that Plaintiffs claim disclosure-related
14 violations, the claims must be dismissed because there is no private right of action
15 under the disclosure rules of RESPA. *Bloom v. Martin*, 865 F. Supp. 1377, 1384-85
16 (N.D. Cal. 1994).

17 In any event, Plaintiffs' RESPA claims are time-barred. Section 16 of
18 RESPA provides that any private suit must be brought "within one year from the
19 date of the occurrence of the violation." 12 U.S.C. § 2614. The loan documents
20 attached to the Request for Judicial Notice reflect a transaction date of February 23,
21 2006. Plaintiffs' action accrued, and the one-year statute of limitations began to run,
22 on those dates. Plaintiffs failed to file this suit for more than one year after they
23 signed their loan documents. Their RESPA claims are conclusively barred. 12
24 U.S.C. § 2614(a).

25 **C. Plaintiffs Fail To State A Claim Against Defendants Under RICO.**

26 Plaintiffs' cause of action for violations of RICO, 18 U.S.C. § 1961 et seq.,
27 should be dismissed because Plaintiffs have not alleged facts to satisfy the statutory
28 elements of the claim. The Complaint is devoid of any facts that would show either

1 the existence of “racketeering activity” or a “pattern of racketeering activity” or of
 2 an “unlawful debt.” 18 U.S.C. § 1961, subds. (1), (5), and (6). *See also id.* § 1962,
 3 subd. (a), (c). Because Plaintiffs have not met their burden of pleading facts
 4 showing the existence of any potential RICO violations, the Fourth Cause of Action
 5 must be dismissed. *See Andrews v. Heaton*, 483 F.3d 1070, 1076 (10th Cir. 2007)
 6 (affirming the dismissal of RICO claims that were based on “vague and conclusory
 7 allegations of fraud”); *Reidy v. Meritor Sav., F.S.B.*, 705 F. Supp. 39, 41 (D. D.C.
 8 1989) (aff’d without op., 888 F.2d 898 (D.C. Cir. 1989)) (granting defendant’s
 9 motion to dismiss because the complaint failed to allege sufficient facts to show that
 10 defendant was engaged in the collection of an “unlawful debt” as defined in the
 11 RICO statutes).

12 Plaintiffs have not alleged any facts that show that Defendants engaged in any
 13 indictable acts punishable by a year or more in prison, let alone the two or more
 14 criminal acts required to show a “pattern of racketeering activity” under 18 U.S.C.
 15 §§ 1961(5) and 1962. Similarly, Plaintiffs do not allege that the loan constitutes an
 16 “unlawful debt,” meaning that it is an illegal gambling debt or a debt that carries an
 17 interest rate “at least twice the enforceable rate.” *Reidy*, 705 F. Supp. at 41.

18 Plaintiffs’ RICO claim also fails because they cannot satisfy the damages
 19 requirement. To state a claim for RICO, in addition to the other required elements,
 20 Plaintiffs “must allege facts tending to show that he or she was injured by the use or
 21 investment of racketeering income.” *Nugget Hydroelectric, L.P. v. Pacific Gas &*
 22 *Elec. Co.*, 981 F.2d 429, 437 (9th Cir. 1992) (affirming the dismissal of plaintiff’s
 23 RICO claim without leave to amend). Plaintiffs’ Complaint does not contain the
 24 required allegations. Plaintiffs’ RICO claim should be dismissed.

25 **V. PLAINTIFFS’ CLAIMS SHOULD BE DISMISSED BECAUSE**
 26 **PLAINTIFFS HAVE NOT TENDERED THE AMOUNTS OWED ON**
 27 **THE LOAN**

28 Plaintiffs’ claims against Defendants, including their request for injunctive

1 relief, should also be dismissed because Plaintiffs have not alleged that they have
 2 tendered the payments owed under the Loan. Plaintiffs do not deny that they signed
 3 a note, incurred the debt at issue or that they are delinquent. (*See, e.g.*, Complaint ¶
 4 11 [discussing payoff amounts for the loan].)

5 Plaintiffs ask this Court to enjoin the foreclosure sale on their property (*see*
 6 Complaint, p. 7:9-16 [Prayer for Relief ¶¶ 1-2]). A party cannot enjoin a foreclosure
 7 sale unless she has tendered the obligation in full. *See United States Cold Storage v.*
 8 *Great W. Sav. & Loan Ass'n*, 165 Cal. App. 3d 1214, 1222 (1985) (“[T]he law is
 9 long-established that a trustor or his successor must tender the obligation in full as a
 10 prerequisite to challenge of the foreclosure sale”); Roger Bernhardt, California
 11 Mortgage & Deed of Trust Practice (C.E.B. 3d ed.) § 7.37 (“Courts usually require
 12 the trustor to pay or to tender payment of any amounts admittedly owed the
 13 beneficiary as a condition for issuing a temporary restraining order or preliminary
 14 injunction.”). Because Plaintiffs have not tendered the amounts still owing on their
 15 loan, Plaintiffs cannot obtain an injunction against any foreclosure sale under the
 16 deed of trust securing the loan or obtain any other relief based on the claimed
 17 wrongful foreclosure on their property.

18 **VI. PLAINTIFFS’ CLAIM FOR ATTORNEY FEES AND TREBLE**
 19 **DAMAGES SHOULD BE STRICKEN**

20 Federal Rule of Civil Procedure 12(f) allows the court to strike any
 21 “immaterial” or “impertinent” matter from pleadings. A prayer for relief may be
 22 stricken where the damages sought are not recoverable as a matter of law. *See*
 23 *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1479, n. 34 (C.D. Cal. 1996) (citing
 24 *Tapley v. Lockwood Green Engineers, Inc.*, 502 F.2d 559, 560 (8th Cir. 1974)).

25 Plaintiffs’ Complaint seeks attorney fees and treble damages “as may be
 26 permitted by law.” Plaintiffs’ allegations state no basis for such relief. Plaintiffs’
 27 prayer for attorney fees and treble damages should be stricken from the Complaint.
 28

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1 **VII. PLAINTIFFS SHOULD BE ORDERED TO PROVIDE A MORE**
2 **DEFINITE STATEMENT OF ANY REMAINING CLAIMS**

3 If this Court does not dismiss all of the causes of action asserted in the
4 Complaint, the Court should order Plaintiffs to provide a more definite statement of
5 the remaining claims.

6 Rule 12(e) authorizes a motion for more definite statement to be granted
7 when the pleading is “so vague or ambiguous that [the defendant] cannot reasonably
8 be required to frame a responsive pleading.” Fed. R. Civ. P. 12(e).

9 The Complaint does not “plead a short and plain statement” of the elements of
10 Plaintiffs’ claim. The Complaint does not satisfy the *Bell Atlantic Corp. v. Twombly*
11 standard requiring “more than labels and conclusions” to plead claims that are
12 “plausible on [their] face.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. at 1964-1965,
13 1974. If this Court allows any of Plaintiffs’ claims to survive, Plaintiffs should be
14 ordered to set forth in detail the specific facts supporting each count they assert.

15 **VIII. CONCLUSION**

16 For all the foregoing reasons, Defendants respectfully request that the Court
17 dismiss the Complaint of Plaintiffs Denise Gallegos and Adriana Alvarez as set
18 forth above. In the alternative, Defendants respectfully request that the Court order
19 Plaintiffs to provide a more definite statement of their claims.

20 Dated: December 11, 2008

21 Stuart W. Price, Esq.
22 Sean D. Muntz, Esq.
23 Michael T. Levin, Esq.
24 **BRYAN CAVE LLP**

25 By: /s/ Michael T. Levin

26 Michael T. Levin
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