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

IN RE: COUNTRYWIDE FINANCIAL
CORP. MORTGAGE MARKETING AND
SALES PRACTICES LITIGATION

SYMONE LEYVAS, *et al.*,

Plaintiffs,

v.

BANK OF AMERICA CORP., *et al.*

Defendants.

KIMBERLY A. JACKSON, on behalf of
herself and all others similarly situated,

Plaintiffs,

v.

COUNTRYWIDE FINANCIAL CORP., *et al.*,

Defendants.

HEATH O. WHITE, on behalf of himself and
all others similarly situated,

Plaintiffs,

v.

COUNTRYWIDE FINANCIAL CORP., *et al.*,

Defendants.

CASE NO. 08md1988 DMS (LSP)
CASE NO. 08cv1888 DMS (LSP)
CASE NO. 08cv1957 DMS (LSP)
CASE NO. 08cv1972 DMS (LSP)

**ORDER (1) GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' PARTIAL
MOTION TO DISMISS AND (2)
DENYING DEFENDANTS'
MOTION TO STRIKE**

[Docket Nos. 101 (08md1988), 47
(08cv1888), 35 (08cv1957), and 79
(08cv1972)]

1 This matter comes before the Court on Defendants’ partial motion to dismiss and motion to
2 strike the First Amended Consolidated Class Action Complaint (“FAC”). Plaintiffs have filed an
3 opposition to the motion, and Defendants have filed a reply. After thoroughly reviewing the parties’
4 briefs and the record on file herein, the Court grants in part and denies in part the partial motion to
5 dismiss, and denies the motion to strike.

6 **I.**

7 **PROCEDURAL BACKGROUND¹**

8 On February 5, 2009, this Court issued an Order dismissing certain aspects of Plaintiffs’ claims
9 for relief, as well as certain individual claims due to lack of standing. (*See id.*) In that Order, the
10 Court granted Plaintiffs leave to file a First Amended Consolidated Class Action Complaint (“FAC”)
11 that cured the pleading and standing deficiencies. Plaintiffs seized that opportunity and filed a FAC
12 on March 6, 2009. The FAC realleges Plaintiffs’ claims for (1) violation of the Racketeer Influenced
13 and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1962(c), (2) conspiracy to violate RICO, 18
14 U.S.C. § 1962(d), (3) violation of California Business and Professions Code § 17200, (4) violation of
15 California Business and Professions Code § 17500, and (5) unjust enrichment. In response to the
16 FAC, Defendants filed the present partial motion to dismiss and motion to strike.

17 **II.**

18 **DISCUSSION**

19 Defendants raise three primary arguments in support of their partial motion to dismiss and
20 motion to strike. First, they argue, as they did in their first motion to dismiss, that Plaintiffs have
21 failed to allege a RICO enterprise. Second, Defendants assert Plaintiffs have failed to state a claim
22 of “unfair” conduct under California Business and Professions Code § 17200, therefore those
23 allegations must be stricken. Third, Defendants contend, as they did in their first motion to dismiss,
24 that Plaintiffs Marini and Philip Menichetti lack standing.

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28 ¹ The factual background of this case was set out in detail in the Court’s Order on Defendants’
previous motion to dismiss (“Order”). (*See In re Countrywide Financial Corp. Mortgage Marketing
and Sales Practices Litig.*, Case No. 08md1988, Docket No. 75.)

1 **A. Motion to Dismiss**

2 Dismissal pursuant to Rule 12(b)(6) is proper only where there is no cognizable legal theory
3 or an absence of sufficient facts alleged to support a cognizable legal theory. *Navarro v. Block*, 250
4 F.3d 729, 732 (9th Cir. 2001) (citing *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.
5 1988)). In deciding a 12(b)(6) motion, all material factual allegations of the complaint are accepted
6 as true, as well as all reasonable inferences to be drawn from them. *Cahill v. Liberty Mut. Ins. Co.*,
7 80 F.3d 336, 338 (9th Cir. 1996). However, the court need not accept all conclusory allegations as
8 true; rather, it must “examine whether conclusory allegations follow from the description of facts as
9 alleged by the plaintiff.” *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992) (citation omitted).
10 *See also Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 275-76 (9th Cir. 1982)
11 (court need not accept conclusory legal assertions); *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th Cir.
12 1977) (“Conclusory allegations, unsupported by facts, [will be] rejected as insufficient to state a claim
13 under the Civil Rights Act.”); *accord Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984) (“All
14 well-pleaded facts, as distinguished from conclusory allegations, must be taken as true.”). A claim
15 ““should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in
16 support of his claim which would entitle him to relief.”” *Perfect 10, Inc. v. Visa Intern. Service Ass’n*,
17 494 F.3d 788, 794 (9th Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 2871 (2008), (quoting
18 *Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9th Cir. 2002)).

19 1. RICO Enterprise

20 As set out in the Court’s previous Order, RICO defines an enterprise to include “any
21 individual, partnership, corporation, association, or other legal entity, and any union or group of
22 individuals associated in fact although not a legal entity[.]” 18 U.S.C. § 1961(4). In this case,
23 Plaintiffs allege two different RICO enterprises: (1) The Countrywide Broker Enterprise, and (2) the
24 Countrywide Enterprise.

25 a. The Broker Enterprise

26 In their previous motion to dismiss, Defendants argued the Broker Enterprise was legally
27 invalid because Plaintiffs failed to plead the requisite connections between the independent mortgage
28 brokers, and Plaintiffs allegations were “too vague and overbroad.” Although the Court rejected those

1 arguments in its previous Order, Defendants reassert the former argument here, namely that the Broker
2 Enterprise is legally invalid because Plaintiffs fail to plead the necessary connections between the
3 independent mortgage brokers.

4 Notably, Defendants do not cite any new, binding authority to support their renewed argument.
5 Nevertheless, the Court has re-reviewed the authorities cited previously, and finds no reason to depart
6 from its previous conclusion. For the reasons stated in the Court’s previous order, the Court rejects
7 Defendants’ argument that the allegations concerning the Broker Enterprise are legally insufficient.

8 b. The Countrywide Enterprise

9 With respect to the Countrywide Enterprise, Defendants argue the Court misapplied the
10 “something more” test set out in the previous Order. As Defendants admit, this argument sounds in
11 reconsideration, (*see* Mem. of P. & A. in Supp. of Mot at 10-11), and it is a new argument. However,
12 a motion for reconsideration is not the proper place to raise arguments that could have been raised
13 earlier. *See Kona Enterprises, Inc. v. Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (holding motion for
14 reconsideration pursuant to Federal Rule of Civil Procedure 59(e) “may *not* be used to raise arguments
15 or present evidence for the first time when they could reasonably have been raised earlier in the
16 litigation.”) Nevertheless, the Court has considered Defendants’ new argument, but finds it
17 unpersuasive. The Court stands by the reasoning in its previous Order, and finds the allegations
18 concerning the Countrywide Enterprise are sufficient to withstand Defendants’ motion to dismiss.
19 Accordingly, Defendants’ motion to dismiss the first two claims for relief is denied.

20 2. Standing

21 Next, Defendants move to dismiss the claims of Plaintiffs Marini and Philip Menichetti for
22 lack of standing. After the briefing on this motion was submitted, the Court granted Plaintiff Marini’s
23 motion to substitute Tom Orr, as Chapter 7 Bankruptcy Trustee for the Bankruptcy Estate of Edward
24 Marini, for Plaintiff Edward Marini in this case. With that substitution, and Defendants’ admission
25 that “Mr. Marini’s bankruptcy trustee is the proper party to prosecute Marini’s claims in the absence
26 of abandonment,” (Reply Br. at 17), Defendants’ motion to dismiss Plaintiff Marini’s claims is denied
27 as moot. The Court therefore turns its attention to Philip Menichetti.

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1 Unlike Plaintiff Marini, Philip Menichetti has not moved to substitute the bankruptcy trustee
2 of his estate as a plaintiff in this case. Instead, Mr. Menichetti has submitted a “Stipulation
3 Concerning Exemption,” which he filed in the bankruptcy court. Plaintiffs assert this Stipulation cures
4 any deficiency in Mr. Menichetti’s standing, but they fail to provide any authority to support their
5 assertion. Indeed, in their opposition to Defendants’ previous motion to dismiss, Plaintiffs admitted
6 that the only methods to cure Mr. Menichetti’s standing deficiency were to abandon the claim or
7 substitute the bankruptcy trustee as a plaintiff. (*See In re Countrywide*, Docket No. 59 at 28.) Absent
8 evidence that either option was exercised, Mr. Menichetti lacks standing to pursue this case. In light
9 of the Court’s previous order, Mr. Menichetti’s claim is dismissed with prejudice.

10 **B. Motion to Strike**

11 In addition to moving for dismissal of the claims discussed above, Defendants move to strike
12 Plaintiffs’ allegation that Defendants’ conduct was “unfair” under California Business and Professions
13 Code § 17200. Federal Rule of Civil Procedure 12(f) enables the court to strike from any pleading
14 “any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). The function
15 of Rule 12(f) is to “avoid the expenditure of time and money that must arise from litigating spurious
16 issues by dispensing with those issues prior to trial.” *Sidney-Vinsein v. A.H. Robins Co.*, 697 F.2d
17 880, 885 (9th Cir. 1983). However, “[b]ecause of ‘the limited importance of pleadings in federal
18 practice,’ motions to strike pursuant to Rule 12(f) are disfavored.” *Estate of Migliaccio v. Midland*
19 *National Life Ins. Co.*, 436 F. Supp. 2d 1095, 1100 (C.D. Cal. 2006) (citing *Bureerong v. Uvawas*, 922
20 F. Supp. 1450, 1478 (C.D. Cal. 1996)). Courts disfavor motions to strike because they are “often used
21 as delaying tactics, and because of the policy disfavoring resolution on the merits” at the pleadings
22 stage. *RDF Media Ltd. v. Fox Broadcasting Co.*, 372 F. Supp. 2d 556, 561 (C.D. Cal. 2005) (citing
23 *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1478 (C.D. Cal. 1996)). Such motions are denied “if any
24 doubt exists whether the allegations in the pleadings might be relevant in the action.” *Montecino v.*
25 *Spherion Corp.*, 427 F. Supp.2d 965, 967 (C.D. Cal. 2006) (citing *In re 2TheMart.com Inc. Sec. Litig.*,
26 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000)).

27 Although Defendants move to strike Plaintiffs’ allegations of unfairness, their arguments
28 appear to be directed at the legal sufficiency of those allegations. (*See Mem. of P. & A. in Supp. of*

1 Mot. at 13) (asserting Plaintiffs “have not stated a claim for UCL relief based on alleged ‘unfair’
2 business conduct.”) Given this disparity, the Court is uncertain whether Defendants are seeking to
3 strike these allegations pursuant to Rule 12(f) or dismiss them pursuant to Rule 12(b)(6).
4 Nevertheless, to the extent Defendants are seeking to strike these allegations, they have not shown the
5 allegations are “redundant, immaterial, impertinent, or scandalous[.]” Fed. R. Civ. P. 12(f). Nor have
6 they shown that the allegations fail to state a cognizable legal theory. Indeed, Defendants
7 acknowledge there is a split among the lower state courts and the federal courts about the legal
8 standard applicable to consumer claims of “unfair” business practices under California Business and
9 Professions Code § 17200. (See Reply Br. at 9.) Accordingly, Defendants’ motion to strike, or in the
10 alternative to dismiss, Plaintiffs’ allegations of “unfair” conduct is denied.

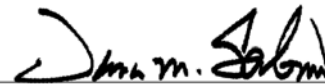
11 **III.**

12 **CONCLUSION**

13 For these reasons, the Court grants in part and denies in part Defendants’ partial motion to
14 dismiss. Specifically, the Court grants the motion to dismiss Plaintiff Philip Menichetti’s claim for
15 lack of standing, but denies remainder of the motion. The Court also denies Defendants’ motion to
16 strike.

17 **IT IS SO ORDERED.**

18 DATED: May 18, 2009

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20 HON. DANA M. SABRAW
21 United States District Judge