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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

JAIME ENGLER, AND ALL  
SIMILARLY SITUATED PERSONS ET  
AL.,

Plaintiff (s),

v.

RECONTRUST COMPANY, a Foreign  
Corporation, BAC HOME LOANS  
SERVICING, L.P., a Foreign  
Corporation, BANK OF AMERICA,  
N.A., a foreign Corporation,  
MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS INC, AKA  
MERS, a Foreign Corporation, MERS  
CORP, A Foreign Corporation,  
AMERICAN FIRST REAL ESTATE  
SERVICES, Inc, A California  
Corporation, 43-126 Parkway Esplanade  
East, La Quinta, CA 92253, in rem  
property,

ALL PERSONS KNOWN AND  
UNKNOWN CAUSE OF ACTIONING  
ANY LEGAL OR EQUITABLE RIGHT,  
TITLE, ESTATE, LIEN OR INTEREST  
IN REAL PROPERTY DESCRIBED  
HEREIN

ADVERS TO PLAINTIFFS TITLE OR  
ANY CLOUD ON PLAINTIFFS TITLE  
THERETO, REFERRED TO AS 43-126  
Parkway Esplanade East, La Quinta, CA  
92253,

Case No. CV12-1165 CBM (SPx)

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION TO DISMISS**

1 Defendants.

2 PEOPLE OF CALIFORNIA, UNITED  
3 STATES OF AMERICA, RIVERSIDE  
4 COUNTY, CALIFORNIA

5 Parties In Interest.

6 Before the Court is a Motion to Dismiss under Federal Rule of Civil  
7 Procedure 12(b)(6) and Motion to Strike Punitive Damages filed by Defendants  
8 ReconTrust N.A., Bank of America Corp., and Bank of America, N.A.  
9 (collectively, “Defendants”). (Docket No. 39 (“Motion”).) Defendants have also  
10 filed a Request for Judicial Notice (“RJN”). (Docket No. 40.)

11 Plaintiff is proceeding *pro se*. The Court again advises Plaintiff that the  
12 Central District of California offers Pro Se Clinics in Riverside, Santa Ana, and  
13 Los Angeles to provide information and guidance to *pro se* litigants, such as  
14 Plaintiff, who are not represented by counsel. The Los Angeles Pro Se Clinic is  
15 located in:

16 The United States Courthouse  
17 312 N. Spring Street, Room G-19, Main Street Floor  
18 Los Angeles, CA 90012

19 The Los Angeles Pro Se Clinic is open on Mondays, Wednesdays, and  
20 Fridays from 9:30 am - 12:00 pm and then from 2:00 pm - 4:00 pm. Plaintiff can  
21 find more information about all the Clinics, including hours and addresses, at  
22 <http://court.cacd.uscourts.gov/cacd/ProSe.nsf/>.

### 23 I. JURISDICTION

24 This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337, 2201.  
25 This Court has supplemental jurisdiction over the state law causes of action  
26 pursuant to 28 U.S.C. § 1367.

### 27 II. PROCEDURAL AND FACTUAL OVERVIEW

28 This case is about a foreclosure of Plaintiff’s property initiated by

1 Defendant ReconTrust N.A. Defendants include Bank of America Corp.  
2 (“BAC”); ReconTrust, N.A. (“ReconTrust”); and Bank of America, N.A.  
3 (“BANA”). In 2007, Plaintiff decided to refinance a residence located at 126  
4 Parkway Esplanade East, La Quinta, California (the “Property”). On June 21,  
5 2007, Plaintiff signed a Deed of Trust (the “Note”) to refinance the Property.  
6 (SAC ¶ 16.) The initial trustee on the Note was Chicago Title Company  
7 (“Chicago Title”), and the original beneficiary was Mortgage Electronic  
8 Registration Systems, Inc. (“MERS”). (RJN, Exh. A.)<sup>1</sup>

9 A nonjudicial foreclosure process began on March 24, 2011 when  
10 ReconTrust issued a “Notice of Default” document to inform Plaintiff that he was  
11 in default on his mortgage. (RJN, Exh. D.) On March 25, 2011, a “Substitution of  
12 Trustee” was recorded, which stated that MERS substituted ReconTrust as the  
13 trustee on the Note (replacing Chicago Title). (RNJ, Exh. B.) On the same day, a  
14 “Corporation Assignment of Deed of Trust” was recorded, which stated that  
15 MERS assigned its beneficial rights under the Note to BAC Home Loans  
16 Servicing, LP. (RJN, Exh. C.)

17 Three months later, on June 24, 2011, a “Notice of Trustee’s Sale” was  
18 recorded, which stated that the Property would be sold at auction in a July 20,  
19 2011 foreclosure sale. (RJN, Exh. E.) At the sale, Defendant BANA purchased  
20 the Property. (RJN, Exh. F.)

21 At some point between the time ReconTrust was substituted as the trustee  
22 (March 25, 2011) and the foreclosure sale (July 20, 2011), ReconTrust securitized  
23 Plaintiff’s loan in connection with a mortgage loan trust called Countrywide  
24

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25 <sup>1</sup> Defendants seek judicial notice of six documents: the original “Deed of Trust,” “Substitution of Trustee,”  
26 “Corporation Assignment of Deed of Trust,” “Notice of Default and Election to Sell Under Deed of Trust,” “Notice  
27 of Trustee Sale,” and “Trustee’s Deed Upon Sale.” (RJN, Exhs. A-F.) Each of the documents has been filed with  
28 the County of Riverside Office of the Assessor-County Clerk-Reporter. Some of these documents were included or  
referenced in the SAC. (*See, e.g.*, RJN, Exhs. A, B, C.) The court takes judicial notice of these documents because  
they are matters of public record. FED. R. EVID. 201; *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).  
The Court’s judicial notice does not mean that the Court accepts as proven fact that the various documents are  
legitimate or non-fraudulent. *See Lee*, 250 F.3d at 689-90.

1 Alternative Loan Trust 2008-HY1. (SAC ¶ 139.)

2 Plaintiff originally filed suit against Defendants BAC and MERS on June 6,  
3 2012. (Docket No. 1.) On March 1, 2013, the Court dismissed Plaintiff's First  
4 Amended Complaint with leave to amend. (Docket No. 28.) The operative  
5 Complaint currently before the Court is Plaintiff's Second Amended Complaint  
6 (the "SAC"), which alleges thirteen causes of action: (1) Declaratory Relief; (2)  
7 Violation of RICO; (3) "Common Law Conspiracy;" (4) "Filing of Invalid Lien;"  
8 (5) "Fraudulent Conveyance Deceptive Practices Code of Federal Regulations 17  
9 CFR Parts 204-249;" (6) Fraudulent Concealment; (7) Fraudulent Inducement; (8)  
10 Wrongful Foreclosure; (9) Violation of the Real Estate Settlement Procedures Act;  
11 (10) Violation of the Fair Credit Reporting Act; (11) Violation of the Federal Fair  
12 Debt Collection Practices; (12) Violation of the Truth in Lending Act; and (13)  
13 Constructive Fraud.

14 On August 27, 2013, Defendants filed the instant Motion. On September  
15 30, 2013, Plaintiff filed his Opposition three weeks late. (Docket No. 43.) Under  
16 the Local Rules, the Court may decline to consider any document that a party files  
17 late. C.D. Cal. R. 7-12. The Court can also issue sanctions against Plaintiff for  
18 late filing. C.D. Cal. R. 7-13, 83-7. Plaintiff is reminded that the Local Rules  
19 apply to all litigants, including litigants like him who proceed *pro se* without a  
20 lawyer. Future rule violations may be met with sanctions.

### 21 **III. STANDARD OF LAW**

22 Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a  
23 complaint for "failure to state a claim upon which relief can be granted."  
24 Dismissal of a complaint can be based on either a lack of a cognizable legal theory  
25 or the absence of sufficient facts alleged under a cognizable legal theory. *Somers*  
26 *v. Apple, Inc.*, 729 F.3d 953, 959-960 (9th Cir. 2013). On a motion to dismiss for  
27 failure to state a claim, the court accepts as true all well-pleaded allegations of  
28 material fact and construes them in a light most favorable to the non-moving

1 party. *Blantz v. Cal. Dep't of Corr. & Rehab.*, 727 F.3d 917, 922 (9th Cir. 2013).  
2 To survive a motion to dismiss, the complaint “must contain sufficient factual  
3 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”  
4 *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S. Ct. 1937, 1940, 173 L. Ed. 2d 868  
5 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct.  
6 1955, 1974, 167 L. Ed. 2d 929 (2007)). A claim is facially plausible when the  
7 plaintiff pleads factual content that allows the court to draw the reasonable  
8 inference that the defendant is liable for the misconduct alleged. *Salameh v.*  
9 *Tarsadia Hotel*, 726 F.3d 1124, 1129 (9th Cir. 2013). The plausibility standard  
10 requires more than the sheer possibility or conceivability that a defendant has  
11 acted unlawfully. *Id.* If a complaint cannot be cured by additional factual  
12 allegations, dismissal without leave to amend is proper. *Id.*

#### 13 IV. DISCUSSION

14 Plaintiff’s First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth,  
15 Eleventh, Twelfth, and Thirteenth Causes of Action are dismissed with prejudice.  
16 Defendants’ Motion to Dismiss Plaintiff’s Eighth Cause of Action is denied.  
17 Defendants’ Motion to Strike Plaintiff’s request for punitive damages is denied.  
18 The only remaining cause of action in this case is the Eighth Cause of Action.

##### 19 A. First Cause of Action: “Declaratory Relief – Fraudulent 20 Reconveyance”

21 Plaintiff’s first cause of action is styled as “Declaratory Relief Defendants  
22 Made a Fraudulent Conveyance” under the Uniform Fraudulent Conveyance Act.  
23 (SAC at 17; SAC ¶ 57.) The Uniform Fraudulent Conveyance Act (“UCTA”) has  
24 been repealed and replaced by the Uniform Fraudulent Transfer Act (“UFTA”).  
25 *See* CAL. CIV. CODE § 3439 et seq. UFTA applies to transfers on or after January  
26 1, 1987. CAL CIV. CODE § 3439.12. Because the transfer challenged by Plaintiff  
27 occurred after 1987, UFTA is the applicable law. *Id.*

28 Plaintiff does not specifically allege which UCTA statute Defendants

1 violated. To survive Defendants' Motion to Dismiss, the facts he alleges must  
2 satisfy one of the UFTA causes of action. There are three possibilities under  
3 California Civil Code §§ 3439.04(a)(1), 3439.04(a)(2), and 3439.05. Under these  
4 statutes, a debtor's transfer is fraudulent as to a creditor if certain criteria are met.  
5 *See* CAL. CIV. CODE §§ 3439.04(a)(1), 3439.04(a)(2), 3439.05. These statutes  
6 provide a cause of action for a creditor. A creditor is a person who has a "right to  
7 payment." CAL. CIV. CODE § 3439.01(b), (c). Here, Plaintiff has not alleged that  
8 he has a right to payment that Defendants owe him, so he is not a creditor.  
9 Accordingly, Plaintiff has not alleged facts satisfying the elements of either  
10 fraudulent transfer cause of action.

11 Plaintiff's First Cause of Action is dismissed with prejudice.

12 **B. Second Cause of Action: Violation of RICO by MERS.**

13 In its May 1, 2013 Order, the Court dismissed Plaintiff's RICO claim  
14 without prejudice. Plaintiff has again failed to plead facts satisfying the elements  
15 of a RICO claim.

16 To state a claim under RICO, Plaintiff must plead facts satisfying five  
17 elements: (1) the existence of an enterprise affecting interstate commerce, (2) that  
18 Defendants were associated with or employed by the enterprise, (3) that  
19 Defendants participated in the conduct of the affairs of the enterprise, (4) that  
20 Defendants participated in a pattern of racketeering which included at least two  
21 predicate acts; and (5) that Plaintiff incurred actual injury to business or property.  
22 *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed.  
23 2d 346 (1985). Plaintiff fails to allege facts satisfying the fourth and fifth RICO  
24 elements.

25 **1. Predicate Acts**

26 Plaintiff alleges that Defendants committed mail and wire fraud each and  
27 every time they mailed a document. (SAC ¶¶ 70-71.) RICO claims based on  
28 predicate acts of mail and wire fraud must be dismissed where the alleged

1 predicate acts fail to state a claim for violation of the mail and wire fraud statutes.  
2 *See Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988)  
3 (dismissing RICO claims because predicate acts of mail and wire fraud were not  
4 plead with specificity required by Rule 9(b)). Claims about mail or wire fraud  
5 must satisfy Federal Rule of Civil Procedure 9(b), which requires fraud claims to  
6 “state with particularity the circumstances constituting fraud or mistake.” FED. R.  
7 Civ. P. 9(b); *Albright*, 862 F.2d at 1392.

8 Plaintiff has not identified a mail and wire fraud statute that has been  
9 violated or how the use of the mail was a racketeering activity. Further, Plaintiff’s  
10 generalized allegation that mail and wire fraud occurred each time a document  
11 was mailed or recorded does not satisfy Rule 9(b) because it does not state with  
12 particularity the actions that constitute mail and wire fraud.

## 13 **2. Actual Injury to Business or Property**

14 Plaintiff alleges he suffered from mental and emotional anguish and distress  
15 because of the RICO violations. (SAC ¶ 86.) Plaintiff cannot collect damages for  
16 emotional distress under RICO, so this allegation fails as a matter of law. *Berg v.*  
17 *First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990).

18 Plaintiff’s RICO theory focuses on MERS, the Mortgage Electronic  
19 Registration System, which Plaintiff believes is a racketeering enterprise. To  
20 allege actual injury to business or property, Plaintiff must allege that the RICO  
21 activities carried out by MERS were a proximate cause of his injuries. *Holmes v.*  
22 *Sec. Investor Prot. Corp.*, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532  
23 (1992). Though Plaintiff alleges in conclusory fashion that as a result of the RICO  
24 violations he was damaged, he fails to allege any causal connection between  
25 MERS’s activities and the loss of his home, good credit rating, and money. (*See*  
26 SAC ¶¶ 86, 87, 91.) Plaintiff’s allegation that he is injured by the alleged scheme  
27 is merely a legal conclusion with no factual detail.

28 Plaintiff’s Second Cause of Action is dismissed with prejudice.

1           **C. Third Cause of Action: “Common Law Conspiracy”**

2           Plaintiff’s Third Cause of Action is for “Common Law Conspiracy.”

3           Conspiracy is a legal doctrine imposing liability on persons who share a common  
4           plan to commit a tort, not an independent cause of action. *Applied Equip. Corp. v.*  
5           *Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-11 (1994). Plaintiff fails to allege  
6           any legal claim or elements in this cause of action.

7           Plaintiff’s Third Cause of Action is dismissed with prejudice.

8           **D. Fourth Cause of Action: “Filing an Invalid Lien”**

9           Plaintiff’s Fourth Cause of Action, “Filing an Invalid Lien,” is not a  
10          recognized cause of action under federal or California law. Moreover, the Court  
11          interprets this cause of action as challenging the original Note, which established  
12          the lien upon the Residence. Plaintiff does not allege any facts from which one  
13          could conclude that the original Note is fraudulent or violates a statute.

14          Plaintiff’s Fourth Cause of Action is dismissed with prejudice.

15          **E. Fifth Cause of Action: Fraudulent Conveyance Deceptive Practices:  
16          Code of Federal Regulation 17 CFR Parts 240-249**

17          Plaintiff’s Fifth Cause of Action for “Fraudulent Conveyance Deceptive  
18          Practices: Code of Federal Regulation 17 CFR Parts 240-249” is not a cause of  
19          action that is supported by California or federal law. To the extent that Plaintiff’s  
20          allegations challenge the assignment of the Note or the subsequent foreclosure  
21          sale on the ground that Defendants securitized his mortgage loan, this claim fails  
22          as a matter of law. California courts and federal courts have ruled that an  
23          assignment of a promissory note—such as the Note in this case—is not made  
24          invalid by the securitization of the promissory note. *See, e.g., Robinson v.*  
25          *Countrywide Home Loans, Inc.*, 199 Cal. App. 4th 42, 45-46 (2011) (affirming  
26          dismissal where the plaintiffs “alleged that their promissory note was ‘sold and  
27          resold’ on the secondary mortgage market, and that as a result, it had become  
28          difficult or impossible to ascertain the actual owner of the beneficial interest in the  
                note”); *Toneman v. United States Bank*, No. CV 12-09369-MMM (MRWx), 2013



1 U.S. Dist. LEXIS 84240, at \*25-31 (C.D. Cal. Feb. 22, 2013) (Morrow, J.)  
2 (rejecting plaintiff’s challenge to a foreclosure based on the fact that the mortgage  
3 loan was securitized); *Boyster v. Wells Fargo Bank, N.A.*, No. C 11-03943 SI, 2012  
4 WL 1144281, at \*5 (N.D. Cal. April 4, 2012) (Illston, J.) (rejecting plaintiff’s  
5 challenge to foreclosure sale based on the fact that the mortgage loan was  
6 securitized).

7 Plaintiff’s Fifth Cause of Action is dismissed with prejudice.

8 **F. Sixth and Seventh Causes of Action: Fraudulent Concealment**  
9 **Fraudulent Inducement**

10 Plaintiff’s Sixth Cause of Action, fraudulent concealment, and Seventh  
11 Cause of Action, fraudulent inducement, do not plead sufficient facts to satisfy the  
12 heightened pleading requirements for fraud claims. A plaintiff alleging fraud or  
13 mistake must “state with particularity the circumstances constituting fraud or  
14 mistake.” FED. R. CIV. P. 9(b). Additionally, where multiple defendants are asked  
15 to respond to allegations of fraud, the complaint must inform each defendant of his  
16 alleged participation in the fraud. *Moore v. Kayport Package Express*, 885 F.2d  
17 531, 540-41 (9th Cir. 1989).

18 **1. Sixth Cause of Action: Fraudulent Concealment**

19 To allege a claim for fraudulent concealment under California law, Plaintiff  
20 must allege facts satisfying the following:

- 21 (1) the defendant must have concealed or suppressed a material fact,  
22 (2) the defendant must have been under a duty to disclose the fact to  
23 the plaintiff, (3) the defendant must have intentionally concealed or  
24 suppressed the fact with the intent to defraud the plaintiff, (4) the  
25 plaintiff must have been unaware of the fact and would not have  
26 acted as he did if he had known of the concealed or suppressed fact,  
and (5) as a result of the concealment or suppression of the fact, the  
plaintiff must have sustained damage.

27 *Kaldenbach v. Mut. of Omaha Life Ins. Co.*, 178 Cal. App. 4th 830, 850 (2009)  
28 (citation omitted); *Grant v. Aurora Loan Servs.*, 736 F. Supp. 2d 1257, 1272 (C.D.

1 Cal. 2010) (citations omitted).

2 In Plaintiff's Sixth Cause of Action, he makes general allegations as to how  
3 the securitization of the loan injured him. (See SAC ¶¶ 129, 132.) Plaintiff's  
4 generalized allegations do not satisfy the elements of a fraudulent concealment  
5 claim. *Kaldenbach*, 178 Cal. App. 4th at 850. And, Plaintiff fails to clearly state  
6 what actions each Defendant carried out, which is required to meet his pleading  
7 burden for a fraud claim. *Moore*, 885 F.2d at 540-41.

## 8 **2. Seventh Cause of Action: Fraudulent Inducement**

9 For a party to successfully plead that he was fraudulently induced to enter a  
10 contract, he must allege that he "knows what he is signing, but his consent is  
11 induced by fraud, mutual assent is present, and a contract is formed, which by  
12 reason of fraud, is voidable." *Duffens v. Valenti*, 161 Cal. App. 4th 434, 449  
13 (2008) (citation omitted); *Foster Poultry Farms v. Alkar-Rapidpak-MP Equip.,*  
14 *Inc.*, 868 F. Supp. 2d 983, 992 (E.D. Cal. 2012).

15 Here, the only agreement into which Plaintiff has entered was the original  
16 Note. (RJN, Exh. A.) Plaintiff has not alleged fraudulent conduct by Defendants  
17 that induced him to sign the Note. Plaintiff's allegations here once again focus on  
18 the securitization of the mortgage loan on the Property. (See, e.g., SAC ¶¶ 136,  
19 137.) These allegations fail to satisfy the elements of fraudulent inducement.  
20 *Duffens*, 161 Cal. App. 4th at 449. Furthermore, Plaintiff's allegations fail to meet  
21 his pleading burden for a fraud claim because he does not identify the actions of  
22 each Defendant. *Moore*, 885 F.2d at 540-41.

23 Plaintiff's Sixth and Seventh Causes of Action are dismissed with prejudice.

## 24 **G. Eighth Cause of Action: Wrongful Foreclosure**

25 Plaintiff alleges that Defendants' nonjudicial foreclosure was invalid  
26 because Defendants securitized the loan. (SAC ¶¶ 138-150.) As discussed above,  
27 this claim fails as a matter of law because the securitization of a loan does not  
28 preclude nonjudicial foreclosure. *Robinson*, 199 Cal. App. 4th at 45-46.

1 Plaintiff also alleges that Defendants were not authorized to initiate a  
2 nonjudicial foreclosure because the Substitution of Trustee document (which is  
3 part of the chain of documents Defendants believe gave them the right to  
4 foreclose) was fraudulent. (See SAC ¶¶ 22, 23, 56, 57.) Specifically, Plaintiff  
5 alleges that the Substitution of Trustee document was signed by a ReconTrust  
6 employee named T. Sevillano on behalf of MERS (the original beneficiary) rather  
7 than a MERS employee. (SAC ¶ 22; see also RJN, Exh. B.)

8 “The trustee under a trust deed upon real property . . . may be substituted by  
9 the recording . . . of a substitution executed and acknowledged by . . . all of the  
10 beneficiaries under the trust deed or their successors in interest.” CAL. CIV. CODE  
11 § 2934a(a)(1) (emphasis added); see also 10-25A CAL. LEGAL FORMS—  
12 TRANSACTION GUIDE § 25A.210(m). Here, the beneficiary listed on the original  
13 Note was MERS. (RJN, Exh. A.) To comply with California Civil Code §  
14 2934a(a)(1), MERS (or its agent) should have signed the Substitution of Trustee  
15 document as the beneficiary of the original Note. Instead, a ReconTrust employee  
16 (Sevillano) signed the Substitution of Trustee document. (RJN, Exh. B; SAC ¶  
17 22.) Thus, Plaintiff makes a colorable allegation that the substitution document  
18 was executed in violation of California Civil Code § 2934a.

19 If a substitution of trustee is fraudulent, then a nonjudicial foreclosure sale  
20 based on that substitution is void. See *Pro Value Props., Inc. v. Quality Loan*  
21 *Serv. Corp.*, 170 Cal. App. 4th 579, 583 (2009) (failure to comply with CAL. CIV.  
22 CODE § 2934a(a)(1) renders subsequent nonjudicial foreclosure sale void); *Miller*  
23 *v. Wells Fargo Bank*, No. C-12-2282 EMC, 2012 WL 1945498, at \*2, 4 (N.D. Cal.  
24 May 30, 2012) (Chen, J.) (granting preliminary injunction preventing foreclosure  
25 sale because the plaintiff was likely to prevail on claim that foreclosure was  
26 improper due to fraudulent substitution of trustee); *Glaski v. Bank of Am., Nat’l*  
27 *Ass’n*, 218 Cal. App. 4th 1079, 1100 (2013) (foreclosure sale is void if the  
28 foreclosing entity lacked the authority to foreclose on the property).

1 Courts have ruled that a plaintiff can state a wrongful foreclosure claim if  
2 the defendants were not proper parties to foreclose in the first place due to  
3 allegedly fraudulent assignments prior to the foreclosure sale. *See, e.g., Ohlendorf*  
4 *v. Am. Home Mortgage Servicing*, 279 F.R.D. 575, 582-83 (E.D. Cal. 2010); *see*  
5 *also Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 1155  
6 (2011) (allegation that wrong party initiated foreclosure places a case outside the  
7 bar against legal challenges to a foreclosing entity’s right to carry out nonjudicial  
8 foreclose).

9 Defendants also argue that the tender rule applies because Plaintiff is  
10 alleging an irregularity in the foreclosure sale process. In general, tender is  
11 required to set aside a foreclosure. *United States Cold Storage v. Great Western*  
12 *Savings & Loan Ass’n.*, 212 Cal. Rptr. 232, 238 (Ct. App. 1985). Under this rule,  
13 a defaulted borrower is required to allege that he can tender the amount due on his  
14 loan in order to maintain any cause of action for irregularity in the sale. *Abdallah*  
15 *v. United Savings Bank*, 43 Cal. App. 4th 1101, 1109 (1996).

16 Here, an exception to the tender rule applies. Plaintiff is not required to  
17 allege that he can tender because he alleges that the foreclosure sale is void  
18 because Defendants’ lacked the authority to foreclose due to a fraudulent  
19 Substitution of Trustee document. *See Glaski*, 218 Cal. App. 4th at 1100 (“Tender  
20 is not required where the foreclosure sale is void . . . , such as when a plaintiff  
21 proves that the entity lacked the authority to foreclose on the property.”); *Lester v.*  
22 *J.P. Morgan Chase Bank*, 926 F. Supp. 2d 1081, 1093 (N.D. Cal. 2013) (“where a  
23 plaintiff alleges that the entity lacked authority to foreclose on the property, the  
24 foreclosure sale would be void . . . . The tender rule does not apply to a void . . .  
25 foreclosure sale.”) (citations omitted)).

26 Defendants’ Motion to Dismiss Plaintiff’s Eighth Cause of Action is denied.  
27  
28

1 **H. Ninth Cause of Action: “Failure to Notify of Transfer/Assignment”**  
2 **Under 12 U.S.C. § 2605**

3 Plaintiff’s Ninth Cause of Action alleges a violation of the Real Estate  
4 Settlement Procedures Act (“RESPA”) under 12 U.S.C. § 2605. Plaintiff has not  
5 adequately alleged that he is entitled to damages. Plaintiff only requests statutory  
6 damages of \$2,000. (*Id.* at ¶¶ 154-55.) Statutory damages are available only  
7 when there has been a “pattern or practice of noncompliance” with RESPA. 12  
8 U.S.C. § 2605(f)(1). Plaintiff has not alleged there is a pattern or practice of  
9 noncompliance. Indeed, he only alleges a single RESPA violation. (*See* SAC ¶¶  
10 152-53.) And, Plaintiff has not alleged any actual damages resulting from the  
11 RESPA violation.

12 Plaintiff’s Ninth Cause of Action is dismissed with prejudice.<sup>2</sup>

13 **I. Tenth Cause of Action: Fair Credit Reporting Act**

14 Plaintiff alleges that Defendants violated the Fair Credit Report Act  
15 (“FCRA”). Plaintiff’s Tenth Cause of Action makes the non-specific allegation  
16 that Defendants violated the FCRA by reporting “false, negative information on  
17 Plaintiff’s credit report . . . causing Plaintiff to suffer damages.” (SAC ¶ 156.)  
18 Plaintiff does not cite any section of the FCRA, nor does he plead sufficient facts  
19 for a cause of action. Plaintiff does not provide any facts as to what was falsely  
20 reported, what negative information was reported, or how that information caused  
21 damage to Plaintiff. Plaintiff fails to allege more than a conclusory statement that  
22 Defendants violated the FCRA. *Iqbal*, 129 S. Ct. at 1949.

23 Plaintiff’s Tenth Cause of Action is dismissed with prejudice.

24 **J. Eleventh Cause of Action: Fair Debt Collection Practices Act**

25 To state a cause of action under the Fair Debt Collection Practices Act  
26 (“FDCPA”), Plaintiff must allege that: (1) he is a consumer within the meaning of

27 <sup>2</sup> Contrary to Defendants’ argument, RESPA § 2605 violations are subject to a three-year statute of limitations, not  
28 a one-year statute. 12 U.S.C. § 2614; *Garcia v. Wachovia Mortg. Corp.*, 676 F. Supp. 2d 895, 908 (C.D. Cal. 2009).

1 the FDCPA (2) the debt arises out of a transaction entered into for personal  
2 purposes; (3) the defendant is a debt collector within the meaning of the FDCPA  
3 and (4) the defendant violated one of the provisions of the FDCPA, 15 U.S.C. §§  
4 1692a-1692o. *Gutierrez v. Wells Fargo Bank*, No. C 08-5586 SI, 2009 WL  
5 322915, at \*2 (N.D. Cal. Feb. 9, 2009) (Illston, J.)

6 Plaintiff fails to allege facts satisfying the second element—*i.e.*, that the  
7 debt arises out of a transaction entered into for personal purposes. Plaintiff also  
8 fails to allege facts satisfying the fourth element—that Defendants violated a  
9 provision of the FDCPA.<sup>3</sup> Under § 1692g of the FDCPA, “[w]ithin five days of  
10 the initial communication with a consumer in connection with the collection of  
11 any debt, a debt collector shall . . . send the consumer a written notice” containing  
12 various information relating to the debt owed, including notice that the debtor can  
13 dispute the debt. 15 U.S.C. § 1692g. Plaintiff has merely alleged that “Defendant,  
14 as servicer for the owner, did not validate the subject debt.” (SAC ¶ 159.) This is  
15 a conclusory legal statement that the Court does not accept as an allegation of fact.  
16 *Iqbal*, 556 U.S. at 678.

17 Plaintiff’s Eleventh Cause of Action is dismissed with prejudice.<sup>4</sup>

18 **K. Twelfth Cause of Action: Truth in Lending Act Violation Under 15**  
19 **U.S.C. § 1641(g)**

20 Plaintiff alleges violations of Truth in Lending Act (“TILA”) under 15  
21 U.S.C. § 1641(g). TILA § 1641(g) requires an assignee of a loan to notify the  
22 borrower in writing of the transfer within 30 days of the transfer. 15 U.S.C. §  
23 1641(g). Causes of action brought under § 1641(g) have a statute of limitations of  
24 one year from the time Defendant fails to respond to the borrower’s notice of  
25 rescission. 15 U.S.C. §§ 1640(a), (e).

26 <sup>3</sup> Plaintiff did not indicate the section of 15 U.S.C. § 1692 under which he is proceeding. However, based on  
27 Plaintiff’s allegations, it is clear that Plaintiff was referring to § 1692g.

28 <sup>4</sup> Defendants argue they are not debt collectors within the meaning of the FDCPA. However, the June 24, 2011  
Notice of Trustee’s Sale, which Defendants have asked the Court to judicially notice, was signed by a ReconTrust  
employee and states, “ReconTrust Company, N.A. is a debt collector attempting to collect a debt.” (RJN, Exh. E.)

1 Here, the latest date the statute of limitations could begin is on September 1,  
2 2011, which is 30 days after August 2, 2011 when the last transfer at issue—the  
3 Trustee’s Deed Upon Sale (when BANA purchased the Property)—was signed.  
4 (RJN, Exh. F.) Therefore, the one year statute of limitations ran one year later, on  
5 September 1, 2012. Plaintiff did not file his SAC asserting this claim until July,  
6 25, 2013. Therefore, Plaintiff’s TILA claim is time-barred.

7 Plaintiff’s Twelfth Cause of Action is dismissed with prejudice.

8 **L. Thirteenth Cause of Action: Constructive Fraud**

9 “The elements of a claim for breach of fiduciary duty are: (1) existence of a  
10 fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately  
11 caused by the breach.” *Stanley v. Richmond*, 35 Cal. App. 4th 1070, 1086 (1995).  
12 “Absent special circumstances, a loan transaction is at arms-length and there is no  
13 fiduciary relationship between the borrower and lender.” *Oaks Mgmt. Corp. v.*  
14 *Superior Court*, 145 Cal. App. 4th 453, 466 (2006). A foreclosure trustee is not a  
15 true trustee, and does not owe a fiduciary duty, but merely acts as an agent of the  
16 beneficiary of the Note. *Cisneros v. Instant Capital Funding Grp., Inc.*, 263  
17 F.R.D. 595, 608 (E.D. Cal. 2009) (citing *Vournas v. Fidelity Nat’l Title Ins. Co.*,  
18 86 Cal. Rptr. 2d 490 (Ct. App. 1999)).

19 Plaintiff’s allegation that ReconTrust owes a duty of good faith and fair  
20 dealing and a fiduciary duty to Plaintiff fails. Even assuming ReconTrust was  
21 validly substituted as the trustee on the Note, ReconTrust would only be a  
22 foreclosure trustee and would not owe a fiduciary duty to Plaintiff. *Id.* Moreover,  
23 Plaintiff does not make any specific allegation as to how Defendants breached a  
24 duty of good faith and fair dealing. (*See, e.g.*, SAC ¶ 166.) Plaintiff has failed to  
25 allege facts that would state a claim plausible on its face. *Iqbal*, 556 U.S. at 678.

26 Plaintiff’s Thirteenth Cause of Action is dismissed with prejudice.

27 **M. Rule 12(f) Motion to Strike Plaintiff’s Prayer for Punitive Damages**

28 Plaintiff has requested punitive damages. Defendants argue the Plaintiff’s

1 request for punitive damages should be stricken under Federal Rule of Civil  
2 Procedure 12(f) because Plaintiff has not made sufficient allegations that  
3 Defendants acted with malice, fraud, or oppression. This is not persuasive. The  
4 wrongful foreclosure cause of action, which survives Defendants' Motion,  
5 contains allegations of fraud. Moreover, Rule 12(f) does not authorize what  
6 Defendants request. *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974-75  
7 (9th Cir. 2010). Defendants' Motion to Strike Plaintiff's prayer for relief for  
8 punitive damages is denied.

9 **V. CONCLUSION**

10 Plaintiff's First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth,  
11 Eleventh, Twelfth, and Thirteenth Causes of Action are dismissed with prejudice.  
12 Defendants' Motion to Dismiss Plaintiff's Eighth Cause of Action is denied.  
13 Defendants' Motion to Strike Plaintiff's request for punitive damages is denied.  
14 Accordingly, the only cause of action remaining in Plaintiff's SAC is the Eighth  
15 Cause of Action.

16  
17 **IT IS SO ORDERED.**

18 DATED: December 20, 2013

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20 **CONSUELO B. MARSHALL**  
21 **UNITED STATES DISTRICT JUDGE**  
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