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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ROGER OTERO, an individual,	)	Case No. CV 12-01375 DDP (JEMx)
et al.,	)	
	)	
Plaintiff,	)	<b>ORDER DENYING PLAINTIFFS' MOTION</b>
	)	<b>TO REMAND AND GRANTING</b>
v.	)	<b>DEFENDANT'S MOTION TO DISMISS</b>
	)	
FEDERAL NATIONAL MORTGAGE	)	
ASSOCIATION, et al.,	)	[Dkt. Nos. 5, 8]
	)	
Defendants.	)	

Presently before the court is Defendant Federal National Mortgage Association ("Fannie Mae")'s Motion to Dismiss. Having considered the submissions of the parties

**I. Background**

In April 2007, Plaintiffs obtained a home loan from Bank of America and executed a promissory note in favor of Bank of America, secured by a Deed of Trust, under which PRLAP, Inc. was named Trustee and Bank of America was the beneficiary. (Complaint ¶¶ 5-7, Ex. A.)<sup>1</sup>

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<sup>1</sup> Though the complaint alleges that Plaintiffs obtained a loan in July 2009, the Deed of Trust, attached as an exhibit to the complaint, is dated April 12, 2007.

1 Plaintiffs were unable to make payments on the loan, and on  
2 June 9, 2009, Defendant NDEX West, LLC (NDEX) recorded a Notice of  
3 Default as agent for beneficiary Bank of America. (Request for  
4 Judicial Notice, Ex. B).<sup>2</sup> On August 13, 2009, Bank of America  
5 substituted NDEX as Trustee. (RJN, Ex. C.) On November 2, 2010,  
6 NDEX recorded a Notice of Trustee's Sale. (RJN, Ex. D.) The  
7 Notice of Trustee's Sale did not list the beneficiary of the Deed  
8 of Trust.

9 Fannie Mae was the highest bidder at the foreclosure sale,  
10 which occurred on April 11, 2011. (RJN, Ex. E). On July 11, 2011,  
11 three months after the sale but before the recording of the  
12 Trustee's Deed Upon Sale, Bank of America assigned its interest in  
13 the Deed of Trust to Fannie Mae. (RJN, Ex. F.) Ten days later, on  
14 July 21, NDEX recorded a Trustee's Deed Upon Sale in favor of  
15 Fannie Mae. (RJN, Ex. E). The Trustee's Deed Upon Sale, however,  
16 stated "The Grantee herein WAS the foreclosing beneficiary." (Id.)

17 On December 29, 2011, Plaintiffs filed a complaint in state  
18 court alleging causes of action for (1) wrongful foreclosure, (2)  
19 set aside trustee sale, (3) cancel trustee's deed, (4) quiet title,  
20 (5) breach of contract, (6) violation of [California] Business and  
21 Professions Code § 1572, and (7) intentional misrepresentation.  
22 Fannie Mae subsequently removed to this court, and now moves to  
23 dismiss the entire complaint. Plaintiffs move to remand this case  
24 to state court.

## 25 **II. Legal Standard**

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27 <sup>2</sup> The exhibits to Plaintiffs' complaint are practically  
28 illegible. Where possible, the court therefore cites to identical  
documents identified in Defendant's Request for Judicial Notice,  
which is granted. The court

1 A complaint will survive a motion to dismiss when it contains  
2 "sufficient factual matter, accepted as true, to state a claim to  
3 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.  
4 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,  
5 570 (2007)). When considering a Rule 12(b)(6) motion, a court must  
6 "accept as true all allegations of material fact and must construe  
7 those facts in the light most favorable to the plaintiff." Resnick  
8 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint  
9 need not include "detailed factual allegations," it must offer  
10 "more than an unadorned, the-defendant-unlawfully-harmed-me  
11 accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or  
12 allegations that are no more than a statement of a legal conclusion  
13 "are not entitled to the assumption of truth." Id. at 679. In  
14 other words, a pleading that merely offers "labels and  
15 conclusions," a "formulaic recitation of the elements," or "naked  
16 assertions" will not be sufficient to state a claim upon which  
17 relief can be granted. Id. at 678 (citations and internal  
18 quotation marks omitted).

19 "When there are well-pleaded factual allegations, a court should  
20 assume their veracity and then determine whether they plausibly  
21 give rise to an entitlement of relief." Id. at 679. Plaintiffs  
22 must allege "plausible grounds to infer" that their claims rise  
23 "above the speculative level." Twombly, 550 U.S. at 555.

24 "Determining whether a complaint states a plausible claim for  
25 relief" is a "context-specific task that requires the reviewing  
26 court to draw on its judicial experience and common sense." Iqbal,  
27 556 U.S. at 679.

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1 A defendant may remove a case from state court to federal  
2 court if the case could have originally been filed in federal  
3 court. 28 U.S.C. § 1441(a); see also Snow v. Ford Motor Co., 561  
4 F.2d 787, 789 (9th Cir. 1977). "The district courts shall have  
5 original jurisdiction of all civil actions where the matter in  
6 controversy exceeds the sum or value of \$75,000 . . . and is  
7 between . . . citizens of different States[.]" 28 U.S.C.  
8 § 1332(a)(1). The removal statute is strictly construed against  
9 removal jurisdiction, and federal jurisdiction must be rejected if  
10 any doubt exists as to the propriety of removal. Gaus v. Miles,  
11 Inc., 980 F.2d 564, 566 (9th Cir. 1992).

### 12 **III. Discussion**

#### 13 A. Plaintiffs' Motion to Remand

14 This case was properly removed to this court. Plaintiffs  
15 argue that the parties are not diverse because Fannie Mae has  
16 several different regional offices. (Remand Mot. at 5.) This  
17 argument ignores the fact that Fannie Mae is a citizen of  
18 Washington, D.C., where it maintains its headquarters and "nerve  
19 center." Hertz Corp. v. Friend, 130 S.Ct. 1181, 1192 (2010).  
20 While Plaintiffs argue that they only seek to cancel the Trustee's  
21 Deed Upon Sale, the complaint explicitly seeks to quiet title to  
22 the property at issue, which is valued far above the jurisdictional  
23 minimum. See Rodriguez v. Wells Fargo Bank, N.A., No. 11-cv-05172  
24 RMW, 2011 WL 6304152 at \*3 (N.D. Cal. Dec. 16, 2011). Plaintiffs'  
25 Motion to Remand is therefore denied.

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1 B. Defendant's Motion to Dismiss

2 Fannie Mae argues that Plaintiffs may not bring any  
3 foreclosure-related claims absent a viable tender of the amount of  
4 Plaintiffs' indebtedness. (Mot. at 3.) "A tender is an offer of  
5 performance made with the intent to extinguish the obligation."  
6 Arnolds Mgmt. Corp. v. Eischen, 158 Cal. App.3d 575, 580 (1984)  
7 (citing Cal. Civ. Code, § 1485). "When a debtor is in default of a  
8 home mortgage loan, and a foreclosure is either pending or has  
9 taken place, the debtor must allege a credible tender of the amount  
10 of the secured debt to maintain any cause of action for wrongful  
11 foreclosure." Alicea v. GE Money Bank, 2009 WL 2136969 \*3 (N.D.  
12 Cal. 2009). The tender requirement spares courts from being called  
13 upon to "order a useless act performed" in cases where plaintiffs  
14 would be unable, even under proper sale procedures, to redeem a  
15 property. FPCI RE-HAB 01 v. E & G Investments, Ltd., 207  
16 Cal.App.3d 1018, 1021-22 (1989).

17 Plaintiffs appear to argue that an exception to the tender  
18 rule applies here. (Opp. at 7-8.) Indeed, an equitable exception  
19 may apply where it would be inequitable to require tender. Onofrio  
20 v. Rice, 55 Cal. App. 4th 413, 424 (1997). Courts have applied the  
21 equitable exception to the tender rule where plaintiffs contest the  
22 validity of a foreclosure prior to the foreclosure sale. See,  
23 e.g., Tamburri v. Suntrust Mortgage, Inc., 2011 WL 6294472 \*3, 5  
24 (N.D. Cal. December 15, 2011); Sacchi v. Mortgage Electronic  
25 Registration Systems, Inc., 2011 WL 2533029 \*9-10 (C.D. Cal. June  
26 24, 2011). The exception does not apply, however, in post-  
27 foreclosure situations such as this one. See, e.g., Rowen v. Bank

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1 of America, N.A., No. CV 12-1762 CAS, 2012 WL 2160632 at \*8 (C.D.  
2 Cal. 2012).

3 Plaintiffs further argue that they have sufficiently alleged  
4 tender. (Opp. at 7.) The Complaint alleges that "Plaintiffs are  
5 ready, willing and able to pay the monthly mortgage payments, given  
6 but not limited to financing," and that they have satisfied any  
7 tender requirement "in that [Plaintiffs] are ready and willing to  
8 submit an application for a loan modification in order to work out  
9 some sort of agreement with the bank to allow them to make more  
10 affordable payments . . . . (Complaint ¶¶ 15, 19.) The tender  
11 rule, however, requires that Plaintiffs offer to pay the full  
12 amount of the debt. Arnolds Mgmt., 158 Cal. App. 3d at 578.  
13 Having offered only to make resumed or reduced monthly payments,  
14 Plaintiffs have not satisfied the tender rule. Because all of  
15 Plaintiff's causes of action are related to their wrongful  
16 disclosure claims, the complaint must be dismissed.<sup>3</sup> Id. at 579.

17 **IV. Conclusion**

18 For the reasons stated above, Plaintiffs' Motion to Remand is  
19 DENIED. Defendant Fannie Mae's Motion to Dismiss is GRANTED.  
20 IT IS SO ORDERED.

22 Dated: November 9, 2012



DEAN D. PREGERSON  
United States District Judge

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25 <sup>3</sup> Plaintiff's first cause of action for wrongful foreclosure  
26 makes reference to California Civil Code § 2923.5. Tender is not  
27 required when plaintiffs bring suit under California Civil Code  
28 section 2923.5. Das v. WMC Mortgage Corp., No. C10-0650 PVT, 2010  
WL 4393885 \*2-3 (N.D. Cal. Oct. 29, 2010). There is, however, no  
post-sale remedy for violations of California Code Section 2923.5.  
Mabry v. Superior Court, 185 Cal. App. 4th 208, 235 (2010).