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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-6586-GHK (JCx)	Date	November 26, 2012
Title	*Adrian Hill & Ethel Hill v. US Bank, N.A., et al.*		

Presiding: The Honorable **GEORGE H. KING, CHIEF U.S. DISTRICT JUDGE**

Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: **(In Chambers) Order re:** Defendants' Motion to Dismiss Complaint (Dkt. No. 5)

This matter is before us on Defendants US Bank, N.A. ("US Bank"), Mortgage Electronic Registration Systems, Inc. ("MERS"), and Wells Fargo Bank, N.A. dba America's Servicing Company's ("Wells Fargo" and collectively, "Defendants") Motion to Dismiss Plaintiffs Adrian and Ethel Hill's ("Plaintiffs") Complaint. We have considered the arguments in support of and in opposition to the Motion and consider this matter appropriate for resolution without oral argument. L.R. 7-15. As the Parties are familiar with the facts, we will repeat them only as necessary. Accordingly, we rule as follows.

I. Legal Standard

In order to survive dismissal for failure to state a claim, a complaint must set forth "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). It must contain factual allegations sufficient to "state a claim to relief that is plausible on its face." *Id.* at 570; *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). In considering a motion to dismiss, we must accept the allegations of the complaint as true and construe them in the light most favorable to the plaintiff. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). We need not accept as true, however, legal conclusions "cast in the form of factual allegations." *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). "In sum, 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. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

Although review under Rule 12(b)(6) is generally limited to the contents of the complaint, we may "consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Thus, "[e]ven if a document is not attached to a complaint, it may be incorporated by reference into a complaint

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if the . . . document forms the basis of the plaintiff's claim." *Id.* This "incorporation by reference doctrine" has been extended "to situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint." *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). Matters of public record are also generally proper subjects of judicial notice. *See, e.g.*, *Grant v. Aurora Loan Servs., Inc.*, 736 F. Supp. 2d 1257, 1264 (C.D. Cal. 2010).

Here, Defendants have attached seven documents and request that we take judicial notice of them: (1) the Deed of Trust (RFJN, Ex. A); (2) the Assignment of Deed of Trust (RFJN, Ex. B);(3) the Notice of Substitution of Trustee (RFJN, Ex. C); (4) the Notice of Default (RFJN, Ex. D); (5) the Notice of Trustee's Sale (RFJN, Ex. E); (6) the Trustee's Deed Upon Sale (RFJN, Ex. F); (7) Plaintiff Ethel Hill's Chapter 7 Bankruptcy Petition (RFJN, Ex. G). Plaintiffs do not appear to dispute the authenticity of these documents or that they were recorded. Instead, Plaintiffs argue that Defendants had no authority to execute the relevant title documents subsequent to the Deed of Trust. As Plaintiffs' claims depend on the contents of Exhibits A-F, we take judicial notices of these Exhibits. We decline to take judicial notice of Plaintiff Ethel Hill's bankruptcy petition, as Plaintiffs' claims do not depend on it.[1]

II. Background

On December 15, 2005, Plaintiffs executed a Note and Deed of Trust ("DOT") in the amount of $260,000, secured by an interest in real property located at 605 West Regent Street, Inglewood, California 90301 ("Property"). (Compl. ¶ 8; RFJN, Ex. A). The DOT names People's Choice Home Loan, Inc. ("People's Choice") as the lender, F.C.I. as the trustee, and MERS as the nominee and beneficiary. (RFJN, Exh. A). During the period relevant to the Complaint, Wells Fargo acted as the servicer of Plaintiffs' loan. The DOT specifically authorized that "[t]he Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower." (RFJN, Ex. A, ¶ 20).

MERS recorded an "Assignment of Deed of Trust" ("Assignment") on October 27, 2009. (RFJN, Ex. B). The Assignment states that MERS, "as nominee for People's Choice," transfers all beneficial interest under the DOT to US Bank, as trustee for Mastr Asset Backed Securities Trust, 2006-HE2. On October 30, 2009, US Bank recorded a "Substitution of Trustee," in which NDEx West, LLC was substituted as the trustee under the DOT. (RFJC, Ex. C). On May 11, 2011, NDEx West initiated foreclosure proceedings against Plaintiffs by recording a Notice of Default ("NOD"). (RFJN, Ex. D).

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[1] Defendants argue that Plaintiff Ethel Hill is judicially estopped from proceeding in this action because she had filed for bankruptcy on December 9, 2011 without scheduling her claims in this action, and that her petition had been discharged without the claims ever being scheduled. (Mot. 3-4). Because Defendants fail to submit documents showing that Ms. Hill's petition had been discharged, we find that we have insufficient factual basis from which to evaluate this argument. Thus, we decline to address it at this time.

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On April 20, 2012, NDEx West recorded a Notice of Trustee's Sale. (RFJN, Ex. E). The Property was sold to US Bank in a foreclosure sale on June 19, 2012. (RFJN, Ex. G).

Plaintiffs do not dispute that any of the aforementioned documents were recorded. Instead, Plaintiffs allege that the foreclosure is void because "Defendants did not actually own Plaintiff[s'] Note and therefore had no right to foreclose." (Compl. ¶ 18). In particular, Plaintiffs allege that Defendants do not have an interest in the loan because Defendants attempted to securitize his loan into the Mastr Asset Backed Securities Trust 2006-HE2, but failed to do so properly. Plaintiffs allege that under the Pooling and Servicing Agreement ("PSA") for the trust, the trust had a closing date of June 29, 2006. (*Id.* ¶ 28). Thus, because the Note and DOT were not assigned to the trust until October 27, 2009, "Plaintiff[s'] Note could not have been a part of the Trust." (*Id.* ¶ 29). Moreover, Plaintiffs allege that the Note did not have "a complete chain of endorsements" as required under the PSA. (*Id.* ¶ 30). Plaintiffs assert that because of these alleged failures to comply with the PSA, "none of [the] Defendants [is a] present holder[] in due course of Plaintiff[s'] Note such that they can enforce Plaintiffs['] obligation and demand mortgage payments." (*Id.* ¶ 41).

Plaintiffs further allege that Defendants violated the DOT and California Civ. Code Section 2934(a) by failing to file a valid Substitution of Trustee. They contend that only the lender, or People's Choice, had the power to execute such substitution. (*Id.* ¶ 47).

With respect to Wells Fargo, Plaintiffs allege that they "became delinquent on their loan due largely to the recommendation of [Wells Fargo], whose representative allegedly told Plaintiffs "to miss their next two payments" when they "inquire[d] about getting a loan modification under the Making Home Affordable ("HAMP") loan modification program." (*Id.* ¶ 50). Plaintiffs allege that Wells Fargo made such recommendation to "profit off the late fees, foreclosure fees, and even trial modification payments which were never applied towards the principal balance." (*Id.* ¶ 51). Plaintiffs further allege that under the PSA, a Servicer like Wells Fargo "is required to actively engage in 'loss mitigation' under their agreement with the Trust to prevent the foreclosure of the property and to provide for income to the Trust in the form of payments by Plaintiff[s] on their mortgage." (*Id.* ¶ 171). Plaintiffs allege that under this provision, they are "the intended Third Party Beneficiary of the PSA." (*Id.*).

Based on the foregoing allegations, Plaintiffs assert the following thirteen claims against US Bank, MERS, and Wells Fargo: (1) declaratory relief under 28 U.S.C. §§ 2201, 2202; (2) negligence; (3) quasi contract; (4) violation of the Helping Families Save Their Homes Act of 2009, 15 U.S.C. § 1641(g); (5) violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.*; (6) violation of California Business & Professions Code §§ 17200 and 17500; (7) accounting; (8) constructive trust; (9) wrongful foreclosure; (10) "to void or cancel trustee's deed upon sale"; (11) quiet title; (12) breach of contract; and (13) civil conspiracy. Plaintiffs appear to assert claims 1, 2, 6, 9, 11, and 13 against all Defendants, and assert claims 3, 4, 5, 7, 8, and 12 against US Bank and Wells Fargo. Claim 10 appears to be asserted against US Bank only.

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III. Discussion

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A. Defendants' Authority to Foreclose

Preliminarily, we note that most of Plaintiffs' claims turn on the assertion that Defendants lacked the authority to foreclose on the Property.

Plaintiffs primarily argue that Defendants lacked the authority to foreclose because Defendants failed to comply with the requirements under the PSA in securitizing the loan. However, the argument that improper securitization renders a lender's interest in a loan unenforceable has been resoundingly rejected by district courts. *See Bascos v. Fed. Home Loan Mortg. Corp.*, 2011 WL 3157063, at *6 (C.D. Cal. July 22, 2011) ("To the extent Plaintiff challenges the securitization of his loan because Freddie Mac failed to comply with the terms of its securitization agreement, Plaintiff has no standing to challenge the validity of the securitization of the loan as he is not an investor of the loan trust."); *Lane v. Vitek Real Estate Indus. Grp.*, 713 F. Supp. 2d 1092, 1099 (E.D. Cal. 2010) ("The argument that parties lose interests in a loan when it is assigned to a trust pool has also been rejected by numerous district courts.").

Moreover, to the extent Plaintiffs' Complaint alleges that they have standing to challenge Defendants' alleged failure to comply with the PSA because they are the "intended Third Party Beneficiary of the PSA," (Compl. ¶ 171), Defendants specifically argued in their moving papers that Plaintiffs "have no standing to seek relief based on a purported violation of the [PSA]" because they are not investors of the loan trust. (Mot. 5). Plaintiffs' Opposition fails to address this argument. Thus, we deem this failure as Plaintiffs' concession that they lack standing.[2] *See* L.R. 7-12; *Richter v. Mutual of Omaha, Ins. Co.*, 2007 WL 6723708, *5 (C.D. Cal. Feb. 1, 2007). Accordingly, Plaintiffs claims fail to the extent they rely on the theory that Defendants lacked authority to foreclose because Defendants failed to comply with the PSA.

Second, in their Opposition, Plaintiffs argue that Defendants lacked authority to foreclose because MERS lacked the authority to assign the loan to US Bank. Plaintiffs argue that under the DOT, only the original lender, People's Choice, had the authority to assign because only it was entitled to receive the monthly loan payments. (Opp'n 6). Plaintiffs rely on *Weingartner v. Chase Home Finance, LLC*, 702 F. Supp. 2d 1276, 1281 (D. Nev. 2010), in which the court reviewed Nevada law, for the proposition that MERS does not have the authority "to transfer the beneficial interest in a promissory

[2] We note that even if we review the merits of Plaintiffs' assertion that they are third party beneficiaries under the PSA, Plaintiffs' argument fails, given that they are not investors of the loan trust. *See, e.g.*, *Bascos*, 2011 WL 3157063, at *6. *Cf. Escobedo v. Countrywide Home Loans, Inc.*, 2009 WL 4981618, *2-3 (S.D. Cal. Dec. 15, 2009) (concluding that qualified borrowers are merely "incidental beneficiaries" and not third-party beneficiaries of a Servicer Participation Agreement between Fannie Mae and Countrywide, which "provided that Countrywide shall perform the loan modification . . . services . . . described in the Financial Instrument"); *Simmons v. Countrywide Home Loans, Inc.*, 2010 WL 2635220, at *5 (S.D. Cal. June 29, 2010) (same).

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note without more evidence of its agency in this capacity than being named as a nominee on a deed of trust."

However, California courts reviewing this issue under the California's nonjudicial foreclosure framework have specifically held that "allegation that MERS was merely a nominee is insufficient to demonstrate that MERS lacked authority to make a valid assignment of the note on behalf of the original lender." *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 271 (Ct. App. 2011); *Herrera v. Fed. Nat'l Mortg. Ass'n*, 205 Cal. App. 4th 1495, 1504-05 (Ct. App. 2012). Where the DOT specifically states that MERS has the right to exercise all interests of the beneficiary, MERS's authority to assign the DOT on behalf of the lender is "not reasonably subject to dispute." *See Herrera*, 205 Cal. App. 4th at 1505. Here, the DOT expressly provides that the "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as the nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property." (RFJN, Ex. A, at 6). Thus, pursuant to the terms of the DOT, MERS had the authority to assign the DOT on behalf of the lender.

Plaintiffs also appear to argue that MERS lacked authority to assign the DOT because there was no written instrument between the lender and MERS that granted MERS specific authority to convey title to the property at issue. This argument is belied by the express terms of the DOT quoted above, which specifically grants MERS the right to exercise any or all interests of the lender, which includes the power to assign the DOT. *See Calvo v. HSBC Bank USA, N.A.*, 199 Cal. App. 4th 118, 125 (Ct. App. 2011) (finding that "MERS . . . had the right to initiate foreclose . . . pursuant to the express language of the deed of trust," given that "[p]laintiff agreed in the deed of trust that MERS had the right to initiate foreclosure").

Accordingly, Plaintiffs' claims fail to the extent that they rely on the theory that Defendants have no authority to foreclose.

B. Claim #1: Declaratory Relief

Under 28 U.S.C. § 2201, "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." However, such relief is limited by the express terms of the statute to cases "of actual controversy." *Id.* Declaratory relief should be denied if it will "neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." *United States v. Washington*, 759 F.2d 1353, 1356-57 (9th Cir. 1985). Moreover, "[d]eclaratory relief may be unnecessary where an adequate remedy exists under some other causes of action." *Minnesota Life Ins. Co. v. Philpot*, 2012 WL 4486311, at *11 (S.D. Cal. Sept. 27, 2012).

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Here, Plaintiffs request that we declare that "with the exception of People's Choice, none of the named Defendants . . . have any right or interest in Plaintiff[s'] Note or Deed of Trust . . . and therefore cannot foreclose or collect Plaintifff[s'] mortgage payments." (Compl. ¶ 87). As discussed above, however, the declaration sought by Plaintiffs is not supported by law, and thus, there is no actual controversy regarding the Defendants' right and interest in the DOT.

Accordingly, Plaintiffs' claim for declaratory relief is **DISMISSED without leave to amend**.

C. Claim #2: Negligence

"In order to establish a claim for negligence, a plaintiff must establish four required elements: (1) duty, (2) breach, (3) causation, and (4) damages." *Ileto v. Glock Inc.*, 349 F.3d 1191, 1203 (9th Cir. 2003). Defendants move to dismiss Plaintiffs' claim for negligence on the ground that they did not owe Plaintiffs a duty of care. "The existence of a legal duty to use reasonable care in a particular factual situation is a question of law for the court to decide." *Castaneda v. Saxon Mortg. Servs., Inc.*, 687 F. Supp. 2d 1191, 1198 (E.D. Cal. 2009) (quoting *Vasquez v. Residential Invs., Inc.*, 118 Cal. App. 4th 269, 278 (2004)). As a general rule, barring an assumption of duty or a special relationship, "a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." *Vann v. Aurora Loan Servs. LLC*, 2011 WL 2181861, at *4 (N.D. Cal. June 3, 2011) (quoting *Nymark v. Heart Fed. Sav. & Loan Ass'n*, 231 Cal. App. 3d 1089, 1096 (1991)). "Courts have held that this rule is applicable to loan servicers as well." *Id.*; *accord Castaneda*, 687 F. Supp. 2d at 1198.

Here, Plaintiffs fail to cite any authority for the proposition that US Bank or MERS owed them a duty as beneficiaries under the DOT. Instead, Plaintiffs assert that "the tort of wrongful foreclosure claim involves the breach of duty of care by the persons responsible for the process." (Opp'n 3). An equitable cause of action for wrongful foreclosure, however, is unrelated to a duty of care under a negligence claim. *See, e.g., Grajeda v. Bank of Am., N.A.*, 2012 WL 4795985, *1-2 (S.D. Cal. Oct. 9, 2012). Additionally, Plaintiffs have not alleged that US Bank or MERS engaged in any conduct that exceeded the scope of their conventional role as mere beneficiaries under the DOT. Plaintiffs have thus failed to establish that US Bank or MERS owed Plaintiffs a duty of care, thereby falling short of the requisite pleading requirements for a negligence claim.

With respect to Wells Fargo, Plaintiffs allege that it induced them into going into default when they inquired about loan modification in order to "profit off the late fees, foreclosure fees, and even trial modification payments which were never applied towards the principal balance." (Compl. ¶ 51). Plaintiffs further allege that "[o]nce they became two months behind, Defendants failed to put Plaintiffs into a modification agreement that would have cured any alleged default and would have been an absolute defense to foreclosure." (*Id.* ¶ 53). In essence, the negligence claim against Wells Fargo appears to be based on Wells Fargo's alleged conduct in modifying their loan. Most courts reviewing this issue, however, "have characterized a loan modification as a traditional money lending activity,

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warranting application . . . [of the general rule] that a financial institution [] owes no duty of care to a borrower." *Settle v. World Sav. Bank, FSB*, 2012 WL 1026103, at *8 (C.D. Cal. Jan. 11, 2012); *see also Dooms v. Fed. Home Loan Mortg. Corp.*, 2011 WL 1303272, at *9 (E.D. Cal. Mar. 31, 2011) ("The moving defendants are correct that a negligence claim based on their roles as lender and loan servicer fails in the absence of a duty to forego foreclosure or to provide a loan modification."). This is the case even where the plaintiff alleges that there was substantial delay in the modification process and where the plaintiff alleges that the financial institution affirmatively represented to them that a permanent modification would be put in place. *See Argueta v. J.P. Morgan Chase*, 2011 WL 2619060, at *5 (E.D. Cal. June 30, 2011) (concluding that Chase owed plaintiff no duty of care even though plaintiff alleged that Chase failed to "actually review Plaintiff for modification," took "five months to review Plaintiff for a loan modification," and refused "to accept further documentation from Plaintiff to prove that the Property was her primary resident."); *Sullivan v. JP Morgan Chase Bank, N.A.*, 725 F. Supp. 2d 1087, 1092 (E.D. Cal. 2010) ("Plaintiffs have provided no authority to support their argument that lenders owe borrowers a duty of care not to misinform them about the loan modification process. Therefore, Plaintiffs' allegations that Defendant misrepresented to them that a permanent loan modification would be put into place are insufficient to form the basis of a negligence claim."). Based on these authorities, we conclude that Wells Fargo owed no duty to Plaintiffs in the loan modification process, given that its alleged conduct does not exceed the scope of its role as the loan servicer.

In their Opposition, Plaintiffs also appear to argue that they assert the negligence claim based on violations of FDCPA and TILA. (Opp'n 4). As discussed below, however, Plaintiffs' FDCPA and TILA claims fail, and thus, such claims cannot support the negligence claim on a negligence per se theory.

Accordingly, Plaintiffs' negligence claim is **DISMISSED without leave to amend**.

D. Claim #3: Quasi contract

Plaintiffs allege that "Defendants accepted payments from Plaintiff[s] knowing that the Trust did not acquire an interest in Plaintiff[s'] Note." (Compl. ¶ 96). Thus, Plaintiffs allege that they are entitled to the return of payments made. (*Id.*). Additionally, Plaintiffs allege that Defendants were also unjustly enriched by "applying charges to the mortgage accounts of Plaintiff[s] which were either illegal, wrong in character, wrong in amount, unauthorized, or otherwise improper." (Compl. ¶ 97). We observe that even though the latter allegation is purportedly asserted against all Defendants, other parts of the Complaint suggest that it is targeted at Wells Fargo, who allegedly "enticed Plaintiffs to go behind [on their payments] under the false pretenses that they needed to in order to qualify for Making Home Affordable loan modification program" so that it could generate "late fees, foreclosure fees, and even trial modification payments which were never applied towards the principal balance." (Compl. ¶ 51).

Under the law of restitution, "where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct," the law will, where appropriate, "imply a contract (or rather, a quasi-contract), without regard to the parties' intent, in order to avoid unjust enrichment." *Durell v.*

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Sharp Healthcare, 183 Cal. App. 4th 1350, 1370 (Ct. App. 2010). "The fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is unjust for the person to retain it." *Id.* (alteration removed). A claim for quasi contract "cannot lie where a valid express contract covering the same subject matter exists between the parties." *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 856 (N.D. Cal. 2004); *see also Durell*, 183 Cal. App. 4t 1370 ("An unjust enrichment theory is inapplicable because [the plaintiff] alleges the parties entered into express contracts.").

To the extent that Plaintiffs base their quasi contract claim on their allegation that Defendants never acquired an interest in the Property, the claim fails as discussed above in Part III.A.

To the extent that Plaintiffs' quasi contract claim is targeted at Wells Fargo for its alleged conduct in generating fees related to Plaintiffs' default, we find that the quasi contract claim cannot lie because Plaintiffs' allegations indicate the existence of an express contract. In alleging that Wells Fargo advised Plaintiffs to go into default to collect certain fees, there must necessarily have been an agreement that expressly prescribed such fees in the event of default. Thus, no quasi contract claim can lie based on Wells Fargo's collection of these fees.

To the extent that Plaintiffs allege that they made trial modification payments under Wells Fargo's advice, we find that Plaintiffs have not plausibly alleged that Wells Fargo's retainment of the payments, even if true, is unjust, given that Wells Fargo did not have a duty to modify Plaintiffs' loan and Plaintiffs have not alleged that Wells Fargo lacked the authority to prescribe certain eligibility criteria for loan modification, which could include certain trial payments. Plaintiffs' Opposition provides no indication that they can allege additional facts to support this theory of liability.

Accordingly, Plaintiffs' quasi contract claim is **DISMISSED without leave to amend**.

E. Claim #4: Violation of 15 U.S.C. § 1641(g)

In 2009, TILA was amended to add, in relevant part, subsection (g) to 15 U.S.C. § 1641. Helping Families Save Their Homes Act, Pub. L. No. 111–22, § 404, 123 Stat. 1632, 1649 (2009). As amended, TILA requires that: "not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer."

Plaintiffs allege that US Bank violated § 1641(g) by failing to "provide [them] with a written notice [of the Assignment of the DOT] within 30 days" after the assignment. (Compl. ¶ 107). They allege that they "never received any notices indicating any relevant information" regarding the assignment, that "[i]n fact, when [they] asked Servicer about the identity of their lender, Servicer refused to disclose the information." (*Id.* at ¶ 108). Plaintiffs concede that this claim is asserted outside the one-year statute of limitations under § 1641(g), but argue that the statute of limitations should be

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equitably tolled because "[t]hey could not have with reasonable diligence discovered such facts because they did not receive copies of the Assignment as required by law." (*Id.* at ¶ 110).

"The mere existence of TILA violations and lack of disclosure does not itself equitably toll the statute of limitations. A contrary rule would render the one-year statute of limitations meaningless, as it would be tolled whenever there were improper disclosures." *Murphy v. Metrocities Mortg. LLC*, 2011 WL 5319917, at *2 (C.D. Cal. Sept. 27, 2011) (citations and alterations omitted). Thus, to establish grounds for equitable tolling, plaintiffs must assert fraudulent conduct beyond the nondisclosure itself. *See id.* (holding that Plaintiff's TILA claim was time-barred because "[e]xcepting the lack of disclosure itself, Plaintiff has not shown fraudulent concealment by Central Mortgage or any other circumstance warranting equitable tolling").

Here, other than allegations of nondisclosure, Plaintiffs assert only the vague allegation that Wells Fargo had refused to disclose the identity of the lender upon inquiry. Plaintiffs allege no specific facts relating to the timing and context of this conversation sufficient to show that Wells Fargo was fraudulently concealing the identity of US Bank as the beneficiary. Because Plaintiffs' Opposition provides no indication that any such facts may be alleged, we find and conclude that Plaintiffs' § 1641(g) claim is time-barred and must be dismissed.

Moreover, we note that even if Plaintiffs' § 1641(g) claim were timely, they cannot allege any actual damages resulting from US Bank's failure to provide notice of the assignment. "Where a creditor fails to comply with the requirements of § 1641(g), liability only exists for any actual damage sustained by such person as a result of the failure." *Che v. Aurora Loan Servs., LLC*, 847 F. Supp. 2d 1205, 1209 (C.D. Cal. 2012) (internal quotations omitted); 15 U.S.C. § 1640(a)(1). That Plaintiffs were not notified of the assignment had no effect on their ability to make payments under the loan, given that they acknowledge that payments were made to Wells Fargo, the servicer. (*See* Compl. ¶ 11). Plaintiffs do not allege that there was any confusion as to where and to whom to submit their payments under the loan.

Accordingly, Plaintiffs' claim for violation of § 1641(g) is **DISMISSED without leave to amend**.

F. Claim #5: Violation of the FDCPA

To establish a FDCPA claim, plaintiffs must show: (1) that they are a consumer within the meaning of 15 U.S.C. §§ 1692a(3) and 1692c(d); (2) that the debt arises out of a transaction entered into for personal purposes; (3) that the defendant is a debt collector within the meaning of § 1692a(6); and (4) that the defendant violated one of the provisions of the FDCPA, §§ 1692a-1692o. *Ananiev v. Aurora Loan Servs., LLC*, 2012 WL 2838689, at *3 (N.D. Cal. July 10, 2012).

"Although the Ninth Circuit has not yet addressed whether a foreclosure action constitutes 'debt collection' under the FDCPA, district courts throughout the Ninth Circuit have concluded that it does

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not." *Ananiev*, 2012 WL 2838689, at *3; *see also Aniel v. T.D. Serv.*, 2010 WL 3154087, at *1 (N.D. Cal. Aug. 9, 2010); *Gallegos v. Recontrust Co.*, 2009 WL 215406, at *3 (S.D. Cal. Jan. 29, 2009); *Izenberg v. ETS Servs., LLC*, 589 F. Supp. 2d 1193, 1199 (C.D. Cal. 2008). Moreover, [m]ortgagees and their beneficiaries, including mortgage servicing companies and trustee fiduciaries, are not 'debt collectors' subject to the FDCPA." *Khast v. Washington Mut. Bank*, 2011 WL 940792, at *3 (S.D. Cal. Mar. 16, 2011).

Here, the only debt collection activity identified in the Complaint relates to the foreclosure of the Property, and Plaintiffs' Opposition points to no additional facts suggesting otherwise. Plaintiffs' only response is that Wells Fargo was not acting as a loan servicer because it was collecting payments without authorization. Because this argument depends on Plaintiffs' theory that the DOT was not properly assigned to US Bank, a theory we reject above, Plaintiffs' FDCPA claim fails.

Accordingly, Plaintiffs' FDCPA claim is **DISMISSED without leave to amend**.

G. Claim #6: Violation of California Business & Professions Code §§ 17200 and 17500; Claim # 7: Accounting

In their Opposition, Plaintiffs state that they "[do] not oppose the motion as it relates [to] claims for an accounting and unfair competition. Their application is more theoretical than practical." (Opp'n 9). We construe this statement as Plaintiffs' withdrawal of these claims and hereby **DISMISS them without leave to amend**. We view, with strong disfavor, Plaintiffs' assertion of "theoretical" claims without regard for scarce judicial resources.

H. Claim #8: Constructive Trust

"A constructive trust is an equitable remedy to compel the transfer of property by one who is not justly entitled to it to one who is." *Habitat Trust for Wildlife, Inc v. City of Rancho Cucamonga*, 175 Cal. App. 4th 1306, 1332 (Ct. App. 2009). It may "only be imposed when three conditions are met: the existence of a res, the plaintiff's right to the res, and the defendant's acquisition of the res by some wrongful act." *Id.* As a remedy, it is dependent on other causes of action and cannot stand alone. *See Embarcadero Municipal Improvement Dist. v. Cty. of Santa Barbara*, 88 Cal. App. 4t 781, 793 (Ct. App. 2001) ("A constructive trust is not a substantive device but merely a remedy, and an action seeking to establish a constructive trust is subject to the limitation period of the underlying substantive right."). Because we conclude that Plaintiffs fail to state any claim against any Defendants, Plaintiffs have no basis to seek a constructive trust. Accordingly, Plaintiffs' claim for constructive trust is **DISMISSED without leave to amend**.

I. Claim #9: Wrongful Foreclosure

To state a claim for an equitable cause of action for wrongful foreclosure, Plaintiffs must show that "(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering." *Lona v. Citibank, N.A.*, 202 Cal. App. 4th 89, 104 (Ct. App. 2011).

Plaintiffs base this claim entirely on their allegation that Defendants "did not have the authority to exercise the power of sale within the Deed." (Compl. ¶ 140). As discussed in Part III.A., however, Plaintiffs have failed to plausibly allege that US Bank lacks an interest in their loan. Thus, this claim must be dismissed. In their Opposition, Plaintiffs have not identified additional facts that could support their assertion that US Bank does not have an interest in their loan. Accordingly, the wrongful foreclosure claim is hereby **DISMISSED without leave to amend.**

J. Claim #10: "To Void or Cancel Trustee's Deed Upon Sale"

This appears to be the same claim as Plaintiffs' claim for wrongful foreclosure. Accordingly, it is likewise **DISMISSED without leave to amend.**

K. Claim #11: Quiet Title

To state a claim for quiet title, plaintiffs must set forth in their complaint: (1) a legal description and street address of the subject real property; (2) the title of plaintiff as to which determination is sought and the basis of the title; (3) the adverse claims to the title of the plaintiff against which a determination is sought; (4) the date as of which the determination is sought; and (5) a prayer for the determination of the title of the plaintiff against the adverse claims. Cal. Code Civ. P. § 761.020.

Plaintiffs here seek a "declaration that the title to the subject property is vested in Plaintiff[s] alone and that the Defendants . . . be declared to have no estate, right, title or interest in the Property." (Compl. ¶ 165). We note that this claim appears to be inappropriately asserted against all Defendants, as the only party with an adverse claim to the title is US Bank, which purchased the Property at the trustee's sale. To the extent that this claim is asserted against US Bank, it must be dismissed because the claim appears to be entirely based on Plaintiffs' allegation that Defendants lacked authority to foreclose. Accordingly, Plaintiffs' claim for quiet title is **DISMISSED without leave to amend.**

L. Claim #12: Breach of Contract

Plaintiffs' breach of contract claim appears to be based entirely on the allegation that Defendants failed to comply with the PSA's requirements in securitizing the loan. As discussed above in Part III.A., this theory fails.

Accordingly, Plaintiffs' breach of contract claim is **DISMISSED without leave to amend.**

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UNITED STATES DISTRICT COURT
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M. Claim #13: Civil Conspiracy

Plaintiffs allege that "Defendants engaged in an unlawful combination and conspiracy to originate, raise, and service mortgage loans through a pattern and practice of predatory lending and to conceal this unlawful activity for the purpose of unjustly enriching the joint venturers and conspirators." (Compl. ¶ 175).

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." *Applied Equipment Corp v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-11 (Ct. App. 1994). "The threshold requirement for a civil conspiracy is the formation of a conspiracy by two or more persons who have agreed on a common plan to commit a tortious act." *Cranstal Resources, Ltd v. Zukowski & Bresenhan*, 2002 WL 22426, at 4 (Ct. App. Jan. 9, 2002) (citing *Kidron v. Movie Acquisition Corp.*, 40 Cal. App. 4th 1571, 1581-82 (Ct. App. 1995)).

Here, Plaintiffs' claim for civil conspiracy fails. Not only is the conclusory allegation of predatory lending wholly unsupported by specific factual allegations, but it also appears to be unrelated to all other allegations raised in the Complaint. More importantly, as the preceding discussion makes clear, Plaintiffs cannot state any claims against any Defendants.

Accordingly, Plaintiffs' purported claim for civil conspiracy is **DISMISSED without leave to amend**.

IV. Conclusion

Based on the foregoing, Defendants' Motion is **GRANTED** in its entirety.

IT IS SO ORDERED.

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Initials of Deputy Clerk Bea

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