

NO JS-6

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

11 REINHARD A. TIEFENTHALER et ) Case No. ED CV 10-01722 DDP (OPx)  
al., )  
12 Plaintiffs, ) **ORDER GRANTING DEFENDANTS' MOTION**  
13 ) **TO DISMISS FIRST AMENDED**  
14 v. ) **COMPLAINT**  
15 ) [Motion filed on May 31, 2011  
WELLS FARGO BANK NA et al., ) Term. Dkt. Nos. 26, 28, and 32]  
16 Defendants. )

17 This matter comes before the court on a Motion to Dismiss  
18 filed by Wells Fargo Bank, N.A. successor in interest by merger  
19 with Wachovia Mortgage, FSB and NDEX West L.L.C ("Defendants").  
20 After reviewing the materials submitted by the parties and  
21 considering the arguments therein, the court GRANTS the motion and  
22 adopts the following Order.

23 || I. BACKGROUND

24 On October 2, 2008, Plaintiffs Reinhard and Margaret  
25 Tiefenthaler ("Plaintiffs") obtained a loan from Wachovia, secured  
26 by a deed of trust against the subject property at 1309 E. Country  
27 Club Blvd., Big Bear City, California 92314 (the "Property").  
28 (Wachovia's Request For Judicial Notice in Support of Motion to

1 Dismiss ("RJN"), Ex. A.) Plaintiffs defaulted on their loan, so a  
2 notice of default was recorded on June 29, 2010. (RJN, Ex. B.) On  
3 October 4, 2010, a Notice of Trustee's Sale was recorded noticing a  
4 trustee's sale on October 26, 2010. (RJN, Ex. C.) On October 5,  
5 2010, Plaintiffs brought suit against Defendants in state court,  
6 seeking to enjoin the foreclosure sale, damages for alleged fraud,  
7 and declaratory relief. (Complaint ("Compl.") ¶¶ 66, 67, 78.) On  
8 October 26, 2010, the Trustee's Sale took place and the property  
9 was sold. (RJN, Ex. D.) On November 8, 2010, Defendants removed the  
10 present action to this court based on diversity jurisdiction.  
11 (Notice of Removal ¶ 2.) After removal, Defendants moved to  
12 dismiss Plaintiffs' complaint under Federal Rules of Civil  
13 Procedure 12(b)(6), 8, and 9(b). (Dkt. No. 7.) This court granted  
14 the motion with leave to amend. (Dkt. No. 21.) On May 12, 2011,  
15 Plaintiffs filed their first amended complaint ("FAC"). (Dkt. No.  
16 24.)

17 **II. LEGAL STANDARD**

18 Under the Federal Rule of Civil Procedure 12(b)(6), a  
19 complaint is subject to dismissal when the plaintiff's allegations  
20 fail to state a claim upon which relief can be granted. When  
21 considering a 12(b)(6) motion to dismiss for failure to state a  
22 claim, "all allegations of material fact are accepted as true and  
23 should be construed in the light most favorable to [the]  
24 plaintiff." Resnick v. Hayes, 213 F.3d 433, 447 (9th Cir. 2000).

25 In Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009), the  
26 Supreme Court explained that a court considering a 12(b)(6) motion  
27 should first "identify[] pleadings that, because they are no more  
28 than conclusions, are not entitled to the assumption of truth."

1       Id. Next, the court should identify the complaint's "well-pleaded  
2 factual allegations, . . . assume their veracity and then determine  
3 whether they plausibly give rise to an entitlement to relief."  
4       Id.; see also Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th  
5 Cir. 2009) ("In sum, for a complaint to survive a motion to  
6 dismiss, the non-conclusory factual content, and reasonable  
7 inferences from that content, must be plausibly suggestive of a  
8 claim entitling the plaintiff to relief" (internal quotation marks  
9 omitted)).

10      **III. DISCUSSION**

11      **A. Rule 8**

12       Defendants seek to dismiss Plaintiffs' claims for failure to  
13 comply with the pleading requirements under the Federal Rules of  
14 Civil Procedure. Rule 8 requires a plaintiff to "plead a short and  
15 plain statement of the elements of his or her claim, identifying  
16 the transaction or occurrence giving rise to the claim and the  
17 elements of the *prima facie* case." Bautista v. Los Angeles County,  
18 216 F.3d 837, 840 (9th Cir. 2000). It is well settled, for  
19 example, that a pleading may not simply allege a wrong has been  
20 committed and demand relief, but rather, must give "fair notice" of  
21 the claim being asserted and the "grounds upon which it rests."  
22 Yamaguchi v. United States Dept. Of Air Force, 109 F.3d 1475, 1481  
23 (9th Cir. 1997).

24       Here, even construing all allegations of material fact in  
25 Plaintiffs' favor, Plaintiffs' causes of action do not satisfy the  
26 minimal notice pleading requirements of Rule 8. Plaintiffs' FAC  
27 lists statutes and definitions in support of their claims. (FAC ¶¶  
28 9-28.) However, Plaintiffs have failed to identify any specific

1 facts underlying Plaintiffs' allegations as to the various  
2 statutory provisions pursuant to which Plaintiff bring suit. In  
3 particular, Plaintiffs do not identify any particular conduct by  
4 Wachovia that violates the statutory provisions. A mere recitation  
5 of statutes and legal definitions does not constitute a claim.  
6 Such pleading does not give Defendants fair notice of the claim and  
7 the grounds upon which it rests. Vague allegations and mere labels  
8 and conclusions are insufficient to withstand a motion to dismiss.  
9 See Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 553-55  
10 (2007). Accordingly, Plaintiffs' claims are dismissed for failure  
11 to state a claim upon which relief may be granted.

12 **B. Preemption**

13 Defendants next argue that the Home Owners' Loan Act of 1933,  
14 12 U.S.C. § 1461 et seq. ("HOLA") and regulations promulgated by the  
15 Treasury Department's Office of Thrift Supervision ("OTS"), 12  
16 C.F.R. § 560, preempt Plaintiffs' state law claims. (Defendants'  
17 Motion to Dismiss Plaintiffs' First Amended Complaint, ("Def.'s  
18 Motion") 4: 5-12.) Pursuant to HOLA, OTS is authorized "to  
19 prescribe a nationwide system of operation, supervision, and  
20 regulation which would apply to federal [savings] associations."  
21 Glendale Fed. Sav. & Loan Ass'n v. Fox, 459 F. Supp. 903, 909 (C.D.  
22 Cal. 1978). Acting under such authority, OTS promulgated 12 C.F.R.  
23 § 560.2(b), which provides for preemption of state laws that impose  
24 upon federal savings banks any requirements regarding "terms of  
25 credit, . . . [d]isclosure and advertising, . . . [or][p]rocessing,  
26 origination, servicing, sale or purchase of . . . mortgages." 12  
27 C.F.R. § 560.2(b)(4,9-10).

28

1       In Silvas v. E\*Trade Mortgage Corp., 514 F.3d 1001 (9th Cir.  
2 2008), the Ninth Circuit described HOLA as "so pervasive as to  
3 leave no room for state regulatory control." Id. at 1004-1005  
4 (internal citation omitted). The court explained that "because  
5 there has been a history of significant federal presence in  
6 national banking, the presumption against preemption of state law  
7 is inapplicable" in the banking context. Id. at 1004-1005  
8 (internal citation omitted). In Silvas, the plaintiffs brought  
9 several claims under California's Unfair Competition Law ("UCL")  
10 related to a mortgage. Id. at 1003. The Silvas court held that  
11 because plaintiffs' claims were "entirely based on [Defendant's]  
12 disclosures and advertising," the claims "[fell] within the  
13 specific type of law listed in § 560.2(b)(9)," and were therefore  
14 preempted. Id. at 1006 (emphasis in original).

15       Here, Plaintiffs allege: "All of the Defendants have involved  
16 themselves in a conspiracy . . . [by] listing a non-beneficiary as  
17 beneficiary, using a State Notary to attest to signatures on  
18 different dates than the actual date of the signing of documents in  
19 different counties than the county where the document [sic] were  
20 signed, by claiming money was loaned when in actuality, assets were  
21 exchanged." (FAC 1: 26-28 - 2: 1-4.) Furthermore, Plaintiffs  
22 allege that Defendants do not have the right to foreclose on  
23 Plaintiffs' property, are not the real parties in interest, and  
24 breached their agreement to loan money. (See FAC ¶ 7.) Defendants  
25 argue that Plaintiffs' allegations trigger one or more of HOLA's  
26 regulations because they relate to lending, processing, and  
27 servicing policies of federal savings banks and their successors  
28

1 and are therefore preempted. (Def.'s Motion 8: 13-15.) The court  
2 agrees.

3 The court finds a comparison with Rivera v. Wachovia Bank,  
4 instructive. Rivera v. Wachovia Bank, No. 09-0433, 2009 WL 2406301  
5 (S.D. Cal. Aug. 4, 2009). In Rivera, the court found that  
6 plaintiff's allegations that Wachovia induced him to sign loan  
7 documents without adequate disclosures in regard to the interest  
8 rate and its adjustment over time in violation of state law were  
9 expressly the type of lending activity regulations Congress sought  
10 to preempt. Rivera, 2009 WL 2406301 at \*2. Similarly, in Andrade  
11 v. Wachovia Mortgage, the court ruled that the plaintiff's state  
12 law based fraud, injunctive relief, and quiet title claims were  
13 expressly preempted by HOLA. Andrade v. Wachovia Mortgage, 2009 WL  
14 1111182, No. 09-0377 (S.D. Cal. April 21, 2009). The Andrade court  
15 reasoning that:

16 Plaintiff's allegations revolve entirely  
17 around the "processing, origination, [and]  
18 servicing" of the Plaintiff's mortgage,  
19 including the "terms of credit" offered, the  
20 "loan-related fees" charged, and the adequacy  
21 of disclosures made by Defendants in  
soliciting and settling the loan. 12 C.F.R. §  
560.2(b)(4), (9), (10). Because the state  
laws on which Plaintiff relies, as applied,  
would regulate lending activities expressly  
contemplated by § 560.2(b), the claims are  
preempted.

22  
23 Andrade, 2009 WL 1111182 at \*3.

24 In the present action, Plaintiffs' claims are difficult to  
25 discern and are not pled with particularity. However, it appears  
26 that Plaintiffs broadly assert that Defendants engaged in fraud in  
27 the initial disclosure, origination, and servicing of Plaintiffs'  
28 mortgage. In support of their claims, Plaintiffs cite the UCL §

1 17200, which appears to be the entire grounds for related relief.  
2 The court must resolves any doubt in favor of preemption. Weiss v.  
3 Washington Mutual Bank, 147 Cal. App. 4th 72, 77 (2007). To the  
4 extent that Plaintiffs' state law claims for fraud relate to the  
5 "processing," "disclosure," "origination," and/or "sale or purchase  
6 of" their mortgage, they are preempted and therefore dismissed. 12  
7 C.F.R. § 560.2(b)(10).

8 **C. Declaratory Relief**

9 Defendants move to dismiss any declaratory relief based on the  
10 failure to identify specific grounds for relief. Plaintiffs seek a  
11 determination of whether Defendants have a right to a non-judicial  
12 foreclosure action and whether false documents were used. (FAC ¶  
13 7.) Plaintiffs' declaratory relief is subject to the provisions of  
14 the Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201, which  
15 permits a district court to hear declaratory actions. The DJA is  
16 procedural only. Aetna Life Ins. Co. of Hartford, Conn. v.  
17 Haworth, 300 U.S. 227, 240. Furthermore, a DJA action requires a  
18 district court to "inquire whether there is a case of actual  
19 controversy within its jurisdiction." American States Ins. Co. v.  
20 Kearns, 15 F.3d 142, 143-44 (9th Cir. 1994). Here, as discussed in  
21 relation to the various causes brought by Plaintiffs, the court is  
22 not persuaded that there is an actual controversy, and accordingly  
23 Defendants' motion to dismiss Plaintiffs' request for declaratory  
24 relief is granted.

25 **D. Tender**

26 "When a debtor is in default of a home mortgage loan, and a  
27 foreclosure is either pending or has taken place, the debtor must  
28 allege a credible tender of the amount of the secured debt to

1 maintain any cause of action for wrongful foreclosure." Alicea v.  
2 GE Money Bank, 2009 WL 2136969 \*3 (N.D. Cal. July 16, 2009). In  
3 order to enjoin or set aside a foreclosure sale, the debtor must  
4 make a valid and viable tender of the indebtedness. Id. (citing  
5 Karlsen v. American Savings & Loan Ass'n, 15 Cal. App. 3d 122, 117  
6 (1971)). A valid and viable tender of payment of the indebtedness  
7 owing is essential to an action to cancel a voidable sale under a  
8 deed of trust. The rationale behind the rule is that if plaintiffs  
9 could not have redeemed the property had the sale procedures been  
10 proper, any irregularities in the sale did not result in damages to  
11 the plaintiffs. Lopez v. Chase Home Fin. LLC, No. 09-0449, 2009 WL  
12 981676 at \*5 (E.D. Cal. Apr. 9, 2009). Thus even if notices were  
13 deficient, Plaintiffs' failure to plead tender of the indebtedness  
14 eliminates a challenge to the foreclosure process. In fact, a  
15 complaint that does not allege such a tender does not state a cause  
16 of action. McElroy v. Chase Manhattan Mortgage Corp., 134 Cal.  
17 App. 4th 388 (2005).

18 As noted above, Plaintiffs' claims are difficult to discern  
19 and are not pled with particularity. Here, because it appears that  
20 Plaintiffs have failed to tender, which is a condition precedent  
21 to any claim for wrongful foreclosure, the court grants Defendants'  
22 motion.

23 **E. Fraud**

24 Defendants also move to dismiss Plaintiffs' fraud claims on  
25 the grounds that the claims are not pled with the specificity  
26 required by Rule 9(b). Fed. R. Civ. P. 9(b). The Ninth Circuit  
27 has held that "when averments of fraud are made, the circumstances  
28 constituting the alleged fraud" must "be specific enough to give

1 defendants notice of the particular misconduct," thereby enabling  
2 them to "defend against the charge and not just deny that they have  
3 done anything wrong." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097,  
4 1106 (9th Cir. 2003) (internal quotation marks and citations  
5 omitted). Therefore, averments of fraud "must be accompanied by  
6 'the who, what, when, where, and how' of the misconduct charged."  
7 Id. (quoting Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)  
8 (internal quotation marks omitted)). In their FAC, Plaintiffs do  
9 not allege that Defendants made any specific misrepresentations  
10 that induced them to enter into the loan transaction. Rather,  
11 Plaintiffs assert general allegations without any specification of  
12 misconduct. (FAC 1:26-28, 2:1-4.) These allegations are not  
13 pleaded with sufficient particularity to satisfy Rule 9(b).  
14 Therefore, Defendants are entitled to dismissal of Plaintiffs'  
15 fraud claims on the grounds that the claims are not pled with the  
16 specificity required by Rule 9(b).

17 Moreover Plaintiffs assert that "[a]ll of the Defendants have  
18 involved themselves in a conspiracy." (FAC 1.) Conspiracy is a  
19 legal doctrine that only operates where an actual tort has been  
20 committed. Applied Equipment Corp. v. Litton Saudi Arabia Ltd., 7  
21 Cal. 4th 503, 511 (1994). Under California law, there is no  
22 separate and distinct cause of action for civil conspiracy.  
23 Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.,  
24 122 F.3d 1211, 1228 (9 th Cir. 1997).

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1      **III. CONCLUSION**

2      For the foregoing reasons, the court GRANTS Defendants' motion  
3 to dismiss without prejudice. Plaintiffs shall file a third  
4 amended complaint on or before August 19, 2011. Plaintiffs'  
5 Request for Void Judgment Pursuant to FRCP 60 B(4) (Dkt. No. 28) is  
6 VACATED as moot, and Plaintiffs' Petition to Postpone Ruling on  
7 Motion (Dkt. No. 32) is DENIED.

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IT IS SO ORDERED.

Dated: July 19, 2011



DEAN D. PREGERSON

United States District Judge

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