

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF CALIFORNIA

4 MARY AMARAL, JOE AMARAL and DANNY
5 AMARAL,

6 Plaintiffs,

7 v.

8 WACHOVIA MORTGAGE CORPORATION, a
9 North Carolina Corporation;
10 CARRINGTON MORTGAGE SERVICES, LLC;
11 and DOES 1-50 inclusive,

12 Defendants.

09-CV-00937-OWW-GWA

MEMORANDUM DECISION AND
ORDER RE: (1) DEFENDANT
CARRINGTON'S MOTION TO
DISMISS OR, IN THE
ALTERNATIVE, MOTION FOR A
MORE DEFINITE STATEMENT;
(2) DEFENDANT WACHOVIA'S
MOTION TO DISMISS; AND (3)
DEFENDANT WACHOVIA'S MOTION
TO STRIKE

13 I. INTRODUCTION

14 Before the court is a motion to dismiss or, in the
15 alternative, a motion for a more definite statement filed by
16 Defendant Carrington Mortgage Corporation ("Carrington"), and a
17 motion to dismiss and a motion to strike filed by Defendant
18 Wachovia Mortgage, FSB ("Wachovia") erroneously sued as Wachovia
19 Mortgage Corporation. The motions are directed at the claims
20 asserted by Plaintiffs Mary Amaral, Joe Amaral, and Danny Amaral
21 ("Plaintiffs") in their removed complaint (Doc. 24-2). The
22 following background facts are taken from the complaint and other
23 documents on file in this case.

24 II. BACKGROUND

25 A. General Background

26 This is a mortgage fraud case concerning Plaintiffs' residence
27 located in Lemoore, California. Initially, Plaintiffs obtained two
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1 loans from Freemont & Loan ("Freemont"), one for \$460,000 (the
2 "First Loan") and one for \$115,000 (the "Second Loan"). Around
3 January 2008, Plaintiffs approached Wachovia to obtain a third
4 loan, i.e., a refinance loan, to pay off both their First and
5 Second Loan. (Doc. 24-2 at 2-3.)

6 On or about April 1, 2008, Carrington took over "servicing" of
7 the First Loan allegedly without notice to Plaintiffs. On or about
8 April 30, 2008, Wachovia purportedly wired \$594,806.16 to Freemont
9 to pay off both loans. On May 13, 2008, however, Carrington sent
10 Plaintiffs a Notice of Intent to Foreclose on the First Loan. This
11 notice stated that the monthly loan payments due on or after March
12 1, 2008, had not been received. Starting in June 2008, Plaintiffs
13 made monthly payments to Wachovia on the refinance loan. Starting
14 in December 2008, Wachovia refused to accept Plaintiffs' payments.
15 (*Id.* at 3-4.)

16 **B. Procedural History And Plaintiffs' Complaint**

17 On April 21, 2009, Plaintiffs filed a complaint in Kings
18 County Superior Court. In May 2009, Defendant Carrington filed a
19 notice of removal purporting to remove, with Wachovia's consent,
20 Plaintiffs' state case to federal court. Carrington, however,
21 attached the wrong complaint to its notice of removal - the
22 attached complaint was filed by "Gerald Anudokem" in the Northern
23 District of California. This irregularity was pointed out to
24 Carrington in an order dated September 17, 2009. (Doc. 23.) On
25 October 1, 2009, Carrington filed an amended notice of removal (to
26 which no party objected) and attached the correct complaint.

27 Plaintiffs' complaint contains causes of action for: (1) a
28 violation of the Real Estate Settlement Procedures Act of 1974, 12

1 U.S.C. § 2601 et seq. ("RESPA"); (2) a violation of § 2937 of the
2 California Civil Code; (3) declaratory relief; (4) fraud; and (5)
3 conversion. The RESPA, § 2937, and declaratory relief claims are
4 asserted against Carrington. The fraud and conversion claims are
5 asserted against Wachovia.

6 Federal question jurisdiction, which exists over the RESPA
7 claim, is the asserted basis for subject matter jurisdiction.
8 Supplemental jurisdiction is asserted as to the state law claims.

9 C. The Motions

10 Carrington moves to dismiss Plaintiffs' RESPA, § 2937, and
11 declaratory relief claims. Alternatively, Carrington moves for a
12 more definite statement of these claims. Wachovia moves to dismiss
13 the fraud and conversion claims, and also moves to strike
14 Plaintiffs' request for punitive damages. With respect to the
15 fraud claim, Wachovia further contends that Plaintiffs have failed
16 to comply with Rule 9(b)'s pleading requirements.

17
18 III. STANDARDS OF DECISION

19 A. Motion To Dismiss

20 Dismissal under Rule 12(b)(6) is appropriate where the
21 complaint lacks sufficient facts to support a cognizable legal
22 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699
23 (9th Cir. 1990). To sufficiently state a claim to relief and
24 survive a 12(b)(6) motion, the pleading "does not need detailed
25 factual allegations" but the "[f]actual allegations must be enough
26 to raise a right to relief above the speculative level." *Bell Atl.*
27 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Mere "labels and
28 conclusions" or a "formulaic recitation of the elements of a cause

1 of action will not do." *Id.* Rather, there must be "enough facts to
2 state a claim to relief that is plausible on its face." *Id.* at 570.
3 In other words, the "complaint must contain sufficient factual
4 matter, accepted as true, to state a claim to relief that is
5 plausible on its face." *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct.
6 1937, 1949 (2009) (internal quotation marks omitted). The Ninth
7 Circuit has summarized the governing standard, in light of *Twombly*
8 and *Iqbal*, as follows: "In sum, for a complaint to survive a motion
9 to dismiss, the non-conclusory factual content, and reasonable
10 inferences from that content, must be plausibly suggestive of a
11 claim entitling the plaintiff to relief." *Moss v. U.S. Secret*
12 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks
13 omitted). Apart from factual insufficiency, a complaint is also
14 subject to dismissal under Rule 12(b)(6) where it lacks a
15 cognizable legal theory, *Balistreri*, 901 F.2d at 699, or where the
16 allegations on their face "show that relief is barred" for some
17 legal reason, *Jones v. Bock*, 549 U.S. 199, 215 (2007).

18 In deciding whether to grant a motion to dismiss, the court
19 must accept as true all "well-pleaded factual allegations" in the
20 pleading under attack. *Iqbal*, 129 S. Ct. at 1950. A court is not,
21 however, "required to accept as true allegations that are merely
22 conclusory, unwarranted deductions of fact, or unreasonable
23 inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988
24 (9th Cir. 2001); see, e.g., *Doe I v. Wal-Mart Stores, Inc.*, 572
25 F.3d 677, 683 (9th Cir. 2009). "When ruling on a Rule 12(b)(6)
26 motion to dismiss, if a district court considers evidence outside
27 the pleadings, it must normally convert the 12(b)(6) motion into a
28 Rule 56 motion for summary judgment, and it must give the nonmoving

1 party an opportunity to respond." *United States v. Ritchie*, 342
2 F.3d 903, 907 (9th Cir. 2003). "A court may, however, consider
3 certain materials-documents attached to the complaint, documents
4 incorporated by reference in the complaint, or matters of judicial
5 notice-without converting the motion to dismiss into a motion for
6 summary judgment." *Id.* at 908.

7 B. Motion For A More Definite Statement

8 "If a pleading fails to specify the allegations in a manner
9 that provides sufficient notice, a defendant can move for a more
10 definite statement under Rule 12(e) before responding."
11 *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002). Under Rule
12 12(e), "[a] party may move for a more definite statement of a
13 pleading" when it is "so vague or ambiguous that the party cannot
14 reasonably prepare a response."

15 A Rule 12(e) motion is proper only if the complaint is so
16 indefinite that the defendant cannot ascertain the nature of the
17 claim being asserted, i.e., so vague that the defendant cannot
18 begin to frame a response. See *Famolare, Inc. v. Edison Bros.*
19 *Stores, Inc.*, 525 F. Supp. 940, 949 (E.D. Cal. 1981). The motion
20 must be denied if the complaint is specific enough to notify
21 defendant of the substance of the claim being asserted. See
22 *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1461 (C.D. Cal. 1996); see
23 also *San Bernardino Pub. Employees Ass'n v. Stout*, 946 F. Supp.
24 790, 804 (C.D. Cal. 1996) ("A motion for a more definite statement
25 is used to attack unintelligibility, not mere lack of detail, and
26 a complaint is sufficient if it is specific enough to apprise the
27 defendant of the substance of the claim asserted against him or
28 her.").

1 C. Motion To Strike

2 Under Rule 12(f), a court may strike from a pleading "an
3 insufficient defense or any redundant, immaterial, impertinent, or
4 scandalous matter." Fed. R. Civ. P. 12(f). "The function of a
5 12(f) motion to strike is to avoid the expenditure of time and
6 money that must arise from litigating spurious issues by dispensing
7 with those issues prior to trial." *Sidney-Vinsein v. A.H. Robins*
8 *Co.*, 697 F.2d 880, 885 (9th Cir. 1983). A motion to strike should
9 not be granted unless it is clear that the matter to be stricken
10 could have no possible bearing on the subject matter of the
11 litigation. *Neveu v. City of Fresno*, 392 F. Supp. 2d 1159, 1170
12 (E.D. Cal. 2005).

13 D. Rule 9(b)

14 In terms of factual sufficiency, Rule 9(b), when it applies,
15 imposes an elevated pleading standard. Rule 9(b) states:

16 In alleging fraud or mistake, a party must state with
17 particularity the circumstances constituting fraud or
18 mistake. Malice, intent, knowledge, and other conditions
of a person's mind may be alleged generally.

19 "To comply with Rule 9(b), allegations of fraud must be specific
20 enough to give defendants notice of the particular misconduct which
21 is alleged to constitute the fraud." *Swartz v. KPMG LLP*, 476 F.3d
22 756, 764 (9th Cir. 2007) (internal quotation marks omitted). The
23 "time, place, and specific content of the false representations as
24 well as the identities of the parties to the misrepresentations"
25 must be specified. *Id.* (internal quotation marks omitted). The
26 "[a]verments of fraud must be accompanied by the who, what, when,
27 where, and how of the misconduct charged." *Kearns v. Ford Motor*
28 *Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). A plaintiff alleging

1 fraud "must set forth more than the neutral facts necessary to
2 identify the transaction. The plaintiff must set forth what is
3 false or misleading about a statement, and why it is false." *Vess*
4 *v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)
5 (emphasis removed).

6 7 IV. ANALYSIS

8 A. Carrington's Motion

9 1. RESPA Claim

10 As to the RESPA claim, Plaintiffs' complaint alleges:

11 23. The transaction was a 'federally related mortgage
12 loan' as that term is defined in the Real Estate
13 Settlement and Procedures Act ('RESPA'), 12 U.S.C. §
14 2602(1).

15 24. Carrington is a 'servicer' as defined in 12 U.S.C.
16 § 2605(i) (2), (3).

17 25. The notification provision in section 2605(c) (1)
18 states: 'Each transferee servicer to whom the servicing
19 of any federally related mortgage loan is assigned, sold,
20 or transferred shall notify the borrower of any such
21 assignment, sale, or transfer.' Section 2605(c) (2) (A)
22 states that the notice required 'shall be made to the
23 borrower not more than 15 days after the effective date
24 of transfer of the servicing of the mortgage loan (with
25 respect to which such notice is made).'

26 26. Plaintiffs never received a notice regarding the
27 purported assignment, sale or transfer of the servicing
28 of the loan to Carrington.

29 27. Further, if the Notice of Default is correct and
30 Carrington became the 'transferee servicer' as of March
31 1, 2008, Carrington failed to provide notice of the
32 transfer of servicing within 15 days after the effective
33 date of transfer.

34 28. Pursuant to RESPA, the above violations committed by
35 Carrington subject defendants to actual damages to the
36 plaintiffs and any additional damages allowed by the
37 Court.

38 (Doc. 24-2 at 5.)

1 In enacting RESPA, Congress found "that significant reforms in
2 the real estate settlement process are needed to insure that
3 consumers . . . are provided with greater and more timely
4 information on the nature and costs of the settlement process and
5 are protected from unnecessarily high settlement charges caused by
6 certain abusive practices" 12 U.S.C. § 2601(a). The RESPA
7 provision at issue in Plaintiffs' complaint, § 2605(c), deals with
8 a loan servicer's obligation to give notice to a borrower when a
9 federally related mortgage loan is assigned, sold or transferred to
10 that servicer.

11 Section 2605(c) reads, in pertinent part, as follows:

12 (1) Each transferee servicer to whom the servicing of any
13 federally related mortgage loan is assigned, sold, or
14 transferred shall notify the borrower of any such
15 assignment, sale, or transfer.

16

17 (2) (A) Except as provided in subparagraphs (B) and (C),
18 the notice . . . shall be made to the borrower not more
19 than 15 days after the effective date of transfer of the
20 servicing of the mortgage loan (with respect to which
21 such notice is made).

22 (3) Any notice required under paragraph 1 [above] shall
23 include information described in subsection (b)(3) of
24 this section [i.e., § 2605(b)(3)].

25 12 U.S.C. § 2605(c) (1)-(3).

26 In terms of civil liability, "[w]hoever fails to comply" with
27 § 2605(c), or any provision of § 2605, is liable to the borrower
28 for "any actual damages to the borrower as a result of the failure"
and "any additional damages, as the court may allow, in the case of
a pattern or practice of noncompliance with the requirements of
this section, in an amount not to exceed \$1,000." § 2605(f) (1) (A) -
(B).

1 Carrington advances two arguments as to why Plaintiffs' RESPA
2 claim under § 2605(c) is insufficiently pled. First, citing *Wanger*
3 *v. EMC Mortgage Corp.*, 103 Cal. App. 4th 1125 (2002), Carrington
4 argues that Plaintiffs' allegation that they never "received" a
5 notice from Carrington when it became the loan servicer is
6 insufficient to state a claim under § 2605(c) because this section
7 only requires Carrington to "mail" the requisite notice to the
8 borrower; it does not require Carrington to ensure the notice is
9 actually "received" by the borrower or physically placed in the
10 borrower's hands. See also *Rodriguez v. Countrywide Homes*, __ F.
11 Supp. __, 2009 WL 3792308, at *5-6 (E.D. Cal. 2009). Second,
12 Carrington contends the RESPA claim fails because Plaintiffs have
13 not alleged that they suffered "actual damages" as a result of the
14 statutory violation nor, more importantly, any facts suggesting that
15 they suffered actual damages.

16 In opposition, Plaintiffs offer to amend their complaint to
17 allege, on information and belief, that the requisite RESPA notice
18 "was not sent" by Carrington. While this amendment would address
19 Carrington's first argument, it would not cure the deficiency in
20 Plaintiffs' complaint with respect to actual damages.

21 As Carrington correctly notes, there are no allegations in the
22 complaint suggesting that Plaintiffs suffered actual damages as a
23 result of Carrington's alleged violation of § 2605(c). Absent
24 factual allegations suggesting that Plaintiffs suffered actual
25 damages, Plaintiffs' RESPA claim is insufficiently pled and subject
26 to dismissal. *Molina v. Washington Mutual Bank*, No. 09-CV-00894-IEG
27 (AJB), 2010 WL 431439, at *7 (S.D. Cal. Jan. 29, 2010) (concluding
28 that a RESPA claim was infirm because the plaintiffs "failed to

1 sufficiently plead pecuniary loss"); *Lemieux v. Litton Loan*
2 *Servicing, LP*, No. 2:09-cv-02816-JAM-EFB, 2009 WL 5206641, at *3
3 (E.D. Cal. Dec. 22, 2009) ("Plaintiffs have not pled facts showing
4 they suffered actual damages. Their failure to do so defeats their
5 RESPA claim."); *Garcia v. Wachovia Mortgage Corp.*, __ F. Supp. 2d
6 __, 2009 WL 3837621, at *10 (C.D. Cal. 2009) (dismissing RESPA claim
7 because Plaintiff "failed to allege damages under Section 2605").
8 Although Plaintiffs have alleged that Carrington's RESPA violation
9 "subjects defendant[] to actual damages" under the statute (Doc. 24-
10 2 at 6), this allegation is insufficient. "Th[is] is not a factual
11 allegation of damage to Plaintiff[s]; it is a conclusory statement
12 of law." *Garcia*, 2009 WL 3837621 at *10.

13 The RESPA claim is DISMISSED WITH LEAVE TO AMEND.

14 2. Section 2937

15 The complaint asserts, perfunctorily, a "Violation of
16 [California] Civil Code § 2937" against Carrington. The complaint
17 alleges:

18 31. Defendant Carrington failed to give written notice to
19 plaintiffs of the transfer of servicing of indebtedness
on the First Loan.

20 32. Pursuant to Civil Code § 2937(g), plaintiffs are not
21 liable to the holder of the note or any servicing agent
for payments made to Fremont, nor are they liable for
late charges.

22 (Doc. 24-2 at 6.) Carrington raises two arguments against this
23 purported claim. First, without citing any authority, Carrington
24 argues that § 2937 does not give rise to a private right of action;
25 instead, a violation of the statute merely relieves the aggrieved
26 borrower of certain monetary obligations such as late charges. See
27 § 2937(g). Second, Carrington contends that even if § 2937 gives
28

1 rise to a private right of action, Plaintiffs' allegations are
2 insufficient to state a claim because the statute only requires
3 Carrington to "mail" the requisite notice to the borrower; it does
4 not require Carrington to ensure the notice is actually received by
5 the borrower or physically given to the borrower. According to
6 Carrington, Plaintiffs must, at a minimum, allege that Carrington
7 "failed to mail" the statutory notice.

8 Section 2937 reads, in pertinent part, as follows:

9 (a) The Legislature hereby finds and declares that
10 borrowers or subsequent obligors have the right to know
11 when a person holding a promissory note, bond, or other
12 instrument transfers servicing of the indebtedness
13 secured by a mortgage or deed of trust on real property
14 containing one to four residential units located in this
state. The Legislature also finds that notification to
the borrower or subsequent obligor of the transfer may
protect the borrower or subsequent obligor from
fraudulent business practices and may ensure timely
payments.

15

16 (b) Any person transferring the servicing of indebtedness
17 as provided in subdivision (a) to a different servicing
18 agent and any person assuming from another responsibility
19 for servicing the instrument evidencing indebtedness,
shall give written notice to the borrower or subsequent
obligor before the borrower or subsequent obligor becomes
obligated to make payments to a new servicing agent.

20

21 (e) The notices required by subdivision (b) shall be sent
22 by first- class mail, postage prepaid, to the borrower's
23 or subsequent obligor's address designated for loan
payment billings, or if escrow is pending, as provided in
the escrow, and shall contain each of the following:

24 (1) The name and address of the person to which the
25 transfer of the servicing of the indebtedness is made.

26 (2) The date the transfer was or will be completed.

27 (3) The address where all payments pursuant to the
28

1 transfer are to be made.

2 (f) Any person assuming from another responsibility for
3 servicing the instrument evidencing indebtedness shall
4 include in the notice required by subdivision (b) a
statement of the due date of the next payment.

5 (g) The borrower or subsequent obligor shall not be
6 liable to the holder of the note, bond, or other
7 instrument or to any servicing agent for payments made to
8 the previous servicing agent or for late charges if these
payments were made prior to the borrower or subsequent
obligor receiving written notice of the transfer as
provided by subdivision (e) and the payments were
otherwise on time.

9 Cal. Civ. Code § 2937(a)-(b), (e)-(g).

10 As to Carrington's first argument, i.e., that § 2937 does not
11 create a private right of action, *Faria v. San Jacinto Unified*
12 *School District*, 50 Cal. App. 4th 1939, 1947 (1996) (internal
13 citations and quotation marks omitted), explains the general rule:

14 The general rule is that '[f]or every wrong there is a
15 remedy.' (Civ. Code, § 3523.) In accordance with that
16 principle, [t]he violation of a statute gives to any
17 person within the statute's protection a right of action
to recover damages caused by its violation. Where a new
right is created by statute, the party aggrieved by its
violation is confined to the statutory remedy if one is
18 provided; otherwise any appropriate common law remedy may
19 be resorted to. A private right of action is an
appropriate remedy when it is needed to assure the
effectiveness of the provision

20 Carrington has not explained why the general rule stated in
21 *Faria* - that a statutory violation gives any person within the
22 statute's protection a right to recover damages caused by the
23 violation - does not apply in this case. Nor has Carrington argued
24 that § 2937(g) is a remedial provision which precludes any *further*
25 remedy for a statutory violation (this argument would actually
26 undermine Carrington's contention that § 2937 provides no private
27
28

1 right of action at all).¹

2 Even assuming, however, that § 2937 may supply a private right
3 of action, there is a problem with the complaint that precludes a
4 conclusive resolution of Carrington's argument. It is impossible
5 to discern, from the complaint, whether Plaintiffs are even
6 asserting a private right of action under § 2937 or, instead, are
7 using § 2937 solely as a defense. *Sutton v. Providence St. Joseph*
8 *Md. Ctr.*, 192 F.3d 826, 844 (9th Cir. 1999) (recognizing that a
9 statute may give the plaintiff a viable "defense" but not a "private
10 right of action"); see also *Sanai v. Saltz*, 170 Cal. App. 4th 746,
11 775 n.21 (2009) (same). There is no indication in the complaint
12 that Plaintiffs are requesting damages, declaratory relief, or some
13 other affirmative remedy for the alleged violation of § 2937. The
14 complaint merely states that, because of the statutory violation,
15 "plaintiffs are not liable to holder of the note or to any servicing
16 agent for payments made to Fremont, nor are they liable for late
17 charges." (Doc. 24-2 at 6.) An allegation that Plaintiffs are "not
18 liable" is not equivalent to, and falls short of, pleading an
19 affirmative claim for relief.

20 Without knowing whether Plaintiffs are using § 2937 to obtain
21 some affirmative remedy, whether Plaintiffs have a viable private
22 right of action cannot be properly analyzed or conclusively
23 determined at this time. Whether § 2937 provides a private right
24 of action is not something which can be determined in the abstract.

25
26 ¹ Under certain circumstances, § 2937(g) excuses the
27 remission of payments and late charges to the new servicing agent
28 if the payments have been made to the former payee.

1 See *Maldonado v. Morales*, 556 F.3d 1037, 1044 (9th Cir. 2009) ("The
2 role of the courts is neither to issue advisory opinions nor to
3 declare rights in hypothetical cases, but to adjudicate live cases
4 or controversies.") (internal quotation marks omitted); *Schneider*
5 *v. Chertoff*, 450 F.3d 944, 959 (9th Cir. 2006) ("It has long been
6 settled that we have no authority to give opinions upon . . .
7 abstract propositions, or to declare principles or rules of law
8 which cannot affect the matter in issue in the case before us")
9 (internal quotation marks omitted).

10 Carrington's motion to dismiss on the grounds that § 2937 does
11 not provide Plaintiffs with a private right of action is DENIED
12 without prejudice to refiling. Carrington's motion for more a
13 definite statement is, however, GRANTED. Because it is unclear
14 whether Plaintiffs are asserting a private right of action under §
15 2937, Plaintiffs, if they wish to pursue such a claim, must amend
16 the complaint to clarify whether they are requesting damages,
17 declaratory relief, or some other affirmative remedy for the
18 statutory violation.² Carrington's motion for a more definite
19 statement of this claim is GRANTED WITH LEAVE TO AMEND.

20 As to Carrington's second argument in support of dismissal,
21 Plaintiff has offered to amend the complaint to allege, on
22 information and belief, that the requisite statutory notice under
23 § 2937 "was not sent" by Carrington. This proposed amendment
24 addresses Carrington's second argument and tracks the statutory
25 text, which requires that notices "be sent by first-class mail." §

26
27 ² If they are using the statute only defensively, then there
28 should not be a separately pled "claim" or "cause of action" for a
violation of § 2937 in any amended complaint.

1 2937(e). At this juncture, however, whether Plaintiffs are even
2 asserting a private right of action under § 2937, or are using the
3 statute solely as a defense, is unclear. Given the complaint's lack
4 of clarity on this issue, Carrington's motion to dismiss for failure
5 to state a "claim" is premature, as no affirmative "claim" presently
6 appears in the complaint. If Plaintiffs amend the complaint to
7 affirmatively assert a private right of action (i.e., a claim) under
8 § 2937, it can then be determined whether it is subject to dismissal
9 for, among other reasons, insufficient factual allegations.

10 Carrington's motion to dismiss the § 2937 "claim" because it
11 is insufficiently pled is DENIED without prejudice to refileing.

12 3. Declaratory Relief

13 Plaintiffs assert a declaratory relief claim against
14 Carrington. The complaint describes a purported controversy between
15 Carrington and Plaintiffs concerning a non-judicial foreclosure on
16 Plaintiffs' property.

17 35. An actual controversy has arisen and now exists
18 between plaintiffs and Carrington concerning their
19 respective rights and duties under the Deed of Trust, in
20 that defendants allege that a default exists as stated in
21 the Notice of Default, and that the defendants have the
22 right to complete the non-judicial foreclosure pursuant
23 to the Notice of Trustee's Sale, while plaintiffs allege
24 that the Notice of Default is defective, and therefore
25 defendants have no right to proceed with the non-judicial
26 foreclosure pursuant to the Notice of Trustee's Sale.

27 36. Plaintiffs desire a judicial determination of their
28 rights and duties, and declarations as to whether: (a)
plaintiffs are in default under the provisions of the
Deed of Trust; (b) the Notice of Default and the Notice
of Trustee's Sale are defective and invalid; and (c)
defendants have the right to proceed with the
non-judicial foreclosure pursuant to the Notice of
Trustee's Sale.

(Doc. 24-2 at 7.)

Declaratory relief "operates prospectively, and not merely for

1 the redress of past wrongs." *Babb v. Superior Court*, 3 Cal. 3d 841,
2 848 (1971); see also *County of San Diego v. California*, 164 Cal.
3 App. 4th 580, 607 (2008). A declaratory relief action "serves to
4 set controversies at rest before they lead to repudiation of
5 obligations, invasion of rights or commission of wrongs; in short,
6 the remedy is to be used in the interests of preventive justice, to
7 declare rights rather than execute them." *Babb*, 3 Cal. 3d at 848
8 (internal quotation marks omitted). As recently stated in *Meyer v.*
9 *Sprint Spectrum L.P.*, 45 Cal. 4th 634, 647 (2009) (internal
10 citations and quotation marks omitted):

11 The purpose of a declaratory judgment is to serve some
12 practical end in quieting or stabilizing an uncertain or
13 disputed jural relation. Another purpose is to liquidate
14 doubts with respect to uncertainties or controversies
15 which might otherwise result in subsequent litigation.
16 One test of the right to institute proceedings for
17 declaratory judgment is the necessity of present
18 adjudication as a guide for plaintiff's future conduct in
19 order to preserve his legal rights.

20 The first two declarations which Plaintiffs request concern
21 only past conduct, i.e., whether Plaintiffs are "in default under
22 the provisions of the Deed of Trust" and whether "the Notice of
23 Default and the Notice of Trustee's Sale are defective and invalid."
24 A judicial declaration as to these matters would not, standing
25 alone, serve the purposes of declaratory relief. However, the final
26 declaration Plaintiffs request is whether Carrington has a "right
27 to proceed with the non-judicial foreclosure pursuant to the Notice
28 of Trustee's Sale." This requested declaration is prospective in
nature - the non-judicial foreclosure has not yet occurred - and
could conceivably prevent future litigation over a completed
wrongful foreclosure, as well as guide the parties' future conduct.

Carrington argues that declaratory relief is not necessary

1 because "[i]f Carrington wants to foreclose on the subject home in
2 the future, it need not rely on the validity of the previously
3 recorded notice of default, it can issue a new notice of default."
4 Incidentally, this argument underscores that there is an ongoing
5 dispute between the parties over their rights and duties and reveals
6 the potential utility of declaratory relief in guiding the parties'
7 future conduct, i.e., Carrington may or may not need to issue a new
8 notice of default if the old one is or is not defective.

9 Carrington's motion to dismiss the declaratory relief claim is
10 GRANTED in part and DENIED in part. The motion is GRANTED to the
11 extent the complaint requests independent declarations as to past
12 conduct, i.e., whether Plaintiffs are "in default under the
13 provisions of the Deed of Trust" and whether "the Notice of Default
14 and the Notice of Trustee's Sale are defective and invalid." This
15 portion of the declaratory relief claim is DISMISSED.³ The motion
16 is DENIED to the extent the complaint requests a declaration that
17 Carrington has a "right to proceed with the non-judicial foreclosure
18 pursuant to the Notice of Trustee's Sale."

19 B. Wachovia's Motion

20 1. HOLA Preemption

21 Wachovia, a federally chartered savings bank, moves to dismiss
22

23 ³ To the extent the first two requested declarations (i.e.,
24 whether Plaintiffs are in default and whether the default notice
25 and trustee's sale notice were defective and invalid) are tied to
26 and provide the basis for the third requested declaration (i.e.,
27 whether Carrington can proceed with the non-judicial foreclosure),
28 a determination as to whether Plaintiffs are entitled to the third
requested declaration will involve an analysis of the issues
surrounding the first two with no need for separate declarations on
all three matters.

1 the state law fraud and conversion claims on the grounds that these
2 claims are preempted by the federal Home Owners Loan Act ("HOLA").⁴
3 Numerous courts have found state law fraud and conversion claims
4 preempted by HOLA. See, e.g., *Lopez v. Wachovia Mortgage*, No. 2:09-
5 CV-01510-JAM-DAD, 2009 WL 4505919, at *5 (E.D. Cal. Nov. 20, 2009);
6 *Kelley v. Mortgage Electronic Registration Sys., Inc.*, 642 F. Supp.
7 2d 1048, 1054 (N.D. Cal. 2009); *Andrade v. Wachovia Mortgage, FSB*,
8 No. 09 CV 0377 JM (WMc), 2009 WL 1111182, at *2 (S.D. Cal. Apr. 21,
9 2009).

10 "HOLA was designed to restore public confidence by creating a
11 nationwide system of federal savings and loan associations to be
12 centrally regulated according to nationwide best practices." *Silvas*
13 *v. E*Trade Mortgage Corp.*, 514 F.3d 1001, 1004 (9th Cir. 2008)
14 (internal quotation marks omitted). HOLA and its accompanying
15 regulations represent a "radical and comprehensive response to the
16 inadequacies of the existing state system, and [are] so pervasive
17 as to leave no room for state regulatory control." *Silvas*, 514 F.3d
18 at 1004 (internal quotation marks omitted). Through HOLA, Congress
19 gave the Office of Thrift Supervision ("OTS") wide authority to
20 issue regulations governing thrifts. *Id.* at 1005. OTS promulgated
21 a preemption regulation, 12 C.F.R. § 560.2, which the Ninth Circuit
22 relies upon to determine whether state law is preempted. *Id.* at
23 1005-06.

24
25 ⁴ Because Wachovia's status as a federal savings bank subject
26 to HOLA is not challenged, judicial notice need not be taken of
27 Wachovia's Certificate Of Corporate Existence (Doc. 30-2, Ex. E),
28 a signed letter from the Office of Thrift Supervision (Doc. 30-2,
Ex. F), and the Charter of Wachovia (Doc. 30-2, Ex. G), which is
signed by the Secretary of the Office of Thrift Supervision.

1 Section 560.2(a) states that "OTS hereby occupies the entire
2 field of lending regulation for federal savings associations. OTS
3 intends to give federal savings associations maximum flexibility to
4 exercise their lending powers in accordance with a uniform federal
5 scheme of regulation." Section 560.2(b) then lists specific types
6 of state laws which are preempted:

7
8 (b) . . . [T]he types of state laws preempted by
9 paragraph (a) of this section include, without
10 limitation, state laws purporting to impose requirements
11 regarding:

12 (4) The terms of credit, including amortization of loans
13 and the deferral and capitalization of interest and
14 adjustments to the interest rate, balance, payments due,
15 or term to maturity of the loan, including the
16 circumstances under which a loan may be called due and
17 payable upon the passage of time or a specified event
18 external to the loan;

19 (9) Disclosure and advertising, including laws requiring
20 specific statements, information, or other content to be
21 included in credit application forms, credit
22 solicitations, billing statements, credit contracts, or
23 other credit-related documents and laws requiring
24 creditors to supply copies of credit reports to borrowers
25 or applicants;

26 (10) Processing, origination, servicing, sale or purchase
27 of, or investment or participation in, mortgages;

28 (11) Disbursements and repayments;

12 C.F.R. § 560.2(b)(4), (9)-(11). The OTS has outlined a proper
21 analysis to employ when evaluating whether state law is preempted
22 under the regulation:

23
24 When analyzing the status of state laws under § 560.2,
25 the first step will be to determine whether the type of
26 law in question is listed in paragraph (b). If so, the
27 analysis will end there; the law is preempted. If the law
28 is not covered by paragraph (b), the next question is
whether the law affects lending. If it does, then, in
accordance with paragraph (a), the presumption arises
that the law is preempted. This presumption can be
reversed only if the law can clearly be shown to fit
within the confines of paragraph (c). For these purposes,

1 paragraph (c) is intended to be interpreted narrowly. Any
2 doubt should be resolved in favor of preemption.

3 *Silvas*, 514 F.3d at 1005 (quoting 61 Fed. Reg. 50951, 50966-67
4 (Sept. 30, 1996)). The Ninth Circuit has adopted this analytical
5 approach. *Id.* at 1006. In *Silvas*, the court stated:

6 As outlined by OTS, the first step is to determine if UCL
7 § 17200, as applied, is a type of state law contemplated
8 in the list under paragraph (b) of 12 C.F.R. § 560.2. If
9 it is, the preemption analysis ends.

10 *Id.* (emphasis added). Here, Plaintiffs' fraud and conversion
11 claims, as applied, are a type of state law contemplated in §
12 560.2(b). These claims are preempted.

13 a. Fraud Claim

14 As to the fraud claim, Plaintiffs allege Wachovia "made
15 material false representations to plaintiffs that their refinance
16 loan was approved by Wachovia, that all loan documents had been
17 processed, and that plaintiff had incurred an obligation to make
18 monthly payments to Wachovia to repay the refinance loan." (Doc. 24-
19 2 at 8.) This fraud claim concerns lending and revolves around the
20 "processing, origination [and/or] servicing" of a mortgage. As
21 applied, this fraud claim is a type of state law contemplated in §
22 560.2(b)(10) and is preempted.

23 Plaintiffs' fraud claim also alleges that "[t]here was no
24 documents indicating the Wachovia loan had been processed or
25 approved, or that plaintiffs had any obligation to pay any money to
26 Wachovia." (Doc. 24-2 at 8.) This fraud allegation fits squarely
27 within § 560.2(b)(10), and likely within § 560.2(b)(9), which deals
28 with information in "credit-related documents," and § 560.2(b)(11),
which deals with "repayments."

Finally, Plaintiffs' fraud claim alleges that Wachovia "made

1 false representations with the intent to induce plaintiffs to make
2 monthly mortgage payments to Wachovia." (Doc. 24-2 at 8.) As
3 applied, this claim is also within § 560.2(b)(10) as it is based on,
4 and seeks to impose liability for and regulate, alleged false
5 statements made in connection with the "[p]rocessing, origination
6 [and/or] servicing . . . of, . . . or participation in," a mortgage.

7 Because Plaintiffs' fraud claim, as applied, bears on lending
8 activities expressly contemplated by § 560.2(b), it is preempted.
9 No further analysis is necessary. Wachovia's motion to dismiss the
10 fraud claim is GRANTED and this claim is DISMISSED.

11 b. Conversion Claim

12 The conversion claim alleges "Wachovia converted the personal
13 property of plaintiffs, in the form of mortgage payments made on a
14 fraudulent and non-existent loan, to its own use or control." (Doc.
15 24-2 at 8.) This claim, as applied, also fits within § 560.2(b).
16 The alleged wrongful conversion of Plaintiffs' "mortgage payments"
17 made on a "fraudulent loan" is a state law claim that is based on
18 alleged wrongful conduct in the "processing, origination [and/or]
19 servicing" of a mortgage, § 560.2(b)(10), and also concerns
20 "repayment[]," § 560.2(b)(11). Because Plaintiffs' conversion
21 claim, as applied, would regulate lending activities expressly
22 contemplated by § 560.2(b), it is preempted, and no further analysis
23 is necessary.⁵ Wachovia's motion to dismiss the conversion claim is
24

25 ⁵ Plaintiffs' reliance on *Fenning v. Glenfield*, 40 Cal. App.
26 4th 1285 (1995) is unpersuasive. *Fenning* is materially
27 distinguishable. See *In re Wash. Mut. Overdraft Prot. Litig.*, 539
28 F. Supp. 2d 1136, 1155 (C.D. Cal. 2008) (noting that *Fenning*
involved "claims for fraud related to a bank's sale of uninsured
investment securities, not its deposit or lending-related
activities").

1 GRANTED and this claim is DISMISSED.⁶

2 c. Requested Amendment

3 At the hearing on the motion, Plaintiffs argued that their
4 fraud and conversion claims are not preempted because Wachovia did
5 not, in fact, issue them a loan. Plaintiffs requested leave to
6 amend to clarify that Wachovia did not issue them a loan, and
7 Plaintiffs believe that such an amendment would save their fraud and
8 conversion claims from preemption.

9 The preceding analysis on preemption is predicated on the
10 understanding that Plaintiffs were, in fact, issued a loan by
11 Wachovia. Numerous allegations in the complaint suggest that
12 Wachovia actually issued them a loan. (See, e.g., Doc. 24-2 at 4
13 (alleging, among other things, "Wachovia failed to give plaintiffs
14 a complete set of executed documents regarding their refinance
15 loan," "[s]ince the inception of the Wachovia loan, plaintiffs made
16 all monthly payments to Wachovia," and "[b]eginning in December
17 2008, Wachovia refused to accept plaintiffs' payment on the Wachovia
18 loan.")). In addition, the allegation in the conversion claim that
19 Wachovia "made" a "fraudulent loan" is based on the necessary
20 premise that Wachovia actually made a loan to Plaintiffs. Either
21 a loan was made which was fraudulent or there was no loan at all,
22 but there cannot be both a loan which was fraudulent and no loan at
23 all. The allegation in the conversion claim that the "fraudulent
24 loan" was "non-existent" can be read to mean, as it was here, that
25 Wachovia actually made the loan to Plaintiffs but formalities were

26
27 ⁶ Because Plaintiffs' fraud and conversion claims are
28 preempted, there is no need to consider Wachovia's other arguments
as to why these claims should be dismissed.

1 not followed and there is no definitive documentation that affirms
2 the loan's existence, i.e., the loan does not exist on paper.

3 Even if Plaintiffs amend their complaint, as requested, to
4 allege that Wachovia never issued a loan to Plaintiffs, it is not
5 clear that this would impact the preemption analysis. One stated
6 purpose for the regulatory preemption provision is to ensure "a
7 uniform federal scheme of regulation" for federal savings
8 associations. 12 C.F.R. § 560.2(a). Under Plaintiffs' analysis,
9 however, in any given situation, the lending activities of federal
10 savings associations would be subject to both federal and state
11 regulations so long as no loan is ultimately issued to the borrower.
12 Nevertheless, supplemental briefing is requested to properly analyze
13 this preemption issue.

14 On or before February 22, 2010, Wachovia shall file
15 supplemental briefing, not to exceed seven (7) pages, to address
16 whether Plaintiffs' proposed amendment to their fraud and conversion
17 claims is futile because these claims will still be preempted even
18 if Wachovia did not issue a loan to Plaintiffs. Any opposition to
19 Wachovia's supplemental briefing is due by February 26, 2010, and
20 shall not exceed five (5) pages. There is no need for a reply.

21 C. Wachovia's Motion To Strike

22 Wachovia moves to strike the punitive damages allegations with
23 respect to the fraud and conversion claims. Given, however, that
24 these claims are preempted and dismissed, Wachovia's motion to
25 strike is DENIED as moot.

26 //

27 //

1 V. CONCLUSION

2 For the reasons stated:

3 1. As to the RESPA claim:

4 a. Carrington's motion to dismiss is GRANTED. This
5 claim is DISMISSED WITH LEAVE TO AMEND.

6 b. Carrington's motion for a more definite statement is
7 DENIED as moot.

8 2. As to the § 2937 "claim":

9 a. Carrington's motion to dismiss is DENIED without
10 prejudice to refiling.

11 b. Carrington's motion for a more definite statement of
12 the § 2937 claim is GRANTED. Because it is unclear whether
13 Plaintiffs are asserting a private right of action under § 2937,
14 Plaintiffs, if they wish to pursue such a claim, must amend the
15 complaint to clarify whether they are requesting damages or some
16 affirmative remedy for the statutory violation.

17 3. As to the declaratory relief claim:

18 a. Carrington's motion to dismiss is GRANTED in part and
19 DENIED in part. The motion is GRANTED to the extent the complaint
20 requests independent declarations as to past conduct, i.e., whether
21 Plaintiffs are "in default under the provisions of the Deed of
22 Trust" and whether "the Notice of Default and the Notice of
23 Trustee's Sale are defective and invalid." This portion of the
24 declaratory relief claim is DISMISSED. The motion is DENIED to the
25 extent the complaint requests a declaration that Carrington has a
26 "right to proceed with the non-judicial foreclosure pursuant to the
27 Notice of Trustee's Sale."

1 b. Carrington's motion for a more definite statement is
2 DENIED as moot.⁷

3 4. As to the fraud and conversion claims:

4 a. Wachovia's motion to dismiss the fraud and conversion
5 claims is GRANTED on the grounds that these claims, as presently
6 pled, are preempted.

7 b. Supplemental briefing is requested, as stated, to
8 address whether Plaintiffs' proposed amendment to the complaint
9 would be futile.

10 c. Wachovia's motion to strike the request for punitive
11 damages is DENIED as moot.

12 Once the supplemental briefing is received and the preemption
13 issue resolved, an order will issue specifying the due date for any
14 amended complaint and any corresponding responsive pleading.

15
16 IT IS SO ORDERED.

17 Dated: February 17, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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26 ⁷ The surviving portion of Plaintiffs' declaratory relief
27 claim is sufficiently clear and does not warrant a more definite
28 statement.