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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF CALIFORNIA

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8 MICHELE A. SPENCE,  
9 Plaintiffs,  
10  
11 v.  
12 WELLS FARGO BANK, N.A.,  
13 Defendant.

1:10-cv-002057-OWW-GSA  
MEMORANDUM DECISION AND ORDER  
REGARDING MOTION TO DISMISS  
(Doc. 10)

14  
15 I. INTRODUCTION.

16 Plaintiff Michele A. Spence ("Plaintiff") brings this action  
17 against Wells Fargo Bank, N.A. ("Defendant"). Plaintiff proceeds  
18 *pro se*. Currently before the court is Defendant's motion to  
19 dismiss. (Doc. 10). Plaintiff filed opposition to Defendant's  
20 motion and a request for judicial notice on March 17, 2011. (Docs.  
21 16, 17). Defendant filed a reply to Plaintiffs' opposition and  
22 request for judicial notice on April 9, 2011. (Doc. 19).

23 II. FACTUAL BACKGROUND.

24 Although the allegations of the complaint are unclear, it  
25 appears that Plaintiff's claims arise out of Defendant's attempt to  
26 enforce a promissory note concerning real property. (See Comp. at  
27 2). Plaintiff complains that Defendant has not presented a valid  
28 proof of claim because Defendant's are only in possession of a

1 photocopy of the promissory note, not the original.

2 According to the complaint, on July 23, 2010, Plaintiff sent  
3 a letter to Defendant "requesting the original wet ink signature as  
4 well as the Deed of Trust, document assignments, and required  
5 public recordings as evidence that [Defendant is] in fact a damaged  
6 party and the true creditor to establish proof of claim within 30  
7 days." (Comp. at 5). Defendant did not respond.

8 On September 24, 2010, Plaintiff sent a second letter to  
9 Defendant requesting proof of claim. Defendant again ignored  
10 Plaintiff's request for verification of the debt.

11 Plaintiff requests a declaration as to whether or not  
12 Defendant's have standing to enforce the promissory note.  
13 Plaintiff contends that Defendant has no right to enforce the  
14 promissory note because Defendant is not a "note holder in due  
15 course."

### 16 **III. LEGAL STANDARD.**

17 Dismissal under Rule 12(b)(6) is appropriate where the  
18 complaint lacks sufficient facts to support a cognizable legal  
19 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th  
20 Cir.1990). To sufficiently state a claim to relief and survive a  
21 12(b)(6) motion, the pleading "does not need detailed factual  
22 allegations" but the "[f]actual allegations must be enough to raise  
23 a right to relief above the speculative level." *Bell Atl. Corp. v.*  
24 *Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).  
25 Mere "labels and conclusions" or a "formulaic recitation of the  
26 elements of a cause of action will not do." *Id.* Rather, there must  
27 be "enough facts to state a claim to relief that is plausible on  
28 its face." *Id.* at 570. In other words, the "complaint must contain

1 sufficient factual matter, accepted as true, to state a claim to  
2 relief that is plausible on its face." *Ashcroft v. Iqbal*, --- U.S.  
3 ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal  
4 quotation marks omitted).

5 The Ninth Circuit has summarized the governing standard, in  
6 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint to  
7 survive a motion to dismiss, the nonconclusory factual content, and  
8 reasonable inferences from that content, must be plausibly  
9 suggestive of a claim entitling the plaintiff to relief." *Moss v.*  
10 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.2009) (internal  
11 quotation marks omitted). Apart from factual insufficiency, a  
12 complaint is also subject to dismissal under Rule 12(b)(6) where it  
13 lacks a cognizable legal theory, *Balistreri*, 901 F.2d at 699, or  
14 where the allegations on their face "show that relief is barred"  
15 for some legal reason, *Jones v. Bock*, 549 U.S. 199, 215, 127 S.Ct.  
16 910, 166 L.Ed.2d 798 (2007).

17 In deciding whether to grant a motion to dismiss, the court  
18 must accept as true all "well-pleaded factual allegations" in the  
19 pleading under attack. *Iqbal*, 129 S.Ct. at 1950. A court is not,  
20 however, "required to accept as true allegations that are merely  
21 conclusory, unwarranted deductions of fact, or unreasonable  
22 inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988  
23 (9th Cir.2001). "When ruling on a Rule 12(b)(6) motion to dismiss,  
24 if a district court considers evidence outside the pleadings, it  
25 must normally convert the 12(b)(6) motion into a Rule 56 motion for  
26 summary judgment, and it must give the nonmoving party an  
27 opportunity to respond." *United States v. Ritchie*, 342 F.3d 903,  
28 907 (9th Cir.2003). "A court may, however, consider certain

1 materials-documents attached to the complaint, documents  
2 incorporated by reference in the complaint, or matters of judicial  
3 notice-without converting the motion to dismiss into a motion for  
4 summary judgment." *Id.* at 908.

5 **IV. DISCUSSION.**

6 Plaintiff's first cause of action seeks a declaration  
7 regarding whether or not Defendant has standing to enforce the  
8 promissory note. Plaintiff's second cause of action asserts "theft  
9 of public funds." Plaintiff's third cause of action is for breach  
10 of contract. Plaintiff's complaint fails to comply with federal  
11 pleading standards. The complaint does not contain sufficient non-  
12 conclusory factual allegations to give rise to any cognizable cause  
13 of action.

14 Plaintiff's first cause of action fails because it appears to  
15 be based on the discredited legal theory that only a "note holder  
16 in due course" has standing to enforce a promissory note.<sup>1</sup> See,  
17 *e.g.*, *Wood v. Aegis Wholesale Corp.*, 2009 U.S. Dist. LEXIS 57151,  
18 \*14 (E.D. Cal. July 2, 2009) (citing *In re Golden Plan of Cal.,*  
19 *Inc.*, 829 F.2d 705, 708-11 (9th Cir.1986) (when a mortgage is sold,  
20 physical transfer of the note is not required). Plaintiff's  
21 invocation of the California Commercial Code is of no avail, as it  
22 has no application in the instant context of real property  
23 financing. See, *e.g.*, *Blanco v. American Home Mortgage Servicing,*  
24 *Inc.*, 2010 U.S. Dist. LEXIS 17415, 2010 WL 716311 at \*2 (E.D.Cal.,  
25 Feb. 26, 2010) (rejecting application of California Commercial Code

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27 <sup>1</sup> Plaintiff also references "qualified written requests" throughout the  
28 complaint, but it is unclear whether Plaintiff seeks to assert any statutory  
claims.

1 section 3301 mortgage context).

2 Plaintiff's second cause of action is unintelligible. *Inter*  
3 *alia*, Plaintiff fails to identify what public funds Defendant  
4 obtained. From the face of the complaint it appears the dispute is  
5 over a private loan transaction. Plaintiff has alleged no facts  
6 that would give rise to standing to complain about the source of  
7 the loan funds.

8 Plaintiff's third cause of action for breach of contract does  
9 not set forth the requisite elements under California law. The  
10 standard elements of a breach of contract claim are: (1) the  
11 existence of a contract, (2) plaintiff's performance or excuse for  
12 nonperformance, (3) defendant's breach, and (4) damage to plaintiff  
13 therefrom. *E.g.*, *Abdelhamid v. Fire Ins. Exch.*, 182 Cal.App.4th  
14 990, 999 (2010).

15 Plaintiff's allegations are unclear. Plaintiff alleges that  
16 "[the] note like most others has been sold and monetized [and thus]  
17 the Lender has 'received payment of all sums secured.'" (Complaint  
18 at 7). Even if this is true, there is no fact alleged that makes  
19 securitization a matter of legal consequence. It appears that  
20 Plaintiff's claim is that Defendant's attempt to foreclose on her  
21 property despite the fact that the note was sold to a third party  
22 somehow breaches her loan contract. However, *inter alia*, Plaintiff  
23 does not allege performance or excuse for nonperformance by her of  
24 her obligations under the contract.

25 Plaintiff's claims are each DISMISSED, without prejudice. One  
26 opportunity will be provided for amendment of the complaint.

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**ORDER**

For reasons stated, IT IS ORDERED:

1) Each of Plaintiff's claims is DISMISSED, without prejudice;

2) Plaintiff shall file and amended complaint within thirty days of electronic service of this decision. Defendant shall file responsive pleading within twenty days of service of the amended complaint; and

3) Defendant shall file a form of order consistent with this memorandum decision within five days of electronic service of this decision.

IT IS SO ORDERED.

**Dated: April 18, 2011**

**/s/ Oliver W. Wanger**  
**UNITED STATES DISTRICT JUDGE**