

1 UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF CALIFORNIA  
3

4 BALDEV GILL, an individual, and  
5 GURMEET GILL, an individual,

6 Plaintiffs,

7 v.

8 WELLS FARGO BANK, N.A., a national  
9 association, doing business as  
10 AMERICA'S SERVICING COMPANY; CAL  
11 WESTERN RECONVEYANCE CORPORATION,  
12 a corporation; FEDERAL HOME LOAN  
13 MORTGAGE CORPORATION, an agency of  
14 the Federal Government and DOES 1  
15 to 100, inclusive,

16 Defendants.

1:11-cv-00218 OWW GSA

MEMORANDUM DECISION AND ORDER  
RE DEFENDANTS' MOTIONS TO  
DISMISS FIRST AMENDED  
COMPLAINT

(DOCS. 4, 10)

17 I. INTRODUCTION

18 Before the court are Defendant Wells Fargo Bank, N.A.'s  
19 ("Wells Fargo") motion to dismiss Baldev Gill and Gurmeet Gills'  
20 (together, "Plaintiffs") first amended complaint ("FAC") (Doc. 4)  
21 and Defendant Federal Home Loan Mortgage Corporation's ("Freddie  
22 Mac") motion to dismiss the FAC (Doc. 10). Plaintiffs filed  
23 oppositions to both motions (Docs. 9 and 13, respectively), to  
24 which Wells Fargo replied (Docs. 11, 14). The motions were heard  
25 June 6, 2011.

26 II. BACKGROUND

27 In June 2002, Plaintiffs purchased a residential property  
28 located at 3550 N. Lodi Avenue, Fresno, California 93722,  
Assessor's Parcel Number 511-192-01 ("Property"). In 2003,

1 Plaintiffs obtained a loan for Plaintiff Baldev Gill's trucking  
2 business; the Property served as security for the loan.

3 Plaintiffs refinanced the Property on May 12, 2004. The Deed  
4 of Trust for the refinancing lists: Preferred Financial Group,  
5 Inc., dba Preferred Mortgage Services as the lender; North  
6 American Title Company as the trustee; and Mortgage Electronic  
7 Registration Systems ("MERS") as the beneficiary and nominee for  
8 the lender. (Doc. 5, Ex. A).

9  
10 From April through July 2009, Plaintiffs fell behind in  
11 their mortgage payments. On July 27, 2009, Cal-Western  
12 Reconveyance Corporation ("Cal-Western") recorded a Notice of  
13 Default. (Doc. 5, Ex. C).

14  
15 Plaintiffs allege that they contacted America's Servicing  
16 Company ("ASC") to apply for a modified payment plan sometime in  
17 2009. Plaintiffs also allege that in or about 2009, Plaintiffs  
18 spoke to a representative from ASC who identified himself as  
19 "Fred," who told Plaintiffs that if they made their payments  
20 pursuant to the terms of the repayment plan, their foreclosure  
21 would be suspended. Plaintiffs allege that Fred told them: "Don't  
22 worry; we are going to put you on a repayment plan." Plaintiffs  
23 paid the sums due under their repayment plan for four months.  
24 Plaintiffs allege that they called ASC after three months and  
25 were told to continue making their payments pursuant to the  
26 repayment plan. Plaintiffs allege that they spoke with "Kathy"  
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1 from ASC in late 2009 or early 2010, who told them the repayment  
2 plan was still in effect and that Plaintiffs would be "saved"  
3 from losing their home.

4 On September 21, 2009, a Substitution of Trustee was  
5 recorded substituting Cal-Western as Trustee under the Deed.  
6 (Doc. 5, Ex. B). The Substitution was signed by Lorrie Womack as  
7 assistant secretary of MERS. Plaintiffs allege that Ms. Womack  
8 was not assistant secretary of MERS or otherwise employed by  
9 MERS, but was a trustee sale manager at Cal-Western.

10 On or about October 30, 2009, Cal-Western recorded a Notice  
11 of Trustee's Sale. (Doc. 5, Ex. E).

12 On or about August 23, 2010, Plaintiffs received a letter  
13 from ASC indicating that their loan modification had been denied.  
14 On or about August 26, 2010, Plaintiffs called ASC to make  
15 payment arrangements and were informed that the Property had been  
16 sold August 24, 2010.

17 A Trustee's Deed Upon Sale was recorded September 3, 2010,  
18 which was signed by Wendy V. Perry. (Doc. 5, Ex. F). Plaintiffs  
19 contend that Ms. Perry is not an employee or agent of Wells  
20 Fargo, but an employee of Cal-Western, and that Cal-Western  
21 falsified documents by signing them purporting to act as  
22 "attorney in fact" to streamline the foreclosure process.

23 On September 14, 2010, Plaintiffs filed a Complaint in the  
24 Superior Court of California, Fresno County, asserting eight  
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1 state law causes of action against Defendants in connection with  
2 the foreclosure of the Property (Doc. 1-1). Plaintiffs filed the  
3 FAC on November 19, 2010 alleging ten state law causes of action  
4 against Defendants. (Doc. 1-8). Freddie Mac removed the case to  
5 federal court on February 7, 2011 on the basis of federal  
6 question jurisdiction. Doc. 1.  
7

### 8 III. LEGAL STANDARD

9 To survive a Rule 12(b)(6) motion to dismiss, a "complaint  
10 must contain sufficient factual matter, accepted as true, to  
11 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955 (2007)). A  
12 complaint does not need detailed factual allegations, but the  
13 "[f]actual allegations must be enough to raise a right to relief  
14 above the speculative level." *Twombly*, 550 U.S. at 555.  
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18 In deciding a motion to dismiss, the court should assume the  
19 veracity of "well-pleaded factual allegations," but is "not bound  
20 to accept as true a legal conclusion couched as a factual  
21 allegation." *Iqbal*, 127 S.Ct. at 1950. "Labels and conclusions"  
22 or "a formulaic recitation of the elements of a cause of action  
23 will not do." *Twombly*, 550 U.S. at 555. "'Naked assertion[s]'  
24 devoid of 'further factual enhancement'" are also insufficient.  
25 *Iqbal*, 127 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557).  
26 Instead, the complaint must contain enough facts to state a claim  
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1 to relief that is "plausible on its face." *Twombly*, 550 U.S. at  
2 570.

3 A claim has facial plausibility when the complaint's factual  
4 content allows the court to draw the reasonable inference that  
5 the defendant is liable for the alleged misconduct. *Iqbal*, 127  
6 S.Ct. at 1949. "The plausibility standard is not akin to a  
7 'probability requirement,' but it asks for more than a sheer  
8 possibility that a defendant has acted unlawfully." *Id.* (quoting  
9 *Twombly*, 550 U.S. at 556). "A well-pleaded complaint may proceed  
10 even if it strikes a savvy judge that actual proof of those facts  
11 is improbable, and 'that a recovery is very remote and  
12 unlikely.'" *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*,  
13 416 U.S. 232, 236, 94 S.Ct. 1683 (1974)).  
14  
15

16 The Ninth Circuit summarizes the governing standard as  
17 follows: "In sum, for a complaint to survive a motion to dismiss,  
18 the non-conclusory 'factual content' and reasonable inferences  
19 from that content, must be plausibly suggestive of a claim  
20 entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*,  
21 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted).  
22

23 If a district court considers evidence outside the  
24 pleadings, a Rule 12(b)(6) motion to dismiss must be converted to  
25 a Rule 56 motion for summary judgment, and the nonmoving party  
26 must be given an opportunity to respond. *United States v.*  
27 *Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003). "A court may,  
28

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

#### 5 6 IV. ANALYSIS

##### 7 A. First Cause of Action: Fraud (Wells Fargo)

8 Under California law, the elements of common law fraud are  
9 "misrepresentation, knowledge of its falsity, intent to defraud,  
10 justifiable reliance, and resulting damages." *Gil v. Bank of Am.,*  
11 *Nat'l Ass'n*, 138 Cal.App.4th 1371, 1381 (2006). "[T]o establish a  
12 cause of action for fraud a plaintiff must plead and prove in  
13 full, factually and specifically, all of the elements of the  
14 cause of action." *Conrad v. Bank of Am.*, 45 Cal.App.4th 133, 156  
15 (1996). There must be a showing "that the defendant *intended* to  
16 induce the plaintiff to act to his detriment in reliance upon the  
17 false representation." *Id.* (emphasis added).

18  
19 Federal Rule of Civil Procedure 9(b) imposes an elevated  
20 pleading standard for fraud claims. Rule 9(b) provides:

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

24 Fed. R. Civ. P. 9(b). "To comply with Rule 9(b), allegations of  
25 fraud must be specific enough to give defendants notice of the  
26 particular misconduct which is alleged to constitute the fraud."  
27 *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (quotations  
28

1 omitted) (quoting *Bly-Magee v. Cal.*, 236 F.3d 1014, 1019 (9<sup>th</sup> Cir.  
2 2001). Allegations of fraud must include the "time, place, and  
3 specific content of the false representations as well as the  
4 identities of the parties to the misrepresentations." *Swartz*, 476  
5 F.3d at 764 (quotations omitted) (quoting *Edwards v. Marin Park,*  
6 *Inc.*, 356 F.3d 1058, 1066 (9<sup>th</sup> Cir. 2004). The "[a]verments of  
7 fraud must be accompanied by the who, what, when, where, and how  
8 of the misconduct charged." *Kearns v. Ford Motor Co.*, 567 F.3d  
9 1120, 1124 (9th Cir. 2009) (quotations omitted) (quoting *Vess v.*  
10 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9<sup>th</sup> Cir. 2003)). A  
11 plaintiff alleging fraud "must set forth more than the neutral  
12 facts necessary to identify the transaction. The plaintiff must  
13 set forth what is false or misleading about a statement, and why  
14 it is false." *Vess*, 317 F.3d at 1106. When asserting a fraud  
15 claim against a corporation, "a plaintiff's burden . . . is even  
16 greater. . . . [T]he plaintiff must 'allege the names of the  
17 persons who made the allegedly fraudulent representations, their  
18 authority to speak, to whom they spoke, what they said or wrote,  
19 and when it was said or written.'" *Lazar v. Superior Court*, 12  
20 Cal.4th 631, 645, 49 Cal.Rptr.2d 377 (1996) (quoting *Tarmann v.*  
21 *State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991)).  
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25 The FAC alleges that MERS was listed as a beneficiary on the  
26 Notice of Default dated July 27, 2009, but that MERS was a  
27 suspended corporation and had no legal authority. The FAC also  
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1 alleges that Wells Fargo did not have authority to accept  
2 payments as of July 27, 2009, as MERS did not assign the Deed of  
3 Trust to Wells Fargo until September 21, 2009. Wells Fargo  
4 rejoins that Plaintiff is confusing MERS with a similarly named  
5 suspended corporation, not MERS. Regardless, these allegations do  
6 not allege a misrepresentation, knowledge of falsity, intent to  
7 defraud, or justifiable reliance.  
8

9 The FAC also alleges that in or about 2009, Plaintiffs spoke  
10 with a representative from ASC who identified himself as "Fred,"  
11 who told Plaintiffs that if Plaintiffs made their payments  
12 pursuant to the terms of a repayment plan, their foreclosure  
13 would be suspended. The FAC alleges that Plaintiffs were notified  
14 that the repayment plan would take place for three months, and  
15 that after three months, they would receive a loan modification.  
16 The FAC alleges that Fred specifically told Plaintiffs: "Don't  
17 worry, we are going to put you on a repayment plan."  
18

19 The FAC alleges that Plaintiffs paid the sums due under the  
20 repayment plan for four months, and that when Plaintiffs called  
21 after three months, they were told to continue their payments  
22 pursuant to the terms of the repayment plan. The FAC also alleges  
23 that in late 2009 or early 2010, they spoke to "Kathy" from ASC  
24 and were notified that the repayment plan was still in effect and  
25 that Plaintiffs would be "saved" from losing their home. The FAC  
26 alleges that after the fourth month, Plaintiffs again contacted  
27  
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1 ASC and were led to believe that the repayment plan had  
2 solidified into a permanent loan modification. The FAC alleges  
3 that these promises were made, even though Defendants had no  
4 intention of honoring the statements made to Plaintiffs, that  
5 Defendants knew they were untrue and did not intend to keep them,  
6 and that they were done to prevent Plaintiffs from bringing their  
7 loan current and saving their home.  
8

9 Plaintiffs' allegations of fraud are deficient. The FAC does  
10 not allege any misrepresentation with respect to "Fred, who said:  
11 "Don't worry, we are going to put you on a repayment plan." The  
12 allegations regarding "Kathy's" statements are not specific  
13 enough to satisfy Rule 9(b) and also do not contain any  
14 misrepresentations. "Unless an agreement to restructure a loan  
15 embodies definite terms, capable of enforcement, it is not a  
16 legally valid contract. 'Preliminary negotiations or an agreement  
17 for future negotiations are not the functional equivalent of a  
18 valid, subsisting agreement.'" *Price v. Wells Fargo Bank*, 213  
19 Cal.App.3d 465, 483, 261 Cal.Rptr. 735 (1989); *accord Keen v.*  
20 *Amer. Home Mortg. Servicing, Inc.*, 2009 WL 3380454, \*9 (E.D. Cal.  
21 2009) (citing *Price*). The FAC's allegation that Plaintiffs again  
22 contacted ASC after the fourth month and were lead to believe  
23 that the repayment plan had solidified into a permanent loan  
24 modification do not identify a specific person who made the  
25 statement or any misrepresentation stated to Plaintiffs. The FAC  
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1 also fails to allege any authority of "Fred," "Kathy," or the  
2 third unnamed person to speak on behalf of Wells Fargo.

3 Wells Fargo's motion to dismiss Plaintiffs' first cause of  
4 action is GRANTED, without prejudice.

5 B. Second Cause of Action: Promissory Estoppel (Wells  
6 Fargo)

7 The elements of a promissory estoppel claim are (1) a  
8 promise clear and unambiguous in its terms; (2) reliance by the  
9 party to whom the promise is made; (3) the reliance must be both  
10 reasonable and foreseeable; and (4) the party asserting the  
11 estoppel must be injured by his or her reliance. *E.g.*, *Aceves v.*  
12 *U.S. Bank N.A.*, 192 Cal.App.4<sup>th</sup> 218, 227, 120 Cal.Rptr.3d 507  
13 (2011). Under this doctrine, "a promise which the promisor should  
14 reasonably expect to induce action or forbearance on the part of  
15 the promisee or a third person and which does induce such action  
16 or forbearance is binding if injustice can be avoided only by  
17 enforcement of the promise." *Kajima/Ray Wilson v. L.A. Cnty.*  
18 *Metro. Transp. Auth.*, 23 Cal.4th 305, 310 (2000) (quoting  
19 Restatement (Second) of Contracts, § 90(1) (1981)).

20  
21  
22 The FAC does not allege an unambiguous promise. Wells  
23 Fargo's alleged promise that the repayment plan would be in  
24 effect for three months and was still in effect is not a promise  
25 that Plaintiffs' loan modification would be approved.

26 Wells Fargo's motion to dismiss Plaintiffs' second cause of  
27 action is GRANTED, without prejudice.  
28

1 C. Third Cause of Action: Quiet Title (Freddie Mac)

2 An action to quiet title may be brought to establish title  
3 against adverse claims to real property or any interest therein.  
4 Cal. Code Civ. Proc. § 760.020. An action to quiet title must be  
5 set forth in a "verified complaint" containing the following: (1)  
6 a description of the property, both legal description and street  
7 address; (2) the title of the plaintiff, and the basis for that  
8 title; (3) the adverse claims to the plaintiff's title; (4) the  
9 date as of which the determination is sought; and (5) a prayer  
10 for the determination of the plaintiff's title against the  
11 adverse claims. Cal. Civ. Proc. Code § 761.020(a)-(e).  
12

13 First, the FAC is not verified, and is subject to dismissal  
14 for failing to meet the procedural requirements of § 761.020.  
15

16 Second, Freddie Mac argues correctly that the cause of  
17 action to quiet title should be dismissed because Plaintiffs have  
18 failed to tender the full amount owed on their loan, which they  
19 must do before seeking redress from a trustee's sale. "In  
20 California it is well-settled that 'a mortgager cannot quiet his  
21 title against the mortgagee without paying the debt secured.'" *Briosos v. Wells Fargo Bank*, 737 F.Supp.2d 1018, 1032 (N.D. Cal.  
22 2010) (quoting *Shimpones v. Stickney*, 219 Cal. 637, 649, 28 P.2d  
23 673 (1934); see also, e.g., *Dimock v. Emerald Prop. LLC*, 81  
24 Cal.App.4th 868, 877-78 (2000) ("[I]n the context of overcoming a  
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1 voidable sale, the debtor must tender any amounts due under the  
2 deed of trust.").

3 Plaintiffs argue that under *Humboldt Sav. Bank v.*  
4 *McCleverty*, 161 Cal. 285, 291, 119 P. 82 (1911), "it is certainly  
5 not the law that an offer to pay the debt must be made, where it  
6 would be inequitable to exact such offer of the party complaining  
7 of the sale." *Humboldt*, however, concerned the foreclosure of two  
8 parcels of property and a widow's interest in one parcel. The  
9 court held it inequitable to condition the widow's right to  
10 attack the sale on payment for both parcels rather than just her  
11 own parcel. *Id.* *Humboldt* is inapplicable here because Plaintiffs  
12 actually owed the debt.  
13

14 Third, Wells Fargo and Freddie Mac argue that Plaintiffs  
15 cannot bring a claim to quiet title because they are not the  
16 legal owners of the Property. Wells Fargo cites two unpublished  
17 district court cases: *Distor v. U.S. Bank NA*, 2009 WL 3429700, \*6  
18 (N.D. Cal. 2009) ("[B]ecause the property has already been sold,  
19 quiet title is no longer an appropriate action to seek to undo  
20 the foreclosure. Plaintiff's claim to title has already been  
21 extinguished."); *Myvett v. Litton Loan Servicing, LP*, 2010 WL  
22 761317, \*6 (N.D. Cal. 2010) ("[P]laintiffs' claim to the property  
23 is extinguished as they allege and admit the property has been  
24 sold; consequently, plaintiffs' action to quiet title necessarily  
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1 fails." ). The FAC does not allege that Plaintiffs hold title to  
2 the Property.

3 Freddie Mac's motion to dismiss Plaintiffs' third cause of  
4 action is GRANTED, without prejudice.

5 D. Fourth Cause of Action: Declaratory Relief (Wells  
6 Fargo, Freddie Mac)

7 Plaintiffs' claim for declaratory relief is based on the  
8 allegation that the foreclosure sale of the Property violated  
9 California Civil Code § 2923.6; that the Trustee's sale was null  
10 and void because it was unfairly and improperly conducted and  
11 violated California Civil Code §§ 2923 and 2924 et seq.; that  
12 Defendants wrongfully caused a Notice of Default and Notice of  
13 Trustee's Sale to be recorded against the Property; and that none  
14 of Defendants had any right to interest in the Note, Deed, or the  
15 Property which authorized them to record such instrument.  
16

17 For the reasons set forth in this memorandum decision, the  
18 FAC does not allege any cognizable legal theory sufficient to  
19 support any claim for declaratory relief. Wells Fargo and Freddie  
20 Mac's motions to dismiss the fourth cause of action are GRANTED,  
21 without prejudice.  
22

23 E. Fifth Cause of Action: Void and Cancel Substitution of  
24 Trustee (Wells Fargo, Freddie Mac) and Sixth Cause of  
25 Action: Void and Cancel the Assignment of the Deed of  
26 Trust (Wells Fargo)

27 Plaintiffs' fifth and sixth causes of action are premised on  
28 the argument that the signatory for both the Substitution of  
Trustee and the Assignment of Deed of Trust are invalid. The

1 fifth cause of action alleges that the Substitution of Trustee is  
2 invalid because Lorrie Womack signed as a VP for MERS, but she is  
3 an employee of Cal-Western. The sixth cause of action alleges  
4 that the Assignment of Deed of Trust is invalid because Jennifer  
5 Victa executed it on behalf of MERS, but is an employee of Cal-  
6 Western.  
7

8 Wells Fargo correctly points out that under California Civil  
9 Code § 2934a, a trustee may be substituted by the mortgagee,  
10 beneficiary or their agents. Cal. Civ. Code §2924a. Section 2924a  
11 provides: "If, by the terms of any trust or deed of trust a power  
12 of sale is conferred upon the trustee, the attorney for the  
13 trustee, or any duly authorized agent, may conduct the sale and  
14 act in the sale as the auctioneer for the trustee." Cal. Civ.  
15 Code §2924a. A lender or beneficiary may make a substitution of  
16 the trustee to conduct the foreclosure and sale. *Kachlon v.*  
17 *Markowitz*, 168 Cal.App.4th 316, 334 (2008). "The power of sale  
18 may be exercised by the assignee if the assignment is duly  
19 acknowledged and recorded." Cal. Civ. Code §2932.5. Plaintiffs  
20 have not pled any facts to establish or allege a good faith basis  
21 for the contention that Womack and Victa are not agents of MERS,  
22 and did not have authority to execute the Substitution of Trustee  
23 and Assignment of Deed of Trust.  
24  
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26 In addition, there is a rebuttable presumption that a  
27 foreclosure sale was conducted regularly and fairly, unless a  
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1 procedural irregularity constituted a substantial defect that is  
2 prejudicial to the trustor or claimants. *Knapp v. Doherty*, 123  
3 Cal.App.4th 76, 96 (2004). The buyer cannot be a bona fide  
4 purchaser. *6 Angels, Inc. v. Stuart-Wright Mortg., Inc.*, 85  
5 Cal.App.4th 1279, 1286, 102 Cal.Rptr.2d 711 (2001) ("Thus, once a  
6 deed reciting that all legal requirements have been satisfied has  
7 been transferred to a buyer at a foreclosure sale, the sale can  
8 be successfully attacked on the grounds of procedural  
9 irregularity only if the buyer is not a bona fide purchaser.").  
10 "It is the burden of the party challenging the trustee's sale to  
11 prove such irregularity and thereby overcome the presumption of  
12 the sale's regularity." *Melendrez v. D & I Inv., Inc.* 127  
13 Cal.App.4th 1238, 1258 (2005). The FAC does not allege that the  
14 buyer was not a bona fide purchaser or any other facts to  
15 overcome the presumption of regularity.  
16  
17

18 Wells Fargo and Freddie Mac's motions to dismiss the fifth  
19 cause of action and Wells Fargo's motion to dismiss the sixth  
20 cause of action are GRANTED, without prejudice.  
21

22 F. Seventh Cause of Action: Void and Cancel the Trustee's  
23 Deed Upon Sale (Wells Fargo)

24 Plaintiffs move to cancel the Trustee's Deed Upon Sale based  
25 on the alleged fraud set forth in the first cause of action and  
26 the alleged defective signatures of Womack and Victa in the fifth  
27 and sixth causes of action. For the reasons set forth in this  
28 memorandum decision, the FAC does not allege any basis to void

1 and cancel the Trustee's Deed Upon Sale.

2 Wells Fargos' motion to dismiss the seventh cause of action  
3 is GRANTED, without prejudice.

4 G. Eighth Cause of Action: Injunctive Relief (Wells Fargo,  
5 Freddie Mac)

6 As the FAC fails to plead any cause of action, Wells Fargo  
7 and Freddie Mac's motions to dismiss the eighth cause of action  
8 is GRANTED, without prejudice.

9 H. Ninth Cause of Action: Set Aside Illegal Trustee's Sale  
10 (Wells Fargo, Freddie Mac)

11 Plaintiffs' ninth cause of action is premised on Wells Fargo  
12 and Cal-Western's alleged lack of standing to initiate  
13 foreclosure of the Property, based on the allegedly faulty  
14 signatures discussed in the fifth and sixth causes of action. The  
15 FAC also alleges that Cal-Western lacked standing because it was  
16 substituted by MERS, an entity that did not have legal authority  
17 to act when the Substitution of Trustees was recorded September  
18 21, 2009. As discussed above, the FAC does not sufficiently  
19 allege facts to support those causes of action. The FAC also  
20 fails to allege a tender of the amount of the indebtedness, which  
21 is a prerequisite to an action to set aside a foreclosure sale  
22 effected under a deed of trust in California. *E.g. Karlsen v. Am.*  
23 *Sav. & Loan Assoc.*, 15 Cal.App.3d 112, 117-18, 92 Cal.Rptr. 851  
24 (1971).

25  
26  
27 Wells Fargo and Freddie Mac's motions to dismiss the ninth  
28 cause of action are GRANTED, without prejudice.



1 I. Tenth Cause of Action: Unfair Business Practices (Wells  
2 Fargo)

3 California law prohibits unfair competition including "any  
4 unlawful, unfair or fraudulent business act or practice." Cal.  
5 Bus. & Prof.Code § 1700 et seq. ("UCL"). Because the statute is  
6 written in the disjunctive, it applies separately to business  
7 acts or practices that are (1) unlawful, (2) unfair, or (3)  
8 fraudulent. *See Pastoria v. Nationwide Ins.*, 112 Cal.App.4th  
9 1490, 1496, 6 Cal.Rptr.3d 148 (2003). Each prong of the UCL is a  
10 separate and distinct theory of liability. *See id.*

11 "California's UCL has a broad scope that allows for  
12 'violations of other laws to be treated as unfair competition  
13 that is independently actionable' while also 'sweep[ing] within  
14 its scope acts and practices not specifically proscribed by any  
15 other law.'" *Hauk v. JP Morgan Chase Bank U.S.A.*, 552 F.3d 1114,  
16 1122 (9th Cir. 2009) (citations omitted). "Violation of almost  
17 any federal, state, or local law may serve as the basis for a UCL  
18 claim." *Plascencia v. Lending 1st Mortg.*, 583 F.Supp.2d 1090,  
19 1098 (N.D. Cal. 2008) (citing *Saunders v. Superior Court*, 27  
20 Cal.App.4th 832, 838-839 (1994)).

21 The FAC alleges that Wells Fargo engaged in unfair business  
22 practices by:

- 23 (1) Failing to engage in loan modification or workout  
24 discussions in good faith as required by California  
25 Civil Code § 2923.6;  
26  
27  
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- 1 (2) Failing to properly disclose the beneficiary in the  
2 Notice of Default;
- 3 (3) Recording a Notice of Default listing parties which had  
4 no standing to foreclose as of the date the Notice of  
5 Default was recorded; and
- 6 (4) Recording an Assignment of Deed of Trust assigned by a  
7 party which lacks standing to act as the beneficiary.  
8

9 As to Plaintiffs' first allegation, California Civil Code §  
10 2323.6 does not require lenders to engage in loan modification or  
11 workout discussions. See Cal. Civ. Code § 2323.6(b) ("It is the  
12 intent of the Legislature that the mortgagee, beneficiary, or  
13 authorized agent offer the borrower a loan modification or  
14 workout plan if such a modification or plan is consistent with  
15 its contractual or other authority."). Plaintiffs' other  
16 allegations are insufficient, for the reasons discussed above.  
17

18 Wells Fargo's motion to dismiss the tenth cause of action is  
19 GRANTED, without prejudice.

20 V. CONCLUSION

21 For the reasons stated:

- 22 1. Wells Fargo's Motion to Dismiss is GRANTED without  
23 prejudice.  
24
- 25 2. Freddie Mac's Motion to Dismiss is GRANTED without  
26 prejudice.  
27
- 28 3. Wells Fargo and Freddie Mac shall submit a proposed form of

1 order consistent with this memorandum decision within five  
2 (5) days of electronic service of this memorandum decision.

3 SO ORDERED.

4 DATED: June 17, 2011

5 /s/ Oliver W. Wanger  
6 Oliver W. Wanger  
7 United States District Judge

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