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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RONALD M. OSBURN, et al.,
Plaintiffs,
v.
OCWEN LOAN SERVICING LLC, et al.,
Defendants.

Case No. 1:18-cv-00310-LJO-SAB
FINDINGS AND RECOMMENDATIONS
RECOMMENDING GRANTING
DEFENDANTS’ MOTION TO DISMISS
AND GRANTING IN PART PLAINTIFFS’
MOTION TO AMEND
(ECF Nos. 29, 30, 42, 44, 45)
OBJECTIONS DUE WITHIN FOURTEEN
DAYS

Plaintiffs Ronald M. Osburn and Sadie M. Osborn (“Plaintiffs”) filed this action against Defendants Onewest Bank, Ocwen Loan Servicing LLC (“Ocwen”), Mortgage Electronic Registration Systems Inc. (“MERS”), Deutsche Bank National Trust Company (“Deutsche Bank”), and Western Progressive LLC (“Western Progressive”). (ECF No. 1.) Currently before the Court is Deutsche Bank, MERS, Ocwen, and Western Progressive’s (“Defendants”) motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The Court heard oral argument on June 20, 2018. Counsel Catarina Benitez appeared for Plaintiffs and counsel Lindsey Kress appeared for Defendants. Having considered the moving, opposition and reply papers, the declarations and exhibits attached thereto, arguments presented at the June 20, 2018 hearing, as well as the Court’s file, the Court issues the following findings and recommendations.

1 I.

2 **PROCEDURAL HISTORY**

3 On May 3, 2018, Plaintiffs filed this action alleging violations of the Real Estate Settlement
4 Procedures Act (“RESPA”), 12 U.S.C. § 2605, and the Truth in Lending Act (“TILA”), 15 U.S.C.
5 § 1638; as well as state law claims for fraud, wrongful foreclosure, quiet title, cancellation of
6 instruments, negligent misrepresentation, breach of contract, and unfair business practices in
7 violation of California Business and Professions Code § 17000. (ECF No. 1.) On March 20, 2018,
8 Plaintiffs filed a motion for a temporary restraining order which was granted on March 26, 2018.
9 (ECF No. 16.) On March 28, 2018, Plaintiffs posted a bond in the amount of \$1,500.00.

10 Defendants filed a response to the motion for a restraining order on April 2, 2018. (ECF
11 Nos. 20-22.) Plaintiff filed a reply on April 5, 2018. (ECF No. 24.) On April 6, 2018, District
12 Judge Lawrence J. O’Neil issued an order requiring Plaintiffs to show cause why the temporary
13 restraining should not be dissolved. (ECF No. 26.) Plaintiffs and Defendants filed a response to
14 the order to show cause and Defendants filed the instant motion to dismiss on April 9, 2018. (ECF
15 Nos. 27, 29-30, 32.)

16 On April 10, 2018, Judge O’Neill issued an order dissolving the temporary restraining
17 order and the motion to dismiss was referred to the undersigned on April 12, 2018. (ECF No. 35,
18 36.) On April 23, 2018, Plaintiffs filed a notice of voluntary dismissal as to Defendant Onewest
19 Bank; and Defendant Onewest Bank was dismissed from this action on April 24, 2018. (ECF Nos.
20 39, 41.)

21 Plaintiffs did not file an opposition to the motion to dismiss, but on June 6, 2018, filed a
22 motion to amend the complaint and an application to hear the motion on shortened time. (ECF No.
23 42.) Plaintiffs’ application to hear the matter on shortened time was granted. (ECF No. 43.)
24 Defendants filed an opposition to the motion to amend on June 13, 2018. (ECF Nos. 44, 45.)
25 Plaintiffs filed a reply on June 15, 2018, that was stricken from the record for being unsigned.
26 (ECF No. 46, 48.) On this same date, Plaintiff filed a signed reply. (ECF No. 47.)

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1 **II.**

2 **COMPLAINT ALLEGATIONS**

3 Around January 2005, Plaintiffs purchased real property located at 4523 West Evergreen
4 Court, Visalia, California and in the County of Tulare by executing mortgage loans. (Compl. ¶¶
5 11, 16, ECF No. 1.) Originally, the Beneficiary and Trustee was America's Wholesale Lender and
6 the monthly payment on the property was \$1,584.86. (Compl. ¶ 16.) Plaintiffs made their
7 payments in a timely manner. (Compl. ¶ 16.) The deed of trust was recorded on January 14, 2005,
8 and there was a second deed of trust recorded for the remaining loan balance. (Compl. 16.)

9 Around February 2006, Plaintiffs' refinanced the property with Home Loan Center Inc. and
10 signed the refinance paperwork, including a note and deed of trust. (Compl. 20.) About March 7,
11 2006, a substitution of trustee and full reconveyance was recorded listing MERS as the beneficiary
12 and substituting ReconTrust Company N.A. as the new trustee. (Compl. ¶ 21.) About March 17,
13 2006, a fixed/adjustable rate note was executed by Plaintiffs with IndyMac Bank. (Compl. ¶ 22.)
14 Although both Plaintiffs executed the original note, the note only bore the signature of Plaintiff
15 Ronald Osburn. (Compl. ¶ 22.) The deed of trust executed on March 17, 2006, was in the amount
16 of \$348,400.00 and listed Indymac Bank as the lender, Transnation Title Insurance Company as
17 the trustee, and MERS as the beneficiary. (Compl. ¶ 23.) The note executed provided for
18 acceleration of the loan and that the lender would provide prior notice of acceleration and had the
19 power to sell the property in the event of default. (Compl. ¶ 25.) There was also a deed of trust for
20 a secondary lien recorded in the amount of \$87,100.00. (Compl. ¶ 26.)

21 Plaintiffs began making mortgage payments in the amount of \$2,178.68 per month.
22 (Compl. ¶ 24.) On May 2, 2006, a substitution of trustee and full reconveyance was recorded.
23 (Compl. ¶ 27.)

24 Around 2011, Plaintiffs received a loan modification from IndyMac Bank and the
25 payments were \$880.00 per month. (Compl. ¶ 28.) On June 26, 2012, a substitution of trustee and
26 full reconveyance was recorded to provide that the indebtedness was paid off and the second deed
27 of trust was transferred to MERS as nominee for Onewest. (Compl. ¶ 29.) Around October 16,
28 2013, Plaintiff received notice that IndyMac would be transferring the mortgaging servicing rights

1 to Ocwen. (Compl. ¶ 33.)

2 On March 28, 2014, it was recorded that the second mortgage was satisfied in full.
3 (Compl. ¶ 30.) In 2016, Plaintiffs noticed that their mortgage payments were increasing and
4 decreasing without explanation. (Compl. ¶ 34.) When they attempted to contact Ocwen, they
5 were informed that there was an automatic stay in effect as a result of their filing bankruptcy
6 although Plaintiffs had not filed bankruptcy. (Compl. ¶ 34.) Ocwen eventually shut down
7 Plaintiffs' mortgage account in 2016, and they no longer had access to their account and were
8 prevented from making payments. (Compl. ¶ 35.)

9 Around January 18, 2017, an assignment of deed of trust was recorded listing MERS as
10 nominee for IndyBank and all interest in the loan was assigned to Deutsche Bank as Trustee for
11 IndyMac. (Compl. ¶ 31.) Plaintiffs have no knowledge of when Onewest became involved in
12 their loan or how IndyMac acquired their mortgage. (Compl. ¶ 32.)

13 Around March 2017, Plaintiffs received a notice of default from Western Progressive LLC.
14 (Compl. ¶ 36.) From March 20, 2017, to June 29, 2017, Plaintiffs received approximately sixty
15 copies of notice of trustee sale indicating Defendants' intent to foreclose on the property. (Compl.
16 ¶ 37.) A notice of trustee sale was recorded by Western Progressive on June 29, 2017, with the
17 trustee sale set to take place on March 27, 2018. (Compl. ¶ 37.)

18 Plaintiffs generally allege that the notes were not legally transferred or delivered and the
19 defendants acted with the intent to defraud them. (Compl. ¶¶ 39-52.) Plaintiffs bring this action
20 against Defendant Ocwen for violation of RESPA and TILA; against Deutsche Bank, Ocwen, and
21 Mers for fraud and negligent misrepresentation; and against Ocwen, MERS, Deutsche Bank, and
22 Western Progressive for wrongful foreclosure, quiet title, cancellation of instruments, breach of
23 contract, and unfair business practices in violation of California's Unfair Competition Law
24 ("UCL"), Cal. Bus. & Prof. Code, § 17200, et seq. (Compl. pp. 11-27.) Plaintiffs are seeking
25 monetary damages and injunctive relief. (Compl. p. 27.)

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1 III.

2 LEGAL STANDARD

3 A. Motion to Dismiss

4 Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss on the
5 grounds that a complaint “fail[s] to state a claim upon which relief can be granted.” A motion to
6 dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the complaint. Navarro v. Block,
7 250 F.3d 729, 732 (9th Cir. 2001). In deciding a motion to dismiss, “[a]ll allegations of material
8 fact are taken as true and construed in the light most favorable to the nonmoving party.” Cahill v.
9 Liberty Mut. Ins. Co., 80 F.3d 336, 337–38 (9th Cir. 1996). The pleading standard under Rule 8 of
10 the Federal Rules of Civil Procedure does not require “ ‘detailed factual allegations,’ but it
11 demands more than an unadorned, the-defendant-unlawfully harmed-me accusation.” Ashcroft v.
12 Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555
13 (2007)). In assessing the sufficiency of a complaint, all well-pleaded factual allegations must be
14 accepted as true. Iqbal, 556 U.S. at 678-79. However, “[t]hreadbare recitals of the elements of a
15 cause of action, supported by mere conclusory statements, do not suffice.” Id. at 678. To avoid a
16 dismissal under Rule 12(b)(6), a complaint must plead “enough facts to state a claim to relief that
17 is plausible on its face.” Twombly, 550 U.S. at 570.

18 In deciding whether a complaint states a claim, the Ninth Circuit has found that two
19 principles apply. First, to be entitled to the presumption of truth the allegations in the complaint
20 “may not simply recite the elements of a cause of action, but must contain sufficient allegations of
21 underlying facts to give fair notice and to enable the opposing party to defend itself effectively.”
22 Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011). Second, so that it is not unfair to require the
23 defendant to be subjected to the expenses associated with discovery and continued litigation, the
24 factual allegations of the complaint, which are taken as true, must plausibly suggest an entitlement
25 to relief. Starr, 652 F.3d at 1216. “Dismissal is proper only where there is no cognizable legal
26 theory or an absence of sufficient facts alleged to support a cognizable legal theory.” Navarro, 250
27 F.3d at 732 (citing Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir.1988)).

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1 to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Judicial
2 notice may be taken “of court filings and other matters of public record.” Reyn’s Pasta Bella, LLC
3 v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006); Lee, 250 F.3d at 689. The Court grants
4 Defendants’ request for judicial notice of court filings and matters of public record. The judicially
5 noted records include:

- 6 1. January 9, 2017 Corporate Assignment of Deed of Trust from MERS, as nominee for
7 Indymac Bank to Deutshce Bank Trust Company, recorded on January 18, 2017. (ECF
8 No. 30-1 at 33-34.)
- 9 2. Notice of Default, filed March 20, 2017. (ECF No. 30-1 at 36-39.)
- 10 3. Notice of Trustee’s Sale, recorded on June 29, 2017. (ECF No. 30-1 at 41-43.)
- 11 4. Voluntary Petition for Bankruptcy filed by Ronald Osburn in case no. 17-13730 of the
12 Eastern District of California on September 28, 2017. (ECF No. 30-1 at 45-52.)
- 13 5. Order Dismissing case no. 17-13730 of for failure to timely file documents. (ECF No.
14 54.)
- 15 6. Voluntary Petition for Bankruptcy filed by Ronald Osburn on November 30, 2017 in
16 case no. 17-14566. (ECF No. 30-1 at 55- 63.)
- 17 7. Order granting trustee’s motion to dismiss for failure to appear, timely oppose, or
18 otherwise defend the matter in case no. 17-14566. (ECF No. 30-1 at 65.)

19 **A. Motion to Dismiss**

20 1. Standing

21 Defendants argue that the crux of Plaintiffs’ complaint is that Defendants did not receive
22 proper reassignment of the loan and thus lack standing to initiate foreclosure proceedings, but this
23 fails as a matter of law as Plaintiffs do not have legal authority to challenge the assignment of their
24 loan. Defendants argue that Plaintiffs are not parties to any of the contracts that they are
25 attempting to challenge and at most their allegations would make the contracts voidable, and not
26 void. Defendants contend that the cause of action for fraud, wrongful foreclosure, quiet title,
27 cancellation of instruments, negligent misrepresentation, and unfair business practices rest upon a
28 theory that fails as a matter of law and should be dismissed without leave to amend.

1 **a. Whether Plaintiffs have standing to bring a pre-foreclosure suit**

2 In Yvanova v. New Century Mortg. Corp., 62 Cal.4th 919 (2016), the California Supreme
3 Court considered whether the “borrower on a home loan secured by a deed of trust may base an
4 action for wrongful foreclosure on allegations a purported assignment of the note and deed of trust
5 to the foreclosing party bore defects rendering the assignment void.” Yvanova, 62 Cal.4th at 923.
6 The Court held that, “because in a nonjudicial foreclosure only the original beneficiary of a deed of
7 trust or its assignee or agent may direct the trustee to sell the property, an allegation that the
8 assignment was void, and not merely voidable at the behest of the parties to the assignment, will
9 support an action for wrongful foreclosure.” Id. However, this holding was “narrow,” and
10 established “only that a borrower who has suffered a nonjudicial foreclosure does not lack standing
11 to sue for wrongful foreclosure based on an allegedly void assignment merely because he or she
12 was in default on the loan and was not a party to the challenged assignment.” Id. at 924. A void
13 contract or transaction is “without legal effect” and is a “mere nullity.” Id. at 929. A voidable
14 contract or transaction is one that may be declared void, but is not void in itself, and may be
15 subject to ratification by the parties. See id. at 930.

16 Defendants argue that the California Supreme Court carved out this limited exception that
17 only applies to post-foreclosure claims and cannot be used to preempt a threatened nonjudicial
18 foreclosure by a suit challenging the foreclosing party’s right to proceed as is at issue here. The
19 Court reviews subsequent case law to determine if courts have found that the holding in Yvanova
20 is limited to post foreclosure proceedings.

21 Some courts have found that the holding in Yvanova would not be limited to post
22 foreclosure actions. For instance, in Lundy v. Selene Fin., LP, No. 15-CV-05676-JST, 2016 WL
23 1059423 (N.D. Cal. Mar. 17, 2016), a federal district court considered the split that existed in
24 California courts as to “whether the borrower on a home loan secured by a deed of trust may base
25 an action for wrongful foreclosure on allegations a purported assignment of the note and deed of
26 trust to the foreclosing party bore defects rendering the assignment void.” Lundy, 2016 WL
27 1059423 at *8. The most prominent case which held that such plaintiffs do not have standing to
28 sue was Jenkins v. JP Morgan Chase Bank, N.A., 216 Cal.App.4th 497 (2013), as modified (June

1 12, 2013), and disapproved of by Yvanova, 62 Cal.4th 919). Lundy, 2016 WL 1059423 at *8.
2 The opposite conclusion was reached by Glaski v. Bank of Am., N.A., 218 Cal.App.4th 1079
3 (2013), which held that “a plaintiff has standing to challenge a completed foreclosure based on
4 allegations that the foreclosing party lacks authority due to an assignment that was void.”

5 The Lundy court found that the holding in Yvanova was likely to be applied to two actions
6 addressing the same issue in the pre-foreclosure context that the California Supreme Court had
7 stayed while Yvanova was decided, Keshtgar v. U.S. Bank, 334 P.3d 686 (2014), and Mendoza v.
8 JP Morgan Chase Bank, 337 P.3d 493 (2014). Lundy, 2016 WL 1059423 at *8. The court noted
9 that at the time that Glaski issued it was the lone minority position on one side of the split of
10 California courts. Id. at *9. However, Glaski had been validated by the California Supreme Court
11 and the Lundy court determined that the California Supreme Court would again reject Jenkins
12 holding that pre-foreclosure plaintiffs are not prejudiced by initiation of foreclosure proceedings
13 based on an allegedly void assignment. Id. at *11. The court predicted that the California
14 Supreme Court would limit the holdings in Jenkins to only those pre-foreclosure plaintiffs who
15 lack a specific factual basis to bring their claims. Id. at *13; but see Shetty v. ARLP Securitization
16 Tr. Series 2014-2, No. CV1605467BROGJSX, 2017 WL 8220702, at *9 (C.D. Cal. Jan. 19, 2017)
17 (Rejecting Lundy and finding the majority of authority in California addressing the issue following
18 Yvanova have held that it did not create standing for borrowers prior to foreclosure. Because to
19 establish standing to challenge an assignment in either a pre- or post-foreclosure context the
20 plaintiff must assert harm that produces invasion of his legal protected interest, prejudice or injury.
21 While a plaintiff who has been foreclosed upon meets this standard, a borrower who has not yet
22 suffered a foreclosure does not.)

23 Following the opinion in Yvanova, the California Supreme Court denied review in
24 Keshtgar, and Mendoza and remanded for reconsideration in light of the decision in Yvanova. See
25 Mendoza v. JPMorgan Chase Bank, N.A., 6 Cal.App.5th 802 (2016), review denied (Mar. 22,
26 2017); Keshtgar v. U.S. Bank, N.A., No. 2D CIVIL NO. B246193, 2016 WL 4183750, at *1 (Aug.
27 8, 2016) (unpublished). On remand, the Keshtgar court held that Yvanova had no bearing on pre-
28 foreclosure actions because the finding was limited to post foreclosure actions. Keshtgar, 2016

1 WL 4183750 at *1. The Mendoza court analyzed the plaintiff’s claims and found she did not have
2 standing to bring the action. Mendoza, 6 Cal.App.5th at 807.

3 In Saterbak v. JPMorgan Chase Bank, N.A., 245 Cal.App.4th 808 (2016), reh’g denied
4 (Apr. 11, 2016), review denied (July 13, 2016), the Court of Appeal for the Fourth District
5 considered whether the trial court erred in finding that a plaintiff who was seeking to stop a
6 threatened foreclosure did not have standing to bring the suit. The plaintiff alleged that the
7 assignments of her loan were invalid because of untimely securitization of the deed of trust and
8 robo-signing. Saterbak, 245 Cal.App.4th at 812. However, the court found that “California courts
9 do not allow such preemptive suits because they ‘would result in the impermissible interjection of
10 the courts into a nonjudicial scheme enacted by the California Legislature.’ ” Id. at 814. Allowing
11 a plaintiff to bring such a suit would impose an additional requirement that the defendant
12 demonstrate that it is authorized to initiate a foreclosure which “would be inconsistent with the
13 policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy.” Id.
14 at 814-15 (quoting Gomes v. Countrywide Home Loans, Inc., 192 Cal.App.4th 1149, 1156
15 (2011)). Since the plaintiff had brought a pre-foreclosure action challenging the lenders ability to
16 foreclose, she did not have standing. Saterbak, 245 Cal.App.4th at 815. The court found that
17 Yvanova did not alter the standing issue because the Supreme Court expressly limited the holding
18 to post-foreclosure suits. Id.

19 Other courts have similarly held that Yvanova does not allow a plaintiff to bring a pre-
20 foreclosure suit to challenge the lenders ability to foreclose before a nonjudicial foreclosure occurs
21 and the legal authority rejecting preemptive foreclosure suits survives. See Rocha v. CIT Bank,
22 N.A., No. 17-CV-05082-BLF, 2018 WL 1609636, at *3 (N.D. Cal. Apr. 3, 2018); Saterbak v.
23 Nat’l Default Servicing Corp., No. 15CV956-WQH-BGS, 2016 WL 4430922, at *7 (S.D. Cal.
24 Aug. 22, 2016); Martinez v. CitiMortgage, Inc., No. D070284, 2017 WL 1101645, at *4 (Mar. 24,
25 2017); Kaurlo v. U.S. Bank, N.A., No. 16-CV-06652-JFW-GJSX, 2016 WL 6808117, at *3
26 (C.D. Cal. Nov. 17, 2016), appeal dismissed sub nom. Kaurlo v. U.S. Bank NA, No. 16-56853,
27 2017 WL 6403850 (9th Cir. Mar. 1, 2017); Baker v. Citi Mortg., Inc., No. A148458, 2018 WL
28 1790709, at *9 (Apr. 16, 2018)(unpublished). Recently in an unpublished case, the Ninth Circuit

1 recognized the holding in Yvanova, but found that “[n]othing about Yvanova suggests that,
2 contrary to longstanding precedent on this point, California now allows an action for wrongful
3 foreclosure before a foreclosure takes place.” Wasjutin v. Bank of Am., N.A., No. 16-55974, 2018
4 WL 1918194, at *2 (9th Cir. Apr. 24, 2018) (unpublished); see also Yagman v. Nationstar Mortg.,
5 LLC, 699 F.App’x 634, 635 (9th Cir. 2017) (“As we have in the past, we join the majority of
6 courts that have declined to extend Yvanova.”).¹

7 The Court is persuaded by the weight of authority finding that under California law a
8 plaintiff cannot bring a preemptive suit to stop foreclosure on property. The California Supreme
9 Court has not held that a borrower may file a preemptive challenge to stop foreclosure and the
10 holding in Yvanova was “narrow,” and established “only that a borrower who has suffered a
11 nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an
12 allegedly void assignment merely because he or she was in default on the loan and was not a party
13 to the challenged assignment.” Id. at 924. Further, the Supreme Court stated that the ruling was a
14 narrow one and they did “not hold or suggest that a borrower may attempt to preempt a threatened
15 nonjudicial foreclosure by a suit questioning the foreclosing party’s right to proceed.” Yvanova,
16 62 Cal.4th at 924.

17 Additionally, “the provisions setting forth California’s nonjudicial foreclosure scheme (§§
18 2924–2924k) cover every aspect of the exercise of a power of sale contained in a deed of trust.
19 The purposes of this comprehensive scheme are threefold: (1) to provide the beneficiary-creditor
20 with a quick, inexpensive and efficient remedy against a defaulting trustor-debtor; (2) to protect
21 the trustor-debtor from wrongful loss of the property; and (3) to ensure that a properly conducted
22 sale is final between the parties and conclusive as to a bona fide purchaser.” Jenkins, 216
23 Cal.App.4th at 509–10. “The comprehensive statutory framework established [in sections 2924 to
24 2924k] to govern nonjudicial foreclosure sales is intended to be exhaustive.” Debrunner v.
25 Deutsche Bank Nat. Tr. Co., 204 Cal.App.4th 433, 440 (2012) (citations omitted). Allowing a

26
27 ¹ Unpublished dispositions and orders of this Court issued on or after January 1, 2007 may be cited to the courts of this
28 circuit in accordance with FRAP 32.1. Ninth Circuit Rule 36-3(b); see Animal Legal Def. Fund v. Veneman, 490 F.3d
725, 733 (9th Cir. 2007) (“as of January 1, 2007, we must now allow parties to cite even unpublished dispositions and
unpublished orders as persuasive authority”).

1 plaintiff to bring a preemptive suit to preclude foreclosure would impose an additional requirement
2 that the defendant demonstrate that it is authorized to initiate a foreclosure which “would be
3 inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and
4 efficient remedy.” Saterbak, 245 Cal.App.4th at 814-15.

5 Further, to establish standing to challenge an assignment in either a pre- or post-foreclosure
6 context the plaintiffs must assert harm that produces invasion of their legal protected interest,
7 prejudice or injury. The Yvanova court found that a plaintiff who has been foreclosed upon clearly
8 meets this standard, Yvanova, 62 Cal.4th at 937, a borrower who has not yet suffered a foreclosure
9 does not.

10 Finally, the majority of courts, including the Ninth Circuit, have declined to extend that
11 holding in Yvanova to allow a plaintiff to file an action for wrongful foreclosure before a
12 foreclosure takes place. The Court finds that Plaintiffs do not have standing in this action to
13 challenge the threatened foreclosure.

14 **b. Whether the Complaint Alleges Void or Voidable Assignment**

15 Further, even assuming that Plaintiffs have standing, the allegations do not demonstrate
16 that the assignment was void.

17 Plaintiff alleges that the note dated March 17, 2006, was not duly endorsed, transferred and
18 delivered to anyone after its initial date of execution and was never duly endorsed, transferred, and
19 delivered to the Trust prior to the closing date of April 27, 2006. (Compl. ¶ 41.) Plaintiff further
20 alleges that the note was never actually transferred or delivered to the Depositor and by the
21 Depositor to the custodian on behalf of the Trust prior to the closing date of April 27, 2006, and
22 therefore the note was never lawfully negotiated and physically delivered to the trust. (Compl. ¶
23 44.) Plaintiff contends that the note was never actually transferred or delivered to the depositor or
24 the custodian on behalf of the trustee for the trust prior to the closing date or at all. (Compl. 47.)
25 Plaintiff also contends that about March 2009, a loan sale agreement was created but transfers to
26 and from Onewest were never made. (Compl. ¶ 42.)

27 “The authority to exercise all of the rights and interests of the lender necessarily includes
28 the authority to assign the deed of trust.” Saterbak, 245 Cal.App.4th at 816 (citations omitted).

1 Cases hold that assignments which “allegedly breach[] a term or terms of a PSA” are voidable
2 rather than void because “the beneficiaries, not the borrower, have the right to ratify the trustee’s
3 unauthorized acts.” Hacker v. Homeward Residential, Inc., 23 Cal.App.5th 111, 121 (2018).
4 California courts have rejected the argument that the trustee needs to have actual physical
5 possession of the note and deed of trust to institute nonjudicial foreclosure proceedings. Kalnoki
6 v. First Am. Tr. Servicing Sols., LLC, 8 Cal.App.5th 23, 42 (2017), reh’g denied (Feb. 22, 2017),
7 review denied (May 10, 2017) (citing Siliga v. Mortgage Electronic Registration Systems, Inc.,
8 219 Cal.App.4th 75, 84 n.5 (2013); Shuster v. BAC Home Loans Servicing, LP, 211 Cal.App.4th
9 505, 511 (2012); Debrunner, 204 Cal.App.4th at 441.

10 Plaintiff also contends that the pooling and service agreement required that on the closing
11 date, “the depositor will deliver or cause to be delivered to the trustee the mortgage file, which
12 contains among other things, the original mortgage note (and any modification or amendment to it)
13 endorsed in blank without recourse, ... an assignment in recordable form of the mortgage, ... and, if
14 applicable, all recorded intervening assignments of the mortgage and any riders or modifications to
15 the mortgage note and mortgage. . . .” (Compl. ¶ 43.) Plaintiff alleges that this was never done.
16 (Id.)

17 Plaintiff contends that the 2017 assignment did not occur by April 27, 2006 and was not
18 recorded until January 18, 2017 long after the trust has closed. (Compl. ¶ 45.) Plaintiff alleges
19 that the assignment was ineffective because the trust could not have accepted the deed of trust after
20 the closing date pursuant to the PSA and noncompliance with the PSA and the requirements of a
21 REMIC trust. (Id.) Also, if assignment was after the closing date, the REMIC statutes would
22 terminate the trust by extinguishing its tax-exempt status. (Id.) Because this transfer did not occur
23 by April 27, 2006, but on January 18, 2017, long after the trust has closed, the assignment was
24 ineffective and void ab initio. (Compl. ¶ 48.)

25 There is no requirement under California law for the assignment of a deed of trust to be
26 recorded in order for an assigned beneficiary to foreclose. Calvo v. HSBC Bank USA, N.A., 199
27 Cal. App. 4th 118, 123 (2011). Assignments of debt, in contrast to the assignment of the security
28 interest, are commonly not recorded. Herrera v. Fed. Nat. Mortg. Assn., 205 Cal.App.4th 1495,

1 1506 (2012), disapproved of by Yvanova, 62 Cal.4th 919). Therefore, a lender can assign the
2 promisory note to another entity in an unrecorded document that was not publicly disclosed.
3 Herrera, 250 Cal.App.4th at 1506. Further, the allegations do not state that any transfers were not
4 timely recorded, but the complaint alleges that the 2017 assignment of the deed of trust was
5 recorded on January 18, 2017.

6 In Mendoza the plaintiff made similar arguments alleging that the untimely assignment into
7 a securitization trust and robo-signing made the assignments void. Mendoza, 6 Cal.App.5th at
8 811. The court considered that Glaski had found that allegations that an assignment that occurred
9 after the closing date were sufficient to support an allegation that the assignment was void and
10 defeat an attack on the ground of standing. Mendoza, 6 Cal.App.5th at 811-12. However, courts
11 routinely hold that a borrower does not have standing to challenge an alleged breach of the terms
12 of the PSA because it is the beneficiary and not the borrower who have the right to ratify the
13 trustee's unauthorized acts. Id. at 813-817 (collecting cases). Similarly, the court rejected the
14 contention that failing to transfer the corpus into the REMIC within three months would violate
15 federal law and make the transaction void, noting that other courts had rejected this argument. Id.
16 at 818.

17 “While transferring a note to the REMIC might have negative tax consequences for the
18 REMIC investors, Plaintiffs have not argued any reason why such a transfer would be
19 ‘meaningless and legally unenforceable.’ ” Mendoza, 6 Cal.App.5th at 14 (quoting Williams v.
20 GMAC Mortg. Inc., No. 13 civ. 4315 (JRO), 2014 WL 2560605, at p. *4 (S.D.N.Y. June 6, 2014)).
21 A later transfer into the REMIC may have negative tax consequences, but losing favorable tax
22 treatment does not necessarily jeopardize the tax status of the entire trust. Mendoza, 6 Cal.App.5th
23 at 819. “The tax implications of securitization simply do not render a voidable transaction void.”
24 Id. The court concluded that allegations that there were violations of the PSA or federal law make
25 the contract voidable, but not void. Finally, the court found that because the bank, and not the
26 borrower is the injured party, if the assignment was in fact robo-signed, it would be voidable, not
27 void, at the injured party's option. Id. (citing Pratap v. Wells Fargo Bank, N.A., 63 F.Supp.3d
28 1101, 1109 (N.D. Cal. 2014)). It is the prevailing view that homeowners lack standing to

1 challenge the validity of robo-signatures because the transaction is voidable, not void. Mendoza, 6
2 Cal.App.5th at 820; Kaurloto, 2016 WL 6808117, at *5.

3 Similarly, courts hold that a transfer of a secured loan in violation of the terms of the
4 securitized trust is at most voidable, rather than void, and the homeowner has no standing to
5 challenge the transaction. Martinez, 2017 WL 1101645, at *4; Renard v. JP Morgan Chase Bank,
6 N.A., No. LACV1700820JAKGJSX, 2017 WL 8292774, at *8 (C.D. Cal. Dec. 13, 2017) see also
7 Suruki v. Ocwen Loan Servicing, LLC, No. 17-15039, 2018 WL 2327207, at *1 (9th Cir. May 23,
8 2018) (unpublished) (belated assignment of loan renders transaction voidable, not void).

9 The Court finds that the allegations in the complaint would make the assignments voidable,
10 but not void. Accordingly, even if the California Supreme Court was to extend Yvanova to allow
11 for pre-foreclosure actions, Plaintiffs would not fall within the limited exception recognized by
12 Yvanova to bring a wrongful foreclosure action.

13 For these reasons, Plaintiffs claims based upon the alleged improper assignment of the
14 loans are premature and cannot proceed in this action. Plaintiffs allege that Defendants Deutsche
15 Bank, Ocwen, and MERS committed fraud because the note, dated March 17, 2006 was not duly
16 endorsed transferred and delivered to anyone after its initial date of execution and was not
17 delivered to the trust prior to the closing date of April 27, 2006, and the signature of Plaintiff Sadie
18 Osburn was removed. Plaintiffs contend that the note was never actually transferred or delivered
19 to the trust prior to the closing date of April 27, 2006. Plaintiffs allege that the defendants
20 misrepresented or concealed the true facts regarding the transfer of their note and deed of trust by
21 assigning it to Indymac after the closing date. The assignment of the trust did not occur by April
22 27, 2006, but on January 18, 2017 after the trust had closed. The pooling and service agreement
23 required the original mortgage note, endorsed in blank, to be delivered with all intervening
24 endorsements showing the complete chain of endorsement and this was not done. Plaintiffs allege
25 that these actions were done with intent to defraud them and the public with regards to the status of
26 the note.

27 Plaintiffs' negligent misrepresentation cause of action alleges the Plaintiffs contend that
28 due to the deficiencies identified in the complaint the note was never properly transferred and

1 Defendants MERS Ocwen, and Deutsche Bank misrepresented that they retained rights under the
2 March 17, 2006 deed of trust.

3 Plaintiffs contend that the notice of default recorded on March 20, 2017, was void due to
4 the failure to properly endorse the loan, transfer the loan, and the modification of signatures on the
5 note during the loan transfer process and bring a claim to quiet title.

6 Plaintiffs also seek cancellation of the notice of default, notice of trustee sale, and
7 assignment of deed of trust.

8 The UCL claim alleges that Defendants misrepresented information causing an assignment
9 of their loan to entities that did not have the right to receive the assignment; used their power to
10 make transfers of the note and deed of trust after the closing date of the pooling and servicing
11 agreements and thereby provided false information to the public and financially interested persons
12 which are fraudulent business practices. Plaintiffs contend that defendants engaged in fraudulent
13 business practices by implementing improper and premature foreclosure proceedings; excusing
14 and recording false and misleading documents; executing and recording legal documents without
15 legal authority; failing to disclose the principal for which documents were being recorded in
16 violation of California Civil Code section 1095, and acting as beneficiaries and trustees without
17 legal authority.

18 These claims all rest upon the improper assignment of the loans and Plaintiff's do not have
19 standing under California law to bring a preemptive action to stop the foreclosure on their
20 property. Accordingly, the Court finds that Defendants' motion to dismiss should be granted as to
21 Plaintiffs' cause of action for fraud, wrongful foreclosure, quiet title, cancellation of instruments,
22 negligent misrepresentation, and unfair business practices.

23 2. Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2605

24 Plaintiffs contend that about November 26, 2017, a qualified written request ("QWR") was
25 provided to Ocwen by Federal Express and it was not acknowledged within five days of receipt.
26 When they inquired of Ocwen, Ocwen stated that it had never received the request.

27 "Congress enacted RESPA in 1974 to protect home buyers from inflated prices in the home
28 purchasing process." Schuetz v. Banc One Mortg. Corp., 292 F.3d 1004, 1008 (9th Cir. 2002).

1 Pursuant to section 2605(e), any servicer of a related mortgage loan who receives a QWR from the
2 borrower for information relating to the loan must provide a written response acknowledging the
3 receipt of the correspondence within 5 days unless the action requested is taken with the time
4 period. 12 U.S.C. § 2605(e)(1)(A). A borrower who fails to comply with this section is liable for
5 actual damages or statutory damages not to exceed \$2,000. 12 U.S.C. § 2605(f)(1). Section 2605
6 only relates to the servicing of a loan, not to its ownership or validity. Tamburri v. Suntrust
7 Mortg., Inc., 875 F.Supp.2d 1009, 1014 (N.D. Cal. 2012).

8 While Plaintiff alleges that Ocwen has a pattern or practice of failing to respond to QWRs
9 and failing to acknowledge receipt, the complaint does not include any factual allegations
10 sufficient to support the allegation. Plaintiffs contend that on a single occasion, November 26,
11 2017, they sent a request that was not responded to within five days.

12 Moreover, to state a RESPA claim, courts generally require a showing of pecuniary loss
13 from the failure to comply to state a claim. Allen v. United Fin. Mortg. Corp., 660 F.Supp.2d
14 1089, 1097 (N.D. Cal. 2009). Plaintiffs have not included any factual allegations about the request
15 that was submitted on November 26, 2017, nor have they alleged damages due to the RESPA
16 violation. Plaintiffs' conclusory allegations that they suffered damages is not sufficient to state a
17 claim.

18 Here, Plaintiffs are alleging defects in the loan documents and transfer of the loan between
19 different entities. RESPA is not designed to cover disputes as to the ownership or validity of a
20 loan. Tamburri, 875 F.Supp.2d at 1014. To the extent that Plaintiffs' allege damages in this action
21 from the defective transfers, the damages suffered would not be from the failure to respond to such
22 inquiries, but would be due to the foreclosure of the property. Such damages are not sufficient to
23 state a claim under RESPA because they are not caused by the failure to respond to the QWR. Id.

24 The Court recommends that Defendants' motion to dismiss the RESPA claims should be
25 granted.

26 3. Truth in Lending Act, 15 U.S.C. § 1638

27 Plaintiffs assert that since 2016, Defendant Ocwen has refused to provide monthly
28 mortgage statements to them and has refused to communicate with Ron Osburn about the subject

1 loan. Plaintiffs contend this is a violation of 15 U.S.C. § 1638(f)(1). Defendants argue that
2 Plaintiff's claims are least partially barred by the statute of limitations. Further, Defendants argue
3 that Plaintiffs claim damage by being unable to ascertain their monthly statement amount but
4 section 1638 does not require information regarding monthly payment amounts on the billing cycle
5 statements.

6 Section 1638(f) provides that a creditor, assignee, or servicer of a residential mortgage shall
7 transmit to the debtor, for each billing cycle, a statement that sets forth the following information:

- 8 (A) The amount of the principal obligation under the mortgage.
9 (B) The current interest rate in effect for the loan.
10 (C) The date on which the interest rate may next reset or adjust.
11 (D) The amount of any prepayment fee to be charged, if any.
12 (E) A description of any late payment fees.
13 (F) A telephone number and electronic mail address that may be used by the
14 obligor to obtain information regarding the mortgage.
15 (G) The names, addresses, telephone numbers, and Internet addresses of
16 counseling agencies or programs reasonably available to the consumer that
17 have been certified or approved and made publicly available by the Secretary
18 of Housing and Urban Development or a State housing finance authority (as
19 defined in section 1441a-1 of Title 12).
20 (H) Such other information as the Board may prescribe in regulations.

21 15 U.S.C. § 1638(f)(1).

22 Pursuant to TILA, any claim based on a failure to make material disclosures must be
23 brought within one year from the date of the occurrence of the violation. 15 U.S.C. § 1640(e);
24 Hallas v. Ameriqurest Mortg. Co., 406 F.Supp.2d 1176, 1183 (D. Or. 2005), aff'd, 280 F.App'x 667
25 (9th Cir. 2008). Here, the complaint in this action was filed on March 3, 2018. (ECF No. 1.)
26 Therefore, any claim that arose prior to March 3, 2017, would be barred by the statute of
27 limitations.

28 Plaintiffs TILA action is based on the failure to provide mortgage statements, which
Plaintiffs allege started in 2016. Therefore, the statute of limitations has run on the TILA claim.
Further, to the extent that Plaintiffs contend that mortgage statements should continue to be
provided, the notice of default and election to sell was filed March 20, 2017. (ECF No. 30-1 at 36-
39.) The notice of default informed Plaintiffs that they were required to pay \$18,931.43 by April
4, 2017 to avoid foreclosure. (ECF No. 30-1 at 36.) California requires a lender to contact the
borrower 30 days prior to filing a notice of default "the borrower's financial situation and explore

1 options for the borrower to avoid foreclosure.” Cal. Civ. Code § 2923.5(a). Plaintiffs do not
2 allege that they were not contacted prior to the notice of default being filed.

3 Plaintiffs’ cannot allege any harm due to the failure to provide mortgage statements once
4 the notice of default was filed for they were already in default and the mortgage company was no
5 longer accepting monthly payments. At this point, Plaintiffs were required to bring the loan
6 current to avoid foreclosure. The Court finds that Plaintiffs have failed to state a claim for
7 violation of TILA. The Court recommends that Defendants’ motion to dismiss the TILA claim be
8 granted.

9 4. Breach of Contract

10 In the complaint, Plaintiffs allege that from the time that they executed a loan modification
11 agreement until the date the complaint was filed they fully complied with the loan modification
12 terms and conditions by making the monthly mortgage payments to make them current and
13 Defendants breached the agreement by refusing to apply their monthly payments. Defendants
14 argue that Plaintiffs cannot compel performance of the contract while they are in default as
15 evidenced by the complaint.

16 A cause of action for damages for breach of contract under California law is comprised of
17 the following elements: “(1) the contract, (2) plaintiff’s performance or excuse for
18 nonperformance, (3) defendant’s breach, and (4) the resulting damages to plaintiff.” Careau & Co.
19 v. Sec. Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1388 (1990), as modified on denial of reh’g
20 (Oct. 31, 2001); accord Wall St. Network, Ltd. v. New York Times Co., 164 Cal.App.4th 1171,
21 1178 (2008). “[I]t is elementary that one party to a contract cannot compel another to perform
22 while he himself is in default.” Durell v. Sharp Healthcare, 183 Cal.App.4th 1350, 1367 (2010)
23 (citations omitted).

24 Plaintiffs allege that a loan modification was received from IndyMac Bank in 2011, and
25 payments at the time were \$880.00 per month. (Compl. ¶ 28.) Around 2016, after Ocwen began
26 servicing their loan, Plaintiffs noticed that their monthly mortgage payments were increasing and
27 decreasing without an explanation. (Compl. ¶¶ 34, 113.) After communication with Ocwen in
28 2016, the mortgage account was shut down and Plaintiffs were prevented from having access to

1 their account and making payment towards their loan. (Compl. ¶ 35.) In March 2017, Plaintiffs
2 received a notice of default. (Compl. ¶ 36, 115.) Plaintiffs allege that each month that a payment
3 was made they were presented with different amounts to pay, and were left with no choice but to
4 guess what their payment requirement was each month. (Compl. ¶ 116.) Plaintiffs paid the
5 amount they believed they were required to pay, many months amounting to more than the
6 minimum payment set forth in the loan agreement. (Compl. ¶ 116.)

7 While Plaintiffs allege that they complied with all terms of the 2011 modification, the
8 Court is not required to accept as true allegations that contradict exhibits attached to the complaint
9 or matters properly subject to judicial notice, or allegations that are merely conclusory,
10 unwarranted deductions of fact, or unreasonable inferences. Daniels-Hall v. National Educ. Ass'n,
11 629 F.3d 992, 998 (9th Cir. 2010). The loan modification agreement attached to the complaint and
12 signed by Ron Osburn on November 22, 2010, shows that Plaintiffs' payments were \$965.16 per
13 month beginning on December 1, 2010 for 60 months including impounds which could increase.²
14 (ECF No. 1-16 at 4.) The agreement also provides that the payment could increase on December
15 1, 2016, December 1, 2017, and December 1, 2017. (Id.) The notice of default attached to
16 Plaintiffs' complaint shows that Defendants were in default as of January 1, 2016. (ECF No. 1-13
17 at 4.) The Court finds that Plaintiffs' allegations that they complied with all requirements of the
18 loan modification are contradicted by other statements and the exhibits attached to the complaint,
19 and therefore, are not entitled to a presumption of truth.

20 The Court finds that Plaintiffs have failed to allege a plausible breach of contract claim
21 against Defendants. The Court recommends that Defendants' motion to dismiss the breach of
22 contract claim should be granted.

23 5. Conclusion

24 Based on the foregoing, the Court finds that Defendants' motion to dismiss should be
25 granted. The Court next considers Plaintiff's motion to amend the complaint.

26 ² A court generally cannot consider material outside of the complaint when ruling on a motion to dismiss. Hal Roach
27 Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989). However, the incorporation by
28 reference doctrine allows material that is attached to the complaint to be considered, as well as "unattached evidence
on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to
plaintiff's claim; and (3) no party questions the authenticity of the document." Corinthian Colleges, 655 F.3d at 999.

1 **B. Motion to Amend**

2 Plaintiffs seek to file an amended complaint to delete the RESPA claims and amend
3 information regarding the remaining causes of action. Again, Defendants counter that the crux of
4 the amended complaint is that Defendants did not receive proper assignment of the loan; and
5 therefore, amendment is futile as Plaintiffs lack standing. Plaintiff replies that recently in Hacker,
6 the court evaluated a similar situation and was allowed to bring suit challenging the foreclosure.

7 1. First Amended Complaint

8 In the first amended complaint, Plaintiffs deleted the RESPA cause of action and included
9 the following additional factual allegations.

10 In the first cause of action for fraud, Plaintiffs allege that section 2.01 of the pooling
11 service agreement required the seller to transfer to the depositor all interest of the seller of the
12 mortgage loans. (First Am. Compl. (“FAC”) ¶ 57.) Plaintiffs contend that the assignments of the
13 deed of trust purportedly assigning all beneficial interest in the note was not conducted by the
14 proper party and thus was void ab initio. (Id.)

15 In the second cause of action for wrongful foreclose, Plaintiffs contend that Defendants had
16 a sale date set for May 3, 2018, and have placed the sale on hold to gain an advantage in this
17 proceeding. (FAC ¶ 68.) A new sale date is set for July 17, 2018. (Id.)

18 In the third cause of action for quiet title, Plaintiff contend that they have attempted to
19 make payments to the proper noteholder but have been prevented from doing so because the proper
20 noteholder’s identify has not been determined and prior attempts and offers to tender have been
21 refused. (FAC ¶ 73.)

22 In the sixth cause of action for breach of contract, Plaintiffs allege that in or around 2016,
23 Ocwen closed Plaintiffs’ account and stopped reporting the loan to credit bureaus. In or about
24 September 2016, when Plaintiffs reviewed their credit reports they noticed that the mortgage
25 became inactive, as if it no longer existed as of 2016. (FAC ¶ 100.) As Plaintiff’s believed that
26 they account had been closed and was no longer reported to credit bureaus, Plaintiff did not know,
27 and Ocwen refused to communicate with them, an adequate payment method. (FAC ¶ 101.)

28 In the seventh cause of action for violation of the Truth in Lending Act, Plaintiffs allege

1 that starting in January 2017 and through March 2018, Ocwen has refused to provide mortgage
2 statements to Plaintiff and has refused to communicate with Plaintiff Ron Osburn about the subject
3 loan. (FAC ¶ 111.) As a result, Plaintiff Ron Osburn’s credit has been ruined. (Id.)

4 In the eighth cause of action for violation of the UCL, Plaintiffs alleges that Defendants
5 were not the beneficiaries or noteholders at the time that the notice of default was recorded, and
6 that a new sale date has been set for July 17, 2018. (FAC ¶ 119.)

7 2. Discussion

8 Plaintiffs argue that recently the California Court of Appeals decided Hacker which
9 addressed a similar situation to that presented here. Plaintiff contends that Defendants misconstrue
10 their argument which is that MERS did not have authority to assign the deed of trust, not that the
11 loan was not timely transferred into the trust. Plaintiffs contend that similar to the argument made
12 by the plaintiff in Hacker, the assignment was void. Therefore, they argue that the fact that
13 Plaintiffs are not parties to the pooling and servicing agreement is not relevant. Plaintiffs also
14 argue that the deed of trust and the note were split and there is no underlying right by any of the
15 named defendants to enforce the note.

16 a. Plaintiffs do not have standing to bring action to preempt foreclosure

17 In Hacker, the plaintiff was transferred property as part of a settlement agreement and sued
18 multiple defendants alleging claims for breach of written contracts; breach of the covenant of good
19 faith and fair dealing; wrongful, improper and fraudulent trustee sale; fraud; unfair business
20 practices; cancellation of void instruments; slander of title; declaratory relief; and specific
21 performance of contract. 23 Cal.App.5th at 113-115. Some of the claims were premised on an
22 alleged breach of the terms of the deed of trust and short sale agreement and others challenged the
23 assignment of the deed of trust and subsequent recorded instruments that he alleged were void and
24 a sham. Id. at 115. The defendants filed a demurrer which was granted without leave to amend.
25 Id. at 116-17.

26 On appeal, the appellate court found that the trial court properly found that the plaintiff
27 failed to allege facts establishing an ownership interest sufficient to confer standing. Id. at 118.
28 The plaintiff had not attached the grant deed and did not establish that he was the owner of the

1 grant deed in the filed complaints. Id. at 119. However, the appellate court also found that the
2 trial court misconstrued the nature of the plaintiff's claim. Plaintiff was not alleging that the
3 parties violated the terms of the PSA nor was he challenging any aspects of the securitization
4 process whereby the original mortgage was transferred to the trust. Id. The plaintiff alleged that a
5 subsequent assignment of the deed of trust was void because at the time of the transfer, it was void
6 because the loan had already been sold to someone else and there was no longer a beneficial
7 interest in the loan to convey. Id.

8 The appellate court found that the trial court abused its discretion by failing to allow the
9 plaintiff the opportunity to file an amended complaint. Id. at 121. The property had been acquired
10 in a foreclosure sale and the plaintiff alleged that the seller had no power to foreclose on the
11 property because it was never the true owner of the deed of trust. Id. Had the plaintiff alleged that
12 the assignment violated the PSA it would merely have been voidable, not void. Id. Here, the
13 plaintiff was clearly alleging that the foreclosing party never possessed legal title to the property;
14 and therefore, the assignment was void. Id.

15 The Court finds Hacker to be distinguishable from the instant action on two grounds. First,
16 the foreclosure in Hacker had already occurred. Therefore, Hacker falls within the limited
17 exception recognized by Yvanova to bring a wrongful foreclosure action. However, while this
18 action alleging that there is a pending foreclosure, it has not yet occurred. So, this action is not
19 within the exception recognized in Yvanova.

20 Second, the plaintiff in Hacker was not challenging the assignment based on the
21 securitization process by which the mortgage was transferred. The plaintiff claimed that at the
22 time of the second assignment, the lender had previously sold the interest in the loan so no longer
23 possessed interest in the loan. Here, Plaintiffs are not alleging that the defendants had sold or
24 transferred the loan to someone else and no longer hold the legal interest in the loan. Plaintiff is
25 challenging the securitization process itself.

26 Plaintiff also alleges that section 2.01 of the pooling service agreement required the seller
27 to transfer to the depositor all interest of the seller of the mortgage loans; and that the the deed of
28 trust and the note were split so the defendants have no authority to foreclose on the property.

1 Pursuant to section 2.01 of the agreement, the depositor transferred to the seller all interest in the
2 mortgage loan (a); and all interest in the trust fund (b).³ (ECF No. 1-17 at 82.) Citing In re Veal,
3 450 BR 897, 916 (2011), Plaintiffs argue that Exhibit 7 demonstrates that the deed of trust was
4 assigned without the note and therefore, the note was unsecured and unenforceable.

5 In re Veal, was a bankruptcy case in which the question considered was whether the bank
6 had standing to seek relief from the automatic bankruptcy stay; and is not persuasive in the
7 circumstances presented here. In re Veal recognized that “under the common law generally, the
8 transfer of a mortgage without the transfer of the obligation it secures renders the mortgage
9 ineffective and unenforceable in the hands of the transferee.” In re Veal, 450 B.R. at 915.
10 However, some states have altered this rule by statute. Id. at 916-17. In re Veal recognized that
11 California was one of the states that had changed the common law rule by the nonjudicial
12 foreclosure statute. Id. at 916-17, n.34; In re Marks, No. BAP CC-12-1140-KIDH, 2012 WL
13 6554705, at *7 (B.A.P. 9th Cir. Dec. 14, 2012), aff’d, 624 F. App’x 963 (9th Cir. 2015).

14 Because of the exhaustive nature of the nonjudicial foreclosure scheme, “California
15 appellate courts have refused to read any additional requirements into the non-judicial foreclosure
16 statute.” Lane v. Vitek Real Estate Indus. Grp., 713 F.Supp.2d 1092, 1098 (E.D. Cal. 2010) (citing
17 Moeller v. Lien, 25 Cal.App.4th 822, 834 (1994); I.E. Assoc. v. Safeco Title Ins. Co., 39 Cal.3d
18 281 (1985)). There is “no stated requirement in California’s non-judicial foreclosure scheme that
19 requires a beneficial interest in the Note to foreclose. Rather, the statute broadly allows a trustee,
20 mortgagee, beneficiary, or any of their agents to initiate non-judicial foreclosure. Accordingly, the
21 statute does not require a beneficial interest in both the Note and the Deed of Trust to commence a
22 non-judicial foreclosure sale.” Debrunner, 204 Cal.App.4th at 441; Lane, 713 F.Supp.2d at 1099;
23 see also In re Marks, 2012 WL 6554705, at *8 (“California’s nonjudicial foreclosure statutes are
24 governed by CAL. CIV. CODE (“CCC”) §§ 2924 through 2924k, which do not require that the
25 note be in the possession of the party initiating foreclosure.”); Jenkins, 216 Cal.App.4th at 513 (we
26

27 ³ Although the amended complaint states that the pooling and service agreement is attached at exhibit 16,
28 there is no exhibit 16 and the Court finds no such agreement attached. (FAC ¶ 42.) However, the pooling
and servicing agreement is attached to the March 3, 2018 complaint. (ECF No. 1-17.)

1 find the statutory provisions, because they broadly authorize a “trustee, mortgagee, or beneficiary,
2 or any of their authorized agents” to initiate a nonjudicial foreclosure (§ 2924, subd. (a)(1), italics
3 added), do not require that the foreclosing party have an actual beneficial interest in both the
4 promissory note and deed of trust to commence and execute a nonjudicial foreclosure sale.
5 Jenkins, 216 Cal.App.4th at 513.

6 As previously addressed, Plaintiffs allegations that the transfer was not completed pursuant
7 to the terms of the agreements only alleges a voidable transaction. Hacker, 23 Cal.App.5th at 121.
8 Plaintiffs have not included any facts in the proposed amended complaint to sufficient to allege a
9 void transaction. Plaintiffs allegations in the proposed amendment are substantially similar to
10 those in the complaint and allege voidable, but not void transactions. For these reasons, and the
11 reasons discussed supra at IV.A.1, the Court finds that Plaintiffs do not have standing in this action
12 to challenge the threatened foreclosure.

13 To the extent that Plaintiffs allege that Defendants are wrongfully avoiding foreclosure on
14 the property to prevent them from having standing, the Court rejects this argument. On March 3,
15 2018, Plaintiffs filed this action pre-foreclosure. (ECF No. 1.) Further, Plaintiffs filed a motion on
16 March 20, 2018, for a temporary restraining order to stop the foreclosure sale on their home. (ECF
17 No. 4.) Judge O’Neill issued a temporary restraining order on March 26, 2018. (ECF No. 16.)
18 The temporary restraining order was dissolved on April 10, 2018. (ECF No. 35.)

19 Plaintiffs have chosen to prosecute this action seeking to stop the foreclosure sale of their
20 home, and the Court can infer no evil motive on behalf of Defendants because the relief Plaintiff
21 sought, to stop the foreclosure sale, has been received. It was Plaintiffs decision to bring this
22 premature action, and the defendants decision to defer the foreclosure sale while this action is
23 being litigated to determine if they have the right to foreclose is reasonable.

24 **b. TILA**

25 Defendants argue that the amended complaint states that the alleged TILA violations began
26 in January 1, 2017, and are therefore, barred by the statute of limitations. Defendants continue to
27 argue that Plaintiffs’ have not include allegations to support a claim for damages as required by the
28 statute.

1 Plaintiffs reply that Defendants did not provide monthly statements beginning in 2016 and
2 no statements were received until March 2018. Plaintiffs contend that the purpose of the statute is
3 to ensure that borrowers receive monthly mortgage statements that disclose the current status of
4 their obligation, to provide accurate information about their mortgage, and to allow the borrower to
5 understand any errors and how to avoid them. Plaintiffs argue that they were required to guess at
6 their monthly mortgage payments and the only way to get Ocwen's attention was to stop making
7 mortgage payments with the hope that the errors would be resolved. Plaintiffs state that the
8 inaccurate credit reporting caused damage to their credit, monetary damage, and damage to their
9 reputation.

10 The Court finds that Plaintiffs have failed to state a TILA claim for the reasons discussed in
11 IV.A.3. In the amended complaint, Plaintiffs allege that inaccurate credit reporting caused damage
12 to their credit report, but the complaint only alleges that in or around 2016, Ocwen closed
13 Plaintiffs' account and stopped reporting the loan to credit bureaus. (FAC ¶ 100.) In or about
14 September 2016, when Plaintiffs reviewed their credit reports they noticed that the mortgage
15 became inactive, as if it no longer existed as of 2016. (FAC ¶ 100.) While Plaintiffs make the
16 conclusory allegation that Plaintiff Ron Osburn's credit has been ruined, there are no factual
17 allegations to support such a claim. Even if the account had been closed and the loan was not
18 reported to the credit bureaus, it is unclear how the failure to report would "ruin" his credit. If no
19 reports were made then there would be no report that the loan was delinquent or a foreclosure was
20 pending.

21 The limitations period here would be based on the filing of the complaint, and would be
22 March 3, 2017. Plaintiffs fail to allege any factual allegations by which the Court can reasonably
23 infer that they suffered damages from the failure to provide periodic statements after March 3,
24 2017.

25 **c. Breach of Contract**

26 Defendants argue that Plaintiffs' breach of contract claim remains deficient as they did not
27 perform their obligations under the contract. In the amended complaint, Plaintiffs allege that they
28 did not know, and Ocwen refused to communicate with them, an adequate payment method. (FAC

¶ 101.) However, the allegations in the complaint also indicate that Plaintiffs were receiving periodic statements prior to January 1, 2017. (FAC ¶ 111.)

While Plaintiffs argue that they did not know who or where to pay their mortgage, on October 16, 2013, Plaintiffs' received a notice of serving transfer which stated that the mortgaging servicing rights were transferred to Defendant Ocwen. (FAC ¶ 96.) Around 2015, Defendant Ocwen was servicing their loan and that the payments were increasing and decreasing without an explanation by Ocwen. (FAC ¶ 97.) Defendant Ocwen eventually shut down their mortgage account and prevented them from having access to their account. (FAC ¶ 99.) Around 2016 Defendant Ocwen closed their account. (FAC ¶ 100.) The allegations in the complaint demonstrate that Plaintiffs were aware that Ocwen was servicing their loan and indicates that they were receiving information on the monthly payment amounts through 2016.

Further, the notice of default and election to sell under deed of trust, dated March 13, 2017, informed Plaintiffs that they were required to pay \$18,931.43 as of April 4, 2017. (ECF No. 30-1 at 36. To find out the amount to pay, or arrange for payment to stop the foreclosures, Plaintiffs were to contact:

**DEUTSCHE BANK NATIONAL TRUST COMPANY as Trustee for
INDYMAC INDX MORTGAGE LOAN TRUST 2006-AR11, MORTGAGE
PASS-THROUGH CERTIFICATES Series 2006-AR11, By Ocwen Loan
Servicing, LLC, its attorney in-fact**

**C/O Western Progressive, LLC
Northpark Town Center
1000 Abernathy Rd NE; Bldg 400, Suite 200
Atlanta, GA 30328
Servicer Phone: 877-596-8580**

(ECF No. 30-1 at 37.) Plaintiffs were informed by the notice of default the amount due to bring the loan current and who to contact to make such payment.

Plaintiffs factual allegations are insufficient to correct the deficiencies in the breach of contract claim identified supra at IV.A.4. Plaintiffs have failed to state a cognizable claim for breach of contract.

3. Conclusion

Based on the foregoing, the Court finds that Plaintiffs' motion to amend should be granted

1 in part. The request to file the proposed first amended complaint should be denied as futile
2 because Plaintiffs have failed to allege any cognizable claims.

3 For the reasons discussed in this findings and recommendations, Plaintiffs do not have
4 standing to bring a pre-foreclosure suit to challenge the nonjudicial foreclosure on their property.
5 Therefore, the Court recommends that the cause of action for fraud, wrongful foreclosure, quiet
6 title, cancellation of instruments, negligent misrepresentation, and unfair business practices be
7 dismissed without leave to amend.

8 However, Plaintiffs may be able to cure the defects in the TILA and breach of contract
9 claims. Accordingly, the Court recommends that the TILA and breach of contract claims be
10 dismissed with leave to amend.⁴

11 **V.**

12 **RECOMMENDATIONS**

13 Accordingly, IT IS HEREBY RECOMMENDED that:

- 14 1. Defendants' motion to dismiss, filed April 9, 2018, be GRANTED;
- 15 2. Plaintiffs' cause of action for fraud, wrongful foreclosure, quiet title, cancellation of
16 instruments, negligent misrepresentation, and unfair business practices be
17 DISMISSED WITHOUT LEAVE TO AMEND;
- 18 3. Plaintiffs' motion to amend, filed June 6, 2018, be GRANTED IN PART AND
19

20 ⁴ The parties are advised that pursuant to Rule 11 of the Federal Rules of Civil Procedure,

21 By presenting to the court a pleading, written motion, or other paper--whether by signing, filing,
22 submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the
23 person's knowledge, information, and belief, formed after an inquiry reasonable under the
24 circumstances:

- 23 (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay,
or needlessly increase the cost of litigation;
- 24 (2) the claims, defenses, and other legal contentions are warranted by existing law or by a
nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new
25 law;
- 26 (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have
evidentiary support after a reasonable opportunity for further investigation or discovery; and
- 27 (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified,
are reasonably based on belief or a lack of information.

28 Fed. R. Civ. P. 11(b). If the Court finds that Rule 11 has been violated, the court can impose appropriate sanctions on
an attorney, law firm, or party that violated the rule. Fed. R. Civ. P. 11(c)(1)(2)(3).

1 DENIED IN PART; and

2 4. Plaintiff be GRANTED leave to file a first amended complaint to cure the
3 deficiencies in the TILA and breach of contract cause of action.⁵

4 This findings and recommendations is submitted to the district judge assigned to this
5 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court’s Local Rule 304. Within fourteen
6 (14) days of service of this recommendation, any party may file written objections to this findings
7 and recommendations with the Court and serve a copy on all parties. Such a document should be
8 captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The district judge
9 will review the magistrate judge’s findings and recommendations pursuant to 28 U.S.C. §
10 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may
11 result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014)
12 (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

13 IT IS SO ORDERED.

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15 Dated: June 22, 2018

16 
STANLEY A. BOONE
UNITED STATES MAGISTRATE JUDGE

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27 ⁵ Plaintiffs are advised that they have not been granted leave to file an amended complaint. The district judge will
28 issue an order addressing the findings and recommendations and address whether Plaintiffs may file an amended
complaint.