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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 AHMAD RAZAWI and DANIELA
12 RAZAWI,

No. 2:09-cv-00985-MCE-JFM

13 Plaintiffs,

14 v.

MEMORANDUM AND ORDER

15 FEDERAL DEPOSIT INSURANCE
16 CORPORATION AS RECEIVER FOR
17 DOWNEY SAVINGS, F.A., CENTRAL
18 MORTGAGE COMPANY, MTC
19 FINANCIAL, INC. dba TRUSTEE
20 CORPS, MORTGAGE ELECTRONIC
21 REGISTRATION SYSTEMS, INC.,
22 COMMUNITY ONE FINANCIAL & REAL
23 ESTATE, JAMAL AKBAR, ALEX
24 BURHAN AND CHRIS COLON and
25 DOES 1-20 INCLUSIVE,

26 Defendants.
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24 Through the present lawsuit, Plaintiffs Ahmad and Daniela
25 Razawi ("Plaintiffs") seek redress for a litany of alleged
26 statutory and common law violations arising from the refinancing
27 of their home mortgage and the subsequent non-judicial
28 foreclosure and trustee's sale of the mortgaged property.

1 Named Defendants in this matter include: Federal Deposit
2 Insurance Corporation as receiver for Downey Savings, F.A.;
3 Central Mortgage Company ("CMC"); MTC Financial, Inc., doing
4 business as Trustee Corps; Mortgage Electronic Registration
5 Systems, Inc. ("MERS"); Community One Financial & Real Estate;
6 and individual Defendants Jamal Akbar, Alex Burhan and Chris
7 Colon. Defendant MTC Financial, Inc., dba Trustee Corps
8 ("Trustee Corps") now moves to dismiss, pursuant to
9 Rule 12(b)(6), for failure to state a claim, and to strike
10 Plaintiffs' punitive damages claims pursuant to Rule 12(f). As
11 set forth below, Defendant Trustee Corps' Rule 12(b)(6) motion is
12 granted, and its Rule 12(f) motion is denied as moot.

14 **BACKGROUND**

15
16 On December 9, 2005, Plaintiffs secured a \$520,000 loan by
17 executing a Deed of Trust ("Deed") encumbering their home,
18 located at 4045 Clover Valley Road, Rocklin, CA 95677 ("Subject
19 Property"). The Deed identifies Downey Savings and Loan
20 Association, F.A., as the Lender, and DSL Service Company as the
21 Trustee.¹

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24 ¹ "[D]ocuments whose contents are alleged in a complaint and
25 whose authenticity no party questions, but which are not
26 physically attached to the pleading, may be considered in ruling
27 on a Rule 12(b)(6) motion to dismiss" without converting the
28 motion to one for summary judgment. See Branch v. Tunnell, 14
F. 3d 449, 454 (9th Cir. 1994), overruled on other grounds by
Galbraith v. County of Santa Clara, 307 F. 3d 1119 (9th Cir.
2002). To the extent relied upon in this Order, Defendant's
Request for Judicial Notice is granted. Defendant's remaining
requests are denied as moot.

1 According to Plaintiffs' First Amended Complaint ("FAC"),
2 sometime in 2005 several employees from Defendant Community One
3 Financial and Real Estate Services ("Community One"), including
4 Defendants Burhan and Colon, approached Plaintiff Daniela Razawi,
5 whose office is in the same building as Community One. These
6 employees solicited her and her husband, co-Plaintiff Ahmad
7 Razawi, to refinance their home. Defendants Burhan and Colon
8 assured Plaintiffs that they could secure for them the "best
9 deal" and "best interest rates" available on the market.
10 Plaintiffs expressed interest in this offer and explained that
11 they hoped to obtain cash from the refinancing to buy a new home.
12 They planned to convert their existing home in Rocklin into a
13 rental property, but intended to retain it to become their
14 eventual retirement home.

15 Defendants Burhan and Colon advised Plaintiffs that an
16 Option ARM loan with Downey Savings would best fit their needs.
17 Defendants Burhan, Colon and Akbar allegedly assured Plaintiffs
18 that although the Option ARM was an adjustable-rate loan, their
19 payments would never exceed \$1,924.81 per month. These
20 individual Defendants also allegedly promised Plaintiffs that if
21 the loan ever became unaffordable, they could simply refinance it
22 again into an affordable loan. By September 2008, however,
23 Plaintiffs' monthly mortgage payments had risen to more than
24 \$3,600 per month, which Plaintiffs were unable to afford.

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1 Plaintiffs further allege that Defendant Burhan told them he
2 would have Defendant Community One's appraiser "push" the
3 appraised value of Plaintiffs' property to ensure approval of the
4 loan. When Plaintiffs protested and questioned the propriety of
5 this practice, Defendant Burhan purportedly told them not to
6 worry about it. In addition, Plaintiffs allege that Defendants
7 Burhan and Colon falsely promised that Downey Savings, not
8 Plaintiffs, would pay the broker fee.

9 According to Plaintiffs, they never received a copy of the
10 required loan documents prior to closing. Instead, a mobile
11 notary brought the documents and gave them only a few minutes to
12 sign and initial them. Plaintiffs never had the opportunity to
13 review the documents, nor did the notary explain to them what
14 they were signing. In addition, Plaintiffs were never furnished
15 with a notice of cancellation or disclosure of the amount
16 financed or the finance charge, as required by the federal Truth
17 in Lending Act ("TILA"), 15 U.S.C. § 1601 et seq. Plaintiffs
18 signed the promissory note and Deed on December 9, 2005. The
19 Deed was recorded at the Placer County Recorder's Office on
20 December 15, 2005.

21 On November 15, 2006, Downey Savings & Loan Association,
22 F.A., assigned the Deed and promissory note to MERS, as nominee
23 for CMC, the assignee. This Corporate Assignment of Deed of
24 Trust instrument was recorded on November 27, 2006.

25 On April 30, 2008, MERS assigned the Deed to CMC. This
26 Assignment of Deed of Trust document was not recorded until
27 April 13, 2009.

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1 On October 1, 2008, CMC substituted Trustee Corps as trustee
2 under the Deed. The Substitution of Trustee document, however,
3 was not recorded until January 29, 2009.

4 On October 2, 2008, a Notice of Default and Election to Sell
5 under Deed of Trust was executed by Trustee Corps, on behalf of
6 CMC. The notice was recorded that same day. According to the
7 notice, as of October 2, 2008, Plaintiffs were in default in the
8 amount of \$27,835.56.

9 On January 5, 2009, CMC assigned the Deed to Deutsche Bank
10 National Trust Company as Trustee for Downey 2006-AR1 ("Deutsche
11 Bank"). The Assignment of Deed of Trust document was recorded on
12 April 13, 2009.

13 On January 29, 2009, Trustee Corps executed a Notice of
14 Trustee's Sale, which was recorded the same day.

15 On March 18, 2009, Trustee Corps sold the Subject Property
16 to Deutsche for \$450,540. The Trustee's Deed Upon Sale
17 instrument was recorded on April 13, 2009.

18 On April 14, 2009, Plaintiffs mailed a Qualified Written
19 Request ("QWR"), pursuant to the Real Estate Settlement
20 Procedures Act ("RESPA"), 12 U.S.C. § 2605 et seq., to Defendant
21 CMC. The QWR purported to rescind the loan under TILA and
22 demanded a cancellation of the trustee sale. Plaintiffs filed
23 their original complaint with this Court on April 10, 2009 and
24 their FAC on June 2, 2009.

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1 A court granting a motion to dismiss a complaint must then
2 decide whether to grant leave to amend. A court should “freely
3 give” leave to amend when there is no “undue delay, bad faith[,]
4 dilatory motive on the part of the movant,...undue prejudice to
5 the opposing party by virtue of...the amendment, [or] futility of
6 the amendment....” Fed. R. Civ. P. 15(a); Foman v. Davis, 371
7 U.S. 178, 182 (1962). Generally, leave to amend is denied only
8 when it is clear the deficiencies of the complaint cannot be
9 cured by amendment. DeSoto v. Yellow Freight Sys., Inc., 957
10 F.2d 655, 658 (9th Cir. 1992).

11 ANALYSIS

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14 Plaintiffs’ FAC is anything but a model of clarity. From
15 what this Court can glean from a holistic reading of Plaintiffs’
16 FAC, it appears that Plaintiffs’ claims against Trustee Corps
17 rest on two general factual theories, pled in the alternative.
18 First, Plaintiffs seem to allege that all of the financial
19 companies in its FAC, including Trustee Corps, were active
20 participants in what should be deemed an unlawful secondary
21 market that involved the sale and purchase of mortgage-backed
22 debt. Under this theory, Trustee Corps would be liable for any
23 fraudulent promises made to borrowers because it profited from
24 real-estate loans like the ARM loan that Plaintiffs entered into
25 in 2005. Moreover, Trustee Corps would be liable for foreclosing
26 Plaintiffs’ loan and selling its property pursuant to what it
27 knew to be an unlawful deed of trust.

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1 Second, Plaintiffs appear to assert, in the alternative,
2 that Trustee Corps is a third-party stranger to their mortgage
3 agreement that illicitly foreclosed against and sold a property
4 to which it had no legal right. Under this theory, Trustee Corps
5 breached the duties imposed by law on trustees, either
6 intentionally or negligently, by assuming the role of trustee
7 after being improperly substituted. Plaintiffs seem to base this
8 theory predominately on the fact that the current loan servicer
9 and trustee have not produced the original promissory note.
10 Except where Plaintiffs' FAC indicates otherwise, this Court will
11 assume that Plaintiffs rely on one of the two foregoing theories
12 in assessing the viability of each of Plaintiffs' causes of
13 action.

14 Moreover, as a preliminary observation, this Court notes
15 that Plaintiffs have pled neither of these factual theories with
16 sufficient specificity to survive a Rule 12(b)(6) motion to
17 dismiss. Plaintiffs have not made any factual allegations that
18 would give rise to a reasonable inference that Trustee Corps
19 either participated in a conspiracy to defraud mortgagors or
20 unlawfully assumed the duties of a trustee. Accordingly,
21 Plaintiffs have not met their "obligation to provide the
22 'grounds' of [their] 'entitlement to relief'" by pleading "more
23 than labels and conclusions." Twombly, 550 U.S. at 555.
24 Furthermore, these speculative and conclusory allegations are not
25 entitled to the presumption of veracity. "[T]he tenet that a
26 court must accept as true all of the allegations contained in a
27 complaint is inapplicable to legal conclusions." Ashcroft v.
28 Iqbal, --- U.S. ----, 129 S. Ct. 1937, 1949 (2009).

1 Nevertheless, because Plaintiffs' claims against Trustee Corps
2 are legally deficient on additional grounds, this Court will now
3 address each cause of action in turn.

4
5 **1. Second Cause of Action: California Civil Code § 1788 et**
6 **seq. (Rosenthal Act)**

7 The California Rosenthal Fair Debt Collection Practices Act
8 ("Rosenthal Act") prohibits a host of unfair and oppressive
9 methods of collecting debt. "Civil Code sections 2924 through
10 2924k provide a comprehensive framework for the regulation of a
11 nonjudicial foreclosure sale pursuant to a power of sale
12 contained in a deed of trust." Moeller v. Lien, 25 Cal. App. 4th
13 822, 830 (1994). However, for trustees engaged in the process of
14 non-judicial foreclosure, California Civil Code section 2924(b)
15 provides immunity from liability under the Rosenthal Act. That
16 section provides, "[i]n performing acts required by this article,
17 a trustee shall not be subject to [Civil Code] Title 1.6c
18 (commencing with Section 1788) of Part 4." Thus, as a trustee
19 acting pursuant to a deed of trust, Trustee Corps is entitled to
20 the protection of Civil Code § 2924(b).

21 Plaintiffs' only response to this absolute statutory
22 exemption is to assert that Trustee Corps was improperly
23 substituted as the trustee. This argument cites paragraph 43 of
24 the FAC for support, which states "Defendants were not in
25 possession of the note ... and therefore they were proceeding to
26 foreclose without rights under the law."

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1 Contrary to Plaintiffs' contention, however, a trustee does not
2 need to have possession of the original note in order to conduct
3 a valid foreclosure sale pursuant to Civil Code sections 2924
4 through 2924k. Several district courts in California have
5 recently rejected this argument. See, e.g., Gamboa v. Trustee
6 Corps, 2009 WL 656285 at *4 (N.D. Cal.); cf. Hernandez v.
7 Reconstruct Co., 2009 WL 250005 at *2 (S.D. Cal.) ("To the extent
8 that Plaintiff contends that [the lender] must possess the
9 *original* note to initiate foreclosure proceedings, Plaintiff has
10 not cited legal authority supporting such a dubious
11 proposition").

12 In addition, Plaintiffs have not pled any facts that would
13 even suggest that the substitution of Trustee Corps was invalid.
14 To the contrary, Trustee Corps has produced a notarized
15 instrument by which CMC substituted Trustee Corps as trustee on
16 October 1, 2008. The document was subsequently recorded on
17 January 29, 2009. Since Plaintiffs have failed to allege a
18 single fact that would contradict this evidence, they have failed
19 to meet their pleading burden under Rule 8(a)(2) of "showing"
20 that they are entitled to relief. See Twombly, 550 U.S. at 557
21 (recognizing "the threshold requirement of Rule 8(a)(2) that the
22 'plain statement' possess enough heft to 'sho[w] that the pleader
23 is entitled to relief'"). With respect to the non-judicial
24 foreclosure sale of the Subject Property, California Civil Code
25 section 2924(b) exempts Trustee Corps from the strictures of the
26 Rosenthal Act. Accordingly, Defendant's Motion to Dismiss
27 Plaintiffs' Second Cause of Action is granted with leave to
28 amend.

1 **2. Third Cause of Action: Negligence**

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3 It appears from Plaintiffs' FAC that the only negligence

4 allegations asserted against Trustee Corps are that "Defendants

5 failed to maintain the original mortgage note, failed to properly

6 create original documents, and failed to make the required

7 disclosures to the Plaintiffs." FAC, 13:24-26. Plaintiffs cite

8 no authority, however, to substantiate the existence of any legal

9 duty that Trustee Corps would have breached if it is in fact

10 responsible for these alleged failures. Moreover, any duties

11 imposed on a trustee must derive from statute or the deed of

12 trust. Indeed, "there is no authority for the proposition that a

13 trustee under a deed of trust owes any duties with respect to

14 exercise of the power of sale beyond those specified in the deed

15 and the statutes. There are, moreover, persuasive policy reasons

16 which militate against a judicial expansion of those duties."

17 I.E. Associates v. Safeco Title Ins. Co., 39 Cal. 3d 281, 288

18 (1985). Because Plaintiffs have not identified a single

19 provision in the statutes or deed of trust that creates a duty

20 that Trustee Corps has allegedly violated, they have failed to

21 meet their pleading burden. Consequently, Trustee Corps' Motion

22 to Dismiss Plaintiffs' Third Cause of Action is granted with

23 leave to amend.

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1 **3. Sixth Cause of Action: Fraud**

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3 In California, the required elements for a fraud claim are:
4 “(a) a misrepresentation (false representation, concealment, or
5 nondisclosure); (b) knowledge of falsity (or ‘scienter’);
6 (c) intent to defraud, i.e., to induce reliance; (d) justifiable
7 reliance; and (e) resulting damage.” In re Estate of Young, 160
8 Cal. App. 4th 62, 79 (2008) (citation omitted). As previously
9 noted, “[i]n alleging fraud ... a party must state with
10 particularity the circumstances constituting fraud.” Fed. R.
11 Civ. P. 9(b).

12 To attempt to explain how they have satisfied Rule 9(b)’s
13 pleading standard, Plaintiffs proffer the following argument.
14 They contend that they “have alleged that in ‘selling’ these
15 mortgage notes on the secondary market, Defendants, including
16 Defendant MTC, failed to follow the basic legal requirements for
17 the transfer of a negotiable instrument and the transfer of an
18 interest in real property.” Pls.’ Opp. at 19:18-21. By virtue
19 of these purportedly illegal sales, Plaintiffs contend,
20 “Defendant MTC is attempting to obtained [sic] putative legal
21 title to Plaintiffs’ Property without ever establishing that it
22 was ever a ‘person entitled to enforce’ the security interest
23 under the Note and Deed of Trust.” Id. at 19:25-20:1 (citing FAC,
24 ¶¶ 30-32).

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1 These allegations are insufficient to state a claim for
2 fraud for at least two reasons. First, it is utterly
3 incomprehensible how allegedly unlawful transfers of mortgage-
4 backed debt could constitute a "misrepresentation," which is the
5 essence of a claim for fraud. Second, Plaintiffs' grossly
6 conclusory allegations fall well short of the applicable pleading
7 standard. Plaintiffs' naked assertions in its opposition, even
8 if properly alleged in the FAC, would run afoul of the
9 prohibition under Rule 8(a)(2) against pleading mere "labels and
10 conclusions." Twombly, 550 U.S. at 555. *A fortiori*, the above
11 sweeping, unsubstantiated allegations fail to satisfy Rule 9(b)'s
12 heightened "particularity" standard, and Trustee Corps' Motion to
13 Dismiss Plaintiffs' Sixth Cause of Action is granted with leave
14 to amend.

15
16 **4. Seventh Cause of Action: California Business and**
17 **Professions Code § 17200 et seq.**

18 California's Unfair Competition Law ("UCL"), Business and
19 Professions Code section 17200, defines "unfair competition" as
20 "any unlawful, unfair or fraudulent business act or practice."
21 Plaintiffs allege two separate liability theories against Trustee
22 Corps, both of which are unavailing.

23 First, Plaintiffs point to the broad scope of the UCL:
24 "California's UCL ... allows for 'violations of other laws to be
25 treated as unfair competition that is independently actionable'
26 while also 'sweep[ing] within its scope acts and practices not
27 specifically proscribed by any other law.'"

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1 Hauk v. JP Morgan Chase Bank USA, 552 F. 3d 1114, 1122 (9th Cir.
2 2009) (quoting Kasky v. Nike, Inc., 27 Cal. 4th 939, 949 (2002)).
3 On the basis of this authority, Plaintiffs assert that they have
4 stated a claim under the UCL "because Plaintiffs' FAC currently
5 alleges viable claims for breach of contract and breach of the
6 implied covenant of good faith and fair dealing and fraud."
7 Pls.' Opp. at 21:15-17. This argument must fail, however, with
8 respect to Defendant Trustee Corps, because it is premised on the
9 viability of additional causes of action that Plaintiffs have
10 failed adequately to allege.

11 As already discussed, Plaintiffs have failed to state a
12 claim for fraud against Trustee Corps because they have not
13 satisfied the particularity requirement of Rule 9(b). Nor can
14 Plaintiffs premise UCL liability on a breach of contract or
15 breach of the covenant of good faith and fair dealing theory.
16 Plaintiffs have not asserted a breach of contract action against
17 Trustee Corps in their FAC. Lastly, as set forth below,
18 Plaintiffs cannot state a claim against Trustee Corps for breach
19 of the covenant of good faith and fair dealing, because they have
20 failed to allege that they have a contractual relationship with
21 Trustee Corps, which is an essential prerequisite to such a
22 claim.

23 In addition, Plaintiffs contend that they have stated a
24 viable UCL claim against Trustee Corps because "Defendant MTC is
25 in the business of foreclosing against homeowners it alleges are
26 in default" and "foreclosed against Plaintiffs' Property without
27 right to do so." Pls.' Opp. at 21:19-21.

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1 As the Court has already observed, however, "Civil Code sections
2 2924 through 2924k provide a comprehensive framework for the
3 regulation of a nonjudicial foreclosure sale pursuant to a power
4 of sale contained in a deed of trust." Moeller, 25 Cal. App. 4th
5 at 830. Because Plaintiffs have not alleged any violations of
6 Civil Code sections 2924 through 2924k against Trustee Corps,
7 Trustee Corps is immune from UCL liability for any of its actions
8 relating to its non-judicial foreclosure sale of the Subject
9 Property.

10 Consequently, for the foregoing reasons, Defendant's Motion
11 to Dismiss Plaintiffs' Seventh Cause of Action is granted with
12 leave to amend.

13
14 **5. Ninth Cause of Action: Breach of Implied Covenant of**
15 **Good Faith and Fair Dealing**

16 "The prerequisite for any action for breach of the implied
17 covenant of good faith and fair dealing is the existence of a
18 contractual relationship between the parties, since the covenant
19 is an implied term in the contract." Smith v. City and County of
20 San Francisco, 225 Cal. App. 3d 38, 49 (1990). Because
21 Plaintiffs have not properly alleged a contractual relationship
22 with Trustee Corps, Defendant's Motion to Dismiss Plaintiffs'
23 Ninth Cause of Action is dismissed.

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1 **6. Tenth and Twelfth Causes of Action: Wrongful**
2 **Foreclosure; Set Aside Trustee's Sale**

3 Under their Tenth and Twelfth Causes of Action, Plaintiffs
4 level another challenge against the validity of Trustee Corps'
5 foreclosure sale of the Subject Property. Specifically,
6 Plaintiffs contend that Trustee Corps is not a "true foreclosure
7 trustee" but a "third party stranger to Plaintiffs' Mortgage Note
8 and Deed of Trust." Pls.' Opp. 23:10-11. To substantiate this
9 contention, Plaintiffs call attention to the fact that Trustee
10 Corps filed the Notice of Default with the Placer County Recorder
11 on October 2, 2009, but did not have the Substitution of Trustee
12 instrument recorded until January 29, 2009.

13 At the outset, this Court rejects Plaintiffs' challenge to
14 the validity of the foreclosure sale insofar as it depends on the
15 erroneous understanding that a trustee must be in possession of
16 the original promissory note in order to conduct a valid sale.
17 The Court has already disposed of this argument and will not
18 revisit it here.

19 Plaintiffs' instant claims are further defective because, by
20 their own admission, they have not alleged that they are able to
21 tender their owing obligation under the note. See Pls.' Opp.
22 24:9-14. It is well-settled that "[a] valid and viable tender of
23 payment of the indebtedness owing is essential to an action to
24 cancel a voidable sale under a deed of trust." Karlsen v.
25 American Sav. & Loan Assn., 15 Cal. App. 3d 112, 117 (1971).

26 Accordingly, Trustee Corps' Motion to Dismiss Plaintiffs'
27 Tenth and Twelfth Causes of Action is granted with leave to
28 amend.

1 **7. Eleventh Cause of Action: Quiet Title**

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3 Plaintiffs have failed to state a quiet title claim against
4 Trustee Corps because, as Trustee Corps has correctly stated, it
5 has never claimed an interest in the subject property. Under
6 California law, "judgment in [a quiet title] action is binding
7 and conclusive on all ... persons ... who have any claim to the
8 property." Cal. Code Civ. Pro. § 764.030. Because Plaintiffs
9 cannot state a quiet title claim against Trustee Corps as a
10 matter of law, Defendant's Motion to Dismiss Plaintiffs' Eleventh
11 Cause of Action is granted with leave to amend.
12

13 **8. Thirteenth Cause of Action: Cancellation of Trustee's**
14 **Deed**

15 "A written instrument, in respect to which there is a
16 reasonable apprehension that if left outstanding it may cause
17 serious injury to a person against whom it is void or voidable,
18 may, upon his application, be so adjudged, and ordered to be
19 delivered up or canceled." Cal. Civ. Code § 3412. In their
20 final claim for relief, Plaintiffs seek cancellation of the
21 Trustee's Deed Upon Sale ("TDUS") on the ground that the
22 instrument "is invalid, void and of no force or effect regarding
23 Plaintiff's [sic] interests in the Property." FAC, 23:10-11.
24 This claim must fail for at least two reasons.

25 First, Plaintiffs do not dispute Defendant's contention that
26 in order to bring an action for the cancellation of a written
27 instrument, a plaintiff must offer to restore all benefits
28 received from the transaction, less damages suffered.


1 See Ebbert v. Mercantile Trust Co. of Cal., 213 Cal. 496, 501
2 (1931). Plaintiffs have not met this requirement. Second,
3 Plaintiffs reassert their above-rejected argument that the sale
4 is legally void because Trustee Corps has not produced the
5 original promissory note. Accordingly, Defendant's Motion to
6 Dismiss Plaintiffs' Thirteenth Cause of Action is granted with
7 leave to amend.

8
9 **CONCLUSION**

10
11 For the foregoing reasons, Trustee Corps' Motion to Dismiss
12 (Docket No. 17) is GRANTED with leave to amend. Trustee Corps'
13 Motion to Strike Plaintiffs' punitive damages claims (included in
14 Docket No. 17) is DENIED as moot.² Plaintiffs may (but is not
15 required to) file an amended complaint, not later than twenty
16 (20) days following the date this Memorandum and Order is filed
17 electronically. Nevertheless, if no amended complaint is filed
18 within said twenty (20)-day period, without further notice, those
19 causes of action dismissed by virtue of this Order will be deemed
20 to have been dismissed with prejudice.

21 IT IS SO ORDERED.

22 Dated: September 8, 2009

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25 MORRISON C. ENGLAND, JR.
26 UNITED STATES DISTRICT JUDGE

27 ² Because oral argument will not be of material assistance,
28 the Court orders this matter submitted on the briefs. E.D. Cal.
Local Rule 78-230(h).