

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

AHMAD RAZAWI and DANIELA RAZAWI, No. 2:09-cv-00985-MCE-JFM

Plaintiffs,

V.

MEMORANDUM AND ORDER

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

## Defendants.

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Through the present lawsuit, Plaintiffs Ahmad and Daniela Razawi ("Plaintiffs") seek redress for a litany of alleged statutory and common law violations arising from the refinancing of their home mortgage and the subsequent non-judicial 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.

13

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.<sup>1</sup>

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24 <sup>1</sup> "[D]ocuments whose contents are alleged in a complaint and  
25 whose authenticity no party questions, but which are not  
physically attached to the pleading, may be considered in ruling  
26 on a Rule 12(b)(6) motion to dismiss" without converting the  
motion to one for summary judgment. See Branch v. Tunnell, 14  
27 F. 3d 449, 454 (9th Cir. 1994), overruled on other grounds by  
Galbraith v. County of Santa Clara, 307 F. 3d 1119 (9th Cir.  
28 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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## STANDARD

3 On a motion to dismiss for failure to state a claim under  
4 Rule 12(b) (6), all allegations of material fact must be accepted  
5 as true and construed in the light most favorable to the  
6 nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336,  
7 337-38 (9th Cir. 1996). Rule 8(a)(2) requires only "a short and  
8 plain statement of the claim showing that the pleader is entitled  
9 to relief" in order to "give the defendant fair notice of what  
10 the...claim is and the grounds upon which it rests." Bell Atl.  
11 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v.  
12 Gibson, 355 U.S. 41, 47 (1957)). While a complaint attacked by a  
13 Rule 12(b)(6) motion to dismiss does not need detailed factual  
14 allegations, a plaintiff's obligation to provide the "grounds" of  
15 his "entitlement to relief" requires more than labels and  
16 conclusions, and a formulaic recitation of the elements of a  
17 cause of action will not do. Id. at 555-556 (internal citations  
18 and quotations omitted). Factual allegations must be enough to  
19 raise a right to relief above the speculative level. Id. at 555  
20 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure  
21 § 1216, pp. 235-36 (3d ed. 2004) ("The pleading must contain  
22 something more...than...a statement of facts that merely creates  
23 a suspicion [of] a legally cognizable right of action")).

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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).

## ANALYSIS

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.

28 || //

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  
seq. (Rosenthal Act)**

6

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**

2

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.

28 ///

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**

2

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.<sup>2</sup> 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

23  
24   
25 MORRISON C. ENGLAND, JR.  
26 UNITED STATES DISTRICT JUDGE

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