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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CONSTANCE SOLANO and the SOLANO	)	
FAMILY TRUST,	)	2:10-cv-02426-GEB-GGH
	)	
Plaintiffs,	)	
	)	<u>ORDER GRANTING MOTIONS TO</u>
v.	)	<u>DISMISS</u>
	)	
AMERICA'S SERVICING COMPANY, a	)	
division of WELLS FARGO, NA;	)	
MORTGAGEIT, INC.; MORTGAGE	)	
ELECTRONIC REGISTRATION SYSTEMS,	)	
INC.; NDEX WEST, LLC; FINANCIAL	)	
TITLE COMPANY; U.S. BANK NA;	)	
BANC OF AMERICA FUNDING 2007-6	)	
TRUST; MORTGAGE AND INVESTORS	)	
INVESTMENT CONSULTANTS, INC.,	)	
and DOES 1-10,000, inclusive,	)	
	)	
Defendants.	)	
_____	)	

Defendant MortgageIT, Inc. ("MortgageIT") moves for dismissal of Plaintiffs' First Amended Complaint ("Amended Complaint") under Federal Rule of Civil Procedure ("Rule") 12(b)(6), arguing Plaintiffs fail to state a viable claim against it.

Defendants Wells Fargo Bank, N.A. dba America's Servicing Company ("Wells Fargo Bank"); Mortgage Electronic Registration Systems, Inc. ("MERS"); and U.S. Bank N.A. as Trustee for Banc of America Funding 2007-6 Trust ("U.S. Bank") (collectively referred to as "Wells Fargo Defendants") also seek dismissal of Plaintiffs' claims under Rule

1 12(b)(6). Defendant NDeX West, LLC ("NDeX") joins Wells Fargo  
2 Defendants' dismissal motion.

3 For the reasons stated below, the motions to dismiss are  
4 granted.

### 5 I. LEGAL STANDARD

6 "In reviewing the dismissal of a complaint, we inquire whether  
7 the complaint's factual allegations, together with all reasonable  
8 inferences, state a plausible claim for relief." Cafasso, U.S. ex rel.  
9 v. General Dynamics C4 Systems, 637 F.3d 1047, 1054 (9th Cir. 2011)  
10 (citing Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009)). The  
11 material allegations of the complaint are accepted as true and all  
12 reasonable inferences are drawn in favor of the plaintiff. Al-Kidd v.  
13 Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009). However, this tenet "is  
14 inapplicable to legal conclusions." Iqbal, 129 S. Ct. at 1949. Further,  
15 "[a] pleading that offers 'labels and conclusions' or 'a formulaic  
16 recitation of the elements of a cause of action will not do.' Nor does  
17 a complaint suffice if it tenders 'naked assertion[s]' devoid of  
18 'further factual enhancement.'" Id. (quoting Bell Atlantic Corp. v.  
19 Twombly, 550 U.S. 544, 555, 557 (2007)). "In sum, for a complaint to  
20 survive a motion to dismiss, the nonconclusory 'factual content,' and  
21 reasonable inferences from that content, must be plausibly suggestive of  
22 a claim entitling the plaintiff to relief." Moss v. U.S. Secret Serv.,  
23 572 F.3d 962, 969 (9th Cir. 2009) (internal citation omitted).

### 24 II. BACKGROUND

25 On or about March 23, 2007, Plaintiff Constance Solano  
26 ("Solano") obtained two loans, which were secured by her real property,  
27 located at 3161 Big Bear Drive, Roseville, CA (the "Property"). (First  
28 Amended Complaint ("FAC") ¶¶ 1, 18, 25.) The primary loan was for

1 \$592,000.00 (the "Primary Loan"), and the second loan was for \$83,000.00  
2 (the "Secondary Loan"). (FAC ¶¶ 19, 25.) However, Plaintiffs do not  
3 distinguish between the two loans within the Amended Complaint. In their  
4 opposition brief, Plaintiffs argue "all of the securitization and chain  
5 of title problems apply equally to [the Secondary Loan]." (Pl.'s Opp'n  
6 13:14-19.) Therefore, unless otherwise indicated, it is assumed each  
7 claim refers to both the Primary and Secondary loans.

8 On or about May 12, 2007, Solano "grant deeded the subject  
9 property to . . . Solano-3161 Big Bear, LLC" ("Solano-3161"). (FAC  
10 ¶ 20.) On or about July 1, 2010, Solano-3161 "quitclaimed the subject  
11 property to the Solano Family Trust." Id.

12 The Deed of Trust on the Primary Loan identifies Mortgage &  
13 Investment Consultants, Inc., as the lender, Financial Title Company as  
14 trustee, and MERS as beneficiary. Id. Ex. A. The Deed of Trust on the  
15 Secondary Loan identifies MortgageIT as the lender, Financial Title  
16 Company as trustee, and MERS as beneficiary. Id. Ex. B. Plaintiffs  
17 allege Wells Fargo Bank subsequently began servicing the loans. Id.  
18 ¶¶ 2, 21-22.

19 An Assignment of Deed of Trust dated March 29, 2010, assigned  
20 and transferred to U.S. Bank "all beneficial interest under [the] Deed  
21 of Trust" on the Primary Loan. Id. Ex. E. U.S. Bank substituted NDeX as  
22 trustee of the Deed of Trust on the Primary Loan on April 9, 2010. Id.  
23 Ex. F.

24 On or about March 8, 2010, an agent of NDeX signed and  
25 recorded a Notice of Default, naming NDeX as the trustee. Id. ¶ 24. On  
26 or about June 9, 2010, NDeX filed a Notice of Trustee Sale in connection  
27 with the Primary Loan, in which it indicated the Property was in  
28 foreclosure. Id. ¶ 24, Ex. G.

1 On January 5, 2011, U.S. Bank purchased the Property in a  
2 foreclosure sale from NDeX West, the foreclosing beneficiary. Id. ¶ 24,  
3 Ex. I.<sup>1</sup> Plaintiffs remain in possession of the property. Id. ¶ 24.

4 Plaintiffs' claims stem from their allegations that Defendants  
5 have acted improperly from the loans' origin through foreclosure. Id.  
6 ¶¶ 25-30.

### 7 III. DISCUSSION

8 Defendants filed earlier dismissal motions challenging  
9 Plaintiffs' Complaint, which were granted with leave to amend as to all  
10 but the TILA Rescission claim, which was dismissed with prejudice.  
11 Plaintiffs subsequently filed their Amended Complaint on May 11, 2011,  
12 which comprises thirteen claims.

#### 13 A. Breach of Contract

14 Movants seek dismissal of Plaintiffs' following two claims  
15 based in breach of contract: a violation of the Home Ownership  
16 Protection Act ("HOEPA") and a breach of the security instrument.

17 Movants seek dismissal of Plaintiffs' HOEPA claim, arguing,  
18 *inter alia*, the HOEPA rescission claim is barred by the three-year  
19 statute of limitations and the HOEPA damages claim is barred by the one-  
20 year statute of limitations. (MortgageIT's Mot. 6:4-9; Wells Fargo  
21 Defs.' Mot. 4:5-6.)

22 Plaintiffs allege Defendants Mortgage & Investors, MERS,  
23 MortgageIT, and U.S. Bank violated HOEPA by failing to make certain

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24  
25 <sup>1</sup> The two Deeds of Trust, Assignment of Deed of Trust,  
26 Substitution of Trustee, Notice of Default, Notice of Trustee Sale, and  
27 Trustee's Deed upon Sale "may be considered" in ruling on Defendants'  
28 Rule 12(b)(6) motions, since they are attached to Plaintiffs' Amended  
Complaint. Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc., 896  
F.2d 1542, 1555 n.19 (9th Cir. 1989) (stating "material which is  
properly submitted as part of the complaint may be considered" in ruling  
on a Rule 12(b)(6) motion).

1 required disclosures prior to when their loan transactions closed; and,  
2 by "[e]ngaging in a pattern and practice of extending credit to  
3 Plaintiffs without regard to her ability to pay." (FAC ¶ 64.) Plaintiffs  
4 allege they "have a legal right to resend [sic] the consumer credit  
5 transaction" and "Defendants [are] liable to the Plaintiffs for  
6 [damages]." (FAC ¶¶ 65, 69.)

7 "HOEPA is an amendment of TILA, and therefore is governed by  
8 the same remedial scheme and statutes of limitations as TILA." Hamilton  
9 v. Bank of Blue Valley, 746 F. Supp. 2d 1160, 1179 (E.D. Cal. 2010)  
10 (citation and internal quotation marks omitted). A borrower's right to  
11 rescind a loan transaction under TILA "expire[s] three years after the  
12 date of the consummation of the transaction[.]" 15 U.S.C. § 1635(f)  
13 (2010). "Consummation" is defined under the statute as "the time that a  
14 consumer becomes contractually obligated on a credit transaction."  
15 Grimes v. New Century Mortg. Corp., 340 F.3d 1007, 1009 (9th Cir. 2003)  
16 (quoting 12 C.F.R. § 226.2(a)(13)(2010)). This three-year limitations  
17 period "represents an absolute limitation on rescission actions [and]  
18 bars any claims filed more than three years after the consummation of  
19 the transaction. Therefore, § 1635(f) is a statute of repose, depriving  
20 the courts of subject matter jurisdiction when a § 1635 claim is brought  
21 outside of the three-year limitation period." Miguel v. Country Funding  
22 Corp., 309 F.3d 1161, 1164 (9th Cir. 2002) (internal quotation marks and  
23 citation omitted).

24 Since Plaintiffs allege "[o]n or about March 23, 2007," Solano  
25 "executed a written Promissory Note," the three-year statute of  
26 limitations expired on or about March 23, 2010. (FAC ¶ 19.) However,  
27 Plaintiffs did not rescind the transaction until they filed their  
28 Complaint on September 9, 2010. (Compl. ¶ 119; ECF No. 1.) Therefore,

1 the Court lacks subject matter jurisdiction over Plaintiffs' HOEPA  
2 rescission claim, and this claim is dismissed against all Defendants  
3 with prejudice. See Omar v. Sea-Land Serv., Inc., 813 F.2d 986, 991 (9th  
4 Cir. 1987) ("A trial court may dismiss a claim sua sponte under Fed. R.  
5 Civ. P. 12(b)(6) . . . without notice where the claimant cannot possibly  
6 win relief.").

7 HOEPA damages claims are also subject to TILA's statute of  
8 limitations. See Hamilton, 746 F. Supp. 2d at 1179. An action under TILA  
9 for actual or statutory damages must be brought "within one year from  
10 the date of the occurrence of the violation." 15 U.S.C. § 1640(e) (2010).  
11 "[A]s a general rule[, this] limitations period starts [to run] at the  
12 consummation of the transaction." King v. California, 784 F.2d 910, 915  
13 (9th Cir. 1986). Therefore, the statute of limitations on Plaintiffs'  
14 HOEPA damages claim expired on or about March 23, 2008.

15 Plaintiffs allege equitable tolling for their HOEPA damages  
16 claim as follows:

17 Plaintiffs first learned of the actions of  
18 Defendants, including their failure to disclose and  
19 the fraud committed upon them in May of 2010. Any  
20 applicable statute of limitations should run from  
21 this date. . . . Plaintiff could not have learned  
22 of these violations at the time the loan was  
23 obtained by looking at her loan documents and  
24 escrow closing statements as the true facts of the  
25 lender and the securitization of her note and deed  
26 of trust and the fees attached thereto, which were  
27 undisclosed to her, were not apparent from the face  
28 of the loan documents, nor deed of trust.

24 (FAC ¶ 72.) Further, Plaintiffs assert "a lay Plaintiff without legal  
25 knowledge as to the aforementioned federal statutes and state causes of  
26 action would not have been able to discover what Defendants failed to  
27 disclose." (Pl.'s Opp'n 15:12-14.) These tolling allegations are  
28 insufficient to justify equitable tolling since Plaintiffs have not

1 alleged facts demonstrating they were prevented from discovering  
2 Defendants' alleged HOEPA violations within the one-year statutory  
3 period. See Davis v. Mortgageit, Inc., No. Civ. S-09-3028 FCD/GGH, 2010  
4 WL 2943162, at \*3-4 (E.D. Cal. July 23, 2010) (finding equitable tolling  
5 inapplicable in a case where Plaintiffs argued it was only after  
6 performing a Forensic Loan Document Audit that they discovered the  
7 alleged TILA violations since Plaintiffs "could have conducted an audit  
8 of their documents, forensic or otherwise" within the limitations  
9 period); see also Ahmad v. World Savings Bank, at \*2 (finding equitable  
10 tolling inapplicable since plaintiff failed to allege facts explaining  
11 how she was prevented from comparing her loan documents and disclosures  
12 with TILA statutory and regulatory requirements to discover alleged TILA  
13 disclosure violations). Plaintiffs "have offered no factual allegations  
14 to show that they were unable to compare the allegedly improper  
15 disclosures in the loan documents with the required disclosures under  
16 . . . HOEPA." Wadhwa v. Aurora Loan Servs., LLC, 2011 WL 1601593, at \*3  
17 (E.D. Cal. Apr. 27, 2011). Therefore, Plaintiffs' HOEPA damages claim is  
18 dismissed against all Defendants.

19 Movants also seek dismissal of Plaintiffs' breach of security  
20 instrument claim, arguing "there are no facts pled to support [the]  
21 elements" of a breach of contract claim. (MortgageIT's Mot. 19:11-12;  
22 Wells Fargo Defs.' Mot. 7:19-22.)

23 In California, "[a] cause of action for breach of contract  
24 requires proof of the following elements: (1) existence of the contract;  
25 (2) plaintiff's performance or excuse for nonperformance; (3)  
26 defendant's breach; and (4) damages to plaintiff as a result of the  
27 breach." CDF Firefighters v. Maldonado, 158 Cal. App. 4th 1226, 1239  
28

1 (2008). This breach of contract claim is premised on Plaintiffs' invalid  
2 Substitution of Trustee allegation, as follows:

3 The Substitution of Trustee in this case is void,  
4 due to fraud, and was not executed in compliance  
5 with California Civil Code § 29[2]4(a). The  
6 Substitution of Trustee was invalid also because it  
7 was not executed by the Lender, per requirement of  
8 the Deed of Trust. The duly appointed Trustee under  
9 the Deed of Trust as of the recording of the Notice  
10 of Default on March 8, 2010 was Financial Title Co.  
11 NdexWest was [n]ever effectively substituted as  
12 trustee. . . . The Notice of Default was recorded  
13 PRIOR to the assignment, which if it were the true  
14 holder-in-due-course, it would be mandatory to  
15 obtain beneficial interest in the Deed of Trust,  
16 prior to invoking foreclosure. . . .

17 The fraudulent assignment was recorded AFTER  
18 the Notice of Default, which proves the Notice of  
19 Default was void at its inception and recording on  
20 March 8, 2010. . . .

21 (FAC ¶¶ 148-49.) Under California Civil Code § 2924(a), "a trustee,  
22 mortgagee or beneficiary or any of their authorized agents may conduct  
23 the foreclosure process by filing a Notice of Default." Wood v. Aegis  
24 Wholesale Corp., 2009 WL 1948844, at \*3 (E.D. Cal. July 6, 2009)  
25 (internal quotation omitted). "[A]ny of the beneficiary's authorized  
26 agents" may file the Notice of Default, and "it is immaterial to the  
27 validity of the foreclosure process that [NDeX West] filed the Notice of  
28 Default before [NDeX West] was officially substituted as trustee." Id.  
at \*4. Therefore, Plaintiffs' allegation that "the fraudulent assignment  
was recorded AFTER the Notice of Default, which proves the Notice of  
Default was void at its inception and recording" is without merit. (FAC  
¶ 149.) Therefore, Plaintiffs' breach of security instrument claim is  
dismissed.

26 **B. RESPA**

27 Movants seek dismissal of Plaintiffs' 12 U.S.C. § 2607 Real  
28 Estate Settlement Procedures Act ("RESPA") claim, arguing, *inter alia*,



1 it is barred by the one-year statute of limitations. (MortgageIT's Mot.  
2 5:13-16; Wells Fargo Defs.' Mot. 5:16-20.) Plaintiffs counter that the  
3 statute of limitations should be equitably tolled. (Pls.' Opp'n ¶ 35.)

4 "The primary ill that § 2607 is designed to remedy is the  
5 potential for unnecessarily high settlement charges, . . . caused by  
6 kickbacks, fee-splitting, and other practices that suppress price  
7 competition for settlement services. This ill occurs, if at all, when  
8 the plaintiff pays for the tainted service, typically at the closing."  
9 Jensen v. Quality Loan Serv. Corp., 702 F. Supp. 2d 1183, 1195 (E.D.  
10 Cal. 2010) (quoting Snow v. First Am. Title Ins. Co., 332 F.3d 356,  
11 359-60 (5th Cir. 2003)). 12 U.S.C. § 2614 provides that a § 2607 claim  
12 "may be brought . . . [within] 1 year . . . from the date of the  
13 occurrence of the violation[.]" "Barring extenuating circumstances, the  
14 date of the occurrence of the violation is the date on which the loan  
15 closed." Ayala v. World Sav. Bank, FSB, 616 F. Supp. 2d 1007, 1020 (C.D.  
16 Cal. 2009) (internal quotation marks and citation omitted); see also  
17 Jensen, 702 F. Supp. 2d at 1195 ("[C]ourts have considered the  
18 'occurrence of the violation' as the date the loan closed.").

19 Here, Plaintiffs' loans "closed" on or about March 23, 2007.  
20 Therefore, the one-year statute of limitations expired on March 23,  
21 2008. However, Plaintiffs did not file their Complaint in this action  
22 until September 9, 2010. Further, Plaintiffs' Amended Complaint does not  
23 sufficiently explain why they could not have discovered Defendants'  
24 alleged § 2607 violation within the one-year statutory period.  
25 Plaintiffs assert the following explanation:

26 Plaintiff could not have learned of these  
27 violations at the time the loan was obtained by  
28 looking at her loan documents and escrow closing  
statements as the true facts of the lender and the  
securitization of her note and deed of trust and  
the fees attached, which were undisclosed to her,

1           were not apparent from the face of the loan  
2           documents, nor deed of trust.

3           (FAC ¶ 77.) Further, Plaintiffs argue "a lay Plaintiff without legal  
4           knowledge as to the aforementioned federal statutes and state causes of  
5           action would not have been able to discover what Defendants failed to  
6           disclose." (Pls.' Opp'n 15:12-14.) These assertions are insufficient to  
7           justify equitable tolling of the statute-of-limitations period, since  
8           Plaintiffs "failed to plead any facts demonstrating that [they] could  
9           not have discovered the alleged RESPA violations by exercising due  
10          diligence." Quiroz v. Countrywide Bank, N.A., WL 3849909, at \*6 (C.D.  
11          Cal. Nov. 16, 2009). Therefore, Plaintiffs have not shown the doctrine  
12          of equitable tolling applies to their § 2607 claim.

13           In the Court's May 3, 2010 Order, Plaintiffs were granted  
14          leave "to file a First Amended Complaint addressing the deficiencies in  
15          any claim dismissed without prejudice." (Order, May 3, 2010 ("Order")  
16          20:5-6.) Plaintiff's RESPA claim was previously dismissed since  
17          "Plaintiff has not shown that the doctrine of equitable tolling applies  
18          to her section 2607 claim." Id. 7:11-12. Since Plaintiffs have not cured  
19          these deficiencies, it is clear "any amendment would be futile, [and]  
20          there [is] no need to prolong the litigation by permitting further  
21          amendment." Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1039 (9th Cir.  
22          2002). Therefore, Plaintiffs' RESPA claim is dismissed with prejudice.

23           **C.    TILA Rescission**

24           Movants seek dismissal of Plaintiffs' Truth in Lending Act  
25          ("TILA") rescission claim, since the claim was dismissed with prejudice  
26          in the May 3, 2011 Order: "[T]he court lacks subject matter jurisdiction  
27          over Plaintiff's TILA rescission claim, and this claim is dismissed  
28          against all Defendants with prejudice." (Order 8:8-11.) Since Plaintiffs

1 allege an identical TILA rescission claim, each Movant's dismissal  
2 motion is granted.

3 **D. FCRA Claim**

4 Movants also seek dismissal of Plaintiffs' Fair Credit  
5 Reporting Act ("FCRA") claim alleged under 15 U.S.C. § 1681s, arguing  
6 Plaintiffs have alleged insufficient facts to support a claim under  
7 subsection 2(b). (MortgageIT's Mot. 9:20-10:17; Wells Fargo Defs.' Mot.  
8 7:10-17.)

9 The FCRA imposes responsibilities on the sources that provide  
10 credit information to credit reporting agencies ("CRAs"). Gorman v.  
11 Wolpoff & Abramson, LLP, 584 F.3d 1147, 1153-54 (9th Cir. 2009)  
12 (quotation omitted). The duties imposed by subsection 2(b) of the FCRA  
13 are "triggered only when a [source of credit information] receives  
14 notice of a dispute from a [CRA] that has itself received notice of a  
15 dispute from a consumer." Pineda v. GMAC Mortgage, LLC, No. CV 08-5341  
16 AHM (PJWx), 2009 WL 1202885, at \*4 (C.D. Cal. Apr. 30, 2009) (citation  
17 omitted); see also Clark v. FLA Card Services, N.A., No. C 09-5240 SBA,  
18 2010 WL 2232161, at \*3 (N.D. Cal. June 3, 2010) (citing Gorman, 584 F.3d  
19 at 1154).

20 Plaintiffs' FCRA claim comprises the following allegations:

21 Defendants wrongfully, improperly, and illegally  
22 reported negative information as to Plaintiffs to  
23 one or more credit reporting agencies, resulting in  
24 Plaintiffs having negative information on their  
25 credit reports and the lowering of their FICO  
26 scores.

- 27 A. The negative information included, but  
28 was not limited to, an excessive amount  
of debt into which Plaintiffs were  
tricked into seed [sic] into signing;
- B. Notwithstanding the above, Plaintiffs  
have paid each and every payment on time  
from the time of the closing of the loan  
and until Plaintiffs' default.

1 Pursuant to 15 USC § 1681 (s) (2) (b),  
2 Plaintiffs are entitled to maintain a private cause  
3 of action against Defendants for an award of  
4 damages in an amount to be proven at the time of  
5 trial for all violations of The Fair Credit  
Reporting Act which caused actual damages to  
Plaintiffs, including emotional distress and  
humiliation.

6 (FAC ¶¶ 84-85.) These allegations are insufficient to state an FCRA  
7 subsection 2(b) claim since Plaintiffs do not allege that they disputed  
8 any negative information with a CRA or that notice of such dispute was  
9 provided to any Defendant. See Clark, 2010 WL 2232161, at \* 3  
10 (dismissing the plaintiff's FCRA claim where the complaint included "no  
11 allegations that Plaintiff disputed any charges with any credit  
12 reporting bureau or that notice of such dispute was provided to  
13 [defendant]").

14 Since Plaintiffs' FCRA claim was previously dismissed with  
15 leave to amend for the same reasons and Plaintiffs have failed to cure  
16 the insufficiencies in their subsection 2(b) FCRA allegations, further  
17 leave to amend would be futile. (Order 9:23-27, 20:5-6.) Therefore,  
18 Plaintiffs' FCRA claim against the Movants is dismissed with prejudice.

19 **E. Negligent Misrepresentation**

20 Movants also seek dismissal of Plaintiffs' negligent  
21 misrepresentation claim, arguing, *inter alia*, that this claim fails to  
22 comply with Rule 9(b)'s heightened pleading standard. (MortgageIT's Mot.  
23 12:2-10; Wells Fargo Defs.' Mot. 10:21-22.)

24 Plaintiffs' negligent misrepresentation claim includes the  
25 following allegations:

26 Defendants knowingly and intentionally  
27 concealed material information from Plaintiffs  
28 which is required by federal and state statutes and  
regulations to be disclosed to the Plaintiffs both  
before and after closing.

1 Defendants also materially misrepresented  
2 material information to the Plaintiffs with full  
3 knowledge of Defendants at their affirmative  
4 representations were false, fraudulent, and  
5 misrepresented the truth at the time said  
6 representations were made. Specifically, Defendants  
7 disguised the mortgage transaction to create the  
8 appearance of the lender's being a properly  
9 chartered and registered financial institution,  
10 authorized to do business and to enter into the  
11 subject transaction, when in fact the real party in  
12 interest was not disclosed to Plaintiffs, and  
13 neither were the various fees, rebates, refunds,  
14 kickbacks, profits and gains of the various parties  
15 who participated in this unlawful scheme. . . .

16 As such, this fraudulent scheme . . . was in  
17 fact a sham to use Plaintiffs' interest in the real  
18 property to collect interest in excess of the legal  
19 rate.

20 (FAC ¶¶ 89-92.)

21 Rule 9(b)'s heightened pleading standard applies to "averments  
22 of fraud" in all civil cases, regardless of whether "fraud" is an  
23 essential element of the claim. Vess v. Ciba-Geigy Corp., 317 F.3d  
24 1097, 1103-05 (9th Cir. 2003). Rule 9(b) provides that "[i]n alleging  
25 fraud or mistake, a party must state with particularity the  
26 circumstances constituting fraud or mistake." The required specificity  
27 includes the "time, place, and specific content of the false  
28 representations as well as the identities of the parties to the  
misrepresentations." Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir.  
2007) (internal quotation marks and citation omitted). Further, in  
alleging fraud against multiple defendants,

Rule 9(b) does not allow a complaint to merely lump  
multiple defendants together but requires  
plaintiff[] to differentiate [her] allegations when  
suing more than one defendant . . . and inform each  
defendant separately of the allegations surrounding  
his alleged participation in the fraud. . . . [A]  
plaintiff must, at a minimum, identify the role of  
each defendant in the alleged fraudulent scheme.

1 Id. at 764-65 (internal quotations omitted).

2 Plaintiffs' conclusory "averments of fraud" do not provide the  
3 specificity required by Rule 9(b) since they lack sufficient detail  
4 concerning the time, date, and place of the alleged misrepresentations  
5 and non-disclosures, and the identity of the individuals who made them.  
6 See Kearns v. Ford Motor Co., 567 F.3d 1120, 1125-27 (9th Cir. 2009)  
7 (holding that allegations concerning false representations and  
8 non-disclosures "are grounded in fraud" and are subject to Rule 9(b)).  
9 Plaintiffs' allegations also fail to distinguish among the Defendants.  
10 Plaintiffs attempt to clarify these allegations in their opposition  
11 brief, but their arguments merely demonstrate the lack of requisite  
12 specificity in their negligent misrepresentation claim: "Plaintiff's  
13 Cause of Action for negligent misrepresentation is adequately pled in  
14 that the misrepresentations arise out of her loan agreement with  
15 Defendants." (Pls.' Opp. 16:15-16.)

16 Since Plaintiffs' negligent misrepresentation claim was  
17 dismissed with leave to amend for the same reasons and Plaintiffs have  
18 failed to sufficiently detail the "averments of fraud" under Rule 9(b)  
19 standards, further leave to amend would be futile. (Order 11:7-11, 20:5-  
20 6.) Therefore, Plaintiffs' negligent misrepresentation claim against the  
21 Movants is dismissed with prejudice.

#### 22 **F. Breach of Fiduciary Duty**

23 Movants also seek dismissal of Plaintiffs' breach of fiduciary  
24 duty claim, arguing Plaintiffs do not allege the necessary existence of  
25 a fiduciary relationship with any Movant. (MortgageIT's Mot. 12:20-21,  
26 13:8-17; Wells Fargo Defs.' Mot. 9:15-10:11.)

27 In California, to state a claim for breach of fiduciary duty,  
28 a plaintiff must allege: (1) the existence of a fiduciary relationship;

1 (2) the breach of that relationship; and (3) damage proximately caused  
2 thereby. Roberts v. Lomanto, 112 Cal. App. 4th 1553, 1562 (2003).

3 "Breach of fiduciary duty is a tort that by definition may be  
4 committed by only a limited class of persons." 1-800 Contacts, Inc. v.  
5 Steinberg, 107 Cal. App. 4th 568, 592 (2003). As a general rule, "a loan  
6 transaction is at arms-length and there is no fiduciary relationship  
7 between the borrower and lender." Oaks Mgmt. Corp. v. Superior Court,  
8 145 Cal. App. 4th 453, 466 (2006). Further, loan servicers typically do  
9 not have a fiduciary relationship with borrowers. See Linder v. Aurora  
10 Loan Servicing, LLC, No. 2:09-cv-03490-JAM-KJM, 2010 WL 1525399, at \*5  
11 (E.D. Cal. Apr. 15, 2010); Moreno v. Citibank, N.A., No. C-09-5339 CW,  
12 2010 WL 103822, at \*3 (N.D. Cal. Mar. 19, 2010).

13 Plaintiffs' fiduciary duty claim contains the following  
14 allegations:

15 Defendants, by . . . contracting to provide  
16 mortgage loan services and a loan program to  
17 Plaintiff which was not only to be best suited to  
18 the Plaintiffs given their income and expenses, but  
19 by which Plaintiffs would also be able to satisfy  
20 their obligations without risk of losing their  
21 home, were "fiduciaries" in which Plaintiffs  
22 reposed trust and confidence . . . .

20 Defendants breached their fiduciary duties to  
21 Plaintiffs by fraudulently inducing Plaintiffs to  
22 enter into a mortgage transaction which was  
23 contrary to Plaintiffs' stated intentions; contrary  
24 to Plaintiffs' interest; and contrary to the  
25 Plaintiffs' preservation of their home.

23 (FAC ¶¶ 99-100.) These allegations are insufficient to show the  
24 existence of a fiduciary relationship between Plaintiffs and any Movant.  
25 See Pajarillo v. Bank of Am., No. 10CV937 DMS (JMA), 2010 WL 4392551, at  
26 \*5 (S.D. Cal. Oct. 28, 2010) (dismissing a breach of fiduciary claim  
27 based upon identical allegations to those plead in this case).

1 Since Plaintiffs' breach of fiduciary duty claim was  
2 previously dismissed with leave to amend for the same reasons and  
3 Plaintiffs have failed to cure the insufficient allegations in their  
4 Amended Complaint, further leave to amend would be futile. (Order 12:19-  
5 20, 20:5-6.) Therefore, Plaintiffs' breach of fiduciary duty claim  
6 against the Movants is dismissed with prejudice.

7 **G. Unjust Enrichment**

8 Movants also seek dismissal of Plaintiffs' unjust enrichment  
9 claim, arguing, *inter alia*, an unjust enrichment claim cannot be stated  
10 "where there exists between the parties a valid express contract  
11 covering the same subject matter." (MortgageIT's Mot. 15:6-22; Wells  
12 Fargo Defs.' Mot. 10:14-23.)

13 Plaintiffs' unjust enrichment claim is based upon an alleged  
14 "implied contract" ensuring they "understood all fees which would be  
15 paid to the Defendants to obtain credit on [their] behalf" and that they  
16 would not be "charge[d] any fees which were not related to the  
17 settlement of the loan and without full disclosure" of the same. (FAC  
18 ¶ 105.) However, under California law, "it is well settled that an  
19 action based upon an implied-in-fact or quasi-contract cannot lie where  
20 there exists between the parties a valid express contract covering the  
21 same subject matter." Lance Camper Mfg. Corp. v. Republic Indem. Co., 44  
22 Cal. App. 4th 194, 203 (1996); see also Paracor Fin., Inc. v. Gen. Elec.  
23 Capital Corp., 96 F.3d 1151, 1167 (9th Cir. 1996) (stating under  
24 California law "unjust enrichment is an action in quasi-contract, which  
25 does not lie when an enforceable, binding agreement exists defining the  
26 rights of the parties"). Here, Plaintiffs obtained two loans, secured by  
27 Deeds of Trust, and allege to have entered into a written loan  
28 modification agreement with Wells Fargo. (FAC ¶¶ 18-19, 21, 25, 160.)



1 None of Plaintiffs' allegations plausibly suggest that valid contracts  
2 did not exist between the parties. See Smith v. Aurora Loan Servs., No.  
3 CIV S-10-0198 MCE DAD P, 2010 WL 3504899, at \*4 (E.D. Cal. Sept. 7,  
4 2010) ("The complaint does not allege sufficient facts to maintain a  
5 plausible claim for unjust enrichment [where the Plaintiff] alleges  
6 Plaintiff and Defendants entered into the Loan, and no allegations in  
7 the complaint support a claim that no contract exists between the  
8 parties.").

9 Since Plaintiffs' unjust enrichment claim was previously  
10 dismissed with leave to amend for the same reasons and Plaintiffs have  
11 failed to cure the deficiencies in their Amended Complaint, further  
12 leave to amend would be futile. (Order 1:20-23, 20:5-6.) Therefore,  
13 Plaintiffs' unjust enrichment claim against the Movants is dismissed  
14 with prejudice.

#### 15 **H. Civil RICO**

16 Movants also seek dismissal of Plaintiffs' civil Racketeer  
17 Influenced and Corrupt Organizations Act ("RICO") claim, arguing, *inter*  
18 *alia*, Plaintiffs' allegations were not pled with the required  
19 specificity. (MortgageIT's Mot. 15:9-18; Wells Fargo Defs.' Mot. 13:3-6,  
20 14:2.)

21 The Ninth Circuit "applie[s] the particularity requirements of  
22 [R]ule 9(b) to [averments of fraud in] RICO claims." Moore v. Kayport  
23 Package Express, Inc., 885 F.2d 531, 541 (9th Cir. 1989). Therefore,  
24 Plaintiffs' fraud allegations in their RICO claim must "identify the  
25 time, place and manner of each fraud plus the role of each defendant in  
26 each scheme." Id. (internal quotation omitted).

27 Plaintiffs' civil RICO claim contains the following  
28 allegations:

1 Defendants' actions and use of multiple  
2 corporate entities, multiple parties, and concerted  
3 and predetermined acts and conduct specifically  
4 designed to defraud Plaintiffs constitutes an  
5 "enterprise", with the aim and objective of the  
6 enterprise being to perpetuate a fraud upon the  
7 Plaintiffs through the use of intentional  
8 nondisclosure, material misrepresentation, and  
9 creation of the fraudulent loan documents. . . .

10 Plaintiffs allege that the exhibits attached  
11 to this Amended Complaint, show the false and  
12 fraudulent documents filed with the Placer County  
13 Recorder Office constitutes probable cause for  
14 granting all relief requested in this First Amended  
15 Complaint. Plaintiffs allege that Defendants did,  
16 each, act wrongfully to take and deprive them of  
17 their property, knowing that they, without their  
18 knowledge converted their note and deed of trust to  
19 a Mortgage Backed Security, to charge them for  
20 insurance and other forms of credit enhancements,  
21 which have paid Plaintiffs' note, thereby falsely  
22 claiming a "default" on the obligation.

23 At various times and places enumerated, all  
24 Defendants did acquire and/or maintain, directly or  
25 indirectly, an interest in or control of a RICO  
26 enterprise of individuals who were associated in  
27 fact and who did engage in, and whose activities  
28 did affect, interstate and foreign commerce . . . .

During the pertinent time in question, all  
Defendants did cooperate jointly and severally in  
the commission of two or more of the RICO predicate  
acts . . . .

(FAC ¶¶ 121, 126-28.)

These allegations are insufficient to state a civil RICO  
claim. Plaintiffs do not allege facts concerning the time, date, and  
place of the alleged misrepresentations and non-disclosures, the  
identity of who made them, or the role of each Defendant in the  
"enterprise." Further, Plaintiffs' vague allegation that "exhibits  
attached to this Amended Complaint, show the false and fraudulent  
documents" does not meet the requisite specificity required under Rule  
9(b). (FAC ¶ 126.)

1           Since Plaintiffs' civil RICO claim was previously dismissed  
2 with leave to amend for the same reasons, and Plaintiffs have again  
3 failed to meet the requisite specificity required under Rule 9(b),  
4 further leave to amend would be futile. (Order 15:4-12, 20:5-6.)  
5 Therefore, Plaintiffs' civil RICO claim against the Movants is dismissed  
6 with prejudice.

### 7           **I.    Quiet Title**

8           Movants also seek dismissal of Plaintiffs' quiet title claim,  
9 arguing, *inter alia*, Plaintiffs have not pled their ability to tender  
10 the amount of their debt. (MortgageIT's Mot. 21:20-22:3; Wells Fargo  
11 Defs.' Mot. 11:1-5.)

12           Under California law, it is well-settled that "a mortgagor  
13 cannot quiet his title against the mortgagee without paying the debt  
14 secured." Briosos v. Wells Fargo Bank, 737 F. Supp. 2d 1018, 1032 (N.D.  
15 Cal. 2010) (citing Shimpones v. Stickney, 219 Cal. 637, 649 (1934)).  
16 Therefore, "to maintain a quiet title claim, a plaintiff 'is required to  
17 allege tender of the proceeds of the loan at the pleading stage.'" Id.  
18 (quoting Velasquez v. Chase Home Fin., LLC, No. C 10-01641 SI, 2010 WL  
19 3211905, at \*4 (N.D. Cal. Aug. 12, 2010)); see also Hensley v. Bank of  
20 New York Mellon, No. 1:10-CV-1316 AWI SMS, 2010 WL 5418862, at \*3 (E.D.  
21 Cal. Dec. 23, 2010) (dismissing a quiet title claim where the plaintiff  
22 did "not allege that she has tendered, or is able to tender").

23           Plaintiffs do not satisfy this pleading requirement. They  
24 allege the following under their breach of contract claim, which is  
25 incorporated by reference into the quiet title claim: "Upon the true  
26 'lenders' full performance of its obligations under HOEPA, Plaintiffs  
27 shall tender all sums to which the true lender is entitled." (FAC ¶¶ 68,  
28 173.) However, "[a] tender must be one of full performance and must be

1 unconditional to be valid." Arnolds Mgmt. Corp. v. Eischen, 158 Cal.  
2 App. 3d 575, 578 (1984) (citations omitted). Plaintiffs argue this  
3 pleading requirement need not be satisfied here: "[t]ender is not  
4 required . . . when the owner's action attacks the validity of the  
5 underlying debt because the tender would constitute an affirmation of  
6 the debt." (Pls.' Opp'n 24:4-7 (citing Onofrio v. Rice, 55 Cal. App. 4th  
7 413, 424 (1997).) However, Plaintiffs have not sufficiently attacked the  
8 validity of the underlying debt in their Amended Complaint.

9         Since Plaintiffs' quiet title claim was previously dismissed  
10 with leave to amend for the same reasons, and Plaintiffs have again  
11 failed to "allege tender of the amount of debt owed," further leave to  
12 amend would be futile. (Order 16:3-4, 20:5-6.) Therefore, Plaintiffs'  
13 quiet title claim against the Movants is dismissed with prejudice.

#### 14         **J. Usury and Fraud**

15         Movants also seek dismissal of Plaintiffs' "usury and fraud"  
16 claim, arguing Plaintiffs failed to allege that the interest rate on  
17 either loan exceeded the statutory minimum. (MortgageIT's Mot. 18:16-18;  
18 Wells Fargo Defs.' Mot. 13:12-18.) Further, Movants argue Plaintiffs  
19 have not sufficiently amended their complaint to "satisfy Rule 9(b)'s  
20 heightened pleading standards." (MortgageIT's Mot. 19:1-3; Wells Fargo  
21 Defs.' Mot. 11:7-9.)

22         Plaintiffs' "usury and fraud" claim contains the following  
23 allegations:

24                 [T]he subject loan, notes, and mortgage were  
25                 structured so as to create the appearance of a  
26                 higher value of real property than the actual fair  
27                 market value.

28                 Defendants disguised the transaction to create  
29                 the appearance of the lender's being a properly  
30                 chartered and registered financial institution . .  
31                 . when in fact the real party in interest was not  
32                 disclosed to Plaintiffs, and neither were the

1 various fees, rebates, refunds, kickbacks, profits  
2 and gains of the various parties who participated  
in this unlawful scheme.

3 Said real party in interest . . . was neither  
4 a financial institution nor an entity . . .  
5 authorized . . . to do business in the state, nor  
to act as banking, lending or other financial  
institution anywhere else.

6 As such, this fraudulent scheme . . . was in  
7 fact a sham to use Plaintiffs' interest in the real  
property to collect interest in excess of the legal  
rate. . . .

8 The transaction of all the loan of money was  
9 pursuant to a written agreement, and as such,  
10 subject to the rate limitation set forth under  
state and federal law. The "formula break" a  
11 reference to end these laws was exceeded by a  
factor in excess of 10 contrary to the applicable  
law.

12 (FAC ¶¶ 140-44.)

13 Although Plaintiffs alleged "usury and fraud" as a single  
14 claim, they are separate claims under California law. Therefore, the  
15 sufficiency of Plaintiffs' allegations are addressed separately under  
16 each claim.

17 Under California law, the elements of a usury claim are: "(1)  
18 The transaction must be a loan or forbearance; (2) the interest to be  
19 paid must exceed the statutory maximum; (3) the loan and interest must  
20 be absolutely repayable by the borrower; and (4) the lender must have a  
21 willful intent to enter into a usurious transaction." Ghirardo v.  
22 Antonioli, 8 Cal. 4th 791, 798 (1994). "A loan that charges an interest  
23 rate greater than 10 percent per annum is usurious." 321 Henderson  
24 Receivables Origination LLC v. Sioteco, 173 Cal. App. 4th 1059, 1076  
25 (2009).

26 Plaintiffs do not allege the rate of interest charged on  
27 either of the two loans, or that either rate exceeded the maximum rate  
28 allowable by law. Therefore, Plaintiffs' usury claim is insufficient to

1 state an actionable claim. See Pajarillo v. Bank of America, No. 10CV937  
2 DMS (JMA), 2010 WL 4392551, at \*8 (S.D. Cal. Oct. 28, 2010) (dismissing  
3 a usury claim when the plaintiff failed to "sufficiently allege how the  
4 interest . . . received by Defendants exceeded the statutory maximum  
5 rate").

6 Under California law, the elements of a fraud claim are: (1)  
7 misrepresentation (including, false representation, concealment, or  
8 nondisclosure); (2) knowledge of falsity; (3) intent to induce reliance;  
9 (4) justifiable reliance; and (5) resulting damage. Engalla v.  
10 Permanente Med. Grp., Inc., 15 Cal. 4th 951, 974 (1997). A claim  
11 involving fraud must satisfy Rule 9(b)'s heightened pleading  
12 requirements. Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1103 (9th Cir.  
13 2003).

14 Plaintiffs' conclusory allegations concerning Defendants'  
15 "fraudulent scheme" do not provide the specificity required by Rule  
16 9(b). In their Amended Complaint, Plaintiffs allege no additional facts  
17 concerning either the "various fees, rebates, refunds, kickbacks,  
18 profits and gains" or the "rate limitation set forth under state and  
19 federal law." (FAC ¶¶ 141, 144.) Plaintiffs repeat the allegation that  
20 Defendants entered the disguised transaction "to create the appearance  
21 of being a properly chartered and registered financial institution," but  
22 do not specify which Defendants engaged in the transaction or identify  
23 which transaction is at issue, as is required by Rule 9(b). (FAC ¶¶ 90-  
24 92, 112-114, 141-43.) In fact, Plaintiffs state in their opposition  
25 brief that "[d]iscovery is necessary to determine each Defendant's role  
26 and liability in the case." (Pls.' Opp. 21:26-27.)

27 Since Plaintiffs' "usury and fraud" claim was previously  
28 dismissed with leave to amend for the same reasons, and Plaintiffs have

1 failed to cure the deficiencies in their Amended Complaint, further  
2 leave to amend would be futile. (Order 12:19-20, 20:5-6.) Therefore,  
3 Plaintiffs' "usury and fraud" claim against the Movants is dismissed  
4 with prejudice.

5 **K. Wrongful Foreclosure**

6 Movants also seek dismissal of Plaintiffs' wrongful  
7 foreclosure claim, arguing, *inter alia*, that Plaintiffs lack standing to  
8 challenge the foreclosure since Plaintiffs failed to allege tender of  
9 the amounts due. (MortgageIT's Mot. 20:13-17; Wells Fargo Defs.' Mot.  
10 11:1-5.)

11 To state a wrongful foreclosure claim, "a plaintiff must  
12 allege a credible tender of the amount of the secured debt . . . ."  
13 Roque v. Suntrust Mortg., Inc., No. C-09-00040 RMW, 2010 WL 546896, at  
14 \*4 (N.D. Cal. Feb. 10, 2010) (citing Abdallah v. United Savings Bank, 43  
15 Cal. App. 4th 1101, 1109 (1996)); see also Guerrero v. Greenpoint Mortg.  
16 Funding, Inc., No. 10-15333, 2010 WL 4117102, at \*1 (9th Cir. Oct. 20,  
17 2010) (stating the plaintiffs "lacked standing to bring a claim for  
18 'wrongful foreclosure,' because they failed to allege actual, full and  
19 unambiguous tender of the debt owed on the mortgage"). Plaintiffs do not  
20 allege credible tender of the amount of debt owed, or their ability to  
21 tender, notwithstanding having previously been given opportunity.

22 Since Plaintiffs' wrongful foreclosure claim was previously  
23 dismissed with leave to amend for the same reasons, and Plaintiffs have  
24 again failed to "allege tender of the amount of debt owed," further  
25 leave to amend would be futile. (Order 19:1-3, 20:5-6.) Therefore,  
26 Plaintiffs' wrongful foreclosure claim against the Movants is dismissed  
27 with prejudice.

28 ///

1           **L.     Civil Conspiracy**

2           Movants also seek dismissal of Plaintiffs' civil conspiracy  
3 claim, arguing, *inter alia*, it is not an independent cause of action and  
4 Plaintiffs have not pled an underlying tort against them. (MortgageIT's  
5 Mot. 15:24-28; Wells Fargo Defs.' Mot. 15:11-15.)

6           "Conspiracy is not a cause of action, but a legal doctrine  
7 that imposes liability on persons who, although not actually committing  
8 a tort themselves, share with the immediate tortfeasors a common plan or  
9 design in its perpetration." Applied Equip. Corp., Litton Saudi Arabia  
10 Ltd., 7 Cal. 4th 503, 510 (1994) (internal citation omitted). "Standing  
11 alone, a conspiracy does no harm and engenders no tort liability. It  
12 must be activated by the commission of an actual tort." Id. at 511.  
13 Further, to allege a civil "conspiracy to defraud," a complaint must  
14 meet the particularity requirements of Rule 9(b). Sandry v. First  
15 Franklin Fin. Corp., No. 1:10-cv-01923-OWW-SKO, 2011 WL 202285, at \*4  
16 (E.D. Cal. Jan. 20, 2011).

17           Plaintiffs' tort claims have been dismissed against the  
18 Movants, and Plaintiffs' conclusory allegations that Defendants "agreed  
19 . . . to engage in [a] conspiracy to defraud" Plaintiffs "for the common  
20 purpose of accruing economic gains for themselves at the expense of and  
21 detriment to Plaintiffs" do not provide the specificity required by Rule  
22 9(b). (FAC ¶ 115.)

23           Since Plaintiffs' civil conspiracy claim was previously  
24 dismissed with leave to amend for the same reasons, and Plaintiffs have  
25 again failed to allege sufficient underlying tort claims, further leave  
26 to amend would be futile. (Order 12:19-20, 20:5-6.) Therefore,  
27 Plaintiffs' civil conspiracy claim against the Movants is dismissed with  
28 prejudice.

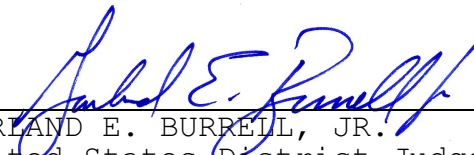


1 **IV. CONCLUSION**

2 For the stated reasons, each Movant's dismissal motion is  
3 GRANTED. Plaintiff is granted fourteen (14) days from the date on which  
4 this order is filed to file a Second Amended Complaint addressing the  
5 deficiencies in any claim dismissed without prejudice.

6 Plaintiff is warned that a dismissal with prejudice could be  
7 entered under Federal Rule of Civil Procedure 41(b) if Plaintiff fails  
8 to file an amended complaint within the prescribed time period.

9 Dated: September 26, 2011

10   
11 \_\_\_\_\_  
12 GARLAND E. BURRELL, JR.  
13 United States District Judge  
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