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

CHRISTIAN PEDERSEN and
SONIKA TINKER,

Plaintiffs,

CIV No. S-11-0642 KJM EFB

vs.

GREENPOINT MORTGAGE FUNDING,
Inc., a New York Corporation; MARIN
CONVEYANCING CORP.: MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS
INC.; QUALITY LOAN SERVICE CORP.;
AURORA LOAN SERVICES; LSI TITLE
COMPANY; GREENPOINT MORTGAGE
FUNDING TRUST MORTGAGE PASS-
THROUGH CERTIFICATES, SERIES 2007-AR1 and
DOES ONE THROUGH 20,

ORDER

Defendants.

On June 8, 2011, the court heard argument on plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss. Holly S. Burgess appeared for plaintiffs, who were present in court; Matthew Learned of McCarthy & Holthus, LLP, appeared telephonically for defendants Aurora Loan Services LLC (Aurora) and Mortgage Electronic Registration Services, Inc. (MERS).

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1 I. Background

2 On March 8, 2011, plaintiffs filed an action against Aurora and MERS, as well as
3 Greenpoint Mortgage Funding, Inc., Marin Conveyancing Corp., Quality Loan Service Corp.,
4 LSI Title Company, Greenpoint Mortgage Funding Trust Mortgage Pass-Through Certificates,
5 Series 2007-ARI, and twenty Doe defendants, alleging violations of the Homeowners Equity
6 Protection Act (HOEPA), 15 U.S.C. § 1639, *et seq.*; the Real Estate Settlement Procedures Act
7 (RESPA), 12 U.S.C. § 2601, *et seq.*; the Truth in Lending Act (TILA), 15 U.S.C. § 1601, *et seq.*
8 and Regulation Z § 226.4; fraudulent misrepresentation; breach of fiduciary duty; unjust
9 enrichment; civil conspiracy; RICO; quiet title; usury and fraud; wrongful foreclosure; and
10 breach of trust instruments.

11 On April 7, 2011, plaintiffs filed a motion for a temporary restraining order,
12 alleging that a trustee's sale of their house was scheduled for April 11, 2011, but that defendants
13 did not have the legal authority to foreclose on plaintiffs' property. ECF No. 9. Although
14 plaintiffs gave defendants notice of their application for a restraining order, defendants did not
15 respond. ECF No. 14. The court denied the application on April 8, 2011.

16 Defendants Aurora and MERS filed a motion to dismiss and to expunge a lis
17 pendens on April 15, 2011, in tandem with a request for judicial notice. ECF Nos. 16 & 17.
18 Plaintiffs have asked the court to take judicial notice of additional materials in connection with
19 their opposition to the motion to dismiss. ECF Nos. 25-26, 29.

20 On April 20, 2011, plaintiffs filed a motion for a preliminary injunction and asked
21 the court to take judicial notice of still more documents. ECF Nos. 20-22. Defendants have
22 submitted even more materials as part of their opposition to the request for injunctive relief.
23 ECF No. 27.

24 On April 20, 2011, defendants Quality Loan Service Corporation and LSI Title
25 Company filed Declarations of Non-Monetary Status under Cal. Civil Code § 2924*l*. ECF No.
26 18. On May 18, 2011, plaintiffs filed objections to these declarations. ECF No. 34.

1 II. Standards For A Motion To Dismiss

2 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move to
3 dismiss a complaint for "failure to state a claim upon which relief can be granted." A court may
4 dismiss "based on the lack of cognizable legal theory or the absence of sufficient facts alleged
5 under a cognizable legal theory." *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699
6 (9th Cir. 1990). A motion to dismiss under this rule may also challenge the sufficiency of fraud
7 allegations under the more particularized standard of Rule 9(b) of the Federal Rules of Civil
8 Procedure. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003).

9 Although a complaint need contain only "a short and plain statement of the claim
10 showing that the pleader is entitled to relief," (Fed. R. Civ. P. 8(a)(2)), in order to survive a
11 motion to dismiss this short and plain statement "must contain sufficient factual matter . . . to
12 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct.
13 1937, 1949 (2009) (quoting *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 570 (2007)). A
14 complaint must include something more than "an unadorned, the-defendant-unlawfully-harmed-
15 me accusation" or "labels and conclusions" or "a formulaic recitation of the elements of a
16 cause of action." *Iqbal*, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555). Determining
17 whether a complaint will survive a motion to dismiss for failure to state a claim is a "context-
18 specific task that requires the reviewing court to draw on its judicial experience and common
19 sense." *Iqbal*, 129 S.Ct. at 1950. Ultimately, the inquiry focuses on the interplay between the
20 factual allegations of the complaint and the dispositive issues of law in the action. *See Hishon v.*
21 *King & Spalding*, 467 U.S. 69, 73 (1984).

22 In making this context-specific evaluation, this court must construe the complaint
23 in the light most favorable to the plaintiff and accept as true the factual allegations of the
24 complaint. *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007). This rule does not apply to "a legal
25 conclusion couched as a factual allegation," *Papasan v. Allain*, 478 U.S. 265, 286 (1986)
26 (quoted in *Twombly*, 550 U.S. at 555), nor to "allegations that contradict matters properly subject

1 to judicial notice” or to material attached to or incorporated by reference into the complaint.
2 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988-89 (9th Cir. 2001). A court’s
3 consideration of documents attached to a complaint or incorporated by reference or matter
4 subject to judicial notice will not convert a motion to dismiss into a motion for summary
5 judgment. *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003); *Parks School of Business*
6 *v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995); *compare Van Buskirk v. CNN*, 284 F.3d 977,
7 980 (9th Cir. 2002) (noting that even though court may look beyond pleadings on motion to
8 dismiss, generally court is limited to face of the complaint on 12(b)(6) motion).

9 III. Requests For Judicial Notice

10 Defendants ask the court to take judicial notice of a number of documents
11 recorded in Placer County, all relating to the acquisition of and foreclosure on 1977 Green
12 Meadow Lane, Meadow Vista, California. Defendants’ Request For Judicial Notice (DRFJN),
13 ECF No. 17, Exs. A-E. Under Rule 201 of the Federal Rules of Evidence, a court may take
14 judicial notice of adjudicative facts “not subject to reasonable dispute” because they are “capable
15 of accurate and ready determination by resort to sources whose accuracy cannot reasonably be
16 questioned.” Plaintiff does not object to the court’s consideration of these documents, most of
17 which are attached to the complaint. These are properly before the court. *Champlaine v. BAC*
18 *Home Loans Servicing, LP*, 706 F.Supp.2d 1029, 1040 (E.D. Cal. 2009); *Lee v. County of Los*
19 *Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (court may take judicial notice of matters of public
20 record).

21 Plaintiffs have asked the court to take judicial notice of several types of
22 information. The first is a decision in a bankruptcy court matter, which they believe supports
23 their position. *See In re Salazar*, 448 B.R. 814 (Bankr. S.D. Cal. 2011). Second, they have
24 proffered a Consent Order, Stipulation and Consent to Issuance of Consent Order, Amended
25 Order to Cease and Desist, all stemming from proceedings in the federal Office of Thrift
26 Supervision, *In the Matter Of Aurora Bank FSB*, NE-11-16 and NE-10-33, and a Consent Order

1 and Stipulation and Consent To The Issuance of a Consent Order issued by the Office of Thrift
2 Supervision in *In the Matter of MERSCORP, Inc.*, AA-EC-11-20. Third, they have presented the
3 declaration of Daniel Edstrom, concerning his search for the Trust Agreement, the Prospectus
4 Supplement, the monthly certificateholders' statement and the monthly loan level files related to
5 the Greenpoint Mortgage Funding Trust Mortgage Pass-Through Certificates, Series 2007-AR1.
6 Edstrom avers that he has traced plaintiffs' loan, number 0124382367, and has provided the loan
7 level file from March 25, 2011, which he pasted into a spreadsheet and which, he avers,
8 demonstrates that "the payments on Plaintiffs' loan are being made." ECF No. 29, Declaration
9 of Daniel Edstrom, ¶¶ 12, 15 & Ex. 3.

10 The court declines to take judicial notice of *In re Salazar, supra*, as the decision
11 itself is not an adjudicative fact. *See* FED. R. EV. 201, comment ("adjudicative facts are those to
12 which the law is applied in the process of adjudication. They are the facts that normally go to
13 the jury in a jury case. They relate to the parties, their activities, their properties, their
14 businesses"). Nevertheless, to the extent the decision has any bearing on the pending motions,
15 the court will consider it in resolving those motions.

16 The court will take judicial notice of the various orders and stipulations relating to
17 OTS's orders and decrees involving Aurora Bank and MERS, as these are federal government
18 documents, readily available on the Office of Thrift Supervision's website. *See Serrano v.*
19 *World Savings Bank*, 2011 WL 1668631, at *2 (N.D. Cal. May 3, 2011) (government documents
20 not subject to reasonable dispute and so judicially noticeable).

21 Finally, the court declines to take judicial notice of Daniel Edstrom's declaration
22 and its attached exhibits. While the Greenpoint Mortgage trust document and prospectus may be
23 publicly available on the SEC's website, the court does not find them relevant to the issues posed
24 by the pending motions. Exhibit 3, which Edstrom describes as a manipulated record of the
25 activity in plaintiffs' loan, is not subject to judicial notice: there is nothing else in the record
26 connecting the loan number Edstrom searched to plaintiffs and nothing clearly demonstrating

1 that payments are being made on plaintiffs' loan, as he claims. This information is not subject to
2 accurate and ready determination in light of the record before the court.

3 IV. The Complaint

4 As noted, the complaint alleges violations of the Homeowners Equity Protection
5 Act (HOEPA), 15 U.S.C. § 1639 *et seq.*; the Real Estate Settlement Procedures Act (RESPA), 12
6 U.S.C. § 2601, *et seq.*; the Truth in Lending Act (TILA), 15 U.S.C. § 1601, *et seq.* and
7 Regulation Z § 226.4; fraudulent misrepresentation; breach of fiduciary duty; unjust enrichment;
8 civil conspiracy; RICO; quiet title; usury and fraud; wrongful foreclosure; and breach of trust
9 instruments. Many of the allegations in the complaint listed under "Facts Common To All
10 Causes Of Action" are not specific to this action, but are a screed against the mortgage industry
11 and the securitization of mortgages generally.¹ Complaint (Compl.) ¶¶ 16-32.

12 With respect to their case in particular, plaintiffs do allege that on April 17, 2007,
13 Tinker executed a Deed of Trust and security instrument with Greenpoint Mortgage as the lender
14 and Marin Conveyancing as the Trustee. *Id.* ¶ 38. They identify Greenpoint Mortgage Funding,
15 Inc. as a New York Corporation in the business of banking services; defendant MERS as a
16 business that operates a database and assigned mortgages in violation of California Corporations
17 Code § 191(d); and defendant Aurora as a business engaged in banking services and the
18 servicing of residential mortgages.

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21 ¹ For example, plaintiffs assert that "[t]he foreclosing entity and its agents regularly
22 commit perjury in their testimony," without providing a single instance of alleged perjury in this
23 or any other case and that employees of Quality Loan "executed and notarized forged documents
24 as to the ownership of the loan," again without providing a concrete example to support the
25 claim, and that "the multiple transfers of title of the mortgage loan between the originator.. . the
26 REIT Trust, the Depositor and the REMIC Trust is simply ignored as it [*sic*] never can be proved
or shown to the Court." Compl. ¶¶ 17, 22, 37. These contentions do not advance plaintiffs'
case. *Cf. In re Macklin*, 2011 WL 2015520, at *13 (Bankr. E.D. Cal. May 19, 2011) (motion
"packed with claims, contentions and inflammatory comments indicting the mortgage system"
did not assist the court in reaching the single issue with merit). Similarly, the claim plaintiffs
make, that their "mortgage obligation has been paid" and their "alleged 'default' is a fiction,"
has been characterized as "illogical." *Id.* at *5.

1 Plaintiffs also allege that “the chain of title is hopelessly confused and
2 convoluted” and it reveals “a slew of other illegal actions.” *Id.* ¶ 40. After discussing the
3 alleged problems in the chain of title and the Notice of Default, plaintiffs assert that Tinker
4 called an unidentified “lender/service” to request a loan modification or other means to avoid
5 foreclosure, but that the lender/servicer refused to work with plaintiffs or to disclose any options
6 available to avoid foreclosure. *Id.* ¶¶ 41-44, 45-46, 48. Instead, while refusing or neglecting to
7 give plaintiffs “the opportunity to cooperate in resolving the debt,” the defendants “purposefully
8 deceived plaintiffs that the Mortgage modification was proceeding as planned and deceptively
9 and purposefully wrongfully foreclosed on Plaintiffs’ property.” *Id.* ¶¶ 51, 52.

10 Finally, plaintiffs aver that “[b]ecause it is not clear who was actually in interest
11 at the time of the actions described below, Plaintiffs allege this Cause of Action in the alternative
12 against each of the possible parties at fault.” *Id.* ¶ 65. In connection with their HOEPA cause of
13 action, but realleged in each subsequent cause of action by reference to the preceding
14 paragraphs, plaintiffs ask rescission of the mortgage loan transaction, termination of the
15 mortgage and security interest in the property, return of any money or property paid by plaintiffs;
16 an amount equal to twice the finance charges; relinquishment of the right to retain any proceeds
17 and actual damages. *Id.* ¶ 64. In their prayer for relief, plaintiffs ask for an order compelling the
18 defendants to transfer legal title in the subject property to plaintiffs, a declaration that defendants
19 have no right or interest in the property, an order enjoining defendants from claiming any interest
20 in the property; and a declaration that the foreclosure is void, among other things. *Id.* at 28-29.

21 Plaintiffs’ separate causes of action are set forth and analyzed in light of the
22 pending motion, below.

23 V. The Motion To Dismiss

24 A. TILA and HOEPA

25 Plaintiffs allege that defendants’ disclosure of the finance charges was improper
26 and that they failed to provide the required notice of the right to rescind the transaction, in

1 violation of 15 U.S.C. § 1601, *et seq.*, and failed to provide accurate TILA disclosures about the
2 amount being financed. Compl. ¶¶ 61, 71-73. They also claim that defendants failed to make
3 the disclosure required under HOEPA, 15 U.S.C. § 1639(A)(1); offered credit to plaintiff Tinker
4 without regard to her ability to pay; and failed to notify her of the right to rescind the transaction.
5 Compl. ¶¶ 56-60. In addition, they aver that the fact that the loan was “actually the proceeds
6 from the sale of securities, and not a loan as it is defined under the laws of California, was a
7 ‘material disclosure’ which was deliberately and intentionally undisclosed.” *Id.* ¶ 32. They
8 assert that they “first learned” of defendants’ actions in September 2010, which should be the
9 trigger date for the statute of limitations. Compl. ¶¶ 67, 77.

10 Defendants argue that plaintiffs’ claims are too vague to satisfy the pleading
11 requirements of Federal Rule of Civil Procedure 8(a)(2) and that the claims are time-barred.
12 Motion To Dismiss (MTD), ECF No. 16-1, at 9-11.² Plaintiffs counter that they are entitled to
13 equitable tolling and argue, without citation to authority, that when the ground for rescission is
14 fraud or mistake, the statute does not begin to run until the aggrieved party discovers the facts
15 constituting the fraud. Opposition (Opp’n), ECF No. 25 at 12-13.

16 Under the Truth in Lending Act, 15 U.S.C. §§ 1601, *et seq.*, and its implementing
17 regulations, 12 C.F.R. § 226.1, *et seq.*, a lender must make certain disclosures to a borrower
18 before the consummation of a loan, including the finance charges, the annual percentage rate,
19 and the right to rescind the transaction. 15 U.S.C. § 1638(a) & (b); 12 C.F.R. §§ 226.17(b),
20 226.23(b); *see Yamamoto v. Bank of New York*, 329 F.3d 1167, 1169 (9th Cir. 2003). TILA
21 provides causes of action for rescission and damages if the lender does not make the required
22 disclosures.

23 HOEPA is an amendment to TILA, designed to “combat predatory lending,”
24 which applies only to certain high cost loans. *In re First Alliance Mortgage Co.*, 471 F.3d 977,
25

26 ² The court relies on the page numbers assigned by its CM/ECF system.

1 984 n.1 (9th Cir. 2006); *Hamilton v. Bank of Blue Valley*, 746 F.Supp.2d 1160, 1179 (E.D. Cal.
2 2010) (HOEPA is amendment to TILA); 15 U.S.C. §§ 1602(aa) & 1639. To plead a HOEPA
3 violation, a plaintiff must allege facts that the loan is one covered by the statutes. *Yulaeva v.*
4 *Greenpoint Mortgage Funding, Inc.*, 2010 WL 5394859, at *4 (E.D. Cal. Dec. 21, 2010).
5 Plaintiffs' allegations fall short of this standard.

6 Both TILA and HOEPA allow for rescission of certain loans and for damages, so
7 long as the borrower acts within specified time periods. Under 15 U.S.C. § 1635(f), if the lender
8 fails to provide notice of rescission rights, the usual three day period is extended to three years
9 from the date of the consummation of the transaction. Under 15 U.S.C. § 1640(e), if the
10 borrower seeks damages from TILA and HOEPA violations, he must file his action within one
11 year of the transaction. *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1163 (9th Cir. 2002)
12 (rescission); *Edstrom v. Ndex West, LLC*, 2010 WL 4069482, at *3 (E.D. Cal. Oct. 18, 2010)
13 (damages).

14 The Ninth Circuit has observed that “the failure to make the required disclosures
15 occurred, if at all, at the time the loan documents were signed.” *Meyer v. Ameriquest Mortgage*,
16 342 F.3d 899, 902 (9th Cir. 2003); *see also King v. State of California*, 784 F.2d 910, 915 (9th
17 Cir. 1986). In this case, the loan documents were signed in April 2007, rendering the TILA and
18 HOEPA actions untimely. Compl. ¶ 38.

19 Plaintiffs argue they are entitled to equitable tolling, based on their threadbare
20 allegation that they did not learn of the violations, because of defendants' fraud, until September
21 2010. ECF No. 25 at 12-13; Compl. ¶¶ 67, 77. They fail to acknowledge, however, that
22 § 1635(f) is a statute of repose, not a statute of limitations, and as such is not subject to equitable
23 tolling. *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 412 (1998) (“we . . . hold that § 1635(f)
24 completely extinguishes the right of rescission at the end of the 3-year period”); *Lane v. Vitek*
25 *Real Estate Industries Group*, 713 F.Supp.2d 1092, 1099 (E.D. Cal. 2010). Even assuming that

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1 plaintiffs' mortgage was subject to rescission, this action comes too late. *See Champlaine v. BAC*
2 *Home Loans Servicing, LP*, 706 F.Supp.2d 1029, 1042 (E.D. Cal. 2009).

3 Plaintiffs may be entitled to equitable tolling for their TILA damages claim, but
4 their complaint as pled is too conclusory to support the assertion. "To establish excusable delay,
5 plaintiffs must show 'fraudulent conduct by the defendant[s] resulting in their concealment of the
6 operative facts, [their] failure . . . to discover the operative facts that are the basis of [their] cause
7 of action within the limitations period, and [their] *due diligence* . . . *until discovery of those*
8 *facts.*'" *Edstrom v. Ndex West. LLC*, 2010 WL 4069482, at *3 (quoting *Federal Election Com'n.*
9 *v. Williams*, 104 F.3d 237, 240-41 (9th Cir. 1996) (emphasis in original)). Plaintiffs' assertion
10 that they did not discover the violations until September 2010 "is insufficient to establish the
11 necessity for equitable tolling under even the pleading standards of Federal Rule of Civil
12 Procedure 8(a)." *Lane*, 713 F.Supp. at 1100. Plaintiffs will be given leave to amend this portion
13 of their TILA claim, if they are able to do so in light of Federal Rule of Civil Procedure 11.

14 They will not, however, be given leave to amend their HOEPA damage claims.

15 A high-cost HOEPA loan 'is a consumer credit transaction that is
16 secured by the consumer's principal dwelling, other than a
17 residential mortgage transaction, . . . if . . . the total points and fees
18 payable by a consumer at or before closing will exceed the greater
19 of . . . 8 percent of the total loan amount; or . . . \$400.' *Id.*
20 §1602(aa)(1).

21 *Cunningham v. Nationscredit Financial Services*, 497 F.3d 714, 717 (7th Cir. 2007). A
22 residential mortgage transaction is "a transaction in which a . . . deed of trust. . is created or
23 retained against the consumer's dwelling to finance the acquisition . . . of such dwelling." 15
24 U.S.C. § 1602(w). Nothing in the complaint suggests that the loan at issue in this case was taken
25 to refinance the home at issue or to fund construction. HOEPA does not, therefore, apply to this
26 transaction. *Yulaeva v. Greenpoint Mortgage Funding, Inc.*, 2010 WL 5394859, at *4.

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1 B. RESPA

2 Under the Real Estate Procedures Act, a lender may not charge a borrower fees
3 related to the mortgage other than for services actually performed. 12 U.S.C. § 2607(b); *Jensen*
4 *v. Quality Loan Service Corp.*, 702 F.Supp.2d 1183, 1194 (E.D. Cal. 2010). Plaintiffs allege,
5 again in conclusory fashion, that “in connection with the mortgage loan to Plaintiffs, Defendants
6 accepted charges for the rendering of real estate services which were in fact charges for other
7 than services actually performed.” Compl. ¶ 70. Defendants argue that the claim is too
8 conclusory to survive a motion to dismiss and is barred by RESPA’s statute of limitations.

9 Under 12 U.S.C. § 2614, a claim under § 2607 must be brought within a year after
10 the “date of the occurrence of the violation. . . .” *See Brewer v. Indymac Bank*, 609 F.Supp.2d
11 1104, 1117 (E.D. Cal. 2009). As noted above, plaintiff Tinker consummated this real estate loan
12 in April 2007; the instant action, filed in March 2011, is not timely.

13 Defendants do concede that the RESPA statute of limitations is subject to
14 equitable tolling, but argue that plaintiffs’ assertions do not support any such claim. *Id.* at 1117-
15 18; *Yuleva v. Greenpoint Mortgage Funding, Inc.* 2009 WL 2880393, at *14 (E.D. Cal. Sept. 3,
16 2009) (*Yuleva I*). They are correct: as with plaintiffs’ TILA claim, to plead their entitlement to
17 equitable tolling, plaintiffs must do more than claim they were unable to discover the nature of
18 their claim because of defendants’ fraud, but rather must allege facts in support of a claim of
19 excusable delay. *Brewer*, 609 F.Supp.2d at 1117; *Edstrom*, 2010 WL 4069482, at *3. Plaintiffs
20 will be given leave to amend this claim if they are able, not only to provide specifics about
21 equitable tolling but also to describe the nature of the fees charged and the basis for their claim
22 that those fees did not relate to services performed. *Compare Palmer v. GMAC Commercial*
23 *Mortg.*, 628 F.Supp.2d 186, 193-94 (D.D.C. 2009) (complaint was adequate, if thin, when
24 plaintiff alleged that excessive fees for the loan must have been for services not provided in light
25 of her credit-worthiness).

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1 C. Fair Credit Reporting Act

2 The Fair Credit Reporting Act (FCRA), 15 U.S. C. §§ 1681, *et seq.*, was enacted
3 in order to ensure that consumer reporting agencies “exercise their grave responsibilities with
4 fairness. . .” 15 U.S.C. § 1681(a)(4). It applies to consumer reporting agencies or users of
5 reported information who wilfully or negligently violate its provisions. *Rush v. Macy’s New*
6 *York*, 775 F.2d 1554, 1557 (11th Cir. 1985). A “consumer reporting agency” is one that
7 “regularly engages in whole or in part in the practice of assembling or evaluating consumer
8 credit information or other information on consumers for the purpose of furnishing consumer
9 reports to third parties” 15 U.S.C. § 1681a(f); *Rush*, 775 F.2d at 1557. A consumer report
10 is “any . . . communication of any information by a consumer reporting agency bearing on a
11 consumer’s credit worthiness, credit standing, credit capacity, general reputation, personal
12 characteristics or mode of living which is used . . . or collected . . . for the purpose of serving as a
13 factor in establishing the consumer’s eligibility for . . . credit. . . .” 15 U.S.C. § 1681a(d); *Mathis*
14 *v. LHR, Inc.*, 2010 WL 316546, at *2 (S.D. Ga. Jan. 26, 2010).

15 Plaintiffs allege that defendants “wrongfully, improperly, and illegally reported
16 negative credit information”, including “an excessive amount of debt into which Plaintiffs were
17 tricked into . . . signing,” even though plaintiffs made every payment on time from closing until
18 the time of default; this caused a decline in plaintiffs’ credit score. Compl. ¶ 79. They describe
19 defendant Aurora as an entity “engaged in the business of banking services and servicing of
20 residential mortgages” and MERS as a business which was “operating a database, assigning
21 mortgages. ” Plaintiffs have not alleged any facts suggesting that defendants Aurora or MERS
22 are in the business of compiling consumer credit information and thus subject to FCRA; in fact,
23 their descriptions of these two defendants demonstrate that neither is in a business subject to the
24 provisions of the act. *Hedman v. Aurora Loan Services*, 2010 WL 3784170, at *4 (E.D. Cal.
25 Sep. 27, 2010). This cause of action is dismissed with prejudice.

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1 D. Fraudulent Misrepresentation

2 Plaintiffs allege that the defendants maliciously concealed information that should
3 have been disclosed, “materially misrepresented material information” and “misrepresented the
4 truth;” that plaintiff Tinker reasonably relied on defendants “in agreeing to execute the mortgage
5 loan documents;” and that plaintiffs first learned of these misstatements and omissions in
6 September 2010. Compl. ¶¶ 84-87, 90. In the section of the complaint providing “facts common
7 to all counts,” plaintiffs describe only one instance of concealment: they allege the defendants
8 failed to disclose the identity of the “true lender,” i.e., the members of the REMIC trust. Compl.
9 ¶ 32.

10 Defendants argue that these allegations do not state a claim for fraudulent
11 misrepresentation under California law and do not meet the heightened pleading standard for
12 fraud under Federal Rule of Civil Procedure 9(b). Plaintiffs do not discuss how the complaint’s
13 allegations meet the pleading requirements. Instead they provide examples of defendants’
14 allegedly fraudulent acts; they claim, for example, that defendants recorded spurious documents,
15 which is prohibited by California law. ECF No. 25 at 16. Even if these arguments established
16 the elements of fraudulent misrepresentation, the court could not consider them in evaluating the
17 sufficiency of the complaint. *Adams v. New York State Educ. Dept.*, 752 F.Supp.2d 420, 433 n.4
18 (S.D.N.Y. 2010) (court will not consider information in points and authorities in considering
19 sufficiency of complaint); *Winn v. Lassen Canyon Nursery Inc.*, 2010 WL 4688798, at *2 (E.D.
20 Cal. Nov. 10, 2010).

21 In California, a claim of fraudulent misrepresentation has five elements:
22 (1) misrepresentation, which encompasses false representation, concealment and nondisclosure;
23 (2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance; and (5) damage. *Lazar v.*
24 *Superior Court*, 12 Cal.4th 631, 637 (1996); *Champlaie v. BAC Home Loans Servicing, LP*, 706
25 F.Supp.2d at 1058; *Dooms v. Federal Home Loan Mortgage Corporation*, 2011 WL 1232989, at
26 *13 (E.D. Cal. 2011). A fraud claim against a corporation must provide information about the

1 person who made the representations challenged as fraudulent, and his or her authority to speak.
2 *Dooms*, 2011 WL 1232989, at *14.

3 In addition to the usual pleading requirements of Rule 8, allegations of fraud must
4 meet heightened pleading standards. Under Rule 9(b), a plaintiff who alleges fraud “must state
5 with particularity the circumstances constituting the fraud,” but may “aver[] generally” the state
6 of mind animating the fraud. The pleading must “be specific enough to give defendants notice
7 of the particular misconduct . . . so that they can defend against the charge and not just deny that
8 they have done anything wrong.” *Sanford v. Memberworks, Inc.*, 625 F.3d 550, 558 (9th Cir.
9 2010) (quoting *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009)). To avoid
10 dismissal, the complaint must describe the time, place, and specific content of the false
11 representations and identify the parties to the misrepresentations. *Id.*; *Dooms v. Federal Home*
12 *Loan Mortgage Corporation*, 2011 WL 1232989, at *14. In addition, a plaintiff may not “lump
13 multiple defendants together” but rather must “differentiate their allegations.” *Destine v.*
14 *Reiswig*, 630 F.3d 952, 958 (9th Cir. 2011) (quoting *Cisneros v. Instant Capital Funding Grp.*,
15 *Inc.*, 263 F.R.D. 595, 606-07 (E.D. Cal. 2009)). Plaintiffs’ conclusory claims – that defendants
16 failed to disclose the true identity of the lender – fall far short of the specificity required by the
17 federal rules and do not match the elements of the cause of action as defined by federal law.

18 Defendants also argue that the cause of action is barred by the three year statute
19 of limitations. *See* Cal. Civ. Code § 338(d) (three year statute of limitations for actions “on the
20 ground of fraud or mistake,” which does not accrue “until the discovery . . . of the facts
21 constituting the fraud”). A party is deemed to have discovered the fraud when he “has reason at
22 least to suspect the factual basis for its elements.” *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal.4th
23 797, 807 (2005) (quoting *Norgart v. The Upjohn Company*, 21 Cal.4th 383, 398 (1999)). To rely
24 on a claim of delayed discovery, a plaintiff must allege facts showing that the facts could not
25 have been discovered earlier even in the exercise of reasonable diligence and identifying how
26 and when plaintiff discovered the fraud. *Briosos v. Wells Fargo Bank*, 2011 WL 1740100, at *4

1 (N.D. Cal. May 5, 2011); *but see Bonds v. Nicoletti Oil, Inc.*, 2008 WL 2233511, at **7-8 (E.D.
2 Cal. May 28, 2008) (questioning whether California pleading standards apply, but finding it
3 plaintiff's burden to plead facts supporting delayed discovery). Plaintiffs' bare claim that they
4 did not discover the fraud until September 2010 does not save this claim from the operation of
5 the statute of limitations. They will be given leave to amend this portion of the complaint, if
6 they are able.

7 E. Breach Of Fiduciary Duty

8 Plaintiffs allege that defendants breached their fiduciary duty to Tinker by
9 inducing her to "enter into a mortgage transaction which was contrary to TINKER'S stated
10 intention; contrary to the Plaintiffs' interest; and contrary to Plaintiffs' preservation of their
11 home." Compl. ¶ 93. They also allege that they "reposed trust and confidence" in defendants
12 because plaintiffs are not bankers, mortgage brokers, mortgage lenders or securities dealers. *Id.*
13 ¶ 92. Defendants argue that there is no fiduciary relationship between a lending institution and a
14 borrower. ECF No. 16-1 at 14. Plaintiffs respond that defendant Aurora, a loan servicer, was a
15 fiduciary because it was not a lender and that other defendants were fiduciaries because they
16 were not the source of the funds and so are brokers only, not lenders. ECF No. 25 at 17.
17 Nothing in their description of the transaction, however, suggests that either Aurora or MERS
18 played any role in the loan origination, either as lender or broker. Compl. ¶¶ 3-4, 17-18.

19 The elements of a claim of breach of fiduciary duty are (1) the existence of a
20 fiduciary duty; (2) a breach of that duty; (3) damage as the result of the breach. *Rosal v. First*
21 *Federal Bank of California*, 671 F.Supp.2d 1111, 1128 (N.D. Cal. 2009). Under California law,
22 there is no fiduciary relationship between a lender and a borrower when "the institution's
23 involvement in the loan transaction does not exceed the scope of its conventional role as mere
24 lender of money." *Nymark v. Heart Fed. Savings & Loan Assn.*, 231 Cal.App.3d 1089, 1096
25 (1991); *Rosal*, 671 F.Supp. 2d at 1129. Courts have similarly determined that a loan servicer
26 owes no fiduciary duty to a borrower "when its involvement in the transaction does not exceed

1 the scope of its conventional role as a loan servicer such that it assumed a fiduciary duty.”
2 *Huerta v. Ocwen Loan Servicing, Inc.*, 2010 WL 728223, at *4 (N.D. Cal. Mar. 1, 2010);
3 *Walters v. Fidelity Mortgage of California, Inc.*, 730 F.Supp.2d 1185, 1205 (E.D. Cal. 2010).
4 Nothing in the complaint suggests that MERS, described as a corporation that operates a
5 database and assigns mortgages, has any fiduciary relationship with a mortgagor. Nothing in its
6 role as nominee for the lender suggests that MERS owes any fiduciary duty to a trustor/borrower
7 and plaintiffs have not alleged as much. This claim is properly dismissed.

8 F. Unjust Enrichment

9 Plaintiffs allege that Tinker had an implied contract with defendants for them to
10 provide credit to Tinker without charging fees unrelated to the settlement of the loan and that
11 defendants cannot retain the fruits of their acts in charging a “higher interest rate, fees, rebates,
12 kickbacks, profits . . . gains and yield spread premium unrelated to the settlement services
13 provided at closing.” Compl. ¶¶ 98-99.

14 Defendants contend that unjust enrichment is not a cause of action but rather is a
15 general principle underlying other remedies. ECF No. 16-1 at 14. They note that plaintiffs’
16 claims all stem from the fees collected as part of the original loan transaction and that nothing in
17 the complaint suggests either MERS or Aurora were parties to that transaction. *Id.* Plaintiffs
18 counter that the claim of fees and kickbacks is pled generally, not only in connection with the
19 loan. ECF No. 25 at 18.

20 The elements of an unjust enrichment claim are “receipt of a benefit and [the]
21 unjust retention of the benefit at the expense of another.” *Peterson v. Cellco Partnership*, 164
22 Cal.App.4th 1583, 1593 (2008) (quoting *Lectrodryer v. SeoulBank*, 77 Cal.App.4th 723, 726
23 (2000)). It is, as defendants argue, not an independent cause of action, but rather is pled as part
24 of a quasi-contract claim “in order to avoid unjustly conferring a benefit upon a defendant where
25 there is no valid contract.” *Ram v. Wachovia Mortg., FSB*, 2011 WL 1135285, at *9 (E.D. Cal.
26 Mar. 25, 2011). Despite plaintiffs’ argument, their claim of unjust enrichment is based on fees,

1 interest rates, kickbacks and profits, among other things, “unrelated to settlement services
2 provided at closing.” They have not pled that Aurora or MERS had any part in the loan closing
3 process, which is the basis of their claim of unjust enrichment. This portion of the complaint
4 fails to state a claim. *See Jackson v. Ocwen Loan Servicing, LLC*, 2010 WL 3294397, at *6
5 (E.D. Cal. Aug. 20, 2010).

6 G. Civil Conspiracy To Defraud

7 Plaintiffs allege that “in connection with the application for and consummation of
8 the mortgage loan . . . the Defendants agreed . . . to engage in actions in a course of conduct
9 designed to further an illegal act or accomplish a legal act by unlawful means, and to commit one
10 or more overt acts in furtherance of the conspiracy to defraud Plaintiff, including . . . the
11 commencement of foreclosure.” Compl. ¶ 105. They also aver that the defendants agreed to
12 engage in the conspiracy to defraud “for the common purpose of accruing economic gains for
13 themselves . . .,” and that as a result of the “actions of Defendants in combination resulting in
14 fraud and breaches of fiduciary duty,” plaintiffs have suffered damages. Compl. ¶¶ 106, 108.

15 The elements of a cause of action for civil conspiracy in California are “the
16 formation and operation of the conspiracy and damage resulting to the plaintiff from an act or
17 acts done in furtherance of the common design.” *Doctors’ Co. v. Superior Court*, 49 Cal.3d 39,
18 44 (1989); *Champlaie*, 706 F.Supp.2d at 1057. “[T]ort liability arising from conspiracy
19 presupposes that the conspirator is legally capable of committing the tort; i.e., that he or she
20 owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that
21 duty.” *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 511 (1994);
22 *Champlaie*, 706 F.Supp.2d at 1057. Plaintiffs have not identified any duty recognized by law
23 that Aurora and MERS owes to them and so have not pled a civil conspiracy claim based on
24 breach of a specific duty.

25 Plaintiffs do allege that defendants entered into a conspiracy to defraud. Like
26 civil conspiracy in general, a conspiracy to defraud is not an independent tort, but rather “only

1 serves as a theory of liability for claims of fraud.” *Lane v. Vitek Real Estate Industries Group*,
2 713 F.Supp.2d at 1103; *Mehrtash v. Mehrdash*, 93 Cal.App.4th 75, 82 (2001) (“there is no
3 separate tort of civil conspiracy, and there is no civil action for conspiracy to commit a
4 recognized tort unless the wrongful act itself is committed . . .”). In California, “nondisclosure
5 is not ordinarily actionable unless the defendant is a fiduciary with a duty to disclose,” but
6 “active concealment or suppression of facts by a nonfiduciary is the equivalent of a false
7 representation, i.e., actual fraud.” *Younan v. Equifax, Inc.*, 111 Cal.App.3d 498, 512-13 (1980).
8 Because a conspiracy to defraud requires that the defendants engaged in fraud, the strict pleading
9 requirements of Rule 9(b) apply. *Lane*, 713 F.Supp.2d at 1103. Plaintiffs have come nowhere
10 near satisfying these requirements, but will be given the opportunity to do so if they are able.

11 H. RICO

12 Plaintiffs allege that each of the defendants is “an enterprise Defendant” and that
13 each one’s use of “multiple corporate entities, multiple parties, and concerted and predetermined
14 acts and conduct specifically designed to defraud Plaintiffs constitutes ‘an enterprise,’” designed
15 to perpetrate a fraud “through the use of intentional nondisclosure, material misrepresentation,
16 and creation of fraudulent loan documents.” They also allege that defendants knew the other
17 defendants were engaging in or planning to engage in the violations of law described in the body
18 of the complaint and each abetted the acts of the other. Compl. ¶¶ 112-113, 119. Defendants
19 argue that these allegations do not satisfy the pleading requirements for a civil RICO violation.
20 As is typical of plaintiffs’ opposition to the motion to dismiss, plaintiffs engage in no real
21 analysis of the challenges to their pleading but rather fall back on the fact that this court must
22 presume their allegations to be true and to draw all inferences in their favor. What plaintiffs ask,
23 in essence, is for the court to supply essential allegations for their causes of action in the guise of
24 drawing inferences. This the court cannot do, even when applying the liberal standard of
25 evaluating *pro se* complaints; it certainly will not do so where, as here, counsel has drafted the
26 complaint. *Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982); *Smith v. United States*,

1 561 F.3d 1090, 1096 (10th Cir. 2009) (court “will not supply additional factual allegations to
2 round out a plaintiff’s complaint or construct a legal theory on a plaintiff’s behalf.”).

3 Under 18 U.S.C. § 1962(c), it is unlawful “for any person employed by or
4 associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct
5 of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful
6 debt.” “Racketeering activity” is defined as any of a number of “generically specified criminal
7 acts as well as the commission of one of a number of listed predicate offenses.” *Sosa v.*
8 *DIRECTV, Inc.*, 437 F.3d 923, 939 (9th Cir. 2006). A “pattern of racketeering activity” requires
9 at least two acts, and an unlawful debt is one stemming from illegal gambling. 18 U.S.C.
10 § 1961(1), (5) & (6).

11 Although § 1962 defines a crime, a plaintiff may seek civil remedies for RICO
12 violations if he has been “injured in his business or property by reason of a violation of section
13 1962. . . .” 18 U.S.C. § 1964(c). The elements of a RICO claim are “(1) conduct; (2) of an
14 enterprise; (3) through a pattern (4) of racketeering activities (known as ‘predicate acts’);
15 (5) causing injury to the plaintiff’s ‘business or property.’” *Grimmett v. Brown*, 75 F.3d 506,
16 510 (9th Cir. 1996). The fifth element has two subparts: the plaintiff must show that the injury
17 was proximately caused by the conduct and that he has suffered a concrete financial loss. *Chaset*
18 *v. Fleer/Skybox Intern., LP*, 300 F.3d 1083, 1086 (9th Cir. 2002). “Congress enacted RICO ‘to
19 combat organized crime, not to provide a federal cause of action and treble damages’ for
20 personal injuries.” *Id.* (quoting *Oscar v. University Students Coop. Ass’n.*, 965 F.3d 783, 785
21 (9th Cir. 1992) (en banc)).

22 Plaintiffs’ RICO cause of action does not appear to be tethered to the statute, but
23 rather is pled simply as a general damages claim for which plaintiffs’ seeks treble damages.
24 Nothing in the complaint suggests that the defendants have committed any of the crimes listed as
25 RICO predicate acts. To the extent the court can identify anything in this convoluted claim as a
26 predicate act, it is the perpetration of fraud on plaintiffs “by use of intentional nondisclosure,

1 material misrepresentation, and creation of the fraudulent loan documents.” Neither fraud, in
2 and of itself, nor the creation of fraudulent loan documents are predicate offenses under RICO.
3 *See Derakhshan v. Mortgage Electronic Registration Systems*, 2009 WL 3346780, at *4 (C.D.
4 Cal. Oct.13, 2009) (predatory lending is not predicate offense for RICO). This cause of action is
5 not sufficiently pled.

6 I. Quiet Title

7 Plaintiffs allege that defendants have no legal or equitable claim, right or interest
8 to their property and further allege that “the real party in interest on the lender’s side may be the
9 owner of the asset-backed security issued by the servicing and pooling vendor, the insurer
10 through some claimed equitable interests, or the Federal Government through the United States
11 Department of the Treasury or the Federal Reserve. The security is a ‘securitized’ bond deriving
12 its value from the underlying mortgages, of which the subject mortgage is one. Thus Plaintiffs
13 are entitled to quiet title against Defendants, clearing title of the purported subject mortgage
14 encumbrance.” Compl. ¶¶ 124-126. Plaintiffs also claim they have attempted to rescind the
15 loan, but do not know to whom the request should be addressed. *Id.* ¶ 123.

16 Defendants argue that plaintiffs cannot quiet title, as they have not tendered the
17 balance of the loan secured by the Deed of Trust. ECF No. 16-1. Plaintiffs counter that none of
18 the defendants are the real parties in interest, as none of them funded the loan and that if tender is
19 required, it would not be payable to any of the defendants. ECF No. 25 at 20.

20 Tender of the indebtedness is required to quiet title in California. *Aguilar v. Boci*,
21 39 Cal.App.3d 475, 477 (1974) (“the cloud upon his title persists until the debt is paid”); *Kelley*
22 *v. Mortgage Electronic Registration Systems Inc.*, 642 F.Supp.2d 1048, 1057 (N.D. Cal. 2009).
23 Plaintiffs have not suggested they are able to tender the amount due under the note, whether or
24 not it is owed to defendants. They will be given the opportunity to amend if they are able.

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1 J. Usury And Fraud

2 Plaintiffs allege that the loan and mortgage were structured so as to create the
3 appearance that the property was worth more than the actual market value; that defendants
4 disguised the transaction so that neither the real party in interest nor the fees, rebates or
5 kickbacks were revealed to plaintiffs; that defendants’ scheme was a plan to trick plaintiffs into
6 signing “what would become a negotiable security used to sell unregulated securities under
7 fraudulent and changed terms from the original note” and used to collect interest “in excess of
8 the legal rate.” Compl. ¶¶ 130-133.

9 Defendants argue that these allegations fail to state a claim for usury because the
10 complaint asserts, without factual support, that the interest exceeds the legal rate. ECF No. 16-1
11 at 18. They also contend that California’s usury laws are preempted by the Depository
12 Institutions and Deregulation and Monetary Control Act of 1980, 12 U.S.C. § 183d, which
13 provides that loans secured by a first lien on residential property are exempted from state usury
14 laws. *Id.* They cite only a case discussing the preemption of Washington’s laws without
15 addressing whether California law has opted out of the provisions preempting state usury laws.
16 *See* 12 U.S.C. § 1735f-7a(b)(2). The court declines to make defendants’ argument for them.

17 In California, “the usury laws protect against the oppression of debtors through
18 excessive interest rates charged by lenders.” *Agapitov v. Lerner*, 108 Cal.App.4th 830, 838
19 (2003). A usury claim has four elements: the transaction must be a loan or forbearance³, the
20 interest must exceed the statutory maximum, the loan and interest must be absolutely repayable
21 by the borrower, and the lender must intend to enter into a usurious transaction. *Ghirardo v.*

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24 ³ “A forbearance occurs when the creditor, in exchange for consideration, agrees to wait
25 for a period of time to collect the debt. A forbearance may also occur in credit sale transactions,
26 where the original note is modified to extend the period of payment.” *Roodenburg v. Pavestone
Co., L.P.*, 171 Cal.App.4th 185, 192 (2009) (quoting *Sheehy v. Franchise Tax Bd.*, 84
Cal.App.4th 280, 284 (2000)).

1 *Antonioli*, 8 Cal.4th 791, 798 (1994). An interest rate that exceeds ten percent per annum may
2 be usurious. Cal. Const. Art. 15 § 1.

3 Plaintiffs do not disclose the interest rate on their loan or contend that it exceeded
4 the maximum rate allowed by law and so have not adequately pled a cause of action for usury.

5 *Solano v. America's Servicing Company*, 2011 WL 1669735, at *9 (E.D. Cal. May 3, 2010).

6 This claim will be dismissed with leave to amend.

7 K. Wrongful Foreclosure And Breach Of Trust Instruments

8 Plaintiffs allege that defendants are not the beneficiaries of the deed of trust, but
9 rather are acting as trustees of a REMIC⁴ Loan Pool Trust; that “if the truth is that the Note was
10 separated from the Deed of Trust and transferred to the loan pool, . . . the Right Title and Interest
11 to the Deed of Trust followed the Note. . . and any subsequent purported Assignment is a lie. . .;”
12 the substitution of the trustee in this case is void because it was not executed by the lender and
13 did not comply with provisions of the California Civil Code; the Notice of Default was recorded
14 before the assignment; that the assignment of the mortgage with a power of sale must be
15 recorded in order for any sale under the mortgage to be proper; that the foreclosure violates
16 paragraph 20 of the Deed of Trust because defendants have not complied with its provisions.
17 Compl. ¶¶ 142-151.

18 Defendants argue that the Notice of Default was properly issued by Quality Loan
19 Services because it was acting as agent for the beneficiary even before it was formally

20
21 ⁴ “Real Estate Mortgage Investment Conduits or ‘REMICS’ . . . are trusts established to
22 facilitate under favorable tax consequences the issuance of asset-backed securities in the form of
23 beneficial interests in large pools of real estate mortgages. Typically an institutional lender or
24 ‘depositor’ assembles a pool of mortgages which it or an affiliated investment bank deposits into
25 a trust administered by a trustee, which then issues certificates of beneficial ownership to
26 investors. The trust holds the mortgages for the benefit of the certificate holders. When
homeowners . . . make their monthly mortgage payments, or pay off their mortgages, or when
they sell or refinance, the payments go to the trust and are passed through to the certificate
holders” *Deutsche Bank National Trust Company v. DeFranco*, 2011 WL 1759816, at *1
n.1 (Conn. Super. 3/14/11) (internal quotation & citation omitted; cited as provided by
Connecticut Rules of Appellate Procedure, 2011 Connecticut Practice Book, Chapter 67, § 67-
11).

1 substituted as Trustee and that the substitution was proper under California law. They also argue
2 that MERS, the beneficiary of the loan, has the authority to pursue foreclosure upon the
3 borrowers' default. ECF No. 16-1 at 19-21. Plaintiffs counter that the Notice of Default was
4 issued by parties who were strangers to the original transaction and that MERS' purported
5 substitution of the Trustee is invalid because MERS, as only the nominee of the beneficiary, did
6 not have authority under California law to take any actions. ECF No. 25 at 20-23.

7 In this case, the deed of trust identified GreenPoint Mortgage Funding, Inc. as the
8 lender, the trustee as Marin Conveyancing Corp., and MERS as the beneficiary.⁵ ECF No. 2-3 at
9 3-4. The deed continues:

10 TRANSFER OR RIGHTS IN THE PROPERTY. The beneficiary
11 of this Security Interest is MERS (solely as nominee⁶ for Lender
12 and Lender's successors and assigns) and the successors and
13 assigns of MERS. This Security Instrument secures to Lender:
14 (i) the repayment of the Loan, and all renewals, extensions and
15 modifications of the Note; and (ii) the performance of the
16 Borrower's covenants and agreements under this Security
17 Instrument and the Note. For this purpose, Borrower irrevocably
18 grants and conveys to Trustee, in trust, with power of sale, the . . .
19 described property. . . .

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20 ⁵ MERS is "a national electronic registry that tracks the transfer of ownership interests
21 and servicing rights in mortgage loans." *Gomes v. Countrywide Home Loans, Inc.*, 192
22 Cal.App.4th 1149, 121 Cal.Rptr. 3d 819, 822 (2011). "Through the MERS System, MERS
23 becomes the mortgagee of record for participating members through assignment of the members'
24 interests to MERS. MERS is listed as the grantee in the official records maintained at county
25 register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights
26 to the mortgages. The lenders can then sell these interests to investors without having to record
the transaction in the public record." *Lane*, 713 F.Supp.2d at 1098-99; *see also Deutsche Bank
National Trust Co v. DeFranco*, 2011 WL 1759816, at *1 n.2 (describing MERS).

25 ⁶ A "nominee" is "a person designated to act in place of another" or one "who holds bare
26 legal title for the benefit of others or who receives and distributes funds for the benefit of
others." *Black's Law Dictionary* at 1072 (9th Ed. 2009).

1 Borrower understands and agrees that MERS holds only legal title
2 to the interests granted by Borrower in this Security Instrument,
3 but if necessary to comply with law or custom, MERS (as nominee
4 for Lender and Lender’s successors and assigns) has the right: to
5 exercise any or all of those interests, including, but not limited to,
6 the right to foreclose and sell the Property; and to take any action
7 required of Lender including, but not limited to, releasing and
8 cancelling this Security Instrument.

9 ECF No. 2-3 at 4. The Deed contains additional terms in paragraph 20:

10 The Note or a partial interest in the Note (together with this
11 Security Instrument) can be sold one or more times without prior
12 notice to Borrower. A sale might result in a change in the entity
13 (know as the “Loan Servicer”) that collects Periodic Payments due
14 under the Note and this Security Instrument and performs other
15 mortgage servicing obligations under the Note, this Security
16 Instrument, and Applicable Law.

17 ECF No. 2-3 at 12-13. Other provisions give the lender the power of sale:

18 If Lender invokes the power of sale, Lender shall execute or cause
19 Trustee to execute a written notice of the occurrence of an event of
20 default and of Lender’s election to cause the Property to be sold.
21 Trustee shall cause this notice to be recorded in each county in
22 which any part of the Property is located. Lender or Trustee shall
23 mail copies of the notice . . . to Borrower After the time
24 required by Applicable Law, Trustee, without demand on
25 Borrower, shall sell the property at public auction

26 Trustee shall deliver to the purchaser Trustee’s deed conveying the
Property without covenant or warranty . . .

ECF No. 2-3 at 14, ¶ 22.

The deed in this case also provides:

Lender, at its option, may from time to time appoint a successor
trustee to any Trustee appointed hereunder by an instrument
executed and acknowledged by the Lender and recorded in the
office of the Recorder of the county in which the Property is
located. The instrument shall contain the name of the original
Lender, Trustee and Borrower . . . and the name and address of the
successor trustee. Without conveyance of the Property, the
successor trustee shall succeed to all the title, powers and duties
conferred upon the Trustee herein. . . .

ECF No. 2-3 at 14.

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1 On December 15, 2008 at 2:46 p.m., the Placer County Recorder recorded a
2 “Notice of Default and Election To Sell Under Deed of Trust.” This provided:

3 NOTICE IS HEREBY GIVEN: That the undersigned is either the
4 original trustee, the duly appointed substituted trustee, or acting as
5 agent for the trustee or beneficiary under a Deed of Trust dated
6 April 3, 2007. . . .to secure certain obligations in favor of
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,
INC., AS NOMINEE FOR GREENPOINT MORTGAGE
FUNDING, INC., as beneficiary, recorded 4/17/2007. . . .

7 ECF No. 2-6 at 3. The Notice continued: “the present beneficiary . . . has executed and delivered
8 to . . . [the] Trustee, a written Declaration of Default and Demand for same . . . and has elected
9 and does hereby elect to cause the trust property to be sold. . . .” ECF No. 2-6 at 3. The
10 document identifies “Quality Loan Service Corp., AS AGENT FOR BENEFICIARY BY: LSI
11 Title Company” and is signed by “Karen Glenn as Authorized Agent.”⁷ *Id.*

12 On January 3, 2009, Quality Loan Service Corp. sent a “Debt Validation Notice”
13 to plaintiffs, relating to “a debt owed to MORTGAGE ELECTRONIC REGISTRATION
14 SYSTEMS, INC.” and listing the delinquency owed as of December 15, 2008 as \$9,393.63. ECF
15 No. 2-7 at 2.

16 On January 28, 2009 at 10:18 a.m., the Placer County Recorder’s Office recorded
17 a “Substitution of Trustee,” by which MERS substituted Quality Loan Service Corporation as
18 trustee. ECF No. 2-8 at 2. Although it was signed on December 15, 2008, by Mary Jane Sarne,
19 identified as Vice President of MERS, it was not notarized until December 29, 2008. ECF No.
20 2-8 at 3.⁸

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22
23 ⁷ The signature is hard to read, but appears to be that shown here.

24 ⁸ To the extent plaintiffs rely on the different dates on the substitution as evidence of
25 some wrongdoing or fraud, they are mistaken: “notarization is an acknowledgment of the
26 signer’s identity and is not essential to a document’s validity.” *In re Mi Arbolito, LLC*, 2010 WL
3829660, at *17 (Bankr. S.D. Cal. 2010); *see also Wilson v. Pacific Coast Title*, 106 Cal.App.2d
599, 602 (1951) (assignment valid even though it was not acknowledged until two years after it
was signed).

1 On March 17, 2009, at 9:37 a.m., Quality Loan Service Corp. recorded a Notice
2 of Trustee’s Sale. ECF No. 2-9 at 2.

3 On September 2, 2010, MERS recorded an assignment of its beneficial interest in
4 the deed of trust, “together with the note or notes therein described or referred to in said ‘Deed of
5 Trust’ to Aurora Loan Services LLC.” ECF No. 2-10 at 2. Plaintiffs corresponded with Aurora
6 in an attempt to remedy the default and prevent the sale. ECF No. 9-12 at 1-54.

7 Quality Loan Service recorded another Notice of Trustee’s Sale, setting the sale
8 for March 2011. The sale was held in April; Quality Loan Service as Trustee issued a Trustee’s
9 Deed Upon Sale, granting the deed to Aurora, the foreclosing beneficiary and listing the amount
10 of unpaid debt as \$713,552.88. ECF No. 36-1 at 4-5

11 Plaintiffs argue that the sale was not proper because neither Quality nor Aurora
12 had the authority to foreclose, as the chain of title purporting to convey this authority is “void or
13 illegal;” no entity had the authority to convey the beneficial interest because the “funding for the
14 loans came from the investors, and not from the ‘Lender;” and that MERS had no authority to
15 substitute Quality as trustee and advance the foreclosure; that Greenpoint, listed as the lender in
16 the Deed of Trust, made no assignments or substitutions. ECF No. 25 at 21-23. They rely on *In*
17 *re Salazar*, 448 B.R. 814 (Bankr. S.D. Cal. 2011), to argue that MERS does not have the
18 authority to assign the beneficial interest in the deed of trust and that the assignments were not
19 properly recorded under California Civil Code section 2932.5⁹ before the Notice of Default was
20 recorded. ECF No. 25 at 22. Defendants counter correctly that *Salazar* is not binding precedent
21 and moreover that it misapplies California law, which does not require that an assignment be
22 recorded every time a beneficial interest in a note and deed of trust is sold. They rely on a
23

24 ⁹ Section 2932.5 provides: “Where a power to sell real property is given to a mortgagee
25 . . . in an instrument to secure the payment of money, the power is part of the security and vests
26 in any person who by assignment becomes entitled to payment of the money secured by the
instrument. The power of sale may be exercised by the assignee if the assignment is duly
acknowledged and recorded.”

1 number of cases that have found section 2932.5 to apply only to mortgages, not to deeds of trust.
2 ECF No. 36 at 10; *see, e.g., Parcay v. Shea Mortgage, Inc.*, 2010 WL 1659369, at *11 (E.D. Cal.
3 Apr. 23, 2010); *Caballero v. Bank of America*, 2010 WL 4604031, at *3 (N.D. Cal. Nov. 4,
4 2010).

5 In *Salazar*, US Bank foreclosed on the debtor’s house although it was not the
6 original beneficiary of record and there was no recorded assignment of the deed of trust to it.
7 The Bank then filed an unlawful detainer action against the debtor, and that action was close to
8 trial when the debtor filed bankruptcy. US Bank sought relief from the stay in bankruptcy so it
9 could continue with the unlawful detainer action, but the court denied the request, finding that
10 the debtor had established a “prima facie case that the foreclosure sale was void.” *Id.* at 816-17.

11 To reach that conclusion, the court determined that for the foreclosure to have
12 been valid, US Bank had to be entitled to payment of the secured debt and its status as
13 foreclosing beneficiary had to be recorded before the sale, both required by section 2932.5. *Id.*
14 at 820. The court rejected the argument that section 2932.5 applied only to mortgages, finding
15 that the historical distinctions between the two forms of security for real property transactions
16 had been abolished and that it was more important than it had been during the Great Depression
17 for a borrower to know the identity of the entity with the power of sale. *Id.* at 821-22.

18 The court in *Salazar* also rejected US Bank’s argument that MERS’ status as
19 nominee of the beneficiary obviated the need for recording of the assignment under section
20 2932.5. *Id.* at 822. It concluded that MERS’ role as nominee of the beneficiary did not give it
21 authority to foreclose under the Deed of Trust, because that document reserved that power to the
22 lender, to be exercised by MERS only when ““necessary to comply with law or custom,”” which
23 was not defined. *Id.* at 823. The court then declined US Bank’s “invitation to overlook the
24 statutory foreclosure mandates of California law” and rejected MERS as an alternative to public
25 recordation. *Id.* at 824; *see also In re Doble*, 2011 WL 1465559 (Bankr. S.D. Cal. Apr. 24,
26 2011) (reaching similar conclusions).

1 Despite *Salazar*'s appeal to compelling policy considerations, this court does not
2 find the case persuasive on either point in light of the current state of the law.

3 1. Section 2932.5

4 In California, a mortgage is defined in the Civil Code as “a contract by which
5 specific property . . . is hypothecated for the performance of an act, with the necessity of a
6 change of possession.” Cal. Civ. Code § 2920.¹⁰ However, “there are no statutory provisions
7 dictating the form or stating the effect of deeds of trust.” *Domarad v. Fisher & Burke, Inc.*, 270
8 Cal.App.2d 543, 553 (1969) (internal quotation omitted). Although both are used to secure the
9 purchase of real property, early California cases treated them differently, holding that a mortgage
10 created a lien on the property rather than passing title to the mortgagee, while title passed to the
11 trustee under a deed of trust. *Bank of Italy Nat. Trust & Savings Ass'n v. Bentley*, 217 Cal. 644,
12 654-55 (1933). Although the California Supreme Court found this distinction to have become
13 “well settled in our law [such that it] cannot now be disturbed,” *id.* at 655, it also recognized that
14 despite the “anomalous nature” of deeds of trust, they are in essence “only a mortgage with
15 power of sale.” *Id.* at 656-57. “In practical effect, if not in legal parlance, a deed of trust is a
16 lien on the property.” *Monterey S.P. Partnership v. W.L. Bangham, Inc.*, 49 Cal.3d 454, 460
17 (1989). “[M]ortgagees and trust deed beneficiaries alike hold security interests in property
18 encumbered by mortgages and deeds of trust. . . .” *Id.* at 461; *Olympic Federal Savings and*
19 *Loan Association v. Regan*, 648 F.2d 1218, 1221 (9th Cir. 1981) (“security interests represented
20 by deeds of trust and those by mortgage liens are treated as if they were legally identical”).

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25 ¹⁰ All subsequent references to California statutes are to the Civil Code unless otherwise
26 specified.

1 Despite their similarities, mortgages and deeds of trust are in fact different in a
2 number of ways:

3 *Parties.* In the *mortgage*, there are two parties: the mortgagor and
4 the mortgagee. . . . In the *deed of trust*, there are usually three
parties: the trustor, the trustee, and the beneficiary. . . .

5 *Title.* In the *mortgage*, title remains with the mortgagor until a
6 foreclosure sale; then it passes from the mortgagor to the
7 purchaser. In the *deed of trust*, title passes to the trustee, who
holds it until default; then, after sale, it goes from the trustee to the
purchaser.

8 4 Witkin, Summary of California Law, Chap. VIII § 5 (10th Ed. 2005) (emphases in original);
9 *see also Parcay v. Shea Mortgage Inc.*, 2010 WL 1659369 at *12 (E.D. Cal. Apr. 23, 2010) (“A
10 deed of trust generally involves three parties, the borrower/trustor . . . who conveys the right to
11 sell the property to the trustee for the benefit of the lender/beneficiary.”); *Aviel v. Ng*, 161
12 Cal.App.4th 809, 816 (2008) (“there are three parties to a deed of trust: (1) the trustor, who owns
13 the property that is conveyed to (2) the trustee as security for the obligation owed to (3) the
14 beneficiary” [footnote, internal quotation omitted]).

15 Even though the trustee of a deed of trust holds title only “so far as may be
16 necessary to the execution of the trust,” *Bank of Italy*, 217 Cal. at 656, this difference underlies
17 the different application of section 2932.5. In *Stockwell v. Barnum*, 7 Cal.App. 413, 417 (1908),
18 the court found a directed sale valid, even though the assignment of the deed of trust to the
19 person who directed the sale had not been recorded. It noted that section 858, the predecessor of
20 section 2932.5, did not apply to deeds of trust. It reasoned that in a mortgage, the authority of
21 the mortgagee to sell must be clear, whereas with a deed of trust, the trustee holds the title, “thus
22 enabling him in executing the trust, to transfer to the purchaser a marketable record title. It is
23 immaterial who holds the note.” *Id.*; *see also Caballero v. Bank of America*, 2010 WL 4604031,
24 at *3 (N.D. Cal. Nov. 4, 2010); *Selby v. Bank of America*, 2010 WL 4347629, at *3 (S.D. Cal.
25 Oct. 27, 2010). “If the trustee’s deed recites that all statutory notice requirements and
26 procedures required by law for the conduct of the foreclosure sale have been satisfied, a

1 rebuttable presumption arises that the sale has been conducted regularly and properly. . . .”
2 *Moeller v. Lien*, 25 Cal.App.4th 822, 831 (1994); *see also Hamilton v. Bank of Blue Valley*, 746
3 F.Supp.2d at 1174; *but see Tamburri v. Suntrust Mortgage, Inc.*, 2011 WL 2654093, *5 (N.D.
4 Cal. July 6, 2011) (noting that *Stockwell* was decided before distinctions between mortgages and
5 deeds of trust were blurred.)

6 Section 2932.5 thus requires the recorded assignment of a mortgage so that a
7 prospective purchaser knows that the mortgagee in fact had the authority to exercise the power
8 of sale. This is not necessary when a deed of trust is involved, as the trustee conducts the sale
9 and transfers title, which sale and transfer carry a presumption of regularity. *See Domrad*, 270
10 Cal.App.2d at 554 (“The purpose of the recording statutes is to give notice to prospective
11 purchasers or mortgagees of land of all existing and outstanding estates, titles or interest,
12 whether valid or invalid, that may affect their rights as bona fide purchasers”).

13 2. The Role Of MERS

14 The Deed of Trust in this case lists MERS as the beneficiary, acting as nominee
15 for the lender, and gives MERS the authority to take certain actions, including instituting
16 foreclosure proceedings ECF No. 2-3 at 4. In *Salazar*, the court interpreted a similar deed of
17 trust and concluded that MERS did not have the authority to substitute the trustee or seek
18 foreclosure because that authority was reserved for the lender, while MERS was authorized to
19 act only “when necessary to comply with law or custom,” a phrase which was not explained or
20 defined by any evidence in the record. *Id.* at 823.

21 A number of courts considering the same language have concluded that it confers
22 on MERS the rights of the beneficiary, from foreclosing on the property, to assigning its
23 beneficial interest, to substituting a new trustee. *See Pantoja v. Countrywide Home Loans*, 640
24 F.Supp.2d 1177, 1188-89 (N.D. Cal. 2009) (foreclosing); *Hensley v. Bank of New York Mellon*,
25 2011 WL 2118810, at *2 (E.D. Cal. May 27, 2011) (assigning beneficial interest). Courts that
26 have found the form deed of trust to give MERS broad authority have generally neither focused

1 on nor discussed the phrase “when necessary to comply with law or custom,” suggesting the
2 phrase does not restrict MERS’ authority under the deed. Given the current state of the law, this
3 court also declines to find this language restricts MERS’ ability to exercise the powers plaintiff
4 Tinker granted to it in the deed of trust.

5 Other courts have found that whatever the role a nominee may play when
6 “necessary to comply with law and custom,” MERS acts as the agent of the lender. *Gomes v.*
7 *Countrywide Home Loans, Inc.*, 192 Cal.App. 4th 1149, 1156 n.7 & 1157 (2011); *In re Macklin*,
8 2010 WL 2015520, at *5; *Perlas v. Mortgage Electronic Registration Systems, Inc.*, 2010 WL
9 3079262, at *3 (N.D. Cal. Aug. 6, 2010); *Kurek v. America’s Wholesale Lender*, 2011 WL
10 3240482, at *2 (N.D. Cal. 2011); *see also In re Martinez*, 444 B.R. 192, 206 (Bankr. D.Kan.
11 2011) (“nominee” and “agent” have “nearly identical legal definitions”). In this case, as
12 GreenPoint’s agent, MERS can substitute a trustee or assign the beneficial interest under the
13 deed.

14 Finally, at least one court has considered the meaning of the phrase with which
15 the court in *Salazar* grappled: the form language in the deed of trust ““does not . . . require that the
16 nominee have the power to act only when directed by law; rather, the nominee may act on behalf
17 of the Lender as authorized by the deed of trust.”” *Tapia v. U.S. Bank, N.A.*, 718 F.Supp.2d 689,
18 696 (E.D. Va. 2010) (quoting *Ruiz v. Samuel I. White P.C., et al.*, 2009 WL 4823933, at *1 (E.D.
19 Va. Dec. 11, 2009)). This court agrees. However unfortunately arcane and obscure, the
20 language does nothing more than restate in less than clear terms that the deed of trust authorizes
21 MERS to act on the lender’s behalf.¹¹

23 ¹¹ Other courts have suggested that the analysis of MERS’ authority is different when, as
24 in *Salazar*, MERS or another party seeks affirmative relief, and that such an order does not
25 determine rights in property, which can only be resolved in an adversary proceeding in
26 bankruptcy. *In re Emrich*, 2009 WL 3816174, at *1 (Bankr. N.D. Cal. Nov. 12, 2009); *In re*
Mortgage Electronic Registration Systems Litigation, 2011 WL 251453, at *4 (D. Ariz. Jan. 25,
2011). This court declines to consider this issue in light of its conclusion that in this case in light
of the applicable law the deed of trust authorizes MERS to act.

1 3. The Foreclosure In This Case

2 California’s scheme of non-judicial forfeiture is contained in sections 2924
3 through 2924i. *Garfinkle v. Superior Court*, 21 Cal.3d 268, 274 (1978). These provisions
4 “cover every aspect” of the foreclosure process. *Phillips v. MERS*, 2099 WL 3233865, at *9
5 (E.D. Cal. Oct. 2, 2009) (quoting *I.E. Assoc. v. Safeco Title Ins. Co.*, 39 Cal.3d 281, 285 (1985));
6 *see also Moeller*, 25 Cal. App.4th at 834.

7 Under California Civil Code section 2924(a)(1), a ‘trustee,
8 mortgagee, or beneficiary or any of their authorized agents’ may
9 conduct the foreclosure process. Under California Civil Code
10 section 2924b(b)(4), a ‘person authorized to record the notice of
11 default or notice of sale’ includes ‘an agent for the mortgagee or
12 beneficiary, an agent of the named trustee, or an agent of that
13 substituted trustee.’ ‘Upon default by the trustor, the beneficiary
14 may declare a default and proceed with a nonjudicial foreclosure
15 sale.’ *Moeller*, 25 Cal.App.4th at 830, 30 Cal.Rptr.2d 777. There
16 is no stated requirement in California’s non-judicial scheme that
17 requires a beneficial interest in the Note to foreclose. Rather, the
18 statute broadly allows a trustee, mortgagee, beneficiary, or any of
19 their agents to initiate nonjudicial foreclosure. Accordingly, the
20 statute does not require a beneficial interest in both the Note and
21 the Deed of Trust to commence a non-judicial foreclosure sale.

22 *Lane*, 713 F.Supp.2d at 1098-99. Thus, under California law, a lender or its agents may ask the
23 trustee to commence non-judicial foreclosure following default if the deed of trust contains a
24 power of sale clause. *Gzell v. Novastar Mortgage, Inc.*, 2010 WL 3293537 at *9 (E.D. Cal. Aug.
25 19, 2010). The first step in this process is the recording of a notice of default and election to sell
26 by the trustee. *Id.* (quoting *Moeller*, 25 Cal.App.4th at 830), § 2924(a)(1). Thereafter, the
trustee must wait three months before proceeding further. *Moeller*, 25 Cal.App.4th at 830;
§ 2924(a)(2).¹² Twenty days before the sale, the trustee must publish, post and mail a notice of
sale, which must be recorded fourteen days before the sale. *Moeller*, 25 Cal.App.4th at 830;
§ 2924f(b)(1). The borrower’s opportunity to cure the default by paying the amounts in default
continues until five days before the sale. *Moeller*, 25 Cal.App.4th at 830; § 2924c(a)(1).

¹² This section has been amended, effective January 11, 2011. The court refers to the sections of the statute in effect at the time the notice of default was filed in this case.

1 In this case, the Notice of Default was recorded on December 15, 2008 in the
2 name of Quality Loan Service, as agent for the beneficiary, by LSI Title, and signed by someone
3 “as authorized agent.” A substitution of Quality for Marin Conveyancing as Trustee was
4 recorded on January 28, 2009, having been dated December 15, 2008, but not notarized until
5 December 29, 2008. ECF Nos. 2-6 at 2-3 & 2-8 at 2-3. Quality recorded the Notice of Sale on
6 March 17, 2009. ECF No. 2-9 at 2. Quality prepared subsequent Notices of Sale and in fact
7 conducted the trustee’s sale. ECF No. 2-11 at 2-3 & 27-1 at 4-5. At the time of the sale, MERS
8 had conveyed its beneficial interest to Aurora. ECF No. 2-10 at 2.

9 As noted above, MERS had the authority to assign its interest to Aurora; this has
10 no impact on the validity of the foreclosure and does not constitute a breach of the trust
11 instrument.

12 The substitution of Quality as trustee after the notice of default was recorded is
13 more troublesome, but ultimately not conclusive. First, the notice of default is signed by
14 someone at LSI Title, acting as authorized agent. Under section 2924(a)(1), “the trustee,
15 mortgagee, or beneficiary, or any of their authorized agents” are authorized to file the notice of
16 default. Nothing in the record suggests that LSI Title or the person who actually signed the
17 Notice of Default was not authorized to act for the trustee or beneficiary. And once the
18 substitution was recorded, Quality “succeed[ed] to all the powers, duties, authority, and title
19 granted and delegated to the trustee named in the deed of trust.” Section 2934a(a)(4). Assuming
20 Notice of Default was properly filed by an agent of the trustee or beneficiary, Quality assumed
21 the trustee’s powers upon the recording of the substitution and properly conducted the sale.

22 Even assuming that the Notice of Default was filed before Quality was
23 substituted, plaintiffs are not entitled to relief. In *Ferguson v. Avelo Mortgage, LLC*, 195
24 Cal.App.4th 1618 (2011) (as modified on June 20, 2011), Quality recorded a notice of default
25 before it was properly substituted as trustee. By the time it issued the notice of sale, it had been
26 properly substituted. The court found the notice of sale, issued after the proper substitution, was

1 valid, as was the foreclosure, completed “long after its substitution as trustee took effect.” *Id.* at
2 *6. The court distinguished those cases that “voided a non judicial foreclosure sale when a party
3 other than the trustee initiated the proceeding and *completed* the sale without having been
4 substituted in as the trustee.” *Id.* (emphasis in original); *see also U.S. Hertz, Inc. v. Niobrara*
5 *Farms*, 41 Cal.App.3d 68 (1974) (no prejudice when substitution was recorded one minute after
6 the notice of default); *compare Dimock v. Emerald Properties LLC*, 81 Cal.App.4th 868 (2000)
7 (entity that conducted the sale had been replaced as trustee; foreclosure void); *Pro Value*
8 *Properties, Inc. v. Quality Loan Service Corp.*, 170 Cal.App.4th 579 (2009) (substitution never
9 recorded; sale void). In *Ferguson*, the court noted that the borrower “offers no authority for the
10 proposition that the defective nature of the initial notice of default corrupted all subsequent steps
11 in the nonjudicial foreclosure proceeding such that the sale was void, not merely voidable.”
12 *Ferguson*, 195 Cal.App.4th at 1628. When a sale is voidable rather than void because of
13 “irregularities in a nonjudicial trustee’s sale, [they] may be grounds for setting it aside if they are
14 prejudicial to the party challenging the sale.” *Id.* at 1624. To set aside a sale, however, the party
15 challenging it must tender the amount of the debt or at least the amount of the default, because
16 the irregularities in the foreclosure procedures cannot be deemed to damage plaintiff when
17 plaintiff “could not redeem the property had sale procedures been proper.” *Compare id.* (amount
18 of indebtedness) *with Miller v. Washington Mutual Bank*, 2011 WL 845935, at *4 (N.D. Cal.
19 Mar. 8, 2011) (amount in default). In this case, as noted above, plaintiffs have not tendered the
20 amount owed, the amount they are in default, or even suggested they were willing and able to
21 tender the costs of the trustee’s sale. Moreover, at argument on the motion their lawyer
22 suggested that their loan was not actually in default, which suggests an unwillingness to tender
23 any amount. Plaintiffs have not satisfactorily pled the ability to tender, which is necessary to
24 proceed on a claim of wrongful foreclosure. They will, however, be given leave to amend this
25 portion of the complaint, if they can in good faith allege that they have the willingness and
26 ability to meet the tender requirement.

1 L. Expunging The Lis Pendens

2 Plaintiffs have recorded a *lis pendens* on 1977 Green Meadow Lane, Meadow
3 Vista, California, asserting that the Deed of Trust was improperly assigned or transferred. ECF
4 No. 17 at 476-479. They assert that recording a *lis pendens* is mandatory when a party files a
5 quiet title action. ECF No. 19. Defendants argue, however, that as none of plaintiffs' claims
6 relating to an interest in property survives, this court must expunge the *lis pendens*.

7 "A *lis pendens* is a recorded document giving constructive notice that an action
8 has been filed affecting right or title to possession of the real property described in the notice."
9 *Park 1000 Investment Group II v. Ryan*, 180 Cal.App.4th 795, 807 (2010) (internal citation &
10 quotation omitted). A court should expunge a *lis pendens* if it determines that the action "as pled
11 lacks evidentiary merit . . ." *Id.*; see also *Palmer v. Zaklama*, 109 Cal.App.4th 1367, 1378
12 (2003). Because the court is giving plaintiffs leave to amend the complaint, it declines to
13 expunge the *lis pendens* at this time.

14 V. The Motion For A Preliminary Injunction

15 In support of their request for injunctive relief, plaintiffs have offered copies of
16 stipulated Cease and Desist orders entered into by the Office of Thrift Supervision and Aurora
17 and MERS. Among the provisions are requirements that Aurora bring in an independent
18 consultant to conduct foreclosure reviews to determine "whether at the time the foreclosure was
19 initiated . . . the foreclosing party or agent of the party had properly documented ownership of
20 the promissory note and mortgage (or deed of trust) under relevant state law, or was otherwise a
21 proper party of the action. . . ." and "whether a foreclosure sale occurred when an application for
22 a loan modification or other Loss Mitigation was under consideration when the loan was
23 performing in accordance with a trial or permanent loan modification, or when the loan had not
24 been in default for a sufficient period of time to authorize foreclosure pursuant to the terms of the
25 mortgage loan documents" ECF No. 29 at 30-31. In connection with an earlier request for
26 a temporary restraining order in this case, plaintiffs submitted documents suggesting that Aurora

1 offered and then rejected loan modifications more than once after the Notice of Default had been
2 filed. ECF No. 19-1 at 30-51.

3 The court's determination that the current complaint fails to state a claim means
4 that it has no basis to issue an injunction: there is nothing currently before it suggesting that
5 plaintiffs have a chance of succeeding on the merits. Nevertheless, in light of the OTS Cease
6 and Desist Orders and the review Aurora has agreed to undertake, plaintiffs may be harmed if
7 they were eligible for a modification that was improperly denied them and that might be
8 disclosed during this review. If plaintiffs file an amended complaint they may renew their
9 request for a preliminary injunction.

10 VI. Quality Loan Service And LSI Title's Declaration Of Non-Monetary Status

11 On April 20, 2011, Quality Loan Service and LSI Title filed Declarations of Non-
12 Monetary Status under section 2924I, averring that they reasonably believe they were named in
13 their capacities as trustees. ECF Nos. 18, 18-1, 18-2. On May 13, 2011, plaintiffs objected.

14 Under section 2924I(c) and (d), parties have fifteen days to object to such a
15 declaration and if there is no objection within that period, a trustee is not required to participate
16 in the litigation except for certain discovery requests and is bound by any order relating to the
17 deed of trust. Plaintiffs' objections were not timely.

18 IT IS THEREFORE ORDERED that:

19 1. Defendants' motion to dismiss (ECF No. 16) is granted as follows:

20 A. Plaintiffs' causes of action for rescission under TILA, HOEPA, FCRA,
21 breach of fiduciary duty as to Aurora and MERS and unjust enrichment as to Aurora and MERS
22 are dismissed with prejudice;

23 B. Plaintiffs' remaining causes of action are dismissed with leave to
24 amend;

25 2. Defendants' request to expunge the *lis pendens* is denied without prejudice;

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3. Plaintiffs' motion for a preliminary injunction (ECF No.19) is denied without prejudice;

4. Plaintiffs' objections to defendants Quality Loan Services and LSI Title's declarations of non-monetary status are overruled;

5. Plaintiffs' amended complaint is due twenty-one days from the date of this order; and

6. The status conference previously set for August 24, 2011 will be reset after the filing of an amended complaint.

DATED: August 26, 2011.


UNITED STATES DISTRICT JUDGE