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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

TIM DEERINCK, et al.,  
Plaintiffs,  
v.  
HERITAGE PLAZA MORTGAGE INC.,  
et al.  
Defendants.

No. 2:11-cv-01735-MCE-EFB

MEMORANDUM AND ORDER

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Pending before the Court is Defendants Bank of America, N.A. and Bank of New York Mellon's Motion to Dismiss Plaintiffs' Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).<sup>1</sup> (Defs.' Mot. to Dismiss, ECF No. 10.) For the reasons discussed below, Defendants' Motion to Dismiss is granted.<sup>2</sup>

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<sup>1</sup> All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure unless otherwise noted.

<sup>2</sup> Because oral argument will not be of material assistance, the Court ordered this matter submitted on the briefing. See E.D. Cal. Local Rule 230(g).

1 **BACKGROUND**

2  
3 **A. Introduction**

4  
5 On June 28, 2011, Plaintiffs Tim and Dina Deerinck  
6 ("Plaintiffs") filed the present action against Bank of America,  
7 N.A. ("Bank of America"), doing business as BAC Home Loans  
8 Servicing, and Bank of New York-Mellon ("Bank of New York"), as  
9 trustee for the benefit of the Countrywide Alternate Trust  
10 2006-8T1 ("Countrywide Trust") (collectively, "Defendants").<sup>3</sup>  
11 Plaintiffs' Complaint seeks relief under five causes of action:  
12 (1) declaratory relief under 28 U.S.C. § 2201-2202;  
13 (2) negligence; (3) violation of the Truth in Lending Act,  
14 15 U.S.C. § 1641(g); (4) violation of Cal. Bus. & Prof. Code  
15 section 17200 et seq.; and (5) quiet title.

16  
17 **B. Allegations in Plaintiffs' Complaint**<sup>4</sup>

18  
19 In January of 2006, Plaintiffs executed a promissory note  
20 for \$585,000.00 ("Promissory Note") with Heritage Plaza Mortgage,  
21 Inc. ("Heritage"), in order to purchase property located in  
22 Manteca, California (the "subject property").

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24  
25 <sup>3</sup> On September 23, 2011, Plaintiffs dismissed all claims  
26 against Heritage Plaza Mortgage Inc., in its capacity as  
originating lender. (See ECF No. 19.)

27 <sup>4</sup> The following facts are taken primarily from Plaintiffs'  
28 Complaint. (Compl., ECF No. 1.) For purposes of this Motion,  
the Court accepts these facts as true and makes all inferences in  
the light most favorable to Plaintiffs.

1 (Compl., ECF No. 1 ¶¶ 16, 58; Defs.' Request for Judicial Notice  
2 ("RJN"), ECF No. 11, Ex. B.)<sup>5</sup> The Deed of Trust named Heritage  
3 as the lender, First American Title Company of Stockton as the  
4 trustee, and Mortgage Electronic Registrations System, Inc.  
5 ("MERS") as the beneficiary. (Compl. ¶ 58; Defs.' RJN, Ex. A at  
6 1-2.)<sup>6</sup> Plaintiffs identify Bank of America as the loan servicer.  
7 (Compl. ¶ 95.)

8 Plaintiffs' claims focus on the securitization and sale of  
9 their Deed of Trust and Promissory Note on the secondary mortgage  
10 market. (Id. ¶ 3.) Specifically, at some point after  
11 origination, Heritage attempted to securitize and sell  
12 Plaintiffs' Deed of Trust and Promissory Note to the Countrywide  
13 Alternative Trust Series 8T1-2006 (the "Countrywide Trust").  
14 (Id. ¶¶ 4, 9-10.) Bank of New York is the Trustee of the  
15 Countrywide Trust and the Countrywide Trust is governed by a  
16 Pooling and Servicing Agreement ("PSA"). The parties involved in  
17 the securitization allegedly failed to adhere to the PSA's  
18 requirement that the Deed of Trust and Promissory Note must be  
19 properly endorsed, transferred, accepted, and deposited with the  
20 Countrywide Trust on or before the date specified in the PSA.

21 ///

22 \_\_\_\_\_  
23 <sup>5</sup> Defendants request the Court take judicial notice of the  
24 Promissory Note and Deed of Trust executed by Plaintiffs and  
25 Heritage pursuant to Federal Rules of Evidence 201(b)  
26 (authorizing judicial notice of adjudicative facts "capable of  
27 accurate and ready determination by resort to sources whose  
28 accuracy cannot be reasonably questioned"). Defendants' requests  
are unopposed and are the proper subject of judicial notice.  
Accordingly, Defendants' Request for Judicial Notice of the Deed  
of Trust (Ex. B) is granted.

<sup>6</sup> Defendants' Request for Judicial Notice of the Promissory  
Note (Ex. A) is granted. See n.5.

1 (Id.) As a result of this failure to comply with the PSA,  
2 Plaintiffs' contend that the Promissory Note and Deed of Trust  
3 are not part of the Countrywide Trust. (Id. ¶ 10.) Thus, Bank  
4 of New York, as Trustee for the Countrywide Trust, has no  
5 authority to collect on the loan. (Id. ¶¶ 4, 10-11.)<sup>7</sup>

6 Plaintiffs contend they then attempted to determine the  
7 identity of the current owner of their Deed of Trust and  
8 Promissory Note. On or around April 12, 2010, Plaintiffs sent a  
9 Qualified Written Request ("QWR") letter to Bank of America  
10 requesting specific information about the status of Plaintiffs'  
11 loan account. (Id. ¶ 44, Ex. B.) In response to the April 12,  
12 2010 QWR, Bank of America represented that Bank of New York was  
13 the owner of Plaintiffs' Deed of Trust and Promissory Note and  
14 that Bank of America is the servicer. (Id. ¶ 45, Ex. C.) Per  
15 Plaintiffs' April 12, 2010 request, Bank of America enclosed a  
16 copy of Plaintiffs' Promissory Note. (Id.) According to the  
17 Plaintiffs, the Promissory Note was not endorsed by or to Bank of  
18 America or Bank of New York. (Id.)

19 On May 13, 2010, Plaintiff Tim Deerinck e-mailed Alicia  
20 Reatz, a relationship manager with the Bank of New York, to  
21 obtain more information about the ownership status of their Deed  
22 of Trust. (Id. ¶ 46.) Ms. Reatz informed Plaintiffs that Bank  
23 of New York is "a Trustee, therefore, we [Bank of New York] do  
24 not physically own the loan or the property." (Id. ¶ 47.)

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26  
27 <sup>7</sup> While Plaintiffs do not dispute that they owe money on the  
28 loan, they dispute the amount of money owed and seek the Court's  
assistance in determining who the holder in due course is of  
their Note and Deed of Trust.

1 On August 9, 2010, Plaintiffs commissioned a company called  
2 Luminaq to conduct a securitization audit on their Deed of Trust  
3 and Promissory Note to determine the current owner of their loan.  
4 (Id. ¶ 48.) Plaintiffs contend that Neil L. Garfield, Esq., an  
5 attorney with Luminaq, determined that: (1) Heritage did not  
6 effectively dispose of the beneficial interest in Plaintiffs'  
7 Deed of Trust and Promissory Note; (2) Heritage failed to  
8 transfer Plaintiffs' Promissory Note and Deed of Trust to Bank of  
9 New York and the Countrywide Trust; (3) that Heritage Plaza and  
10 Bank of New York intentionally and knowingly failed to follow the  
11 PSA governing the Countrywide Trust; (4) that Heritage Plaza  
12 failed to perfect title by not following the PSA; and (5) "[t]he  
13 beneficiaries have no power to enforce the terms of the  
14 [Countrywide] Trust." (Id. ¶¶ 49-50.)

15 On May 9, 2011, Plaintiffs sent a second QWR letter to Bank  
16 of America demanding the name, address, and contact information  
17 of the current owner of the Note. (Id. ¶ 55, Ex. E.) On June 7,  
18 2011, Bank of America responded to Plaintiffs' second QWR by  
19 sending a life loan history report of Plaintiff's loan. (Id.  
20 ¶ 56, Ex. F.) According to Plaintiffs, Bank of America did not  
21 include any additional response. (Id.) Plaintiffs allege that  
22 because they cannot identify the true owner of their note, they  
23 do not know if they are sending their monthly mortgage payments  
24 to the correct party and that multiple banks may seek to enforce  
25 Plaintiffs' debt obligation.<sup>8</sup> (Id. ¶ 8; emphasis added.)

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26  
27 <sup>8</sup> Plaintiffs do not allege that they have defaulted on their  
28 mortgage payments, nor do they allege that any entity has  
(continued...)

1 In the course of Plaintiffs' quest to identify the owner of  
2 their loan, Defendants allegedly failed to properly credit  
3 payments made, incorrectly calculated interest on accounts, and  
4 failed to accurately debt fees. (Id. ¶¶ 71, 74-75, 77.) As a  
5 result, Plaintiffs contend that they have overpaid in interest,  
6 their credit limit has been reduced, and their credit score has  
7 been damaged. (Id. ¶¶ 71, 74-75, 77.)

8 Based on these allegations, Plaintiffs challenge the  
9 securitization of their loan and seek relief under five causes of  
10 action against Defendants. First, Plaintiffs request a judicial  
11 determination pursuant to 28 U.S.C. §§ 2201-2202 that Defendants  
12 do not have any right or interest in Plaintiffs' Promissory Note,  
13 Deed of Trust, or the subject property and similarly, lack the  
14 authority to collect Plaintiffs' mortgage payments or enforce  
15 Plaintiffs' debt obligation. (Id. ¶¶ 89-91.) Plaintiffs allege  
16 that an actual controversy exists between Plaintiffs, Bank of New  
17 York, and Bank of America with regard to Bank of New York's  
18 authority to collect mortgage payments and enforce Plaintiffs'  
19 loan and as to the secured or unsecured status of Plaintiffs'  
20 loan. (Id. ¶¶ 85-88.) Plaintiffs seek punitive damages in order  
21 to deter Defendants from engaging in similar conduct. (Id.  
22 ¶ 92.)

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27 <sup>8</sup>(...continued)  
28 commenced a nonjudicial foreclosure proceeding against the  
subject property.

1 Second, Plaintiffs allege a negligence claim against  
2 Defendants. (Id. ¶¶ 93-97.) Specifically, Plaintiffs contend  
3 that Defendants owe a duty to exercise reasonable care to follow  
4 California law with respect to the enforcement of debts and to  
5 refrain from taking actions against Plaintiffs outside the scope  
6 of their legal authority. (Id. ¶¶ 95-96.)

7 Third, Plaintiffs allege that Defendant Bank of New York  
8 violated Truth in Lending Act section 1641(g) by failing to  
9 provide Plaintiffs with written notice specifying that Bank of  
10 New York had been assigned the beneficial interest in Plaintiffs'  
11 Deed of Trust within thirty days of the date of the assignment of  
12 the Deed of Trust. (Compl. ¶ 105.)

13 Fourth, Plaintiffs allege that Defendants have violated  
14 California Business and Profession Code section 17200 by engaging  
15 in "unlawful, fraudulent, and deceptive business practices" with  
16 respect to mortgage loan servicing, assignment of Plaintiffs'  
17 Note and Deed of Trust, and other related matters. (Compl.  
18 ¶ 115.) Additionally, Plaintiffs allege the Defendants engaged  
19 in unlawful, fraudulent and deceptive business practices by:  
20 (1) failing to disclose the principal which documents were being  
21 executed and recorded in violation of California Civil Code 1095;  
22 (2) failing to record powers of attorney in connection with other  
23 recorded documents in violation of California Civil Code 2933;  
24 (3) violating the "Security First Rule;" (4) demanding and  
25 accepting payment of debts which were non-existent; (5) accepting  
26 loan payments as beneficiaries and trustees without legal  
27 authority to do so; (6) other deceptive business practices; and  
28 ///

1 (7) violation of Truth in Lending Act section 1641(g).

2 (Id. ¶¶ 115-116.)

3 Fifth, Plaintiffs request the Court quiet title to the  
4 subject property in the Plaintiffs. Specifically, Plaintiffs  
5 seek a judicial determination that title to the subject property  
6 is solely vested in Plaintiffs and that Defendants should be  
7 declared to have no right, title, or interest in the subject  
8 property. (Id. ¶¶ 122-128.) Plaintiffs allege that they have  
9 offered and are ready, willing and able to tender their  
10 obligation. (Id. ¶ 123.) Additionally, Plaintiffs allege they  
11 are the owners of the subject property, that their interest in  
12 title lies in the Deed of Trust from Heritage, that Defendants  
13 have no right, title, interest, or estate in the subject  
14 property, and that Plaintiffs' interest is adverse to Defendants'  
15 claim to ownership. (Id. ¶¶ 124-126.)

16 On August 5, 2011, Defendants filed the pending motion to  
17 dismiss. (ECF No. 10.) On September 8, 2011, Plaintiffs filed  
18 their Opposition.<sup>9</sup> (ECF No. 16.)

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21  
22 <sup>9</sup> Five months after Plaintiffs filed their Opposition to  
23 Defendants' Motion to Dismiss, Plaintiffs filed a document  
24 requesting the Court take judicial notice of an official report  
25 generated by the City and County of San Francisco's Office of the  
26 Assessor-Recorder entitled, "Foreclosure in California: A Crisis  
27 of Compliance Report." (Pls.' RJN, ECF No. 22, Ex. A.)  
28 Plaintiffs' RJN is unopposed and is accordingly granted. See  
City of Sausalito v. O'Neill, 386 F.3d 1186, 1223 n.2 (9th Cir.  
2004) (finding a court may take judicial notice of records and  
reports of state administrative bodies, so long as their  
authenticity is not in dispute). While the Court grants  
Plaintiffs' RJN, the Court notes Plaintiffs do not specify how  
this official report relates to Plaintiffs' allegations and  
claims against Defendants.



1 STANDARD

2  
3 **A. Motion to Dismiss Pursuant to 12(b)(6)**

4  
5 On a motion to dismiss for failure to state a claim under  
6 Federal Rule of Civil Procedure Rule 12(b)(6), all allegations of  
7 material fact must be accepted as true and construed in the light  
8 most favorable to the nonmoving party. Cahill v. Liberty Mut.  
9 Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Rule 8(a)(2)  
10 requires only "a short and plain statement of the claim showing  
11 that the pleader is entitled to relief" in order to "give the  
12 defendant fair notice of what the . . . claim is and the grounds  
13 upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544,  
14 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). A  
15 complaint attacked by a Rule 12(b)(6) motion to dismiss does not  
16 require detailed factual allegations. However, "a plaintiff's  
17 obligation to provide the grounds of his entitlement to relief  
18 requires more than labels and conclusions, and a formulaic  
19 recitation of the elements of a cause of action will not do."  
20 Id. (internal citations and quotations omitted). A court is not  
21 required to accept as true a "legal conclusion couched as a  
22 factual allegation." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950  
23 (2009) (quoting Twombly, 550 U.S. at 555). "Factual allegations  
24 must be enough to raise a right to relief above the speculative  
25 level."

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1 Twombly, 550 U.S. at 555 (citing 5 Charles Alan Wright & Arthur  
2 R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)  
3 (stating that the pleading must contain something more than “a  
4 statement of facts that merely creates a suspicion [of] a legally  
5 cognizable right of action.”)).

6 Furthermore, “Rule 8(a)(2) . . . requires a showing, rather  
7 than a blanket assertion, of entitlement to relief.” Twombly,  
8 550 U.S. at 556 n.3 (internal citations and quotations omitted).  
9 Thus, “[w]ithout some factual allegation in the complaint, it is  
10 hard to see how a claimant could satisfy the requirements of  
11 providing not only ‘fair notice’ of the nature of the claim, but  
12 also ‘grounds’ on which the claim rests.” Id. (citing 5 Charles  
13 Alan Wright & Arthur R. Miller, supra, at § 1202). A pleading  
14 must contain “only enough facts to state a claim to relief that  
15 is plausible on its face.” Id. at 570. If the “plaintiffs . . .  
16 have not nudged their claims across the line from conceivable to  
17 plausible, their complaint must be dismissed.” Id. However,  
18 “[a] well-pleaded complaint may proceed even if it strikes a  
19 savvy judge that actual proof of those facts is improbable, and  
20 ‘that a recovery is very remote and unlikely.’” Id. at 556  
21 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

22 A court granting a motion to dismiss a complaint must then  
23 decide whether to grant leave to amend. Leave to amend should be  
24 “freely given” where there is no “undue delay, bad faith or  
25 dilatory motive on the part of the movant . . . undue prejudice  
26 to the opposing party by virtue of allowance of the amendment,  
27 [or] futility of the amendment . . . .”

28 ///

1 Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital,  
2 LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing  
3 the Foman factors as those to be considered when deciding whether  
4 to grant leave to amend). Not all of these factors merit equal  
5 weight. Rather, "the consideration of prejudice to the opposing  
6 party . . . carries the greatest weight." Id. (citations  
7 omitted). Dismissal without leave to amend is proper only if it  
8 is clear that "the complaint could not be saved by any  
9 amendment." Intri-Plex Techs. v. Crest Group, Inc., 499 F.3d  
10 1048, 1056 (9th Cir. 2007) (citations omitted); Ascon Props.,  
11 Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989)  
12 ("Leave need not be granted where the amendment of the complaint  
13 . . . constitutes an exercise in futility . . .").

## 14 15 ANALYSIS

### 16 17 **A. Declaratory Relief**

18  
19 Defendants move to dismiss Plaintiffs' declaratory relief  
20 claim on the basis that Plaintiffs have failed to plead an actual  
21 controversy exists. (ECF No. 10 at 12-13.)

22 Plaintiffs' first cause of action for declaratory relief is  
23 based on the theory that Defendant Bank of New York has no  
24 authority to collect on Plaintiffs' loan and has no interest or  
25 title in the subject property. (See Compl. ¶¶ 3,4, 9-12, 34-35,  
26 42, 54.)

27 ///

28 ///

1 Plaintiffs base their theory on the allegation that the parties  
2 involved in the securitization of Plaintiffs' Deed of Trust and  
3 Promissory Note did not comply with the securitization procedures  
4 set forth in the PSA governing the Countrywide Trust, thus,  
5 Plaintiffs' Deed of Trust and Promissory Note are not part of the  
6 Countrywide Trust. (See id. ¶¶ 4, 9, 10.)

7 Plaintiffs' theory does not give rise to a legally  
8 cognizable claim. Plaintiffs' claim is based on a alleged breach  
9 of the PSA—the securitization agreement—which governs the  
10 Countrywide Trust. However, Plaintiffs lack standing to  
11 challenge the process in which their mortgage was securitized  
12 because they are not a party to the PSA. Plaintiffs were not  
13 investors of the Countrywide Trust, nor are they third-party  
14 beneficiaries of the PSA, thus, they do not have standing to  
15 challenge an alleged breach of that agreement. See e.g.,  
16 Bascos v. Federal Home Loan Mortg. Corp, 2011 WL 3157063, at \*6  
17 (C.D. Cal. July 22, 2011) ("To the extent Plaintiff challenges  
18 the securitization of his loan because Freddie Mac failed to  
19 comply with the terms of the securitization agreement, Plaintiff  
20 has no standing to challenge the validity of the securitization  
21 of the loan as he is not an investor of the loan trust.").<sup>10</sup>

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23 <sup>10</sup> Other district courts have also held that borrowers do  
24 not have standing to challenge breach of securitization  
25 agreements. See Armeni v. America's Wholesale Lender, 2012 WL  
26 253967 at \*2 (C.D. Cal. Jan. 25, 2012) (same); Junger v. Bank of  
27 Am., N.A., 2012 WL 603262 (C.D. Cal. Feb. 24, 2012) (same); In re  
28 Correia, 452 B.R. 319, 324 (1st Cir. B.A.P. 2011) (Where debtors  
asked the court to declare mortgage assignment invalid based on  
breach of Pooling Services Agreement, a contract to which debtors  
were not a party nor third-party beneficiaries, the court found  
that debtors lacked standing to object to breaches of the terms  
(continued...)

1 Here, the Plaintiffs lack standing for the same reason;  
2 namely, they are not a party to the PSA. Plaintiffs' claim for  
3 declaratory relief is based on their theory of improper  
4 securitization. Thus, because Plaintiffs lack standing to raise  
5 an alleged breach of the PSA, Plaintiffs' declaratory relief  
6 claim must fail.<sup>11</sup> Accordingly, Defendants' Motion to Dismiss  
7 Plaintiffs' claim for declaratory relief is granted.

8  
9 **B. Negligence**

10  
11 Defendants move to dismiss Plaintiffs' negligence claim on  
12 the basis that Plaintiffs have failed to explain what legal  
13 authority imposes a duty of care on Bank of New York and Bank of  
14 America, and Plaintiffs have not provided any facts that suggest  
15 that any alleged duty was breached. (ECF No. 10 at 14.)

16 ///

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19 \_\_\_\_\_  
20 <sup>10</sup> (...continued)  
21 of the PSA); Rodenhurst v. Bank of Am., 773 F. Supp. 2d 886, 899  
22 (D. Haw. 2011) ("The overwhelming authority does not support a  
23 [claim] based upon improper securitization."); Greene v. Home  
24 Loan Servs. Inc., 2010 WL 3749243, \*4 (D. Minn. Sept. 21, 2010)  
25 ("Plaintiffs do not have standing to bring their challenge  
26 regarding the securitization of the mortgage" because they were  
27 "not a party to the Pooling and Servicing Agreement.").

28  
<sup>11</sup> Plaintiffs have not sufficiently pled their claims  
against Defendants for negligence, violation of the Truth in  
Lending Act § 1641(g) and California Bus. & Prof. Code section  
17200, to withstand Defendants' Motion to Dismiss. Accordingly,  
to the extent that Plaintiffs' declaratory relief claim is based  
on any of those claims, Plaintiffs' declaratory relief claim must  
be dismissed.

1 In order to state a cause of action for negligence, a  
2 plaintiff must allege: (1) the defendant has a legal duty to use  
3 due care; (2) the defendant breached such legal duty; (3) the  
4 defendant's breach was the proximate or legal cause of the  
5 resulting injury; and (4) damage to the plaintiff. Ladd v.  
6 County of San Mateo, 12 Cal. 4th 913, 917 (1996). The existence  
7 of a legal duty on the part of the defendant is a question of law  
8 to be determined by the court. Kentucky Fried Chicken of  
9 California, Inc. v. Superior Court, 14 Cal. 4th 814, 819 (1997).  
10 When not provided by statute, the existence of such a duty  
11 depends upon the foreseeability of the risk and a weighing of  
12 policy considerations for and against the imposition of  
13 liability. Jacoves v. United Merchandising Corp.,  
14 9 Cal. App. 4th 88, 105 (1992).

15 "[A]s a general rule, a financial institution owes no duty  
16 of care to a borrower when the institution's involvement in the  
17 loan transaction does not exceed the scope of its conventional  
18 role as a mere lender of money." Nymark v. Heart Fed. Sav. &  
19 Loan Ass'n, 231 Cal. App. 3d 1089, 1095-96 (affirming summary  
20 judgment in favor of defendant lending institution because  
21 defendant owed no duty to plaintiff in conducting its loan  
22 processing procedures); see Wagner v. Benson, 101 Cal. App. 3d  
23 27, 35 (1980) (finding liability to a borrower for negligence  
24 arises only when the lender actively participates in the financed  
25 enterprise beyond the domain of the usual money lender) (internal  
26 quotations and citations omitted).

27 ///  
28 ///

1 "Under California law, a lender does not owe a borrower or third  
2 party any duties beyond those expressed in the loan agreement,  
3 except those imposed due to special circumstance." Resolution  
4 Trust Corp. v. BVS Dev., 42 F.3d 1206, 1214 (9th Cir. 1994)  
5 (citing Nymark, 231 Cal. App. 3d at 1096); see also Castaneda v.  
6 Saxon Mortg. Services, Inc., 687 F. Supp. 2d 1191, 1197-98 (E.D.  
7 Cal. 2009) (concluding that a loan servicer owed no duty of care  
8 to the plaintiff). Further, a trustee under a deed of trust "is  
9 not a true trustee, and owes no fiduciary obligations; [it]  
10 merely acts as a common agent for the trustor and beneficiary of  
11 the deed of trust. [The trustee's] only duties are: (1) upon  
12 default to undertake the steps necessary to foreclose the deed of  
13 trust; or (2) upon satisfaction of the secured debt to reconvey  
14 the deed of trust." Wong v. Am. Servicing Co., Inc., 2009 WL  
15 5113516, at \*6 (E.D. Cal. Dec. 18, 2009) (alterations in  
16 original) (internal quotation marks omitted).

17 Here, Plaintiffs fail to allege facts that show special  
18 circumstances that would suggest either Bank of New York or Bank  
19 of America owed Plaintiffs a duty of care. For example,  
20 Plaintiff has not alleged that Bank of New York, as trustee of  
21 the Countrywide Trust, actively participated in Plaintiffs' loan  
22 transaction such that Bank of New York now owes Plaintiffs a duty  
23 of care. Moreover, as previously noted, Plaintiffs are not  
24 beneficiaries of or parties to the Countrywide Trust. Similarly,  
25 Plaintiffs fail to allege Bank of America, as loan servicer,  
26 actively participated in the financed enterprise "beyond the  
27 usual practices associated with the lending business," Wong,  
28 2009 WL 5113516 at \*6.

1 Plaintiffs have not alleged that either of these Defendants  
2 assumed a duty or entered into a special relationship besides  
3 what one would expect from an arm's length mortgage transaction.  
4 Plaintiffs do not allege that their relationship with Bank of  
5 New York and Bank of America went beyond that of borrower,  
6 beneficiary, and loan servicer. Plaintiffs do not cite to any  
7 common law or statutory authority that gives rise to a duty of  
8 care. Instead, Plaintiffs allege that Bank of New York and Bank  
9 of America owed a unique duty to *not* take actions against  
10 Plaintiffs which Bank of New York and Bank of America did not  
11 have legal authority to take. (Compl. ¶¶ 95-96 (emphasis  
12 added).) This bare allegation fails to amount to the active  
13 participation required to establish a duty of care under Nymark.  
14 231 Cal. App. 3d at 1097.

15 Plaintiffs have failed to establish that Bank of New York  
16 and Bank of America owed Plaintiffs a duty of care. Accordingly,  
17 Defendants' Motion to Dismiss Plaintiffs' negligence claim is  
18 granted.

19

20 **C. Truth In Lending Act § 1641(g)**

21

22 Defendants move to dismiss that Plaintiffs' Truth in Lending  
23 Act ("TILA"), 15 U.S.C. 1640 et seq., claim on the basis that  
24 Plaintiffs do not allege sufficient facts to trigger the  
25 protection of TILA and fail to allege detrimental reliance.  
26 (ECF No. 10 at 16.)

27 ///

28 ///



1           The purpose of the TILA is to ensure that users of consumer  
2 credit are informed as to the terms on which credit is offered  
3 them. Jones v. E\*Trade Mortg. Corp., 397 F.3d 810, 812 (9th Cir.  
4 2005). TILA "requires creditors to provide borrowers with clear  
5 and accurate disclosures of terms dealing with things like  
6 finance charges, annual percentage rates of interest, and the  
7 borrower's rights." Beach v. Ocwen Fed. Bank, 523 U.S. 410, 412  
8 (1998). TILA § 1641, titled "Liability of Assignees," requires  
9 that when an entity purchases or is assigned the beneficial  
10 interest in a loan on a property, it must notify the borrower in  
11 writing within 30 days of when the loan was transferred. See  
12 15 U.S.C. § 1641(g). Subsection (g) of § 1641 lists the  
13 particular information that the assignee's notice must contain.  
14 This subsection only applies to the "new owner or assignee of the  
15 debt." See id.

16           Here, Plaintiffs allege that TILA § 1641(g) applies to Bank  
17 of New York, that Bank of New York did not provide written notice  
18 to Plaintiffs within 30 days of the date of assignment, that  
19 Plaintiffs did not receive notice of how to reach a Bank of New  
20 York agent or where their Deed of Trust was recorded, and did not  
21 receive any other relevant information about Bank of New York.  
22 (Compl. ¶¶ 101-112.) However, Plaintiffs do not offer any  
23 supporting factual allegations. Significantly, Plaintiffs fail  
24 to provide any factual allegation regarding *when* the purported  
25 transfer occurred, or *why* Bank of New York is subject to TILA's  
26 notice requirements. Plaintiffs make only conclusory allegations  
27 that they did not receive notice required by TILA § 1641(g) from  
28 Bank of New York.

1 Plaintiffs' cursory recitation of the requirements of TILA §  
2 1641(g) is insufficient to support a TILA violation claim and to  
3 survive Defendants' Motion to Dismiss. Iqbal, 129 S. Ct. at  
4 1950. Accordingly, Defendants' Motion to Dismiss Plaintiffs'  
5 TILA claim is granted.

6  
7 **D. California Bus. & Prof. Code section 17200**

8  
9 Defendants move to dismiss Plaintiffs' claim for violations  
10 of California Bus. & Prof. Code section 17200 on the basis that  
11 Plaintiffs' claims are not supported by their factual  
12 allegations. (ECF No. 10 at 17-19.)

13 California's Business and Professions Code §§ 17200 et seq.  
14 (more commonly known as California's Unfair Competition Law  
15 ("UCL")) defines unfair competition as "any unlawful, unfair or  
16 fraudulent business act or practice." "Unlawful" practices are  
17 practices "forbidden by law, be it civil or criminal, federal,  
18 state, or municipal, statutory, regulation, or court-made."  
19 Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-39 (1994)  
20 (citing People v. McKale, 25 Cal. 3d 626, 632 (1979)). To state a  
21 cause of action based on an "unlawful" business act or practice  
22 under the UCL, a plaintiff must allege facts sufficient to show a  
23 violation of some underlying law. McKale, 25 Cal.3d at 635.

24 A business act or practice is "unfair" when the conduct  
25 "threatens an incipient violation of an antitrust law, or  
26 violates the policy or spirit of one of those laws because its  
27 effects are comparable to a violation of the law, or that  
28 otherwise significantly threatens or harms competition."

1 Cel-Tech Communications, Inc. v. L.A. Cellular Tel. Co.,  
2 20 Cal.4th 163, 187 (1999). To sufficiently plead an action  
3 based on an "unfair" business act or practice, a plaintiff must  
4 allege facts showing the "unfair" nature of the conduct and that  
5 the harm caused by the conduct outweighs any benefits that the  
6 conduct may have. Motors, Inc. v. Times Mirror Co., 102 Cal.  
7 App. 3d 735, 740 (1980).

8 A "fraudulent" business act or practice is one in which  
9 members of the public are likely to be deceived. Hall v. Time,  
10 Inc., 158 Cal. App. 4th 847, 849 (2008); Olsen v. Breeze, Inc.,  
11 48 Cal. App. 4th 608, 618 (1996) ("does not refer to the common  
12 law tort of fraud but only requires a showing members of the  
13 public 'are likely to be deceived'"). Thus, in order to state a  
14 cause of action based on a "fraudulent" business act or practice,  
15 the plaintiff must allege that consumers are likely to be  
16 deceived by the defendant's conduct. Committee on Children's  
17 Television, Inc. v. General Foods Corp., 35 Cal. 3d 197, 212  
18 (1983). Furthermore, a plaintiff alleging unfair business  
19 practices under § 17200 "must state with reasonable particularity  
20 the facts supporting the statutory elements of the violation."  
21 Khoury v. Maly's of California, Inc., 14 Cal. App. 4th 612, 619  
22 (1993).

23 In this case, Plaintiffs fail to plead a UCL claim under any  
24 available theory. First, the "unlawful" prong of the UCL  
25 requires an underlying violation of a state or federal statute or  
26 common law. As discussed above, the Court has granted  
27 Defendants' Motion as to Plaintiffs' negligence and TILA claims.  
28 ///

1 As a result, these claims cannot form the basis of Plaintiffs'  
2 UCL claim. In addition, merely listing Civil Code violations, as  
3 Plaintiffs do here, without more, is not sufficient to maintain a  
4 plausible claim. Iqbal, 129 S. Ct. at 1949. Ultimately,  
5 Plaintiffs' conclusory statements suggesting that Defendants are  
6 in violation of certain statutes are not sufficient to withstand  
7 a motion to dismiss.

8 Next, Plaintiffs do not adequately plead an independent UCL  
9 claim for unfair or fraudulent business practices because  
10 Plaintiffs fail to allege facts to support any identifiable  
11 wrongdoing by specific Defendants. Likewise, Plaintiffs' mere  
12 conclusory recitation of the elements of these claims do not give  
13 proper notice to the respective Defendants as to the alleged  
14 misconduct. Accordingly, Plaintiffs' UCL claim cannot survive  
15 Defendants' Motion to Dismiss. Accordingly, Defendants' Motion  
16 to Dismiss Plaintiffs' UCL claim is granted.

17  
18 **E. Quiet Title**

19  
20 Defendants move to dismiss Plaintiffs' quiet title claim on  
21 the basis that Plaintiffs do not and cannot allege that they have  
22 made an offer to tender or tendered the amount due on the loan.  
23 (ECF No. 12 at 20.) Defendants argue that to maintain a quiet  
24 title action, Plaintiffs must pay the outstanding debt owed on  
25 the subject property.

26 California Code of Civil Procedure § 760.010 provides for a  
27 quiet title action "to establish title against adverse claims to  
28 real or personal property or any interest therein."

1 To state a cause of action for quiet title, a plaintiff must  
2 plead: (1) a legal description of the property that is the  
3 subject of the action; (2) the title of the plaintiff and the  
4 basis upon which such title is asserted; (3) the adverse claims  
5 to the title of the plaintiff against which a determination is  
6 sought; (4) the date as of which the determination is sought; and  
7 (5) a prayer for the determination of the title of the plaintiff  
8 against the adverse claims. See Cal. Civ. Proc. Code § 760.020.  
9 The complaint in an action to quiet title must be verified,  
10 unless plaintiff is a public entity. Id. Additionally, in an  
11 action to quiet title, the plaintiff must stand on the strength  
12 of his or her own title and not the weaknesses of the defendant's  
13 title. Millard v. Faus, 268 Cal. App. 2d 76, 82 (1968).

14 Further, under California law, "it is well-settled that 'a  
15 mortgagor cannot quiet his title against the mortgagee without  
16 paying the debt secured.'" Briosos v. Wells Fargo Bank,  
17 737 F. Supp. 2d 1018, 1032 (N.D. Cal. 2010) (quoting Shimpones v.  
18 Stickney, 219 Cal. 637, 649 (1934)). Therefore, "to maintain a  
19 quiet title claim, a plaintiff 'is required to allege tender of  
20 the proceeds of the loan at the pleading stage.'" Id. (quoting  
21 Velasquez v. Chase Home Fin., LLC, 2010 WL 3211905, at \*4 (N.D.  
22 Cal. Aug. 12, 2010)); see also Hensley v. Bank of New York  
23 Mellon, 2010 WL 5418862, at \*3 (E.D. Cal. Dec. 23, 2010)  
24 (dismissing a quiet title claim where the plaintiff did "not  
25 allege that she has tendered, or is able to tender").

26 Contrary to Defendants' argument, Plaintiffs have adequately  
27 alleged their ability to tender and that Plaintiffs have offered  
28 to tender their obligation. (See Compl. ¶ 123.)

1 Specifically, the allege they have offered and are ready, willing  
2 and able to tender their obligation in full. (Id.) Further,  
3 Plaintiff has sufficiently alleged all the requisite elements  
4 under California Code of Civil Procedure section 760.20 to  
5 support a cause of action for quiet title. (See id. ¶¶ 124-128.)

6       However, Plaintiffs base their quiet title action on the  
7 alleged weakness of Defendants' interest in title, instead of the  
8 strength of their own title. Specifically, similar to their  
9 claim for declaratory relief, Plaintiffs' quiet title claim is  
10 based on the allegation that Heritage failed to properly transfer  
11 Plaintiffs' Deed of Trust and Promissory Note into the  
12 Countrywide Trust in violation of the Countrywide Trust PSA, and  
13 thus, Bank of New York, as Trustee of the Countrywide Trust, has  
14 no interest in Plaintiffs' Deed of Trust or Promissory Note and  
15 no authority to enforce Plaintiffs' loan. Plaintiffs' quiet  
16 title action relies on the assumption that Plaintiffs' Deed of  
17 Trust and Promissory Note are not part of the Countrywide Trust  
18 res, and thus, Defendants do not have any interest in the subject  
19 property or authority to enforce Plaintiffs' loan. As previously  
20 discussed, Plaintiffs have failed to establish that they have  
21 standing to challenge such a breach of the securitization  
22 agreement governing the Countrywide Trust. Therefore,  
23 Plaintiffs' quiet title claim must be dismissed. Accordingly,  
24 Defendants' Motion to Dismiss Plaintiffs' quiet title claim is  
25 granted.

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1 **CONCLUSION**

2  
3 For the reasons stated above, Defendants' Motion to Dismiss  
4 (ECF No. 10) is granted with leave to amend. Plaintiffs may file  
5 an amended complaint not later than twenty (20) days following  
6 the date of this Memorandum and Order should they choose to do  
7 so.

8 IT IS SO ORDERED.

9 Dated: March 29, 2012

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12 MORRISON C. ENGLAND, JR.  
13 UNITED STATES DISTRICT JUDGE  
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