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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

TIM DEERINK, et al.,  
Plaintiff,

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

v.

MEMORANDUM AND ORDER

BANK OF NEW YORK MELLON, N.A.,  
et al.,  
Defendants.

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Before the Court is Defendants Bank of New York Mellon, N.A. and Bank of America Corporation's Motion to Dismiss Plaintiffs' First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).<sup>1</sup> (Defs.' Mot. To Dismiss, ECF No. 25.) 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 Deerink  
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 Alternative Trust  
10 2006-8T1 ("Countrywide Trust"), and Mortgage Electronic  
11 Registration Systems, Inc. ("MERS") (collectively,  
12 "Defendants").<sup>3</sup> Plaintiffs' Complaint sought relief under five  
13 causes of action: (1) declaratory relief under 28 U.S.C.  
14 §§ 2201-02; (2) negligence; (3) violation of the Truth in Lending  
15 Act ("TILA"), 15 U.S.C. § 1641(g); (4) violation of the Unfair  
16 Competition Law ("UCL"), California Business and Professions Code  
17 and § 17200 et seq.; and (5) quiet title.

18  
19 **B. Allegations in Plaintiffs' Initial Complaint**<sup>4</sup>

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

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 initial 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 MERS as the beneficiary. (Compl. ¶ 58; Defs.' RJN,  
5 Ex. A at 1-2.) Plaintiffs identified Bank of America as the loan  
6 servicer. (Compl. ¶ 95.)

7 Plaintiffs' claims focused on the securitization and sale of  
8 their Deed of Trust and Promissory Note on the secondary mortgage  
9 market. (Id. at ¶ 3.) Specifically, at some point after  
10 origination, Heritage attempted to securitize and sell  
11 Plaintiffs' Deed of Trust and Promissory Note to Countrywide  
12 Trust. (Id. at ¶¶ 4, 9-10.) Bank of New York is the Trustee of  
13 the Countrywide Trust, which is governed by a Pooling and  
14 Servicing Agreement ("PSA"). One of the terms of the PSA is that  
15 the Deed of Trust and Promissory Note must be properly endorsed,  
16 transferred, accepted, and deposited with Countrywide Trust on or  
17 before the date specified in the PSA. Plaintiffs alleged that  
18 the parties involved failed to adhere to this term of the PSA,  
19 and thus, Plaintiffs contended, the Promissory Note and Deed of  
20 Trust are not part of the Countrywide Trust. (Id. at ¶ 10.) As  
21 a result of the failed securitization, Plaintiffs claimed that  
22 Bank of New York, as Trustee for Countrywide Trust, has no  
23 authority to collect on the loan. (Id. at ¶¶ 4, 10-11.)

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25  
26 <sup>5</sup> Defendants requested the Court take judicial notice of the  
27 Promissory Note and Deed of Trust executed by Plaintiffs and  
28 Heritage pursuant to Federal Rules of Evidence 201(b). The Court  
granted Defendants' Request for Judicial Notice of the Deed of  
Trust (Ex. B) and the Promissory Note (Ex. A). See Order, ECF  
No. 23.

1 Plaintiffs claimed that as a result of Defendants' conduct,  
2 they have suffered damages trying to determine the true owners of  
3 their loan, they have overpaid in interest, and their credit  
4 limit and credit score have been reduced as a result of  
5 Defendants' improper reports to credit agencies. (Id. at ¶¶ 71,  
6 74-75, 77.)

7 In their first cause of action in their initial Complaint,  
8 Plaintiffs sought a judicial determination pursuant to 28 U.S.C.  
9 §§ 2201-2202 that Defendants do not have any right or interest in  
10 Plaintiffs' Promissory Note, Deed of Trust, or the subject  
11 property, and that they lack authority to collect Plaintiffs'  
12 mortgage payments or enforce Plaintiffs' debt obligation. (Id.  
13 at ¶¶ 89-91.) Plaintiffs alleged that an actual controversy  
14 exists with regard to Bank of New York's authority to collect  
15 mortgage payments and enforce Plaintiffs' loan, and as to the  
16 secured or unsecured status of Plaintiffs' loan. (Id. at  
17 ¶¶ 85-88.)

18 Second, Plaintiffs claimed that Defendants negligently  
19 failed to exercise reasonable care in following California law  
20 with respect to the enforcement of debts. (Id. at ¶¶ 93-97.)

21 Third, Plaintiffs claimed that Defendant Bank of New York  
22 violated the Truth in Lending Act § 1641(g) by failing to provide  
23 Plaintiffs with written notice specifying that Bank of New York  
24 had been assigned the beneficial interest in Plaintiffs' Deed of  
25 Trust within thirty days of the date of the assignment of the  
26 Deed of Trust. (Compl. at ¶ 105.)

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1 Fourth, Plaintiffs alleged that Defendants violated  
2 California Business and Profession Code § 17200 by engaging in  
3 "unlawful, fraudulent, and deceptive business practices" with  
4 respect to mortgage loan servicing, assignment of Plaintiffs'  
5 Note and Deed of Trust, and other related matters. (Compl. at  
6 ¶ 115.)

7 Finally, Plaintiffs requested the Court quiet title to the  
8 subject property in the Plaintiffs. Specifically, Plaintiffs  
9 alleged that they were the sole owners, that Defendants had no  
10 right, title, or interest in the property. Additionally,  
11 Plaintiffs alleged that they had offered and were ready, willing,  
12 and able to tender their obligations. (Id. at ¶¶ 122-128.)

13 On March 29, 2012, the Court granted Defendants' Motion to  
14 Dismiss Plaintiffs' initial Complaint with leave to amend. The  
15 Court found that Plaintiffs failed to state facts sufficient to  
16 sustain any of their causes of action, and were given twenty days  
17 to remedy their pleadings. Plaintiffs filed their First Amended  
18 Complaint ("FAC" ECF No. 24) on April 18, 2012.

19 In the FAC, Plaintiffs drop MERS as a defendant. Plaintiffs  
20 no longer claim that MERS "cannot grant, assign, or transfer any  
21 true or pecuniary beneficial interest in Plaintiffs' Note and  
22 Mortgage." (Compl. at 9.) They also drop the allegation that as  
23 a result of MERS purportedly improper assignment, "the lender's  
24 interest in Plaintiffs' Promissory Note [is] unsecured...[and  
25 thus] is without legal force or effect." (Id. at 10.)  
26 Additionally, Plaintiffs drop the second cause of action for  
27 negligence and the fifth cause of action for quiet title.

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1 Plaintiffs renew their causes of action for (1) declaratory  
2 relief, (2) violation of 15 U.S.C. § 1641(g), and (3) violation  
3 of Cal. Bus. & Prof. Code § 17200, et seq.

4  
5 **C. Plaintiffs' New Claims**

6  
7 For the causes of action re-alleged in the FAC, Plaintiffs  
8 make essentially the same factual claims, but now allege new  
9 details regarding a document (the "Assignment") purporting to  
10 assign Plaintiff's Promissory Note to Bank of New York as trustee  
11 for Countrywide. Plaintiffs allege the Assignment "was not  
12 executed until September 8, 2011, more than five years after the  
13 Closing Date" dictated by the PSA. (FAC at 11-12.) The  
14 Assignment was allegedly executed by Kathy Oriard, purportedly as  
15 Vice President of MERS. (FAC at 15.)

16 Plaintiffs further allege that Kathy Oriard was not an  
17 employee of MERS, but an employee of Bank of America. (Id.)  
18 Plaintiffs allege Bank of New York and/or Bank of America acted  
19 with the intent to illegally collect Plaintiffs' payments with  
20 the knowledge that the Assignment did not in fact legally grant,  
21 assign or transfer Plaintiffs' interest to Bank of New York per  
22 the PSA. (Id.) Also, MERS did not identify the principal, in  
23 violation of California law. (Id.)

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1 For the first cause of action for declaratory relief,  
2 Plaintiffs make essentially the same claim they made in their  
3 initial Complaint; that Plaintiffs' mortgage was improperly  
4 securitized, and, therefore, Defendants have no right or power to  
5 demand mortgage payments or otherwise enforce the terms of the  
6 Note or Deed of Trust. (FAC at 6-8.) Regarding Plaintiffs'  
7 ongoing mortgage payments, "Plaintiffs do not dispute that they  
8 owe money on their mortgage obligation. Rather, Plaintiffs  
9 dispute the amount owed and seek the Court's assistance in  
10 identifying who the true creditor is of their Note and Deed of  
11 Trust." (Id. at 16). Defendants argue that the renewed cause of  
12 action should still fail because Plaintiffs lack standing to  
13 enforce the terms of the PSA and fail to establish any actual  
14 controversy. (ECF No. 25 at 12.)

15 For the second cause of action, the TILA violation,  
16 Plaintiffs contend that Bank of New York failed to notify them  
17 within thirty (30) days of the alleged September 8, 2011  
18 assignment. (FAC at 20.) Defendants counter that this claim  
19 fails because Plaintiffs had notice of the assignment to Bank of  
20 New York and because they fail to allege any detrimental  
21 reliance. (ECF No. 25 at 15.)

22 Finally, Plaintiffs' third cause of action, the UCL  
23 violation, is based on Defendants' alleged TILA violation, as  
24 well as their allegedly fraudulent assignment documentation.  
25 Defendants contend that Plaintiffs' UCL claim fails because they  
26 lack standing and do not allege wrongful conduct. (ECF No. 25 at  
27 17.)

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

17           A court granting a motion to dismiss a complaint must then  
18 decide whether to grant leave to amend. Leave to amend should be  
19 "freely given" where there is no "undue delay, bad faith or  
20 dilatory motive on the part of the movant, . . . undue prejudice  
21 to the opposing party by virtue of allowance of the amendment,  
22 [or] futility of the amendment . . . ." Foman v. Davis, 371 U.S.  
23 178, 182 (1962); Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d  
24 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to  
25 be considered when deciding whether to grant leave to amend).  
26 Not all of these factors merit equal weight. Rather, "the  
27 consideration of prejudice to the opposing party . . . carries  
28 the greatest weight."

1 Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 185  
2 (9th Cir. 1987). Dismissal without leave to amend is proper only  
3 if it is clear that “the complaint could not be saved by any  
4 amendment.” Intri-Plex Techs. v. Crest Group, Inc., 499 F.3d  
5 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411  
6 F.3d 1006, 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil  
7 Co., 866 F.2d 1149, 1160 (9th Cir. 1989) (“Leave need not be  
8 granted where the amendment of the complaint . . . constitutes an  
9 exercise in futility . . . .”)).

10  
11 **ANALYSIS**

12  
13 **A. Plaintiffs’ First Cause of Action for Declaratory**  
14 **Relief**

15 Plaintiffs once again seek a declaration from the Court that  
16 Defendants have no right to collect mortgage payments or  
17 otherwise enforce the terms of the Note and Deed of Trust. (FAC  
18 at 18.) Plaintiffs’ claim for declaratory relief rests on the  
19 theory that the alleged failure to properly securitize the  
20 mortgage “renders Defendants third-party strangers to the  
21 underlying debt obligation,” or alternatively that the Sept. 8,  
22 2011 Assignment of the Deed of Trust was void because of a  
23 fraudulent representation on the form. (Id. at 8, 15.)  
24 Plaintiffs contend that there is an “actual controversy” because  
25 they dispute Bank of New York’s claim to be the rightful holder  
26 of the note, and their right to collect mortgage payments. (Id.)

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1 Defendants move to dismiss Plaintiffs' declaratory relief claim  
2 on the basis that Plaintiffs lack standing to enforce the terms  
3 of the PSA, and additionally, that they fail to allege the  
4 existence of an "actual controversy." (MTD, ECF No. 25 at 12.)

5 This Court previously ruled in this case that Plaintiffs  
6 lacked standing to challenge the process in which their mortgage  
7 was securitized because they are not a party to the PSA. See  
8 Order ECF No. 23 at 12; see also, Bascos v. Federal Home Loan  
9 Mortg. Corp., 2011 WL 3157063, at \*6 (C.D. Cal. July 22, 2011)  
10 ("To the extent Plaintiff challenges the securitization of his  
11 loan because Freddie Mac failed to comply with the terms of the  
12 securitization agreement, Plaintiff has no standing to challenge  
13 the validity of the securitization of the loan as he is not an  
14 investor of the loan trust."). Because Plaintiffs have not  
15 alleged any further information that would tend to cast doubt on  
16 Defendants' representation that they are the true holder of the  
17 Note, and thus entitled to collect Plaintiffs' mortgage payments,  
18 the Court declines to grant declaratory relief.

19 Further, declaratory relief is not an independent claim, but  
20 rather a form of relief. Santos v. Countrywide Home Loans,  
21 No. Civ. 2:09-02642 WBS DAD, 2009 WL 3756337, at \*5 (E.D. Cal.  
22 Nov. 6, 2009). The court may dismiss a claim for declaratory  
23 relief where the relief sought is commensurate with the relief  
24 sought in the other causes of action. Cerecedes v. U.S.  
25 Bankcorp, 2011 WL 2711071 at \*4 (E.D. Cal. July 11, 2011).

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1 As discussed below, because Plaintiffs fail to state a claim for  
2 either violation of 15 U.S.C. § 1641(g) or violation of Cal. Bus.  
3 & Prof. Code § 17200, the Court GRANTS Defendants' Motion to  
4 Dismiss Plaintiffs' claim for declaratory relief without leave to  
5 amend.

6  
7 **B. Plaintiffs' Second Cause of Action for Violation of**  
8 **Truth in Lending Act, 15 U.S.C. § 1641(g).**

9 Plaintiffs allege that Defendants violated 15 U.S.C.  
10 § 1641(g) of TILA by failing to timely inform Plaintiffs when  
11 their mortgage was assigned to a new owner. Specifically,  
12 Plaintiffs contend they received no notice of the Bank of New  
13 York's assignment after the letter dated September 8, 2011 was  
14 signed. (FAC at 20.) Defendants counter that Plaintiffs had  
15 constructive notice, and the initial Complaint shows that Bank of  
16 America informed them by writing that Bank of New York was the  
17 owner of their mortgage. (ECF No. 25 at 15.) Additionally,  
18 Defendants argue that Plaintiffs have failed to allege any  
19 detrimental reliance, and that any damages were purely  
20 speculative. (Id. at 16-17.)

21 TILA, 15 U.S.C. § 1641(g) states that "[n]ot later than 30  
22 days after the date on which a mortgage loan is sold or otherwise  
23 transferred or assigned to a third party, the creditor that is  
24 the new owner or assignee of the debt shall notify the borrower  
25 in writing of such transfer..." 15 U.S.C. § 1641(g)(1). A  
26 creditor is only liable for actual damages sustained as a result  
27 of its alleged failure to provide written notice.

28 ///

1 Beall v. Quality Loan Serv. Corp., 2011 WL 1044148, at \*6 (S.D.  
2 Cal. Mar. 21, 2011) ("A creditor that fails to comply with any  
3 requirement imposed under § 1641(g)(1) only faces liability for  
4 any actual damage sustained by such person as a result of the  
5 failure."); see also Che v. Aurora Loan Services, 2012 WL 899629,  
6 at \*3-4 (C.D. Cal. March 15, 2012) (finding that speculative  
7 damages are not enough to impose liability against a creditor for  
8 alleged violation of 15 U.S.C. § 1641(g), as liability exists  
9 only for actual damages). Plaintiffs' claim for damages rests  
10 primarily on the assertion that another lender may seek to  
11 collect payments, or that a potential buyer may be deterred by a  
12 so-called "cloud" on Plaintiffs' title. (See FAC at 21.) The  
13 other damages sought, including "overcalculation and overpayment  
14 of interest on Plaintiffs' Loan, [and] the costs of repairing  
15 Plaintiffs' credit" have not been sufficiently linked to any of  
16 Defendants' actions. Since Plaintiffs' damages are purely  
17 speculative and were not caused by any violation of § 1641(g),  
18 Plaintiffs' second cause of action fails.

19  
20 **C. Plaintiffs' Third Cause of Action for Violation of the**  
21 **Unfair Competition Law, California Business and**  
22 **Professions Code § 17200, Et Seq.**

23 Plaintiffs' claim for violation of the UCL, Cal. Bus. &  
24 Prof. Code § 17200, is based on their allegations that Bank of  
25 New York and Bank of America "engaged in unfair, unlawful, and  
26 fraudulent business practices." (FAC at 21.) Specifically,  
27 Plaintiffs contend that Defendant Bank of New York violated  
28 15 U.S.C. § 1641(g) by failing to notify them of its purported  
acquisition of Plaintiffs' mortgage. (Id. at 22.)

1 Additionally, Plaintiffs allege that Defendants violated Cal.  
2 Penal Code § 532(f)(a)(4) by filing the Assignment in the County  
3 Recorder's Office with knowledge that the Assignment contained  
4 the deliberate misrepresentation that Bank of New York had been  
5 assigned Plaintiffs' Note and Mortgage. (Id.) Defendants  
6 contend that these claims are unsupported by any credible or  
7 specific allegations of fact, and Plaintiffs lack standing to  
8 assert the UCL claims. (ECF No. 25 at 18.)

9       The Court previously ruled in this case that Plaintiffs' UCL  
10 claims failed because any allegations of unlawful conduct were  
11 conclusory, and any allegations of unfair or fraudulent conduct  
12 were unsupported by any identifiable wrongdoing by specific  
13 Defendants. (ECF No. 23 at 20.) Plaintiffs' new UCL claim is  
14 based on violation of Cal. Penal Code § 532(f)(a)(4), presumably  
15 based on the allegedly fraudulent signature on the Assignment.  
16 Plaintiffs' amended UCL claim fails for the same reasons it did  
17 in the initial Complaint. Plaintiffs essentially are alleging  
18 that Defendants engaged in fraudulent activity, without meeting  
19 Rule 9(b)'s requirement that such claims be pled with  
20 particularity. A court is not required to accept as true a  
21 "legal conclusion couched as a factual allegation." Iqbal,  
22 129 S. Ct. at 1950. Plaintiffs offer no facts or other evidence  
23 to support their allegation that Kathy Oriard misrepresented  
24 herself in signing the Assignment. In addition, merely listing  
25 Civil Code violations, as Plaintiffs do here, without more, is  
26 not sufficient to maintain a plausible claim. Id. at 1949.

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1 Plaintiffs' assertion that Defendants violated Cal. Penal Code  
2 § 532(f)(a)(4) by "filing or causing the Assignment to be filed  
3 with the San Joaquin County Recorder's Office in connection with  
4 Plaintiffs' mortgage loan transaction with knowledge that the  
5 Assignment contained deliberate misstatements and  
6 misrepresentations" is merely a conclusory recitation of the  
7 elements of the offense. Therefore, Plaintiffs' third cause of  
8 action fails.

9  
10 **CONCLUSION**

11  
12 As a matter of law, and for the reasons set forth above,  
13 Defendants' Motion to Dismiss (ECF No. 25) is GRANTED without  
14 leave to amend. The Clerk of the Court is directed to close this  
15 case.

16 IT IS SO ORDERED.

17 Dated: August 6, 2012

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20 MORRISON C. ENGLAND, JR.  
21 UNITED STATES DISTRICT JUDGE  
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