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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ISAAC GUTIERREZ AND  
PURIFICACION M. INFANTE,

Plaintiffs,

v.

BANK OF AMERICA, N.A., ET AL.

Defendants.

No. 2:13-cv-01695-TLN-AC

**ORDER**

This matter is before the Court pursuant to Defendants Bank of America, N.A. (“Defendant B.A.”), Mortgage Electronic Registration Systems, Inc. (“Defendant MERS”), U.S. Bank (“Defendant U.S. Bank”) and National Association as Trustee for the Harborview Mortgage Loan Trust 2005-12 Mortgage Loan Pass-through Certificates, Series 2005-12’s (“Defendant Trustee”) (collectively referred to as “Defendants”) Motion to Dismiss.<sup>1</sup> (ECF No. 8.) Plaintiffs Isaac Gutierrez (“Plaintiff Gutierrez”) and Purificacion Infante (“Plaintiff Infante”) (collectively referred to as “Plaintiffs”) oppose Defendants’ motion. (ECF No. 14.) Defendants filed a reply in response to Plaintiffs’ opposition. (*See* ECF No. 17.) The Court has carefully considered the arguments raised by both parties. For the reasons stated below, Defendants’ Motion to Dismiss (ECF No. 8) is hereby GRANTED.

<sup>1</sup> This matter was submitted without oral argument on December 3, 2013. (Minute Order, ECF No. 13); see also E.D. Cal. Local Rule 230(g).

1           **I.       FACTUAL AND PROCEDURAL BACKGROUND**

2           On August 2, 2005, Plaintiff Gutierrez entered into a mortgage loan transaction for the  
3 Subject Property. (Compl., ECF No. 1 at ¶ 7.) The loan documents consisted of a Deed of Trust,  
4 Adjustable Rate Note, Adjustable Rate Rider, and Prepayment Rider. (ECF No. 1 at ¶ 7.) The  
5 loan product was an adjustable rate mortgage with negative amortization (110%). (ECF No. 1 at  
6 ¶ 7.) The loan documents were recorded in the Solano County Recorder’s Office on August 11,  
7 2005. (ECF No. 1 at ¶ 7.) The Deed of Trust identifies Paul Financial, LLC as the lender and  
8 Foundation Conveyancing, LLC as the trustee. (ECF No. 1 at ¶ 8.) Defendant MERS is  
9 identified as the nominal beneficiary for Paul Financial, LLC. (ECF No. 1 at ¶ 8.) The original  
10 servicer of the loan was Paul Financial, LLC. (ECF No. 1 at ¶ 9.) The servicer assigned No.  
11 124461119 to the loan. (ECF No. 1 at ¶ 9.) Shortly after the loan closed, Countrywide Home  
12 Loans, Inc. assumed the servicing role. (ECF No. 1 at ¶ 9.)

13           In July, 2008, when Defendant B.A. acquired Countrywide Financial Corporation,  
14 Defendant B.A.’s loan servicing company, BAC Home Loans Servicing LP (“BAC”) became the  
15 servicer of Plaintiff Gutierrez’s loan. (ECF No. 1 at ¶ 9.) BAC subsequently merged into  
16 Defendant B.A. and so Defendant B.A. became the servicer. (ECF No. 1 at ¶ 9.)

17           Shortly after the Gutierrez loan closed, it was sold to the HVMLT 2005-12 Trust on or  
18 before September 30, 2005, the Closing Date of the Trust. (ECF No. 1 at ¶ 11.) Countrywide  
19 Home Loans, Inc., the loan originator sold the loan to Greenwich Capital Financial Products, Inc.  
20 (“GCFP”) as Sponsor/Seller in the securitization transaction. (ECF No. 1 at ¶ 13.) Immediately  
21 thereafter, GCFP sold the subject loan, pooled with other mortgages, on September 1, 2005, to  
22 Greenwich Capital Acceptance, Inc. (“GCA”), the securitization “Depositor.” (ECF No. 1 at ¶  
23 13.) Finally, GCA transferred the loan to Defendant U.S. Bank, National Association  
24 (“Defendant U.S. Bank”), as trustee for the HVMLT 2005-12 Trust.

25           On June 8, 2006, Plaintiff Gutierrez recorded a Grant Deed conveying the Subject  
26 Property to Jorge Infante. (ECF No. 1 at ¶ 20.) On June 23, 2008, Recontrust Company, acting  
27 as an agent for the (unidentified) Beneficiary, recorded a Notice of Default and Election to Sell  
28 Under Deed of Trust (“NOD”) against the Subject Property. (See NOD, ECF No. 1-3.) The

1 NOD states that “[t]o find out the amount you must pay, or to arrange for payment to stop the  
2 foreclosure, or if your property is in foreclosure for any other reason, contact: MORTGAGE  
3 ELECTRONIC REGISTRATION SYSTEMS, INC. C/O Countrywide Home Loans, Inc.” (ECF  
4 No. 1-3.) On December 23, 2009, Defendant MERS filed a Substitution of Trustee purporting to  
5 substitute Recontrust Company for the original trustee under the Deed of Trust executed by  
6 Plaintiff Gutierrez. (Substitution of Trustee, ECF No. 1-4.) Concurrently with the Substitution of  
7 Trustee, on December 23, 2009, Recontrust recorded a Notice of Trustee’s Sale scheduling a  
8 foreclosure sale of the Subject Property for January 7, 2010. (Notice of Trustee’s Sale, ECF No.  
9 1-5.) However, the scheduled sale did not take place. On January 13, 2010, MERS recorded a  
10 second Substitution of Trustee, again purporting to substitute Recontrust for the original trustee  
11 under the Gutierrez Deed of Trust. (Second Substitution of Trustee, ECF No. 1-6.) Again,  
12 Recontrust concurrently recorded another Notice of Trustee’s Sale with the Second Substitution  
13 of Trustee on January 13, 2010, this time scheduling the foreclosure sale of the Subject Property  
14 for February 5, 2010. (Notice of Trustee’s Sale, ECF No. 1-7.) Again, the scheduled sale did not  
15 take place.

16 On February 5, 2010, Jorge I. Infante recorded a Grant Deed conveying his interest in the  
17 Subject Property to Jorge I. Infante and Purificacion M. Infante, husband and wife. (ECF No. 1 at  
18 ¶ 26.) The Grant Deed was executed on June 19, 2009. (Grant Deed, ECF No. 1-8.)

19 On February 10, 2011, Defendant MERS recorded: (1) a third Substitution of Trustee  
20 again purporting to substitute Recontrust for the original trustee under the Deed of Trust (Third  
21 Substitution of Trustee, ECF No. 1-9); (2) a Corporation Assignment of Deed of Trust assigning  
22 its beneficial interest in the Subject Loan to BAC Home Loans Servicing, LP, FKA Countrywide  
23 Home Loans Servicing, LP (Assignment of Deed of Trust, ECF No. 1-10); and (3) a Notice of  
24 Trustee’s Sale scheduling a foreclosure sale of the Subject Property for March 8, 2011 (Notice of  
25 Trustee’s Sale, ECF No. 1-11). The Subject Property was sold at the March 8, 2011 foreclosure  
26 auction to BAC for \$659,700.00, and the Trustee’s Deed Upon Sale was recorded on March 24,  
27 2011. (Trustee’s Deed Upon Sale, ECF No. 1-12.)

28 Plaintiffs filed a complaint on August 15, 2013. (ECF No. 1.) The Complaint alleges five

1 causes of action: (1) wrongful foreclosure; (2) quiet title; (3) slander of title; (4) cancellation of  
2 instruments; and (5) violation of California Business and Professions Code §17200 et seq. (ECF  
3 No. 1.) Defendants have filed a motion to dismiss all of Plaintiffs’ claims pursuant to Federal  
4 Rule of Civil Procedure 12(b)(6). (ECF No. 8.)

## 5 **II. LEGAL STANDARD**

6 Federal Rule of Civil Procedure 8(a) requires that a pleading contain “a short and plain  
7 statement of the claim showing that the pleader is entitled to relief.” *See Ashcroft v. Iqbal*, 556  
8 U.S. 662, 678–79 (2009). Under notice pleading in federal court, the complaint must “give the  
9 defendant fair notice of what the claim . . . is and the grounds upon which it rests.” *Bell Atlantic*  
10 *v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted). “This simplified notice  
11 pleading standard relies on liberal discovery rules and summary judgment motions to define  
12 disputed facts and issues and to dispose of unmeritorious claims.” *Swierkiewicz v. Sorema N.A.*,  
13 534 U.S. 506, 512 (2002).

14 On a motion to dismiss, the factual allegations of the complaint must be accepted as true.  
15 *Cruz v. Beto*, 405 U.S. 319, 322 (1972). A court is bound to give plaintiff the benefit of every  
16 reasonable inference to be drawn from the “well-pleaded” allegations of the complaint. *Retail*  
17 *Clerks Int’l Ass’n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not allege  
18 “‘specific facts’ beyond those necessary to state his claim and the grounds showing entitlement to  
19 relief.” *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads  
20 factual content that allows the court to draw the reasonable inference that the defendant is liable  
21 for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. 544, 556 (2007)).

22 Nevertheless, a court “need not assume the truth of legal conclusions cast in the form of  
23 factual allegations.” *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir.  
24 1986). While Rule 8(a) does not require detailed factual allegations, “it demands more than an  
25 unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. A  
26 pleading is insufficient if it offers mere “labels and conclusions” or “a formulaic recitation of the  
27 elements of a cause of action.” *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678  
28 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory

1 statements, do not suffice.”). Moreover, it is inappropriate to assume that the plaintiff “can prove  
2 facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not  
3 been alleged[.]” *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*,  
4 459 U.S. 519, 526 (1983).

5 Ultimately, a court may not dismiss a complaint in which the plaintiff has alleged “enough  
6 facts to state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 697 (quoting  
7 *Twombly*, 550 U.S. at 570). Only where a plaintiff has failed to “nudge[] [his or her] claims . . .  
8 across the line from conceivable to plausible[.]” is the complaint properly dismissed. *Id.* at 680.  
9 While the plausibility requirement is not akin to a probability requirement, it demands more than  
10 “a sheer possibility that a defendant has acted unlawfully.” *Id.* at 678. This plausibility inquiry is  
11 “a context-specific task that requires the reviewing court to draw on its judicial experience and  
12 common sense.” *Id.* at 679.

13 In ruling upon a motion to dismiss, the court may consider only the complaint, any  
14 exhibits thereto, and matters which may be judicially noticed pursuant to Federal Rule of  
15 Evidence 201. *See Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988); *Isuzu*  
16 *Motors Ltd. v. Consumers Union of United States, Inc.*, 12 F. Supp. 2d 1035, 1042 (C.D. Cal.  
17 1998).

18 If a complaint fails to state a plausible claim, “[a] district court should grant leave to  
19 amend even if no request to amend the pleading was made, unless it determines that the pleading  
20 could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122,  
21 1130 (9th Cir. 2000) (en banc) (quoting *Doe v. United States*, 58 F.3d 484, 497 (9th Cir. 1995));  
22 *see also Gardner v. Marino*, 563 F.3d 981, 990 (9th Cir. 2009) (finding no abuse of discretion in  
23 denying leave to amend when amendment would be futile). Although a district court should  
24 freely give leave to amend when justice so requires under Rule 15(a)(2), “the court’s discretion to  
25 deny such leave is ‘particularly broad’ where the plaintiff has previously amended its  
26 complaint[.]” *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 520 (9th Cir.  
27 2013) (quoting *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir. 2004)).  
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1           **III. ANALYSIS**

2           The Court addresses each of Plaintiffs’ claims separately below.<sup>2</sup>

3                   a. Wrongful Foreclosure

4           The crux of Plaintiffs’ argument is that during the securitization of the mortgage a defect  
5 occurred, thereby clouding the title. The chain of title was “irreversibly broken when original  
6 lender Paul Financial sold the Gutierrez mortgage loan and was paid in full for it, but failed to  
7 assign the Deed of Trust to the initial purchaser of the loan, Countrywide Home Loans, Inc.”  
8 (ECF No. 1 at ¶ 19.) Thus, Plaintiff reasons that the assignment of the mortgage from the original  
9 lender Paul Financial to Countrywide never occurred, and the securitization Sponsor/Seller “did  
10 not, and could not, validly assign and transfer the mortgage loan to U.S. Bank as trustee for the  
11 certificate holders of the HVMLT 2005-12 Trust on or before the Trust’s Closing date of  
12 September 30, 2005.” (ECF No. 1 at ¶ 19.) Accordingly, Plaintiffs argue that the foreclosure is  
13 void because none of the Defendants in this case had the right or authority to foreclose upon the  
14 property.

15           Defendants argue that Plaintiffs’ claim fails for two reasons. First, Defendants argue that  
16 Plaintiffs’ claim that the securitization broke the chain of title is contrary to California law and,  
17 second, that Plaintiffs cannot state a claim for wrongful foreclosure because they have failed to  
18 allege any harm or prejudice resulting from the securitization as is required to support a claim for  
19 wrongful foreclosure. (ECF No. 8 at 11.) Defendants also contend that Plaintiff lacks standing to  
20 assert any cause of action pursuant to the Pooling and Servicing Agreement (“PSA”) because they  
21 were not a party to it.

22           In opposition, Plaintiffs present two assertions. First, plaintiffs contend that one who sales  
23 the beneficial interest in a promissory note to a securities trust does not retain the rights to  
24 foreclose on property, and thus Defendants’ foreclosure is void. Second, Plaintiffs assert that due  
25 to the foreclosure being void, Plaintiffs are not required to tender the amount due to sustain their  
26 claims.

27 \_\_\_\_\_  
28 <sup>2</sup> Neither of the parties dispute that California law applies to Plaintiffs’ claims and have thus cited California law in support of their arguments. As such, the Court finds that California law governs its analysis.

1 Pursuant to the arguments presented by the parties, the Court makes the following  
2 findings: (1) Plaintiffs do not have standing to challenge the validity of the PSA; (2) securitization  
3 of the loan does not void the beneficiary's interests; and (3) Plaintiffs cannot allege that they were  
4 prejudiced by the foreclosure.

### 5 **1. Standing to Challenge the PSA**

6 In support of Plaintiffs' contention that they have standing to challenge the PSA, Plaintiffs  
7 cite *Johnson v. HSBC Bank USA, Nat. Ass'n*, No. 3:11-CV-2091-JM-WVG, 2012 WL 928433, at  
8 \*2 (S.D. Cal. Mar. 19, 2012). In *Johnson*, the court acknowledges that Ninth Circuit district  
9 courts are split as to whether a Mortgagor has a right to challenge the securitization process. *Id.*  
10 Although the *Johnson* court found that plaintiff was not foreclosed from bringing his claim, this  
11 Court finds that the majority of district courts have held that plaintiffs who are not parties to a  
12 PSA do not have standing to raise violations of a PSA or to otherwise bring claims on the basis  
13 that a PSA was violated. See *Hosseini v. Wells Fargo Bank, N.A.*, No. C-13-02066 DMR, 2013  
14 WL 4279632, at \*3 (N.D. Cal. Aug. 9, 2013); *Gilbert v. Chase Home Fin., LLC*, No. 1:13-CV-  
15 265 AWI SKO, 2013 WL 2318890, at \*3 (E.D. Cal. May 28, 2013); *Elliot v. Mortgage Elec.*  
16 *Registration Sys.*, No. 12-CV-4370 YGR, 2013 U.S. Dist. LEXIS 61820, \*7-\*10 (N.D. Cal. Apr.  
17 25, 2013); *Sabherwal v. Bank of N.Y. Mellon*, No. 11cv2874 WQH-BGS, 2013 U.S. Dist. LEXIS  
18 2930, \*20-\*21, 2013 WL 101407 (S.D. Cal. Jan. 7, 2013); *Dinh v. Citibank, N.A.*, No. SA CV  
19 12-1502-DOC (RNBx), 2013 U.S. Dist. LEXIS 2312, \*8-\*11, 2013 WL 80150 (C.D. Cal. Jan. 7,  
20 2013); *Ramirez v. Kings Mortg. Servs.*, No. 1:12-cv-01109-AWI-SKO, 2012 U.S. Dist. LEXIS  
21 160583, \*13-\*14, 2012 WL 5464359 (E.D. Cal. Nov. 8, 2012); *Armstrong v. Chevy Chase Bank,*  
22 *FSB*, No. 5:11-cv-05664 EJD, 2012 U.S. Dist. LEXIS 144125, \*6-\*7, 2012 WL 4747165 (N.D.  
23 Cal. Oct. 3, 2012); *Hale v. World Sav. Bank*, No. CIV 2:12-cv-1462-GEB-JFM, 2012 U.S. Dist.  
24 LEXIS 141917, \* 17-\*18, 2012 WL 4675561 (E.D. Cal. Oct. 1, 2012); *Almutarreb v. Bank of*  
25 *N.Y. Trust Co., N.A.*, No. C-12-3061 EMC, 2012 U.S. Dist. LEXIS 137202, \*3-\*7, 2012 WL  
26 4371410 (N.D. Cal. Sept. 24, 2012); *Armeni v. America's Wholesale Lender*, No. CV 11-8537  
27 CAS (AGRx), 2012 WL 603242, at \*3 (C.D. Cal. Feb. 24, 2012); *Junger v. Bank of Am.*, No. CV  
28 11-10419 CAS (VBKx), 2012 U.S. Dist. LEXIS 23917, \*7-\*8, 2012 WL 603262 (C.D. Cal. Feb.

1 24, 2012); *Bascos v. Fed. Home Loan Mortgage Corp.*, No. CV 11-3968-JFW JCX, 2011 WL  
2 3157063, at \*6 (C.D. Cal. July 22, 2011).

3 The Court adopts the majority view that Plaintiffs do not have standing to challenge the  
4 PSA. Accordingly, Plaintiff cannot maintain its claim for wrongful foreclosure and dismissal is  
5 appropriate. Moreover, even if Plaintiffs did have standing, Plaintiffs' arguments as to defects in  
6 the securitization of the loan and prejudice also fail to state a claim.

## 7 2. Securitization of the Loan

8 Plaintiffs allege that the securitization of the loan divested Defendant MERS of its  
9 beneficiary interest. Thus, Plaintiffs contend that MERS could not have transferred its interest to  
10 Defendants BAC. In support, Plaintiffs cite *Cerezo v. Wells Fargo Bank, N.A.*, No. 13-1540 PSG,  
11 2013 WL 4029274 (N.D. Cal. Aug. 6, 2013). Again, the Court finds that Plaintiffs' position is  
12 not followed by the majority of courts. *See Patel v. Mortgage Elec. Registration Sys., Inc.*, No.  
13 4:13-CV-1874 KAW, 2013 WL 4029277, at \*4 (N.D. Cal. Aug. 6, 2013) (finding that the transfer  
14 of the Note and the beneficial interest through the securitization process does not constitute a sale  
15 of the Property, and therefore, there is no requirement that it be recorded); *McGough v. Wells*  
16 *Fargo Bank, N.A.*, No. C12-0050 TEH, 2012 WL 2277931, at \*4 (N.D. Cal. June 18, 2012)  
17 ("Theories that securitization undermines the lender's right to foreclose on a property have been  
18 rejected by the courts."); *Sami v. Wells Fargo Bank, et al.*, No. 12-00108, 2012 WL 967051 at  
19 \*4-\*6 (N.D. Cal. March 21, 2012) (rejecting arguments that securitization invalidates standing to  
20 foreclose and finding borrower has no standing to challenge violations of the terms of a Pooling  
21 and Service Agreement ("PSA") as improper securitization); *Wadhwa v. Aurora Loan Servs.,*  
22 *LLC*, No. 11-1784, 2011 WL 2681483 at \*4 (E.D. Cal. July 8, 2011) (rejecting argument that  
23 securitization, and assignment of the note to a REMIC invalidates interests other than the  
24 borrower's); *Hafiz v. Greenpoint Mortgage Funding, Inc.*, 652 F. Supp. 2d 1039, 1043 (N.D. Cal.  
25 2009) (rejecting argument that defendants' power of sale is lost by assignment of original  
26 promissory note to a trust pool); *Benham v. Aurora Loan Servs.*, No. 09-2059, 2009 WL  
27 2880232, at \*3 (N.D. Cal. Sept. 1, 2009) (rejecting same argument regarding trust pool); *Reyes v.*  
28 *GMAC Mortgage LLC*, No. 11-0100, 2011 WL 1322775, at \*2 (D. Nev. Apr. 5, 2011)



1 (“securitization of a loan does not in fact alter or affect the legal beneficiary’s standing to enforce  
2 the deed of trust”); *see also Lane v. Vitek Real Estate Indus. Group*, 713 F. Supp. 2d 1092, 1099  
3 (E.D. Cal. 2010) (noting that “[t]here is no stated requirement in California’s non-judicial  
4 foreclosure scheme that requires a beneficial interest in the Note to foreclose. Rather, the statute  
5 broadly allows a trustee, mortgagee, beneficiary, or any of their agents to initiate non-judicial  
6 foreclosure”). Again, the Court declines Plaintiffs’ invitation to apply the minority approach and  
7 thus finds that Plaintiffs’ claim for wrongful foreclosure fails.

### 8 **3. Prejudice**

9 Finally, Plaintiffs have not adequately alleged that the foreclosure was prejudicial. Case  
10 law instructs that the elements of an equitable cause of action to set aside a foreclosure sale are:  
11 (1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real  
12 property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale  
13 was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the  
14 trustor or mortgagor tendered the amount of the secured indebtedness or was excused from  
15 tendering.” *Lona v. Citibank, N.A.*, 202 Cal. App. 4th 89, 104 (2011).

16 Here, Plaintiffs’ wrongful foreclosure claim fails because Plaintiffs do not allege facts that  
17 satisfy the second or third prong. Specifically, Plaintiffs fail to allege that they were able to  
18 tender the amount owed on the mortgage. *See Dick v. Am. Home Mortgage Servicing, Inc.*, No.  
19 2:13-00201 WBS, 2013 WL 5299180, at \*3 (E.D. Cal. Sept. 18, 2013) (“Plaintiffs do not allege  
20 they could have met these obligations, and thus any defects in the foreclosure were not prejudicial  
21 to plaintiffs.”); *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 272 (2011) (“[A]  
22 plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged  
23 imperfection in the foreclosure process was prejudicial to the plaintiff’s interests.”); *Herrera v.*  
24 *Fed. Nat’l Mortg. Ass’n*, 205 Cal. App. 4th 1495, 1508 (2012) (finding no prejudice from  
25 assignment of loan where borrowers defaulted on the loan and failed to tender and cure default);  
26 *cf. Silga v. Mortg. Elec. Registration Sys., Inc.*, 219 Cal. App. 4th 75, 85 (2013) (“The assignment  
27 of the deed of trust and the note did not change [plaintiffs’] obligations under the note, and there  
28 is no reason to believe that ... the original lender would have refrained from foreclosure in these

1 circumstances.”).

2 Plaintiffs contend that they are exempt from the tender rule (referenced above as the third  
3 prong) because they allege that the foreclosure was void, not voidable, and thus an exception to  
4 the tender rule. (ECF No. 15.) The Court agrees with Plaintiffs’ assertion that a void foreclosure  
5 is an exception to the tender rule, but disagrees that the facts as alleged show that the foreclosure  
6 is void. Moreover, even if the foreclosure was void, Plaintiffs still cannot show the second prong,  
7 prejudice, because they have not alleged that they could meet the financial obligations under the  
8 loan. *Dick v. Am. Home Mortgage Servicing, Inc.*, 2013 WL 5299180 at \*3; *Herrera v. Fed.*  
9 *Nat’l Mortg. Ass’n*, 205 Cal. App. 4th at 1508. Accordingly, Defendants’ motion to dismiss  
10 Plaintiffs’ wrongful foreclosure claim is GRANTED.

11 b. Quiet Title

12 An action to quiet title is brought “to establish title against adverse claims to real or  
13 personal property or any interest therein.” Cal. Civ. Proc. Code § 760.020. In a quiet title action,  
14 two conditions must be met. First, a complaint must be verified and include “(1) a legal  
15 description of the property and its street address or common designation, (2) the title of the  
16 plaintiff and the basis of the title, (3) the adverse claims to the title of the plaintiff, (4) the date as  
17 of which the determination is sought, and (5) a prayer for the determination of the title of the  
18 plaintiff against the adverse claims.” *Permpoon v. Wells Fargo Bank Nat’l Ass’n*, No. 09-CV-  
19 01140-H (BLM), 2009 U.S. Dist. LEXIS 89723, at \*15 (S.D. Cal. Sept. 29, 2009) (citing Cal.  
20 Civ. Proc. Code § 761.020). Second, a plaintiff must pay or offer to pay any outstanding debts on  
21 the subject property before the action to quiet title is commenced. *Hamilton v. Bank of Blue*  
22 *Valley*, 746 F. Supp. 2d 1160, 1177–78 (E.D. Cal. 2010); *Phillips v. Wells Fargo Bank, N.A.*, No.  
23 09CV1486-H (BLM), 2009 WL 3756698, at \*5 (S.D. Cal. Nov. 6, 2009). As discussed above,  
24 Plaintiffs do not allege that they are able to meet the financial debts on the subject property. As  
25 such, their claim for quiet title fails, and Defendants motion to dismiss this claim is GRANTED.

26 c. Slander of Title

27 Plaintiffs’ slander of title claim is predicated on Plaintiffs’ allegations that MERS retained  
28 no beneficial interest in the subject property after the mortgage was securitized. Because this

1 Court has already discounted this argument, Plaintiffs fail to state a claim as to this cause of  
2 action. Thus, Defendants' motion to dismiss Plaintiffs' slander of title claim is GRANTED.

3 d. Cancellation of Instruments

4 Plaintiffs essentially claim that pursuant to the securitization of the loan Defendants were  
5 divested of their interest in the loan, and thus any subsequent transfers of interest were false  
6 assignments and the loan contracts and Promissory Notes are null and void. (ECF No. 1 at ¶¶ 59–  
7 64.) Consequently, Plaintiffs ask the court to cancel the Deeds of Trust. While fraudulent loan  
8 documents might provide grounds for loan cancellation, as stated above, Plaintiffs' Complaint  
9 fails to state a claim for fraud. Further, Plaintiffs' inability to perform the obligations to which  
10 Plaintiff Gutierrez agreed, without more, does not provide a basis for cancellation of the loan.  
11 *See Andrade v. Wachovia Mortgage, FSB*, No. 09 CV 0377 JM (WMC), 2009 WL 1111182, at \*4  
12 (S.D. Cal. Apr. 21, 2009). “[I]n an action for rescission or cancellation of instruments, a  
13 complainant is required to do equity ‘by restoring to the defendant any value the plaintiff received  
14 from the transaction.’” *Id.* (quoting *Fleming v. Kagan*, 189 Cal. App. 2d 791, 796–97 (1961)).  
15 Therefore, because Plaintiffs have not alleged that they are prepared to return the loan proceeds to  
16 Defendants, they fail to state a claim for cancellation of the loan documents. *Id.* As such,  
17 Defendants' motion to dismiss Plaintiffs' claim for cancellation is GRANTED.

18 e. California Business and Professions Code §17200 et seq.

19 Section 17200 prohibits “any unlawful, unfair or fraudulent business act or practice.” Cal.  
20 Bus. & Prof. Code § 17200; *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1554  
21 (2007). Plaintiffs' allegations concerning this claim are all founded on their theory that  
22 Defendants did not have a valid interest in the mortgage affecting the Subject Property. Because  
23 the Court has already disposed of this argument, Plaintiffs' have failed to allege any unlawful,  
24 unfair or fraudulent business act or practice that would support Plaintiffs' § 17200 claim. As  
25 such, Defendants' motion to dismiss Plaintiffs' § 17200 claim is hereby GRANTED.

26 **IV. CONCLUSION**

27 For the foregoing reasons, Defendants' Motion to Dismiss Plaintiffs' Complaint (ECF No.

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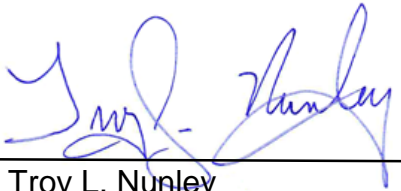
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8) is hereby GRANTED. Plaintiffs may file an amended complaint within thirty days of the entry of this order. Failure to do so will result in this case being closed.

IT IS SO ORDERED.

Dated: April 4, 2014



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Troy L. Nunley  
United States District Judge