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5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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8 WILLIAM G. KIRK,

No. C 12-05969 SI

9 Plaintiff,

**ORDER DISMISSING COMPLAINT  
WITHOUT LEAVE TO AMEND;  
VACATING HEARING**

10 v.

11 WELLS FARGO BANK, N.A.; and DOES 1-  
12 100, inclusive,

13 Defendant.  
\_\_\_\_\_ /

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15 Now before the Court is defendant's motion to dismiss plaintiff's first amended complaint  
16 ("FAC") pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which  
17 relief can be granted. Plaintiff has filed an opposition to which defendant has replied. Pursuant to Civil  
18 Local Rule 7-1(b), the Court determines that the matter is appropriate for resolution without oral  
19 argument and VACATES the hearing currently scheduled for April 19, 2013. Having considered the  
20 parties' arguments, the Court hereby GRANTS defendants' motion to dismiss WITHOUT LEAVE TO  
21 AMEND, for the reasons set forth below.

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23 **BACKGROUND**

24 On January 11, 2006, Kirk borrowed \$476,000 from Wells Fargo to refinance an existing  
25 mortgage loan. FAC ¶ 8, Ex. B ("Deed of Trust"). In exchange for the loan, Kirk executed a  
26 promissory note ("the Note") and the Deed of Trust. *Id.* Kirk's home, located at 147 Mabry Way, San  
27 Rafael, California, secured the loan. *Id.* ¶ 3. The Deed of Trust identifies Kirk as the borrower, Wells  
28 Fargo as the lender and beneficiary, and Fidelity National Title Insurance Co. as trustee ("Fidelity").

1 *Id.* ¶ 8 The Deed of Trust granted Fidelity a security interest in the property. *Id.*, Ex. B. The Deed of  
2 Trust also provides:

3 **Acceleration; Remedies.** Lender shall give notice to Borrower prior to acceleration  
4 following any breach of any covenant or agreement in this Security Instrument . . . The  
5 notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date,  
6 not less than 30 days from the date the notice is given to borrower, by which the default  
7 must be cured; (d) that failure to cure on or before the date specified in the notice may  
8 result in acceleration of the sums secured by this Security Instrument and sale of the  
9 Property . . .

10 If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute a  
11 written notice of the occurrence of an event of default and of Lender’s election to cause  
12 the Property to be sold . . . After the time required by Applicable Law, Trustee, without  
13 demand on Borrower, shall sell the Property at public auction to the highest bidder at the  
14 time and place and under the terms designated in the notice of sale in one or more  
15 parcels and in any order Trustee determines.

16 Deed of Trust, p.14 ¶ 22. The Deed of Trust further provides:

17 **Sale of Note; Change of Loan Servicer; Notice of Grievance.** The Note or partial  
18 interest in the Note (together with this Security Instrument) can be sold one or more  
19 times without prior notice to Borrower. A sale might result in a change in the entity  
20 (known as the “Loan Servicer”) that collects Periodic Payments due under the Note and  
21 this Security Instrument and performs other mortgage loan servicing obligations under  
22 the Note, this Security Instrument and Applicable law . . .

23 Deed of Trust, p.13 ¶ 20. Thus, the Deed of Trust and the Note plainly contemplate that they may be  
24 transferred or sold without prior notice.

25 Wells Fargo securitized and sold the Note and beneficial interest in the Deed of Trust to Wells  
26 Fargo Mortgage Backed Securities 2006-2 Trust (“Trust”). FAC ¶ 9. Wells Fargo continued collecting  
27 mortgage payments and servicing the loan. *Id.* ¶ 10.

28 On July 9, 2012, Wells Fargo executed an assignment of the Deed of Trust – dated July 5, 2012  
– and recorded it in the Official Records of Marin County. RJN Ex. 2.<sup>1</sup> The assignment states that  
Wells Fargo transferred all beneficial interest under the Deed of Trust to U.S. National Bank  
Association, as trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through  
Certificates Series 2006-2. *Id.*

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<sup>1</sup> Pursuant to Rule 201 of the Federal Rules of Evidence, the Court hereby takes judicial notice  
of the foreclosure related documents attached to defendant’s motion as they are either public records  
or documents incorporated by reference into plaintiff’s complaint.

1 By July 2012, Kirk was in default. RJN Ex. 1. The Notice of Default, which was recorded in  
2 the Official Records of Marin County on July 10, 2012, states that Kirk owed \$27,130.92 in past due  
3 payments. When Kirk failed to cure his default, on October 24, 2012, the trustee Fidelity recorded a  
4 Notice of Trustee’s Sale in the Official Records of Marin County, which states that the sale would be  
5 held on November 13, 2012. RJN, Ex. 3. The property was sold on November 13, 2012, for \$399,000.  
6 RJN, Ex. 4.

7 On October 19, 2012, Kirk filed suit in Marin County Superior Court against Wells Fargo  
8 alleging breach of contract, breach of the implied covenant of good faith and fair dealing, quiet title, and  
9 violation of California Business and Professions Code Section 17200. Wells Fargo removed the case  
10 to this Court and filed a motion to dismiss the complaint. On January 9, 2013, the Court granted Wells  
11 Fargo’s motion, giving plaintiff leave to amend. In that Order, the Court rejected Kirk’s argument that  
12 the assignment of the Note and the beneficial interest was a sale of the Property. Accordingly, the Court  
13 rejected Kirk’s argument that the assignment was invalid because it was not recorded. Such an  
14 assignment, the Court held, need not have been recorded under the terms of the contract.

15 On January 25, 2013, Kirk filed an amended complaint alleging a single cause of action for  
16 wrongful foreclosure. On March 3, 2013, Wells Fargo again moved to dismiss, arguing that plaintiff  
17 has failed to allege facts sufficient to support a wrongful foreclosure claim.

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19 **LEGAL STANDARD**

20 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it  
21 fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss,  
22 the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*  
23 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires the plaintiff  
24 to allege facts that add up to “more than a sheer possibility that a defendant has acted unlawfully.”  
25 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although courts do not require “heightened fact pleading  
26 of specifics,” *Twombly*, 550 U.S. at 544, a plaintiff must provide “more than labels and conclusions, and  
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1 a formulaic recitation of the elements of a cause of action will not do,” *id.* at 555. The plaintiff must  
2 allege facts sufficient to “raise a right to relief above the speculative level.” *Id.*

3 In deciding whether the plaintiff has stated a claim, the Court must assume that the plaintiff’s  
4 allegations are true and must draw all reasonable inferences in his or her favor. *Usher v. City of Los*  
5 *Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true  
6 “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.”  
7 *St. Clare v. Gilead Scis., Inc.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Moreover, “the tenet that a court  
8 must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”  
9 *Iqbal*, 556 U.S. at 678. In considering a motion to dismiss, the court may take judicial notice of matters  
10 of public record outside the pleadings. *See MGIC Indemn. Corp. v. Weisman*, 803 F.2d 500, 504 (9th  
11 Cir. 1986).

12 If the Court dismisses a complaint, it must decide whether to grant leave to amend. The Ninth  
13 Circuit has “repeatedly held that a district court should grant leave to amend even if no request to amend  
14 the pleading was made, unless it determines that the pleading could not possibly be cured by the  
15 allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal  
16 quotation marks omitted). Dismissal of a *pro se* complaint without leave to amend is proper only if it  
17 is “absolutely clear that the deficiencies of the complaint could not be cured by amendment.” *Noll v.*  
18 *Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (quoting *Broughton v. Cutter Labs.*, 622 F.2d 458, 460  
19 (9th Cir. 1980)).

## 21 DISCUSSION

22 A nonjudicial foreclosure sale is presumed to have been conducted regularly and fairly. *Nguyen*  
23 *v. Calhoun*, 105 Cal.App.4th 428, 444 (Cal.Ct.App.2003) (“Our analysis proceeds on the presumption  
24 of validity accorded the foreclosure sale”). To state a cause of action for wrongful foreclosure, the  
25 plaintiff must plead “(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive  
26 sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking  
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1 the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases  
2 where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the  
3 secured indebtedness or was excused from tendering.” *Lona v. Citibank, N .A.*, 202 Cal.App.4th 89,  
4 104 (Cal.Ct.App.2011).

5 Kirk’s FAC is fatally defective because as a threshold matter, it contains no valid allegations that  
6 the foreclosure was illegal, fraudulent, or willfully oppressive. Kirk’s primary argument is that the  
7 Notice of Default initiating the non-judicial foreclosure was invalid because it was signed by Fidelity  
8 as agent to the beneficiary, Wells Fargo, an entity that allegedly was neither the trustee nor beneficiary  
9 under the Deed of Trust due to the prior securitization. FAC ¶ 34.

10 This argument fails, as a matter of law, for two reasons. First, under California law, “[t]he  
11 trustee, mortgagee, or beneficiary, or any of their authorized agents” may commence the nonjudicial  
12 foreclosure process by recording and serving a notice of default. Cal. Civ. Code § 2924(a)(1). Thus,  
13 Fidelity was properly authorized to initiate judicial foreclosure as trustee, on behalf of U.S. National  
14 Bank – to whom Wells Fargo had assigned its beneficial interest. Second, Wells Fargo did not lose its  
15 status as beneficiary when it transferred its beneficial interest under the Deed of Trust to U.S. National  
16 Bank, as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates  
17 Series 2006-2. In fact, Judge Gonzalez Rogers specifically rejected this argument when plaintiff’s  
18 counsel made it in a similar action before this Court involving Wells Fargo. *See Permito v. Wells Fargo*  
19 *Bank, N.A.*, 2012 WL 1380322, \*5 (N.D. Cal. 2012) (observing that many other courts have also rejected  
20 this argument). The “securitization of a loan does not in fact alter or affect the legal beneficiary’s  
21 standing to enforce the deed of trust.” *Reyes v. GMAC Mortgage LLC*, 2011 WL 1322775, at \*2 (D.  
22 Nev. Apr.5, 2011). Moreover, as discussed above, the Deed of Trust specifically contemplated both  
23 that the trustee could issue the notice of default and that the beneficiary, Wells Fargo, could lawfully  
24 sell “[t]he Note or partial interest in the Note (together with this Security Instrument),” without changing  
25 its legal relationship to the borrower. *See Deed of Trust*, p.13 ¶ 20, p.14 ¶ 22. Accordingly, Wells  
26 Fargo remained the beneficiary and the default notice at issue was lawfully issued by the Wells Fargo’s  
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1 agent, Fidelity.

2 Because Kirk's FAC fails to allege anything illegal, fraudulent, or willfully oppressive in the  
3 sale, the Court need not consider the other arguments raised in defendant's motion. The Court finds that  
4 dismissal is warranted because the Notice of Default was not invalid, as plaintiff suggests. Moreover,  
5 having granted Kirk leave to amend once before, and finding no allegations here that would support a  
6 wrongful foreclosure action, the Court finds that leave to amend would be inappropriate.

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**CONCLUSION**

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10 For the foregoing reasons, the Court holds that plaintiffs have failed to state a claim, and  
11 GRANTS defendants' motion to dismiss, WITHOUT LEAVE TO AMEND. The Clerk shall close the  
12 file.

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**IT IS SO ORDERED.**

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15 Dated: April 18 , 2013

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SUSAN ILLSTON  
United States District Judge