

United States District Court  
Northern District of California

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

DAWNEEN PARDINI CAOVILO;  
DAVID CAOVILO,

Plaintiffs,

v.

WELLS FARGO BANK, N.A., et al.,

Defendants.

Case No.: 13-cv-1003 JSC

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS (Dkt. No. 7)**

In this civil action, Plaintiffs sue Wells Fargo Bank and Wells Fargo Home Mortgage, Inc. (collectively “Wells Fargo”) for injunctive and declaratory relief seeking to stay a foreclosure sale of their home.<sup>1</sup> Now pending before the Court is Defendants’ Motion to Dismiss for Failure to State a Claim. (Dkt. No. 7.) Plaintiffs did not appear at the time set for the hearing on this motion on May 16, 2013, although they arrived few minutes after the Court called the next case; the Court also notes that Plaintiffs previously appeared on April 25, 2013 the date the motion to dismiss was initially set to be heard. After reviewing the

<sup>1</sup> Both parties have consented to the jurisdiction of a United States magistrate judge pursuant to 28 U.S.C. § 636(c).

1 papers submitted by both parties, the Court GRANTS the motion to dismiss with leave to  
2 amend.

### 3 **ALLEGATIONS OF THE COMPLAINT**

4 The relevant facts taken from Plaintiffs' Complaint, documents incorporated into the  
5 Complaint by reference, and documents of which the Court takes judicial notice, are as  
6 follows.<sup>2</sup>

7 On October 3, 2006, Plaintiffs David Caovilla and Dawn Pardini secured a loan of  
8 \$385,250.00 from World Savings Bank, FSB, ("WSB") a federal savings bank . (Dkt. No. 1-  
9 1, pp. 66-71.) The loan was secured by a deed of trust ("the Deed") recorded against 3787  
10 Bayview Circle, Concord, California 94520 ("the Property") and was memorialized by a  
11 promissory note ("Note"). (Dkt. No. 7-2, Ex. A.)

12 WSB changed its name to Wachovia Mortgage, FSB ("Wachovia") in November  
13 2007. (Dkt. No. 7-2, Ex. B.) Effective November 1, 2009, Wachovia converted to a national  
14 bank named Wells Fargo Southwest, National Association, which then merged with and into  
15 Wells Fargo Bank, National Association. (Dkt. No. 7-2, Exs. C & D.)

16 On November 23, 2011, NBS Default Services on behalf of Defendant Wells Fargo  
17 sent Plaintiffs a Notice of Default ("Notice") and recorded it with the Contra Costa County  
18 Recorder's Office, quantifying the delinquency at \$9,462.79. (Dkt. No. 7-2, Ex. E.) Nearly  
19 six months later, a Substitution of Trustee was recorded with the Contra Costa County  
20 Recorder's Office substituting Wells Fargo Bank as the beneficiary in lieu of WSB, the  
21 original trustee. (Dkt. No. 7-2, Ex. F.) That same day, a Notice of Trustee's Sale was  
22 recorded setting a trustee sale for April 4, 2012. (Dkt. No. 7-2, Ex. G.)

23 Plaintiffs allege that they attempted to communicate with Defendants unsuccessfully  
24 several times following their receipt of the Notice of Default. Shortly before filing suit,

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25  
26 <sup>2</sup> The Court GRANTS Defendants' Request for Judicial Notice (Dkt. No. 7-1) as the  
27 documents are "generally known within the trial court's territorial jurisdiction" or "can be  
28 accurately and readily determined from sources whose accuracy cannot reasonably be  
questioned." Federal Rule of Evidence 201(b); *see also Coto Settlement v. Eisenberg*, 593  
F.3d 1031, 1038 (9th Cir. 2010) (finding that judicial notice is also appropriate for "materials  
incorporated into the complaint").

1 Plaintiffs sent Defendants an “Offer to Settle” wherein they requested a permanent loan  
2 modification. (Dkt. No. 1-1, pp. 63-64.)

### 3 **PROCEDURAL HISTORY**

4 On February 27, 2013, Plaintiff filed this action in the Superior Court for the County  
5 of Contra Costa; shortly thereafter, Defendants removed the action to this Court based on  
6 diversity jurisdiction.<sup>3</sup> Defendants then filed the underlying motion to dismiss seeking  
7 dismissal of Plaintiffs’ claims with prejudice. Plaintiffs initially failed to file an opposition to  
8 the motion, but upon receipt of an Order to Show Cause from this Court, Plaintiffs filed an  
9 opposition brief.

### 10 **LEGAL STANDARD**

11 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges  
12 the sufficiency of the complaint where the action fails to allege “enough facts to state a claim  
13 to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).  
14 “A claim has facial plausibility when the plaintiff pleads factual content that allows the court  
15 to draw the reasonable inference that the defendant is liable for the misconduct alleged. The  
16 plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a  
17 sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
18 (2009) (internal citations omitted). Under Federal Rule of Civil Procedure 8(a)(2) a party is  
19 only required to make “a short and plain statement of the claim showing that the pleader is  
20 entitled to relief, in order to give the defendant fair notice of what the claim is and the  
21 grounds upon which it rests.” *Twombly*, 550 U.S. at 554 (internal citations and quotations  
22 omitted).

23 For purposes of ruling on a Rule 12(b)(6) motion, the court “accept[s] factual  
24 allegations in the complaint as true and construe[s] the pleadings in the light most favorable  
25 to the non-moving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031  
26 (9th Cir. 2008). However, even under the liberal pleading standard of Federal Rule of Civil

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28 <sup>3</sup> Diversity jurisdiction exists because Plaintiffs allege they are citizens of California and this Court has previously held that Wells Fargo is a citizen of South Dakota and not of California. *See Flores v. Wells Fargo Bank, N.A.*, 2012 WL 832546 (N.D. Cal. Mar. 12, 2012).

1 Procedure 8(a)(2), “a plaintiff’s obligation to provide the grounds of his entitlement to relief  
2 requires more than labels and conclusions, and a formulaic recitation of the elements of a  
3 cause of action will not do.” *Twombly*, 550 U.S. at 555 (internal citations and quotations  
4 omitted). “Determining whether a complaint states a plausible claim for relief ... [is] a  
5 context-specific task that requires the reviewing court to draw on its judicial experience and  
6 common sense.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1950 (2009).

7 Pro se pleadings are generally liberally construed and held to a less stringent standard.  
8 See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). In *Hebbe v. Pliler*, 627 F.3d 338 (9th Cir.  
9 2010), the Ninth Circuit held that courts must still liberally construe pro se filings post-*Iqbal*  
10 noting that “[w]hile the standard is higher, our obligation remains, where the petitioner is pro  
11 se, particularly in civil rights cases, to construe the pleadings liberally and to afford the  
12 petitioner the benefit of any doubt.” *Id.* at 342 (internal quotations and citations omitted).  
13 Nevertheless, the Court may not “supply essential elements of the claim that were not initially  
14 pled.” *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

15 Generally, when a complaint is dismissed, “leave to amend shall be freely given when  
16 justice so requires.” *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892 (9th Cir. 2010);  
17 see Fed.R.Civ.P. 15(a). The Ninth Circuit has “repeatedly held that a district court should  
18 grant leave to amend even if no request to amend the pleading was made, unless it determines  
19 that the pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*,  
20 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal quotation marks omitted).

## 21 DISCUSSION

22 Plaintiffs’ Complaint contains three causes of action: (1) permanent and temporary  
23 injunctive relief seeking to enjoin the foreclosure sale, (2) declaratory relief declaring that  
24 Wells Fargo has no legal or equitable rights, and (3) quiet title. In essence, Plaintiffs appear  
25 to be making a wrongful foreclosure claim which the Court analyzes in detail below.

### 26 A. Defendants’ Standing to Foreclose

27 The Complaint is predicated on the theory that the Defendants lack standing to  
28 foreclose. Plaintiffs’ arguments appear premised on The Uniform Commercial Code  
 (“UCC”) as they argue that pursuant to the UCC the Note is a non-negotiable instrument

1 which cannot be conveyed without endorsement. (Complaint ¶¶14-17.) Plaintiffs also  
2 contend that the Note cannot be conveyed or transferred by endorsement and they challenge  
3 the authenticity of “all the signatures of any alleged original instrument pursuant to UCC 3-  
4 308.” (*Id.* ¶ 15.) Finally, Plaintiffs argue that under Article 9 of the UCC that to effectively  
5 transfer there must be “evidence of a valid assignment of mortgage/deed of trust AND the  
6 note” because “assignment of a mortgage or deed of trust is not the same as an assignment of  
7 the note” and to have standing to foreclose the bank must “provide all valid and recorded  
8 assignments of the security instrument AND the note.” (*Id.* ¶ 16.)

9 Defendants contend that Plaintiffs’ theory fails as a matter of law. They argue that  
10 California Civil Code sections 2924 et seq. established a “comprehensive framework for the  
11 regulation of a non-judicial foreclosure sale pursuant to a power of sale contained in a deed of  
12 trust.” (Dkt. No. 7, 10:5-7 (citing *Moeller v. Lien*, 25 Cal.App.4th 822, 830 (1994).)  
13 Defendants further contend that the UCC provisions on which Plaintiffs rely do not apply to  
14 non-judicial foreclosure proceedings; rather, California courts considering Section 2924  
15 authorize a trustee, mortgagee, or beneficiary, or any of their authorized agents to initiate the  
16 foreclosure process. Defendants rely on *Gomes v. Countrywide Home Loans, Inc.*, 192  
17 Cal.App.4th 1149, 1155 (2011), to establish Wells Fargo’s right to foreclosure.

18 In their opposition to the motion to dismiss, Plaintiffs do not respond to Defendants’  
19 arguments with particularity, but reiterate their argument that Wells Fargo has “failed to  
20 provide sufficient evidence of lawful ownership of the note AND Deed of trust and chain of  
21 title, Defendant Bank has failed to provide a copy the Actual note and Actual Deed in  
22 question and has only provided copies that were received from the county records office.  
23 Bank has failed to produce original documents that are not forged or altered.” (Dkt. No. 12.)  
24 Plaintiffs also detail their efforts to obtain discovery from Wells Fargo, apparently to no avail.

25 It is well-established that California’s nonjudicial foreclosure statutes, California Civil  
26 Code sections 2924 through 2924(k), exclusively govern nonjudicial foreclosures. *Moeller v.*  
27 *Lien*, 25 Cal. App. 4th 822, 831 (1994). In *Moeller*, the court considered whether California  
28 Civil Code section 3275, “Relief in case of forfeiture,” could be “applied against a bona fide  
purchaser for value at a nonjudicial foreclosure sale.” 25 Cal. App. 4th at 826. The court

1 reasoned that Cal. Civ. Code §§ 2924-2924(k) “provide a comprehensive framework for the  
2 regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of  
3 trust.” *Id.* at 834. The court added:

4       The comprehensive statutory framework established to govern nonjudicial foreclosure  
5 sales is intended to be exhaustive. It includes a myriad of rules relating to notice and  
6 right to cure. It would be inconsistent with the comprehensive and exhaustive  
7 statutory scheme regulating nonjudicial foreclosures to incorporate another unrelated  
8 cure provision into statutory nonjudicial foreclosure proceedings.

9 *Id.* (internal citations omitted); *see also Hague v. Wells Fargo Bank, N.A.*, 2011 WL 3360026,  
10 at \*3 (N.D. Cal. Aug. 2, 2011) (following *Moeller*); *Germon v. BAC Home Loans Servicing,*  
11 *L.P.*, 2011 WL 719591, at \*2 (S.D. Cal. Feb. 22, 2011) (same); *Canales v. Fed. Home Loan*  
12 *Mortg. Corp.*, 2011 WL 3320478, at \*6 (C.D. Cal. Aug. 1, 2011) (following *Moeller* and  
13 holding that therefore UCC and Corporations Code do not apply to nonjudicial foreclosure).

14       Accordingly, California federal courts refuse to apply the UCC to nonjudicial  
15 foreclosures. *See e.g., Padayachi v. IndyMac Bank*, 2010 WL 4367221, at \*3 (N.D. Cal. Oct.  
16 28, 2010) (“[A]lthough Article 3 of the UCC governs negotiable instruments, it does not  
17 apply to nonjudicial foreclosure under deeds of trust.”). For example, in *Padayachi*, the  
18 court held that “[t]here is no requirement that any of the entities physically possess the note  
19 secured by the deed of trust or that any of them be a person entitled to enforce the note under  
20 [UCC] § 3301.” 2010 WL 4367221, at \*3 (internal quotation marks omitted); *see also*  
21 *Bulaoro v. Oro Real Inc.*, No. 11-03059, 2011 WL 6372458 (N.D. Cal. Dec. 20, 2011)  
22 (noting that Article 9 of the UCC only applies to security interests in personal property and  
23 fixtures, and thus, “does not apply to plaintiffs’ mortgage”) (internal citations omitted);  
24 *Pagtalunan v. Reunion Mortgage Inc.*, 2009 WL 961995, at \*2 (N.D. Cal. Apr. 8, 2009)  
25 (“California law does not require possession of the note as a precondition to non-judicial  
26 foreclosure under a deed of trust.”).

27       Even if the UCC applied, Plaintiffs’ assertion that Defendants have not “produced the  
28 ‘original’ note or evidence of a valid assignment(s) necessary to convey security interest to  
defendant Wells Fargo Bank” is belied by the judicially noticeable documents. (Complaint ¶  
17.) These documents include the Deed identifying Plaintiffs as the Borrowers and WSB its

1 successors and/or assignees as the Lender (Dkt. No. 7-2, Ex. A); a letter from OTS approving  
2 WSB's change in name to Wachovia (Dkt. No. 7-2, Ex. B); a letter to Wells Fargo from the  
3 Comptroller of the Currency certifying the conversion of Wachovia to a national bank with  
4 the name Wells Fargo Bank Southwest, N.A. ("WFBS") (Dkt. No. 7-2, Ex. C); and an FDIC  
5 record certifying the merger of WFBS with Wells Fargo (Dkt. No. 7-2, Ex. D).

6 Plaintiffs do not challenge the accuracy of the evidence chronicling the succession of  
7 Wells Fargo from Wachovia and WSB; rather, they appear to contend that the documents are  
8 forged or altered and that Defendants have failed to establish chain of title. However,  
9 "California's non-judicial foreclosure scheme ...broadly allows a trustee, mortgagee,  
10 beneficiary, or any of their agents to initiate non-judicial foreclosure. Accordingly, the statute  
11 does not require a beneficial interest in both the Note and the Deed of Trust to commence a  
12 non-judicial foreclosure sale." *Lane v. Vitek Real Estate Indus. Grp.*, 713 F. Supp. 2d 1092,  
13 1099 (E.D. Cal. 2010). Further, Plaintiffs have failed to include specific allegations regarding  
14 their claim that the Deed or Note are forgeries, and instead, insist without citation that the  
15 copies from the County Recorder's Office are insufficient.<sup>4</sup>

16 In *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 1155 (2011), the  
17 plaintiff alleged that the company selling the property in the nonjudicial foreclosure was not  
18 authorized to do so by the owner of the note. *Id.* at 1155. The court, however, held that a  
19 plaintiff may not use the courts to test whether the entity initiating a nonjudicial foreclosure  
20 has the authority to do so. *See id.* The court explained that "nowhere does [Civil Code  
21 section 2924] provide for a judicial action to determine whether the person initiating the  
22 foreclosure process is indeed authorized, and we see no ground for implying such an action."  
23 *Id.* Under section 2924(a)(1), a "trustee, mortgagee, or beneficiary, or any of their authorized  
24 agents" may initiate a nonjudicial foreclosure. The court reasoned that "[b]ecause of the  
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26 <sup>4</sup> Plaintiffs' argument that the Defendants have "montetized and sold the Plaintiff's note under  
27 a 'mortgage backed securities instrument' to investors under a pooling interest and therefore  
28 lacks standing" is similarly unavailing. (Complaint, 2:21-23); *Niranjan v. Bank of America*,  
No. 12-05706, 2013 WL 1701602, at \*2 (N.D. Cal. Apr.18, 2013)(plaintiff lacks "standing to  
challenge foreclosure based on a loan's having been securitized").

1 exhaustive nature of this scheme, California appellate courts have refused to read any  
2 additional requirements into the non-judicial foreclosure statute.” *Id.* at 1154 (internal  
3 citations and quotation marks omitted).

4 The court emphasized that nonjudicial foreclosures are less expensive and more  
5 quickly remedied than judicial foreclosures. *See id.* Moreover, “the recognition of the right  
6 to bring a lawsuit to determine a nominee’s authorization to proceed with foreclosure on  
7 behalf of the noteholder would fundamentally undermine the nonjudicial nature of the process  
8 and introduce the possibility of lawsuits filed solely for the purpose of delaying valid  
9 foreclosures.” *Id.* The *Gomes* court did suggest, however, that a suit for wrongful  
10 foreclosure might survive if “the plaintiff’s complaint identified a *specific factual basis* for  
11 alleging that the foreclosure was not initiated by the correct party.” *Id.* at 1156 (emphasis in  
12 original); *see also Lester v J.P. Morgan Chase Bank*, 2013 WL 633333 (N.D. Cal. Feb. 20,  
13 2013) (holding that *Gomes* does not foreclose claim that includes a specific factual basis for  
14 alleging that lender did not have authority to foreclose); *Sacchi v. Mortgage Elec.*  
15 *Registration Sys., Inc.*, 2011 WL 2533029, \*8 (C.D. Cal. June 24, 2011) (“Plaintiffs have  
16 alleged just such a specific factual basis—namely, that RCS was not yet the beneficiary under  
17 the DOT when it executed the Substitution of Trustee in favor of Fidelity.”); *Tamburri v.*  
18 *Suntrust Mortg., Inc.*, 2011 WL 6294472, \*14 (N.D. Cal. Dec. 15, 2011) (“Plaintiff alleges  
19 that the wrong parties issued the Notice of Default. At the 12(b)(6) stage, given the factual  
20 uncertainties underlying the parties’ arguments, Plaintiff’s claim is sufficient to withstand a  
21 motion to dismiss.”).

22 As in *Gomes*, Plaintiffs’ Complaint does not identify a *specific factual basis* to  
23 challenge Defendants’ authority to foreclose. *See Gomes*, 192 Cal. App. 4th at 1156. The  
24 absence of such allegations is an additional reason Plaintiffs’ claims must be dismissed.

## 25 **B. HOLA Preemption**

26 Defendants also argue that to the extent Plaintiffs’ claims concern the transfer of the  
27 Note from WSB to Wachovia and then to Wells Fargo, they are preempted by HOLA.  
28 Plaintiffs have not responded to this argument.



1 “[P]reemption may be inferred when federal regulation in a particular field is so  
2 pervasive as to make reasonable the inference that Congress left no room for the States to  
3 supplement it.” *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 558 (9th Cir.  
4 2002) (internal quotations and citations omitted). Federal regulations provide that HOLA  
5 “occupies the field” and therefore preempts state law dealing with the “[p]rocessing,  
6 origination, servicing, sale or purchase of, or investment or participation in, mortgages.” 12  
7 C.F.R. § 560.2(b)(10). Moreover, courts have directly addressed the issue of where, as here,  
8 a foreclosure occurs after a merger between the original owner of the note and another  
9 company. “Claims regarding foreclosures occurring post-merger are still generally covered  
10 by HOLA when the loan itself originated pre-merger.” *Castillo v. Wachovia Mortgage*, 2012  
11 WL 1213296, \*5 (N.D. Cal. Apr. 11, 2012); *see also* 9 Witkin, Summary of Cal. Law,  
12 Corporations § 198 (10th ed. 2005) (In a merger the surviving entity “succeeds to the rights,  
13 property, debts and liabilities, without other transfer”).

14 *DeLeon v. Wells Fargo Bank, N.A.*, 729 F. Supp. 2d 1119 (N.D. Cal. 2010) is  
15 illustrative. The action concerned a note secured by WSB and a non-judicial foreclosure  
16 initiated by Wells Fargo. At the time the loan was made to the plaintiffs, WSB was a  
17 “federally chartered savings bank organized and operating under HOLA.” *Id.* at 1126. The  
18 court concluded that as such, the “same preemption analysis would apply to any alleged  
19 conduct after November 1, 2009, when the lender merged into a national banking  
20 association.” *Id.*; *see also Appling v. Wachovia Mortgage, FSB*, 745 F. Supp. 2d 961, 971  
21 (N.D. Cal. 2010) (“although Wells Fargo itself is not subject to HOLA and OTS regulation,  
22 [the] action is nonetheless governed by HOLA because Plaintiff’s loan originated with a  
23 federal savings bank and was therefore subject to the requirements set forth in HOLA and  
24 OTS regulations.”); *Lopez v. Wachovia Mortg.*, 2010 WL 2836823, at \*2 (N.D. Cal. July 19,  
25 2010) (finding that although Wells Fargo is a federally chartered national bank, the action is  
26 governed by HOLA because the loan originated with World Savings Bank, which was  
27 regulated by OTS and subject to HOLA); *Parmer v. Wachovia*, 2011 WL 1807218, at \*1  
28 (N.D. Cal. Apr. 22, 2011) (“World Savings Bank, Wachovia, and its successor Wells Fargo,  
were subject to HOLA with respect to the origination and ownership of plaintiff’s loan, and

1 any claims asserted by plaintiff related to the servicing or processing of the loan or its sale to  
2 a subsequent purchaser, are all preempted.”).

3 *Ahmed v. Wells Fargo Bank & Co.*, 2011 WL 1751415 (N.D. Cal. May 9, 2011)  
4 involved a substitution of trustee and a notice of foreclosure. Among his arguments, the  
5 plaintiff claimed that defendants failed to provide proof of their right to foreclose. *Id.* at \*1.  
6 Three of the plaintiff’s causes of action concerned “alleged defects in the procedure used to  
7 foreclose the subject property,” including the claim that “defendants did not possess the  
8 promissory note.” *Id.* at \*3. The court concluded that such causes of action are preempted by  
9 HOLA, reasoning that “[t]hese claims are predicated upon alleged improprieties in the  
10 foreclosure procedure used by defendants and therefore affect lending because they involve  
11 the ‘processing, origination, servicing, sale or purchase of, or investment or participation in,  
12 mortgages,’ as defined in 12 C.F.R. § 560.2(b)(10).” *Id.*; *see also Hague v. Wells Fargo*  
13 *Bank, N.A.*, 2012 WL 1029668, at \*4 (N.D. Cal. Mar. 26, 2012) (“The wrongful foreclosure  
14 action is based on allegations regarding note ownership, securitization, and substitution of  
15 trustee, all defects in the foreclosure procedure used by Defendant and therefore within the  
16 ambit of HOLA preemption.”).

17 Plaintiffs’ case is no different. To the extent they argue that Wells Fargo failed to  
18 prove its authority to foreclose, such claims fall within the scope of those state laws  
19 specifically preempted by HOLA since they concern the “[p]rocessing, origination, servicing,  
20 sale or purchase of, or investment or participation in, mortgages.” 12 C.F.R. § 560.2(b)(10).  
21 As Plaintiffs’ claims address the transfer of enforcement rights as part of the purchase of their  
22 Note, they are preempted.

23 Finally, HOLA does not itself provide a private right to action. *See Taylor v. Citizens*  
24 *Fed. Sav. & Loan Ass’n*, 846 F.2d 1320 (11th Cir. 1988) (holding that mortgagor had no  
25 private right of action for alleged violations of HOLA because HOLA was not enacted for  
26 special benefit of mortgagors and there was no indication of legislative intent to create private  
27 remedy); *Burns Int’l, Inc. v. W. Sav. & Loan Ass’n*, 978 F.2d 533, 536 (9th Cir. 1992)  
28 (agreeing with *Taylor* in holding that the creation of new federal common law causes of  
action is unnecessary for allegations of fraudulent misrepresentations in connection with a

1 bank loan because the remedy under state law is adequate); *Bolden v. KB Home*, 618 F. Supp.  
2 2d 1196, 1206 (C.D. Cal. 2008) (interpreting *Burns* to support finding of no private right of  
3 action under the HOLA); *cf. Amaral v. Wachovia Mortg. Corp.*, 2010 WL 2673766, at \*11  
4 (E.D. Cal. July 2, 2010) (declining to following *Burns* where decision involved subject matter  
5 jurisdiction based on alleged HOLA violation by defendant, not HOLA preemption). Further,  
6 this Court has previously dismissed Section 2923.5 claims as preempted by HOLA with  
7 prejudice. *See Giordano v. Wachovia Mort., FSB*, 2010 WL 5148428, at \* 5 (N.D. Cal., Dec.  
8 14, 2010) (dismissing Section 2923.5 claim without leave to amend as preempted by HOLA).

9 **C. Plaintiffs' Claims for Injunctive and Declaratory Relief**

10 Plaintiffs' first cause of action seeks permanent and injunctive relief; however,  
11 "[i]njunctive relief is a remedy, not a cause of action, and thus it must be tethered to some  
12 independent legal duty owed by the defendant." *Martone v. Burgess*, No. 08–2379, 2008 WL  
13 3916022, at \*3 (N.D. Cal. Aug. 25, 2008). Because the claim for injunctive relief is  
14 predicated on Plaintiffs' argument that Defendants lack standing to foreclose, which the Court  
15 has rejected, Plaintiffs' claim for injunctive relief claim necessarily fails.

16 Similarly, Plaintiffs' second cause of action for declaratory relief must present an  
17 actual controversy between the parties. *Preciado v. Wells Fargo Home Mortgage*, No. 13-  
18 00382, 2013 WL 1899929, at \*6 (N.D. Cal. May 7, 2013). Because the Court concludes that  
19 Plaintiffs' lack of standing argument (on which the declaratory relief claim is based) fails to  
20 state a claim, Plaintiffs' second cause of action must be dismissed as well.

21 **D. Plaintiffs' Quiet Title Claim**

22 Plaintiffs' third cause of action for quiet title alleges that there is no evidence that  
23 Wells Fargo is the real party in interest and the Deed is defective. Under California law, a  
24 claim for quiet title must be in a verified complaint and include: (1) a description of the  
25 property that is the subject of the action, (2) the title of the plaintiff as to which a  
26 determination under this chapter is sought and the basis of the title, (3) the adverse claims to  
27 the title of the plaintiff against which a determination is sought, (4) the date as of which the  
28 determination is sought, and (5) a prayer for the determination of the title of the plaintiff  
against the adverse claims. *See Cal.Code Civ. Pro. § 761.020*. Further, Plaintiffs must allege

1 that they “are the rightful owners of the property, i.e., that they have satisfied their obligations  
2 under the deed of trust.” *Kelley v. Mortgage Elec. Registration Sys.*, 642 F.Supp.2d 1048,  
3 1057 (N.D. Cal. 2009). “[I]t is dispositive as to this claim that, under California law, a  
4 borrower may not assert ‘quiet title’ against a mortgagee without first paying the outstanding  
5 debt on the property.” *Rosenfeld v. JPMorgan Chase Bank, N.A.*, 732 F. Supp. 2d 952, 975  
6 (N.D. Cal. 2010) (internal citation omitted). Here, Plaintiffs’ Complaint is not verified and  
7 Plaintiffs have not alleged that they paid their outstanding debt. Accordingly, their claim for  
8 quiet title must be dismissed.

### 9 CONCLUSION

10 Based on the foregoing, Defendants’ Motion to Dismiss (Dkt. No. 7) is GRANTED.

11 As Plaintiffs have not previously amended their complaint, are proceeding pro se, and  
12 have twice attempted to appear for oral argument, the Court grants them leave to amend to  
13 add new claims if they can do so in good faith in light of this Order. Plaintiffs’ amended  
14 complaint may not be based on any claims under the UCC [or the transfer of the Note to  
15 Wells Fargo]. If Plaintiffs elect to file an amended complaint, it is due on or before June 17,  
16 2013. Plaintiffs are warned that failure to file an amended complaint by the deadline will  
17 result in dismissal of their action with prejudice.

18 Plaintiffs may also contact the Legal Help Center, 450 Golden Gate Avenue, 15th  
19 Floor, Room 2796, Telephone No. (415) 782-9000 extension 8657, for free legal advice  
20 regarding their claims.

### 21 IT IS SO ORDERED.

22 Dated: May 16, 2013

23   
24 JACQUELINE SCOTT CORLEY  
25 UNITED STATES MAGISTRATE JUDGE  
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