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

ROCKRIDGE TRUST, et al.,

Plaintiffs,

v.

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

Defendants.

Case No.: C-13-01457 JCS

**ORDER DISMISSING PLAINTIFFS’
COMPLAINT WITHOUT PREJUDICE**

I. INTRODUCTION

Plaintiffs Rockridge Trust and Ray K. Shahani, trustee, (“Shahani”) (collectively, “Plaintiffs”) brought this action against Defendants Wells Fargo, N.A. (“Wells Fargo”), Bank of America, N.A. (“Bank of America”), First American Trustee Servicing Solutions LLC (“First American Trustee”), and First American Loanstar Trustee Services LLC (“First American Loanstar”) (collectively, “Defendants”) alleging twenty causes of action arising out of a series of loan modification negotiations followed by foreclosure. Presently before the Court are (1) a Motion to Dismiss jointly filed by Wells Fargo and Bank of America (“Wells Fargo Motion”); and (2) a Motion to Dismiss filed by First American Trustee (“First American Motion”).¹ The parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). The Court finds the Motion appropriate for decision without oral argument. The hearing on the Motions scheduled for June 28, 2013 at 9:30 a.m. is vacated. The Case Management Conference, also scheduled for June 28, 2013 at 9:30 a.m., is

¹ First American Loanstar and First American Trustee assert that they are one legal entity, which underwent a name change in 2010. Dkt. No. 17 (Certificate of Interested Entities filed by First American Trustee). The entity’s current name is “First American Trustee Servicing Solutions, LLC.” *Id.* The entity is a Texas limited liability company that is wholly owned by First American Title Insurance Company. *Id.*

1 moved to 1:30 p.m. of that same day. For the reasons set out below, the Court GRANTS the Motions
2 and dismissed Plaintiffs' Complaint without prejudice.

3 **II. BACKGROUND**

4 **A. The Complaint**

5 **1. Factual Background**

6 On or about February 23, 2007, Shahani executed a consumer loan transaction in the amount
7 of \$755,250 with Wells Fargo to re-finance his single family residential property located at 82
8 Rockridge Drive, San Francisco, CA. Complaint, ¶ 20.² Wells Fargo took a security interest in the
9 subject property in a Deed of Trust ("DOT").³ *Id.* at ¶ 20 and Ex. 1.⁴ Fidelity National Title
10 Insurance Company ("Fidelity National") was named as the trustee under the DOT. *Id.* at Ex. 1. On
11 March 13, 2007, Wells Fargo executed a Substitution of Trustee ("First Substitution") substituting
12 itself for Fidelity National as trustee. *Id.* at ¶ 22 and Ex. 2.

13 Plaintiffs made payments pursuant to the mortgage agreement for close to two years. *Id.* at ¶
14 23. Shortly thereafter, Wells Fargo and/or Wells Fargo Home Mortgage ("Home Mortgage")
15 represented that Home Mortgage was the servicer of Plaintiffs' loan. *Id.* at ¶ 24. However, Home
16 Mortgage ceased to exist as a separate entity in May 2004. *Id.* at ¶ 26. In February 2009, Shahani
17 requested a loan modification to reduce the fixed loan interest rate of 6.375% to one commensurate
18 with the then-available rates of between 2% and 4%. *Id.* at ¶¶ 25, 140(a). At the time, Shahani was
19 less than 30 days late on his monthly mortgage payments but feared the possibility of multiple claims
20 for late and/or unpaid payments. *Id.* at ¶ 25. Shahani entered the loan modification process with
21 Home Mortgage that month. *Id.*

22 Pursuant to the loan modification negotiations, Shahani submitted financial information
23 pertaining to his income and expenses in March 2009. *Id.* at ¶ 140(c). In April 2009, Defendants
24 requested additional documentation. *Id.* at ¶ 140(e). In May 2009, Defendants informed Shahani that
25 all requested documentation had been received and was in process. *Id.* at ¶ 140(f). In July 2009,
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28 ² The Complaint is attached to the Notice of Removal as Exhibit A. *See* Dkt. No. 1.

³ The DOT lists Wells Fargo Bank, N.A., as the lender.

⁴ Plaintiffs did not attach a copy of the Note to their Complaint.

1 Shahani was informed by telephone that the loan modification was denied. *Id.* at ¶ 140(g).⁵ Shahani
2 was invited to re-fax further financial information to update his file. *Id.* During negotiations that
3 month, Shahani spoke to Lupeta, Leslie, Doris, Dante, and Gordon, all separate agents for Defendants,
4 regarding his loan modification request. *Id.* at ¶ 140(j). Shahani also received a letter, dated July 1,
5 2009, incorrectly stating that his expenses exceeded his income by close to \$4,100. *Id.* at ¶ 140(h).⁶
6 A July 14, 2009 letter to Shahani indicated that “the loan file ha[d] been referred to our attorney with
7 instructions to begin foreclosure proceedings.” *Id.* at ¶ 140(k).⁷

8 In a letter, Shahani received an unsigned, incomplete, and unrecorded Notice of Default
9 (“NOD”). *Id.* at ¶ 140(l) and Ex. 3.⁸ The mailing, attached to the Complaint as Exhibit 3, recites that
10 the contents are a “copy of the ‘notice,’ the original of which was filed for record on July 20, 2009 in
11 the Office of the Recorded of San Francisco, California.” *Id.* at Ex. 3 (capitalization omitted). On the
12 signature line of the mailed copy of the NOD, the document reads: “original document signed by
13 authorized agent.” *Id.* (capitalization omitted). The NOD was executed by First American Loanstar
14 as agent for the current beneficiary and by First American Title Insurance Company as Attorney-in-
15 Fact. *Id.* The mailing also contained a copy of the Notice of Default Declaration (“NOD
16 Declaration”), completed by Home Mortgage as the “mortgagee, beneficiary, or authorized agent.”
17 *Id.* The copy states: “Original document executed by authorized agent.” *Id.* (italics omitted). Also
18 included in Exhibit 3 is a letter, dated July 23, 2009, from First American Loanstar stating: (1) that
19 the creditor to whom the debt is owed is Bank of America; (2) Home Mortgage is the servicer; and (3)
20 First American Loanstar has been authorized by either the servicer or the creditor to initiate
21 foreclosure proceedings. *Id.* The letter also states that the outstanding debt is \$783,383.70. *Id.*

22 On July 28, 2009, Shahani was informed by the “Loss Mitigation” department that Defendants
23 were suspending foreclosure and no foreclosure sale date was set. *Id.* at ¶ 140(n).⁹ Shahani received a
24 July 28, 2009 letter indicating that Defendants were reviewing the information he had provided and
25 working quickly to respond to his request for assistance with his mortgage payment challenges. *Id.* at

26 ⁵ The Complaint states that Defendant was informed by telephone that the loan modification was denied. This appears to
be a typographical error.

27 ⁶ Plaintiffs do not allege the true relation between Shahani’s expenses and income.

28 ⁷ Plaintiffs do not allege which Defendant sent the letter.

⁸ Plaintiffs do not allege which Defendant sent the letter.

⁹ Plaintiffs do not identify which Defendant’s loss mitigation department they are referring to.

1 ¶ 140(m).¹⁰ On August 5, 2009, a person named David from a call center in Milwaukee requested
2 proof of income and statements of profit and loss for the past three months to be sent to Mary
3 Mulholland in Norfolk. *Id.* at ¶ 140(o).¹¹ That month, Shahani was informed numerous times that his
4 application was in the review stage. *Id.* On August 25, 2009, the loan modification was denied due to
5 expenses greater than income by over \$7543. *Id.* at ¶ 140(p). The next day, Shahani was orally
6 informed that a work director would re-review the file if he resubmitted a number of documents,
7 which he did. *Id.* Shahani spoke to Travis, Marion, and Jessica between September 4 and 11, 2009.
8 *Id.* at ¶ 140(q).¹²

9 Meanwhile, on August 19, 2009, Wells Fargo executed a Second Substitution of Trustee
10 (“Second Substitution”) naming First American Loanstar as Trustee. *Id.* at ¶ 28 and Ex. 4.¹³
11 Plaintiffs attach a copy of the Second Substitution accompanied by an affidavit stating that “[a] copy
12 of the attached substitution has been mailed prior to the recording thereof...” *Id.* at Ex. 4. The copy
13 of the substitution states, on the signature line: “original document signed, dated, and notarized by
14 current beneficiary.” *Id.* (capitalization omitted). Directly above that line is written: “Wells Fargo
15 Bank, N.A.”. *Id.* (capitalization omitted).

16 On or about September 3, 2009, Wells Fargo recorded an Assignment of Deed of Trust
17 (“Assignment”) assigning all beneficial interest to Bank of America. *Id.* at ¶ 30, Ex. 5. The
18 Assignment was dated August 25, 2009, and signed by a putative agent of First American Loanstar as
19 Wells Fargo’s attorney-in-fact. *Id.* at Ex. 5.

20 An October 5, 2009 letter from Defendants offered Plaintiffs yet another loan modification
21 and requested a number of pieces of information. *Id.* at ¶ 140(r). The next day, Defendant instructed
22 Shahani to submit an initial payment of \$5,412.27, due in two weeks, and financial documentation.
23 *Id.* at ¶ 140(s).¹⁴ Shahani wired the requested payment on the deadline. *Id.* at ¶ 140(t). A letter dated
24 October 16, 2009 stated that the loan modification was denied because Shahani failed to provide

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26 ¹⁰ Plaintiffs do not allege which Defendant sent the letter.

27 ¹¹ Plaintiffs do not allege which Defendant David and Mulholland represented.

28 ¹² Plaintiffs provide no detail as to the capacity of the named individuals or the content of their conversations.

¹³ Plaintiffs allege that First American Loanstar was named as a replacement for Fidelity National. However, the copy of the Second Substitution attached as Exhibit 4 identifies Fidelity National as the original trustee, but states that First American Loanstar is being substituted for the original trustee or the successor trustee.

¹⁴ Plaintiffs do not allege which Defendant they are referring to.

1 requested documentation within the time frame provided in his trial modification period workout plan
2 *Id.* at ¶ 140(u). No time frame had been provided. *Id.* Shortly thereafter, on or about October 21,
3 2009, First American Loanstar recorded a Notice of Trustee’s Sale (“First NOTS”), listing the sale
4 date as November 10, 2009. *Id.* at ¶ 31 and Ex. 6.¹⁵ Nevertheless, on October 26, 2009, Shahani was
5 informed that he had been approved for modification and should re-submit certain documents. *Id.* at ¶
6 140(w). A week later, on November 2, Shahani learned that his initial payment had been declined.
7 *Id.* at ¶ 140(x). That same day, Shahani re-submitted documentation. *Id.* at ¶ 140(y). On November
8 9, 2009, Defendants sent Shahani a letter that he had been denied modification because he did not
9 provide the requested documentation within the time frame required by his trial modification period
10 workout plan. *Id.* at ¶ 140(z). Two days later, Shahani filed a Chapter 11 bankruptcy petition for
11 personal business reorganization. *Id.* at ¶ 140(aa). Thus, from his request for modification in
12 February 2009 to his bankruptcy filing in November 2009 his modification requests had been denied.
13 *Id.* at ¶ 32.

14 Nearly two years later, on August 13, 2011, Wells Fargo, as servicing agent for Bank of
15 America, obtained relief from the bankruptcy stay. *Id.* at ¶¶ 24, 140(bb) and Ex. 7. Wells Fargo
16 immediately invited Shahani to enter loan modification negotiations. *Id.* at ¶ 35. Shortly after
17 Shahani submitted a battery of financial documentation, he was informed that he needed to be a
18 minimum of 3 months current on his loan payments to qualify for modification pursuant to the
19 investor guidelines. *Id.* Wells Fargo accepted monthly payments in the amount of \$4012.27
20 beginning in September 2012. *Id.* The payments were based on an interest rate of 6.375%, two to
21 three times greater than the then-prevalent rates. *Id.* Ten months later, Defendants denied Shahani’s
22 modification request stating “as per investor guidelines” they could not find “affordability” for
23 Shahani’s requests. *Id.* Shahani was never provided a copy of the investor’s guidelines. *Id.*

24 Soon after, on August 16, 2012, First American Loanstar recorded a second Notice of
25 Trustee’s Sale (“Second NOTS”) stating that the property would be sold on September 11, 2012. *Id.*
26 at ¶ 36 and Ex. 8.¹⁶ Exhibit 8 is a copy of the recording request made by First American Loanstar,

27 ¹⁵ In another portion of the Complaint, Plaintiffs make the inconsistent allegation that the First NOTS was unsigned and
unrecorded. Complaint at ¶ 140(v). Those inconsistent allegations are contradicted by Exhibit 6.

28 ¹⁶ Although Plaintiffs refer to this as the Second NOTS, Plaintiffs also state in a separate portion of the Complaint that
Shahani received a NOTS in July 2012 setting the sale date for September 11, 2013. *Id.* at ¶ 140(hh). Plaintiffs refer to

1 dated August 20, 2012, indicating that the original document was signed by an authorized agent. *Id.*
2 at Ex. 8. At the same time, Wells Fargo ceased accepting mortgage payments. *Id.* at ¶ 140(jj)-(ll).

3 Nevertheless, loan modification negotiations continued. After Shahani obtained assistance
4 from the office of Congresswoman Jackie Speier, he received a letter, in mid-August 2012, indicating
5 that Christine Mak (“Mak”) of Wells Fargo’s Office of Executive Complaint would be his single point
6 of contact for his loan modification request. *Id.* at ¶ 140(mm)-(nn). Shahani submitted a large
7 amount of updated documents to Mak over the course of the next two weeks. *Id.* at ¶ 140(oo). In late
8 August, Mak sent Shahani a letter stating that Wells Fargo would respond to his request for a loan
9 modification on September 11, 2012. *Id.* at ¶ 140(pp). After numerous requests to postpone the
10 September 11, 2012 sale, Mak promised to request its continuance on September 5, 2012 but did not
11 do so. *Id.* at ¶¶ 140(qq)-(rr). Two days later, on the seventh, the sale was postponed. *Id.* at ¶ 140(ss).
12 Wells Fargo did not postpone the sale date on its online posting until September 10, 2012. *Id.* at ¶
13 140(tt)-(uu). A subsequent sale date was set and postponed until March 4, 2013. *Id.* at ¶¶ 38, 140(vv)
14 and Ex. 9.

15 On February 18, 2013, Keri Peck (“Peck”), an agent of Wells Fargo, told Shahani in writing
16 that “[w]e anticipate that we will be able to provide you with resolution by March 07, 2013.” *Id.* at ¶¶
17 39, 140(ww) and Ex. 10. The next day, Wells Fargo requested additional information from Shahani.
18 *Id.* at ¶ 140(xx). Shahani responded with 128 pages of documents within a week. *Id.* Three days
19 later, on February 28, 2013, Wells Fargo requested several additional and/or duplicate items. *Id.* at ¶¶
20 41, 140(yy) and Ex. 12. Over the next two days, Shahani sent Wells Fargo 284 pages of responsive
21 documentation. *Id.* On March 7, 2013, Wells Fargo requested several additional and/or duplicate
22 items needed to review Shahani’s request for loan modification. *Id.* at ¶¶ 42, 140(zz) and Ex. 12.
23 Shahani provided additional documentation and a line-item letter response on March 8, 2013 and
24 March 11, 2013. *Id.*

25 On March 4, 2013, during the negotiations, the foreclosure sale was held and the property was
26 sold back to the beneficiary, Bank of America, for \$972,843.08. *Id.* at ¶ 44 and Ex. 14. Plaintiffs
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28 Exhibit 7, the order relieving Wells Fargo from the bankruptcy stay, for that proposition. It is unclear if they are referring
to the Second NOTS or some other NOTS.

1 allege on information and belief that none of the Defendants holds the original note or has any legal
2 interest in the loan or the property. *Id.* at ¶¶ 45-46.

3 **2. Alleged Causes of Action**

4 Plaintiffs allege the following twenty causes of action:

5 (1) Violation of the Security First Rule against Wells Fargo and Bank of America:

6 Plaintiffs allege that Shahani tendered eleven payments of \$4,012.27 from September 2011 through
7 July 2012 to Home Mortgage pursuant to a trial modification agreement. *Id.* at ¶ 51. Plaintiffs allege
8 that the acceptance of these funds violated the security first rule, California Code of Civil Procedure §
9 726, because Wells Fargo, Home Mortgage, and Bank of America had already chosen to foreclose on
10 the subject property. *Id.* at ¶ 53. Plaintiffs allege that this renders the DOT void, and destroys any
11 interest Wells Fargo, Home Mortgage, or Bank of America purported to exercise in proceeding with
12 foreclosure, rendering the sale invalid and void. *Id.* at ¶ 54.

13 (2) Breach of Oral Contract against Wells Fargo and Bank of America: Plaintiffs allege

14 that Wells Fargo and Home Mortgage assured Shahani that they would not proceed with the
15 foreclosure sale while they were reviewing his request for loan modification. *Id.* at ¶ 57. Plaintiffs
16 allege that Shahani waited for the results of their review since February 2009, during which time
17 Wells Fargo assured him that they would continue to postpone the Trustee’s Sale as long as he
18 continued providing requested information regarding modification. *Id.* Although no final
19 determination had been made, Wells Fargo, Home Mortgage, and/or Bank of America instructed First
20 American Loanstar to foreclose on March 4, 2013. *Id.* at ¶ 58. “Accordingly, Wells Fargo and Home
21 Mortgage breached the oral agreement it entered into with Plaintiff not to proceed with the foreclosure
22 process while it was reviewing Plaintiff’s request for a loan modification and while Plaintiff made
23 monthly payments of \$4012.27.” *Id.* As a result, Plaintiffs have suffered consequential damages of
24 not less than \$1,000,000. *Id.* at ¶ 59.

25 (3) Breach of Written Contract against Wells Fargo and Bank of America: Plaintiffs

26 allege that Wells Fargo and Bank of America entered a Servicer Participation Agreement (“SPA”)
27 with Fannie Mae in which they agreed to apply the Home Affordable Mortgage Program (“HAMP”)
28 criteria to all loans they service. *Id.* at ¶ 61. Plaintiffs allege that they are third party beneficiaries of

1 this agreement. *Id.* at ¶ 62. Plaintiffs allege that, pursuant to the SPA, Wells Fargo and Bank of
2 America agreed to offer a three-month HAMP trial period at a payment level of 31% of income to all
3 borrowers who meet the HAMP criteria and pass the NPV test. *Id.* at ¶ 63. Plaintiffs allege that Well
4 Fargo and Bank of America breached the SPA by not offering Shahani a HAMP trial period even
5 though he met the HAMP criteria and passed the NPV test. *Id.* at ¶ 64. As a result, Plaintiffs have
6 suffered consequential damages of not less than \$1,000,000. *Id.* at ¶ 65.

7 (4) Wrongful Foreclosure Based on Statutory Violations against Bank of America, Wells
8 Fargo, and “First American”.¹⁷ Plaintiffs allege that their mortgage loan is subject to California Civil
9 Code §§ 2923.5, 2923.52, and 2923.6 because it was created in March 2007, when Shahani refinanced
10 his original home loan. *Id.* at ¶¶ 67, 71. Plaintiffs state the requirements of §§ 2923.5 and 2923.52.
11 *Id.* at ¶¶ 68-74. Plaintiffs allege that those provisions were violated. *Id.* at ¶ 75.

12 Plaintiffs allege that the NOD is void because it lacks required information including the book
13 and recordation number, instead containing in the relevant section the above-referenced statement that
14 the document was a copy of the notice. *Id.* at ¶ 75 and Ex. 3. Plaintiffs also allege that the NOD
15 Declaration is void because it has no date and signature, instead reciting that the original document
16 was executed by the authorized agent. *Id.* In addition, Plaintiffs allege that the NOD is void because
17 First American Loanstar stated, in the accompanying letter, that Bank of America was the beneficiary,
18 but Plaintiffs are unaware of any assignment or other transaction up to that point that transferred the
19 beneficial interest under the DOT to Bank of America. *Id.* at ¶¶ 75, 77-81 and Ex. 3. Moreover,
20 Plaintiffs allege that the NOD Declaration is deficient in that it does not identify which statutory
21 requirement was met by the beneficiary. *Id.* at ¶ 75.

22 Plaintiffs also allege that the First NOTS was scheduled the sale far less than the six months
23 after the NOD required by statute. *Id.* Plaintiffs further allege that the NOTS was never posted in
24 accordance with California Civil Code § 2924f(b)(1). *Id.* at ¶ 83.

25 Plaintiffs allege that § 2923.6 creates in loan servicers a duty to accept loan modification
26 proposals where the loan is in payment default and the anticipated recovery under the workout plan
27 exceeds the anticipated recovery through foreclosure on a net present value basis. *Id.* at ¶¶ 85-86.

28 ¹⁷ Although the Complaint distinguishes between First American Trustee and First American Loanstar, it does not do so in
identifying the parties against whom causes of action are pled against.

1 Plaintiffs allege that Shahani offered, and was willing and able to execute, a modification to a new
2 loan amount of \$700,000, at a new interest rate of 3%, over a new 30-year term, with monthly
3 payments of \$2,824.75. *Id.* at ¶ 89. Plaintiffs estimate that the net present value of that plan is
4 \$700,000, which would exceed their estimate of the net present value of foreclosure by \$118,380. *Id.*
5 at ¶¶ 90-94. Plaintiffs arrived at the net present value of foreclosure by subtracting the outstanding
6 property taxes and estimated costs of foreclosure from the present fair market value of the home. *Id.*
7 at ¶¶ 90-93. As a result, Plaintiffs allege that Defendants are required to accept the loan modification.
8 *Id.* at ¶ 95.

9 Plaintiffs allege that Defendants violated the Homeowner’s Bill of Rights (“HBOR”) in
10 several ways: (1) by dual tracking the modification negotiations and the foreclosure process; (2) by
11 failing to properly respond to documents Shahani submitted; (3) by failing to comply with the single
12 point of contact requirements; (4) by charging application fees for loan modification; and (5) by
13 charging late fees during consideration of the loan modification. *Id.* at ¶¶ 96-100. Plaintiffs seek
14 injunctive relief, statutory damages, and attorney’s fees pursuant to the HBOR. *Id.* at ¶ 101.

15 As a result of all of the alleged violations, Plaintiffs allege that the foreclosure is void, rather
16 than voidable, and seek to have the sale rescinded. *Id.* at ¶¶ 102-104. Alternatively, Plaintiffs seek
17 special damages. *Id.* at ¶ 105. In addition, Plaintiffs seek general damages. *Id.* at ¶ 106.

18 (5) Federal Violations against Wells Fargo, Bank of America, and First American:

19 Plaintiffs allege that Wells Fargo has engaged in a pattern and practice of discrimination and
20 mortgage abuse relating to people of color. *Id.* at ¶ 108. As a result, Plaintiffs allege that Wells Fargo
21 reached a fair lending settlement with the U.S. Department of Justice in July 2012 in connection with
22 a lawsuit alleging lending discrimination by Wells Fargo against African-American and Hispanic
23 borrowers. *Id.* at ¶ 109. Plaintiffs allege that Defendants have not complied with the settlement
24 because they have not offered Shahani, a racial minority in the United States, anything other than a
25 subprime loan. *Id.* at ¶ 110.

26 Next, Plaintiffs allege that Defendants have violated 42 U.S.C. § 1983. *Id.* at ¶ 111.

27 In addition, Plaintiffs allege that Defendants breached a robo-signing and dual tracking
28 settlement agreement entered in February 2012 by 49 state attorney generals, the federal government,

1 and several banks including Wells Fargo and Bank of America. *Id.* at ¶¶ 116, 119. Specifically,
2 Plaintiffs allege that Wells Fargo dual-tracked their loan and that the relevant documents were robo-
3 signed. *Id.* at ¶ 119. Plaintiffs also allege that Defendants breached the agreement by collecting
4 excessive monthly payments beginning in September 2011 and subsequently by refusing to accept
5 monthly payments increasing the arrears. *Id.* at ¶ 120.

6 (6) Violation of Anti-Trust Laws against Wells Fargo, Bank of America, and First
7 American: Plaintiffs allege that Defendants have engaged in a scheme to monopolize and control
8 mortgage loans to residential homeowners in violation of California and Federal law. *Id.* at ¶¶ 122-
9 31.

10 (7) Civil Harassment against Wells Fargo, Bank of America, and First American:
11 Plaintiffs allege that Defendants have engaged in nearly four years of harassing telephone calls and
12 correspondence constituting civil harassment in violation of California Civil Code § 527.6. *Id.* at ¶
13 133-34. Plaintiffs seek a temporary restraining order and injunction. *Id.* at ¶ 135.

14 (8) Breach of Implied Covenant of Good Faith and Fair Dealing against Wells Fargo,
15 Bank of America, and First American: Plaintiffs allege that Defendants breached the covenant of
16 good faith and fair dealing by failing to disclose the terms and conditions of the loan modification and
17 by utilizing underwriting techniques that prevented Shahani from ever having any hope of repaying
18 their loan. *Id.* at ¶¶ 138-39. Plaintiffs also allege that Defendants acted in bad faith throughout the
19 modification negotiations, including by carrying out the foreclosure sale prior to making a
20 determination regarding Shahani's most recent attempt to obtain a modification. *Id.* at ¶¶ 140-41.
21 Plaintiffs further allege that Shahani reasonably relied on representations made by Defendants that he
22 would be considered for loan modification by failing to plan for foreclosure. *Id.* at ¶ 142. Moreover,
23 Plaintiffs allege that the terms of the loan were unconscionable due to the excessive and
24 discriminatory interest rate. *Id.* at ¶ 143.

25 (9) Civil Conspiracy against Wells Fargo, Bank of America, and First American:
26 Plaintiffs allege that Defendants conspired to enter a fraudulent sales scheme wherein they directed an
27 inflated appraisal process to make Shahani's loan exceed the market rate and falsely represented to
28

1 Shahani that he could not qualify for any other financing. *Id.* at ¶ 145. As a result, Plaintiffs were
2 damaged in excess of \$220,000. *Id.* at ¶ 146.

3 (10) Quiet Title against Wells Fargo, Bank of America, and All Persons Unknown Claiming
4 Any Legal or Equitable Right, Title, Estate, Lien, or Interest in the Property: Plaintiffs seek to quiet
5 title in the property as of October 15, 2012. *Id.* at ¶¶ 149-51. Plaintiffs seek a ruling that the property
6 belongs to them and an award of consequential damages of no less than \$1,000,000. *Id.* at ¶ 153.

7 (11) Slander of Title against All Defendants: Plaintiffs allege that First American,
8 purportedly but falsely acting as either the trustee or the agent of the beneficiary of the DOT,
9 wrongfully and without privilege caused a NOD, Substitution, Assignment, and two Notices of
10 Trustee's Sale to be recorded against the subject property. *Id.* at ¶¶ 155-56. In addition, First
11 American wrongfully refused to cancel the Trustee's Sale. *Id.* at ¶ 157. None of the Defendants had
12 authority to execute any of those documents. *Id.* at ¶ 158. By causing the documents to be executed,
13 they slandered Plaintiffs' title. *Id.* at ¶ 159. Those actions are not privileged. *Id.* at ¶ 160. Plaintiffs
14 suffered damages in an amount not less than \$1,000,000. *Id.* at ¶ 161.

15 (12) Cancellation of Instruments against All Defendants: Plaintiffs seek cancellation of
16 both Substitutions of Trustee, the NOD, the Assignment, and both Notices of Trustee's Sale because
17 they are wrongfully recorded and if left outstanding will cause Plaintiffs to suffer damages. *Id.* at ¶¶
18 163-64. Plaintiff alleges that Defendants caused the documents to be prepared and recorded with the
19 specific intent to defraud Shahani. *Id.* at ¶ 165. Plaintiffs seek \$1,000,000 in damages as well as
20 punitive and exemplary damages. *Id.* at ¶ 167.

21 (13) Promissory Estoppel against Wells Fargo and Bank of America: Plaintiffs allege that
22 Wells Fargo and Bank of America promised not to foreclose on the subject property if Shahani
23 completed an application for a loan modification and made monthly payments in certain amounts. *Id.*
24 at ¶ 169. Plaintiffs allege that Shahani, as Wells Fargo and Bank of America should have reasonably
25 expected, justifiably relied by acting as required. *Id.* at ¶¶ 170-71. In addition, Shahani relied by
26 failing to explore the possibility of refinancing or marketing and selling the property himself. *Id.* at ¶
27 171. Plaintiffs also allege that Wells Fargo and Bank of America should be estopped from violating
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1 the SPA by proceeding to foreclosure without completing a HAMP analysis. *Id.* at ¶ 172-74.

2 Plaintiffs seek a recovery of not less than \$1,000,000. *Id.* at ¶ 175.

3 (14) Negligence against All Defendants: Plaintiffs allege that, as lender and servicer, Wells
4 Fargo and Bank of America owed Plaintiffs a reasonable duty to maintain proper and accurate loan
5 records. *Id.* at ¶ 177. Plaintiffs allege that Wells Fargo and Bank of America breached that duty by
6 foreclosing while telling Shahani it was not doing so and by misleading Shahani into believing that
7 Home Mortgage was a distinct entity. *Id.* at ¶ 178.

8 Further, Plaintiffs allege that First American, acting as trustee under the DOT, has a duty to
9 exercise reasonable care to follow California law with regard to foreclosures, to avoid conflicts of
10 interest, and to refrain from taking any action against Plaintiffs that it had no right to take. *Id.* at ¶
11 179. Plaintiffs allege that First American breached its duty by failing to properly train its employees
12 with regard to execution of each of the recorded documents. *Id.* at ¶ 180.

13 Plaintiffs seek \$1,000,000 in general and special damages. *Id.* at ¶ 181.

14 (15) Negligent Misrepresentation against Wells Fargo and Bank of America: Plaintiffs
15 allege that Wells Fargo, Bank of America, and Home Mortgage made representations to Shahani that
16 they would postpone the foreclosure sale and complete a loan modification based on the current FMV
17 of the subject property and that they would modify the loan and reduce the principal in an amount of
18 the loan and that they would lower the interest rate and that they would forgive and waive the
19 arrearage and/or roll the arrearage into the principal and amortize it for as long as 40 years or more if
20 Shahani completed an application for a loan modification, made monthly payments in a specified
21 amount, and agreed to continuously provide financial information. *Id.* at ¶ 183. These representations
22 were not true, and there were no reasonable grounds for believing them to be true at the time they
23 were made. *Id.* at ¶¶ 184-85. Wells Fargo, Bank of America, and Home Mortgage had no intention
24 of modifying the loan when they made those representations, but intended that Shahani rely on them.
25 *Id.* at ¶¶ 185-86. Plaintiffs reasonably relied and as a result suffered damages of not less than
26 \$1,000,000. *Id.* at ¶¶ 187-88.

27 (16) Fraud against Wells Fargo and Bank of America: Plaintiffs allege fraud based on the
28 following misrepresentations: (1) Wells Fargo, Bank of America, and Home Mortgage represented to

1 Shahani that they would not foreclose on the subject property during the time that a loan modification
2 was being reviewed and he was making monthly payments while intending to foreclose in any event;
3 (2) Wells Fargo representatives represented themselves as being employed by Home Mortgage
4 leading Shahani to believe that Home Mortgage was a separate entity; (3) Defendants misrepresented,
5 in connection with a broader scheme to make commissions, kickbacks, and other profits, to Shahani
6 and others that they owned the DOT and mortgage note causing Shahani to pay substantial sums of
7 money; (4) Defendants misrepresented that the loan terms given to Shahani were the best that they
8 could obtain and well within the economic value of the property, causing him to enter the mortgage
9 agreement; and (5) Defendants refused to provide the loan modification based on misrepresentations
10 that Shahani did not qualify for modification and on inflated estimates of the value of the subject
11 property. *Id.* at ¶¶ 190-98. Shahani justifiably relied on the above representations, all of which were
12 made with the intent to induce reliance, by entering the loan, making mortgage payments, and failing
13 to explore alternative remedies during the foreclosure process. *Id.* at ¶¶ 190-98, 204, 207. Shahani
14 suffered seeks recovery for his emotional distress, damage to his credit, and punitive damages. *Id.* at
15 ¶¶ 199, 206, 209.

16 (17) Violation of the Rosenthal Fair Debt Collection Practices Act (“Rosenthal Act”)
17 against Wells Fargo and Bank of America: Plaintiffs allege that the debt owed pursuant to the DOT is
18 a consumer debt pursuant to the Rosenthal Act. *Id.* at ¶ 211. Wells Fargo, Bank of America, and
19 Home mortgage are mortgage servicing companies in the business of collecting and processing
20 mortgage payments. *Id.* at ¶ 212. Their representatives misrepresented that they would not foreclose
21 if Shahani applied for loan modification and made monthly payments of \$4012.27, and Shahani made
22 11 payments as a result of that misrepresentation. *Id.* at ¶ 213. Plaintiffs seek actual and statutory
23 damages, attorneys’ fees, and costs. *Id.* at ¶ 214.

24 (18) Violation of California Business and Professions Code § 17200 et seq. (“UCL”)
25 against All Defendants: Plaintiffs allege that, by the above described conduct, and also by failing to
26 disclose the principal for which documents were being executed and recorded and failing to record
27 powers of attorney in connection with recorded documents, Defendants committed unfair, unlawful,
28 and fraudulent business practices in violation of the UCL. *Id.* at ¶¶ 216-19, 225. This conduct is

1 ongoing, unjustly enriched Defendants at Plaintiffs' expense through the collection of mortgage
2 payments, and causes harm to the public that outweighs any utility it may have. *Id.* at ¶¶ 220-223.
3 Plaintiffs seek injunctive relief, attorneys' fees, and restitution. *Id.* at ¶¶ 223, 26.

4 (19) Declaratory Relief against All Defendants: Plaintiffs allege that there is a dispute
5 between themselves, Wells Fargo, and Bank of America as to the ownership of the subject property
6 and request the court declare the rights of the parties in the matter. *Id.* at ¶¶ 228-29.

7 (20) Injunctive Relief against All Defendants: Plaintiffs allege that Defendants are acting in
8 violation of statute and will continue to do so without injunctive relief. *Id.* at ¶¶ 231-33. Plaintiffs
9 further allege that they do not have an adequate remedy at law. *Id.* at ¶ 234. Plaintiffs seek injunctive
10 relief.

11 **B. Removal**

12 The purported basis for removal was federal diversity jurisdiction. Notice of Removal, 2-13.
13 The Notice of Removal asserts that Plaintiffs are California citizens, Wells Fargo is a citizen of South
14 Dakota, Bank of America is a citizen of North Carolina, and First American Trustee is a citizen of
15 Texas. *Id.* at 2, 13. The Notice of Removal does not assert any alternative basis for removal.

16 **C. The Motions**

17 **1. Wells Fargo Motion**

18 First, Wells Fargo and Bank of America attack the sufficiency of Plaintiffs' federal claims.
19 Wells Fargo Motion, 3-4. They interpret the cause of action for "Federal Violations" to assert a §
20 1983 claim, but argue that it is insufficient for lack of governmental action. *Id.* at 3. In addition, they
21 argue that Plaintiffs have not provided anything more than conclusory allegations in support of their
22 clause of action for violation of anti-trust laws. *Id.* at 3-4.

23 Second, Wells Fargo and Bank of America address Plaintiffs' state law statutory claims. *Id.* at
24 4-8. They argue that Plaintiffs have not pled a violation of the security first rule because the
25 Complaint does not allege a set-off. *Id.* at 4-5 (citing *Mehta v. Wells Fargo Bank, N.A.*, 737
26 F.Supp.2d 1185, 1202-03 (S.D. Cal. 2010)). Further, they contend that the action for wrongful
27 foreclosure does not state a claim for relief because (1) the remedy for a violation of California Civil
28 Code section 2923.5 is constrained to postponement of the foreclosure sale, which in this case has

1 already occurred; and (2) California Civil Code section 2932.5 does not apply to Plaintiffs' loan. *Id.*
2 at 5-6. Next, they assert that Plaintiffs' civil harassment cause of action fails to allege lack of
3 legitimate purpose, because all communications were related to the foreclosure process, or actual
4 distress. *Id.* at 6-7. In addition, they argue that Plaintiffs' Rosenthal Act claim fails to allege debt
5 collection. *Id.* at 7. Finally, they contend that Plaintiffs fail to allege predicate unlawful or fraudulent
6 conduct to support their UCL claim. *Id.* at 7-8.

7 Third, Wells Fargo and Bank of America turn to Plaintiffs' state common law claims. *Id.* at 8-
8 14. They argue that Plaintiffs' breach of oral contract claim is contradicted by the allegations of the
9 Complaint in that Shahani received a response to his request for a loan modification in accordance
10 with the alleged contract. *Id.* at 8. Even if the response was not given, they argue that the breach of
11 oral contract claim is bared by the statute of limitations. *Id.* at 9. They further argue that the breach
12 of written contract claim fails because Plaintiffs are not third party beneficiaries of the server
13 participation agreement and therefore cannot enforce that agreement, nor can they assert a private
14 right of action under HAMP. *Id.* at 9-10. Moreover, they contend that Plaintiffs cannot assert a cause
15 of action for the breach of the covenant of good faith and fair dealing because they cannot tie that
16 cause of action to any contractual provision. *Id.* at 10-11. In addition, they argue that Plaintiffs have
17 not alleged who made a promise or when to support the promissory estoppel cause of action. *Id.* at
18 11. As to the fraud-based causes of action – fraud, negligent misrepresentation, and conspiracy –
19 Wells Fargo and Bank of America assert that Plaintiffs have not pled those theories with the
20 particularity required by Federal Rule of Civil Procedure 9(b). *Id.* at 11-12. They contend that the
21 action for slander of title fails because recordation of foreclosure notices is privileged. *Id.* at 12-13.
22 Next, they assert that the negligence claim fails because Plaintiffs are unable to allege the existence of
23 a legal duty. *Id.* at 13-14. Finally, they argue that the declaratory relief cause of action provides a
24 remedy that must be tethered to another claim and cannot stand alone. *Id.* at 14.

25 Fourth, Wells Fargo and Bank of America argue that Plaintiffs equitable causes of action –
26 wrongful foreclosure, quiet title, cancellation of instruments, and injunctive relief – are all barred by
27 Plaintiffs' failure to allege tender. *Id.* at 14-15.

28

1 Finally, Bank of America argues that it should be dismissed from this action with prejudice
2 because Plaintiffs have not made any specific allegations against it. *Id.* at 15-16.

3 2. First American Motion

4 To begin, First American Trustee argues that its acts as trustee are privileged pursuant to
5 California Civil Code section 47. First American Motion, 4. Second, First American Trustee asserts
6 that its duties as a trustee are limited by statute such that it will incur no liability for any good faith
7 error resulting from good faith reliance on information provided in good faith by the beneficiary
8 regarding the nature and amount of the default under the secured obligation. *Id.* at 5. Accordingly,
9 First American Trustee contends that it is statutorily immune from Plaintiffs' claims. *Id.* at 6.

10 Third, First American Trustee argues California Civil Code sections 2923.5 and 2923.6
11 provide no relief for a borrower after a trustee sale has been completed. *Id.* Moreover, it contends
12 that even a lender cannot be compelled to modify a loan. *Id.* at 6-7. In addition, First American
13 Trustee asserts that Plaintiffs' claim cannot properly be directed against it because it acted only as the
14 trustee and was not tasked with evaluating the lender's due diligence. *Id.* at 7. Next, it argues that
15 section 2923.6 provides no private right of action and does not apply to borrowers. *Id.* at 8.

16 Fourth, First American Trustee contends that Plaintiffs' claims of statutory violations in the
17 foreclosure process fail because they are barred by Plaintiffs' failure to allege tender, Plaintiffs failed
18 to allege prejudice, and the allegations are insufficient to state a claim in any event. *Id.* at 8-10.
19 Moreover, First American asserts that any causes of action under the HBOR fail because the HBOR
20 did not go into effect until January 1, 2013, after the NOD and NOTS had been issued. *Id.* at 9.

21 Fifth, First American Trustee interprets the "Federal Violations" cause of action to assert (1)
22 violation of civil rights and breach of fair-lending settlement agreement; and (2) violation of robo-
23 signing and dual tracking settlement agreement. *Id.* at 10. First American Trustee contends that it is
24 not a party to any of the underlying litigation and that Plaintiffs have not explained how a borrower
25 would have a private right of action under those agreements. *Id.* at 10-11.

26 Sixth, First American Trustee asserts that the cause of action for "Anti-Trust Violations"
27 contains only conclusory allegations, none of which apply to the processing of foreclosures and thus
28 none of which apply to it. *Id.* at 11.

1 Seventh, First American Trustee contends that the civil harassment claim fails because they
2 have not alleged that it engaged in any harassing conduct that did not serve any legitimate purpose.
3 *Id.* at 12.

4 Eighth, First American Trustee argues that it cannot be liable for a breach of the implied
5 covenant of good faith and fair dealing without a contractual relationship. *Id.* It asserts that Plaintiffs
6 have not alleged any such relationship with it. *Id.* at 12-13.

7 Ninth, First American Trustee states that the allegations of civil conspiracy are not properly
8 directed at it because they concern the process of extending the loan. *Id.* at 14.

9 Tenth, First American Trustee contends that the cause of action for cancellation of instruments
10 fails because the subject property has already been sold at a foreclosure sale such that the relevant
11 instruments no longer carry any weight. *Id.* at 14-15.

12 Eleventh, First American Trustee asserts that the negligence claim is insufficient for failure to
13 allege any duty it owes. *Id.* at 15-16.

14 Twelfth, First American Trustee argue that Plaintiffs have not pled any violations of the UCL
15 by First American in particular or stated a predicate violation to support a claim under the unlawful
16 prong. *Id.* at 17.

17 Thirteenth, First American Trustee contends that the declaratory relief action has no
18 independent basis, and thus fails with each of Plaintiffs' other causes of action. *Id.*

19 Fourteenth, First American Trustee asserts that the slander of title cause of action fails because
20 the recordings are privileged. *Id.* at 17-18.

21 Finally, First American Trustee contends that Plaintiffs are not entitled to injunctive relief
22 because the foreclosure sale has already occurred, so there is nothing left to enjoin. *Id.* at 18-19.

23 **D. Opposition**

24 **1. Opposition to Wells Fargo Motion**

25 First, Plaintiffs argue that their federal claims are properly pled. Opposition to Wells Fargo
26 Motion, 8-12. They contend that they pled a civil rights violation pursuant to the Fair Housing Act,
27 which prohibits discrimination in real estate-based transactions. *Id.* at 8-9 (citing 42 U.S.C. §
28 3605(a)). Plaintiffs also state that the Civil Rights Act of 1964 prohibits housing discrimination in

1 any program receiving federal financial assistance. *Id.* at 8. Moreover, Plaintiffs assert that
2 Defendants have not complied with a Department of Justice Settlement Agreement. *Id.* at 9. In
3 addition, Plaintiffs contend that they have stated a claim for anti-trust violations of California and
4 federal law by alleging that Wells Fargo, Bank of America, and the other Defendants conspired to fix
5 the price and availability of loans and loan modifications. *Id.* at 11.

6 Second, Plaintiffs assert that their state statutory claims are properly pled. *Id.* at 12-19.
7 Plaintiffs contend that they sufficiently alleged a violation of the security first rule because they
8 alleged that Defendants elected non-judicial foreclosure as their remedy by initiating the foreclosure
9 process but still demanded and collected payments as a precondition on Plaintiffs' request to consider
10 a loan modification. *Id.* at 13. In addition, Plaintiffs argue that they pled a violation of the HBOR
11 because (1) they pled that acceptance of their proposed loan modification would maximize net present
12 value such that their proposed loan modification should have been accepted; and (2) they pled that
13 their loan modification negotiations were dual-tracked. *Id.* at 13-15. Moreover, Plaintiffs argue that
14 they have stated a civil harassment claim because Wells Fargo made numerous duplicate requests
15 without any legitimate purpose. *Id.* at 16-17. Plaintiffs also attempt to add a claim for intentional
16 infliction of emotional distress under their civil harassment claim. *Id.* at 16. As to their Rosenthal
17 Act claim, Plaintiffs contend that, pursuant to that cause of action, they challenge only the actions
18 Defendants took in collecting the underlying debt and not Defendants engagement in the foreclosure
19 process. *Id.* at 17-18. Finally, Plaintiffs assert that they have stated a UCL claim predicated on
20 various state law violations, failure to comply with the HAMP guidelines, anti-trust violations, and
21 Defendants' false representation that they would consider Plaintiffs' loan modification only to deny
22 that request on technicalities or clearly incorrect financial calculations. *Id.* at 18-19.

23 Third, Plaintiffs contend that their state common law claims are sufficient. *Id.* at 19-24.
24 Addressing their contract related claims, Plaintiffs state that Defendants breached their oral promise to
25 provide a loan modification, made in February 2009, by never providing a modification that was not
26 later withdrawn. *Id.* at 19. Plaintiffs also argue that Defendants breached their subsequent promises
27 to grant a modification if certain payments were made and to postpone the trustee's sale. *Id.* Further,
28 Plaintiffs assert that Defendants were required to comply with HAMP once they agreed to discuss

1 loan modifications and Plaintiffs can properly rely on the HAMP guidelines as an predicate for a state
2 breach of contract action. *Id.* at 20-21. Plaintiffs assert that Defendants breached the underlying loan
3 agreement by failing to evaluate their modification request on the merits, frustrating the purpose of
4 the contract. *Id.* at 21. Moreover, Plaintiffs argue that they detrimentally relied on Defendants'
5 promises to offer a loan modification by making over \$40,000 in loan payments between September
6 2011 and June 2012 and by providing personal financial documentation. *Id.* at 21-22. Regarding
7 their fraud claims, Plaintiffs contend that they have provided specific allegations. *Id.* at 22. As to
8 their cause of action for slander of title, Plaintiffs argue that the HBOR entitles them to injunctive
9 relief and that the trustee's deed falsely and improperly asserts that Bank of America owns the
10 property. *Id.* at 22-23. Moreover, Plaintiffs assert that HBOR does not require tender. *Id.* at 23.
11 Finally, Plaintiffs contend that they are entitled to a declaration of their rights or duties with respect to
12 the real property pursuant to California Civil Code section 1060. *Id.* at 23. Finally, Plaintiffs contend
13 that they have properly alleged a duty of care in support of their negligence cause of action that
14 Defendants owed them in considering their loan modification application. *Id.* at 23-24.

15 Fourth, Plaintiffs argue that they alleged that all Defendants acted as agents of Bank of
16 America, so Bank of America is properly a defendant in this action. *Id.* at 24-25.

17 **2. Opposition to First American Motion**

18 First, Plaintiffs argue that First American Trustee cannot assert its qualified litigation privilege
19 in this case because (1) it was not properly substituted as a trustee; and (2) it acted with malice as
20 evidenced by its false representations that it was acting on behalf of the beneficiary and without
21 proper authority in executing the foreclosure related documents and carrying out the trustee's sale.
22 Opposition to First American Motion, 5-7.

23 Second, Plaintiffs contend that they may properly sue First American Trustee pursuant to the
24 HBOR for their failure to ensure that no loan modification application was pending when it executed
25 the trustee's sale and that they may seek injunctive relief because they initiated their suit prior to the
26 recordation of the trustee's deed. *Id.* at 7-11. Thus, the trustee's deed is invalid. *Id.* at 7.

27 Third, Plaintiffs assert that they satisfied the tender requirement through their various loan
28 modification offers, pursuant to which they offered to pay more than the full market value of the

1 property. *Id.* at 11-13. Moreover, Plaintiffs state that tender is not required where the sale is void ab
2 initio. *Id.* at 13 n.7.

3 Fourth, echoing the arguments in the Opposition to Wells Fargo, Plaintiffs argue that (1) their
4 federal claims are properly pled; and (2) their civil harassment claim is properly pled. *Id.* at 13-18.

5 Fifth, Plaintiffs contend that their allegations of a civil conspiracy are sufficient to implicate
6 First American Trustee, in particular with regard to the recordation of documents. *Id.* at 18-19.

7 Sixth, Plaintiffs assert that the trustee's deed, and all documents that led to its execution,
8 should be cancelled because it slanders their title to the property in question. *Id.* at 19.

9 Seventh, as to the negligence claim, Plaintiffs argue that they properly alleged that First
10 American Trustee owed them several duties pertaining to the execution and recordation of documents,
11 a duty to ensure Wells Fargo and Bank of America complied with the HBOR, and a duty not to
12 proceed with foreclosure before a sufficient period of time had elapsed since a loan modification
13 request that triggered the HBOR had been denied. *Id.* at 20.

14 Eighth, Plaintiffs assert that First American Trustee violated the UCL based on underlying
15 violations of California statutes, anti-trust violations, and California common law violations by
16 instituting improper and premature foreclosure proceedings without authorization to generate fees. *Id.*
17 at 21.

18 Ninth, Plaintiffs contend that declaratory relief pursuant to California Civil Code section 1060
19 is proper to ascertain their rights and duties under the contract or with respect to the property. *Id.* at
20 21-22.

21 **E. Replies**

22 **1. Wells Fargo Reply**

23 In reply, Wells Fargo and Bank of America assert that eight of Plaintiffs' causes of action
24 should be dismissed with prejudice and the remaining causes of action must be amended if they are to
25 state a claim for relief. Reply in Support of Wells Fargo Motion ("Wells Fargo Reply"), 2-8.

26 First, they contend that taking action to collect on a debt, where no judicial action is taken,
27 does not violate the security first rule as a matter of law. *Id.* at 2.

28

1 Second, they assert that Plaintiffs cannot state a claim under the HBOR because Plaintiffs had
2 not submitted a complete application and because Plaintiffs had submitted applications that had been
3 considered and rejected prior to January 1, 2013. *Id.* at 3-5.

4 Third, Wells Fargo and Bank of America argue that Plaintiffs cannot allege harassment for no
5 legitimate purpose based on the legal activity of foreclosure, nor can they turn their cause of action
6 into one for intentional infliction of emotional distress. *Id.* at 5.

7 Fourth, they argue that Plaintiffs' equitable causes of action must be dismissed for Plaintiffs'
8 failure to allege tender. *Id.* at 5-6.

9 Fifth, they contend that the claim for slander of title fails based on privilege because Plaintiffs
10 cannot dispute that they lost title at the trustee's sale, whether or not they seek redress for that loss in
11 this suit. *Id.* at 6-7.

12 Sixth, they assert that, at a minimum, Plaintiffs should be required to amend their Complaint
13 (1) to specify conduct by Defendants that violated the Rosenthal Act; (2) to satisfy the federal
14 pleading standard for anti-trust violations; (3) to allege fraud with specificity; (4) to allege breach of
15 contract; (5) to allege facts that would give rise to a duty of care; and (6) to provide predicate
16 violations in support of the UCL claim and declaratory relief claim. *Id.* at 7-8.

17 2. First American Reply

18 To begin, First American Trustee seeks judicial notice of the fact that both First American
19 Trustee and First American Loanstar are the same entity. Reply in Support of First American Motion
20 ("First American Reply"), 2-3 (relying on a certificate of amendment filed with the Texas Secretary of
21 State on May 13, 2010). First American Trustee modifies its argument as to the HBOR by stating that
22 Plaintiffs' dual tracking claims are without merit because the loan modification was denied between
23 February and November 2009. *Id.* at 4.

24 III. REQUESTS FOR JUDICIAL NOTICE

25 The standard for judicial notice is set forth in Rule 201 of the Federal Rules of Evidence,
26 which allows a court to take judicial notice of an adjudicative fact not subject to "reasonable dispute,"
27 either because it is "generally known within the territorial jurisdiction of the trial court" or it is
28 "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably

1 be questioned.” Fed. R. Evid. 201. As a general rule, the court “may not consider any material beyond
2 the pleadings in ruling on a Rule 12(b)(6) motion.” *U.S. v. Corinthian Colleges*, 655 F.3d 984, 998-99
3 (9th Cir. 2011) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)). However, the
4 court may consider unattached evidence on which the complaint “necessarily relies” if: “(1) the
5 complaint refers to the document; (2) the document is central to plaintiff’s claim; and (3) no party
6 questions the authenticity of the document.” *Id.* at 999 (citing *Marder v. Lopez*, 450 F.3d 445, 448
7 (9th Cir. 2006)). In addition, the court may take judicial notice of “matters of public record,” but not
8 facts that may be “subject to reasonable dispute.” *Id.* (citing *Lee*, 250 F.3d at 689).

9 The parties request judicial notice of a combined total of 35 exhibits, several of which are
10 redundant. The Court takes judicial notice of public filings that are matters of public record, but not
11 facts contained within those filings that may be subject to reasonable dispute.¹⁸

12 The remaining documents consist of (1) correspondence between Shahani and his
13 representatives and Wells Fargo and its representative; (2) printouts from the Nationwide Posting &
14 Publishing website; and (3) a report on the California foreclosure crisis compiled by several advocacy
15 groups. Plaintiffs’ Request for Judicial Notice in Opposition to Wells Fargo Motion, Exs. 10-16, 18-
16 19. Although Plaintiffs have not articulated why judicial notice of these documents would be proper,
17 nearly all of the correspondence and both printouts from the Nationwide Posting & Publishing
18 Website were attached to the Complaint and must therefore be considered in considering the present
19 Motions.¹⁹ As to the advocacy group report, the Court takes judicial notice of its existence, as that
20 fact is readily verifiable, but it does not take judicial notice of the veracity of its assertions or
21 conclusions as those matters are not readily verifiable and are subject to reasonable dispute. The
22 Court cannot consider only Exhibits 15 and 19, as neither is attached to the Complaint, referred to in
23 the Complaint, a matter of public record, capable of ready and accurate determination by reference to
24 sources whose accuracy cannot reasonably be questioned, or generally known within this territorial
25 jurisdiction.

26 ¹⁸ This includes Exhibits A-G of Wells Fargo and Bank of America’s Request for Judicial Notice in Support of Wells
27 Fargo Motion; Exhibits A-E of First American Trustee’s Request for Judicial Notice in Support of First American Motion;
28 Exhibits 1- 9, 17 of Plaintiffs’ Request for Judicial Notice in Opposition to Wells Fargo Motion; Exhibits A-C of
Plaintiffs’ Request for Judicial Notice in Opposition to First American Motion; and Exhibit A of First American Trustee’s
Supplemental Request for Judicial Notice in Support of First American Motion.

¹⁹ This applies to Exhibits 10-14, 16.

1 **IV. ANALYSIS**

2 **A. Legal Standard**

3 A complaint may be dismissed for failure to state a claim for which relief can be granted
4 under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6). “The purpose
5 of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the complaint.” *N. Star*
6 *Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). Generally, a plaintiff’s burden at the
7 pleading stage is relatively light. Rule 8(a) of the Federal Rules of Civil Procedure states that “[a]
8 pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the
9 claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a).

10 In ruling on a motion to dismiss under Rule 12, the court analyzes the complaint and takes
11 “all allegations of material fact as true and construe[s] them in the light most favorable to the non-
12 moving party.” *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal may
13 be based on a lack of a cognizable legal theory or on the absence of facts that would support a valid
14 theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint must
15 “contain either direct or inferential allegations respecting all the material elements necessary to
16 sustain recovery under some viable legal theory.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562
17 (2007) (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). “A
18 pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of
19 action will not do.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at
20 555). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual
21 enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at 557).

22 The factual allegations must be definite enough to “raise a right to relief above the speculative level.”
23 *Twombly*, 550 U.S. at 555. However, a complaint does not need detailed factual allegations to survive
24 dismissal. *Id.* Rather, a complaint need only include enough facts to state a claim that is “plausible
25 on its face.” *Id.* at 570. That is, the pleadings must contain factual allegations “plausibly suggesting
26 (not merely consistent with)” a right to relief. *Id.* at 545 (noting that this requirement is consistent
27 with Fed. R. Civ. P. 8(a)(2), which requires that the pleadings demonstrate that “the pleader is entitled
28 to relief”).

1 **B. Subject Matter Jurisdiction**

2 **1. Diversity Jurisdiction**

3 Federal subject matter jurisdiction based on diversity requires complete diversity of citizenship
4 and an amount in controversy in excess of \$75,000. 28 U.S.C. § 1332(a). Here, complete diversity is
5 lacking. Plaintiffs are citizens of California. Moreover, as this Court recently determined, First
6 American Trustee is a citizen of California because it is a Limited Liability Company wholly owned
7 by First American Title Company, a California corporation. *See Perez v. Wells Fargo Bank, N.A.*, __
8 F.Supp.2d __, 2013 WL 892746, at *15 n.5 (N.D. Cal. Mar. 8, 2013); *see also Johnson v. Columbia*
9 *Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006) (LLC’s are “citizen[s] of every state in
10 which [their] owners/members are citizens”).²⁰

11 **2. Federal Question Jurisdiction**

12 “The district courts shall have original jurisdiction of all civil actions arising under the
13 Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. Generally, “[a] case arises
14 under federal law where federal law creates the cause of action or where the vindication of a right
15 under state law necessarily turns on some construction of federal law.” *Republican Party of Guam v.*
16 *Gutierrez*, 277 F.3d 1086, 1088-89 (9th Cir. 2002) (quoting *Franchise Tax Bd. v. Constr. Laborers*
17 *Vacation Trust*, 463 U.S. 1, 8-9, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)). Federal question
18 jurisdiction is found only where a federal question appears on the face of a properly pleaded
19 complaint. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987).

20 Here, there are four claims that potentially fall within this Court’s subject matter jurisdiction
21 on the basis of a federal question: (1) the “Federal Violations” cause of action; (2) the “Violation of
22 Anti-Trust Laws” cause of action and its incorporation as a predicate to the UCL cause of action; (3)
23 the incorporation of alleged HAMP violations into Plaintiffs’ breach of written contract, promissory
24 estoppel, and UCL causes of action; and (4) the declaratory relief cause of action. As discussed
25 below, the Court dismisses all claims over which it has original federal question jurisdiction.
26

27 _____
28 ²⁰ In this case, First American Trustee’s certificate of interested parties indicates that it is owned by First American Title Insurance Company rather than First American Title Company. This does not affect the outcome, because First American Title Insurance Company is also a California corporation.

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a. Federal Violations Cause of Action

The Complaint can be read to allege three theories in support of the broad “federal violations” cause of action: (1) Defendants entered a fair-lending settlement agreement with the United States Department of Justice to compensate African-American and Hispanic borrowers who were improperly steered into higher-priced subprime loans but Defendants have not complied with the terms of the settlement because they offered Shahani, a member of a racial minority in the United States, only a subprime loan; (2) Defendants have abridged Shahani’s civil rights in violation of 42 U.S.C. § 1983; and (3) Defendants violated a settlement agreement between themselves and 49 state attorneys general as well as the federal government by refusing to modify Shahani’s loan, by dual-tracking his loan modification application, and by robo-signing foreclosure related documents. Complaint, ¶¶ 108-11, 115-19.

i. § 1983 Claim

Plaintiffs’ § 1983 claim falls within the Court’s federal question jurisdiction. However, as discussed below, Plaintiffs have not sufficiently pled a cause of action pursuant to § 1983. Their “Federal Violations” cause of action is dismissed to the extent it relies on a violation of § 1983.

§ 1983 provides a cause of action against any person who, under color of state law, deprives another of any rights, privileges, or immunities secured by the Constitution or the laws of the United States. To state a claim for a violation of § 1983, a plaintiff must allege deprivation of a constitutional right by a government official acting “under the color of state law.” *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). Plaintiffs have not alleged that Defendants were state actors.

ii. Breach of Settlement Agreements

Plaintiffs’ claims for breach of the two settlement agreements are dismissed because Plaintiffs have not alleged that they are parties to either agreement, that they are intended third-party beneficiaries of either agreement, or that they otherwise have any authority to enforce either agreement.²¹ Plaintiffs make no argument in their briefing that they have any such authority. To the extent their “Federal Violations” cause of action relies on this theory, it is dismissed.

²¹ The Court notes that it is unclear why Plaintiffs characterize these claims as federal violations. In general, for the purposes of construction and enforcement, settlement agreements are “governed by principles of local law which apply to interpretation of contracts generally.” *United Commercial Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992) (quotations omitted). However, several courts have found a federal question where the plaintiffs alleged a breach of

iii. Violation of the Fair Housing Act

In their Opposition briefs, Plaintiffs argue that Defendants violated the Fair Housing Act. In support of this point, Plaintiffs seek judicial notice of allegations in a complaint filed by the Department of Justice. Those allegations were made in support of the claim that Wells Fargo engaged in lending practices that discriminated against African-American and Hispanic borrowers relative to non-Hispanic white borrowers. *See* Opposition to Wells Fargo, 8-9; Plaintiffs’ Request for Judicial Notice in Support of Opposition to Wells Fargo, Ex. 17. In the Complaint itself, Plaintiffs made no reference to the Fair Housing Act. The only allegations that can be read as supporting a claim for violation of the Fair Housing Act are: (1) “Wells Fargo exhibited a pattern and practice of discrimination and mortgage abuse relating to people of color;” (2) a reference to the Department of Justice settlement agreement arising from the suit against Wells Fargo alleging discrimination against African-American and Hispanic borrowers because they were disproportionately steered into higher-priced subprime loans; and (3) Shahani “is a member of a racial minority in the United States, and Defendants have refused to offer [him] anything other than a subprime loan.” Complaint, ¶¶ 108-10. These conclusory allegations, in a section of the Complaint that explicitly implicates other statutory authority and contractual authority, cannot be read to state a claim under the Fair Housing Act. For example, the Complaint lacks even the allegation that Defendants considered Shahani’s race, or were aware of his race, in making their lending decision.

iv. Leave to Amend

Although their “Federal Violations” cause of action is dismissed, Plaintiffs are given leave to amend to clearly plead a federal violation with supporting factual allegations.

b. Violation of Anti-Trust Laws Cause of Action

Plaintiffs allege that Defendants formed an unlawful trust to fix the terms of mortgage loans and loan modifications in California. Complaint, ¶¶ 122-25, 128-29. Plaintiffs specifically allege that this conduct violates the Cartwright Act, and generally allege that it violates California and federal law. *Id.* at ¶¶ 122, 125-26. The Court reads the Complaint as simultaneously alleging a violation of the Sherman Act, and thereby raising a federal question.

a federal contract governed by federal common law. *See Omega v. Wells Fargo & Co.*, 2012 WL 685440, at *1 n.2 (N.D. Cal. Mar. 2, 2012) (collecting cases). The Court does not decide this issue at the moment.

1 Under California law, the Cartwright Act prohibits, among other things, any combination “[t]o
2 prevent competition in [the] sale or purchase of any ... commodity” or to “[a]gree in any manner to
3 keep the price of ... [any] commodity at a fixed or graduated figure.” *Knevelbaard v. Kraft Foods,*
4 *Inc.*, 232 F.3d 979, 986 (9th Cir. 2000) (quoting Cal. Bus. & Prof. Code § 16720(c), (e)(2)).
5 Similarly, the federal Sherman Act prohibits “[e]very contract, combination ... or conspiracy in
6 restraint of trade,” including horizontal price-fixing among competitors. *Id.* (citing 15 U.S.C. § 1;
7 *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397, 47 S.Ct. 377, 71 L.Ed. 700 (1927)). Both
8 the Sherman Act and the Cartwright Act require the plaintiff to demonstrate antitrust standing,
9 although the standards are slightly different. *Id.* at 987.

10 Under the Sherman Act, the court looks to: “(1) the nature of the plaintiff’s alleged injury; that
11 is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury;
12 (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity of
13 apportioning damages.” *Id.* “When horizontal price fixing causes buyers to pay more, or sellers to
14 receive less, than the prices that would prevail in a market free of the unlawful pay restraint, antitrust
15 injury occurs.” *Id.* at 988.

16 Under the Cartwright Act, the plaintiff must show that an antitrust violation was the proximate
17 cause of his injuries. *Kolling v. Dow Jones & Co.*, 137 Cal.App.3d 709, 723, 187 Cal.Rptr. 797
18 (1982). Moreover, an “antitrust injury” must be proved; that is, the type of injury the antitrust laws
19 were intended to prevent, and which flows from the invidious conduct that renders defendants’ acts
20 unlawful. *Id.* In addition, a plaintiff must show an injury within the area of the economy that is
21 endangered by a breakdown of competitive conditions. *Id.* at 724.

22 Here, Plaintiffs offer only conclusory allegations that Defendants have agreed to fix the prices
23 and terms of loans and loan modifications. *See* Complaint, ¶¶ 122-25. Moreover, the Complaint
24 expressly declines to provide “whether the prices agreed were high or low, reasonable or
25 unreasonable.” Complaint, ¶ 128. As such, Plaintiffs cannot plausibly allege that they suffered any
26 injury as a result of any alleged price fixing. Thus, even if their conclusory allegations could state a
27 cause of action, Plaintiffs have not alleged standing. Their anti-trust claims are dismissed with leave
28 to amend. Likewise, they have not pled standing to assert this theory as a predicate for a violation of

1 the UCL. See *Kwikset Corp. v. Superior Court*, 51 Cal.App.4th 310, 337, 120 Cal.Rptr.3d 741, 246
2 P.2d 877 (2011) (to establish standing under the UCL a plaintiff must “(1) establish a loss or
3 deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2)
4 show that the economic injury was a result of, i.e., *caused by*, the unfair business practice...”).

5 **c. HAMP Violations**

6 Plaintiffs allege HAMP violations in their third cause of action for breach of a written contract
7 and as predicate conduct for their UCL claim. Contrary to their assertion in their Opposition, their
8 breach of contract claim is a pure attempt to enforce the SPA against Wells Fargo and Bank of
9 America as a third party beneficiary by holding them liable for failing to give Plaintiffs a loan
10 modification in light of the HAMP criteria. Complaint, ¶¶ 61-65; Opposition to Wells Fargo, 20.
11 This Court joins many others in this district in holding that Plaintiffs are not third party beneficiaries
12 under the SPA and are unable to enforce that agreement. See *Cleveland v. Aurora Loan Servs., LLC*,
13 2011 WL 2020565, at *4 (N.D. Cal. May 24, 2011) (collecting cases); see also *Mora v. U.S. Bank*
14 *N.A.*, 2012 WL 2061629, at *6 n.7 (N.D. Cal. June 7, 2012) (stating that the plaintiffs could not
15 premise their breach of contract claim on an alleged failure to give them a HAMP modification
16 because HAMP provides no private right of action). Plaintiffs’ third cause of action is dismissed, but
17 Plaintiffs will be given an opportunity to amend their Complaint if they wish to elaborate a breach of
18 written contract under a different theory.

19 To the extent Plaintiffs incorporate HAMP violations in their causes of action for promissory
20 estoppel and violation of the UCL, this court joins many other district courts in concluding that “no
21 federal question [is] presented merely because [Plaintiff’s] state law claims may incorporate or turn
22 upon allegations of HAMP violations.” See, e.g., *Brothers v. Bank of America, N.A.*, 2012 WL
23 4471590, at *2 n.2 (N.D. Cal. Sept. 26, 2012) (quoting *Carlos v. Bank of America Home Loans*, 2011
24 WL 166343, at *1 (C.D. Cal. Jan. 13, 2011)); *De Long v. Bank of America, N.A.*, 2012 WL 1498868,
25 at *4 (N.D. Cal. Apr. 27, 2012) (collecting cases); *Akil v. Carrington Mortg. Servs., LLC*, 2012 WL
26 3231330, at *1 (E.D. Cal. Aug. 6, 2012). Moreover, those claims are based almost entirely on
27 questions of state law. The Court declines to exercise supplemental jurisdiction over those causes of
28 action.

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d. Declaratory Relief Cause of Action

On the face of the Complaint, it is unclear whether the declaratory relief cause of action is asserted on the basis of state or federal law. In their Opposition, Plaintiffs clarify that their declaratory relief cause of action is brought pursuant to California Code of Civil Procedure section 1060. Opposition to Wells Fargo, 23. In any event, there would be no federal question even if Plaintiffs sought declaratory relief pursuant to 28 U.S.C. § 2201.

The Declaratory Judgment Act is not an independent source of federal subject matter jurisdiction. *Vaden v. Discovery Bank*, 556 U.S. 49, 70 n.19, 129 S.Ct. 1262, 173 L.Ed.2d 206 (2009). The Act is procedural and does not extend the jurisdiction of the federal courts. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671, 70 S.Ct. 876, 94 L.Ed. 1194 (1950). “The use of the declaratory judgment statute does not confer jurisdiction by itself if jurisdiction would not exist on the face of a well-pleaded complaint brought without the use of 28 U.S.C. § 2201.” *Janakes v. U.S. Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985).

The Court has already dismissed all federal questions in the Complaint. This cause of action seeks only for the court to determine, on the basis of Plaintiffs’ state law theories, that Plaintiffs continue to be the rightful owners of the subject property. It does not independently give rise to a federal question. Moreover, to the extent that it can be read as a defensive action anticipating a future lawsuit, that lawsuit would be a state law action, such as an unlawful detainer action, seeking to eject Shahani from the property at issue. *See Standard Ins. Co. v. Saklad*, 127 F.3d 1179, 1181 (9th Cir. 1997) (if the declaratory judgment defendant could have brought a coercive action in federal court to enforce its rights then federal question jurisdiction exists). The Court declines to exercise supplemental jurisdiction over this claim.

3. Supplemental Jurisdiction Over Remaining State Law Claims

“[Supplemental] jurisdiction is a doctrine of discretion, not of plaintiff’s right.” *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). “Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original

1 jurisdiction that they form part of the same case or controversy under Article III of the United States
2 Constitution.” 28 U.S.C. § 1367(a). “The district courts may decline to exercise supplemental
3 jurisdiction over a claim” if, among other reasons, “the district court has dismissed all claims over
4 which it has original jurisdiction.” 28 U.S.C. § 1367(c)(3). In addition, when “the state issues
5 substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the
6 comprehensiveness of the remedy sought, the state claims may be . . . left for resolution to state
7 tribunals.” *Gibbs*, 383 U.S. at 727; *see also* 28 U.S.C. § 1367(c)(2). Here, Plaintiffs’ state law claims
8 form the body of this action. They involve a number of disputes arising out of the parties’ loan
9 modification discussions, the foreclosure process, and compliance with California statutes pertaining
10 to both. Accordingly, having dismissed all claims over which it has original jurisdiction, the Court
11 declines to exercise its supplemental jurisdiction over the remaining state law claims. The remaining
12 state law claims are dismissed without prejudice for lack of subject matter jurisdiction.

13 **IV. CONCLUSION**

14 For the foregoing reasons, Plaintiffs’ Complaint is dismissed without prejudice. Plaintiffs may
15 file an amended complaint within 10 days. If no amended complaint is filed the Clerk shall close the
16 file.

17 IT IS SO ORDERED.

18 Dated: June 24, 2013

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22 JOSEPH C. SPERO
23 United States Magistrate Judge
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