

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

3
 4 ELOISA TORRES and WESLEY V. HARRIS,

No. C 10-04761 CW

5 Plaintiffs,

ORDER GRANTING
 DEFENDANT'S
 MOTION TO DISMISS
 AND DENYING
 PLAINTIFFS'
 MOTION FOR AN
 EXTENSION OF TIME
 TO FILE AN
 AMENDED COMPLAINT
 (Docket Nos. 8
 and 18)

6 v.

7 WELLS FARGO HOME MORTGAGE, INC.,

8 Defendant.
 _____/

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 10
 11 Defendant Wells Fargo Bank, N.A., sued as Wells Fargo Home
 12 Mortgage, Inc., moves to dismiss the complaint of pro se Plaintiffs
 13 Eloisa Torres and Wesley V. Harris. Plaintiffs oppose the motion.
 14 After briefing closed on Wells Fargo's motion to dismiss,
 15 Plaintiffs filed a motion for an extension of forty-five days to
 16 file an amended complaint. The motions were taken under submission
 17 on the papers. Having considered the papers submitted by the
 18 parties, the Court GRANTS Wells Fargo's motion to dismiss and
 19 DENIES Plaintiffs' motion for an extension of time.

20 BACKGROUND

21 Plaintiffs' complaint is composed, for the most part, of
 22 general allegations about the mortgage industry.¹ The only
 23 specific allegation is that Plaintiffs "entered into a consumer
 24 contract for the refinance of a primary residence located at 15561
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26 _____
 27 ¹ Plaintiffs' complaint is largely identical to the pleadings
 28 filed in Padilla v. One West Bank, Case No. C 10-4080 CW; Blackwell
v. Wells Fargo Home Mortgage, Case No. C 10-4917 JF; and Bennett v.
Suntrust Mortgage, Inc., Case No. 10-3375 JF.

1 Oceanside Way San Leandro CA 94579." Compl. 1. The complaint then
2 alleges that "Defendants, acting in concert and collusion with
3 others, induced Petitioner to enter into a predatory loan agreement
4 with Defendant."² Plaintiffs do not identify the role Wells Fargo
5 played in the violations that they allege in their complaint.

6 The following information is taken from documents tendered by
7 Wells Fargo.³ On June 26, 2006, Plaintiffs obtained a \$600,000
8 loan from Provident Funding Associates, L.P. Def.'s Request for
9 Judicial Notice (RJN), Ex. A, 1. The loan was secured by a deed of
10 trust (DOT) that named First American Title Company as trustee and
11 Mortgage Electronic Registration Systems, Inc. (MERS) as
12 beneficiary. Id. Under the DOT, Plaintiffs granted the Oceanside
13 Way property to First American Title Company in trust with a power
14 of sale. Id. at 3.

15 On February 1, 2010, a notice of default and election to sell
16 under the DOT was recorded. RJN, Ex. B. The notice indicated
17 that, as of January 29, 2010, Plaintiffs were \$57,751.43 in arrears
18 on their mortgage. Id. at 1. A declaration filed in support of
19 the notice of default was signed by Wells Fargo's Vice President of
20 Loan Documentation. The declaration did not state the role Wells
21 Fargo played in Plaintiffs' loan.

22 On April 6, 2010, MERS substituted First American LoanStar
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24 ² Although Plaintiffs' allegations speak of "Defendants," they
25 name only one Defendant, Wells Fargo Home Mortgage, Inc.

26 ³ Plaintiffs do not oppose Wells Fargo's request for judicial
27 notice of documents recorded in the Alameda County Clerk-Recorder's
28 Office that are related to their mortgage. Accordingly, the Court
GRANTS Wells Fargo's request.

1 Trustee Services LLC for First American Title Company as trustee on
2 the DOT. RJN, Ex. C at 1. On April 29, 2010, MERS assigned its
3 beneficial interest in the DOT to HSBC Bank USA, N.A., as Trustee
4 for Wells Fargo Asset Securities Corporation Mortgage Pass-Through
5 Certificates Series 2006-14 (HSBC Bank). RJN, Ex. D, 1.

6 On May 11, 2010, First American LoanStar recorded a notice of
7 trustee's sale, which stated that the Oceanside Way property would
8 be sold at a public auction on June 1, 2010. RJN, Ex. E. A
9 declaration accompanying the notice was signed by Marsha Graham,
10 one of Wells Fargo's assistant vice presidents. Id. at 2.

11 The Oceanside Way property was sold on September 17, 2010, not
12 on June 1, 2010 as indicated in the notice of trustee's sale. RJN,
13 Ex. F, 2. HSBC Bank purchased the Oceanside Way property. Id. at
14 1.

15 In the "Causes of Action" section of their complaint,
16 Plaintiffs assert the following claims: (1) breach of fiduciary
17 duty; (2) negligence and negligence per se; (3) fraud; (4) breach
18 of the covenant of good faith and fair dealing; (5) violation of
19 the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601 et seq.; and
20 (6) intentional infliction of emotional distress. Plaintiffs seek
21 damages in the amount of \$934,442.92, punitive damages in the
22 amount of \$2,803,328.76, rescission of the loan contract, quiet
23 title to the Oceanside Way property and an injunction enjoining
24 Wells Fargo from engaging in fraudulent, deceptive, predatory and
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1 negligent acts.⁴

2 LEGAL STANDARD

3 A complaint must contain a "short and plain statement of the
4 claim showing that the pleader is entitled to relief." Fed. R.
5 Civ. P. 8(a). When considering a motion to dismiss under Rule
6 12(b)(6) for failure to state a claim, dismissal is appropriate
7 only when the complaint does not give the defendant fair notice of
8 a legally cognizable claim and the grounds on which it rests.
9 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In
10 considering whether the complaint is sufficient to state a claim,
11 the court will take all material allegations as true and construe
12 them in the light most favorable to the plaintiff. NL Indus., Inc.
13 v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this
14 principle is inapplicable to legal conclusions; "threadbare
15 recitals of the elements of a cause of action, supported by mere
16 conclusory statements," are not taken as true. Ashcroft v. Iqbal,
17 ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550
18 U.S. at 555).

19 When granting a motion to dismiss, the court is generally
20 required to grant the plaintiff leave to amend, even if no request
21 to amend the pleading was made, unless amendment would be futile.
22 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
23 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment
24 would be futile, the court examines whether the complaint could be

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26 ⁴ Plaintiffs allude to other statutes in the "General
27 Allegations" section of their complaint. However, only these six
28 causes of action are listed after the heading, "Causes of Action."

1 amended to cure the defect requiring dismissal "without
2 contradicting any of the allegations of [the] original complaint."
3 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).

4 DISCUSSION

5 Plaintiffs' opposition appears to be a form response, largely
6 identical to that filed in Padilla, and fails to address arguments
7 raised in Wells Fargo's motion to dismiss. Their opposition, like
8 their complaint, also does not explain Wells Fargo's role with
9 respect to their loan. However, Plaintiffs address a claim for
10 violations of the Real Estate Settlement Procedures Act (RESPA), 12
11 U.S.C. §§ 2601, et seq. Although their complaint does not contain
12 such a claim, the Court considers and dismisses it below.

13 I. Set Aside of Foreclosure Sale

14 Wells Fargo argues that Plaintiffs' entire complaint must be
15 dismissed because they lack standing to challenge the foreclosure
16 sale. This argument sweeps too broadly.

17 It is not evident that Plaintiffs are challenging the
18 September, 2010 sale of the Oceanside Way property. Even if they
19 are, they have not offered a basis to set it aside. A plaintiff
20 seeking to set aside a foreclosure sale must first allege tender of
21 the amount of the secured indebtedness. Abdallah v. United Savings
22 Bank, 43 Cal. App. 4th 1101, 1109 (1996) (citing FPCI RE-HAB 01 v.
23 E & G Investments, Ltd., 207 Cal. App. 3d 1018, 1021-22 (1989));
24 Smith v. Wachovia, 2009 WL 1948829, at *3 (N.D. Cal.). Without
25 pleading tender or the ability to offer tender, a plaintiff cannot
26 state a cause of action to set aside a foreclosure sale. Karlsen
27 v. Am. Savings & Loan Ass'n, 15 Cal. App. 3d 112, 117 (1971)

1 (citing Copsey v. Sacramento Bank, 133 Cal. 659, 662 (1901));
2 Smith, 2009 WL 1948829, at *3 (citing Karlsen).

3 Plaintiffs have not alleged facts that warrant setting aside
4 the foreclosure sale. Even if they had, Plaintiffs do not allege
5 tender or the current ability to offer tender. Thus, to the extent
6 that they seek to set aside the foreclosure sale, Plaintiffs offer
7 no basis to do so. This does not, however, warrant dismissal of
8 their entire complaint.

9 II. Quiet Title

10 Plaintiffs ask that title in the Oceanside Way property be
11 quieted in their favor. To state a claim for quiet title under
12 California law, a plaintiff's complaint must contain: (1) a
13 description of the property; (2) the title of the plaintiff and its
14 basis; (3) the adverse claims to that title; (4) the date as of
15 which the determination is sought; and (5) a prayer for relief of
16 quiet title. Cal. Civ. Proc. Code § 761.020.

17 Plaintiffs do not allege that Wells Fargo has asserted any
18 adverse claim to title in the Oceanside Way property. Plaintiffs'
19 opposition discusses a lender's rights with respect to the
20 property, but they do not aver that Wells Fargo was their lender;
21 as noted above, Provident Funding was named as Plaintiffs' lender
22 in the DOT.

23 Even if Wells Fargo asserted a claim against the property,
24 Plaintiffs have failed to plead facts that tend to show that they
25 have a colorable claim to the property. Plaintiffs appear to
26 assert that they still hold title because no lender ever presented
27 them with the original promissory note and, as a result, the

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1 foreclosure sale was improper. However, in California, there is no
2 requirement that a trustee produce the original promissory note
3 prior to a non-judicial foreclosure sale. See, e.g., Pantoja v.
4 Countrywide Home Loans, Inc., 640 F. Supp. 2d 1177, 1186 (N.D. Cal.
5 2009); Smith v. Wachovia, 2009 WL 1948829, at *3 (N.D. Cal.); Neal
6 v. Juarez, 2007 WL 2140640, *8 (S.D. Cal.). California Civil Code
7 sections 2924 through 2924k "provide a comprehensive framework for
8 the regulation of a non-judicial foreclosure sale pursuant to a
9 power of sale contained in a deed of trust." Knapp v. Doherty, 123
10 Cal. App. 4th 76, 86 (2004) (quoting Moeller v. Lien, 25 Cal. App.
11 4th 822, 830 (1994)). Knapp explains the non-judicial foreclosure
12 process as follows:

13 Upon default by the trustor [under a deed of trust
14 containing a power of sale], the beneficiary may declare
15 a default and proceed with a nonjudicial foreclosure
16 sale. The foreclosure process is commenced by the
17 recording of a notice of default and election to sell by
18 the trustee. After the notice of default is recorded,
19 the trustee must wait three calendar months before
20 proceeding with the sale. After the 3-month period has
21 elapsed, a notice of sale must be published, posted and
22 mailed 20 days before the sale and recorded 14 days
23 before the sale.

19 Knapp, 123 Cal. App. 4th at 86 (citation omitted). "A properly
20 conducted nonjudicial foreclosure sale constitutes a final
21 adjudication of the rights of the borrower and lender." Id. at 87.
22 Plaintiffs have not alleged actionable irregularities in the non-
23 judicial foreclosure sale. Thus, it appears that the September,
24 2010 sale resolved ownership rights to the property.

25 Plaintiffs have not alleged that Wells Fargo has asserted a
26 claim to the property, nor have they have alleged facts tending to
27 show that they have a colorable claim of title. Accordingly,
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1 Plaintiffs' request to quiet title is dismissed with leave to
2 amend.

3 III. Breach of Fiduciary Duty

4 Absent special circumstances, a loan transaction, like all
5 ordinary banking transactions, does not establish a fiduciary
6 relationship between the borrower and lender. Oaks Mgmt. Corp. v.
7 Superior Court, 145 Cal. App. 4th 453, 466 (2006); see also Price
8 v. Wells Fargo Bank, 213 Cal. App. 3d 465, 476 (1989) ("A debt is
9 not a trust and there is not a fiduciary relation between debtor
10 and creditor as such. The same principle should apply with even
11 greater clarity to the relationship between a bank and its loan
12 customers."). Generally, a financial institution does not owe a
13 borrower a duty of care. Nymark v. Heart Fed. Sav. & Loan Ass'n,
14 213 Cal. App. 3d 1089, 1095-96 (1991).

15 Plaintiffs did not respond to Wells Fargo's argument that they
16 have not alleged facts suggesting that it was their fiduciary.
17 Instead, in their opposition, Plaintiffs complain about their
18 lender's role in their original loan transaction. However, as
19 already noted, Plaintiffs' DOT names Provident Funding, not Wells
20 Fargo, as their lender. Even if Wells Fargo were their lender,
21 Plaintiffs do not allege facts to suggest that there were special
22 circumstances surrounding the loan transaction that gave rise to a
23 fiduciary relationship.

24 Accordingly, Plaintiffs' breach of fiduciary duty claim is
25 dismissed. Plaintiffs are granted leave to amend to allege facts
26 that support their assertion that Wells Fargo was their fiduciary.

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1 IV. Negligence and Negligence Per Se

2 Plaintiffs plead claims for negligence and "negligence per
3 se."

4 To state a claim for negligence, a plaintiff must allege
5 (1) the defendant's legal duty of care to the plaintiff; (2) the
6 defendant's breach of duty; (3) injury to the plaintiff as a result
7 of the breach; and (4) damage to the plaintiff. Hoyem v. Manhattan
8 Beach City Sch. Dist., 22 Cal. 3d 508, 513 (1978). "The legal duty
9 of care may be of two general types: (a) the duty of a person to
10 use ordinary care in activities from which harm might reasonably be
11 anticipated, or (b) an affirmative duty where the person occupies a
12 particular relationship to others." McGettigan v. Bay Area Rapid
13 Transit Dist., 57 Cal. App. 4th 1011, 1016-17 (1997). "[A]s a
14 general rule, a financial institution owes no duty of care to a
15 borrower when the institution's involvement in the loan transaction
16 does not exceed the scope of its conventional role as a mere lender
17 of money." Nymark, 231 Cal. App. 3d at 1095; see also Kinner v.
18 World Savings & Loan Ass'n, 57 Cal. App. 3d 724, 732 (1976)
19 (holding no duty of care owed by lender to borrower to ensure
20 adequacy of construction loan); Wagner v. Benson, 101 Cal. App. 3d
21 27, 35 (1980) (finding no duty owed by lender to borrower where
22 lender is not involved extensively in borrower's business).
23 Courts, including this one, have applied this rule to loan
24 servicers. See, e.g., Hendrickson v. Popular Mortg. Servicing,
25 Inc., 2009 WL 1455491, *7 (N.D. Cal.); Marks v. Ocwen Loan
26 Servicing, 2008 WL 344210, *6 (N.D. Cal.).

27 Negligence per se is not a cause of action, but rather an
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1 evidentiary presumption that a party failed to exercise due care if

2 (1) He violated a statute, ordinance, or
3 regulation of a public entity;

4 (2) The violation proximately caused death or
5 injury to person or property;

6 (3) The death or injury resulted from an
7 occurrence of the nature which the statute,
8 ordinance, or regulation was designed to
9 prevent; and

10 (4) The person suffering the death or the
11 injury to his person or property was one of the
12 class of persons for whose protection the
13 statute, ordinance, or regulation was adopted.

14 Cal. Evid. Code § 669.

15 Plaintiffs allege that Wells Fargo "owed a general duty of
16 care . . . to perform due diligence as to" their loan and to avoid
17 marketing loans they knew that borrowers could not afford. Compl.
18 28-29. In their opposition, they also assert that Wells Fargo also
19 had a duty of care under TILA, RESPA, the Home Ownership and Equity
20 Protection Act (HOEPA) and related regulations. The allegations
21 supporting their negligence claim focus on the original loan
22 agreement, which they executed in June, 2006. However, Plaintiffs
23 do not allege that Wells Fargo was involved in the original loan
24 transaction, nor do any of the proffered loan documents suggest
25 that it was. Therefore, Wells Fargo could not have undertaken any
26 of the improper acts alleged in this cause of action.

27 Further, Wells Fargo notes that Plaintiffs' negligence claim
28 was not filed within two years of the date of the alleged injury,
as required by the statute of limitations. Cal. Civ. Proc. Code
§ 335.1. Plaintiffs did not respond directly to this argument.

1 Instead, they include in their opposition a general section on
2 "Statute of Limitations / Equitable Tolling," in which they
3 complain that they were victims of fraud and ask that all
4 limitations periods be equitably tolled.

5 Plaintiffs' arguments appear to implicate the doctrine of
6 equitable estoppel, not equitable tolling. As explained by the
7 California Supreme Court,

8 Equitable tolling and equitable estoppel are distinct
9 doctrines. Tolling, strictly speaking, is concerned with
10 the point at which the limitations period begins to run
11 and with the circumstances in which the running of the
12 limitations period may be suspended. Equitable estoppel,
13 however, comes into play only after the limitations
14 period has run and addresses the circumstances in which a
15 party will be estopped from asserting the statute of
16 limitations as a defense to an admittedly untimely action
17 because his conduct has induced another into forbearing
18 suit within the applicable limitations period.

19 Lantzy v. Centex Homes, 31 Cal. 4th 363, 383 (2003) (citations and
20 internal quotation and editing marks omitted). Fraud that prevents
21 a party from filing suit could justify estopping a defendant from
22 asserting a statute of limitations defense. Id. at 384. However,
23 Plaintiffs fail to plead that Wells Fargo engaged in any fraud that
24 precluded them from filing suit. Thus, equitable estoppel is not
25 warranted.

26 Plaintiffs have not stated a claim for negligence and are not
27 entitled to a presumption of negligence per se. Further, their
28 negligence claim appears to be time-barred. Accordingly, their
negligence claim is dismissed. Plaintiffs are granted leave to
amend to plead facts that support a negligence claim that is not
barred by the two-year statute of limitations.

1 V. Fraud

2 In this cause of action, Plaintiffs allege that unnamed
3 "Agents" made misrepresentations with the intention of inducing
4 Plaintiffs to act in reliance on them.

5 Because all of Plaintiffs' allegations of fraud address the
6 loan origination and closing procedures, they do not implicate
7 Wells Fargo, which does not appear to have been involved in these
8 transactions. Therefore, Wells Fargo is not the proper party on
9 this claim. Also, Plaintiffs' allegations lack the specificity
10 required under Federal Rule of Civil Procedure 9(b) for all claims
11 sounding in fraud. See Fed. R. Civ. P. 9(b) ("In all averments of
12 fraud or mistake, the circumstances constituting fraud or mistake
13 shall be stated with particularity."); Wool v. Tandem Computers,
14 Inc., 818 F.2d 1433, 1439 (9th Cir. 1987) (allegations must include
15 the time, place and nature of the alleged fraudulent activities).
16 Therefore, Wells Fargo's motion to dismiss this claim is granted.
17 Plaintiffs are granted leave to amend to plead specific facts,
18 including the time, place and nature of Wells Fargo's alleged
19 fraudulent conduct.

20 VI. Breach of the Covenant of Good Faith and Fair Dealing

21 Under California law, "[t]he prerequisite for any action for
22 breach of the implied covenant of good faith and fair dealing is
23 the existence of a contractual relationship between the parties,
24 since the covenant is an implied term in the contract." Smith v.
25 City & County of S.F., 225 Cal. App. 3d 38, 49 (1990).

26 Plaintiffs have not alleged that they have any direct
27 contractual relationship with Wells Fargo. In their opposition,
28

1 Plaintiffs do not address Wells Fargo's argument on this point.
2 Therefore, Plaintiffs' claim for breach of the covenant of good
3 faith and fair dealing is dismissed. They are granted leave to
4 amend to plead the nature of their contract with Wells Fargo, if
5 any, and how it was breached.

6 VII. Truth in Lending Act

7 TILA was enacted "to assure a meaningful disclosure of credit
8 terms so that the consumer will be able to compare more readily the
9 various credit terms available to him and avoid the uninformed use
10 of credit." Yamamoto v. Bank of N.Y., 329 F.3d 1167, 1169 (9th
11 Cir. 2003) (citing 15 U.S.C. § 1601(a)). If required disclosures
12 are not made, the consumer may obtain damages or seek to rescind
13 the loan. Id. at 1170; Martinez v. EMC Mortg. Corp., 2009 WL
14 2043013, *5 (E.D. Cal.).

15 The only parties who can be liable for TILA violations are the
16 original creditor and assignees of that creditor. 15 U.S.C.
17 §§ 1640, 1641; Redic v. Gary H. Watts Realty Co., 762 F.2d 1181,
18 1185 (4th Cir. 1985); Nevis v. Wells Fargo Bank, 2007 WL 2601213,
19 *2 (N.D. Cal.). Servicers of consumer obligations are not treated
20 as assignees for purposes of imposing liability unless they are
21 also the owner of the obligation. 15 U.S.C. § 1641(f); Chow v.
22 Aegis Mortg. Corp., 286 F. Supp. 2d 956, 959 (N.D. Ill. 2003).

23 Here, Provident Funding was the original lender of the loan;
24 Plaintiffs did not plead, nor are there any documents that show,
25 that Wells Fargo is an assignee of Provident Funding. Because
26 Wells Fargo is not the original lender or the assignee of the
27 lender, it is not a proper party to a TILA action and, therefore,
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1 this claim is dismissed.

2 Moreover, Wells Fargo cannot be liable for damages because the
3 one-year statute of limitations has expired. 15 U.S.C. § 1640(e).
4 Plaintiffs executed the loan agreement in June, 2006 but filed
5 their lawsuit in September, 2010. Thus, the TILA claim for damages
6 is untimely. Their attempt to seek equitable relief from the
7 statute of limitations fails for the reasons stated above.

8 Plaintiffs' TILA claim for rescission fails because the
9 Oceanside Way property has already been sold. See Beach v. Ocwen
10 Fed. Bank, 523 U.S. 410, 411 (1998) (stating that 15 U.S.C.
11 § 1635(f) provides that right of rescission expires three years
12 after loan closes or upon the sale of secured property, whichever
13 is earlier). Furthermore, Plaintiffs have not alleged the present
14 ability to tender amounts owed under the loan. Courts have
15 discretion to condition rescission under TILA on tender by the
16 borrower of funds received from the lender. Yamamoto, 329 F.3d at
17 1171; Martinez v. EMC Mortg. Corp., 2009 WL 2043013 *6 (E.D. Cal.)
18 (noting "absent meaningful tender, TILA rescission is an empty
19 remedy, not capable of being granted"). Plaintiffs do not respond
20 to Wells Fargo's argument that they must tender amounts owed under
21 the loan.

22 For all of the reasons above, the Court grants Wells Fargo's
23 motion to dismiss the TILA claim. Plaintiffs are granted leave to
24 amend to plead facts showing that Wells Fargo is a proper TILA
25 defendant and that support equitable relief from the one-year
26 statute of limitations for damages.

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1 VIII. Intentional Infliction of Emotional Distress

2 A claim of intentional infliction of emotional distress
3 requires a plaintiff to plead: "(1) extreme and outrageous conduct
4 by the defendant with the intention of causing, or reckless
5 disregard of the probability of causing, emotional distress;
6 (2) the plaintiff's suffering severe or extreme emotional distress;
7 and (3) actual and proximate causation of the emotional distress by
8 the defendant's outrageous conduct." Christensen v. Superior
9 Court, 54 Cal. 3d 868, 903 (1991). The conduct must be so extreme
10 as to "exceed all bounds of that usually tolerated in a civilized
11 community," id., and the distress so severe "that no reasonable man
12 in a civilized society should be expected to endure it," Fletcher
13 v. W. Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 397 (1970).

14 Plaintiffs allege that the action of Wells Fargo, "driven as
15 it was by profit at the expense of increasingly highly leveraged
16 and vulnerable consumers who placed their faith and trust in the
17 superior knowledge and position of Defendants," constituted extreme
18 and outrageous conduct. Compl. 32. Plaintiffs' complaint,
19 however, fails to allege sufficient facts showing extreme and
20 outrageous conduct. Thus, Plaintiffs do not state a claim for
21 intentional infliction of emotional distress against Wells Fargo.

22 IX. Real Estate Settlement Procedures Act

23 Although Plaintiffs do not include a claim for violation of
24 RESPA, 12 U.S.C. §§ 2601 et seq., in the section of the complaint
25 entitled, "Causes of Action," the Court addresses it because
26 Plaintiffs mention it several times in the "General Allegations"
27 section of their complaint and in their opposition.

1 Plaintiffs do not make clear under which sections of RESPA
2 they bring their claim. However, they allege that they made a
3 request for the production of the original promissory note and
4 imply that Wells Fargo did not respond. Compl. at 2. This may be
5 a claim under § 2605 for a response to a qualified written request.

6 The statute of limitation for § 2605 claims is three years,
7 see 12 U.S.C. § 2614, and thus, a § 2605 claim premised on
8 Plaintiffs' request for documents from Wells Fargo may not be time-
9 barred. RESPA places a duty upon loan servicers to respond to
10 "qualified written requests." Lawther v. Onewest Bank, 2010 WL
11 4936797, *6 (N.D. Cal.). A qualified written request is one that
12 includes identifying information about the borrower and provides "a
13 statement of the reasons for the belief of the borrower, to the
14 extent applicable, that the account is in error or provides
15 sufficient detail to the servicer regarding other information
16 sought by the borrower." 12 U.S.C. § 2605(c)(1). The request must
17 be related to the servicing of the loan, and the servicer must
18 provide a written response acknowledging receipt of the
19 correspondence within twenty days, unless the requested action is
20 taken within that period. Lawther, 2010 WL 4936797 at *6. A loan
21 servicer must respond only if the information requested is related
22 to loan servicing. Id. If a loan servicer fails to comply with
23 the provisions of § 2605, a borrower is entitled to any actual
24 damages as a result of the failure. Id. The plaintiff must
25 include, at the pleading stage, a demonstration of some actual
26 pecuniary loss. Id. The plaintiff must also allege a causal
27 relationship between the alleged damages and the RESPA violation.

28

1 Id. at *7.

2 It is possible that Plaintiffs could state a claim under
3 § 2605 against Wells Fargo. However, they have not alleged that
4 Wells Fargo was the servicer of their loan, that they made a
5 qualified request for information related to the servicing of their
6 loan, that Wells Fargo did not respond to their request in
7 accordance with § 2605 and that this failure caused them to suffer
8 damages. Therefore, the RESPA claim is dismissed with leave to
9 amend to correct these deficiencies.

10 X. Preliminary Injunction

11 Attached to Plaintiffs' complaint, but not filed as a separate
12 document, is a "Petition for Preliminary Injunction" that asks the
13 Court to enjoin Wells Fargo from foreclosing on the Oceanside Way
14 property. However, as noted above, the property was foreclosed in
15 September, 2010, before Plaintiffs' lawsuit was filed.
16 Accordingly, Plaintiffs' request for a preliminary injunction is
17 denied as moot.

18 CONCLUSION

19 For the foregoing reasons, Wells Fargo's motion to dismiss is
20 GRANTED. (Docket No. 8.) The Court's rulings are summarized as
21 follows:

- 22 1. Any challenge of the September, 2010 foreclosure sale
23 fails because Plaintiffs have not plead tender of the
24 amounts owed on their loan or the ability to offer
25 tender. Plaintiffs are granted leave to amend to cure
26 this deficiency.
- 27 2. Plaintiffs' request that title be quieted in their favor

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1 is dismissed. Plaintiffs are granted leave to amend to
2 allege that Wells Fargo has asserted an adverse claim
3 against the Oceanside Way property and that they have a
4 colorable claim to it.

5 3. Plaintiffs' claim for breach of fiduciary duty is
6 dismissed. They are granted leave to amend to allege
7 facts demonstrating that they had a fiduciary
8 relationship with Wells Fargo.

9 4. Plaintiffs' claim for negligence fails, they are not
10 entitled to avail themselves of the evidentiary
11 presumption of negligence per se and their negligence
12 claim appears to be time-barred. They are granted leave
13 to amend to plead facts concerning Wells Fargo's
14 negligent conduct and that suggest their negligence claim
15 is not time-barred.

16 5. Plaintiffs' fraud claim fails because they have not
17 alleged, with sufficient specificity, that Wells Fargo
18 engaged in any fraudulent conduct. They are granted
19 leave to amend to plead specific facts concerning the
20 time, place and nature of Wells Fargo's alleged fraud.

21 6. Plaintiffs' claim for breach of the covenant of good
22 faith and fair dealing is dismissed. They are granted
23 leave to amend to plead the nature of their contract with
24 Wells Fargo, if any, and how it was breached.

25 7. Plaintiffs' TILA claim for damages is dismissed with
26 leave to amend to allege facts demonstrating that Wells
27 Fargo was an assignee of its lender and that they are
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1 entitled to equitable relief from the one-year statute of
2 limitations. Plaintiffs' TILA claim for rescission is
3 dismissed with prejudice as barred by the foreclosure
4 sale of the Oceanside Way property.

5 8. Plaintiffs' claim for intentional infliction of emotional
6 distress is dismissed with leave to amend to plead the
7 nature of the extreme and outrageous conduct committed by
8 Wells Fargo.

9 9. Plaintiffs' RESPA claim is dismissed with leave to amend
10 to plead, if they can truthfully do so, that Wells Fargo
11 was their loan servicer, that it committed RESPA
12 violations within the three-year statute of limitations
13 and that they suffered damages as a result.

14 10. Plaintiffs' request that the Court enjoin the sale of the
15 Oceanside Way property is denied as moot.

16 Plaintiffs are granted leave to amend their complaint so long
17 as they can truthfully cure the deficiencies noted above.

18 Plaintiffs shall file their amended complaint fourteen days from
19 the date of this Order. Although Plaintiffs request forty-five
20 days in their motion, they do not justify such an extension; thus,
21 their motion for an extension of time is DENIED. (Docket No. 18.)

22 Plaintiffs' failure to file a complaint within fourteen days will
23 result in the dismissal of their action for failure to prosecute.

24 If Plaintiffs file an amended complaint, Wells Fargo shall
25 answer or move to dismiss twenty-one days after it is filed.

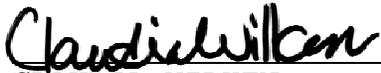
26 Plaintiffs shall file an opposition fourteen days after Wells Fargo
27 files a motion to dismiss. Any reply, if necessary, shall be due

1 seven days after Plaintiffs file their opposition. Any motion to
2 dismiss will be taken under submission on the papers. Plaintiffs'
3 failure to comply with this briefing schedule will result in the
4 dismissal of their action for failure to prosecute.

5 The initial case management conference, currently set for
6 February 8, 2011, is continued to March 22, 2011 at 2:00 p.m.

7 IT IS SO ORDERED.

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9 Dated: 1/4/2011


CLAUDIA WILKEN
United States District Judge

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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 TORRES et al,

5 Plaintiff,

6 v.

7 WELLS FARGO HOME MORTGAGE, INC. et
8 al,

9 Defendant.

Case Number: CV10-04761 CW

CERTIFICATE OF SERVICE

10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court,
11 Northern District of California.

12 That on January 4, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said
13 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
14 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located
15 in the Clerk's office.

16 Eloisa Torres
17 15561 Oceanside Way
18 San Leandro, CA 94579

19 Wesley V. Harris
20 15561 Oceanside Way
21 San Leandro, CA 94579

22 Dated: January 4, 2011

23 Richard W. Wieking, Clerk
24 By: Nikki Riley, Deputy Clerk
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