

United States District Court
For the Northern District of California

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

WALTER BURNS and ALICE BURNS,
Plaintiffs,

v.

FIRST AMERICAN TRUSTEE SERVICING SOLUTIONS, LLP; WELLS FARGO BANK, N.A.; CONTRA COSTA COUNTY RECORDER; BANK OF AMERICA, N.A.; LIBERTY TITLE COMPANY; WELLS FARGO HOME MORTGAGE CO.; and AMERICAN SECURITIES COMPANY,
Defendants.

No. C 11-0023 CW

ORDER GRANTING MOTIONS TO DISMISS OF DEFENDANT CONTRA COSTA COUNTY (Docket No. 24); FIRST AMERICAN TRUSTEE SERVICING SOLUTIONS, LLC (Docket No. 27); DEFENDANT WELLS FARGO BANK, N.A. (Docket No. 31) and DEFENDANT BANK OF AMERICA, N.A. (Docket No. 49); AND DENYING PLAINTIFFS' MOTIONS TO HOLD DEFENDANT BANK OF AMERICA IN DEFAULT, TO VOID SALE, FOR AN ORDER TO SHOW CAUSE AGAINST DEFENDANT FIRST AMERICAN TRUSTEE SERVICING SOLUTIONS, TO JUDICIALLY NOTICE A LEGAL DEFECT IN THE INTEGRITY OF DEFENDANT CONTRA COSTA COUNTY RECORDER'S OFFICE, AND TO DISQUALIFY JUDGE (Docket Nos. 44, 48, 55, 65)

Pro se Plaintiffs Walter and Alice Burns bring this action that is related to a residential home loan they obtained in November, 2005. Defendants Contra Costa County, on behalf of its Clerk-Recorder's Office (Recorder's Office);¹ First American

¹ Plaintiffs name "Contra Costa County Recorder" in their complaint, apparently referring to the Clerk-Recorder's Office, which is a department of Contra Costa County. See Cal. Gov't Code §§ 23005 and 24000(g).

1 Trustee Servicing Solutions, LLC;² Wells Fargo Bank, N.A., on
2 behalf of itself and its Wells Fargo Home Mortgage Co. division
3 (collectively, Wells Fargo); and Bank of America, N.A., have filed
4 motions to dismiss. Plaintiffs oppose the motions, and move for
5 entry of default against Bank of America, to void a trustee's sale,
6 for an order requiring First American to show cause why it should
7 not be held in contempt, "to judicially notice a legal defect in
8 the integrity of the Defendant Contra Costa County Recorder's
9 Office" and to "disqualify the presiding judge for judicial
10 misconduct." The motions were taken under submission on the
11 papers. Having considered the papers submitted by the parties, the
12 Court GRANTS Contra Costa County's, First American's, Wells Fargo's
13 and Bank of America's motions to dismiss, and DENIES Plaintiffs'
14 motions.

15 BACKGROUND

16 This summary of Plaintiffs' case is based on their Verified
17 First Amended Complaint (1AC) and documents contained in Wells
18 Fargo's request for judicial notice, which Plaintiffs join.
19 Because Plaintiffs' 1AC does not clearly explain the nature of
20 their case, the Court also relies on their Proposed Joint Case
21 Management Statement, to the extent it is consistent with their
22 1AC.

23 In November, 2005, Plaintiffs obtained a \$557,000.00
24 adjustable-rate loan secured by property located at 1221 Hookston
25 Road in Concord, California. The deed of trust (DOT) for that loan

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27 ² Plaintiffs sued First American Trustee Servicing Solutions,
28 LLC, as First American Trustee Servicing Solutions, LLP.

1 named Wells Fargo as "Lender" and Fidelity National Title Insurance
2 Company as "Trustee." Wells Fargo's Request for Judicial Notice
3 (RJN), Ex. I, 1-2. The DOT contained numerous provisions,
4 including the following:

5 20. Sale of Note; Change of Loan Servicer; Notice of
6 Grievance. The Note or a partial interest in the Note
7 (together with this Security Instrument) can be sold one or
8 more times without prior notice to Borrower. . . .

9 24. Substitute Trustee. Lender, at its option, may from time
10 to time appoint a successor trustee to any Trustee appointed
11 hereunder by an instrument executed and acknowledged by Lender
12 and recorded in the office of the Recorder of the county in
13 which the Property is located. . . .

14 Id. at 11 and 13. Plaintiffs' signatures appear at the end of the
15 DOT, under a block of text stating, "BY SIGNING BELOW, Borrower
16 accepts and agrees to the terms and covenants contained in this
17 Security Instrument and in any Rider executed by Borrower and
18 recorded with it." Id. at 14. Also, each page of the DOT,
19 including those containing the provisions recited above, bears the
20 initials "AMB" and "WGB," apparently referring to Plaintiffs.

21 On September 28, 2010, a "Substitution of Trustee" was
22 recorded in the Recorder's Office, stating that Wells Fargo had
23 substituted First American for Fidelity National as trustee. Wells
24 Fargo RJN, Ex. M. On September 29, 2010, a "Notice of Default and
25 Election to Sell under Deed of Trust" was recorded, indicating
26 that, as of September 28, 2010, Plaintiffs were \$51,589.47 in
27 arrears on their November, 2005 loan. Wells Fargo RJN, Ex. N. The
28 notice indicated that Plaintiffs had failed to make all payments
due on and after August 1, 2009.

On October 27, 2010, an "Assignment of Deed of Trust" was

1 recorded, indicating that on October 19, 2010, Wells Fargo assigned
2 its interest in the DOT to Bank of America. On January 5, 2011, a
3 "Notice of Trustee's Sale" was recorded, stating that the Hookston
4 Road property would be sold on January 26, 2011 at 1:30 p.m.³

5 Plaintiffs allege that the DOT was made available to them for
6 "acknowledgment only, (not approval)." 1AC at 2. Plaintiffs
7 complain that the DOT "could be sold, transferred, conveyed, and
8 re-conveyed to others without the knowledge or consent of the
9 debtor for the benefit of the others," and assert that such
10 transfers could occur "perhaps at a series of discounts without the
11 debtor benefiting [sic] and without their knowledge or consent."
12 Id. The crux of Plaintiffs' argument appears to be that Wells
13 Fargo sold the note for their loan "at perhaps a beneficial
14 discount without revealing the value of the note transferred, and
15 without altering the interest rate from the outstanding loan value
16 to the alleged discounted loan value." Id. at 5.

17 Plaintiffs state that, in February, 2010, they stopped making
18 "regular payments to Defendant Wells Fargo" when they "learned that
19 Defendant BOA had acquired control of the loan contract from
20 Defendant Wells Fargo for values received." Pls.' Proposed Jt.
21 Case Mgmt. Statement ¶ 2a.

22 Plaintiffs maintain that they are "being held as peons" in
23 violation of their constitutional and statutory rights because they
24 have been required to pay "an artificial indebtedness obligation to
25 a suspected lender for which no lawful contract exists between

26
27 ³ The Hookston Road property was apparently sold on February
28 25, 2011.

1 them." 1AC at 7. Based on their 1AC and Proposed Joint Case
2 Management Statement, the Court understands Plaintiffs to assert
3 claims for the following:⁴ (1) deprivation of their Fourteenth
4 Amendment rights to equal protection and due process, in violation
5 of 42 U.S.C. § 1983; (2) involuntary servitude and peonage, in
6 violation of the Thirteenth Amendment and 42 U.S.C. § 1994;
7 (3) violation of 18 U.S.C. § 1001(a); (4) fraud; and (5) breach of
8 contract. Plaintiffs seek damages for their claims.

9 Defendants Liberty Title Company and American Securities
10 Company have not appeared in this action. Plaintiffs indicate that
11 they attempted to serve Liberty Title Company, but that the
12 entity's corporate status has been suspended by California's
13 Franchise Tax Board and that its agent for service of process has
14 resigned. Plaintiffs maintain that American Securities Company no
15 longer exists. Plaintiffs have proffered no evidence that they
16 have made further attempts to serve Liberty Title or American
17 Securities.

18 Plaintiffs sought a temporary restraining order to prevent the
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20 ⁴ Plaintiffs state in their 1AC that they bring claims for
21 violation of their Fourteenth Amendment rights; involuntary
22 servitude and peonage, in violation of the Thirteenth Amendment and
23 42 U.S.C. § 1994; and violation of 18 U.S.C. § 1001(a). Plaintiffs
24 allege that their involuntary servitude and peonage has been
25 "exacerbated under conditions of fraud." 1AC at 7. They reiterate
26 in their Proposed Joint Case Management Statement that their action
27 rests on alleged violations of the Fourteenth Amendment and the
28 Thirteenth Amendment, and assert that they seek relief pursuant to
42 U.S.C. § 1983. Contra Costa County, First American, Wells Fargo
and Bank of America address these claims, but also offer argument
concerning claims for fraud based on Plaintiffs' assertions
throughout their papers that they were deceived. Wells Fargo also
addresses whether Plaintiffs state a claim for breach of contract,
based on their allegations that the DOT was breached.

1 sale of the Hookston Road property. That motion was denied.

2 DISCUSSION

3 Because Plaintiffs are proceeding pro se, their pleadings and
4 motions are construed liberally. Bernhardt v. L.A. Cnty, 339 F.3d
5 920, 925 (9th Cir. 2003).

6 I. Contra Costa County's Argument Regarding Lack of Subject
7 Matter Jurisdiction

8 Subject matter jurisdiction is a threshold issue which goes to
9 the power of the court to hear the case. Federal subject matter
10 jurisdiction must exist at the time the action is commenced.

11 Morongu Band of Mission Indians v. Cal. State Bd. of Equalization,
12 858 F.2d 1376, 1380 (9th Cir. 1988). A federal court is presumed
13 to lack subject matter jurisdiction until the contrary
14 affirmatively appears. Stock W., Inc. v. Confederated Tribes, 873
15 F.2d 1221, 1225 (9th Cir. 1989). Plaintiffs have the burden to
16 show that jurisdiction exists. Thornhill Publ'g Co. v. Gen. Tel. &
17 Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979)

18 Plaintiffs maintain that their case is subject to the Court's
19 diversity jurisdiction under 28 U.S.C. § 1332. That statute
20 provides federal district courts with original jurisdiction over
21 civil cases that involve an amount in controversy that exceeds
22 \$75,000 and are between "citizens of different States." 28 U.S.C.
23 § 1332(a)(1). However, Plaintiffs and Contra Costa County are
24 citizens of California. Thus, this action cannot fall within the
25 Court's diversity jurisdiction.

26 Nevertheless, the Court has jurisdiction over this action.
27 Plaintiffs have asserted claims pursuant to federal law, enabling
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1 the Court to exercise federal question jurisdiction over this
2 lawsuit. To the extent that Plaintiffs bring related state law
3 claims, the Court may exercise supplemental jurisdiction pursuant
4 to 28 U.S.C. § 1367.

5 Accordingly, Contra Costa County's argument that the Court
6 lacks subject matter jurisdiction is not well-taken.

7 II. Motions to Dismiss for Failure to State a Claim

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

23 When granting a motion to dismiss, the court is generally
24 required to grant the plaintiff leave to amend, even if no request
25 to amend the pleading was made, unless amendment would be futile.
26 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
27 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment
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1 would be futile, the court examines whether the complaint could be
2 amended to cure the defect requiring dismissal "without
3 contradicting any of the allegations of [the] original complaint."
4 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).
5 Leave to amend should be liberally granted, but an amended
6 complaint cannot allege facts inconsistent with the challenged
7 pleading. Id. at 296-97.

8 A. Violation of Fourteenth Amendment Rights to Equal
9 Protection and Due Process

10 Plaintiffs appear to allege that Defendants have deprived them
11 of their rights to equal protection and due process, in violation
12 of § 1983.⁵

13 Generally, the protections afforded by the Fourteenth
14 Amendment reach state, not private, action. Brentwood Acad. v.
15 Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).
16 Wells Fargo, First American and Bank of America are private actors,
17 and Plaintiffs' allegations do not suggest that these Defendants'
18 actions had such a close nexus with any state action that they
19 "'may be fairly treated as that of the State itself.'" Brentwood,
20 531 U.S. at 295 (quoting Jackson v. Metro. Edison Co., 419 U.S.
21 345, 351 (1974)).⁶ Because amendment would be futile, Plaintiffs'
22 claims against these Defendants under § 1983 are dismissed with

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24 ⁵ Claims seeking damages for violations of the Fourteenth
25 Amendment must be brought under § 1983. See Magana v. Commonwealth
of the N. Mariana Islands, 107 F.3d 1436, 1441-42 (9th Cir. 1997).

26 ⁶ Plaintiffs contend that these Defendants used the Recorder's
27 Office to perpetuate a fraud. However, Plaintiffs do not allege
28 facts suggesting that the Recorder's Office engaged in joint action
with these Defendants.

1 prejudice. Swartz v. KPMG LLP, 476 F.3d 756, 761 (9th Cir. 2007);
2 Albrecht v. Lund, 845 F.2d 193, 195 (9th Cir. 1988). Although they
3 have not yet appeared, the Court likewise dismisses with prejudice
4 Plaintiffs' § 1983 claims against Liberty Title and American
5 Securities Company because these Defendants, as private actors, are
6 in a position similar to that of Wells Fargo, First American and
7 Bank of America. See Abagninin v. AMVAC Chem. Corp., 545 F.3d 733,
8 742-43 (9th Cir. 2008); Silverton v. Dep't of Treasury, 644 F.2d
9 1341, 1345 (9th Cir. 1981) ("A District Court may properly on its
10 own motion dismiss an action as to defendants who have not moved to
11 dismiss where such defendants are in a position similar to that of
12 moving defendants or where claims against such defendants are
13 integrally related.").

14 Plaintiffs have not articulated a cognizable basis for their
15 § 1983 claim against the Recorder's Office. A municipality may be
16 sued under § 1983 "for constitutional torts committed by its
17 officials according to an official policy, practice, or custom."
18 Cortez v. Cnty. of L.A., 294 F.3d 1186, 1188 (9th Cir. 2002).
19 Plaintiffs appear to bring their § 1983 claim against the
20 Recorder's Office because it recorded documents related to their
21 November, 2005 loan. However, the allegations contained in
22 Plaintiffs' 1AC do not suggest that the recording of these
23 documents violated Plaintiffs' constitutional rights and that such
24 a violation was the result of an official Contra Costa County
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1 policy, practice or custom.⁷ Plaintiffs do not allege any form of
2 disparate treatment, as required to state an equal protection
3 claim. See, e.g., Sagana v. Tenorio, 384 F.3d 731, 740 (9th Cir.
4 2004). Nor do they allege facts to suggest that their substantive
5 or procedural due process rights were violated. See, e.g., Shanks
6 v. Dressel, 540 F.3d 1082, 1087-90 (9th Cir. 2008) (explaining
7 rights to substantive due process and procedural due process).

8 Plaintiffs' § 1983 claim against the Recorder's Office is
9 dismissed with prejudice. Plaintiff's opposition offers no
10 indication that their claim against the Recorder's Office is not
11 futile.

12 B. Involuntary Servitude and Peonage

13 Plaintiffs assert that Defendants held them to involuntary
14 servitude and peonage, in violation of the Thirteenth Amendment and
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17 ⁷ After filing their IAC, Plaintiffs filed a motion in which
18 they contended that "Mr. Stephen Weir, posing as the county
19 recorder, did not take an oath of office during the current term of
20 office" and, therefore, all documents related to the foreclosure of
21 the Hookston Road property have no legal effect. Docket No. 55, at
22 1. They also assert that Weir stamped the foreclosure documents
23 with a "bogus reference number" to prevent the discovery of a so-
24 called "ghost 'trustee.'" Id. at 7. Based on these assertions,
25 Plaintiffs maintain that Weir engaged in fraud, Cal. Civ. Code
26 § 1710, and violated California Government Code § 1770(i) and the
27 California Consumer Legal Remedies Action, Cal. Civ. Code §§ 1750,
28 et seq. Because these allegations were not plead in their
complaint, they cannot constitute bases for Plaintiffs' action.
Even if they had been plead, these assertions would not state a
claim for relief. The gravamen of Plaintiffs' argument is that
Weir took an oath of office prior to the inception of his current
term and, as a result, the oath was defective. However, Plaintiffs
identify no legal basis for their argument. Because judicial
notice of these alleged facts is improper, see Fed. R. Evid. 201,
Plaintiffs' motion to "judicially notice a defect in the integrity
of the Defendant Contra Costa County Recorder's Office" is DENIED.
(Docket No. 55.)

1 42 U.S.C. § 1994, which abolished peonage.⁸ Involuntary servitude
2 is established when a victim has "no available choice but to work
3 or be subject to legal sanction." United States v. Kozminski, 487
4 U.S. 931, 943 (1988). Peonage is a subspecies of involuntary
5 servitude that involves coercion "by threat of legal sanction to
6 work off a debt to a master." Id. at 943. Peonage claims require
7 debtors to allege indebtedness and compulsory service to the
8 creditor until the debt is paid. Bailey v. Alabama, 219 U.S. 219,
9 242 (1911); see also Dolla v. Unicast Co., 930 F. Supp. 202, 204-05
10 (E.D. Pa. 1996).

11 Plaintiffs have not plead facts to suggest that any Defendant
12 has held them in a state of involuntary servitude or peonage.
13 Plaintiffs do not allege that they owe a debt to First American or
14 the Recorder's Office or that they have been compelled to work for
15 these Defendants. And although their allegations suggest they may
16 owe a debt to Wells Fargo or Bank of America, Plaintiffs do not
17 allege that either of these Defendants has required Plaintiffs to
18 work for it until any debt is retired.

19 Accordingly, Plaintiffs' Thirteenth Amendment and § 1994
20 claims against Contra Costa County, First American, Wells Fargo and
21 Bank of America are dismissed. Although they have not yet
22 appeared, the Court likewise dismisses these claims against Liberty
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24 ⁸ Various district courts have concluded that there is no
25 direct cause of action under § 1 of the Thirteenth Amendment. See,
26 e.g., Jane Doe I v. Reddy, 2003 WL 23893010, at *9-*10 (N.D. Cal.)
27 (listing cases). But see Channer v. Hall, 112 F.3d 214, 217 (5th
28 Cir. 1997) (assuming, without deciding, that § 1 of the Thirteenth
Amendment gives rise to a cause of damages). The Court assumes,
without deciding, that such a direct cause of action exists.

1 Title and American Securities Company because these Defendants are
2 in a position similar to that of Contra Costa County, First
3 American, Wells Fargo and Bank of America. See Abagninin, 545 F.3d
4 at 742-43; Silverton, 644 F.2d at 1345. Because Plaintiffs'
5 opposition offers no indication that these claims are not futile,
6 this dismissal is with prejudice.

7 C. Violation of 18 U.S.C. § 1001(a)

8 Plaintiffs seek damages against Defendants pursuant to 18
9 U.S.C. § 1001(a), a criminal statute that punishes whoever, "within
10 the jurisdiction of the executive, legislative, or judicial branch
11 of the Government of the United States, knowingly and
12 willingly . . . falsifies, conceals, or covers up by any trick,
13 scheme, or device a material fact." However, § 1001(a) does not
14 create a private right of action. See Loehr v. Ventura Cnty. Cmty.
15 Coll. Dist., 742 F.2d 1310, 1320 (9th Cir. 1984) (deeming
16 plaintiff's proposal to add a claim under § 1001 "patently
17 frivolous"); see also Fed. Sav. & Loan Ins. Corp. v. Reeves, 816
18 F.2d 130, 137 (5th Cir. 1987).

19 Accordingly, Plaintiffs' § 1001(a) claims are dismissed with
20 prejudice.

21 D. Fraud

22 Plaintiffs mention fraud throughout their 1AC and their
23 papers. Contra Costa County, First American, Wells Fargo and Bank
24 of America assert that, if Plaintiffs intended to bring fraud
25 claims, they are insufficiently plead.

26 Claims of fraud require plaintiffs to plead
27 "(a) misrepresentation; (b) knowledge of falsity (or

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1 scienter); (c) intent to defraud, i.e., to induce reliance;
2 (d) justifiable reliance; and (e) resulting damage.'" In re
3 Napster, Inc. Copyright Litig., 479 F.3d 1078, 1096 (9th Cir. 2007)
4 (quoting Small v. Fritz Cos., Inc., 30 Cal. 4th 167, 173 (2003));
5 see generally Cal. Civ. Code §§ 1709-10.

6 "In all averments of fraud or mistake, the circumstances
7 constituting fraud or mistake shall be stated with particularity."
8 Fed. R. Civ. Proc. 9(b). The allegations must be "specific enough
9 to give defendants notice of the particular misconduct which is
10 alleged to constitute the fraud charged so that they can defend
11 against the charge and not just deny that they have done anything
12 wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985).
13 Statements of the time, place and nature of the alleged fraudulent
14 activities are sufficient, id. at 735, provided the plaintiff sets
15 forth "what is false or misleading about a statement, and why it is
16 false." In re GlenFed, Inc., Secs. Litig., 42 F.3d 1541, 1548 (9th
17 Cir. 1994). Scienter may be averred generally, simply by saying
18 that it existed. Id. at 1547; see Fed. R. Civ. Proc. 9(b)
19 ("Malice, intent, knowledge, and other condition of mind of a
20 person may be averred generally."). Allegations of fraud based on
21 information and belief usually do not satisfy the particularity
22 requirements of Rule 9(b); however, as to matters peculiarly within
23 the opposing party's knowledge, allegations based on information
24 and belief may satisfy Rule 9(b) if they also state the facts upon
25 which the belief is founded. Wool v. Tandem Computers, Inc., 818
26 F.2d 1433, 1439 (9th Cir. 1987).

27 Plaintiffs' allegations suggest that any fraud claim they may
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1 have intended to bring is based on a purported failure to disclose
2 Wells Fargo's power to sell the note for their November, 2005 loan
3 "perhaps at a series of discounts without [Plaintiffs] benefiting
4 [sic] and without their knowledge or consent." 1AC at 2. However,
5 aside from Wells Fargo and Liberty Title, it does not appear that
6 any other Defendant had a role in the origination of Plaintiffs'
7 November, 2005 loan. With respect to Wells Fargo and Liberty
8 Title, Plaintiffs' allegations do not satisfy the heightened
9 pleading requirement for fraud required by Rule 9(b). Plaintiffs
10 do not, with particularity, identify any misrepresentation.
11 Notably, Plaintiffs' DOT states that their loan may be sold without
12 notice to them. Plaintiffs do not allege that Wells Fargo or
13 Liberty Title misrepresented this provision or endeavored to
14 prevent Plaintiffs from learning about it.

15 Accordingly, to the extent that Plaintiffs intended to plead
16 claims for fraud, they fail to state them. Thus, any such claims
17 are dismissed without prejudice to refiling in state court.⁹ This
18 dismissal applies to Plaintiffs' claims against Liberty Title and
19 American Securities because these Defendants are in a position
20 similar to that of Contra Costa County, First American, Wells Fargo
21 and Bank of America.

22 E. Breach of Contract

23 Plaintiffs assert in their 1AC and papers that the DOT, to
24 which Wells Fargo was a party, was breached. Wells Fargo asserts

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26 ⁹ Even if they stated fraud claims, the Court would decline to
27 exercise supplemental jurisdiction over them. 28 U.S.C.
28 § 1367(c)(3).

1 that, to the extent Plaintiffs intended to bring a breach of
2 contract claim, it is insufficiently plead.

3 To assert a cause of action for breach of contract, a
4 plaintiff must plead: (1) the existence of a contract; (2) the
5 plaintiff's performance or excuse for non-performance; (3) the
6 defendant's breach; and (4) damages to the plaintiff as a result of
7 the breach. Armstrong Petrol. Corp. v. Tri-Valley Oil & Gas Co.,
8 116 Cal. App. 4th 1375, 1391 n.6 (2004).

9 As explained above, the crux of Plaintiffs' complaint is that
10 Wells Fargo allegedly sold their loan to Bank of America without
11 their knowledge and any benefit to them. However, Plaintiffs have
12 not identified a contract that prohibited this conduct. Indeed,
13 the DOT appears to contain a provision that permits such a
14 transfer.

15 Accordingly, to the extent that Plaintiffs intended to plead a
16 claim for breach of contract against Wells Fargo, they fail to
17 state one. Thus, any such claim is dismissed without prejudice to
18 refiling in state court.¹⁰

19 II. Plaintiffs' Motions

20 Plaintiffs' motion for entry of default against Bank of
21 America is not well-taken. Bank of America has appeared in this
22 action. Accordingly, this motion is denied.

23 Plaintiffs' motion to void the February 25, 2011 trustee's
24 sale of the Hookston Road property is also denied. Plaintiffs'

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26 ¹⁰ Even if they stated such a claim, the Court would decline to
27 exercise supplemental jurisdiction over it. 28 U.S.C.
28 § 1367(c)(3).

1 arguments that the sale subjected them to involuntary servitude and
2 peonage fail for the reasons stated above. Furthermore, Plaintiffs
3 have not alleged tender of their indebtedness, nor the ability to
4 provide such tender. A plaintiff seeking to set aside a
5 foreclosure sale must first allege tender of the amount of the
6 secured indebtedness. Abdallah v. United Sav. Bank, 43 Cal. App.
7 4th 1101, 1109 (1996) (citing FPCI RE-HAB 01 v. E & G Investments,
8 Ltd., 207 Cal. App. 3d 1018, 1021-22 (1989)); Smith v. Wachovia,
9 2009 WL 1948829, at *3 (N.D. Cal.). Without pleading tender or the
10 ability to offer tender, a plaintiff cannot state a cause of action
11 to set aside a foreclosure sale. Karlsen v. Am. Sav. & Loan Ass'n,
12 15 Cal. App. 3d 112, 117 (1971) (citing Copsey v. Sacramento Bank,
13 133 Cal. 659, 662 (1901)); Smith, 2009 WL 1948829, at *3 (citing
14 Karlsen). Related to First American's involvement in the sale of
15 the Hookston Road property, Plaintiffs seek an order requiring
16 First American to show cause why the Court should not hold it in
17 contempt. However, Plaintiffs have not identified any Court order
18 with which First American has failed to comply.

19 Finally, Plaintiffs ask the undersigned to disqualify herself
20 from these proceedings. However, Plaintiffs have not identified
21 any basis under 28 U.S.C. § 455 to justify their motion.

22 CONCLUSION

23 For the foregoing reasons, the Court GRANTS Contra Costa
24 County's (Docket No. 24), Wells Fargo's (Docket No. 31), First
25 American's (Docket No. 27) and Bank of America's (Docket No. 49)
26 motions to dismiss; and DENIES Plaintiffs' motions for entry of
27 default against Bank of America (Docket No. 44), to void sale and
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1 for an order to show cause against First American (Docket No. 48),
2 "to judicially notice a legal defect in the integrity of the"
3 Recorder's Office (Docket No. 55) and for disqualification (Docket
4 No. 65).

5 The Court's holdings on Plaintiffs' claims are as follows:

- 6 1. Plaintiffs' § 1983 claims for violations of their
7 Fourteenth Amendment rights to due process and equal
8 protection against Wells Fargo, First American, Bank of
9 America, Liberty Title and American Securities Company
10 are dismissed with prejudice. These are private actors
11 to which § 1983 does not apply. Because Plaintiffs'
12 opposition does not suggest that their § 1983 claim
13 against the Recorder's Office is not futile, this claim
14 is dismissed with prejudice.
- 15 2. Plaintiffs' claims for involuntary servitude and peonage
16 are dismissed with prejudice. Because Plaintiff's
17 opposition does not suggest that these claims are not
18 futile, they are dismissed with prejudice.
- 19 3. Plaintiffs' claims under 18 U.S.C. § 1001(a) are
20 dismissed with prejudice because this statute does not
21 afford a private right of action.
- 22 4. Plaintiffs' claims for fraud, to the extent they intended
23 to bring such claims, are dismissed without prejudice to
24 refiling in state court.
- 25 5. Plaintiffs' claim for breach of contract against Wells
26 Fargo, to the extent they intended to bring such a claim,
27 is dismissed without prejudice to refiling in state
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court.

The Clerk shall enter judgment accordingly and close the file.

IT IS SO ORDERED.

Dated: 4/8/2011



CLAUDIA WILKEN
United States District Judge

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

4 BURNS et al,

5 Plaintiff,

Case Number: CV11-00023 CW

CERTIFICATE OF SERVICE

6 v.

7 FIRST AMERICAN TRUSTEE SERVICING
8 SOLUTIONS LLP et al,

9 Defendant.
_____/

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 April 8, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies)
13 in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in
14 the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's
15 office.

16 Alice Burns
17 1221 Hookston Road
18 Concord, CA 94518

19 Walter Burns
20 1221 Hookston Road
21 Concord, CA 94518

22 Dated: April 8, 2011

23 Richard W. Wieking, Clerk
24 By: Nikki Riley, Deputy Clerk
25
26
27
28