

United States District Court  
For the Northern District of California

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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

PAUL FARAH,	)	Case No. 5:13-cv-01127-PSG
	)	
Plaintiff,	)	<b>ORDER GRANTING DEFENDANTS'</b>
	)	<b>MOTION TO DISMISS</b>
v.	)	
	)	
WELLS FARGO HOME MORTGAGE and	)	<b>(Re: Docket No. 49)</b>
U.S. BANK NATIONAL ASOCIATION,	)	
	)	
Defendants.	)	

In this foreclosure-related action, Defendants Wells Fargo Home Mortgage and U.S. Bank National Association move to dismiss Plaintiff Paul Farah’s fourth amended complaint.<sup>1</sup> Farah did not file an opposition. On this basis alone, the court could consider the motion unopposed. But in light of Farah’s pro se status and his appearance at the hearing, the court will proceed to address the motion’s merits. Having considered those merits, the court GRANTS Defendants’ motion.

<sup>1</sup> See Docket No. 49.

## I. BACKGROUND

The court reviews the factual background of this case laid out in its prior order.<sup>2</sup>

### A. Factual Background

Farah and Wells Fargo executed a Deed of Trust that was recorded on August 5, 2005.<sup>3</sup> In 2009 Farah unsuccessfully sought a loan modification “while experiencing hardship and reduction in income.”<sup>4</sup> Farah tried to sell the house “conventionally” in 2010.<sup>5</sup> At an indeterminate time Farah first disclosed to Wells Fargo his intent to short sell the property, in part, to protect his credit rating.<sup>6</sup> Farah believed he had reached an understanding with Wells Fargo that any scheduled foreclosure sale would be delayed while Wells Fargo evaluated the short sale offers submitted by Farah.<sup>7</sup> Farah claims he had a backup plan to avoid foreclosure on his property – access to his retirement funds – that he planned to tap in the event Wells Fargo rejected the short sale offers he submitted.<sup>8</sup>

In late April 2012 Farah submitted a short sale for Wells Fargo’s review.<sup>9</sup> Farah’s real estate agent “discovered in late May that Wells Fargo was not planning to postpone the sale and alerted Farah of her findings.”<sup>10</sup> “On May 31, 2012, Farah placed several calls to Wells Fargo” to

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<sup>2</sup> See Docket No. 45.

<sup>3</sup> The court draws the following facts, taken as true for the purposes of this motion to dismiss, from the fourth amended complaint. See Docket No. 48 at 4.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *See id.*

<sup>7</sup> *See id.*

<sup>8</sup> *See id.*

<sup>9</sup> *See id.*

<sup>10</sup> *Id.* at 6.

1 inquire about the short sale proposal and possibly postpone the pending foreclosure proceedings.<sup>11</sup>  
2 Farah “spoke with multiple Wells Fargo employees,” including one customer service  
3 representative, Jessica, who assured Farah that the “short sale offer and sale postponement request”  
4 were both in process.<sup>12</sup> At bottom, Farah claims he got the “runaround” from Wells Fargo  
5 employees who conspired to withhold information, making him believe that Wells Fargo would be  
6 postponing the sale so it could continue to process the offer.<sup>13</sup> Wells Fargo “executed on their  
7 intended [foreclosure] sale the next day (June 1, 2012).”<sup>14</sup>  
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9 **B. Procedural History**

10 On March 13, 2013, Farah responded with this suit alleging fraudulent and deceptive  
11 business practices.<sup>15</sup> Farah amended his complaint the next day.<sup>16</sup> Without apparent objection, on  
12 June 11, 2013, Farah again amended his complaint<sup>17</sup> and on June 20, 2013, he amended the  
13 complaint a third time.<sup>18</sup> The court granted Defendants’ motion to dismiss, but offered Farah leave  
14 to submit an amended complaint.<sup>19</sup> Farah submitted a belated fourth amended complaint that is  
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18 <sup>11</sup> *Id.*

19 <sup>12</sup> *Id.*

20 <sup>13</sup> *Id.* at 17 (“Farah was never provided with the critical information that he was entitled to have  
21 that evening and was instead fooled by Wells Fargo Customer Service Representatives whom he  
22 spoke with, who all gave him the runaround and fooled him into thinking that the sale  
23 postponement ‘could’ come through and that it was only a matter of time for Ms. Gaiter to call and  
24 confirm; unbeknownst to Farah at the time, this act by Jessica, Alton and A jay was just the  
25 cover-up piece of a plan being executed by Wells Fargo employees, who all conspired to withhold  
26 information in order to blindside him with their actions.”).

27 <sup>14</sup> *Id.*

28 <sup>15</sup> *See* Docket No. 1.

<sup>16</sup> *See* Docket No. 5.

<sup>17</sup> *See* Docket No. 22.

<sup>18</sup> *See* Docket No. 27.

<sup>19</sup> *See* Docket No. 45.

1 largely duplicative of its prior complaint.<sup>20</sup> Defendants again move to dismiss the operative  
2 complaint.<sup>21</sup> The operative complaint alleges (1) fraud; (2) breach of contract; (3) breach of good  
3 faith, fiduciary duty and fair dealing; and (4) unlawful transfer of title and possession.<sup>22</sup> Farah  
4 seeks (1) rescission, (2) quiet title, (3) money damages, and (4) credit file corrections.<sup>23</sup>

## 5 II. LEGAL STANDARDS

### 6 A. Motion to Dismiss

7 A complaint must contain “a short and plain statement of the claim showing that the pleader  
8 is entitled to relief.”<sup>24</sup> When a plaintiff fails to proffer “enough facts to state a claim to relief that is  
9 plausible on its face,” the complaint may be dismissed for failure to state a claim upon which relief  
10 may be granted.<sup>25</sup> A claim is facially plausible “when the pleaded factual content allows the court  
11 to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>26</sup> Under  
12 Fed. R. Civ. P. 12(b)(6), “dismissal can be based on the lack of a cognizable legal theory or the  
13 absence of sufficient facts alleged under a cognizable legal theory.”<sup>27</sup> Dismissal without leave to  
14 amend is appropriate if it is clear that the complaint could not be saved by amendment.<sup>28</sup>

### 15 B. Fed. R. Civ. P. 9(b)

16 “A party must state with particularity the circumstances constituting fraud or mistake,”  
17 which requires “statements regarding the time, place, and nature of the alleged fraudulent  
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20 <sup>20</sup> See Docket No. 48.

21 <sup>21</sup> See Docket No. 49.

22 <sup>22</sup> See Docket No. 48 at 7-9.

23 <sup>23</sup> See Docket No. 48 at 13.

24 <sup>24</sup> Fed. R. Civ. P. 8(a)(2).

25 <sup>25</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

26 <sup>26</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

27 <sup>27</sup> *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

28 <sup>28</sup> See *Eminence Capital, LLC v. Asopeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

1 activities” under Rule 9(b).<sup>29</sup> “Mere conclusory allegations of fraud are insufficient.”<sup>30</sup> To satisfy  
2 the heightened standard under Rule 9(b), allegations must be “specific enough to give defendants  
3 notice of the particular misconduct which is alleged to constitute the fraud charged so that they can  
4 defend against the charge and not just deny that they have done anything wrong.”<sup>31</sup> This includes  
5 “the who, what, when, where, and how of the misconduct charged.”<sup>32</sup> Plaintiff must also allege  
6 what is false or misleading about a statement, and why it is false.”<sup>33</sup> “A court may dismiss a claim  
7 grounded in fraud when its allegations fail to satisfy [Rule] 9(b)’s heightened pleading  
8 requirements.”<sup>34</sup>

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10 **C. Rescission**

11 “Under California law, in an action to set aside a trustee’s sale, a plaintiff must  
12 demonstrate that he has made a ‘valid and viable tender [offer] of payment of the indebtedness.’”<sup>35</sup>  
13 The tender rule requires a plaintiff to (1) “demonstrate a willingness to pay” and (2) “show the  
14 ability to pay.”<sup>36</sup> “The rationale behind the rules is that if [the borrower] could not have redeemed  
15 the property had the sale procedures been proper, any irregularities in the sale did not result in  
16 damages to the [borrower].”<sup>37</sup> Tender is a requirement in a quiet title action as well as in any

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20 <sup>29</sup> *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547-48 (9th Cir. 1994).

21 <sup>30</sup> *Id.*

22 <sup>31</sup> *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).

23 <sup>32</sup> *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).

24 <sup>33</sup> *GlenFed*, 42 F.3d at 1548.

25 <sup>34</sup> *Saldate v. Wilshire Credit Corp.*, 686 F. Supp. 2d 1051, 1064 (E.D. Cal. 2010).

26 <sup>35</sup> *Pantoja v. Countrywide Home Loans, Inc.*, 640 F. Supp. 2d 1177, 1183-84 (N.D. Cal. 2009)  
(quoting *Karlsen v. Am. Sav. & Loan Ass’n*, 158 Cal. App. 3d 575, 578 (1971)).

27 <sup>36</sup> *Id.* (quoting *In re Worcester*, 811 F.2d 1224, 1231 (9th Cir. 1987)).

28 <sup>37</sup> *Lona v. Citibank, N.A.*, 202 Cal. App. 4th 89, 112 (2011).

1 action to set aside a trustee sale.<sup>38</sup> Further, the borrower must offer to pay the full amount of the  
2 debt for which the property was a security.<sup>39</sup>

3 Tender is not required where (1) “the borrower’s action attacks the validity of the  
4 underlying debt” since “it would constitute an affirmation of the debt”; (2) “the person who seeks  
5 to set aside the trustee’s sale has a counter-claim or set-off against the beneficiary”; (3) “it would  
6 be inequitable to impose such a condition on the party challenging the sale”; or (4) “the trustor is  
7 not required to rely on equity to attack the deed because the trustee’s deed is void on its face.”<sup>40</sup>  
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### 9 III. DISCUSSION

#### 10 A. The Tender Rule

11 Defendants challenge the entire fourth amended complaint because it fails to allege a valid  
12 tender.<sup>41</sup> Under ordinary circumstances a debtor is required to allege a valid tender as a  
13 precondition of challenging a foreclosure sale.<sup>42</sup> The complaint alleges that Farah was prepared to  
14 cure the default, if Wells Fargo denied his short sale offer. On its face Farah’s complaint does not  
15 allege that he tendered the outstanding debt on the loan. Farah’s related allegations further do not  
16 establish that any recognized exception to the tender rule applies, for example, that he is  
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20 <sup>38</sup> See *Sowinski v. Wells Fargo Bank, N.A.*, Case No. 3:11-6431-SC, 2012 WL 5904711, at \*2  
(N.D. Cal. Nov. 26, 2012).

21 <sup>39</sup> See *Abdallah v. United Sav. Bank*, 43 Cal. App. 4th 1101, 1109 (1996).

22 <sup>40</sup> *Id.* (describing exceptions to the tender requirement).

23 <sup>41</sup> See Docket No. 49 at 5 (“Under California law, a plaintiff challenging a foreclosure sale under  
24 any cause of action or theory must tender the amount received under the loan. . . . Simply stated,  
25 Plaintiff cannot challenge the foreclosure sale and quiet title to the property without paying or  
tendering what he borrowed.”).

26 <sup>42</sup> See *Sierra-Bay Fed. Land Bank Assn. v. Superior Court*, 227 Cal. App. 3d 318, 337 (1991) (the  
27 “debtor must offer to do equity by making a tender or otherwise offering to pay his debt”);  
*Alicea v. GE Money Bank*, Case No. 4:09-cv-00091-SBA, 2009 WL 2136969, at \*3  
28 (N.D. Cal. July 16, 2009) (“When a debtor is in default of a home mortgage loan, and a foreclosure  
is either pending or has taken place, the debtor must allege a credible tender of the amount of the  
secured debt to maintain any cause of action for wrongful foreclosure.”).

1 challenging the validity of underlying debt,<sup>43</sup> that he has an offset against a creditor,<sup>44</sup> or that the  
2 foreclosure sale was void.<sup>45</sup> The final exception, inequity, is generally invoked only when the sale  
3 at issue has yet to occur.<sup>46</sup> Here, the sale already occurred. The equities in this case do not favor  
4 evicting the home's new residents and unwinding the foreclosure sale would be an "idle task" as  
5 the home would be subject to foreclosure again absent Farah's tendering the outstanding debt. In  
6 sum, the operative complaint does not adequately plead tender as required to challenge the  
7 foreclosure sale and quiet title to the property.

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9 In its prior order the court declined to adopt a per se rule that a plaintiff challenging a  
10 foreclosure sale without satisfying the tender rule is automatically be barred from challenging all  
11 claims related to the sale, but suggested a more nuanced approach was warranted.<sup>47</sup> The court held  
12 that at a minimum Farah's claim for unlawful transfer of title and possession to be implicated.<sup>48</sup>  
13 With a second look at the claims recopied into the amended complaint, the court appreciates that  
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16 <sup>43</sup> *Soares v. ReconTrust Co., N.A.*, Case No. 3:12-cv-00070-SC, 2012 WL 1901234, at \*11  
(N.D. Cal. May 25, 2012) (*quoting Lona*, 202 Cal. App. 4th at 112 (the "tender rule does not apply  
17 where the borrower's action attacks the validity of the underlying debt"))).

18 <sup>44</sup> *See Ward v. Pickett*, Case No. 4:13-cv-01735-DMR, 2013 WL 5496549, at \*11  
(N.D. Cal. Oct. 3, 2013) (*quoting Lona*, 202 Cal. App. 4th at 112-13 (the tender rule does not apply  
19 "when the person who seeks to set aside the trustee's sale has a counter-claim or set-off"))).

20 <sup>45</sup> *See Tamburri v. Suntrust Mortgage, Inc.*, Case No. 3:11-cv-02899-EMC, 2011 WL 6294472, at  
21 \*4 (N.D. Cal. Dec. 15, 2011) (*quoting Miller & Starr California Real Estate 3d* § 10:212 ("When  
22 the sale is totally void, a tender usually is not required.")).

23 <sup>46</sup> *See Nissim v. Wells Fargo Bank, N.A.*, Case No. 4:12-cv-01201-CW, 2013 WL 192903, at \*9  
24 (N.D. Cal. Jan. 17, 2013) (*quoting Chan Tang v. Bank of Am., N.A.*, Case No. 11-cv-2048-DOC,  
25 2012 WL 960373, at \*5 (C.D. Cal. Mar. 19, 2012) (noting that where plaintiff seeks equitable relief  
26 to postpone or prevent the sale, many "courts have refused to extend the tender rule to cases where  
27 the foreclosure sale has not yet occurred")); *see also Robinson v. Bank of America*,  
28 Case No. 5:12-cv-00494-RMW, 2012 WL 1932842, at \*3-4 (N.D. Cal. May 29, 2012);  
*Bowe v. American Mortg. Network, Inc.*, Case No. 11-cv-08381-DDP-SHX, 2012 WL 2071759,  
at \*3 (C.D. Cal. June 8, 2012); *Giannini v. American Home Mortg. Servicing, Inc.*,  
Case No. 3:11-cv-04489-TEH, 2012 WL 298254, at \*2-3 (N.D. Cal. Feb. 1, 2012);  
*Tamburri*, 2011 WL 6294472, \* 3; *Sacchi v. Mortgage Electronic Registration Systems, Inc.*,  
Case No. 11-cv-1658-AHM-CWX, 2011 WL 2533029, at \*1 (C.D. Cal. June 24, 2011).

<sup>47</sup> *See* Docket No. 45 at 7.

<sup>48</sup> *See id.*

1 two more of Farah’s claims (1) breach of contract and (2) breach of good faith, fiduciary duty, and  
2 fair dealing spring from the broader challenge lobbed at Defendants’ foreclosure sale. The  
3 equitable relief sought by Farah on the basis of those claims – that the foreclosure sale be set aside  
4 – implicate the tender rule. The court therefore finds that each of those claims fails on that basis  
5 alone. Nonetheless, the court believes a claim-by-claim evaluation of Farah’s claims is warranted.

6 **B. Unlawful Transfer of Title and Possession of Property Against Wells Fargo and U.S.  
7 Bank**

8 Although Farah alleges title to the disputed property was fraudulently procured, the  
9 amended complaint still does not sufficiently identify any defect in the foreclosure proceedings.  
10 Thus, the complaint fails to allege facts upon which relief can be granted. And as discussed above,  
11 the amended complaint also does not allege a valid tender or that an exception to the tender rule  
12 applies. Because the court is convinced that amendment to this claim would be futile, this claim is  
13 DISMISSED with prejudice.  
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15 **C. Fraud**

16 Farah alleges that Wells Fargo employees withheld information regarding the status of the  
17 short sale proposal that he submitted to Wells Fargo for its review. Wells Fargo “concealed  
18 material information” that they knew “was false or ignored its truth as they did not want him to  
19 exercise his legal rights and options available to him” which led to Farah’s detriment and injury.<sup>49</sup>  
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21 At bottom though, Farah has not identified a fraudulent misrepresentation made by an  
22 employee of Wells Fargo with an affirmative duty to disclose the information. That Farah called  
23 Wells Fargo on the eve of the foreclosure of his home and was unable to reach the employee  
24 responsible for the potential short sale of his home does not amount to a fraudulent  
25 misrepresentation necessary to state a fraud claim pursuant to Rule 9(b). Because the court  
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28 <sup>49</sup> Docket No. 48 at 10.



1 believes Farah’s fraud-based claim is undercut by this foundational flaw, Farah’s fraud claim is  
2 DISMISSED with prejudice.

3 **D. Breach of Contract**

4 The amended complaint alleges Farah “was preempted by Wells Fargo from implementing  
5 his mitigation strategy to his detriment and was not allowed to act as he entered into the short sale  
6 contract with the security of a backup plan to change his position if necessary” to avoid  
7 foreclosure.<sup>50</sup> Farah argues he entered a binding contract with Wells Fargo that was breached  
8 when Wells Fargo sold the property through foreclosure proceedings.<sup>51</sup>  
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10 “Under California law, the elements of a breach of contract claim are: (1) the existence of a  
11 contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and  
12 (4) resulting damage to plaintiff.”<sup>52</sup> It is “well settled that ‘if an ‘essential element’ of a promise is  
13 reserved for the future agreement of both parties, the promise gives rise to no legal obligation until  
14 such future agreement is made.’”<sup>53</sup> Here, it is undisputed that the terms of the short sale were  
15 essential to the contract. The amended complaint does not allege that the parties agreed to terms of  
16 the proposed short sale, just that Wells Fargo would consider Farah’s proposal. On that basis, the  
17 court finds Farah and Wells Fargo did not enter a binding contract.  
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19 Moreover, as outlined above, Farah did not satisfy the tender rule in this case. Allegations  
20 amounting to a breach of an implied contract to accept a short sale are insufficient to sidestep the  
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22 <sup>50</sup> Docket No. 48 at 11.

23 <sup>51</sup> *See id.* (explaining breach of contract cause of action and how Farah “relied on Wells Fargo to  
24 act in good faith” to “his detriment”).

25 <sup>52</sup> *EPIS, Inc. v. Fid. & Guar. Life Ins. Co.*, 156 F. Supp. 2d 1116, 1124 (N.D. Cal. 2001)  
(modifying punctuation) (citing *Reichert v. General Ins. Co.*, 68 Cal. 2d 822, 830 (1968)).

26 <sup>53</sup> *Cnty. of Alameda v. Superior Court*, Case No. A121590, 2009 WL 2993813, at \*5  
27 (Cal. Ct. App. Sept. 21, 2009) (*quoting City of Los Angeles v. Super. Ct. of L.A. Cnty.*,  
28 51 Cal. 2d 423, 433 (1959)); *But see Copeland v. Baskin Robbins U.S.A.*,  
96 Cal. App. 4th 1251, 1255-60 (2002) (holding that in circumstances where essential elements  
have been agreed to by the parties, agreements to negotiate may be enforceable).

1 tender requirement. To challenge the foreclosure proceedings in this case, Farah’s complaint was  
2 required to have satisfied the tender rule or qualify for a recognized exception. The amended  
3 complaint does not and therefore the breach of contract fails on this additional, independent  
4 ground.

5 Because the court is convinced additional amendment of this claim would be futile, Farah’s  
6 claim for breach of contract is DISMISSED with prejudice.

7 **E. Breach of Good Faith, Fiduciary Duty, and Fair Dealing**

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9 In order “to state a claim for breach of an implied covenant of good faith and fair dealing,  
10 the specific contractual obligation from which the implied covenant of good faith and fair dealing  
11 arose must be alleged.”<sup>54</sup> “This is because it is universally recognized that the scope of conduct  
12 prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the  
13 contract.”<sup>55</sup> Accordingly the “prerequisite for any action for breach of the implied covenant of  
14 good faith and fair dealing is the existence of a contractual relationship between the parties, since  
15 the covenant is an implied term in the contract.”<sup>56</sup> The court agrees that, as a matter of law,  
16 because there was no underlying contract between Farah and Defendants, Farah’s claim for breach  
17 of good faith and fair dealing fails. As to the breach of fiduciary duty claim, Farah has alleged no  
18 facts to indicate why a fiduciary relationship exists between the parties.<sup>57</sup>

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21 <sup>54</sup> *Grant v. Aurora Loan Servs., Inc.*, 736 F. Supp. 2d 1257, 1268 (C.D. Cal. 2010) (*quoting*  
22 *Inter-Mark USA, Inc. v. Intuit, Inc.*, Case No. 3:07-cv-04178-JCS, 2008 WL 552482, at \*6  
(N.D. Cal. Feb. 27, 2008)).

23 <sup>55</sup> *Id.* (citations and quotations omitted).

24 <sup>56</sup> *Id.* (citations and quotations omitted).

25 <sup>57</sup> *See Fortaleza v. PNC Fin. Servs. Grp., Inc.*, 642 F. Supp. 2d 1012, 1025 (N.D. Cal. 2009)  
26 (*quoting Nymark v. Heart Fed. Savings & Loan Ass’n*, 231 Cal. App. 3d 1089, 1093 n.1, 1096  
27 (1991) (“The relationship between a lending institution and its borrower-client is not fiduciary” in  
28 nature and, “as a general rule, a financial institution owes no duty of care to a borrower when the  
institution’s involvement in the loan transaction does not exceed the scope of its conventional role  
as a mere lender of money.”)); *Oaks Management Corp. v. Superior Court*,  
145 Cal. App. 4th 453, 466 (2006) (holding that absent special circumstances, a loan transaction is  
at arms-length and there is no fiduciary relationship between the borrower and lender).


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The court also cannot accept that heightened fiduciary duties purportedly inlaid onto a mortgage agreement permit Farah to circumvent the tender rule's requirements. Farah's challenge to the foreclosure of his home required him to tender the outstanding balance on the home. He did not. His additional breach of good faith, fiduciary duty, and fair dealing claim therefore fails on this additional, independent ground.

Because the court is convinced additional amendment would be futile, Farah's claims of breach of good faith, fiduciary duty, and fair dealing are all DISMISSED with prejudice.

**IT IS SO ORDERED.**

Dated: January 23, 2014

  
PAUL S. GREWAL  
United States Magistrate Judge