

1 \$140,500.00, was also secured by a deed of trust on their property. They executed the loan
2 documents for the second loan in May 2006.

3 A notice of default and election to sell under deed of trust was recorded against the
4 property in November 2008. And in February 2009, a notice of trustee's sale was recorded
5 against the property. The Jelsings then transferred legal title to the property by grant deed
6 to Plaintiff KAP CA, LLC in November 2009. The same month, a third-party buyer tendered
7 a short-sale offer to Defendant Wells Fargo, which serviced the first loan. Wells Fargo
8 denied the offer.

9 Plaintiffs allege eight causes of action related to their two loans. The Court discusses
10 the law and facts related to each claim below.

11 12 **II. LEGAL STANDARD**

13 Under Federal Rule of Civil Procedure 8(a)(2), the plaintiff is required only to set forth
14 a "short and plain statement of the claim showing that the pleader is entitled to relief," and
15 "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."
16 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When reviewing a motion to
17 dismiss, the allegations of material fact in plaintiff's complaint are taken as true and
18 construed in the light most favorable to the plaintiff. See *Parks Sch. of Bus., Inc. v.*
19 *Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). But only factual allegations must be
20 accepted as true—not legal conclusions. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).
21 "Threadbare recitals of the elements of a cause of action, supported by mere conclusory
22 statements, do not suffice." *Id.* Although detailed factual allegations are not required, the
23 factual allegations "must be enough to raise a right to relief above the speculative level."
24 *Twombly*, 550 U.S. at 555. Furthermore, "only a complaint that states a plausible claim for
25 relief survives a motion to dismiss." *Iqbal*, 129 S. Ct. at 1949.

26 In ruling on a motion to dismiss, a court may take judicial notice of matters of public
27 record that are not subject to reasonable dispute. *Lee v. City of Los Angeles*, 250 F.3d 668,
28 689 (9th Cir. 2001).

1 III. DISCUSSION

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3 1. Real Estate Settlement Procedures Act

4 As an initial matter, Wells Fargo, MERS, and Deutsche Bank all argue that Plaintiffs’
5 failure to tender the full amount of their outstanding obligation undermines all their claims.
6 The Court disagrees. As explained in a later section of this order, only some of Plaintiffs’
7 claims require a tender; others do not.

8 Plaintiffs claim against Wells Fargo under the Real Estate Settlement Procedures Act
9 (“RESPA”), for example, does not require a tender to be valid. It does, however, fail for other
10 reasons.

11 Plaintiffs make a claim under RESPA for failing to respond to a qualified written
12 request (“QWR”), which is a request for information about a loan. See 12 U.S.C. § 2605(e).
13 Plaintiffs allege they sent Wells Fargo a QWR, but it never responded. RESPA requires loan
14 servicers to respond to QWR’s. See *id.* Wells Fargo does not dispute that it failed to
15 respond. Instead, it argues that Plaintiffs have not pled they suffered damages because of
16 Wells Fargo’s failure, which is an essential element of their claim. The Court agrees.

17 “Numerous courts have read Section 2605 as requiring a showing of pecuniary
18 damages in order to state a claim.” *Molina v. Wash. Mut. Bank*, No. 09cv894, 2010 WL
19 431439, at *7 (S.D. Cal. Jan. 29, 2010) (listing cases). Here, Plaintiffs only allege they “were
20 harmed and were unable to evaluate the Loans or correct their account.” This conclusory
21 allegation is not enough and fails to adequately plead damages.

22 Plaintiffs also seek statutory damages for the alleged RESPA violations. But statutory
23 damages are only available for a “pattern or practice of [RESPA] noncompliance.” See 12
24 U.S.C. § 2605(f)(1)(B). Plaintiffs have not alleged a pattern or practice, and their RESPA
25 claim is **DISMISSED without prejudice.**

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1 **2. California Civil Code § 2943**

2 Plaintiffs assert a state-law claim against Wells Fargo and PNC Mortgage LLC² for
3 their alleged failure to respond to a demand letter. Wells Fargo argues that this claim should
4 be dismissed because federal law explicitly preempts it.

5 State laws that “obstruct, impair, or condition a national bank’s ability to fully exercise
6 its Federally authorized real estate lending powers do not apply to national banks.” 12
7 C.F.R. § 34.4(a). Any state laws regulating national banks, including those regarding
8 disclosure and advertising, § 34.4(a)(9), or processing, participation in, or servicing of
9 mortgages, § 34.4(a)(10), are preempted by federal law. § 34.4(a). These preemption
10 regulations, which apply to national banks, are nearly identical to regulations that govern
11 national savings associations. See 12 C.F.R. § 560.2(b).

12 Plaintiffs dispute that Wells Fargo is a national savings association, but they do not
13 dispute that Wells Fargo is a national bank. In fact, Plaintiffs admit that Wells Fargo “is a
14 bank organized under the laws of the United States.” (Compl. ¶ 5.) Whether Wells Fargo
15 is a national bank or a savings association, the preemption regulations apply equally. See
16 12 C.F.R. §§ 34.4(a), 560.2(a). Plaintiffs’ state law claim rests on Wells Fargo’s alleged
17 failure to respond to a demand letter. Under California law, when a lender receives a letter
18 demand for “a copy of the note or other evidence of indebtedness,” it must deliver a copy,
19 along with a beneficiary statement, within twenty-one days. Cal. Civ. Code § 2943(b)(1).
20 This provision imposes a requirement related to disclosure, 12 C.F.R. § 560.2(b)(9), or the
21 processing or servicing of mortgages, § 560.2(b)(10). It is therefore preempted.

22 Plaintiffs point to an exception in the regulations for a state law that “[f]urther[s] a vital
23 state interest” and “only has an incidental effect on lending operations or is not otherwise
24 contrary to the purposes” of the preemption regulation. 12 C.F.R. § 560.2(c)(6). This
25 exception is inapplicable. First, it is very unlikely that the state law regarding demand letters
26 furthers a *vital* state interest. Second, this exception only applies to state laws not
27 specifically listed in § 560.2(b). *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1005 (9th
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² Plaintiffs have since voluntarily dismissed PNC Mortgage LLC and PNC Bank, N.A.

1 Cir. 2008). And since state laws related to disclosure and the servicing of mortgages are
2 specifically listed in § 560.2(b), the exception does not apply.

3 Even assuming California Civil Code § 2943 was not preempted, Plaintiffs would still
4 fail to state a claim. That is because the demand letter must be sent either before, or within
5 two months after, the recording of a notice of default, or more than thirty days before entry
6 of the decree of foreclosure. Cal. Civ. Code § 2943(b)(2). Plaintiffs sent their first demand
7 letter well after these deadlines. For these reasons, Plaintiffs fail to state a claim under
8 California Civil Code § 2943 against Wells Fargo.³

9 Because the claim is preempted, the Court **DISMISSES with prejudice** Plaintiffs'
10 second cause of action under § 2943.

11 12 **3. Business and Professions Code § 17200 (Against Wells Fargo)**

13 Plaintiffs assert a claim against Wells Fargo under section 17200 of the California
14 Business and Professions Code. Section 17200 “‘borrows’ violations of other laws and
15 treats” them as unlawful business practices “independently actionable under section 17200.”
16 *Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 383 (1992). “Violation of almost any
17 federal, state, or local law may serve as the basis for a[n] [unfair competition] claim.”
18 *Plascencia v. Lending 1st Mortg.*, 583 F. Supp. 2d 1090, 1098 (N.D. Cal. 2008) (citing
19 *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838–39 (1994)).

20 Plaintiffs cite three other laws as predicate violations for § 17200. Two are the alleged
21 RESPA and California Civil Code § 2943 violations. The Court has already held that
22 Plaintiffs failed to state a claim under those laws. So the only remaining alleged predicate
23 violation is under California Civil Code § 2923.6.

24 Section 2923.6 says the “Legislature finds and declares that any duty servicers may
25 have to maximize net present value under their pooling and servicing agreements is owed
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27 ³ Wells Fargo also argues that this claim should be dismissed because Plaintiffs did
28 not tender the amounts they owed. But this is only a prerequisite to challenging a foreclosure
sale, *Abdallah v. United Sav. Bank*, 43 Cal. App. 4th 1101, 1109 (1996), and in this claim
Plaintiffs seek damages.

1 to all parties in a loan pool, or to all investors under a pooling and servicing agreement, not
2 to any particular party in the loan pool or investor under a pooling and servicing agreement.”
3 Cal. Civ. Code § 2923.6(a).⁴ Plaintiffs allege that Wells Fargo violated this law when it
4 refused an offer for a short sale of Plaintiffs’ property. But they have not alleged that Wells
5 Fargo had a duty to maximize net present value under its pooling and service agreement,
6 which is what § 2923.6 focuses on. Moreover, § 2923.6 only says that Wells Fargo must
7 treat all investors equally, and cannot favor one over another. Plaintiffs are not pool
8 investors and § 2923.6 does not require Wells Fargo to accept an offer for a short sale from
9 them. Section 2923.6 was designed to protect the investors and servicers in a pool and not
10 mortgagors. Therefore, Plaintiffs do not have standing to assert this claim.

11 Section 2923.6 also says that “[i]t is the intent of the Legislature that the mortgagee,
12 beneficiary, or authorized agent offer the borrower a loan modification or workout plan if such
13 a modification or plan is consistent with its contractual or other authority.” *Id.* at § 2923.6(b).
14 But “nothing in Cal. Civ. Code § 2923.6 imposes a duty on servicers of loans to modify the
15 terms of loans or creates a private right of action for borrowers.” *Farner v. Countrywide*
16 *Home Loans*, No. 08cv2193, 2009 WL 189025, at *2 (S.D. Cal. January 26, 2009).

17 There is another reason to reject the application of § 2923.6: it is preempted by federal
18 law. As the Court has already discussed, state laws regulating the servicing, processing, or
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20 ⁴ California Civil Code § 2923.6 provides

21 (a) The Legislature finds and declares that any duty servicers may have to maximize net
22 present value under their pooling and servicing agreements is owed to all parties in a loan
23 pool, or to all investors under a pooling and servicing agreement, not to any particular party
24 in the loan pool or investor under a pooling and servicing agreement, and that a servicer acts
in the best interests of all parties to the loan pool or investors in the pooling and servicing
agreement if it agrees to or implements a loan modification or workout plan for which both
of the following apply:

25 (1) The loan is in payment default, or payment default is reasonably foreseeable.

26 (2) Anticipated recovery under the loan modification or workout plan exceeds the
27 anticipated recovery through foreclosure on a net present value basis.

28 (b) It is the intent of the Legislature that the mortgagee, beneficiary, or authorized agent offer
the borrower a loan modification or workout plan if such a modification or plan is consistent
with its contractual or other authority.

1 sale of mortgage loans by national banks or federal savings associations are preempted by
2 federal regulations. 12 C.F.R. §§ 34.4(a)(10), 560.2(b)(10). Section 2923.6 relates to the
3 servicing of mortgage loans and is therefore preempted. *See Biggins v. Wells Fargo & Co.*,
4 266 F.R.D. 399, 417 (N.D. Cal. 2009).

5 Plaintiffs also assert a predicate violation under California Business and Professions
6 Code § 17500, but this provision relates to false advertising, *Durell v. Sharp Healthcare*, 183
7 Cal. App. 4th 1350, 1361 n.5 (2010) (referring to § 17500 as pertaining to false or misleading
8 advertising), and is inapplicable.

9 None of the predicate violations for Plaintiffs' § 17200 are viable, and the Court
10 **DISMISSES without prejudice** Plaintiffs' third cause of action for § 17200 violations.

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12 **4. Business and Professions Code § 17200 (Against MIT and Deutsche and Does)**

13 Plaintiffs assert another § 17200 claim against MIT Lending, Deutsche Bank, and
14 Does for failure to disclose certain terms in connection with the first loan. They use California
15 Business and Professions Code § 17500 as the predicate violation for this cause of action.
16 But as the Court noted above, § 17500 is a California law related to false advertising for the
17 sale of property or services. *See, e.g., Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350,
18 1361 n.5 (2010). None of Plaintiffs' allegations relate to false or misleading advertising, and
19 Plaintiffs therefore fail to state a claim under § 17500 and, by extension, § 17200.

20 Moreover, Plaintiffs' filed their action over four years since the origination of the loan,
21 and their cause of action is time barred. *See* Cal. Bus. & Prof. Code § 17208 (“[a]ny action
22 to enforce any cause of action pursuant to this chapter shall be commenced within four years
23 after the cause of action accrued”). Plaintiffs have not cited any case law to support its
24 argument for delayed accrual.

25 The Court **DISMISSES without prejudice** Plaintiffs' fourth cause of action for § 17200
26 violations.⁵

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28 ⁵ MIT Lending and MortgageIT also argue that Plaintiffs have failed to plead fraud
with particularity. But it does not appear that Plaintiffs are pleading an action for fraud, so
the Court does not address the particularity requirement here.

1 **5. Federal Fair Debt Collection Practices Act**

2 Plaintiffs also make a claim against MIT Lending, Mortgage Electronic Registration
3 Systems, Inc., Deutsche Bank, and Does under the Federal Fair Debt Collection Practices
4 Act, 15 U.S.C. §§ 1692-1692o (“FDCPA”). Plaintiffs allege that Wells Fargo, as agent for
5 Deutsche Bank, violated the FDCPA.

6 As an initial matter, MIT Lending and MortgageIT argue that this claim is time barred.
7 The statute of limitations on FDCPA claims is one year. 15 U.S.C. § 1692k(d). Plaintiffs filed
8 suit on February 23, 2010, and the only allegation within one year of that date is the issuance
9 of a Notice of Trustee’s sale dated February 24, 2009. The Notice of Trustee’s sale is
10 therefore the only possible basis for liability under the FDCPA.

11 Sending a Notice of Trustee’s Sale is not actionable under the FDCPA for two
12 reasons. First, Plaintiffs have not alleged that Wells Fargo is a debt collector. Wells Fargo
13 is a mortgage servicer, and “[a] mortgage servicing company is not a debt collector within the
14 meaning of the FDCPA. *Walker v. Equity 1 Lenders Group*, No. 09cv325, 2009 WL
15 1364430, at *7 (S.D. Cal. May 14, 2009) (citing *Perry v. Stewart Title Co.*, 756 F.2d 1197,
16 1208 (5th Cir. 1985)). Second, “foreclosing on [a] property pursuant to a deed of trust is not
17 the collection of a debt within the meaning of the FDCPA.” *Izenberg v. ETS Servs., LLC*, 589
18 F. Supp. 2d 1193, 1199 (C.D. Cal. 2008) (citing *Ines v. Countrywide Home Loans*, No.
19 08cv1267 WQH (NLS), 2008 WL 4791863, *2 (S.D. Cal. Nov. 3, 2008)).

20 Plaintiffs also allege that MIT and Deutsche Bank failed to disclose certain terms in
21 the first loan. Not only are these claims time barred, see 15 U.S.C. § 1692k(d), but the
22 FDCPA does not address disclosure failures made in connection with a mortgage loan, see
23 15 U.S.C. §§ 1692-1692o.

24 Plaintiffs’ fifth cause of action under the FDCPA is **DISMISSED without prejudice**.

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26 **6. Cancellation of First Trust Deed**

27 Plaintiffs seek to cancel the trust deed related to their first loan. They allege they are
28 entitled to cancel the deed because “the First Note was assigned without a concurrent

1 assignment of the underlying First Trust Deed making the First Trust Deed a nullity.”

2 There are several problems with Plaintiffs’ claim. First, cancellation of a trust deed
3 is really a claim for rescission. *Moreno v. Citibank, N.A.*, 09cv5339, 2010 WL 1038222, at
4 *4 (N.D. Cal. March 19, 2010). And rescission is a remedy, not an independent cause of
5 action. *Id.* (citing Cal. Civ. Code §§ 1689, 1691–92). Moreover, in order to effect a
6 rescission, a party must tender the amounts received under the contract, see Cal. Civ. Code
7 § 1691, which Plaintiffs have not done.⁶

8 Even if Plaintiffs had tendered, the exhibits submitted with their Complaint undermines
9 their claim. Plaintiffs contend that the assignment of the first note did not include an
10 assignment of the trust deed, which somehow nullifies the deed. But the assignment of deed
11 of trust expressly included both the deed and the note. The assignment assigned to
12 Deutsche Bank “all beneficial interest under” the first deed of trust, “[t]ogether with the note
13 or notes therein described or referred to, the money due and to become due thereon with
14 interest, and all rights accrued or to accrue under said Deed of Trust.” The plain language
15 of the assignment contradicts Plaintiffs’ claims that the deed and the note were split.

16 The Court **DISMISSES without prejudice** Plaintiffs’ sixth cause of action for
17 cancellation of trust deed.

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19 **7. Quiet Title**

20 Plaintiffs seek to quiet title in their favor. But the basis for their claim, that the first
21 trust deed was split from the first note, has already been rejected by the Court. Further, in
22 order to allege an action to quiet title, Plaintiffs must have discharged their debt. *Aguilar v.*
23 *Bocci*, 39 Cal. App. 3d 475, 477–79 (1974) (The borrower “cannot quiet title without
24 discharging his debt. The cloud upon his title persists until the debt is paid.”). Plaintiffs do
25 not allege that they have done so.

26 The Court **DISMISSES without prejudice** Plaintiffs’ seventh cause of action for quiet

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28 ⁶ Plaintiffs allegedly offered a short sale to Wells Fargo and argue that this satisfies
the tender requirement. But they cite no authority supporting this contention and the Court
rejects it.

1 title.

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3 **8. Declaratory Relief**

4 Plaintiffs have not alleged any causes of action that would support declaratory relief.
5 Its allegations related to this claim are identical to the allegations in the other claims, which
6 the Court has dismissed. The Court therefore **DISMISSES without prejudice** Plaintiffs'
7 eighth cause of action for declaratory relief. *Surf & Sand, LLC v. City of Capitola*, 2008 WL
8 2225684, at *2, n.5 (N.D. Cal. May 28, 2008) (a claim for declaratory relief “rises or falls with
9 [the] other claims”).

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11 **9. MortgageIT’s Motion to Strike**

12 Defendants MortgageIT and MIT Lending have moved to strike Plaintiffs’ request for
13 damages and attorneys’ fees. But the Court has dismissed the Complaint and **DENIES** this
14 motion as moot.

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16 **10. NDEX West’s Notice of Joinder**

17 Defendant NDEX West, LLC has filed a Notice of Joinder in MortgageIT and MIT
18 Lending’s motion to dismiss and motion to strike [Doc. 30]. Although NDEX has already filed
19 an answer and has therefore waived its ability to file a Rule 12(b)(6) motion, the Court may
20 construe their notice of joinder as a motion for judgment on the pleadings. *See Aldabe v.*
21 *Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980). The Court **DISMISSES** the claims against
22 NDEX because Plaintiffs’ have made no allegations against it, and because Plaintiffs’ claims
23 are legally insufficient as described above.

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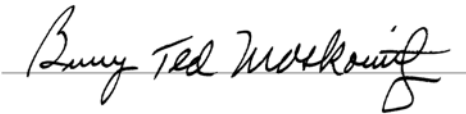
IV. CONCLUSION

The Court **GRANTS** Wells Fargo, MERS, and Deutsche Bank’s motion to dismiss [Doc. 8], and **GRANTS** MIT Lending and MortgageIT’s motion to dismiss [Doc. 26]. The Court **GRANTS** NDEX’s notice of joinder, construed as a motion for judgment on the pleadings. The Court **DENIES as moot** the motion to strike [Doc. 25]. The Court dismisses Plaintiffs’ second cause of action under California Civil Code § 2943 with prejudice, but Plaintiffs may re-plead their other claims.

The Complaint is dismissed in its entirety. Plaintiffs have fourteen days from the filing of this order to re-plead their claims. Failure to do so will result in a final judgment dismissing this case.

IT IS SO ORDERED.

DATED: July 9, 2010


Honorable Barry Ted Moskowitz
United States District Judge