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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

PATRICK J. GERMON and ELIZABETH  
W. GERMON,  
  
Plaintiffs,  
  
v.  
  
BAC HOME LOANS SERVICING, L.P.,  
et al.  
  
Defendant.

Case No. 10cv2482 BTM(POR)

**ORDER GRANTING MOTION TO  
DISMISS COMPLAINT**

Defendants BAC Home Loans Servicing, LP (a limited partnership fka Countrywide Home Loans Servicing, LP) (“BAC”), ReconTrust Company (“ReconTrust”), and Mortgage Electronic Registration Systems (“MERS”) have filed a motion to dismiss Plaintiffs’ Complaint for failure to state a claim. For the reasons discussed below, Defendants’ motion is **GRANTED.**

**I. BACKGROUND**

Plaintiffs allege that in late 2007, they obtained a \$1,000,000 “refinance loan” from Countrywide Home Loans, Inc. (Compl. ¶ 9.)

On December 21, 2007, Plaintiffs executed a Note in favor of Countrywide Bank, FSB, in the amount of \$1,000,000 plus interest. (RJN, Ex. A.)

The Note was secured by a Deed of Trust that was recorded against Plaintiffs’

1 property at 16 Saddle Creek Rd., Fallbrook, CA 92028-9222 (the "Property"). (RJN, Ex. B.)

2 The Deed of Trust identified ReconTrust as the trustee and MERS as the beneficiary.  
3 (Id.) Plaintiffs defaulted on their loan, and on May 4, 2010, ReconTrust recorded a Notice  
4 of Default. (RJN, Ex. C.) The Notice explained that the beneficiary under the Deed of Trust  
5 had elected to cause the trust property to be sold to satisfy the obligations secured thereby.

6 On May 6, 2010, MERS assigned its beneficial interest to BAC. (RJN, Ex. D.) On  
7 August 11, 2010, ReconTrust recorded a Notice of Trustee's Sale, which set the sale for  
8 September 3, 2010. (RJN, Ex. E.)

9 Plaintiffs contacted BAC to request a modification of their loan. (Compl. ¶ 14.) In  
10 early September, BAC agreed to postpone the Trustee's Sale to October 1, 2010. (Id.)  
11 Ultimately, Plaintiffs' loan modification request was denied. (Compl. ¶ 15.)

12 The Trustee's Sale proceeded on October 1, 2010, and BAC purchased the Property.  
13 (RJN, Ex. G.)

14 On October 21, 2010, Plaintiffs commenced this action. In their Complaint, Plaintiffs  
15 assert the following claims: (1) Claim to Set Aside Trustee Sale; (2) Claim to Cancel  
16 Trustee's Deed; (3) Quiet Title; (4) Accounting; (5) Breach of Contract; (6) Breach of Implied  
17 Covenant of Good Faith & Fair Dealing; (7) Violation of Federal Fair Debt Collection  
18 Practices Act ("FDCPA"); and (8) Violation of Federal Truth In Lending Act. Plaintiffs seek  
19 an order setting aside the Trustee's Sale of the Property and quieting title in Plaintiffs as  
20 owners of the Property. Plaintiffs also pray for an accounting, damages, and attorney's fees  
21 and costs.

## 22 23 **II. STANDARD**

24 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should be granted  
25 only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient facts to  
26 support a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th  
27 Cir. 1988). When reviewing a motion to dismiss, the allegations of material fact in plaintiff's  
28 complaint are taken as true and construed in the light most favorable to the plaintiff. See

1 Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). Although  
2 detailed factual allegations are not required, factual allegations “must be enough to raise a  
3 right to relief above the speculative level.” Bell Atlantic v. Twombly, 550 U.S. 544, 127 S.Ct.  
4 1955, 1965 (2007). “A plaintiff’s obligation to prove the ‘grounds’ of his ‘entitle[ment] to  
5 relief’ requires more than labels and conclusions, and a formulaic recitation of the elements  
6 of a cause of action will not do.” Id. “[W]here the well-pleaded facts do not permit the court  
7 to infer more than the mere possibility of misconduct, the complaint has alleged - but it has  
8 not show[n] that the pleader is entitled to relief.” Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, 129 S.Ct.  
9 1937, 1950 (2009) (internal quotation marks omitted).

### 11 **III. DISCUSSION**

12 Defendants contend that the Complaint should be dismissed because Plaintiffs have  
13 failed to state a claim. The Court agrees.

14 Plaintiffs’ claims to set aside the Trustee’s Sale, cancel the Trustee’s Deed, and Quiet  
15 Title rest on the premise that MERS lacked the authority to initiate foreclosure and also  
16 lacked the authority to assign any beneficial interest to BAC. The Court rejects this  
17 argument. As discussed below, this central premise of Plaintiffs is not supported by the facts  
18 or the law.

19 Upon review of the language of the Deed of Trust, it is clear that MERS had the legal  
20 right to initiate nonjudicial foreclosure and could assign such right. The Deed of Trust named  
21 MERS and its successors and assigns as the beneficiary (as nominee for Lender and  
22 Lender’s successor and assigns). The Deed of Trust also provided:

23 Borrower understands and agrees that MERS holds only legal title to the  
24 interests granted by Borrower in this Security Instrument, but, if necessary to  
25 comply with law or custom, MERS . . . has the right: to exercise any or all of  
26 those interests, including, but not limited to, the right to foreclose and sell the  
27 Property; and to take any action required of Lender including, but not limited  
28 to, releasing and canceling this Security Instrument.

(RJN, Ex. B at p. 3.) Courts have held that regardless of whether MERS is an economic  
beneficiary or not, this language grants MERS the power to initiate foreclosure under Cal.  
Civ. Code § 2924 and to assign its beneficial interest under the deed of trust. See

1 Wurtzberger v. Resmae Mortg. Corp., 2010 WL 1779972, at \* 4 (E.D. Cal. Apr. 29, 2010)  
2 (explaining that since the Deed of Trust named MERS as the beneficiary it had the right to  
3 foreclose and the authority to assign its beneficial interest under the deed of trust); Pantoja  
4 v. Countrywide Home Loans, Inc., 640 F. Supp. 2d 1177, 1188-90 (N.D. Cal. 2009) (holding  
5 that pursuant to the plain terms of the Deed of Trust and § 2924, MERS had a right to  
6 conduct the foreclosure process); Santarose v. Aurora Bank FSB, 2010 WL 2232819, at \*  
7 5 (S.D. Tex. June 2, 2010) (“By the plain language of the Deed of Trust, MERS had the right  
8 to foreclose the property.”).

9 Citing to Cal. Comm. Code § 3301, Plaintiffs argue that only the “holder of the note”  
10 can enforce the note. However, the Commercial Code does not govern nonjudicial  
11 foreclosures under deeds of trust under California law. See Padayachi v. IndyMac Bank,  
12 2010 WL 4367221 (N.D. Cal. Oct. 28, 2010); Gaitan v. Mortg. Elec. Reg. Sys., 2009 WL  
13 3244729, at \*10 (C.D. Cal. Oct. 5, 2009). California Civil Code §§ 2924-2924k provide a  
14 “comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to  
15 a power of sale contained in a deed of trust.” Moeller v. Lien, 25 Cal. App. 4th 822, 830  
16 (1994). Within this framework, nonjudicial foreclosure proceedings can be instituted by “the  
17 trustee, mortgagee, or beneficiary, or any of their authorized agents” by filing a notice of  
18 default with the office of the recorder. Cal. Civ. Code § 2924(a)(1). No less than three  
19 months after the filing of the notice of default, a notice of sale may be given by “the  
20 mortgagee, trustee, or other person authorized to take the sale.” Cal. Civ. Code §  
21 2924(a)(3).<sup>1</sup>

22 Plaintiffs’ breach of contract and breach of the implied covenant of good faith and fair  
23 dealing claims are also based upon Plaintiffs’ erroneous theory that MERS lacked authority

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24  
25 <sup>1</sup> Plaintiffs’ claims to set aside the sale and cancel the Trustee’s Deed also fail  
26 because Plaintiffs have failed to tender the amount of the unpaid debt. See Arnolds  
27 Management Corp. v. Eischen, 158 Cal. App. 3d 575, 578 (1984) (“It is settled that an action  
28 to set aside a trustee’s sale for irregularities in sale notice or procedure should be  
accompanied by an offer to pay the full amount of the debt for which the property was  
security.”); Grant v. Aurora Loan Serv., Inc., \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 3517399, at \*8  
(C.D. Cal. Sept. 10, 2010) (holding that plaintiff’s claim seeking to set aside foreclosure sale  
was barred due to plaintiff’s failure to allege that he had tendered or could tender the amount  
of his indebtedness).

1 to initiate foreclosure. Plaintiffs allege that BAC breached the explicit terms of the Note and  
2 Deed of Trust and breached the implied covenant of good faith and fair dealing by allowing  
3 MERS to commence foreclosure proceedings against the Property. (Compl. ¶¶ 34, 38.)  
4 However, as already discussed, the Deed of Trust authorized MERS as the beneficiary to  
5 initiate foreclosure proceedings. Therefore, MERS's actions were consistent with the terms  
6 of the Deed of Trust and do not give rise to a breach of contract/breach of implied covenant  
7 claim against BAC.

8 Plaintiffs also allege that BAC breached the implied covenant of good faith and fair  
9 dealing by "mishandling or overlooking Plaintiffs' financial data when reviewing Plaintiffs' loan  
10 modification request, and then denying the loan modification without allowing Plaintiffs to  
11 resubmit the correct data for review prior to the foreclosure sale on the Property." (Compl.  
12 ¶ 38.) However, absent an express contractual term requiring loan modification, plaintiffs  
13 cannot create such an obligation by alleging breach of the implied covenant. See, e.g.,  
14 Prasad v. BAC Home Loans Servicing LP, 2010 WL 5090331, at \* 4 (E.D. Cal. Dec. 7,  
15 2010); Lawther v. Onewest Bank, 2010 WL 4936797, at \*9 (N.D. Cal. Nov. 30, 2010).

16 Plaintiffs' FDCPA claim also relies upon Plaintiffs' argument that MERS lacked  
17 authority to initiate foreclosure. Again, Plaintiffs allege that MERS lacked the true status of  
18 a beneficiary and that BAC aided MERS by allowing it to act outside the scope of its  
19 authority. (Compl. ¶¶ 42-43.) The Court assumes that Plaintiffs contend that MERS and  
20 BAC violated 15 U.S.C. § 1692f(6)(A), which prohibits "[t]aking or threatening to take any  
21 nonjudicial action to effect dispossession or disablement of property if . . . there is no  
22 present right to possession of the property claimed as collateral through an enforceable  
23 security interest."<sup>2</sup> Plaintiffs' FDCPA claim fails because MERS was in fact authorized to

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24  
25 <sup>2</sup> Section 1692a(6) specifies that *for the purposes of § 1692f(6)*, the term debt  
26 collector "also includes any person who uses any instrumentality of interstate commerce or  
27 the mails in any business the principal purpose of which is the enforcement of security  
28 interests." Thus, even though the FDCPA generally does not apply to actions taken in  
pursuit of foreclosure, "the statute expands its reach to enforcers of security interests in one  
specific instance: where that party seeks to take property to which 'there is no present right  
to possess.'" Rousseau v. Bank of New York, 2009 WL 3162153, at \* 8 (D. Colo. Sept. 29,  
2009). See also Overton v. Foutty & Foutty, LLP, 2007 WL 2413026, at \* 6 (S.D. Ind. Aug.  
21, 2007) ("If a person invokes judicial remedies only to enforce the security interest in

1 initiate foreclosure proceedings.

2 Plaintiffs allege that Defendants violated the Truth in Lending Act (“TILA”) by failing  
3 to give them two copies of the Notice of Right to Cancel. (Compl. ¶¶ 49.) Plaintiffs also  
4 allege that the copy they did receive lacked the appropriate information regarding the dates  
5 on which the 3-day cancellation period began and ended. (*Id.*) Plaintiffs seek “actual and  
6 statutory” damages for the TILA violations. (Compl. ¶¶ 50.) However, a claim for damages  
7 under TILA is governed by a one-year statute of limitations, which begins to run from the  
8 “date of occurrence” of the alleged violation. 15 U.S.C. § 1640(e). The “date of occurrence”  
9 in this case was the closing date of December 21, 2007. Therefore, Plaintiffs’ claim for  
10 damages under TILA is time-barred.<sup>3</sup>

11 Plaintiffs also bring a claim for “accounting.” “A suit for accounting will not lie where  
12 it appears from the complaint that none is necessary or that there is an adequate remedy  
13 at law.” *St. James Church v. Superior Court*, 135 Cal. App. 2d 352, 359 (1955). Plaintiffs  
14 do not allege any facts establishing a need for an accounting. Accordingly, the Court  
15 dismisses this claim as well.

#### 16 17 **IV. CONCLUSION**

18 For the reasons discussed above, Defendants’ motion to dismiss is **GRANTED**.  
19 Plaintiffs’ Complaint is **DISMISSED** in its entirety for failure to state a claim. Although  
20 Plaintiffs have not established that they have viable claims they can bring against  
21 Defendants, the Court grants Plaintiffs leave to file an amended complaint. If Plaintiffs

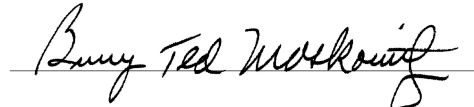
22 \_\_\_\_\_  
23 property, then the effort is not subject to the FDCPA (other than § 1692f(6) and §  
24 1692i(a)).”); *Burnett v. Mortg. Elec. Registration Sys., Inc.*, 2009 WL 3582294, at \* 3 (D. Utah  
25 Oct. 27, 2009) (“§ 1692f(6) still regulates trustees’ conduct while engaging in non-judicial  
foreclosures.”).

26 <sup>3</sup> Plaintiffs acknowledge that the one-year limitations period applies and indicate they  
27 are “willing to withdraw this cause of action.” (Opp. at 8:2-3.) Plaintiffs do not argue that  
28 they are entitled to equitable tolling. Furthermore, Defendants have submitted a copy of a  
Notice of Right to Cancel that contains the required dates and appears to bear the  
signatures of Plaintiffs. (RJN Ex. G.) By signing the Notice, Plaintiffs acknowledged receipt  
of two copies of the Notice of Right to Cancel. Plaintiffs do not dispute that the signatures  
are genuine.

1 choose to file an amended complaint, such complaint must be filed within 20 days of the  
2 entry of this Order.

3 **IT IS SO ORDERED.**

4 DATED: February 22, 2011

A handwritten signature in black ink, reading "Barry Ted Moskowitz". The signature is written in a cursive style and is positioned above a horizontal line.

Honorable Barry Ted Moskowitz  
United States District Judge

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