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

GONZALO ESPINOZA, an individual; and  
ROSALBA ESPINOZA, an individual,

Plaintiffs,

vs.

BANK OF AMERICA, N.A., a North  
Carolina corporation; and SRA  
ASSOCIATES, INC., a New Jersey  
corporation; and DOES 1-20, inclusive,

Defendants.

**CASE NO: 11-CV-0894-IEG (CAB)**

**ORDER GRANTING  
DEFENDANTS' MOTION TO  
DISMISS**

[Doc. No. 13]

Presently before the Court is Defendants' motion to dismiss Plaintiffs' first amended complaint. [Doc. No. 13.] For the reasons stated below, the Court **GRANTS** Defendants' motion.

**BACKGROUND**

The following background is taken from the Plaintiffs' First Amended Complaint ("FAC") unless otherwise noted.

In late 2004, Plaintiffs purchased property located in San Diego County at 397 Camino Elevado, Bonita, CA 91902. The purchase was financed with two mortgages, and the mortgages were secured by deeds of trust (DOT 1 and DOT 2) that were executed and recorded.

1 Over the next two years, Plaintiffs engaged in a series of additional finance transactions.<sup>1</sup> By  
2 the end of 2007, Plaintiffs' property was secured by two deeds of trust, DOT 3 (with Washington  
3 Mutual Bank) and DOT 5 (with Bank of America); all other deeds of trusts had been terminated.

4 Sometime later, Plaintiffs were unable to make their mortgage payments under DOT 3 and  
5 DOT 5. In July 2009, California Reconveyance Company, an agent of Chase Home Finance (as  
6 successor-in-interest to Washington Mutual Bank) filed a Notice of Default (NOD) with the San Diego  
7 County Recorder, thus initiating the nonjudicial foreclosure process under California Civil Code  
8 § 2924.

9 In October 2009, Plaintiffs entered into an agreement with a third party for a "short sale."  
10 Because the agreement was designed to alienate the property for less than the full amount owed on the  
11 property, it was contingent on the approval of the two lien holders, Chase Home Finance (as successor-  
12 in-interest to Washington Mutual Bank) and Bank of America. Plaintiffs obtained approval for the  
13 "short sale" from Chase Home Finance and Bank of America and then closed escrow on the "short  
14 sale." According to the terms of the approval, "[u]pon the bank's receipt of the \$20,875.53 and a  
15 signed copy of the final Short Sale HUD-1 Form the bank will release the lien and charge off the  
16 remaining debt as a collectable balance." [FAC, Ex. E, at 5.] On March 25, 2010, Plaintiffs' closed  
17 escrow on their short sale. [FAC, ¶ 18 & Ex. A.]

18 On April 1, 2010, Bank of America filed a Substitution of Trustee and Full Reconveyance,  
19 releasing its lien on the property. The reconveyance deed states, in bold letters:

20 **This Release of Lien does not constitute a satisfaction of the underlying debt**  
21 **secured by the Mortgage described above, which remains in full force and effect.**  
22 **It serves only to release the lien of the Mortgage upon the above described**  
23 **property.**

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24  
25 <sup>1</sup> In 2006, Plaintiffs refinanced DOT 1 and DOT 2 with Washington Mutual Bank, and a third  
26 deed of trust (DOT 3) was executed. DOT 3 was recorded on June 5, 2006. As part of the refinance  
27 with Washington Mutual Bank, full reconveyance deeds were executed and recorded, terminating DOT  
28 1 and DOT 2. Soon after recording DOT 3, Plaintiffs obtained a home equity line of credit  
("HELOC") with Bank of America, which was secured by a fourth deed of trust (DOT 4) and recorded  
on November 14, 2007. Plaintiffs later refinanced DOT 4 with Bank of America, and a fifth deed of  
trust (DOT 5) was recorded on November 14, 2007. As part of the refinancing with Bank of America,  
a reconveyance deed was executed and recorded, terminating DOT 4.

1 [FAC, Ex. G (emphasis in original).] Plaintiffs then transferred ownership of the property to the new  
2 buyer.

3 In November 2010, Defendant SRA Associates, acting on behalf of Bank of America, sent a  
4 collection letter to Plaintiffs demanding payment of a \$79,652.98 balance. Plaintiffs' obligation to pay  
5 the \$79,652.98 balance is the subject of this action.

6 Plaintiffs filed suit in San Diego Superior Court, and Defendants removed the action to this  
7 Court on April 27, 2011. Shortly thereafter, Defendants moved to dismiss Plaintiffs' complaint. The  
8 Court granted Defendants' motion, dismissing the complaint with leave to amend. On July 27, 2011,  
9 Plaintiffs filed the FAC, alleging three causes of action: (1) for declaratory relief under the California  
10 Code of Civil Procedure § 580d; (2) for declaratory relief under the California Code of Civil Procedure  
11 § 580e; and (3) for declaratory relief under common law antideficiency protection. [Doc. No. 12.]  
12 Defendants now move to dismiss the FAC in its entirety. [Doc. No. 13.]

### 13 LEGAL STANDARD

14 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the  
15 legal sufficiency of the claims asserted in the complaint. *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir.  
16 2001). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient  
17 facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699  
18 (9th Cir. 1990) (citation omitted). Leave to amend should be granted unless the defect is not curable  
19 by amendment. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1108 (9th Cir. 2003).

20 The Court must accept all factual allegations pleaded in the complaint as true and construe  
21 them and draw all reasonable inferences in favor of the nonmoving party. *See Cahill v. Liberty Mut.*  
22 *Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The Court need not, however, accept "legal  
23 conclusions" as true. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "[A] plaintiff's obligation  
24 to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a  
25 formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*,  
26 550 U.S. 544, 555 (2007) (citation omitted). The complaint must contain "enough facts to state a  
27 claim to relief that is plausible on its face." *Id.* at 570. "A claim has facial plausibility when the  
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1 pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for  
2 the misconduct alleged.” *Iqbal*, 129 S. Ct. at 1940.

### 3 DISCUSSION

#### 4 **I. Declaratory Relief Under California Code of Civil Procedure § 580d**

5 Claim one of the FAC alleges section 580d precludes Bank of America from collecting the  
6 remaining balance under DOT 5. The Court addressed this issue in its previous Order. [See Doc. No.  
7 11, at 4.] Under California law, if a borrower defaults on a loan secured by a deed of trust containing a  
8 power of sale clause, the lender may pursue a nonjudicial foreclosure. *Benitez v. Recon Trust, CA*, No.  
9 11-CV-510 BEN (WMC), 2011 WL 998327, at \*2 (S.D. Cal. Mar. 21, 2011) (citing *McDonald v.*  
10 *Smoke Creek Live Stock Co.*, 209 Cal. 231, 236-37 (1930)). A nonjudicial foreclosure is subject to the  
11 antideficiency statutes, which prevent the foreclosing lender from obtaining a judgment for any  
12 difference between the debt and the proceeds from the sale:

13 No judgment shall be rendered for any deficiency upon a note secured by a deed  
14 of trust or mortgage upon real property or an estate for years therein hereafter  
15 executed in any case in which the real property or estate for years therein has  
16 been sold *by the mortgagee or trustee under power of sale contained in the  
17 mortgage or deed of trust.*

18 Cal. Civ. Proc. Code § 580d (emphasis added). By its terms, section 580d applies “only when a  
19 personal judgment against a debtor is sought *after a foreclosure.*” *Dreyfuss v. Union Bank of Cal.*, 24  
20 Cal. 4th 400, 407 (2000) (emphasis added).

21 Plaintiffs argue that, under § 580d, a secured lender waives its right to a deficiency by *initiating*  
22 nonjudicial foreclosure proceedings, whether or not a nonjudicial foreclosure sale actually occurs.  
23 Plaintiffs’ assertion is incorrect under California law. “Mere commencement of nonjudicial  
24 foreclosure proceedings [is] not an election of remedy.” *Bank of Am. v. Graves*, 51 Cal. App. 4th 607,  
25 614-15 (1996) (citing *Carpenter v. Title Ins. & Trust Co.*, 71 Cal. App. 2d 593, 596 (1945)); *Griffin v.*  
26 *Compere*, 114 Cal. App. 2d 246, 247 (1952) (holding that, where a creditor brought a foreclosure  
27 action but then dismissed it, merely initiating the foreclosure action did not constitute an election of  
28 remedies that would preclude a later private sale and suit for the deficiency).

Plaintiffs, citing no authority on this point, argue that, because Bank of America secured a deed  
of trust with a power of sale provision, it effectively enforced the power of sale provision by approving

1 Plaintiffs' short sale. A power of sale provision in a deed of trust grants a lender the right to conduct a  
2 nonjudicial foreclosure sale. *See Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149,  
3 1158 (2011). But no foreclosure sale occurred in this case. Section 580d does not apply here, because  
4 it only applies to protect a debtor from a deficiency judgment *after a foreclosure sale*. *Dreyfuss*, 24  
5 Cal. 4th at 407.

6 Plaintiffs' allegations do not entitle them to relief under section 580d. Thus, the Court  
7 **DISMISSES WITH PREJUDICE** Plaintiffs' first cause of action.

## 8 **II. Declaratory Relief Under California Code of Civil Procedure § 580e**

9 California Civil Procedure Code Section 580e provides, in relevant part:

10 (a)(1) No deficiency shall be owed or collected, and no deficiency judgment shall be  
11 requested or rendered for any deficiency upon a note secured solely by a deed of trust or  
12 mortgage for a dwelling of not more than four units, in any case in which the trustor or  
13 mortgagor sells the dwelling for a sale price less than the remaining amount of the  
indebtedness outstanding at the time of sale, in accordance with the written consent of  
the holder of the deed of trust or mortgage, provided that both of the following have  
occurred:

14 (A) Title has been voluntarily transferred to a buyer by grant deed or by other  
15 document of conveyance that has been recorded in the county where all or part  
of the real property is located.

16 (B) The proceeds of the sale have been tendered to the mortgagee, beneficiary,  
17 or the agent of the mortgagee or beneficiary, in accordance with the parties'  
agreement.

18 In short, section 580e prevents a lender that consents to a short sale from pursuing the post-sale  
19 deficiency.<sup>2</sup> However, because section 580e became effective on January 1, 2011, and the amendment  
20 in July 2011, well after Plaintiffs executed their short sale, Plaintiffs are not protected by section 580e.

21 Plaintiffs closed escrow on their short sale on March 25, 2010, and Bank of America executed  
22 the reconveyance deed on April 1, 2010. [FAC, ¶¶ 18-19.] Title was transferred to the new buyer  
23 shortly thereafter, and by November 3, 2010, Bank of America sought payment of the balance of  
24 Plaintiffs' debt—\$79,652.98. [*Id.* ¶¶ 20-21.] But section 580e was not enacted until January 1, 2011.  
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26 <sup>2</sup> Enacted on January 1, 2011, section 580e initially protected a debtor engaging in a creditor-  
27 approved short sale from liability for any deficiency owed on the *first deed of trust* only. *See* 2010 Cal.  
28 Stat., ch. 701 (S.B. 931). As amended on July 15, 2011, section 580e now applies to any lender that  
consents to a short sale, whether or not the lender is in the first position. *See* Cal. Civil Proc. Code  
§ 580e; 2011 Cal. Stat., ch. 82.

1           The general rule is that statutes operate prospectively unless the statute includes a provision  
2 expressly stating otherwise. *See United States v. Sec. Indus. Bank*, 459 U.S. 70, 79-80 (1982) (“[A]  
3 retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless  
4 such be the unequivocal and inflexible import of the terms, and the manifest intention of the  
5 legislature” (quoting *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)  
6 (internal quotation marks omitted)). Moreover, California’s Civil Procedure Code includes a provision  
7 stating that “[n]o part of [this code] is retroactive, unless expressly so declared.” Cal. Civ. Proc. Code  
8 § 3; *see also Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1207-08 (1988) (“[L]egislative  
9 provisions are presumed to operate prospectively, and that they should be so interpreted ‘unless  
10 express language or clear and unavoidable implication negatives the presumption.’” (quoting *Glavinich*  
11 *v. Commonwealth Land Title Ins. Co.*, 163 Cal. App. 3d 263, 272 (1984))).

12           Nothing in section 580e indicates that it should apply retroactively. Because it was enacted  
13 after Plaintiffs conducted their short sale, Defendants argue that section 580e does not preclude them  
14 from seeking the remaining balance of Plaintiffs’ loan.

15           Plaintiffs attempt to avoid the retroactivity issue by reframing the focus of section 580e. They  
16 argue section 580e regulates *deficiencies* stemming from short sales, not the short sales themselves.  
17 Under Plaintiffs’ theory, once enacted, section 580e extinguished any then-existing deficiencies.  
18 Because there remained a deficiency balance on Plaintiffs’ loan at the time the new law took effect,  
19 Plaintiffs argue that section 580e bars Defendants from seeking the deficiency. [Pls.’ Mot., at 11 (“The  
20 legislature could have easily put that no deficiency should lie after the effective date of this bill[;]  
21 however, they did not. Plaintiffs assert that this was intentional.”).]

22           The practical effect interpreting the statute as Plaintiffs suggest would be to extinguish the  
23 rights to deficiency balances negotiated between parties prior to the enactment of section 580e. In  
24 other words, despite Plaintiffs’ attempt to interpret section 580e so that it would apply to this case  
25 without also operating retroactively, applying the statute as Plaintiffs’ request would cause the precise  
26 harm courts seek to avoid with the presumption against applying statutes retrospectively: interference  
27 with parties’ antecedent rights. *See Nat’l Collection Agency, Inc. v. Fabila*, 93 Cal. App. 3d Supp. 1,  
28 \*3 (1979) (“It is well settled that no law impairing the obligations of contracts may be passed.” (citing

1 U.S. Const. art. I, § 10; Cal. Const. art. I, § 9)); *In re Rauer's Collection Co.*, 87 Cal. App. 2d 248, 253  
2 (1946) (“The rule that a statute is presumed to operate prospectively only, unless an intent to the  
3 contrary clearly appears, is especially applicable to cases where retroactive operation of the statute  
4 would impair the obligations of contracts or interfere with vested rights.”).

5 Plaintiffs’ interpretation of section 580e also ignores the most plausible reading of the statutory  
6 text. Section 580e provides that a lender cannot collect a deficiency “in any case in which the trustor  
7 or mortgager *sells* the dwelling for a sale price less than the remaining amount of the indebtedness  
8 outstanding at the time of the sale.” Cal. Civ. P. Code § 580e(a)(1) (emphasis added). The word  
9 “sells” is prospective in nature; it suggests the legislature intended section 580e’s antideficiency  
10 protections to apply to future short sales, not to extinguish deficiencies remaining from short sales that  
11 occurred before the statute was enacted.

12 The legislative history also indicates that section 580e was intended to apply to short sales  
13 occurring after the statute took effect. Analyzing the July 2011 amendment to section 580e, the  
14 Assembly Committee on Judiciary stated:

15 SB 458 [codified as amended at Cal. Civ. Proc. Code § 580e] . . . adds additional  
16 protections against post-short sale deficiency liability to junior note holders (seconds)  
17 when those lenders approve a short sale. It is important to note that the short sale process  
18 remains voluntary on every participant’s part—only lenders that actually agree to the sale  
will be affected, and sellers that cannot put together an acceptable sale may still go to  
foreclosure and even bankruptcy.

19 Assembly Committee Bill Analysis of SB 458, June 28, 2011, *available at* [ftp://www.leginfo.ca.gov/  
20 pub/11-12/bill/sen/sb\\_0451-0500/sb\\_458\\_cfa\\_20110627\\_113447\\_asm\\_comm.html](ftp://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0451-0500/sb_458_cfa_20110627_113447_asm_comm.html) (last accessed  
21 Sept. 30, 2011). As in the statute itself, the Committee’s use of forward-looking language—“when  
22 those lenders approve a short sale,” “only lenders that actually agree to the sale,” “sellers that cannot  
23 put together an acceptable sale”—suggests the legislature intended section 580e to apply to future short  
24 sales, not those that had already occurred.

25 Section 580e applies only to short sales occurring after the statute was enacted. Here, the  
26 parties negotiated the terms of the short sale, and the short sale occurred, before section 580e was  
27 enacted. Accordingly section 580e does not apply to this case. Thus, the Court **DISMISSES WITH**  
28 **PREJUDICE** Plaintiffs’ second cause of action.

1           **III. Declaratory Relief Under Common Law Antideficiency Protection**

2           Defendants correctly argue that California’s antideficiency protections are creatures of statute,  
3 not the common law. *See* Roger Bernhardt, California Mortgages, Deeds of Trust, and Foreclosure  
4 Litigation § 5.1 (4th ed. 2009); *see also In re Kearns*, 314 B.R. 819, 822-23 (9th Cir. 2004) (discussing  
5 the interplay of the several statutes that comprise “California’s complex web of foreclosure and  
6 antideficiency laws” (citing *Western Sec. Bank v. Superior Court*, 15 Cal. 4th 232, 237 (1997))).  
7 Absent an applicable statutory provision, California law does not provide antideficiency protection.  
8 *See Dreyfuss*, 24 Cal. 4th at 412 (declining to expand the scope of antideficiency statutes because the  
9 breadth of their protections “is a matter for the Legislature to consider”).

10           Plaintiffs argue that the common law “*Hibernia Rule*,” named for *The Hibernia Sav. & Loan*  
11 *Soc’y v. R.S. Thornton*, 109 Cal. 427, 429 (1895), precludes Bank of America from seeking the  
12 deficiency in this case. [FAC, ¶ 43, Pls.’ Opp’n, at 13-14.] The *Hibernia Rule* is not itself an  
13 antideficiency protection, but it does prevent secured lenders from circumventing antideficiency  
14 protections for debtors.

15           Generally, “[i]n California, a creditor secured by a trust deed on real property must rely on the  
16 security before enforcing the underlying debt.” *Bank of Am. v. Graves*, 51 Cal. App. 4th 607, 611  
17 (1996) (citing Cal. Civ. P. Code §§ 580a, 725a, 726); Cal. Civ. P. Code § 726; *see In re Kearns*, 314  
18 B.R. at 820 (discussing section 726 as “California’s so-called ‘one-action/security-first’ real estate  
19 foreclosure statute). “Even if the security is insufficient, the antideficiency statutes (§§ 580a, 580b,  
20 580d) may limit or bar a judgment against the debtor for a deficiency.” *Id.* (citing *Roseleaf Corp. v.*  
21 *Chieringino*, 59 Cal. 2d 35, 38-39 (1963)). Where, however, a creditor is secured by a trust deed on  
22 real property, and “the value of the security has been lost through no fault of creditor, the creditor may  
23 bring a personal action on the debt.” *Id.* (citing *Hibernia*, 109 Cal. at 429). The theory underlying  
24 this avenue for a secured creditor to bring an action against the debtor is “that if the security is lost or  
25 has become valueless at the time the action is commenced, the debt is no longer secured.” *Id.* (quoting  
26 *Brown v. Jensen*, 41 Cal. 2d 193, 195 (1953)). So, for example, where two creditors hold liens on one  
27 parcel of property, and one lienholder forecloses on that parcel, the second lienholder can initiate a  
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1 personal action against the debtor because, at the time of that action, the security no longer has value.<sup>3</sup>

2 *See id.*

3 But under the *Hibernia* Rule, where a secured creditor itself has extinguished the security, the  
4 creditor cannot then initiate a personal action against the debtor. *See id.* at 613. In *Hibernia*, for  
5 example, the secured creditor failed to file a timely claim with the estate of a deceased debtor, and the  
6 superior court assigned the security—a parcel of real property—to the decedent’s husband. 109 Cal. at  
7 428. The California Supreme Court held that, by neglecting to file a timely claim, the creditor  
8 “deprive[d] himself of the right to foreclose the mortgage,” and, therefore, he had also “deprive[d]  
9 himself of the right to action upon the note.” *Id.* at 429.

10 Similarly, in *Pacific Valley Bank v. Schwenke*, the secured creditor, without the debtor’s  
11 consent, released the security through a separate transaction with a third party (the debtor’s business  
12 partner). *See* 189 Cal. App. 3d 134, 137-38 (1987). The Court of Appeal held that “a creditor is not  
13 allowed to circumvent [section 726] by divesting himself of his security without the consent of the  
14 debtor.” *Id.* (citing *Cooper v. Burch*, 3 Cal. App. 470, 471 (1906)). “If he does so, he has waived his  
15 right to proceed on the note.” *Id.* at 140.

16 And in *Simon v. Superior Court*, one bank held two trust deeds on a single parcel of real  
17 property. The bank foreclosed on the first trust deed, and then attempted to sue the debtor directly on  
18 the second trust deed, arguing that, with regard to that deed, it was a sold-out junior lienholder. 4 Cal.  
19 App. 4th 63 (1992). The Court of Appeal held the bank was not a sold-out junior lienholder because,  
20 “[a]s the holder of both the first and second liens, Bank was fully able to protect its secured position.”  
21 *Id.* at 72. By foreclosing on the first deed, the bank itself eliminated the security for the second deed.  
22 Thus, the court held that a deficiency action was barred. *Id.*

23 While Plaintiffs do not expressly state as much, their attempt to apply the *Hibernia* Rule in this  
24 case rests on the following premise: by consenting to a short sale, a secured lender causes the security  
25 to lose value, and therefore forfeits its rights to collect any deficiency. But Plaintiffs point to no  
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27 <sup>3</sup> Under such circumstances, the second lienholder is often referenced as a “sold-out junior  
28 lienholder.” *See Graves*, 51 Cal. App. 4th at 611-12.

1 authority supporting that premise. Moreover, *Hibernia*, *Pacific Valley Bank*, and *Simon* make clear  
2 that the *Hibernia* Rule prevents secured creditors from acting, without the debtors' knowledge, to  
3 extinguish a security in order to circumvent the requirements for secured creditors to "rely on the  
4 security before enforcing the underlying debt." See *Graves*, 51 Cal. App. 4th at 611. Unlike *Hibernia*,  
5 *Pacific Valley Bank*, or *Simon*, Bank of America did not do anything that affected the security without  
6 Plaintiffs' knowledge. Indeed, Plaintiffs themselves sought the short sale, and they actively negotiated  
7 with Bank of America to obtain its consent. Additionally, the deed by which Bank of America  
8 reconveyed the property to Plaintiffs so they could execute the short sale expressly states—in bold  
9 print—that it did not satisfy Plaintiffs' debt.


10 The *Hibernia* Rule does not apply to this case. Plaintiffs have not identified any common law  
11 rule that prevents Bank of America from seeking the deficiency in this case. Accordingly, the Court  
12 **DISMISSES WITH PREJUDICE** Plaintiffs' third cause of action.

13 **CONCLUSION**

14 For the reasons stated above, the Court **GRANTS** Defendants' motion and **DISMISSES**  
15 Plaintiffs' claims **WITH PREJUDICE**. The Clerk shall terminate this case.

16  
17 **IT IS SO ORDERED.**

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20 **DATED: October 13, 2011**

21   
22 **IRMA E. GONZALEZ, Chief Judge**  
23 **United States District Court**