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UNITED STATES DISTRICT COURT  
Northern District of California  
San Francisco Division

EDGARDO C. RUBIO,

No. C 13-05752 LB

Plaintiff,

**ORDER GRANTING MOTION TO  
DISMISS FIRST AMENDED  
COMPLAINT**

v.

[ECF No. 20]

U.S. BANK N.A., AS TRUSTEE FOR THE  
NOTEHOLDERS OF AEGIS ASSET  
BACKED SECURITIES TRUST 2005-3;  
OCWEN LOAN SERVICING LLC;  
WESTERN PROGRESSIVE, LLC;  
MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC.; and  
DOES 1 - 100, Inclusive.

Defendants.

**INTRODUCTION**

Plaintiff Edgardo Rubio sued Defendants U.S. Bank, Ocwen Loan Servicing, Western Progressive, and Mortgage Electronic Registration Systems in connection with foreclosure proceedings commenced against his San Francisco property. *See* First Amended Complaint (“FAC”), ECF No. 16.<sup>1</sup> Defendants move to dismiss. Upon consideration of the papers submitted

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<sup>1</sup> Citations are to the Electronic Case File (“ECF”) with pin cites to the electronically-generated page number at the top of the document.

1 and applicable legal authorities, the court **GRANTS** the motion to dismiss.<sup>2</sup>

2 **STATEMENT**

3 **I. BACKGROUND FACTS<sup>3</sup>**

4 Plaintiff Edgardo Rubio took out a \$610,000 mortgage loan from Aegis Funding Corp. on a  
5 property located at 760 Bacon Street, San Francisco, California (the "Property"). See First Amended  
6 Complaint ("FAC") ¶¶ 3, 9, ECF No. 16. He secured the loan with a Deed of Trust ("DOT"). On  
7 April 21, 2005, Mr. Rubio recorded the DOT in the Official Records of the San Francisco County  
8 Recorder's Office, as document number H941528.<sup>4</sup> *Id.* ¶¶ 3, 9, Ex. A (the Deed of Trust). The DOT  
9 names Amy Mandart as the Trustee. See *id.* Ex. A at 1. It also names Mortgage Electronic  
10 Registration Systems, Inc. ("MERS") as "nominee for Lender and Lender's successors and assigns."  
11 *Id.* Plaintiff alleges that MERS is a corporation that has been suspended from doing business in  
12 California since March 25, 2009, is not licensed to do business in California, and at all relevant  
13 times was illegally conducting business in Alameda County, California. *Id.* ¶ 6.

14 The DOT includes provisions for acceleration and remedies, as follows:

15 22. Acceleration; Remedies. Following Borrower's breach of any covenant or  
16 agreement in this Security Instrument, Lender at its option may require immediate payment  
17 in full of all sums secured by this Security Instrument without further demand and may  
18 invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall  
19 be entitled to collect all expenses incurred in pursuing the remedies provided in this Section  
20 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

21 If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute a  
22 written notice of the occurrence of an event of default and of Lender's election to cause the  
23 Property to be sold. Trustee shall cause this notice to be recorded in each county in which  
24 any part of the Property is located. Lender or Trustee shall mail copies of the notice as  
25 prescribed by Applicable Law to Borrower and to the other persons prescribed by Applicable  
26 Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by  
27 Applicable Law. After the time required by Applicable Law, Trustee, without demand on  
28 Borrower, shall sell the Property at public auction to the highest bidder at the time and place  
and under the terms designated in the notice of sale in one or more parcels and in any order

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24 <sup>2</sup> Pursuant to Civil Local Rule 7-1(b), the court finds this matter suitable for determination  
25 without oral argument and vacates the April 3, 2014 hearing.

26 <sup>3</sup> The following facts are taken from the complaint, the documents attached to it, and the  
27 facts subject to judicial notice.

28 <sup>4</sup> Unless otherwise specified, the recorded documents were filed in the San Francisco County  
Reorder's Office.

1 Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public  
2 announcement at the time and place of any previously scheduled sale. Lender or its designee  
may purchase the Property at any sale.

3 *Id.* Ex. A at 15; *see id.* ¶¶ 24-26 (discussing this provision). The DOT contains other provisions that  
4 relate to the lender’s right to substitute trustees.

5 24. Substitute Trustee: Lender, at its option, may from time to time appoint a successor  
6 trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by  
7 Lender and recorded in the office of the Recorder of the county in which the Property is  
8 located. The instrument shall contain the name of the original Lender, Trustee and Borrower,  
9 the book and page where this Security Instrument is recorded and the name and address of  
the successor trustee. Without conveyance of the Property, the successor trustee shall  
succeed to all the title, powers and duties conferred upon the Trustee herein and by  
Applicable Law. This procedure for substitution of trustee shall govern to the exclusion of  
all other provisions for substitution.

10 *Id.* Ex. A at 15; *see id.* ¶ 27 (discussing this provision).

11 On or before June 28, 2005, Aegis securitized and sold the beneficial interest in Plaintiff’s Deed  
12 of Trust to the Aegis Asset Backed Securities Trust 2005-3, Mortgage-Backed Notes (the “Trust”).

13 *Id.* ¶ 10. The Trust was created by a Pooling and Servicing Agreement (“PSA”) that named  
14 Wilmington Trust Company as Trustee. *Id.* ¶ 10, Ex. B at 6, 21. Wilmington Trust Company’s  
15 assets, including the Trust, were first purchased by Wachovia Bank, N.A., and then by U.S. Bank,  
16 N.A. *Id.* ¶ 11. U.S. Bank currently holds itself out as trustee of the Trust and as the beneficial  
17 interest holder of Mr. Rubio’s DOT. *Id.* According to a “Property Securitization Report” regarding  
18 Mr. Rubio’s property, the Trust is governed by the laws of New York. *Id.*, *see id.* Ex. B at 21.

19 On July 15, 2009, Western Progressive, LLC as Trustee to the DOT recorded a Notice of Default  
20 and Election to Sell Under Deed of Trust (the “First NOD”). *Id.* ¶ 12. At all relevant times,  
21 Western was a limited liability company organized under the laws of Delaware and registered with  
22 the California Secretary of State as business entity no. 200835710284. *Id.* ¶ 5.

23 On October 28, 2009, Aztec Foreclosure Corporation, recorded a substitution of trustee in which  
24 MERS “solely as nominee for U.S. Bank National Association, as Indenture Trustee on behalf of the  
25 Noteholders of Aegis Asset Backed Securities Trust 2005-3, Mortgage-Backed Notes as serviced by  
26 Ocwen Loan Servicing, LLC” substituted Aztec as the trustee of Mr. Rubio’s DOT. *See* RJN Ex. 2.  
27 Also on October 28, 2009, Aztec Foreclosure Service recorded a Notice of Trustee’s Sale  
28 (“NOTS”). *See* FAC ¶ 13.

1 On June 23, 2011, “LSI Title Company, as Agent for Western as Trustee to the DOT” recorded a  
2 second NOD. *Id.* ¶ 14; *see* RJN Ex. 3.

3 On July 25, 2011, another Assignment of Deed of Trust was recorded. FAC ¶ 15; *see* RJN Ex. 4.  
4 In this Assignment, Defendant MERS, “acting solely as nominee for Aegis Funding Corporation,  
5 purported to assign the beneficial interest in Rubio’s DOT “including all rights title and interest in  
6 the mortgage to U.S. BANK, N.A., AS TRUSTEE FOR THE NOTEHOLDERS OF AEGIS ASSET  
7 BACKED SECURITIES TRUST 2005-3.” *Id.* ¶ 15. The document was signed on July 1, 2011, but  
8 states that the assignment was “entered into as of the 24th day of August, 2007.” *See* RJN Ex. 4.

9 On September 7, 2011, Western recorded a Notice of Rescission of Notice of Default rescinding  
10 the June 23, 2011 Notice of Default. *See* RJN Ex. 5.

11 On March 9, 2012, Western, as Trustee to the DOT, recorded a Third NOD. FAC ¶ 16; *see* RJN  
12 Ex. 6.

13 Mr. Rubio alleges that on July 2, 2012, Aegis Funding Company recorded a Substitution of  
14 Trustee (“SOT”) that purported “to substitute Western in as Trustee to the DOT.” FAC ¶ 17.  
15 Although it had not previously been named as trustee, Western had been recording documents since  
16 the July 15, 2009 NOD. *Id.* Also on July 2, 2012, LSI Title Agency recorded an SOT naming  
17 Western as the Trustee. *See* RJN Ex. 7.<sup>5</sup> This SOT was signed by “U.S. Bank National Association,  
18 as Trustee on behalf of the Noteholders of Aegis Asset Backed Securities Trust 2005-3 Mortgage-  
19 Backed Notes, By Ocwen Loan Servicing, LLC, its attorney in fact.” *Id.* Ocwen Loan Servicing,  
20 LLC is a Limited Liability Company organized under the laws of Delaware and registered in  
21 California as business entity no. 200213810063. *Id.* ¶ 4.

22 Western recorded a second, third, and fourth Notice of Trustee’s Sale in the San Francisco  
23 County Recorder’s Office on July 2, 2012, August 30, 2013, and September 4, 2013, respectively.  
24 *Id.* ¶¶ 18-20; RJN Ex. 8 (September 4, 2013 Notice of Trustee’s Sale). Thereafter, Trustee’s Sale  
25 No. 2011-16973 was scheduled for January 27, 2014, to be conducted by Western on behalf of U.S.

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27 <sup>5</sup> It seems likely that the FAC refers to the SOT attached as Exhibit 7 to Defendants’  
28 Request for Judicial Notice, which was not recorded by Aegis Funding Company. Because the court  
presumes the truth of Plaintiff’s allegations, it assumes there are different SOTs. The distinction  
does not change the analysis.

1 Bank, as Trustee. *Id.* ¶ 21.

2 **II. PROCEDURAL HISTORY**

3 Plaintiff filed his original complaint in San Francisco County Superior Court on November 6,  
4 2013, against U.S. Bank, Ocwen Loan Servicing, and Western. *See* Complaint, ECF No. 1-1 at 4.  
5 Defendants removed this action from state court on December 12, 2013. *See* Notice of Removal,  
6 ECF No. 1. On December 19, 2013, Defendants filed a motion to dismiss Plaintiff’s claims.  
7 *See* Motion to Dismiss, ECF No. 7. On January 9, 2014, Plaintiff filed the FAC. *See* ECF No. 16.  
8 The court denied the motion to dismiss as moot. *See* ECF No. 17.

9 In the FAC, Plaintiff asserts claims for (1) breaches of express agreements, (2) breaches of  
10 implied agreements, (3) slander of title, (4) wrongful foreclosure, (5) violation of California Civil  
11 Code section 2923.5, (6) violation of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1601, *et seq.*,  
12 (7) violation of the Real Estate Settlement Procedures Act<sup>6</sup> (“RESPA”), 12 U.S.C. § 2604, (8)  
13 violation of the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692, *et seq.*, (9)  
14 violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1962,  
15 and (10) violations of California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code  
16 § 17200.

17 Defendants thereafter moved to dismiss. *See* ECF No. 20.

18 **ANALYSIS**

19 **I. MOTION TO DISMISS**

20 Rule 8(a) requires that a complaint contain a “short and plain statement of the claim showing that  
21 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A complaint must therefore provide a  
22 defendant with “fair notice” of the claims against it and the grounds for relief. *See Bell Atlantic*  
23 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation and citation omitted).

24 A court may dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) when it does  
25 not contain enough facts to state a claim to relief that is plausible on its face. *See Twombly*, 550  
26 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the  
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28 <sup>6</sup> Plaintiff misnumbered claims seven through ten. *See* FAC at 15, 18, 21, 23, 29 (listing the sixth claim twice). The court follows the correct number sequence.

1 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”  
2 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). “The plausibility standard is not akin to a  
3 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted  
4 unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 557). “While a complaint attacked by a Rule  
5 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to  
6 provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a  
7 formulaic recitation of the elements of a cause of action will not do. Factual allegations must be  
8 enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555 (internal  
9 citations and parentheticals omitted).

10 In considering a motion to dismiss, a court must accept all of the plaintiff’s allegations as true  
11 and construe them in the light most favorable to the plaintiff. *See id.* at 550; *Erickson v. Pardus*, 551  
12 U.S. 89, 93-94 (2007); *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007). In  
13 addition, courts may consider documents attached to the complaint. *Parks School of Business, Inc.*  
14 *v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995) (citation omitted). If the court dismisses the  
15 complaint, it should grant leave to amend even if no request to amend is made “unless it determines  
16 that the pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203  
17 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Cook, Perkiss and Liehe, Inc. v. Northern California*  
18 *Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990)).

## 19 **II. REQUEST FOR JUDICIAL NOTICE**

20 Defendants ask for judicial notice of the following documents, all of which were recorded in the  
21 official records of San Francisco County: (1) a deed of trust that was recorded on April 21, 2005; (2)  
22 a Substitution of Trustee that was recorded on October 28, 2009; (3) a Notice of Default that was  
23 recorded on June 23, 2011; (4) an Assignment of Deed of Trust that was recorded on July 25, 2011;  
24 (5) a Notice of rescission of Notice of Default that was recorded on September 7, 2011; (6) a Notice  
25 of Default that was recorded on March 9, 2012; (7) a Substitution of Trustee that was recorded on  
26 July 2, 2012; and (8) a Notice of Trustee’s Sale recorded on September 4, 2013. Request for  
27 Judicial Notice (“RJN”), ECF No. 21, Exs. 1-7.

28 In considering a motion to dismiss, the court can consider material outside the pleadings that is

1 properly the subject of judicial notice. *See* Fed. R. Evid. 201; *Lee v. City of Los Angeles*, 250 F.3d  
2 668, 689 (9th Cir. 2001); *MGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).  
3 The court also may take judicial notice of material incorporated by reference into the complaint  
4 without converting the motion to dismiss into a motion for summary judgment. *Coto Settlement v.*  
5 *Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010); *Intri-Plex Technologies, Inc. v. Crest Group, Inc.*,  
6 499 F.3d 1048, 1052 (9th Cir. 2007). Documents are incorporated into the complaint by reference  
7 “in situations where the complaint necessarily relies upon a document or the contents of the  
8 document are alleged in a complaint, the document’s authenticity is not in question and there are no  
9 disputed issues as to the document’s relevance.” *Coto Settlement*, 593 F.3d at 1038; *see United*  
10 *States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011); *Knieval v. ESPN*, 393 F.3d 1068,  
11 1076 (9th Cir. 2005); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705, 706 n.4 (9th Cir. 1998), *rev’d by*  
12 *statute on other grounds*; *Int’l Audiotext Network v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir.  
13 1995) (considering an agreement that was not specifically incorporated into the complaint because  
14 the complaint “relies heavily upon its terms and effect” such that the agreement is “integral” to the  
15 complaint). The defendant can attach to a motion to dismiss documents referenced in the complaint  
16 in order to refute the plaintiff’s claims, and the court may consider them. *Branch v. Tunnell*, 14 F.3d  
17 449, 454 (9th Cir. 1994) (*overruled on other grounds in Galbraith v. County of Santa Clara* 307  
18 F.3d 1119, 1127 (9th Cir. 2002)).

19 Because RJN Exhibits 3-4, 6 and 8 are referenced in the FAC and form the basis of allegations  
20 contained therein, the court may take judicial notice of them and may consider the facts within them.  
21 Plaintiff does not object to the court taking judicial notice of the existence of these documents – all  
22 of which are public records – but he objects to the court taking judicial notice of the “facts”  
23 contained within them as “hearsay and reasonably subject to dispute.” Opp’n to RJN, ECF No. 25.  
24 Because these documents are incorporated by reference into the complaint, the court can consider  
25 them in full.

26 RJN Exhibits 2, 5, and 7 are public records the existence of which is not subject to dispute, so  
27 the court takes judicial notice of the documents and undisputed facts contained within them. *See*  
28 *See Lee*, 250 F.3d at 689-90. Because Plaintiff’s objects to the facts (though he does not specifically

1 dispute them), the court does not take judicial notice of the facts within Exhibits 2, 5, and 7.<sup>7</sup>

2 **III. GENERALLY APPLICABLE ARGUMENTS**

3 **A. Western Progressive’s Conduct is Privileged**

4 To the extent that Plaintiff challenges Western Progressive’s recording of statutorily-required  
5 notices or performing statutorily-required foreclosure procedures, they are privileged  
6 communications under the qualified common-interest privilege of California Civil Code § 47.  
7 Section 47 creates a qualified privilege for any communication made “without malice, to a person  
8 interested therein.” Cal. Civ. Code § 47(c). This privilege applies to all torts other than malicious  
9 prosecution. *Edwards v. Centex Real Estate Corp.*, 53 Cal. App. 4th 15, 29 (1997) (discussing the  
10 expansion of section 47 beyond defamation claims).

11 Section 2924(d) “makes the recording of the notice of default by the beneficiary, and any other  
12 statutorily authorized act of the beneficiary acting as trustee, a privileged communication under  
13 section 47.” *Kachlon v. Markowitz*, 168 Cal. App. 4th 316, 333-34 (2008). Additionally, section  
14 2924(b) creates a privilege for trustees: “In performing acts required by this article, the trustees shall  
15 incur no liability for any good faith error resulting from reliance on information provided in good  
16 faith by the beneficiary regarding the nature and the amount of the default under the secured  
17 obligation, deed of trust, or mortgage.” Cal. Civ. Code § 2924(b).

18 Here, the FAC does not allege that Western acted with malice or did not rely in good faith on the  
19 information provided by the beneficiary. *See generally* FAC. In opposition, he argues that  
20 “Defendants acted with the required amount of disregard” because they recorded the documents at  
21 issue with knowledge of the facts underlying Plaintiff’s wrongful securitization theory (discussed  
22 below). Opp’n at 19. This argument is unsupported by factual allegations that Western had the  
23 requisite knowledge or acted with malice. Plaintiff does not otherwise allege any conduct by  
24 Western that would fall outside of the immunity afforded a trustee related to its involvement in a  
25 nonjudicial foreclosure sale. *Perez v. Wells Fargo Bank, N.A.*, No. C-11-02279 JCS, 2011 WL  
26 3809808, at \*12-\*13 (N.D. Cal. Aug. 29, 2011). He fails to state a claim against Western.

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28 <sup>7</sup> Exhibit 1 appears to be a copy of the DOT attached to the FAC.



1           **B. Standing to Challenge Defendants’ Right to Foreclose**

2           The next issue is whether, as a matter of law, Plaintiff can bring a suit to challenge Defendants’  
3 right to foreclose. Defendants argue that Plaintiff’s suit is barred by the decision in *Gomes v.*  
4 *Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149 (2012). Motion at 11-12. The court  
5 disagrees. As Judge Chen has explained:

6           *Gomes* held that California Civil Code § 2924(a)(1) does not “provide for a judicial  
7 action to determine whether the person initiating the foreclosure process is indeed  
8 authorized.” *Id.* at 1155, 121 Cal. Rptr. 3d 819. But the issue in *Gomes* was not  
9 whether the wrong entity had initiated foreclosure; rather, the issue was whether the  
10 company selling the property in the nonjudicial foreclosure sale (MERS) was  
11 authorized to do so by the owner of the promissory note. *See id.* at 1155, 121 Cal.  
12 Rptr. 3d 819 (rejecting the argument that a plaintiff may test whether the person  
13 initiating the foreclosure has the authority to do so; “[t]he recognition of the right to  
14 bring a lawsuit to determine a nominee’s authorization to proceed with foreclosure on  
15 behalf of the noteholder would fundamentally undermine the nonjudicial nature of the  
16 process and introduce the possibility of lawsuits filed solely for the purpose of  
17 delaying valid foreclosures”). Notably, the *Gomes* court distinguished a case cited by  
18 the plaintiff precisely because, in that case, “the plaintiff alleged wrongful foreclosure  
19 on the ground that assignments of the deed of trust had been improperly backdated,  
20 and thus the wrong party had initiated the foreclosure process. No such infirmity is  
21 alleged here.” *Id.* Thus, *Gomes* explicitly avoided the scenario pled here, in which  
22 “the plaintiff’s complaint identified a specific factual basis for alleging that the  
23 foreclosure was not initiated by the correct party.” *Id.* at 1156. *Gomes* is therefore  
24 inapposite.

25 *Tamburri v. Suntrust Mortgage, Inc.*, No. C–11–2899 EMC, 2011 WL 6294472, \*4 (N.D. Cal. Dec.  
26 15, 2011) (footnote omitted); *see Naranjo v. SBMC Mortgage*, No. 11-cv-2229-L(WVG), 2012 WL  
27 3030370, at \*3 (S.D. Cal. July 24, 2012) (finding defendants’ reliance on *Gomes* to be “misguided”  
28 where plaintiff alleged “that the transfer of rights to the WAMU Trust is improper, thus Defendants  
consequently lack the legal right to either collect on the debt or enforce the underlying security  
interest”). Here, Plaintiff does not seek to determine whether Defendants are authorized to  
foreclose; rather, he specifically alleges that they are not. While the factual basis is not clearly  
alleged in the current complaint, on this record, the court does not apply *Gomes* to preclude Plaintiff  
from challenging Defendants’ standing to foreclose and instead dismisses the claims on other  
grounds.

29           **C. Whether Plaintiff Must Allege Prejudice From Foreclosure**

30           Defendants also move to dismiss on the basis that Plaintiff was not prejudiced by the challenged  
31 foreclosure. Motion at 12.

1 Under California law, to challenge a foreclosure sale successfully, the plaintiff must provide  
 2 evidence of failure to comply with the procedural requirements for the foreclosure sale that cause  
 3 prejudice to the person attacking the sale. *See Angell v. Superior Court*, 73 Cal. App. 4th 691, 700  
 4 (1999). *See, e.g., Siliga v. Mortgage Electronic Registrations Systems, Inc.*, 219 Cal. App. 4th 75,  
 5 85 (2013) (borrowers lacked standing to complain about loan servicer’s and assignee’s alleged lack  
 6 of authority to foreclose on deed of trust where borrowers were in default under the note, absent  
 7 evidence that the original lender would have refrained from foreclosure).

8 “Prejudice is not presumed from ‘mere irregularities’ in the foreclosure process.” *Fontenot v.*  
 9 *Wells Fargo Bank*, 198 Cal. App. 4th 256, 272 (2011). In *Fontenot*, the court explained that there is  
 10 no prejudice where a borrower is in default and the assignment of the loan does not interfere with  
 11 the borrower’s ability to make payments:

12 As to plaintiff, an assignment merely substituted one creditor for another, without changing  
 13 her obligations under the note. Plaintiff effectively concedes she was in default, and she does  
 14 not allege that the transfer to HSBC interfered in any manner with her payment of the note . .  
 15 . nor that the original lender would have refrained from foreclosure under the circumstances  
 presented. If MERS indeed lacked authority to make the assignment, the true victim was not  
 plaintiff but the original lender, which would have suffered the unauthorized loss of a \$1  
 million promissory note.

16 *Id.* *Fontenot* was a post-foreclosure challenge.

17 Where foreclosure has not yet occurred, however, some courts find the threat of foreclosure to be  
 18 sufficient prejudice at the pleadings stage. “[T]he threat of foreclosure by the wrong party would  
 19 certainly be sufficient to constitute prejudice to the homeowner because there is no power of sale  
 20 without a valid notice of default.” *Tamburri v. Suntrust Mortgage, Inc.*, No. C-11-2899 EMC, 2011  
 21 WL 6294472, at \*14 (N.D. Cal. Dec. 15, 2011); *see Sacchi v. Mortgage Elec. Registration Sys., Inc.*,  
 22 No. CV 11-1658 AHM CWX, 2011 WL 2533029, at \*9-10 (C.D. Cal. June 24, 2011) (allowing  
 23 wrongful foreclosure claim to go forward where foreclosure sale had not yet taken place).

24 Here, Plaintiff’s action seeks to prevent the foreclosure from occurring. Under *Tamburri*,  
 25 arguably that is sufficient prejudice at this stage of the case. Nonetheless, the court need not reach  
 26 the issue because it dismisses the claims on other grounds.

#### 27 **D. Standing to Assert Claims for Breach of the Pooling and Servicing Agreement**

28 The next issue is whether Plaintiff has standing to the extent his claims are based on Defendants’

1 alleged noncompliance with the Trust’s pooling and servicing agreement (the “PSA”). *See*,  
2 *e.g.*, FAC ¶¶ 30-40, 46, 52-62 (claims one through four).

3 “Ninth Circuit district courts have come to different conclusions when analyzing a plaintiff’s  
4 right to challenge the securitization process . . . .” *Johnson v. HSBC Bank USA, N.A.*, No.  
5 3:11-cv-2091-JM-WVG, 2012 WL 928433, at \*2 (S.D. Cal. March 19, 2012) (collecting cases).  
6 The majority position is that plaintiffs lack standing to challenge noncompliance with a pooling and  
7 service agreement or other similar agreement unless they are parties to or third-party beneficiaries of  
8 the agreement. *See Aniel v. GMAC Mortg., LLC*, No. C 12-04201 SBA, 2012 WL 5389706, at \*4  
9 (N.D. Cal. Nov. 2, 2012) (collecting cases); *Almutarreb v. Bank of New York Trust Co., N.A.*, No.  
10 C-12-3061 EMC, 2012 WL 4371410, at \*2 (N.D. Cal. Sept. 24, 2012) (disagreeing with *Vogan* and  
11 finding that because plaintiffs were neither parties nor third party beneficiaries to pooling and  
12 service agreement, they lacked standing to challenge whether loan transfer occurred outside time  
13 limits in agreement); *Madlaing v. JPMorgan Chase Bank, N.A.*, No. CV F 12-2069 LJO SMS, 2013  
14 WL 2403379, at \*8 (E.D. Cal. May 31, 2013) (plaintiff lacked standing to enforce pooling and  
15 service agreement because he was neither party to nor intended third-party beneficiary of  
16 agreement); *but see Vogan v. Wells Fargo Bank, N.A.*, No. 2:11-CV-02098-JAM-KJN, 2011 WL  
17 5826016, at \*7 (E.D. Cal. Nov. 17, 2011) (allowing UCL claim when plaintiffs alleged that  
18 assignment was executed after the closing date of securities pool, “giving rise to a plausible  
19 inference that at least some part of the recorded assignment was fabricated”). The court follows the  
20 majority approach.

21 Plaintiff urges the court to follow *Glaski v. Bank of America, N.A.*, 218 Cal. App. 4th 1079  
22 (2013), in which the court held that a borrower may have standing to challenge a foreclosure where  
23 the note holder acquired the note from a party who had been assigned it in a void transaction (under  
24 New York law). *Id.* at 1095. There, the note was assigned to a securitized trust after the date that  
25 the trust was closed for purposes of acquiring additional assets. *Id.* The trust in *Glaski* was formed  
26 under New York law, which the court interpreted to confer standing in the specific situation. *See id.*  
27 at 1097. The court noted that “some federal district courts sitting in California have rejected the  
28 post-closing date theory of invalidity on the grounds that the borrower does not have standing to

1 challenge an assignment between two other parties.” *Id.* at 1098. The court distinguished those  
2 cases, however, because “they do not apply New York trust law to the operation of the securitized  
3 trusts in question.” *Id.* at 1098.

4 Every court in this district that has evaluated *Glaski* has found it unpersuasive. *See Zapata v.*  
5 *Wells Fargo Bank, N.A.*, No. C 13-04288 WHA, 2013 WL 6491377, at \*2 (N.D. Cal. Dec. 10, 2013)  
6 (collecting cases). The court follows those cases and concludes that plaintiffs lack standing to  
7 challenge noncompliance with a PSA in securitization unless they are parties to the PSA or third  
8 party beneficiaries of the PSA. Accordingly, to the extent Plaintiff’s claims are based on violation  
9 of a PSA, the court dismisses them with leave to amend facts showing that Plaintiff is a party to or  
10 third-party beneficiary of that PSA.

#### 11 **E. MERS’s Authority to Assign the Deed of Trust**

12 Several of Plaintiff’s claims also are based upon the theory that MERS “could not have retained  
13 the beneficial interest in the DOT after Aegis sold this interest to the securitized trust.” *See, e.g.*,  
14 FAC ¶ 28. Plaintiff in essence alleges that MERS had no authority to execute the assignment that  
15 was recorded on July 25, 2011 and that therefore, the assignment recorded on July 25, 2011 from  
16 MERS to U.S. Bank was invalid.

17 The argument that MERS had no authority is contradicted by the plain language of the DOT  
18 attached to Plaintiff’s complaint. The DOT states that MERS is “acting solely as a nominee for  
19 Lender and Lender’s successors and assigns. . . [and] is the beneficiary under this Security  
20 Instrument.” FAC Ex. A at 1. The DOT also grants “MERS (as nominee for Lender and Lender’s  
21 successors and assigns) . . . the right to: exercise any or all . . . interests, including . . . the right to  
22 foreclose and sell the Property.” *Id.* at 3. Numerous California courts have held that MERS, as the  
23 nominee of the beneficiary, has the authority to foreclose and the authority to assign its beneficial  
24 interest to a third party. *See Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 270-71  
25 (2011); *Gomes v. Countrywide Home Loans*, 192 Cal. App. 4th 1149, 1151 (2011); *see also Perry v.*  
26 *Nat’l Default Servicing Corp.*, No. 10-CV-03167-LHK, 2010 WL 3325623, at \*4 (N.D. Cal. Aug.  
27 20, 2010) (plaintiffs unlikely to succeed on claim that assignment by MERS was invalid since Deed  
28 of Trust stated that MERS had right to act as nominee, including right to assign).

**F. The Tender Rule**

The next issue is whether Plaintiff has standing to challenge either the foreclosure proceedings or the propriety of the recorded documents because he has not alleged that he is willing and able to tender the full amount that he owes. Motion at 14-15. Generally, the “tender rule” applies to claims to set aside a trustee’s sale for procedural irregularities or alleged deficiencies in the sale notice. *Robinson v. Bank of Am.*, No. 12–CV–00494–RMW, 2012 WL 1932842, at \*3 (N.D. Cal. May 29, 2012); *Tamburri*, 2011 WL 6294472, at \*3. “[T]he rationale behind the rule is that if plaintiffs could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the plaintiffs.” *Tamburri*, 2011 WL 6294472, at \*3 (quoting *Cohn v. Bank of Am.*, No. 2:10–cv–00865 MCE KJN PS, 2011 WL 98840, at \*9 (E.D. Cal. Jan. 12, 2011)).

The rule is not absolute, though. Indeed, “[t]ender may not be required where it would be inequitable to do so.” *See Onofrio v. Rice*, 55 Cal. App. 4th 413, 424 (Cal. Ct. App. 1997) (person who purchased the plaintiff’s property at the foreclosure sale was the plaintiff’s own foreclosure consultant who represented that he would assist the plaintiff in avoiding foreclosure). In addition, several federal courts sitting in California have held that the tender rule applies only in cases seeking to set aside a completed sale, rather than an action to prevent a pending sale. *See, e.g., Robinson*, 2012 WL 1932842, at \*4; *Vissuet v. Indymac Mortgage Serv.*, No. 09–CV–2321–IEG (CAB), 2010 WL 1031013, at \*2 (S.D. Cal. Mar. 19, 2010); *Giannini v. Am. Home Mortgage Servicing, Inc.*, No. 11–04489 THE, 2012 WL 298254, at \*3 (N.D. Cal. Feb. 1, 2012). Moreover, tender is not required where a plaintiff alleges a violation of California Civil Code § 2923.5, because, as one California appellate court has stated, “[t]he whole point of section 2923.5 is to create a new, even if limited right, to be contacted about the possibility of alternatives to full payment of arrearages. It would be contradictory to thwart the very operation of the statute if enforcement were predicated on full tender.” *Mabry v. Superior Court*, 185 Cal. App. 4th 208, 225 (Cal. Ct. App. 2010); *see Perez v. Am. Home Mortgage Servicing, Inc.*, No. C 12–00932 WHA, 2012 WL 1413300, at \*5 (N.D. Cal. Apr. 23, 2012) (“Contrary to defendants’ contention, a borrower need not tender the full amount of indebtedness to be entitled to her rights under Section 2923.5.”); *Valdez v. JPMorgan Chase Bank*,

1 N.A., No. EDCV 11–0935 DOC (DTBx), 2012 WL 995278, at \*5 n.5 (C.D. Cal. Mar. 20, 2012)  
 2 (citing *Mabry*); *Luciw v. Bank of Am., N.A.*, No. 5:10–cv–5969–JF (HRL), 2011 WL 1740114, at \*2  
 3 (N.D. Cal. May 5, 2011). Finally, where a plaintiff alleges that the entity lacked authority to  
 4 foreclose on the property, the foreclosure sale would be void. *See Dimock v. Emerald Properties*  
 5 *LLC*, 81 Cal. App. 4th 868, 876 (2000). And “where a sale is void, rather than simply voidable,  
 6 tender is not required.” *Tamburri*, 2011 WL 6294472, at \*4 (citing *Miller & Starr California Real*  
 7 *Estate 3d § 212*); *see also Martinez v. Am.’s Wholesale Lender*, 446 F. App’x 940, 943 (9th Cir.  
 8 2011) (“The tender rule does not apply to a void, as opposed to a voidable, foreclosure sale.”);  
 9 *Dimock*, 81 Cal. App. 4th at 878.

10 Here, Plaintiff asserts that Defendants do not have authority to foreclose and that any foreclosure  
 11 sale would be void. Accordingly, he does not need to allege tender. *See Avila v. Wells Fargo Bank*,  
 12 No. C 12–01237 WHA, 2012 WL 2953117, at \*15 (N.D. Cal. July 19, 2012) (“By alleging that the  
 13 purported trustee, NDex West, was not properly substituted as trustee, had no interest in the subject  
 14 property, and thus was not authorized to initiate a non-judicial foreclosure when it recorded the  
 15 notice of default, plaintiff alleges that the foreclosure sale was void. As such, the tender rule does  
 16 not apply.”) (internal citation omitted); *Vogan v. Wells Fargo Bank*, No. 2:11-CV-02098-JAM-KJN,  
 17 2011 WL 5826016, at \*7-8 (E.D. Cal. Nov. 17, 2011) (“The Court holds that the tender requirement  
 18 does not apply to this case because Plaintiffs are challenging the beneficial interest held by U.S.  
 19 Bank in the deed of trust, not the procedural sufficiency of the foreclosure itself.”); *see also In re*  
 20 *Salazar*, 448 B.R. 814, 819 (S.D. Cal. 2011) (“If U.S. Bank was not authorized to foreclose the  
 21 [Deed of Trust] under Civil Code section 2932.5, the foreclosure sale may be void, and Salazar  
 22 would not need to tender the full amount of the Loan to set aside the sale.”).

#### 23 **IV. THE CLAIMS IN THE FIRST AMENDED COMPLAINT**

##### 24 **A. Breach of Express Agreements**

25 Plaintiff’s first claim is for breach of express agreements, specifically the Deed of Trust and the  
 26 Trust’s Pooling and Servicing Agreement. *See* FAC ¶¶ 22-32.

27 To state a claim for breach of contract, a plaintiff must show the following: (1) a contract  
 28 existed; (2) the plaintiff performed his duties or was excused from performing his duties under the

1 contract; (3) the defendant breached the contract; and (4) the plaintiff suffered damages as a result of  
2 that breach. *See First Commercial Mortgage Co. v. Reece*, 89 Cal. App. 4th 731, 745 (2001).

3 “Facts alleging a breach, like all essential elements of a breach of contract cause of action, must be  
4 pleaded with specificity.” *See Levy v. State Farm Mut. Auto. Ins. Co.*, 150 Cal. App. 4th 1, 5 (2007).

5 “Resolution of contractual claims on a motion to dismiss is proper if the terms of the contract are  
6 unambiguous.” *Monaco v. Bear Stearns Residential Mortg. Corp.*, 554 F. Supp. 2d 1034, 1040 (C.D.  
7 Cal. 2008) (citing *Bedrosian v. Tenet Healthcare Corp.*, 208 F.3d 220 (9th Cir. 2000); *Westlands*  
8 *Water Dist. v. U.S. Dep’t of Interior*, 850 F. Supp. 1388, 1408 (E.D. Cal. 1994)). “A contract  
9 provision will be considered ambiguous when it is capable of two or more reasonable  
10 interpretations.” *Id.* (citing *Bay Cities Paving & Grading, Inc. v. Lawyers’ Mut. Ins. Co.*, 5 Cal. 4th  
11 854, 867 (1993)). “An ambiguity may appear on the face of an agreement or extrinsic evidence may  
12 reveal a latent ambiguity.” *Fremont Indem. Co. v. Fremont Gen. Corp.*, 148 Cal. App. 4th 97, 114  
13 (2007) (citation omitted).

14 Plaintiff’s claim for breach of the DOT is that under the DOT, the lender or trustee is required to  
15 record notices of default, substitutions of trustee, and assignments. *See* FAC ¶¶ 24-28. Defendants  
16 breached these provisions by recording documents when they were not authorized to do so. *Id.* For  
17 example, Plaintiff alleges that Defendants violated the DOT because they are “not in fact the true  
18 Lender or Trustee” but still filed a notice of default. FAC ¶ 26.

19 These bare allegations are not “a short and plain statement of the claim showing that the pleader  
20 is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The allegations are that Defendants were not parties to  
21 the contract, and then the issue is, how could they breach it? Also, to the extent Plaintiff’s claim is  
22 based on an alleged breach of the Trust’s PSA, he lacks standing, as discussed above.

23 The court dismisses the breach of contract claims without prejudice.

#### 24 **B. Breach of Implied Contract**

25 Plaintiff’s second claim is for breach of implied agreement. *See* FAC ¶¶ 33-40. Under  
26 California law, “[a] contract is either express or implied.” *Retired Emps. Ass’n of Orange Cnty.,*  
27 *Inc. v. County of Orange*, 52 Cal. 4th 1171, 1178 (2011) (citing Cal. Civ. Code § 1619). “The  
28 existence and terms of an express contract are stated in words.” *Id.* (citing Cal. Civ. Code § 1620).

1 “The existence and terms of an implied contract are manifested by conduct.” *Id.* (citing Cal. Civ.  
 2 Code § 1621). “The distinction reflects no difference in legal effect but merely in the mode of  
 3 manifesting assent.” *Id.* “Accordingly, a contract implied in fact consists of obligations arising  
 4 from a mutual agreement and intent to promise where the agreement and promise have not been  
 5 expressed in words.” *Id.* (internal quotation and citation omitted). The elements of a cause of action  
 6 for breach of an express or implied contract are the same. *See Gomez v. Lincare, Inc.*, 173 Cal. App.  
 7 4th 508, 525 (2009). The elements are: (1) the existence of the contract; (2) performance by the  
 8 plaintiff or excuse for nonperformance; (3) breach by the defendant; and (4) damages. *First*  
 9 *Commercial Mortg. Co. v. Reece*, 89 Cal. App. 4th 731, 745 (2001).

10 The FAC fails to allege any elements of the claim. Plaintiff claims that an indemnification  
 11 agreement in the Aegis 2005-3 Trust PSA creates an implied contract with him that Defendants  
 12 breached by improperly invoking the power of sale and failing to record the DOT’s assignment.  
 13 Plaintiff alleges he was damaged “in that Plaintiff risks losing title to his Property if the power of  
 14 sale clause is enforceable.” *Id.* ¶ 40. It is not obvious how any of this constitutes a contract, what its  
 15 terms might be, or how Defendants could have breached it. The court dismisses the claim without  
 16 prejudice.

### 17 C. Slander of Title

18 Plaintiff next alleges slander of title in connection with the NODs, NOTS, and the substitution of  
 19 trustee. *See* FAC ¶¶ 41-50.

20 Slander of title “occurs when a person, without privilege to do so, publishes a false statement  
 21 that disparages title to property and causes pecuniary loss.” *Truck Ins. Exchange v. Bennett*, 53 Cal.  
 22 App. 4th 75, 85 (1997). The required elements of a claim for slander of title are “(1) a publication,  
 23 (2) without privilege or justification, (3) falsity, and (4) direct pecuniary loss.” *Sumner Hill*  
 24 *Homeowners’ Ass’n, Inc. v. Rio Mesa Holdings, LLC*, 205 Cal. App. 4th 999, 1030 (2012).

25 A “privileged” publication is one made “[i]n a communication, without malice, to a person  
 26 interested therein [ ] by one who is also interested.” Cal. Civ. Code § 47(c)(1). Nonjudicial  
 27 foreclosure documents are subject to this privilege. *See* Cal. Civ. Code § 2924(d); *see also Ogilvie*  
 28 *v. Select Portfolio Serv’g*, No. 12–CV–001654–DMR, 2012 WL 3010986, at \*3 (N.D. Cal. July 23,



1 2012) (collecting cases). Malice is defined as actual malice, meaning “that the publication was  
 2 motivated by hatred or ill will towards the plaintiff or by a showing that the defendant lacked  
 3 reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard  
 4 of the plaintiff’s rights.” *Kachlon*, 168 Cal. App. 4th at 336. The statutory privilege for trustees of  
 5 deeds of trust discussed above, applies to slander of title claims. *See* Cal. Civ. Code § 2924(b).

6 A “direct pecuniary loss” is restricted to:

7 (a) the pecuniary loss that results directly and immediately from the effect of the conduct of  
 8 third persons, including impairment of vendibility or value caused by disparagement, and

9 (b) the expense of measures reasonably necessary to counteract the publication, including  
 litigation to remove the doubt cast upon vendibility or value by disparagement.

10 *Ryan v. Editions Ltd. W., Inc.*, No. C-06-4812-PVT, 2007 WL 4577867, at \*12 (N.D. Cal. Dec. 27,  
 11 2007) (quoting *Appel v. Burman*, 159 Cal. App. 3d 1209, 1215 (1984); Rest.3d Torts § 633).

12 Pecuniary loss may be comprised of attorney’s fees incurred in quieting title to the allegedly  
 13 slandered property, but not attorney’s fees incurred in the slander of title action itself. *Id.* (“In an  
 14 action for disparagement of title the plaintiff may recover as damages the expense of legal  
 15 proceedings necessary to remove a cloud on the plaintiff’s title. While attorney’s fees are allowed  
 16 for the fees incurred in clearing title, fees incurred in prosecuting a slander of title action are not.”)  
 17 (citation omitted) (emphasis added).

18 Plaintiff’s slander of title claim is based on the filing of three allegedly false documents: the  
 19 June 23, 2011 Notice of Default, the Assignment that was recorded on July 25, 2011, and the July 2,  
 20 2012 Substitution of Trustee. *See* FAC ¶¶ 41-50.

21 As to the June 23, 2011 NOD, Plaintiff alleges it is false because the signatory “had no authority  
 22 to sign on behalf of the true beneficiaries.” FAC ¶ 42. This allegation does not support a slander of  
 23 title claim because Plaintiff can show no damages by the allegedly false signature. *See Elliott v.*  
 24 *Mortgage Elec. Registration Sys., Inc.*, No. 12-CV-4370 YGR, 2013 WL 1820904, at \*2 (N.D. Cal.  
 25 Apr. 30, 2013) (allegedly “robo-signed” documents did not affect the validity of the foreclosure  
 26 process in light of plaintiff’s default and, therefore, did not support slander of title claim and  
 27 collecting cases). Furthermore, the June 23, 2011 NOD was rescinded on September 7, 2011. *See*  
 28 RJN Ex. 5. Plaintiff fails to connect the rescinded NOD to any pecuniary loss.

1 Plaintiff's remaining allegations are either based on his challenge to the Trust's PSA, FAC ¶¶ 44,  
2 46-49, or based on his argument that MERS cannot assign the beneficial interest, FAC ¶¶ 45, 49.  
3 These theories fail to show that a document is false for the reasons discussed above.

#### 4 **D. Wrongful Foreclosure**

5 Plaintiff's next claim is for wrongful foreclosure. *See* FAC ¶¶ 51-62.

6 Under California law, "[t]he elements of an equitable cause of action to set aside a foreclosure  
7 sale are as follows: (1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive  
8 sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party  
9 attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and  
10 (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the  
11 amount of the secured indebtedness or was excused from tendering." *Lona v. Citibank, N.A.*, 202  
12 Cal. App. 4th 89, 104 (2011). "Justifications for setting aside a trustee's sale . . . which satisfy the  
13 first element, include the trustee's or the beneficiary's failure to comply with the statutory  
14 procedural requirements for the notice or conduct of the sale." *Id.* at 104. "Other grounds include  
15 proof that: (1) the trustee did not have the power to foreclose, (2) the trustor was not in default, no  
16 breach had occurred, or the lender had waived the breach, or (3) the deed of trust was void." *Id.*

17 Plaintiff bases his wrongful foreclosure claim on his theory that the late transfer to the Trust  
18 violated the PSA and that this rendered invalid the subsequently-recorded foreclosure documents.  
19 FAC ¶¶ 51-59. As discussed above, however, Plaintiff fails to establish that he has standing to sue  
20 based on the alleged breach of the PSA. Also, this theory is not with sufficient clarity for the court  
21 to follow the logic and appears to be contradicted by other allegations in the complaint. The court  
22 dismisses the claim with leave to amend.

#### 23 **E. California Civil Code § 2923.5**

24 Plaintiff's fifth claim alleges that Defendants violated California Civil Code section 2923.5 by  
25 initiating a non-judicial foreclosure proceeding on his home without fulfilling the statutory  
26 prerequisites. *See* FAC ¶¶ 63-65.

27 Section 2923.5 obligates a party to contact a borrower by phone or in person at least 30 days  
28 before filing a notice of default in order to "explore options for the borrower to avoid foreclosure."

1 Cal. Civ. Code § 2923.5(a)(2). The statute also requires a notice of default to include “a declaration  
 2 that the mortgagee, beneficiary, or authorized agent has contacted the borrower” or “has tried with  
 3 due diligence to contact the borrower as required by this section.” Cal. Civ. Code § 2923.5(b). “The  
 4 right conferred by section 2923.5 is a right to be contacted to ‘assess’ and ‘explore’ alternatives to  
 5 foreclosure prior to a notice of default.” *Mabry v. Superior Court*, 185 Cal. App. 4th 208, 225  
 6 (2010). “Any ‘assessment’ must necessarily be simple – something on the order of, ‘why can’t you  
 7 make your payments?’ . . . Exploration must necessarily be limited to merely telling the borrower  
 8 the traditional ways that foreclosure can be avoided . . . , as distinct from requiring the lender to  
 9 engage in a process that would be functionally indistinguishable from taking a loan application in  
 10 the first place.” *Id.* at 232. “The only remedy provided [for a violation of Section 2923.5] is a  
 11 postponement of the sale before it happens.” *Id.* at 235 (emphasis in original).

12 Plaintiff alleges that Defendants violated section 2923.5 in two ways. First, they failed to  
 13 contact him, in person or by telephone, at least 30 days prior to recording the March 9, 2012 NOD,  
 14 and failed to try with due diligence to contact him. FAC ¶ 64. Second, they failed to attach a  
 15 declaration to the NOD or include a statement of compliance within it. *Id.*

16 Defendants point out that Plaintiff’s claim is contradicted by other allegations in the FAC.  
 17 Motion at 18-19. In the allegations pertaining to the FDCPA claim discussed below, Plaintiff  
 18 alleges that “Defendants violated the FDCPA with actions pertaining to enforcement of the Note and  
 19 Plaintiff’s DOT with challenged debt collection conduct *including Section 2923.5 compliance* which  
 20 failed to include the FDCPA Mini Miranda Warning and FDCPA 30-day validation notice  
 21 requirements.” FAC ¶ 98; *see also* ¶ 99 (referring to the contents of “Defendants [*sic*]  
 22 correspondence or verbal communications regarding Section 2923.5 compliance”); ¶ 101 (same). In  
 23 his opposition brief, Plaintiff argues that the “correspondence or verbal communications” in question  
 24 is the March 9, 2012 NOD. Opp’n at 24.

25 The written notation on the NOD is not obviously correspondence or verbal communication, and  
 26 Plaintiff contradicts his own allegations. The court grants the motion to dismiss.

## 27 **F. TILA**

28 In his sixth claim, Plaintiff alleges that Defendants violated TILA by:

1 failing to provide Plaintiff with accurate material disclosures required under TILA  
 2 and not taking into account the intent of the State Legislature in approving this statute  
 3 which was to fully inform home buyers of the pros and cons of adjustable rate  
 4 mortgages in a language (both written and spoken) that they can understand and  
 comprehend; and advise them to compare similar loan products with other lenders. It  
 also requires the lender to offer other loan products that might be more advantageous  
 for the borrower under the same qualifying matrix.

5 FAC ¶ 67. He also argues that Defendants did not notify him within 30 days after transferring the  
 6 loan. *Id.* ¶ 68. Defendants respond that TILA’s one-year statute of limitation bars the claim and it is  
 7 insufficiently pleaded. Motion at 19-20.

8 TILA aims to “avoid the uninformed use of credit.” 15 U.S.C. § 1601(a). It “has the broad  
 9 purpose of promoting ‘the informed use of credit’ by assuring ‘meaningful disclosure of credit  
 10 terms’ to consumers.” *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559 (1980) (quoting 15  
 11 U.S.C. § 1601). It “requires creditors to provide borrowers with clear and accurate disclosures of  
 12 terms dealing with things like finance charges, annual percentage rates of interest, and the  
 13 borrower’s rights.” *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998) (citing 15 U.S.C. §§  
 14 1631-32, 1635 & 1638). If a lender fails to disclose required material information, a borrower has a  
 15 right to monetary damages within one year of consummation of the loan. 15 U.S.C. § 1640(e); *see*  
 16 *King v. California*, 784 F.2d 910, 915 (1986). Generally, inaccuracies in disclosures are evident  
 17 upon reviewing the disclosure documents themselves, and the statute of limitations begins to run the  
 18 day the documents are executed. *See Meyer v. Ameriquest Mortgage Co.*, 342 F.3d 899, 902 (9th  
 19 Cir. 2003).

20 Here, the loan transaction was in 2005, and the failure to provide information at origination was  
 21 time-barred one year after that. As to the failure to provide disclosures within 30 days of a transfer  
 22 of interest, the last transfer was recorded on July 25, 2011. Any disclosures were due on August 24,  
 23 2011 and the claim would expire on August 24, 2012. The lawsuit was filed in November 2013.

24 Plaintiff nonetheless argues that equitable tolling applies. For TILA damages claims,<sup>8</sup> “the  
 25

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26 <sup>8</sup> A borrower also has a right to rescind within three years of consummation of the loan. 15  
 27 U.S.C. § 1635(f); *see King v. California*, 784 F.2d 910, 913 (9th Cir. 1986). The three-year  
 28 limitations period for a TILA rescission claim is not subject to equitable tolling. *See Beach v.*  
*Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998). In any case, this does not apply here as Plaintiff seeks  
 only damages from First Bank.

1 doctrine of equitable tolling may, in appropriate circumstances, suspend the limitations period until  
 2 the borrower discovers or had reasonable opportunity to discover the fraud or nondisclosures that  
 3 form the basis of the TILA action.” *King*, 784 F.2d 910, 915 (9th Cir. 1986). In determining  
 4 justifiable application of the equitable tolling doctrine, a court “focuses on excusable delay by the  
 5 plaintiff.” *Johnson v. Henderson*, 314 F.3d 409, 414 (9th Cir. 2002). Excusable delay by the  
 6 plaintiff is defined as whether a reasonable plaintiff would not have known of the existence for a  
 7 possible claim within the limitations period. *Lukovsky v. City & Cnty. of San Francisco*, 535 F.3d  
 8 1044, 1051 (9th Cir. 2008). To establish excusable delay, the plaintiff must show “fraudulent  
 9 conduct by the defendant resulting in concealment of the operative facts, failure of the plaintiff to  
 10 discover the operative facts that are the basis of its cause of action within the limitations period, and  
 11 due diligence by the plaintiff until discovery of those facts.” *Fed. Elec. Comm’n v. Williams*, 104  
 12 F.3d 237, 240–41 (9th Cir. 1996).

13 As to the disclosures at origination, those are evident on reviewing the disclosure documents. As  
 14 to the failure to provide disclosures, Plaintiff alleges the Defendants’ fraud conclusorily, *see* FAC  
 15 ¶ 77, and provides no information establishing excusable delay. The court grants the motion to  
 16 dismiss the TILA claim with leave to amend.

### 17 **G. RESPA**

18 In the seventh cause of action, Plaintiff alleges U.S. Bank, Ocwen, and Western violated  
 19 RESPA, 12 U.S.C. § 2605, by failing to respond to Plaintiff’s November 6, 2013 letter.<sup>9</sup> Defendants  
 20 argue that the claim is insufficiently pleaded. The court agrees.

21 RESPA provides plaintiffs with a private right of action for three types of wrongful acts: “(1)  
 22 payment of a kickback and unearned fees for real estate settlement services, 12 U.S.C. § 2607(a),  
 23 (b); (2) requiring a buyer to use a title insurer selected by a seller, 12 U.S.C. § 2608(b); and (3) the  
 24 failure by a loan servicer to give proper notice of a transfer of servicing rights or to respond to a  
 25 qualified written request for information about a loan, 12 U.S.C. § 2605(f).” *Choudhuri v. Wells*

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26  
 27 <sup>9</sup> While paragraphs 78-82 of the FAC appear to allege claims related to the November 6,  
 28 2013 letter, paragraphs 83-91 contain allegations and legal theories related to Plaintiff’s position that  
 the assignment to U.S Bank was invalid. In the context of a RESPA claim, these allegations are  
 unintelligible. Accordingly, to the extent they purport to state a claim, the court dismisses it.

1 *Fargo Bank, N.A.*, No. C 11-00518 SBA, 2011 WL 5079480, at \*8 (N.D. Cal. Oct. 25, 2011) (citing  
2 *Patague v. Wells Fargo Bank, N.A.*, No. C 10-03460 SBA, 2010 WL 4695480, at \*3 (N.D. Cal. Nov.  
3 8, 2010)).

4 Plaintiff's claim concerns the third type of wrongful act under RESPA, which provides that a  
5 loan servicer of a federally related mortgage loan has a duty to confirm receipt of a Qualified  
6 Written Request ("QWR") and respond. *See* 12 U.S.C. §§ 2605(e)(1) and (2).

7 Plaintiff alleges that on November 6, 2013, he submitted a QWR to U.S. Bank, Ocwen, and  
8 Western seeking resolution of "loan servicing disputes" and asking for the "name and address of  
9 Note holder." FAC ¶¶ 79-80. U.S. Bank, Ocwen, and Western failed to respond within 60 days of  
10 receiving the QWR, thus violating 12 U.S.C. § 2605(e)(2). *Id.* ¶¶ 81-82.

11 Plaintiff's claim fails for several reasons.

12 First, he does not allege that U.S. Bank or Western are loan servicers subject to RESPA.  
13 Accordingly, the RESPA claim fails as to them.

14 Second, he fails to plausibly allege that his letter was a QWR. RESPA defines a QWR as a  
15 written request from the borrower to the loan servicer "for information relating to the servicing of  
16 [a] loan" that "(i) includes . . . the name and account of the borrower; and (ii) includes a statement of  
17 the reasons for the belief of the borrower, to the extent applicable, that the account is in error or  
18 provides sufficient detail to the servicer regarding other information sought by the borrower." 12  
19 U.S.C. § 2605(e)(1)(B). Here, Plaintiff provides no detail about the contents of his QWR and does  
20 not allege that he included a statement of the reasons he believed his account was in error. Absent  
21 factual allegations that the purported QWR met the statutory requirements, the RESPA claim does  
22 not survive.

23 Third, even if the QWR allegations were sufficient, Plaintiff fails to plead damages. In order to  
24 avoid dismissal of a RESPA claim, the plaintiff must plead specific facts showing that he suffered  
25 "pecuniary damages." *Allen v. United Fin. Mortg. Corp.*, 660 F. Supp. 2d 1089, 1097 (N.D. Cal.  
26 2009). Moreover any injury must be "a result of the failure" to comply with RESPA. 12 U.S.C.  
27 § 2605(f)(1)(A). This pleading requirement limits RESPA claims to circumstances in which a  
28 plaintiff can allege specific facts to show causation – "actual damages to the borrower as a result of

1 the failure [to comply with RESPA requirements].” *Lal v. Am. Home Servicing, Inc.*, 680 F. Supp.  
 2 2d 1218, 1223 (E.D. Cal. 2010); *see also Tamburri v. Suntrust Mortg., Inc.*, 875 F. Supp. 2d 1009,  
 3 1014 (N.D. Cal. 2012); *Jenkins*, 216 Cal. App. 4th at 531-32.

4 As Defendants argue, the RESPA claim fails because the FAC alleges no facts showing that  
 5 Plaintiff suffered “actual damages” as a result of Defendants’ failure to respond to the purported  
 6 QWR. By the time Plaintiff sent the letter on November 6, 2013, he had long stopped making loan  
 7 payments, and Notices of Default and Notices of Trustee’s Sale had already been recorded. Thus,  
 8 Plaintiff cannot claim (and does not allege) that he failed to make the payments because of issues  
 9 with the servicing of the loan or that he would have made future payments if Defendants had  
 10 responded to the alleged QWR. In fact, Plaintiff sent his QWR the same day he filed this action  
 11 (possibly even after he filed it). *See* Complaint, ECF No. 1-1 at 4 (filed 11/6/2013). This appears to  
 12 be a tactic of Plaintiff’s counsel. *See Rivac v. Ndex W. LLC*, No. C 13-1417 PJH, 2013 WL  
 13 6662762, at \*12 (N.D. Cal. Dec. 17, 2013) (noting this tactic and denying RESPA claim with  
 14 prejudice).<sup>10</sup> Accordingly, Plaintiff cannot claim to have suffered damages based on the failure to  
 15 respond to his QWR. The court grants the motion to dismiss the claim without prejudice.

#### 16 **H. Fair Debt Collection Practices Act**

17 Plaintiff alleges that Defendants are debt collectors within the meaning of the FDCPA and that  
 18 they violated the FDCPA by failing to provide the FDCPA “Mini-Miranda” warning (notice that  
 19 they are “debt collectors” and are attempting to collect on a debt) on the Notice of Default and  
 20 comply with the 30-day validation notice requirements. *See* FAC ¶¶ 96-105.

21 To state a claim under the FDCPA, “a plaintiff must allege facts that establish the following: (1)  
 22 the plaintiff has been the object of collection activity arising from a consumer debt; (2) the  
 23 defendant attempting to collect the debt qualifies as a ‘debt collector’ under the FDCPA; and (3) the  
 24 defendant has engaged in a prohibited act or has failed to perform a requirement imposed by the  
 25 FDCPA.” *Adesokan v. U.S. Bank, N.A.*, No. 11-cv-01236-LJO-SKO, 2011 WL 5341178, at \*4 (E.D.

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26  
 27 <sup>10</sup> In his opposition, Plaintiff does not respond to Defendants’ arguments and instead appears  
 28 to argue conclusorily that Defendants’ alleged violation of the PSA somehow constitutes a RESPA  
 violation. *See* Opp’n at 26-27.

1 Cal. Oct. 31, 2011) (citing *Frazier v. Absolute Collection Serv., Inc.*, 767 F. Supp. 2d 1354, 1363  
2 (N.D. Ga. 2011). Under the FDCPA, a “debt collector” is defined as “any person . . . in any business  
3 the principal purpose of which is the collection of any debts, or who regularly collects or attempts to  
4 collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C.  
5 § 1692a. The term, however, “does not include the consumer’s creditors, a mortgage servicing  
6 company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned.”  
7 *Jara v. Aurora Loan Servs.*, 852 F. Supp. 2d 1204, 1211 (N.D. Cal. 2012) (quoting *Perry v. Stewart*  
8 *Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) (quotation marks omitted)).

9 Defendants argue that they are exempt from the FDCPA because they are not debt collectors  
10 within the meaning of the FDCPA. Motion at 22. The court agrees. Plaintiff’s FDCPA claim is  
11 based on the March 9, 2012 NOD, which states that Plaintiff defaulted on his mortgage on October  
12 1, 2011. See FAC ¶ 99 (alleging FDCPA violation), Ex. C at 2, ECF No. 16-6 at 2 (3/9/2012 NOD  
13 page showing date of default); Opp’n at 24 (confirming that Plaintiff’s FDCPA claim is based on the  
14 3/9/2012 NOD). All of the assignments and transfers alleged in the FAC took place either before  
15 Plaintiff defaulted or after the NOD was recorded. See FAC ¶¶ 9-21.

16 Plaintiff does not substantively dispute Defendants’ argument. Instead, he cites to an  
17 unpublished Eleventh Circuit opinion without providing any analysis. See Opp’n at 24 (citing  
18 *Birster v. Am. Home Mortg. Servicing, Inc.*, No. 11-13574, 2012 WL 2913786 (11th Cir. July 18,  
19 2012)). To the extent *Birster* is relevant as persuasive precedent, it is distinguishable because it  
20 involved more traditional attempts to collect on a debt. There, American Home Mortgage allegedly  
21 “engaged in a relentless assault of harassing phone calls and home inspections in an attempt to  
22 collect the mortgage debt,” and mailed letters that threatened foreclosure unless the homeowner  
23 cured the default. *Id.* at \*1. The Eleventh Circuit found this evidence insufficient to determine  
24 whether the defendant was a debt collector or was engaging in debt collection activity and reversed  
25 the summary judgment entered against the homeowners. *Id.* at \*4 (stating that “an entity can both  
26 enforce a security interest *and* collect on a debt”). In contrast, Plaintiff pleads no facts that would  
27 allow the court to find that any Defendant was a debt collector within the meaning of the FDCPA.

28 In any event, Plaintiff’s FDCPA claim is barred by the statute of limitations. Claims under the



1 FDCPA are subject to a one-year statute of limitations. 15 U.S.C. § 1692k(d).<sup>11</sup> Plaintiff's FDCPA  
 2 claim is based on the most recent NOD, which was recorded on March 9, 2012. *See* FAC ¶ 99  
 3 (alleging FDCPA violation based on "Defendants['] correspondence or verbal communications  
 4 regarding Section 2923.5 compliance"); Opp'n at 24 (stating that "Defendants['] correspondence or  
 5 verbal communications regarding section 2923.5 compliance" refers to the March 9, 2012 NOD).  
 6 Plaintiff did not file suit until November 22, 2013. *See* ECF No. 1. Defendants raise the statute of  
 7 limitations argument in their motion to dismiss. *See* Motion at 23. Plaintiff did not provide any  
 8 reasons why the one-year limitations period does not apply to him. *See* Opp'n at 24-25. The court  
 9 dismisses Plaintiff's FDCPA claim.

### 10 I. RICO

11 Plaintiff alleges that Defendants violated the Racketeer Influenced and Corrupt Organization  
 12 ("RICO") Act by concealing that the loans were securitized, hiding the terms of the securitization  
 13 agreements, sending fraudulent assignments in foreclosure cases, making misrepresentations,  
 14 concealing the parties' lack of standing, and other similar broad allegations against the Defendants  
 15 and the mortgage industry in general. *See* FAC ¶¶ 106-26. These claims have been brought by  
 16 Plaintiffs' counsel in nearly identical form in other cases in this district, and the courts there have  
 17 dismissed them with prejudice. *See, e.g., Bergman v. Bank of Am.*, No. C 13-00741 JCS, 2013 WL  
 18 5863057, \*29-30 (N.D. Cal. Oct. 23, 2013) (collecting cases and dismissing nearly-identical claims  
 19 with prejudice). As in *Bergman*, Plaintiff's RICO claim is not plausible:

20 [T]he Court adopts the reasoning of previous cases and finds that Plaintiffs' claim here is "far  
 21 from plausible." *See Zacharias [v. JPMorgan Chase Bank, N.A.]*, No. 12-06525 SC, 2013  
 22 WL 588757, at \*3 [(N.D. Cal. Feb. 13, 2013)]. Plaintiffs "put forward no facts supporting  
 23 [their] 'sweeping contention that Defendants defrauded everyone' by bringing suit on behalf  
 24 of entities without standing to sue." *See Quach [v. Bank of America, N.A.]*, No. 5:13-CV-  
 00467-EJD, 2013 WL 3788827, at \*3 [N.D. Cal. July 17, 2013] (quoting *Zacharias*, 2013  
 WL 588757, at \*3). They fail to allege facts of an ongoing organization to support the  
 contention that Defendants function as an "enterprise." *See Madlaing [v. JPMorgan Chase*

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25  
 26 <sup>11</sup> This provision provides: "An action to enforce any liability created by this subchapter  
 27 may be brought in any appropriate United States district court without regard to the amount in  
 28 controversy, or in any other court of competent jurisdiction, within one year from the date on which  
 the violation occurs." 15 U.S.C. § 1692k(d).

1 *Bank, N.A.*, No. CV F 12-2069 JLO SMS], 2013 WL 2403379, at \*22 (E.D. Cal. May 31,  
 2 2013). They fail to plausibly allege racketeering activities that are distinct from the alleged  
 3 enterprise. *See Zacharias*, 2013 WL 588757, at \*3. They fail to allege that the loan  
 4 constitutes an unlawful debt, *i.e.*, an unlawful gambling debt. *See Madlaing*, 2013 WL  
 5 2403379, at \*23; 18 U.S.C. § 1961(6) (defining “unlawful debt”). They fail to identify  
 6 authority to support their contention that Defendants had a duty to make disclosures  
 7 regarding securitization. *See Gilbert [v. Chase Home Finance, LLC]*, No. 1:13-cv-265 AWI  
 8 SKO], 2013 WL 2318890, at \*10 [(E.D. Cal. May 28, 2013)]. Moreover, securitization is  
 9 neither a crime nor racketeering activity. *See Rivac [v. Ndex West LLC]*, No. C 13-1417 PJH],  
 10 2013 WL 3476659, at \*8 [(N.D. Cal. July 10, 2013)].

11 Furthermore, Plaintiffs fail to meet the Rule 9(b) pleading standard because they have not  
 12 provided any specific allegations identifying which Defendant took which actions, nor have  
 13 they made any specific allegations about the times, places, and specific content of the  
 14 activities. For example, Plaintiffs appear to allege that Defendants committed the predicate  
 15 acts of mail fraud in furtherance of the “enterprise.” *See Compl.* at ¶ 79. But they do not  
 16 “state the time, place, and specific content” of any of the alleged mailings, nor do they state  
 17 “the identities of the parties to the misrepresentation.” *See Edwards*, 356 F.3d at 1066;  
 18 *Gilbert*, 2013 WL 2318890, at \*10.

19 *Bergman*, 2013 WL 5863057, at \*30. The court dismisses the RICO claims with prejudice.

## 12 J. UNFAIR COMPETITION LAW

13 Plaintiff’s final claim is for violation of California’s Unfair Competition Law (the “UCL”). The  
 14 UCL prohibits any “unlawful, unfair or fraudulent business act or practice.” “Since section 17200 is  
 15 [written] in the disjunctive, it establishes three separate types of unfair competition. The statute  
 16 prohibits practices that are either ‘unfair’ or ‘unlawful,’ or ‘fraudulent.’” *Pastoria v. Nationwide*  
 17 *Ins.*, 112 Cal. App. 4<sup>th</sup> 1490, 1496 (2003); *see also Cel-Tech Communications, Inc. v. Los Angeles*  
 18 *Cellular Tel. Co.*, 20 Cal. 4<sup>th</sup> 163, 180 (1999). To support a claim for a violation of the UCL, a  
 19 plaintiff cannot simply rely on general common law principles. *Textron Fin. Corp. v. Nat’l Union*  
 20 *Fire Ins. Co. of Pittsburgh*, 118 Cal. App. 4<sup>th</sup> 1061, 1072 (2004).

21 Any individual who has “has suffered injury in fact and has lost money or property as a result of  
 22 the unfair competition” may initiate suit. Cal. Bus. & Prof. Code § 17204. To have standing, a  
 23 plaintiff must sufficiently allege that (1) he has “lost ‘money or property’ sufficient to constitute an  
 24 ‘injury in fact’ under Article III of the Constitution” and (2) there is a “causal connection” between  
 25 the defendant’s alleged UCL violation and the plaintiff’s injury in fact. *See Rubio v. Capital One*  
 26 *Bank*, 613 F.3d 1195, 1203-04 (9th Cir. 2010) (citations omitted).

27 The UCL incorporates other laws and treats violations of those laws as unlawful business  
 28 practices independently actionable under state law. *Chabner v. United Omaha Life Ins. Co.*, 225

1 F.3d 1042, 1048 (9th Cir. 2000). Violation of almost any federal, state or local law may serve as the  
 2 basis for a UCL claim. *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838–39 (1994). In  
 3 addition, a business practice may be “unfair or fraudulent in violation of the UCL even if the  
 4 practice does not violate any law.” *Olszewski v. Scripps Health*, 30 Cal.4th 798, 827 (2003).

5 Plaintiff’s UCL claim is based on Defendants’ allegedly “execut[ing] and record[ing] the June  
 6 23, 2011 Notice of Default, knowing that it [*sic*] did not hold the beneficial interest in the Deed of  
 7 Trust, and thus lacked the legal power to initiate a foreclosure.” FAC ¶ 29. 26.

8 The claim fails because it does not assert the requisite harm. Plaintiff alleges that because of  
 9 Defendants’ unfair business practices, “a cloud has been placed on Plaintiff’s title and their [*sic*]  
 10 interest in the Subject Property has been placed in jeopardy.” But California Business and  
 11 Professions Code § 17204 requires plaintiffs to establish that they have suffered an “injury in fact  
 12 and ha[ve] lost money or property as a result of the unfair competition.” *See Walker v. Geico Gen.*  
 13 *Ins. Co.*, 558 F.3d 1025, 1027 (9th Cir. 2009). The FAC does not allege that Plaintiff’s house has  
 14 been sold at a foreclosure sale. Defendants aver that it has not yet been sold. *See Motion at 26.*  
 15 Plaintiff has not alleged that he has lost either money or property as a result of Defendants’ alleged  
 16 actions. Accordingly, the Section 17200 claim is dismissed with leave to amend.

### 17 CONCLUSION

18 The court **GRANTS** Defendants’ motion to dismiss Plaintiff’s First Amended Complaint with  
 19 prejudice as to the RICO claim and without prejudice as to all other claims. Plaintiffs may file an  
 20 amended complaint within 21 days from the date of this order.

21 This disposes of ECF No. 20.

22 **IT IS SO ORDERED.**

23 Dated: March 31, 2014



24 LAUREL BEELER  
 United States Magistrate Judge