UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 17-1296-DOC (JPRx) Date: June 22, 2018

Title: RICKEY M. GILLIAM V. BANK OF AMERICA, N.A., ET AL.

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Deborah Lewman	Not Present
Courtroom Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF: None Present	ATTORNEYS PRESENT FOR DEFENDANT: None Present

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING IN PART DEFENDANTS' MOTIONS TO DISMISS [38] [43] [58]

Before the Court are Defendants Nationstar Mortgage LLC ("Nationstar"); HSBC Bank USA ("HSBC"); National Association, as trustee for the certificate holders of SARM 2005-18; Veriprise Processing Solutions, LLC ("Veriprise"); and Mortgage Electronic Registration Systems, Inc.'s ("MERS") (collectively, "Nationstar Defendants") Motion to Dismiss ("Nationstar Mot.") (Dkt. 38) and Defendants Bank of America N.A. ("BANA") and ReconTrust Company N.A.'s ("ReconTrust") (collectively, "BANA Defendants") Motion to Dismiss ("BANA Mot.") (Dkt. 43). The Court finds these matters suitable for resolution without oral argument. Fed. R. Civ. P. 78; L.R. 7-15. Having reviewed the papers and considered the parties' arguments, the Court GRANTS IN PART Nationstar Defendants' and BANA Defendants' Motions.

I. Background

A. Facts

The Court adopts the facts as set out in Plaintiffs' First Amended Complaint ("FAC") (Dkt. 37).

Plaintiffs Rickey M. Gilliam and Barbara Gilliam ("collectively Plaintiffs") are individuals residing in the State of California, who at all times relevant herein were the owners of the real property located at 7924 Alhambra Drive, Huntington Beach, California 92647-4655 ("Subject Property"). FAC ¶ 12. The Subject Property is Plaintiffs' primary residence. *Id*.

On July 1, 2005, Plaintiffs entered into a loan (the "Loan") transaction in which Countrywide Home Loans, Inc. ("Countrywide") identified itself as the lender. *Id*. ¶ 46. The associated Deed of Trust for the Subject Property identified MERS as the beneficiary solely as the nominee of the lender, and identified the Trustee as ReconTrust. *Id*. ¶¶ 24, 48.

On March 17, 2011, an Assignment of Deed of Trust was recorded that purported to assign all beneficial interest in the Deed of Trust to HSBC, i.e. that made HSBC the beneficiary in place of MERS. *Id.* ¶ 25, Ex. 2.[1] On May 5, 2011, another Assignment of Deed of Trust was recorded that purported to assign all beneficial interest in the Deed of Trust to HSBC. *Id.* ¶ 30, Ex. 3.

On July 20, 2012, Plaintiff Barbara Gilliam filed a complaint ("*Gilliam I*") in the Superior Court of California, County of Orange against Countrywide; Structured Asset Securities Corp.; Structured Adjustable Rate Mortgage Loan Trust, series 2005-18; HSBC; MERS; Aurora Loan Services, LLC; ReconTrust; and BANA. *See* Nationstar Request for Judicial Notice ("Nationstar RJN") (Dkt. 39) Ex. 25. On August 23, 2012, defendants in that case removed *Gilliam I* to this Court. *Id.* at 141. On September 24, 2012, Plaintiffs, seeking quiet title and declaratory relief, filed a First Amended Complaint ("*Gilliam I* FAC")[2] that no longer named ReconTrust or BANA as defendants. In October 2012, Defendants Countrywide, HSBC, MERS, and Aurora Loan Services, LLC filed a motion to dismiss the *Gilliam I* FAC. Nationstar RJN Ex. 27 at 213–14. On

[1] As discussed further below, the events occurring prior to the adjudication in 2012 of *Gilliam v. Countrywide Home Loans, Inc.* are not relevant to this suit in the sense that any allegations of wrongdoing based on these events are barred by res judicata, which Plaintiffs concede. Therefore, the Court only briefly touches on those events to provide background, but the Court does not discuss Plaintiffs' allegations about those events in detail. *See* Compl. ¶¶ 26–34.
[2] Dkt. 13 of *Gilliam v. Countrywide Home Loans, Inc.*, Case No. SA CV 12-1372-DOC (JPRx).

November 12, 2012, this Court dismissed *Gilliam I* with prejudice, finding that Plaintiffs were judicially estopped from pursuing their claims because the right to bring those claims had been assigned to a bankruptcy trustee in Plaintiffs' 2009 bankruptcy proceeding. Nationstar RJN Ex. 27.

Plaintiffs concede that pursuant to "the 2011 assignment"—which was made before Plaintiffs filed *Gilliam I* and thus, on the basis of res judicata, cannot be relitigated in the instant litigation, as described in this Court's Order granting in part Defendants' Motions to Dismiss Plaintiffs' Complaint ("MTD Order") (Dkt. 36)—"HSBC h[eld] interest in the Note and Deed of Trust." *See* FAC ¶ 54.[3]

However, Plaintiffs allege that on August 28, 2013, Tadeh Avidisiany, an assistant vice president of BANA—who Plaintiffs allege did not have any legal rights or interests in the Subject Property, the Note, or the Deed of Trust—recorded an Assignment of Deed of Trust ("BANA Assignment") purporting to transfer BANA's interest in the Note and Deed of Trust to Nationstar. *Id.* ¶¶ 35–36, 55–56; *id.* Ex. 4. Plaintiffs allege that because BANA held "no interest to transfer," BANA had no legal right to execute or record the assignment, and thus the BANA Assignment was "invalid." *Id.* ¶¶ 36, 56, 71. Plaintiffs further allege that the BANA Assignment contradicts MERS's database, which they allege shows Aurora Loan Services as the investor. *Id.* ¶ 57.

On April 16, 2015, HSBC recorded a Substitution of Deed of Trust ("Veriprise Substitution") substituting Veriprise as trustee in place of Recontrust. *Id.* ¶ 37; FAC Ex. 5. In that document, HSBC claims to be the "present beneficiary" of the Deed of Trust. *See id.* Ex 5. Plaintiffs allege that because of the BANA Assignment that purported to transfer any interest in the Deed of Trust to Nationstar in 2013, HSBC—who was previously the beneficiary as a result of the 2011 assignment—"held no interest and therefore held no right to substitute the trustee." FAC ¶¶ 38, 74. Plaintiffs also allege that Nationstar illegally signed the Veriprise Substitution instead of HSBC. FAC ¶ 74.[4]

Also on April 16, 2015, Veriprise, on behalf of HSBC, recorded a Notice of Default claiming Plaintiffs owed money to HSBC. *Id.* ¶¶ 39, 58; FAC Ex. 6. Plaintiffs allege that the Notice of Default was improper and an illegal attempt by Veriprise to collect on the loan "when it d[id] not represent the true creditor of the loan." *Id.* ¶ 69.

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[3] Plaintiffs allege that there were several improper transfers prior to the adjudication of *Gilliam 1*, but acknowledge that those claims are barred by res judicata based on this Court's MTD Order. FAC ¶ 54.

[4] Plaintiffs "alternatively" claim that "even if HSBC had a legal right to substitute the trustee, the subscription of Nationstar as the attorney in fact violates Civil Code § 1095 and is void on its face." FAC ¶ 74. However, this statement is a legal conclusion without factual or analytical support, because Plaintiffs fail to explain why the subscription was supposedly illegal.

Specifically, Plaintiffs allege that Veriprise "was acting as debt collector on behalf of HSBC," but that HSBC was not the beneficiary when the Notice of Default was recorded. *Id*. ¶ 40. Thus, Plaintiffs allege that the Notice of Default is "false and cannot be the basis of a foreclosure." *Id*. ¶ 68.

On August 25, 2015, a second Substitution of Trustee was recorded, substituting Quality in for Veriprise as trustee ("Quality Substitution"). *Id.* ¶ 41. Plaintiffs allege that the Quality Substitution "was recorded [by] Quality Loan Services" itself and that, in the Quality Substitution, Quality alleged that Nationstar, as the loan servicer for HSBC, was substituting Quality as Trustee. *Id*. ¶ 41. Plaintiffs allege that the Quality Substitution was done "in preparation of litigation (i.e. stating they were the servicing agent for the Plaintiff)" and that it is invalid because "neither party held interest in the deed of trust with rights to substitute the trustee." *Id*. ¶ 79.

Plaintiffs allege that on August 10, 2016, Quality recorded a Notice of Trustee Sale ("Not. Trustee Sale"). *Id.* ¶ 42; *see id.* Ex. 7. However, Plaintiffs allege that Quality was not a valid substituted trustee and therefore had no right to record a Notice of Trustee Sale, much less conduct a trustee sale. *Id*. ¶ 80.

Plaintiffs also allege that, although at one point Nationstar was in discussions and negotiations with Plaintiffs for a modification of their loan, Nationstar at the same time continued foreclosure proceedings, which is an illegal process known as "dual tracking." *Id*. ¶¶ 61–64. Plaintiffs allege that they were compelled to file for declaratory relief as a result. *Id*. ¶ 62. Plaintiffs further allege that Nationstar promised "to cease the dual tracking if Plaintiff[s] dismissed [their] declaratory claim with prejudice[]." *Id*. ¶ 62. Plaintiffs claim that they "upheld [their] agreement . . . but Nationstar never held true to its agreement to cease the foreclosure and enter into modification discussions." *Id*. ¶ 64. Plaintiffs allege that Nationstar falsely told them that due to "investor guidelines," Plaintiffs did not qualify for a loan modification. *Id*. ¶ 66. Plaintiffs allege there are no investor guidelines and that HSBC does not engage in modification of "any mortgage loan." *Id*. ¶ 67.

Ultimately, Plaintiffs allege that "none of the Defendants hold any legal right to seek to collect or claim a default on the basis that Plaintiff has no legal duty to pay Defendants any money." *Id.* ¶ 53. Plaintiffs explain (albeit in a legal conclusion) that "while the deed of trust allows sale of the debt without notice, California (and federal) law requires notification of the *purchase* of [the] debt." *Id.* ¶ 50. Plaintiffs allege they never received such notice from any entity—"at no time, from the origination of the loan

to the current date has any entity ever noticed Plaintiff[s] that it had purchased Plaintiff[s'] debt and therefore was [their] legal, valid creditor." *Id.* ¶¶ 49, 51–52.

B. Procedural History

On May 9, 2017, Plaintiff Rickey M. Gilliam initiated this action by filing a Complaint in the Superior Court of California, County of Orange ("*Gilliam II*"). *See* Notice of Removal Ex. 1 (Dkt. 1-1). On July 26, 2017, Nationstar Defendants removed the case to this Court based on diversity jurisdiction. *See id.* at 2–9. On October 4, 2017, this Court issued a Minute Order denying Plaintiff's Motion to Remand, finding that ReconTrust and Quality Defendants were fraudulently joined to destroy diversity.[5]

In August 2017, Nationstar and BANA Defendants filed motions to dismiss (Dkts. 13, 17) Plaintiff Rickey M. Gilliam's initial Complaint. On October 26, 2017, this Court issued the MTD Order, granting in part Defendants' motions without prejudice as to Plaintiff's first, third, fourth, fifth, sixth, and seventh causes of action and denying their motions as to Plaintiff's second cause of action for cancellation of instruments. *See generally* MTD Order. The Court held that Plaintiff could amend his complaint to the extent that his claims were not barred by res judicata due to the prior adjudication of *Gilliam I*. *See* MTD Order at 26. The Court also ordered Rickey M. Gilliam to contact Barbara Gilliam to see if she would voluntarily join as a Plaintiff, and if not, to add her name to the amended complaint as an involuntary Plaintiff. *See* MTD Order at 27.

On November 13, 2017, Plaintiffs— Rickey and Barbara Gilliam—filed the FAC. In their FAC, Plaintiffs assert claims for: (1) declaratory relief/judgment; (2) cancellation of instruments; (3) slander of title; (4) violation of California's Homeowner Bill of Rights ("CHBOR"); (5) violation of California's Unfair Competition Law ("UCL"), California Business & Professions Code § 17200 *et seq.*; (6) breach of contract/estoppel; and (7) accounting. *See* FAC ¶¶ 70–181. Plaintiffs bring each claim against all Defendants, except their claim for violations of CHBOR, which is brought against only BANA, Nationstar, and HSBC, and their claim for breach of contract/estoppel, which is brought only against Nationstar and HSBC. *See id.*

On November 27, 2017, Nationstar Defendants filed both the instant Motion to Dismiss Plaintiffs' First Amended Complaint ("Nationstar Motion") and the Nationstar Request for Judicial Notice ("Nationstar RJN") (Dkt. 39). On December 5, 2017, BANA

[5] As the Court ruled in its Order denying Plaintiff's Motion to Remand (Dkt. 35), Plaintiff cannot state a claim against Quality, because Quality's actions are privileged under California Civil Code § 2924(d). As such, the Court does not address any of Plaintiff's claims against Quality.

Defendants filed their Motion to Dismiss Plaintiffs' First Amended Complaint ("BANA Motion"). On December 18, 2017, Plaintiffs filed their Opposition to the BANA Motion (Opp'n to BANA") (Dkt. 44) and on December 19, 2017, Plaintiffs filed their Opposition to the Nationstar Motion ("Opp'n to Nationstar") (Dkt. 45). On December 19, 2017, Plaintiffs also filed their Opposition to the Nationstar RJN ("Nationstar RJN Opp'n") (Dkt. 46). On December 22, 2017, Nationstar Defendants filed their reply ("Nationstar Reply") (Dkt. 49). BANA Defendants did not file a reply.

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts that, if true, would entitle the complainant to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that a claim must be facially plausible in order to survive a motion to dismiss). The pleadings must raise the right to relief beyond the speculative level; a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). On a motion to dismiss, a court accepts as true a plaintiff's well-pleaded factual allegations and construes all factual inferences in the light most favorable to the plaintiff. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). A court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

In evaluating a Rule 12(b)(6) motion, review is ordinarily limited to the contents of the complaint and material properly submitted with the complaint. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). Under the incorporation by reference doctrine, courts may also consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by* 307 F.3d 1119, 1121 (9th Cir. 2002). Courts may treat such a document as "part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

Dismissal with leave to amend should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). This policy is applied with "extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (holding that dismissal with leave to amend should be

granted even if no request to amend was made). Dismissal without leave to amend is appropriate only when the court is satisfied that the deficiencies in the complaint could not possibly be cured by amendment. *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003).

III. Request for Judicial Notice

Nationstar Defendants asks the Court to take judicial notice of thirty-eight exhibits in support of their Motion. *See* Nationstar RJN. The Court may take judicial notice of court filings and other matters of public record. Fed. R. Evid. 201(b); *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1364 (9th Cir. 1998). It is improper, however, for a court to take judicial notice of the veracity of a public document's contents when the parties dispute the meaning and truth of the contents. *Lee v. City of L. A.*, 250 F.3d 668, 689–90 (9th Cir. 2001) (reversing a district court's grant of a motion to dismiss where the court not only took judicial notice of undisputed matters of public record but also took judicial notice of "disputed facts stated in public records" and relied on the validity of those facts in deciding the motion to dismiss). Nationstar requests judicial notice of the following documents, attached as Exhibits 1–38 to the Nationstar RJN:

1. Deed of Trust, dated July 1, 2005, and recorded on July 8, 2005, in the Orange County Recorder's Office as document number 2005000527963.

2. Notice of Default, recorded on March 18, 2009, in the Orange County Recorder's Office as document No. 2009000126509.

3. Notice of Trustee Sale, recorded on June 18, 2010, in the Orange Recorder's Office as document number 2010000287125.

4. Corporation Assignment of Deed of Trust, recorded on March 17, 2011, in the Orange Recorder's Office as document number 2011000140953.

5. Corporation Assignment of Deed of Trust, recorded on May 11, 2011, in the Orange Recorder's Office as document number 2011000234889.

6. Notice of Trustee's Sale, recorded on November 16, 2011, in the Orange Recorder's Office as document number 2011000581155.

7. Notice of Rescission, recorded on January 16, 2013, in the Orange Recorder's Office as document number 2013000031511.

8. Substitution of Trustee, recorded on April 16, 2015, in the Orange Recorder's Office as document number 2015000194165.

9. Notice of Default, recorded on April 16, 2015, in Orange County Recorder's Office as Instrument No. 2015000194166.

10. Substitution of Trustee, recorded on August 25, 2015, in Orange County Recorder's Office as Instrument No. 2015000440323.

11. Notice of Trustee's Sale, recorded on September 2, 2015, in Orange County Recorder's Office as Instrument No. 2015000454653.

12. Notice of Trustee's Sale, recorded on January 27, 2016, in Orange County Recorder's Office as Instrument No. 2016000035438.

13. Notice of Trustee's Sale, recorded on August 10, 2016, in Orange County Recorder's Office as Instrument No. 2016000374941.

14. Docket for bankruptcy case no. 8:09-bk-14893-RK, at the United States Bankruptcy Court, Central District of California, filed by Plaintiff and Mrs. Gilliam on May 22, 2009.

15. Discharge of Debtor for bankruptcy case no. 8:09-bk-14893-RK, at the United States Bankruptcy Court, Central District of California, filed on November 23, 2009.

16. Docket for civil case no. 8:10-cv-01059-AG-MLG, at the United States District Court, Central District of California, filed by Plaintiff and Mrs. Gilliam against BAC Home Loans Servicing LP, on July 13, 2010.

17. Court Order Granting BAC Home Loans Servicing LP's Motion to Dismiss with leave to amend, for civil case no. 8:10-cv-01059-AG-MLG, at the United States District Court, Central District of California, filed on March 8, 2011.

18. Voluntary Dismissal for civil case no. 8:10-cv-01059-AG-MLG, at the United States District Court, Central District of California, filed by Plaintiff and Mrs. Gilliam on April 7, 2011.

19. Docket for bankruptcy case no. 8:11-bk-26895-CB, at the United States Bankruptcy Court, Central District of California, filed by Plaintiff on December 9, 2011.

20. Chapter 13 Plan for bankruptcy case no. 8:11-bk-26895-CB, at the United States Bankruptcy Court, Central District of California, filed on December 20, 2011.

21. Order and Notice of Dismissal for bankruptcy case no. 8:11-bk-26895-CB, at the United States Bankruptcy Court, Central District of California, filed on January 17, 2012.

22. Docket for bankruptcy case no. 8:12-bk-13966-CB, at the United States Bankruptcy Court, Central District of California, filed by Plaintiff Ricky Gilliam on March 29, 2012.

23. Chapter 13 Plan for bankruptcy case no. 8:12-bk-13966-CB, at the United States Bankruptcy Court, Central District of California, filed on March 29, 2012.

24. Request for Voluntary Dismissal for bankruptcy case no. 8:12-bk-13966-CB, at the United States Bankruptcy Court, Central District of California, filed on May 8, 2012.

25. Docket for civil case no. 30-2012-00585129-CU-OR-CJC, at the Orange County Superior Court, filed by Plaintiffs on July 20, 2012.

26. Notice of Removal for civil case no. 8:12-cv-01372-DOC-JPR, at the United States District Court, Central District of California, filed on August 23, 2012.

27. Order Granting Defendant's Motion to Dismiss with prejudice for civil case no. 8:12-cv-01372-DOC-JPR, at the United States District Court, Central District of California, filed on November 27, 2012.

28. Docket for bankruptcy case no. 8:15-bk-14818-CB, at the United States Bankruptcy Court, Central District of California, filed by Plaintiff Ricky Gilliam on October 1, 2015.

29. Order Dismissing Case with a 180-day Bar for bankruptcy case no. 8:15-bk-14818-CB, at the United States Bankruptcy Court, Central District of California, filed on October 9, 2015.

30. Deed of Trust with Assignment of Rents, Exhibit 4 of Plaintiff's Motion for Relief from the Automatic Stay for bankruptcy case no. 8:15-bk-14818-CB, at the United States Bankruptcy Court, Central District of California, filed by non-party Jason Rudolph Perez on April 6, 2016.

31. Docket for bankruptcy case no. 6:16-bk-11214-WJ, at the United States Bankruptcy Court, Central District of California, filed by non-party Jason Rudolph Perez on February 15, 2016.

32. Motion for Relief from the Automatic Stay for bankruptcy case no. 6:16-bk-11214-WJ, at the United States Bankruptcy Court, Central District of California, filed by HSBC et al., on April 6, 2016.

33. Order Granting Motion for Relief from the Automatic Stay for bankruptcy case no. 6:16-bk-11214-WJ, at the United States Bankruptcy Court, Central District of California, filed on May 4, 2016.

34. Plaintiff Ricky Gilliam's Ex-Parte Objection to Proposed Order Granting Motion for Relief from the Automatic Stay for bankruptcy case no. 6:16-bk-11214-WJ, at the United States Bankruptcy Court, Central District of California, filed on May 4, 2016.

35. Order Denying Plaintiff Ricky Gilliam's Ex-Parte Objection to Proposed Order Granting Motion for Relief from the Automatic Stay for bankruptcy case no. 6:16-bk-11214-WJ, at the United States Bankruptcy Court, Central District of California, filed on May 18, 2016.

36. Plaintiff Ricky Gilliam's Motion to Reconsider the Order Granting Motion for Relief for bankruptcy case no. 6:16-bk-11214-WJ, at the United States Bankruptcy Court, Central District of California, filed on June 6, 2016.

37. Order Denying Plaintiff Ricky Gilliam's Motion to Reconsider the Order Granting Motion for Relief for bankruptcy case no. 6:16-bk-11214-WJ, at the United States Bankruptcy Court, Central District of California, filed on June 27, 2016.

38. Docket for civil case no. 30-2016-00861985-CU-OR-CJC, at the Orange County Superior Court, filed by Plaintiff on July 7, 2016.

Exhibits 1 through 13 are judicially noticeable because they are public documents recorded at the Orange County Recorder's Office. *See Lee*, 250 F.3d at 688–89 ("[U]nder Fed. R. Evid. 201, a court may take judicial notice of 'matters of public record . . . But a court may not take judicial notice of a fact that is "subject to reasonable dispute"). However, Plaintiffs argue that any disputed facts contained in those documents cannot be judicially noticed. *See* Nationstar RJN Opp'n at 2.

Plaintiffs specifically object to Nationstar Defendants' request that the court take judicial notice of Nationstar Exhibit 4, "Corporation Assignment of Deed of Trust," and allege that "MERS had no legal right to assign the Note or the debt." FAC ¶¶ 25–28. Similarly, Plaintiffs object to Nationstar Exhibit 5, "Corporation Assignment of Deed of Trust," again alleging, "MERS had no legal right to assign the Note or the debt." FAC ¶ 33. Plaintiffs also object to Nationstar Exhibit 8, "Substitution of Trustee," and allege that HSCBC could not substitute Veriprise as a trustee because BANA purported to transfer any interest in the Deed of Trust to Nationstar via the BANA Assignment. FAC ¶ 40. *See* Nationstar Ex. 5. Plaintiffs further object to judicial notice of Nationstar Exhibit 9, "Notice of Default," and allege that neither HSBC nor Veriprise had the authority to issue a Notice of Default because "HSCBC was not the beneficiary and [Veriprise] was acting as a debt collector on behalf of HSBC." FAC ¶ 40. Additionally, Plaintiffs object to Nationstar Exhibit 10, "Substitution of Trustee," and Nationstar Exhibit 13, "Notice of Trustee Sale." The facts within these documents therefore, cannot be judicially noticed, as they are "subject to reasonable dispute," and thus the Court does necessarily accept the documents' contents as true or their effects on legal interests as valid. *Lee*, 250 F. 3d at 688–89; *see also Patel v. Parnes*, 253 F.R.D. 531, 536 (C.D. Cal 2008) ("The truth of the content [of a publicly filed document] and the inferences properly drawn from them . . . is not a proper subject of judicial notice under Rule 201.").

The Court also takes judicial notice of the *existence* of Exhibits 14–38 since they are court records available to the public through the Pacer system via the internet. *See C.B. v. Sonora Sch. Dist.*, 691 F. Supp. 2d 1123, 1138 (E.D. Cal. 2009) (taking judicial notice of documents available on Pacer). However, the Court does not take judicial notice of the facts within these exhibits because they may be subject to reasonable dispute. *See Lee*, 250 F.3d at 690 ("On a Rule (12)(b)(6) motion to dismiss, when a court takes judicial notice of another court's opinion, it may do so not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity." (internal quotations omitted)).

In addition, Plaintiffs generally "object[] and oppose[] that any document be used for determination of the facts of this matter on the basis that each and every document contains hearsay statements that are subject to dispute and therefore, are improper matters for judicial notice." *See* Nationstar RJN Opp'n at 2. Similarly, in their Opposition, Plaintiffs further dispute the validity of all title documents, but do not specify to which facts or documents they object with regard to title. *See* Opp'n at 2. While Plaintiffs' blanket objection does not identify any disputed facts, as discussed above, the Court takes judicial notice of the requested documents but does not rely on them in analyzing disputed facts. *See Lee*, 250 F.3d at 689–90.

Finally, as noted in this Court's MTD Order, while neither party requested judicial notice of the operative First Amended Complaint in *Gilliam I*, the Court takes judicial notice of that document on its own. *See United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980) (finding that a court may "take judicial notice of its own records in other cases," as well as the records of another court in other cases).

IV. Discussion

In their Motions, Nationstar and BANA Defendants argue that the Court should dismiss Plaintiffs' claims on the bases of standing, res judicata, and failure to state a claim. All Defendants move to dismiss Plaintiffs' first, third, fourth, fifth, sixth, and seventh causes of action for declaratory relief/judgment, slander of title, violation of CHBOR, violation of California's UCL, breach of contract/estoppel, and accounting. *See generally* Nationstar Mot.; BANA Mot. The Court considers each claimed ground for dismissal in turn.

A. Standing

BANA Defendants allege that Plaintiffs lack standing to challenge the assignments of the Deed of Trust, and that Plaintiffs' assertions that the three recorded assignments are void thus cannot support any of Plaintiffs' claims for relief. BANA Mot. at 9. Specifically, BANA Defendants argue that borrowers like Plaintiffs lack standing to challenge assignments to which they were not a party because such assignments do not cause borrowers to suffer an injurious invasion to their legal rights. *Id.* (citing *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256 (2011)). In response, Plaintiffs contend that they do have standing to challenge the foreclosing entity's alleged lack of authority to foreclose and that case law recognizes a borrowers' right to factually challenge allegedly void assignments. BANA Opp'n at 2–3. To determine whether Plaintiffs have standing to challenge the three purportedly void assignments, the Court looks to recent caselaw on this topic.

In *Yvanova v. New Century Mortgage Corp.*, the Supreme Court of California recognized a split in California courts as to "whether the borrower on a home loan secured by a deed of trust may base an action for wrongful foreclosure on allegations a purported assignment of the note and deed of trust to the foreclosing party bore defects rendering the assignment void." *Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919, 923 (2016). On the one hand, *Jenkins v. JP Morgan Chase Bank* held that borrowers lacked standing to bring preemptive claims against foreclosures where wrongful assignment was alleged. *Jenkins v. JP Morgan Chase Bank*, 216 Cal. App. 4th 497. On

the other hand, *Glaski v. Bank of America., N.A.* held that borrowers did have standing to challenge a completed foreclosure based on allegations of a wrongful assignment. *Glaski v. Bank of America., N.A.*, 218 Cal. App. 4th 1079 (2013). *Yvanova* resolved this split on standing, albeit only in the context of post-sale challenges to foreclosure, whereas this case involves a pre-sale challenge to foreclosure. *See id.* Nevertheless, the reasoning of *Yvanova* is instructive for determining whether Plaintiffs have standing to challenge the assignments in this case.

In *Yvanova*, the California Supreme Court disapproved of *Jenkins*' reasoning and followed *Glaski*'s holding that borrowers had standing to challeange a completed foreclosure based on void assignments, explaining that

> A foreclosed-upon borrower clearly meets the general standard for standing to sue by showing an invasion of his or her legally protected interests—the borrower has lost ownership to the home in an allegedly illegal trustee's sale. Moreover, the bank or other entity that ordered the foreclosure would not have done so absent the allegedly void assignment. Thus, the identified harm—the foreclosure—can be traced directly to [the foreclosing entity's] exercise of the authority purportedly delegated by the assignment.

Yvanova, 62 Cal. 4th at 937 (internal citations omitted). The Court further elaborated:

> Though the borrower is not entitled to object to an assignment of the promissory note, he or she is obligated to pay the debt, or suffer loss of the security, only to a person or entity that has actually been assigned the debt. The borrower owes money not to the world at large but to a particular person or institution, and only the person or institution entitled to payment may enforce the debt by foreclosing on the security . . . The logic of defendants' no-prejudice argument [that borrowers are not prejudiced by invalid or unlawful assignments] implies that *anyone,* even a stranger to the debt, could declare a default and order a trustee's sale—and the borrower would be left with no recourse because, after all, he or she owed the debt to *someone,* though not to the foreclosing entity. This would be an "odd result" indeed.

Id. at 937–38.

However, the California Supreme Court's holding in *Yvanova* was narrow: "We hold only that a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment merely because he or she was in default on the loan and was not a party to the challenged assignment." *Id.* at 924. The Court went on to suggest that, to establish standing to sue for wrongful foreclosure, a plaintiff would have to allege sufficient facts to show that, as a matter of law, the challenged assignment was void—and not simply voidable—such that the foreclosing party did not have legal authority to foreclose. *See id.* ("Because in a nonjudicial foreclosure only the original beneficiary of a deed of trust or its assignee or agent may direct the trustee to sell the property, an allegation that the assignment was void, and not merely voidable at the behest of the parties to the assignment, will support an action for wrongful foreclosure."); *id.* at 923 (stating the question to be decided as "whether the borrower on a home loan secured by a deed of trust may base an action for wrongful foreclosure on allegations a purported assignment of the note and deed of trust *to the foreclosing party* bore defects *rendering the assignment void*" (emphasis added)). The Court explained, "If a purported assignment necessary to the chain by which the foreclosing entity claims that power is absolutely void, meaning of no legal force or effect whatsoever, the foreclosing entity has acted without legal authority by pursuing a trustee's sale, and such an unauthorized sale constitutes a wrongful foreclosure." *Id.* at 935 (citations omitted). Thus, *Yvanova* suggests that a plaintiff, at least in the post-foreclosure context, can establish standing to challenge assignments of a deed of trust—even if the plaintiff was not a party to those assignments—by alleging sufficient facts to show that the challenged assignments are void and that the foreclosing party was thus without authority to foreclose, because in that context the plaintiff can show that the void assignments affected her legally protected interests, namely her ownership of a home. *See id.* at 942–43; *see also Mendoza v. JPMorgan Chase Bank, N.A.*, 6 Cal. App. 5th 802, 810 (2016) (stating that a plaintiff seeking to establish standing under *Yvanova* must allege sufficient facts to show—rather than merely alleging a legal conclusion—that the challenged assignment is void as a matter of law).

With the *Yvanova* decision as background, this Court must attempt to predict how the California Supreme Court would resolve the question of whether homeowner plaintiffs also have standing in the pre-foreclosure context to challenge allegedly void assignments to which they are not parties. This Court sees no reason why *Yvanova*'s reasoning should not apply where a plaintiff is threatened with imminent foreclosure and can allege sufficient facts to show, as a matter of law, that an assignment in the chain of title is void such that the foreclosing entity lacks legal authority to foreclose. As another California district court explained in concluding that *Yvanova* applies in the pre-

foreclosure context, even though the prejudice in the post-foreclosure context is more evident than that in the pre-foreclosure context, "*Yvanova*'s prejudice analysis does not depend on the existence of a completed foreclosure or sale—rather, it focuses more broadly on the unfairness of requiring a plaintiff to be subjected to foreclosure proceedings by an entity that has no right to initiate those proceedings." *Lundy v. Selene Fin., LP*, 2016 U.S. Dist. LEXIS 35547 at *31 (N.D. Cal. 2016). Given *Yvanova*'s reasoning, the Court agrees that prejudice exists in the pre-foreclosure context just as it does in the post-foreclosure context, such that a plaintiff may be able to establish standing to challenge an upcoming foreclosure on the basis of a void assignment.[6]

For the foregoing reasons, BANA Defendants' argument, that Plaintiffs lack standing to challenge assignments of the Deed of Trust simply because Plaintiffs were not parties to those assignments, fails.[7]

Accordingly, BANA Defendants' Motion to Dismiss on the basis of standing is DENIED.

B. Sufficiency of Claims in the FAC

Next, Defendants argue that Plaintiffs fail to allege sufficient facts to state their first, third, fourth, fifth, sixth, and seventh claims.[8] *See* BANA Mot. at 10–13; Nationstar Mot. at 1–7. Defendants suggest in their Motions that this is in part because some of the

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[6] *Jenkins* is distinguishable and does not preclude standing in the pre-foreclosure context. In *Jenkins*—of which *Yvanova* disapproved—the court concluded that preemptive suits for wrongful assignments by borrowers "would fundamentally undermine the nonjudicial nature of the [nonjudicial foreclosure] process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures." *Jenkins*, 216 Cal. App. 4th at 513. In reaching this decision, the court in *Jenkins* relied largely on *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149 (2011). *See Jenkins*, 216 Cal. App 4th at 513. The court in *Gomes* held that there is generally no "judicial action to determine whether the person initiating the foreclosure process is indeed authorized." *Gomes*, 192 Cal. App. 4th 1149 at 1155. However, in *Gomes*, the plaintiff merely alleged on "information and belief" that the foreclosing entity was not entitled to foreclose, but did not provide any factual allegations to support this claim. The court in *Gomes* distinguished cases where "there was a *specific factual basis* for alleging that the foreclosure was not initiated by the correct party." *Gomes*, 192 Cal. App. 4th at 1156. The court in *Glaski* (largely followed by *Yvanova)* noted the limited nature of *Gomes*'s holding. *Glaski*, 218 Cal. App. 4th at 1099. It is unclear whether the court in *Jenkins* limited its holding, like *Gomes*, to cases where Plaintiffs fail to allege a factual basis for their claims. This Court, like the *Lundy* court, predicts that even if the California Supreme Court chooses to apply *Jenkins* in the pre-foreclosure context, it will limit the holding to situations like *Gomes*, where plaintiffs fail to allege specific facts to support their claims. *See Lundy*, 2016 U.S. Dist. LEXIS 35547, at *39.

[7] As Plaintiffs point out, BANA Defendants only challenge Plaintiffs' standing on the basis that Plaintiffs were not parties to the assignments—Defendants make no arguments about the sufficiency of Plaintiffs' factual allegations for the purpose of establishing standing. *See* Opp'n to BANA at 3.

[8] The Court previously determined that Plaintiffs had sufficiently stated their second claim for cancellation of instruments. *See* MTD Order at 18.

factual allegations that support Plaintiffs' claims are barred by res judicata. *See generally* BANA Mot.; Nationstar Mot.

As this Court explained in its MTD Order, "Plaintiff[s'] claims are barred to the extent that they are based on allegations of events that occurred prior to the adjudication of *Gilliam I*." MTD Order at 16. The Court finds it unnecessary to walk through the entire res judicata analysis again, but will discuss in turn the various aspects of Plaintiffs' FAC that are affected by this Court's prior ruling regarding res judicata. *See id.* The Court will then walk through each of Plaintiffs' alleged claims to determine whether they are sufficiently plead. For the reasons discussed below, the only claims to survive Defendants' Motions are Plaintiff's claims against Nationstar under the CHBOR and the UCL, and Plaintiff's slander of title claim to the extent it is premised on the BANA Assignment.

1. Claims against MERS

First, Nationstar Defendants ask the Court to dismiss all of Plaintiffs' claims against MERS—claims for declaratory judgment, cancellation of instruments, slander of title, UCL, and accounting—because MERS, as the initial beneficiary, assigned the deed of trust to HSBC prior to the adjudication of *Gilliam I*, and because Plaintiffs do not allege any further involvement of MERS after the adjudication of *Gilliam I*. Nationstar Mot. at 5. Thus, Nationstar Defendants point out that the claims against MERS, as currently alleged, are barred by res judicata as discussed in this Court's MTD Order. *Id.* In their Opposition to Nationstar, Plaintiffs do not make any objection to the dismissal of claims against MERS, nor do they allege that MERS had any additional involvement in the assignment or substitution of beneficiaries or trustees after the adjudication of *Gilliam I*. *See generally* FAC.

Thus, as the Court explained in the MTD Order, "Plaintiff[s'] claims are barred to the extent that they are based on allegations of events that occurred prior to the adjudication of *Gilliam I*." *See* MTD Order at 16. Plaintiffs fail to allege any additional facts or events involving MERS that occurred after the adjudication of *Gilliam I*. *See generally* FAC.

Accordingly, the Court DISMISSES WITH PREJUDICE Plaintiffs' declaratory judgment, cancellation of instruments, slander of title, UCL, and accounting claims against MERS for events that occurred prior to the adjudication of *Gilliam I*.

2. Claims against ReconTrust

As with MERS, Plaintiffs assert five causes of action against ReconTrust: declaratory judgment, cancellation of instruments, slander of title, UCL, and accounting. *See generally* FAC. Although not explicitly argued by BANA Defendants, as with MERS, Plaintiffs fail to make any factual allegations regarding assignment, substitutions, or any other events involving ReconTrust that occurred after the adjudication of *Gilliam I*. *See generally* FAC. Therefore, as with MERS, Plaintiffs' claims against ReconTrust are barred by res judicata. *See* MTD Order at 16.

Accordingly, the Court DISMISSES WITH PREJUDICE Plaintiffs' declaratory judgment, cancellation of instruments, slander of title, UCL, and accounting claims against ReconTrust for events that occurred prior to the adjudication of *Gilliam I*.

3. Beneficiary of the Deed of Trust

Next, one of the primary issues in the instant litigation is whether any of the Defendants hold the beneficiary interest in the Deed of Trust. Plaintiffs claim that neither HSBC nor Nationstar hold the beneficiary interest, and that therefore no Defendant has the right to foreclose upon the Subject Property. *See* FAC ¶¶ 36, 38, 40, 53.

However, Plaintiffs' claim, that none of the Defendants are the beneficiary of the Deed of Trust, is limited by the findings in *Gilliam I* and this Court's MTD Order. In the MTD Order, the Court found that any claim involving events or claims that could have been litigated prior to the adjudication of *Gilliam I* was barred by res judicata. *See* MTD Order at 16 ("Plaintiff[s'] claims are barred to the extent that they are based on allegations of events that occurred prior to the adjudication of *Gilliam I*."). This means that the assignment by MERS to HSBC ("the HSBC Assignment") is not in question, because the HSBC Assignment took place on March 7, 2011, prior to the adjudication *Gilliam I*, and thus, any challenge to that assignment is barred by res judicata. *See* Nationstar RJN at 4; *see also Gilliam I*. Thus, for the purposes of this lawsuit, HSBC held the beneficiary interest in the Deed of Trust as of 2011.

Plaintiffs now allege that the subsequent assignment, the 2013 BANA Assignment—which took place after the adjudication of *Gilliam I*—is invalid, because when BANA assigned its interest to Nationstar, it "had no legal interest in the deed of trust," supposedly because HSBC held the beneficiary interest as a result of the 2011 assignment, and that therefore, BANA "held no legal right to transfer any beneficial interest to Nationstar." FAC ¶¶ 35–36. At the same time, however, Plaintiffs allege that

HSBC's subsequent "substitution of Veriprise Processing Solutions, LLC as trustee of the deed of trust" in 2015 "was not possible" according to the BANA Assignment. *Id.* ¶ 38. This claim that the Veriprise Substitution by HSBC is invalid is inconsistent with Plaintiff's earlier allegations that the BANA Assignment was invalid because, if the BANA Assignment were invalid, then it seems that HSBC would still hold the beneficiary interest pursuant to the 2011 HSBC Assignment. Plaintiff has not shown, for example, that if the BANA assignment is invalid, the attempted assignment would nevertheless extinguish HSBC's beneficiary interest in the Deed of Trust.

It is possible that Plaintiffs' claim—that HSBC could not substitute Veriprise as trustee—is an attempt to plead in the alternative and argue that, if the BANA Assignment were in fact valid, the Veriprise Substitution by HSBC could not be valid. *See* FAC ¶ 43. Federal Rule of Civil Procedure 8(d)(2) sets out the requirements for pleading in the alternative: "A party may set out [two] or more statements or a claim of defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient." Fed. R. Civ P. 8(d)(2). Thus, the Court will determine whether either of Plaintiffs' claims regarding BANA and HSBC's purported lack of beneficiary interest in the Deed of Trust are sufficiently plead to support Plaintiffs' causes of action.

First, Plaintiffs allege that the BANA Assignment is invalid because BANA did not hold any beneficiary interest in the Deed of Trust when it purported to assign its interest to Nationstar. FAC ¶ 36. Then, Plaintiffs contend that even though the BANA Assignment was invalid, because the BANA Assignment occurred, HSBC lost its beneficiary interest in the Subject Property. *See* FAC ¶¶ 37–38; Opp'n to Nationstar at 6 ("[A]ny foreclosure notices by HSBC are without legal effect as according to the 2013 assignment, it is not the beneficial holder of the debt . . . ."). Plaintiffs suggest this is the case because, even though Plaintiffs and Defendants agree that BANA had "no interest to the title" and as a result BANA's "2013 Assignment is without any 'practical effect,'" "just because Plaintiffs and Defendants say it is without legal effect, does not make it so." Opp'n to Nationstar at 6. In other words, Plaintiffs believe that the BANA Assignment, though invalid, still had legal effect and caused HSBC to lose its beneficiary interest in the Subject Property. *See* FAC ¶¶ 37–38. Plaintiffs explain that, "by law, the assignment remains on record with legal effect."[9] *Id.*

[9] Plaintiffs do not provide legal support for the notion that, "by law," the assignment still has legal effect even though it is "invalid." *See* Opp'n to Nationstar at 6. Plaintiffs assert, relying on *Sciarrata v. U.S.*, 247 Cal. App. 4th 552 (2016), that "any foreclosure notices by HSBC are without legal effect as according to the 2013 assignment, it is not the beneficial holder of the debt . . . ." *Id.* However, the scenario here is distinct from *Sciarrata*. In *Sciarrata*, the

However, contrary to Plaintiffs' assertion, in *Yvanova* the California Supreme Court made clear that "[a] void contract is without legal effect. It binds no one and is a mere nullity. Such a contract has no existence whatever. It has no legal entity for any purpose . . . . A void thing is no thing." *Yvanova*, 62 Cal. 4th at 929 (internal citations and quotation marks omitted). The Court distinguished a void transaction from a voidable transaction, explaining that "neither action nor inaction of a party to [a void transaction] can validate it," while "[a] voidable transaction, in contrast, is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance." *Id.* at 929–30 (internal citations and quotation marks omitted). Here, the BANA Assignment is void because all parties agree that BANA had no beneficiary interest to assign—and thus the parties could not validate the BANA Assignment even if they wanted to. *See id.* at 930 ("Despite its defects, a voidable transaction, unlike a void one, is subject to ratification by the parties."). Accordingly, if the BANA Assignment was invalid because BANA had no legal interest in the Subject Property, as Plaintiffs allege, then the BANA Assignment was void and had no legal effect, and HSBC would still be the beneficiary pursuant to *Gilliam I* and the 2011 Assignment. *See Yvanova*, 62 Cal. 4th at 929; *see also First Nat. Bank of Los Angeles v. Maxwell*, 123 Cal. 360, 371 (1899) (finding in the context of a fraudulent real property transfer that "[s]o far as existing creditors are concerned, the title and ownership of the property remain in the fraudulent grantor as fully as though no transfer had been attempted."). Plaintiffs do not allege that there were any assignments after the adjudication of *Gilliam I* (other than the BANA Assignment) that would make any party, other than HSBC, the beneficiary. *See generally* FAC. Thus, any allegations that HSBC is not the proper beneficiary of the Deed of Trust fail because: (1) principles of res judicata dictate that, for the purposes of this lawsuit, HSBC held the beneficiary interest in the Deed of Trust as of 2011; (2) the only alleged assignment after 2011 was the BANA Assignment; and (3) Plaintiffs allege that the BANA Assignment is void and has no legal effect, which would mean HSBC remained the valid beneficiary of the Deed of Trust even after the BANA Assigment.

To the extent that Plaintiffs may be attempting to plead in the alternative that the BANA Assignment was valid—which would mean that HSBC could not be the valid

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entity attempting to foreclose had no interest in the deed of trust at all. *Sciarrata*, 247 Cal. App. 4th at 564. The court explained, "when a non-debtholder forecloses, a homeowner is harmed because he or she has lost her home to an entity with no legal right to take it." *Id.* at 565–66. However, unlike in *Sciarrata*, Plaintiffs here do not claim that BANA, the party with no legal interest in the Subject Property, attempted to illegally foreclose. *See generally* FAC. Rather, Plaintiffs contend that even though the BANA Assignment was invalid, because the BANA Assignment occurred, HSBC lost its beneficiary interest in the Subject Property. *See* FAC ¶¶ 37–38. Nothing in *Sciarrata* supports Plaintiffs' argument that an invalid assignment still has legal effect.

beneficiary—Plaintiffs do not allege any facts to support such a claim, and they actually contend the opposite. *See* FAC ¶ 36. Plaintiffs themselves clearly state that BANA "had no legal interest" in the Deed of Trust and that the BANA Assignment is therefore invalid. *Id.* Thus, any suggestion by Plaintiffs that BANA, rather than HSBC, is the valid beneficiary is merely a legal conclusion unsupported by factual allegations. *See* FAC ¶¶ 99–100. Similarly, Plaintiffs have not alleged that there was any other assignment of the Deed of Trust, which would make an entity, other than BANA or HSBC, the beneficiary. Therefore, Plaintiffs have not alleged a sufficient factual basis for the Court to find that any party other than HSBC is the valid beneficiary. *See generally* FAC.

To synthesize, any claims that HSBC is not the rightful beneficiary due to the alleged invalidity of the pre-2012 assignments are barred by res judicata because, as this Court explained in its MTD Order, the events occurring prior to the adjudication of *Gilliam I* were already at issue, and were decided, in *Gilliam I*. Next, any claims that HSBC is not the rightful beneficiary due to the recording of the BANA Assignment fail because the BANA Assignment is allegedly void and thus has no legal effect. Finally, any claims that HSBC is not the rightful beneficiary because the BANA Assignment was valid have not been sufficiently plead in the alternative. Accordingly, all claims dependent upon the allegation that HSBC is not the rightful beneficiary are barred either pursuant to res judicata or because the pleadings are insufficient.[10]

Thus, the Court now walks through Plaintiffs' claims to evaluate whether Plaintiffs' allegations are dependent on HSBC not being the valid beneficiary, and to the extent that they are not, whether they are legally sufficient to support Plaintiffs' causes of action.

4. Claims against Veriprise

Plaintiffs assert five causes of action against Veriprise: declaratory judgment, cancellation of instruments, slander of title, UCL, and accounting. *See generally* FAC. Nationstar Defendants argue that the Court should dismiss all claims against Veriprise because Veriprise was not involved with the Subject Property outside of its capacity as trustee, and therefore Veriprise's conduct, including recording any foreclosure notice, is privileged pursuant to California Civil Code §§ 47 and 2924(d). Nationstar Mot. at 5; Reply at 1. Furthermore, Nationstar Defendants argue that Veriprise currently has no

[10] Nothing in this Order precludes Plaintiffs from filing an amended complaint pursuant to Fed. R. Civ. P. 8(d)(2), with alternative factual pleadings as to why BANA, or any other entity, is the beneficiary rather than HSBC, so long as Plaintiffs present more than legal conclusions. Similarly, nothing in this order precludes Plaintiffs from pursuing legal claims against BANA, or other Defendants, based on allegations of invalidity of the BANA Assignment itself.

interest in the Subject Property, because Quality was substituted as trustee in place of Veriprise on August 25, 2015. Nationstar Mot. at 5. Therefore, they argue, any claims against Verprise fail as a matter of law. *Id*.

A trustee's actions related to the foreclosure filings and trustee's sale are generally privileged, and thus immune to suit for acts taken in the role of trustee. *See* Cal. Civ. Code § 2924(d). This privilege bars claims arising out of the statutorily required mailing, publication, and delivery of notices in non-judicial foreclosure, and the performance of statutory non-judicial foreclosure procedures, absent a showing of malice. *Kachlon v. Markowitz*, 168 Cal. App. 4th 316, 333 (2008). To establish malice, a plaintiff must show that "the publication was motivated by hatred or ill will towards the plaintiff or by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication." *Id*. at 336.

Plaintiffs allege that, contrary to Defendants' assertions, Veriprise is not immune from liability for its actions, including recording a Notice of Default, because Veriprise was not a valid legal trustee. Opp'n to BANA at 3–4. First, Plaintiffs allege that Veripise was not the valid trustee because HSBC was not the valid beneficiary, and therefore, did not have the authority to substitute Veriprise in as trustee. FAC ¶¶ 99–100. However, as explained earlier in this Order, the allegation that HSBC was not the valid beneficiary fails because it is not sufficiently supported by factual allegations that are not barred by res judicata. Thus, Plaintiffs' allegation that Veripise was not the valid trustee because HSBC was not the valid beneficiary also fails.

Next, Plaintiffs also argue that Veriprise was not the valid trustee because the 2015 substitution in which Nationstar, on behalf of HSBC, purported to substitute in Veriprise as trustee violates California Civil Code § 1095 and is void on its face. FAC ¶ 74; Opp'n to Nationstar at 4. However, Plaintiffs do not provide any supporting factual allegations or authority to explain why the substitution violates California Civil Code § 1095, which provides that "[w]hen an attorney in fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact." Cal. Civ. Code § 1095. Moreover, Plaintiffs provide no authority showing that a violation of that section would render the Veriprise Substitution void as a matter of law. Therefore, these claims, as currently alleged, are insuficcient to establish that Veriprise was not acting as a valid trustee when it recorded the Notice of Default.

Next, Plaintiffs allege that Veriprise "is a subsidiary of Nationstar and . . . was not operating, legally, as a trustee in the State of California." *Id.* ¶ 59. Plaintiffs appear to be

arguing that Veriprise was not a valid trustee because Veriprise failed to meet certain requirements that are legally mandated in order to operate as a trustee in California. *See id.*; Opp'n to Nationstar at 4. First, Plaintiffs allege that Veriprise cancelled its registration to do business in the state of California on August 28, 2015, seemingly implying that this means Veriprise could not act as trustee in California. *See* FAC ¶ 18, Opp'n to Nationstar at 4. However, Plaintiffs allege that HSBC purported to substitute in Veriprise as trustee, and that Veriprise recorded a Notice of Default, on April 16, 2015, and that Veriprise was replaced as the purported trustee by Quality on August 25, 2015. FAC ¶¶ 37, 39, 41. Thus, all of Veriprise's involvement occurred before it allegedly cancelled its registration to do business in California, and as a result, Plaintiff has not shown that Veriprise acted as trustee without the proper business registration. Second, Plaintiffs claim that Veriprise acted as a trustee in the State of California "even though it holds no physical location in California as required by law." FAC ¶ 154. However, Plaintiffs do not, in either the FAC or their oppositions, provide any legal authority to support the notion that being a valid legal trustee in California requires a trustee to hold a physical location in California itself. *See generally* FAC; Opp'n to BANA; Opp'n to Nationstar. Accordingly, Plaintiffs fail to show that Veriprise is not a valid trustee simply because Veriprise is incorporated in Delaware and "holds no physical location in California." *See* FAC ¶ 154.

Finally, Plaintiffs argue that even if Veriprise was a valid trustee, it is stripped of its privilege under California Civil Code § 2924(d) because it acted in bad faith. *See* Opp'n to Nationstar at 4. Specifically, Plaintiffs claim that Veriprise acted in bad faith because "the fact that the [Veriprise Substitution] relied upon the 2011 [HSBC] assignment, rather than the 2013 [BANA] Assignment shows a callous disregard by Veriprise in validating the authority of its parent company [Nationstar] to substitute it as the trustee." Opp'n to Nationstar at 4. Plaintiffs further explain that, in recording the Notice of Default, Veriprise "assisted its parent company in breaching the deed of trust and violating the California Homeowner Bill of Rights." *Id.*

Generally, California Civil Code § 2924(d) establishes that the recording of a notice of default, and subsequent non-judicial foreclosure procedures, are privileged acts. Cal. Civ. Code § 2924(d). Nonetheless, a plaintiff can overcome this privilege by establishing that the trustee acted with malice, which requires showing that "the publication was motivated by hatred or ill will towards the plaintiff or . . . that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights." *Kachlon*, 168 Cal. App. 4th at 336, 344. Here, Plaintiffs are essentially arguing that Verprise acted with reckless disregard of Plaintiffs' rights by allowing itself to be substituted in as trustee by HSBC

despite the 2013 BANA Assignment, which purported to transfer all beneficial interest in the Deed of Trust to Nationstar. However, Plaintiff's claim that Veriprise acted in bad faith by relying on the 2011 HSBC Assignment, as opposed to the 2013 BANA Assignment, is dependent upon HSBC not being the valid beneficiary—the only way HSBC would not have the right to substitute in Veriprise is if it lost its beneficiary interest in the Subject Property. However, as discussed previously, claims that HSBC did not hold the beneficiary interest in the Subject Property after the 2011 HSBC Assignment are barred by res judicata. Moreover, Plaintiffs have failed to sufficiently allege that the BANA Assignment is valid because they claim BANA had no interest in the property to assign it and further fail to explain how HSBC would have lost its beneficiary interest in any other way. Therefore, Plaintiffs' claim that Veriprise is not privileged because it relied on the 2011 HSBC Assignment in bad faith fails.

Since all of Plaintiffs' claims that Veriprise is not the valid trustee fail, Veriprise is immune from suit for any actions it took, such as publishing a Notice of Default, that fall within the scope of the privilege afforded by California Civil Code § 2924(d). *See* Cal. Civ. Code § 2924(d) (affording privilege to the "mailing, publication, and delivery of notices as required by this section" and to "performance of the procedures set forth in this article").

Accordingly, the Court DISMISSES WITHOUT PREJUDICE Plaintiffs' declaratory judgment, cancellation of instruments, slander of title, UCL, and accounting claims against Veriprise. If Plaintiffs seek to amend these claims, they must clearly articulate why: (a) the claims are based on acts that are not covered by the privilege provided by California Civil Code § 2924(d); or (b) if the acts do fall within the scope of the § 2924(d) privilege, why Veriprise is not entitled to that privilege.

5. Declaratory Judgment

In their first cause of action, Plaintiffs allege that declaratory judgment against all Defendants is warranted to resolve the controversy as to who "holds interest in the deed of trust with the legal right to claim default, order a Notice of Default or substitute the trustee." FAC ¶ 81. BANA Defendants argue that Plaintiffs' claim for declaratory judgment should be dismissed because declaratory judgment is not an independent cause of action.[11] BANA Mot. at 10. Nationstar Defendants also argue that the declaratory

[11] BANA Defendants also argue that, "as a general rule, plaintiffs may not bring actions for proof of a defendant's authority to foreclose" and that therefore, Plaintiffs' request for declaratory relief to determine who holds interest in the Deed of Trust is inappropriate. BANA Mot. at 10 (citing *Vieira v. Prospect Mortg., LLC*, U.S. Dist. LEXIS 117750, at *9 (C.D. Cal. July 9, 2012)). However, the *Vieira* opinion was issued more than four years before

judgment claim "is inapplicable to Nationstar, MERS and Verprise," as none of these three entities have interest in the deed of trust, and accordingly Nationstar Defendants do not have a legal right to claim default, nor have they done so. *See* Nationstar Mot. at 5.

In response to BANA Defendants' argument, Plaintiffs claim that declaratory judgment may be brought as an independent cause of action pursuant to California Code of Civil Procedure § 1060 ("California Declaratory Relief Act"). Opp'n to BANA at 5. Plaintiffs correctly point out that some district courts in the Ninth Circuit sitting in diversity have applied the California Declaratory Relief Act. *See, e.g.*, *Valley Forge Ins. Co. v. APL Co. Pte. Ltd.*, No. CV0909323MMM(VBKX), 2010 WL 960341 (C.D. Cal. Mar. 16, 2010). However, many, if not most, other district courts in the Ninth Circuit apply federal law via the Declaratory Judgment Act (28 U.S.C. § 2201), finding declaratory relief to be a procedural matter under *Erie R. Co. v. Tomkins*, 304 U.S. 64 (1938). *See In re Adobe Systems, Inc. Privacy Litigation*, 66 F. Supp. 3d 1197, 1219 (N.D. Cal. 2014); *Gamble v. GMAC Mortg. Corp.*, No. C-08-05532 RMW, 2009 WL 400359, at *2 (N.D. Cal. Feb. 18, 2009) ("[O]nce a case is removed to federal court, whether to grant declaratory relief becomes a procedural matter implicating the Declaratory Judgment Act."); *DeFeo v. Procter & Gamble Co.*, 831 F. Supp. 776, 779 (N.D. Cal. 1993). Moreover, both the United States Supreme Court and the Ninth Circuit have provided guidance suggesting that declaratory judgment is procedural, and that district courts should thus apply federal law, the Declaratory Judgment Act, when sitting in diversity. *See Golden Eagle Ins. Co. v. Travelers Companies*, 103 F. 3d 750, 753 (9th Cir. 1996) *overruled on other grounds by Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220 (9th Cir. 1998) ("[W]hen [the plaintiff] removed the case to federal court, based on diversity of citizenship, the claim remained one for declaratory relief, but the question whether to exercise federal jurisdiction to resolve the controversy became a procedural question of federal law."); *see also Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) ("[T]he Declaratory Judgment Act is procedural only.")

Yvanova, 62 Cal. 4th at 919. The Court in *Vieira* based its opinion largely on *Gomes*, 192 Cal. App. 4th at 1155. However, as explained in the standing section of this Order, the Court in *Gomes* distinguished cases where "there was a *specific factual basis* for alleging that the foreclosure was not initiated by the correct party." *Yvanova*, 192 Cal. App. 4th at 1156. Here, Plaintiffs have alleged a specific factual basis for challenging the foreclosure. FAC ¶¶ 71–87 ("[N]either Nationstar's subsidiary, [Veriprise], [n]or Quality Loan Services are the valid substituted trustees and therefore have no right to record a Notice of Default or Notices of Trustee Sale, much less conduct a trustee sale."). Accordingly, given the recent *Yvanova* decision, which holds that individuals may have the right to challenge foreclosures by parties that have no interest in the foreclosed property, the Court rejects BANA Defendants' argument.

Therefore, this Court will consider Plaintiffs' claim for declaratory relief under the federal Declaratory Judgment Act.

The Declaratory Judgment Act gives district courts discretion to issue declaratory relief. 28 U.S.C. § 2201; *see Wilton v. Seven Falls Company*, 515 U.S. 277, 288–90 (1995); *see also Government Employees Insurance Company v. Dizol*, 133 F.3d 1220, 1223 (9th Cir. 1998). The purpose of the Declaratory Judgment Act is to "relieve potential defendants from the threat of impending litigation." *Spokane Indian Tribe v. United States*, 972 F.2d 1090, 1091–92 (9th Cir. 1992) (quoting *Hal Roach Studios, Inc. v. Richard Feiner and Co.*, 896 F.2d 1542, 1555 (9th Cir. 1990)). However, as Defendants contend, declaratory relief under the Declaratory Judgment Act is not a cause of action in and of itself, but rather, a remedy. *See Stock W., Inc. V. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989); *see also Rosenfeld v. JP Morgan Chase Bank, N.A.*, 732 F. Supp. 2d 952, 975 (N.D. Cal. 2010) ("[D]eclaratory and injunctive relief are not causes of action; rather, they are remedies."); *Hamilton v. Bank of Blue Valley*, 746 F. Supp. 2d 1160, 1181 (E.D. Cal. 2010) ("A declaratory judgment is not a theory of recovery. The [Declaratory Judgment Act] merely offers an *additional remedy* to litigants." (citations and quotations omitted)). Since declaratory judgment is only a remedy, and therefore derivative of underlying claims, a request for declaratory relief can only withstand a motion to dismiss if one of the substantive causes of action survives such a motion. *See Avirez Ltd. v. Resolution Trust Co.*, 876 F. Supp. 1125, 1143 (C.D. Cal. 1995). Here, at least some of Plaintiffs' substantive causes of action survive Defendants' Motions to Dismiss, and thus Plaintiffs may be able to seek declaratory relief.

To request declaratory judgment under the Declaratory Judgment Act, Plaintiffs must allege that there is an actual controversy. *Am. States Ins. Co. V. Kearns*, 25 F.3d 142 at 143 (9th Cir. 1994). For example, parties may seek declaratory judgment to determine disputed rights and legal relations under contract. *See Societe de Conditionnement en Aluminium v. Hunter Eng'g Co.*, 655 F.2d 938, 944 (9th Cir. 1981) (upholding declaratory judgment of patent rights where no litigation was pending); *see also Factory Sales & Eng'g, Inc. v. Nippon Paper Indus. USA Co.*, No. 3:14-CV-05899, 2015 WL 4094447, at *4 (W.D. Wash. July 7, 2015) (denying motion to dismiss crossclaim seeking declaratory judgment of which parties are beneficiaries to a contract); *Realtek Semiconductor, Corp. v. LSI Corp.*, No. C-12-3451-RMW, 2014 WL 2738226, at *4 (N.D. Cal. June 16, 2014) (finding that disputed royalty rate between parties to a contract presented an actual controversy appropriate for declaratory judgment); *D.R. Horton Los Angeles Holding Co. v. Am. Safety Indem. Co.*, No. 10CV443WQH WM, 2010 WL 3957403, at *1 (S.D. Cal. Oct. 8, 2010) (granting leave to include counterclaim for

declaratory judgment determining whether the defendants were liable under an insurance policy). Declaratory relief is appropriate "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Guerra v. Sutton*, 783 F.2d 1371, at 1376 (9th Cir. 1986) (citing *Bilbrey by Bilbrey v. Brown*, 738 F. 2d 1462, 1470 (9th Cir. 1984)).

As to the controversy at issue in this case, Plaintiffs allege that "a controversy remains as to the 2013 [BANA] Assignment and the [Veriprise and Quality] Substitutions of Trustee that were recorded in 2015 . . . ." FAC ¶ 72. Plaintiffs explain that, as a result of the BANA Assignment to Nationstar, there is a dispute about who holds the debt to the Subject Property and can exercise associated legal rights:

> If Nationstar holds interest in the deed of trust, then only Nationstar could claim a default and substitute the trustee. If the assignment [from BANA to Nationstar] is not valid, then HSBC would be the only party entitled to claim a default and substitute the trustee. If Aurora Loan Services, LLC is the beneficiary, then neither Nationstar or HSBC hold any legal rights to claim a default or substitute the trustee. This is a controversy as to [who] holds the actual debt with legal rights to collect and /or substitute the trustee.

FAC ¶ 78. Thus, Plaintiffs allege that there is a controversy as to which entity—Nationstar, HSBC, or Aurora Loan Services—is the rightful beneficiary. Plaintiffs also assert that there is controversy regarding who the valid trustee is, which is dependent upon resolving who the valid beneficiary is. FAC ¶¶ 73, 80.

In response, Nationstar Defendants argue that there is no controversy because the BANA Assignment was invalid, and thus HSBC is the beneficiary:

> The record is clear. All valid assignments of plaintiffs' deed of trust were executed by the beneficiary of record and recorded. The initial assignment of the deed of trust to HSBC was executed by MERS, which was the agreed upon beneficiary identified in the deed of trust, and was recorded in 2011. (RJN Exs. 4, 5.) Plaintiffs cannot argue the 2013 assignment from Bank of America, N.A. clouds this chain. Bank of America, N.A. purported to assign its interest in the deed of trust to Nationstar through the 2013 assignment. (FAC, Ex. 4.) But Bank of America, N.A. had no interest in the deed of trust to

> assign and the 2013 assignment is without any practical legal effect and does not affect the chain of assignments to HSBC. Veriprise, as the substituted trustee by HSBC, properly initiated the foreclosure when it recorded the notice of default in April 2015. Plaintiffs' erroneous claims regarding the 2013 assignment are designed to distract from plaintiffs' severe default on their loan.

Nationstar Mot. at 5–6.

As Nationstar Defendants' response makes clear, Plaintiffs' claim for declaratory judgment is entirely dependent on the allegation that HSBC may not be the valid beneficiary as a result of the 2013 BANA Assignment. However, as discussed in the "Beneficiary of the Deed of Trust" section above, the BANA Assignment is void and thus has no legal effect. Because, under res judicata, HSBC was the valid beneficiary in 2011, and Plaintiffs do not sufficiently allege that any other entity replaced HSBC as the beneficiary, no controversy exists; HSBC is the valid beneficiary of the Deed of Trust.

Accordingly, the Court DISMISSES WITHOUT PREJUDICE Plaintiffs' request for declaratory judgment. To the extent that Plaintiffs also make a claim for injunctive relief on the same underlying theory, the Court dismisses that claim on the same grounds. *See* FAC (first cause of action entitled "declaratory judgment/injunctive relief").

6. Slander of Title

In their third cause of action for slander of title against all Defendants, Plaintiffs allege that Defendants published false statements, and that those false statements reduced the vendibility of the Subject Property and limited Plaintiffs' access to a market where Plaintiffs were reasonably certain to find a purchaser willing to pay top price. FAC ¶¶ 110–21. Specifically, Plaintiffs claim that the instruments recorded by Defendants—the BANA Assignment, the Veriprise Substitution, the Quality Substitution, the Notice of Default, and the Notice of Trustee Sale—all contain false statements. *Id.* ¶¶ 112–16. Further, Plaintiffs allege that by recording these false statements in the official land records, Defendants have created a cloud on the title of the Subject Property. *Id.* ¶ 118. BANA Defendants argue that Plaintiffs' slander of title claim fails because Plaintiffs cannot establish tortious injury, i.e. pecuniary loss, and that the claim fails as to BANA and Recontrust because neither of them recorded the Notice of Default or the Notice of Trustee Sale. BANA Mot. at 10–11. Nationstar Defendants argue that the claim fails because Plaintiffs do not sufficiently allege pecuniary loss or absence of privilege, and because, to the extent the claim is based on Defendants' alleged recording of fraudulent

or false documents, Plaintiffs fail to meet Rule 9(b)'s heightened pleading standard. Nationstar Mot. at 6–7. The Court will consider these issues in turn before determining whether any portion of Plaintiffs' slander of title claim depends on the allegation that HSBC is not the beneficiary of the Deed of Trust.

Slander of title occurs when a person or entity, "without a privilege to do so, publishes a false statement that disparages title to property and causes the owner thereof some pecuniary loss or damage." *Sumner Hill Homeowners' Association, Inc. v. Rio Mesa Holdings, LLC*, 205 Cal. App. 4th 999, 1030 (2012).[12] The tort for slander of title has been interpreted to include four elements: (1) publication; (2) falsity; (3) absence of privilege; and (4) disparagement of another's land which is relied upon by a third party and which results in a pecuniary loss. *Appel v. Burman*, 159 Cal. App. 3d 1209, 1214 (1985); *see* MTD Order at 18.

a. Disparagement Resulting in Pecuniary Loss

First, Nationstar and BANA Defendants both argue that Plaintiffs have failed to allege the fourth element, "disparagement of another's land, which is relied upon by a third party and which results in pecuniary loss." *See* Nationstar Mot. at 3; BANA Mot. at 6–7; *see also Appel*, 159 Cal. App. 3d at 1214. Specifically, Nationstar Defendants argue that "Plaintiffs do not allege they sold or attempted to sell the property [n]or do [they] allege any disparagement that was relied upon by a third party resulting in pecuniary loss." Nationstar Mot. at 7. In addition, BANA Defendants argue that Plaintiffs' claim of loss of vendibility is hypothetical and that "there is no indication that the property has been made available for sale or that Plaintiffs have received any offers." BANA Mot. at 11. In response, Plaintiff argues that California law recognizes that an individual may demonstrate pecuniary loss by alleging an impairment of vendibility of the relevant property, and that loss of a "particular sale" is not required. Opp'n to BANA at 7–8; Opp'n to Nationstar at 4–5. Thus, the Court must decide whether Plaintiffs' factual allegations as to pecuniary loss are sufficient to satisfy the fourth element of slander of title.

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[12] California common law has adopted the definition of slander of title provided in Restatement of Torts § 624:

> One who, without privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.

Rest. Torts § 624; *see Grudger v. Manton*, 21 Cal. 2d 537, 541 (1943).

The Second Restatement of Torts § 633, relied upon by California courts, defines pecuniary loss as follows:

> The pecuniary loss for which a publisher of injurious falsehood is subject to liability is restricted to (a) the pecuniary loss that results directly and immediately from the effect of the conduct of third persons, *including impairment of vendibility or value caused by disparagement*, and (b) the expense of measures reasonably necessary to counteract the publication including litigation to remove the cast upon vendibility or value of disparagement.

Rest. (Second) Torts § 633 (emphasis added). Therefore, under California law, pecuniary loss can include impairment of vendibility or value.

This rule is also reflected in case law. For example, in *Appel*, which Nationstar Defendants cite, the Court explains that, "although the extant cases deal mainly with the loss incurred as the result of losing a purchaser, it is clear in California that slander of title can result when no purchaser is present." *Appel*, 159 Cal. App. 3d at 1215 (citing *Glass v. Gulf Oil Corp.*, 12 Cal. App. 3d 412, 424 (1970)). California law recognizes that a property owner may recover for the "impairment of vendibility 'of his property' without showing that the loss was caused by prevention of a particular sale." *Glass*, 12 Cal. App. 3d at 424 (quoting Rest. Torts (1938) § 633) ("'The disparaging matter may, if widely disseminated, cause pecuniary loss by depriving its possessor of a market in which, but for the disparagement, his land or other thing might with reasonable certainty have found a purchaser.'"); *see also Davis v. Wood*, 12 Cal. App. 3d 788, 791 (1943) (finding that a slander of title claim was sufficiently plead when a plaintiff alleged that defendants "cast a cloud upon and a slander upon plaintiffs' title . . . that recording of said notices . . . decreased the value of said leasehold interest and rendered it unmarketable, all to the damage of said real estate and to Plaintiff").

Here, Plaintiffs allege that, "the instruments have caused a cloud on title by representing that parties, with no legal right or authority, have an interest, which is false." FAC ¶ 118. Plaintiffs further allege that "the vendibility of the property has been suppressed[,] limiting Plaintiffs['] access to a market in which it is reasonably certain Plaintiffs could find a purchaser willing to pay top price instead of the suppressed value of the property." *Id*. ¶ 119. Thus, Plaintiffs' allegations state a type of pecuniary loss—impairment of vendibility and value—that is sufficient under California case law, and Defendants do not cite any authority that requires Plaintiffs to allege that they actually attempted to sell the property but were unsuccessful. *See* Rest. (Second) Torts § 633;

Appel, 159 Cal. App. 3d at 1215. In addition, Plaintiffs allege that they have incurred attorney's fees and legal costs "as a result of having to bring an action to clear the cloud on title." FAC ¶ 120. As Plaintiffs point out, this is also a recognized form of pecuniary loss for slander of title claims. *See Sumner Hill Homeowners' Assn.*, 205 Cal. App. 4th at 1030 ("[I]t is well-established that attorney fees and litigation costs are recoverable as pecuniary damages in slander of title causes of action when, as expressed in subdivision (1)(b) of section 633 of the Restatement, litigation is necessary 'to remove the doubt cast' upon the vendibility or value of plaintiff's property."); *id.* at 1034–35 ("[W]e hold that at least in cases involving a recorded slander of title (as here), the expenses incurred by plaintiffs in the form of attorney fees and costs to clear title and remove the doubt cast upon their property rights by the recorded falsehood are sufficient special damages to support the cause of action; no other pecuniary damages need be shown."). Accordingly, Plaintiffs have sufficiently plead the fourth element of slander of title.

b. Absence of Privilege

Nonetheless, Nationstar Defendants further argue, as BANA Defendants did in their previous Motion to Dismiss, that the recording of the instruments underlying the slander of title claim is privileged pursuant to California Civil Code § 2924(d) and that privilege from suit defeats the third element of the slander of title claim—absence of privilege. Nationstar Mot. at 7. Meanwhile, Plaintiffs claim that none of the Defendants are protected by privilege under § 2924(d) because they acted with malice when Defendants knew that the BANA Assignment, Veriprise Substitution, and Quality Substitution contained false statements, but recorded the instruments anyway, with "reckless disregard" for the truth and rights of Plaintiffs. FAC ¶ 112. Plaintiffs further argue that HSBC's 2015 substitution of trustee contained false statements intended to deceive Plaintiff[s] "as to the legal role and rights of HSBC and VPS to substitute the trustee." *Id*. ¶ 114.

As discussed previously, California Civil Code § 2924(d) establishes that the recording of an assignment of a deed of trust, and subsequent non-judicial foreclosure procedures, are privileged acts. Cal. Civ. Code § 2924(d); *see also Dubose v. Suntrust Mortg., Inc.*, No. 11-CV-3264, 2012 WL 1376983, at *3 (N.D. Cal. Apr. 19, 2012) (finding that a trustee's notice of default, notice of trustee sale, and substitution of trustee are subject to privilege). To overcome this privilege, a plaintiff must show that the defendant acted with malice. *Kachlon v. Markowitz*, 168 Cal. App. 4th 316, 336 (2008) (holding that unless the Defendant "acted with malice, it [was] immune under the common interest privilege."). Malice requires that the defendant was either "motivated by

hatred or ill will towards the plaintiff" or "lacked reasonable ground for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights." *Id.*

As the Court explained regarding BANA's previous motion to dismiss on the same grounds, because Plaintiffs allege that Defendants knew that the relevant assignment and substitutions contained false statements, but recorded them anyway, Plaintiffs have sufficiently alleged malice or reckless disregard to meet the malice requirement at this stage and to thus overcome privilege. *See* MTD Order at 19; *Lopez v. Wells Fargo Bank, N.A.*, No. 16CV0811 AJB (DHB), 2016 WL 6893591, at *9 (S.D. Cal. Nov. 23, 2016) (finding plaintiff sufficiently pled malice when plaintiff claimed the defendants knew or should have known that the filings were inaccurate because defendants did not have a right to the title or interest in the property); *see also Ogilvie v. Select Portfolio Servs.*, No. 12-CV-001654-DMR, 2012 WL 4891583, at *5 (N.D. Cal. Oct. 12, 2012) (finding plaintiff pled malice when plaintiff alleged defendants formulated false documents with knowledge of their falsity). Moreover, Defendants have not cited any authority to show that the § 2924 privilege applies to the recording of assignments or substitutions, which are not mentioned in § 2924. *See* Cal. Civ. Code § 2924(d). Accordingly, Plaintiffs have sufficiently plead the third element, absence of privilege, of a slander of title claim.

c. Rule 9(b)'s Heightened Pleading Standard

Next, Nationstar Defendants argue that, to the extent Plaintiffs' slander of title claim is based on Defendants' alleged recording of fraudulent or false documents, the claim fails to meet Rule 9(b)'s heightened pleading standard. Nationstar Mot. at 6. To the extent that Nationstar Defendants are arguing that Plaintiffs fail to plead the alleged falsehoods contained in the various recorded documents with particularity, the Court is satisfied that Plaintiffs provide sufficient detail about the alleged deficiencies and false statements in the "Disputed Documents" and "General Allegations" portions of their FAC, as well as under the first cause of action. *See* FAC ¶¶ 23–69. To the extent that Nationstar Defendants argue that Plaintiffs' allegations about falsity must be plead with particularity to establish malice, the Court rejects Defendants' argument that a heightened pleading standard applies because, under Rule 9(b), malice is exempt from the heightened pleading standard. Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."). Accordingly, Plaintiffs allegations about falsity meet the applicable pleading standards.

d. BANA's Involvement

BANA Defendants also argue that there can be no slander of title claim against BANA because BANA did not record the Notice of Default, and therefore the first element—publication—is not met with respect to BANA. BANA Mot. at 11.[13] However, Plaintiffs' claim for slander of title is not limited to a claim based on the recording of the Notice of Default. Plaintiffs also claim that the recording of the BANA Assignment, the Veriprise Substitution, and the Quality Substitution are bases for their slander of title claim. FAC ¶¶ 112–16. Therefore, the fact that BANA did not record the Notice of Default is not dispositive, as Plaintiffs allege that BANA recorded the BANA Assignment, and thus Plaintiffs' slander of title claim against BANA survives. *See* FAC ¶ 35, FAC Ex. 4.

e. Falsity and Sufficiency of Allegations That Are Dependent on HSBC Not Being the Valid Beneficiary

Finally, the Court must evaluate whether any portions of Plaintiffs' slander of title claim rely on allegations that HSBC is not the valid beneficiary. The second element of slander of title requires that the thing that is published be "untrue" or false. *Appel*, 159 Cal. App. 3d at 1214. The documents that Plaintiffs claim are untrue and are the basis for their slander of title claim are the BANA Assignment, the Veriprise Substitution, the Quality Substitution, and the Notice of Default. FAC ¶¶ 110–21. The Court will therefore consider whether Plaintiffs' claims, that these documents contain false statements, are dependent upon an allegation that HSBC is not the valid beneficiary.

First, Plaintiffs claim that a document recorded by BANA—the BANA Assignment—contains untrue statements because when BANA recorded or "published" the BANA Assignment, BANA did not have any interest in the Deed of Trust. FAC ¶¶ 36, 112, 116. This claim does not rely on allegations that HSBC is not the rightful beneficiary, and is consistent with Plaintiffs' general claim that the BANA Assignment is invalid. Therefore, the slander of title claim against BANA is not barred.

Plaintiffs also claim that three documents allegedly recorded by HSBC, Veriprise, and Quality—the Veriprise Substitution, the Notice of Default, and the Quality Substitution—are the basis for a slander of title claim.

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[13] BANA Defendants make the same argument about ReconTrust. *Id.* However, the Court already determined, above, that Plaintiffs fail to allege any actions taken by ReconTrust after the adjudication of *Gilliam I*, and therefore the Court dismissed all claims—including this slander of title claim—against Recontrust.

First, Plaintiffs claim that the Veriprise Substitution recorded by HSBC contains untrue or false statements because HSBC was not the beneficiary, and therefore, could not substitute the trustee. FAC ¶¶ 74, 79, 114. As discussed above, the allegation that HSBC is not the valid beneficiary fails because under res judicata, HSBC was the valid beneficiary in 2011, and Plaintiffs fail to sufficiently allege that any other entity replaced HSBC as the beneficiary after 2011. However, Plaintiffs also claim that the Veriprise Substitution is untrue because the Veriprise Substitution violates Civil Code § 1095. FAC ¶ 79. Civil Code § 1095 provides, "[w]hen an attorney in fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it and his own name as attorney in fact. Cal Civ. Code § 1095. Plaintiffs claim that "the subscription of Nationstar as the attorney in fact violates Civil Code § 1095," but do not explain how the subscription of the Nationstar attorney on behalf of HSBC violates this provision. [14] Accordingly, Plaintiffs have not sufficiently alleged that the Veriprise Substitution contains any false statements.

Next, Plaintiffs also allege that the Quality Substitution contains false statements because Nationstar, who purported to substitute in Quality as the trustee on behalf of HSBC, did not have the right to make the substitution and wrote in the signature block that it was acting "as servicer for Plaintiff." FAC ¶¶ 41, 79, 115, 116; *see also* RJN Ex. 10. This claim also depends in part on allegations that HSBC is not the valid beneficiary, because the only way that HSBC would not be entitled to substitute Quality is if HSBC were not the proper beneficiary. As to the notation in the signature block that Nationstar was acting "as servicer for Plaintiff," it is not clear to whom the word "Plaintiff" refers—it could be HSBC—and thus Plaintiffs here have not sufficiently explained why the statement is false. Accordingly, Plaintiffs have not sufficiently alleged that the Quality Substitution contains any false statements.

Finally, Plaintiffs allege that the Notice of Default is a basis for a slander of title claim because it contains untrue statements. FAC ¶¶ 69, 119. Plaintiffs allege that on April 16, 2015, Veriprise recorded the Notice of Default on behalf of HSBC. *Id*. ¶¶ 5, 39. Thus, although the Court has already dismissed all claims against Veriprise, the Court must analyze this claim to determine whether Plaintiffs may assert a claim against HSBC, since Veriprise is allegedly the agent of HSBC and thus Veriprise's actions may subject HSBC to liability. *See* FAC ¶ 5. Plaintiffs allege that the Notice of Default contained false statements because Veriprise was not a valid trustee. *Id*. ¶¶ 69, 98, 119. Specifically,

[14] To the extent that Plaintiffs wish to allege that the Veriprise Substitution violates California law for failing to conform to proper signing procedures, Plaintiffs must state more than legal conclusions and allege sufficient facts. *See Twombly*, 550 U.S. at 555.

Plaintiffs allege that HSBC was not the valid beneficiary, and therefore, HSBC could not substitute in Veriprise as the trustee. *Id*. ¶¶ 40, 80. These claims are dependent upon HSBC not being the proper beneficiary, because the only way that Veriprise would not have been a valid trustee at the time of recording the Notice of Default is if HSBC was not the beneficiary, and therefore did not have the right to substitute Veriprise as trustee. *See* FAC ¶¶ 99–100. In addition, Plaintiffs allege that even if HSBC is the valid beneficiary, Veriprise is not a valid trustee because it is a debt-collecting agency and was not registered to do business in the state of California at the time it issued the Notice of Default. FAC ¶¶ 18, 97. As explained previously, even taking these circumstances to be true—which the Court must in properly considering a motion to dismiss—Plaintiffs have not, in either the FAC or their Opposition, provided any legal authority to support the notion that these circumstances would preclude Veriprise from being a valid trustee in California. Thus, Plaintiffs have not sufficiently alleged that the Notice of Default contains any false statement.

Accordingly, because Plaintiffs fail to sufficiently allege that any of the documents other than the BANA Assignment contain false statements, the Court DISMISSES WITHOUT PREJUDICE Plaintiffs' slander of title claim to the extent that it is based on the recording of the Veriprise Substitution, the Notice of Default, and the Quality Substitution. If Plaintiffs choose to amend this claim, they should clearly allege why the statements included in these documents are false.

7. California's Homeowner Bill of Rights Claims

In Plaintiffs' fourth cause of action, Plaintiffs assert claims under California's Homeowner Bill of Rights ("CHBOR") against BANA, Nationstar, and HSBC. FAC ¶¶ 122–41. In particular, Plaintiffs allege that these Defendants violated California Civil Code §§ 2923.55(B), 2924.17, 2923.6, and 2923.7(b) by: (1) failing to inform Plaintiffs of their right to receive a copy of the loan and evidence of Defendants' right to collect on the debt; (2) relying on assignments that they knew contained false statements; (3) engaging in dual-tracking by allegedly initiating foreclosure proceedings while in loan modification negotiations with Plaintiffs; and (4) failing to provide a single point of contact at which Plaintiffs could reach Defendants. *See id.* The Court will consider each of these claims in turn as to the BANA Defendants and Nationstar Defendants.

a. CHBOR Claims Against BANA Defendants

BANA Defendants argue that Plaintiffs fail to allege any facts to support their allegation that BANA violated the CHBOR. BANA Mot. at 11. As in Plaintiffs' CHBOR

cause of action in their initial Complaint, which this Court previously dismissed, Plaintiffs only allege that BANA "is bound" by the CHBOR. *See* FAC ¶ 124. However, Plaintiffs do not allege any additional facts explaining how BANA violated any provision of the CHBOR. *See generally* FAC. Nevertheless, Plaintiffs argue that, because they used the language "Plaintiffs incorporate herein the allegations made in the preceding paragraphs, inclusive, as though fully set forth herein," their allegations are sufficient. Opp'n to BANA at 5. Plaintiffs further argue in their Opposition that BANA has violated California Civil Code § 2924.17 by failing to ensure that all documents related to the Subject Property are prepared with accuracy, because BANA recorded the BANA Assignment even though it did not hold any interest in the Subject Property. *Id.*; *see* Cal. Civ. Code § 2924.17. Plaintiffs should include this allegation in the complaint and provide factual allegations about how BANA violated this provision. *See Twombly*, 550 U.S. at 555 (requiring a plaintiff to provide "more than labels and conclusions," and commenting that "a formulaic recitation of the elements of a cause of action will not do"). As currently plead, Plaintiffs fail to sufficiently allege in the FAC that BANA violated any provision of CHBOR.

Accordingly, the Court DISMISSES WITHOUT PREJUDICE Plaintiffs' CHBOR claims against BANA. Plaintiffs may amend their complaint to include factual allegations and reference to any specific provisions of the CHBOR that they claim BANA violated. Plaintiffs should also closely read this Court's analysis below of what is required to allege a violation of Civil Code § 2924.17 before submitting an amended complaint alleging that BANA violated the CHBOR.

b. CHBOR Claims against Nationstar Defendants

Next, Nationstar Defendants also ask the Court to dismiss Plaintiffs' fourth cause of action against them, although Nationstar Defendants do not make any specific arguments about the insufficiency of Plaintiffs' claims as to any specific provision of the CHBOR. *See* Nationstar Mot. at 7–8. Instead, Nationstar Defendants generally argue that the First Amended Complaint fails to set forth facts with sufficient specificity to sustain a cause of action against Nationstar Defendants under any provision of the CHBOR, and claim that Plaintiffs merely recite the statutory language. Nationstar Mot. at 7–8. Furthermore, Nationstar Defendants assert that even if Plaintiffs have sufficiently alleged a violation of the CHBOR, Plaintiffs fail to demonstrate that any violation was material, as is required by California Civil Code § 2924.12. Nationstar Mot. at 8–9. In response, Plaintiffs argue that they sufficiently allege that Defendants failed to conform with the CHBOR, that there is no requirement that Plaintiffs show they were injured or harmed, and that any violation of the law is a material violation. Opp'n to Nationstar at 9. The

Court will first address the sufficiency of Plaintiffs' factual allegations and then address the requirement for pleading a "material" violation.

i. Sufficiency of Factual Allegations

First, Plaintiffs allege that Nationstar violated California Civil Code § 2923.55(b)(B) by failing to provide Plaintiffs with written notice of Plaintiffs' right "to demand a copy of the [Loan] and evidence of Nationstar's alleged right to collect the debt . . . ." FAC ¶ 127. The relevant portion of § 2923.55 provides a list of information that mortgage servicers must provide in writing to borrowers:

> A mortgage servicer shall send the following information in writing to the borrower . . . (B) A statement that the borrower may request the following:
>
> > (i) A copy of the borrower's promissory note or other evidence of indebtedness.
> >
> > (ii) A copy of the borrower's deed of trust or mortgage.
> >
> > (iii) A copy of any assignment, if applicable, of the borrower's mortgage or deed of trust required to demonstrate the right of the mortgage servicer to foreclose.

Cal. Civ. Code § 2923.55(b). Based on this provision, Plaintiffs claim that "Nationstar is required, by law, to provide a written notice of Plaintiffs' right to demand a copy of the Note and evidence of Nationstar's alleged right to collect on the debt . . . ." FAC ¶ 127.

However, Plaintiffs allege that "Nationstar never provided this written notice to Plaintiff[s] prior to or after recording the Notice of Default." FAC ¶ 128. While Defendants suggest that Plaintiffs' factual allegations as to the failure to provide written notice are too limited, Plaintiffs are alleging that Defendants made omissions rather than took actions to violate this provision, and thus Plaintiffs can only allege what Defendants did not do. *See* FAC ¶¶ 127–28; Nationstar Mot. at 3. Because Plaintiffs are unlikely to be able to allege the omission with any further specificity, Plaintiffs have plausibly alleged that Nationstar violated California Civil Code § 2923.55(b) by failing to provide Plaintiffs with written notice. *See Twombly*, 550 U.S. at 555.[15]

[15] However, to the extent that Plaintiffs may be seeking to allege that HSBC violated this provision, Plaintiffs' claim fails. Plaintiffs do not allege that HSBC has violated § 2923.55(b)(B)(i-iii), nor do they allege that HSBC was the

Second, Plaintiffs argue that Nationstar "has materially violated Civil Code § 2924.17 on the basis that Nationstar is taking acts based on . . . assignments that contain false statements and misrepresent the beneficial holder of the debt." FAC ¶ 130. Civil Code § 2924.17 requires that, "before recording or filing" documents such as a notice of default, notice of sale, assignment of a deed of trust, or substitution of trustee, "a mortgage servicer shall ensure that it has reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information." Cal. Civ. Code § 2924.17, *see Mills v. JPMorgan Chase Bank, N.A.*, No. 116CV00665DADEPG, 2016 WL 6896571, at *3 (E.D. Cal. Nov. 23, 2016) (analyzing the requirements of Cal. Civ. Code § 2924.17). The purpose of § 2924.17 is to prevent "robo-signing," "which occurs when persons sign a document without personal knowledge of the content attested to therein and/or sign the documents without the requisite authority to do so." *Id*.; *see also Marquez v. Wells Fargo Bank, N.A.*, No. 13-2819, 2013 WL 5141689 (N.D. Cal. Sept. 13, 2013) ("Section 2924.17 prohibits the practice of robo-signing, in which servicers sign foreclosure documents without determining the right to foreclose.").

Plaintiffs allege that Nationstar violated this provision because it "relied upon a Notice of Default that was recorded by [Veriprise] in which HSBC alleges it is the beneficiary of the deed of trust . . . ." FAC ¶ 129. Plaintiffs further explain that "Nationstar cannot rely upon any document or instrument that contains false statements, regardless to when it was recorded or executed, . . . as competent or reliable evidence of Nationstar's right to act as the alleged 'creditor' or servicer of the creditor." *Id.* ¶ 131. However, this claim—that Nationstar improperly relied on allegedly false statements that HSBC was the valid beneficiary—depends on Plaintiffs' allegation that HSBC is not the valid beneficiary. As discussed above, this allegation is not sufficiently supported, and thus, to the extent that Plaintiffs are claiming that Nationstar violated § 2924.17 by relying on statements that HSBC was the beneficiary of the Deed of Trust, Plaintiffs' claim fails. Plaintiffs also allege that "the Note has not been [e]ndorsed or assigned and therefore Plaintiffs allege Nationstar has taken acts that are not based on competent or reliable evidence as Nationstar has no legal basis rooted in ownership or possession of the Note, or by the assignments, which have been challenged as false and subject to cancellation." *Id.* ¶ 132. However, this claim also seems to depend in part on the failed allegation that HSBC is not the valid beneficiary and, in any case, is plead in a vague and conclusory manner that fails to state a claim for violation of § 2924.17. Accordingly,

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mortgage servicer recording default within the meaning of the § 2923.55(b)(B). *See generally* FAC. In addition, Plaintiffs have not alleged that Nationstar is otherwise an agent of HSBC. *See id*. Therefore, Plaintiffs have not alleged sufficient facts to support a claim under § 2923.55(b)(B) against HSBC.

Plaintiffs fail to state a claim against Nationstar for violation of California Civil Code § 2924.17, the provision of the CHBOR that requires a mortgage servicer to review "competent and reliable evidence to substantiate the borrower's default and the right to foreclose" before recording certain documents.[16]

Third, Plaintiffs allege that Nationstar engaged in "dual tracking" in violation of California Civil Code § 2923.6(c) by continuing foreclosure proceedings while Plaintiffs engaged in a loan modification process. FAC ¶ 135. California Civil Code § 2923.6(c) provides:

> If a borrower submits a complete application for a first lien loan modification offered by, or through, the borrower's mortgage servicer, a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending. A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale or conduct a trustee's sale until any of the following occurs:
>
> (1) The mortgage servicer makes a written determination that the borrower is not eligible for a first lien loan modification, and any appeal period pursuant to subdivision (d) has expired.
>
> (2) The borrower does not accept an offered first lien loan modification within 14 days of the offer.
>
> (3) The borrower accepts a written first lien loan modification, but defaults on, or otherwise breaches the borrower's obligations under, the first lien loan modification.

Cal. Civ. Code § 2923.6(c). Thus, the statute prevents foreclosure proceedings from being conducted while a borrower is engaged in the process of seeking a loan

[16] This claim also fails as to HSBC because Plaintiffs have not alleged that HSBC signed, recorded, or filed any of the documents relevant to this claim. *See* FAC ¶¶ 129–33. Moreover, Plaintiffs have not alleged that HSBC served as the "mortgage servicer," nor have Plaintiffs alleged that Nationstar is otherwise an agent of HSBC such that HSBC would be liable for any wrongful actions on behalf of Nationstar. *See generally* FAC. Furthermore, even if Nationstar were HSBC's agent, because Plaintiff has failed to state a claim under § 2924.17 against Nationstar, any claim against HSBC based on agency would necessarily fail as well. For these reaons, Plaintiffs have not alleged sufficient facts to support a claim under § 2924.17 against HSBC.

modification. As one court explained, "the dual-tracking provision . . . is intended to prevent borrowers from being given the run around, being told one thing by one bank employee while something entirely different is being pursued by another." *Jolley v. Chase Home Finance, LLC* 213 Cal. App. 4th 872, 905 (2013).

Plaintiffs allege that "Nationstar was in discussions and negotiations with Plaintiff[s] for a [loan] modification but while negotiating the modificiation Nationstar violated CHBOR by dual tracking Plaintiff[s]." FAC ¶ 61. Plaintiffs further allege that, as a result, they were compelled to file a claim for declaratory relief. *Id.* ¶ 62. At that point, Nationstar allegedly entered into modification discussions, promising to cease the dual tracking if Plaintiffs dismissed their declaratory claim with prejudice. *Id.* ¶ 63. However, Plaintiffs claim they "upheld [their] agreement by dismissing the declaratory relief claim with prejudice, but Nationstar never held true to its agreement to cease foreclosure and enter into modification discussions." *Id.* ¶ 64. Plaintiffs further allege that,

> Nationstar did engage in negotiations with Plaintiff[s] for a modification out of the Interest Only Terms of the loan, in which Plaintiff[s] qualified for a modification, and further, had a completed application on file with Nationstar as of April 14, 2015 . . . Nationstar continued with the foreclosure by recording the [Notice of Default] and [Notice of Trustee Sale] during the modification process in which Nationstar had a completed modification . . . .

FAC ¶¶ 134 –35.

In response, Nationstar Defendants assert that Plaintiffs only allege "in a conclusory fashion" that Plaintiffs had a completed application on file with Nationstar on April 14, 2015. Nationstar Mot. at 8. Nationstar Defendants argue that Plaintiffs are required to identify the specific documents that "were submitted to what defendants, when those documents were submitted, or when, how, or from who the purported acknowledgement of a complete loan modification application was made." *Id.* The only authority that Defendants cite in support of their argument that such allegations are necessary is California Civil Code § 2923.6(g). However, nothing in that statute requires Plaintiffs to plead these specific facts, which are not elements of a claim under California Civil Code § 2923.6. *See* Cal. Civ. Code § 2923.6. Accordingly, Plaintiffs have alleged sufficient facts to state a plausible claim for violation of Civil Code § 2923.6(g) against Nationstar because Plaintiffs specifically alleged that, while they were in the process of

loan modification negotiations with Nationstar, Nationstar continued with foreclosure proceedings.[17] *See Twombly*, 550 U.S. at 555; *see also* FAC ¶¶ 134–35.

Fourth and finally, Plaintiffs allege that Nationstar violated California Civil Code § 2923.7(b) by failing to provide Plaintiffs a single point of contact ("SPOC"), or rather an individual Nationstar representative whom Plaintiffs could contact for loan modification requests. FAC ¶ 179. In relevant part, § 2923.7 provides that "*[u]pon request from a borrower who requests a foreclosure prevention alternative*, the mortgage servicer shall promptly establish a [SPOC] and provide to the borrower one or more direct means of communication with the [SPOC]." Cal. Civ. Code § 2923.7(a) (emphasis added). Thus, to establish that Nationstar violated § 2923.7, Plaintiffs must first establish that they requested a foreclosure prevention alternative, thus giving rise to Nationstar's duty to provide a SPOC. *See Hild v. Bank of Am., N.A.*, No. EDCV 14-2126-JGB SPX, 2015 WL 401316, at *7 (C.D. Cal. Jan. 29, 2015) ("California Civil Code § 2923.7(a) does not condition the appointment of a SPOC on a borrower's specific request for such a contact; instead the statutory provision requires a SPOC to be appointed when a borrower 'requests a foreclosure prevention alternative,' such as a loan modification." (quoting Cal. Civ. Code § 2923.7(a)).

Plaintiffs allege that "Nationstar never provided a single point of contact in violation of California Civil Code § 2923.7(b) even though Plaintiff[s] ha[d] a completed modification application on file and [were] seeking to restructure [their] debt through modification." FAC ¶ 136. The alleged completion of a loan modification application satisfies the requirement that Plaintiffs request a foreclosure prevention alternative, which gives rise to Nationstar's duty to provide a SPOC. *See Hild, N.A.*, No. EDCV 14-2126-JGB SPX, 2015 WL 401316, at *7 (C.D. Cal. Jan. 29, 2015). Therefore, Plaintiffs have alleged sufficient facts to support a cause of action under § 2923.7(b) against Nationstar.[18]

[17] Although Plaintiffs do not specifically allege that none of the events in § 2923.6(g)(1)–(4) occurred, viewing the facts in the light most favorable to Plaintiffs, the Court assumes that these events did not occur. However, as to HSBC, Plaintiffs have not alleged that Defendant HSBC was engaged in "dual tracking," or that Nationstar is otherwise an agent of HSBCsuch that HSBC was responsible for Nationstar's actions. *See generally* FAC. Thus, Plaintiffs have not provided sufficient factual allegations to support a claim under § 2923.6(c) against HSBC.

[18] However, Plaintiffs have not alleged that they have requested a foreclosure prevention alternative from HSBC or that Nationstar is otherwise an agent of HSBC such that HSBC would be liable for Nationstar's actions. *See generally* FAC. Therefore, Plaintiffs have not alleged sufficient facts to support a claim under California Civil Code § 2923(b) against HSBC.

ii. Requirement for Pleading a "Material" Violation

Still, as to all of Plaintiffs' claims under the CHBOR, Defendants argue that even if Plaintiffs have sufficiently alleged a violation of the CHBOR, Plaintiffs fail to demonstrate that any violation was material as required by California Civil Code § 2924.12 (the statute that creates a private right of action for violations of the CHBOR). Nationstar Mot. at 8–10; *see* Cal. Civ. Code § 2924.12. In response, Plaintiffs assert that there is no requirement that Plaintiffs show they were injured or harmed, and argue that any violation of the CHBOR is a material violation. Opp'n to Nationstar at 9.

California Civil Code § 2924.12 creates a private right of action for violations of the California Homeowner Bill of Rights and allows for injunctive relief in cases where a trustee's deed of trust upon sale has not been recorded. The relevant statute provides:

> (a)(1) If a trustee's deed upon sale has not been recorded, a borrower may bring an action for injunctive relief to enjoin *a material violation* of Section 2923.55, 2923.6, 2923.7, 2924.9, 2923.10, 2924.11, or 2924.17.
>
> (2) Any injunction shall remain in place and any trustee's sale shall be enjoined until the court determines that the mortgage servicer, mortgage trustee, beneficiary, or authorized agent has corrected and remedied the violation or violations giving rise to the action for injunctive relief.

Cal. Civ. Code § 2924. 12(a) (emphasis added). Thus, Plaintiffs must sufficiently establish that the alleged violations of CHBOR are material. However, California Civil Code § 2924.12(a) does not define "material violation." *See* Cal. Civ. Code § 2924.12; *see also Green v. Wells Fargo Bank, N.A.*, No. C 15-00048 JSW, 2015 WL 2159460 (N.D Cal. May 7, 2015) (explaining that there is a lack of authority defining "material violation" under the CHBOR). Nationstar Defendants contend that, to demonstrate a material violation, Plaintiffs must show that actual prejudice resulted from the violation, but Nationstar Defendants fail to cite any authority to support that notion. *See* Nationstar Mot. at 8–10.

District courts in California have taken diverging approaches as to how to apply the materiality requirement of § 2924.12. *See Rahabarian v. JP Morgan* Chase, No. 2:14-CV-01488-JAM, 2015 WL 2345395, at *3 (E.D. Cal., May 14, 2015). Some courts have determined that materiality in CHBOR claims is a factual question that should not be

resolved on a motion to dismiss. *See, e.g.*, *Hestrin v. Citimortgage, Inc.*, 2015 U.S. Dist. LEXIS 23547, at *8 n. 4 (C.D. Cal. Feb. 25, 2015); *Garcia v. PNC Mortg.*, 2015 WL 534395, at *4–5 (N.D. Cal. Feb. 9, 2015). Other courts have determined that every violation that contravenes the purpose of the CHBOR is a material violation. *See, e.g.*, *Green v. Wells Fargo Bank, N.A.*, No. C 15-00048 JSW, 2015 WL 2159460 (N.D. Cal. May 7, 2015) (declining to impose additional pleading standards to Plaintiffs dual-tracking claim under the California Homeowners Bill of Rights in the "absence of any authority defining the meaning of 'material violation'" because one of the purposes of the CHBOR was to eliminate dual tracking). Yet others have found that a violation of the CHBOR is only material when the violation has caused plaintiffs to suffer damages. *See Salazar v. U.S. Bank Nat'l Ass'n*, 2015 WL 1542908, at *7 (C.D. Cal. Apr. 6, 2015) ("[I]t is plausible that [defendant's compliance] would have prevented Plaintiff from suffering the loss of her home, ruined credit, emotional distress, and a future inability to purchase a home.").

This Court agrees with the courts that have found that any violation of the CHBOR is a material if the violation contravenes the purpose of CHBOR. *See, e.g.*, *Green*, 2015 WL 1542908, at *7. The CHBOR was enacted to "ensure fair lending and borrowing practices for California homeowners" and "guarantee basic fairness and transparency for home owners in the foreclosure process." *See* "California Homeowner Bill of Rights," *Office of the Attorney General*, https://oag.ca.gov/hbor (last accessed April 5, 2018). Since Plaintiffs' claims for failure to provide required written notice, engaging in dual tracking, and failure to provide a Specific Point of Contact fall within the general purpose of the CHBOR—to ensure transparency and basic fairness for homeowners in the foreclosure process—the violations alleged by Plaintiffs are plausibly material. *See id.*; *see also* Cal. Civ. Code §§ 2923.55, 2923.6(c), 2923.7(b).

Thus, Plaintiffs have sufficiently alleged material violations of CHBOR, California Civil Code §§ 2923.55, 2923.6(c), and 2923.7(b), against Nationstar.

For the foregoing reasons, the Court DENIES Nationstar Defendants' Motion to Dismiss Plaintiffs' CHBOR claims under California Civil Code §§ 2923.55(b), 2923.6(c), and 2923.7(b) against Nationstar because Plaintiffs have sufficiently alleged material violations of those provisions. However, the Court DISMISSES WITHOUT PREJUDICE Plaintiffs' § 2924.17 claim against Nationstar. Furthermore, because Plaintiffs have failed to sufficiently allege that HSBC violated any provision of CHBOR, the Court DISMISSES WITHOUT PREJUDICE Plaintiffs' CHBOR claims under California Civil Code §§ 2923.55, 2924.17, 2923.6(c), and 2923.7(b) against HSBC.

8. California's Unfair Competition Law

Plaintiffs allege that Defendants BANA, Nationstar, and HSBC violated California's Unfair Competition Law ("UCL") by engaging in unfair and deceptive business practices. FAC ¶ 145.[19] Specifically, Plaintiffs allege that Nationstar engaged in unlawful, unfair, and deceptive business practices by: (1) alleging rights to collect on a loan on the basis of assignments that contain false statements in violation of California Civil Code § 1624(a)(3); (2) failing to provide borrowers with a meaningful opportunity to restructure debt to avoid foreclosure; and (3) claiming that "investor guidelines" prevent loan modification when no "investor guidelines" exist. *Id*. ¶¶ 142–152. In addition, Plaintiffs allege that there was a "scheme" implemented by Defendants that was "specifically designed to defraud California consumers and enrich Defendants at the expense of consumers in this State." FAC ¶ 157.

As an initial matter, BANA Defendants argue that Plaintiffs fail to make any specific allegations as to BANA, and that Plaintiffs' vague allegations are insufficient to state a claim under the UCL. BANA Mot. at 11–12. The Court agrees that if Plaintiffs seek to state a UCL claim against any Defendants other than Nationstar (about whom Plaintiffs allege facts), Plaintiffs must make specific factual allegations as to those particular Defendants. *See Twombly*, 550 U.S. at 555. Thus, because Plaintiffs do not make any specific allegations as to how BANA or HSBC engaged in unlawful or unfair business practices beyond participating in an undefined "scheme," the Court DISMISSES WITHOUT PREJUDICE Plaintiffs' UCL claim against BANA and HSBC.[20] *See Twombly*, 550 U.S. at 555.

As to Plaintiffs' allegations that Nationstar violated the UCL, Nationstar Defendants argue that Plaintiffs' claim fails because it is derivative of Plaintiffs' other failed claims. Nationstar Mot. at 9. In addition, Nationstar Defendants argue Plaintiffs lack standing to bring a UCL claim because Plaintiffs did not suffer injury in fact, and

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[19] Plaintiffs also allege that Veriprise engaged in unfair and deceptive business practices by: (1) alleging that it is a valid trustee and acting as a trustee while holding no physical location in California; and (2) alleging it is a true, valid trustee and failing to evaluate whether the Veriprise Substitution was carried out by a proper party. FAC ¶¶ 153–58. However, as previously explained, Plaintiffs fail to sufficiently allege that Veriprise was not a valid trustee, and therefore, Veriprise is immune from suit for its actions as a trustee pursuant to California Civil Code § 2924. Accordingly, the Court already dismissed all claims against Veriprise. Similarly, the Court already dismissed all claims against MERS and ReconTrust, and thus the Court will not address Plaintiffs' UCL claims against those three entities.

[20] The Court notes that Plaintiffs seem to suggest, in their Opposition, that BANA engages in the unfair and deceptive business practice of violating California Penal Code § 115, for example by recording the invalid BANA Assignment. *See* Opp'n to Nationstar at 15. If Plaintiffs wish to pursue such a claim, they should add the relevant allegations to the UCL cause of action in their complaint.

because "any purported harm Plaintiffs allege is a result of their own default" rather than a result of actions by Nationstar. *See* Nationstar Mot. at 9–10. The Court will first address whether Plaintiffs sufficiently allege illegal business practices before turning to whether Plaintiffs have standing to bring their UCL claim.

The UCL prohibits unfair competition, which includes any "unlawful, unfair, or fraudulent business act or practice" that causes the person asserting a claim to have "suffered injury in fact" and "lost money or property." Cal. Bus. & Prof. Code §§ 17200, 17204. "Unlawful," "unfair," and "fraudulent" are recognized as three separate and distinct theories of liability under the UCL. *South Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 885 (1999).

Plaintiff's UCL claim appears to be based largely on the unlawful theory of liability.[21] Under the UCL, "unlawful" is defined as "an act or practice, committed pursuant to business activity, that is at the same time forbidden by law." *Bernardino v. Planned Parenthood Fed. Of Am.*, 115 Cal. App. 4th 322, 351 (2004). Thus, under that theory of liability, the UCL incorporates other state laws, and violations of those laws are independently actionable. *AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1107 n.1 (9th Cir. 2013) (noting that by prohibiting unlawful business practices, the UCL "'borrows' violations from other laws by making them independently actionable as unfair competitive practices" (internal quotations omitted)); *Chabner v. United Omaha Life Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000).

Plaintiffs have sufficiently alleged that Nationstar violated California Civil Code §§ 2923.55, 2923.6(c), and 2923.7(b) by failing to provide required written notice, dual tracking, and failing to provide a specific point of contact for loan modification

[21] Plaintiffs also suggest that Defendants engage in a number of unfair and deceptive business practices. FAC ¶¶ 146, 149–151. However, Defendants do not address these allegations, and thus the Court will only discuss them briefly. Recognizing a split in authority, the California Court of Appeal has articulated three tests for defining "unfair." *See Dram v. San Fernando Valley Bar Ass'n*, 182 Cal. App. 4th 247, 257–58 (2010). If Plaintiffs wish to state a claim for unfair business practices, Plaintiffs must demonstrate that Defendants' allegedly wrongful acts were unfair within the meaning of one of the three tests. First, the "tethering test" requires that the public policy which is a predicate to a consumer unfair competition action must be tethered to specific constitutional, statutory, or regulatory provisions. *Id.* Second, the "balancing test" asks whether the alleged practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers and requires the court to weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim. *Id.* The third test incorporates the definition of "unfair" from the Federal Trade Commission Act and requires that (1) the consumer's injury be substantial; (2) the injury not be outweighed by any countervailing benefits to consumers or competition; and (3) the injury is one that consumers could not have reasonably avoided. *Id.* (citing 15 U.S.C. § 45(5)(n)). Plaintiffs plausibly allege that the alleged practices are "unfair" under the "balancing test" because "[t]he harm to Plaintiffs and to members of the general public outweighs the utility (if any) of Defendants' policies and practices." FAC ¶ 162.

negotiations. Therefore, Plaintiffs have, at minimum, alleged sufficient facts to support a cause of action against Nationstar under the UCL's unlawful theory of liability.

Nevertheless, Nationstar Defendants argue that Plaintiffs lack standing to bring their claim because Plaintiffs do not sufficiently allege an injury caused by Nationstar. *See* Nationstar Mot. at 9–10. The California Supreme Court has explained that "private standing" to bring a UCL claim "is limited to any 'person who has suffered injury in fact and has lost money or property' as a result of unfair competition." *Kwikset Corp. v. Sup. Ct.*, 51 Cal. 4th 310, 320–21 (2011). Thus, to bring a UCL claim, an individual must allege (1) "a loss of deprivation of money or property sufficient to qualify as injury in fact i.e., *economic injury*"; and (2) "that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." *Id*. at 322. In *Kwikset*, the court explained that injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Id*. at 320–21.

In the FAC, Plaintiffs allege that they have suffered injury in fact, and thus have standing to bring their UCL claim, because they "paid interests and charges on the loan." FAC ¶ 159. Further, Plaintiffs explain that they are "threatened with loss of title to their home" and thus "will lose all monies paid on the property, improvements made to the property, and payments made on the loan." *Id.* ¶ 160. In addition, Plaintiffs claim they "have been assessed increased costs and fees associated with the wrongful activities" and "have incurred the burden to pay the costs of retaining a forensic mortgage loan auditor and attorney to investigate the fraudulent and otherwise illegal activities of the Defendants." *Id.* ¶¶ 160–61. Finally, Plaintiffs allege that "because [they] have been unable to modify the onerous terms of the loan, Plaintiffs' creditworthiness is ruined." *Id.* ¶ 161.

Nationstar Defendants argue that these allegations are insufficient and that Plaintiffs did not suffer injury in fact in the form of lost money or property because Plaintiffs actually owed over $800,000 on the Subject Property. Nationstar Mot. at 9–10. They point out that Plaintiffs do not dispute owing the money on the loan and that Plaintiffs do not allege that they paid Nationstar any money they were not otherwise required to pay under their loan agreement. *Id.* at 10. Nationstar Defendants also argue that any alleged injury is a result of Plaintiffs' own default rather than Defendants' actions, and that therefore the alleged economic injury was not caused by defendants' actions. *Id*.

For the purposes of standing under the UCL, plaintiffs suffer an injury in fact when they have: (1) "expended money due to the defendant's acts of unfair competition;" (2) "lost money or property;" or (3) "been denied money to which [they had] a cognizable claim." *Hall v. Time Inc.*, 158 Cal. App. 4th 847, 854–55 (2008). In addition, plaintiffs must establish a "'causal connection' between [defendant's] alleged UCL violation and [their] injury in fact." *Rubio v. Capital One Bank*, 613 F.3d 1195, 1203 (9th Cir. 2010). Here, Plaintiffs sufficiently allege an injury in fact under the first category because they claim that they had to pay increased costs and fees, and had to retain a forensic mortgage loan auditor and attorney, as a direct result of Defendants' alleged illegal practices. *See Hall*, 158 Cal. App. 4th at 854–55.

Plaintiffs also allege that they will lose money and property if their home is foreclosed, but Nationstar Defendants argue that such foreclosure would be the result of Plaintiffs' own actions in failing to make their loan payments. *See* Nationstar Mot. at 10. "To establish injury in fact in the context of a home foreclosure, it is enough that foreclosure proceedings have been initiated." *Ivey v. JP Morgan Chase Bank, N.A.*, No. 16-CV-00610-HSG, 2016 WL 4502587, at *7 (N.D. Cal. Aug. 29, 2016). However, Plaintiffs must still show that Defendants' illegal conduct, as opposed to Plaintiffs' default, caused the foreclosure proceedings. *See id.* ("While Chase has initiated foreclosure on the Property, which is sufficient to constitute an injury in fact, Plaintiff has failed to adequately allege any unfair, unlawful, or fraudulent conduct by Chase that caused the foreclosure."). Thus, some district courts have concluded, relying on *Jenkins*, 216 Cal. App. 4th at 523, that individuals who default on loan payments before foreclosure proceedings commence, and before the defendants allegedly commited unlawful acts, lack standing under the UCL because in those cases the borrower's own actions in defaulting cause lawful foreclosure proceedings to begin. *See Cornejo v. Ocwen Loan Servicing LLC*, 151 F. Supp. 3d 1102, 1118 (E.D. Cal. 2015) ("Because their default occurred significantly prior to the alleged unlawful acts, [defendants] actions could not have caused the alleged economic loss."). Here, the timeline of Plaintiffs' default compared to Defendants' alleged illegal acts, and to what extent each may have caused the initiation of foreclosure proceedings, is not entirely clear. *See* FAC ¶¶ 160–62. Therefore, if Plaintiffs choose to amend their complaint, the Court suggests that they clarify the causal connection between each alleged illegal act and each alleged injury in fact. Nevertheless, even without the alleged injury of foreclosure, Plaintiffs sufficiently allege an injury because they "expended money due to the defendant's acts of unfair competition," and thus Plaintiffs sufficiently state a UCL claim against Nationstar. *See Hall*, 158 Cal. App. 4th at 854–55.

For the foregoing reasons, the Court DENIES Nationstar Defendants' Motion to Dismiss Plaintiffs' UCL claims against Nationstar, but DISMISSES WITHOUT PREJUDICE Plaintiffs' UCL claims against BANA and HSBC.

9. Breach of Contract & Promissory Estoppel

In their sixth cause of action, Plaintiffs allege a claim for breach of contract and promissory estoppel against HSBC and Nationstar. FAC ¶¶ 166–74. Specifically, Plaintiffs claim that the Deed of Trust is the contract, and that Nationstar and HSBC breached "the contract" by "failing to provide Notice as required by ¶ 22 of the deed of trust . . . ." *Id.* ¶¶ 167, 169. In addition, Plaintiffs alleged that Nationstar breached "the contract" by alleging that Nationstar was a lender, "when in fact its acts were those of a servicer." *Id.* ¶ 168. Plaintiffs claim that the duties created by the Deed of Trust—such as the requirement that the foreclosing party inform Plaintiff of his right to bring a legal action—are conditions precedent to Defendants' ability to foreclose, and that until such duties are met, Defendants are "estopped" from taking any further actions. *Id.* ¶ 170.[22]

In response, Nationstar Defendants argue that Plaintiffs are barred from asserting breach of contract claims against them based on the finding in this Court's MTD Order that Plaintiffs' claims are barred by res judicata to the extent that they are based on allegations of events that occurred prior to the adjudication of *Gilliam I*. Nationstar Reply at 6; *see* MTD Order at 17. In addition, Nationstar Defendants assert that Plaintiffs still fail to plead any of the elements of breach of contract. Nationstar Mot. at 10. Specifically, Nationstar Defendants claim that Plaintiffs have not demonstrated that a contractual relationship exists between Nationstar and Plaintiffs, and that Plaintiffs have only broadly asserted contractual claims against "defendants" but fail to say which Defendants breached the contract. Nationstar Reply at 6. Nationstar Defendants also argue that Plaintiffs have failed to show that they have performed under the contract or that their performance was excused. Nationstar Mot. at 11. Nationstar Defendants further assert that, because Plaintiffs are the breaching party, Plaintiffs are barred from pursuing any

[22] Plaintiffs also allege that "their constitutional right to due process . . . was violated in that Defendants failed to provide proper notice to or with Notice of Default and in filing Notices of Trustee Sale." *Id.* ¶ 172. However, this claim that Defendants violated Plaintiffs' Constitutional right to due process is unfounded because individuals can generally only assert violations of the right to due process under the Fourteenth Amendment against state actors or their equivalent. *See Civil Rights Cases*, 109 U.S. 3, 11 (1883); *see also Apao v. Bank of New York*, 324 F. 3d 1091, 1093 (9th Cir. 2003) (commenting that the Fourteenth Amendment "shields citizens from unlawful governmental actions, but does not affect conduct by private entities"). Plaintiffs do not allege that any of the Defendants are state actors. *See generally* FAC. Therefore, Plaintiffs' claim fails to the extent it is premised upon a violation of the right to due process.

contract claim against Defendants. *Id.* Finally, Nationstar Defendants argue that Plaintiffs have failed to identify what type of estoppel they seek and have failed to plead the elements of any estoppel claim. *Id.* The Court will address each issue in turn.

First, Plaintiffs' breach of contract claim is not barred by res judicata as Nationstar Defendants claim. *See* Nationstar Reply at 6. Plaintiffs assert that Defendants breached ¶ 22 of the Deed of Trust by failing to provide Plaintiffs notice of their right to pursue legal action, prior to or at the time of issuing the Notice of Default. FAC ¶¶ 169, 172. The Notice of Default was issued on April 16, 2015, well after the adjudication of *Gilliam I*. *See* FAC Ex. 6; *see also* Nationstar RJN Ex. 9. Therefore, contrary to Defendants' assertions, the breach would not have "occurred much earlier in time" and Plaintiffs could not have brought this claim in their 2012 action. *See* Nationstar Reply at 11. Thus, the Court will turn to the sufficiency of Plaintiff's factual allegations.

To state a breach of contract claim, Plaintiffs must allege the following elements: "(1) the contract; (2) plaintiff's performance of the contract or excuse for nonperformance; (3) defendants' breach; and (4) the resulting damage to plaintiff." *Lortz v. Connell*, 273 Cal. App. 2d 286, 290 (1969).

First, although Plaintiffs claim that "the contract at issue is the deed of trust," Plaintiffs do not sufficiently allege that any contractual relationship exists between Nationstar and Plaintiffs, because Nationstar was not a party to the deed of trust. *See Batuhan v. Assurity Fin. Servs., LLC*, No. 15-CV-04526-WHO, 2015 WL 7776470, at *3 (N.D. Cal. Dec. 3, 2015) ("[Plaintiff] does not plead facts that plausibly establish the existence of any contractual relationship between herself and Caliber, which is not a party to the Deed of Trust."); *Howard v. First Horizon Home Loan Corp.*, No. 12-cv-05735-JST, 2013 WL 3146792, at *2–3 (N.D. Cal. June 18, 2013) (dismissing a breach of contract claim against a loan servicer predicated on a deed of trust, where the loan servicer was not a party to the deed of trust and the plaintiff's allegations failed to establish a contractual relationship with the loan servicer). Plaintiffs do not allege that Nationstar is the agent of HSBC or is otherwise bound by the Deed of Trust. *See generally* FAC. Plaintiffs' claim against Nationstar therefore fails to meet the first element of a breach of contract claim.

Next, as to the second element relating to performance, Plaintiffs argue that there is an exception to the general rule that a party who breaches first is not entitled to enforce a contract. *See* Opp'n to Nationstar at 18. Plaintiffs argue that Defendants' compliance with the deed of trust is a condition precedent to the right to foreclose and that under the "exception," a lender must comply with all conditions precedent to foreclosure even if a

borrower fails to make payments. *See* FAC ¶ 170; Opp'n to Nationstar at 18. Plaintiffs rely on *Pfeifer v. Countrywide Home* to support their argument that a borrower who has not provided full tender may still assert a breach of contract claim. Opp'n to Nationstar at 18 (citing *Pfeifer v. Countrywide Home*, 211 Cal. App. 4th 1250, 1280 (2012)). However, as Nationstar Defendants argue, the *Pfeifer* court addressed whether full tender was required for borrowers to bring a *wrongful foreclosure* action. *Pfeifer*, Cal. App. 4th at 1280. In *Pfeifer*, the court explicitly distinguished the ability to bring a wrongful foreclosure claim with injunction as a remedy from the ability to bring a breach of contract claim. *Id.* at 1268. Here, Plaintiffs are alleging breach of contract, and *Pfeifer* does not change the rules or elements of a breach of contract claim. Thus, since Plaintiffs fail to allege that they have performed under the contract or that their performance is excused, Plaintiffs fail to allege a breach of contract claim against any of the Defendants.

Furthermore, regarding Plaintiffs' estoppel claim, just as in their initial Complaint, Plaintiffs fail to identify whether they are seeking equitable, promissory, or any other type of estoppel, and fail to provide the requisite factual support in seeking to prevent Nationstar and HSBC from taking any further actions. *See* MTD Order at 24; *see Faulks v. Wells Fargo & Co.*, 231 F. Supp. 3d 387, 403 (N.D. Cal. 2017) ("[P]romissory estoppel binds a promisor when he should reasonably expect a substantial change of position . . . in reliance on his promise, if injustice can be avoided only by its enforcement."); *Medina v. Board of Retirement, Los Angeles County Employees Retirement Assn.*, 112 Cal. App. 4th 864, 868 (2003) ("The requisite elements for equitable estoppel against a private party are: (1) the party to be estopped was apprised of the facts, (2) the party to be estopped intended by conduct to induce reliance by the other party, or acted so as to cause the other party reasonably to believe reliance was intended, (3) the party asserting estoppel was ignorant of the facts, and (4) the party asserting estoppel suffered injury in reliance on the conduct."). Without further information, the Court cannot analyze whether Plaintiffs are entitled to any type of estoppel.

For the foregoing reasons, the Court DISMISSES WITHOUT PREJUDICE Plaintiffs' breach of contract/estoppel claim against HSBC and Nationstar. Plaintiffs may amend their Complaint with sufficient facts to support each element of a breach of contract claim, and separately, sufficient detail about the estoppel they seek. In addition the Court grants Plaintiffs' request for leave to amend to allege a breach of contract claim against BANA and the other Defendants based on Paragraph 16 of the Deed of Trust. However, if Plaintiffs fail to show that a contractual relationship between BANA and Plaintiffs exists, the claim will be similarly dismissed.

10. Accounting

In their seventh cause of action, Plaintiffs seek a full accounting from all Defendants of "all monies paid on the loan and to whom these payments were made," as well as "return of all misdirected principal, interest and any charges or fees assessed against the account and paid by Plaintiffs." FAC ¶¶ 175–81. Plaintiffs explain that "the assignments misrepresent who is entitled to payments and as a result, Plaintiff[s'] . . . payments have been misdirected to the wrong party." *Id.* ¶ 178. Plaintiffs contend that because BANA and Nationstar have alleged to be servicers, BANA and Nationstar owe Plaintiffs a fidiciary duty to account for all monies paid on the account. *Id.* ¶ 177. Plaintiffs do not explain why the other Defendants owe Plaintiff an accounting or allege that Plaintiff actually paid any of the Defendants any money. *See id.* ¶¶ 175–81.

Nationstar and BANA Defendants move to dismiss Plaintiffs' claim for accounting on the ground that an accounting is not a cause of action under which relief may be granted. Nationstar Mot. at 11–12; BANA Mot. at 12–13. Nationstar Defendants argue that Plaintiffs cannot establish that Nationstar owes any monetary sum to Plaintiffs because Plaintiffs are the ones who owe a large sum of payments on the Loan, in the amount of $801,00.00, and therefore, Plaintiffs cannot assert a cause of action for accounting. Nationstar Mot. at 12.

Under California law, an accounting claim is generally a remedy under equity. *Batt v. City & Cty. Of S.F.*, 155 Cal. App. 4th 65, 82 (2007); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477–78 (1962). However, in certain situations, an action for an accounting may be brought to compel the defendant to account to the plaintiff for money or property where: (1) a fiduciary relationship exists between the parties or, (2) where, even though no fiduciary relationship exists, the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable. *Jolley*, 213 Cal. App. 4th at 910. "An action for accounting is not available where the plaintiff alleges the right to recover a sum certain or a sum that can be made certain by calculation." *Teselle v. McLoughlin*, 173 Cal. App. 4th 156, 179 (2009). In addition, the right to an accounting is derivative and must be based on other claims. *Janis v. California State Lottery Com.*, 68 Cal. App. 4th 824, 833 (1998).

As an initial matter, although Plaintiffs purport to bring their accounting claim against all Defendants, as BANA Defendants point out, Plaintiffs fail to allege that ReconTrust is obligated to provide an accounting and the Court has already dismissed all claims against ReconTrust. Similarly, Plaintiffs fail to allege that HSBC owes Plaintiffs

an accounting. Accordingly, DISMISSES WITHOUT PREJUDICE Plaintiffs' accounting claim against HSBC.

On the other hand, Plaintiffs do allege that Nationstar and BANA, as servicers, "had a fiduciary duty to Plaintiff[s] to account for all monies paid" and that Plaintiffs' funds have been "misdirected to the wrong party." FAC ¶ 188. However, Plaintiffs do not allege why a fiduciary relationship exists between mortgage servicers and borrowers. *See id.* Generally, a lending institution does not owe a fiduciary duty to borrowers. *Nymark v. Heart Fed. Savings & Loan Assn.*, 231 Cal. App 3d 1089, 1096 (1991) (holding that "as a general rule, a financial institution owed no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender"). Still, Plaintiffs argue that even if no fiduciary relationship exists, an accounting is warranted because calculating and demanding a fixed sum is not practicable. FAC ¶ 179; *see* Opp'n to BANA at 7.

However, Plaintiffs' claim fails for several reasons. First, Plaintiffs' cause of action for an accounting is not derivative of Plaintiffs' other claims. *See Janis*, 68 Cal. App 4th at 833. Plaintiffs do not allege under their other causes of action that Defendants owe Plaintiffs any money, other than statutory damages, which would be easily calculable. *See Teselle*, 173 Cal. App. 4th at 179. In addition, to the extent that Plaintiffs argue that they have paid money to a party that is not the beneficiary, Plaintiffs made those payments and therefore Plaintiffs themselves may readily calculate any alleged misdirected payments. Furthermore, multiple district courts in California have held that parties owing money—as opposed to parties owed money—have no right to an accounting. *See Hernandez v. First Am. Loanstar Trustee Servs.*, No. 10CV00119 BTM(WVG), 2010 WL 1445192, at *5 (S.D. Cal. 2010); *Quinteiros v. Aurora loan Services*, 740 F. Supp 2d 1163, 1170 (E.D. Cal. 2010). Finally, an accounting is generally not available, as an equitable remedy, where there is an existing remedy at law. *St. James Church of Christ Holiness v. Superior Court In and For Los Angeles County*, 154 Cal. App. 2d 352, 359 (1955). Under California Civil Code § 2943(c), borrowers may demand a payoff demand statement prior to the publication of a notice of sale after the recordation of a notice of default. Cal. Civ. Code § 2943(c); *see Collins v. First Horizon Home Loan Corporation*, No. CV 09-6934-VBF(PLAX), 2009 WL 10672984 (C.D. Cal. 2009). Plaintiffs do not allege that they requested a demand statement. *See generally* FAC. Thus, because Plaintiffs fail to sufficiently allege that Defendants owe Plaintiffs any sum of money or that Plaintiffs demanded a payoff statement from Defendants, they fail to state a claim for accounting.

Accordingly, the Court DISMISSES WITHOUT PREJUDICE Plaintiffs' accounting claim against all Defendants.

V. Disposition

For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART Nationstar and BANA Defendants' Motions to Dismiss.

The Court DISMISSES WITH PREJUDICE all claims against Defendants MERS and ReconTrust on the basis of res judicata and Plaintiffs' failure to make any allegations involving MERS or ReconTrust regarding events that occurred after the adjudication of *Gilliam I*.

The Court DISMISSES WITHOUT PREJUDICE the following claims:

1. All claims against Defendant Veriprise;

2. Plaintiffs' slander of title claim to the extent it is based on the recording of the Veriprise Substitution, the Notice of Default, and the Quality Substitution;

3. Plaintiffs' claim for violations of the CHBOR against BANA and HSBC, and Plaintiffs' CHBOR claim to the extent brought under California Civil Code § 2924.17 against Nationstar;

4. Plaintiffs' UCL claim against HSBC and BANA; and

5. Plaintiffs' claims for declaratory judgment, breach of contract/estoppel, and accounting against all Defendants.

Plaintiffs may file an amended complaint **on or before July 9, 2018**, if so desired.

The Clerk shall serve this minute order on the parties.