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ONEWEST BANK, N.A., f/k/a ONEWEST BANK, FSB and DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF THE INDYMAC INDA MORTGAGE LOAN TRUST 2007-AR3, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-AR3 UNDER THE POOLING AND SERVICING AGREEMENT DATED MAY 1, 2007

UNITED STATE DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SILVIA BURLEY, as chairperson of the California Valley Miwok Tribe; and THE CALIFORNIA VALLEY MIWOK TRIBE, as a federally recognized tribe of Miwok People,

Plaintiff,

vs.

ONEWEST BANK, FSB, FSB; MERIDIAN FORECLOSURE SERVICE; DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF THE INDYMAC INDA MORTGAGE LOAN TRUST 2007-AR3, MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2007-AR-3 UNDER THE POOLING AND SERVICING AGREEMENT DATED MAY 1, 2007; and DOES 1 -10, inclusive,

Defendants.

Case No: 2:14-cv-01349-WBS-EFB

Assigned to: Hon. William B. Shubb

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Date: December 1, 2014
Time: 2:00 p.m.
Courtroom: #5 – 14th Floor

Complaint filed on: 6/14/14
First Amended Complaint filed on: 9/15/14
Trial date: None

TO THE HONORABLE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 1, 2014 at 2:00 p.m. in Courtroom 5-14th Floor, of the above-entitled Court, located at 501 I Street, Sacramento, CA 95814, defendants ONEWEST BANK, N.A., f/k/a ONEWEST BANK, FSB and DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF THE INDYMAC INDA MORTGAGE LOAN TRUST 2007-AR3, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-AR3 UNDER THE POOLING AND SERVICING AGREEMENT DATED MAY 1, 2007 ("Defendants") will move this Court for an order dismissing the First Amended Complaint of plaintiffs SILVIA BURLEY, and THE CALIFORNIA VALLEY MIWOK TRIBE ("Plaintiffs.")

This Motion is made pursuant to Federal Rule of Civil Procedure 12(b)(6) and is based upon the grounds that Plaintiffs have failed to state a claim upon which relief can be granted against Defendants and that Plaintiffs have failed to plead the essential facts which give rise to his claims and/or the claims are barred on their face, as confirmed by matters which may properly be judicially noticed by this Court.

This Motion will be based upon this Notice of Motion and Motion, the attached memorandum of points and authorities, the complete files and records in this action, the request for judicial notice filed concurrently herewith, the oral argument of counsel and upon such other and further evidence as this Court might deem proper.

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Pursuant to L.R. 230, any opposition to this Motion must be filed and served not less than 14 days before the date of the hearing. The reply to an opposition must be filed and served not more than 7 days after the opposition was due.

Respectfully submitted,

WRIGHT, FINLAY & ZAK, LLP

Dated: September 23, 2014 By: /s/ Lukasz I. Wozniak
T. Robert Finlay, Esq.
Lukasz I. Wozniak, Esq.
Attorneys for Defendants,
ONEWEST BANK, N.A., f/k/a ONEWEST BANK, FSB and DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF THE INDYMAC INDA MORTGAGE LOAN TRUST 2007-AR3, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-AR3 UNDER THE POOLING AND SERVICING AGREEMENT DATED MAY 1, 2007

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After the Court permitted Plaintiffs' to file an amended complaint, they filed their current pleading in which they continue to erroneously allege that Defendants violated their sovereign tribal immunity by foreclosing on the subject property following Silvia Burley's default on her mortgage loan. Contrary to Plaintiffs' assertions, real property acquired by a member on an Indian tribe outside of the reservation does not automatically become "Indian land." And while Burley may be affiliated with the California Miwok Tribe, Plaintiffs' pleadings and recorded documents unequivocally demonstrate that she purchased the property outside of the Tribe's reservation, obtained a refinance mortgage loan in her own name and in her individual capacity, and agreed in the loan documents to occupy the property as her personal residence. As such, she cannot rely on the doctrine of sovereign tribal immunity to preclude Defendants from recovering security behind the loan on which she defaulted approximately one (1) year after the origination. For these reasons, the First Amended Complaint fails as a matter of law and should be dismissed in its entirety, with prejudice.

II. STATEMENT OF FACTS

On or about March 15, 2002, plaintiff SILVIA BURLEY ("Burley") purchased the real property located at 10601 Escondido Place, Stockton, CA 95212 ("Property,") taking title thereto as a married woman as her sole and separate property. (*See,* Original Complaint, ¶5; Request for Judicial Notice ["RJN,"] Ex. 1.)[1]

More than four (4) years after the date of this purchase, on October 11, 2006, Burley quitclaimed her interest in the Property to plaintiff CALIFORNIA

[1] To ensure that the title to the Property was vested in Burley's name alone, Tiger Paulk, Burley's husband executed an interspousal transfer deed, granting his potential interest to the Property to Burley. (RJN, Ex. 2.)

VALLEY MI WOK TRIBE ("Tribe.") (RJN, Ex. 3.) Subsequently, on March 15, 2007, the Tribe quitclaimed its interest in the Property back to Burley, who, along with her husband, executed grant deeds to ensure that Burley held title to the Property as her sole and separate property. (RJN, Exs. 4 through 6.)

A month later, on or about April 20, 2007, Burley obtained a loan in the amount of $1,000,000.00 (the "Loan") from IndyMac Bank, F.S.B. ("IndyMac,") which loan was secured by a Deed of Trust that was subsequently recorded in the Official Records of San Joaquin County, creating a first priority lien (the "Lien") against the Property. (First Amended Complaint ["FAC,"] Ex. B-7.)

More than one (1) year after this transaction, on June 18, 2008, Burley quitclaimed her interest in the Property to the Tribe, who took title subject to the Lien. (FAC, Ex. C-8.)[2] At approximately the same time, Burley stopped making payments on the Loan. (RJN, Ex. 7.) Accordingly, when her arrearages reached $48,317.75, on December 11, 2008, a Notice of Default was recorded. (*Id.*)

On January 23, 2009, a Substitution of Trustee was recorded. (RJN, Ex. 8.)

On March 9, 2009, an Assignment of Deed of Trust to IndyMac Federal Bank FSB was recorded. (RJN, Ex. 9.) Four (4) days later, on March 13, 2009, a Notice of Trustee's Sale was recorded and, on April 1, 2009, the Property was sold at a trustee's sale. (RJN, Exs. 10 - 11.) However, approximately ten (10) months later, this sale was rescinded. (FAC, Ex. D-14.)[3]

Following the recording of Rescission of the Trustee's Deed, because Burley's arrearages reached $133,237.98, on February 19, 2010, a second Notice of Default was recorded. (FAC, Ex. E-15.) Next, on June 21, 2010, an Assignment to defendant DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE ("Deutsche Bank") was recorded. (RJN, Ex. 12.)

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[2] (Miller & Starr, 4 Cal. Real Est. § 10:38 (3d ed.))

[3] On February 22, 2010, the December 11, 2008 Notice of Default was rescinded. (FAC, Ex. D-16.)

Three (3) years later, on June 24, 2013, another Substitution of Trustee was recorded. (RJN, Ex, 13.) On the same day, because Burley's arrearages reached $411,659.69, a third Notice of Default was recorded. (FAC, Ex. F-19.) Thereafter, on September 25, 2013, a Notice of Trustee's Sale was recorded. (RJN, Ex. 14.) Subsequently, because neither Burley nor the Tribe (collectively, "Plaintiffs") cured the default, on October 22, 2013, the Property was sold to Deutsche Bank at a trustee's sale. (FAC, Ex. G-21.)

III. ARGUMENT

A. The First Claim for Violation of ECOA, Fifth Claim for Breach of Implied Covenant of Good Faith and Fair Dealing, Sixth Claim for Fraud, Seventh Claim for Promissory Estoppel, and Eleventh Claim for Violation of TILA Fail as a Matter of Law.

Plaintiffs' first, fifth, sixth, seventh, and eleventh claims all fail as a matter of law because they stem from the alleged wrongdoing of IndyMac, which, allegedly, occurred at or prior the origination of the Loan. As will be explained below, OneWest is not, as a matter of law, liable for such conduct.

As explained by the Ninth Circuit, "[o]n July 11, 2008, the Office of Thrift Supervision closed IndyMac, appointed the FDIC as receiver, created a new savings bank, IndyMac Federal, and appointed the FDIC as conservator (FDIC–C) of IndyMac Federal. Another federal savings bank, OneWest Bank, was formed as a thrift holding company to purchase IndyMac Federal's assets and liabilities. As receiver and conservator, the FDIC 'succeeded to all rights, titles, powers, and privileges of IndyMac Federal, including those arising under the Governing Agreements or otherwise related to the Trusts.' As IndyMac Federal's conservator, the FDIC administered the Trusts and serviced the mortgages based on servicing rights established by the Governing Agreements. In that capacity, the FDIC sold certain assets and rights of IndyMac Federal to OneWest for approximately $13.9 billion." *Deutsche Bank Nat. Trust Co. v. F.D.I.C.*, 744 F.3d 1124, 1127 (9th Cir.

2014).[4] "OneWest acquired these rights without being required to assume liabilities that IndyMac had undertaken to maintain the quality of the mortgage loans that had been deposited into the trusts." *Deutsche Bank Nat. Trust Co. v. F.D.I.C.*, 784 F.Supp.2d 1142, 1150 (C.D. Cal. 2011) (emphasis added).

Accordingly, when FDIC, as receiver, sold and assigned certain assets of IndyMac to OneWest (including the Loan), FDIC agreed that it would retain, and that OneWest would not assume, any claim or liability that is subject to the claims process set forth in 12 U.S.C. § 1821(d)(3)-(13). Consequently, because Plaintiffs' claims are plainly based on the alleged acts or omissions of IndyMac, OneWest is not, as a matter of law, liable for the alleged wrongdoing raised in Plaintiffs' claims. *See also*, *Benito v. IndyMac Mortg. Servs.*, 2010 WL 2130648, at *6 (D. Nev. May 21, 2010).

In addition, however, even if Plaintiffs were entitled raise their claims against the FDIC, not Defendants, these claims would still fail because Plaintiffs did not follow the procedure required to bring such claims.

"To address the failures of federally insured banks and savings institutions, Congress enacted the Financial Institutions Reform Recovery and Enforcement Act of 1989 ('FIRREA')." *Paul v. OTS*, 763 F.Supp. 568, 571 (S.D. Fla. 1990); *see also,* 12 U.S.C. § 1821(d)(3)-(13) (which governs the process for asserting claims against failed banks for which the FDIC has been appointed as

[4] There is a strong federal interest in salvaging the core bank business of a failed bank by facilitating transfers of the failed bank's assets to a healthy financial institution. *See*, *Langley v. FDIC*, 484 U.S. 86, 91-92 (1987). To facilitate such transfers, the Federal Deposit Insurance Corporation ("FDIC,") as receiver, has statutory authority to transfer the failed banks' assets while retaining liability for "latent claims of unknown magnitude." *West Park Assocs. v. Butterfield Say. & Loan Ass'n*, 60 F.3d 1452, 1458 (9th Cir. 1995) (citation omitted). Such a result flows from the language that Congress chose, and it recognizes that no rational entity would enter into these arrangements if they were to be potentially saddled with unlimited liability for undisclosed claims that may have led to the failed bank's insolvency. *See*, 12 U.S.C. § 1821(d)(2)(G)(i) (FDIC may transfer any liability or any asset of a failed bank).

receiver.) The scope of claims subject to FIRREA is quite broad. Specifically, FIRREA provides that 'no court shall have jurisdiction over" the following:

> (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
> (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.12 U.S.C. § 1821(d)(13)(D).

Courts have recognized that "[s]ection 1821(d)(13)(D) strips all courts of jurisdiction over claims made outside the administrative procedures of section 1821." *Henderson v. Bank of New England*, 986 F.2d 319, 320 (9thCir. 1993). As a result, a litigant with claims against a failed bank cannot avail itself of the jurisdiction of the courts until that litigant has exhausted the administrative claims process set forth in FIRREA. *See, e.g., Bank of Am. v. Colonial Bank*, 604 F.3d 1239, 1247(11thCir. 2010). Thus, Plaintiffs' failure to comply with FIRREA's mandatory claims process deprives the Court of subject matter jurisdiction over their origination claims asserted against Defendants.

Finally, even if Plaintiffs could overcome the obstacles set forth above, their claims still fail because they are time barred. The statute of limitations for claims for Equal Credit Opportunity Act ("ECOA") violations, breach of implied covenant, promissory estoppel, fraud, and TILA violations is, at most, five (5) years.[5] Accordingly, since the Loan was originated on or about April 20, 2007,

[5] Claims for violation of the Equal Credit Opportunity Act ("ECOA") are subject to a five (5) year statute of limitations. 15 U.S.C. §1691e(f). Claims for breach of implied covenant are subject to a four (4) year statute of limitations. *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal.2d 654, 662 (1958). Further, because the gravamen of Plaintiff's claim for promissory estoppel is fraud, Plaintiff's claims for fraud and promissory estoppel are subject to a three (3) year statute of limitations. *Ferguson v. JPMorgan Chase Bank, N.A.*, 2014 WL 2118527 at *6 (E.D. Cal. May 21, 2014). Finally, Plaintiffs' claim for TILA violation is subject to a one (1) year statute of limitations. 15 U.S.C. § 1640(e).

the statute of limitations for bringing Plaintiffs' claims ran years before the filing of the Complaint.[6]

For all of these reasons, Plaintiffs' claims fail and are subject to a dismissal.

B. In Addition, the First Claim for ECOA Violations Fails Because Plaintiffs Did Not to Allege Elements of the Claim.

ECOA was enacted to prohibit discrimination "on basis of race, color, religion, national origin, sex or marital status, or age" against any applicant in credit transactions. 15 U.S.C. § 1691(a)(1). It was implemented "to ensure that applicants have an *equal opportunity to obtain credit.*" *Hafiz v. Greenpoint Mortgage Funding, Inc.*, 652 F.Supp.2d 1039, 1045 (N.D. Cal. 2009) (emphasis in original). "Though the Ninth Circuit has yet to articulate the elements of an ECOA claim, numerous district courts in this circuit have held that, to state a claim under ECOA, a plaintiff must allege that: "(1) she is a member of a protected class; (2) she applied for credit with defendants; (3) she qualified for credit; and (4) she was denied credit despite being qualified." *Harvey v. Bank of Am., N.A.*, 906 F.Supp.2d 982, 990-91 (N.D. Cal. 2012) (citation omitted.)

Here, Plaintiffs did not allege sufficient facts to satisfy these elements. Specifically, they did not allege that the Tribe applied for credit with Defendants, was qualified for and, subsequently, denied the requested credit despite being qualified. Consequently, because Plaintiffs did not allege the elements of the claim, their claim fails.

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[6] With respect to Plaintiffs' TILA claims, because the alleged violations occurred on or before March 9, 2009 and June 21, 2010, respectively, the statute ran on March 9, 2010 and June 21, 2011, respectively.

C. The Second Claim for Wrongful Foreclosure and Third Claim for Cancellation of Instruments Fail Because Plaintiffs Cannot Demonstrate That the Foreclosure Sale Was Wrongful.

To allege a claim for wrongful foreclosure, Plaintiffs must allege that: "(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering." *Lona v. Citibank, NA.*, 202 Cal.App.4th 89, 104 (2011). Further, to state a claim for cancellation, Plaintiffs were required to "'state facts, not mere conclusions, showing the apparent validity of the instrument designated, and point out the reason for asserting that it is actually invalid.'" *M.F. Farming, Co. v. Couch Distrib. Co.,* 207 Cal.App.4th 180, 200 (2012) (citation omitted).

1. Plaintiffs cannot allege that the foreclosure sale was wrongful.

A non-judicial foreclosure sale is presumed to have been conducted regularly and the burden of alleging specific facts to demonstrate an irregularity in the foreclosure process that is sufficient to overcome this presumption rests with the plaintiff. *Fontenot v. Wells Fargo Bank, N.A.,* 198 Cal.App.4th 256,270 (2011). Here, Plaintiffs contend that the foreclosure sale was improper because (1) Burley's Deed of Trust was, purportedly, void from its inception, (2) the Loan was not properly securitized, (3) Plaintiffs were not in default on the Loan, (4) Defendants violated *Civil Code* section 2923.55, and because (5) Defendants failed to recognize Plaintiffs' "sovereign immunity." Ghese contentions fail.

a. Deed of Trust is not void.

Plaintiffs' contention that the Deed of Trust is void is based on a legally flawed assertion that the Property was located on "Indian land" and that Defendants did not comply with legal requirements prior to issuing of the

instrument. Plaintiffs also allege that the Deed of Trust did not contain terms agreed upon prior to the date of execution of the instrument. (*See,* FAC, ¶¶32, 35, 53, 54, 71, 74, 75, 86.)

While federal law requires lenders issuing loans on Indian land to first obtain approval of the Secretary of Interior, for this requirement to apply, the property serving as security for such loans must be located on "Indian land." *See,* 25 U.S.C. § 483a; 25 CFR 152.34. The term "Indian land" is defined as any "restricted" or "trust land." "Trust land" is defined as land, the title to which is held in trust by the United States for an individual Indian or a tribe. 25 CFR § 151.2(d).[7] "Restricted land" is defined as land, the title to which "is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary of the Interior because of limitations contained in the conveyance instrument pursuant to federal law or because of a federal law directly imposing such limitations." 25 CFR § 151.2(e).

While Plaintiffs contend that the Property became "Indian land" by virtue of Burley's purchase thereof in 2002 (FAC, ¶¶29-32), contrary to Plaintiffs' contentions, the law does not automatically transfer properties located outside of Indian reservations that were privately purchased by the tribe and/or individual Indians into "Indian land" and/or "tribal property."[8] Instead, such properties qualify as "Indian land," only if they were so classified prior to the purchase. *See, e.g., Bd. of Comm'rs of Creek Cnty. v. Seber*, 318 U.S. 705, 712-713 (1943). (The

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[7] "Tribe means any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians... which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs." 25 CFR § 151.2(b). "Individual Indian means: (1) Any person who is an enrolled member of a tribe; (2) Any person who is a descendent of such a member and said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation; (3) Any other person possessing a total of one-half or more degree Indian blood of a tribe…" 25 CFR § 151.2(c).

[8] "Tribal land" is defined as "land or any interest therein, title to which is held by the United States in trust for a tribe, or title to which is held by any tribe subject to Federal restrictions against alienation or encumbrance…." 25 CFR 169.1.

only other way the Property could be transferred into "Indian land" was for Plaintiffs to obtain permission of Congress and the Secretary of Interior for its acquisition. *See,* 25 CFR §§ 151.3 and 151.11.) Hence, the Property could qualify as "restricted" or "tribal" land only if Plaintiffs held title thereto subject to restrictions against alienation or encumbrance prior to purchasing it in 2002 (or if they acquired it subject to such restrictions), which they did not. Accordingly, because Plaintiffs did not allege any facts demonstrating that: (1) they held title to the Property subject to restrictions on alienation thereof prior to 2002, (2) they purchased it subject to such restrictions, and/or (3) the Congress and the Secretary of Interior authorized them to purchase the Property, their contentions fail.

Plaintiff's next contention that the Deed of Trust contained terms that were contrary to the terms agreed upon by Burley and IndyMac in 2007 (FAC, ¶86) fails as a matter of law because, by executing the Deed of Trust, Burley agreed to be bound by its terms. *Civil Code* section 1625 provides:

> [t]he execution of a contract in writing... supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.

"'The rule as applied to contracts is simply that as a matter of substantive law, a certain act, the act of embodying the complete terms of an agreement in a writing (the 'integration'), *becomes the contract of the parties*... Thus, '[u]nder [the] rule[,] the act of executing a written contract... *supersedes* all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.' (Citation.)" *Casa Herrera, Inc. v. Beydoun,* 32 Cal.4th 336, 344 (2004) (citations omitted).

Consequently, because the loan agreement was reduced to a writing, which writing became binding on Burley after the execution of the contract, her allegations fail.

b. Plaintiffs lack standing to challenge securitization of the Loan.

Plaintiffs' next challenge the sale claiming that the Loan was improperly securitized. (FAC, ¶87.) However, this contention is factually unsupported and is unavailable to Plaintiffs as a matter of law - as non-parties to the securitization agreements, Plaintiffs lack standing to challenge the validity of the securitization process. *See, Newman v. Bank of New York Mellon,* 2013 WL 5603316 at *3 (E.D. Cal. Oct. 11, 2013) (citing cases); *Rivac v. Ndex W. LLC,* 2013 WL 6662762 at *4 (N.D. Cal. Dec. 17,2013) (citing cases).[9]

c. The FAC admits that Burley defaulted on the Loan.

As explained in *Parcray v. Shea Mortg. Inc.,* 2010 WL 1659369 at *13 (E.D.Cal. April 23, 2010), a claim for wrongful foreclosure can be stated only if the plaintiff can allege that he or she did not default on the loan. "[F]or a foreclosure to be 'wrongful,' Plaintiff also must allege that no entity had the right to foreclose upon her, not simply that the wrong entity foreclosed upon her...." *Permito v. Wells Fargo Bank, NA.,* 2012 WL 1380322 at *6 (N.D. Cal. Apr. 20, 2012).

Here, although in paragraph 88 of the FAC Plaintiffs contend that they were not in default, in paragraphs 83 and 89, they admitted that Burley defaulted on the Loan, but question the amount of the default. As a result, Plaintiffs cannot demonstrate that they performed their contractual obligations on the Loan and, therefore, their claim fails.

d. The Notice of Default contains satisfied the requirements of Section 2923.55(c).

Plaintiffs next contend that the Notice of Default did not satisfy the declaration requirements of *Civil Code* section 2923.55(c) ("Section 2923.55(c).") (FAC, ¶91). Section 2923.55(c) requires a notice of default to include "a

[9] *See also, Jenkins v. JP Morgan Chase Bank, NA.,* 216 Cal.App.4th 497, 514-15 (2013) (finding that a defaulted borrower does not have standing to challenge any agreements relating to the securitization of his or her loan).

declaration that the mortgage servicer has contacted the borrower, has tried with due diligence to contact the borrower as required by this section, or that no contact was required because the individual did not meet the definition of "borrower" pursuant to subdivision (c) of Section 2920.5." The Notice of Default at issue contains the requisite declaration. (*See,* FAC, Ex. F-19.) Accordingly, Plaintiffs' contention fails.

e. Plaintiffs cannot rely on the doctrine of sovereign immunity.

Tribal sovereign immunity is a federally-created doctrine that bars suits against Indian tribes absent a clear waiver of immunity or Congressional abrogation. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). It is based on the premise that "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Id.* This immunity, however, is unavailable to Plaintiffs for the following reasons.

First, Burley is not entitled to rely on the doctrine. The doctrine of tribal sovereign immunity extends to tribal governments and to tribal officials acting in their official capacity and within the scope of their authority; it does not extend to the individual tribe members. *See, Ingrassia v. Chicken Ranch Bingo & Casino*, 676 F. Supp. 2d 953, 957 (E.D. Cal. 2009). As explained in *California Valley Miwok Tribe v. Jewell*, 2013 WL 6524636, --- F.Supp.2d ---- (D.D.C. Dec. 13, 2013), Burley has not been recognized as a duly appointed tribal official and the issue of the Tribe's governance has not yet been resolved; indeed, it is subject to a continuous litigation. As a result, Burley and the Tribe and not entitled to rely on the doctrine and, therefore, Plaintiffs' contentions fail.

Second, immunity is unavailable to Plaintiffs because the transaction at issue was not entered into by the Tribe. "[T]ribal sovereign immunity ... does not impair the authority of the state court to adjudicate the rights of the individual [tribal member] defendants over whom it properly obtained personal jurisdiction."

Puyallup Tribe, Inc. v. Dep't of Game of State of Wash., 433 U.S. 165, 173, (1977); *see also, Fletcher v. United States,* 116 F.3d 1315, 1324 (10th Cir.1997) (noting that tribal officials, like state and federal officials, are protected by sovereign immunity only when acting in their official capacity). Here, the Tribe did not enter into the Loan. Rather, the contract was entered into between Burley and IndyMac. (FAC, Ex. B-7.) Burley took title to the Property in her individual capacity. (RJN, Exs 4-6, FAC, Ex. B-7.) Consequently, because tribal sovereign immunity inheres in the tribe itself, not in the individual tribe members acting in their capacity as individuals, the doctrine is unavailable to Plaintiffs.

Third, even if it could be alleged that Burley executed the Loan contract on behalf of the Tribe, the immunity would still be unavailable to Plaintiffs because Burley waived it. In *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma,* 532 U.S. 411 (2001), a federally recognized Indian tribe entered into a construction contract with the plaintiff for the installation of a roof on a tribe–owned commercial building located outside the Tribe's reservation. The contract provided for an arbitration provision and a choice of law provision, providing that it should be governed by the laws of the State of Oklahoma. After the execution of the contract but before commencement of the performance, the tribe dishonored the contract. Accordingly, the plaintiff submitted an arbitration demand. In turn, the tribe asserted sovereign immunity and declined to participate in the arbitration proceeding. After, the arbitrator rendered an award in favor of the plaintiff, it filed suit to enforce the award in the District Court of Oklahoma County. The tribe moved to dismiss the action on the grounds of sovereign immunity. The court denied the motion and entered a judgment confirming the award. The Oklahoma Court of Civil Appeals affirmed. *C & L Enterprises, Inc.* at 411-412. Affirming the decision, the Supreme Court found that the contractual provisions providing for application of Oklahoma law, binding arbitration of disputes, and enforcement of arbitration decisions in any state or federal court

with jurisdiction, constituted clear waiver of tribe's sovereign immunity against suit to enforce arbitration award. *Id.* at 418-419.

Similarly to *C & L Enterprises, Inc.,* the Deed of Trust contains a choice of law provision, stating that the contract is governed by that federal law and the law of the State of California. (FAC, Ex. B-7, ¶16.) Accordingly, just like in *C & L Enterprises, Inc.,* by agreeing to the choice of law provision, Burley waived the tribal sovereign immunity.

Fourth, the immunity is unavailable to Plaintiffs because while it protects tribe's commercial activities off Indian lands, (*Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 760 (1998) , at 760), it does not protect non-commercial activity. Here, Burley promised to use the Property as her primary residence, not for any commercial or other purpose. (FAC, Ex. B-7, ¶6.)

Finally, the principle of tribal sovereign immunity is unavailable to Plaintiffs because this immunity protects tribes from lawsuits, not non-judicial actions designed to recover property that served as security for loans. *See, Kiowa,* at 755 ("[t]o say substantive state laws apply to off-reservation conduct ... is not to say that a tribe no longer enjoys immunity *from suit*.... There is a difference between the right to demand compliance with state laws and the means available to enforce them."); *Michigan v. Bay Mills Indian Cmty.,* 134 S. Ct. 2024, 2030 (2014). Accordingly, Plaintiffs cannot rely on tribal immunity to challenge Defendants' act of exercising power of sale under Deed of Trust and non-judicially foreclosing on the Property.

2. Plaintiffs did not demonstrate prejudice.

In addition to all of the above, Plaintiffs' claims fail because Plaintiffs cannot demonstrate that they were prejudiced by any of the Defendants' actions. A party challenging a foreclosure process must demonstrate that the lender's failure to comply with the procedural requirements governing the non-judicial foreclosure process caused him or her prejudice. *Fontenot, supra,* at 272.

"Prejudice is not presumed from 'mere irregularities' in the process." *Id.* "The type of prejudice that must be shown is '"that the foreclosure would have been averted but for [the] alleged deficiencies."'" *Mendoza v. JPMorgan Chase Bank, N.A.*, 228 Cal.App.4th 1020, 1035 (2014).

Plaintiffs did not allege any facts demonstrating that the foreclosure sale would have been averted absent Defendants' alleged wrongdoing. Again, it must be noted that Plaintiffs admitted to having defaulted on the Loan.[10] Accordingly, their damages, if any, resulted from their own failure to make payments on the Loan, and not from any conduct of Defendants. *See, DeLeon v. Wells Fargo Bank, NA.*, 2011 WL 311376 at *7 (N.D. Cal. Jan. 28, 2011); *Ortiz v. America's Servicing Co.*, 2012 WL 2160953 at *8 (C.D. Cal., June 11, 2012); *Solomon v. Aurora Loan Services, LLC,* 2012 WL 2577559 at *5 (E.D. Cal. July 3, 2012). Accordingly, Plaintiffs' claims fail.

3. Plaintiffs did not tender.

A party seeking to challenge a foreclosure sale appears in equity and is thus required to do equity before a court will exercise its equitable powers. *Arnold's Management Corp. v. Eischen*, 158 Cal.App.3d 575, 578-579 (1984). Consistently with this principle, an action to set aside the sale it must be accompanied by an offer to tender the full amount of the debt for which the property was security or, at the very least, by an offer to tender all of the delinquencies and costs due for redemption. *Id.* at 578. Further, to obtain an order canceling an instrument, the plaintiff is required by equity to restore to the defendant "everything of value which the plaintiff has received in the transaction."

[10] Even if they truly challenged the amount of default, they should have tender the amount they believed was really in default and should have asked Defendants for clarification as to the remaining amount. *See,* Miller & Starr, 4 Cal. Real Est. § 10:232 (3d ed., 2013) ("When… the person seeking reinstatement believes that the beneficiary's demand is excessive, reinstatement can be made by a tender of the amount which the person reinstating believes to be the proper amount.")

Fleming v. Kagan (1961) 189 Cal.App.2d 791, 796; *see also*, *Adesokan v. U.S. Bank, N.A.*, 2012 WL 395969, at *4 (E.D.Cal. Feb. 7, 2012); *Salinas v. Wachovia Mortgage*, 2011 WL 3273529 at *2 (E.D. Cal. July 27, 2011).

Since the origination of the tender requirement, courts have expanded its application beyond the equitable causes of action to include any cause of action that is "implicitly integrated" with the allegations of an irregular sale. *Arnolds.*, at 579. The rules governing tender "are strict and are strictly applied." *Nguyen v. Calhoun,* 105 Cal.App.4th 428, 439 (2003). Nothing short of the full amount due is sufficient to constitute a valid tender. *Gaffney v. Downey Savings & Loan Assn.*, 200 Cal.App.3d 1154, 1165 (1988). Tender must be (1) valid, (2) made in good faith, (3) unconditional, (4) made with intent to extinguish the obligation, and the party making the tender must have had the ability to perform. *Civ. Code* §§ 1485, 1486, 1494.

Based on the above authority, since Plaintiffs attempt to set aside the lawful foreclosure sale, their claims for wrongful foreclosure and cancellation, along with all of their remaining claims which are implicitly integrated with the allegations of wrongful foreclosure, fail for lack of tender.

D. The Fourth Claim for Slander of Title Fails as a Matter of Law.

To state a claim for slander of title, Plaintiffs were required allege a "tortious injury to property resulting from unprivileged, false, malicious publication of disparaging statements regarding the title to property owned by plaintiff, to plaintiff's damage." *Watts v. Decision One Mortg. Co., LLC*, 2009 WL 648669 at *6 (S.D. Cal. March 9, 2009) (citation omitted). A disparaging statement is one intended to cast doubt the existence or extent of one's interest in the property. *Glass v. Gulf Oil Corp.*, 12 Cal.App.3d 412, 423 (1970).

The non-judicial foreclosure process is, as a matter of law, insufficient to support the claim because foreclosure notices make no claim to real property and do not cast any doubt as to the property's ownership interest. *Watts, supra,* at *6;

see also, Miller and Starr, *supra,* § 10:181 (3d ed., 2010) ("A recorded notice of default is not a cloud on title.") As a result, the claim fails as a matter of law.

Additionally, the process of publishing and recording of the foreclosure notices and of the Trustee's Deed is classified as privileged activity. *Salazar v. Accredited Home Lenders, Inc.,* 2010 WL 2674405 at *4 (S.D. Cal. July 2, 2010); *see also, Ramirez v. Right–Away Mortg. Inc.,* 2011 WL 3515931 at *3 (N.D. Cal. Aug.11, 2011). Consequently, because the claim is premised on the conduct that is considered privileged, Plaintiffs' allegations fail as a matter of law.

E. The Fifth Claim for Violations of Good Faith and Fair Dealing Fails Because Plaintiffs Did Not Demonstrate a Breach by Defendants.

"The prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties, since the covenant is an implied term in the contract." *Smith v. City and County of San Francisco,* 225 Cal.App.3d 38, 49 (1990).[11] Accordingly, because the contractual relationship between Defendants and the Tribe does not exist (*see,* Deed of Trust- R1N, Ex. 7), the Tribe's claim fails.

With respect to Burley, the claim fails because Plaintiffs cannot allege a breach by Defendants. While the covenant of good faith and fair dealing is implied by law in every contract, it exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made; it does not impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement and it cannot contradict the express terms of a contract. *Guz v. Bechtel National, Inc.,* 24 Ca1.4th 317, 349-350 (2000); *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.,* 100 Cal.App.4th, 44, 55 (1992).

[11] In fact, "[b]reach of the covenant of good faith and fair dealing is nothing more than a cause of action for breach of contract." *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga,* 175 Cal.App.4th 1306, 1344 (2009).

While Burley contends that Defendants breached the covenant implied in the Deed of Trust by varying the terms of the Deed of Trust from the purported terms that were promised to her prior to the execution of the instrument, this contention fails because, as explained above, the document superseded any prior promises allegedly made to Burley. Further, "the covenant is implied in contracts, not in negotiations." *Hafiz v. Greenpoint Mortgage Funding, Inc.*, 652 F. Supp. 2d 1039, 1046 (N.D. Cal. 2009).

Finally, Plaintiffs' contention that Defendants misapplied Plaintiffs' payments (FAC, ¶121) fails because it is factually unsupported. In violation of their pleading requirements set forth in Federal Rule of Civil Procedure 8(a), Plaintiffs did not allege any facts demonstrating how Defendants allegedly misapplied Plaintiffs' payments or when such payments were misapplied. Accordingly, because Plaintiffs did not meet their pleading burden, their claim fails.

F. The Sixth Claim for Fraud Fails Because Plaintiffs Did Not Allege any Wrongful Conduct by Defendants.

Under the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), a party must state the circumstances constituting the fraud with particularity. Plaintiffs must include the "who, what, when, where, and how" of the fraud. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1006 (9th Cir.2003) (citation omitted). "The plaintiff must set forth what is false or misleading about a statement, and why it is false." *Decker v. Glenfed, Inc.,* 42 F.3d 1541, 1548 (9th Cir. 1994). "[W]here multiple defendants are asked to respond to allegations of fraud, the complaint must inform each defendant of his alleged participation in the fraud." *Ricon v. Recontrust Co.,* 2009 WL 2407396 at *2 (S.D. Cal. Aug. 4, 2009). When asserting fraud against a corporation, a plaintiff must also specifically allege the names of the persons, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written. *Wang &*

Wang LLP v. Banco Do Brasil, S.A., 2007 WL 915232 at *2 (E.D. Cal. March 26, 2007).

Here, Plaintiffs did not allege the purported fraud with specificity required by Rule 9(b). Plaintiffs' allegations are conclusory, vague, general, and factually devoid. Plaintiffs failed to satisfy the "who, what, where" requirements of pleading fraud, did not explain why the alleged representations were false, and did not explain the basis for their belief as to why these representations were false. Further, Plaintiffs did not satisfy the requirements of pleading fraud against a corporate entity. For this reason alone, Plaintiffs' claim fails and is subject to this Motion.

In addition, however, the claim fails because Plaintiffs did not allege facts sufficient to satisfy the elements of fraud. To allege a claim for fraud, Plaintiffs were required to allege *specific facts* demonstrating "(1) a misrepresentation, which includes a concealment or nondisclosure; (2) knowledge of the falsity of the misrepresentation, i.e., scienter; (3) intent to induce reliance on the misrepresentation; (4) justifiable reliance; and (5) resulting damages." *Cardlo v. Owens-Illinois, Inc.,* 125 Cal.App.4th, 513, 519 (2004) (citations omitted).

Here, Plaintiffs did not allege <u>any</u> facts to demonstrate a misrepresentation of material fact by Defendants and/or Defendants' knowledge of falsity. Instead, they only offered impermissible conclusions of fraud.

Moreover, "in order to establish fraud it must be shown that the defendant thereby intended to induce the plaintiff to act to his detriment in reliance upon the false representation." *Conrad v. Bank of America, National Trust and Savings* Association, 45 Cal.App.4th 133, 157 (1996) (citations omitted). "The defendant must intend to induce a particular act of the plaintiff and is not liable in fraud for unintended consequences." *Id.* at 157. "Actual reliance occurs when a misrepresentation is 'an immediate cause of [a plaintiff's] conduct, which alters his legal relations,' and when, absent such representations, 'he would not, in all

reasonable probability, have entered into the contract or other transaction.'" *Conroy v. Regents of Univ. of Cal.,* 45 Cal.4th 1244, 1265 (2009). Plaintiffs not only did not provide any facts to demonstrate a fraudulent intent by Defendants, they also did not allege that they informed Defendants that they relied in any specific way on any of the alleged representations by Defendants.

Furthermore, it is well established that "[a] 'complete causal relationship' between the fraud or deceit and the Plaintiffs' damages is required. … Causation requires proof that the defendant's conduct was a '"*substantial factor*"' in bringing about the harm to the plaintiff." *Williams v. Wraxall,* 33 Cal.App.4th 120, 132 (1995). "Misrepresentation, even maliciously committed, does not support a cause of action unless the plaintiff suffered consequential damages… referable to, and caused by, the fraud." *Conrad*, at 159 (citations omitted). "Damages are not recoverable if the fact of damage is too remote, speculative or uncertain." *Block v. Tobin,* 45 Cal.App.3d 214, 219 (1975); *see also, Leegin Creative Leather Products, Inc. v. Diaz,* 131 Cal.App.4th 1517, 1526 (2005).

Plaintiffs did not allege any facts to demonstrate that they were somehow damaged by Defendants' alleged representations. Accordingly, for all of the reasons set forth above, Plaintiff's claim fails.

G. The Seventh Claim for Promissory Estoppel Fails Because Plaintiffs Did Not Allege a Clear and Unambiguous Promise by Defendants.

"Promissory estoppel is 'a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.' [Citation .]" *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority,* 23 Cal.4th 305, 310 (2000). To state a claim for promissory estoppel, Plaintiffs were required to allege facts demonstrating (1) a clear and unambiguous promise by Defendants, (2) Plaintiffs' reasonable and foreseeable reliance, (3) their substantial detriment or injury, caused by their reliance on the promise, and (4) their damages measured by the

extent of the obligation assumed and not performed. *US Ecology, Inc. v. State,* 129 Cal.App.4th 887, 901 (2005); *Toscano v. Greene Music,* 124 Cal.App.4th 685, 692 (2004). Specific facts demonstrating each of the elements are essential - "[t]he party claiming estoppel must specifically plead all facts relied on to establish its elements." *Smith v. City and County of San Francisco,* 225 Cal.App.3d 38, 48 (1990) (citations omitted). Conclusory allegations are insufficient. *Gressley v. Williams,* 193 Cal.App.2d 636, 640-41 (1961).

Promissory estoppel cannot be established absent allegations of a clear, unambiguous, and enforceable promise. *See, Lange v. TIG Ins. Co.* 68 Cal.App.4th 1179, 1185-1186 (1998); *see also, National Dollar Stores v. Wagnon,* 97 Cal.App.2d 915, 919 (1950) ("Estoppel cannot be established from…preliminary discussions and negotiations.") The promise must be one which the promisor should reasonably expect to induce reliance by the promisee. *Drennan v. Star Paving Co.,* 51 Cal.2d 409 (1958). Here, Plaintiffs did not and cannot demonstrate a clear, unambiguous, and enforceable promise by Defendants. Thus, the claim necessarily fails for this reason alone.

Moreover, Plaintiffs were obligated to allege facts demonstrating that they "substantial[ly] change[d] [their] position, either by act or forbearance, in reliance on the promise" (*Youngman v. Nev. Irrigation Dist.,* 70 Cal.2d 240, 249 (1969)) and that their reliance was reasonable. "[T]here must be evident some unusual set of circumstances where no other remedy is available. There must be unconscionable injury and unjust enrichment of the party sought to be estopped." *Jirschik v. Farmers & Merch. Nat'l Bank,* 107 Cal.App.2d 405, 406 (1951). "Under th[e] [promissory estoppel] doctrine a promisor is bound when he should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement." *Smith v. City and County of San Francisco,* 225 Cal.App.3d 38, 48 (1990) (emphasis added). There must be extraordinary or unusual conduct by the

promisee or circumstances that would result in gross injustice. *Parker v. Ololmon,* 171 Cal.App.2d 125, 133 (1959). The sort of material change in position that results in unconscionable injury is beyond the loss of the benefit of the bargain and requires more than the sorts of action ordinarily undertaken in anticipation of entry into contract. *Irving Tier Co. v. Griffin,* 244 Cal.App.2d 852, 865 (1966).

Plaintiffs did not allege any facts to demonstrate such substantial change of position in reasonable reliance on the purported promise. Instead, it appears merely that Burley did not read the Deed of Trust prior to signing it. Thus, it is evident that injustice will not result if the purported "promise" is not enforced as Plaintiffs' "reliance" on a promise is anything but reasonable. *See, Desert Outdoor Advertising v. Superior Court,* 196 Cal.App.4th 866, 873(2011) ("'[G]enerally, it is not reasonable to fail to read a contract; this is true even if the plaintiff relied on the defendant's assertion that it was not necessary to read the contract.'")

Finally, to state a claim, a causal connection between the purported promise and the alleged damages is required. *US Ecology, supra,* at 902-905. Here, as indicated above, Plaintiffs did not and cannot allege any facts demonstrating that they were damaged by Defendants' purported failure to perform their purported promise. Accordingly, Plaintiff's cause of action fails.

H. The Eighth Claim for Unjust Enrichment/Embezzlement Fails.

Under California law, unjust enrichment is not considered as a viable, stand–alone cause of action[12] and there is no civil claim for embezzlement. *Mohebbi v. Khazen*, 2014 WL 2861146, at *16 (N.D. Cal. June 23, 2014). Accordingly, Plaintiffs' claim fails as a matter of law.

[12] *Melchior v. New Line Productions, Inc.,* 106 Cal.App.4th 779, 793(2003); *Levine v. Blue Shield of California,* 189 Cal.App.4th 1117, 1138 (2010).

However, even if unjust enrichment was a viable cause of action, Plaintiffs' claim would still fail because they did not allege any facts to entitle them to a restitution from Defendants.

Elements of an unjust enrichment cause of action are the "receipt of a benefit and [the] unjust retention of the benefit at the expense of another." *Lectrodryer v. SeoulBank,* 77 Cal.App.4th 723, 726 (2000). Here, Plaintiffs did not and cannot allege that Defendants improperly obtained benefits from Plaintiffs and have unjustly retained them at their expense. While Plaintiff s claim that they made certain payments that were misapplied under the terms of the Deed of Trust, Burley was contractually obligated to make these payments to Defendants and, therefore, Plaintiffs cannot allege that Defendants unjustly retained them at Plaintiffs' expense.

I. The Ninth Claim for Violation of Business and Professions Code § 17200 Fails Because It Is Premised on Failed Claims.

Business and Professions Code section 17200 ("Section 17200") prohibits unlawful, unfair, or fraudulent business acts or practices and unfair, deceptive, untrue, or misleading advertising.[13] *Puentes v. Wells Fargo Home Mortg., Inc.,* 160 Cal.App.4th 638, 643-644 (2008). "A plaintiff alleging unfair business practices under these statutes must state with reasonable particularity the facts

[13] "Unlawful" practices are "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Sup.Ct.,* 27 Cal.App.4th 832, 838 (1999). "Unfair" practices constitute "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cal—Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.,* 20 Ca1.4th 163, 187 (1999). When determining "whether the challenged conduct is unfair within the meaning of the unfair competition law..., courts may not apply purely subjective notions of fairness." *Id.* at 184. The "fraudulent" prong under the UCL requires a showing of actual or potential deception to some members of the public, or harm to the public interest. *Id.* at 180; *see also McKell v. Wash. Mut., Inc.,* 142 Cal.App.4th 1457 (2006).

supporting the statutory elements of the violation." *Khoury v. Maly's of California, Inc.,* 14 Cal.App.4th 612, 619 (1993).

Here, Plaintiffs did not allege any facts to demonstrate a conduct by Defendants that could be classified as an unlawful, fraudulent, or unfair business act or practice. Plaintiffs did not allege any conduct by Defendants that could constitute a violation of an antitrust law or a violation of policy or spirit of such law. Further, Plaintiffs did not allege any conduct by Defendants that could be found to significantly threaten or harm competition. Instead, Plaintiffs made vague and conclusory allegations that were unsupported by facts. For this reason alone, their claim fails and should be dismissed.

In addition, Plaintiffs' claim fails because it is predicated on failed allegations. "[S]ection 17200 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable...." *Puentes,* 160 Cal.App.4th 638, 643-644. Accordingly, when the underlying violations cannot be stated, a claim for unfair business practices fails as well. *See, Pantoja v. Countrywide Home Loans, Inc.,* 640 F.Supp.2d 1177, 1190 (N.D. Cal. 2009); *McNeely v. Wells Fargo Bank, NA.,* 2011 WL 6330170 at *4 (C.D. Cal. Dec. 15, 2011). In their UCL claim Plaintiffs merely restate the allegations contained in their previous claims. Thus, because these claims fail, Plaintiffs' Section 17200 claim cannot stand independently and must be dismissed as well.

Finally, the claim fails because Plaintiffs did not allege any facts to demonstrate their standing to allege their claim against Defendants. To have standing to allege a claim for violation of Section 17200 et seq., a plaintiff must allege that he suffered an injury-in-fact as a result of the unfair competition. *Bus. & Profs. Code, §* 17204; *Hale v. Sharp Healthcare,* 183 Cal. App. 4th 1373, 1384 (2010). Because, as explained above, Plaintiffs cannot allege that they suffered such an injury as a result of Defendants' purportedly deceptive conduct, as any

alleged damages they claim to have suffered resulted from their own failure to make payments on the Loan, the claim fails. (See above).

J. Plaintiffs' Tenth Claim for Trespass Fails Because Defendants Were Contractually Authorized to Foreclose.

"The essence of the cause of action for trespass is an 'unauthorized entry' onto the land of another." *Spinks v. Equity Residential Briarwood Apartments*, 171 Cal.App.4th 1004, 1042 (2009) (citation omitted). To allege a claim for trespass, Plaintiffs must allege facts demonstrating that: (1) they owned the Property; (2) Defendants entered Plaintiffs' Property without permission; (3) Plaintiffs suffered harm; and (4) that Defendants' entry was a substantial factor in causing Plaintiffs' harm. *Murphy v. Wells Fargo Bank, N.A.*, 2011 WL 6182422 at *3 (N.D. Cal. Dec. 13, 2011).

Here, Plaintiffs contend that Defendants committed trespass by foreclosing on the Property and by initiating eviction proceedings. (FAC, ¶164.) However, notwithstanding that Plaintiff did not explain how such actions constituted an "unauthorized entry," by executing the Deed of Trust, Burley expressly authorized Defendants to foreclose. (*See,* FAC, Ex. B-7.) Accordingly, because Defendants had express, contractual authority to foreclose, the claim fails.

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IV. CONCLUSION

For all of the reasons set forth above, Defendants respectfully request that this Motion be granted in its entirety, without leave to amend and that Plaintiffs' First Amended Complaint be dismissed, with prejudice.

Respectfully submitted,

WRIGHT, FINLAY & ZAK, LLP

Dated: September 23, 2014

By: /s/ Lukasz I. Wozniak
T. Robert Finlay, Esq.
Lukasz I. Wozniak, Esq.
Attorneys for Defendants,
ONEWEST BANK, N.A., f/k/a ONEWEST BANK, FSB and DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF THE INDYMAC INDA MORTGAGE LOAN TRUST 2007-AR3, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-AR3 UNDER THE POOLING AND SERVICING AGREEMENT DATED MAY 1, 2007

PROOF OF SERVICE

I, Margaret Augustyniak, declare as follows:

I am employed in the County of Orange, State of California. I am over the age of eighteen (18) and not a party to the within action. My business address is 4665 MacArthur Court, Suite 200, Newport Beach, California 92660. I am readily familiar with the practices of Wright, Finlay & Zak, LLP, for collection and processing of correspondence for mailing with the United States Postal Service. Such correspondence is deposited with the United States Postal Service the same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

On September 24, 2014, I served the within **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT** on all interested parties in this action as follows:

[ ] by placing [ ] the original [X] a true copy thereof enclosed in sealed envelope(s) addressed as follows:

Gary R. Saunders, Esq
Saunders Law Group, LTD.
1891 California Avenue, Suite 102
Corona, CA 92881
(951) 272-9114
Attorney for Plaintiffs
Silvia Burley and The California Valley Miwok Tribe

[X] (BY MAIL SERVICE) I placed such envelope(s) for collection to be mailed on this date following ordinary business practices.

[ ] (BY CERTIFIED MAIL SERVICE) I placed such envelope(s) for collection to be mailed on this date following ordinary business practices, via Certified Mail, Return Receipt Requested.

[ ] (BY PERSONAL SERVICE) I caused personal delivery by ATTORNEY SERVICE of said document(s) to the offices of the addressee(s) as set forth on the attached service list.

[ ] (BY FACSIMILE) The facsimile machine I used, with telephone no. (949) 477-9200, complied with California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2006(d), I

caused the machine to print a transmission record of the transmission, a copy of which is attached to the original Proof of Service.

[ ] (BY NORCO OVERNITE - NEXT DAY DELIVERY) I placed true and correct copies thereof enclosed in a package designated by Norco Overnite with the delivery fees provided for.

[X] (CM/ECF Electronic Filing) I caused the above document(s) to be transmitted to the office(s) of the addressee(s) listed by electronic mail at the e-mail address(es) set forth above pursuant to Fed.R.Civ.P.5(b)(2)(E). "A Notice of Electronic Filing (NEF) is generated automatically by the ECF system upon completion of an electronic filing. The NEF, when e-mailed to the e-mail address of record in the case, shall constitute the proof of service as required by Fed.R.Civ.P.5(b)(2)(E). A copy of the NEF shall be attached to any document served in the traditional manner upon any party appearing pro se."

[X] (Federal) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on September 24, 2014, at Newport Beach, California.

Margaret Augustyniak