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8 Attorneys for Defendants,

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

14 **UNITED STATE DISTRICT COURT**  
15 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

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

21 Plaintiff,

22 vs.

23 ONEWEST BANK, FSB, FSB;  
24 MERIDIAN FORECLOSURE  
25 SERVICE; DEUTSCHE BANK  
26 NATIONAL TRUST COMPANY, AS  
27 TRUSTEE OF THE INDYMAC INDIA  
28 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' REPLY TO  
PLAINTIFFS' OPPOSITION  
TO MOTION TO DISMISS THE  
FIRST AMENDED  
COMPLAINT**

Date: December 1, 2014

Time: 2:00 p.m.

Courtroom: #5 – 14<sup>th</sup> Floor

Complaint filed on: 6/14/14

First Amended Complaint filed on:  
9/15/14

Trial date: None

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

3           Defendants ONEWEST BANK, N.A., f/k/a ONEWEST BANK, FSB and  
4           DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF THE  
5           INDYMAC INDA MORTGAGE LOAN TRUST 2007-AR3, MORTGAGE  
6           PASS-THROUGH CERTIFICATES, SERIES 2007-AR3 UNDER THE  
7           POOLING AND SERVICING AGREEMENT DATED MAY 1, 2007  
8           (**“Defendants”**) hereby submit their memorandum of points and authorities in  
9           reply to plaintiffs SILVIA BURLEY, and THE CALIFORNIA VALLEY  
10          MIWOK TRIBE’s (**“Plaintiffs”**) Opposition to Motion to Dismiss Plaintiffs’ First  
11          Amended Complaint (**“Opposition”**) as follows:

12                           **MEMORANDUM OF POINTS AND AUTHORITIES**

13                                   **I.     INTRODUCTION**

14          Plaintiffs’ Opposition does not address Defendants’ arguments and does not  
15          support Plaintiffs’ assertions with citation to relevant authority. In fact, the  
16          Opposition merely re-asserts the allegations contained in Plaintiffs’ First  
17          Amended Complaint (**“FAC”**) and concludes that these allegations are sufficient  
18          to withstand Defendants’ Motion to Dismiss the FAC (**“Motion.”**) As explained  
19          below and in the moving papers, this argument is incorrect, as Plaintiffs’  
20          allegations fail as a matter of law. Accordingly, Defendants’ Motion should be  
21          granted in its entirety and Plaintiffs’ FAC should be dismissed, with prejudice.

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## II. ARGUMENT

**A. Plaintiffs Did Not Address Defendants' Arguments Concerning the Deficiencies of Plaintiffs' First Claim for Violation of ECOA, Fourth Claim for Slander of Title, Fifth Claim for Breach of Implied Covenant of Good Faith and Fair Dealing, Sixth Claim for Fraud, Seventh Claim for Promissory Estoppel, Eighth Claim for Unjust Enrichment/Embezzlement, Tenth Claim for Trespass, and Eleventh Claim for Violation of TILA.**

As set forth in Defendants' Motion, Plaintiffs' first, fifth, sixth, seventh, and eleventh claims all fail as because these claims were premised on conduct that occurred at/prior to the origination of Plaintiffs' loan and, therefore, fail as a matter of law, because:

- (1) OneWest is not liable for such conduct because it did not assume IndyMac's liabilities when it acquired its assets from FDIC;
- (2) Plaintiffs failed to follow the procedure set forth in FIRREA; and
- (3) Plaintiffs' claims are time barred.

Plaintiffs also did not address Defendants' argument that the fourth claim for slander of title fails because the non-judicial foreclosure process is insufficient to support the claim and because the process of publishing and recording of the foreclosure notices and of the Trustee's Deed constitutes privileged activity, that the eighth claim for unjust enrichment/embezzlement fails because the claims are not recognized as viable civil causes of action, and that the tenth claim for trespass fails because Defendants' actions were expressly permitted by the Deed of Trust.

Plaintiffs' failure to address these arguments should be construed as Plaintiffs' concession to the merits of Defendants' argument and as their waiver and concession to dismissal thereof. *See, Shorter v. Los Angeles Unified Sch. Dist.*, 2013 WL 6331204, at \*5 (C.D. Cal. Dec. 4, 2013) (citing cases). For this reason, Defendants' Motion should be granted and Plaintiffs' first, fourth, fifth,

sixth, seventh, eighth, tenth, and eleventh claims should be dismissed with prejudice.

**B. Contrary to Plaintiffs' Argument, They Did Not Allege the Elements of the Claim for ECOA Violations.**

As explained in the Motion, to state a claim for violation of the ECOA, Plaintiffs were required to allege facts demonstrating 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). Contrary to their argument, Plaintiffs did not allege such facts in their FAC.<sup>1</sup> They did not allege that the Tribe is a member of a protected class, that it applied for credit with Defendants, was qualified for credit and was denied such credit by Defendants. In fact, the FAC specifically states that the Tribe authorized Burley to apply for the refinancing loan on her own (FAC, ¶¶37-38, 42-43) and that Burley actually received the requested credit from IndyMac. Hence, Plaintiff's argument fails as Plaintiffs did not and cannot allege the requisite elements of the cause of action.

**C. Plaintiffs Did Not Provide any Authority to Support Their Arguments Concerning Their Second Claim for Wrongful Foreclosure, Third Claim for Cancellation of Instruments, Sixth Claim for Fraud, Seventh Claim for Promissory Estoppel, and Eighth Claim for Unjust Enrichment/Embezzlement.**

In their Opposition, Plaintiffs merely re-asserted the allegations set forth in their FAC and concluded, without supporting their argument with any citation to authority, that their claims for wrongful foreclosure, cancellation of instruments, fraud, promissory estoppel, and unjust enrichment/embezzlement were properly alleged. This argument fails for the following reasons.

<sup>1</sup> In their FAC, Plaintiffs alleged that Defendants violated ECOA by "prevent[ing] the Tribe from putting their name on the title at the loan origination and again during refinancing."

1 First, arguments of counsel unsupported by citation to relevant authority are  
 2 deemed waived and, therefore, should not be considered by the Court. *See, Fry v.*  
 3 *Pliler*, 2004 WL 5264357, at \*30 (E.D. Cal. Aug. 27, 2004) (“bare contention,  
 4 unsupported by explanation or authority, is deemed waived.”) (citing cases);  
 5 *Williams v. Jacquez*, 2011 WL 703616, at \*31 (E.D. Cal. Feb. 18, 2011) (“The  
 6 first half of the claim is unsupported by developed legal argument or citation of  
 7 authority demonstrating how the jury was misled; we therefore deem it  
 8 abandoned.”); *Lexington Ins. Co. v. Silva Trucking, Inc.*, 2014 WL 1839076, at \*3  
 9 (E.D. Cal. May 7, 2014).

10 Second, as set forth in the Motion, Plaintiffs’ conclusion is erroneous  
 11 because the allegations set forth in the FAC are factually unsupported, legally  
 12 incorrect and, for the reasons stated in the underlying Motion, fail as a matter of  
 13 law.<sup>2</sup>

14 As such, Defendants’ Motion should be granted and Plaintiffs’ claims for  
 15 wrongful foreclosure, cancellation of instruments, fraud, promissory estoppel, and  
 16 unjust enrichment/embezzlement should be dismissed, with prejudice.

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20 <sup>2</sup> In addition, Plaintiffs’ assertion that they properly alleged that they suffered prejudice  
 21 resulting from Defendants’ foreclosure demonstrates their lack of understanding of the type of  
 22 prejudice that is necessary to satisfy the element of the wrongful foreclosure cause of action. As  
 23 explained by California courts, “[p]rejudice is not presumed from ‘mere irregularities’ in the  
 24 process.” *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 272 (citations  
 25 omitted). Instead, the plaintiff alleging a cause of action for wrongful foreclosure must allege  
 26 specific facts demonstrating that the irregularity in the foreclosure process impairs the plaintiff’s  
 27 ability to “contest or avert foreclosure.” *Debrunner v. Deutsche Bank Nat. Trust Co.* (2012) 204  
 28 Cal.App.4th 433, 444. Here, Plaintiffs did not allege any facts to demonstrate that Defendants’  
 actions impaired their ability to contest or avert foreclosure. Recorded documents demonstrate  
 that the foreclosure process was commenced only one year after Burley obtained the loan.  
 Plaintiffs had five years to contest the foreclosure process or to explore options to avoid it.  
 Plaintiffs’ decision to not do so, despite being fully aware of their default and the pendency of  
 the foreclosure process does not qualify as the requisite prejudice.

1 **D. Contrary to Plaintiffs' Argument, the FAC Did Not Allege Sufficient**  
2 **Facts to State a Claim for Violations of Good Faith and Fair Dealing**  
3 **Against Defendants.**

4 First, as indicated in the Motion (and acknowledged by Plaintiffs by their  
5 failure to address Defendants' argument in the Opposition), the Tribe cannot state  
6 the claim because " the contractual relationship between Defendants and the Tribe  
7 does not exist.

8 Second, Plaintiffs, once again, did not address Defendants' arguments that  
9 Burley's claim fails because the Deed of Trust superseded any prior promises  
10 allegedly made to Burley by IndyMac and because the covenant was implied in  
11 the Deed of Trust and not in the prior negotiations between Burley and IndyMac.  
12 *See, Hafiz v. Greenpoint Mortgage Funding, Inc.*, 652 F. Supp. 2d 1039, 1046  
(N.D. Cal. 2009).

13 Third, as indicated in the moving papers, Plaintiffs' claim is factually  
14 unsupported. While Plaintiffs attempt to remedy this deficiency by asserting  
15 additional facts in their Opposition (*see*, Opposition, p. 15:9-24), these facts were  
16 not included in the FAC. (*See*, FAC, ¶¶118-124.) As such, because it is the  
17 purpose of Plaintiffs' pleading, not their Opposition, to allege all facts upon which  
18 their claim is based, Plaintiffs' argument fails.

19 **E. The Opposition Demonstrates that the Ninth Claim for Violation of**  
20 **Business and Professions Code § 17200 Fails Because It Is Premised on**  
21 **Failed Claims.**

22 Plaintiffs' Opposition confirms that Plaintiffs based their claim for violation  
23 of *Business and Professions Code* section 17200 ("**Section 17200**") on their  
24 remaining claims, all of which fail for the reasons set forth in the moving papers  
25 and above. Accordingly, Plaintiffs' claim cannot stand independently and must be  
26 dismissed as well. *See, Pantoja v. Countrywide Home Loans, Inc.*, 640 F.Supp.2d  
27 1177, 1190 (N.D. Cal. 2009); *McNeely v. Wells Fargo Bank, NA.*, 2011 WL  
28 6330170 at \*4 (C.D. Cal. Dec. 15, 2011).

1 Further, contrary to Plaintiffs' arguments, the FAC did not allege any facts  
2 to satisfy Plaintiffs' burden of pleading, with reasonable particularity, facts  
3 demonstrating an unlawful, fraudulent, or unfair business act or practice by  
4 Defendants.

5 Finally, contrary to Plaintiffs' argument, Plaintiffs did not allege sufficient  
6 facts to demonstrate that they suffered an economic injury as a result of  
7 Defendants' actions. Addressing the element of standing for purposes of Section  
8 17200, the California Court of Appeals explained:

9  
10 Jenkins's third cause of action must also satisfy the second  
11 prong of the standing requirements under Business and  
12 Professions Code section 17204 (i.e., causation), which  
13 required her to plead a causal link between her economic injury,  
14 the impending nonjudicial foreclosure of her home, and the six  
15 unfair or unlawful acts allegedly committed by Defendants.  
16 (Bus. & Prof.Code, § 17204.) Importantly, Jenkins admits in  
17 both her SAC and opening brief that she defaulted on her loan.  
18 It is also indisputable Jenkins's default triggered the lawful  
19 enforcement of the power of sale clause in the deed of trust, and  
20 it was the triggering of the power of sale clause that subjected  
21 Jenkins's home to nonjudicial foreclosure. Moreover, Jenkins's  
22 SAC and opening brief acknowledge her default occurred *prior*  
23 to the six unlawful or unfair acts she alleges as the basis of her  
24 UCL action. As Jenkins's home was subject to nonjudicial  
25 foreclosure because of Jenkins's default on her loan, which  
26 occurred before Defendants' alleged wrongful acts, Jenkins  
27 cannot assert the impending foreclosure of her home (i.e., her  
28 alleged economic injury) was caused by Defendants' wrongful  
actions. Thus, even if we assume Jenkins's third cause of action  
alleges facts indicating Defendants' actions violated at least one  
of the UCL's three unfair competition prongs (unlawful, unfair,  
or fraudulent), Jenkins's SAC cannot show any of the alleged  
violations have a causal link to her economic injury. In light of  
these facts, we conclude the demurrer to Jenkins's third cause of  
action was proper. *Jenkins v. JP Morgan Chase Bank, N.A.*,  
216 Cal.App.4th 497, 522-23 (2013).



1 Similarly to *Jenkins*, the FAC acknowledges that Burley defaulted on the  
 2 Loan (Plaintiffs merely question the amount of default) and the facts demonstrate  
 3 that that default occurred in June of 2008, prior to OneWest's acquisition of  
 4 IndyMac's assets from FDIC. (*See*, Motion to Dismiss, p.p. 3-4.) As such,  
 5 Plaintiffs simply cannot demonstrate that their purported damages, if any, were  
 6 caused by Defendants' actions. *See also*, *Solomon v. Aurora Loan Servs. LLC*,  
 7 No. CIV. 2:12-209 WBS, 2012 WL 2577559, at \*5 (E.D. Cal. July 3, 2012) ("At  
 8 any point during plaintiff's default, defendant had the right to foreclose on the  
 9 property. It was that default that caused the foreclosure that caused her injury, not  
 10 defendant's denial of a home loan modification."); *Ortiz v. America's Servicing*  
 11 *Co.*, 2012 WL 2160953, at \*8 (C.D. Cal. June 11, 2012) ("plaintiff's allegations  
 12 indicate that plaintiff lost her home because she defaulted on the loan, not because  
 13 of defendants' alleged representations that defendants would approve plaintiff for  
 14 a loan modification. Because the alleged post-default misrepresentations could not  
 15 have caused plaintiff's default, plaintiff lacks standing to bring her UCL claim.")  
 16 Hence, Plaintiffs' argument fails.

17 **F. Contrary to Plaintiff's Argument, Tender Is Required.**

18 Plaintiffs' argue that they should not be required to tender because requiring  
 19 Plaintiffs to tender would lead to inequitable result. This argument is incorrect.

20 Case law explaining the equity exception to the tender rule is limited to  
 21 situations where the amount of the debt is genuinely disputed. *See*, *Lona v.*  
 22 *Citibank, N.A.* (2011) 202 Cal.App.4th 89, 113 (citing to *Humboldt Savings Bank*  
 23 *v. McCleverty* (1911) 161 Cal. 285, 291).<sup>3</sup> Here, Plaintiffs offered no explanation  
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25 <sup>3</sup> The *Humboldt* court found that the "defendant would be subjected to very evident injustice  
 26 and hardship if her right to attack the sale were made dependent upon an offer by her to pay the  
 27 whole debt. The debt was not hers, and she was not liable for any part of it. Her only interest  
 28 was in the homestead property, which [was worth] \$5,000, while the property in which she had  
 no interest was worth over \$57,000. The debt amounted to \$57,618.30." *Humboldt*, *supra*, at  
 291.



1 as to why it would be inequitable to require them to tender the amount of their  
2 indebtedness to Defendants. Plaintiffs do not dispute the amount of their debt,  
3 i.e., their loan – they merely dispute the amount of default. Therefore, given that  
4 Burley managed to reside in the Property without making their regular monthly  
5 payments since 2008, there is nothing inequitable in requiring Plaintiffs to tender,  
6 at the very least, the amount that Burley borrowed from IndyMac.

7 Furthermore, Plaintiffs' argument that tender is not required where the sale  
8 is void constitutes a red herring because Plaintiffs did not allege any facts to  
9 demonstrate that the sale was void. A sale has been considered void in situations  
10 where (1) no breach had occurred, (2) the borrower was not in default at the time  
11 of the sale, (3) the deed of trust was contained an improper description of the  
12 property, (3) the sale was the result of sham bidding or an attempt to restrict  
13 competitive bidding, or (4) where the trustee did not have the power to foreclose.  
14 *See, Lona*, 202 Cal.App.4th at 106. None of these circumstances is present here.  
15 Instead, Plaintiffs simply allege that the Deed of Trust was void at inception,  
16 which contention, as set forth in the moving papers, is legally incorrect.  
17 Accordingly, Plaintiffs' argument fails and Plaintiffs should be required to satisfy  
18 the tender rule.

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**III. CONCLUSION**

For all of the reasons set forth above, Defendants respectfully request that their Motion to Dismiss 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: November 24, 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  
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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 November 24, 2014, I served the within **DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS THE FIRST AMENDED COMPLAINT** on all interested parties in this action as follows:

☐ by placing ☐ the original ☒ 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**

☐ (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

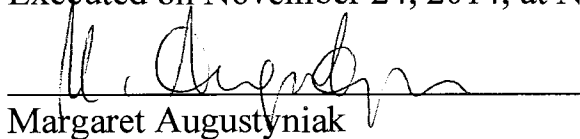
1 caused the machine to print a transmission record of the transmission, a copy of  
2 which is attached to the original Proof of Service.

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

5 [X] (CM/ECF Electronic Filing) I caused the above document(s) to be transmitted to the  
6 office(s) of the addressee(s) listed by electronic mail at the e-mail address(es) set  
7 forth above pursuant to Fed.R.Civ.P.5(b)(2)(E). "A Notice of Electronic Filing  
8 (NEF) is generated automatically by the ECF system upon completion of an  
9 electronic filing. The NEF, when e-mailed to the e-mail address of record in the  
10 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."

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

13 Executed on November 24, 2014, at Newport Beach, California.

14   
15 Margaret Augustyniak