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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Daniel Schayes and Wendy Schayes,
 husband and wife,

No. CV-10-02658-PHX-NVW

10 Plaintiffs,

ORDER

11 vs.

12 Orion Financial Group, Inc.; CitiMortgage,
13 Inc.; Lender Processing Services, Inc.;
14 Mortgage Electronic Registration Systems,
 Inc.; PNMAC Mortgage Co., LLC; and
 Pennymac Loan Services, LLC,

15 Defendants.
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18 Before the Court is “Defendants Pennymac Loan Services, LLC, PNMAC
19 Mortgage Co., LLC and Mortgage Electronic Registration Systems, Inc.’s Motion to
20 Dismiss Complaint for Damages, Injunction, Delcaratory [*sic*] & Other Equitable Relief”
21 (Doc. 21). This motion responds to Plaintiffs’ amended complaint (Doc. 20), which
22 Plaintiffs filed with the Court’s leave after the Court dismissed Plaintiffs’ previous
23 complaint for failure to state a claim.

24 The present motion was filed on June 20, 2011. This District’s local rules required
25 Plaintiffs to respond by July 7, 2011. LRCiv 7.2(c); Fed. R. Civ. P. 6(d). On July 5,
26 2011, Plaintiffs filed for an extension until July 15, 2011. The Court granted this request
27 on July 6, 2011. Plaintiffs filed no response on July 15, nor have they filed anything
28

1 since. On this basis alone, the Court could grant Defendants' motion. LRCiv 7.2(i).
2 However, as explained below, the Court will grant Defendants' motion on its merits.

3 **I. BACKGROUND**

4 The Court draws the following facts from Plaintiffs' amended complaint. The
5 Court will assume the truth of Plaintiffs' plausibly alleged facts, as it must for purposes
6 of the pending motion to dismiss. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

7 Sometime before March 22, 2007, Plaintiffs Daniel and Wendy Schayes decided
8 to buy a home in Arizona with financing of \$1,295,000 provided by Defendant
9 CitiMortgage, Inc. The Schayes filled out a loan application in which they accurately
10 provided their then-current income, as well as supporting documentation in the form of
11 tax returns for the previous two years. However, unknown to the Schayes,
12 CitiMortgage's local agent disregarded that income, replaced it with a lower figure, and
13 then forwarded the application to the CitiMortgage underwriting department. This
14 fictitious lower income figure prompted the underwriting department to treat the Schayes
15 as riskier borrowers and therefore require them to pay a higher interest rate. Further, the
16 underwriting department approved the Schayes for an adjustable-rate loan with a period
17 of interest-only payments, rather than a fixed-rate loan. Before the loan closed,
18 CitiMortgage told the Schayes that the loan product for which they had been approved
19 was the only loan product for which they qualified, when in reality, their actual income
20 would have qualified them for a better loan.

21 The Schayes and CitiMortgage closed this loan transaction on March 22, 2007.
22 Daniel Schayes (but not his wife) executed a promissory note in favor of CitiMortgage,
23 and also a deed of trust securing that note. The loan documentation included a second
24 home rider, suggesting that this Arizona home was not the Schayes' primary residence.
25 Various loan documents give a Florida residential address as the Schayes' mailing
26 address.

27 The Schayes allege that their original loan documents were scanned and then
28 destroyed to facilitate transferring and securitizing the Schayes' loan through Defendant

1 Mortgage Electronic Registration System, commonly known as MERS. MERS was
2 named as a nominal beneficiary under the deed of trust, on behalf of CitiMortgage.
3 Apparently through MERS, CitiMortgage eventually assigned the note and deed of trust
4 to Defendant Pennymac Loan Servicing, or perhaps its parent company, Defendant
5 PNMAC Mortgage Co. The Schayes claimed this happened on June 30, 2010, through
6 an assignment document fabricated by Defendant Orion Financial Group. The Schayes
7 believe this document is fabricated for two reasons. First, news reports show that
8 CitiMortgage has settled cases recently where it was accused of filing documents
9 fabricated by Orion. Second, the assignment document states that note and deed of trust
10 were “executed by Daniel L Schayes and Wendy L Schayes, husband and wife, tenants in
11 the entirety.” (Doc. 20-1 at 34 (boldface removed; capitalization normalized).) This
12 information is incorrect. Only Daniel Schayes executed the note and deed of trust, and
13 “tenants in the entirety” is inapplicable given that the home became community property.
14 However, the deed of trust itself lists the “borrower” as “Daniel L Schayes & Wendy L.
15 Schayes Tenants in Entirety.” (Doc. 20-1 at 5.)

16 At some unspecified point, the Schayes fell behind on their house payments,
17 allegedly because they could not afford the adjustable-rate payments. On August 13,
18 2010, T.D. Service Company of Arizona, designated by MERS as a successor trustee
19 under the deed of trust, noticed a trustee’s sale to take place on November 17, 2010. The
20 Schayes believe that Defendant Loan Processing Services (LPS) asked T.D. Service
21 Company to notice the trustee’s sale. The Schayes claim that LPS is a middleman of
22 sorts, coordinating foreclosures on behalf of lenders through a network of private
23 attorneys that usually communicate only with LPS, not the foreclosing lender. Tiffany &
24 Bosco, counsel for Defendants MERS, Pennymac, and PNMAC Mortgage, is allegedly
25 part of LPS’s network. The Schayes accuse LPS of facilitating numerous unauthorized
26 foreclosures.

27 On November 15, 2010, the Schayes learned for the first time (from a lawyer they
28 hired to review their situation) that CitiMortgage had approved the Schayes’ loan based

1 on falsely deflated income. On November 16, 2010 (one day before the scheduled
2 trustee’s sale), the Schayes filed suit in Maricopa County Superior Court to stop the
3 trustee’s sale. The same day the Schayes filed their complaint, they moved for and were
4 granted a temporary restraining order. On December 13, 2010, Pennymac removed to
5 this Court, claiming diversity jurisdiction. This Court upheld that removal, dismissed the
6 Schayes’ complaint with leave to amend, and dissolved the temporary restraining order.
7 (Doc. 19.)

8 The Schayes have now filed an amended complaint asserting six causes of action.
9 First, the Schayes accuse CitiMortgage, Orion, LPS, and PNMAC Mortgage of common
10 law fraud. Second, the Schayes accuse CitiMortgage and PNMAC Mortgage of statutory
11 consumer fraud. Third, the Schayes seek an accounting from CitiMortgage, Orion, LPS,
12 PNMAC Mortgage, and MERS. Fourth, the Schayes seek to quiet title against
13 CitiMortgage, MERS, PNMAC Mortgage, and unknown parties involved in the
14 mortgage-backed security encompassing their mortgage. Fifth, the Schayes accuse
15 CitiMortgage, MERS, Orion, LPS, and Pennymac of violating A.R.S. § 33-420, which
16 prohibits recording a real estate document that is knowingly forged or knowingly
17 contains false statements. Sixth, the Schayes accuse CitiMortgage and PNMAC
18 Mortgage of unjust enrichment. Defendants MERS, Pennymac, and PNMAC Mortgage
19 have moved to dismiss. It appears that Defendants CitiMortgage, Orion, and LPS have
20 not been served yet.

21 **II. ANALYSIS**

22 **A. Legal Standard**

23 **1. Rule 8(a)**

24 To state a claim for relief under Fed. R. Civ. P. 8(a), a plaintiff must make “‘a
25 short and plain statement of the claim showing that the pleader is entitled to relief,’ in
26 order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon
27 which it rests.’” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations
28 omitted). This “short and plain statement” must also be “plausible on its face.” *Ashcroft*

1 v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009). A claim is plausible if it contains “[f]actual
2 allegations [sufficient] to raise a right to relief above the speculative level,” *Twombly*,
3 550 U.S. at 555, and to permit a reasonable inference that the defendant is liable for the
4 conduct alleged, *Iqbal*, 129 S. Ct. at 1949. “Determining whether a complaint states a
5 plausible claim for relief . . . [is] a context-specific task that requires the reviewing court
6 to draw on its judicial experience and common sense.” *Id.* at 1950.

7 A proper complaint needs no “formulaic recitation of the elements of a cause of
8 action,” *see Twombly*, 550 U.S. at 555, but the plaintiff must at least “allege sufficient
9 facts to state the elements of [the relevant] claim,” *Johnson v. Riverside Healthcare Sys.,*
10 *LP*, 534 F.3d 1116, 1122 (9th Cir. 2008). All of the plaintiff’s plausible factual
11 allegations are accepted as true and the pleadings are construed in a light most favorable
12 to the plaintiff. *Knieval*, 393 F.3d at 1072.

13 **2. Rule 9(b)**

14 Under Fed. R. Civ. P. 9(b), “a plaintiff [alleging fraud] must set forth more than
15 the neutral facts necessary to identify the transaction. The plaintiff must set forth what is
16 false or misleading about a statement, and why it is false.” *In re GlenFed, Inc. Sec.*
17 *Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc). The plaintiff can usually satisfy this
18 requirement by alleging the identity of the person who made the misrepresentation; the
19 time, place, content, and manner of the misrepresentation; the persons who heard, read, or
20 otherwise received the misrepresentation; and the injury caused by reliance on the
21 misrepresentation. 2 James Wm. Moore, *Moore’s Federal Practice* § 9.03[1][b] (3d ed.
22 2010).

23 Specifically with regard to allegations of identity, “there is no absolute
24 requirement that where several defendants are sued in connection with an alleged
25 fraudulent scheme, the complaint must identify false statements made by each and every
26 defendant.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007). However,

27 Rule 9(b) does not allow a complaint to merely lump multiple
28 defendants together but requires plaintiffs to differentiate

1 their allegations when suing more than one defendant and
2 inform each defendant separately of the allegations
3 surrounding his alleged participation in the fraud. . . . [A]
4 plaintiff must, at a minimum, identify the role of each
5 defendant in the alleged fraudulent scheme.

6 *Id.* at 764–65 (alterations incorporated; citations and internal quotation marks omitted).

7 **B. Counts One and Two (Common Law and Statutory Consumer Fraud)**

8 The Schayes’ fraud causes of action are directed almost entirely at CitiMortgage.
9 Their only connection to the Defendants who brought this motion — MERS, Pennymac,
10 and PNMAC Mortgage — is an accusation that PNMAC Mortgage took an assignment of
11 the Schayes’ loan knowing that fraud was supposedly involved in the loan, recordation of
12 documents, and so forth.¹ In other words, the Schayes claim that PNMAC Mortgage was
13 not a bona fide purchaser. But this repeats the Schayes’ previous mistake, confusing a
14 potential UCC defense to payment with an affirmative cause of action. Whether or not
15 CitiMortgage’s purported fraud excuses the Schayes from paying on the note, PNMAC
16 Mortgage is not independently liable for fraud simply because it took the note from
17 CitiMortgage. In addition, just as in the Schayes’ original complaint, the amended
18 complaint does not state a cause of action for any sort of fraud with the specificity
19 required by Rule 9(b), at least with respect to MERS, Pennymac, and PNMAC Mortgage.
20 This claim will therefore be dismissed with respect to those three defendants.

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22 ¹ Count Two accuses PNMAC Mortgage of complicity in CitiMortgage’s alleged
23 scheme to sell the Schayes an unduly expensive loan product. (Doc. 20 ¶¶ 106, 108.) The
24 Schayes’ previous complaint did not make such allegations, and this Court dismissed it
25 for failing to show how anyone other than CitiMortgage (not then named as a defendant)
26 defrauded them. Accordingly, these new allegations of complicity between CitiMortgage
27 and PNMAC Mortgage are an obvious attempt to avoid dismissal on the same grounds.
28 There are no factual allegations that link PNMAC Mortgage to CitiMortgage until
Pennymac took an assignment from CitiMortgage. Thus, accusations that PNMAC
Mortgage participated in CitiMortgage’s alleged fraud do not comport with Fed. R. Civ.
P. 11 and will not be considered.

1 **C. Count Three (Accounting)**

2 The Schayes’ previous complaint asked for an accounting. The Court stated that
3 Arizona does not appear to provide a right to an accounting against one’s lender, but the
4 Court nonetheless noted the Schayes’ claim that they were

5 informed and believe that their note may have already been
6 paid by a third party either through a government program or
7 through private mortgage or other counter party insurance.
8 As a result, such information is necessary to determine if the
9 security deed of trust was a valid lien against the Property and
10 whether or not there was [*sic*] a valid trustee’s sale

11 (Doc. 1 at 16, ¶ 48.) Although payoff is a defense to foreclosure, the Court disregarded
12 this allegation as implausible on its face. The Court permitted amendment to give the
13 Schayes an opportunity to “explain in detail how they were informed, or why they
14 believe, that another party may have already paid off their debt.” (Doc. 19 at 15.)

15 The Schayes’ amended complaint again asks for an accounting because they

16 are informed and believe that their note may have already
17 been paid by a third party either through a government
18 program or through private mortgage, other counter party
19 insurance or Credit Default Swaps. The Plaintiffs have been
20 informed that such payoff of their loan may have been made
21 by Investors, Insurers, Counterparties on credit default swaps,
22 conveyances or constructive trusts arising by operation of law
23 through cross collateralization and over-collateralization
24 within the aggregate asset pools or later within the Special
25 Purpose Vehicle tranches (“tranches”), the United States
26 Treasury Department through the Troubled Assets Relief
27 Program, The United States Federal Reserve, other parties
28 that have traded in mortgage backed securities from the
 aggregated pools or securitized tranches containing interests
 in the loans. (See Exhibit 1 Affidavit of William E
 McCaffrey, attached to complaint)

(Doc. 20 ¶ 121.)

 Even if an “accounting” is a proper cause of action here, this allegation again fails
to state a claim. First, the Schayes did not attach an “Affidavit of William E McCaffrey”
to their amended complaint. Second, the broad sweep of this claim reveals that the
Schayes merely speculate that some party may have compensated their lender.
Speculation is not enough, *see Twombly*, 550 U.S. at 555, especially naked speculation of

1 this variety. This claim will therefore be dismissed with respect to MERS, Pennymac,
2 and PNMAC Mortgage.

3 **D. Count Four (Quiet Title)**

4 The Court dismissed the Schayes' previous quiet title claim because the Schayes
5 had not alleged their willingness to pay off the outstanding balance of their home loan.
6 *See Eason v. IndyMac Bank, FSB*, CV09-1423-PHX-JAT, 2010 WL 1962309, at *2
7 (D. Ariz. May 14, 2010) (quiet title not available if loan balance remains outstanding);
8 *Farrell v. West*, 57 Ariz. 490, 491, 114 P.2d 910, 911 (1941). "The Schayes may
9 amend," the Court said, "but if they do so, they must allege in good faith that they are
10 ready and able to tender the unpaid balance of their loan." (Doc. 19 at 15.)

11 In their amended complaint, the Schayes claim "in good faith" that they

12 are ready and able to tender the unpaid balance, "if any", of
13 their validly secured loan. Plaintiffs believe that there is no
14 unpaid balance as the loan has been paid in full and the Deed
of Trust a nullity. ¶¶ If the debt is proven, Plaintiffs have a
good faith belief they could tender payment of the
outstanding balance of a valid loan.

15 (Doc. 20 ¶¶ 135–36.) This representation is insufficient to permit a quiet title cause of
16 action. The Schayes here attempt to say the magic words while at the same time insulate
17 themselves from actual obligation. The quiet title claim will therefore be dismissed with
18 respect to MERS, Pennymac, and PNMAC Mortgage.

19 **E. Count Five (Violation of A.R.S. § 33-420)**

20 A.R.S. § 33-420 imposes liability for recording false or forged documents in some
21 circumstances, or failing to remove them from public records. The first type of liability
22 arises for persons who knowingly cause a false or forged to be recorded:

23 A person purporting to claim an interest in, or a lien or
24 encumbrance against, real property, who causes a document
25 asserting such claim to be recorded in the office of the county
26 recorder, knowing or having reason to know that the
27 document is forged, groundless, contains a material
28 misstatement or false claim or is otherwise invalid is liable to
the owner or beneficial title holder of the real property for the
sum of not less than five thousand dollars, or for treble the

1 actual damages caused by the recording, whichever is greater,
2 and reasonable attorney fees and costs of the action.

3 A.R.S. § 33-420(A). The second type of liability arises for persons who may not have
4 caused the document to be recorded, but who know of its falsity and fail to remove it
5 after a proper demand:

6 A person who is named in a document which purports to
7 create an interest in, or a lien or encumbrance against, real
8 property and who knows that the document is forged,
9 groundless, contains a material misstatement or false claim or
10 is otherwise invalid shall be liable to the owner or title holder
11 for the sum of not less than one thousand dollars, or for treble
12 actual damages, whichever is greater, and reasonable attorney
13 fees and costs as provided in this section, if he wilfully
14 refuses to release or correct such document of record within
15 twenty days from the date of a written request from the owner
16 or beneficial title holder of the real property.

17 *Id.* § 33-420(C).

18 The Schayes argue that both these subsections apply, but they have not alleged
19 that they gave the notice required by subsection C. Therefore, to the extent the Schayes’
20 claims are directed at this second type of liability — failing to withdraw a recorded
21 document after being warned of its falsity — those claims are dismissed.

22 As for subsection A, the Schayes claim that MERS and non-party T.D. Service
23 Company of Arizona knowingly caused false document to be recorded, namely, two
24 substitution of trustee documents and the two notices of trustee’s sales. These documents
25 contain false statements, the Schayes argue, because MERS identified itself as the
26 beneficiary of the deed of trust.

27 Assuming that MERS made a false statement — which is not clear, given that
28 MERS was the nominee for the beneficiary — there is no liability under the statute
because assignments of mortgages and notices of trustee’s sales are not “document[s]
asserting” a “claim [of] interest in, or a lien or encumbrance against[] real property.”
A.R.S. § 33-420(A). Although a notice of sale arguably “assert[s]” an “interest” in real
property by implication — who would cause a notice of sale to be filed if they or their
principal did not claim an interest? — Arizona courts interpret subsection A’s “document

1 assert[ing] an . . . interest” as the same sort of “document which purports to *create* an
2 interest” (emphasis added) described in subsection C. *See Bianco v. Patterson*, 159 Ariz.
3 472, 474, 768 P.2d 204, 206 (Ct. App. 1989) (discussing the connection between liability
4 under subsections A and C).

5 Cases applying § 33-420 support this interpretation. The allegedly offending
6 recordation is always some sort of document purporting to create an interest, lien, or
7 encumbrance, such as a lis pendens, mechanics lien, or the deed of trust itself. *See, e.g.,*
8 *Pence v. Glacy*, 207 Ariz. 426, 428, 87 P.3d 839, 841 (Ct. App. 2004) (improperly
9 formed deed of trust); *TWE Retirement Fund Trust v. Ream*, 198 Ariz. 268, 273–74, 8
10 P.3d 1182, 1187–88 (Ct. App. 2000) (lis pendens); *Guarriello v. Sunstate Equip. Corp.,*
11 *Inc.*, 187 Ariz. 596, 597, 931 P.2d 1106, 1107 (Ct. App. 1996) (mechanic’s lien); *City of*
12 *Mesa v. Smith Co. of Ariz., Inc.*, 169 Ariz. 42, 46–47, 816 P.2d 939, 943–44 (Ct. App.
13 1991) (lis pendens). The Court could locate no authority applying this statute to
14 assignments of mortgages and notices of trustee’s sales. Therefore, this claim will be
15 dismissed with respect to MERS, Pennymac, and PNMAC Mortgage.

16 **F. Count Six (Unjust Enrichment)**

17 The Schayes’ unjust enrichment accusations against PNMAC Mortgage amount to
18 a repeat of their accusation that no one has a right to receive payments under the
19 promissory note because it has allegedly been destroyed and/or separated from the deed
20 of trust. This claim is meritless. The Schayes’ unjust enrichment claim will therefore be
21 dismissed with respect to MERS, Pennymac, and PNMAC Mortgage.


22 **III. LEAVE TO AMEND**

23 Although leave to amend should be freely given “when justice so requires,” Fed.
24 R. Civ. P. 15(a)(2), the Schayes do not merit leave to amend against MERS, Pennymac,
25 or PNMAC Mortgage. Leave to amend need not be granted where there exist
26 circumstances “such as undue delay, bad faith or dilatory motive on the part of the
27 movant, repeated failure to cure deficiencies by amendments previously allowed, undue
28 prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of

1 amendment.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). Here, the Schayes requested
2 extra time to file their response, which the Court granted. The Schayes then failed to file
3 a response. This displays bad faith and a dilatory motive. In addition, the Schayes did
4 not correct deficiencies in their previously dismissed complaint. Accordingly, the
5 Schayes will not receive leave to amend against MERS, Pennymac, or PNMAC
6 Mortgage.

7 IT IS THEREFORE ORDERED that “Defendants Pennymac Loan Services, LLC,
8 PNMAC Mortgage Co., LLC and Mortgage Electronic Registration Systems, Inc.’s
9 Motion to Dismiss Complaint for Damages, Injunction, Delcaratory [*sic*] & Other
10 Equitable Relief” (Doc. 21) is GRANTED. Defendants Pennymac Loan Services, LLC,
11 PNMAC Mortgage Co., LLC, and Mortgage Electronic Registration Systems, Inc. are
12 DISMISSED with prejudice.

13 Dated this 27th day of July, 2011.

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17 Neil V. Wake
18 United States District Judge
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