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

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9 David M. Campbell; Marie G. Campbell,

No. CV 11-0180-PHX-DGC

10 Plaintiffs,

**ORDER**

11 vs.

12 California Reconveyance Company, et al.,

13 Defendants.

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15 Defendants move to dismiss Plaintiffs' complaint under Rule 12(b)(6) of the  
16 Federal Rules of Civil Procedure (Doc. 10), and Plaintiffs oppose (Doc. 13). In the  
17 alternative, Plaintiffs request leave to amend (Doc. 13 at 2), and the request is unopposed  
18 (*see* Doc. 15). Plaintiffs also move to remand (Doc. 11), and Defendants oppose  
19 (Doc. 12). The motions are fully briefed (Docs. 10-16) and the parties do not request oral  
20 argument. For the reasons set forth below, the Court will deny the motion to remand,  
21 grant in part and deny in part the motion to dismiss, and grant the motion to amend to the  
22 extent of the dismissed claims.

23 **I. Motion to Remand.**

24 Plaintiffs filed their initial complaint in Maricopa County Superior Court. The  
25 case was removed to this Court after issuance of a temporary restraining order by the  
26 state court enjoining the trustee sale of Plaintiffs' home. Docs. 1, 11. Plaintiffs do not  
27 argue that removal was improper, but argue that the Court should decline to exercise  
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1 diversity jurisdiction under the abstention doctrines enunciated in *Burford v. Sun Oil Co.*,  
2 319 U.S. 315, 327 (1943), and *Younger v. Harris*, 401 U.S. 37 (1971).

3 Plaintiffs argue that *Burford* abstention is proper because many cases are pending  
4 in Arizona courts involving the issues raised by Plaintiffs' complaint, and a state court is  
5 better equipped to interpret Arizona's foreclosure-regulation statutory scheme and make  
6 necessary policy judgments on issues of first impression. *Id.* at 8. Plaintiffs argue that  
7 *Younger* abstention is appropriate because of pending state proceedings to foreclose on  
8 Plaintiffs' home and the State's interest in resolving issues concerning procedures for  
9 foreclosure. *Id.* at 10. Defendants respond that removal was proper, that a trustee sale is  
10 not a state proceeding, that the issues raised here do not involve the Arizona system of  
11 administrative regulation or sovereignty, and that resolving difficult or undecided  
12 questions of state law is not a sufficient ground for abstention. Doc. 12.

13 The Court agrees with Defendants. This case falls within the Court's diversity  
14 jurisdiction, and Plaintiffs have not shown that a parallel state judicial proceeding is  
15 pending or that a state-court judgment has been entered on issues before the Court. Nor  
16 have Plaintiffs shown that this Court would be unable to apply Arizona law to the issues  
17 before it. *See La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 27 (1959)  
18 (noting that "the mere difficulty of state law does not justify a federal court's  
19 relinquishment of jurisdiction in favor of state court action"). The motion to remand will  
20 be denied. In light of this ruling, the Court also denies Plaintiffs' request for costs related  
21 to the motion (Doc. 11).

## 22 **II. Motion to Dismiss.**

### 23 **A. Legal Standard.**

24 When analyzing a complaint for failure to state a claim to relief under Rule  
25 12(b)(6), the well-pled factual allegations "are taken as true and construed in the light  
26 most favorable to the nonmoving party." *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th  
27 Cir. 2009) (citation omitted). Legal conclusions couched as factual allegations "are not  
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1 entitled to the assumption of truth,” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009), and  
2 therefore “are insufficient to defeat a motion to dismiss for failure to state a claim,” *In*  
3 *re Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010) (citation omitted). To avoid a  
4 Rule 12(b)(6) dismissal, the complaint must plead “enough facts to state a claim to relief  
5 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This  
6 plausibility standard “is not akin to a ‘probability requirement,’ but it asks for more than  
7 a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 129 S. Ct. at 1949  
8 (quoting *Twombly*, 550 U.S. at 556). “[W]here the well-pleaded facts do not permit the  
9 court to infer more than the mere possibility of misconduct, the complaint has alleged –  
10 but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’” *Id.* at 1950 (quoting Fed.  
11 R. Civ. P. 8(a)(2)).

## 12 **B. Discussion.**

13 This case involves an impending trustee sale of Plaintiffs’ house. Plaintiffs’  
14 complaint brings five causes of action against all defendants: (1) vacatur of substitution  
15 of trustee, assignment of deed of trust, and notice of trustee sale recordations; (2) quiet  
16 title; (3) breach of the duty of good faith and fair dealing; (4) accounting; and  
17 (5) injunctive relief. Doc. 1-1 at 18-29. Defendants move to dismiss the entire  
18 complaint. Doc. 10 at 1.

### 19 **1. Vacatur of Recordations.**

20 Under Arizona’s declaratory judgment statute, “[a]ny person interested under a  
21 deed, will, written contract or other writings constituting a contract, or whose rights,  
22 status or other legal relations are affected by a statute, municipal ordinance, contract or  
23 franchise, may have determined any question of construction or validity arising under the  
24 instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights,  
25 status or other legal relations thereunder.” A.R.S. § 12-1832.

26 Defendants argue this claim of declaratory relief must be dismissed because no  
27 actual controversy is alleged. Doc. 10 at 4-5. More specifically, they assert that the only  
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1 dispute here is who owns the note and who is a beneficiary under the deed of trust, and  
2 that such dispute does not affect Plaintiffs. *Id.* at 5. Plaintiffs respond that Defendants’  
3 threatened foreclosure of their home gives them standing to challenge the propriety of the  
4 recordings related to their property. Doc. 13 at 6-10, 11:1-9. The Court agrees. A  
5 trustee sale would affect Plaintiffs’ property interest, and under Arizona law the validity  
6 of the sale depends upon the recorded documents Plaintiffs seek to vacate. As discussed  
7 in more detail below, Plaintiffs have made plausible factual allegations as to the  
8 impropriety of at least some of the recorded documents Plaintiffs seek to vacate.  
9 Accordingly, Plaintiffs have shown a sufficient interest in a declaratory judgment.

## 10 **2. Count 2 – Quiet Title.**

11 Defendants argue this claim fails because “the alleged basis for the claim is merely  
12 theoretical,” Plaintiffs’ request for production of the note is unsupported, and that if  
13 Plaintiffs merely aim to “attack[] MERS’ involvement,” those claims also fail as a matter  
14 of law. Doc. 10 at 5-6. Plaintiffs respond that the complaint adequately alleges a quiet-  
15 title claim. Doc. 13 at 11.

16 Under Arizona law, an action to quiet title is statutory, but also includes equitable  
17 considerations. *Lavidas v. Smith*, 987 P.2d 212, 218 (Ariz. App. 1999). A party bringing  
18 a quiet title action must allege that it has an interest in real property and that the interest is  
19 adverse to another person who claims an interest in the same property. A.R.S. § 12-  
20 1101(A). Plaintiffs’ complaint alleges that they have title to the subject property, that  
21 Defendants are asserting a right to alienate Plaintiffs’ title, and that the two interests are  
22 adverse. Doc. 1-1 at 21-24.

23 The issue remains, however, whether Plaintiffs’ claim states a plausible basis for  
24 relief under *Twombly* and *Iqbal*. Plaintiffs make several arguments for plausibility. They  
25 first assert that the deed of trust was assigned by MERS to U.S. Bank and that the  
26 assignment is invalid. Doc. 13 at 4, 8. The invalidating factor argued in the response is  
27 not that MERS lacked the legal capacity to assign its interest – an argument made in the  
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1 complaint and rejected in other cases, *e.g.*, *Kane v. Bosco*, No. CV 10-1787-PHX-JAT,  
2 2010 WL 4879177, \*8 (D. Ariz. Nov. 23, 2010) – but rather that the assignment was  
3 signed by Deborah Brignac purporting to be a Vice President of MERS despite Ms.  
4 Brignac’s Linked-In profile listing her as employed by California Reconveyance  
5 Corporation (“CRC”). Doc. 13 at 4, 8. Plaintiffs argue that the absence of MERS from  
6 Ms. Brignac’s Linked-In profile makes plausible their allegation that she lacked the  
7 capacity to sign on behalf of MERS.<sup>1</sup> Secondly, Plaintiffs assert that U.S. Bank’s  
8 subsequent substitution of trustee is invalid for two independent reasons: (1) the  
9 instrument assigning MERS’s interest to U.S. Bank is invalid as discussed above, and  
10 (2) the substitution-of-trustee instrument was signed by Ms. Brignac asserting to be a  
11 Vice President of U.S. Bank. Doc. 13 at 4, 8. Thirdly, Plaintiffs assert that U.S. Bank  
12 cannot be the holder of their note because the mortgage pool that supposedly includes  
13 Plaintiffs’ note had closed one month before Plaintiffs’ loan originated. *Id.* at 4, 7-8.  
14 Defendants’ reply argues that the allegations regarding Ms. Brignac “constitute nothing  
15 more than unwarranted deductions of fact,” but does not specify why the inferences  
16 Plaintiffs draw are unwarranted. Doc. 15 at 4.

17 In *Twombly*, the United States Supreme Court noted that “[a]sking for plausible  
18 grounds [for making an inference] . . . simply calls for enough fact to raise a reasonable  
19 expectation that discovery will reveal evidence of [the inferred fact].” 550 U.S. at 556.  
20 The Court in *Iqbal* went further to address facial plausibility of express allegations.  
21 *Iqbal*, 129 S. Ct. at 1949. The *Iqbal* court refined the two-pronged approach for  
22 plausibility announced in *Twombly*: (1) a court determines if an allegation is a statement  
23 of fact or a statement of law; and (2) a court applies its “judicial experience and common

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25 <sup>1</sup> This Court’s Westlaw search of federal and state decisions revealed only two  
26 cases where Ms. Brignac’s name is mentioned: *Bjorn v. Lender Processing Servs.*, 2011  
27 WL 42873 (S.D. Cal. January 6, 2011), and *Caravantes v. Cal. Reconveyance Co.*, 2010  
28 WL 4055560 (S.D. Cal. October 14, 2010). The cases do not raise the same issues as  
Plaintiffs’ complaint, and therefore the Court could find no prior judicial decision  
deeming Ms. Brignac to be authorized by MERS. *Bjorn* does, however, show an  
affiliation between Ms. Brignac and CRC.

1 sense” to the specific context alleged and determines whether the facts alleged plausibly  
2 give rise to an entitlement to relief. *Iqbal*, 129 S. Ct. at 1949-1950. As to the first prong,  
3 the Court observed that only allegations of fact can be assumed true. *Id.* As to the  
4 second prong, the Court noted “[t]o be clear, we do not reject . . . bald allegations on the  
5 ground that they are unrealistic or nonsensical. . . . It is the conclusory nature of . . .  
6 allegations, rather than their extravagantly fanciful nature, that disentitles them to the  
7 presumption of truth.” *Id.* at 1951.

8 In this case, Plaintiffs have alleged in part that the person who signed two  
9 important instruments was not authorized to do so. Plaintiffs have drawn this inference  
10 from the fact that the signer’s public profile does not list her as being employed by  
11 MERS or U.S. Bank, the entities for whom she signed. Defendants do not argue that  
12 Linked-In is untrustworthy, or that Ms. Brignac’s profile is out of date. Defendants also  
13 do not assert the existence of agreements or other documents that appoint Ms. Brignac or  
14 all CRC vice presidents as vice presidents of MERS and U.S. Bank.<sup>2</sup> Defendants only  
15 argue that the inference is unwarranted. As *Iqbal* makes clear, a court does not reject  
16 “bald allegations on the ground that they are unrealistic or nonsensical.” *Iqbal*, 129 S. Ct.  
17 at 1951. Given Plaintiffs’ fact-supported allegation that Ms. Brignac is not authorized to  
18 sign on behalf of MERS or U.S. Bank, the Court has no basis for concluding that  
19 Plaintiffs’ allegations are implausible.<sup>3</sup>

20 Assuming Plaintiffs’ factual allegations to be true, the Court must still address  
21 whether the claim to quiet title is plausible in light of Plaintiffs’ default. Under Arizona  
22 law, a title holder may have a superior claim to title as to one party and an inferior claim  
23 as to another. *See, e.g., Bowen v. Chemi-Cote Perlite Corp.*, 432 P.2d 435, 443 (Ariz.

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25 <sup>2</sup> Such agreements were produced in other cases involving MERS. *E.g., Langley*  
26 *v. Chase Home Finance, LLC*, 2011 WL 1150772 \*13 (W.D. Mich. March 11, 2011).  
27 Defendants do not assert that MERS and U.S. Bank have no employees as such. Docs.  
28 10, 15.

<sup>3</sup> The Court need not address Plaintiffs’ allegation that the mortgage pool  
purporting to hold their note had closed prior to issuance of their loan.

1 1967). Moreover, rights of possession and alienation can also be superior or inferior as  
2 between parties. *Id.* Therefore, the dispositive issue is whether Plaintiffs have superior  
3 claims to specific rights as against Defendants, not whether Plaintiffs’ default would  
4 defeat their claim as against the world.

5 Plaintiffs’ quiet-title cause of action is unclear about all of the rights to which they  
6 seek a declaration. Doc. 1-1 at 21-23. The pleading makes in part claims that have been  
7 rejected in other cases, including that MERS has no authority to assign the deed of trust  
8 (Doc. 1-1 at 22:19-20), and that the note and deed of trust are inseparable (*id.* at 22:22-  
9 23). *E.g.*, *Kane v. Bosco*, No. CV 10-1787-PHX-JAT, 2010 WL 4879177, \*8 (D. Ariz.  
10 Nov. 23, 2010); *Maxa v. Countrywide Loans, Inc.*, No. CV 10-8076-PCT-NVW, 2010  
11 WL 2836958 (D. Ariz. July 19, 2010). The pleading appears to assert broadly that none  
12 of the defendants has a right to foreclose and that Plaintiffs are entitled to a finding of  
13 superior plenary rights as to all defendants. Doc. 1-1 at 23:20-22, 24:1-7. Plaintiffs’  
14 response to the motion to dismiss, however, appears to limit the claim to barring the  
15 alienation of the property at foreclosure by a trustee who was not properly appointed. *See*  
16 Doc. 13 at 12:9-14 (“Defendants’ suggestion . . . allows the Defendants to foreclose in  
17 the name of an entity that is not the beneficiary under the deed of trust, and on the basis  
18 of the fraudulent Assignment, Substitution of Trustee and Notice of Trustee’s Sale[.]”).

19 Because the Court finds the other arguments in Plaintiffs’ complaint implausible  
20 as a matter of law for the reasons stated above, and because Plaintiffs have made a  
21 plausible allegation as to the propriety of the trustee appointment as discussed above, the  
22 Court will dismiss the quiet title claim as to all rights except alienation by the alleged  
23 trustee. The Court will also grant Plaintiffs’ unopposed motion to amend their complaint  
24 as to this claim.

### 25 **3. Count 3 – Breach of Good Faith and Fair Dealing.**

26 Defendants argue this claim fails because Plaintiffs have not alleged the denial of  
27 a contracted-for benefit. Doc. 10 at 6-8. Plaintiffs respond that the deed of trust  
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1 contemplated the possible modification of the loan, and that Defendants’ denial of  
2 modification based on an allegedly-false reason violates the duty of good faith and fair  
3 dealing. Doc. 13 at 14. Plaintiffs also assert that Defendants’ allegedly fraudulent  
4 execution of the assignment and substitution of trustee violated the covenant implicit in  
5 the deed of trust. *Id.*

6 This claim is alleged against all defendants. Each defendant has a different  
7 relationship to Plaintiffs, however, and the basis for liability is not clearly alleged as to  
8 each defendant. For example, Plaintiffs have not adequately pled Defendant U.S. Bank,  
9 NA owed them a duty, and Plaintiffs express serious doubts about whether the trust for  
10 which U.S. Bank acts as trustee is the holder of the note. Doc. 1-1 at 18:1-12. Moreover,  
11 Plaintiffs allege that Defendant CRC is not a valid trustee under the deed of trust. *Id.* at  
12 15:9-13, 17:1-4. In light of this allegation, Plaintiffs fail to explain the source of CRC’s  
13 duty to them. Although Plaintiffs are entitled to plead alternative theories of relief, the  
14 claim as pled is not styled as an alternative claim.

15 Finally, Plaintiffs’ allegations of breach as to Defendant JPMorgan Chase Bank,  
16 N.A. (“Chase”) stem from Chase’s actions related to the loan modification process.  
17 Doc. 24-25. Plaintiffs have not adequately established a basis for Chase’s contractual  
18 duties, however. The complaint does not allege Plaintiffs’ contract obligated Chase to  
19 offer a modification. Although the complaint alleges Chase’s failure to perform  
20 consistent with representations toward Plaintiffs, it does not allege reliance on an  
21 enforceable promise by Chase to process a modification in a given fashion. In sum, the  
22 complaint does not allege a contractual benefit that Chase denied. *See Rawlings v.*  
23 *Apodaca*, 726 P.2d 565, 569 (Ariz. 1986) (“The essence of that duty is that neither party  
24 will act to impair the right of the other to receive the benefits which flow from their  
25 agreement or contractual relationship.”).

26 This claim is dismissed without prejudice as to all defendants. The Court will also  
27 grant Plaintiffs’ unopposed motion to amend their complaint as to this claim.  
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**4. Count 4 – Accounting.**

Defendants argue this claim must be dismissed because Plaintiffs do not allege lack of knowledge about the amount owed and because Plaintiffs’ allegation that the loan may have been paid by a third party is implausible. Doc. 10 at 7. Plaintiffs respond that they are entitled to an accounting because that accounting may confirm their allegation that the note has been paid in full by a third party, and that such party would be the only party who may assert a right against Plaintiffs’ property. Doc. 13 at 15.

Under Arizona law, a claim for an accounting requires Plaintiffs to allege an agency or trust relationship with respect to the party of which the request for accounting is made. *See Mollohan v. Christy*, 294 P.2d 375, 376-77 (Ariz. 1956). To the extent the complaint demands an accounting from all defendants, the claim fails in light of Plaintiff’s allegations that CRC is not a valid trustee and that U.S. Bank has no interest in the note. The Court will not presume which defendant has a duty to Plaintiffs – Plaintiffs must specifically allege such a duty themselves.

This claim is dismissed without prejudice as to all defendants. The Court will also grant Plaintiffs’ unopposed motion to amend their complaint as to this claim.

**5. Count 5 – Injunctive Relief.**

Injunctive relief is a remedy, not a claim. The Court will dismiss this claim to the extent it seeks to assert a separate claim for relief, but not to the extent it seeks a remedy for other valid claims in the complaint.

**IT IS ORDERED:**

1. Plaintiffs’ motion to remand (Doc. 11) is **denied**.
  2. Defendants’ motion to dismiss (Doc. 10) is **granted in part and denied in part** as stated above.
  3. Plaintiffs’ motion for leave to amend (Doc. 13) is **granted** as stated above.
- Plaintiffs shall file and amended complaint by **May 20, 2011**.

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4. The Court will set a Rule 16 scheduling conference by separate order.  
Dated this 5th day of May, 2011.



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David G. Campbell  
United States District Judge