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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Don Davis and Debra Davis, husband and
wife,

No. CV-11-01686-PHX-NVW

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Plaintiffs,

ORDER

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vs.

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U.S. Bank National Association as Trustee)
for RGMSI 2006S12 Residential Funding,)
14 LLC fka Residential Funding Corporation;)
Mortgage Electronic Registration Systems;)
15 Merscorp; Executive Trustee Services,)
LLC; and Doe Corporations 1-40,

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Defendants.

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Before the Court is Defendants' Motion to Dismiss Complaint (Doc. 6), which the

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Court will grant.

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I. Background

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On September 1, 2006, Plaintiffs executed a promissory note and deed of trust in the
23 amount of \$510,000, secured by property located at 1095 W. Via Palmas, Queen Creek,
24 Arizona 85242. At some point, Plaintiffs defaulted on their note, and a Notice of Trustee's
25 Sale of the property was recorded on October 20, 2010. A trustee's sale of the property has
26 not yet occurred.

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Plaintiffs sought a preliminary injunction and temporary restraining order in Pinal
28 County Superior Court on June 30, 2011. After Plaintiffs' request for a preliminary

1 injunction and temporary restraining order was denied, Plaintiffs filed the currently pending
2 complaint for breach of contract, accounting, quiet title. Defendants removed the action to
3 this Court on August 25, 2011 (Doc. 1).

4 **II. Legal Standards**

5 **A. Rule 8, Federal Rules of Civil Procedure**

6 A claim must be stated clearly enough to provide each defendant fair opportunity to
7 frame a responsive pleading. *McHenry v. Renne*, 84 F.3d 1172, 1176 (9th Cir. 1996).
8 “Something labeled a complaint . . . , yet without simplicity, conciseness and clarity as to
9 whom plaintiffs are suing for what wrongs, fails to perform the essential functions of a
10 complaint.” *Id.* at 1180. A complaint must contain “a short and plain statement of the claim
11 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “Each allegation must
12 be simple, concise, and direct.” Fed. R. Civ. P. 8(d)(1). A complaint having the factual
13 elements of a cause of action present but scattered throughout the complaint and not
14 organized into a “short and plain statement of the claim” may be dismissed for failure to
15 satisfy Rule 8(a). *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 640 (9th Cir. 1988).

16 **B. Rule 9(b), Federal Rules of Civil Procedure**

17 “In alleging fraud or mistake, a party must state with particularity the circumstances
18 constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Rule 9(b) requires allegations of fraud
19 to be “specific enough to give defendants notice of the particular misconduct which is alleged
20 to constitute the fraud charged so that they can defend against the charge and not just deny
21 that they have done anything wrong.” *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th
22 Cir. 2001). “While statements of the time, place and nature of the alleged fraudulent
23 activities are sufficient, mere conclusory allegations of fraud are insufficient.” *Moore v.*
24 *Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). Further,

25 Rule 9(b) does not allow a complaint to merely lump multiple defendants
26 together but requires plaintiffs to differentiate their allegations when suing
27 more than one defendant and inform each defendant separately of the
28 allegations surrounding his alleged participation in the fraud. In the context
of a fraud suit involving multiple defendants, a plaintiff must, at a minimum,
identify the role of each defendant in the alleged fraudulent scheme.

1 *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (internal quotations, alterations,
2 and citations omitted).

3 **C. Rule 12(b)(6), Federal Rules of Civil Procedure**

4 On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), all allegations of material fact
5 are assumed to be true and construed in the light most favorable to the nonmoving party.
6 *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Dismissal under Rule 12(b)(6) can
7 be based on “the lack of a cognizable legal theory” or “the absence of sufficient facts alleged
8 under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th
9 Cir. 1990). To avoid dismissal, a complaint need contain only “enough facts to state a claim
10 for relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570
11 (2007). The principle that a court accepts as true all of the allegations in a complaint does
12 not apply to legal conclusions or conclusory factual allegations. *Ashcroft v. Iqbal*, 129 S. Ct.
13 1937, 1949 (2009). “Threadbare recitals of the elements of a cause of action, supported by
14 mere conclusory statements, do not suffice.” *Id.* “A claim has facial plausibility when the
15 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
16 defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to
17 a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has
18 acted unlawfully.” *Id.* To show that the plaintiff is entitled to relief, the complaint must
19 permit the court to infer more than the mere possibility of misconduct. *Id.*

20 **III. Analysis**

21 Defendants moved to dismiss Plaintiffs’ complaint on September 1, 2011 (Doc. 6).
22 Although Plaintiffs’ response to Defendants’ motion was due on September 19, 2011, no
23 response has been filed with this Court. Failure to respond alone is grounds for the Court to
24 grant Defendants’ motion to dismiss. *See* LRCiv. 7.2(i). The Court finds Plaintiffs’ failure
25 to respond to Defendants’ motion constitutes acquiescence to the motion being granted.
26 Nevertheless, the Court agrees with Defendants’ substantive analysis; the complaint fails to
27 allege sufficient facts to state a plausible claim for breach of contract, accounting, or quiet
28 title. The Court will therefore grant Defendants’ motion to dismiss on the merits for the

1 reasons stated in Defendants' motion.


2 **IV. Leave to Amend**

3 Leave to amend should be freely given "when justice so requires." Fed. R. Civ.
4 P. 15(a)(2). Plaintiffs will be given an opportunity to amend their complaint to make clear
5 their allegations in short, plain statements that state a plausible claim for relief. Any amended
6 complaint must conform to the requirements of Rule 8(a), 8(d)(1), and 9(b) of the Federal
7 Rules of Civil Procedure. Plaintiffs are warned that if they elect to file an amended
8 complaint and fail to comply with the Federal Rules of Civil Procedure, the action may be
9 dismissed. *See* Fed. R. Civ. P. Rule 41(b); *McHenry*, 84 F.3d at 1177 (affirming dismissal
10 with prejudice of prolix, argumentative, and redundant amended complaint that did not
11 comply with Rule 8(a)); *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 673-74 (9th Cir.
12 1981) (affirming dismissal of amended complaint that was "equally as verbose, confusing,
13 and conclusory as the initial complaint"); *Corcoran v. Yorty*, 347 F.2d 222, 223 (9th Cir.
14 1965) (affirming dismissal without leave to amend of second complaint that was "so verbose,
15 confused and redundant that its true substance, if any, [was] well disguised").

16 IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss (Doc. 6) is
17 granted.

18 IT IS FURTHER ORDERED that Plaintiffs may file an amended complaint by
19 October 28, 2011. The Clerk is directed to terminate this case without further order if
20 Plaintiffs do not file an amended complaint by October 28, 2011.

21 DATED this 6th day of October, 2011.

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24 Neil V. Wake
25 United States District Judge
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