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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Mischelle K. Henry; Eljay Scott,

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No. CV 12-01055-PHX-JAT

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Plaintiffs,

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ORDER

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vs.

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Arizona Trust Deed Corporation,
Mortgage Electronic Registration Services,
Wells Fargo Bank N.A. ; All Persons
Unknown, Claiming Any Legal Or
Equitable Right, Title, Estate, Lien, Or
Interest In The Property Described In The
Complaint Adverse To Plaintiffs' Title, Or
Any Cloud On Plaintiffs' Title Thereo;
and Does 1-20, Inclusive,

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Defendants.

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Pending before the Court are (1) Defendants Wells Fargo Bank, N.A.'s and Mortgage
Electronic Registration Systems, Inc.'s Motion to Dismiss Plaintiffs' Complaint (Doc. 8) and
22 (2) Motion for Summary Disposition (Doc 9.). Plaintiffs have not filed a response to either
23 Motion. The Court now rules on the Motions.

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I. Factual and Procedural Background

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Plaintiff Mischelle K. Henry signed a Deed of Trust on March 28, 2005 (Doc. 8,
26 Exhibit A). The Deed of Trust secured a loan in the amount of \$132,300.00 for real property
27 located at 5044 West Chicago Circle South, Chandler, Arizona 85226 (the "Property"). (Doc.
28 8, Exhibit A). The Deed of Trust identifies Plaintiff Henry as the "Borrower" (Doc. 8,

1 Exhibit A at ¶A) and identifies Deines McCutcheon Mortgage, Inc as the “Lender.” (*Id.* at
2 ¶C). The Deed of Trust also names Defendant Arizona Trust Deed Corporation as “Trustee”
3 (*Id.* at ¶ D) and Defendant Mortgage Electronic Registration Systems, Inc. (“MERS”) as “a
4 nominee for Lender and Lender’s successors and assigns” and as “the beneficiary under this
5 Security Instrument.” (*Id.* at ¶ E).

6 Within the Deed of Trust, there is a paragraph stating that the note or partial interest
7 in the note “can be sold one or more times without prior notice to the Borrower.” (Doc. 8,
8 Exhibit A at ¶ 20). The Deed of Trust, within the same provision, further states that “the
9 mortgage loan servicing obligations of the Borrower will remain with the Loan Servicer or
10 be transferred to a successor Loan Servicer . . .” (*Id.*). On August 10, 2011, MERS assigned
11 “all its right, title, and beneficial interest” under the Deed of Trust to Defendant Wells Fargo
12 Bank, N.A. (Doc 8., Exhibit B). Plaintiffs filed a complaint against Defendants alleging a
13 claim for quiet title to the Property. Defendants now move to dismiss the complaint for
14 failure to state a claim upon which relief can be granted..

15 II. Legal Standard

16 To survive a motion to dismiss, a complaint must state a plausible claim for relief.
17 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
18 556 (2007)). The complaint must contain allegations that nudge the claims contained therein
19 “across the line from conceivable to plausible.” *Id.* at 680 (quoting *Twombly*, 550 U.S at
20 556).

21 A complaint must meet the pleading standard of Rule 8 which demands “more than
22 an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* at 678 (citing *Twombly*,
23 550 U.S. at 555). Further, “where the well-pleaded facts do not permit the court to infer more
24 than the possibility of misconduct, the complaint has alleged-but it has not shown that the
25 pleader is entitled to relief.” *Id.* at 679 (internal quotations and citation omitted). “Where a
26 complaint pleads facts that are merely consistent with a defendant’s liability, it stops short
27 of the line between possibility and plausibility of ‘entitlement to relief.’ ” *Id.* (quoting
28 *Twombly*, 550 U.S. at 557) (internal quotations omitted).

1 **III. Analysis**

2 In their Complaint, Plaintiffs solely seek quiet title to the Property. Plaintiffs allege
3 that they are entitled to quiet title because a split of the note and the Deed of Trust occurred
4 and rendered the Deed of Trust a “nullity.” (Doc. 1-1). The Plaintiffs argue that this “nullity”
5 should result in the striking of the Deed of Trust from the chain of title and the Court should
6 grant quiet title to the Plaintiffs, enjoining and barring the Defendants from asserting any
7 claim against the property.

8 Defendants argue that Plaintiffs’ complaint should be dismissed because (1) Plaintiffs
9 have failed to state a claim upon which relief can be granted, specifically that Plaintiff Henry
10 has not alleged in the complaint that she paid off her loan or tendered the balance due on her
11 loan, (2) Plaintiffs provide no legal basis for relief other than arguments that the Court has
12 repeatedly rejected, and (3) Plaintiff Scott has no standing to bring the claim.

13 Plaintiffs have not successfully alleged that they are entitled to “Quiet Title” to the
14 Property. This Court has previously stated that “Quiet [T]itle is not a remedy available to a
15 trustor under an Arizona Trust Deed until the debt is paid or tendered.” *Eason v. IndyMac*
16 *Bank, FSB*, CV 09-1423-PHX-JAT, 2010 WL 4573270, at *3 (D. Ariz. Nov. 5, 2010), *aff’d*
17 *sub nom.*, *Eason v. Indymac Fed. Bank FSB*, 10-17710, 2012 WL 4358626, at *1 (9th Cir.
18 Sept. 25, 2012). In this case, Plaintiffs have not alleged that they paid the loan amount, and
19 have not alleged or made any argument that they can currently pay the balance on the loan.

20 Plaintiffs further allege that MERS has no interest in the note, Deed of Trust, or the
21 Property. (Doc. 1-1). This allegation however, is not grounded in any alleged fact and is
22 disproved by the Deed of Trust itself. The Deed of Trust states, and Plaintiffs admit, that
23 MERS is the beneficiary of the Deed of Trust. (Doc. 1-1, ¶3; Doc. 8, Exhibit A, ¶E). A
24 “beneficiary” is the “person named or otherwise designated in a trust deed as the person for
25 whose benefit a trust deed is given, or the person’s successor in interest.” Ariz. Rev. Stat.
26 Ann. § 33-801. Furthermore, the Ninth Circuit Court of Appeals and this Court have held that
27 under a Deed of Trust, such as the one in question, MERS can be a legitimate beneficiary.
28 *See, e.g., Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1042 (9th Cir. 2011).

1 Additionally, Plaintiffs allege that the Deed of Trust was split from the note. However,
2 the Ninth Circuit Court of Appeals recognized in *Cervantes* that “notes and deeds are not
3 irreparably split: the split only renders the mortgage unenforceable if MERS or the trustee,
4 as nominal holders, are not agents of the lenders.” *Cervantes*, 656 F.3d at 1044. This court
5 has continuously rejected the argument that “as Lenders nominee, MERS cannot act as
6 lender’s agent.” *See, e.g., In re Mortgage Elec. Registration Sys. (MERS) Litig.*, MDL
7 09-2119-PHX-JAT, 2012 WL 1912133, at *3 (D. Ariz. May 25, 2012) (quoting *Bean v.*
8 *BAC Home Loans Servicing, L.P.*, No CV 11-553-PHX-GMS, 2012 WL 171435, at *1 -2 (D.
9 Ariz. Jan. 20, 2012)) (citation omitted).

10 Plaintiffs have not paid the balance of the loan securing the Deed of Trust, nor alleged
11 their willingness to do so, and their claims depend on legal theories that this Court has
12 repeatedly rejected. Therefore, Plaintiffs have failed to allege a claim for quiet title upon
13 which relief can be granted. Because the claim will be dismissed on the merits, the Court
14 need not address whether Plaintiff Scott has standing to bring a quiet title claim in this case.

15 **IV. Leave to Amend**

16 Under previous Ninth Circuit Court of Appeals precedent, the court would *sua sponte*
17 grant leave to amend when granting a motion to dismiss, unless a pleading could not be cured
18 by the allegation of other facts. *See Lacey v. Maricopa County*, 693 F.3d 896, 927 (9th Cir.
19 2012) (citing *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)). However, this precedent
20 has been called into question by the Court of Appeals, in light of the recent changes to the
21 Federal Rule of Civil Procedure 15, which now allows parties twenty-one days from
22 responsive pleadings and motions to dismiss to amend as of right. *See id.* Further, when a
23 plaintiff requests leave to amend, the Court must consider the following factors: (1) undue
24 delay, (2) bad faith, (3) prejudice to the opposing party, (4) futility of amendment, and (5)
25 whether plaintiff has previously amended his complaint. *Western Shoshone Nat. Council v.*
26 *Molini*, 951 F.2d 200, 204 (9th Cir. 1991). In this case, granting leave to amend the
27 complaint would be futile. Not only have the Plaintiffs asserted arguments the Court has
28 rejected repeatedly, making it apparent Plaintiffs could not state a plausible claim upon

1 which relief could be granted, but Plaintiffs have also failed to respond to Defendants'
2 Motion to Dismiss or Defendants' Motion for Summary Disposition.

3 **V. Conclusion**

4 Based on the foregoing,

5 **IT IS ORDERED** that Defendants' Motion to Dismiss Plaintiffs' Complaint (Doc.
6 8) is granted.

7 **IT IS FURTHER ORDERED** that Defendants' Motion for Summary Disposition
8 (Doc. 9) is denied as moot.

9 DATED this 2nd day of November, 2012.

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13 James A. Teilborg
14 United States District Judge
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