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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Deutsche Bank National Trust Company,

No. CV-14-01720-PHX-NVW

10 Plaintiff,

ORDER

11 v.

12 Kenneth McLeod, et al.,

13 Defendants.
14

15 Deutsche Bank National Trust Company sues to foreclose a note and deed of trust
16 on Kenneth and Carol McLeod's house. Before the Court is Defendants' Motion to
17 Dismiss for Lack of Jurisdiction and Failure to State a Claim Fed. R. Civ. P. 12(b)(1) and
18 12(b)(6) (Doc. 11). A prior state court judgment bars the relief Deutsche Bank seeks, so
19 the Bank cannot state a claim upon which relief can be granted. Deutsche Bank refused,
20 in five years of further proceedings following entry of that judgment, to ask the state
21 court to fix the supposed error, and it refuses even now to make that request in post-
22 judgment proceedings. This Court lacks jurisdiction to change the state court judgment
23 by fixing the error Deutsche Bank contends underlies it. Whichever way one comes at it,
24 the McLeods' Motion to Dismiss must be granted. This dismissal will leave Deutsche
25 Bank free to seek correction in the state court, if it can justify its five-year delay, or to
26 reacquire the note and deed of trust from the current holder. It can then seek amendment
27 of the state court judgment based on changed circumstances to allow foreclosure based
28 on the new endorsement.

1 **I. BACKGROUND**

2 In October 2006, the McLeods delivered to New Century Mortgage Corporation a
3 \$771,000 note secured by a deed of trust on their home in Chandler, Arizona (the
4 “Property”). Plaintiff Deutsche Bank represented at oral argument that it obtained
5 ownership of the note and deed of trust in February 2007. When the McLeods defaulted
6 on their loan payments in June 2007, the loan servicer at the time “gave notice of default
7 and made demand upon the McLeods for payment of the amounts due and owing on the
8 loan.” Doc. 1 at 5. In response, the McLeods filed an action in Maricopa County
9 Superior Court on August 4, 2008.

10 A partial copy of the state court complaint provided to this Court at oral argument
11 reveals that the McLeods sued a number of entities—including “Deutsche Bank National
12 Trust Company, a California Corporation” and “Securitized Asset Backed Receivables
13 LLC Trust 2007-NC2, a New York LLC”—on a variety of theories, from violations of
14 the federal Truth in Lending Act and Home Ownership and Equity Protection Act to
15 breach of contract and violations of the Arizona Consumer Fraud Act.

16 Deutsche Bank conceded at oral argument that Deutsche Bank National Trust
17 Company was served with process in the McLeods’ suit. Deutsche Bank does not appear
18 to contest the McLeods’ claims that “Securitized Asset Backed Receivables LLC ...
19 w[as] served August 6, 2008,” Doc. 11 at 4, or that “Deutsche Bank, Trustee and its
20 principal SABR Trust answered the suit on August 29, 2008,” Doc. 11-3 at 2. Two
21 weeks after the suit was filed, Mortgage Electronic Registration Systems, Inc., which was
22 listed as the nominee beneficiary under the deed of trust, recorded an assignment of its
23 beneficial interest to Deutsche Bank National Trust Company as Trustee under Pooling
24 and Servicing Agreement dated as of February 1, 2007 Securitized Asset Backed
25 Receivables LLC Trust 2007-NC2 Mortgage Pass-Through Certificates, Series 2007-
26 NC2.

27 The state court entered a default judgment (“Default Judgment”) on November 24,
28 2008, against Securitized Asset Backed Receivables LLC Trust 2007-NC2 (“SABR”),

1 which had been “properly served by personal service.” Doc. 1-8 at 1. That judgment
2 quieted title to the Property in favor of the McLeods as against SABR and provided that
3 “SABR is permanently enjoined and prohibited from recording any documents affecting
4 or purporting to affect title of the subject property; and, any acts or recordings now or in
5 the future by Defendant SABR relating to the subject property shall be of no force or
6 effect.” *Id.* at 2. Both parties agreed at oral argument that the basis for the state court’s
7 entry of the Default Judgment was the McLeods’ assertion that SABR did not hold the
8 note and therefore could not foreclose on the Property. The McLeods told this Court they
9 had not argued to the state court that there was any flaw in the lien or the security
10 instrument, or that the debt was extinguished or void. Rather, the Default Judgment
11 adjudicated only that SABR had no lien because it was not the holder of the note.

12 Because there were ten other Defendants, the state court litigation continued for an
13 additional five-and-a-half years after entry of the Default Judgment. During that time,
14 Deutsche Bank did not “(1) move to set aside the State Court Judgment; (2) file a Motion
15 for Judgment on the Pleadings; (3) file a Motion for Reconsideration; (4) file a Motion
16 for Summary Judgment; (5) file a special action; or (6) directly appeal.” Doc. 11 at 7-8.
17 In November 2013, the state court “on its own motion [amended] the caption of this
18 matter to reflect that the named Defendant Deutsche Bank National Trust Company’s true
19 name is Deutsche Bank National Trust Company as Trustee Under Pooling and Servicing
20 Agreement Dated as of February 1, 2007 Securitized Asset Backed Receivables LLC
21 Trust 2007-NC2 Mortgage Pass-Through Certificates, Series 2007-NC2.” Doc. 11-4 at 1.
22 By that time, all other defendants named in the complaint had been voluntarily dismissed.
23 Finally, in March 2014, the state court determined that, because the McLeods had
24 received the only remedy they sought in their complaint—i.e., the Default Judgment
25 against SABR—the action had been completed at the time that the other state court
26 defendants ceased to be parties to the action. The state court then dismissed the
27 remainder of the action.

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1 Deutsche Bank filed the instant action in July of this year, seeking (1) “a judgment
2 of foreclosure in its favor” on the Property, (2) a declaratory judgment that the Default
3 Judgment is invalid, does not affect Deutsche Bank’s lien interest in the Property, did not
4 extinguish the deed of trust, and “did not result in ... free and clear title to the McLeods
5 without payment of the debt,” and (3) an order that the McLeods pay the outstanding
6 balance of their mortgage to Deutsche Bank, along with interest, fees and costs. Doc. 1 at
7 9-11. By this Complaint, Deutsche Bank, as agent for SABR, does exactly what the state
8 court judgment enjoins SABR, its principal, from doing. The McLeods’ Motion to
9 Dismiss argues that (1) pursuant to Federal Rule of Civil Procedure 12(b)(1), this Court
10 lacks jurisdiction over the case under the *Rooker-Feldman* doctrine, (2) Deutsche Bank’s
11 claim is barred by res judicata, and thus does not state a claim upon which relief can be
12 granted, as provided by Rule 12(b)(6), and (3) Deutsche Bank’s suit is untimely.

13 14 **II. LEGAL ANALYSIS**

15 **A. Res Judicata**

16 “The Full Faith and Credit Act, 28 U. S. C. § 1738, requires federal courts as well
17 as state courts to give state judicial proceedings ‘the same full faith and credit . . . as they
18 have by law or usage in the courts of such State . . . from which they are taken.’”
19 *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 519 (1986) (ellipses in original).
20 Under Arizona law of “the doctrine of *res judicata*, a judgment on the merits in a prior
21 suit involving the same parties or their privies bars a second suit based on the same cause
22 of action.” *Gilbert v. Bd. of Med. Exam’rs*, 155 Ariz. 169, 174, 745 P.2d 617, 622 (Ct.
23 App. 1987). “A default judgment has the same *res judicata* effect as a judgment on the
24 merits where the issues were litigated.” *Norriega v. Machado*, 179 Ariz. 348, 353, 878
25 P.2d 1386, 1391 (Ct. App. 1994).

26 Here, Deutsche Bank asserts it is not bound by the Default Judgment because that
27 judgment “was not entered as to [Deutsche Bank].” Doc. 16 at 11. In other words,
28 Deutsche Bank’s position is that “because [the Default Judgment] was taken against a

1 trust instead of the trustee representing the trust,” *id.* at 12, Deutsche Bank, in its role as
2 trustee, is not bound by the Default Judgment.

3 Under general principles of trust law, a trust is “a fiduciary relationship with
4 respect to property ... subjecting the person who holds title to the property to duties to
5 deal with it for the benefit of charity or for one or more persons.” Restatement (Third) of
6 Trusts § 2 (2003). That is, a trust is not itself capable of taking legal action, such as
7 recording documents that affect title to real property, because it is no more than a
8 relationship among different actors. To the extent that courts sometimes refer to trusts as
9 legal entities, this terminology connotes only “the trust estate and the associated fiduciary
10 relation between the trustee and the beneficiaries.” *See id.* cmt. a. In this sense, a trustee
11 may be said to owe duties “to ‘the trust,’” but the trust is not capable, independent of the
12 trustee, of managing the property that is held in trust. *See id.* Rather, it is only the
13 trustee—“[t]he person who holds property in trust,” *id.* § 3(3)—who can buy, sell, lease
14 or otherwise dispose of property for the beneficiary’s sake.

15 But those general principles of trust law, under which a judgment concerning trust
16 property must be against the trustee, are not the only principles that may govern here.
17 The Deutsche Bank/SABR trust concerned SABR’s beneficial ownership of notes
18 secured by Arizona deeds of trust on many properties. There are no common law deeds
19 of trust under Arizona law. Deeds of trust are authorized and regulated only by statute.
20 A.R.S. §§ 33-801 through 33-821; *see generally M & I Bank, FSB v. Coughlin*, 805 F.
21 Supp. 2d 858, 861-63 (D. Ariz. 2011). Under those statutes, the beneficiary of the deed
22 of trust may be sued and the trustee may not. “Any order of the court entered against the
23 beneficiary is binding upon the trustee with respect to any actions that the trustee is
24 authorized to take by the trust deed or by this chapter.” A.R.S. § 33-807(E). Deutsche
25 Bank was apparently set up as a trustee to hold the notes secured by the deeds of trust,
26 but the statutory right and obligation to sue the beneficiary, not the trustee, may apply
27 here. This trust holding deeds of trust may not so easily evade the Arizona rule directing
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1 that actions be brought directly against the beneficiary of the deed of trust, rather than
2 against the trustee who holds the formal title.

3 Stripped of Deutsche Bank’s distracting labels, its argument is really that the state
4 court erred in quieting title and enjoining actions as against the trust beneficiary rather
5 than the trustee. That contention may or may not be correct, as noted in the preceding
6 paragraph. But error does not dispense with res judicata—not in general and not here.
7 “The lack of legal capacity of a person or organization named a party to an action does
8 not prevent application of the rules of res judicata to the judgment therein unless the
9 incapacity of the named party had a substantial adverse effect on the adequacy of the
10 protection afforded his interests or the interests of others whom he represents.”
11 Restatement (Second) of Judgments § 35 (1982). Because both Deutsche Bank and
12 SABR were served and appeared in the state court litigation prior to entry of the Default
13 Judgment, there can be no prejudice to SABR—or to Deutsche Bank. Indeed, as the state
14 court litigation stretched on for more than five years, Deutsche Bank neglected to seek
15 relief from the Default Judgment, which on its face bars this later action.

16 Deutsche Bank now seeks, in effect, what it declined for five years to seek in the
17 state court—an adjudication that the Default Judgment does not give what it plainly
18 purports to give, and that it was error to grant the injunction it does give. Principles of
19 res judicata bar Deutsche Bank from moving this case across the street to a new court and
20 a new judge to make the motion it and SABR refused to make in the state court.
21 Accordingly, Deutsche Bank’s Complaint is barred by res judicata and will be dismissed
22 for failure to state a claim upon which relief can be granted.

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24 **B. Relief from the Default Judgment for Changed Circumstances**

25 Deutsche Bank’s refusal for five years to fix in the state court what it says has
26 been wrong all along does not mean the McLeods get their house free and clear of what
27 they borrowed. As noted above, the parties agree that the Default Judgment means only
28 that SABR or its agent Deutsche Bank was not the beneficial owner of the note at the

1 time of the judgment. That necessarily means that the note was not effectively endorsed
2 to one of them, which in turn means the note is still with the last holder. That holder can
3 foreclose or endorse the note afresh to anyone it wants. A foreclosure based on a new
4 and valid endorsement should be good.

5 Assuming the last holder again endorses the note to Deutsche Bank, the Default
6 Judgment would need to be modified based on changed circumstances so that it did not
7 prohibit foreclosure based on that new and valid endorsement. But a permanent
8 injunction must be obeyed until modified by the issuing court. *See GTE Sylvania v.*
9 *Consumers Union of the United States*, 445 U.S. 375, 386 (1980) (citing “the established
10 doctrine that persons subject to an injunctive order issued by a court with jurisdiction are
11 expected to obey that decree until it is modified or reversed, even if they have proper
12 grounds to object to the order” (citations omitted)). The addressee of an injunction may
13 not violate the injunction and then defend on the basis that the injunction should be
14 modified. That modification must be sought in advance in the issuing court, not some
15 other court of the injunction addressee’s choice. *See Sys. Fed’n No. 91 Ry. Emps.’ Dep’t*
16 *v. Wright*, 364 U.S. 642, 647 (1961) (“The source of the power to modify is of course the
17 fact that an injunction often requires continuing supervision *by the issuing court* and
18 always a continuing willingness to apply its powers and processes on behalf of the party
19 who obtained that equitable relief. ... [T]he court cannot be required to disregard
20 significant changes in law or facts if it is ‘satisfied that what *it has been doing* has been
21 turned through changing circumstances into an instrument of wrong.’” (emphasis added)
22 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932))).

23 24 **C. *Rooker-Feldman***

25 If res judicata principles alone do not bar Deutsche Bank from seeking this Court’s
26 permission to violate the plain language of the state court’s Default Judgment, then the
27 *Rooker-Feldman* doctrine does, even as narrowly understood. The *Rooker-Feldman*
28 doctrine holds that federal district courts lack jurisdiction over “cases brought by state-

1 court losers complaining of injuries caused by state-court judgments rendered before the
2 district court proceedings commenced and inviting district court review and rejection of
3 those judgments.” *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284
4 (2005). Only the Supreme Court has jurisdiction over such cases. *Id.* at 283.

5 Deutsche Bank’s Complaint does ask for adjudication that the state court’s Default
6 Judgment is “invalid.” Doc. 1 at 10. But in its Response Deutsche Bank retrenches and
7 says, “The instant action does not challenge the validity of the state court default
8 judgment, but simply requests a determination as to its scope and effect.” Doc. 16 at 2.
9 Deutsche Bank now disclaims any request to overturn the Default Judgment, and the
10 Court holds Deutsche Bank to that renunciation. The renunciation necessarily precludes
11 any request to modify the Default Judgment so as to take this foreclosure action outside
12 its plain prohibition. If Deutsche Bank could now renounce its renunciation, its desired
13 relief would be barred by the *Rooker-Feldman* doctrine.

14 Notwithstanding *res judicata* and *Rooker-Feldman*, Deutsche Bank has remedies.
15 It can ask the state court to fix the purported error if it can work around its five-year delay
16 in asking. If Deutsche Bank obtains a new and valid endorsement of the note, it may be
17 able to modify the Default Judgment to allow foreclosure on the Property. Ariz. R. Civ.
18 P. 60(c)(6) (identical to Fed. R. Civ. P. 60(b)(6)).

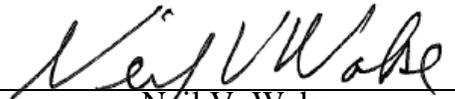
19 Deutsche Bank has failed to state a claim upon which relief can be granted.
20 Because of the *res judicata* effects of the Default Judgment, there is nothing Deutsche
21 Bank could allege in an amended pleading that would cure the defects in its Complaint.
22 The *Rooker-Feldman* doctrine bars this Court from fixing any errors in the Default
23 Judgment. The Complaint and the action will therefore be dismissed without leave to
24 amend.

25 Resolving Defendants’ Motion does not require applying Arizona’s statutes of
26 limitations to this case. Accordingly, the Court will not address that issue.

1 IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss for Lack of
2 Jurisdiction and Failure to State a Claim Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (Doc. 11)
3 is granted.

4 IT IS FURTHER ORDERED that the Clerk enter judgment dismissing this action
5 with prejudice, but without prejudice to seeking relief from the Default Judgment from
6 the state court. The Clerk shall terminate this case.

7 Dated this 1st day of December, 2014.

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11 Neil V. Wake
12 United States District Judge
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