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

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9 Raymond L. Doyle and Kathleen Doyle,
husband and wife

No. CV-12-8080-PCT DGC

10 Plaintiffs,

ORDER

11 v.

12 Federal National Mortgage Association

13 Defendant.
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16 Defendant Federal National Mortgage Association (“Fannie Mae”) filed a motion
17 to dismiss Plaintiffs’ complaint challenging the trustee sale of Plaintiffs’ vacation home.
18 Doc. 7; *see* Doc. 1-1. The motion has been fully briefed and no party has requested oral
19 argument. Docs. 12, 16. Plaintiffs also filed a motion for a temporary restraining order
20 (“TRO”) and preliminary injunction which has been fully briefed. Doc. 8; Docs. 15, 17.
21 For the reasons set forth below, the Court will grant Defendant’s motion to dismiss and
22 deny Plaintiffs’ motion for a TRO and preliminary injunction.

23 **I. Background.**

24 On February 16, 2007, Plaintiffs obtained a loan from American Brokers Conduit
25 (“ABC”) in the amount of \$204,000 for the purchase or refinance of a vacation home at
26 1807 East Winterhaven Drive in Mohave Valley, Arizona. Doc. 1-1, ¶¶ 3, 6, 11; Doc 7-1
27 at 3 (Promissory Note). Plaintiffs executed a Deed of Trust giving the lender a security
28 interest in the property with a right of sale. Doc. 1-1, ¶ 6; *see* Doc. 7-1 at 8-29 (Deed of

1 Trust).¹ ABC subsequently assigned the loan to Bank of America (“BAC”), and BAC
2 appointed Reconstruct Company (“Reconstruct”) as trustee. Doc. 1-1, ¶ 7, Doc. 7 at 2.

3 Plaintiffs defaulted on their loan after Mr. Doyle became ill and lost his job.
4 Doc. 1-1, ¶¶ 41-42. In July of 2010, Reconstruct recorded a notice of trustee sale on the
5 property with the Mohave County Recorder’s Office. Doc. 7 at 3. The date for the
6 trustee sale was set for October 15, 2010, but was later postponed. *Id.*

7 Beginning in September of 2010 and lasting through December of 2010, Plaintiffs
8 attempted to enter into a loan modification agreement with BAC. *Id.*, ¶¶ 43-51. During
9 this time, Plaintiffs submitted payments of \$5000 and \$755.44. *Id.*, ¶¶ 45-47. Plaintiffs
10 were advised in December of 2010 that the latter payment was negotiated, but the \$5000
11 payment was not. *Id.*, ¶ 50. Plaintiffs do not claim to have made any other payments.

12 Reconstruct held a trustee sale of the property on January 18, 2011. Defendant
13 Fannie Mae purchased the property at the sale. Doc. 1-1, ¶¶ 8, 52, Doc. 7 at 3. Fannie
14 Mae subsequently instituted a forcible entry and detainer (“FED”) action in Mohave
15 County Superior Court, seeking to possess the property and to exclude Plaintiffs. Doc. 1-
16 1, ¶ 9; Doc. 7 at 3. The court granted judgment on the pleadings in favor of Fannie Mae,
17 but Plaintiffs have not yet been evicted. Doc. 7 at 3-4, 4 n. 4.

18 On March 1, 2012, Plaintiffs filed this action in Mohave County Superior Court,
19 alleging that they did not receive notice of default and notice of the trustee sale prior to
20 the sale as required by law, that the foreclosure is therefore invalid, and that they are the
21 true owners of the property. Doc. 1-1, ¶¶ 11, 14, 15. The complaint makes eight claims:
22 wrongful foreclosure (Count I), declaratory judgment (Count II), fraud or waiver and
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24 ¹ Generally, on a motion to dismiss, a court may only consider material that is
25 properly presented to the court as part of the complaint. *See Lee v. City of L.A.*, 250 F.3d
26 668, 688-89 (9th Cir. 2001). Courts may, however, consider “documents ‘whose
27 contents are alleged in a complaint and whose authenticity no party questions, but which
28 are not physically attached to the [plaintiff’s] pleading.’” *In Re SiliconGraphics Secs.
Litig.*, 183 F.3d 970, 986 (9th Cir. 1999) (quoting *Branch v. Tunnell*, 14 F.3d449, 454
(9th Cir. 1994)); *see also Knievel v. ESPN*, 393 F.3d 1068, 1076-77 (9th Cir. 2005). The
Court therefore may consider the Note and the Deed of Trust which are referenced in the
Complaint.

1 estoppel (Count III), breach of contract (Count IV), statutory damages (Count V),
2 trespass (Count VI), injunctive relief (Count VII), and quiet title (Count VIII).

3 Fannie Mae removed the action to federal court on diversity grounds (Doc. 1) and
4 subsequently filed its motion to dismiss. Fannie Mae argues that Plaintiffs waived their
5 right to challenge the trustee sale by failing to seek judicial relief before the sale took
6 place, and that Plaintiffs nonetheless fail to state a claim under any of the theories alleged
7 in the complaint.

8 **II. Legal Standard.**

9 When analyzing a complaint for failure to state a claim under Rule 12(b)(6), “[a]ll
10 allegations of material fact are taken as true and construed in the light most favorable to
11 the non-moving party.” *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). To avoid
12 a Rule 12(b)(6) dismissal, the complaint “must plead ‘enough facts to state a claim to
13 relief that is plausible on its face.’” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017,
14 1022 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
15 Dismissal is appropriate where the complaint lacks a cognizable legal theory, lacks
16 sufficient facts alleged under a cognizable legal theory, or contains allegations disclosing
17 some absolute defense or bar to recovery. *See Weisbuch v. County of L.A.*, 119 F.3d 778,
18 783, n.1 (9th Cir. 1997).

19 **III. Discussion.**

20 **A. Waiver of Claims under A.R.S. § 33-811(C).**

21 Fannie Mae seeks dismissal of all claims premised on the invalidity of the trustee
22 sale because defenses to a foreclosure sale not raised in an action for injunctive relief
23 brought before the sale are waived. Doc. 7 at 5. Fannie Mae relies on the following
24 Arizona statute:

25 The trustor, its successors or assigns, and all persons to whom
26 the trustee mails a notice of a sale under a trust deed pursuant
27 to § 33-809 shall waive all defenses and objections to the sale
28 not raised in an action that results in the issuance of a court
order granting relief pursuant to rule 65, Arizona rules of civil
procedure, entered before 5:00 p. m. mountain standard time
on the last business day before the scheduled date of the sale.

1 A.R.S. § 33-811(C).

2 Plaintiffs respond that they have not waived their claims because § 33-811(C)
3 applies only to those who are provided notice of sale, and Plaintiffs allege that they were
4 not provided notice of default or notice of sale. Doc. 12 at 6, 11; *see* Doc. 1-1, ¶¶ 11, 14,
5 19-22, 37, 53, 71.

6 The Arizona Court of Appeals recently addressed this issue and concluded, under
7 the plain language of § 33-811(C), that waiver applies to the trustor regardless of whether
8 the trustee has complied with the notice-mailing requirements of § 33-809(C). *Madison*
9 *v. Groseth*, 279 P.3d 633, 637 (Ariz. Ct. App. 2012). This is because the persons who
10 must receive notice for purposes of waiver are listed separately in § 33-811(C) from the
11 trustor. *Id.* The Court of Appeals explained that “[a]lthough § 33-809(C) mandates
12 service on trustors, we decline to interpret the reference to § 33-809 in § 33-811(C) as
13 requiring service on trustors as a prerequisite to application of the waiver provision; this
14 interpretation would render the separate reference to the ‘trustor’ in § 33-811(C)
15 superfluous.” *Id.*

16 *Madison* is dispositive of the waiver issue in this case. Plaintiffs do not claim that
17 they filed for an injunction before the trustee sale. Any defenses or objections they have
18 to the validity of the sale are therefore waived under § 33-811(C). As the court found in
19 *Madison*, the fact that Plaintiffs allege not to have been provided notice does not change
20 this outcome. The Court finds that Counts One, Two, Five, Six, Seven, and Eight all rest
21 on Plaintiff’s objections to the validity of the trustee sale and are waived.²

22 **B. Plaintiffs’ Remaining Claims.**

23 Claim Three asserts fraud and rests on Plaintiffs’ allegation that during their

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25 ² To the extent Plaintiffs attempt to make a separate due process claim under the
26 United States and Arizona Constitutions related to their alleged lack of notice (*see*
27 Doc. 1-1, ¶ 26), this claim fails because the sale was held and the notice given (or not
28 given) by the non-party trustee, not by Fannie Mae. Moreover, Plaintiffs have not
alleged state action as required for a due process claim. *See Kenly v. Miracle Properties*,
412 F. Supp. 1072, 1074 (D. Ariz. 1976).

1 attempted loan modification “Defendant” made material misrepresentations of fact.
2 Doc. 1-1, ¶¶ 39-67. To the extent Plaintiffs appear to rely on statements made by BAC
3 and its agents, the allegations are insufficient because BAC is not a party to this action
4 and Plaintiffs allege no facts showing that Defendant Fannie Mae was involved in any
5 events prior to the trustee sale. Plaintiffs’ alternative claims for waiver and estoppel fail
6 for the additional reason that they seek to invalidate the trustee sale and – as explained
7 above – Plaintiffs have waived any defenses or challenges to that sale.

8 Claim Four asserts breach of contract and rests on the allegation that “Defendant”
9 breached a contract “not to foreclose” and an agreement to modify Plaintiff’s loan that
10 constituted “a novation of the original agreement between Plaintiffs and Defendant.”
11 Doc. 1-1, ¶¶ 70-71; 72-76. Again, such allegations pertain only to BAC, not Fannie Mae.
12 Because BAC is not named in this action and Plaintiff has alleged no facts showing that
13 Fannie Mae was in any way involved in Plaintiff’s loan modification discussions, these
14 allegations fail to support a claim for breach of contract.

15 **C. Plaintiffs’ Motion for a TRO.**

16 Plaintiffs filed a motion for a TRO and preliminary injunction seeking to bar
17 Fannie Mae from entering, taking possession, or interfering with Plaintiffs’ use and
18 enjoyment of the property. Doc. 8 at 1. To obtain a preliminary injunction, a plaintiff
19 must show that he is likely to succeed on the merits, that he is likely to suffer irreparable
20 harm in the absence of preliminary relief, that the balance of equities tips in his favor, and
21 that an injunction is in the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S.
22 7, 129 S. Ct. 365, 374 (2008). For the reasons already discussed, the Court finds that
23 Plaintiffs’ have no chance of success on the merits their claims. The Court will deny
24 Plaintiffs’ motion.

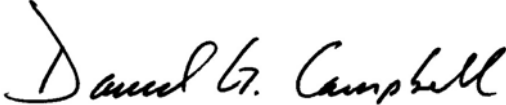
25 **IT IS ORDERED:**

- 26 1. Defendant Fannie Mae’s motion to dismiss (Doc. 7) is **granted**.
- 27 2. Plaintiffs’ motion for a TRO and preliminary injunction (Doc. 8) is **denied**.

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3. The Clerk is directed to terminate this action.

Dated this 6th day of August, 2012.



David G. Campbell
United States District Judge