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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

VERNON GREEN,)	CV F 10 – 1251 AWI GSA
)	
Plaintiff,)	MEMORANDUM OPINION
)	AND ORDER ON
v.)	DEFENDANTS’ MOTION TO
)	DISMISS
BANK OF AMERICA MORTGAGE)	
CAPITAL CORPORATION, BANK OF)	
AMERICA, RECONTRUST)	Doc. # 6
COMPANY, and Does 1 through 10,)	
)	
Defendants.)	

This is an action for injunctive relief by plaintiff Vernon Green (“Plaintiff”), representing himself *in pro per*, against defendants Recontrust Co., and BAC Home Loans Servicing (“Defendants”).¹ Plaintiff’s complaint requests the court issue injunctive orders to prevent the foreclosure sale of Plaintiff’s residence on the ground Defendants are not in possession of the original promissory note and therefore lack standing to foreclose on Plaintiff’s property. In the instant motion, Defendants move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Plaintiff’s complaint on the ground California’s comprehensive scheme of non-judicial foreclosure grants the trustee of a Deed of Trust the right to initiate the foreclosure process without having to produce the original note. Although

¹ Defendants state that BAC Home Loans Servicing is erroneously named in this suit as two entities, “Bank of America Mortgage Capital Corp., and Bank of America.” “Defendants” hereinafter refers to Recontrust Co. and BAC Home Loans Servicing.

1 Defendants do not dispute the court’s jurisdiction over this action, the court finds it necessary
2 to address the issue jurisdiction for the reasons that follow. Venue is proper in this court.

3 **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

4 Plaintiff’s complaint alleges the following with regard to the court’s jurisdiction over
5 this action:

6 Jurisdiction in this action in equity is based on the Constitution for [sic] The
7 United States of America and in particular Article 1, Section 10 and the
8 [First], [Fourth], [Ninth] and [Tenth], [Eleventh], [Fourteenth] Amendments.
9 Jurisdiction is further invoked under the 1849 Constitution for the state of
10 California and under [Federal Rule of Civil Procedure] 17, [California Code
11 of Civil Procedure] 2924, 15 U.S.C. § 1601 et seq.² [Truth in Lending Act
12 (“TILA”)] and 12 U.S.C. [§] 2601 [Real Estate Settlement Practices Act
13 (“RESPA”)] concerning the obligation of contracts. Defendant/Respondent
14 Bank of America is located in North Carolina and is organized under 31
15 U.S.C. and is subject to 12 U.S.C. [sic].

16 Doc. # 1 at ¶ 1.

17 Plaintiff purchased a residence in Mokelumne Hill in Calaveras County. Plaintiff
18 alleges he executed a promissory note and Deed of Trust securing his residence on September
19 21, 2006. Plaintiff alleges that on or about January 27, 2010, he sent Defendants a document
20 titled “Notice of Request for Clarification and Notice of Private International Remedy
21 Demand” (hereinafter the “Request”). A copy of the Request is appended to Plaintiff’s
22 complaint at Exhibit “A”. By inspection, the Request appears to be a list of questions aimed
23 mostly at eliciting responses from Defendants that bolster Plaintiff’s theories regarding the
24 legitimacy of Defendants’ authority to foreclose on Plaintiff’s home. It does not appear that
25 the Request was served on Defendants in connection with any judicial proceeding that had
26 been commenced at the time. It is clear that this action was not commenced until after the
27 Request had been served on Defendants. Based on Defendants’ non-response to Plaintiff’s
28 Request, Plaintiff represents the allegations set forth in the Request are conclusively admitted
or denied, depending on the wording of the particular question. For the most part, the

² 15 U.S.C. § 1601 states the general findings and declares the purpose of consumer credit provisions. The court assumes that Plaintiff intended to invoke the jurisdictional provisions of 15 U.S.C. § 1640.

1 allegations set forth in Plaintiff's complaint consist of factual allegations, and legal
2 conclusory statements that were set forth in the Request and to which Defendants did not
3 respond.

4 Defendant's motion to dismiss or, in the alternative for a more definite statement was
5 filed on August 19, 2010. As of this writing, Plaintiff has filed no opposition. On September
6 23, 2010, the court vacated the date set for hearing on Defendants' motion to dismiss and
7 took the matter under submission as of September 27, 2010.

8 **LEGAL STANDARD**

9 A federal court is "obliged to inquire sua sponte whenever a doubt arises as to the
10 existence of federal jurisdiction." Mt. Healthy City School Dist. Bd. Of Educ. v. Doyle, 429
11 U.S. 274, 278 (1977). "A plaintiff suing in a federal court must show in his pleading,
12 affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and,
13 if he does not do so, the court, on having the defect called to its attention or on discovering
14 the same, must dismiss the case, unless the defect be corrected by amendment." Smith v.
15 McCullough, 270 U.S. 456, 459 (1926). It is a fundamental precept that federal courts are
16 courts of limited jurisdiction. Limits upon federal jurisdiction must not be disregarded or
17 evaded. Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978). The plaintiff
18 has the burden to establish that subject matter jurisdiction is proper. Kokkonen v. Guardian
19 Life Ins. Co., 511 U.S. 375, 377 (1994). This burden, at the pleading stage, must be met by
20 pleading sufficient allegations to show a proper basis for the court to assert subject matter
21 jurisdiction over the action. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189
22 (1936); Fed. R. Civ. P. 8(a)(1).

23 For purposes of federal question jurisdiction, a case arises under federal law if a right
24 or immunity created by the Constitution or laws of the United States is "an element, and an
25 essential one, of the plaintiff's cause of action." Gully v. First Nat'l Bank, 299 U.S. 109, 112
26 (1936). Jurisdiction exists if a plaintiff makes a "substantial claim under an act of Congress."
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1 Carlson v. Principal Financial Group, 320 F.3d 301 (2d Cir.2003) (citing Fair v. Kohler Die
2 & Specialty Co., 228 U.S. 22, 25 (1913)). “The jurisdictional inquiry is rather
3 straightforward and depends entirely upon the allegations in the complaint.” Carlson, 320
4 F.3d at 306. “[W]here the complaint ... is so drawn as to seek recovery directly under the
5 Constitution or laws of the United States, the federal court, but for two possible exceptions
6 later noted, must entertain the suit.” Bell v. Hood, 327 U.S. 678, 681-82 (1946). The two
7 exceptions occur “where the alleged claim under the Constitution or federal statutes clearly
8 appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where
9 such a claim is wholly insubstantial and frivolous.” Id. at 682-83. “Thus, in order to sustain
10 federal jurisdiction, the complaint must allege a claim that arises under the Constitution or
11 laws of the United States and that is neither made solely for the purpose of obtaining
12 jurisdiction nor wholly insubstantial and frivolous.” Carlson, 320 F.3d at 306.

13 **DISCUSSION**

14 Although Defendants have moved to dismiss Plaintiff’s complaint for failure to state
15 a claim upon which relief can be granted pursuant to F.R.C.P. 12(b)(6), even a cursory
16 reading of Plaintiff’s complaint raises the court’s concern as to its jurisdiction over this
17 action. The document the court has construed as Plaintiff’s complaint is titled “Petition to
18 Show Cause to Determine the True Creditor with Standing to Foreclose and Take
19 Possession.” Plaintiff’s pleading is essentially a rather lengthy argument for the proposition
20 that an entity seeking to foreclose on a deed of trust must be holder in due course of the
21 originals of both the promissory note and the deed of trust (mortgage) in order to effect
22 foreclosure on the property secured by the deed of trust. At the end of the pleading, Plaintiff
23 requests that “an injunction order be issued to estop [Defendants] from exercising power of
24 sale rights that they have admitted they do not have” (presumably pursuant to Defendant’s
25 non-reply to Plaintiff’s Request). Doc. # 1 at 10:5-6.

26 Neither Plaintiff’s prayer for relief nor any of the argument contained in the body of
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1 Plaintiff's pleading invokes the United States Constitution or any discernable act of Congress
2 either directly or by implication. Plaintiff invokes Article I, section 10 of the Constitution
3 and several of the Amendments but his pleading gives no hint of how any right or immunity
4 arising thereunder could have been infringed by Defendants' actions. Article I, section 10 of
5 the Constitution, as well as the First, Fourth, and Fourteenth Amendments limit *state* action.
6 No state action is involved in anything Plaintiff has alleged. See Geist v. California
7 Reconveyance Co., 2010 WL 1999854 (N.D. Cal. 2010) at *1 ("it is well settled law that
8 non-judicial foreclosure proceedings do not involve state action"). Similarly, the Ninth,
9 Tenth and Eleventh Amendments reserve rights to the states or to the people. Plaintiff's
10 pleadings give no indication how any rights arising under these Amendments might possibly
11 be implicated.

12 In addition, it is impossible to see how anything Plaintiff has alleged has anything to
13 do with either of the two federal statutes Plaintiff invoked in his statement of jurisdiction, 15
14 U.S.C. § 1601 et seq., TILA, or 12 U.S.C. § 2601, RESPA. "TILA is only a 'disclosure
15 statute' and 'does not substantively regulate consumer credit but rather requires disclosure of
16 certain terms and conditions of credit before consummation of a consumer credit transaction.'
17 [Citation.]" Hauk v. JP Morgan Chase Bank, 552 F.3d 1114, 1120 (9 Cir. 2009) (quoting
18 Rendler v. Corus Bank, 272 F.3d 992, 996 (7 Cir. 2001) (internal quotations omitted)).
19 Plaintiff does not make any allegations that Defendants make any false representations with
20 regard to any terms and conditions of the mortgage.

21 Similarly, Plaintiff's allegations have no discernable connection to the more diffuse
22 purposes of RESPA. Those purposes include "(1) [. . .] more effective advance disclosure to
23 home buyers and sellers of settlement costs; (2) [. . .] the elimination of kickbacks or referral
24 fees that tend to increase unnecessarily the costs of certain settlement devices; (3) [. . .] a
25 reduction in the amounts home buyers are required to place in escrow accounts established to
26 insure the payment of real estate taxes and insurance; and (4) [. . .] significant reform and
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1 modernization of local record keeping of land title information.” 12 U.S.C. § 2601(b).

2 By extraordinary stretch of the imagination one could possibly infer that Plaintiff’s
3 pleading was intended to convey some sense in which his “Request” was a qualified written
4 request (“QWR”) within the meaning of 12 U.S.C. § 2605(e)(1)(A), in which case the party
5 servicing Plaintiff’s loan account would be required to respond pursuant to subdivision
6 (e)(1)(B). Such inference is undercut, however, by the fact that Plaintiff’s request does not
7 seek information about the status of his loan account nor does Plaintiff’s Request purport to
8 challenge or question Defendant’s determination of the status of Plaintiff’s loan account.
9 See 12 U.S.C. § 2605(e)(1)(B)(ii) (defining QWR as a written statement by the borrower of
10 the reasons for the borrower’s belief that the loan account is in error). Because Plaintiff’s
11 “Request” does not relate in any obvious way to the status of Plaintiff’s loan account, the
12 court cannot construe the Request as a QWR within the meaning of 12 U.S.C.
13 §2605(e)(1)(A).

14 As something of a side note, the court points out that two conclusions flow from the
15 observation that Plaintiff’s Request does not meet the statutory definition of QWR. First, the
16 court concludes that Plaintiff has not alleged a federal claim under RESPA. Second, because
17 Plaintiff’s Request is not a QWR within the meaning of the statute, Defendants have no legal
18 obligation to respond to the Request under any law the court is aware of and consequently
19 Defendants’ failure to respond does not establish the truth or falsity of any fact alleged by
20 Plaintiff. The court mentions this because any future pleading by Plaintiff that references the
21 “Request” in order to establish any fact or legal conclusion will receive little, if any,
22 consideration by this court.

23 The court concludes Plaintiff’s pleading does not allege a claim under any law of the
24 United States or any constitutional provision. The court also finds the complaint does not
25 allege the elements of diversity jurisdiction. The court therefore concludes it lacks subject
26 matter jurisdiction over Plaintiff’s action.

1 If a complaint is dismissed for failure to state a claim, leave to amend should be
2 granted unless the court determines that the allegation of other facts consistent with the
3 challenged pleading could not possibly cure the deficiency.” Schreiber Distributing Co. v.
4 Serv-Well Furniture Co., Inc., 806 F.2d 1393, 1401 (9th Cir. 1986). The formal conclusion
5 the court reaches in dismissing Plaintiff’s action for lack of federal subject matter jurisdiction
6 is that Plaintiff’s pleading fails to allege any claim for relief that arises under the Constitution
7 or laws of the United States. The court also reaches a second conclusion with regard to
8 Plaintiff’s pleadings that is not necessary to the court’s determination of its jurisdiction and
9 so requires only minimal discussion. Simply and briefly stated, Plaintiff’s pleading fails to
10 assert a claim under either federal *or* California law that is cognizable in federal court. The
11 legal basis for Plaintiff’s request for injunctive relief against foreclosure is his contention that
12 Defendants lack authority to foreclose because they have not, and perhaps cannot, produce
13 the original signed note. District courts in California have uniformly rejected such claims
14 noting that “[u]nder California law, there is no requirement for the production of the original
15 note to initiate a non-judicial foreclosure.” Blanco v. American Home Mortgage Servicing,
16 Inc., 2009 WL 4674904 (E.D. Cal. 2009) at *9 (citing Oliver v. Countrywide Home Loans,
17 Inc., 2009 WL 3122573 (E.D. Cal. 2009) at *3, and listing additional cases).

18 The court recognizes that Plaintiff is representing himself and therefore the court does
19 not lightly reach the conclusion that further amendment of Plaintiff’s pleading would be
20 futile. However, the court has reviewed the entirety of Plaintiff’s Pleading and of the
21 “Request” and can only conclude that any action Plaintiff could file that would be cognizable
22 in this court would bear absolutely no relationship to anything Plaintiff has filed up to this
23 point. To put it colloquially, Plaintiff is barking up the wrong tree by attempting to advance
24 his theories concerning the legitimacy of Defendant’s legal authority to carry out a non-
25 judicial foreclosure proceeding under California law. The court concludes that any action
26 Plaintiff could file that would be cognizable in this court would be a fundamentally different

1 action than the one now before the court – a different case entirely rather than an amendment
2 of the present case. The court will therefore dismiss Plaintiff’s action without leave to
3 amend.

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5 THEREFORE, in accordance with the foregoing discussion, it is hereby ORDERED
6 that Plaintiff’s action is DISMISSED in its entirety without leave to amend. The Clerk of the
7 Court shall CLOSE the CASE.

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9 IT IS SO ORDERED.

10 Dated: October 12, 2010

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13 CHIEF UNITED STATES DISTRICT JUDGE
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