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

<b>THUYDUONG NGUYEN, et al.,</b>	)	<b>1:11-CV-00755 AWI SMS</b>
	)	
<b>Plaintiffs,</b>	)	<b>ORDER GRANTING</b>
	)	<b>DEFENDANT’S MOTION TO</b>
<b>v.</b>	)	<b>DISMISS</b>
	)	
<b>SAXON MORTGAGE SERVICING,</b>	)	<b>[Doc. #7]</b>
<b>INC., et al.,</b>	)	
	)	
<b>Defendants.</b>	)	
_____	)	

**INTRODUCTION<sup>1</sup>**

Plaintiffs Thuyduong Nguyen and Jason Palarca obtained a residential home loan from Defendant Decision One Mortgage Company, LLC (“Decision One”) in order to finance the real property located at 2968 Trigger Lane, Livingston, CA 95334.<sup>2</sup> On January 10, 2007, a deed of trust was recorded against Plaintiffs’ real property in the amount of \$299,814.00. The real property has not been sold at a foreclosure sale.

<sup>1</sup> The Introduction is provided for background only and does not form the basis of the Court’s decision; the assertions contained therein are not necessarily taken as adjudged to be true. The legally relevant facts relied upon by the Court are discussed within the analysis.

<sup>2</sup> It appears that Decision One has not been properly served by Plaintiffs. To date, Decision One has not answered or appeared in this matter.

1 On February 4, 2011, Plaintiffs filed a Complaint against Defendants Decision One and  
2 Saxon Mortgage Services, Inc. (“Saxon”) in Merced County Superior Court.<sup>3</sup> On May 10, 2011,  
3 Saxon removed the case to this Court based on federal question and diversity jurisdiction.  
4 Subsequently, on May 17, 2011, Saxon filed (1) a motion to dismiss or in the alternative motion  
5 for more definite statement; and (2) a motion to strike portions of Plaintiffs’ Complaint.  
6 Plaintiffs failed to file an opposition to either of Saxon’s motions. For the reasons that follow,  
7 Saxon’s motion to dismiss is granted.

### 8 LEGAL STANDARD

9 Under Federal Rule of Civil Procedure 12(b)(6), a claim may be dismissed because of the  
10 plaintiff’s “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). A  
11 dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the  
12 absence of sufficient facts alleged under a cognizable legal theory. Johnson v. Riverside  
13 Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008); Navarro v. Block, 250 F.3d 729, 732 (9th  
14 Cir. 2001). In reviewing a complaint under Rule 12(b)(6), all allegations of material fact are  
15 taken as true and construed in the light most favorable to the non-moving party. Marceau v.  
16 Blackfeet Hous. Auth., 540 F.3d 916, 919 (9th Cir. 2008); Vignolo v. Miller, 120 F.3d 1075,  
17 1077 (9th Cir. 1999). The Court is not required “to accept as true allegations that are merely  
18 conclusory, unwarranted deductions of fact, or unreasonable inferences.” In re Gilead Scis. Sec.  
19 Litig., 536 F.3d 1049, 1056-57 (9th Cir. 2008); Spewell v. Golden State Warriors, 266 F.3d 979,  
20 988 (9th Cir. 2001). As the Supreme Court has explained:

21 While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need  
22 detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his  
23 ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic  
24 recitation of the elements of a cause of action will not do. Factual allegations must  
be enough to raise a right to relief above the speculative level, on the assumption  
that all the allegations in the complaint are true (even if doubtful in fact).

25 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

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26  
27 <sup>3</sup> Saxon was erroneously sued in the Complaint as Saxon Mortgage Servicing, Inc.

1 To avoid a Rule 12(b)(6) dismissal, “a complaint must contain sufficient factual matter,  
2 accepted as true, to state a claim to relief that is plausible on its face[.]” Telesaurus VPC, LLC v.  
3 Power, 623 F.3d 998, 1003 (9th Cir. 2010) (citations omitted). “In sum, for a complaint to  
4 survive a motion to dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from  
5 that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” Moss v.  
6 United States Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009).

7 If a Rule 12(b)(6) motion to dismiss is granted, “[the] district court should grant leave to  
8 amend even if no request to amend the pleading was made, unless it determines that the pleading  
9 could not possibly be cured by the allegation of other facts.” Doe v. United States, 58 F.3d 494,  
10 497 (9th Cir. 1995). In other words, leave to amend need not be granted when amendment would  
11 be futile. Gompper v. VISX, Inc., 298 F.3d 893, 898 (9th Cir. 2002).

## 12 DISCUSSION

### 13 1. Wrongful Foreclosure

14 In the first cause of action, Plaintiffs bring a wrongful foreclosure claim. “Wrongful  
15 foreclosure is an action in equity, where a plaintiff seeks to set aside a foreclosure sale that has  
16 already occurred.” Manzano v. Metlife Bank, N.A., No. CIV. 2:11–651 WBS DAD, 2011 WL  
17 2080249, at \*6 (E.D. Cal. May 25, 2011). In the Complaint, Plaintiffs allege that the real  
18 property at issue has not been sold at a foreclosure sale. Complaint at ¶ 5. Since Plaintiffs’  
19 house has not yet been sold, a claim for wrongful foreclosure is not yet ripe. Accordingly,  
20 Saxon’s motion to dismiss Plaintiffs’ first cause of action for wrongful foreclosure is  
21 GRANTED.

22 Within the wrongful foreclosure claim, Plaintiffs allege that all Defendants should be  
23 restrained from bringing a foreclosure sale against the Plaintiffs’ real property. Complaint at ¶  
24 13. It appears that Plaintiffs are seeking an injunction against Defendants in order to prevent a  
25 foreclosure sale. To the extent that Plaintiffs are seeking an injunction, Plaintiffs are granted  
26 leave to amend.

1 2. Declaratory Relief

2 In the third cause of action, Plaintiffs request declaratory relief. Plaintiffs seek “the  
3 remedy of cancellation of the improper foreclosure sale and restitution of the real property to the  
4 Plaintiffs.” Complaint at ¶ 17.

5 “The existence of an actual controversy relating to the legal rights and duties of the  
6 respective parties, suffices to maintain an action for declaratory relief.” McClain v. Octagon  
7 Plaza, LLC, 159 Cal. App. 4th 784, 800 (2008). Declaratory relief is improper in this case  
8 because Plaintiffs allege that no foreclosure sale has occurred. Complaint at ¶ 5. Thus, there is  
9 no actual controversy relating to the legal rights and duties of the respective parties.

10 Accordingly, Saxon’s motion to dismiss Plaintiffs’ third cause of action for declaratory relief is  
11 GRANTED.

12 3. Fraud, Intentional Misrepresentation and Negligent Misrepresentation

13 In the fourth, fifth and sixth causes of action, Plaintiffs bring claims for fraud, intentional  
14 misrepresentation and negligent misrepresentation. In California, the elements of fraud are (1)  
15 misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity  
16 (or scienter); (3) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (5)  
17 resulting damage. Lazar v. Superior Court, 12 Cal. 4th 631, 638 (1996). “The same elements  
18 comprise a cause of action for negligent misrepresentation, except there is no requirement of  
19 intent to induce reliance.” Cadlo v. Owens-Illinois, Inc., 125 Cal. App. 4th 513, 519 (2004).

20 Under California law, the elements of a cause of action for intentional misrepresentation  
21 are: (1) a promise made regarding a material fact without any intention of performing it; (2) the  
22 existence of the intent at the time of making the promise; (3) the promise was made with intent to  
23 deceive or with intent to induce the party to whom it was made to enter into the transaction; (4)  
24 the promise was relied on by the party to whom it was made; (5) the party making the promise  
25 did not perform; and (6) the party to whom the promise was made was injured. Henein v. Saudi  
26 Arabian Parsons Ltd., 818 F.2d 1508, 1514 (9th Cir. 1987).

1 The heightened pleading standard of Rule 9(b) of the Federal Rules of Civil Procedure  
2 applies to claims for fraud, intentional misrepresentation and negligent misrepresentation.  
3 See Fed. R. Civ. P. 9(b); Robinson v. Wachovia Mortg., No. CIV. 2:10-3014 WBS GGH, 2011  
4 WL 338502, at \*3 (E.D. Cal. Jan. 31, 2011). Under Rule 9(b), “a party must state with  
5 particularity the circumstances constituting the fraud.” A plaintiff must include the “who, what,  
6 when, where, and how” of the fraud. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th  
7 Cir. 2003).

8 Plaintiffs fail to allege any misrepresentation by Saxon in the Complaint. Therefore,  
9 Plaintiffs have not stated a claim for fraud, intentional misrepresentation or negligent  
10 misrepresentation against Saxon. Accordingly, Saxon’s motion to dismiss Plaintiffs’ fourth, fifth  
11 and sixth causes of action for fraud, intentional misrepresentation and negligent  
12 misrepresentation is GRANTED without prejudice and with leave to amend.

#### 13 4. Quiet Title

14 In the ninth cause of action, Plaintiffs bring a quiet title claim. The purpose of a quiet  
15 title action is to determine “all conflicting claims to the property in controversy and to decree to  
16 each such interest or estate therein as he may be entitled to.” Newman v. Cornelius, 3 Cal. App.  
17 3d 279, 284 (1970). California law requires a plaintiff seeking to quiet title in the face of a  
18 foreclosure to allege tender or an offer of tender of the amount borrowed. Kozhayev v.  
19 America’s Wholesale Lender, No. CIV S-09-2841 FCD DAD PS, 2010 WL 3036001, at \*5 (E.D.  
20 Cal. Aug. 2, 2010); see also Shimpones v. Stickney, 219 Cal. 637, 649 (1934). Thus, a “quiet  
21 title action is doomed in the absence of Plaintiffs’ tender of the full amount owed.” Gjurovich v.  
22 Cal., No. 1:10-cv-01871-LJO-SMS, 2010 WL 4321604, at \*8 (E.D. Cal. Oct. 26, 2010).

23 Plaintiffs’ Complaint does not allege tender or an offer of tender of the amount borrowed.  
24 Therefore, Plaintiffs cannot sustain a quiet title action. Accordingly, Saxon’s motion to dismiss  
25 Plaintiffs’ ninth cause of action for quiet title is GRANTED without prejudice and with leave to  
26 amend.

1 5. Breach of Contract

2 In the tenth cause of action, Plaintiffs bring a breach of contract claim. In California, “[a]  
3 cause of action for breach of contract requires proof of the following elements: (1) existence of  
4 the contract; (2) plaintiff’s performance or excuse for nonperformance; (3) defendant’s breach;  
5 and (4) damages to plaintiff as a result of the breach.” Williams v. Bank of Am., No.  
6 2:09-CV-3060-JAM-KJM, 2010 WL 3034197, at \*4 (E.D. Cal. Jul. 30, 2010) (quoting CDF  
7 Firefighters v. Maldonado, 158 Cal. App. 4th 1226, 1239 (2008)). Plaintiffs’ Complaint does not  
8 identify the existence of any contract entered into between them and Saxon. Therefore, Plaintiffs  
9 have not stated a claim for breach of contract against Saxon. Accordingly, Saxon’s motion to  
10 dismiss Plaintiffs’ tenth cause of action for breach of contract is GRANTED without prejudice  
11 and with leave to amend.

12 6. Accounting

13 In the eleventh cause of action, Plaintiffs bring a claim for an accounting. A cause of  
14 action for an accounting requires a showing that a relationship exists between the plaintiff and  
15 defendant that requires an accounting, and that some balance is due to the plaintiff that can only  
16 be ascertained by an accounting. Teselle v. McLoughlin, 173 Cal. App. 4th 156, 179 (2009).  
17 Plaintiffs have not alleged any facts indicating the existence of a fiduciary relationship between  
18 them and Saxon that requires an accounting and additionally have not alleged that some balance  
19 is due to them that can only be ascertained by an accounting. Therefore, Plaintiffs have failed to  
20 state a claim for an accounting against Saxon. Accordingly, Saxon’s motion to dismiss  
21 Plaintiffs’ eleventh cause of action for an accounting is GRANTED without prejudice and with  
22 leave to amend.

23 7. Cancellation of Trustee’s Deed, Rescission and Restitution, and Constructive Trust

24 In the second, seventh and eighth causes of action, Plaintiffs bring claims for cancellation  
25 of trustee’s deed, rescission and restitution, and constructive trust respectively. These claims are  
26 not independent causes of action. First, a request to cancel the trustee’s deed is “dependent upon  
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1 a substantive basis for liability, [and it has] no separate viability.” Glue-Fold, Inc. v.  
2 Slautterback Corp., 82 Cal. App. 4th 1018, 1023 (2000). Second, “[r]escission is not a cause of  
3 action; it is a remedy.” Nakash v. Superior Court, 196 Cal. App. 3d 59, 70 (1987). Third,  
4 restitution is synonymous with unjust enrichment. McBride v. Boughton, 123 Cal. App. 4th 379,  
5 387 (2004). Unjust enrichment is “not a cause of action . . . or even a remedy, but rather a  
6 principle, underlying various legal doctrines and remedies.” Id. Finally, constructive trust is a  
7 remedy and not a cause of action. Embarcadero Mun. Improvement Dist. v. Cnty. of Santa  
8 Barbara, 88 Cal. App. 4th 781, 793 (2001).

9 As discussed above, since Plaintiffs have failed to succeed on any independently viable  
10 claim, Plaintiffs’ second, seventh and eighth causes of action also fail. Accordingly, Saxon’s  
11 motion to dismiss Plaintiffs’ second, seventh and eighth causes of action is GRANTED.

12 **CONCLUSION**

13 IT IS HEREBY ORDERED that Saxon’s motion to dismiss Plaintiffs’ Complaint is  
14 GRANTED consistent with this order.<sup>4</sup> Any amended complaint must be filed within twenty-one  
15 (21) days of the filing of this order.

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17 IT IS SO ORDERED.

18 Dated: July 1, 2011

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21 CHIEF UNITED STATES DISTRICT JUDGE

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27 <sup>4</sup> In light of the Court dismissing Plaintiffs’ Complaint, Saxon’s motion to strike is  
28 rendered moot.