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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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9 DEBORAH BURKE and SEAN K. BURKE ) Case No. 13-4249 SC  
10 Plaintiffs, )  
11 v. ) ORDER GRANTING MOTION TO  
12 ) DISMISS  
13 JPMORGAN CHASE BANK, N.A; WELLS )  
14 FARGO BANK, N.A. AS TRUSTEE FOR )  
15 JPMORGAN MORTGAGE TRUST 2008-R2 )  
16 MORTGAGE PASS-THROUGH )  
17 CERTIFICATE SERIES 2008-R2, )  
18 Defendants. )  
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18 **I. INTRODUCTION**

19 Plaintiffs Deborah Burke and Sean Burke (collectively,  
20 "Plaintiffs") bring this action in connection with the threatened  
21 foreclosure of their home in Livermore, California ("the  
22 Property"). Defendants JP Morgan Chase Bank, N.A. ("JPMorgan") and  
23 Wells Fargo Bank, N.A. ("Wells Fargo") now move to dismiss for  
24 failure to state a claim pursuant to Federal Rule of Civil  
25 Procedure 12(b)(6). ECF No. 5 ("Mot."). The Motion is fully  
26 briefed, ECF Nos. 10 ("Opp'n"), 19 ("Reply"), and appropriate for  
27 determination without oral argument pursuant to Civil Local Rule 7-  
28 1(b). For the reasons set for below, the Motion is GRANTED.

1    **II.    BACKGROUND**

2            On August 7, 2007, Plaintiffs refinanced their existing  
3 mortgage on the Property, obtaining a \$1,256,250 loan.    ECF No. 1  
4 ("Compl.") ¶ 5, Ex. A.    The deed of trust securing the mortgage  
5 identifies Washington Mutual Bank, FA ("WaMu") as the lender.    Id.  
6 Ex. A ("DOT").    Plaintiffs allege that on or before August 22,  
7 2008, their mortgage loan was contributed to a mortgage backed  
8 security ("MBS") identified as JPMorgan Mortgage Trust 2008 R-2  
9 Pass-through Certificates Series 2008-R2, of which Wells Fargo is  
10 the trustee.    Id. ¶ 7.    Plaintiffs further allege that the  
11 securitization of their loan failed, leaving Wells Fargo without  
12 any legal or equitable interest in the mortgage.    Id. p. 2.    The  
13 complaint is vague on why the securitization failed, stating only  
14 that the sale "w[as] made without the required intervening  
15 assignment of Plaintiffs' Deed of Trust and endorsement of the  
16 Note."    Id. ¶ 12.

17            On September 25, 2008, WaMu was closed by the Office of Thrift  
18 Supervision, and the Federal Deposit Insurance Corporation ("FDIC")  
19 was named Receiver.    On September 25, 2008, JPMorgan acquired  
20 certain assets and liabilities of WaMu through an asset purchase  
21 agreement with the FDIC.    ECF No. 17 ("RJN") Ex. 2.    Though  
22 Plaintiffs now allege that JPMorgan does not have any legal or  
23 equitable interests in their loan, they applied for a loan  
24 modification with JPMorgan sometime in 2010.    Compl. ¶ 14.  
25 JPMorgan rejected the application in May 2010, stating that  
26 Plaintiffs' income was insufficient.    Id.    Plaintiffs then re-  
27 applied for a loan modification.    That application was also  
28 rejected on the ground that Plaintiffs were "not at risk default

1 because [they] ha[d] the ability to pay [their] current mortgage  
2 payment." Id. ¶ 15.

3 On October 28, 2010, a notice of default and election to sell  
4 ("NOD") was recorded with Alameda County, stating that Plaintiffs  
5 were \$28,024.95 in arrears. Id. ¶ 17, Ex. E. Plaintiffs allege  
6 that the NOD's statement that Plaintiffs could contact JPMorgan  
7 about the foreclosure proceedings was false because JPMorgan had no  
8 right to collect mortgage payments and there is no evidence that  
9 JPMorgan is a valid loan servicer or beneficiary of Plaintiffs'  
10 mortgage. Id. Plaintiffs reason that because their loan was sold  
11 to the MBS trust before JPMorgan acquired the assets of WaMu,  
12 JPMorgan did not succeed to the servicing rights of WaMu. Id. In  
13 April 2011 and April 2012, notices of trustee sales were recorded  
14 with Alameda County. Id. ¶¶ 21, 22. The first notice of trustee's  
15 sale indicates that the unpaid balance on the loan was  
16 \$1,395,095.88. Plaintiffs allege that these instruments, like the  
17 NOD, are null and void. Id. ¶ 23. It is unclear from the  
18 pleadings whether the foreclosure sale has yet taken place.

19 Based on these allegations, Plaintiffs assert causes of action  
20 for: (1) wrongful foreclosure, (2) quiet title, (3) slander of  
21 title, (4) fraud, (5) cancellation of instruments, (6) violation of  
22 California Civil Code section 2923.5, (7) violation of California  
23 Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et  
24 seq.; and (8) unjust enrichment. Plaintiffs pray for, inter alia,  
25 an injunction against foreclosure activity on the Property, a  
26 finding that Plaintiffs are the rightful holders of title to the  
27 Property, general and consequential damages, and attorney's fees.

28

1    **III. LEGAL STANDARD**

2        A motion to dismiss under Federal Rule of Civil Procedure  
3    12(b)(6) "tests the legal sufficiency of a claim." Navarro v.  
4    Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based  
5    on the lack of a cognizable legal theory or the absence of  
6    sufficient facts alleged under a cognizable legal theory."  
7    Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
8    1988). "When there are well-pleaded factual allegations, a court  
9    should assume their veracity and then determine whether they  
10    plausibly give rise to an entitlement to relief." Ashcroft v.  
11    Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court  
12    must accept as true all of the allegations contained in a complaint  
13    is inapplicable to legal conclusions. Threadbare recitals of the  
14    elements of a cause of action, supported by mere conclusory  
15    statements, do not suffice." Id. (citing Bell Atl. Corp. v.  
16    Twombly, 550 U.S. 544, 555 (2007)).

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18    **IV. DISCUSSION**

19        The gravamen of all eight of Plaintiffs' claims is that  
20    Defendants do not have a beneficial interest in Plaintiffs'  
21    mortgage either because (1) the securitization of the mortgage  
22    failed, or (2) Plaintiffs' mortgage was not transferred as part of  
23    the P&A Agreement because it was securitized and sold before the  
24    agreement took effect. Both of these theories are unavailing.  
25    Accordingly, the Court finds all of Plaintiffs' claims implausible.

26        With respect to the first theory, Plaintiffs lack standing to  
27    challenge the securitization process because they were not parties  
28    to the agreement that securitized the note. See Junger v. Bank of

1 Am., N.A., CV 11-10419 CAS VBKX, 2012 WL 603262, at \*3 (C.D. Cal.  
2 Feb. 24, 2012). In any event, it is entirely unclear from the  
3 pleadings why the alleged securitization failed. Plaintiffs plead  
4 that the sale of the loan to the MBS trust was made "without the  
5 required intervening assignment of Plaintiffs' Deed of Trust and  
6 endorsement of the Note," Compl. ¶ 12, but has yet to point to any  
7 authority which would impose such a requirement. The Complaint  
8 makes reference to Section 860 of the Internal Revenue Code, id. ¶  
9 9, which pertains to "deduction[s] for deficiency dividends." It  
10 is unclear why this tax statute has any application here, and to  
11 the extent that it does, it is unclear how it could disrupt the  
12 chain of title to Plaintiffs' DOT and note or JPMorgan's right to  
13 service the loan.

14 Plaintiffs' second theory -- that Defendants lost all interest  
15 in the loan when it was sold to the MBS trust -- is also  
16 unpersuasive. This Court has held that a plaintiff may state a  
17 claim for wrongful foreclosure based on allegations that sale of  
18 the DOT precluded Defendants from retaining a beneficial interest  
19 in that DOT. See Subramani v. Wells Fargo Bank N.A., C 13-1605 SC,  
20 2013 WL 5913789, at \*4 (N.D. Cal. Oct. 31, 2013). However,  
21 Plaintiffs have not alleged that WaMu ever transferred the DOT to a  
22 third party (though Plaintiffs have alleged that WaMu's assets were  
23 conveyed to JPMorgan as part of the P&A Agreement). Rather,  
24 Plaintiffs merely allege that the promissory note was transferred  
25 to a MBS trust. "There is no stated requirement in California's  
26 non-judicial foreclosure scheme that requires a beneficial interest  
27 in the Note to foreclose. Rather, the statute broadly allows a  
28 trustee, mortgagee, beneficiary, or any of their agents to initiate

1 non-judicial foreclosure." Lane v. Vitek Real Estate Indus. Grp.,  
2 713 F. Supp. 2d 1092, 1099 (E.D. Cal. 2010). As the pleadings and  
3 judicially noticeable documents suggest that WaMu retained a  
4 beneficial interest in the DOT after the alleged securitization of  
5 the note and that this interest was transferred to JPMorgan as part  
6 of the P&A Agreement, the Court finds implausible Plaintiffs'  
7 conclusory allegations that Defendants lack sufficient interest to  
8 commence foreclosure proceedings.

9 Accordingly, Plaintiffs' Complaint is DISMISSED with leave to  
10 amend. The amended pleading shall set forth specific and plausible  
11 allegations explaining why Defendants lack sufficient interest to  
12 foreclose on the Property.

13  
14 **V. CONCLUSION**

15 For the foregoing reasons, Defendants JPMorgan Chase Bank, N.A.  
16 and Wells Fargo Bank, N.A.'s Motion to Dismiss is GRANTED.  
17 Plaintiffs Deborah Burke and Sean Burke's Complaint is DISMISSED  
18 with leave to amend. Plaintiffs shall file their amended pleading  
19 within thirty (30) days of the signature date of this Order.  
20 Failure to do so may result in dismissal of this action with  
21 prejudice.

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23 IT IS SO ORDERED.

24  
25 January 14, 2014

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UNITED STATES DISTRICT JUDGE