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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ERNEST L. BONNER,  
Plaintiff,

No. C 16-01363 WHA

v.

FAY SERVICING, LLC; CHRISTIANA  
TRUST, a Division of Wilmington Savings  
Fund Society FSB as Trustee for ARLP Trust  
2; WESTERN PROGRESSIVE, LLC;  
OCWEN LOAN SERVICING, LLC; and  
DOES 1–100, inclusive,

**ORDER CONVERTING  
MOTIONS TO DISMISS  
INTO MOTIONS FOR  
SUMMARY JUDGMENT**

Defendants.

**INTRODUCTION**

In this foreclosure dispute, defendants loan servicers move to dismiss the borrower’s complaint. For the reasons set forth below, their motions will be converted to motions for summary judgment.

**STATEMENT**

In July 2006, plaintiff Ernest Bonner obtained a thirty-year adjustable loan for \$880,000, secured by a deed of trust with New Century Mortgage Corporation (now dissolved) to purchase real property in Alameda, California. Bonner has lived rent-free in the house for several years without paying on the home loan. By way of his own commissioned “third-party forensic mortgage securitization investigation and audit,” Bonner attempts to outline the history

1 of his loan’s securitization and chain of title (Compl. ¶¶ 3–4). He challenges his pending  
2 foreclosure by claiming that the securitization of his original mortgage loan was improper and  
3 thus void. Here are the details.

4 In December 2006, New Century bundled Bonner’s loan in a pool with similar  
5 residential mortgage loans and sold it to Carrington Securities, LP. According to the complaint,  
6 after the first transaction occurred, Bonner’s loan underwent a series of transactions during the  
7 securitization process, where it landed in the hands of an unknown lender and beneficiary (*id.* at  
8 ¶¶ 5–8). Then, in 2007, defendant Ocwen Loan Servicing, LLC, acting as attorney-in-fact for  
9 New Century, issued an assignment of the deed of trust to REO Properties Corporation.

10 The gist of Bonner’s allegations is that Ocwen (as New Century’s agent) had no interest  
11 in the deed of trust to assign to REO Properties or anyone else because New Century had  
12 already transferred all beneficial interests in the deed of trust to Carrington *before* REO  
13 Properties acquired any assets from New Century (*id.* at ¶ 11). Bonner states that “without a  
14 continuing agency relationship and authority from the unassigned and unknown new lender  
15 and beneficiary in the deed of trust, any beneficial interest that New Century Mortgage (or its  
16 servicing agent Ocwen) may have retained under the securitization agreements . . . was also  
17 effectively and completely extinguished” (*id.* at ¶ 8).

18 The complaint states that in 2014, despite this invalid second assignment, REO  
19 Properties transferred the loan to defendant Christiana Trust, a Division of Wilmington Savings  
20 Fund Society FSB as Trustee for ARLP Trust 2. In turn, Christiana Trust transferred the loan  
21 to Wilmington Trust, which is the entity pursuing the current foreclosure but not a defendant to  
22 this action. Ocwen also transferred the loan to another servicing agent, defendant Fay  
23 Servicing, LLC, in 2015 (*id.* at ¶¶ 2–4).

24 Basically, Bonner contends New Century sold his loan twice and only the original  
25 purchaser (and its successors in the chain of title) may sue on a default, not the second.  
26 Nine years after the mortgage was originally issued, Bonner received a notice of default and  
27 initiated this action against defendants (as servicers descending from the second assignment  
28 to REO Properties) for pursuing a foreclosure that he claims is illegal, null and void.

1 At oral argument, defense counsel explained the apparent discrepancy of the second  
2 assignment to REO Properties. While defendants agree that there was an initial assignment  
3 to Carrington, they claim that Bonner failed to pay on the original loan and it was therefore  
4 tendered back to New Century as a nonperforming loan, making the subsequent assignment  
5 by New Century to defendants valid. The complaint does not address this reassignment back  
6 to New Century and therefore does not rule out this possibility.

7 Bonner incorporates his theory of void assignment to allege the following claims  
8 for relief: (1) wrongful foreclosure, (2) fraud, (3) slander of title, (4) a violation of  
9 Sections 2934a(a)(1)(A) and 2924.5 of the California Civil Code, and (5) a violation of  
10 Section 17200 of the California Business and Professions Code. Bonner also seeks to  
11 permanently enjoin all foreclosure activity on his real property as well as restitution,  
12 accounting, and declaratory relief.

13 Bonner initiated the instant action in state court in February 2016 against defendants,  
14 who jointly removed it here on the basis of diversity jurisdiction. Defendants Fay Servicing  
15 and Christiana Trust now jointly move to dismiss for failure to state a claim and defendant  
16 Ocwen separately moves to dismiss on the same grounds. Bonner also names as defendant  
17 Western Progressive, LLC, which was listed as a trustee on the notice of default. At the  
18 hearing, Western Progressive’s counsel stated that they are a non-party to the action after filing  
19 a declaration of non-monetary status in state court, which Bonner did not oppose. This order  
20 follows full briefing and oral argument.

21 **ANALYSIS**

22 Defendants contend that Bonner lacks standing to challenge the original assignment  
23 because it was at most voidable, not void. The California Supreme Court in *Yvanova v.*  
24 *New Century Mortg. Corp.*, 62 Cal. 4th 919, 939 (2016) (emphasis added), held that “borrowers  
25 have standing to challenge assignments as void, *but not as voidable.*”

26 Bonner alleges, to repeat, that the original lender, New Century, sold his loan to  
27 Carrington Securities for full loan value. As a result of this first assignment, Bonner alleges  
28 that the original lender had no interest in the deed of trust when it assigned the deed of trust

1 for a *second time* to REO Properties, because all beneficial interests in the deed of trust had  
2 already been transferred to another entity, Carrington, before the assignment. Consequently, the  
3 original beneficiaries failed to assign Bonner’s loan to a subsequent trustee within the time  
4 frame governed by state law — on or before the closing date of December 19, 2006 (Compl.  
5 ¶ 19). Bonner alleges the assignment and all the documents related to it are null and void.

6 Defendants contend that Bonner’s theory of improper securitization merely renders  
7 the assignment voidable at most, rather than void. Defendants contest the allegation that  
8 New Century had no interest to assign the loan to REO Properties. They claim that Bonner  
9 defaulted on the loan after it was assigned to Carrington, therefore the non-performing loan  
10 was validly tendered back to New Century for it to reassign. If it was true that the loan was put  
11 back to the originator and then reassigned, then the Court would agree that Bonner has failed to  
12 state a claim for relief.

13 When a complaint is challenged under FRCP 12(b)(6), we must accept the facts  
14 in plaintiff’s complaint as true. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).  
15 Here, however, defendants attempt to undermine Bonner’s factual allegations that the  
16 assignment of this loan is void. Defendants ask the Court to take judicial notice of various  
17 documents, including notices of default and assignment records, to demonstrate that Bonner  
18 defaulted in 2007 and that the subsequent assignments were valid. In these circumstances,  
19 this order converts the motions to dismiss to motions for summary judgment.


20 Under FRCP 12(d), a district court may convert a motion to dismiss to a motion for  
21 summary judgment. FRCP 12(d) provides that if, on a motion to dismiss under 12(b)(6),  
22 “matters outside the pleadings are presented to and not excluded by the court, the motion must  
23 be treated as one for summary judgment under Rule 56. All parties must be given a reasonable  
24 opportunity to present all the material that is pertinent to the motion.” Once the motion is  
25 converted, the legal standard changes and summary judgment is proper if there is no genuine  
26 issue as to any material fact and the moving party is entitled to judgment as a matter of law.

27 Because defendants’ motions to dismiss rely on evidence outside the pleadings,  
28 pursuant to FRCP 12(d) the motions will be converted into motions for summary judgment

1 under FRCP 56. Defense counsel shall have **FOURTEEN CALENDAR DAYS** to submit further  
2 competent proof to prove up their representations at the hearing concerning the reassignment  
3 back to New Century. Plaintiff's counsel shall have **TWENTY-EIGHT CALENDAR DAYS** to  
4 conduct discovery, all of which shall be expedited, more if good cause is shown. Counsel must  
5 cooperate in the discovery. At the end of discovery, plaintiff and defendants shall submit a  
6 supplement to the record, including briefing, by **NOON ON SEPTEMBER 5, 2016**.

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8 **IT IS SO ORDERED.**

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10 Dated: July 25, 2016.

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13 WILLIAM ALSUP  
14 UNITED STATES DISTRICT JUDGE  
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