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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

HERMAN Q. CHRISTOPHER, et al.,  
  
Plaintiffs,  
  
vs.  
  
FIRST FRANKLIN FINANCIAL CORP., et  
al.,  
  
Defendants.

CASE NO. 10CV17 DMS (CAB)

**ORDER GRANTING  
DEFENDANTS’ MOTION TO  
DISMISS AND DEFENDANTS’  
MOTION TO DISSOLVE  
PRELIMINARY INJUNCTION**

Pending before the Court are Defendants’ motions to dismiss and to strike portions of Plaintiffs’ Second Amended Complaint (“SAC”). Defendants also move to dissolve the preliminary injunction that was issued by the San Diego Superior Court prior to the matter being removed to this Court. For the following reasons, the motions are granted.

**I.  
BACKGROUND**

This matter arises out of Plaintiff Herman Q. Christopher’s home loan and subsequent foreclosure of real property located in San Diego, California (the “Subject Property”). Plaintiffs are Herman Q. Christopher and DBR Strategies, Inc. Defendants are First Franklin Financial Corporation (“Franklin”), LaSalle Bank, N.A. (“LaSalle”), Merrill Lynch First Franklin Mortgage Loan Trust 2007-4 (“Merrill Lynch”), and Bank of America.

1 On or about April 20, 2007, Plaintiff Christopher obtained a loan from Defendant Franklin in  
2 exchange for a deed of trust on the Subject Property. (SAC ¶¶ 13-14.) The deed of trust was recorded  
3 on April 26, 2007. (*Id.* at Ex. C.) Christopher went into default on the loan on or about June 1, 2007.  
4 (*Id.* at ¶ 15.) Christopher subsequently recorded a grant deed assigning all rights, title, and interest  
5 to the Subject Property to Plaintiff DBR Strategies, Inc., effective on or about July 10, 2007. (*Id.* at  
6 ¶ 2.) On August 29, 2007, Franklin signed an Assignment of Deed of Trust naming LaSalle as the  
7 assignee with a date of assignment of March 3, 2008. (*Id.* at ¶ 17, Ex. D.) On August 31, 2007,  
8 Mortgage Electronic Registration Systems, Inc., as nominee for Franklin, signed an Assignment of  
9 Deed of Trust naming Franklin as the assignee with a date of assignment of August 31, 2007. (*Id.* at  
10 ¶ 18, Ex. E.) Plaintiffs allege that these assignments of the deed of trust were out of order. (*Id.* at ¶  
11 19.) On September 12, 2007, Defendants LaSalle and Merrill Lynch, along with Cal-Western  
12 Reconveyance Corporation (“Cal-Western”), caused to be recorded a notice of default on the Subject  
13 Property. (*Id.* at ¶ 20, Ex. F.) On February 1, 2008, Defendants recorded a Notice of Trustee’s Sale,  
14 setting the sale date for February 20, 2008. (*Id.* at ¶ 22, Ex. G.) The Subject Property was sold at the  
15 trustee’s sale to Defendants LaSalle and Merrill Lynch. (*Id.* at ¶ 23.)

16 Plaintiffs’ original complaint was removed from state court on January 5, 2010. (Doc. 1.) On  
17 February 5, 2010, Plaintiffs filed a First Amended Complaint which this Court subsequently dismissed  
18 without prejudice. (Doc. 11.) Plaintiffs filed the SAC on May 19, 2010. (Doc. 12.) The SAC asserts  
19 six claims for relief: 1) to set aside sale; 2) to cancel trustee’s deed; 3) quiet title; 4) unjust enrichment;  
20 5) declaratory relief; and 6) accounting. Defendants filed motions to dismiss and strike on June 7,  
21 2010, and a motion to dissolve the preliminary injunction on June 23, 2010. (Docs. 13, 15.) Plaintiffs  
22 filed an opposition to each motion and Defendants filed a reply to each. (Docs. 17-20.)

## 23 II.

### 24 LEGAL STANDARD

25 A party may move to dismiss a claim under Rule 12(b)(6) if the claimant fails to state a claim  
26 upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The Federal Rules require a pleading to  
27 include a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.  
28 R. Civ. P. 8(a)(2). The Supreme Court, however, recently established a more stringent standard of

1 review for pleadings in the context of 12(b)(6) motions to dismiss. *See Ashcroft v. Iqbal*, \_\_\_ U.S.  
2 \_\_\_, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). To survive a motion  
3 to dismiss under this new standard, “a complaint must contain sufficient factual matter, accepted as  
4 true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 129 S. Ct. at 1949 (quoting  
5 *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content  
6 that allows the court to draw the reasonable inference that the defendant is liable for the misconduct  
7 alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). “Determining whether a complaint states a plausible  
8 claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its  
9 judicial experience and common sense.” *Id.* at 1950 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d  
10 Cir. 2007)). In *Iqbal*, the Court began this task “by identifying the allegations in the complaint that  
11 are not entitled to the assumption of truth.” *Id.* at 1951. It then considered “the factual allegations in  
12 respondent’s complaint to determine if they plausibly suggest an entitlement to relief.” *Id.*

### 13 III.

### 14 DISCUSSION

15 Plaintiffs contend that there was a mis-assignment of the deed of trust, that the promissory note  
16 and the deed of trust were not properly assigned together, and that Defendants violated a pooling and  
17 service agreement. Plaintiffs further contend that Defendants have been unjustly enriched by receipt  
18 of payments from an insurance policy and that an accounting of the remaining balance owed to  
19 Defendants is necessary. Plaintiffs assert that the SAC contains sufficient facts and allegations to put  
20 Defendants on notice of the claims against them. In contrast, Defendants contend that Plaintiffs have  
21 failed to allege tender, that neither a recording of the assignment of the deed of trust nor possession  
22 of the promissory note was necessary for the foreclosure to occur, and that the allegations regarding  
23 the pooling and service agreement are inadequately pled. Defendants further contend that Plaintiffs  
24 allege no facts supporting an accounting claim, that Plaintiffs’ claim for unjust enrichment does not  
25 allege an inadequate remedy at law, and that Plaintiffs have failed to allege facts supporting their claim  
26 that any enrichment of Defendants was in fact unjust.

27 Assuming that all factual allegations contained in the SAC are true and construing them in the  
28 light most favorable to Plaintiffs, the SAC does not provide sufficient notice to Defendants to enable

1 Defendants to respond to Plaintiffs’ claims and fails to state “a claim for relief that is plausible on its  
2 face.” “Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
3 statements, do not suffice.” *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555). Furthermore,  
4 as Plaintiffs have had ample opportunity to adequately plead claims against Defendants, leave to  
5 amend will not be granted. Accordingly, the Court dismisses Plaintiffs’ SAC with prejudice.  
6 Nevertheless, the Court addresses Defendants’ arguments as to each individual claim.

7 **A. Challenges to the Non-Judicial Foreclosure Proceeding**

8 Defendants contend that Plaintiffs’ First, Second, Third, and Fifth claims to set aside the sale,  
9 to cancel the trustee’s deed, to quiet title, and for declaratory relief, respectively, all of which seek to  
10 challenge the non-judicial foreclosure proceeding, fail because Plaintiffs have failed to allege tender.  
11 “A valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a  
12 voidable sale under a deed of trust.” *Karlsen v. Am. Sav. & Loan Ass’n.*, 15 Cal. App. 3d 112, 117  
13 (1971). Although Plaintiffs have alleged they are “willing and able to tender any amounts to the real  
14 and true owners of the original promissory note upon proof that the note is in the lawful possession  
15 of the true . . . owners and upon any credits paid by insurance in the event of a default,” such  
16 conditional allegation is insufficient to support a claim for relief challenging a non-judicial foreclosure  
17 sale. (SAC ¶ 48.) For an offer of tender to be valid, it must be unconditional. *Karlsen*, 15 Cal. App.  
18 3d at 118-20. Although the requirement of tender may be waived “where it would be inequitable to  
19 exact such offer of the party complaining of the sale,” Plaintiffs have failed to allege facts in the SAC  
20 showing that requiring tender in the instant action would be inequitable. *Humboldt Sav. Bank v.*  
21 *McCleverty*, 161 Cal. 285, 291 (1911) (citation omitted). Accordingly, Plaintiffs’ failure to allege  
22 unconditional tender is fatal to their claims seeking to challenge the non-judicial foreclosure  
23 proceeding. Despite this, the Court briefly addresses the allegations made by Plaintiffs in support of  
24 such claims.

25 Plaintiffs allege in the SAC that Defendants had no authority to foreclose on the Subject  
26 Property because none of Defendants is in possession of the original promissory note underlying the  
27 loan at issue. (SAC ¶¶ 24, 26.) However, in the case of a non-judicial foreclosure sale pursuant to a  
28 power of sale contained in a deed of trust, no party needs to physically possess the promissory note

1 for the foreclosure to occur. *See* Cal. Civ. Code § 2924(a)(1); *see also* *Harrington v. Home Capital*  
2 *Funding, Inc.*, No. 08cv1579 BTM (RBB), 2009 WL 514254, at \* 4 (S.D. Cal. Mar. 2, 2009) (“There  
3 is no requirement that the original note be in possession of or produced by the party filing the notice  
4 of default or giving the notice of sale.”). To the extent Plaintiffs allege that the deed of trust and  
5 promissory note were not properly assigned or transferred together, the assignments attached as  
6 exhibits to the SAC by Plaintiffs indicate that each assignment was for both the deed of trust and the  
7 note. (SAC Ex. D, Ex. E.)

8 Plaintiffs also allege that there is a discrepancy in the dates of the assignments of the deed of  
9 trust that renders the assignment invalid. (SAC ¶ 19.) “[California] Civil Code sections 2924 through  
10 2924k provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale  
11 pursuant to a power of sale contained in a deed of trust.” *Moeller v. Lien*, 25 Cal. App. 4th 822, 830  
12 (1994). Nothing in this comprehensive framework requires the assignment of a deed of trust to be  
13 recorded in order for a non-judicial foreclosure to occur. Rather, “an agent for the mortgagee or  
14 beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee,  
15 or an agent of that substituted trustee” constitutes a “person authorized to record the notice of default  
16 or the notice of sale”. Cal. Civ. Code § 2924b(b)(4). On September 10, 2007, a Substitution of  
17 Trustee was executed naming Cal-Western as the trustee under the subject deed of trust.<sup>1</sup> Cal-Western  
18 was thus authorized to subsequently record the notice of default and the notice of trustee’s sale and  
19 to proceed with the non-judicial foreclosure proceeding.

20 Plaintiffs further allege that Defendants have violated a pooling and service agreement. (SAC  
21 ¶¶ 27-30.) Plaintiffs’ allegations, however, fail to identify the terms of the agreement or how such  
22 alleged violations would entitle Plaintiffs to relief. Accordingly, the allegations regarding the pooling  
23 and service agreement are insufficient to support a plausible claim for relief.

24 For each of the above-stated reasons, Plaintiffs have failed to establish that there is a present  
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26 <sup>1</sup> In support of their motion to dismiss, Defendants requested that the Court take judicial  
27 notice of 1) this Court’s prior Order granting Defendants’ motion to dismiss Plaintiffs’ First Amended  
28 Complaint in the present action, dated April 30, 2010, and 2) the Substitution of Trustee recorded in  
the San Diego County Recorder’s office on January 22, 2008. As these documents are matters of  
public record subject to judicial notice under Federal Rule of Evidence 201, Defendants’ request for  
judicial notice is granted.

1 and actual controversy between the parties meriting declaratory relief.

2 **B. Unjust Enrichment**

3 Plaintiffs' Fourth claim for relief alleges that "[p]ayments to the defendants under any  
4 insurance policy upon default in payments by the plaintiffs and reacquisition of the SUBJECT  
5 PROPERTY constitute an unjust enrichment to defendants because defendants have been partially or  
6 fully compensated for their losses." (SAC ¶ 52.) The Court construes Plaintiffs' purported claim for  
7 unjust enrichment as an attempt to plead a claim for relief giving rise to a right of restitution. A party  
8 is required to make restitution "if he or she is unjustly enriched at the expense of another. A person  
9 is enriched if the person receives a benefit at another's expense." *McBride v. Boughton*, 123 Cal. App.  
10 4th 379, 389 (2004) (citations and quotations omitted). Plaintiffs have failed to adequately plead facts  
11 showing that any enrichment of Defendants pursuant to an insurance policy was unjust.

12 **C. Accounting**

13 Plaintiffs' Sixth claim for relief seeks an accounting as to all Defendants because "[t]he amount  
14 of money still owed to defendants LASALLE, BANK OF AMERICA, MERRILL LYNCH is unknown  
15 to plaintiffs and cannot be determined without an accounting." (SAC ¶ 61.) An accounting may be  
16 sought "where a fiduciary relationship exists between the parties" or "where . . . the accounts are so  
17 complicated that an ordinary legal action demanding a fixed sum is impracticable." 5 Witkin, Cal.  
18 Proc. 5th (2008) Pleading, § 819. "A suit for an accounting will not lie where it appears from the  
19 complaint that none is necessary or that there is an adequate remedy at law." *St. James Church of*  
20 *Christ Holiness v. Super. Ct. of L.A. County*, 135 Cal. App. 2d 352, 359 (1955).

21 Plaintiffs seek an accounting of "payments received in satisfaction of the promissory note"  
22 based on the belief that Defendants "have been partially or fully compensated by insurance upon the  
23 first default." (SAC ¶ 62.) Plaintiffs allege that "[a]ll defendants are agents, employees and other  
24 fiduciaries of each other as set forth" in the SAC. (SAC ¶ 11.) However, Plaintiffs fail to further  
25 plead facts that sufficiently support the assertion that a fiduciary relationship exists between the  
26 Defendants. Additionally, although Plaintiffs' Opposition to Defendants' Motion to Dismiss claims  
27 that the complex nature of the securitization process warrants an accounting, the SAC itself fails to  
28 allege that the accounting is so complicated that an ordinary legal action demanding a fixed sum is

1 impracticable. Accordingly, it appears from the SAC that no accounting is necessary.

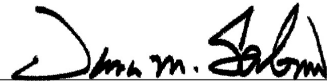
2 **IV.**

3 **CONCLUSION**

4 For the reasons stated above, Defendants' motion to dismiss is granted. Plaintiffs have had  
5 ample opportunity to properly plead a case and have failed to do so. Therefore, Plaintiffs' Second  
6 Amended Complaint is dismissed with prejudice. Defendants' motion to strike is denied as moot.  
7 Finally, in light of the Court's decision, Defendants' motion to dissolve the preliminary injunction is  
8 granted.

9 **IT IS SO ORDERED.**

10 DATED: September 29, 2010



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12 HON. DANA M. SABRAW  
13 United States District Judge  
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