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

DOUGLAS AND JULIE
ALSOBROOK,

Plaintiffs,

vs.

AMERICAN HOME MORTGAGE et
al.,

Defendants.

CASE NO. 12-cv-2151-GPC-
WMC

**ORDER GRANTING
DEFENDANTS' MOTIONS
TO DISMISS**

[DKT. NO. 22]

I. INTRODUCTION

On March 15, 2013, Defendants Mortgage Electronic Registration Systems , Inc. ("MERS") and Ocwen Loan Servicing filed a motion to dismiss Plaintiffs' first amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 22.) On March 27, 2013 Defendant Saxon Mortgage filed a notice joining aforementioned motion. (Dkt. No. 24.) For the reasons set out below, the Court hereby **GRANTS** Defendants' motion to dismiss without prejudice.

II. BACKGROUND

On May 31, 2007, Plaintiffs Douglas and Julie Alsobrook completed a loan for the property located at 4075 Bancroft Drive, La Mesa, California 91941 and the

1 promissory note was secured by a Deed of Trust.¹ The Deed of Trust lists MERS as
2 “the beneficiary under this Security Instrument,” American Home Mortgage as the
3 lender, and Lawyer’s Title as the trustee. On February 12, 2010, a notice of default
4 and election to sell under deed of trust was filed in San Diego County, which
5 showed that Plaintiffs were in default on the aforementioned loan in the amount of
6 \$18,309.78. (Dkt. No. 23, Ex. 2 “Notice of Default.”) On March 16, 2010, MERS
7 assigned all of its rights, title and interest in the Deed of Trust to Saxon Mortgage
8 Services, inc. (Dkt. No. 23, Ex. 3 “Assigned of Deed of Trust.”) On June 14, 2012, a
9 notice of sale was recorded by the Trustee, setting a sale date for July 10, 2012 and
10 indicating an unpaid obligation of \$335,426.42. (Dkt. No. 23, Ex. 6 “Notice of
11 Sale.”) The sale date has been postponed by oral proclamation. (Dkt. No. 23 at 2,
12 “Statement of Facts.”)

13 On August 31, 2012, Plaintiffs brought this pro se action alleging wrongful
14 foreclosure and fraud, seeking injunction and declaratory relief to prevent the
15 foreclosure of their property and seeking to void the Deed of Trust and to quiet title.
16 (Dkt. No. 1.) On February 12, 2013, this Court granted Defendant’s motion to
17 dismiss without prejudice and granted Plaintiffs leave to file an amended complaint.
18 (Dkt. No. 20.) On February 26, 2013, Plaintiffs filed a first amended complaint.
19 (Dkt. No. 21, “FAC.”) The FAC alleges wrongful foreclosure and seeks to quiet title
20 and declaratory relief. (Id.)

21 Plaintiffs assert American Home Mortgage improperly transferred or assigned
22 the promissory note related to their property. (FAC ¶¶ 17-23.) Plaintiffs allege
23 American Home Mortgage failed to properly transfer the deed of trust to the
24 REMIC Trust resulted in a violation of the Pooling and Servicing Agreement. (FAC

26 ¹Pursuant to Federal Rules of Evidence, Rule 201, Defendants have requested the Court take
27 judicial notice of legal documents underpinning Plaintiffs’ entire action. As Plaintiffs’ complaint fails
28 to provide the relevant facts regarding the foreclosure of their property in question, the Court, having
reviewed the exhibits, finds that the information can be accurately and readily determined from reliable
sources. Accordingly, the Court takes judicial notice of Defendants MERS and Ocwen exhibits 1-6.
See Dkt. No. 23.

¶¶ 24-25.) According to Plaintiffs, American Home Mortgage failed to physically deliver the promissory note to an unnamed REMIC trust and therefore “the Deed of Trust is rendered a nullity [since] the Promissory Note itself is not also transferred.” (FAC ¶ 32.) Moreover, Plaintiffs assert that because American Mortgage failed to properly transfer the promissory note and as American Mortgage is now out of business, neither REMIC Trust nor Ocwen Loan Servicing have the legal right to collect mortgage payments from Plaintiffs. (FAC ¶ 43.) Plaintiff further alleges wrongful foreclosure based on the theory that Defendants do not have standing to foreclose on the property because MERS improperly assigned the interest under the Deed of Trust. (FAC ¶¶ 50-52.) Plaintiffs also assert Defendants have failed to comply with California Civil Code §§ 2932.5 because there was no recorded assignment of deed of trust. (FAC ¶¶ 53-56.)

Defendants Ocwen Loan Servicing and Mortgage Electronic Registration Systems, Inc. (“MERS”) move to dismiss Plaintiffs’ first amended complaint. (Dkt. No. 22.) Defendants contend Plaintiffs fail to state a claim for wrongful foreclosure as a matter of law. (Dkt. No. 22 at 2.) Defendants further argue that Plaintiffs lack standing to challenge securitization of their loan and lack standing to challenge the wrongful foreclosure based on the MERS assignment. (*Id.* at 3-5.) Defendants also contend Plaintiff has failed to state a claim to quiet title and declaratory relief. (*Id.* at 5-6.)

III. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of a complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984); see Neitzke v. Williams, 490 U.S. 319, 326 (1989) (“Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law.”). Alternatively, a complaint may be dismissed where it presents a cognizable legal theory yet fails to

1 plead essential facts under that theory. Robertson, 749 F.2d at 534. While a plaintiff
2 need not give “detailed factual allegations,” a plaintiff must plead sufficient facts
3 that, if true, “raise a right to relief above the speculative level.” Bell Atlantic Corp.
4 v. Twombly, 550 U.S. 544, 545 (2007). “To survive a motion to dismiss, a
5 complaint must contain sufficient factual matter, accepted as true, to ‘state a claim
6 to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
7 (quoting Twombly, 550 U.S. at 547). A claim is facially plausible when the factual
8 allegations permit “the court to draw the reasonable inference that the defendant is
9 liable for the misconduct alleged.” Id. In other words, “the non-conclusory ‘factual
10 content,’ and reasonable inferences from that content, must be plausibly suggestive
11 of a claim entitling the plaintiff to relief.” Moss v. U.S. Secret Service, 572 F.3d
12 962, 969 (9th Cir. 2009). “Determining whether a complaint states a plausible claim
13 for relief will . . . be a context-specific task that requires the reviewing court to draw
14 on its judicial experience and common sense.” Iqbal, 556 U.S. at 679.

15 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume
16 the truth of all factual allegations and must construe all inferences from them in the
17 light most favorable to the nonmoving party. Thompson v. Davis, 295 F.3d 890, 895
18 (9th Cir. 2002); Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996).
19 Legal conclusions, however, need not be taken as true merely because they are cast
20 in the form of factual allegations. Ileto v. Glock, Inc., 349 F.3d 1191, 1200 (9th Cir.
21 2003); W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). When ruling
22 on a motion to dismiss, a court may consider the facts alleged in the complaint,
23 documents attached to the complaint, documents relied upon but not attached to the
24 complaint when authenticity is not contested, and matters of which the court takes
25 judicial notice. Lee v. Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001).

26 **IV. DISCUSSION**

27 **A. Quiet Title**

28 Plaintiffs have failed to state a claim to quiet title. Under California Code of

1 Civil Procedure, Plaintiffs are required to state: (a) a legal description of the real
2 property and its street address, (b) Title as to which a determination is sought and
3 the basis of the title, (c) adverse claims to the title, (d) the date as to which the
4 determination is sought, and (e) a prayer for the determination of the title of the
5 Plaintiff against the adverse claims. Cal. Civ. Pro. Code §761.020. Moreover, to
6 quiet title the debt must be discharged. Aguilar v. Bocci, 39 Cal. App. 3d 475, 477
7 (1979)(“[A]ppellant can[not] quiet title without discharging his debt . . . the cloud
8 upon his title persists until the debt is paid”)(internal citations omitted). Here,
9 Plaintiffs allege that because American Home Mortgage did not properly sell or
10 transfer the promissory note no party can enforce the terms of the loan and Plaintiffs
11 have no further debt obligations on the loan. (FAC ¶¶ 38, 47.) This allegation fails
12 to state a proper claim to quiet title. Plaintiffs allegations do not establish who has
13 legal basis to the title nor do Plaintiffs show the discharge of loan debt. As such,
14 Plaintiffs fail to state a claim to quiet title.

15 **B. Wrongful Foreclosure**

16 Defendants assert Plaintiffs lack standing to challenge securitization of their
17 loan, and therefore cannot state a claim for wrongful disclosure. (Dkt. No. 22 at 3-
18 4.) Plaintiffs do not challenge these arguments in their response. (Dkt. No. 25.)

19 The Court finds Plaintiffs lack standing to challenge the securitization of their
20 loan. As an initial matter, Plaintiffs allege the Defendants do not have authority to
21 foreclose on their home. Courts have rejected similar claims that corporations do
22 not have the authority to foreclose because the original mortgage lender
23 “improperly” packaged and sold the original loan. Lane v. Vitek Real Estate
24 Industries Group, 713 F.Supp. 2d 1092 (E.D. Cal. 2010)(“The argument that parties
25 lose interest in a loan when it is assigned to a trust pool has also been rejected by
26 numerous district courts.”); Benham v. Aurora Loan Services, 2009 WL 2880232 at
27 *3 (N.D. Cal. Sept.1, 2009) (“Other courts in this district have summarily rejected
28 the argument that companies like MERS lose their power of sale pursuant to the

1 deed of trust when the original promissory note is assigned to a trust pool.”). Here,
2 Plaintiffs allege the “transfer of beneficial ownership in the Deed of Trust to any
3 third party as result of the execution of said assignment by MERS or any agent of
4 MERS is invalid.” (FAC ¶ 52.) The Court finds the allegation is baseless and fails
5 to properly state a wrongful foreclosure claim.

6 Moreover, Plaintiffs have not asserted that they are party to the loan
7 securitization agreement. Courts have also rejected claims challenging foreclosure
8 when Plaintiffs are not a party to the securitization agreement. Bascos v. Fed. Home
9 Loan Mortgage Corp., CV 11-3968-JFW JCX, 2011 WL 3157063 (C.D. Cal. July
10 22, 2011)(“Plaintiff has no standing to challenge the validity of the securitization of
11 the loan as he is not an investor of the loan trust”). Courts have also held that
12 homeowner-plaintiff lacks standing when challenging the assignment of a deed of
13 trust because “only someone who suffered a concrete and particularized injury that
14 is fairly traceable to the substitution can bring an action to declare the assignment . .
15 . void.” Carollo v. Vericrest Fin., Inc., 2012 WL 4343816 (N.D. Cal. Sept. 21,
16 2012) (citing Javaheri v. JPMorgan Chase Bank, N.A., 2012 WL 3426278 at *6
17 (C.D. Cal. Aug. 13, 2012). Plaintiffs FAC does not allege that they were party to
18 the loan securitization agreement nor have they asserted such a “concrete or
19 particularized injury” related to the transfer of the promissory note. As such, the
20 Court finds Plaintiffs lack to standing to challenge the securitization of their loan.

21 As an additional matter, California courts have rejected the “holder of note”
22 theory that Plaintiffs rely upon. In essence, Plaintiffs argue that American Home
23 Mortgage improperly sold and transferred the promissory note, and therefore there
24 is no ability to determine the actual holder of the note. California’s nonjudicial
25 foreclosure scheme is set forth in California Civil Code sections 2924 through
26 2924(k), which “provide a comprehensive framework for the regulation of a
27 nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of
28 trust.” Moeller v. Lien, 25 Cal.App. 4th 822, 830 (1994). California appellate courts

1 have “refused to read any additional requirements into the non-judicial foreclosure
2 statute.” Id. at 830. The California Superior court recently affirmed this approach
3 in Gomes v. Countrywide Home Loans, Inc., stating “the recognition of the right to
4 bring a lawsuit to determine a nominee's authorization to proceed with foreclosure
5 on behalf of the noteholder would fundamentally undermine the nonjudicial nature
6 of the process and introduce the possibility of lawsuits filed solely for the purpose
7 of delaying valid foreclosures.” Gomes, 192 Cal. App. 4th 1149, 1155 (2011),
8 review denied (May 18, 2011). To the extent that Plaintiffs rely upon this theory, the
9 wrongful foreclosure claim also fails.

10 **C. Failure to Comply with California Civil Code § 2932.5**

11 Plaintiff has not sufficiently alleged Defendants have violated California
12 Civil Code § 2932.5. This section provides: “Where a power to sell real property is
13 given to a mortgagee, or other encumbrancer, in an instrument intended to secure
14 the payment of money, the power is part of the security and vests in any person who
15 by assignment becomes entitled to payment of the money secured by the instrument.
16 The power of sale may be exercised by the assignee if the assignment is duly
17 acknowledged and recorded.” Cal. Civ. Code § 2932.5. Lenders must contact the
18 borrower by phone or in person to “assess the borrower’s financial situation and
19 explore options for the borrower to avoid foreclosure.” Here, Plaintiffs allege
20 Defendants have not complied with Cal. Civ. C. § 2932.5 for failure to record a
21 document in the “public chain of title reflecting from whom it acquired the
22 beneficial interest in Plaintiffs’ Deed of Trust.” (FAC ¶ 56.) Defendants argue that
23 § 2932.5 is inapplicable to deeds of trust. (Dkt. No. 22 at 5.)

24 Plaintiffs fail to allege violation of Cal. Civ. Code § 2932.5. “It has been
25 established since 1908 that this statutory requirement that an assignment of the
26 beneficial interest in a debt secured by real property must be recorded in order for
27 the assignee to exercise the power of sale applies only to a mortgage and not to a
28 deed of trust. Calvo v. HSBC Bank USA, N.A., 199 Cal. App. 4th 118, 122(2011),

1 review denied (Jan. 4, 2012). Here, Plaintiffs allegations are entirely based on the
2 improper transfer of the deed of trust, on the underlying mortgage that created the
3 lien. As such, the Court finds Plaintiff has failed to state a violation of Cal. Civ.
4 Code § 2932.5.

5 **D. Declaratory Relief**

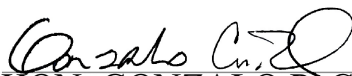
6 The Declaratory Judgment Act, 28 U.S.C. § 2201, provides that federal courts
7 may issue declaratory judgments only in cases of an “actual controversy.” 28 U.S.C.
8 § 2201. For similar reasons as previously discussed, Plaintiffs have failed to state
9 an “actual controversy” exists for purposes of 28 U.S.C. §2201 (a). As such, the
10 Court finds Plaintiffs have failed to state a claim for declaratory relief.

11 **IV. CONCLUSION**

12 For the foregoing reasons, Defendants motion to dismiss is **GRANTED**
13 **WITHOUT PREJUDICE**. Plaintiffs are granted **LEAVE TO AMEND** the
14 complaint thirty (30) days from the date of this order to address deficiencies noted
15 herein. Defendants are granted twenty (20) days from the date of service of
16 plaintiff’s second amended complaint to file a response thereto. Accordingly, the
17 Court hereby **VACATES** the hearing date scheduled for Friday, May 31, 2013.

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19 **IT IS SO ORDERED.**

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21 DATED: May 30, 2013

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23 HON. GONZALO P. CURIEL
24 United States District Judge
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