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

PETER R. SOLLENNE and  
PATRICIA D. SOLLENNE, as  
Trustees for the Sollenne Family  
Trust, dated December 12, 2007,  
Plaintiffs,  
  
vs.  
  
U.S. BANK NATIONAL  
ASSOCIATION, as Trustee for  
Lehman XS Trust Mortgage Pass-  
Through Certificates, Series 2007-  
18N; NATIONSTAR MORTGAGE,  
LLC; and DOES 1-10, inclusive,  
  
Defendants.

CASE NO. 12-CV-2977-BEN (WVG)  
**ORDER GRANTING MOTION TO  
DISMISS**  
[Docket No. 19]

Before this Court is a Motion to Dismiss (Docket No. 19) filed by Defendants  
Nationstar Mortgage LLC (Nationstar) and U.S. Bank National Association (USBNA).  
For the reasons stated below, the motion is **GRANTED**.

**I. Background**

On March 28, 2013, Peter R. Sollenne and Patricia D. Sollenne (Plaintiffs),  
acting in their capacities as trustees for the “Sollenne Family Trust, dated December  
12, 2007,” and proceeding pro se, filed a First Amended Complaint (FAC) alleging  
misconduct relating to a mortgaged property in Carlsbad, California. (Docket No. 17).

Plaintiffs allege that they executed a note and deed of trust, in their personal

1 capacities, with Washington Mutual Bank (WaMu) as the lender in May 2004. (FAC  
2 ¶¶ 12-13). Plaintiffs refinanced with Countrywide Home Loans in May 2006, (*id.* ¶  
3 14), and again with CMG Mortgage, Inc. (CMG) in June 2007, (*id.* ¶ 15). At that time  
4 they were informed their servicer would be Aurora Loan Servicing. (*Id.*). In 2012,  
5 Nationstar identified themselves as the servicer of the loan. (*Id.* ¶ 16). On January 22,  
6 2008, Plaintiffs deeded their interest in the property into the Sollenne Family Trust,  
7 dated December 12, 2007. (*Id.* ¶ 17).

8 Plaintiffs allege that their loan was bundled into a group of notes and sold as a  
9 derivative “mortgage backed security,” to Lehman XS Trust Mortgage Pass-Through  
10 Certificates, Series 2007-18N (“Trust”). (*Id.* ¶ 18). They allege that, accordingly, none  
11 of the Defendants own the loan or the note, that they cannot be a beneficiary under the  
12 deed of trust, or a lawfully appointed trustee under the deed of trust, and that they have  
13 no right to declare a default, cause notices of foreclosure sale to issue or be recorded,  
14 or to foreclose on their interest in the property. (*Id.*) USBNA is alleged to be the  
15 trustee for Trust, and Nationstar is alleged to be Trust’s servicer. (*Id.* ¶¶ 19-20).

16 Plaintiffs also allege that the procedures in the Pooling and Services Agreement  
17 (PSA) for the Trust have not been followed. (*Id.* ¶ 26). They allege that the note and  
18 the mortgage, the debt or obligation evidenced by the note and deed of trust were not  
19 properly assigned and transferred from CMG (the originator) to USBNA (the trustee  
20 of the Trust) in accordance with the PSA. (*Id.* ¶¶ 28-31). Plaintiffs claim the PSA was  
21 violated by a failure to complete the assignment before the closing date, and a failure  
22 to provide a complete and unbroken chain of transfers and assignments. (*Id.* ¶¶ 30-31).  
23 Plaintiffs claim that no perfected chain of title exists transferring the mortgage loan  
24 from CMG to the Trust. (*Id.* ¶ 34).

25 In the alternative, Plaintiffs claim that Nationstar alleges to be the holder and  
26 owner of the note and beneficiary of the deed of trust, but that the note identifies the  
27 originator as the holder, and there is no perfected chain of title between CMG and  
28 Nationstar. (*Id.* ¶ 35).

1 Plaintiffs claim that no documents or records have been produced to demonstrate  
2 the note or deed of trust was properly transferred prior to the closing date, and that any  
3 documents transferring it after the closing date are void under the PSA. (*Id.* ¶¶ 36-37).

4 Plaintiffs list the following deficiencies which they contend render invalid any  
5 security interest in the deed of trust: 1) the separation of title, ownership and interest  
6 in the note and deed of trust; 2) the lack of assignments to or from the intervening  
7 entities when the loan was sold; 3) the failure to assign and transfer the beneficial  
8 interest in the DOT to Defendants in accordance with the PSA; 4) the failure to  
9 endorse, assign, and transfer the note to USBNA in accordance with the PSA and  
10 California law; 5) that there were no assignments of beneficiary or endorsements of the  
11 note to each intervening entity; and 6) Defendants violated terms of the PSA. (*Id.* ¶  
12 48).

13 They claim no party to the securitized transaction or any Defendant holds a  
14 perfected and secured claim in the property, and that all Defendants are estopped and  
15 precluded from asserting a secured or unsecured claim against the property. Plaintiffs  
16 also claim that the only individuals with standing to foreclose on the note would be the  
17 certificate holders of the trust, rather than Defendants, since the certificate holders are  
18 “the end users and pay taxes on their interest gains” and Defendants were paid in full.  
19 (*Id.* ¶ 52).

20 Plaintiffs claim California law requires that a transfer of mortgage paper as  
21 collateral requires the owner to physically deliver the note to the transferee. (*Id.* ¶¶ 55,  
22 58). They also claim that the note must be endorsed to be transferred. (*Id.* ¶ 56).

23 Plaintiffs allege three causes of action: 1) quiet title; 2) declaratory relief to  
24 determine the validity of the deed of trust on the date the Note was assigned and to  
25 determine if any defendant has authority to foreclose; and 3) injunctive relief to stop  
26 further collection activity, including the sale of the property. Plaintiffs’ desired  
27 remedies also include a request for an order compelling the Defendants to transfer or  
28 release legal title and any alleged encumbrances, and possession of the property to

1 Plaintiffs. (*Id.* at 17).

## 2 **II. Legal Standard**

3 Under Federal Rule of Civil Procedure 12(b)(6), dismissal is appropriate if,  
4 taking all factual allegations as true, the complaint fails to state a plausible claim for  
5 relief on its face. FED. R. CIV. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
6 556-57 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (requiring plaintiff  
7 to plead factual content that provides “more than a sheer possibility that a defendant  
8 has acted unlawfully”). Under this standard, dismissal is appropriate if the complaint  
9 fails to state enough facts to raise a reasonable expectation that discovery will reveal  
10 evidence of the matter complained of, or if the complaint lacks a cognizable legal  
11 theory under which relief may be granted. *Twombly*, 550 U.S. at 556.

## 12 **III. Discussion**

### 13 A. Plaintiffs Cannot Challenge Defendants to Prove Authority to Foreclose 14 Without Making Specific Factual Allegations

15 California courts have rejected efforts to force defendants to bear the burden of  
16 proving that a proper assignment has occurred. California’s nonjudicial foreclosure  
17 statutes are a “comprehensive scheme” designed 1) to provide a quick, inexpensive and  
18 efficient remedy against defaulting parties, 2) to protect the debtor/trustor from  
19 wrongful loss, and 3) to ensure that a sale is final between the parties and conclusive  
20 as to a bona fide purchaser. *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th  
21 256, 270 (1st Dist. 2011) (citing *Moeller v. Lien*, 25 Cal. App. 4th 822, 830 (2d Dist.  
22 1994)). A nonjudicial foreclosure sale is presumed to have been conducted regularly,  
23 and the burden of proof rests with the party attempting to rebut this presumption. *Id.*  
24 (citations omitted). Accordingly, where a plaintiff contends that a sale is invalid  
25 because the party had no authority to conduct the sale, the burden is on the plaintiff to  
26 affirmatively plead facts showing an impropriety. *Id.* The burden has been placed on  
27 defendants, even when the foreclosure sale has not yet occurred. *See McCloskey v.*  
28 *Land Home Finan. Servs.*, No. 12-cv-2775, 2012 WL 3583347, at \*2 (N.D. Cal. Aug.

1 20, 2012).

2 Plaintiffs cannot simply bring an action to require the foreclosing party to  
3 demonstrate its authority to foreclose in court. *Silga v. Mortg. Elec. Registration Sys.,*  
4 *Inc.*, 219 Cal. App. 4th 75, 84-85 (2d Dist. 2013) (citations omitted). Plaintiffs must  
5 provide some specific factual basis for their claims that Defendants lack authority. *See*  
6 *id.* Similarly, Plaintiffs cannot simply assert that there is no proper chain of title, or  
7 that it was not properly transferred or assigned, without providing some basis from  
8 which this Court could conclude that this is more than speculation. *See Iqbal*, 556 U.S.  
9 at 678; *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 1155-56  
10 (2011) (no judicial action to test whether person initiating foreclosure has authority to  
11 do so, where no specific factual basis was asserted for alleging that foreclosure was  
12 initiated by the wrong party).

13 As discussed below, the specific claims proffered by Plaintiffs fail. Plaintiffs’  
14 efforts to require Defendants to “prove and certify” must therefore fail. (FAC ¶ 43).

15 B. Assignment was Proper Under California Law

16 Plaintiffs allege that the original “holder” of the note and deed of trust was  
17 CMG. (*Id.* ¶¶ 28, 34-35). Plaintiffs contend at various points in their FAC that the  
18 assignment of the note and deed of trust was not valid under California law. (*Id.* ¶¶ 38,  
19 48d, 55, 56, 58). For instance, Plaintiffs contend that the parties were required to  
20 endorse and physically transfer the original note. (*Id.* ¶¶ 55, 56, 58).

21 Defendants contend that there was a valid assignment under California law, and  
22 they are therefore authorized to foreclose upon the property. Defendants rely on  
23 California Civil Code § 2932.5, which states:

24 Where a power to sell real property is given to a mortgagee, or other  
25 encumbrancer, in an instrument intended to secure the payment of money,  
26 the power is part of the security and vests in any person who by  
27 assignment becomes entitled to payment of the money secured by the  
instrument. The power of sale may be exercised by the assignee if the  
assignment is duly acknowledged and recorded.

28 Defendants contend that the assignment was duly acknowledged and recorded, and

1 therefore the assignee could exercise the power of sale. (Mot. at 5).

2 Review of case law indicates that the recordation requirement of this section  
3 applies only to mortgages, and not to deeds of trust. *Caballeros v. Bank of Am.*, 468  
4 Fed. App'x 709, 710 (9th Cir. 2012). The Ninth Circuit has affirmed a district court's  
5 holding that the requirement of a recording prior to a foreclosure sale does not apply  
6 to a deed of trust. *Caballero v. Bank of Am.*, No. 10-cv-2973, 2010 WL 4604031, at  
7 \*3 (N.D. Cal. Nov. 4, 2010), *affirmed by Cabellero*, 468 Fed. App'x 709; *see also*  
8 *Hayes v. EMC Mortg. Corp.*, 205 Cal. App. 4th 329, 336 (2012) (trustee of deed of  
9 trust may initiate foreclosure irrespective of whether an assignment of the beneficial  
10 interest is recorded).

11 In the present case, Defendants do offer a recorded assignment. (RJN, Exh. 15).  
12 Defendants submitted a variety of documents relating to the subject property and have  
13 asked that this Court take judicial notice of their contents. (RJN). In ruling on a  
14 motion to dismiss for failure to state a claim, "a court may generally consider only  
15 allegations contained in the pleadings, exhibits attached to the complaint, and matters  
16 properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir.  
17 2007). Federal Rule of Evidence 201 states that a judicially-noticable fact must be "not  
18 subject to reasonable dispute in that it is either (1) generally known within the  
19 territorial jurisdiction of the trial court or (2) capable of accurate and ready  
20 determination by resort to sources whose accuracy cannot reasonably be questioned."  
21 A recorded document is a public record, and its existence is easily verifiable and not  
22 subject to reasonable dispute. *See Pantoja v. Countrywide Home Loans, Inc.*, 640 F.  
23 Supp. 2d 1177, n.12 (N.D. Cal. 2009); *W. Fed. Sav. & Loan Ass'n v. Heflin Corp.*, 797  
24 F. Supp. 790, 792 (N.D. Cal. 1992).

25 Although Plaintiffs' claims are not always clear, they allege that the original  
26 "holder and owner" of the note was CMG, that the loan was allegedly sold into the  
27 Trust, and that there is no perfected chain of title between CMG and either Nationstar  
28 or USBNA. (FAC ¶¶ 34-35). Plaintiffs appear to dispute the validity of the

1 promissory note, and “reject” it as it does not provide evidence as to the identity of the  
2 current holder of the note. (Opp. at 8.) However, Plaintiffs nowhere appear to dispute  
3 the authenticity of the assignment document (RJN, Exh. 15), or the Deed of Trust,  
4 (RJN, Exh. 10) and provide no basis for doing so. Plaintiffs appear to contend that  
5 Defendants were required to take other steps for a valid assignment. Regardless, these  
6 documents are part of the public record, and this Court may properly take judicial  
7 notice of the fact that these documents have been recorded. This Court therefore takes  
8 judicial notice of Exhibits 10 and 15.

9       The Deed of Trust lists CMG as the lender and MERS as the beneficiary and the  
10 nominee for the lender. (RJN, Exh. 10). The assignment document, acknowledged by  
11 MERS as nominee for CMG, assigns the loan and deed of trust to Defendant  
12 Nationstar. (RJN, Exh. 15).

13       To the extent Plaintiffs contest the assignment on the ground that additional  
14 steps must be taken, such as endorsement and production of the original note, their  
15 claims must fail. California law does not require production of the note in order to  
16 pursue nonjudicial foreclosure. *Nguyen v. Wells Fargo Bank, N.A.*, 749 F. Supp. 2d  
17 1022, 1035 (N.D. Cal. 2010). Even if Defendants were required to take other steps for  
18 the transfer to be valid, Plaintiffs must provide specific factual allegations, and cannot  
19 simply challenge Defendants to produce the note and prove any other requirements are  
20 satisfied. For instance, although Plaintiffs allege that the note must be endorsed and  
21 physically delivered, they neither provide authority for this requirement, nor provide  
22 factual allegations from which this Court could conclude that the claim that the note  
23 was not endorsed and transferred is anything other than speculation. *See Iqbal*, 556  
24 U.S. at 678; *Gomes*, 192 Cal. App. 4th at 1155-56.

25       Plaintiffs have failed to plead facts from which this Court could conclude that  
26 California law was not complied with in the assignment of the mortgage loan.  
27 Plaintiffs’ claims based upon a failure to comply with California law are therefore  
28 **DISMISSED WITHOUT PREJUDICE.**

1           C. Securitization

2           Contrary to Plaintiffs’ claims, Defendants may enforce the note, even if it has  
3 been securitized. Plaintiffs make a variety of claims related to the securitization. (FAC  
4 ¶¶ 18, 21, 25). Among other things, they claim that none of the defendants own the  
5 loan, that they are impermissibly characterizing it as a security and a negotiable  
6 instrument, and that they cannot qualify as a real party in interest. (*Id.*)

7           However, it is well established that securitization does not prevent the  
8 beneficiary from enforcing the note and deed of trust. Many district courts have  
9 considered and rejected this argument. *See, e.g., McGough v. Wells Fargo Bank, N.A.*,  
10 No. C12-0050, 2012 WL 2277931, at \*4 (N.D. Cal. June 18, 2012); *Lane v. Vitek Real*  
11 *Estate Indus. Grp.*, 713 F. Supp. 2d 1092, 1099 (E.D. Cal. 2010); *Benham v. Aurora*  
12 *Loan Servs.*, No. 09-2059, 2009 WL 2880232, at \*3 (N.D. Cal. Sept. 1, 2009); *Hafiz*  
13 *v. Greenpoint Mortg. Funding, Inc.*, 652 F. Supp. 2d 1039, 1042-43 (N.D. Cal. 2009).

14 Plaintiffs’ claims premised on the argument that the loan was securitized are therefore  
15 **DISMISSED WITH PREJUDICE.**

16           D. Pooling and Servicing Agreement

17           Many of Plaintiffs’ arguments are premised on the argument that the PSA was  
18 not followed, and therefore the securitization was improper. It is well established that  
19 where a plaintiff is not an investor in the PSA, the plaintiff has no standing to challenge  
20 violations of the PSA’s terms. *See, e.g., Sabherwal v. Bank of N.Y. Mellon*, No. 11-cv-  
21 2874, 2013 WL 101407, at \*7 (S.D. Cal. Jan. 8, 2013) (dismissing claims based on  
22 theory securitization was improper because defendant failed to deposit notes before  
23 closing date in violation of securitization agreement); *McGough*, 2012 WL 2277932,  
24 at \*4; *Sami v. Wells Fargo Bank*, No. C12-108, 2012 WL 967051, at \*5-6 (N.D. Cal.  
25 Mar. 21, 2012) (dismissing claims based on theory that Wells Fargo failed to comply  
26 with PSA).

27           Plaintiffs’ claims premised upon the failure to comply with the PSA are therefore  
28 **DISMISSED WITH PREJUDICE.**



1           E. MERS' Authority to Assign the Note and Deed of Trust

2           Plaintiffs claim in their Response that MERS has no authority to assign the note  
3 and deed of trust. Specifically, they argue that MERS has no beneficial interest in the  
4 note, does not physically possess the note, does not receive income from the payments,  
5 and is an employee of the servicer. (Opp. at 12). Plaintiffs argue that the “actual  
6 owner” has not executed an assignment. (*Id.*) However, California courts have  
7 concluded that MERS has authority to assign a deed of trust in its capacity as nominee  
8 beneficiary. *Fontenot*, 198 Cal. App. 4th at 270-71 (MERS as nominee for lender  
9 could act with authority to assign interest in note, the burden is on the plaintiff to  
10 demonstrate lack of authority); *Herrera v. Fed. Nat'l Mort. Assoc.*, 205 Cal. App. 4th  
11 1495, 1505-06 (4th Dist. 2012) (same). Plaintiffs' claims related to MERS' authority  
12 to assign the note or deed of trust are therefore **DISMISSED**.

13           F. Separation of Note and Deed of Trust

14           Plaintiffs argue that the note and deed of trust have been improperly separated.  
15 (FAC ¶¶ 38, 39, 48(a)). Plaintiffs' allegations are not entirely clear, but to the extent  
16 that they are based upon Defendants' alleged failure to produce the documents to prove  
17 a proper assignment, they must fail as described above. The Ninth Circuit has  
18 explicitly rejected any argument that a note and deed of trust are impermissibly split  
19 because a party was designated as the payee of the note but listed MERS, as its  
20 nominee, as the beneficiary under the deed of trust. *In re Green*, Nos. CC-11-MkHHA,  
21 ND 09-1164-RR, 2012 WL 4857552, at \*8 (9th Cir. BAP Oct. 15, 2012).

22           Plaintiffs must provide some basis from which this Court could conclude that the  
23 note and deed of trust have been impermissibly split. Speculation is insufficient.  
24 Claims related to the separation of the note and the deed are therefore **DISMISSED**.

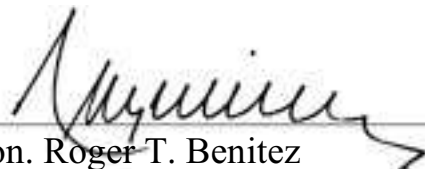
25 **IV. Conclusion**

26           Plaintiffs' claims premised upon the securitization of the loan and violations of  
27 the PSA are **DISMISSED WITH PREJUDICE**. All other claims that Plaintiffs may  
28 be attempting to assert are **DISMISSED WITHOUT PREJUDICE**. Plaintiffs have

1 leave to amend the claims which were dismissed without prejudice. Any Second  
2 Amended Complaint must be filed no later than **thirty (30) days** after this order has  
3 been signed. Plaintiffs are cautioned that they must plead specific factual allegations  
4 from which this Court could conclude that Plaintiffs' claims that Defendants lack  
5 authority are more than speculation. Plaintiffs cannot require Defendants to take any  
6 actions to prove their authority unless such factual allegations are presented.

7 **IT IS SO ORDERED.**

8  
9 DATED: December 13, 2013

10   
11 Hon. Roger T. Benitez  
12 United States District Judge

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