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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 AMOR MEDINA DEL ROSARIO AND
12 ELVIE CANLAS DEL ROSARIO,
13 Plaintiffs,

14 v.

15 WELLS FARGO BANK, NATIONAL
16 ASSOCIATION, AS TRUSTEE FOR
17 THE MERRILL LYNCH MORTGAGE
18 INVESTORS TRUST, SERIES 2006-F1.;
19 PNC MORTGAGE, INC., FKA
20 NATIONAL CITY MORTGAGE
21 COMPANY,

22 Defendants.

Case No.: 3:16-cv-00649-BEN-NLS

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED
COMPLAINT**

23 Defendants Wells Fargo Bank, National Association, as Trustee for the Merrill
24 Lynch Mortgage Investors Trust, Series 2006-F1, and PNC Bank, N.A. (erroneously sued
25 as PNC Mortgage, Inc., FKA National City Mortgage Company) (“Defendants”) have
26 filed a Motion to Dismiss Plaintiffs Amor Medina Del Rosario and Elvie Canlas Del
27 Rosario’s (“Plaintiffs”) First Amended Complaint. (Mot., ECF No. 13.) For the reasons
discussed below, the Motion is **GRANTED**.

1 **BACKGROUND**¹

2 Plaintiffs, proceeding pro se, have filed a complaint, seeking to avoid nonjudicial
3 foreclosure on a piece of residential property at 10685 Brookhollow Court, San Diego,
4 California (the “Subject Property”) that they own and occupy. On October 20, 2016, this
5 Court granted Defendants’ motion to dismiss Plaintiffs’ original complaint on several
6 grounds. Plaintiffs thereafter filed a First Amended Complaint. (FAC, ECF No. 12.)
7 The First Amended Complaint repeats the allegations of the initial complaint.

8 On or about December 29, 2005, Plaintiffs executed a promissory note in the
9 amount of \$499,000 for the Subject Property, secured by a deed of trust. (FAC ¶ 14;
10 Defs.’ Request for Judicial Notice (“RJN”) Ex. C.)² The lender and beneficiary of the
11 deed of trust was National City Mortgage, a division of National City Bank of Indiana,
12 and now known as PNC Mortgage Inc. (*Id.* ¶¶ 15, 17; RJN Ex. C.) National City Bank
13 of Indiana was the named trustee on the note and deed of trust. (*Id.* ¶ 16; RJN Ex. C.)
14 Plaintiffs allege that there has been “no documented assignment of the Note.” (FAC ¶
15 24.)

16 Plaintiffs fell behind on their payments. On August 6, 2009, Cal-Western
17 Reconveyance Company (“Cal-Western”) recorded a Notice of Default. (*Id.* ¶ 76 & Ex.
18 F.) The Notice states that Cal-Western is “either the original trustee, the duly appointed
19 substituted trustee, or acting as agent for the trustee or beneficiary under [the] deed of
20

21 ¹ The Court is not making any findings of fact, but rather, summarizing the relevant
22 allegations of the Complaint for purposes of evaluating Defendants’ Motion to Dismiss.

23 ² Defendants ask this Court to take judicial notice of the following documents: (1)
24 Complaint in San Diego Superior Court Case No. 37-2010-00089465; (2) Complaint in
25 San Diego Superior Court Case No. 37-2013-00034612; (3) Deed of Trust, recorded in
26 San Diego Recorder’s Office as Document No. 2006-0012709. Pursuant to Federal Rule
27 of Evidence 201, the Court takes judicial notice of these documents as they are matters of
public record. *See, e.g., Valasquez v. Mortg. Elec. Registration Sys., Inc.*, No. C 08-3818
PJH, 2008 WL 4938162, *2-3 (N.D. Cal. Nov. 17, 2008) (taking judicial notice of
documents in county public record).

1 trust.” (*Id.* Ex. F) Plaintiffs claim that Cal-Western acted ultra vires and was never
2 substituted as trustee or authorized to act as an agent. (*Id.* ¶ 80.)

3 The Notice of Default further states that “the mortgagee, beneficiary or the
4 mortgagee’s or beneficiary’s authorized agent has either contacted the borrower or tried
5 with due diligence to contact the borrower as required by California Civil Code 2923.5.”
6 (*Id.*) But Plaintiffs allege that they were never contacted prior to the recording of the
7 Notice of Default. (*Id.* ¶ 79.) They claim that Defendants “did not review Plaintiffs’
8 financial situation and further did not advise them of all options available to avoid
9 foreclosure.” (*Id.* ¶ 81, 83-84, 90-91.) Plaintiffs contend these and other failures violated
10 California law, thereby nullifying Defendants’ authority to foreclose. (*Id.* ¶ 82.)

11 In 2010, Plaintiffs sued PNC Bank, Cal-Western, and Pacific Data Mortgage in
12 California state court to stop foreclosure on the home. (*Id.* ¶ 49 & Ex. C.) In that
13 lawsuit, Plaintiffs alleged that the defendants fraudulently induced them to enter the loan
14 agreement on inferior terms and wrongfully sought to foreclose on Plaintiffs when they
15 were not in default. (*See id.* Ex. C.) Plaintiffs allege that “both parties agreed to settle
16 the manner by PNC agreeing to provide Plaintiffs with an acceptable loan modification,
17 in exchange for Plaintiffs’ agreement to voluntarily dismiss the lawsuit.” (*Id.* ¶ 52.)
18 However, Plaintiffs contend that “PNC reneged on the agreement, and failed to provide
19 Plaintiffs with the loan modification they were promised.” (*Id.* ¶ 54.) Plaintiffs claim
20 that this conduct by PNC constitutes fraud. (*See id.* ¶¶ 55-61.)

21 On or about May 9, 2012, Cal-Western Reconveyance Company recorded a Notice
22 of Trustee Sale, bearing instrument number 2012-0273037. (*Id.* ¶ 97 & Ex. G.) Plaintiffs
23 again contend that Cal-Western acted without authority (*id.* ¶ 99-100), and that
24 Defendants did not review Plaintiffs’ financial situation or advise them of their options to
25 avoid foreclosure (*id.* ¶¶ 101-02). Plaintiffs once more claim these failures nullify
26 Defendants’ authority to foreclose. (*Id.* ¶ 101.)

27 At some point, “Plaintiffs’ loan was . . . sold into a securitized Trust, entitled the

1 Merrill Lynch Mortgage Investors Inc., 2006-F1.” (*Id.* ¶ 23.) The trust had a “cut-off
2 date” of April 1, 2006, and a “closing date” of April 28, 2006. (*Id.* ¶¶ 23, 29, 38.)
3 “Plaintiffs’ note and loan were not transferred to the Merrill Lynch Securitized Trust
4 prior to its closing date.” (*Id.* ¶ 29.)

5 On September 25, 2015, PNC Bank recorded an Assignment of Deed of Trust to
6 “Wells Fargo Bank, N.A., as Trustee, for Merrill Lynch Mortgage Investors Trust, Series
7 MLMI 2006-F1” (“Wells Fargo”). (*Id.* ¶ 70, Ex. E.) The assignment made Wells Fargo
8 the beneficiary of the deed of trust. (*Id.* Ex. E.) Plaintiffs allege that the assignment of
9 the deed of trust was ineffective, invalid, and void because it occurred after the closing
10 date of the Merrill Lynch securitized trust. (*See id.* ¶ 29-30, 34-35.) They also contend
11 that because “there has been no documented assignment of the Note, . . . the [deed of
12 trust] and note were not properly transferred together, which consequently has bifurcated
13 the [deed of trust] and note, rendering them unenforceable.” (*Id.* ¶ 24.)

14 On November 25, 2015, Wells Fargo, as beneficiary under the deed of trust,
15 recorded a Notice of Rescission of Notice of Default, bearing instrument number 2015-
16 0613850. (*Id.* ¶ 103 & Ex. H.) The Notice states that Wells Fargo “does hereby rescind,
17 cancel and withdraw said Declaration of Default and Demand for Sale and said Notice of
18 Breach and Election to Cause Sale.” (*Id.* Ex. H.) The Notice is signed by Bernis M.
19 Gonyea of Clear Recon Corp. (*Id.*) Plaintiffs allege that Clear Recon Corp. is “the new
20 foreclosing trustee” but there is no “evidence of a recorded Substitution of Trustee
21 document authorizing Clear Recon. Corp. to be substituted as trustee.” (*Id.* ¶ 104.)

22 On April 29, 2016, PNC denied Plaintiffs hardship assistance on their loan. (*Id.* ¶
23 63 & Ex. D.) The letter from PNC states that Plaintiffs’ “loan on the related property has
24 received the maximum number of foreclosure alternative options that are permitted by the
25 assignee or mortgage owner of your loan.” (*Id.* Ex. D.) Challenging this decision,
26 Plaintiffs contend that they made “the requisite 3 trial payments which should have
27 resulted in a full and final modification.” (*Id.* ¶ 63.)

1 Plaintiffs bring three claims for relief. The first claim for relief alleges wrongful
2 foreclosure. The second claim for relief alleges negligence. The third claim for relief
3 alleges fraud.

4 **LEGAL STANDARD**

5 “[A] complaint must contain sufficient factual matter, accepted as true, to state a
6 claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78
7 (2009). “A claim is facially plausible ‘when the plaintiff pleads factual content that
8 allows the court to draw the reasonable inference that the defendant is liable for the
9 misconduct alleged.’” *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013) (quoting
10 *Iqbal*, 556 U.S. at 678). When considering a Rule 12(b)(6) motion, the court must
11 “accept as true facts alleged and draw inferences from them in the light most favorable to
12 the plaintiff.” *Stacy v. Rederite Otto Danielsen*, 609 F.3d 1033, 1035 (9th Cir. 2010)
13 (citing *Barker v. Riverside Cnty. Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009)).
14 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
15 statements, do not suffice.” *Iqbal*, 556 U.S. at 678.

16 **DISCUSSION**

17 Like Plaintiffs’ original complaint, their First Amended Complaint fails to plead
18 sufficient facts to state plausible claims.

19 **1. Wrongful Foreclosure Claim**

20 Plaintiffs allege wrongful foreclosure “due to the void [deed of trust] assignment,
21 and the promissory fraud committed [by PNC], pursuant to the voluntary dismissal of the
22 2010 action resulting in the acceleration of the Note.” (FAC ¶ 115.) A wrongful
23 foreclosure is a common law tort claim to set aside a foreclosure sale, or an action for
24 damages resulting from the sale, on the basis that the foreclosure was improper.
25 *Sciarratta v. U.S. Bank Nat’l Ass’n*, 247 Cal. App. 4th 552, 561 (2016). As an initial
26 matter, Plaintiffs’ claim fails because they have not alleged that a foreclosure sale has
27 occurred.

1 Furthermore, as explained in the Court’s order granting Defendants’ motion to
2 dismiss Plaintiffs’ original complaint, Plaintiffs lack standing to challenge the assignment
3 under *Saterbak v. JPMorgan Chase Bank, N.A.*, 245 Cal. App. 4th 808 (2016). *Saterbak*
4 explained that plaintiffs who bring pre-foreclosure lawsuits challenging defendants’
5 authority to foreclose lack standing to bring such preemptive suits. *Id.* at 814. Likewise
6 here, to the extent Plaintiffs challenge Defendants’ authority to foreclose, such claims fail
7 because Plaintiffs lack standing. *See Tjaden v. HSBC Bank USA*, __ F. App’x __, 2017
8 WL 943943, at *1 (9th Cir. Mar. 10, 2017) (holding that plaintiffs’ pre-foreclosure action
9 to challenge the foreclosing entity’s right to initiate a nonjudicial foreclosure fails under
10 *Saterbak*).

11 To the extent that Plaintiffs bring a wrongful foreclosure claim based on alleged
12 fraud that occurred in 2010, Federal Rule of Civil Procedure 9(b) requires Plaintiffs to
13 “state with particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b).
14 Plaintiffs fail to meet this standard. Rather, they rely on conclusory allegations that PNC
15 reneged on an agreement to offer Plaintiffs a loan modification. Plaintiffs further fail to
16 explain how PNC’s actions in 2010 led to Plaintiffs’ apparent present inability to pay.

17 The wrongful foreclosure claim is **DISMISSED**.

18 **2. Negligence**

19 Plaintiffs allege that “PNC, acting as Plaintiffs’ alleged lender and/or servicer, had
20 a duty to exercise reasonable care and skill to maintain proper and accurate loan records
21 and to discharge and fulfill the other incidents attendant to the maintenance, accounting,
22 and servicing of loan records.” (FAC ¶ 122.) “PNC further had a duty to Plaintiffs to
23 disclose its true interest in the Subject Property and communicate with and provide
24 Plaintiffs with proof of who owned or had any liens on the Subject Property, refraining
25 from taking any action against Plaintiffs outside its legal authority, not charging any
26 improper fees and/or charges on Plaintiffs’ account, accurately crediting payments made
27 by Plaintiffs and providing all relevant and accurate information regarding Plaintiffs’

1 loan accounts to Plaintiffs.” (*Id.* ¶ 123.)

2 To state a cause of action for negligence, a plaintiff must allege: (1) the defendant
3 owed the plaintiff a duty of care; (2) the defendant breached that duty, and (3) the breach
4 proximately caused the plaintiff’s damages or injuries. *Lueras v. BAC Home Loans*
5 *Servicing, LP*, 221 Cal. App. 4th 49, 62 (2013). Under California law, “as a general rule,
6 a financial institution owes no duty of care to a borrower when the institution’s
7 involvement in the loan transaction does not exceed the scope of its conventional role as
8 a mere lender of money.” *Nymark v. Heart Fed. Savings & Loan Ass’n*, 231 Cal. App. 3d
9 1089, 1096 (1991). “Liability to a borrower for negligence arises only when the lender
10 ‘actively participates’ in the financed enterprise ‘beyond the domain of the usual money
11 lender.’” *Id.* (internal citation omitted). Here, Plaintiffs make only conclusory
12 allegations that Defendants exceeded the scope of a traditional lender’s responsibility.
13 *See Barcarse v. Central Mortg. Co.*, 661 F. App’x 905, 907 (9th Cir. 2016) (affirming
14 dismissal where plaintiffs failed to plead facts showing that defendants exceeded the
15 scope of a lender’s conventional role).

16 The negligence claim is **DISMISSED**.

17 **3. Fraud**

18 Plaintiffs allege that “PNC fraudulently misrepresented to Plaintiffs the nature of
19 its scheme to sell bearer notes into securitization, submitted fraudulent documents in the
20 record, in an attempt to commit fraud upon the Court, in its attempt to commit wrongful
21 foreclosure, and committed promissory fraud when it failed to honor an agreement to
22 provide Plaintiffs’ [sic] with an acceptable loan modification in lieu of the voluntary
23 dismissal of the 2010 lawsuit, and induced Plaintiffs’ [sic] to rely on Defendant PNC’s
24 prior reputation as a traditional ‘loan to hold’ lender, and Plaintiffs justifiably relied on
25 said misrepresentation.” (FAC ¶ 131.)

26 Allegations of fraud must be stated with particularity. Fed. R. Civ. P. 9(b). “In
27 order to plead fraud with particularity, the complaint must allege the time, place, and

1 content of the fraudulent representation; conclusory allegations, do not suffice.” *Shroyer*
2 *v. New Cingular Wireless Serv., Inc.*, 622 F.3d 1035, 1042 (9th Cir. 2010) (citing *Moore*
3 *v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989)); *Kearns v. Ford*
4 *Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (requiring plaintiffs plead who, what,
5 when, where, and how). “Rule 9(b) does not allow a complaint to merely lump multiple
6 defendants together, but ‘requires plaintiffs to differentiate their allegations when suing
7 more than one defendant . . . and to inform each defendant separately of the allegations
8 surrounding his alleged participation in the fraud.” *Swartz v. KPMG LLP*, 476 F.3d 759,
9 765 (9th Cir. 2007) (quoting *Haskin v. R.J. Reynolds Tobacco Co.*, 995 F. Supp. 1437,
10 1439 (M.D. Fla. 1998)). “[G]eneral allegations that the ‘defendants’ engaged in
11 fraudulent conduct,” with only specific allegations as to some, “patently fail[s] to comply
12 with Rule 9(b).” *Id.* at 765.

13 Here, Plaintiffs do not meet these heightened pleading requirements. The First
14 Amended Complaint fails to include the specific details of the alleged misrepresentations
15 and, instead, relies on conclusory assertions. Moreover, Plaintiffs’ allegations only speak
16 to Defendant PNC, but they seek to hold each Defendant liable for fraud. (*See* FAC ¶
17 135.)

18 The fraud claim is **DISMISSED**.

19 CONCLUSION

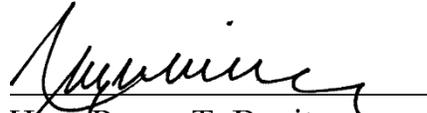
20 For the above reasons, the Court **GRANTS** the Motion to Dismiss.

21 The Court will grant Plaintiffs leave to file a second amended complaint that
22 corrects the deficiencies noted by the Court and Defendants. *See* Fed. R. Civ. P. 15
23 (“The court should freely give leave [to amend] when justice so requires.”) Plaintiffs
24 may file a second amended complaint no later than fourteen (14) days after the signature
25 date of this Order. An amended complaint must clearly set out the facts, Plaintiffs’
26 theory of the case, and what claims are asserted. Plaintiffs must attempt to address the
27 pleading deficiencies identified in this Order and the Court’s previous order granting

1 Defendants' motion to dismiss Plaintiffs' original complaint.

2 **IT IS SO ORDERED.**

3 Dated: April 5, 2017

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5 Hon. Roger T. Benitez
6 United States District Judge
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