

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

4 DANIEL HAGOS,
5
6 Plaintiff,
7 vs.
8 MTC FINANCIAL, INC.; WASHINGTON
9 MUTUAL BANK; MORTGAGE ELECTRONIC
10 REGISTRATION SYSTEMS, INC. ("MERS"),
11 Defendants.

Case No.: 2:11-cv-01272-GMN-NJK

ORDER

12 This action arises out of the foreclosure proceedings initiated against the property of pro
13 se Plaintiff Daniel Hagos. Before the Court is the Motion to Dismiss (ECF No. 18) filed by
14 Defendant MTC Financial, Inc., dba Trustee Corps ("Trustee Corps"). Plaintiff filed a Response
15 (ECF No. 20) and Defendant filed a Reply (ECF No. 21).

16 I. BACKGROUND

17 In 2006, Plaintiff and another borrower, Miyuki Akui, obtained a mortgage loan from
18 Washington Mutual Bank, FA, secured by a Deed of Trust on the property located at 6659
19 Catoctin Avenue, Las Vegas, Nevada, 89139, APN#: 176-11-112-048 ("the property"). (Deed of
20 Trust, Ex. A to Mot. to Dismiss, ECF No. 18.) The Deed of Trust names California
21 Reconveyance Company as Trustee. (Id.) On October 10, 2010, a Substitution of Trustee was
22 recorded by JP Morgan Chase Bank, N.A., as beneficiary, naming Trustee Corps as Trustee.
23 (Substitution of Trustee, Ex. C to Mot. to Dismiss, ECF No. 18.) Plaintiff subsequently
24 defaulted on the loan, and Trustee Corps recorded a Notice of Default on August 30, 2011, on
25 behalf of the beneficiary. (Ex. A to Compl., ECF No. 1; Ex. B to Mot. to Dismiss, ECF No. 6-1.)

1 Trustee Corps recorded a Notice of Trustee's Sale on July 13, 2011. (Ex. B to Compl., ECF No.  
2 1.) Plaintiff filed his original Complaint before this Court on August 5, 2011, alleging  
3 (1) common law fraud; (2) violations of the Fair Debt Collection Practices Act; and (3) extreme  
4 emotional distress. (ECF No. 1.)

5 On May 18, 2012, the Court entered its Order (ECF No. 12) dismissing Plaintiff's  
6 original Complaint and giving Plaintiff leave to amend his claims for common law fraud,  
7 violation of the Fair Debt Collection Practices Act and extreme emotional distress. The Court  
8 stated that "[b]ecause Plaintiff is representing himself pro se, the Court gives him leniency in  
9 amending the Complaint," and that "[i]f Plaintiff can do so, he is given leave to amend his  
10 Complaint to cure the deficiencies described above." (Order, 5:14-16, ECF No. 12.)

11 Plaintiff filed his Amended Complaint on July 13, 2012, adding Washington Mutual  
12 Bank and Mortgage Electronic Registration Systems, Inc. ("MERS") as defendants and alleging  
13 the following causes of action: (1) Wrongful Foreclosure; (2) Fraud; (3) Quiet Title;  
14 (4) Declaratory Relief; (5) Violation of the Real Estate and Settlement Procedures Act, 12  
15 U.S.C. § 2601, et seq. and the Federal Reserve Acts, 24 C.F.R. § 3500, et seq.; and (6) Violation  
16 of TILA, 15 U.S.C. § 1641(g). (Am. Compl., ECF No. 15.) Plaintiff does not appear to amend  
17 his causes of action for extreme emotional distress or for violations of the Fair Debt Collection  
18 Practices Act.

## 19 **II. LEGAL STANDARD**

20 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action  
21 that fails to state a claim upon which relief can be granted. *See North Star Int'l v. Ariz. Corp.*  
22 *Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule  
23 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not  
24 give the defendant fair notice of a legally cognizable claim and the grounds on which it rests.  
25 *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint

1 is sufficient to state a claim, the Court will take all material allegations as true and construe them  
2 in the light most favorable to the plaintiff. See *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th  
3 Cir. 1986).

4 The Court, however, is not required to accept as true allegations that are merely  
5 conclusory, unwarranted deductions of fact, or unreasonable inferences. See *Sprewell v. Golden*  
6 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action  
7 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation  
8 is plausible, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550  
9 U.S. at 555) (emphasis added).

10 A court may also dismiss a complaint pursuant to Federal Rule of Civil Procedure 41(b)  
11 for failure to comply with Federal Rule of Civil Procedure 8(a). *Hearns v. San Bernardino*  
12 *Police Dept.*, 530 F.3d 1124, 1129 (9th Cir.2008). Rule 8(a)(2) requires that a plaintiff's  
13 complaint contain "a short and plain statement of the claim showing that the pleader is entitled  
14 to relief." Fed. R. Civ. P. 8(a)(2). "Prolix, confusing complaints" should be dismissed because  
15 "they impose unfair burdens on litigants and judges." *McHenry v. Renne*, 84 F.3d 1172, 1179  
16 (9th Cir.1996). Mindful of the fact that the Supreme Court has "instructed the federal courts to  
17 liberally construe the 'inartful pleading' of pro se litigants," *Eldridge v. Block*, 832 F.2d 1132,  
18 1137 (9th Cir. 1987), the Court will view Plaintiff's pleadings with the appropriate degree of  
19 leniency.

20 "Generally, a district court may not consider any material beyond the pleadings in ruling  
21 on a Rule 12(b)(6) motion . . . . However, material which is properly submitted as part of the  
22 complaint may be considered on a motion to dismiss." *Hal Roach Studios, Inc. v. Richard*  
23 *Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly,  
24 "documents whose contents are alleged in a complaint and whose authenticity no party  
25 questions, but which are not physically attached to the pleading, may be considered in ruling on

1 a Rule 12(b)(6) motion to dismiss” without converting the motion to dismiss into a motion for  
2 summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule of  
3 Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*  
4 *Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers  
5 materials outside of the pleadings, the motion to dismiss is converted into a motion for summary  
6 judgment. See Fed. R. Civ. P. 12(d); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912,  
7 925 (9th Cir. 2001).

8 If the court grants a motion to dismiss, it must then decide whether to grant leave to  
9 amend. Pursuant to Rule 15(a), the court should “freely” give leave to amend “when justice so  
10 requires,” and in the absence of a reason such as “undue delay, bad faith or dilatory motive on  
11 the part of the movant, repeated failure to cure deficiencies by amendments previously allowed,  
12 undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the  
13 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only  
14 denied when it is clear that the deficiencies of the complaint cannot be cured by amendment. See  
15 *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

### 16 **III. DISCUSSION**

17 As a threshold matter, the Court recognizes that Plaintiff was not given leave to add  
18 causes of action and that his amended cause of action alleging fraud is the only one re-alleged  
19 by Plaintiff that he was permitted to amend in the Court’s May 2012 Order. The Court will  
20 dismiss these other causes of action on this basis and finds further that Plaintiff suffers no  
21 prejudice from dismissal of these claims, because they also fail to state a claim on which relief  
22 can be granted pursuant to Rule 12(b)(6), as discussed in Defendant’s motion to dismiss.

23 Regarding Plaintiff’s fraud claim, in its previous Order the Court found that:

24 Plaintiff’s allegations center around the Notice of Breach and Default, and the  
25 Notice of Trustee’s Sale sent by Defendant, alleging that the demands for payment  
were knowingly false. Plaintiff alleges that “Defendant knew, or should have  
known that said demand was made without standing or capacity on the part of

1 Defendant.” Plaintiff does not allege the specific false statements in the notices or  
2 the facts leading him to allege that this demand was made without standing or  
3 capacity on the part of Defendant.

4 (Order, 4:11-16.)

5 Here, Plaintiff has not alleged additional facts under the heading of this cause of action  
6 for fraud, even as to the additional defendants. (See Am. Compl., 19:¶71–20:¶78.) Therefore,  
7 the Court must review Plaintiff’s nine pages of general factual allegations under the heading  
8 “Factual Allegations” in his Amended Complaint to determine whether Plaintiff has cured his  
9 previous failure to plead fraud with the required specificity. (See Am. Compl., 5:¶19–14:¶54.)

10 To state a claim for fraud or intentional misrepresentation, a plaintiff must allege three  
11 factors: (1) a false representation by the defendant that is made with either knowledge or belief  
12 that it is false or without sufficient foundation; (2) an intent to induce another’s reliance; and  
13 (3) damages that result from this reliance. See *Nelson v. Heer*, 163 P.3d 420, 426 (Nev. 2007).  
14 A claim of “fraud or mistake” must be alleged “with particularity.” Fed. R. Civ. P. 9(b). A  
15 complaint alleging fraud or mistake must include allegations of the time, place, and specific  
16 content of the alleged false representations and the identities of the parties involved. See *Swartz*  
17 *v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007). Rule 9(b) does not allow a complaint to  
18 merely lump multiple defendants together but requires plaintiffs to differentiate their allegations  
19 when suing more than one defendant and inform each defendant separately of the allegations  
20 surrounding his alleged participation in the fraud.” *Id.*

21 Plaintiff begins by alleging that Washington Mutual never assigned the beneficial interest  
22 in the Deed of Trust, and alleges that the securitization of the loan note terminated the Deed of  
23 Trust “and or” mortgage, such that the original beneficiary was “paid in full” and “the original  
24 loan was actually paid off.” (Am. Compl., 5:¶21–6:¶26.) Here, the Court takes judicial notice of  
25 the fact that in 2008, the banking assets of Washington Mutual were seized and placed into

1 receivership by the Federal Deposit Insurance Corporation (FDIC), and subsequently sold to  
2 JPMorgan Chase. Accordingly, because securitization is not a basis for a fraud claim, and  
3 because JPMorgan Chase acquired the beneficial interest in the Deed of Trust by acquisition, the  
4 Court finds no support for Plaintiff's fraud claim based on these allegations.

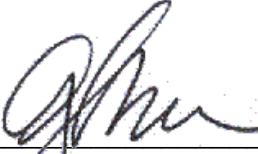
5 Plaintiff next appears to allege fraud against Mortgage Electronic Registration Systems,  
6 Inc. ("MERS") in that "the original Deed of Trust that secured the Promissory Note listed  
7 MERS as the beneficiary" and that "MERS does not have the legal right to substitute in a new  
8 Trustee for the Deed of Trust or mortgage instrument since only the owner of the Note has that  
9 power." (Am. Compl., 7:¶28-9:¶31.) However, the Court finds no mention of MERS in the  
10 Deed of Trust, nor in any other foreclosure document, and notes that the Substitution of Trustee  
11 was executed by the beneficiary, JP Morgan Chase, pursuant to the authority described in the  
12 Deed of Trust. Accordingly, these allegations provide no support for a fraud claim against any  
13 defendant.

14 The remainder of Plaintiff's allegations in this section of the Amended Complaint restate  
15 his prior allegations as to securitization of the loan note, and "splitting" of the note, and  
16 therefore offer no support for Plaintiff's fraud claim. Accordingly, because the Court finds no  
17 basis on which to find that Plaintiff has adequately pleaded fraud on the part of any defendant,  
18 and because the facts alleged by Plaintiff do not show that any violations are plausible, the Court  
19 must dismiss Plaintiff's Complaint.

20 **IV. CONCLUSION**

21 **IT IS HEREBY ORDERED** that the Motion to Dismiss (ECF No. 18) is **GRANTED**.  
22 Plaintiff's Amended Complaint (ECF No. 15) is **DISMISSED**. The Clerk shall enter judgment  
23 accordingly.

24 **DATED** this 29th day of March, 2013.

25   
\_\_\_\_\_  
Gloria M. Navarro  
United States District Judge