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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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SETH BROCHE and REBECCA BROCHE,

Case No. 3:13-cv-00320-MMD-WGC

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Plaintiffs,

12

v.

ORDER

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QUALITY LOAN SERVICE CORP.,

(Plfs.' Motion to Remand – dkt. no. 7;
Def.'s Motion to Dismiss – dkt. no. 6)

14

Defendant.

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I. SUMMARY

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Before the Court are Plaintiffs Seth and Rebecca Broche's Motion to Remand to State Court (dkt. no. 7) and Defendant Quality Loan Service Corporation's ("Quality Loan") Motion to Dismiss (dkt. no. 6). For the reasons set forth below, Plaintiffs' Motion to Remand is denied and Defendant's Motion to Dismiss is granted.

20

II. BACKGROUND

21

Plaintiffs Seth and Rebecca Broche purchased the property located at 121 Drew Court, Stateline, Nevada. (Dkt. no. 1-2 ¶ 1.) Ms. O'Connor obtained a loan of \$640,000 ("the Loan") from Aegis Wholesale Corporation ("Aegis"), and executed a promissory note ("Note") that was secured by a deed of trust on the property ("Deed of Trust") for \$640,000. (Dkt. no. 6-1.) The Deed of Trust names Aegis as lender, Stewart Title of Douglas County as trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS") as beneficiary. (*Id.*) The Deed of Trust was signed on April 27, 2006, and recorded on May 2, 2006, in the official records of Douglas County, Nevada. (*Id.*)

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1 On February 27, 2012, an assignment of the Deed of Trust was recorded by
2 MERS as nominee of Aegis in favor of HSBC Bank USA, as Trustee for Deutch Alt.-B
3 Securities Mortgage Loan Trust, Series 2007-AB1 Mortgage Pass-Through Certificates
4 ("HSBC"). (Dkt. no. 6-2.) The Assignment was recorded in Clark County on February 29,
5 2012. (*Id.*)

6 On June 25, 2012, a Substitution of Trustee ("the Substitution") was executed
7 substituting Quality Loan for Stewart Title of Douglas County. (Dkt. no. 6-2.) The
8 Substitution was recorded on June 29, 2012. (*Id.*) The Substitution was signed by Wells
9 Fargo, N.A. ("Wells Fargo") as servicer and attorney-in-fact for HSBC. (*Id.*)

10 On February 22, 2013, a Notice of Default and Election to Sell Under Deed of
11 Trust ("Notice of Default") was signed by Quality Loan. (Dkt. no. 6-4.) The Notice of
12 Default was recorded on February 27, 2013. (*Id.*) Attached to the Notice of Default was
13 an Affidavit of Authority ("Affidavit") signed by Valencia D. Bush, a Vice President of
14 Loan Documentation for Wells Fargo. (*Id.*)

15 **III. MOTION TO REMAND**

16 **A. Legal Standard**

17 Federal courts are courts of limited jurisdiction, having subject-matter jurisdiction
18 only over matters authorized by the Constitution and Congress. U.S. Const. art. III, § 2,
19 cl. 1; see e.g., *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A
20 suit filed in state court may be removed to federal court if the federal court would have
21 had original jurisdiction over the suit. 28 U.S.C. § 1441(a). However, courts strictly
22 construe the removal statute against removal jurisdiction, and "[f]ederal jurisdiction *must*
23 be rejected if there is any doubt as to the right of removal in the first instance." *Gaus v.*
24 *Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (emphasis added). The party seeking
25 removal bears the burden of establishing federal jurisdiction. *Durham v. Lockheed Martin*
26 *Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006).

27 To establish subject matter jurisdiction pursuant to diversity of citizenship, the
28 party asserting jurisdiction must show: (1) complete diversity of citizenship among

1 opposing parties, and (2) an amount in controversy exceeding \$75,000. 28 U.S.C.
2 § 1332(a). Where a defendant removes a plaintiff's state action on the basis of diversity
3 jurisdiction, the defendant must either: (1) demonstrate that it is facially evident from the
4 plaintiff's complaint that the plaintiff seeks in excess of \$75,000, or (2) prove, by a
5 preponderance of the evidence, that the amount in controversy meets the jurisdictional
6 limit. *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115 (9th Cir. 2004). In considering what
7 evidence may be considered under (2) above, the Ninth Circuit has adopted the
8 "practice of considering facts presented in the removal petition as well as any 'summary-
9 judgment[sic]-type evidence relevant to the amount in controversy at the time of
10 removal.'" *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir.
11 2003) (quoting *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir.
12 1997)).

13 For jurisdictional purposes, the amount in controversy is determined by the
14 amount at stake in the underlying litigation. *Theis Research, Inc. v. Brown & Bain*, 400
15 F.3d 659, 662 (9th Cir. 2005). In determining the amount in controversy, a district court
16 may consider the amount of compensatory and punitive damages recoverable based on
17 plaintiff's complaint as well as attorney fees, but may not consider interest and cost of
18 suit. *Meisel v. Allstate Indem. Co.*, 357 F. Supp. 2d 1222, 1225 (citing *Hunt v. Wash.*
19 *State Apple. Adver. Comm'n*, 432 U.S. 333, 347-48 (1977)).

20 B. Discussion

21 Defendant has met its burden in establishing diversity jurisdiction pursuant to 28
22 U.S.C. § 1332(a). There exists diversity of citizenship. Plaintiffs are residents of Douglas
23 County, Nevada (dkt. no. 1-2 ¶ 1) and are therefore citizens of Nevada. Defendant is a
24 Californian corporation with its principle place of business in San Diego, California (dkt.
25 no. 1 ¶ 5.)

26 "In actions seeking declaratory or injunctive relief, it is well established that the
27 amount in controversy is measured by the value of the object of the litigation." *Hunt v.*
28 *Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977); see also *Cohn v.*

1 *Petsmart*, 281 F. 3d 837, 840 (9th Cir. 2002). As the Deed of Trust lists the amount of
2 the debt secured as \$640,000 (dkt. no. 6-1), the amount in controversy requirement is
3 satisfied.

4 Given that the parties are diverse and the amount in controversy requirement is
5 met, the Court will exercise jurisdiction over this dispute.

6 **IV. MOTION TO DISMISS**

7 **A. Legal Standard**

8 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which
9 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide
10 "a short and plain statement of the claim showing that the pleader is entitled to relief."
11 Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While
12 Rule 8 does not require detailed factual allegations, it demands more than "labels and
13 conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v.*
14 *Iqbal*, 556 US 662, 678 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).
15 "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550
16 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient
17 factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at
18 678 (internal citation omitted).

19 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
20 apply when considering motions to dismiss. First, a district court must accept as true all
21 well-pled factual allegations in the complaint; however, legal conclusions are not entitled
22 to the assumption of truth. *Id.* at 679. Mere recitals of the elements of a cause of action,
23 supported only by conclusory statements, do not suffice. *Id.* at 678. Second, a district
24 court must consider whether the factual allegations in the complaint allege a plausible
25 claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint
26 alleges facts that allow a court to draw a reasonable inference that the defendant is
27 liable for the alleged misconduct. *Id.* at 678. Where the complaint does not permit the
28 court to infer more than the mere possibility of misconduct, the complaint has "alleged —

1 but not shown — that the pleader is entitled to relief.” *Id.* at 679 (internal quotation marks
2 omitted). When the claims in a complaint have not crossed the line from conceivable to
3 plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

4 A complaint must contain either direct or inferential allegations concerning “all the
5 material elements necessary to sustain recovery under *some* viable legal theory.”
6 *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,
7 1106 (7th Cir. 1989) (emphasis in original)).

8 **B. Discussion**

9 In Nevada, a trustee's exercise of the power of sale on behalf of a beneficiary to a
10 deed of trust is governed by the procedural requirements of section 107.080 of Nevada
11 Revised Statutes. Nev. Rev. Stat. § 107.080. A sale made pursuant to this section must
12 be declared void if the trustee or other person authorized to make the sale does not
13 substantially comply with the provisions of this section or any applicable provision of
14 sections 107.086 and 107.087. Nev. Rev. Stat. § 107.080(5)(a).

15 Plaintiffs argue in their Complaint that the Affidavit attached to the Notice of
16 Default was not based on personal knowledge, in violation of NRS 107.080(2)(c). (See
17 dkt. no. 1-2 ¶ 8.) Plaintiffs do not contest the accuracy of any information in the affidavit
18 nor do they claim any required information was missing. Their sole complaint concerns
19 whether the Affiant had personal knowledge. Based on this alleged violation of NRS
20 107.080(2)(c), Plaintiffs demand that the Court award Plaintiffs three times their actual
21 damages or the sum of \$5,000, whichever is greater, order provision of attorney's fees
22 and costs, and enjoin Defendant from proceeding with the sale contained in the Deed of
23 Trust. (See *id.*)

24 As of the recording date of the instant Notice of Default in February 2013, NRS
25 107.080(2)(c) provides that the power of sale must not be exercised until:

26 The beneficiary, the successor in interest of the beneficiary or the trustee
27 first executes and causes to be recorded in the office of the recorder of the
28 county wherein the trust property, or some part thereof, is situated a notice
of the breach and of the election to sell or cause to be sold the property to
satisfy the obligation which, except as otherwise provided in this

1 paragraph, **includes a notarized affidavit of authority to exercise the**
2 **power of sale stating, based on personal knowledge** and under the
penalty of perjury:

- 3 (1) The full name and business address of the trustee or the trustee's
4 personal representative or assignee, the current holder of the note
secured by the deed of trust, the current beneficiary of record and the
5 servicers of the obligation or debt secured by the deed of trust;
6 (2) The full name and last known business address of every prior known
beneficiary of the deed of trust;
7 (3) That the beneficiary under the deed of trust, the successor in interest of
the beneficiary or the trustee is in actual or constructive possession of
8 the note secured by the deed of trust;
9 (4) That the trustee has the authority to exercise the power of sale with
respect to the property pursuant to the instruction of the beneficiary of
10 record and the current holder of the note secured by the deed of trust;
11 (5) The amount in default, the principal amount of the obligation or debt
secured by the deed of trust, a good faith estimate of all fees imposed
and to be imposed because of the default and the costs and fees
12 charged to the debtor in connection with the exercise of the power of
sale; and
13 (6) The date, recordation number or other unique designation of the
instrument that conveyed the interest of each beneficiary and a
description of the instrument that conveyed the interest of each
beneficiary.

14 The affidavit described in this paragraph is not required for the exercise of
15 the trustee's power of sale with respect to any trust agreement which
concerns a time share within a time share plan created pursuant to chapter
16 119A of NRS if the power of sale is being exercised for the initial
beneficiary under the deed of trust or an affiliate of the initial beneficiary.
17 (emphasis added)

18 Defendant responds that the Affidavit is in compliance with NRS 107.080(2)(c)
19 and that it clearly states that it is within the personal knowledge of the affiant. (See dkt.
20 no. 6 at 4-5.) Defendant argues that the personal knowledge requirement can be met if
21 the affiant's knowledge is based on her personal review of the business records of the
22 original lender, servicer, or beneficiary. (See *id.*)

23 The Affidavit states in relevant part:

24 The following facts are, except where otherwise indicated, true of my own
25 personal knowledge based upon my personal review of business records
of Wells Fargo Where the following facts are not based on my
26 personal knowledge, they are based on my personal review of documents
which are of public record in the State of Nevada and/or documents
27 created by third parties the accuracy of which Wells Fargo relies on in
conducting its business of servicing mortgage loans. (See dkt. no. 6-4 at
28 4.)

1 From the face of this Affidavit of Authority, the Court cannot find any evidence that
2 a violation of NRS § 107.080(2)(c) has occurred. Plaintiffs do not allege, and the Court
3 finds no reason to find, that there were any misrepresentations in the Affidavit. Plaintiffs'
4 sole contention is that an affiant's reliance on her review of business records does not
5 constitute personal knowledge. Plaintiffs cite no relevant law in support of this contention
6 and it is counter to the consistent findings of this Court. See, e.g., *Hidalgo v. Nat'l Default*
7 *Servicing Corp.*, No. 1:13-cv-00196, 2013 WL 663123, at *3 (D. Nev. Feb. 21, 2013)
8 (finding "[p]ersonal knowledge can come from the review of the contents of business
9 records") (citation omitted)); *Toigo v. Wells Fargo Bank, N.A.*, No. 2:13-cv-00792, 2013
10 WL 3049073, at *5-6 (D. Nev. June 17, 2013) (finding "full compliance" with NRS §
11 107.080(2)(c) based on review of a nearly identical affidavit).

12 Accordingly, the Court finds that Plaintiffs have failed to plead facts showing that a
13 violation of NRS § 107.080(2)(c) is plausible, or even possible. Therefore this claim is
14 dismissed with prejudice.


15 **V. CONCLUSION**

16 The Court notes that the parties made several arguments and cited to several
17 cases not discussed above. The Court has reviewed these arguments and cases and
18 determines that they do not warrant discussion as they do not affect the outcome of the
19 Motion.

20 It is therefore ordered that Plaintiffs' Motion to Remand (dkt. no. 7) is denied.

21 It is further ordered that Defendant's Motion to Dismiss (dkt. no. 6) is granted with
22 prejudice.

23 DATED THIS 11th day of February 2014.

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25 _____
26 MIRANDA M. DU
27 UNITED STATES DISTRICT JUDGE
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