

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL TREECE and KRISTEN A.
TREECE,

Plaintiffs,

v.

FIELDSTON MORTGAGE COMPANY;
MORTGAGE ELECTRONIC
REGISTRATION SYSTEM; WELLS
FARGO BANK, NA; FIELDSTONE
SERVICING CORP.; HSBC BANK
USA, NA; US BANK, NA; LITTON
LOAN SERVICING; CHASE BANK,
NA; OCWEN MORTGAGE COMPANY;
PACIFIC NORTHWEST TITLE CO. OF
WASHINGTON, INC.; and DOES 1-50,

Defendants.

CASE NO. 11-5981 RJB

ORDER ON DEFENDANTS'
MOTION TO DISMISS AND ON
PLAINTIFFS' MOTION FOR
LEAVE TO AMEND THE
COMPLAINT

This matter comes before the Court on Defendants Litton Loan Servicing L.P. ("Litton"),
HSBC Bank USA, National Association, as Indenture Trustee of the Fieldstone Mortgage
Investment Trust, Series 2006-3 ("HSBC Bank") (erroneously sued as HSBC Bank USA, NA),
Ocwen Loan Servicing ("Ocwen") (erroneously sued as Ocwen Mortgage Company), Mortgage

1 Electronic Registration Systems, Inc. (“MERS”), and Wells Fargo Bank, National Association,
2 as Master Servicer’s (“Wells Fargo”) (collectively “moving Defendants”) Motion to Dismiss
3 Plaintiffs’ Complaint (Dkt. 10) and Plaintiffs’ motion for leave to amend their Complaint (Dkt.
4 12). The Court has considered the pleadings filed regarding the motions, the remaining record
5 and is fully advised.

6 Plaintiffs filed this action, *pro se*, seeking to stop foreclosure on their property, asserting
7 that Defendants violated their federal rights under the Truth In Lending Act (“TILA”), 15 U.S.C.
8 § 1601, *et seq.* and the Real Estate Settlement Procedure Act (“RESPA”), 12 U.S.C. § 2601, *et*
9 *seq.* Dkt. 1. Plaintiffs also make a state law claim to quiet title. *Id.* For the reasons set forth
10 below, the moving Defendants’ Motion to Dismiss (Dkt. 10) should be granted and the claims
11 asserted against them dismissed.

12 I. **FACTS AND PROCEDURAL HISTORY**

13 A. **FACTUAL BACKGROUND**

14 Originally filed in Pierce County, Washington Superior Court on October 28, 2011, the
15 Verified Complaint concerns a note secured by a deed of trust for the purchase of real property
16 commonly known as: 6313-6315 7th Street Court East, Tacoma, Washington; Pierce County
17 Assessor’s parcel or account number: 0420061107 (“property”). Dkt. 1-1. The property is
18 located in Pierce County, Washington. *Id.*

19 According to the attachments to the Verified Complaint, on July 6, 2006, Plaintiff Michael
20 Treece, as borrower, signed an Adjustable Rate Note (“note”) in favor of Fieldstone Mortgage
21 Company, as lender, for a loan of \$333,000 at an interest rate of 8.5% to purchase the subject
22 property. Dkt. 1-1, at 22-26. In the note, Mr. Treece promised to make monthly payments until
23
24

1 the loan is paid in full. *Id.*, at 22. Mr. Treece acknowledged that he understood that Fieldstone
2 Mortgage Company may transfer the note. *Id.*

3 That same day, Mr. Treece, as borrower, executed a deed of trust granting Fieldstone
4 Mortgage Company a security interest in the property in exchange for the loan. *Id.*, at 28. The
5 deed of trust named “Pacific Northwest Title Company” as trustee. *Id.*, at 29. MERS was
6 appointed as the “beneficiary” and “nominee” for Fieldstone Mortgage Company and its
7 “successors and assigns.” *Id.*, at 29. Under the deed of trust, Mr. Treece agreed to giving MERS
8 the “right to foreclose and sell the property” in the event he defaulted in his obligations under the
9 note and deed of trust. *Id.*, at 30. The deed of trust further provides:

10 The note or a partial interest in the note (together with this security instrument)
11 can be sold one or more times without prior notice to borrower. A sale might
12 result in a change in the entity (known as the “loan servicer”) that collects
13 periodic payments due under the note and this security instrument.

14 *Id.*, at 39. The Complaint provides that the note and deed of trust were sold and “securitized into
15 a trust,” the “Fieldstone Mortgage Investment Trust Series 2006N3,” with moving Defendant
16 HSBC Bank USA, as Indenture Trustee. Dkt. 1-1, at 14-15. The remaining moving Defendants
17 are loan servicers and MERS. Dkt. 10.

18 Defendants request that the Court take judicial notice of (and Plaintiffs do not dispute)
19 documents recorded with the Pierce County Auditor’s Office that the loan was modified around
20 July 1, 2008 and for a second time in June of 2011. Dkt. 9, at 32-47.

21 **B. ALLEGATIONS IN THE COMPLAINT**

22 Plaintiffs’ Complaint contains multiple general allegations regarding the national home loan
23 industry. Dkt. 1-1. As it relates to their situation, the Complaint alleges that Plaintiffs did not
24 receive various disclosures in connection with the July 2006 loan. Dkt. 1-1, at 9-11. Plaintiffs
allege that the lender violated “rules” by “putting Plaintiffs into a loan” without “reasonable

1 basis for believing that there are sufficient funds to support the loan.” *Id.*, at 11. The Complaint
2 further asserts that MERS does not have a beneficial interest in the note and so the “assignment
3 executed by MERS” is “illegal.” *Id.*, at 1-1, at 15. It asserts that the Defendants “lack standing
4 to enforce the negotiable instrument” because they are not the real party in interest. *Id.*, at 17.
5 Plaintiffs allege that the real party of interest is the shareholders of the trust, and “because no one
6 party represents a real party of interest, then no one party may enforce the promissory note.” *Id.*,
7 at 17. Plaintiffs reason that because the shareholders can write off a debt, “the debt is
8 discharged.” *Id.* Accordingly, Plaintiffs seek declaratory relief that the deed of trust be held
9 null and void and that the note be declared fully discharged. *Id.*, at 18. They seek injunctive
10 relief: that the Defendants be ordered to “give a full and fair accounting of all money received”
11 and they be required to return all money received. *Id.* Plaintiffs further seek a declaration that
12 they are the rightful title holders and that all Defendants have no “estate, right, title or interest in
13 said property.” *Id.* Plaintiffs further seek any other relief “as is necessary and appropriate.” *Id.*

14 C. PENDING MOTIONS

15 In the pending Motion to Dismiss, filed pursuant to Fed. R. Civ. P. 12 (b)(6), Defendants
16 argue that: 1) the claims in the Complaint asserted against them should be dismissed because
17 there are no allegations of wrongdoing made against them, 2) Plaintiffs’ contention of an invalid
18 assignment of the deed of trust by MERS to HSBC fails because Plaintiffs agreed to designate
19 MERS as the lender’s beneficiary, 3) Plaintiffs’ TILA claim should be dismissed because
20 Defendants were not involved in the loan origination and the claim is barred by the statute of
21 limitations, 4) Plaintiffs’ RESPA claim against these Defendants should be dismissed because
22 they were not involved in the loan’s origination, and 5) Plaintiffs’ Complaint fails to allege
23 sufficient facts to state a claim for quiet title against them. Dkt. 10.

1 Plaintiffs file a Response, arguing that the motion to dismiss should not be granted because
2 further discovery regarding the moving Defendants' relationship with Fieldstone Mortgage is
3 required. Dkt. 12. Plaintiffs argue that Defendants have not given them any documentation of a
4 valid assignment of the mortgage from Fieldstone to any of them. *Id.* They argue that the note
5 and deed of trust have been improperly separated when the note was securitized into the trust.
6 *Id.* Plaintiffs reason, then, that “[i]f the deed of trust is held by one party and the note is held by
7 another party, there is no one party which can lay claim the the [sic] Plaintiffs’ property.” *Id.*, at
8 2-3. Plaintiffs argue that MERS does not have a beneficial interest in the note and so the
9 assignment executed by MERS is not valid. *Id.* Plaintiffs request that the Court take judicial
10 notice of the Congressional Oversight Panel’s Report, dated November 16, 2010. *Id.* Plaintiffs
11 argue that there “may be issues of ‘robo-signing’” here. *Id.*, at 4-5. Plaintiffs argue that “Ocwen
12 Loan Servicing wants to take real property without offering any proof that might tend to show
13 who holds a beneficial interest in the promissory note.” *Id.*, at 6. Plaintiffs argue that they have
14 requested documents from Ocwen through “Qualified Written Requests,” and Ocwen “has failed
15 the produce any relevant material.” *Id.*, at 8-9.

16 Defendants Reply, arguing that 1) Plaintiffs’ request for the original promissory note does
17 not give rise to a viable cause of action because Defendants are not required to produce the
18 original to foreclose, 2) Plaintiffs’ arguments that MERS does not have a beneficial interest fail
19 as a matter of law, and 3) Plaintiffs fail to respond to the defects raised regarding their TILA,
20 RESPA, and quiet title claims. Dkt. 13. Defendants oppose allowing Plaintiffs leave to file an
21 amended complaint. *Id.*

22 C. ORGANIZATION OF OPINION

23
24

1 This opinion will address Defendants’ motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)
2 as to each of the claims in conjunction with Plaintiffs’ motion for leave to file an amended
3 complaint.

4 II. DISCUSSION

5 A. FED. R. CIV. P. 12 (b)(6) MOTION TO DISMISS/LEAVE TO AMEND A 6 COMPLAINT - STANDARD

7 Federal Rule of Civil Procedure 8(a)(2) provides that a pleading must contain a “short and
8 plain statement of the claim showing that the pleader is entitled to relief.” Under Fed. R. Civ. P.
9 12 (b)(6), a complaint may be dismissed for “failure to state a claim upon which relief can be
10 granted.” Dismissal of a complaint may be based on either the lack of a cognizable legal theory
11 or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica*
12 *Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). While a complaint attacked by a Rule
13 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to
14 provide the grounds of his entitlement to relief requires more than labels and conclusions, and a
15 formulaic recitation of the elements of a cause of action will not do. *Bell Atlantic Corp. v.*
16 *Twombly*, 550 U.S. 544, 555 (2007) (*internal citations omitted*).

17 Accordingly, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual
18 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v.*
19 *Iqbal*, 129 S.Ct. 1937, 1949 (2009)(*citing Twombly*, at 570). A claim has “facial plausibility”
20 when the party seeking relief “pleads factual content that allows the court to draw the reasonable
21 inference that the defendant is liable for the misconduct alleged.” *Id.* First, “a court considering
22 a motion to dismiss can choose to begin by identifying pleadings that, because they are no more
23 than conclusions, are not entitled to the assumption of truth.” *Id.*, at 1950. Secondly, “[w]hen
24 there are well-pleaded factual allegations, a court should assume their veracity and then

1 determine whether they plausibly give rise to an entitlement to relief.” *Id.* “In sum, for a
2 complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable
3 inferences from that content, must be plausibly suggestive of a claim entitling the pleader to
4 relief.” *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

5 If a claim is based on a proper legal theory but fails to allege sufficient facts, the plaintiff
6 should be afforded the opportunity to amend the complaint before dismissal. *Keniston v.*
7 *Roberts*, 717 F.2d 1295, 1300 (9th Cir. 1983). If the claim is not based on a proper legal theory,
8 the claim should be dismissed. *Id.* “Dismissal without leave to amend is improper unless it is
9 clear, upon de novo review, that the complaint could not be saved by any amendment.” *Moss v.*
10 *U.S. Secret Service*, 572 F.3d 962, 972 (9th Cir. 2009).

11 Fed. R. Civ. P. 15(a)(2) provides that “a party may amend its pleading only with the
12 opposing party's written consent or the court's leave. The court should freely give leave when
13 justice so requires.” “Five factors are taken into account to assess the propriety of a motion for
14 leave to amend: bad faith, undue delay, prejudice to the opposing party, futility of amendment,
15 and whether the plaintiff has previously amended the complaint. Futility alone can justify the
16 denial of a motion to amend.” *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004)(*internal*
17 *quotations and citations omitted*).

18 **B. TILA CLAIMS**

19 Plaintiffs’ claim for rescission and or damages (to the extent they makes a claim for
20 damages), pursuant to TILA, should be dismissed. Under TILA and “Regulation Z” at 12 C.F.R.
21 § 226.23:

22 (1) In a credit transaction in which a security interest is or will be retained or
23 acquired in a consumer's principal dwelling, each consumer whose ownership
24 interest is or will be subject to the security interest shall have the right to rescind
the transaction, except for transactions described in paragraph (f) of this section...

1 (3) The consumer may exercise the right to rescind until midnight of the third
2 business day following consummation, delivery of the notice required by
3 paragraph (b) of this section, or delivery of all material disclosures, whichever
4 occurs last. If the required notice or material disclosures are not delivered, the
5 right to rescind shall expire 3 years after consummation, upon transfer of all of the
6 consumer's interest in the property, or upon sale of the property, whichever occurs
7 first. In the case of certain administrative proceedings, the rescission period shall
8 be extended in accordance with section 125(f) of the Act.

9 12 C.F.R. § 226.23(a)(3); 15 U.S.C. § 1635(a) and (f).

10 The subject note and deed of trust were executed on July 6, 2006. Dkt. 1-1. Allegations in
11 the Complaint assert that TILA was violated in regard to the original loan. Dkt. 1-1. This case
12 was filed on October 28, 2011, over five years later. *Id.* Plaintiffs' TILA claims, asserted
13 against all Defendants, should be dismissed as barred by the statute of limitations. Their motion
14 to file an amended complaint, in order to restate this claim, should be denied as futile. The Court
15 need not reach Defendants' remaining arguments on Plaintiffs' TILA claims.

16 C. RESPA CLAIM

17 "Congress enacted the Real Estate Settlement Procedures Act in 1974 to protect consumers
18 from abusive practices in mortgage closings." *Johnson v. Wells Fargo Home Mortg., Inc.*, 635
19 F.3d 401, 417 (9th Cir. 2011). Plaintiffs assert that Defendants violated 12 U.S.C. § 2601, which
20 provides that RESPA was passed "to insure that consumers throughout the Nation are provided
21 with greater and more timely information on the nature and costs of the settlement process and
22 are protected from unnecessarily high settlement charges."

23 Plaintiffs' RESPA claim, to the extent that it is asserted against the moving Defendants,
24 should be dismissed. Plaintiffs make allegations regarding their original loan, but do not dispute
that these Defendants were not involved in that transaction. Plaintiffs have failed to pleaded
factual allegations which would "plausibly give rise to an entitlement to relief" under RESPA
against Litton, Ocwen, or Wells Fargo (the servicers), or MERS or HSBC Bank.

1 Although Plaintiffs' response does make reference to a "qualified written request" they
2 allegedly directed to Ocwen, (Dkt. 12), Plaintiffs' Complaint makes no mention of it. To the
3 extent that Plaintiffs appear to base their RESPA claim on the allegation that MERS does not
4 have a beneficial interest in the note, their claim should be dismissed. Plaintiffs offer no
5 authority for their contention that MERS was without authority to make the assignments of
6 which they complain. Plaintiffs are merely attempting to state a legal conclusion, without any
7 reasoning to support such a conclusion. This issue has been repeatedly raised and rejected by
8 several courts in this district. *Dooms v. Cal-Western Reconveyance Corp. of Washington*, 2011
9 WL 5592760 (W.D. Wash. 2011); *Rhodes v. HSBC Bank USA N.A.*, 2011 WL 3159100 (W.D.
10 Wash. 2011); *Daddabbo v. Countrywide Home Loans, Inc.*, 2010 WL 2102485 (W.D. Wash.
11 2010); *Vawter v. Quality Loan Service Corp. of Washington*, 707 F.Supp.2d 1115, 1125-1126
12 (W.D. Wash. 2010). This Court agrees with the reasoning set forth in those cases. Further, as
13 pointed out in *Rhodes*, in exchange for the loan on the property, Mr. Treece signed the note and
14 deed of trust which provided underlying security for the obligation due under the note. He
15 agreed that MERS had the authority to act as a beneficiary under the deed of trust – "such
16 authority was explicitly granted by Plaintiffs upon execution of the instrument." *Rhodes*, at 4.
17 In this case, Mr. Treece "specifically agreed to MERS' role as beneficiary under the deed of
18 trust" he signed and agreed that MERS could assign its' interests, in whole or in part, and that the
19 Note could be sold. *Id.* Plaintiffs fail to allege a "cognizable legal theory" under which they
20 would be entitled to relief under RESPA, and the RESPA claim should be dismissed. *Balistreri*,
21 at 699.

22 To the extent that Plaintiffs move to amend their Complaint to add a RESPA claim, the
23 motion should be denied without prejudice. Plaintiffs failed to file a proposed amended
24

1 | complaint, and so the Court was unable to determine whether Plaintiffs' new allegations would
2 | be sufficient to entitle them to relief under RESPA.

3 | **D. QUIET TITLE CLAIM**

4 | In Washington, a plaintiff in a quiet title action must set forth in the complaint the nature of
5 | their "estate, claim or title to the property, and the defendant may set up a legal or equitable
6 | defense to plaintiff's claims; and the superior title, whether legal or equitable, shall prevail."
7 | RCW 7.25.120.

8 | Defendants argue that Plaintiffs can not state a claim against them for "quiet title"
9 | because they do not have a competing ownership claim on the property. Dkt. 10. Plaintiffs do
10 | not meaningfully respond. Further, a quiet title claim against a mortgagee requires that a
11 | mortgagor is the rightful owner of the property, that is, that the mortgagor has paid an
12 | outstanding debt secured by the mortgage. *See Kelley v. Mers, Inc.*, 642 F.Supp. 2d 1048, 1057
13 | (N.D. Cal. 2009); *Evans v. BAC Home Loans Servicing LP*, 2010 WL 5138394 at #3 (W.D.
14 | Wash. 2010). Plaintiffs here fail to allege that they have paid the outstanding debt secured by the
15 | mortgage. Their claim for quiet title against the moving Defendants should be dismissed.
16 | Further, because it is unclear what allegations Plaintiffs intend to make against these Defendants
17 | regarding a quiet title claim, their motion for leave to file an amended complaint to attempt to
18 | restate this claim should be denied without prejudice.

19 | **E. CONCLUSION**

20 | Plaintiffs have failed to state any claims to relief that are plausible on their face against these
21 | Defendants. *Iqbal*, at 1949. Further, Plaintiffs' motion to amend their Complaint to allege a
22 | TILA claim should be denied as it is barred by the statute of limitations. Plaintiffs' motion to
23 | file an amended complaint should be denied without prejudice as to their remaining claims.

