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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 DAVID A. PERRIE,

7 Plaintiff,

8 v.

9 ONEWEST BANK, FSB, et al.,

10 Defendants.

CASE NO. C11-6063BHS

ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS

11 This matter comes before the Court on Defendants OneWest Bank, FSB
12 ("OneWest"), Mortgage Electronic Registration Systems, Inc. ("MERS"), and Regional
13 Trustee Services Corporation's ("Regional") motion to dismiss (Dkt. 7). The Court has
14 reviewed the briefs filed in support of the motion and the remainder of the file and hereby
15 grants the motion for the reasons stated herein.
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17 **I. PROCEDURAL HISTORY**

18 On December 28, 2011, Plaintiff David Perrie ("Perrie") filed a complaint against
19 Defendants OneWest, Regional, MERSCORP, INC., MERS, and numerous unnamed
20 Does and Roes. Dkt. 1.

21 On January 31, 2012, Defendants OneWest and MERS filed a motion to dismiss.
22 Dkt. 7. On February 2, 2012, Defendant Regional joined the motion. Dkt. 10. Perrie did
23 not respond.

24 **II. FACTUAL BACKGROUND**

25 On February 8, 2008, Pierre executed a promissory note in the amount of \$208,000
26 payable to IndyMac Bank, FSB. Dkt. 7, Exh. 1. On February 19, 2008, Pierre executed a
27 Deed of Trust that encumbered real property commonly known as 19930 83rd Avenue
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1 East, Spanaway, Washington (“Property”). *Id.*, Exh. 2. On May 26, 2011, Pierre was
2 sent a Notice of Default. *Id.*, Exh. 3. On August 10, 2011, Regional recorded a Notice of
3 Trustee’s Sale and set the sale for November 14, 2011. *Id.*, Exh. 5. The sale was initially
4 postponed, but finally occurred on January 13, 2012.

5 III. DISCUSSION

6 As a threshold matter, the Court may consider a failure to respond to a motion as
7 an admission that the motion has merit. Local Rule CR 7(b)(2). Perrie failed to respond
8 to the instant motion and the Court considers the failure an admission that the motion has
9 merit.

10 Motions to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil
11 Procedure may be based on either the lack of a cognizable legal theory or the absence of
12 sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d
13 696, 699 (9th Cir. 1990).


14 The sole method to contest and enjoin a foreclosure sale is to file an action to
15 enjoin or restrain the sale in accordance with RCW 61.24.130. *CHD, Inc. v. Boyles*,
16 138 Wn. App. 131, 137 (2007). An individual waives his right to challenge a foreclosure
17 when he “(1) receives notice of the right to enjoin the sale, (2) has actual or constructive
18 knowledge of a defense to foreclosure before the sale, and (3) fails to bring an action to
19 obtain a court order enjoining the sale.” *Id.* (citing *Plein v. Lackey*, 149 Wn.2d 214, 227
20 (2003)).

21 In this case, Pierre waived his right to contest the foreclosure in this action. Perrie
22 receive notice of his right to enjoin the sale. *See* Dkt. 7, Exh. 5. Perrie had actual
23 knowledge of defenses to the foreclosure. *See* Dkt. 1 (the complaint). Perrie failed to
24 seek a court order enjoining the sale. *Id.* Therefore, the Court grants Defendants’ motion
25 to dismiss Perrie’s claims.
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1 **IV. ORDER**

2 Therefore, it is hereby **ORDERED** that Defendants' motion to dismiss (Dkt. 7) is
3 **GRANTED** and Perrie's claims against OneWest, MERS, and Regional are
4 **DISMISSED with prejudice.**

5 DATED this 7th day of March, 2012.

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8 BENJAMIN H. SETTLE
9 United States District Judge
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