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7 Attorneys for Defendants Bank of America N.A.,  
 8 Countrywide Home Loans Inc., BAC Home Loans Servicing I.P.,  
 9 Recontrust Company N.A., and Mortgage Electronic  
 10 Registration Systems Inc.

11 **IN THE UNITED STATES DISTRICT COURT**  
 12 **IN AND FOR THE DISTRICT OF ARIZONA**

13 ROAN CIARDI and BLANCA CIARDI,  
 14 husband and wife,

15 Plaintiffs,

16 vs.

17 THE LENDING COMPANY, INC.; BANK  
 18 OF AMERICA, NATIONAL ASSOCIATION,  
 19 also known by its subsidiaries in this case,  
 20 BAC HOME LOANS, INC., f/k/a  
 21 COUNTRYWIDE HOME LOANS, INC.,  
 22 BAC HOME LOANS SERVICING, f/k/a  
 23 COUNTRYWIDE HOME LOANS  
 24 SERVICING LP; RECONTRUST  
 25 COMPANY, a/k/a RECONTRUST  
 26 COMPANY, N.A.; and MORTGAGE  
 27 ELECTRONIC REGISTRATION SYSTEMS,  
 28 INC.,

Defendants.

No. CV10-0275-PHX-JAT

**DEFENDANTS' MOTION TO  
 DISMISS**

(Hon. James A. Teilborg)

Defendants Bank of America N.A. ("Bank of America"), Countrywide Home Loans  
 Inc. ("Countrywide") (improperly named as "BAC Home Loans Inc."), BAC Home Loans

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1 Servicing LP ("BAC"), Recontrust Company N.A. ("Recontrust"), and Mortgage Electronic  
 2 Registration Systems Inc. ("MERS") (collectively, "Defendants") respectfully move to  
 3 dismiss Plaintiffs' Complaint for failure to state a claim on which relief may be granted.  
 4 Plaintiffs have failed to support with sufficient facts their conclusion that they may stop  
 5 paying their mortgage loan, and their objections to Defendants' right to foreclose their trust  
 6 deed as a result of their undisputed default of that loan have been thoroughly rejected by the  
 7 courts. Accordingly, the Court should dismiss with prejudice Plaintiffs' Complaint.

### 8 MEMORANDUM OF POINTS AND AUTHORITIES

#### 9 I. PLAINTIFFS' ALLEGATIONS.

10 Plaintiffs allege that Defendant The Lending Company Inc. loaned Plaintiff Bianca  
 11 Ciardi \$270,500.00 on or about December 19, 2005, for the purpose of purchasing certain  
 12 real property. [First Amended Complaint (1/20/10) ("Complaint") ¶ 11] The loan was  
 13 evidenced by a promissory note ("Note") and secured by a deed of trust ("Deed of Trust").<sup>1</sup>  
 14 [Complaint ¶¶ 11, 12] According to the Complaint, the loan was sold and securitized after  
 15 The Lending Company originated it. [Complaint ¶ 17]

16 Defendants are allegedly proceeding toward a trustee's sale of the property  
 17 encumbered by the Deed of Trust. [Complaint ¶ 3] Plaintiffs do not dispute the debt at  
 18 issue or allege that they are not in default. [Complaint ¶ 21] Rather, they challenge  
 19 Defendants' authority to conduct the foreclosure sale. While they do not assert any  
 20

21 <sup>1</sup> The Court may consider these documents without converting this Motion into a  
 22 motion for summary judgment because Plaintiffs refer to them in the Complaint. The Court  
 23 is "not required to accept as true conclusory allegations which are contradicted by  
 24 documents referred to in the complaint." Steckman v. Hart Brewing, Inc., 143 F.3d 1293,  
 25 1295-96 (9th Cir. 1998). Although Plaintiffs did not physically attach the documents to the  
 26 Complaint, "a district court ruling on a motion to dismiss may consider documents whose  
 27 contents are alleged in a complaint and whose authenticity no party questions, but which are  
 28 not physically attached to the plaintiff's pleading." Parrino v. FHP, Inc., 146 F.3d 699, 705  
 (9th Cir. 1998) (internal citations and quotations omitted). Further, the Deed of Trust is a  
 matter of public record and properly subject to judicial notice. See Pesci v. IRS, 67 F. Supp.  
 2d 1189, 1191-92 (D. Nev. 1999), aff'd, 225 F.3d 663 (9th Cir. 2000) (court deciding  
 motion to dismiss may consider matters subject to judicial notice).

1 particular causes of action, they apparently seek to enjoin the sale, have the security for their  
2 loan declared void, and obtain a declaration that they have no current obligation to pay their  
3 otherwise undisputed debt. [Complaint ¶¶ 21, 53]

#### 4 **II. LEGAL STANDARD.**

5 To survive a motion to dismiss, "a complaint must contain sufficient factual matter,  
6 accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal,  
7 556 U.S. ---, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S.  
8 544, 570 (2007)) (reversing denial of motion to dismiss). "[A] plaintiff's obligation to  
9 provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and  
10 conclusions, and a formulaic recitation of the elements of a cause of action will not do."  
11 Twombly, 550 U.S. at 555 (citation omitted). A plaintiff cannot meet his burden simply by  
12 contending that he "might later establish some 'set of [undisclosed] facts' to support  
13 recovery." Id. at 561. Rather, "[a] claim has facial plausibility when the plaintiff pleads  
14 factual content that allows the court to draw the reasonable inference that the defendant is  
15 liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949. It is not sufficient if the  
16 complaint merely establishes a "sheer possibility" that the defendant has acted unlawfully.  
17 "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it  
18 'stops short of the line between possibility and plausibility of entitlement to relief.'" Id.  
19 (quoting Twombly, 550 U.S. at 557). To determine whether a complaint states a plausible  
20 claim for relief, the court must rely on its "judicial experience and common sense." Id. at  
21 1950.

22 In considering a motion to dismiss, "[t]he court need not . . . accept as true  
23 allegations that contradict matters properly subject to judicial notice, are conclusory or mere  
24 legal conclusions, or unwarranted deductions of fact or unreasonable inferences, or  
25 contradicted by documents referred to in the Complaint, or are internally inconsistent."  
26 Pesci v. IRS, 67 F. Supp. 2d 1189, 1191-92 (D. Nev. 1999), aff'd, 225 F.3d 663 (9th Cir.  
27 2000) (citations omitted). Dismissal can be "based on the lack of a cognizable legal theory  
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1 or the absence of sufficient facts alleged under a cognizable legal theory.” Balistreri v.  
2 Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted). Where there is  
3 an “obvious alternative explanation” for the conduct alleged, the complaint should be  
4 dismissed for failure to state a claim. Iqbal, 129 S. Ct. at 1951.

5 **III. ARGUMENT.**

6 **A. Defendants’ Right To Foreclose Does Not Depend On Defendants’ Right**  
7 **To Enforce Plaintiff’s Promissory Note.**

8 Plaintiffs repeatedly assert that Defendants may not enforce the Deed of Trust  
9 because they are not holders in due course of the Note. [See, e.g., Complaint ¶¶ 16, 21, 23,  
10 27] Arizona’s state and federal courts have resoundingly rejected the contention that a trust  
11 deed is not enforceable unless the trustee or beneficiary can demonstrate that he also is  
12 entitled to enforce the borrower’s promissory note under the Uniform Commercial Code’s  
13 negotiable instrument rules. The Maricopa County Superior Court recently held that “the  
14 UCC does not apply to [non-judicial foreclosures] and the ‘show me the note’ stratagem  
15 lacks merit.” Diessner v. Mortgage Electronic Registration Sys. Inc., No. CV2009-053546  
16 (Ariz. Sup. Ct. Nov. 19, 2009) (unpublished minute entry; copy attached hereto as Exhibit  
17 A). That court’s holding was well-supported by four recent decisions of this Court rejecting  
18 Plaintiffs’ position. See Diessner v. MERS, 618 F. Supp. 2d 1184, 1187–88 (D. Ariz. 2009)  
19 (“Arizona’s non-judicial foreclosure statute does not require presentation of the original  
20 note before commencing foreclosure proceedings”); Mansour v. Cal-Western Reconveyance  
21 Corp., 618 F. Supp. 2d 1178, 1181 (D. Ariz. 2009) (dismissing complaint based on “show  
22 me the note” theory); Goodyke v. BNC Mortgage Inc., 2009 WL 2971086, \*2 (D. Ariz.  
23 Sept. 11, 2009) (“Because [p]laintiffs’ action involves the nonjudicial foreclosure of a real  
24 estate mortgage under Arizona statutes that do not require presentation of the original note  
25 before commencing foreclosure proceedings, Count Two fails to state a claim upon which  
26 relief may be granted”); Garcia v. GMAC Mortgage LLC, 2009 WL 2782791, \*3 (D. Ariz.  
27 Aug. 31, 2009) (dismissing complaint asserting “original note” argument).  
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1 The courts of jurisdictions with similar non-judicial foreclosure statutes are in accord  
2 with this Court and the Arizona state courts. See Olivier v. Ndex West LLC, 2009 WL  
3 2486314, \*2 (E.D. Cal. Aug. 12, 2009) (stating that the “provisions of the UCC pertain to  
4 negotiable instruments, not non-judicial foreclosure under deeds of trust”); Aguero v.  
5 Mortgageit Inc., 2009 WL 2486311, \*5 (E.D. Cal. Aug. 12 2009) (recognizing that “[i]t is  
6 well-established that non-judicial foreclosures can be commenced without producing the  
7 original promissory note”); Sicairos v. NDEX West LLC, 2009 U.S. Dist. LEXIS 11223,  
8 \*6-7 (S.D. Cal. Feb. 11, 2009) (noting that the legal theory underlying Plaintiff’s Complaint  
9 is “flawed” and that the UCC is the “[w]rong law” to look to for claims involving non-  
10 judicial foreclosure); Farner v. Countrywide Home Loans, 2009 U.S. Dist. LEXIS 5303, \*4  
11 (S.D. Cal. Jan. 29, 2009) (“[I]here does not appear to be any requirement under California  
12 law that the original note be produced in order to render the foreclosure proceeding valid”);  
13 Ernstberg v. Mortgage Investors Group, 2009 WL 160241, \*5 (D. Nev. Jan. 22, 2009)  
14 (“Plaintiff has failed to cite to any authority under Nevada law that states that a trustee’s  
15 power of sale is tied to the presentment of the original note to the debtor”); Puttkuri v.  
16 Recontrust Co., 2009 U.S. Dist. LEXIS 32, \*6 (S.D. Cal. Jan. 5, 2009) (“California law does  
17 not require production of the original note to proceed with a non-judicial foreclosure”);  
18 Quintos v. Decision One Mortgage Co. LLC, 2008 U.S. Dist. LEXIS 104503, \*7-8 (S.D.  
19 Cal. Dec. 29, 2008) (recognizing that “an allegation that [the foreclosing entity] did not have  
20 the original note or had not received it is insufficient to render the foreclosure proceeding  
21 invalid”); Candelo v. NDEX West LLC, 2008 U.S. Dist. LEXIS 105926, \*12, 20 (E.D. Cal.  
22 Dec. 23, 2008) (dismissing complaint for failure to show that defendants are prohibited from  
23 foreclosing); San Diego Home Solutions Inc. v. Recontrust Co., 2008 U.S. Dist. LEXIS  
24 99684, \*5 (S.D. Cal. Dec. 10, 2008) (law does “not require that the original note be in the  
25 possession of the party initiating non-judicial foreclosure”); Pineda v. Saxon Mortgage  
26 Services, 2008 U.S. Dist. LEXIS 102439, \*7 n.2 (C.D. Cal. Dec. 10, 2008) (“There is no  
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1 requirement in California that the holder of a note be in actual physical possession . . . to  
2 foreclose”).

3 Further, the courts have rejected Plaintiffs’ argument even under the rules governing  
4 judicial foreclosures, which impose far more stringent requirements. See New England  
5 Savings Bank v. Bedford Realty Corp., 680 A.2d 301, 309–10 (Conn. 1996) (“the fact that  
6 [plaintiff] never possessed the lost promissory note is not fatal to its foreclosure of the  
7 mortgage”); Mitchell Bank v. Schanke, 676 N.W.2d 849, 860 (Wis. 2004) (bank not  
8 required to produce note where it could prove debt by other evidence); Ocwen Federal Bank  
9 FSB v. Russell, 53 P.3d 312, 323 (Haw. Ct. App. 2002) (copy of the mortgage note,  
10 declaration from the loan servicer, report from the loan servicer’s computer system, and a  
11 copy of the relevant assignment sufficient to establish right to foreclose); Gonzales v. Tama,  
12 749 P.2d 1116, 1117–18 (N.M. 1988) (failure to prove note not fatal, where mortgage  
13 incorporated note by reference and was made at same time as note and as part of same  
14 transaction); In re Dolata, 306 B.R. 97, 130 (Bankr. W.D. Penn. 2004) (holding, under state  
15 law and multiple treatises, that “the production of an accompanying bond or note, as a  
16 matter of law, is not essential to a mortgagee’s right of action on a mortgage”); Resolution  
17 Trust Corp. v. Love, 36 F.3d 972 (10th Cir. 1994) (applying UCC section 3-301 only to  
18 claim for deficiency judgment, in case where plaintiff could not produce original note but  
19 had already foreclosed the mortgage); Commercial Fed. Savings & Loan Ass’n v.  
20 Grabenstein, 437 N.W.2d 775, 777 (Neb. 1989) (“The possession and production of the note  
21 for cancellation is not an absolute requirement as a basis for a decree [of foreclosure]”);  
22 Boehmer v. Heinen, 9 N.W.2d 216, 217 (Neb. 1943) (plaintiff need not produce note, if  
23 plaintiff can establish by other evidence that plaintiff owns the note or debt it represents);  
24 Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997) (plaintiff need only produce some  
25 written evidence of secured debt).

26 While these decisions constitute only persuasive authority in this Court, they are  
27 strongly persuasive. In Arizona, trustee’s sales are governed exclusively by A.R.S. §§ 33-  
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1 801–821, which provide the “only procedure” for a valid trustee’s sale. Patton v. First Fed.  
 2 Sav. & Loan Ass’n of Phoenix, 118 Ariz. 473, 476, 578 P.2d 152, 155 (1978); accord  
 3 Chavez v. ReconTrust Co., 2008 WL 5210893, \*3–4 (E.D. Cal. Dec. 11, 2008) (slip copy)  
 4 (noting that statutory framework governing non-judicial foreclosures is exhaustive and  
 5 should not be supplemented with additional requirements). These statutes do not require  
 6 that a beneficiary or trustee be entitled to enforce the borrower’s promissory note in order to  
 7 hold a sale. Rather, they provide that

8 [b]y virtue of his position, a power of sale is conferred upon the  
 9 trustee of a trust deed under which the trust property may be  
 10 sold, in the manner provided in this chapter, after a breach or  
 11 default in performance of the contract or contracts, for which the  
 12 trust property is conveyed as security, or a breach or default of  
 the trust deed. . . . The power of sale may be exercised by the  
 trustee without express provision therefore in the trust deed.

13 A.R.S. § 33-807(A) (emphases added). This provision makes it plain that the existence of a  
 14 trust deed securing an obligation confers inherent authority<sup>2</sup> on the trustee to sell the trust  
 15 property upon default, that such sales are governed only by the requirements set forth in the  
 16 chapter regulating them, and that a sale may be held to remedy a breach of the trust deed  
 17 itself—necessarily including any agreement in the trust deed to pay the underlying debt—  
 18 not just the note the trust deed secures.<sup>3</sup> Plaintiffs’ argument violates this statute because it  
 19 would regulate trustee’s sales other than “in the manner provided in this chapter,” which  
 20 nowhere imposes the requirements Plaintiffs advocate.

21 The courts also have recognized that an action on the note and a non-judicial  
 22 foreclosure are separate remedies available to the owner of a defaulted loan. See, e.g.,

23 \_\_\_\_\_  
 24 <sup>2</sup> In other words, the trustee need not obtain the prior approval of the borrower or a  
 court, a requirement Plaintiffs seek in effect to impose.

25 <sup>3</sup> Plaintiffs’ Deed of Trust provides that “Borrower shall pay when due the principal  
 26 of, and interest on, the debt evidenced by the Note and any prepayment charges and late  
 27 charges due under the Note.” [Exhibit B at 3] A breach of this agreement—which Plaintiffs  
 28 do not dispute occurred—is sufficient in itself to give rise to a right of sale under A.R.S. §  
 33-807(A).

1 Universal Inv. Co. v. Sahara Motor Inn Inc., 127 Ariz. 213, 215, 619 P.2d 485, 487 (Ct.  
2 App. 1980). Plaintiffs' position violates this precedent as well, because it impermissibly  
3 equates non-judicial foreclosure with a judicial action on the note. This would effectively  
4 nullify any lender's statutory right to hold a trustee's sale pursuant to the non-judicial  
5 procedure, which the courts have held to be a distinct remedy enacted for the specific  
6 purpose of providing "relatively inexpensive and speedy foreclosure proceedings."  
7 Andreola v. Ariz. Bank, 26 Ariz. App. 556, 559, 550 P.2d 110, 113 (1976); see also  
8 LeDesma v. Pioneer Nat'l Title Ins. Co., 129 Ariz. 171, 173-74, 629 P.2d 1007, 1009-10  
9 (Ct. App. 1981).

10 The contention that the right to enforce a trust deed somehow hinges upon the right  
11 to enforce the secured promissory note has been thoroughly rejected in Arizona and  
12 elsewhere. The Court should accordingly dismiss with prejudice Plaintiffs' Complaint to  
13 the extent it relies on this argument.

14 **B. Plaintiffs Are Not Entitled To Stop Paying Their Mortgage Loan.**

15 Plaintiffs argue that, "As no entity has yet emerged that has demonstrated possession  
16 of the rights of holder in due course of the Note to their Property, Plaintiffs allege that they  
17 are not obliged to pay any additional monies to entities that are not entitled to receive  
18 payments due to the lack of a verifiable interest in their Property." [Complaint ¶ 21]  
19 Defendants take this to mean that Plaintiffs seek a declaration that they may stop paying  
20 their mortgage loan pending production of the Note by the holder in due course. The Court  
21 may not issue a declaratory judgment absent a showing of an "actual controversy" between  
22 the parties. 28 U.S.C. § 2201(a); Theme Promotions Inc. v. News Am. Marketing FSI, 546  
23 F.3d 991, 1010 (9th Cir. 2008) (affirming denial of leave to amend complaint to add claim  
24 for declaratory relief). "[T]he requirements of pleading and practice in actions for  
25 declaratory relief are exactly the same as in other civil actions." Kam-Ko Bio-Pharm  
26 Trading Co. Ltd-Australasia v. Mayne Pharm (USA) Inc., 560 F.3d 935, 943 (9th Cir. 2009)  
27 (quoting 10B Wright, Miller, & Kane, Federal Practice & Procedure: Civil § 2768 (3d ed.  
28

1 1998); see also Fed. R. Civ. P. 57 (“These rules govern the procedure for obtaining a  
2 declaratory judgment”). Thus, Plaintiffs may not obtain a declaratory judgment unless they  
3 “allege facts from which it appears there is a substantial likelihood that [they] will suffer  
4 injury in the future.” Malowney v. Fed. Collection Deposit Group, 193 F.3d 1342, 1346  
5 (11th Cir. 1999) (citing City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)) (affirming  
6 dismissal of declaratory judgment action). For two reasons, Plaintiffs are not entitled to the  
7 declaration sought.

8 First, Plaintiffs have not alleged facts demonstrating an actual controversy or a right  
9 to stop paying their mortgage loan. Defendants have not initiated judicial proceedings to  
10 enforce the Note; thus, Defendants need not prove their right to receive Plaintiffs’ mortgage  
11 payments. If Plaintiffs wish to nullify or suspend their mortgage obligations, they must  
12 plead facts plausibly demonstrating an actual controversy that should be resolved in their  
13 favor. They have failed to do so. Plaintiffs “do not deny that they have a debt obligation.”  
14 [Complaint ¶ 21] Rather, they allege only that their Note was securitized and that a  
15 recorded document search did not reveal any assignments to the securitization trust that  
16 Plaintiffs allege owns their Note. [Complaint ¶¶ 23, 26] These are not facts “showing that  
17 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). While securitization might possibly  
18 be consistent with Plaintiffs’ theories regarding the ownership of the Note, mere consistency  
19 between the facts pled and the conclusion asserted is not enough as a matter of law to state a  
20 claim. Twombly, 550 U.S. at 557 (noting “[t]he need at the pleading stage for allegations  
21 plausibly suggesting (not merely consistent with)” the conclusions asserted). And the  
22 alleged lack of a recorded assignment, even if true, demonstrates nothing. There is no  
23 requirement in Arizona that a promissory note, an assignment of a promissory note, or an  
24 assignment of a trust deed be recorded.<sup>4</sup> See A.R.S. § 33-706 (“An assignment of a  
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26  
27 <sup>4</sup> The Complaint contains various legal conclusions about the validity of unrecorded  
28 mortgages. [Complaint ¶¶ 35, 36] But Plaintiffs do not allege that their trust deed was  
never recorded, only that no assignments were ever recorded. Regardless, the statutes  
Plaintiffs cite are notice statutes governing the validity of mortgages as between mortgagees

1 mortgage may be recorded in like manner as a mortgage”) (emphasis added). Thus,  
 2 Plaintiffs cannot raise a plausible inference that no valid assignment exists merely because  
 3 one was never recorded. Finally, Plaintiffs have not alleged any facts suggesting that they  
 4 have been paying the wrong entity, for instance, that their account balance has not been  
 5 properly decreasing or that they have received conflicting demands for payment from  
 6 multiple parties. Thus, Plaintiffs have not made a plausible showing of a substantial  
 7 likelihood that they will suffer injury if they continue paying their mortgage, have not  
 8 demonstrated an actual controversy with Defendants, and have no right to declaratory relief.  
 9 Malowney, 193 F.3d at 1346.

10 Second, Plaintiffs’ allegations are demonstrably false even at the pleading stage.  
 11 Both the Deed of Trust and the Note contain clear contractual promises to pay The Lending  
 12 Company, or its successors and assigns, the principal balance of Plaintiffs’ mortgage loan  
 13 plus interest. [Exhibit B at 3; Exhibit C at 1] An allonge to the Note dated December 19,  
 14 2005, and executed by Mark A. Nickel as president of The Lending Company, reflects an  
 15 endorsement of the Note to the order of Countrywide Bank N.A.<sup>5</sup> [Exhibit C at 4] Finally,  
 16 the Prospectus for the securitization trust, which the Complaint quotes extensively, reflects  
 17 the sale of the Note from Countrywide to the trust, and identifies Countrywide Home Loans  
 18 Servicing LP as the master servicer for the trust, with authority to collect note payments and  
 19 even to modify the loans.<sup>6</sup> [Exhibit D at 6, 42, 78, 88–95] While Plaintiffs do not identify  
 20 their servicer in the Complaint, it presumably was Countrywide Home Loans Servicing LP,  
 21

22 and subsequent purchasers and encumbrancers, not between the mortgagee and mortgagor.  
 23 A.R.S. § 33-411.

24 <sup>5</sup> The Court may consider the allonge in deciding this Motion to Dismiss because it is  
 25 part of the Note, which Plaintiffs reference repeatedly in the Complaint and which forms the  
 26 subject and basis of the Complaint.

27 <sup>6</sup> The Court may also access the Prospectus directly from the website of the  
 28 Securities and Exchange Commission at:  
<http://www.sec.gov/Archives/edgar/data/1269518/000095012906003594/v18870b5e424b5.t>  
 XI.

1 and is now BAC (following Bank of America's acquisition of the Countrywide entities),  
2 since Plaintiffs named those companies as defendants in this action. This chain of  
3 assignment, coupled with Plaintiffs' failure to plead any facts suggesting that they have been  
4 paying the wrong party, demonstrates that there is no actual, plausible controversy regarding  
5 Bank of America's right to receive Plaintiffs' mortgage payments.

6 **C. MERS Has Authority To Initiate A Foreclosure Sale.**

7 Plaintiffs contend that MERS had no authority to substitute the trustee and initiate the  
8 non-judicial foreclosure process, and that the very appearance of MERS on the Deed of  
9 Trust voids the security for their loan. The Deed of Trust itself sinks this claim. By signing  
10 the Deed of Trust, Mrs. Ciardi agreed that "MERS is the beneficiary under this Security  
11 Instrument." [Exhibit B at 1] She further agreed that MERS "holds only legal title to the  
12 interests granted by Borrower in this Security Instrument, but, if necessary to comply with  
13 law or custom, MERS . . . has the right: to exercise any or all of those interests, including,  
14 but not limited to, the right to foreclose and sell the Property." [Exhibit B at 2] The courts  
15 have upheld this language and repeatedly found that MERS has authority to initiate  
16 foreclosure proceedings. See, e.g., In re Huggins, 357 B.R. 180, 183-85 (Bankr. D. Mass.  
17 2006); Mortgage Electronic Registration Sys. Inc. v. Coakley, 41 A.D.3d 674, 675 (N.Y.  
18 App. 2007); Mortgage Electronic Registration Sys. Inc. v. Azize, 965 So. 2d 151, 153-54  
19 (Fla. App. 2007); Mortgage Electronic Registration Sys. Inc. v. Revoredo, 955 So. 2d 33, 34  
20 (Fla. App. 2007); In re Sina, 2006 WL 2729544, at \*1-2 (Minn. App. Sept. 26, 2006);  
21 Mortgage Electronic Registration Sys. Inc. v. Ventura, 2006 WL 1230265, at \*1 (Conn.  
22 Super. April 20, 2006). It necessarily follows that if MERS has authority to hold a trustee's  
23 sale, then its appearance on the trust deed does not void the security for the underlying loan.

24 Plaintiffs cite various opinions purportedly supporting their position, but none apply  
25 here. In Landmark Nat'l Bank v. Kesler, 216 P.3d 158 (Kan. 2009), the court did not  
26 invalidate the participation of MERS in the foreclosure process. The court merely held that  
27 where property is encumbered by a MERS mortgage and a non-MERS mortgage, a party  
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1 seeking to foreclose the non-MERS mortgage need only notify the other mortgagee, not  
2 MERS, since MERS acts only as nominee for the mortgagee. Id. at 166. In Bellistri v.  
3 Ocwen Loan Servicing LLC, 284 S.W.3d 619 (Mo. Ct. App. 2009), a loan servicer claimed  
4 an interest in certain real property by virtue of an assignment of a promissory note and deed  
5 of trust from MERS. Id. at 621. Since the record contained no evidence that MERS owned  
6 the note and deed of trust, or was given authority to transfer the note and deed of trust by  
7 their owner, the court unremarkably held that the loan servicer had no interest in the subject  
8 property. Id. at 623–24. Plaintiffs here have not alleged that some party claims an interest  
9 in their property by virtue of an invalid assignment from MERS; indeed, the only authority  
10 they contest—the authority to hold a trustee’s sale—was explicitly granted to MERS in the  
11 Deed of Trust signed by Mrs. Ciardi. Finally, Plaintiffs state various legal conclusions  
12 about the effect of “splitting” the ownership of a trust deed from the ownership of the  
13 promissory note it secures. Even if true, these conclusions are not relevant to this case  
14 because Plaintiffs have not alleged that the Note and Deed of Trust have separate owners.  
15 While Plaintiffs describe the securitization of the Note at length, they nowhere set forth a  
16 separate track of assignments for the Deed of Trust. Since assignment of a note also works  
17 an assignment of the note’s security as a matter of law in Arizona, the current holder of the  
18 Note must also own the Deed of Trust. Hill v. Favour, 52 Ariz. 561, 568, 84 P.2d 575, 578  
19 (1938). Since MERS acts as nominee for the lender and the lender’s successors and assigns  
20 pursuant to the Deed of Trust, MERS has authority to hold a foreclosure sale on behalf of  
21 the current note holder. [Exhibit B at 1]

#### 22 Relief Requested

23 For the foregoing reasons, Defendants respectfully request that the Court enter an  
24 order dismissing with prejudice Plaintiffs’ Complaint.  
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DATED this 16th day of February, 2010.

BRYAN CAVE LLP

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Attorneys for Defendants

COPY of the foregoing electronically filed  
this 16th day of February, 2010.

COPY of the foregoing <sup>hand-delivered</sup> ~~mailed~~ to the  
following this 16th day of February, 2010:

Roan and Bianca Ciardi  
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