

1 SHELLEY VON BRINCKEN
2 PO Box 2362
3 Gras Valley, CA 95945

4 Plaintiff in Pro Se
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8 **IN THE UNITED STATES BANKRUPTCY COURT**
9 **SOUTHERN DISTRICT OF NEW YORK**
10

11 In re GMAC MORTGAGE, LLC,

12 Debtor
13

14 SHELLEY VON BRINCKEN,

15 Plaintiff,
16

17 vs.

18 GMAC MORTGAGE, LLC or Assignee, ETS
19 SERVICES, LLC, OCWEN
20 LOANSERVICING, LLC and DOES 1-20

21 Defendant(s).
22

Case No: 12-12020 MG

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS MOTION TO DISMISS
COMPLAINT AND PLAINTIFF'S
OBJECTION TO DEFENDANT'S
REQUEST FOR JUDICIAL NOTICE**

[Filed concurrently herewith]

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FEB 25 2016

U.S. BANKRUPTCY COURT, SDNY

23 **To all Parties** and their attorney(s) of record, please take Notice that the above entitled
24 Plaintiff, SHELLEY VON BRINCKEN, hereby opposes Defendant's Motion to Dismiss.
25

26 **I. INTRODUCTION**

27 Defendants, in typical foreclosure "mill" fashion, make considerable accusation as to
28 the merits of Plaintiff's case in its motion. Defendants have utterly failed to bring one judicially
noticeable fact or piece of evidence in support of their contention that they are entitled under

1 Plaintiff's loan contract. In the hopes of casting Plaintiff in the die of a "deadbeat homeowner",
2 Defendants motion must be overruled for the reasons set forth below. Defendants throughout the
3 motion rely upon legal conclusion and argument as to the merits of the complaint. This is not
4 well-taken and cannot survive a motion to dismiss.
5

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **II. LEGAL STANDARD**

8 For purposes of a motion to dismiss, the plaintiff's allegations are taken as true, and the
9 Court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v.*
10 *McKeithen*, 395 U.S. 411, 421 (1969). To defeat such a motion, the factual allegations must
11 simply be "enough to raise a right to relief above the speculative level...on the assumption that
12 all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v.*
13 *Twombly*, 550 U.S. 544 (2007), (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal
14 Practice and Procedure § 1216 (3d ed. 2004)).
15

16 The court must draw all reasonable inferences in the plaintiff's favor, *Doe v. United*
17 *States*, 419 F.3d 1058, 1062 (9th Cir. 2005), and presume that general allegations embrace those
18 specific facts that are necessary to support the claim," *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871,
19 889 (1990).
20

21 "Further, the court may not take notice of any matter that is in dispute." *U.S. v. Ritchie*,
22 342 F.3d 903, 908 (9th Cir., 2008). Plaintiff has squarely put every disputed fact and every
23 presumed legal effect of each and every title instrument at issue in her complaint (Compl. at ¶
24 115).
25
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1 Plaintiff has put the contractual and legal authority/capacity of each Defendant at issue
2 and as disputed in her Complaint. Defendants' legal presumption of authority based upon
3 disputed facts is not sufficient grounds for dismissal as a matter of law (*U.S. v. Ritchie, id.*).
4

5 In the absence of authenticated legal authority to act as *bona fide* beneficiary and/or as
6 trustee under Plaintiff's deed of trust, the statutory presumption of legal effect has not yet arisen.
7 There is no language in the statute under California Civ. Code § 2934a(d) which indicates that
8 the legislature intended a recorded assignment of deed of trust or substitution of trustee
9 instrument to be self-authenticating legal authority or to be beyond rebuttal or challenge. Plaintiff
10 here has rebutted such legal presumption timely and clearly in the Complaint. (Fed. R. Evid.
11 Rule 302, *Applying State Law to Presumptions in Civil Cases*). The contract was a California
12 contract.
13

14 Plaintiff hereby **Objects** to this court's subject matter and/or *in personam* jurisdiction
15 over all Defendant Parties. Defendants are invoking the power of the court through a motion and
16 all Defendant Parties have failed to establish standing to move this court. Standing is a threshold
17 issue and must be addressed upon such a challenge.
18

19 "The objection that a federal court lacks subject-matter jurisdiction may be raised by a
20 party, or by a court on its own initiative, at any stage in the litigation, even after trial and the
21 entry of judgment." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) (citations omitted)
22 (jurisdiction upheld); see also *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) ("Whenever it appears
23 by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter,
24 the court shall dismiss the action."). Plaintiff has raised such an objection.
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1 “[T]here is a presumption that a federal court lacks subject matter jurisdiction, and the
2 party seeking to invoke federal jurisdiction must affirmatively allege the facts supporting it.”),
3 *Kontrick, id.* In Defendant’s motion, Defendants fail to judicially notice any facts as they may
4 be contained within recorded documents in their RJN. The RJN is timely objected to as to the
5 facts and legal presumptions contained within the recorded instruments and California law
6 prohibits this court from taking judicial notice of any purported facts within those instruments
7 (See below: *Herrera, Love, Stormedia*). Thus, the Court is without any affirmative factual
8 showing by Defendant that would entitle them to dismissal.
9

10
11 See also 13D Wright & Miller § 3522, pp. 104–07 (“If these facts are challenged, the
12 burden is on the party claiming jurisdiction to prove that the court has jurisdiction over the
13 subject matter. . . . *This showing must be made by a preponderance of the evidence.*”) [emph.
14 added]. Moore’s Federal Practice ¶ 102.14 (citing *McNutt v. Gen. Motors Acceptance Corp. of*
15 *Ind., Inc.*, 298 U.S. 178, 189 (1936) (“The burden of proving all jurisdictional facts is on the
16 party asserting jurisdiction.”). Defendants have failed to carry their burden by a *preponderance*
17 *of evidence*. Defendants have provided this court no evidence whatsoever based upon Plaintiff’s
18 timely rebuttal to the RJN by Defendants. The RJN and motion fail as a matter of law.
19
20

21 None of the “*facts*” or presumptions of legal effect within the documents that were
22 recorded at the county land records are “generally within the trial court’s territorial jurisdiction,
23 or; can be accurately and readily determined from sources whose accuracy cannot be reasonably
24 questioned”. (F.R.E. Rule 201 (b)). See Defendant’s RJN; Plaintiff’s Objection to
25 Defendant’s RJN. The motion must fail as a matter of law.
26
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1 Defendants have effectively presented matters outside the pleadings by way of the
2 Request for Judicial Notice of records and the rebutted facts contained within those records.

3
4 Defendants have specifically attempted to bring disputed facts, as alleged in Plaintiff's
5 Complaint clearly, to lure this Court into error. Defendants are not permitted to turn a motion to
6 dismiss into a contested hearing over the *interpretation* of documents that are at issue. *U.S. v.*
7 *Ritchie, id.*

8
9 Plaintiff sufficiently alleges and provides facts and reasonable inferences drawn
10 therefrom that, when taken as true, defeat Defendant's motion. (*Bell Atlantic Corp.; Lujan, id.*).

11 This results in Defendants' motion being treated as a Motion for Summary Judgment
12 under **FRCP Rule 12 (d)**. As such, Plaintiff must be given a reasonable opportunity to present
13 material that is pertinent to the action. Plaintiff is also entitled to proper notice of a Motion for
14 Summary Judgment, not the instant motion presented by Defendants. Defendants are precluded
15 from cloaking a summary judgment as a motion to dismiss. Therefore, the motion fails as a
16 matter of law. Factual disputes are properly resolved only on summary judgment or at trial, not
17 on a motion to dismiss. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).
18

19
20 Simply put, it is the purported "facts" contained within the recorded documents
21 (assignments of deed, etc.) that are at issue and, as such, there are material disputes as to those
22 facts that cannot be dismissed under such a motion. A controversy exists as to the purported
23 facts contained within the recorded documents and the motion to dismiss fails as a matter of
24 law.
25

26
27 **Fed. R. Evid. Rule 302, Applying State Law to Presumptions in Civil Cases:** In a
28 civil case, state law governs the effect of a presumption regarding a claim or defense for which

1 state law supplies the rules of decision. Plaintiff has sufficiently disputed the facts and
2 presumed legal effect contained within the recorded instruments proffered by Defendants in
3 their Motion and request for judicial notice (See: **Plaintiff's Obj. to Def's RJN**); Defendants
4 may not plead themselves into a *presumptive* role where Plaintiff has specifically rebutted the
5 presumption of truth contained within the records of the county; Defendants only offer this
6 court defective circular logic that "because it was put on paper and recorded, it must be true".
7

8 The facts contained within public records are subject to *rebuttable* presumption;
9 Plaintiff has timely rebutted such presumptions. The disputed documents are part of county land
10 title records, thus, state law decisions regarding legal presumptions control this matter.
11

12 *Herrera v. Deutsche Bank Nat. Trust Co.*, 196 Cal.App.4th 1366 Cal App.; "Taking
13 judicial Notice of a document is not the same as accepting the truth of its contents or accepting a
14 particular interpretation of its meaning", *Joslin v. H.A.S. Insurance Brokerage* (1986) 184 Cal
15 App 3d 369, 374.
16

17 "While courts take notice of public records, they do not take notice of the truth of the
18 matters stated therein", *Love v. Wolf* (1964) 226 Cal App 2d 378, 403.
19

20 "When judicial notice is taken of a document ... the truthfulness and proper
21 interpretation of the document are disputable", *StormMedia, Inc. v. Superior Court* (1999) 20 Cal.
22 4th 449, 457, fn. 9 (*Stormedia.*).
23

24 Because it is Defendant's burden to prove jurisdictional facts, and the land title records
25 that were subject of Defendant's RJN in its motion have been properly and timely rebutted as to
26 the truth and content of the instruments, Defendants fail, as a matter of law, to carry their
27 burden, thus, the Motion must fail. 13D Wright & Miller § 3522, pp. 104-07 ("If these facts are
28

1 challenged, the burden is on the party claiming jurisdiction to prove that the court has
2 jurisdiction over the subject matter. . . . This showing must be made by a preponderance of the
3 evidence.”). Defendants are precluded from entering evidence into a motion to dismiss
4 proceeding. Defendants’ motion must be derived strictly from the record and any judicially
5 noticeable facts available to Defendants. Defendants have not carried their burden.
6

7 This Court is bound in its scope of judicial review of a recorded document under
8 *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106 [62
9 Cal.Rptr.3d 59] (*Poseidon*). “[T]he fact a court may take judicial notice of a recorded deed, or
10 similar document, does not mean it may take judicial notice of factual matters stated therein.”
11

12 “The hearing on demurrer may not be turned into a contested evidentiary hearing
13 through the guise of having the court take judicial notice of documents whose truthfulness or
14 proper interpretation is disputable.” (*Fremont Indemnity Co. v. Fremont General Corp.*, 148
15 Cal.App.4th 97, 114 (2007)). The demurrer above is the equivalent to the federal motion to
16 dismiss and is binding because of its authority over the judicial notice of state recorded
17 documents relating to California contract and real property.
18
19

20 Numerous California state cases stand “for the general principle that the party asserting
21 a right under an assigned instrument bears the burden of demonstrating the assignment.”
22 *Fontenot v. Wells Fargo Bank*, 198 Cal.App.4th 256, 270 (2011), citing *Neptune*
23 *Society Corp. v. Longanecker*, 194 Cal.App.3d 1233, 1242 (1987). *Neptune Society*, in turn,
24 relied on this Court’s opinion in *Cockerell v. Title Ins. & Trust Co.*, 42 Cal.2d 284, 292 (1954),
25 where the Court held:
26
27
28

1 *“The burden of proving an assignment falls upon the party asserting rights thereunder.*
2 *In an action by an assignee to enforce an assigned right, the evidence must not only be*
3 *sufficient to establish the fact of assignment when the fact is in issue [citation] but the measure*
4 *of sufficiency requires that the evidence of assignment be clear and positive to protect an*
5 *obligor from any further claim by the primary obligee”.* (Citations omitted.).

7 *Cockerell* has never been overruled or limited and it remains controlling law. Under
8 *Cockerell*, the Defendant must demonstrate it holds, or acts as an agent for a party that holds,
9 Plaintiff's loan pursuant to a valid transfer. Plaintiff does not have that burden. The Defendant,
10 not Plaintiff, must prove it has standing to enforce the Deed of Trust. Defendants have not
11 demonstrated as a matter of law that they have standing.

13 Plaintiff has alleged that Defendants have not acquired any right, title or interest in his
14 debt obligation, which created a disputed issue of fact on standing.

16 The question is not whether the Deed of Trust is void. The question is whether the
17 Defendants, as purported holders of Plaintiff's loan, had the power to enforce the terms of the
18 deed of trust. A non-judicial foreclosure (Notice of Default instrument) had to start with a *bona*
19 *fide* party as the claimed assignee of the “Lender.” *Jenkins v. JPMorgan Chase Bank, N.A.*, 216
20 Cal.App.4th at 508. That assignee must prove through authenticated, admissible evidence, that
21 it is entitled to payment and to exercise the power of sale contained in the deed of trust. By
22 simply regurgitating recorded title instruments without proffering the evidence to support every
23 fact, capacity and legal effect of the instrument(s), Defendants are without legal authority to
24 enforce the terms of the deed as a matter of law (*Cockerell, Fontenot, Neptune Society, id.*) and
25 by operation of law. (Cal. Civ. Code §§ 2924.17, 2924 (a)(6)).

1 In California, when a party authorizes a foreclosure without the power to do so, the
2 foreclosure is *void*, not voidable. *See, e.g., Pro Value Properties, Inc. v. Quality Loan service*
3 *Corp.*, 170 Cal.App.4th 579, 581, 583 (2009). As the First District recently held, “a sale is
4 rendered void when it is conducted by an entity that lacks authority to do so.” *Ram v. OneWest*
5 *Bank*, 223 Cal.App.4th 1, 10 (2015).
6

7 Defendants incorrectly aver that Plaintiff must show prejudice. The “prejudice” test
8 cannot be applied when a borrower alleges a foreclosure is *void* because the lender or servicer
9 has no power to foreclose:
10

11 “The second element—prejudice—is met when an irregularity in the proceeding
12 adversely affects the trustors’ ability to protect their interest in the property. ‘Prejudice’
13 however, ‘is not presumed from ‘mere irregularities’ in the process. . . .’ [¶] A sale is not
14 rendered void merely because of minor or technical defects. . . . A sale is rendered void when
15 the defects are substantial. . . . Similarly, a sale is rendered void when the foreclosure sale is
16 conducted by an entity that lacks the authority to do so”. *Ram v. OneWest Bank*, 234
17 Cal.App.4th at 8, quoting *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal.App.4th at 272 (italics
18 added). Plaintiff has the right to discovery and an evidentiary hearing to determine the capacity
19 of the Defendants so that if the documents are determined by this Court as being void and of no
20 legal effect, those instruments may be removed from the records of the county and Plaintiff is
21 not further damages and prejudiced by the falsified documents.
22
23
24

25 Although no sale has occurred, the ultimate result of Defendant’s actions, as admitted by
26 Defendant, is the non-judicial sale of the property by a party that has never proven that it is
27 entitled to enforce the deed of trust.
28

1 But, Plaintiff does not rely on procedural errors or “mere irregularities in the process.”
2 Plaintiff does not say the notices they received were late, or were not delivered. Plaintiff argues
3 an error of substance—the entity that authorized the foreclosure, the entities that started the
4 process, had no power to foreclose because they had no interest in the loan. This error makes
5 the non-judicial process of foreclosure on Plaintiff’s home *void*. *Ram v. OneWest Bank, supra*.
6 When an error makes a sale void, it no longer is procedural.
7

8 The cases imposing a prejudice rule, since they are based on procedural errors, do not
9 apply. They do not require Plaintiff to allege prejudice. Therefore, Defendant’s reliance on
10 those authorities is moot and does not support a theory upon which Defendants may rest their
11 motion.
12

13 CONCLUSION

14 For all of the authorities and facts contained herein and in the papers before the Court,
15 Plaintiff requests this Court overrule Defendants’ motion in its entirety and Order Defendants to
16 Answer.
17

18 Respectfully Submitted,
19

20 February 23th, 2016
21



/s/ Shelley von Brincken

22 Shelley von Brincken, Plaintiff in Pro Se
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2 PO Box 2362
3 Gras Valley, CA 95945

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REQUEST FOR JUDICIAL NOTICE**

[Filed concurrently herewith]

21 **To the Clerk of the court,** the Court and all parties hereto in the above entitled action,
22 Plaintiff hereby objects to Defendant's Request for Judicial Notice of documents.

23 Objections are as follows:

24 1. All Exhibits

25 The Exhibits are hereby objected to properly under:

26 While courts take notice of public records, they do not take notice of the truth of the
27 matters stated therein", *Love v. Wolf* (1964) 226 Cal App 2d 378, 403.
28

1 "When judicial notice is taken of a document ... the truthfulness and proper interpretation
2 of the document are disputable", *StorMedia, Inc. v. Superior Court* (1999) 20 Cal. 4th 449, 457,
3 fn. 9 (*Stormedia.*).

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12 therein."


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14 the guise of having the court take judicial notice of documents whose truthfulness or proper
15 interpretation is disputable." (*Fremont Indemnity Co. v. Fremont General Corp.*, 148
16 Cal.App.4th 97, 114 (2007)).

17 Under Fed. R. of Evid., Rule 201(b), "The court may judicially notice a fact that is not
18 subject to reasonable dispute because it: (1) is generally known within the trial court's territorial
19 jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot
20 be reasonably questioned."

21 Plaintiff has substantially and sufficiently rebutted any and all presumptions of truth, fact,
22 legal presumptions or effects arising from the above disputed instruments and/or validity of all
23 instruments that were recorded against his title.

24 Respectfully Submitted,

25 Dated this 23th day of February, 2016


/s/ Shelley von Brincken

Shelley von Brincken, Plaintiff