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8 Attorneys for *Defendants* **ROBIN P. ARKLEY, CEO; SN SERVICING**
9 **CORPORATION; ANDY CECERE** (erroneously sued as “ANDY CECERE, CEO,
10 as Trustee of the Bungalow Series IV Trust”); and **US BANK TRUST NATIONAL**
11 **ASSOCIATION AS TRUSTEE OF THE BUNGALOW SERIES IV TRUST**
12 (erroneously sued as “US BANK TRUST NATIONAL ASSOCIATION”)

13 **UNITED STATES DISTRICT COURT**

14 **EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO DIVISION**

15 PAUL JOHN HANSEN; and T J HERBST
16 TRUST 1, a Non-Statutory Trust,

17 Plaintiff,

18 vs.

19 ROBIN P. ARKLEY, CEO; SN
20 SERVICING CORPORATION; ANDY
21 CECERE, CEO, as Trustee of the
22 Bungalow Series IV Trust; US BANK
23 TRUST NATIONAL ASSOCIATION,

24 Defendants

CASE NO.: 2:20-CV-02436-KJM-CKD

**DEFENDANTS’ NOTICE OF
MOTION AND MOTION TO
DISMISS PLAINTIFFS’
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

[Fed. R. Civ. P. 12(b)(6)]

Date: April 16, 2021
Time: 10:00 a.m.
Ctrm: 3, 15th floor
Judge: Hon. Kimberly J. Mueller
Location: Robert T. Matsui Courthouse
501 I Street
Sacramento, CA 95814

Complaint Filed: December 9, 2020

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on April 16, 2021, at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 3, 15th Floor, of the above-entitled Court, located at 501 I Street, Sacramento, CA 95814, Defendants, ROBIN P. ARKLEY, CEO; SN SERVICING CORPORATION; ANDY CECERE (erroneously sued as “ANDY CECERE, CEO, as Trustee of the Bungalow Series IV Trust”); and US BANK TRUST NATIONAL ASSOCIATION AS TRUSTEE OF THE BUNGALOW SERIES IV TRUST (erroneously sued as “US BANK TRUST NATIONAL ASSOCIATION”) (together, “Defendants”) will move this Court to dismiss the Complaint of Plaintiffs PAUL JOHN HANSEN; and T J HERBST TRUST 1, a Non-Statutory Trust (“Plaintiffs”), pursuant to Federal Rules of Civil Procedure Rule 12(b)(6) on the grounds that Plaintiff fails to state a claim upon which relief can be granted.

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1 Defendants seek an order of the Court dismissing Plaintiff's Complaint,
2 without leave to amend, pursuant to Fed. R. Civ. P. 12(b)(6). This motion will be
3 based on this Notice of Motion and Motion, the Memorandum of Points and
4 Authorities, and the Request for Judicial Notice filed concurrently herewith, the
5 pleadings and records on file, and such other argument or evidence as may be
6 presented to the Court at the hearing on the motion. As Plaintiffs are not represented
7 by counsel, no meet and confer was required as set forth in the Court's Standing
8 Order.

9
10 Date: February 25, 2021

GHIDOTTI | BERGER, LLP

11
12 */s/ Rachel C. Witcher* _____

13 Rachel C. Witcher

14 Attorneys for *Defendants* **ROBIN P.**

ARKLEY, CEO; SN SERVICING

15 **CORPORATION; ANDY CECERE**

16 (erroneously sued as "ANDY CECERE,

CEO, as Trustee of the Bungalow Series

17 IV Trust"); and **US BANK TRUST**

NATIONAL ASSOCIATION AS

18 **TRUSTEE OF THE BUNGALOW**

19 **SERIES IV TRUST** (erroneously sued

20 as "US BANK TRUST NATIONAL

ASSOCIATION")

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs T J HERBST TRUST 1 (the “Herbst Trust”) and PAULT JOHN
4 HANSEN, as sole Trustee and as Beneficiary (“Hansen”) (collectively, “Plaintiffs”)
5 brought this action seeking to delay nonjudicial foreclosure despite the longstanding
6 default on the mortgage loan secured by the real property located at 3635 Bellinger
7 Court, North Highlands, CA 95660 (the “Subject Property”). Plaintiffs’ Complaint
8 attempts to allege civil rights violations under 42 U.S.C. sections 1983, 1985 and
9 1986. However, Plaintiffs fail to establish standing and do not allege specific
10 conduct by defendants to satisfy the pleading standards of Rule 8. Based on the
11 allegations, the admissions, and the judicially noticeable materials, Plaintiffs fail to
12 state a claim against defendants. As such, the Motion to Dismiss should be granted.

13 **II. STATEMENT OF FACTS**

14 **A. LOAN ORIGATION AND DEFAULT**

15 In or around May 2005, the Subject Property was granted to non-party Thomas
16 J. Herbst (“Herbst”). (See Request for Judicial Notice [“RJN”], Ex. A.) On or about
17 May 24, 2005, Herbst obtained a \$311,000.00 loan (“Loan”) from American Family
18 Funding that was secured against the Subject Property by a deed of trust recorded on
19 June 3, 2005 as Instrument No. 20050603 0279 (“Deed of Trust”) in the Official
20 Records of the County of Sacramento (the “Official Records”). (RJN, Ex. B.) As
21 evidenced by recorded Assignments of Deed of Trust, the Deed of Trust was
22 ultimately assigned to Defendant US BANK TRUST NATIONAL ASSOCIATION
23 AS TRUSTEE OF THE BUNGALOW SERIES IV TRUST (“US Bank”). (RJN, Ex.
24 C.)

25 On October 2, 2015, a Notice of Default was recorded in the Official Records
26 listing a past due amount on the Loan of \$42,233.28 as of October 2, 2015. (RJN, Ex.
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1 D.) Herbst failed to cure his default on the Loan and on October 26, 2017, a Notice of
2 Trustee's Sale was recorded in the Official Records referencing a foreclosure sale date
3 of November 20, 2017. (RJN, Ex. E.)

4 **B. FIVE BANKRUPTCY ACTIONS FILED BY THOMAS J. HERBST**

5 In order to avoid foreclosure of the Subject Property, Herbst has filed **five**
6 separate bankruptcy actions in the United States Bankruptcy Court for the Northern
7 District of California. The first bankruptcy, Case Number 16-51679 was filed as a
8 Chapter 13 on June 6, 2016 and dismissed on October 2, 2017. (RJN, Ex. F.) The
9 second bankruptcy, Case Number 17-52776 was filed as a Chapter 13 on November
10 17, 2017, converted to a Chapter 7 on March 5, 2018, and dismissed on August 13,
11 2018. (RJN, Ex. G.) The third bankruptcy, Case Number 19-51404 was filed as a
12 Chapter 13 on July 12, 2019 and dismissed on September 12, 2019. (RJN, Ex. H.)
13 The fourth bankruptcy, Case Number 19-52037 was filed as a Chapter 7 on October 7,
14 2019. (RJN, Ex. I.) In the fourth bankruptcy case, a Motion for Relief from the
15 Automatic Stay was granted as to the Subject Property on June 2, 2020. (RJN, Ex. J.)
16 Thereafter, the fourth bankruptcy case was terminated on December 11, 2020. (RJN,
17 Ex. I.)

18 The fifth bankruptcy, Case Number 21-50095 was recently filed on January 27,
19 2021. (RJN, Ex. K-L.) In the fifth bankruptcy, Herbst claims that as of the date of
20 filing he is the owner of the Subject Property. (RJN, Ex. L-12, Pg. 12.) However, on
21 August 14, 2020 (during the pendency of Herbst's fourth bankruptcy and prior to
22 filing of his fifth bankruptcy), a Quitclaim Deed was recorded in the Official Records
23 referencing transfer of the Subject Property from Herbst to the Herbst Trust. (RJN,
24 Ex. M.) It appears that Herbst did not advise the bankruptcy court of the transfer of
25 the Subject Property to the Herbst Trust during pendency of the fourth bankruptcy
26 case or in his petition filed in the fifth bankruptcy. (See RJN, Ex. I, K-L.)
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1 *Home Loans, Inc.*, 2015 WL 12661910, at *8 (C.D. Cal., Oct. 14, 2015) (“[s]uch
2 pleading cannot survive a motion to dismiss”); *Newman v. OneWest Bank, FSB*, No.
3 EDCV 10-0064, 2010 WL 797188, *5 (C.D. Cal. Mar. 5, 2010); see also *In re Sagnet*
4 *Tech., Inc.*, 278 F.Supp.2d 1079, 1094 (N.D. Cal. Aug. 15, 2003) (“[T]he complaint
5 fails to state a claim because plaintiffs do not indicate which individual defendant or
6 defendants were responsible for which alleged wrongful act.”); see also *Corazon v.*
7 *Aurora Loan Services*, No. C 11-00542 SC, 2011 WL 1740099, *5 (N.D. Cal. May 5,
8 2011).

9 Here, Plaintiffs’ Complaint lacks specific facts as to Defendants ROBIN P.
10 ARKLEY, CEO (“Arkley”), SN SERVICING CORPORATION (“SN Servicing”),
11 ANDY CECERE (erroneously sued as “ANDY CECERE, CEO, as Trustee of the
12 Bungalow Series IV Trust”) (“Cecere”), and US Bank (collectively “Defendants”).
13 While Plaintiffs allege that Defendants “[f]alsely claim the possession of an
14 instrument, note, that evidences right to foreclosure, of the subject land...”
15 (Complaint, ¶ 33(i)), no specific allegations as to these individual Defendants exist to
16 support a violation of Plaintiffs’ civil rights. Because Plaintiffs’ Complaint lumps all
17 Defendants together without explanation, the Complaint necessarily fails.

18 **B. THE HERBST TRUST CANNOT MAINTAIN LITIGATION IN *PRO***
19 ***SE* AND HANSEN HAS NO STANDING TO SUE**

20 Plaintiffs’ Complaint contends that the Herbst Trust is the owner of the Subject
21 Property. (Complaint, ¶ 23.) However, the Herbst Trust appears to be unrepresented
22 in this action. A party’s right to represent his or her own interests “does not extend to
23 other parties or entities.” *Simon v. Hartford Life, Inc.*, 546 F.3d 661, 664-65 (9th Cir.
24 2008). In other words, a non-attorney may not file an action *pro se* on behalf of a
25 trust. *McCalip v. De Legarret*, Case No. CV 08-2250, 2008 WL 3891254, *2 (C.D.
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1 Cal. Aug. 18, 2008) (citing *C.E. Pope Equity Trust v. United States*, 818 F.2d 696,
2 697 (9th Cir. 1987).

3 Both Hansen and the Herbst Trust are litigating this action in *pro se*. The
4 Herbst Trust is unable to pursue this action in *pro se* based on the authority set forth
5 above. Moreover, Hansen appears to claim no personal interest in the Subject
6 Property and has no standing to assert claims concerning his right to the Subject
7 Property free and clear of the Deed of Trust. Thus, if the Complaint is not dismissed
8 in its entirety, the Herbst Trust (at the very least) must be ordered to show cause as to
9 its improper *pro se* litigant status.

10 **C. PLAINTIFFS' CLAIM FOR VIOLATION OF 42 U.S.C. §§ 1983, 1985**
11 **AND 1986 FAILS**

12 **1. 42 U.S.C. § 1983**

13 42 U.S.C. section 1983 provides relief against state actors acting “under color of
14 [law].” 42 U.S.C. § 1983; see *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 927 (1982)
15 (“In cases under § 1983, ‘under color of law’ has consistently been treated as the same
16 thing as the ‘state action’ required under the Fourteenth Amendment.”) Here, the
17 Complaint fails to allege a violation of Plaintiffs’ Constitutional rights by a person
18 acting under color of state law.

19 **2. 42 U.S.C. §§ 1985 and 1986**

20 42 U.S.C. section 1985 provides relief in the event of “a private conspiracy to
21 deny equal protection of laws” and “for the purpose of preventing or hindering the
22 constituted authorities of any State or Territory from giving or securing to all persons
23 within such State or Territory the equal protection of the laws.” *Bretz v. Kelman*, 773
24 F.2d 1026, 1027 n.3 (9th Cir. 1985). A plaintiff must allege that they are a member of a
25 protected class and the conspiracy (if alleged) was based on a class-based or other
26 discriminatory motive. *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971); *Watkins v.*
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1 *United States Army*, 875 F.2d 699, 722 (9th Cir. 1989). Furthermore, in order to state a
2 claim under 42 U.S.C. section 1986, a plaintiff must first have a viable claim under
3 section 1985. *Trerice v. Pedersen*, 769 F.2d 1398, 1403 (9th Cir. 1985) (citing
4 *Mollnow v. Carlton*, 716 F.2d 627, 632 (9th Cir. 1983)).

5 Here, Plaintiffs have not alleged that they are members of a protected class, nor
6 do they allege that Defendants engaged in any racial or class-based discrimination.
7 Because Plaintiffs have not pled the necessary elements to state a claim, the Motion to
8 Dismiss should be granted.

9 **D. PLAINTIFFS’ REFERENCE TO THE “FAIR DEBT COLLECTION**
10 **PRACTICES ACT” SHOULD BE DISREGARDED**

11 Plaintiffs do not specifically allege a claim under the Fair Debt Collection
12 Practices Act (“FDCPA”), but vaguely reference the statute (15 U.S.C. section 1692 *et*
13 *seq.*) in paragraphs 25 through 30 of the Complaint. To state a claim for violation of
14 FDCPA, “a plaintiff must allege facts that establish the following: (1) the plaintiff has
15 been the object of collection activity arising from a consumer debt; (2) the defendant
16 attempting to collect the debt qualifies as a ‘debt collector’ under the FDCPA; and (3)
17 the defendant engaged in a prohibited act or has failed to perform a requirement
18 imposed by the FDCPA.” *Gomez v. Wells Fargo Home Mortg.*, 2011 WL 5834949, at
19 *5 (N.D. Cal. Nov. 21, 2011) (internal citations omitted).

20 First, Plaintiffs have failed to establish that are the target of debt collection
21 activity by Defendants or that they have standing to pursue a claim under the FDCPA.
22 According to 15 U.S.C. section 1692a, a “consumer” under the FDCPA only extends to
23 a person “obligated or allegedly obligated to pay any debt.” 15 U.S.C. § 1692a.
24 Indeed, Plaintiffs are not listed as “borrowers” on the subject Deed of Trust (RJN, Ex.
25 B), but simply appear to claim and interest in the Subject Property which is encumbered
26 by the Deed of Trust. Moreover, the Complaint is vague and conclusory in nature as it
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1 fails to reference which provision of the FDCPA that Defendants allegedly violated.

2 Additionally, Plaintiffs have failed to establish that Defendants are “debt
3 collectors” as defined by the statute. “Debt Collector” is defined in the FDCPA as “any
4 person...in any business the principal purpose of which is the collection of any debts, or
5 who regularly collects or attempts to collect, directly or indirectly, debts owed or due
6 asserted to be owed or due another.” 15 U.S.C. § 1692a(6). US Bank is the current
7 beneficiary of the Deed of Trust (RJN, Ex. B) and SN Servicing is the current servicer
8 of the Loan. An entity which makes efforts to collect its own debt is not a “debt
9 collector” under the FDCPA. For example:

10 Wells Fargo is not a “debt collector” within the meaning of the FDCPA
11 because it was attempting to collect its own debt. *Valdez v. America's*
12 *Wholesale Lender*, 2009 WL 5114305, at *25–26 (N.D.Cal. Dec. 18, 2009)
13 (defendant mortgage company efforts to collect its own debt does not make
14 defendant a ‘debt collector’ under the FDCPA); see also *Zhuravlev v. BAC*
15 *Home Loans Servicing, LP*, 2010 WL 2873253, at *2 (N.D.Cal. July 20, 2010)
16 (a debt collector does not include the consumer's creditors, a mortgage
17 servicing company, or an assignee of a debt, as long as the debt was not in
18 default at the time it was assigned). Nor is a mortgage servicing company ... a
19 debt collector within the meaning of the FDCPA. See *Reyes–Aguilar v. Bank*
20 *of America, N.A.*, 2014 WL 2917049, at *10 (N.D.Cal. June 24, 2014);
21 *Caballero v. Ocwen Loan Serv.*, 2009 WL 1528128, at *1 (N.D.Cal. May 29,
22 2009) (loan servicer was not “debt collector” under FDCPA); *Jelsing v. MIT*
23 *Lending*, 2010 WL 2731470, at *5 (S.D.Cal. July 9, 2010) (“Plaintiffs have
24 not alleged that Wells Fargo is a debt collector. *1114 Wells Fargo is a
25 mortgage servicer, and [a] mortgage servicing company is not a debt collector
26 within the meaning of the FDCPA); *Rowe v. Educ. Credit Mgmt. Corp.*, 559
27 F.3d 1028, 1031 (9th Cir.2009) (“a ‘creditor’ is not a ‘debt collector’ under
28 the FDCPA”). Additionally, the overwhelming majority of courts within the
Ninth Circuit have concluded that nonjudicial foreclosures do not constitute
debt collection under the FDCPA. See, e.g., *Ligon v. JP Morgan Chase Bank*,
2011 WL 2550836, at *3 (N.D.Cal. June 27, 2011) (collecting cases).

25 *Pratap v. Wells Fargo Bank, N.A.*, 63 F.Supp.3d 1101, 1113–1114 (N.D. Cal. 2014).

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1 Finally, Arkley and Cecere are individuals, and despite any employment by SN
2 Servicing or US Bank, do not meet the definition of “debt collector” under the statute.
3 As such, Plaintiffs are unable to plead standing or that any of Defendants are “debt
4 collectors” under the statute. The vague references to the statute should be disregarded
5 by the Court.

6 **E. PLAINTIFFS’ “SHOW ME THE NOTE” THEORY HAS BEEN**
7 **WIDELY REJECTED**

8 The Complaint appears to contend that Defendants cannot foreclose on the
9 Subject Property because they “have no note” and “do not have evidence that any
10 substantive money was in any account that was given Plaintiff, or Thomas Herbst...”
11 (Complaint, ¶ 28(i-ii).) However, this theory has been widely rejected. “Under
12 California law, there is no requirement for the production of an original promissory note
13 prior to the initiation of a nonjudicial foreclosure...Therefore, the absence of an original
14 promissory note in a nonjudicial foreclosure does not render a foreclosure invalid.”
15 *Pantoja v. Countrywide Home Loans, Inc.*, 640 F.Supp.2d 1177, 1186 (N.D. Cal. 2009).
16 “Production of the original note is not required to proceed with a non-judicial
17 foreclosure.” *Hafiz v. Greenpoint Mortg. Funding, Inc.*, 652 F.Supp.2d 1039, 1043
18 (N.D. Cal. 2009) (citing *Patalunan v. Reunion Mortgage, Inc.*, 2009 WL 961995, at *1
19 (N.D. Cal. 2009); see also *Sicairos v. NDEX West, LLC*, 2009 WL 385855 at *3 (S.D.
20 Cal. Feb. 13, 2009). Based on the forgoing authorities, and to the extent that Plaintiffs’
21 Complaint relies on the flawed “show me the note” theory, the Complaint should be
22 dismissed.

23 **V. LEAVE TO AMEND SHOULD BE DENIED**

24 The court may deny leave to amend a pleading where the amendment would not
25 cure the pleading’s deficiencies. *AE v. County of Tulare*, 666 F.3d 631, 636 (9th Cir.
26 2012) (court may deny leave to amend where amendment would be futile or plaintiff
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1 has failed to cure pleading’s deficiencies in prior amendments); *Vasquez v. Los*
2 *Angeles County*, 487 F.3d 1246, 1258 (9th Cir. 2007) (identifying “futility of
3 amendment” as a basis for denying leave to amend.) *Pro se* pleadings are generally
4 held to a less stringent standard than those drafted by attorneys. However, *pro se*
5 pleadings are not exempt from the requirements of Rule 8. The court’s liberal
6 interpretation of a *pro se* complaint may not supply essential elements of a claim that
7 is not pled. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992); *Ivey v. Bd. Of*
8 *Regents Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). As discussed above, the
9 Complaint is vague and ambiguous. Plaintiffs fail to articulate facts sufficient to
10 support any alleged wrongdoing by Defendants. Despite Plaintiffs’ *pro se* status, the
11 Complaint, as drafted, establishes no basis for recovery. Thus, the Court should
12 dismiss the Complaint without leave to amend.

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1 **VI. CONCLUSION**

2 The instant Complaint should be dismissed with prejudice. No cause of action,
3 based on the facts currently alleged, can survive a Rule 12(b)(6) attack. Plaintiffs
4 cannot allege any facts against Defendants that would be sufficient to state a claim for
5 relief. For all the foregoing reasons, the Complaint should be dismissed without leave
6 to amend.

7
8 Date: February 25, 2021

Respectfully submitted,

9 GHIDOTTI | BERGER, LLP

10 /s/ Rachel C. Witcher

11 Rachel C. Witcher

12 Attorneys for *Defendants* **ROBIN P.**

13 **ARKLEY, CEO; SN SERVICING**

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14 CEO, as Trustee of the Bungalow Series

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