

1 Litton stopped moving forward with the initial foreclosure on
2 or about January 30, 2008, because Plaintiffs and Litton had
3 entered into a forbearance agreement, wherein Litton provided
4 Plaintiffs with an arrearage repayment plan. Comstock Decl. at
5 ¶ 11. About six months after the forbearance agreement was entered
6 into, Plaintiffs again fell behind on their mortgage payments. Id.
7 at ¶ 12. However, Litton continued to work with Plaintiffs. Id.

8 Plaintiffs continued with their attempts to avoid foreclosure,
9 working with both National City Mortgage and Litton. First,
10 Plaintiffs at some point sought to obtain a loan modification with
11 National City Mortgage, and Plaintiffs continued to work with
12 National City Mortgage on the application for a loan modification
13 through 2009.¹² Grey Decl. ¶ 9; Comstock Decl., Ex. 27. The exact
14 timing of the application for a loan modification is unclear, but
15 does not appear to be material.

16 Litton's records also show that Plaintiffs attempted to sell
17 the Property to avoid foreclosure. Comstock Decl. at ¶ 13;
18 Comstock Decl., Ex. 28 "Litton's Comment Notes for August 5, 2008."
19 On August 5, 2008, Plaintiffs informed Litton that Plaintiffs would
20 like to sell the Property, and that Plaintiffs were under a
21 contract to sell the Property to Plaintiffs' tenants, Dean and
22 Rachel Kennedy. Comstock Decl. at ¶ 13; Comstock Decl., Ex. 29
23 "Plaintiffs' Exclusive Right to Sell Listing Contract." However,
24 the records show that on September 3, 2008, Plaintiffs informed
25 Litton that Plaintiffs were unable to sell the Property because

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27 ¹² Ms. Grey's Declaration states that the application was made in
28 August 2007; Exhibit 27 to Ms. Comstock's Declaration indicates
that documents were submitted in support of the application in
2008.

1 Plaintiffs were \$40,500 short. Comstock Decl. at ¶ 14; Comstock
2 Decl., Ex. 30 "Litton's Comment Notes for September 3, 2008."
3 According to the records, Plaintiffs asked that Litton share in the
4 shortfall with the junior lienholder, Countrywide, by charging off
5 approximately \$20,000. Comstock Decl. at ¶ 14; Comstock Decl., Ex.
6 30 "Litton's Comment Notes for September 3, 2008." These same
7 records show that on September 8, 2008, Plaintiffs informed Litton
8 that Countrywide was unable to charge off a large enough portion of
9 the unpaid debt, therefore Plaintiffs could not sell the Property.
10 Comstock Decl. at ¶ 15; Comstock Decl., Ex. 30 "Litton's Comment
11 Notes for September 8, 2008." Litton again reminded Plaintiffs
12 about other options such as a deed in lieu of foreclosure, but
13 Plaintiffs did not seem interested. Comstock Decl. at ¶ 15;
14 Comstock Decl., Ex. 31 "Litton's Comment Notes for September 8,
15 2008."

16 On November 1, 2008, judicial foreclosure proceedings were
17 again commenced by Deutsche Bank. Comstock Decl. at ¶ 16;
18 Comstock Decl., Ex. 32 "Complaint Filed by Deutsche Bank in the
19 Superior Court of Litchfield." On November 7, 2008, as part of the
20 foreclosure proceedings, Litton requested the original note from
21 Residential Funding Corporation to send to counsel for Litton in
22 the foreclosure action. Comstock Decl. at ¶ 17. Ms. Comstock
23 states that the next day, Litton was informed -- it is not clear by
24 whom -- that the original note was missing from the collateral
25 file. Id. at ¶ 17; Comstock Decl., Ex. 33.

26 During the course of discovery in the foreclosure action,
27 Plaintiffs requested any documents establishing Deutsche Bank as
28 the holder of the note. Grey Decl. at ¶ 15. In response, Deutsche
Bank produced a Lost Note Affidavit on February 27, 2009, but did

1 not provide Plaintiffs with a copy of the note or any other
2 documents. Id. The affidavit was prepared by Denise Bailey of
3 Litton, assistant secretary of Litton, and assistant secretary of
4 Residential Funding Company, as "attorney in fact"¹³ for Deutsche
5 Bank. Grey Decl., Ex. N "Lost Note Affidavit." The affidavit
6 states in pertinent part:

7
8 3. I, and/or other employees of Litton Loan
9 Servicing Inc. personally searched our document
10 control center, which took [left blank] hour(s)
11 in an attempt to locate the original Promissory
12 Note to no avail.

13 4. In connection with this case, a diligent
14 search was conducted in an attempt to locate
15 the original executed Promissory Note as
16 indicated below. I, or other persons acting
17 under my direction, checked all files in which
18 we could possibly expect to find the Promissory
19 Note. If a copy of the Promissory Note is
20 available it is attached hereto. The
21 Promissory Note has not been pledged or
22 hypothecated or otherwise impaired.

23 The affidavit does not state where the original note was located at
24 any particular point in time prior to the loss of the note, nor
25 does the affidavit state that Deutsche Bank ever possessed the
26 original note. Grey Decl., Ex. N "Lost Note Affidavit." The
27 affidavit does not state (indeed, leaves blank) the number of hours
28 Litton spent searching for the note. However, the affidavit states

23 ¹³ The Court interprets this to mean that Ms. Bailey asserted that
24 she was acting under a power of attorney, although she does not
25 state that explicitly.
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27
28

1 that Deutsche Bank was the "holder" of the note as of February 27,
2 2009.¹⁴ Id.

3 There is no evidence indicating the present location of the
4 note. The Declaration of Mr. Martin of PNC Mortgage states that
5 PNC Bank -- into which National City Mortgage merged -- is not in
6 possession of the note. Martin Decl. at ¶ 8. Mr. Martin has also
7 not been able to locate any other documents referencing Plaintiffs'
8 loan. Id. at ¶ 9. Similarly, Ms. Yan of PNC Mortgage also states
9 that Ms. Yan and other employees of PNC Bank have searched PNC
10 Bank's records and have confirmed that the collateral file, which
11 allegedly included the original note, mortgage and assignment, was
12 delivered to Deutsche Bank.¹⁵ Yan Decl. at ¶ 7.

13 The Property was scheduled to be auctioned on September 30,
14 2009, but Plaintiffs filed a bankruptcy petition in the U.S.
15 Bankruptcy Court for the Northern District of California under
16 Chapter 13 in Case No. 09-58171-RLE on September 25, 2009, to
17 prevent the sale. Plaintiffs then filed this second bankruptcy
18 case on December 14, 2009. The first bankruptcy case was dismissed
19 on December 17, 2009.

20 On July 6, 2011, Plaintiffs served a letter that Plaintiffs
21 contend was a Qualified Written Request ("QWR") on attorneys Kevin
22 Hahn, Charles Nunley, Mark Oto, and Erica Loftis -- attorneys that
23 Plaintiffs claim were employed by the law firm Malcolm & Cisneros,

24 ¹⁴ Plaintiffs believe that the lost note affidavit does not
25 contain sufficient content to demonstrate that Deutsche Bank
26 is entitled to enforce the note. The Court will address this
argument within the analysis portion of this decision.

27 ¹⁵ According to Ms. Yan, neither National City Mortgage nor PNC
28 claims any interest in the Plaintiffs' note or mortgage after
June 26, 2003.

1 which represents Defendants in this proceeding.¹⁶ Grey Decl. at
2 ¶ 19; Grey Decl., Ex. Q "QWR Letter." The letter explained that
3 Plaintiffs have been unable to determine who currently holds the
4 note, and requested copies of the note and other information about
5 anyone who has held the note. Grey Decl. at ¶ 19; Grey Decl., Ex.
6 Q "QWR Letter." According to Ms. Grey, there was no acknowledgment
7 or response of any kind to the letter.¹⁷ Grey Dec. at ¶ 19.

8 According to Ms. Grey, there are at least two other liens on
9 the property. One is a broker's lien in the amount of \$50,000 held
10 by Country Living & Associates. Id. at ¶ 25. The other is in the
11 amount of \$12,500, and is held by Edward F. Cullen. Id. at ¶ 26.
12 Plaintiffs do not dispute the validity of these two liens.

13 14 Analysis

15 Before the Court turns to the two motions, it is important to

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17 ¹⁶ According to the California State Bar's website, it appears
18 that not all of these attorneys are currently employed by Malcolm &
19 Cisneros. Instead, the State Bar's website shows that only Kevin
20 Hahn and Erica Loftis are employed by this firm.

21 ¹⁷ Plaintiffs request that the Court treat Defendants' failure to
22 respond to Plaintiffs' inquiry regarding ownership of the note as
23 evidence suggesting lack of Defendants' ownership. Defendants
24 argue that the letter does not constitute a QWR because the letter
25 was not sent to the loan servicer, and Plaintiffs did not provide
26 sufficient reasons for claiming that the account is in error as
27 required by 12 U.S.C. § 2605(e)(1)(B)(ii). Defendants further
28 argue that even if the letter constitutes a QWR, the Court should
disregard Plaintiffs' request because Plaintiffs failed to raise
the claim in their Second Amended Complaint. Because Plaintiffs
first raised the § 2605(e)(1)(B)(ii) claim in this motion, the
claim is not properly asserted, and the Court does not consider it.
See Coleman v. Quaker Oats Co., 232 F.3d 1271, 1291-1293 (9th Cir.
2000). However, the Court does not opine whether the claim could
be asserted, if done properly.

1 identify the claims which are asserted in this adversary
2 proceeding. Plaintiffs's Second Amended Complaint¹⁸ asks the Court
3 to make various, overlapping declarations: (1) that Deutsche Bank
4 has no enforceable interest in the Property; (2) that Litton is an
5 improper party to the action; (3) that title is quiet and
6 Plaintiffs take the Property free of Deutsche Bank's mortgage
7 encumbrances;¹⁹ and (4) that Litton's Proof of Claim filed on
8 January 11, 2010 and the Amended Proof of Claim filed on September
9 23, 2010 are defective, false, fraudulent or otherwise unlawful.

10 However, there are really only two determinations which
11 Plaintiffs ask this Court to make: (1) that Deutsche Bank lacks
12 standing to enforce the lost promissory note; and (2) that Litton
13 lacks standing to assert a claim, because Litton cannot enforce the
14 note on behalf of Deutsche Bank without proof of Deutsche Bank's
15 right to enforce the note, and because Litton was not the servicer
16 when the proof of claim was filed. Both cross-motions are aimed at
17 these two issues.²⁰

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19 ¹⁸ Because Plaintiffs are not represented by counsel, the Court has
20 liberally construed the Second Amended Complaint in accordance with
21 Haines v. Kerner, 404 U.S. 519, 520 (1972), and Johnson v. Lucent
22 Technologies, Inc., 653 F.3d 1000, 1011 (9th Cir. 2011). However,
as noted above, Ms. Grey, one of the Plaintiffs, is a licensed
attorney.

23 ¹⁹ The Second Amended Complaint does not specify whether the quiet
24 title claim arises under Connecticut or California law.

25 ²⁰ In the Second Amended Complaint, Plaintiffs claim that the sworn
26 proof of claim filed by Litton on behalf of Deutsche Bank is false,
27 fraudulent and otherwise unlawful. Plaintiffs have not sought
28 summary judgment on any fraud claim which might be asserted.
However, the Court understands the allegations of fraud to be
premised upon Litton's alleged lack of standing.

1 On the issue of standing, Defendants bear the burden of proof,
2 and hence, the burden of production. See Veal v. American Home
3 Mortgage Servicing, Inc. (In re Veal), 450 B.R. 897, 907 n.11
4 (B.A.P. 9th Cir. 2011). There are two types of standing:
5 constitutional and prudential. See Cetacean Cmty. v. Bush, 386
6 F.3d 1169, 1174-75 (9th Cir. 2004). Constitutional standing
7 requires the following: (1) the plaintiff must suffer an "injury in
8 fact" that is concrete and particularized and actual or imminent,
9 not conjectural or hypothetical; (2) the injury must be fairly
10 traceable to the defendant's action; and (3) it is likely, not
11 speculative, that the injury can be redressed by a ruling in the
12 plaintiff's favor. Id. By contrast, prudential, or non-
13 constitutional, standing exists when a particular plaintiff has the
14 statutory right to sue. Id.

15 Therefore, within the context of Plaintiffs' motion, the Court
16 considers whether the evidence, construed in a light most favorable
17 to Defendants, supports a finding of standing. In the context of
18 Defendants' motion, the Court considers whether Defendants have
19 presented uncontroverted evidence which, construed in a light most
20 favorable to Plaintiffs, establishes standing.

21
22 **A. Plaintiffs' Motion**

23 First, in considering Plaintiffs' motion, the Court views the
24 evidence in a light most favorable to Defendants. In doing so,
25 there is some evidence that Deutsche Bank is entitled to enforce
26 the promissory note. The photocopy of the promissory note suggests
27 an unbroken chain of endorsements which ultimately led to Deutsche
28 Bank becoming the holder of the note. Likewise, the Assignment of
the note and mortgage were also to Deutsche Bank, and despite the

1 loss of the note, there is a lost note affidavit which states that
2 the note was not pledged, hypothecated or otherwise impaired, and
3 that Deutsche Bank was the holder¹ of the note at the time the
4 affidavit was sworn.

5 Despite the apparent irregularity with which Plaintiffs take
6 objection -- specifically, the Assignment to Deutsche Bank
7 occurring before the endorsement to Residential Funding Corporation
8 and later endorsement to Deutsche Bank -- the Court must, for
9 purposes of Plaintiffs' motion only, construe this evidence most
10 favorably to Defendants. Because Residential Funding Corporation
11 was the master servicer for the PSA in which Deutsche Bank was the
12 trustee, the Assignment is not necessarily inconsistent with the
13 two later endorsements.

14 There is also some evidence that Litton was the servicer of
15 the loan at the time when Litton filed a proof of claim on behalf
16 of Deutsche Bank. There is evidence that Litton took over the
17 servicing of the loan on December 1, 2007, and continued to act as
18 the loan servicer until the servicing obligation was transferred to
19 Ocwen on November 1, 2011. Litton filed the proof of claim on
20 behalf of Deutsche Bank on January 11, 2010. Thus, the Court must
21 deny Plaintiffs' motion.

22
23 **B. Defendants' Motion**

24 Next, in considering Defendants' motion, the Court views the
25 evidence in a light most favorable to Plaintiffs. In this
26 analysis, the Court considers whether the evidence which Defendants

27 ¹ The affidavit claims that Deutsche Bank was the "holder" of
28 the note, but because the note was lost and Deutsche Bank lacked
physical possession of the note, the Court understands the
affidavit to claim that Deutsche Bank was the owner of the note.

1 have presented undeniably shows that Deutsche Bank has the right to
2 enforce the note. Because the note is lost, and all that Deutsche
3 Bank has been able to produce is a lost note affidavit of
4 questionable legal validity -- as discussed infra -- the Court
5 considers whether the lost note affidavit contains sufficient
6 information to establish that Deutsche Bank has the present right
7 to enforce the note. At the October 29, 2012 hearing, the parties
8 agreed that Connecticut state law governs the lost affidavit issue,
9 although they disputed the sufficiency of the lost note affidavit.

10 The lost note affidavit suggests that, at least as of February
11 27, 2009, Deutsche Bank was the holder of the note. However, the
12 Court cannot view the affidavit in a vacuum. Judging the
13 sufficiency of the affidavit under Connecticut law, the Court
14 cannot conclude that the applicable Connecticut statute is
15 satisfied. Under Conn. Gen. Stat. § 42a-3-309, a creditor can
16 enforce a lost, destroyed or stolen instrument, as follows:

17 (a) A person not in possession of an instrument
18 is entitled to enforce the instrument if (i)
19 the person was in possession of the instrument
20 and entitled to enforce it when loss of
21 possession occurred, (ii) the loss of
22 possession was not the result of a transfer by
23 the person or a lawful seizure, and (iii) the
24 person cannot reasonably obtain possession of
25 the instrument because the instrument was
26 destroyed, its whereabouts cannot be
27 determined, or it is in the wrongful possession
28 of an unknown person or a person that cannot be
found or is not amenable to service of process.

(b) A person seeking enforcement of an
instrument under subsection (a) must prove the
terms of the instrument and the person's right
to enforce the instrument. If that proof is
made, section 42a-3-308 applies to the case as
if the person seeking enforcement had produced
the instrument. The court may not enter
judgment in favor of the person seeking
enforcement unless it finds that the person
required to pay the instrument is adequately

1 protected against loss that might occur by
2 reason of a claim by another person to enforce
 the instrument. Adequate protection may be
 provided by any reasonable means.

3 Here, the lost note affidavit does not state that Deutsche Bank
4 ever had possession of the note, as required by § 42a-3-309(a)(i).
5 Indeed, the affidavit is silent about many important things,
6 including: whether Deutsche Bank ever had physical possession of
7 the note; if so, where Deutsche Bank kept the note; who at Deutsche
8 Bank was the custodian of the note; what specific efforts were made
9 to locate the note; or how long particular individuals searched for
10 the note, or where such individuals searched. In addition, the
11 affidavit is current only as of February 27, 2009, and there is
12 nothing more current which demonstrates, one way or the other, that
13 Deutsche Bank continues to have the right to enforce the note.

14 There is also evidence which suggests that Litton may not have
15 been the loan servicer when Litton filed the proof of claim.
16 Indeed, the October 1, 2009 letter to Plaintiffs identified
17 National City Mortgage as the loan servicer. The letter stated
18 that National City Mortgage would be known as PNC Mortgage, and
19 that Plaintiffs should mail payments to PNC Mortgage. The October
20 1, 2009 letter is in direct conflict with the evidence that Litton
21 was the loan servicer between December 1, 2007 and November 2011.
22 Therefore, there is a genuine disputed issue of fact on this issue,
23 and the Court must deny Defendants' motion.

24
25 **C. Rule 9011 Sanctions**

26 In their Opposition to Defendants' cross-motion, Plaintiffs
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