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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Jay Levine and Lisa Levine,

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No. CV-09-1656-PHX-JAT

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Plaintiffs,

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ORDER

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vs.

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Downey Savings and Loan F.A. and/or
U.S. Bank N.A., DSL Service Company
and Tiffany & Bosco as Successor Trustee
including Michael A. Bosco Jr., Attorney
at Law, National City Bank, MERS,
DOES 1-250, et al.,

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Defendants.

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Pending before the Court are numerous motions to dismiss including: Defendants U.S. Bank National Association (“U.S. Bank”) and DSL Service Company’s (“DSL Service”) Motion to Dismiss (Doc. #11); Defendants Tiffany & Bosco, P.A. and Michael A. Bosco, Jr.’s (collectively, “Tiffany & Bosco”) Motion to Dismiss (Doc. #26); and Defendant National City Bank’s (“National City”) Motion to Dismiss (Doc. #27).¹ For the reasons that follow, the Court grants Defendants’ motions to dismiss.

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¹Plaintiffs never filed a response to either Tiffany & Bosco’s Motion or National City’s Motion.

1 **I. BACKGROUND**

2 Plaintiffs purchased the subject property (the “Property”) in 2001. (Doc. #1-1 at 12.)
3 In June, 2005, Plaintiffs refinanced the Property by executing a promissory note (the “Note”)
4 and deed of trust (the “Deed of Trust”) in favor of Defendant Downey Savings and Loan
5 Association, F.A. (“Downey Savings”). (*Id.*) The Deed of Trust names DSL Service
6 Company (“DSL Service”) as the successor trustee (“Trustee”). (Doc. #11 at 3.) Plaintiffs
7 obtained one loan through Defendant Downey Savings, and a second loan through Defendant
8 National City. (Doc. #1-1 at 12.) Thus, in this action, Defendants Downey Savings and
9 National City are the beneficiaries to the Deed of Trust, DSL Service is the Trustee, U.S.
10 Bank is the predecessor in interest to Downey Savings, and Tiffany & Bosco is the Substitute
11 Trustee. (Doc. #11 at 1.)

12 In May, 2009, DSL Service served Plaintiffs with a Notice of Default and Election to
13 Sell Under Deed of Trust (Doc. #11, Ex. B) due to Plaintiffs’ failure to pay the monthly
14 mortgage payments. (*Id.*)² The foreclosure sale was initially set for August 14, 2009. (*Id.*)
15 In August, 2009, Plaintiffs filed suit in this Court seeking declaratory relief, injunctive relief,
16 and to recover damages for Defendants’ alleged violations of the Uniform Commercial Code
17 (“UCC”), Truth in Lending Act (“TILA”), Federal Fair Debt Collections Practices Act
18 (“FDCPA”), Real Estate Settlement Procedures Act (“RESPA”), Home Ownership and
19 Equity Protection Act (“HOEPA”), and the Arizona Consumer Fraud Act (“ACFA”). (*Id.*)
20 Defendants U.S. Bank and DSL Service timely removed Plaintiffs’ complaint to federal court
21 pursuant to 28 U.S.C. § 1441.

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25 ² The Defendants point out, and the Court acknowledges, that although Plaintiffs
26 allege “they did pay the outstanding Loan amount due” in their Response (Doc. #15 at 9),
27 this is inconsistent with their Complaint, where Plaintiffs admitted that they “have defaulted
28 on the loans” and failed to dispute their “inability to pay the monthly mortgage payments.”
(Doc. #1-1 at 12, 20.)

1 **II. LEGAL STANDARD**

2 To survive a Rule 12(b)(6) motion for failure to state a claim, a complaint must meet
3 the requirements of Federal Rule of Civil Procedure 8(a)(2). Rule 8(a)(2) requires a “short
4 and plain statement of the claim showing that the pleader is entitled to relief,” so that the
5 defendant has “fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell*
6 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)(quoting *Conley v. Gibson*, 355 U.S. 41,
7 47 (1957)). “Without some factual allegation in the complaint, it is hard to see how a
8 claimant could satisfy the requirement of providing not only ‘fair notice’ of the nature of the
9 claim, but also ‘grounds’ on which the claim rests.” *Id.* (citing 5 C. WRIGHT & A. MILLER,
10 FEDERAL PRACTICE AND PROCEDURE §1202, at 94-95(3d ed. 2004)).

11 In deciding a motion to dismiss under Rule 12(b)(6), the Court must construe the facts
12 alleged in the complaint in the light most favorable to the drafter of the complaint and the
13 Court must accept all well-pleaded factual allegations as true. *See Shwarz v. United States*,
14 234 F.3d 428, 435 (9th Cir. 2000). Nonetheless, the Court does not have to accept as true
15 a legal conclusion couched as a factual allegation. *Papasan v. Allain*, 478 U.S. 265, 286
16 (1986). Although a complaint attacked for failure to state a claim does not need detailed
17 factual allegations, the pleader’s obligation to provide the grounds for relief requires “more
18 than labels and conclusions, and a formulaic recitation of the elements of a cause of action
19 will not do.” *Twombly*, 550 U.S. at 555 (internal citations omitted). Dismissal is appropriate
20 where the complaint lacks either a cognizable legal theory or facts sufficient to support a
21 cognizable legal theory. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
22 1988); *Weisbuch v. County of L.A.*, 119 F.3d 778, 783 n.1 (9th Cir. 1997).

23 But Federal Rule of Civil Procedure 15 provides that “[a] party may amend its
24 pleading once as a matter of course[] before being served with a responsive pleading[.]” FED
25 R. CIV. P. 15(a)(1)(A). “A motion to dismiss is not a ‘responsive pleading’ within the
26 meaning of the Rule. Neither the filing nor granting of such a motion before answer
27 terminates the right to amend; an order of dismissal denying leave to amend at that state is
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1 improper . . .” *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th
2 Cir. 1986)(quoting *Mayes v. Leipziger*, 729 F.2d 605, 607 (9th Cir. 1984)). If a court
3 dismisses a complaint for failure to state a claim, “leave to amend should be granted unless
4 the court determines that the allegation of other facts consistent with the challenged pleading
5 could not possibly cure the deficiency.” *Schreiber Distrib.*, 806 F.2d at 1401 (citing
6 *Bonanno v. Thomas*, 309 F.2d 320, 322 (9th Cir. 1962)).

7 **III. DISCUSSION**

8 Plaintiffs argue that Defendants do not possess the right to initiate foreclosure.³ In
9 response, Defendants argue that Plaintiffs’ allegations contained in their complaint are
10 merely generalized allegations containing labels and conclusions and, as such, fail to state
11 a claim upon which relief may be granted. (Doc. #11 at 2.) In addition, Defendants argue
12 that the majority of claims are time-barred or the statutes cited by Plaintiffs do not apply to
13 the loan at issue.⁴ (*Id.*) Because Plaintiffs’ allegations consist of nothing more than blanket
14 assertions and conclusions, and Plaintiffs’ Response appears to contain multiple arguments
15 that either fail to cure the original deficiencies, are alleged for the first time, or are not
16 relevant to the present circumstances,⁵ the Court finds that the complaint fails to state a claim
17 upon which relief may be granted. In addition, the complaint contains multiple arguments
18 that fail to state a cognizable legal theory even if all of the allegations are true.

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22 ³ In their Response, Plaintiffs state “the primary issue that guides the other issues is
23 the Original Note and who has possession of said Note.”

24 ⁴ Because the Court dismisses Plaintiffs’ Complaint for failure to state a claim upon
25 which relief may be granted, the Court declines to address these arguments.

26 ⁵ *See, e.g.*, (Doc. #14 at 16) (alleging that the “Haber Certification” constitutes hearsay
27 and, alternatively, it would support “entry of summary judgment in favor of the
28 Defendants.”). *Cf. (Id.* at 13) (“Parties do not have a debtor-creditor relationship”); *with (Id.*
at 12) (“[t]he FDCPA applies only to ‘debt collectors,’ which Defendants can only be”).

1 **A. Count One**

2 In Count One, Plaintiffs challenge Defendants’ right to initiate foreclosure. (*Id.*)
3 Specifically, Plaintiffs allege that Defendants do not possess the Original Note securing the
4 mortgage. (Doc. #1-1 at 13-14.) Plaintiffs seek a judicial declaration that Defendants have
5 no right, title, interest, or estate in the Property. (*Id.*) To support their claim, Plaintiffs argue
6 that the Court would be in conflict with hundreds of recent District Court decisions requiring
7 the bank and/or lenders to show the court the Original Note. (Doc. #14 at 3.) Although some
8 of these decisions may have addressed the “Original Note” argument in a different context,
9 Plaintiffs misconstrue the law regarding the Uniform Commercial Code (“UCC”) as applied
10 to Arizona’s non-judicial foreclosure statute. *See* ARIZ. REV. STAT. ANN. § 47-3301 (2006).

11 The District Court of Arizona has repeatedly rejected the “show me the note”
12 argument for non-judicial foreclosure proceedings. *Mansour v. Cal-Western Reconveyance*
13 *Corp.*, 618 F. Supp. 2d 1178, 1181 (D. Ariz. 2009) (reasoning that the UCC statute pertaining
14 to negotiable instruments provides that “persons entitled to enforce an instrument [include]
15 . . . a person not in possession of the instrument who is entitled to enforce the instrument
16 pursuant to A.R.S. § 47-3301”) (quotations omitted); *Diessner v. Mortgage Election Reg.*
17 *Syst.*, 618 F. Supp. 2d 1184 (D. Ariz. 2009) (dismissing claim because “action involve[d] the
18 non-judicial foreclosure of a real estate mortgage under an Arizona statute which does not
19 require presentation of the original note before commencing foreclosure proceedings”)
20 (referencing ARIZ. REV. STAT. ANN. § 33-807). Plaintiffs fail to cite, nor is the Court aware
21 of, any controlling authority supporting their “show me the note” theory. Furthermore,
22 *Mansour* and *Diessner* make it clear that Arizona law regarding the UCC and negotiable
23 instruments allows enforcement by “a person not in possession of the instrument who is
24 entitled to enforce the instrument pursuant to [A.R.S.] § 47-3309.” 618 F.Supp.2d at 1181.
25 Therefore, using the reasoning set forth in *Diessner* and *Mansour*, the Court concludes that
26 Count One fails to state a claim upon which relief may be granted and must be dismissed.
27 Furthermore, this claim is dismissed without leave to amend because Defendants’ alleged
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1 acts cannot form the basis for relief and an amendment would not cure this deficiency. *See*
2 *Diessner*, 618 F. Supp. 2d at 1187-88 (no basis for relief because non-judicial foreclosure
3 does not require original note) (footnotes omitted); *see Abagninin v. AMVAC Chemical*
4 *Corp.*, 545 F.3d 733, 742 (9th Cir. 2008) (Denying leave to amend is appropriate when the
5 court determines that the deficiency of claim cannot be cured by an amended complaint or
6 by any other means).

7 **B. Counts Two and Three**

8 In Count Two, Plaintiffs argue that Defendants' alleged "fraudulent conduct"
9 constitutes a violation of the Arizona Consumer Fraud Act ("ACFA"), A.R.S. § 44-1521, *et*
10 *seq.* (Doc. #1-1 at 14.) In Count Three, Plaintiffs argue that Defendants do not possess the
11 right "to initiate foreclosure under the security instrument identified in the Notice of
12 Trustee's Sale" or to direct DSL Service to foreclose and sell the Property and seek that the
13 Deeds of Trust and both loan agreements be rescinded. (*Id.* at 15). Defendants argue that
14 Plaintiffs have failed to satisfy the pleading standard. (Doc. #15 at 4-5.) Here, the Court
15 finds that both Counts contain generic blanket assertions that are insufficient to survive a
16 motion to dismiss. *Bell Atlantic*, 550 U.S. at 556 n.3. First, Plaintiffs' Complaint and
17 Response both fail to allege any facts that identify what conduct by any Defendant violates
18 the ACFA. Second, the only conduct Plaintiffs describe in their claim for common law fraud
19 is that Defendants "intentionally failed to disclose the foregoing facts as of June 29th, 2005,
20 and thereafter, continued to keep this material information from Plaintiffs." (*Id.*) But the
21 Complaint does not identify what "material information" related to the origination of the loan
22 agreement the Defendants were required to disclose. Therefore, Counts Two and Three fail
23 to state a claim upon which relief may be granted and must be dismissed.

24 **C. Count Four**

25 In Count Four, Plaintiffs allege "on information and belief" that Defendants violated
26 provisions of the Federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692,
27 Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601-2607, and the Arizona
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1 Consumer Fraud Act (“ACFA”), A.R.S. § 44-1521, *et seq.*, based on Defendants’ attempt to
2 fraudulently foreclose on a property that Defendants have no right to foreclose on.⁶ (Doc.
3 #1-1 at 16-17.) As a result, Plaintiffs seek that Defendants be enjoined from proceeding with
4 the foreclosure. (*Id.*) For each claim, Defendants argue that dismissal is appropriate because
5 the Complaint fails to allege any facts demonstrating a violation. (Doc. #11 at 7.) The Court
6 agrees with Defendants.

7 The Complaint fails to identify what provisions Defendants allegedly violated or what
8 conduct by any Defendant violates the FDCPA, RESPA, or ACFA. This is insufficient to
9 survive a motion to dismiss. A “belief” that Defendants may have engaged in unspecified
10 actions that may have violated unidentified provisions of one of the relevant statutes does not
11 “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. Because this
12 blanket assertion is insufficient to provide Defendants with fair notice of Plaintiffs’ claim,
13 *Twombly*, 550 U.S. at 556 (quoting *Conley*, 355 U.S. at 47), Count Four fails to state a claim
14 upon which relief may be granted. Accordingly, these claims must be dismissed.

15 **D. Counts Five and Six**

16 In Counts Five and Six, Plaintiffs’ claims are based on Defendants’ failure to satisfy
17 disclosure requirements. (Doc. #1-1 at 17-18.) In Count Five, Plaintiffs allege vague
18 “statutory violations and unlawful practices and acts of defendants” that constitute unlawful
19 business acts and/or practices. (*Id.* at 17.) In Count Six, Plaintiffs allege that Defendants
20 breached their fiduciary duty by not “advis[ing] them and plac[ing] them on notice of all
21 disclosures required by law.” (*Id.* at 18.) Defendants argue that Plaintiffs’ claim is merely
22 a blanket assertion, which fails to satisfy their obligation under Rule 8(a)(2). *Twombly*, 550
23 U.S. at 555 (“Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of
24 entitlement to relief.”). The Court agrees with Defendants. In both Count Five and Count
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26 ⁶ The Court points out that this argument has previously been addressed, resulting in
27 the denial of Plaintiffs’ Temporary Restraining Order. (Doc. #23.)
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1 Six, although Plaintiffs identify general conduct—Defendants’ failure to comply with
2 disclosure requirements—Plaintiffs fail to allege any facts that demonstrate such an allegation
3 or identify what information the Defendants were required to disclose. In addition, the
4 complaint fails to allege any facts that identify what provisions Defendants allegedly
5 violated. Therefore, the Court finds that Plaintiffs have failed to state a claim upon which
6 relief may be granted and dismisses Plaintiffs’ claims under Counts Five and Six.

7 **E. Counts Seven and Eight**

8 In Count Seven, Plaintiffs allege that Defendants’ actions constitute a breach of
9 written contract. (Doc. #1-1 at 19.) In Count Eight, Plaintiffs allege that Defendants’ actions
10 constitute a breach of the implied covenant of good faith and fair dealing. (*Id.* at 19-20.) In
11 response, Defendants argue that Plaintiffs have failed, in both their complaint and their
12 response, to allege any facts demonstrating a breach of any alleged contract or implied
13 covenant of good faith and fair dealing. (Doc. #15 at 7-8.) The Court agrees with
14 Defendants.

15 In Count Seven, the only allegation that Plaintiffs make is that they were harmed “as
16 a consequence of the breach of the Contract” by Defendants. (Doc. #1-1 at 19.) Plaintiffs
17 do not identify which contract was breached, which provision was breached in a contract, or
18 the conduct by Defendants that breached the contract.⁷ In Count Eight, Plaintiffs argue that
19 Defendants originated the loans in complete disregard of their duty under 15 U.S.C. §
20 1639(h). (*Id.* at 20.) Plaintiffs’ claims are blanket conclusions that lack any supporting facts
21 identifying conduct where Defendants intentionally hid or concealed information. As such,
22 Plaintiffs have failed to satisfy the pleading requirement under Rule 8. *Iqbal*, 129 S. Ct. at
23 1949-50 (Although for the purposes of a motion to dismiss we must take all of the factual
24 allegations in the complaint as true, we “are not bound to accept as true a legal conclusion

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26 ⁷ In their Response, Plaintiffs merely restate that they have identified these allegations
27 but do not reference the facts supporting this in their Complaint or provide any reference at
28 all. (Doc. #14 at 14.)

1 couched as a factual allegation” (internal quotation marks omitted)). Accordingly, both
2 claims must be dismissed.

3 **F. Count Nine**

4 In Count Nine, Plaintiffs allege Defendants violated 15 U.S.C. § 1639(h) by “lowering
5 their own underwriting standards.” (Doc. #1-1 at 20.) In response, Defendants argue that
6 Plaintiffs’ claim must be dismissed because Plaintiffs do not allege any facts to support their
7 argument. Again, the Court agrees with Defendants. Plaintiffs fail to allege any facts
8 demonstrating how the Defendants lowered their underwriting standards. Without facts or
9 law to support this allegation, this conclusory statement is insufficient under *Twombly*. 550
10 U.S. at 555 (“While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need
11 detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his
12 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation
13 of the elements of a cause of action will not do.”) (citations omitted). Accordingly, the Court
14 dismisses Plaintiffs’ HOEPA claim.

15 **G. Count Ten**

16 In Count Ten, Plaintiffs allege that Defendants U.S. Bank and/or Downey Savings
17 violated 18 U.S.C. §§ 513-514. (Doc. #1-1 at 21.) Specifically, Plaintiffs allege that on or
18 after June 29, 2005, Defendants electronically copied and then destroyed the Original Note
19 so that they could unlawfully transfer the note at a reduced cost. (*Id.*) In response,
20 Defendants argue that, even assuming this allegation was true, Plaintiffs’ claim fails because
21 they do not have a private right of action to sue under these criminal statutes. (Doc. #11 at
22 11.) Therefore, the claim should be dismissed due to lack of subject matter jurisdiction. (*Id.*
23 at 12) (referencing *Freeman v. UMB Bank*, No. 04-4145-SAC, 2005 WL 272978, at * 2 (D.
24 Kan. Jan. 13, 2005) (“When a plaintiff attempts to bring suit under a federal criminal statute,
25 but fails to establish that a private cause of action exists under that statute, dismissal for lack
26 of subject matter jurisdiction is appropriate.”); *see also Keyter v. McCain*, No. 06-15253,
27 2006 WL 3326932, at *1 (9th Cir. Nov. 6, 2006) (affirming dismissal of civil action brought

1 under federal criminal statute).

2 The Court agrees with Defendants. In their motion and response, Plaintiffs fail to cite
3 any law to support their entitlement to relief under 18 U.S.C. §§ 513-514. Consequently,
4 dismissal is appropriate because Plaintiffs have failed to state a cognizable legal theory. *See*
5 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (Dismissal is
6 appropriate where the complaint lacks either a cognizable legal theory or facts sufficient to
7 support a cognizable legal theory). Accordingly, the Court dismisses Plaintiffs' claim under
8 Count Ten.

9 **H. Count Eleven**

10 In Count Eleven, Plaintiffs allege vague references to "illegal loan practices." (Doc.
11 #1-1 at 21.) This includes the conclusory statement that "[b]anks can not lend credit" and
12 "defendant may have committed the following acts" (*Id.*) Plaintiffs fail to provide
13 factual allegations supporting their claim that a common law cause of action exists for
14 "illegal loan practices." Therefore, this blanket assertion fails to give Defendants "fair notice
15 of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 556 n.3.
16 Accordingly, the Court dismisses for failure to state a claim upon which relief may be
17 granted.

18 **IV. CONCLUSION**

19 For the reasons discussed above, Plaintiffs' complaint fails to state a claim upon
20 which relief may be granted.⁸

21 Accordingly,

22 **IT IS ORDERED** that Defendants U.S. Bank and DSL Service's Motion to Dismiss
23 Plaintiffs' Complaint (Doc. #11) is **granted**.

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25 ⁸ In Count Twelve, Plaintiffs request that the Court grant a Temporary Restraining
26 Order and Injunctive Relief. (Doc. #1-1 at 25.) Because the Court has previously denied this
27 request (Doc. #23), in addition to the reasons discussed above, the Court dismisses Count
28 Twelve.

