

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

7

8

9

Roan Ciardi and Bianca Ciardi, husband
and wife,

No. CV 10-0275-PHX-JAT

10

Plaintiff,

ORDER

11

vs.

12

13

The Lending Company, Inc.; Bank of
America, National Association, also
known by its subsidiaries in this case,
BAC Home Loans, Inc., f/k/a Countrywide
Home Loans, Inc.; BAC Home Loans
Servicing, f/k/a Countrywide Home Loans
Servicing, LP; Recontrust Company, a/k/a
Recontrust Company, N.A.; Mortgage
Electronic Registration Systems, Inc.,

18

Defendants.

19

20

21

Pending before the Court are Defendants' Motion to Dismiss Plaintiffs' First
Amended Complaint (Doc. # 8); Defendants' Motion to Vacate Temporary Restraining Order
(Doc. 13); and Plaintiffs' Application for Temporary and Permanent Injunction (Doc. # 15).
For the reasons that follow, the Court grants Defendants' motion to dismiss and motion to
vacate temporary restraining order, but denies Plaintiffs' application for temporary and
permanent injunction.

27

///

28

///

1 **I. Background**

2 In December 2005, Plaintiff Bianca Ciardi borrowed \$270,500 from The Lending
3 Company for the purpose of purchasing real property. Plaintiff Bianca Ciardi also executed
4 a promissory note and a deed of trust. Shortly thereafter, Plaintiffs’ note was sold.

5 Eventually, Plaintiffs defaulted on their note and their home was nearing auction in
6 a non-judicial trustee’s sale. Plaintiffs filed the present action in Maricopa County Superior
7 Court seeking to preclude the trustee’s sale. Plaintiffs sought and were awarded a temporary
8 restraining order (“TRO”) without notice. Defendants removed to this Court, and now seek
9 to have the TRO dissolved and Plaintiffs’ first amended complaint dismissed pursuant to
10 Federal Rules of Civil Procedure 12(b)(6).

11 **II. Analysis**

12 To survive a 12(b)(6) motion for failure to state a claim, a complaint must meet the
13 requirements of Federal Rule of Civil Procedure 8(a)(2). Rule 8(a)(2) requires a “short and
14 plain statement of the claim showing that the pleader is entitled to relief,” so that the
15 defendant has “fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell*
16 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47
17 (1957)).

18 Although a complaint attacked for failure to state a claim does not need detailed
19 factual allegations, the pleader’s obligation to provide the grounds for relief requires “more
20 than labels and conclusions, and a formulaic recitation of the elements of a cause of action
21 will not do.” *Twombly*, 550 U.S. at 555 (internal citations omitted). The factual allegations
22 of the complaint must be sufficient to raise a right to relief above a speculative level. *Id.*
23 Rule 8(a)(2) “requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.
24 Without some factual allegation in the complaint, it is hard to see how a claimant could
25 satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also
26 ‘grounds’ on which the claim rests.” *Id.* (citing 5 C. Wright & A. Miller, *Federal Practice*
27 *and Procedure* §1202, pp. 94, 95(3d ed. 2004)).

28

1 Rule 8's pleading standard demands more than "an unadorned, the-defendant-
2 unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)(citing
3 *Twombly*, 550 U.S. at 555). A complaint that offers nothing more than naked assertions will
4 not suffice. To survive a motion to dismiss, a complaint must contain sufficient factual
5 matter, which, if accepted as true, states a claim to relief that is "plausible on its face." *Iqbal*,
6 129 S.Ct. At 1949. Facial plausibility exists if the pleader pleads factual content that allows
7 the court to draw the reasonable inference that the defendant is liable for the misconduct
8 alleged. *Id.* Plausibility does not equal "probability," but plausibility requires more than a
9 sheer possibility that a defendant has acted unlawfully. *Id.* "Where a complaint pleads facts
10 that are 'merely consistent' with a defendant's liability, it 'stops short of the line between
11 possibility and plausibility of 'entitlement to relief.'" *Id.* (citing *Twombly*, 550 U.S. at 557).

12 In deciding a motion to dismiss under Rule 12(b)(6), the Court must construe the facts
13 alleged in the complaint in the light most favorable to the plaintiff and the Court must accept
14 all well-pleaded factual allegations as true. *See Shwarz v. United States*, 234 F.3d 428, 435
15 (9th Cir. 2000). Nonetheless, the Court does not have to accept as true a legal conclusion
16 couched as a factual allegation. *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Moreover, the
17 Ninth Circuit has pronounced a "policy of liberal construction in favor of *pro se* litigants."
18 *Rand v. Rowland*, 154 F.3d 952, 957 (9th Cir. 1998). This Court must construe Plaintiffs'
19 complaint liberally and afford Plaintiffs the benefit of any doubt. *Karim-Panahi v. L.A.*
20 *Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988). However, the status of *pro se* "does not
21 relieve the party of the burden of alleging sufficient facts on which a recognized legal claim
22 could be based. Bald assertions and conclusions of law will not suffice." *Kerr v. Wanderer*
23 *& Wanderer*, 211 F.R.D. 625, 629 (D. Nev. 2002) (citation omitted).

24 With these standards in mind, the Court notes that Plaintiffs' amended complaint is
25 not the model of clarity. Plaintiffs do not allege any specific causes of action, and much of
26 their amended complaint is simply a narrative concerning the mortgage securitization
27 industry. Nevertheless, in reading and analyzing Plaintiffs' amended complaint, the Court
28 rules as follows.

1 Plaintiffs assert throughout their amended complaint that Defendants are precluded
2 from enforcing the deed of trust because Defendants are not holders in due course of
3 Plaintiffs' note. This precise argument has been addressed several times over in this district
4 and in other district courts within the Ninth Circuit that have similar statutes permitting non-
5 judicial trustee's sales. The Court finds the reasoning in *Diessner v. Mortgage Electric*
6 *Registration Services* particularly persuasive:

7 Diessner specifically requests the court to declare that MERS and Aurora "are
8 not entitled to enforce the underlying promissory Note described in the
9 security instrument" and "have no legal claim to title on the subject property."
10 Count one is based on Diessner's argument that "[u]nder the law of negotiable
11 instruments as codified in the Uniform Commercial Code (codified in Arizona
12 at A.R.S. § 47-3101, *et al.*), a purported Note holder who is not in possession
13 of the original negotiable instrument is not entitled to enforce it."

14 Diessner does not cite, nor is the court aware of, any controlling
15 authority providing that the cited UCC section applies in non-judicial
16 foreclosure proceedings in Arizona. To the contrary, district courts "have
17 routinely held that Plaintiff's 'show me the note' argument lacks merit."
18 Furthermore, Arizona's non-judicial foreclosure statute does not require
19 presentation of the original note before commencing foreclosure proceedings.
20 Because this action involves the non-judicial foreclosure of a real estate
21 mortgage under an Arizona statute which does not require presentation of the
22 original note before commencing foreclosure proceedings, count one of
23 plaintiff's complaint fails to state a claim upon which relief may be granted.

24 618 F.Supp.2d 1184, 1187 (D. Ariz. 2009) (footnotes omitted). *See also Mansour v. Cal-*
25 *Western Reconveyance Corp.*, 618 F.Supp.2d 1178, 1181 (D. Ariz. 2009) (rejecting similar
26 "show me the note" argument and collecting cases with similar holdings). To the extent
27 Plaintiffs' amended complaint relies upon a "show me the note" theory, Plaintiffs' amended
28 complaint fails.

29 Plaintiffs argue that the deed of trust has been "rendered fatally defective" because
30 it was severed from the promissory note. (Doc. # 15 at p. 13.) Hence, "the foreclosure
31 clause in the Deed of Trust cannot be triggered, because the Debt Obligation has been
32 reduced to an unsecured note." (*Id.*) Plaintiffs, however, fail to allege any facts in their
33 amended complaint that would support such a theory. Indeed, the very language of the deed
34 of trust, which Plaintiffs quote in their amended complaint, states that MERS will serve as
35 the nominee for the original lender as well as the original lender's successors and assigns.

1 Thus, from the very language of the deed of trust, to which Plaintiff Bianca Ciardi agreed to
2 in entering into the home loan transaction, MERS is still acting as the nominee for the current
3 holder of the promissory note. Plaintiffs have failed to allege any facts suggesting that
4 MERS is not the nominee of the current owner of the promissory note; nor do Plaintiffs
5 allege any facts supporting their assertion that the promissory note and the deed of trust have
6 been bifurcated. For these reasons, Plaintiffs' argument fails.

7 Plaintiffs also argue that MERS is not a valid beneficiary entitled to initiate
8 foreclosure. Again, Plaintiffs ignore the language of the deed of trust, which Plaintiff Bianca
9 Ciardi freely entered into. The deed of trust, as quoted in Plaintiffs' amended complaint,
10 designates MERS as the beneficiary and authorizes MERS to take any action to enforce the
11 loan, including the right to foreclose and sell the property. To the extent Plaintiffs rely on
12 a theory that the beneficiary must have an interest in the actual note, Plaintiffs have failed
13 to cite any law so requiring. Further, Plaintiffs have failed to allege any facts or otherwise
14 explain how the mere listing of MERS as the beneficiary renders the deed of trust invalid.
15 Because the deed of trust explicitly states that MERS is the beneficiary with the authority to
16 foreclose and sale the property, the Court finds Plaintiffs' arguments unavailing.

17 Plaintiffs also allege a number of violations of Arizona statutes regarding the
18 recording of certain loan documents. However, Plaintiffs have failed to cite any Arizona
19 statute that requires the recording of a promissory note or even the assignment of a
20 promissory note. Relatedly, Plaintiffs fail to cite a basis in law for their assertion that an
21 assignment of a deed of trust must be recorded in order to be valid. Moreover, the statutes
22 Plaintiffs do cite relate to protecting bona fide purchasers, and not the original borrower.

23 Plaintiffs' next assert that Defendants' failure to disclose the assignments of the
24 promissory note and the separate agency contracts between MERS and each successor lender
25 somehow nullifies MERS status as the beneficiary. Plaintiffs have failed to allege any facts
26 supporting their conclusion that such agency contracts do not exist. Moreover, as discussed
27 above, the language in the deed of trust confers an agency relationship between MERS and
28

1 the original and successive lenders without the need to produce a separate agency contract
2 each time the promissory note is sold.

3 **III. Conclusion**

4 The Court has reviewed Plaintiffs' amended complaint. Even considering Plaintiffs'
5 pro se status and, in so doing, construing Plaintiff's amended complaint liberally, the Court
6 finds that Plaintiffs have failed to state a claim upon which relief may be based. Plaintiffs
7 are seeking a preliminary injunction to halt the planned foreclosure of Plaintiffs' home.
8 However, in order to obtain preliminary injunctive relief, the moving party must show a
9 likelihood of success on the merits. *Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct. 365,
10 376 (2008). Because the Court finds that Plaintiffs' amended complaint fails for a failure to
11 state a claim, Plaintiffs have failed, necessarily, of showing a likelihood of success on the
12 merits. As such, the Court denies Plaintiffs' request for a preliminary injunction.

13 Accordingly,

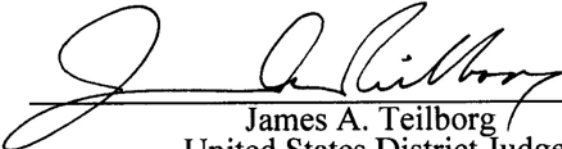
14 **IT IS ORDERED** that Defendants' Motion to Dismiss Plaintiffs' First Amended
15 Complaint (Doc. # 8) is granted.

16 **IT IS FURTHER ORDERED** that Defendants' Motion to Vacate Temporary
17 Restraining Order (Doc. # 13) is granted. In light of the Court's decision to grant
18 Defendants' motion to dismiss, the temporary restraining order entered in this case by the
19 Maricopa County Superior Court is vacated.

20 **IT IS FURTHER ORDERED** that Plaintiffs' Application for Temporary and
21 Permanent Injunction (Doc. # 15) is denied.

22 **IT IS FURTHER ORDERED** that the Clerk of the Court shall dismiss this case with
23 prejudice.

24 DATED this 24th day of May, 2010.

25
26
27 
28 James A. Teilborg
United States District Judge