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NOT FOR PUBLICATION

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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Terence Kibodeaux and Diane Kibodeaux,
husband and wife,

No. CV-10-956-PHX-GMS

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Plaintiffs,

AMENDED ORDER

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vs.

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Wells Fargo Bank, N.A. d/b/a America's
Servicing Company a/k/a ASC; DOES I-X
and ABC Corporations I-X,

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Defendants.

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Pending before the Court is Defendant's Motion to Dismiss Count III of Plaintiffs' Complaint. (Doc. 11). For the reasons set forth below, the Court grants the motion and dismisses Count III without prejudice.

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BACKGROUND

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Plaintiffs, Terence and Diane Kibodeaux ("Plaintiffs") owned a home in Chino Valley, Arizona, from April 2006 to October 2008. (Doc. 1, Ex. 3 p. 19--25 ¶ 5). Plaintiffs fell behind on their mortgage payments in July of 2008 and subsequently entered into a forbearance agreement with Wells Fargo Bank d/b/a America's Servicing Company ("Defendant"). (*Id.* at ¶¶ 2, 6). Defendant invalidated the forbearance agreement because Plaintiffs failed to pay the full amount due on the first scheduled payment. (*Id.* at ¶¶ 9--11). On July 31, 2008, Defendant mailed a letter to Plaintiffs advising them of the invalidation and that there were other options. *Id.*

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1 On August 4, 2008, Plaintiffs and Defendant entered into a second forbearance
2 agreement. (*Id.* at ¶ 12). Plaintiffs were to make payments on August 14, 2008, September
3 13, 2008, October 13, 2008, and a final balloon payment on December 13, 2008. *Id.* After
4 making the August payment in full, Plaintiffs' September payment was \$36 less than the
5 amount due. (*Id.* at ¶¶ 13-14). Plaintiffs called Defendant to inquire why their September
6 payment check had not been cashed. (*Id.* at ¶ 15). Plaintiffs were advised by Defendant that
7 the \$36 shortage would be taken from Plaintiffs' impound/escrow account and that
8 Defendant would cash and apply Plaintiffs' September check. (*Id.* at ¶ 16). After cashing
9 Plaintiffs' check, Defendant invalidated the second forbearance agreement without giving
10 notice to Plaintiffs of the invalidation, and did not return Plaintiffs' September payment. (*Id.*
11 at ¶ 18).

12 Unbeknownst to Plaintiffs, Defendant conducted a trustee's sale on October 7, 2008,
13 and U.S. Bank was the highest bidder.¹ (*Id.* at ¶¶ 24-1, 25).² U.S. Bank paid the bid price
14 on the day of the trustee's sale.³ (Doc. 1, Ex. 3 p. 30). On October 8, 2008, Defendant
15 received Plaintiffs' October payment in full. (Doc. 1, Ex. 3 p. 19-25 ¶ 19). On October 15,
16 2008, Plaintiffs received a handwritten note from Service First Realty stating that the
17 property had been foreclosed and that Plaintiffs were required to vacate the property
18 "ASAP." (*Id.* at ¶ 20). Plaintiffs called Defendant, which confirmed that the note was
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20 ¹ Plaintiffs allege Defendant was the highest bidder at the trustee's sale. The
21 Trustee's Deed, attached as exhibit 2 of Plaintiffs' amended complaint names "U.S. Bank
22 National Association as Trustee" as the grantee and the highest bidder of the property at the
23 trustee's sale. (Doc. 1, Ex. 3 p. 28--30). *See Lee v. City of L. A.*, 250 F.3d 668, 688 (9th Cir.
24 2001) (determining that a court may consider material properly submitted as part of the
25 complaint without converting a motion to dismiss into a motion for summary judgment).
Whether Defendant or U.S. Bank purchased the property does not change the Court's
analysis. The key fact is simply that the property was purchased at the trustee's sale.

26 ² Plaintiffs' amended complaint contains three paragraphs numbered "24." This order
refers to the first paragraph numbered 24 as "24-1."

27 ³ The Trustee's Deed, attached as Exhibit 2 to Plaintiffs' amended complaint, states
28 that the highest bidder paid the bid price on the date of the sale. *See* footnote 1.

1 legitimate and that the property had been foreclosed on October 7, 2008. (*Id.* at ¶ 21).
2 Defendant’s records also indicated at the time that Plaintiffs were not in violation of the
3 second forbearance agreement. *Id.* On or about October 16, 2008, Defendant caused a
4 trustee’s deed to be recorded in the Official Records of Yavapai County. (*Id.* at ¶ 26-1).⁴ On
5 October 18, 2008, Defendant returned Plaintiffs’ October payment with a letter stating that
6 the funds did not represent the total amount due to reinstate the account and that there were
7 no written arrangements agreeing to accept the enclosed funds. (*Id.* at ¶ 24-3).⁵

8 Plaintiffs initiated this cause of action in Maricopa County Superior Court. Plaintiffs
9 allege three claims: (1) Breach of Contract, (2) Breach of Good Faith and Fair Dealing, and
10 (3) Violation of Arizona Revised Statutes (“A.R.S.”) § 33-420. Defendant timely removed
11 the case to this Court pursuant to 28 U.S.C. § 1441. Defendant now moves to dismiss only
12 Count III of Plaintiffs’ amended complaint for failure to state a claim upon which relief can
13 be granted.

14 LEGAL STANDARD

15 To survive dismissal for failure to state a claim pursuant to Federal Rule of Civil
16 Procedure 12(b)(6), a complaint must contain more than “labels and conclusions” or a
17 “formulaic recitation of the elements of a cause of action”; it must contain factual allegations
18 sufficient to “raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*,
19 550 U.S. 544, 555 (2007). While “a complaint need not contain detailed factual allegations
20 . . . it must plead ‘enough facts to state a claim to relief that is plausible on its face.’”
21 *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Twombly*,
22 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content
23 that allows the court to draw the reasonable inference that the defendant is liable for the
24 misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550

26 ⁴ Plaintiffs’ amended complaint contains two paragraphs numbered “26.” This order
27 refers to the first paragraph numbered 26 as “26-1.”

28 ⁵ See *supra* note 2.

1 U.S. at 556). The plausibility standard “asks for more than a sheer possibility that a
2 defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent
3 with a defendant’s liability, it stops short of the line between possibility and plausibility of
4 entitlement to relief.” *Id.* (citing *Twombly*, 550 U.S. at 556–57) (internal quotations and
5 citations omitted).

6 When analyzing a complaint under Rule 12(b)(6), a court’s inquiry is generally
7 “limited to the allegations in the complaint, which are accepted as true and construed in the
8 light most favorable to the plaintiff.” *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th
9 Cir. 2008). However, a court is not required to accept as true “allegations contradicting
10 documents that are referenced in the complaint or that are properly subject to judicial notice.”
11 *Id.* Similarly, legal conclusions couched as factual allegations are not given a presumption
12 of truthfulness, and “conclusory allegations of law and unwarranted inferences are not
13 sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

14 DISCUSSION

15 **Plaintiffs Fail to State a Claim Pursuant to A.R.S. § 33-420.**

16 Plaintiffs assert a claim that Defendant violated A.R.S. § 33-420 by causing a
17 groundless trustee’s deed to be recorded after Defendant conducted a trustee’s sale of the
18 property in question. A.R.S. § 33-420(A) states:

19 A person purporting to claim an interest in, or a lien or
20 encumbrance against, real property, who causes a document
21 asserting such claim to be recorded in the office of the county
22 recorder, knowing or having reason to know that the document
23 is forged, groundless, contains a material misstatement or false
24 claim or is otherwise invalid is liable to the owner or beneficial
25 title holder of the real property for the sum of not less than five
26 thousand dollars, or for treble the actual damages caused by the
27 recording, whichever is greater, and reasonable attorney fees
28 and costs of the action.

A.R.S. § 33-420(A). This statute affords relief only to the “owner or beneficial title holder
of the real property” at the time of the improper recording. *Id.* Defendant argues that no
relief is available to Plaintiffs because, pursuant to A.R.S. §§ 33-810 and 811, Plaintiffs were
not the “owners or beneficial title holders” of the property when the trustee’s deed was

1 recorded. Plaintiffs did not plead sufficient facts alleging they were the owners of the real
2 property at the time of the recording.

3 In relevant part, A.R.S. § 33-810(A) states:

4 The [trustee's] sale shall be completed on payment by the
5 purchaser of the price bid in a form satisfactory to the trustee.
6 The subsequent execution, delivery and recordation of the
7 trustee's deed as prescribed by section 33-811 are ministerial
8 acts. If the trustee's deed is recorded in the county in which the
9 trust property is located within fifteen business days after the
10 date of the sale, the trustee's sale is deemed perfected at the
11 appointed date and time of the trustee's sale.

12 A.R.S. § 33-810(A). U.S. Bank was the highest bidder at the trustee's sale conducted on
13 October 7, 2008. U.S. Bank paid the bid price on the sale date. A plain reading of section
14 33-810(A) is that the trustee's sale of the property became complete when U.S. Bank paid
15 the trustee. *Id.* The statute does not require recordation of the trustee's deed in order for the
16 sale to be completed, as this is merely a "ministerial [act]." *See id.*; *see also In re Steiner*,
17 251 B.R. 137, 141 (Bankr. D. Ariz. 2000) ("Since the sale is already deemed complete upon
18 payment of the bid price . . . the 'ministerial act' provision must have been included to
19 override the more general law that such transactions would be void as to creditors and
20 subsequent purchasers for valuable consideration without notice until the deed is recorded.").
21 Once the trustee's sale price is paid, the highest bidder/grantee becomes the owner of the
22 property. Thus, when U.S. Bank paid the sale price at the trustee's sale, it became the new
23 owner of the property. *See* A.R.S. § 33-811(E) ("The trustee's deed shall operate to convey
24 to the purchaser the title, interest and claim of the trustee, the trustor, the beneficiary, their
25 respective successors in interest and all persons claiming the trust property.").

26 Plaintiffs cannot raise a claim under section 33-420 unless they can allege facts
27 indicating that they remained the owners of the property even after the trustee's sale took
28 place. To do so, Plaintiffs must in some way argue that the trustee's sale was invalid.
Arizona law provides that the trustee's deed "shall raise the presumption of compliance with
the requirements of the deed of trust and this chapter relating to the exercise of the power of
sale and the sale of the trust property, including recording, mailing, publishing and posting

1 of notice of sale and the conduct of the sale.” A.R.S. § 33-811(B). Therefore, a presumption
2 arises that the trustee’s sale is valid. Plaintiffs argue that Defendant lacked authority to
3 exercise its power of sale and was therefore not compliant with the statutory requirements
4 in section 33-801 *et. seq.*, as Plaintiffs allegedly were current on their loan payments. While
5 a trustee’s sale may not occur absent a breach or default, *see* A.R.S. § 33-807(A), Plaintiffs’
6 argument is nonetheless unavailing. Section 33-811(C) states:

7 The trustor, its successors or assigns, and all persons to whom
8 the trustee mails a notice of a sale under a trust deed pursuant to
9 section 33-809 shall waive all defenses and objections to the
10 sale not raised in an action that results in the issuance of a court
 order granting relief pursuant to rule 65, Arizona rules of civil
 procedure, entered before 5:00 p.m. mountain standard time on
 the last business day before the scheduled date of the sale.

11 A.R.S. § 33-811(C). As it appears that Plaintiffs did not timely seek Rule 65 relief, Plaintiffs
12 have waived any defenses and objections to the sale, such as any argument that the sale was
13 improperly held or that the sale included procedural error. Plaintiffs have not pled any
14 factual allegations why the waiver clause does not operate with regard to the trustee’s sale
15 conducted by Defendant, nor have they alleged that Defendant did not notice the sale as
16 required by statute.

17 The Court recognizes “that the absence of a notice requirement in § 33-811(C) raises
18 possible due process concerns,” and there may be certain circumstances where section 33-
19 811(C) might not operate. *See Maher v. Bank One, N.A.*, No. 2 CA-CV 2008-0193, 2009
20 WL 2580100, at *5 (Ariz. Ct. App. Aug. 20, 2009) (citing *Curtis v. Richardson*, 212 Ariz.
21 308, 312, 131 P.3d 480, 484 (Ct. App. 2006). However, Plaintiffs have made no assertion
22 that Defendant did not comply with the notice requirements in a way that might void the sale.
23 Plaintiffs merely state that the trustee’s sale was conducted unbeknownst to them.⁶ Without
24 any allegations set forth by Plaintiffs as to why the waiver clause does not apply, the Court
25 considers Plaintiffs objections waived as to the validity of the trustee’s sale. Accordingly,
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27 ⁶ The specific notice requirements a trustee must comply with are set forth in A.R.S.
28 § 33-801 *et. seq.*

1 the Court interprets the plain meaning of section 33-811(B) and presumes that the trustee's
2 sale was conducted in compliance with the deed of trust and the statutory requirements found
3 in A.R.S. § 33-801 *et. seq.*⁷

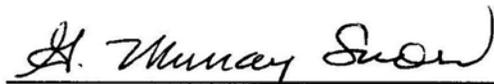
4 As Plaintiffs have not properly challenged the trustee's sale, the ownership interest
5 in the property transferred away from Plaintiffs upon payment of the bid price at the trustee's
6 sale. Accordingly, Plaintiffs were not the owners or beneficial title holders of the property
7 at the time of the recording for purposes of A.R.S. § 33-420.

8 **CONCLUSION**

9 Because Plaintiffs may be able to plead facts sufficient to give rise to liability against
10 Defendant, the Court grants Defendant's Motion without prejudice.

11 **IT IS THEREFORE ORDERED** that Defendant Wells Fargo Bank, N.A.'s Motion
12 to Dismiss Count III (Doc. 11) is **GRANTED** without prejudice.

13 DATED this 2nd day of August, 2010.

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G. Murray Snow
United States District Judge
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25 ⁷ A.R.S. § 33-420(D) states, “[a] document purporting to create an interest in, or a
26 lien or encumbrance against, real property not authorized by statute, judgment or other
27 specific legal authority is presumed to be groundless and invalid.” Since the Court presumes,
28 at this time, that the waiver clause applies and Defendant had statutory authority to conduct
the trustee's sale, it follows that the trustee's deed would not be presumed groundless and
invalid.