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NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael Edward Haskins and Barbara Ann Haskins,
Plaintiffs,
vs.
Brian T. Moynihan, *et al.*,
Defendants.

No. CV-10-1000-PHX-GMS

ORDER

Pending before the Court are Defendant R.K. Arnold’s (“Arnold”) Motion to Dismiss Plaintiffs’ Second Amended Complaint (Doc. 72) and Plaintiffs’ Motion to Remand (Doc. 74). For the reasons set forth herein, the Court grants Defendant Arnold’s Motion to Dismiss and denies Plaintiffs’ Motion to Remand.

BACKGROUND

This case arises out of a lending transaction, in which Plaintiffs sought to finance their home with a note and deed of trust. Plaintiffs generally allege that various entities failed to provide accurate disclosures as required by Arizona and federal law, engaged in a series of fraudulent acts related to the securitization of their mortgage, and attempted to foreclose on the deed of trust without proper authorization.

On August 17, 2010, the Court granted Plaintiffs leave to file a Second Amended Complaint, advising Plaintiffs of the facial deficiency of that complaint, and permitting them to correct the deficiencies should they choose to file a third amended complaint. (Doc. 54).

1 On August 27, 2010, Plaintiffs filed the Second Amended Complaint, which brings claims
2 against officers of the various corporations alleged to have been involved in Plaintiffs'
3 lending transaction. (Doc. 59). Defendants Arnold, Mazilo, Moynihan, and Taylor filed a
4 second Motion to Quash Service of Process on September 3, 2010. (Doc. 60). The motion
5 was granted with directions from the Court that Plaintiffs must properly serve the defendants
6 pursuant to rule 4 of the Federal Rules of Civil Procedure. (Doc. 68). Defendant Arnold
7 subsequently filed a Motion to Dismiss Plaintiffs' Second Amended Complaint, asserting
8 that Plaintiff had failed to state a claim upon which relief could be granted, that personal
9 jurisdiction did not exist, and that Plaintiffs had no standing to sue. (Doc. 72). Plaintiffs'
10 in their Response denied the allegations in Defendants' Motion to Dismiss, alleged that
11 Defendants "instructed other corporate officers, agents and/or employees to commit the
12 felonious acts that have harmed Plaintiff [sic]", and asserted that the Court lacked jurisdiction
13 to adjudicate this case. (Doc. 73).

14 Plaintiffs then filed a Motion to Remand, asserting that the Court should decline
15 jurisdiction over this case based upon an unspecified doctrine of abstention. (Doc. 74).
16 Defendants' Response to Motion for Remand asserts that abstention is not appropriate in this
17 case, and that jurisdiction is properly vested in this Court. (Doc. 75).

18 DISCUSSION

19 1. Failure to state a claim—12(b)(6)

20 To survive dismissal for failure to state a claim pursuant to Federal Rule of Civil
21 Procedure 12(b)(6), a complaint must contain more than "labels and conclusions" or a
22 "formulaic recitation of the elements of a cause of action"; it must contain factual allegations
23 sufficient to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*,
24 550 U.S. 544, 555 (2007). While "a complaint need not contain detailed factual allegations
25 . . . it must plead 'enough facts to state a claim to relief that is plausible on its face.'"
26 *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Twombly*,
27 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content
28 that allows the court to draw the reasonable inference that the defendant is liable for the

1 misconduct alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Twombly*, 550
2 U.S. at 556). The plausibility standard “asks for more than a sheer possibility that a
3 defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely consistent
4 with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of
5 entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal citations omitted).

6 When analyzing a complaint for failure to state a claim under Rule 12(b)(6), “[a]ll
7 allegations of material fact are taken as true and construed in the light most favorable to the
8 nonmoving party.” *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). However, legal
9 conclusions couched as factual allegations are not given a presumption of truthfulness, and
10 “conclusory allegations of law and unwarranted inferences are not sufficient to defeat a
11 motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

12 As the Court noted in its August 17, 2010 Order, Plaintiffs “allege no facts and make
13 no argument suggesting that the individual Defendants are liable for any acts allegedly
14 committed by the various corporations mentioned in the Second Amended Complaint.”
15 Plaintiffs merely offer the conclusion that Arnold “caused events to occur” through his
16 position within the corporation. This general allegation does not provide the Court with a
17 sufficient factual basis from which it could draw the “reasonable inference” that Arnold is
18 liable for any alleged misconduct. As the Court informed Plaintiffs in its August 17, 2010
19 Order, “corporate officers and directors are generally shielded from liability for acts done in
20 good faith on behalf of the corporation[.]” Even viewing all facts in the light most favorable
21 to Plaintiffs, Plaintiffs have not asserted sufficient facts for the Court to find more than a
22 sheer possibility that Defendant has acted unlawfully. Thus, because Plaintiffs have failed
23 to state a claim that is plausible on its face and have not attempted to remedy the facially
24 deficient Second Amended Complaint, Plaintiffs’ Second Amended Complaint is dismissed
25 with prejudice as to Arnold.¹

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27 ¹ In the Court’s August 17, 2010 Order, Plaintiffs were advised that they may be
28 permitted to file a motion for leave to file a third amended complaint in order to remedy the

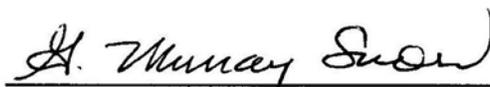
1 **2. Failure to serve—4(m)**

2 In an October 12, 2010 Order, Plaintiffs were directed to properly serve Defendants
3 pursuant to Rule 4 of the Federal Rules of Civil Procedure, and were warned that failure to
4 comply with the rules would result in the dismissal of the action with prejudice pursuant to
5 Federal Rule of Civil Procedure 41(b). Plaintiffs also had been advised in a previous order
6 that Federal Rule of Civil Procedure 4(m) requires a defendant to be served within 120 days
7 after the complaint has been filed. (Doc. 44). The Second Amended Complaint was filed
8 on August 27, 2010. (Doc. 59). Plaintiffs' deadline to effectuate service upon all parties was
9 thus, December 25, 2010. To date, only Defendant Arnold has been properly served. (Doc.
10 77). Because Plaintiffs have failed to properly serve all Defendants the other named
11 Defendants within the 120 day limit imposed by Rule 4(m), the Court must dismiss this
12 action against those defendants who have not been served with prejudice.

13 **IT IS THEREFORE ORDERED:**

- 14 1. Defendant Arnold's Motion to Dismiss Plaintiffs' Second Amended Complaint
15 (Doc. 72) is **GRANTED** with prejudice;
- 16 2. Plaintiffs' Motion to Remand (Doc. 74) is **DENIED** as moot;
- 17 3. Plaintiffs' Second Amended Complaint is dismissed with prejudice for failure
18 to comply with Rule 4(m), as to Defendants Moynihan, Taylor, Mazilo, Zarro and Haggerty.
- 19 4. The Clerk of the Court is directed to **TERMINATE** this action.

20 DATED this 3rd day of February, 2011.

21
22 
23 _____
24 G. Murray Snow
25 United States District Judge
26

27 _____
28 deficiencies noted in the Second Amended Complaint. To date, Plaintiffs have not filed such
a motion.