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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Cynthia Roche Yares,

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No. CV 10-2575-PHX-JAT

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Plaintiff,

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**ORDER**

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vs.

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Bear Stearns Residential Mortgage Corp.;  
Ocwen Loan Servicing, LLC; LaSalle  
Bank N.A., as Trustee for the Registered  
14 Holders of Bear Stearns Asset Backed  
Securities I Trust 2007-HE4; Mortgage  
15 Electronic Registration Systems Inc.,

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Defendant.

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Pending before the Court is a Motion to Dismiss (Dkt. 10) filed by Defendant Bear Stearns Residential Mortgage Corp. ("Bear Stearns"), and a Motion to Dismiss (Dkt. 12) filed by Defendants Ocwen Loan Servicing ("Ocwen"), LaSalle Bank N.A., as Trustee for the Registered Holders of Bear Stearns Asset Backed Securities I Trust 2007-HE4 ("LaSalle"), and Mortgage Electronic Registration Systems, Inc. ("MERS"). A hearing was held on June 20, 2011, and the Court is now prepared to rule on the Motions to Dismiss.

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**I. BACKGROUND**

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On or about January 9, 2007, Plaintiff obtained a loan for \$240,000 from Bear Stearns.

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1 (Dkt. 7, Ex. A.<sup>1</sup>) The loan was secured by a Deed of Trust on the real property located at  
2 4733 East Vernon Avenue, Phoenix, Arizona 85008 (the “Property”). (*Id.*) MERS, as  
3 nominee for Bear Stearns, was named the beneficiary under the Deed of Trust. (*Id.*)

4 MERS, as nominee for Bear Stearns, assigned the Deed of Trust to LaSalle, care of  
5 Ocwen. (Dkt. 7, Ex. B.) The Assignment of Deed of Trust was “made and entered into as  
6 of the 01st of August, 2007,” executed on May 18, 2009, and recorded on June 1, 2009, in  
7 the Official Records of Maricopa County, Arizona. (*Id.*)

8 On February 10, 2009, a Notice of Substitution of Trustee was recorded, in which  
9 Ocwen, on behalf of LaSalle, appointed Christopher R. Perry (“Perry”) as the successor  
10 trustee under the Deed of Trust. (Dkt. 7, Ex. C.) Immediately thereafter, Perry recorded a  
11 Notice of Trustee’s Sale. (Dkt. 7, Ex. D.) The trustee’s sale of the Property was originally  
12 scheduled for May 12, 2009. (*Id.*)

13 Plaintiff does not allege in the Complaint that her loan payments were current at the  
14 time the power of sale provisions in the Deed of Trust were invoked by the beneficiary under  
15 the Deed of Trust.

16 On October 12, 2010, Plaintiff filed a complaint in the Superior Court for Maricopa  
17 County, Arizona. (Dkt. 7.) The Complaint sets forth four counts: injunctive relief,  
18 declaratory relief, breach of contract, and payment/cancellation of mortgage loan. (Dkt. 7  
19 at pp. 15–17, 22.) On October 13, 2010, Plaintiff recorded a lis pendens on the Property in  
20 connection with the state court action. (Dkt. 22 at p. 3.)

21 On November 29, 2011, Defendants removed the state court action to federal court  
22 on the basis of diversity jurisdiction, pursuant to 28 U.S.C. § 1332. (Dkt. 1.) The Court  
23 subsequently denied Plaintiff’s motion to remand. (Dkt. 20.)

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26 <sup>1</sup> The Court may take judicial notice of matters of public record without converting  
27 the Motions to Dismiss into motions for summary judgment. *Lee v. City of Los Angeles*, 250  
28 F.3d 668, 689 (9th Cir. 2001). Because the exhibits to Plaintiff’s Complaint are public  
records, the Court may properly take judicial notice of the undisputable facts contained in  
these documents. *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

1           Following the trustee’s sale of the Property,<sup>2</sup> Plaintiff was named as a defendant in a  
2 forcible entry and detainer action in a separate state court proceeding. (Dkt. 22 at p. 3.)  
3 Final argument in that state court proceeding occurred on April 26, 2011. (*Id.*) According  
4 to Plaintiff, she was evicted from the Property on May 10, 2011. Plaintiff was unsure if an  
5 appeal had been filed on her behalf in the state court proceeding.

## 6 **II. LEGAL STANDARD**

7           Defendants have moved to dismiss the Complaint (Dkt. 7) for failure to state a claim  
8 upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil  
9 Procedure. To survive a Rule 12(b)(6) motion for failure to state a claim, a complaint must  
10 meet the requirements of Rule 8. Rule 8(a)(2) requires a “short and plain statement of the  
11 claim showing that the pleader is entitled to relief,” so that the defendant has “fair notice of  
12 what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550  
13 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

14           Although a complaint attacked for failure to state a claim does not need detailed  
15 factual allegations, the pleader’s obligation to provide the grounds for relief requires “more  
16 than labels and conclusions, and a formulaic recitation of the elements of a cause of action  
17 will not do.” *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The factual  
18 allegations of the complaint must be sufficient to raise a right to relief above a speculative  
19 level. *Id.*

20           Rule 8’s pleading standard demands more than “an unadorned, the-defendant-  
21 unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949  
22 (2009) (citing *Twombly*, 550 U.S. at 555). A complaint that offers nothing more than blanket  
23 assertions will not suffice. To survive a motion to dismiss, a complaint must contain  
24 sufficient factual matter, which, if accepted as true, states a claim to relief that is “plausible  
25 on its face.” *Iqbal*, 129 S. Ct. at 1949. Facial plausibility exists if the pleader pleads factual

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27           <sup>2</sup> According to a Trustee’s Deed Upon Sale, recorded as Maricopa County Recording  
28 No. 2011-0010318, the successor trustee, Perry sold the Property at a trustee’s sale on  
December 20, 2010, to Canadien Investors Associates LLC.

1 content that allows the court to draw the reasonable inference that the defendant is liable for  
2 the misconduct alleged. *Id.* Plausibility does not equal “probability,” but plausibility  
3 requires more than a sheer possibility that a defendant has acted unlawfully. *Id.* “Where a  
4 complaint pleads facts that are ‘merely consistent’ with a defendant’s liability, it ‘stops short  
5 of the line between possibility and plausibility of entitlement to relief.’” *Id.* (quoting  
6 *Twombly*, 550 U.S. at 557).

7 In deciding a motion to dismiss under Rule 12(b)(6), the Court must construe the facts  
8 alleged in a complaint in the light most favorable to the drafter of the complaint, and the  
9 Court must accept all well-pleaded factual allegations as true. *Shwarz v. United States*, 234  
10 F.3d 428, 435 (9th Cir. 2000). Nonetheless, the Court does not have to accept as true a legal  
11 conclusion couched as a factual allegation, *Papasan*, 478 U.S. at 286, or an allegation that  
12 contradicts facts that may be judicially noticed by the Court, *Shwarz*, 234 F.3d at 435.

### 13 **III. ANALYSIS**

14 Defendants have moved to dismiss the Complaint, because Plaintiff has failed to state  
15 a claim upon which relief can be granted. (Dkt. 10, 12.) Plaintiff’s Response to the Motions  
16 to Dismiss contains the same arguments set forth in the Complaint, and also includes  
17 allegations against Perry and other parties for fraud and theft.<sup>3</sup> (Dkt. 22.)

18 As an initial matter, the Court finds the Complaint fails to meet the pleading standard  
19 set forth in Rule 8 of the Federal Rules of Civil Procedure. Rule 8 requires a plaintiff to  
20 “plead a short and plain statement of the elements of his or her claim, identifying the  
21 transaction or occurrence giving rise to the claim and the elements of the prima facie case.”  
22 *Bautista v. Los Angeles County*, 216 F.3d 837, 840 (9th Cir. 2000). Rule 8 requires each  
23 allegation of a complaint to be “simple, concise, and direct.” Fed.R.Civ.P. 8(d)(1). This  
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26 <sup>3</sup> It appears that Plaintiff’s response attempts to add parties, such as Perry, and claims,  
27 such as fraud and theft. (*See e.g.* Dkt. 22 at p. 3) (“Plaintiff hereby accuses the Law Firm of  
28 Perry & Shapiro, the Canadian Investors Association, and PAJ LLC of fraud and theft of her  
property.”). These attempted additions are improper, and the Court will not consider claims  
and parties not properly included in the Complaint.

1 requirement “applies to good claims as well as bad, and is the basis for dismissal independent  
2 of Rule 12(b)(6).” *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996). “Something  
3 labeled a complaint but written more as a press release, prolix in evidentiary detail, yet  
4 without simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs,  
5 fails to perform the essential functions of a complaint.” *Id.* at 1180. “Prolix, confusing  
6 complaints . . . impose unfair burdens on litigants and judges.” *Id.* at 1179. Here, the  
7 Complaint fails to meet the Rule 8 pleading requirements. The Complaint is filled with  
8 speculative legal conclusions, repetitive arguments, and lengthy, compound allegations. The  
9 Complaint does not contain a short and plain statement of each claim showing that Plaintiff  
10 is entitled to relief, and the Complaint lacks the simple, concise and direct allegations  
11 required by Rule 8.

12 **1. Motion to Dismiss Filed By LaSalle, Ocwen & MERS**

13 Defendants LaSalle, Ocwen and MERS have moved to dismiss the Complaint on the  
14 grounds that Plaintiff fails to state a claim upon which relief can be granted. The Court will  
15 grant the Motion to Dismiss. The Complaint consists of claims and arguments that have  
16 repeatedly been considered and rejected by courts in the District of Arizona.

17 *A. Injunctive & Declaratory Relief*

18 In Counts One and Two of the Complaint, Plaintiff attempts to state claims for  
19 injunctive and declaratory relief; however, injunctive and declaratory relief are remedies for  
20 underlying causes of action, and not independent causes of action. Plaintiff must base her  
21 request for injunctive and declaratory relief on a cognizable legal theory.<sup>4</sup> For the reasons

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23 <sup>4</sup> The Eleventh Circuit explained:

24 [A]ny motion or suit for a traditional injunction must be predicated upon a  
25 cause of action, such as nuisance, trespass, the First Amendment, etc.,  
26 regarding which a plaintiff must show a likelihood or actuality of success on  
27 the merits. There is no such thing as a suit for a traditional injunction in the  
28 abstract. For a traditional injunction to be even theoretically available, a  
plaintiff must be able to articulate a basis for relief that would withstand  
scrutiny under Fed.R.Civ.P. 12(b)(6) (failure to state a claim).

1 discussed below, Plaintiff has failed to sufficiently plead any underlying cause of action that  
2 would entitle her to either of these equitable remedies.

3 *B. “Show Me the Note” Theory*

4 While the Complaint is often verbose and confusing, most of Plaintiff’s allegations  
5 seem to be premised on variations of the “show me the note” theory. In her response to the  
6 Motions to Dismiss, Plaintiff denies asserting an action premised on the “show me the note”  
7 theory; however, the Complaint is replete with variations of this line of argument. Plaintiff  
8 argues that “[n]one of the parties and entities seeking to non-judicially foreclose the Deed  
9 of Trust . . . is the lawful assignee of record of the original lenders’ Bear Stearns[] beneficial  
10 interest in the Deed of Trust or Note,” and “none of the parties and entities seeking to enforce  
11 the Note is the transferee by valid endorsement or allonge of that Note with the power or  
12 authority to enforce the Note.” (Dkt. 22 at p. 2.)

13 In the “General Allegations” section of the Complaint, as well as in Counts One, Two  
14 and Three, Plaintiff repeatedly asserts that, because Defendants have not presented evidence  
15 of the chain of title to the promissory note and/or the Deed of Trust, no Defendant has  
16 authority to conduct a trustee’s sale of the Property. (*See e.g.* Dkt. 7, ¶ 13) (“That because  
17 Defendant Ocwen . . . had never lawfully been assigned either the beneficial interest in the  
18 Deed of Trust . . . or the Original Promissory Note . . . , it lacks authority to enforce the  
19 instrument.”).

20 Plaintiffs have offered the Court no relevant, controlling authority to support any of  
21 these claims. Rather, non-judicial trustee’s sales are controlled by the rules enumerated in  
22 A.R.S. §§ 33–801 to -821, and do not require production of the promissory note and/or the  
23 deed of trust. *See Warren v. Sierra Pac. Mortgage Servs. Inc. FN*, No. CV 10-2095, 2011  
24 WL 1526957, at \*5 (D. Ariz. April 22, 2011); *Kane v. Bosco*, No. CV 10-1787, 2010 WL  
25 4879177, at \*11 (D. Ariz. Nov. 23, 2010). Under Arizona law, and “[u]nlike their judicial  
26 foreclosure cousins that involve the court, deed of trust sales are conducted on a contract

27 \_\_\_\_\_  
28 *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004).

1 theory under the power of sale authority of the trustee.” *In re Krohn*, 52 P.3d 774, 777 (Ariz.  
2 2002). “[A] power of sale is conferred upon the trustee of a trust deed under which the trust  
3 property may be sold . . . after a breach or default in performance of the contract or contracts,  
4 for which the trust property is conveyed as security.” A.R.S. § 33–807(A).

5 The Arizona statutes governing the sale of foreclosed property through trustee’s sale  
6 do not specifically require that the foreclosing party produce a physical copy of the original  
7 promissory note. Accordingly, the courts within the District of Arizona have routinely  
8 rejected the “show me the note” theory and related arguments. *Diessner v. Mortgage Elec.*  
9 *Registration Sys.*, 618 F. Supp. 2d 1184, 1187–88 (D. Ariz. 2009); *Mansour v. Cal–Western*  
10 *Reconveyance Corp.*, 618 F. Supp. 2d 1178, 1181 (D. Ariz. 2009). Given that Plaintiff has  
11 offered no contrary authority and has expressly consented to the non-judicial foreclosure in  
12 the Deed of Trust, the Court rejects the claims premised on the “show me the note” theory.

13 C. “Broken Chain of Title” Allegations

14 The Complaint also includes allegations concerning the purported “broken chain of  
15 title.” These “broke chain of title” allegations are strewn throughout the Complaint, which  
16 makes addressing each count or cause of action in a linear fashion difficult. The allegations  
17 arise in connection with the assignment of the beneficiary’s interest in the Deed of Trust.  
18 Plaintiff alleges that the trustee’s sale is unauthorized, because the Assignment of Deed of  
19 Trust was recorded after the documents relating to the trustee’s sale (*i.e.*, the Notice  
20 Substitution of Trustee and the Notice of Trustee’s Sale). (Dkt. 7, ¶¶ 13, 14, 64.) Plaintiff  
21 also alleges that Ocwen was not properly assigned any interest in the Deed of Trust or the  
22 promissory note, and, thus, had no authority to appoint Perry as the successor trustee to  
23 non-judicially foreclose the Deed of Trust.

24 Contrary to Plaintiff’s allegations and arguments, the Assignment of Deed of Trust  
25 was effective and valid on August 1, 2007, even though it was not recorded until June 1,  
26 2009. Courts have rejected claims for wrongful foreclosure on the basis of backdating, and  
27 instead have utilized the effective date of assignment. *See Nichols v. Bosco*, No. CV 10-  
28 1872, 2011 WL 814916, at \*4 (D. Ariz. Mar. 4, 2011); *Mitchell v. EMC Mortgage Corp.*, No.

1 CV 09-1362, 2009 WL 3274407, at \*5 (D. Ariz. Oct. 13, 2009); *Quintero Family Tr. v.*  
2 *OneWest Bank, F.S.B.*, No. CV 09-1561, 2010 WL 392312, at \*7 n.6 (S.D. Cal. 2001); *see*  
3 *also* 6A C.J.S. *Assignments* § 88 (2011). Further, Arizona law does not require an  
4 assignment to be recorded in order for it to become effective. Recordation serves to put  
5 parties on notice, not to effectuate the assignment. Accordingly, the Court rejects Plaintiff's  
6 allegations that LaSalle, through its agent Ocwen, lacked standing to conduct foreclosure  
7 proceedings due the recordation date of the Assignment of Deed of Trust.

8 Plaintiff also appears to allege throughout the Complaint that a trustee's sale is not  
9 valid until Bear Stearns, as the original lender, produces an assignment of the beneficial  
10 interest to Plaintiff. (Dkt. 7, ¶ 60.) However, the Assignment of Deed of Trust, attached to  
11 the Complaint, effectuates the exact transfer of the original lender's beneficial interest that  
12 Plaintiff alleges has not been produced. (*See* Dkt. 7, Ex. B.) Accordingly, the trustee's sale  
13 cannot be invalid on this ground.

14 Based on the foregoing, all causes of action arising in connection with the "show me  
15 the note" theory and the "broken chain of title" allegations will be dismissed for failure to  
16 state a claim upon which relief can be granted.

#### 17 *D. Breach of Contract Claim*

18 Plaintiff alleges that Defendants committed an anticipatory breach of the Deed of  
19 Trust "by threatening to conduct an unlawful and unauthorized non-judicial Trustee's Sale  
20 of the Plaintiff borrowers' property." (Dkt. 7, ¶ 63.) Defendants argue, correctly, that with  
21 respect to Count Three, Plaintiff has failed to state a claim upon which relief can be granted.

22 In order to state a claim for breach of contract, a plaintiff must allege the existence of  
23 a contract between the plaintiff and the defendant, a breach of the contract by the defendant,  
24 and resulting damage to the plaintiff. *Chartone, Inc. v. Bernini*, 83 P.3d 1103, 1111 (Ariz.  
25 App. 2004). Additionally, in order to state a claim for anticipatory breach of contract, "there  
26 must be a positive and unequivocal manifestation on the part of the party allegedly  
27 repudiating [the contract] that he will not render promised performance when the time fixed  
28 for performance arrives." *Esplendido Apartments v. Olsson*, 697 P.2d 1105, 1110 (Ariz.



1 App. 1984).

2 As set forth above, Plaintiff's allegation that the Notice of Trustee's Sale is invalid  
3 due to purported discrepancies in the chain of title is unavailing. The Assignment of Deed  
4 of Trust effectively conveyed Bear Stearns's beneficial interest in the Deed of Trust to  
5 LaSalle, and thereafter, LaSalle's agent Ocwen initiated foreclosure proceedings on behalf  
6 of LaSalle. Regardless of the merits of the chain of title allegations, the Complaint fails to  
7 connect these allegations to the elements of an anticipatory breach of contract claim. With  
8 respect to anticipatory breach of contract, Plaintiff has not alleged any "positive and  
9 unequivocal manifestation" of Defendants' intent not to render a promised performance.

10 Further, even if Plaintiff had alleged a claim for breach of contract, Plaintiff has not  
11 denied that she defaulted on her obligations under the Deed of Trust. Absent curative action  
12 by Plaintiff, Defendants may lawfully sell the Property at a trustee's sale pursuant to the  
13 power of sale provisions in the Deed of Trust. Based on the foregoing, Plaintiff has failed  
14 to state a breach of contract claim, and Count Three of the Complaint must be dismissed.

15 *E. Credit Default Swap and Quiet Title Claim*

16 In Court Four of the Complaint for "Payment/Cancellation of Mortgage Loan,"  
17 Plaintiff alleges that:

18 On information and belief, the original Lender BSRMC, and/or its purported  
19 successor LaSalle Bank collected the proceeds on the Credit Default Swap  
20 insurance it purchased thereby paying the Promissory Note in question in full  
21 and requiring the recipient of the proceeds of the Credit Default Swap  
22 insurance to record a Satisfaction of Mortgage acknowledging that the Note  
23 has been paid off in full.

24 (Dkt. 7, ¶ 78.) First, this claim is based entirely on speculation. Plaintiff admits that she does  
25 not know if either Bear Stearns or LaSalle purchased a credit default swap. (*Id.* ¶¶ 75–76,  
26 78.) Second, Plaintiff misunderstands the nature and purpose of a credit default swap.

27 A credit default swap is a financial instrument, similar to insurance, used by  
28 corporations to transfer credit risk from one party to another. To the extent a credit default  
swap pays money owed to a lender when a borrower defaults on a loan, the benefit does not  
accrue to the borrower, as Plaintiff suggests in Court Four of the Complaint. *See Dumont v.*

1 *HSBC Mortgage Corp., USA*, No. CV 10-1106, 2010 WL 3023885, at \*6 (D. Ariz. Aug. 2,  
2 2010) (citing PBS.org, Frontline: Inside the Meltdown: Individual Borrowing Lesson:  
3 Glossary of Financial Terms: Credit Default Swap, <http://www.pbs.org/wgbh/pages/frontline>  
4 [/teach/meltdown/glossary.html](http://www.pbs.org/wgbh/pages/frontline/teach/meltdown/glossary.html) (last visited June 20, 2011)). Therefore, even if one of the  
5 Defendants received proceeds from a credit default swap when Plaintiff defaulted on her  
6 loan, Plaintiff is not entitled to the cancellation of the loan or quiet title to the Property.

7 Further, to the extent that Plaintiff seeks to quiet title to the Property, Plaintiff has  
8 failed to allege that she has satisfied her loan obligations and, therefore, is entitled to the  
9 release of the Deed of Trust. Additionally, Plaintiff has not indicated that she is ready,  
10 willing and able to tender the full amount owed on the loan. Thus, Plaintiff's purported use  
11 of the action to quiet title is inappropriate. Accordingly, Court Four fails to state a claim  
12 upon which relief can be granted, and must be dismissed.

13 *F. Unconstitutionality of A.R.S. § 33-811(B)*

14 Although not enumerated as a cause of action in the Complaint, Plaintiff seeks to  
15 challenge the constitutionality of the "conclusive presumption" in A.R.S. § 33-811(B), which  
16 provides, in relevant part:

17 The trustee's deed shall raise the presumption of compliance with the  
18 requirements of the deed of trust and this chapter relating to the exercise of the  
19 power of sale and the sale of the trust property, including recording, mailing,  
20 publishing and posting of notice of sale and the conduct of the sale. A  
21 trustee's deed shall constitute conclusive evidence of the meeting of those  
22 requirements in favor of purchasers or encumbrancers for value and without  
23 actual notice. Knowledge of the trustee shall not be imputed to the  
24 beneficiary.

25 A.R.S. § 33-811(B). Plaintiff alleges that the conclusive presumption violates  
26 constitutionally-mandated separation of powers and is an unlawful encroachment on the  
27 rulemaking power of the Arizona Supreme Court. (Dkt. 7, ¶ 32.) Plaintiff requests the right  
28 to prospectively challenge the validity of the trustee's deed, because Defendants will not  
have in their possession certain loan documents at the time of a prospective trustee's sale of  
the Property. (*Id.*, ¶ 33.)

At the time the Complaint was filed, the trustee's sale had not occurred and the

1 issuance of a trustee’s deed was only speculative in nature. (*Id.*, ¶¶ 30, 31.) “A claim is not  
2 ripe for adjudication if it rests upon contingent future events that may not occur as  
3 anticipated, or indeed may not occur at all.” *Bova v. City of Medford*, 564 F.3d 1093, 1096  
4 (9th Cir. 2009) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)).

5 The “conclusive presumption” that Plaintiff argues is unconstitutional was not even  
6 applicable at the time the Complaint was filed. When she filed the Complaint, Plaintiff could  
7 have, but did not, challenge the subject matter of A.R.S. § 33-811(B). Specifically, Plaintiff  
8 could have directly challenged Defendants’ compliance with either the Deed of Trust’s  
9 power of sale provisions, or the Arizona statutes governing trustee’s sales, but she did not.

10 Notwithstanding the prospective nature of Plaintiff’s allegations in the Complaint  
11 (Dkt. 7, ¶ 33), the Court has rejected Plaintiff’s “show me the note” and “chain of title”  
12 arguments, which provide the foundation for Plaintiff’s unconstitutionality argument.  
13 Accordingly, the Court will dismiss Plaintiff’s claim that the “conclusive presumption” in  
14 A.R.S. § 33-811(B) is unconstitutional.

15 *G. Removal of Lis Pendens*

16 In addition to dismissal of the Complaint, LaSalle, Ocwen and MERS also seek an  
17 order quashing the lis pendens filed by Plaintiff against the Property. (Dkt. 12 at p. 8.) A  
18 lis pendens remains in effect until trial if there is “some basis” for the claim. *Evergreen*  
19 *West, Inc. v. Boyd*, 810 P.2d 612, 619 (Ariz. App. 1991). Because the Court will give  
20 Plaintiff leave to amend the Complaint, the Court will not remove the lien caused by the lis  
21 pendens at this time. However, in the event that Plaintiff does not file an amended complaint  
22 in accordance with this Order, the lis pendens will be quashed.

23 **2. Motion to Dismiss Filed By Bear Stearns**

24 Bear Stearns argues that the Complaint fails to allege a cognizable claim against it.  
25 And, for the most part, the allegations in the Complaint do not involve Bear Stearns.  
26 Plaintiff, in her response, argues that Bear Stearns has clouded title to the Property “by  
27 failing to disclose whether a beneficial interest in Plaintiffs’ home mortgage loan was ever  
28 in fact conveyed to [LaSalle].” (Dkt. 22 at p. 3.) Plaintiff argues that by failing to disclose

1 certain loan documents, Bear Stearns is still the lender, and, as a result, is liable for “the  
2 fraudulent attempt to steal the Plaintiffs’ home.” (*Id.* at p. 7.)

3 As discussed above, Bear Stearns was not required to show Plaintiff the original  
4 promissory note, an endorsement or allonge of the original promissory note, or a recorded  
5 assignment from Bear Stearns to LaSalle, prior to the current beneficiary’s initiation of  
6 foreclosure proceedings. The “show me the note” theory in the Complaint, to the extent that  
7 it implicates Bear Stearns, fails to state a claim upon which relief can be granted.

8 With respect to the breach of contract claim, Plaintiff alleges:

9 That by threatening to conduct an unlawful and unauthorized non-judicial  
10 Trustee’s Sale of the Plaintiff borrowers’ property, the Defendant BSRMC  
11 original lender, its alleged assignee, and the purported servicer of the Loan  
have committed an anticipatory breach of the terms and conditions of the  
contract between Plaintiff borrower and her original lender.

12 (Dkt. 7, ¶ 63.)

13 As discussed above, as of August 1, 2007, the Assignment of Deed of Trust assigned  
14 Bear Stearns’s interest in the Deed of Trust to LaSalle. (Dkt. 7, Ex. B.) Bear Stearns is not  
15 a foreclosing entity, and no longer has any interest in the Deed of Trust or the Property. Bear  
16 Stearns cannot breach a contract to which it is not a party. Therefore, Plaintiff fails to state  
17 a claim against Bear Stearns for the allegedly unlawful foreclosure proceedings conducted  
18 by other parties after Bear Stearns assigned its beneficial interest in the Deed of Trust.

19 With respect to Court Four of the Complaint, Plaintiff attempts to assert a claim  
20 against Bear Stearns or another purported assignee under Arizona insurance law. (Dkt. 7,  
21 ¶¶ 40–41.) However, Plaintiff’s allegations are insufficient to state a cognizable claim.  
22 Plaintiff’s allegations that Bear Stearns or the other Defendants engaged in credit default  
23 swaps are speculative and conclusory in nature, and Plaintiff does not allege how the credit  
24 default swaps were in violation of Arizona insurance law.

25 Plaintiff, in her response, also attempts to raise issues with the “legal status” of Bear  
26 Stearns as an entity. (Dkt. 22 at pp. 7, 9.) These purported issues are irrelevant to Bear  
27 Stearns’s Motion to Dismiss on the grounds that Plaintiff has failed to state a claim against  
28 Bear Stearns.

1           The Court finds that as a result of Bear Stearns’s assignment of its interest in the Deed  
2 of Trust prior to the initiation of foreclosure proceedings, Bear Stearns cannot be liable for  
3 the wrongdoing alleged in the Complaint. Plaintiff’s claims arise in connection with the  
4 foreclosure of the Deed of Trust on the Property, and the remedies sought by Plaintiff pertain  
5 to the halting or undoing of the trustee’s sale of the Property. Bear Stearns has no interest  
6 in the Property, and Plaintiff does not allege that Bear Stearns has engaged in any activity  
7 with respect to the trustee’s sale. Therefore, Plaintiff’s claims against Bear Stearns must be  
8 dismissed.

9           **3. Leave to Amend the Complaint**

10           In this case, Plaintiff has not amended the Complaint as a matter of right pursuant to  
11 Rule 15 of the Federal Rules of Civil Procedure. Defendants LaSalle, Ocwen and MERS  
12 filed the last motion to dismiss on December 6, 2010. (Dkt. 12.) Because the 21-day time  
13 frame to file an amendment following a motion to dismiss has expired, Plaintiff has lost the  
14 right to amend the Complaint once as a matter of course. Fed.R.Civ.P. 15(a)(1). Defendants  
15 have requested the Court to grant their Motions to Dismiss with prejudice. However, the  
16 Ninth Circuit has instructed district courts to grant leave to amend, *sua sponte*, when  
17 dismissing a case for failure to state a claim, “unless the court determines that the pleading  
18 could not possibly be cured by the allegations of other facts.” *Lopez v. Smith*, 203 F.3d 1122,  
19 1127 (9th Cir. 2000) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)). There  
20 is a “longstanding rule that ‘[l]eave to amend should be granted if it appears at all possible  
21 that the plaintiff can correct the defect.’” *Id.* at 1129 (quoting *Balistreri v. Pac. Police Dep’t*,  
22 901 F.2d 696, 701 (9th Cir. 1990)).

23           Plaintiff will be given a reasonable opportunity, if she so chooses, to amend the  
24 Complaint to cure the deficiencies identified in this Order, and to make clear her allegations  
25 in short plain statements in the manner required in Rule 8 of the Federal Rules of Civil  
26 Procedure. Plaintiff is cautioned not to simply re-allege the failed claims in an amended  
27 complaint. In addition to the issues discussed throughout this Order, the Court also notes,  
28 that Plaintiff has peppered the Complaint with repetitive requests for relief. If Plaintiff

1 amends the Complaint, then she is advised to set forth her demand for relief in one place at  
2 the end of the amended complaint as required by Rule 8(a)(3).

3 **IV. CONCLUSION**

4 For the reasons set forth above, the Court will grant the pending Motions to Dismiss  
5 without prejudice, and will permit Plaintiff to file an amended complaint.

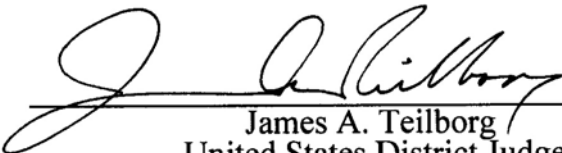
6 Accordingly,

7 **IT IS HEREBY ORDERED** that the Motion to Dismiss (Dkt. 10) is **GRANTED**  
8 without prejudice.

9 **IT IS FURTHER ORDERED** that Defendants' Motion to Dismiss Plaintiff's  
10 Complaint (Dkt. 12) is **GRANTED** without prejudice.

11 **IT IS FURTHER ORDERED** that Plaintiff may file an amended complaint no later  
12 than 21 days from the date of this Order. If Plaintiff does not file an amended complaint  
13 within 21 days, then the Clerk of the Court shall, without further Court order, dismiss this  
14 case with prejudice, and the lis pendens recorded against the Property shall be quashed.

15 Dated this 24th day of June, 2011.

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20 James A. Teilborg  
21 United States District Judge  
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