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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Leo Stoller,

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No. 2:11-CV-00338-PHX-GMS

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Plaintiff,

)

ORDER

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vs.

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Bank of New York Mellon Trust
Company; Bank of America; Countrywide
Bank N.A.; Leonard Street and Donna
Street; H&R Block Bank; M&I Marshall
& Ilsley Bank; Stephen E. Sterrett and
Betty L. Sterrett; RSM Capital Funding
LLC; Trie Consulting LLC; Jon Mirmelli,
individually and as co-founder RSM
Capital; John Hall & Associates;
Recontrust Company N.A., aka Bank of
America; Does 1 Through 10,

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Defendants.

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The sole Plaintiff in this case is Leo Stoller. Pending before this Court are: (1) his
Motion to Disqualify Judge Snow for His Personal Bias and Prejudice Against Leo Stoller,
Doc. 98; (2) Defendant M&I Marshall & Isley Bank’s (“M&I”) Motion to Dismiss and
Joinder in Motion to Dismiss, Docs. 6, 17; (3) Defendants Bank of New York Mellon Trust
Company, Bank of America, Countrywide Bank N.A., Recontrust Company N.A., and Bank
of America, N.A.’s (collectively the “Bank of America Defendants”) Motion to Dismiss,
Doc. 7, (4) Defendant John Hall & Associates’ (“John Hall”) Motion to Dismiss and Joinders
in Motion to Dismiss, Docs. 8, 15 (5) Defendant H&R Block Bank’s (“Block Bank”) Motion
to Dismiss, Doc. 14, and, (6) Defendant Stephen E. and Betty L. Sterrett’s Motion to Dismiss

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1 and Joinder in Motions to Dismiss, Doc 84.

2 For the reasons set forth below, the Court denies Plaintiff's Motion to Disqualify,
3 Doc. 98, and grants the remaining motions. The Motions to Dismiss by the Bank of America
4 Defendants, Doc. 7, and the Sterrett Defendants, Doc. 84 are granted with prejudice. The
5 remaining motions are granted with leave to amend.

6 BACKGROUND

7 In his Complaint, filed in Maricopa County Superior Court in early December 2010,
8 Plaintiff alleges, among other things, that he obtained rights to claims arising from four
9 single family residences. The Complaint alleges that Plaintiff obtained the rights to the first
10 property from Phillip B. Stone, and that he obtained the rights to the final three properties
11 directly or indirectly through Rae Ribadeneira.

12 The Stone property was located at 28437 N.112th Way in Scottsdale Arizona.
13 ("Property 1"). Pursuant to the Complaint, Phillip B. Stone obtained a loan from
14 Countrywide to purchase this property. Complaint, Doc. 1-2 at ¶ 68. The Complaint alleges
15 that Stone quit claimed the property to Christopher Stoller Pension and Profit Sharing Plan,
16 LTD., ("CSPPSP") on September 19, 2008 and CSPPSP assigned to Leo Stoller "any claims
17 arising or related to said property." *Id.* At ¶ 30. Attached as Exhibit 3 to the Complaint, and
18 incorporated into the Complaint by reference, is Stone's quitclaim deed to CSPPSP. *Id.* at
19 ¶¶ 16, 30.¹

20 In 2005 and 2006 Rae Ribadeneira obtained three loans to finance home purchases
21 in the Phoenix metropolitan area.

22 With her first loan, taken out on July 12, 2006, from Countrywide Financial d/b/a
23 America's Wholesale Lender, Ms. Ribadeneira purchased a single family residence located
24 at 10632 E. Blue Sky Drive in Scottsdale Arizona. ("Property 2"). Countrywide was the
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26 ¹ Documents, such as deeds and deeds of trust that are referenced in the Complaint
27 and supplied by the parties may be considered in a Motion to Dismiss when their authenticity
28 is not questioned. *Cervantes v. Countrywide Home Loans, Inc.*, ___ F.3d ___, 2011 WL
3911031 at * 5 n. 2 (9th Cir. Sept. 7, 2011).

1 beneficiary on a deed of trust on the property that was executed and filed on that same date.
2 *Id.* at ¶¶ 17, 44. As the Complaint and the documents attached to it demonstrate, Ribadeneira
3 quit claimed all her right title and interest in the property to CSPPSP on October 20, 2008.
4 *Id.* at ¶ 32, Plaintiff has attached and incorporated the quit claim deed to the Complaint as
5 part of Exhibit 1. On February 9, 2010, a trustee's sale occurred on Property 2. The
6 Complaint alleges that Defendant Bank of New York Mellon purchased Property 2 for
7 \$1,113,750 at the sale. *Id.* at ¶ 87.

8 With her next loan, also taken out from Countrywide, approximately two weeks after
9 the first, on July 27, 2006, Ribadeneira purchased a single family residence located near
10 Property 2 at 10665 E. Blue Sky Drive, Scottsdale Arizona. ("Property 3"). Countrywide
11 was the beneficiary on a deed of trust simultaneously recorded on the property. *Id.* at ¶ 18,
12 45. Ribadeneira quit claimed all her rights, title and interest in the property to CSPPSP on
13 October 16, 2008. The quit claim deed is attached to the Complaint. On or about November
14 9, 2009 a trustee's sale occurred on Property 3. The Complaint alleges that purchasers of the
15 property at the trustee's sale, or thereafter were Defendants RSM Capital Funding L.L.C.,
16 TRIE Consulting LLC, and Stephen E. and Betty L. Sterrett. *Id.* at ¶ 99.

17 On October 24, 2005, Ribadeneira refinanced property located at 47816 N. 15th Lane
18 in New River ("Property 4"). *Id.* at ¶ 38, 46. Although Ribadeneira alleges that she
19 refinanced the property from Block Bank, *Id.* at ¶¶ 46, 60-67, a deed of trust on the property
20 was recorded with Premier Mortgage Funding as beneficiary on December 5, 2006. That
21 deed of trust is incorporated in the Complaint. On September 24, 2008, a notice of trustee's
22 sale was recorded against the property. Doc. 14, Ex. F. The Complaint alleges that a little
23 less than a month later, on October 21, 2008, Ribadeneira quit claimed "all her rights, title
24 and interest" in the property to CSPPSP, "including the right to pursue such claims against,
25 among others any financial institutions, by quit claim deed and written assignment." The
26 quit claim deed is incorporated in the Complaint. The Complaint further alleges that
27 thereafter Ribadeneira assigned to Leo Stoller any claims arising or related to this property.
28 *Id.* at ¶ 38. Plaintiff then subsequently contacted Block Bank on behalf of Ribadeneira. *Id.*

1 at ¶ 39. Again according to the Complaint, Plaintiff notified the trustee that there were
2 objections to the sale of Property 4 one month before the sale occurred.

3 Subsequently Property 4 was sold at a trustee's sale in late June 2009. A Trustee's
4 Deed Upon Sale was recorded on June 26, 2009 noting that property 4 was sold to Block
5 Bank for the amount of \$250,000. Complaint at ¶ 119, Doc. 14, Ex. G. Approximately two
6 months later, the Street Defendants purchased the property from Block Bank with the
7 purchase financed by M&I. Complaint at ¶¶ 115, 119. The Streets subsequently signed a
8 deed of trust on the property in which MERS was a nominal beneficiary for M&I.

9 Prior to any of the alleged foreclosures, on December 9, 2008, CSPPSP filed a
10 previous complaint in Maricopa County Superior Court against Countrywide.² The
11 Complaint sought damages for violating state and federal disclosure laws including the
12 Truth-In-Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA) and
13 various related state law claims. Doc. 7, Ex. H. It also sought to enjoin Countrywide from
14 foreclosing on Properties 1, 2 or 3. Property 4 was not a subject of the lawsuit. That lawsuit
15 was removed to federal court and dismissed with prejudice for failure to state a claim by
16 Judge Wake on May 18th 2009. *Id.* at Ex. I.

17 Thereafter the non-judicial foreclosure sales on both Property 4 and Property 3
18 occurred on June 26, 2009 and November 9, 2009, respectively.

19 A month after the foreclosure sale on Property 3, on December 2, 2009, Plaintiff filed
20 an additional complaint in the Circuit Court of Cook County, Illinois. That action was
21 almost identical to the one filed by CSPPSP against Countrywide on December 9, 2008 and
22 dismissed with prejudice by this Court in May 2009. The only distinctions were that the
23 Plaintiff in the Illinois case was Leo Stoller as opposed to CSPPSP. Further, in addition to

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25 ² "A court may take judicial notice of 'matters of public record' without converting
26 a motion to dismiss into a motion for summary judgment." *Lee v. City of Los Angeles*, 250
27 F.3d 668, 689 (9th Cir. 2001) quoting *MGIC Indem. Copr. v. Weisman*, 803 F.2d 500, 504
28 (9th Cir. 1986). The previous complaint filed by both CSPPSP and Leo Stoller, as well as
the orders and judgments on those complaints are matters of public record and do not convert
the motions to dismiss into motions for summary judgment.

1 Countrywide, the Illinois case named Bank of America, Recontrust Company, and individual
2 officers of Bank of America, as parties Defendant—because Bank of American had purchased
3 Countrywide and Recontrust was wholly-owned by Bank of America.

4 Like the 2008 case dismissed with prejudice by this Court, the Illinois Complaint
5 sought damages for violating state and federal disclosure laws including the Truth-In-
6 Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA) and various
7 related state law claims related to the three properties. Doc. 7, Ex. H. Despite the fact that
8 the foreclosure sale on Property 3 had already occurred, it also sought to enjoin Countrywide
9 from foreclosing on properties 1, 2 or 3. Property 4 was not a subject of the lawsuit. The
10 Complaint also asserted a common law claim for deceptive trade practices and a
11 Racketeering and Illinois Rico Claim.

12 Thereafter the judicial foreclosure sale occurred on Property 2 on February 9, 2010.

13 On August 4, 2010, the Illinois Court dismissed Leo Stoller’s complaint with
14 prejudice finding that it was barred by the final judgment of this Court issued in May, 2009.
15 In doing so, it further found both that Leo Stoller was in privity with CSPPSP and so was
16 bound by the judgment against that entity and, further, that any new claims asserted by
17 Plaintiff against the Defendants could have been raised in the case that was dismissed in this
18 Court, and thus were barred by res judicata.

19 Five days later, on August 9, 2010 Plaintiff filed a new complaint in the Illinois
20 Court. This complaint was based on essentially identical factual allegations concerning the
21 three properties as were the previous two complaints. In this second Illinois complaint,
22 however, Plaintiff added as Defendants, the lawyers of the Defendants in the previous suit,
23 and Mellon Bank and several of its officers individually, based on the allegation that Mellon
24 had purchased Property 2 at the trustee’s sale that took place in February 2010. It also
25 asserted additional common law and statutory claims against the former and new Defendants.
26 The Cook County Court dismissed that entire case with prejudice on April 12, 2011.

27 Before Cook County dismissed Plaintiff’s third case with prejudice, Plaintiff filed this
28 complaint in Maricopa County Superior Court on December 3, 2010. It was removed to this

1 Court on February 18, 2011. The core of this Complaint remains Plaintiff's claims against
2 the Countrywide, Recontrust, Bank of America and Mellon Defendants based on the loans
3 originally made by Countrywide on Properties 1, 2 and 3. These claims are set forth in
4 Counts one, (seeking to rescind the trustee's sale of Property 2), Count two (claiming the
5 gross inadequacy of the sale price at trustee's sale on property 2), Count three (seeking to
6 rescind trustee's sale on Property 3), Count four (alleging the gross inadequacy of the sale
7 price at trustee's sale and unjust enrichment on Property 3) and Count seven (wrongful
8 foreclosure as to Properties 2 and 3). The present Complaint adds Defendants RSM Capital
9 Funding L.L.C., TRIE Consulting LLC, and Stephen E. and Betty L. Sterrett to Counts three
10 and four and adds the Sterrett Defendants only with respect to Count seven. It does so
11 because these Defendants either purchased Property 3 at the trustee's sale on Property 3 that
12 occurred on November 9, 2009, or they were subsequent purchasers of the property. *Id.* at
13 ¶ 99.

14 In Count five Plaintiff seeks to rescind the trustee's sale related to Property 4 and
15 names Block Bank, M&I and Leonard and Donna Street as Defendants. Plaintiff names the
16 same Defendants in Count six which alleges the gross inadequacy of the sales price at the
17 trustee's sale and Count eight which alleges wrongful foreclosure. Plaintiff's basis for suing
18 Block Bank is, he alleges, that Block Bank initiated the loan to Ribadeneira and, in doing so,
19 engaged in practices that violated TILA and RESPA. See Complaint at ¶¶ 47, 60-67. He
20 further alleges that Block Bank did not comply with Arizona notice requirements in
21 conducting the non-judicial foreclosure sale. His allegations also apparently include an
22 allegation that the notice of trustee's sale was insufficient to comply with the Fair Debt
23 Collection Practices Act ("FDCPA"). *Id.* at ¶¶ 115-17. The Street Defendants and M&I are
24 apparently named as Defendants to these Counts because the Streets subsequently purchased
25 the property from Block Bank, and that purchase was financed by M&I.

26 ANALYSIS

27 Defendants' Motions to Dismiss have been briefed and have been pending for some
28 time. The delay in obtaining a ruling on these motions results, in part, from Plaintiff's

1 attempt to take an interlocutory appeal from this Court’s decision allowing Plaintiff’s counsel
2 to withdraw. This Court only permitted such withdrawal after it had obliged counsel for Mr.
3 Stoller to file responses to the Motions To Dismiss filed by Defendants. The Ninth Circuit
4 has recently issued its mandate dismissing Plaintiff’s interlocutory appeal. Nevertheless,
5 Plaintiff subsequently filed a Motion to Disqualify this Court. Prior to ruling on the
6 Defendants’ various motions to dismiss, therefore, this Court is first obliged to take up
7 Plaintiff’s Motion to Disqualify and to determine whether the motion has merit.

8 **1. Motion To Disqualify**

9 Plaintiff’s motion is brought pursuant to 28 U.S.C. §§ 144 and 455. Having carefully
10 considered the questions raised by the motion, the Court denies the motion in all respects.

11
12 To the extent that Plaintiff’s motion is based on 28 U.S.C. § 455(a), that statute
13 requires that “any justice, judge, or magistrate [magistrate judge] of the United States shall
14 disqualify himself in any proceeding in which his impartiality might reasonably be
15 questioned.” 28 U.S.C. § 455(a). The statute “is self-enforcing on the part of the judge.”
16 *United States v. Sibla*, 624 F.2d 864, 867-8 (9th Cir. 1980). “[I]t includes no provision for
17 referral of the question of recusal to another judge; if the judge sitting on a case is aware of
18 grounds for recusal under section 455, that judge has a duty to recuse himself or herself.”
19 *Id.* at 868.

20 After thorough examination of the facts of this case, the undersigned is aware of no
21 basis, and the Plaintiff provides none, on which the impartiality of this Court might
22 reasonably be questioned. Plaintiff suggests that the undersigned is biased and prejudiced
23 against him to the extent that a reasonable person would question the impartiality of this
24 Court. The assertion of bias and/or prejudice set forth in Plaintiff’s motion is based on
25 rulings that the undersigned has issued in two related matters. However, the Plaintiff is not
26 a party to either of those matters. Rather, Plaintiff’s relative, apparently his brother,
27 Christopher Stoller, is a party to those matters. In the first matter, no basis for federal
28 jurisdiction was asserted. This Court, therefore, remanded the matter to state court. The

1 second remains pending before this Court.

2 The Plaintiff offers no basis on which to conclude that the Court has entered rulings
3 against Christopher Stoller which suggest that its impartiality against Christopher's brother,
4 the Plaintiff in this matter, could reasonably be questioned. Even if Plaintiff had done so in
5 his motion, 'a judge's adverse ruling is not a basis on which his removal can be sought.'
6 *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986).

7 Section 144 applies when a party to a proceeding believes that the district judge "has
8 a personal bias or prejudice either against him or in favor of any adverse party[.]" 28 U.S.C.
9 § 144. Normally, a motion properly brought pursuant to § 144 "must be referred to another
10 judge for a determination of its merits." *Sibla*, at 867. Nevertheless, where the affidavit
11 brought pursuant to a § 144 motion is facially insufficient, "no relief under section 144 is
12 available." *Id.* To adequately support the motion the movant must also file an affidavit that
13 "specifically alleges facts stating grounds for recusal under section 144."

14 Plaintiff completely fails to comply with the threshold requirements of the statute.
15 Even if the Court were inclined to credit the assertions of Plaintiff's motion as if it qualified
16 as a separate affidavit, as the statute requires, the motion does not set forth factual material
17 "legally sufficient" to state a claim that the undersigned has a "bias or prejudice bias against
18 *him* or in favor of any adverse party[.]" 28 U.S.C. § 144 (emphasis added). The statute
19 "must be given the utmost strict construction to safeguard the judiciary from frivolous attacks
20 on its dignity and integrity and to prevent abuse and insure the orderly functioning of the
21 judicial system." *Rademacher v. City of Phoenix*, 442 F. Supp. 27, 29 (D. Ariz. 1977)
22 (citations omitted).

23 In his motion, Plaintiff asserts that "Stoller asserts that the undersigned has a personal
24 bias and prejudice toward Stoller, a nonrepresented and disabled litigant." The Stoller that
25 Plaintiff is referencing, however, is not the Plaintiff but Plaintiff's brother, who, again, is not
26 a party to this action. In a footnote to the above sentence, Plaintiff notes that "Stoller has
27 been declared disabled in Illinois Probate Court (Case no. 09 P 957), *see* attached order of
28 Judge Winters, declaring Stoller a disabled person." The attached order, however,

1 demonstrates that it is not the Plaintiff that has been determined to be a disabled person.
2 Rather, according to the attached judgment it is Christopher Stoller, presumably Plaintiff's
3 brother, who is the subject of the petition and the court's order. According to the judgment,
4 entered in late February of this year upon the verified petition of Leo Stoller, the Illinois
5 Probate Court determined Christopher Stoller to be "totally without understanding or
6 capacity to make and communicate decisions regarding his person." As a result, the Illinois
7 Probate Court appoints the office of the Illinois State Guardian as the "continuous" "plenary
8 guardian of the estate and person" of Christopher Stoller.

9 Thus, Plaintiff sets forth no evidence that the Court would have had any bias or
10 prejudice against Plaintiff. Of course, not only is Christopher Stoller not a party to this
11 action, if the attached judgment is accurate and if it remains in force, Christopher Stoller may
12 not act as a Plaintiff in this or any other action on his own behalf as it relates to his estate or
13 financial affairs.

14 Plaintiff also makes in his motion generalized allegations charging the undersigned
15 with bias and prejudice "for various reasons" including "denying, depriving and disregarding
16 Stoller's due process rights; violating Stoller's Constitutional rights to have his motions
17 heard and ruled upon" "issuing orders which did not provide Stoller meaningful time to
18 respond; and "violating the duty to comply with the Supreme Law of the Land of Stoller's
19 due process." Nevertheless, Plaintiff offers no explanation as to how any of the
20 undersigned's rulings accomplished that result. Of course, even if he had, 'a judge's adverse
21 ruling is not a basis on which his removal can be sought." *Studley*, at 939. The bias alleged
22 must be personal or extrajudicial in nature.

23 Therefore, Plaintiff's pure speculation that the Court is biased against a non-party,
24 based on a mental disability of which the Court was previously unaware, is insufficient as
25 a matter of law to invoke the protections of 28 U.S.C. § 144. Plaintiff's Motion to Disqualify
26 is therefore denied as not being based on legally sufficient reasons to invoke the protections
27 of the statute. *United States v. Vespe*, 868 F.2d 1328, 1340 (3rd Cir. 1989) (holding that
28 affidavit containing merely conclusory statements or opinion need not be credited in

1 considering a motion to recuse.).

2 **2. The Bank of America and Sterrett³ Defendants.**

3 All Plaintiff's claims set forth in Counts One, Two, Three, Four and Seven of the
4 Complaint against the Bank of America and Sterrett Defendants are dismissed with prejudice.
5 To the extent Counts One and Three seek to rescind the trustee's sale, they attempt to revive
6 CSPPSP's claims to the property which were dismissed two and a half years ago by this
7 Court in May 2009.

8 The quit claim deeds that are attached to the Complaint indicate that Properties 2 and
9 3 were quit claimed by Ribadeneira only to CSPPSP. After Ribadeneira quit claimed her
10 interests in Properties 2 and 3 to CSPPSP, Plaintiff offers no basis on which he could make
11 claims related to such properties except to the extent his rights may have been derivative of
12 those of CSPPSP. Nevertheless, CSPPSP's right to make claims as against properties 1, 2
13 or 3 arising from any trustee's sales on those properties was terminated with prejudice by
14 Judge Wake's Order dismissing CSPPSP's suit in May, 2009. Res judicata bars the
15 reassertion of claims where "(1) the prior litigation involved the same parties or their privies,
16 (2) the prior litigation was terminated by a final judgment on the merits, and (3) the prior
17 litigation involved the same 'claim' or 'cause of action' as the later suit." *Hydranautics v.*
18 *Filmtec Corp.*, 204 F.3d 880, 889 (9th Cir. 2000). Therefore, Plaintiff has no further basis
19 to assert claims based on rights related to Properties 1, 2 or 3, or challenging the trustee's sale
20 on those properties. They are thus dismissed as a matter of res judicata.

21 In his response, Plaintiff asserts that because the foreclosures had not yet occurred
22 when CSPPSP brought its originally dismissed complaint, neither it nor he could have
23 asserted claims based on the inadequacy of the sales price at the trustee's sales on Properties
24 2 and 3. Nevertheless, because, after the entry of Judge Wake's Order, neither CSPPSP, nor
25 Plaintiff, acting based on any assignment from CSPPSP, could challenge the sale of the

27 ³ The Sterretts, the ultimate purchasers of Property 3, have separately moved to
28 dismiss and joined in their co-defendants motions to dismiss.

1 properties, he also has no standing to challenge the adequacy of the property's sales price.
2 *See AOM Group, LLC v. Downey Sav. & Loan Ass'n, F.A.*, 2010 WL 3342024 (D. Ariz. Aug.
3 25, 2010).

4 Further, in the absence of a basis on which he could assert a claim to the property,
5 Plaintiff was not entitled to notice under the foreclosure statutes. A.R.S. § 33-808 (2007) or
6 § 33-809 (Supp. 2010). Plaintiff has not pleaded that he recorded his request with the
7 County Recorder pursuant to the statutes. In such case A.R.S. § 33-811(C) (2007) effectively
8 bars any claim for rescission by Plaintiff. It further demonstrates the insufficiency of
9 Plaintiff's claim for failure to comply with the notice required under those statutes that he
10 asserts in Counts one and three.

11 Even assuming Plaintiff was not precluded by Judge Wake's Order from challenging
12 the gross inadequacy of the sales price, he would be precluded from doing so by either of the
13 orders of the Cook County Circuit Court dismissing such claims with prejudice in Illinois.
14 In both cases in the Illinois Court Plaintiff raised claims seeking the rescission of the trustee's
15 sales that occurred on Properties 1, 2 and 3. He filed his first Illinois complaint after the
16 trustee's sale had already occurred on Property 3. He filed his second Illinois complaint after
17 the trustee's sale had already occurred on both Properties 2 and 3. He thus could have, and
18 in the second complaint did, bring claims against the subsequent purchasers – *e.g.* Mellon
19 Bank as the subsequent purchaser of Property 2.

20 Plaintiff's first Cook County complaint was dismissed with prejudice on August 4,
21 2010. His second Cook County complaint was dismissed with prejudice on April 12, 2011.
22 Because Plaintiff could have and, in his second Illinois complaint, did in part raise claims
23 against the subsequent purchasers of the properties that have been the subject of his repeated
24 lawsuits, he is barred from raising claims against the subsequent purchasers related to the
25 adequacy of the sales price by the dismissal with prejudice of both of his similar suits in
26 Illinois. *International Union v. Karr*, 994 F.2d 1426, 1430 (9th Cir. 1993) (holding that the
27 doctrine of res judicata precludes a party from bringing a second suit to assert claims "that
28 could have been asserted in the prior action."), *see also McClain v. Apodaca*, 793 F.2d 1031,

1 1034 (9th Cir. 1986).

2 At any rate, Plaintiff has failed to adequately plead a claim for gross inadequacy of
3 sales price under Arizona state law under either Counts two or four. According to that law
4 “a court is warranted in invalidating a sale where the price is less than 20 percent of fair
5 market value and, absent other foreclosure defects, is usually not warranted in invalidating
6 a sale that yields in excess of that amount.” *In re Krohn*, 203 Ariz. 205, 212, 52 P.3d 774,
7 781 (2002) quoting Restatement (Third) of Property: Mortgages § 8.3 cmt. b. The allegations
8 of Plaintiff’s own Complaint, however, establish that the price garnered by Property 2 at the
9 trustee’s sale in February 2010 was approximately 50% of its appraised value in 2008 prior
10 to the significant depression in real estate prices in Arizona. Such an allegation is
11 insufficient to state a claim for gross inadequacy of sales price. Similarly, with respect to
12 Property 3, Plaintiff’s Complaint alleges that in 2007 it was valued at \$1,775,000 and that
13 it sold at the Trustee’s sale in November 2009 for \$1,352,600. This, too, is an insufficient
14 allegation on which to state a claim for gross inadequacy of sales price.

15 Of course, Plaintiff could have also asserted the wrongful foreclosure claim that he
16 asserts against these Defendants in his earlier complaints just as he could have earlier
17 asserted his claim for inadequacy of the sales price. It is, apparently, indistinct from his
18 claims in Counts One and Three. Thus, this claim too is barred by res judicata. *International*
19 *Unions, supra*.

20 Even if it were not, “Arizona state courts have not yet recognized a wrongful
21 foreclosure cause of action.” *Cervantes*, 2011 WL 3911031 at *6. And, as the *Cervantes*
22 court further noted “[a]lthough a federal court exercising diversity jurisdiction is ‘at liberty
23 to predict the future course of [a state] law,’ plaintiffs choosing ‘the federal forum ... [are]
24 not entitled to trailblazing initiatives under [state law].” *Id. quoting Ed Peters Jewelry Co.*
25 *v. C&J Jewelry Co., Inc.*, 124 F.3d 252, 262-63 (1st. Cir. 1997). Where, as in this case, there
26 is no allegation that Plaintiffs were current on any of the respective loans, this Court is
27 disinclined to surmise that a state court would recognize a tort of wrongful foreclosure.
28 Accordingly Count Seven of Plaintiff’s Complaint is dismissed with prejudice, against the

1 moving Defendants as are Counts One, Two, Three, and Four.

2 **3. Claims Based On Property 4.**

3 Defendants M&I, Block Bank, and John Hall all move to dismiss for failure to state
4 a claim, Docs 6, 8 and 14. Their motions are well taken.

5 **a. Block Bank**

6 Plaintiff's Complaint sets forth no basis on which Plaintiff may assert claims relating
7 to Property 4. According to ¶ 38 of Plaintiff's Complaint, Rae Ribadeneira assigned all of
8 her right title and interest in Property 4 to CSPPSP on October 21, 2008. The Complaint
9 says that Ribadeneira "then assigned to LEO STOLLER any claims arising or related to this
10 property." The Complaint further asserts that then Plaintiff contacted Block Bank on behalf
11 of Ribadeneira on or about March 15, 2009. Nevertheless, if, as the Complaint alleges,
12 Ribadeneira had quit claimed all of her right title and interest in Property 4 to CSPPSP on
13 October 21, 2008, then Ribadeneira had no further interest in the property to assign to
14 Plaintiff, or on which Plaintiff could represent her interests.

15 The Complaint states no basis on which Plaintiff has any rights relating to Property
16 4. In the absence of such a basis, Plaintiff's Complaint is dismissed with leave to amend. *See*
17 *AOM Group, LLC v. Downey Sav. & Loan Ass'n, F.A.*, 2010 WL 3342024 (D. Ariz. Aug. 25,
18 2010).

19 Further, in the absence of a basis on which he could assert a claim to Property 4,
20 Plaintiff was not entitled to notice under the foreclosure statutes. A.R.S. § 33-808 or § 33-
21 809. Plaintiff has not pleaded that he recorded a request for notice with the County Recorder
22 pursuant to the statutes. In such case A.R.S. § 33-811(C) effectively bars any claim for
23 rescission by Plaintiff. Plaintiff's failure to allege a basis for standing further demonstrates
24 the insufficiency of Plaintiff's claim for failure to comply with the notice required under
25 those statutes that he asserts in Count Five.

26 Should Plaintiff have a good faith basis for seeking to amend his Complaint, however,
27 the deed of trust which he has attached to, and incorporated into his Complaint, apparently
28 demonstrates that Ribadeneira did not originate her loan on Property 4 with Block Bank as

1 the original lender, as some paragraphs of the Complaint allege. *See, e.g.*, Complaint at ¶¶
2 46, 60-67. Rather the original lender to Ribadeneira appears to have been Premier Mortgage
3 Funding, Inc. To the extent that Block Bank was not the originator of the loan to
4 Ribadeneira it is likely not an appropriate Defendant on any TILA, RESPA or Fair Debt
5 Collection Practices Act (“FDCPA”) Claims.

6 At any rate, as the Ninth Circuit recently noted in *Cervantes*, TILA claims are subject
7 to a one-year statute of limitations, and the limitations period begins to run “when the
8 plaintiffs executed their loan documents, because they could have discovered the alleged
9 disclosure violations and discrepancies at that time.” *Cervantes v. Countrywide Home Loans*,
10 ___ F.3d ___, 2011 WL 3911031 at * 8 (9th Cir. Sept. 7, 2011). Thus given the date on
11 which the Complaint alleges that the loan documents were executed, any TILA claim appears
12 to be time-barred. Further, as this Court has previously held, the FDCPA does not apply to
13 non-judicial foreclosures of deeds of trust, and therefore, no FDCPA claim is appropriate.
14 *Mansour v. Cal-Western Reconveyance Corp.*, 618 F.Supp. 2d. 1178, 1182 (D. Ariz. 2009).

15 Further, Plaintiff’s Complaint in Count Six fails to adequately set forth a claim under
16 Arizona law for grossly inadequate sales price. According to the Complaint the property in
17 2008 was valued at \$334,000. A Trustee’s Deed Upon Sale was recorded on June 26, 2009
18 noting that Property 4 was sold to Block Bank for the amount of \$250,000. Complaint at ¶
19 119, Doc. 14, Ex. G. Based on the Arizona law detailed above, the allegation is insufficient
20 to state a claim for grossly inadequate sales price.

21 As is also set forth above, Arizona courts have not recognized a cause of action for
22 wrongful foreclosure – Count Eight of the Complaint. For the reasons stated above, one will
23 not be recognized by this Court in the absence of a good faith assertion that the underlying
24 loan was not in default.

25 **b. M&I**

26 In addition to the above-identified lack of any interest by Plaintiff held in Property 4,
27 Defendant M&I is barely mentioned in a voluminous Complaint. The single mention it
28 receives is for financing the subsequent purchase by the Street Defendants of Property 4 in

1 ¶ 115 of the Complaint. In addition to the claim for wrongful foreclosure, Count Eight, that
2 has already been dismissed, Plaintiff also names M&I as a Defendant in Counts Five (failure
3 to comply with applicable law and for rescission), and Six (gross inadequacy of sale price
4 and unjust enrichment).

5 Nevertheless, based on the allegations of the Complaint, there are no facts set forth
6 upon which it could be determined that M&I is liable for either of the torts alleged, or is a
7 necessary party in light of the relief sought. There is no factual allegation that M&I had any
8 responsibility for, or in connection with, the conduct of the trustee's sale, was the purchaser
9 at the sale, or, to the extent that M&I had rights in a deed of trust subsequently filed against
10 the property, that there is any basis on which Plaintiff could require M&I to surrender that
11 interest through rescission or otherwise. To the extent that M&I has any present interest in
12 the property that is derivative of the rights of a subsequent purchaser for value, no facts have
13 been pleaded with respect to M&I that would deprive them of the rights to which they are
14 otherwise entitled under A.R.S. § 33-811(B) ("A trustee's deed shall constitute conclusive
15 evidence of the meeting of those requirements in favor of purchasers or encumbrancers for
16 value and without actual notice. Knowledge of the trustee shall not be imputed to the
17 beneficiary."). And, at any rate, as is specified above, Plaintiff has failed to state a claim for
18 grossly inadequate sales price in Count Six.

19 "Dismissal is proper when the complaint does not make out a cognizable legal theory
20 or does not allege sufficient facts to support a cognizable legal theory." *Cervantes*, supra,
21 at * 3. Because that is the case with respect to M&I under the current complaint, dismissal
22 with leave to amend is appropriate here.

23 **c. John Hall**

24 Similarly, the Complaint makes virtually no mention of John Hall & Associates other
25 than to name it as the locale of another co-defendant. *See* Complaint at ¶ 6(b). While each
26 count of the Complaint sets forth the individual Defendants against which that count is
27 brought, none of the counts in the Complaint is brought against John Hall. It is not apparent
28 from a reading of the Complaint as a whole that John Hall was ever intended to be named as

1 a Defendant in this action. To the extent that the Plaintiff did intend to state a claim against
2 John Hall, he has failed to do so. “Dismissal is proper when the complaint does not make
3 out a cognizable legal theory or does not allege sufficient facts to support a cognizable legal
4 theory.” *Cervantes*, supra, at * 3. Dismissal against John Hall & Associates with leave to
5 amend is, thus, appropriate here. Accordingly,

6 **IT IS HEREBY ORDERED:**

- 7 1. Denying Plaintiff’s Motion to Disqualify, Doc. 98.
- 8 2. Granting Defendants Bank of New York Mellon Trust Company, Countrywide
9 Bank N.A., Recontrust Company N.A., and Bank of America, N.A.’s Motion to Dismiss,
10 Doc. 7, with prejudice.
- 11 3. Granting Defendant Stephen E. and Betty L. Sterrett’s Motion to Dismiss and
12 Joinder in Motions to Dismiss, Docs. 84, 6, 8, 14, with prejudice.
- 13 4. Granting Defendant John Hall & Associates Motion to Dismiss and Joinders
14 in Motion to Dismiss, Docs. 8, 15, with leave to amend.
- 15 5. Granting Defendant H&R Block Bank’s Motion to Dismiss, Doc. 14, with
16 leave to amend.
- 17 6. Granting Defendant M&I Marshall & Ilsley Bank’s (“M&I”) Motion to
18 Dismiss and Joinder in Motion to Dismiss, Docs. 6, 17, with leave to amend.

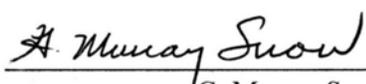
19 **IT IS FURTHER ORDERED** that pursuant to Fed. R. Civ. P. 11 and the inherent
20 power of this Court that Plaintiff shall file a memorandum by **October 14, 2011** in which he
21 shall show cause why he should not: (1) be assessed the attorneys’ fees and costs of
22 Defendants Bank of New York Mellon Trust Company, Countrywide Bank N.A., Recontrust
23 Company N.A., and Bank of America, N.A. and Stephen E. and Betty L. Sterrett in filing
24 their Motions to Dismiss; and (2) why he should not be barred from further filing any claims
25 on Properties 1, 2 and 3 within the United States District Court for the District of Arizona
26 without leave of court to do so.

27 **IT IS FURTHER ORDERED** that if Plaintiff has a good faith basis on which to seek
28 to amend his Complaint against Defendants M&I, John Hall and Block Bank, he shall file

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such an amended complaint **within 30 days** of this Order. Should Plaintiff fail to file an amended complaint **within 30 days**, the Clerk of the Court is directed to terminate this action with respect to Defendants M&I, John Hall and Block Bank.

DATED this 26th day of September, 2011.



G. Murray Snow
United States District Judge