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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jay Boersma,)	No. CV11-768-PHX-JAT
Plaintiff,)	ORDER
vs.)	
M&I Marshall & Ilsley Bank,)	
Defendant.)	

Defendant M&I Marshall & Ilsley Bank (“M&I”) has filed a Motion to Dismiss with Prejudice (Doc. 7) and a Motion to Strike Plaintiff’s Opposition to Dismiss (Doc. 17). The Court now rules on the Motions.

BACKGROUND

Plaintiff Jay Boersma has filed two previous law suits concerning M&I’s right to foreclose on his residential property – *Boersma v. M&I Marshall & Ilsley Bank* CV10-2221-PHX-NVW and *Boersma v. M&I Marshall & Ilsley Bank* CV11-148-PHX-ROS.¹ Both of those prior suits were dismissed without prejudice. In this third lawsuit, Plaintiff again alleges that Defendant does not have the right to foreclose on the residential property located at 15324 E. Sundown Dr., Fountain Hills, Arizona, despite Plaintiff admittedly failing to

¹The Court may consider matters of public record, like judicial filings, on a motion to dismiss without converting the motion into a motion for summary judgment. *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010).

1 make loan payments (Doc. 7-1 ¶3) on the \$1,207,500 Promissory Note signed on June 22,
2 2005 (Doc. 5-2 in CV10-2221-PHX-NVW).

3 **MOTION TO STRIKE**

4 Plaintiff filed three separate responses to Defendant's Motion to Dismiss. He filed
5 an Opposition to Motion to Dismiss on May 16, 2011 (Doc. 10), a Memorandum in Support
6 of Opposition to Motion to Dismiss on May 31, 2011 (Doc. 13), and an Opposition to Motion
7 to Dismiss on September 22, 2011 (Doc. 16). Defendant moves to strike the second
8 Opposition (Doc. 16) filed on September 22, 2011.

9 Local Rules of Civil Procedure allow a party to file one responsive memorandum in
10 opposition to a motion to dismiss. L.R.Civ.P. 7.2(c). If a party wants to file more than one
11 response, then the party needs to obtain the permission of the Court.

12 Plaintiff filed his original Opposition on May 16, 2011, and also filed a Memorandum
13 in Support on May 31, 2011.² Because Plaintiff had already filed his one allowed response
14 to the Motion to Dismiss, he needed to seek leave to file the second Opposition he filed in
15 September of 2011. Because Plaintiff did not receive permission from the Court to file the
16 second Opposition, the Court will grant Defendant's Motion to Strike the second Opposition
17 (Doc. 16). Even if the Court had allowed the second Opposition, the Court would not have
18 reached a different result on the Motion to Dismiss.

19 **MOTION TO DISMISS**

20 **I. Legal Standard**

21 The Court may dismiss a complaint for failure to state a claim under 12(b)(6) for two
22 reasons: 1) lack of a cognizable legal theory and 2) insufficient facts alleged under a
23 cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.
24 1990).

25 To survive a 12(b)(6) motion for failure to state a claim, a complaint must meet the
26

27 ²Defendant has not moved to strike the Memorandum that Plaintiff filed on May 31,
28 2011, which Plaintiff also filed without leave.

1 requirements of Federal Rule of Civil Procedure 8(a)(2). Rule 8(a)(2) requires a “short and
2 plain statement of the claim showing that the pleader is entitled to relief,” so that the
3 defendant has “fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell*
4 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)(quoting *Conley v. Gibson*, 355 U.S. 41,
5 47 (1957)).

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

16 Rule 8’s pleading standard demands more than “an unadorned, the-defendant-
17 unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)(citing
18 *Twombly*, 550 U.S. at 555). A complaint that offers nothing more than naked assertions will
19 not suffice. To survive a motion to dismiss, a complaint must contain sufficient factual
20 matter, which, if accepted as true, states a claim to relief that is “plausible on its face.” *Iqbal*,
21 129 S.Ct. at 1949. Facial plausibility exists if the pleader pleads factual content that allows
22 the court to draw the reasonable inference that the defendant is liable for the misconduct
23 alleged. *Id.* Plausibility does not equal “probability,” but plausibility requires more than a
24 sheer possibility that a defendant has acted unlawfully. *Id.* “Where a complaint pleads facts
25 that are ‘merely consistent’ with a defendant’s liability, it ‘stops short of the line between
26 possibility and plausibility of entitlement to relief.’” *Id.* (citing *Twombly*, 550 U.S. at 557).

27 In deciding a motion to dismiss under Rule 12(b)(6), the Court must construe the facts
28 alleged in the complaint in the light most favorable to the drafter of the complaint and the

1 Court must accept all well-pleaded factual allegations as true. *See Shwarz v. United States*,
2 234 F.3d 428, 435 (9th Cir. 2000). Nonetheless, the Court does not have to accept as true
3 a legal conclusion couched as a factual allegation. *Papasan v. Allain*, 478 U.S. 265, 286
4 (1986).

5 **II. Analysis and Conclusion**

6 Plaintiff's Complaint contains a lot of general allegations regarding securitization of
7 loans in the banking industry. Plaintiff does not assert that Defendant definitely sold his loan
8 into the secondary market, but that many loans are re-packaged and sold. The Complaint
9 also quotes from some federal statutes and rules. The only legal theory that Plaintiff
10 specifically alleges against Defendant is the so-called "show me the note" theory. Plaintiff
11 asserts that unless Defendant can produce his original Promissory Note, Defendant cannot
12 foreclose on his property.

13 In Arizona, and "[u]nlike their judicial foreclosure cousins that involve the court, deed
14 of trust sales are conducted on a contract theory under the power of sale authority of the
15 trustee." *In re Krohn*, 52 P.3d 774, 777 (Ariz. 2002). *See also* A.R.S. § 33-807(A)
16 (providing power of sale authority to trustee after default). Plaintiff does not cite, nor is the
17 Court aware of, any controlling Arizona authority requiring the production of the original
18 note before the commencement of a foreclosure sale. To the contrary, courts within the
19 District of Arizona "have routinely held that [the] 'show me the note' argument lacks merit."
20 *Diessner v. Mortgage Elec. Registration Sys.*, 618 F.Supp.2d 1184, 1187-88 (D. Ariz. 2009)
21 (quoting *Mansour v. Cal-W. Reconveyance Corp.*, 618 F.Supp.2d 1178, 1181 (D. Ariz.
22 2009)). And the Arizona Court of Appeals, citing precedent from this Court, recently
23 confirmed that "Arizona's non-judicial foreclosure statute does not require presentation of
24 the original note before commencing foreclosure proceedings." *Hogan v. Wash. Mut. Bank*,
25 *N.A.*, 261 P.3d 445, 448 (Ariz. Ct. App. 2011).

26 Plaintiff acknowledges that a trustee does not have to produce the original promissory
27 note before it initiates a trustee sale. But he argues that Defendant must produce the
28 Promissory Note here because he has challenged Defendant's "standing" to foreclose. The

1 fact that Plaintiff has filed a lawsuit does not change the rules regarding production of the
2 note. Because Plaintiff's only claim, the "show me the note" claim, fails as a matter of law,
3 the Court will grant the Motion to Dismiss.

4 Moreover, even if Defendant were required to produce Plaintiff's Promissory Note,
5 Defendant has done so. Defendant attached both the Recorded Deed of Trust and Plaintiff's
6 Promissory Note as exhibits to its motion to dismiss in Plaintiff's first case. (Docs. 5-1 &
7 5-2 CV10-2221-PHX-NVW).

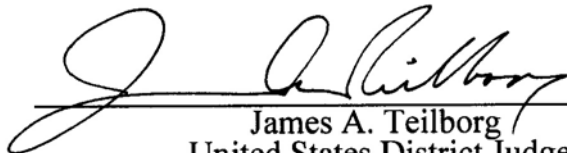
8 The Court will grant the Motion to Dismiss with prejudice because Plaintiff could not
9 allege any more facts that would save his "show me the note" claim and amendment is
10 therefore futile.

11 Accordingly,

12 **IT IS ORDERED** Granting Defendant's Motion to Strike (Doc. 17).

13 **IT IS FURTHER ORDERED** Granting Defendant's Motion to Dismiss with
14 prejudice (Doc. 7).

15 DATED this 31st day of January, 2012.

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20 James A. Teilborg
21 United States District Judge
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