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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Zsa Zsa Graham-Miller,

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No. CV11-00848-PHX-JAT

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Plaintiff,

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ORDER

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vs.

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Nationstar Mortgage LLC; Quality Loan
Service Corp.; CitiMortgage; Mortgage
Electronic Registration Systems, Inc.; and
K. Hovanian American Mortgage LLC,

)

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Defendants.

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Currently pending before the Court are: 1) Motion to Dismiss, or, in the Alternative, Motion for More Definite Statement (Doc. 7) filed by Defendants Nationstar Mortgage, LLC (“Nationstar”), Mortgage Electronic Registration Systems, Inc. (“MERS”), and Quality Loan Service Corp. (“Quality”); 2) Motion to Dismiss with Prejudice (Doc. 8) filed by Defendant CitiMortgage; 3) Plaintiff’s Motion to Review the Authentication of Official Documents Related to Fraud (Doc. 23); 4) Plaintiff’s Alternative Motion for More Definite Statement (Doc. 25); and Plaintiff’s Motion to Review Notary Public Oath and Certificate of Filing for Authentication (Doc. 34). The Court now rules on the Motions.

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BACKGROUND

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Defendant K. Hovanian American Mortgage LLC (“Hovanian”) made a home loan (the “Loan”) to Plaintiff Zsa Zsa Graham-Miller and non-party Elbert L. Miller (collectively, the “Borrowers”) in the principal amount of \$268,000 on June 15, 2006. The Loan is

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1 evidenced by a \$268,000 note (the “Note”) executed by Borrowers and payable to Hovanian.
2 The Borrowers also executed a Deed of Trust in favor of Hovanian encumbering real
3 property located at 3546 E. Blue Ridge Way, Gilbert, Arizona (the “Property”). Defendant
4 MERS is the designated beneficiary of the Deed of Trust. Borrowers stopped making
5 payments on the note beginning September 2010.

6 MERS assigned its interest in the Deed of Trust to Defendant Nationstar on March 1,
7 2011. On that same date, Nationstar substituted Defendant Quality as the Trustee under the
8 Deed of Trust. Quality noticed a non-judicial Trustee’s Sale of the Property for June 2, 2011.
9 The Notice of Trustee’s Sale was later canceled.

10 **MOTIONS TO DISMISS**

11 Defendants Nationstar, MERS, and Quality moved pursuant to Rule 12(b)(6) to
12 dismiss Plaintiff’s Complaint. In the alternative, they moved for a more definite statement.
13 They argue that Plaintiff’s rambling 30-page Complaint, that does not contain any delineated
14 Counts or causes of action, is incomprehensible and fails to meet Rule 8’s pleading
15 requirements.

16 Defendant CitiMortgage also moved pursuant to Rule 12(b)(6) to dismiss the
17 Complaint. CitiMortgage argues that the only time Plaintiff even mentions CitiMortgage is
18 in the caption of the Complaint. Because Plaintiff makes no allegations against it,
19 CitiMortgage asserts that it should be dismissed from this case. CitiMortgage further argues
20 that the Complaint woefully fails to meet the pleading standards and that to the extent the
21 Complaint can be read as identifying claims, those claims fail as a matter of law.

22 **A. LEGAL STANDARD**

23 The Court may dismiss a complaint for failure to state a claim under Federal Rule of
24 Civil Procedure 12(b)(6) for two reasons: 1) lack of a cognizable legal theory and 2)
25 insufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep’t*,
26 901 F.2d 696, 699 (9th Cir. 1990).

27 To survive a 12(b)(6) motion for failure to state a claim, a complaint must meet the
28 requirements of Federal Rule of Civil Procedure 8(a)(2). Rule 8(a)(2) requires a “short and

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

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

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

26 In deciding a motion to dismiss under Rule 12(b)(6), the Court must construe the facts
27 alleged in the complaint in the light most favorable to the drafter of the complaint and the
28 Court must accept all well-pleaded factual allegations as true. *See Shwarz v. United States*,

1 234 F.3d 428, 435 (9th Cir. 2000). Nonetheless, the Court does not have to accept as true
2 a legal conclusion couched as a factual allegation. *Papasan v. Allain*, 478 U.S. 265, 286
3 (1986).

4 In Arizona, courts assess the sufficiency of a claim under Arizona Rule of Civil
5 Procedure 8, which mirrors Federal Rule of Civil Procedure 8.¹ *Cullen v. Auto-Owners Ins.*
6 *Co.*, 189 P.3d 344, 346 (Ariz. banc 2008). Arizona courts follow a notice pleading standard.
7 *Id.* Under that standard, a pleading must give the adverse party fair notice of the nature and
8 basis of the claim and indicate generally the type of litigation involved. *Id.*

9 If a pleading does not meet the standards of Rule 8, a party may move to dismiss for
10 failure to state a claim pursuant to Arizona Rule of Civil Procedure 12(b)(6). When deciding
11 a Rule 12(b)(6) motion, Arizona courts consider only the pleading itself and the well-pleaded
12 allegations contained therein. *Id.* The courts assume the truth of all well-pleaded factual
13 allegations and reasonable inferences therefrom. *Id.* “Because Arizona courts evaluate a
14 complaint’s well-pled facts, mere conclusory statements are insufficient to state a claim upon
15 which relief can be granted . . . a complaint that states only legal conclusions . . . does not
16 satisfy Arizona’s notice pleading standard under Rule 8.” *Id.*

17 Arizona courts did not adopt the Supreme Court’s admonition in *Conley v. Gibson*,
18 355 U.S. 41 (1957) that complaints should not be dismissed unless it appears beyond doubt
19 that the plaintiff could prove no set of facts in support of her claim. *Id.* at 346-47. Arizona
20 trial courts may not speculate about hypothetical facts that might entitle a plaintiff to relief.
21 *Id.* at 347. Instead, they are limited to considering the well-pleaded allegations and
22 reasonable inferences from those allegations. *Id.*

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27 ¹The Court notes that Plaintiff filed her Complaint in Arizona state court, which has
28 not adopted *Twombly*. The Court does not need to decide which pleading standard applies,
federal or state, because the Complaint fails to state a claim under either standard.

1 **B. ANALYSIS AND CONCLUSION**

2 Plaintiff’s Complaint fails to meet either the federal pleading standard, as announced
3 in *Twombly* and *Iqbal*, or the Arizona notice pleading standard. First, Plaintiff never clearly
4 identifies what her causes of action might be. She mentions several statutory sections and
5 rules, but never alleges how any of the Defendants violated those statutes or rules. In fact,
6 the only Defendant that Plaintiff even discusses in the Complaint is Nationstar. The
7 Complaint certainly does not give fair notice of the basis for her claims.

8 Second, and more importantly, courts have rejected all the causes of action that
9 Plaintiff appears to attempt to allege. Although difficult to discern from Plaintiff’s scattered
10 allegations, Plaintiff seems to be alleging some claims typically attempted in mortgage
11 foreclosure litigation: Nationstar is not the holder in due course of the Note (“show me the
12 note”); the Note and the Deed of Trust were impermissibly separated; the lender did not lend
13 actual money, just credit (“vapor money”); and wrongful foreclosure.

14 The main thrust of Plaintiff’s Complaint appears to be that Nationstar cannot produce
15 the original Note and therefore is not a “holder in due course” under the UCC. Courts have
16 repeatedly rejected this argument. *See, e.g., Hogan v. Wash. Mut. Bank*, 261 P.3d 445, 448-
17 49 (Ariz. Ct. App. 2011); *Diessner v. Mortgage Elec. Registration Sys.*, 618 F.Supp.2d 1184,
18 1187-88 (D. Ariz. 2009). Any attempt to state a claim based on Defendants’ inability to
19 produce the original Note therefore fails as a matter of law.

20 This Court also has rejected attempts to state a claim for impermissible separation of
21 a promissory note from a deed of trust. *Owens v. Reconstruct Co.*, 2011 WL 3684473 *3 (D.
22 Arizona August 23, 2011)(citing *Maxa v. Countrywide Loans, Inc.*, 2010 WL 2836958 *4
23 (D. Arizona July 19, 2010)). The Court has found no Arizona authority suggesting that a
24 trustee must produce both the promissory note and the deed of trust together before the
25 trustee can foreclose. Any attempt to state a claim for separation of Plaintiff’s Note and
26 Deed of Trust therefore fails.

27 Any attempt to state a “vapor money” claim similarly fails. Proponents of the vapor
28 money theory argue that home mortgages are not enforceable because banks do not loan

1 actual money. *Vollmer v. Present*, 2011 WL 11415 *6 (D. Arizona January 4, 2011). Courts
2 in this District universally have rejected this argument. *See, e.g., Vollme*, 2011 WL 11415
3 at *6; *Owens*, 2011 WL at *3.

4 Plaintiff entitled her complaint, “Unlawful Foreclosure.” (Doc. 1-1.) The Court
5 therefore assumes that Plaintiff is attempting to allege the tort of wrongful foreclosure.
6 Arizona state courts have not yet recognized a wrongful foreclosure action. *Cervantes v.*
7 *Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1043 (9th Cir. 2011). But to the extent the
8 cause of action even exists in Arizona, the cause is not ripe until a foreclosure sale has
9 occurred. *Id.* at 1043-44; *Jones v. Bank of Am.*, 2010 WL 2228517, at *3 (D. Ariz. June, 1,
10 2010). Because no Trustee Sale has occurred here, Plaintiff cannot possibly state a claim for
11 wrongful foreclosure.

12 Plaintiff’s Complaint does not satisfy the pleading requirements of either Federal or
13 Arizona Rule of Civil Procedure 8. Additionally, to the extent the Court generously
14 construes Plaintiff’s allegations as articulating legal theories, those legal theories fail as a
15 matter of law. The Court therefore will grant the Motions to Dismiss.

16 **ALTERNATIVE MOTION FOR MORE DEFINITE STATEMENT**

17 Plaintiff filed a pleading that she captioned “Alternative Motion for More Definite
18 Statement.” (Doc. 25.) In the pleading, Plaintiff states that she “submits this motion to
19 change the original motion ‘Unlawful Disclosure’ to ‘Common Law Fraud.’” (Id. p.1.) The
20 Court construes this pleading as a motion to amend the Complaint. In the pleading, Plaintiff
21 specifies that she is “only changing the motion and would like to keep all original documents
22 filed in the original case in the Superior Court of the State of Arizona . . . as supporting
23 documentation.” (Id. p.2.)

24 The Court initially notes that Plaintiff’s motion is procedurally improper because she
25 did not submit a copy of the proposed amended complaint as required by Local Rule of Civil
26 Procedure 15.1. *Cervantes*, 656 F.3d at 1043 (holding the plaintiffs’ motion to amend was
27 procedurally improper because it was made orally and they did not submit a copy of the
28 proposed amended pleadings). Nonetheless, the Court will consider the motion.

1 The Court should freely give leave to amend “when justice so requires.” Fed. R. Civ.
2 P. 15(a)(2). Whether to grant a motion to amend depends on the following factors: (1) undue
3 delay, (2) bad faith, (3) prejudice to the opposing party, (4) futility of amendment, and (5)
4 whether plaintiff has previously amended his complaint. *Western Shoshone Nat. Council v.*
5 *Molini*, 951 F.2d 200, 204 (9th Cir. 1991). The most important of these factors is prejudice
6 to the opposing party. *U.S. v. Pend Oreille Public Utility Dist., No. 1*, 926 F.2d 1502, 1511
7 (9th Cir. 1991).

8 Defendants have not argued that Plaintiff acted with undue delay or in bad faith in
9 requesting to change her claim from wrongful foreclosure to common law fraud. Nor do
10 Defendants argue they will be prejudiced if the Court allows Plaintiff to amend her
11 Complaint, which is the most important factor. And Plaintiff has not amended her Complaint
12 previously.

13 Defendants do argue that amendment would be futile. They argue Plaintiff cannot
14 state a claim for fraud. Although the Court suspects that is true, the Court cannot say with
15 certainty that amendment would be futile. Moreover, Plaintiff initially filed her Complaint
16 in state court, where she did not anticipate having to meet federal standards. Because
17 Defendants have not demonstrated prejudice and because the Court cannot say with certainty
18 that amendment would be futile, the Court will allow Plaintiff to file an amended complaint.

19 But Plaintiff’s amended complaint must make clear her allegations in short, plain
20 statements in the manner required by Rule 8 of the Federal Rules of Civil Procedure. And
21 Plaintiff must make specific allegations against each Defendant. She cannot simply name
22 a Defendant in the caption, then never allege any wrongdoing by that Defendant.

23 Moreover, Plaintiff is cautioned not to simply re-allege the legal theories that the
24 Court in this Order found fail to state a claim, i.e., show me the note, vapor money,
25 separation of the note and deed, wrongful foreclosure. The Court further cautions Plaintiff
26 that if she wants to allege fraud claims, she must do so with the specificity required by Rule
27 9(b). “In alleging fraud or mistake, a party must state with particularity the circumstances
28 constituting fraud or mistake.” Fed.R.Civ.P. 9(b).

1 The Court also notes that Plaintiff has peppered the Complaint with repetitive requests
2 for relief, admissions, production and with interrogatories. If Plaintiff amends the
3 Complaint, then she is advised to set forth her demand for relief in one place at the end of the
4 amended complaint as required by Rule 8(a)(3). Finally, Plaintiff cannot make requests for
5 admissions or requests for production in her amended complaint and cannot list questions for
6 Defendants to answer.

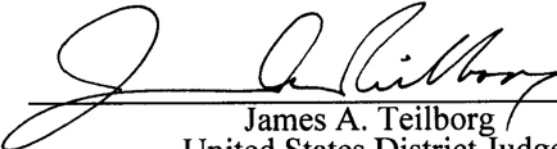
7 Accordingly,

8 **IT IS ORDERED GRANTING** Defendants' Motions to Dismiss (Docs. 7 & 8).

9 **IT IS FURTHER ORDERED GRANTING** Plaintiff's Alternative Motion for More
10 Definite Statement (Doc. 25), which the Court has construed as a motion to amend. Plaintiff
11 shall have twenty (20) days from the date of this Order to file an amended complaint that
12 complies with the Court's directions above. If Plaintiff does not file an amended complaint
13 within twenty days of the date of this Order, the Clerk's office shall dismiss this case with
14 prejudice without further notice.

15 **IT IS FURTHER ORDERED DENYING** Plaintiff's Motion to Review the
16 Authentication of Official Documents Related to Fraud (Doc. 23) and Plaintiff's Motion to
17 Review Notary Public Oath and Certificate of Filing for Authentication (Doc. 34) because
18 Plaintiff has not articulated a valid legal basis for her requests in those pleadings.

19 DATED this 8th day of February, 2012.

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23 James A. Teilborg
24 United States District Judge
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