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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Susan M. Snyder, a married woman, as  
her sole and separate property,

No. CV-12-0016-PHX-LOA

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Plaintiff,

**ORDER**

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vs.

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HSBC Bank, USA, N.A., a foreign  
corporation; Les Zieve; and Ocwen Loan  
Servicing, LLC, a foreign limited  
liability company, et al.,

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Defendants.

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Pending before the Court are two Rule 12(b)(6) motions to dismiss, one filed by Defendants HSBC Bank, USA, N.A.<sup>1</sup> (“HSBC”) and Ocwen Loan Servicing, LLC (“Ocwen”), and the other by Defendant Les Zieve (“Zieve”), each asserting the Complaint fails to state claims upon which relief may be granted. (Docs. 10, 22) Plaintiff filed responses and a Motion to Allow Supplemental Pleading, purportedly authorized by Rule 15, Fed.R.Civ.P., regarding factual allegations made in HSBC and Ocwen’s Reply. (Docs. 17, 19) Defendants HSBC and Ocwen replied and filed a Request to Correct Record, which the Court construes as a notice of *errata*, informing the Court that

<sup>1</sup> The Bank indicates it was erroneously sued as HSBC Bank, USA, N.A. when, at all times material to the Complaint, it was acting as the trustee on behalf of ACE Securities Corp.; Home Equity Loan Trust, Series 2006-HE1 for the registered holders of ACE Securities Corp.; and Home Equity Loan Trust, Series 2006-HE1, and Asset Backed Pass-Through Certificates. (Doc. 10 at 2)

1 Plaintiff's real property did not proceed to a trustee's sale on January 30, 2012. (Docs. 18,  
2 20) Because oral argument would not aid the Court's decisional process, HSBC and  
3 Ocwen's and Plaintiff's requests for oral argument are denied.<sup>2</sup> *Mahon v. Credit Bur. of*  
4 *Placer County, Inc.*, 171 F.3d 1197,1200 (9th Cir. 1999).

5 After considering the briefing and applicable law, the Court will grant Defendants'  
6 motions, dismiss the Complaint, and grant Plaintiff leave to file an amended complaint.

### 7 **I. Background**

8 This lawsuit arises over a dispute whether a loan modification agreement was  
9 reached by the parties in September 2010 or whether Plaintiff is in default on the loan  
10 regarding her real property located on West Fishhook Court, Surprise, Arizona. (Doc. 1, ¶  
11 8 at 17) Plaintiff's property is subject to a deed of trust as a result of her execution of a  
12 promissory note in June 2005 with HSBC. (*Id.*, ¶ 7 at 16) At some time, Plaintiff stopped  
13 making full payments on the loan. Plaintiff represents she retained the services of Michael  
14 S. Define, an attorney, to negotiate a loan modification agreement ("LMA") with Ocwen,  
15 the servicing agent for the HSBC loan.<sup>3</sup> Plaintiff and Define claim Plaintiff "was  
16 ultimately approved for a loan modification by Ocwen and executed a written contract  
17 stating such." (Doc. 17-1 at 1-4, Exhibit ("Exh.") 1, Affidavit of Michael S. DeFine, Esq.)  
18 Plaintiff attaches a copy of a nine-page document, entitled Loan Modification Agreement,  
19 but it is signed only by Plaintiff. (Doc. 17-1 at 9-17, Exh. 2)

20 Consistent with her claim that the parties reached a LMA, Plaintiff represents she  
21 made ten consecutive payments in the amount specified in the LMA. (Doc. 1, ¶¶ 10-11 at  
22 17) Plaintiff alleges that after the tenth payment was returned to her by Ocwen, she was  
23 informed this payment was not the full amount due under the original note and deed of  
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26 <sup>2</sup> Plaintiff's request for oral argument did not comply with LRCiv 7.2(f).

27 <sup>3</sup> The Complaint fails to allege the relationship, if any, between HSBC and Ocwen,  
28 and why HSBC is liable for the acts of Ocwen.

1 trust and she was in default on the loan.<sup>4</sup> (*Id.*) Plaintiff provides a copy of the front of  
2 check No. 1069, dated September 8, 2010, which was made payable to Ocwen in the  
3 amount of \$922.41. (Doc. 17-1 at 8) This is the exact amount which was due “on or  
4 before 9/10/2010[]” according to the LMA. (*Id.*, ¶ 2 at 9) Plaintiff claims neither Ocwen  
5 nor HSBC returned any of the other nine partial payments. (Doc. 17 at 5) Further, prior  
6 to the LMA, Ocwen and/or HSBC sent a notice of default and started fore-closure  
7 proceedings, but after the LMA, Ocwen and HSBC cancelled the scheduled fore-closure  
8 sale and accepted payments under the LMA for the next nine months. (*Id.*, ¶¶ 13-14)  
9 After returning the last payment, “Ocwen and/or HSBC then re-filed the required  
10 documents for foreclosure under Arizona law.” (*Id.*, ¶ 15) Plaintiff alleges she and her  
11 attorney Define “attempted on several occasions after Ocwen sent back the second check  
12 to give Ocwen and/or HSBC the opportunity to recognize their errors . . . but they  
13 continued to send back the check and deny liability under the terms of the loan modifi-  
14 cation agreement.” (*Id.*, ¶ 21) According to Plaintiff, Ocwen provided Plaintiff a monthly  
15 account statement, showing her reduced principal, the deferred principal, and the reduced  
16 interest rate, all in accordance with the LMA. (Doc. 17-1 at 22)

17 Plaintiff filed suit in the Maricopa County Superior Court, State of Arizona on  
18 December 8, 2011. (Doc. 1 at 15-25, Complaint) Defendants HSBC and Ocwen removed  
19 the action to this District Court on January 3, 2012. (*Id.* at 1-5) Plaintiff’s verified Com-  
20 plaint asserts four causes of action: (1) declaratory relief,<sup>5</sup> Count One; (2) conversion and  
21 slander of title, Count Two; (3) breach of the covenant of good faith and fair dealing,  
22 Count Four;<sup>6</sup> and (4) intentional misrepresentation, Count Five. (Doc. 1 at 15-25) On

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24 <sup>4</sup> Plaintiff’s Response indicates Plaintiff “received the eleventh payment back[,]” not  
25 the tenth, doc. 17 at 4.

26 <sup>5</sup> “[A] request for declaratory relief constitutes a remedy rather than a separate cause  
27 of action.” *Salgado v. America’s Servicing Co.*, 2011 WL 3903072, 5 (D.Ariz. Sept. 6, 2011)  
(citing *Silvas v. GMAC Mortgage, LLC*, 2009 WL 4573234 \* 7 (D.Ariz. Dec. 1, 2009)).

28 <sup>6</sup> Plaintiff did not allege a Count Three. (Doc. 1 at 20-21)

1 December 8, 2011 and without notice to Defendants, Plaintiff obtained a temporary  
2 restraining order (“TRO”) from a Superior Court commissioner pursuant to Arizona Rule  
3 of Civil Procedure 65(d), enjoining Defendants from foreclosing on or selling Plaintiff’s  
4 property or removing Plaintiff from her property. (Doc. 1 at 13-14) The TRO was set to  
5 expire at “the conclusion of the Order to Show Cause Hearing scheduled” before a  
6 Superior Court judge on January 5, 2012. (*Id.* at 10-11) Defendants HSBC and Ocwen,  
7 however, removed this action on January 3, 2012, three days before the OSC hearing.

8 On June 5, 2012, over five months after removal, Plaintiff filed a notice of pending  
9 motion required by LRCiv 3.7(c), requesting a hearing on her Application for Temporary  
10 Restraining Order and Preliminary Injunction. (Doc. 30) *See* LRCiv 3.7(c) (“If a motion  
11 is pending and undecided in the state court at the time of removal, the Court need not  
12 consider the motion unless and until a party files and serves a notice of pending motion . .  
13 . .”). According to Plaintiff’s Notice, the parties disagree whether the December 8, 2011  
14 TRO is currently valid as Defendants “[i]ntend to sell the Plaintiff’s home at a trustee sale  
15 currently set for June 20, 2012.” (*Id.* at 2) A Rule 16(a) pretrial conference is scheduled  
16 before the undersigned on June 14, 2012. (Doc. 32)

17 Defendants HSBC and Ocwen contend “Plaintiff’s Complaint fails to plead the  
18 facts necessary to put them on notice of the precise wrongdoing Plaintiff believes they  
19 committed.” (Doc. 10 at 3) Specifically, they argue Plaintiff failed to affirmatively plead  
20 that a valid and binding loan modification agreement was entered into and executed by  
21 Defendants. (*Id.*) They point out the Complaint does not allege HSBC and Ocwen  
22 executed the LMA; thus, their dismissal motion “should be granted because Plaintiff’s  
23 Complaint lacks the facts necessary to determine if a loan modification agreement was  
24 executed and entered into by Defendants and the terms Plaintiff alleges were breached.”  
25 (*Id.*) According to Defendants HSBC and Ocwen, “[a]bsent an allegation that a loan  
26 modification was executed by Defendants, and what provision of the modification agree-  
27 ment was allegedly breached, all of Plaintiff’s claims fail and Defendants’ motion to  
28 dismiss should be granted.” (*Id.* at 5)

1           Regarding Plaintiff’s conversion claim, Count Two, and the bad faith claim, Count  
2 Four, HSBC and Ocwen contend Plaintiff has not shown that a valid contract was formed  
3 modifying Plaintiff’s note, that Defendants have breached the contract, or Defendants  
4 have foreclosed on her property, citing *Bike Fashion Corp. v. Kramer*, 202 Ariz. 420,  
5 423-24, 46 P.3d 431, 434-35 (Az.Ct.App. 2002) (“The general rule is that an implied  
6 covenant of good faith and fair dealing cannot directly contradict an express contract term  
7 . . . .”). (*Id.* at 7) HSBC and Ocwen argue Plaintiff’s conversion claim is not ripe because  
8 “Plaintiff is in possession of the property and continues to enjoy the benefits of the  
9 property without payment.” (*Id.* at 6) Additionally, they argue Plaintiff’s slander-of-title  
10 claim is without merit because a beneficiary under a deed of trust, like HSBC, is entitled  
11 to initiate a non-judicial foreclosure proceeding when a debtor, like Plaintiff, is in default  
12 on a loan, citing *SWC Baseline & Crimson Investors, LLC v. Augusta Ranch Ltd.*  
13 *Partnership*, 228 Ariz. 271, 265 P.3d 1070, 1086 (Az.Ct.App. 2011) (“Slander of title  
14 requires proof of ‘the uttering and publication of the slanderous words by the defendant,  
15 the falsity of the words, malice and special damages.’ [citation omitted] Malice, a  
16 required element of the claim, means acting ‘from improper motives or without reason-  
17 able belief in the efficacy of the claim.’”). They argue because HSBC and Ocwen are  
18 proceeding appropriately to foreclose on Plaintiff’s property, claims of conversion and  
19 slander of title are not viable. Finally, HSBC and Ocwen argue that Plaintiff’s claim for  
20 material misrepresentation or fraud fails because the Complaint does not set forth  
21 sufficient facts to support the heightened pleading standard required by Rule 9(b), Fed.R.  
22 Civ.P., or satisfy the elements of a fraud claim. (*Id.* at 7) According to HSBC and  
23 Ocwen, because the Complaint fails to set forth specific facts of what the material  
24 misrepresentation was, who made it, when it was made or how it was false, the speaker’s  
25 knowledge of the statement’s falsity and how the statement proximately caused Plaintiff  
26 damages, Plaintiff’s material misrepresentation claim in Count Five must be dismissed.  
27 (*Id.* at 8)

28           Defendant Les Zieve, a licensed Arizona escrow agent, argues that, as a successor

1 trustee, he is not a proper party to this action and was named as a defendant in this action  
2 solely in his role as trustee. (Doc. 22 at 3) According to Zieve, HSBC determined a  
3 default existed under the note and deed of trust with Plaintiff, appointed Zieve as  
4 successor trustee of the deed of trust pursuant to A.R.S. § 33-803, and instructed him to  
5 commence foreclosure proceedings. (*Id.* at 2) He points out “[t]here is not one single  
6 allegation that Les Zieve breached his obligations as the trustee of the deed of trust under  
7 ARS §33-801 et seq. or the deed of trust.” (*Id.* at 3) Zieve cites A.R.S. § 33-807(E)  
8 which provides that “[t]he trustee need only be joined as a party in legal actions pertain-  
9 ing to a breach of the trustee’s obligation under this chapter or under the deed of trust.”  
10 A.R.S. § 33-807(E). Zieve points out that under Arizona law “the trustee under a deed of  
11 trust is only a proper party to a legal action if it is alleged that he violated some provision  
12 of the trustee’s sale statutes or the deed of trust.” (Doc. 22 at 3) Arizona law is clear that  
13 “[a]ny order of the court entered against the beneficiary (Lender) is binding upon the  
14 trustee with respect to any actions that the trustee is authorized to take by the trust deed or  
15 by this chapter.”<sup>7</sup> *Id.* (referring to A.R.S. § 33-807(E)).

16 On May 30, 2012, Plaintiff responded to Zieve’s Motion to Dismiss, urging the  
17 Court to deny the motion because “Plaintiff named [Zieve] based upon the requirements  
18 of A.R.S. §12-1841(A) of the Uniform Declaratory Judgment Act.” (Doc. 28 at 5) Rely-  
19 ing upon A.R.S. §§ 12-1841 and -1843 only, Plaintiff argues she “[w]as required to name  
20 all persons with any interest that would be affected by the declaratory judgment as parties  
21 . . . as [Zieve] is a person with an interest under the deed of trust at issue in this matter.”  
22 (*Id.* at 7-8) According to Plaintiff, “[t]his Court needs to have jurisdiction over Defendant  
23 Les Zieve in order to ensure that any orders of the Court are obeyed as it is clear that  
24 Defendant Les Zieve does not believe it is subject to the jurisdiction of this Court and  
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27 <sup>7</sup> “‘Beneficiary’ means the person named or otherwise designated in a trust deed as  
28 the person for whose benefit a trust deed is given, or the person’s successor in interest.”  
A.R.S. § 33-801(1).

1 intends to sell the real property on June 20, 2012.”<sup>8</sup> (*Id.* at 8)

## 2 **II. Jurisdiction**

3 District courts have original subject-matter jurisdiction over an action pursuant to  
4 either federal-question, 28 U.S.C. § 1331, or diversity jurisdiction, *id.* § 1332(a). The  
5 party who asserts diversity jurisdiction “bears the burden” of proving its existence. *Lew v.*  
6 *Moss*, 797 F.2d 747, 749 (9th Cir. 1986). A party seeking to invoke diversity juris-diction  
7 must affirmatively allege the actual citizenship of all the parties. *Kanter v.*  
8 *Warner–Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001) (citation omitted). HSBC and  
9 Ocwen removed this action to this District Court, alleging jurisdiction exists under 28  
10 U.S.C. § 1332 because the parties’ citizenship is completely diverse and the amount in  
11 controversy exceeds the sum of \$75,000.00, exclusive of interest and costs. (Doc. 1, ¶¶ 7,  
12 14, Notice of Removal)

13 “A natural person is a citizen of a particular state if they are a citizen of the United  
14 States and domiciled within that state.” *Pimal Property, Inc. v. Fireman’s Fund Ins. Co.*,  
15 2005 WL 3273559, \* 2 n. 1 (D.Ariz. November 29, 2005) (citation omitted). Plaintiff  
16 avers she is domiciled in, and a citizen of, the State of Arizona. (Doc. 1, ¶ 1 at 15, Com-  
17 plaint) HSBC and Ocwen cite the Complaint which alleges that Defendant Zieve is an  
18 escrow agent that “resides in California” which is insufficient to affirmatively establish  
19 Zieve is a citizen of, and domiciled in, California. *Kanter*, 265 F.3d at 857.

20 Defendant HSBC represents it is “a federally-chartered national banking associa-  
21 tion with its main office and principal place of business in Virginia.” (Doc. 1, ¶ 9 at 3)  
22 National banking associations are “[d]eemed citizens of the States in which they are  
23 respectively located.” 28 U.S.C. § 1348. For purposes of diversity jurisdiction, national  
24 banks are citizens only of the states in which their main offices, as set forth in their  
25 articles of association, are located. *Wachovia Bank v. Schmidt*, 546 U.S. 303, 306-307

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27 <sup>8</sup> The Court has not been provided any documentation that Defendants have re-  
28 initiated foreclosure proceedings notwithstanding the uncertain validity of the December 8,  
2011 State TRO.

1 (2006) (interpreting 28 U.S.C. § 1348); *Oraha v. Metrocities Mortg., LLC*, 2011 WL  
2 4101111, \* 2 (D.Ariz. September 8, 2011). HSBC is domiciled in, and a citizen of,  
3 Virginia. (Doc. 1, ¶ 9 at 3)

4 Plaintiff's Complaint alleges that Ocwen "is a foreign limited liability company."  
5 (Doc. 1, ¶ 4 at 16) "[L]imited liability companies are citizens of every state of which any  
6 member is a citizen." *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th  
7 Cir. 2006) ("Notwithstanding LLCs' corporate traits, . . . every circuit that has addressed  
8 the question treats them like partnerships for the purposes of diversity jurisdiction . . . We  
9 therefore join our sister circuits and hold that, like a partnership, an LLC is a citizen of  
10 every state of which its owners/members are citizens."); *see also Baldwin v. Monier*  
11 *Lifetile, L.L.C.*, 2005 WL 3334344 (D.Ariz. December 7, 2005).

12 Counsel for HSBC and Ocwen has filed an affidavit affirmatively stating the state  
13 of citizenship of each LLC member and Zieve. Defendant Ocwen is a Delaware limited  
14 liability company and its sole member is Ocwen Financial Corporation. Ocwen Financial  
15 Corporation is a Florida for-profit corporation with Florida corporate citizenship and  
16 Atlanta, Georgia as its principal place of business. (Doc. 33, ¶ 3 at 2) In other words,  
17 Atlanta, Georgia is Ocwen Financial Corporation's headquarters, which is corroborated  
18 by Exhibit 1, a printout from the official website for the Florida Division of Corporations  
19 located at [www.sunbiz.org](http://www.sunbiz.org). (*Id.*, Exh. 1) *See Hertz Corp. v. Friend*, \_\_\_ U.S. \_\_\_, 130  
20 S.Ct. 1181, 1192 (2010) (a corporation's principal place of business, for diversity  
21 jurisdiction purposes, is its nerve center, abrogating *Tosco Corp. v. Communities for a*  
22 *Better Environment*, 236 F.3d 495, 500-502 (9th Cir. 2001) (*per curiam*)). HSBC and  
23 Ocwen's counsel avers that Zieve, is a citizen of both the United States and California  
24 and is domiciled in California, which is corroborated by Zieve's counsel. (*Id.*, ¶ 4 at 2;  
25 doc. 34) Zieve is "[c]itizen of both United States and California and domiciled in  
26 California [and] maintains his permanent home in California with the intention to remain  
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1 in California.” (Doc. 34, ¶ 3 at 2<sup>9</sup>) The Court concludes it has subject-matter jurisdiction  
2 over this case pursuant to 28 U.S.C. § 1332(a).

3 The parties have consented to magistrate-judge jurisdiction pursuant to 28 U.S.C. §  
4 636(c). (Docs. 7, 12, 26)

### 5 **III. Standard of Review**

6 A complaint must contain a “short and plain statement of the claim showing that  
7 the pleader is entitled to relief[.]” Fed.R.Civ.P. 8(a). Dismissal of a complaint under  
8 Federal Rule of Civil Procedure 12(b)(6) may be granted for two reasons: 1) failure to  
9 allege a cognizable legal theory, or 2) the facts alleged are insufficient to state a  
10 cognizable legal theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.  
11 1990).

12 To survive a Rule 12(b)(6) motion, a complaint must meet the requirements of  
13 Federal Rule of Civil Procedure 8(a)(2). Rule 8(a)(2) requires a “short and plain statement  
14 of the claim showing that the pleader is entitled to relief,” so that a defendant has “fair  
15 notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atlantic Corp. v.*  
16 *Twombly*, 550 U.S. 544, 555 (2007) (citation omitted).

17 Although a complaint challenged for failure to state a claim does not need detailed  
18 factual allegations, a plaintiff’s obligation to provide the grounds for relief requires “more  
19 than labels and conclusions, and a formulaic recitation of the elements of a cause of  
20 action will not do.” *Twombly*, 550 U.S. at 555 (internal citations omitted). The factual  
21 allegations of the complaint must be sufficient to raise plaintiff’s right to relief above a  
22 speculative level. *Id.* Federal Rule 8(a)(2) “requires a ‘showing,’ rather than a blanket  
23 assertion, of entitlement to relief. Without some factual allegation in the complaint, it is  
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25 <sup>9</sup> Zieve’s affidavit was not filed in text-searchable format and, therefore, fails to  
26 comply with LRCiv 7.1(c), 5.5(b) and the definition of “.pdf,” in the District Court’s ECF  
27 Administrative Policies and Procedures Manual, at I(A), p. 2. Future filings by Zieve that fail  
28 to comply with the Local Rules in this regard may result in the striking of the filing or denial  
of the motion.

1 hard to see how a claimant could satisfy the requirement of providing not only ‘fair  
2 notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.” *Id.*  
3 (citation omitted)).

4 Federal Rule of Civil Procedure 8’s pleading standard demands more than “an  
5 unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S.  
6 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). A complaint that offers nothing more  
7 than naked assertions will not suffice. To survive a motion to dismiss, a complaint must  
8 contain sufficient factual matter, which, if accepted as true, states a claim to relief that is  
9 “plausible on its face.” *Id.* Facial plausibility exists if the pleader pleads factual content  
10 that allows the court to draw the reasonable inference that the defendant is liable for the  
11 misconduct alleged. *Id.* Plausibility does not equal “probability,” but plausibility requires  
12 more than a sheer possibility that a defendant has acted unlawfully. *Id.* “Where a com-  
13 plaint pleads facts that are ‘merely consistent’ with a defendant’s liability, it ‘stops short  
14 of the line between possibility and plausibility of entitlement to relief.’” *Id.* (citing  
15 *Twombly*, 550 U.S. at 557).

16 In deciding whether to grant a motion to dismiss, a district court must accept as  
17 true all “well-pleaded factual allegations in the complaint as true, [but courts] are not  
18 bound to accept as true a legal conclusion couched as a factual allegation.” *Iqbal*, 556  
19 U.S. at 678 (2009) (quoting *Twombly*, 550 U.S. at 555) (internal quotation marks omit-  
20 ted). A court is not “required to accept as true allegations that are merely conclusory,  
21 unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State*  
22 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

### 23 **III. Governing Law**

#### 24 **A. General Principles**

25 In Arizona, “[d]eed of trust sales are held without the prior judicial authorization  
26 required in a mortgage foreclosure.” *Contreras v. U.S. Bank as Trustee for CSMC Mortg.*  
27 *Backed Pass-through Certificates etc.*, 2009 WL 4827016, \* 4 (D.Ariz. December 15,  
28 2009) (citing *In re Krohn*, 203 Ariz. 205, 208, 52 P.3d 774, 777 (Ariz. 2002)). “Arizona’s

1 deed of trust statutes were enacted in 1971 to bypass time-consuming and expensive  
2 judicial foreclosure by using the power of sale authority to sell property securing a  
3 delinquent loan after complying with statutory procedural requirements.” *Id.* Unlike a  
4 mortgage, “[a] deed of trust is a three-party instrument where the trustor (borrower)  
5 transfers legal title in real property to the trustee (legal title holder) as security for the  
6 performance by the trustor or a third party of obligations to the beneficiary (lender).”  
7 *Maxa v. Countrywide Loans, Inc.*, 2010 WL 2836958, \* 4 (D.Ariz. July 19, 2010) (cita-  
8 tions omitted). In Arizona, though a promissory note and trust deed are generally  
9 construed together, A.R.S. § 33-817,<sup>10</sup> “the note and the deed of trust are nonetheless  
10 distinct instruments that serve different purposes. The note is a contract that evidences the  
11 loan and the obligor’s duty to repay.” *Hogan v. Washington Mut. Bank, N.A.*, \_\_\_ P.3d  
12 \_\_\_, \_\_\_, 2012 WL 1835540, \* 3 (Ariz. May 18 2012), vacating 227 Ariz. 561, 261 P.3d  
13 445 (Az.Ct.App. 2011) (citing A.R.S. § 33-801(4)). “The trust deed transfers an interest  
14 in real property, securing the repayment of the money owed under the note.” *Id.* (citing  
15 A.R.S. §§ 33-801(4), -801(8), -801(9), -805, -807(A)).

#### 16 **A. Breach of Contract**

17 “In order to state a claim for breach of contract, a plaintiff must allege the exis-  
18 tence of a contract between the plaintiff and defendant, a breach of the contract by the  
19 defendant, and resulting damage to the plaintiff.” *Warren v. Sierra Pacific Mortg. Svcs*  
20 *Inc.*, 2011 WL 1526957, \* 3 (D.Ariz. April 22, 2011) (citing *Chartone, Inc. v. Bernini*,  
21 207 Ariz. 162, 170, 83 P.3d 1103, 1111 (Az.Ct.App. 2004)); *Graham v. Asbury*, 112 Ariz.  
22 184, 185, 540 P.2d 656 (Ariz. 1975).

23 Plaintiff has failed to allege sufficient facts that she has a breach-of-contract claim

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25 <sup>10</sup> A.R.S. § 33-817 provides “[t]he transfer of any contract or contracts secured by a  
26 trust deed shall operate as a transfer of the security for such contract or contracts.” A.R.S. §  
27 33-817.  
28

1 against HSBC and Ocwen which is “plausible on its face” under the *Twombly* and *Iqbal*  
2 standard. In fact, there is no count which alleges a breach-of-contract cause of action. The  
3 Complaint’s general allegations make no factual representations that HSBC agreed to a  
4 loan modification, much less provide facts to support a plausible claim. (*See* doc. 1, ¶¶ 9-  
5 23 at 8-19) While the Complaint alleges more facts against Ocwen, the Court agrees with  
6 HSBC and Ocwen that the Complaint fails to affirmatively plead that a valid and binding  
7 loan modification agreement was reached and executed by these Defendants.

### 8 **B. Statute of Frauds**

9 HSBC and Ocwen raise in their reply that the LMA claim is a loan agreement  
10 regarding an interest in real property and falls within Arizona’s Statute of Frauds, A.R.S.  
11 § 44-101. (Doc. 18 at 4) An agreement that falls within the Statute of Frauds can only be  
12 modified in writing. HSBC and Ocwen contend that Plaintiff has failed to state a claim  
13 upon which relief can be granted because the LMA was not reduced to writing and signed  
14 by them. Thus, Plaintiff’s claims arising from the unilaterally executed LMA are subject  
15 to the Statute of Frauds. (*Id.* at 3) HSBC and Ocwen’s reply points out that the alleged  
16 LMA provided by Plaintiff, and Define’s Declaration, explicitly sets forth that:

17  
18 You understand that the Note and Mortgage will not be modified unless and until  
19 (i) you receive from the Servicer a copy of this Agreement signed by the Servicer,  
20 (ii) you successfully complete the trial period (as defined below), and (iii) the  
21 Servicer receives assurances from the title insurance company insuring the lien of  
the Mortgage... In order for the terms of this Agreement to be effective, you  
promise to make an initial payment of \$922.41 on or before 9/10/2010 and one  
Trial Payment of principal and interest in the amount of \$742.84 to Servicer on or  
before 10/1/2010.

22 (*Id.* at 3) HSBC and Ocwen argue “[e]ven assuming that part performance satisfied the  
23 statue of frauds, [Plaintiff] cannot show the agreement ever took effect because she failed  
24 to make the down payment before [September] 10, 20[10] as explicitly required.” (*Id.* at  
25 4) Moreover, the part-performance exception to the Statute of Frauds does not apply  
26 because “the submission of payments by Plaintiff ‘must conclusively establish that a  
27 contract exists[,]’” citing *Owens v. M.E. Schepp Ltd. Partnership*, 218 Ariz. 222, 227  
28

1 (Ariz. 2008)). (*Id.*)

2 Plaintiff argues, however, that the Statute of Frauds does not apply to this case  
3 because, “once the Plaintiff completed her[] obligations under the ‘Trial Period’, the  
4 Defendants were obligated pursuant to Paragraph 3 of the [LMA] to modify the terms of  
5 the loan in accordance with the terms of the [LMA]. The Account Statement sent monthly  
6 by the Defendants in fact shows that this is exactly what the Defendants did in fact do.”<sup>11</sup>

7 (Doc. 17 at 9)

8 Arizona’s Statute of Frauds, codified at A.R.S. § 44-101, provides, in relevant part:

9 No action shall be brought in any court in the following cases unless the promise  
10 or agreement upon which the action is brought, or some memorandum thereof, is  
11 in writing and signed by the party to be charged, or by some person by him  
thereunto lawfully authorized:

12 . . . .

13 Upon an agreement . . . for the sale of real property or an interest therein.

14 A.R.S. § 44–101(6); *Owens*, 218 Ariz. at 225, 182 P.3d at 667. In Arizona, a mortgage or  
15 deed of trust is “an interest” in real property for purposes of the Statute of Frauds.

16 *Schrock v. Federal Nat. Mortg. Ass’n*, 2011 WL 3348227, \* 4 (D.Ariz. August 3, 2011)  
17 (citing *Freeming Const. Co. v. Security Sav. & Loan Ass'n*, 115 Ariz. 514, 516, 566 P.2d  
18 315, 317 (Az.Ct.App. 1977); *Passey v. Great Western Associates II*, 174 Ariz. 420, 422,  
19 850 P.2d 133, 135 (Az.Ct.App. 1993) (“We find that the statute of frauds requirement of a  
20 signed writing prevents Passey from enforcing the acreage-release provision in the  
21 unsigned deed of trust addendum.”). A loan modification agreement and deed of trust  
22 agreement must be in writing and signed by the party to be charged to be enforceable.  
23 Thus, “[a] modification to the material terms of a mortgage loan [or loan secured by a

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24  
25  
26 <sup>11</sup> Plaintiff’s reliance in her Response, doc. 17 at 8, upon the Arizona Court of Appeals  
27 decision in *Owens v. M.E.Schepp Ltd. P’ship*, 216 Ariz. 273, 165 P.3d 674 (Az.Ct.App.  
28 2007) is misplaced because this divided panel opinion was vacated by the Arizona Supreme  
Court on May 8, 2008, and, therefore, has no precedential value. *Owens v. M.E. Schepp Ltd.  
Partnership*, 218 Ariz. 222, 182 P.3d 664 (Ariz. 2008).

1 deed of trust] must also be in writing and signed.” *Schrock*, 2011 WL 3348227 at \* 4  
2 (citing *e.g.*, *Best v. Edwards*, 217 Ariz. 497, 176 P.3d 695, 698–99 (Az.Ct.App. 2008));  
3 *Executive Towers v. Leonard*, 7 Ariz.App. 331, 439 P.2d 303, 305 (Az.Ct.App. 1968);  
4 *Womack v. Bank of America, N.A.*, 2000 WL 35725366, \* 4 (Az.Ct.App. November 20,  
5 2000) (“[w]here an original agreement comes within provisions of the statute of frauds  
6 requiring certain agreements to be in writing, the statute of frauds renders invalid and  
7 ineffectual a subsequent oral agreement changing the terms of the written contract.”)  
8 (quoting *Executive Towers v. Leonard*, 7 Ariz.App. 331, 333, 439 P.2d 303, 305  
9 (Az.Ct.App. 1968) (citation omitted)).

10 “Generally, Arizona case law does not recognize oral modifications of a contract  
11 that would originally fall under the statute of frauds . . . .” *Narramore v. HSBC Bank*  
12 *USA, N.A.*, 2010 WL 2732815, 3 (D.Ariz. July 7, 2010) (citation omitted). “Arizona  
13 courts, however, have long recognized limited exceptions to the statute.” *Owen*, 218 Ariz.  
14 226, 182 P.3d at 668, (citing *e.g.*, *Latimer v. Hamill*, 5 Ariz. 274, 277–78, 52 P. 364, 366  
15 (1898) (characterizing the part performance exception as too well settled to require  
16 citations of authority) (quotation marks omitted). “The cases reason that because the  
17 statute is intended to prevent fraud, specific performance of an oral contract is sometimes  
18 required to prevent the statute from becoming ‘an instrument by which fraud is perpe-  
19 trated.’” *Id.* (quoting *Trollope v. Koerner*, 106 Ariz. 10, 16, 470 P.2d 91, 97 (Ariz. 1970)).

20 As the Arizona Supreme Court explained:

21 The “part performance” exception to the statute of frauds is grounded in the  
22 equitable principle of estoppel. (citations omitted) The label “part performance” is  
23 in some ways a misnomer: the relevant acts need not be required by the oral  
24 agreement, but rather must be undertaken in reliance on the agreement. Restate-  
25 ment (Second) of Contracts § 129 cmt. a; (citations omitted).

26 In addition to providing an equitable basis for ordering specific performance,  
27 acts of part performance serve an important evidentiary function—they excuse the  
28 writing required by the statute because they provide convincing proof that the  
contract exists. (citations omitted) So that this exception does not swallow the rule,  
the acts of part performance take an alleged contract outside the statute only if they  
cannot be explained in the absence of the contract.

1 *Id.* “Whether this doctrine is labeled estoppel or part performance does not affect the  
2 ultimate result of its application, which is that a party may be precluded from asserting  
3 the Statute of Frauds as a defense when he has induced or permitted another to change his  
4 position to his detriment in reliance on an oral agreement which would be within the  
5 Statute.” *Dollar Tree Stores, Inc. v. Bayless Inv. & Trading Co.*, 2011 WL 6032966, \* 5-6  
6 (D.Ariz. December 1, 2011) (quoting *William Henry Brophy Coll. v. Tovar*, 127 Ariz.  
7 191, 619 P.2d 19, 22 (Az.Ct.App. 1980) (citation omitted). “Arizona courts have  
8 repeatedly affirmed that the party seeking to enforce the oral agreement must be seeking  
9 an equitable remedy.” *Dollar Tree Stores*, 2011 WL 6032966 at \* 6 (citing *William Henry*  
10 *Brophy Coll.*, 619 P.2d at 23; *Trollope*, 470 P.2d at 98 (citing *Evans v. Mason*, 82 Ariz.  
11 40, 308 P.2d 245, 248 (Ariz. 1957) (“This court has squarely held that notwithstanding  
12 the procedural merger of law and equity, the equitable doctrine of part performance is  
13 inapplicable in a suit where only money damages are sought”). “Where a party seeks  
14 only a remedy at law, the equitable doctrines are unavailable to escape Statute of Frauds.”  
15 *Id.* (citing *William Henry Brophy Coll.*, 619 P.2d at 23).

16 It is unclear whether Plaintiff is claiming the part-performance exception to the  
17 Statute of Frauds applies in this case. Plaintiff discusses it in her response, doc. 17 at 8-9,  
18 but the Complaint clearly fails to allege sufficient facts to state a plausible claim that the  
19 part-performance exception applies here. Moreover, this exception is an equitable one  
20 which is only available to a party seeking equitable relief, but Plaintiff is seeking  
21 damages. *Dollar Tree Stores*, 2011 WL 6032966 at \* 5-6. The Court will permit Plaintiff  
22 to file an amended complaint to allege a plausible claim if she is asserting the part-  
23 performance exception.

### 24 25 **C. Fraud**

26 “In alleging fraud . . . , a party must state with particularity the circumstances  
27 constituting fraud . . . .” Fed.R.Civ.P. 9(b). “Rule 9(b) requires allegations of fraud to be  
28 ‘specific enough to give defendants notice of the particular misconduct which is alleged

1 to constitute the fraud charged so that they can defend against the charge and not just  
2 deny that they have done anything wrong.” *Dumesnil v. Bank of America, N.A.*, 2010  
3 WL 1408889, \* 2 (D.Ariz. April 7, 2010) (quoting *Bly-Magee v. California*, 236 F.3d  
4 1014, 1019 (9th Cir. 2001)). “While statements of the time, place and nature of the  
5 alleged fraudulent activities are sufficient, mere conclusory allegations of fraud are  
6 insufficient.” *Id.* (quoting *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540  
7 (9th Cir. 1989)); *see also Echols v. Beauty Built Homes, Inc.*, 132 Ariz. 498, 500, 647  
8 P.2d 629, 631 (Ariz. 1982) (citations omitted).

9 HSBC and Ocwen argue “Plaintiff’s claim for material misrepresentation fails  
10 because the Complaint does not set forth sufficient facts to support the heightened plead-  
11 ing standard or satisfy the elements of a fraud claim.” (Doc. 10 at 7) Plaintiff discusses  
12 the facts from her perspective derived from the exhibits and states, “[a]ll nine elements of  
13 the claim for fraud or material misrepresentation are present and outlined in the Com-  
14 plaint.” (Doc. 17 at 13) The Court disagrees that the Complaint complies with federal  
15 law on pleading such a claim, but will grant Plaintiff’s request “that she be allowed to  
16 amend the Complaint to allege these very specific facts of the claim.” (*Id.*)

#### 17 **D. Breach of the Covenant of Good Faith and Fair Dealing**

18 “Under Arizona law, the covenant of good faith and fair dealing is implied in  
19 every contract, and the ‘duty arises by virtue of a contractual relationship.’” *Silving v.*  
20 *Wells Fargo Bank, NA*, 800 F.Supp.2d 1055, 1070 (D.Ariz. 2011) (quoting *Rawlings v.*  
21 *Apodaca*, 151 Ariz. 149, 726 P.2d 565, 569 (Ariz. 1986)). “The essence of that duty is  
22 that neither party will act to impair the right of the other to receive the benefits which  
23 flow from their agreement or contractual relationship.” *Id.* at 1071. Either party can  
24 breach the covenant of good faith and fair dealing by exercising discretion under the  
25 contract in such a way as to deny the other party a reasonably expected benefit of the  
26 bargain. *Wells Fargo Bank v. Ariz. Laborers*, 201 Ariz. 474, 490, 38 P.3d 12, 28 (Ariz.  
27 2002)). “[B]ecause a party may be injured when the other party to a contract manipulates  
28 bargaining power to its own advantage, a party may nevertheless breach its duty of good



1 faith without actually breaching an express covenant in the contract.” *Id.*, 201 Ariz at 491,  
2 38 P.3d at 29.

3 “[A]rizona law recognizes that a party can breach the implied covenant of good  
4 faith and fair dealing both by exercising express discretion in a way inconsistent with a  
5 party’s reasonable expectations and by acting in way not expressly excluded by the  
6 contract’s terms but which nevertheless bear adversely on the party’s reasonably expected  
7 benefits of the bargain.” *Bike Fashion Corp.*, 202 Ariz. at 424, 46 P.3d at 435.

8 There is a difference in the proof required, depending on whether the claim sounds  
9 in tort or in contract. *Wells Fargo Bank*, 201 Ariz. at 491, 38 P.3d at 29. Count Four of  
10 the Complaint does not specify whether the bad faith allegation arises in tort or contract,  
11 but it does request an award of punitive damages in paragraph 49, which is consistent  
12 with the tort claim of bad faith. (Doc. 1 at 21-22) “[I]t is well settled in Arizona that the  
13 relationship between a Bank and an ordinary depositor, absent any special agreement, is  
14 that of debtor and creditor.” *Rodriguez v. Quality Loan Service Corp.*, 2010 WL 1644695,  
15 \* 2 (D.Ariz. April 22, 2010) (quoting *McAlister v. Citibank*, 171 Ariz. 207, 212, 829 P.2d  
16 1253, 1258 (Ct.App.1992) (quotation omitted)). If Plaintiff is alleging a tortious claim of  
17 bad faith, the Complaint fails to state a claim because the Complaint does not allege  
18 HSBC and Ocwen had a special or fiduciary relationship with Plaintiff. *Addvensky v.*  
19 *Dysart Unified School Dist. No. 89*, 2011 WL 1882289, \* 7 (D.Ariz., May 17, 2011)  
20 (internal quotation marks omitted) (quoting *Wells Fargo Bank*, 201 Ariz. 474, 490, 38  
21 P.3d 12, 28 (Ariz. 2002)). “Action for breach of the covenant may sound in contract or in  
22 tort, but sustaining a tort claim requires a plaintiff to allege and prove a “special relation-  
23 ship between the parties arising from elements of the public interest, adhesion, of  
24 fiduciary responsibility.” *Id.*

25 HSBC and Ocwen claim the Complaint fails to state a contractual claim for breach  
26 of the covenant of good faith and fair dealing “because Plaintiff fails to allege sufficient  
27 facts to show that an underlying contract [the LMA] existed and the express terms  
28 thereof.” (Doc. 10 at 6) While it is true that Arizona law implies a covenant of good faith

1 and fair dealing in every contract, as HSBC and Ocwen argue, similarly “[A]rizona law  
2 recognizes that a party can breach the implied covenant of good faith and fair dealing  
3 both by exercising express discretion in a way inconsistent with a party’s reasonable  
4 expectations and by acting in way not expressly excluded by the contract’s terms but  
5 which nevertheless bear adversely on the party’s reasonably expected benefits of the  
6 bargain.” *Bike Fashion Corp.*, 202 Ariz. at 424, 46 P.3d at 435; *see also Gould v. M & I*  
7 *Marshall & Ilsley Bank*, 2011 WL 5826031, \* 2 (D.Ariz. November 18, 2011). “Acts in  
8 accord with the terms of one’s contract cannot without more be equated with bad faith.”  
9 *Wells Fargo Bank*, 201 Ariz. at 492, 38 P.3d at 30 (citation omitted).

10 Plaintiff has not alleged that HSBC and Ocwen acted in a way “not expressly  
11 excluded” by the LMA, and Plaintiff may have been adversely affected by a reasonable  
12 expected benefit under the LMA. Count Four is dismissed for failure to state a claim, but  
13 the Court will grant Plaintiff leave to file an amended complaint, alleging a bad faith  
14 claim.

#### 15 **D. Trustee Liability**

16 “In Arizona, non-judicial foreclosure sales, or trustees’ sales, are governed by  
17 statute.” *Hogan*, \_\_\_ P.3d \_\_\_, \_\_\_, 2012 WL 1835540 at \* 1 (citing A.R.S. §§ 33-801 to  
18 -821; *In re Vasquez*, 228 Ariz. 357, 359, 266 P.3d 1053, 1055 (Ariz. 2011)). “When  
19 parties execute a deed of trust and the debtor thereafter defaults, A.R.S. § 33-807  
20 empowers the trustee to sell the real property securing the underlying note through a  
21 non-judicial sale.” *Id.* Under Arizona law, “[a] trustee under a trust deed does not have  
22 the legal powers or obligations of a trustee under traditional trust law, but rather serves as  
23 a type of common agent for both parties.” *Contreras*, 2009 WL 4827016 at \* 5 n. 2  
24 (citing *In re Bisbee*, 157 Ariz. 31, 34, 754 P.2d 1135, 1138 (Ariz. 1988)). “A trustee’s  
25 primary duty arises upon default.” *Id.* Section 33-809(C) requires that, after recording the  
26 notice of the trustee’s sale under § 33-808, the trustee must send the trustor, the debtor,  
27 notice of the default, signed by the beneficiary or his agent, setting forth the unpaid  
28 principal balance. *Transamerica Fin. Servs., Inc. v. Lafferty*, 175 Ariz. 310, 313-14, 856

1 P.2d 1188, 1191-92 (Az.Ct.App. 1993) (recognizing that a trustee’s obligation is only to  
2 mail notice to address provided). A trustee owes the trustor a fiduciary duty, and may be  
3 held liable for conducting a trustee’s sale when the trustor is not in default. *Hogan*, 2012  
4 WL 1835540 at 3 (citing *Patton v. First Fed. Sav. & Loan Ass’n of Phoenix*, 118 Ariz.  
5 473, 476, 578 P.2d 152, 155 (Ariz. 1978)).

6 Here, HSBC is the beneficiary under the deed of trust on Plaintiff’s property.  
7 *Hatch Cos. Contracting, Inc. v. Ariz. Bank*, 170 Ariz. 553, 556, 826 P.2d 1179, 1182  
8 (Az.Ct.App. 1991) (“While deeds of trust are given to secure debts, [Arizona] statutes  
9 governing deeds of trust provide that a deed of trust “conveys” the trust property to a  
10 trustee who holds the property for the benefit of the beneficiary designated in the deed of  
11 trust.”). “If the trustee is joined as a party in any other action, the trustee is entitled to be  
12 immediately dismissed and to recover costs and reasonable attorney fees from the person  
13 joining the trustee.” *Eason v. IndyMac Bank FSB*, 2010 WL 1381889, \* 3 (D.Ariz. April  
14 6, 2010) (citing A.R.S. § 33-807(E) (emphasis added); see also *BT Capital, LLC v. TD*  
15 *Service Co. of Arizona*, \_\_\_ P.3d \_\_\_, 2012 WL 1556654, \* 4 (Ariz. May 4, 2012). In *BT*  
16 *Capital*, the Arizona Supreme made clear that the rights of BT Capital, the unsuccessful  
17 bidder on property auctioned at a trustee’s sale, “[a]re determined by the statutes govern-  
18 ing deeds of trust, not the common law[,]” citing, *inter alia*, A.R.S. § 33–807(E) (“[t]he  
19 trustee need only be joined as a party in legal actions pertaining to a breach of the  
20 trustee’s obligations under this chapter or under the deed of trust”). *Id.* Because Arizona’s  
21 deed of trust “[s]tatutes do not recognize any right to recover damages in these circum-  
22 stances, they preclude a third party like BT from asserting claims for common law breach  
23 of contract against the trustee or beneficiary.” *Id.*

24 Plaintiff has not alleged or explained how Zieve, the successor trustee, has  
25 breached his obligations under the deed or Arizona law. Plaintiff relies upon Arizona’s  
26 declaratory judgment statute, A.R.S. § 12-1841(A), as her authority that Plaintiff was  
27 “required” to bring this action against Zieve because he is a “person” within the meaning  
28 of A.R.S. § 12-1843 and has an “[i]nterest that would be affected by” Plaintiff’s

1 declaratory judgment action. (Doc. 28 at 4, 7) A.R.S. § 12-1841(A) states in relevant  
2 part:

3           When declaratory relief is sought, all persons shall be made parties who have or  
4 claim any interest which would be affected by the declaration, and no declaration  
5 shall prejudice the rights of persons not parties to the proceeding. . . .

6 A.R.S. § 12-1841(A).

7           Under A.R.S. § 33–807(E), a trustee should only be joined as a party in legal  
8 actions if the trustee is alleged to have breached his obligations under Arizona trustee law  
9 or the deed of trust. A.R.S. § 33–807(E). The plain meaning of the first sentence of the  
10 statute is that the plaintiff need only join the trustee as a party to a claim when that claim  
11 asserts that the trustee breached one or more of the trustee’s obligations arising under  
12 either the deed of trust or Arizona statutes regulating trust deeds. *Kentera v. Fremont Inv.*  
13 *& Loan*, 2011 WL 4005411, 8 (D.Ariz. September 8, 2011). The second sentence of the  
14 statute specifies that, to the extent a plaintiff wishes to challenge actions that a deed of  
15 trust or Arizona statute authorize a trustee to take, an order against the beneficiary alone  
16 is sufficient to bind the trustee. *Id.*

17           “Thus, to receive the protection of A.R.S. § 33–807(E) as to any particular claim, a  
18 trustee must establish three elements. First, that the trustee has been named as a defendant  
19 in the claim. Second, that the claim relates to the authority of the trustee to act, given to  
20 the trustee either by the trust deed or Arizona statutes regulating trust deeds. Third, that  
21 the claims do not allege that the trustee breached any of his or her obligations that arise  
22 under either the deed of trust or the statutory chapter of the Arizona Revised Statutes that  
23 regulates deeds of trust.” *Id.* (citing *Puzz v. Chase Home Finance, LLC*, 763 F.Supp.2d  
24 1116, 1122 (D.Ariz. 2011).

25           Plaintiff has conflated the role of a trustee in a foreclosure action with a necessary  
26 party to a declaratory judgment action which requires that all parties to a contract be  
27 joined in the action pursuant to A.R.S. § 12-1841(A). In Arizona, “[t]he purpose of a  
28 declaratory judgment action is to obtain a judicial determination of parties’ rights and

1 obligations in a controversy prior to one party’s breach of those rights.” *State v. Mabery*  
2 *Ranch, Co., L.L.C.*, 216 Ariz. 233, 242-43, 165 P.3d 211, 220-21 (Az.Ct.App. 2007)  
3 (citation omitted). Here, Plaintiff has made no claim that Zieve, who is neither a party nor  
4 a signatory to the LMA, has breached the LMA. See, doc. 17-1 at 9-17. Except for §  
5 12-1841(A), Plaintiff has not provided any authority that a trustee under a deed of trust,  
6 who is not a party to an alleged LMA, must be joined in the action when Arizona law  
7 clearly provides that a judicial order entered against the beneficiary, HSBC, is binding  
8 upon the trustee, Zieve. A.R.S. § 33-807(E). Because Plaintiff has ignored the limits to a  
9 trustee’s liability under Arizona law, the Court concludes that Zieve should not have been  
10 sued in this action. Plaintiff has not alleged any obligation of the trustee arising either  
11 under the statutes regulating trustees or the deed of trust itself that Zieve violated. The  
12 action against Zieve, therefore, will be dismissed with prejudice pursuant to the require-  
13 ments of A.R.S. § 33–807(E). Pursuant to the mandate of this statute, Zieve is awarded  
14 his reasonable attorney’s fees and costs from Plaintiff for joining Zieve in this action.  
15 Such fees and costs shall be awarded upon Zieve’s compliance with LRCiv. 54.2.

#### 16 **IV. Leave to Amend**

17 “[T]he Ninth Circuit has instructed district courts to grant leave to amend, *sua*  
18 *sponte*, when dismissing a case for failure to state a claim, ‘unless the court determines  
19 that the pleading could not possibly be cured by the allegations of other facts.’” *Schrock*  
20 *v. Federal Nat. Mortg. Ass’n*, 2011 WL 3348227, \* 9 (D.Ariz. August 3, 2011) (quoting  
21 *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000)). “There is a longstanding rule that  
22 [l]eave to amend should be granted if it appears at all possible that the plaintiff can  
23 correct the defect.” *Id.* (internal quotation marks and citations omitted).

24 Defendants HSBC and Ocwen request the Complaint be dismissed “without leave  
25 to amend[,]” but do not cite any authority or explain why the trial court should disregard  
26 the Ninth Circuit’s directive to grant leave to amend when dismissing a case for failure to  
27 state a claim. (Doc. 18 at 2) The Court will grant Plaintiff leave to file an amended  
28 complaint because it is cannot conclude at this time that Plaintiff can not cure any of her

1 claims by allegations of additional facts.

2 Plaintiff is also notified that an amended complaint supersedes the prior complaint  
3 and must be complete in itself, without incorporating by reference any prior or superseded  
4 pleading. *Untalan v. Alliance Bancorp*, 2011 WL 4704232 (D.Haw. Oct. 4, 2011) (citing  
5 *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987)). An amended complaint must stand on  
6 its own. Plaintiff is forewarned that if she elects to file an amended complaint and it fails  
7 to comply with the Court’s instructions or case law explained in this order, the action will  
8 be dismissed with prejudice. *Watson v. U.S. Bank Nat. Ass’n*, 2011 WL 1480130, \* 3  
9 (D.Ariz. April 19, 2011). In addition, Plaintiff may not reassert a claim against Defendant  
10 Zieve as the Court has dismissed him from this action with prejudice. *Untalan*, 2011 WL  
11 4704232 at 9.

## 12 **V. Motion to Allow Supplemental Pleading**

13 Relying on Rule 15, Fed.R.Civ.P., and after briefing closed on Defendants’ Motion  
14 to Dismiss, Plaintiff sought permission to supplement her Response because Defendants  
15 “[m]isstated the facts of this case and raised a defense in their reply that is not available to  
16 them pursuant to Arizona Revised Statutes (A.R.S.) § 33-811.” (Doc. 19 at 2) Plaintiff  
17 points out that, contrary to Defendants’ assertion that the trustee’s sale of Plaintiff’s  
18 residence occurred on January 30, 2012, “Exhibit 1 attached hereto clearly shows the  
19 foreclosure sale has not occurred [and] this matter was transferred to the Federal Court for  
20 the District of Arizona by the Defendants on January 3, 2012.” (*Id.* at 2-3)

21 Federal Rule of Civil Procedure 15, Fed.R.Civ.P., deals with amending pleadings  
22 as defined in Rule 7 and is inapplicable to filing supplemental memorandum on a pending  
23 motion. Nevertheless, the district court is vested with inherent powers to manage their  
24 cases and courtrooms, including authorizing supplemental briefing. *Chambers v. NASCO,*  
25 *Inc.*, 501 U.S. 32, 43-45 (1991). Trial courts have inherent power to manage their own  
26 affairs so as to achieve the orderly and expeditious disposition of cases. *Link v. Wabash*  
27 *Railroad Co.*, 370 U.S. 626, 629–31 (1962). In light of defense counsel’s concession that  
28 “he was misinformed that the foreclosure sale was conducted on January 30, 2012[.]”

1 doc. 20 at 2, Exh. 1, Piccuta Declaration at ¶ 3, and the inapplicability of § 33-811(C) to  
2 Plaintiff's claims, the Court will deny Plaintiff's Motion to Allow Supplemental Pleading  
3 as moot.

4 Based on the foregoing,

5 **IT IS ORDERED** that Defendants HSBC and Ocwen's Motion to Dismiss, doc.  
6 10, is **GRANTED**. The Complaint is dismissed as to Defendants HSBC and Ocwen with-  
7 out prejudice for failure to state claims upon which relief may be granted. If Plaintiff files  
8 a proposed amended complaint, it must be consistent with this order and specifically set  
9 forth the citizenship of each defendant.

10 **IT IS FURTHER ORDERED** that should Plaintiff seek to bring an amended  
11 complaint, she shall file a motion for leave to file an amended complaint **no later than**  
12 **Wednesday, June 13, 2012**. The motion must attach the proposed amended complaint  
13 and comply with the requirements of LRCiv 15.1.

14 **IT IS FURTHER ORDERED** that Defendant Les Zieve's Motion to Dismiss,  
15 doc. 22, is **GRANTED**. Defendant Les Zieve is dismissed with prejudice from this  
16 action. The Clerk is kindly directed to enter judgment in favor of Defendant Les Zieve  
17 against Plaintiff without Rule 54(b) language. *See AGA Shareholders, LLC v. CSK Auto,*  
18 *Inc.*, 2009 WL 297704 (D.Ariz. Feb. 6, 2009). Les Zieve is awarded his reasonable  
19 attorney's fees and costs from Plaintiff upon Zieve's filing a timely application for his  
20 attorneys' fees and costs by **Friday, July 6, 2012** in compliance with LRCiv. 54.2.  
21 Plaintiff shall file a response by **Monday, August 6, 2012**. An optional reply may be filed  
22 by **Friday, August 31, 2012**.

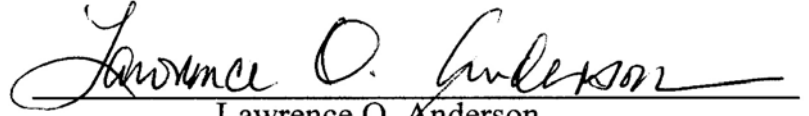
23 **IT IS FURTHER ORDERED** that, because the briefing is adequate and oral  
24 argument would not aid the Court, Defendants' and Plaintiff's requests for oral argument  
25 are **DENIED**.

26 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Allow Supplemental  
27 Pleading, doc. 19, is **DENIED** as moot.

28 **IT IS FURTHER ORDERED** that Defendants' Request to Correct Record, doc.

1 20, which the Court construes as a notice of *errata*, is **DENIED** as an unnecessary  
2 motion.

3 DATED this 8<sup>th</sup> day of June, 2012.

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5   
6 Lawrence O. Anderson  
United States Magistrate Judge

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