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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8  
9 Ramona Robinson

10 Plaintiff,

11 v.

12 Yvonne J. Miller and John Doe Wheeler,  
her husband; et al.,

13 Defendants.  
14

No. CV-12-00142-PHX-DGC

**ORDER**

15 Defendants Mortgage Electronic Registration Systems, Inc. (“MERS”), Ocwen  
16 Loan Servicing, LLC, the Bank of New York Mellon, and Saxon Mortgage Services have  
17 filed a motion to dismiss Plaintiff’s complaint, and Plaintiff has filed a response.  
18 Docs. 15, 19. No party has requested oral argument. For the reasons set forth below, the  
19 Court will grant the motion.

20 **I. Procedural History.**

21 On February 24, 2011, Plaintiff filed an action in state court against a number of  
22 defendants, alleging, *inter alia*, breach of contract and wrongful foreclosure stemming  
23 from the January 7, 2011 foreclosure sale of her home. CV-11-00559-PHX-SRB,  
24 Doc. 1-2. Defendants removed the action to federal court based on federal subject matter  
25 and supplemental jurisdiction because Plaintiff’s allegations that Defendants violated the  
26 federal Home Affordable Modification Program (“HAMP”) permeated the complaint.  
27 *Id.*, Doc. 1. The action was assigned to Judge Susan R. Bolton.

28 On March 31, 2011, Defendants MERS, Ocwen Loan Servicing, LLC, and the

1 Bank of New York Mellon filed a motion to dismiss, and Plaintiff failed to respond. *Id.*,  
2 Doc. 9; *see id.*, Doc. 20. After advising Plaintiff that the court would deem the motion  
3 unopposed and subject to being granted under Local Rule of Civil Procedure 7.2(i) and  
4 Federal Rule of Civil Procedure 41(b) if Plaintiff did not respond by April 18, 2011,  
5 Judge Bolton dismissed the complaint as to the moving Defendants on May 4, 2011. *Id.*,  
6 Docs. 10, 20.<sup>1</sup> Judge Bolton subsequently dismissed the complaint as to Saxon Mortgage  
7 Services due to Plaintiff's failure to serve, and a final judgment was entered in favor of  
8 all Defendants on July 6, 2011. *Id.*, Doc. 25.

9 On October 27, 2011, Plaintiff filed a second complaint in state court, alleging  
10 three claims: (1) breach of contract (note and deed of trust), (2) breach of covenant of  
11 good faith and fair dealing, and (3) wrongful foreclosure, each stemming from the same  
12 foreclosure sale. Doc. 1-1. The complaint largely follows Plaintiff's previous complaint  
13 word-for-word. Defendants removed the new complaint to federal court on the basis of  
14 diversity jurisdiction on January 20, 2012. Doc. 1. Defendant J. P. Morgan Chase Bank  
15 filed a motion to dismiss, which the Court granted on April 25, 2012. Doc. 4; *see* Doc.  
16 10. Defendants MERS, Ocwen Loan Servicing, LLC, the Bank of New York Mellon,  
17 and Saxon Mortgage Services filed the instant motion to dismiss on April 26, 2012.

18 Defendants argue that Plaintiff's claims are precluded by *res judicata* in light of  
19 the final judgment entered in the prior lawsuit. Doc. 15 at 3, 5-7. Defendants also argue  
20 that the claims are barred by A.R.S. § 33-811(C), are based on invalid legal conclusions,  
21 and fail to set forth sufficient elements to state a claim. *Id.* at 3, 7-12.

## 22 **II. Legal Standard.**

23 When analyzing a complaint for failure to state a claim under Rule 12(b)(6), the  
24 well-pled factual allegations are taken as true and construed in the light most favorable to  
25 the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009) (citation  
26 omitted). Legal conclusions couched as factual allegations are not entitled to the

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28 <sup>1</sup> Two other defendants filed motions to which Plaintiff did not respond and were  
likewise dismissed. *See* Docs. 21, 22.

1 assumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), and therefore are  
2 insufficient to defeat a motion to dismiss for failure to state a claim, *In re Cutera Sec.*  
3 *Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010). To avoid a Rule 12(b)(6) dismissal, the  
4 complaint must plead enough facts to state a claim to relief that is plausible on its face.  
5 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This plausibility standard “is not  
6 akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a  
7 defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at  
8 556). “[W]here the well-pleaded facts do not permit the court to infer more than the mere  
9 possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’ – ‘that the  
10 pleader is entitled to relief.’” *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

### 11 **III. Discussion.**

12 Where federal court jurisdiction is based on diversity of citizenship, the *res*  
13 *judicata* law of Arizona applies. See *Priest v. American Smelting & Refining Co.*, 409  
14 F.2d 1229, 1231 (9th Cir. 1969); *Gramm v. Lincoln*, 257 F.2d 250, 255 n.6 (9th Cir.  
15 1958). In Arizona, *res judicata* will preclude a claim when a former judgment on the  
16 merits was rendered by a court of competent jurisdiction and the matter now in issue  
17 between the same parties was, or might have been, determined in the former action. *Hall*  
18 *v. Lalli*, 977 P.2d 776, 779 (Ariz. 1999); accord *Blonder-Tongue Labs. v. Univ. of Ill.*  
19 *Found.*, 402 U.S. 313, 323-24 (1971). Dismissals for failure to prosecute or to comply  
20 with the rules or order of any court, other than a dismissal for lack of jurisdiction,  
21 improper venue, or failure to join a party, constitute a judgment on the merits. Ariz. R.  
22 Civ. P. 41(b); see *Hoff v. City of Mesa*, 344 P.2d 1013, 1015 (Ariz. 1959).

23 Defendants argue that the current claims against them were either brought or could  
24 have been brought in the prior action. The prior action named the same Defendants and  
25 involved the same foreclosure. Plaintiff previously asserted claims for breach of the note,  
26 deed of trust, and loan modification agreement; breach of the covenant of good faith and  
27 fair dealing; and wrongful foreclosure – the same claims asserted against Defendants in  
28 this case. Compare CV-11-00559-PHX-SRB, Doc. 1-2, ¶¶ 69, 71, 74; 77-78 with Doc. 1-

1 1, ¶¶ 68, 73, 74, 79-80.

2 Plaintiff contends that her claims are not the same because the thrust of her first  
3 complaint was Defendants’ failure to comply with HAMP, and it has since become clear  
4 that a mortgage borrower has no private right of action under that program. Doc. 19 at 6.  
5 But merely eliminating the references to HAMP in the complaint does not change the fact  
6 that Plaintiff asserts breaches of the same note and deed of trust that were the subject of  
7 the earlier case, and that she asserts wrongful foreclosure with respect to the same sale.  
8 Plaintiff has not alleged any claims she did not or could not have alleged in the earlier  
9 complaint.<sup>2</sup>

10 Plaintiff argues that the complaint makes new allegations such as “robo signing”  
11 and fraud that she was unable to discover earlier because Defendants failed to comply  
12 with her discovery requests. Doc. 19 at 7. The complaint alleges these deficiencies in  
13 the transfers of Plaintiff’s mortgage documents and the fraudulent signing of the notice of  
14 trustee sale. *See, e.g.*, Doc. 1-1, ¶¶ 23, 24, 32, 38, 44, 49, 51. As Defendants argue,  
15 however, Plaintiff has not shown that these alleged deficiencies caused her damages.  
16 Doc. 15 at 10. Moreover, borrowers who are not party to the assignment of their  
17 mortgage – and whose rights are not affected by it – lack standing to bring a claim. *Id.*;  
18 *see In Re Mortgage Electronic Registration Sys. (MERS) Litigation*, MDL No. 09-2119-  
19 JAT, 2011 WL 4550189 at \*5 (D. Ariz. Oct. 3, 2011). Thus, the new allegations are  
20 insufficient to support a claim under any of the legal theories asserted.

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27 <sup>2</sup> As the Court previously discussed in its order granting J. P. Morgan Chase  
28 Bank’s motion to dismiss, Plaintiff’s wrongful foreclosure claim also fails substantively  
because Arizona courts do not recognize such a claim, and Plaintiff does not dispute that  
she defaulted on her loan payments before her property was sold. *See* Doc. 10 at 4-5.

