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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 David A. Kester, on behalf of himself and
10 all others similarly situated,

11 **Plaintiff,**

12 v.

13 CitiMortgage, Inc.; CR Title Services, Inc.;
14 and Does 1 to 25, inclusive,

15 **Defendants.**

No. CV-15-00365-PHX-NVW

ORDER

16
17 This is a putative class action of foreclosed homeowners for statutory damages
18 under A.R.S. § 33-420(A). The statute penalizes persons claiming an interest or lien in
19 real property for recording a document “knowing or having reason to know that the
20 document is forged, groundless, contains a material misstatement or false claim or is
21 otherwise invalid” For each such document, the statute imposes a \$5,000 penalty.

22 Plaintiff alleges three documents relating to the trustee’s sale of his house were
23 recorded in violation of the statute because they were acknowledged before a notary
24 whose commission had been revoked ten days earlier. He also alleges this defect in
25 acknowledgment affected hundreds or perhaps thousands of other documents. On
26 Plaintiff’s theory, statutory penalties could run into the millions of dollars.

27 Before the Court is Defendants’ Motion to Dismiss Plaintiff’s Amended Class
28 Action Complaint (Doc. 16) for failure to state a claim upon which relief can be granted.
The Motion will be granted.

1 **I. LEGAL STANDARD**

2 A motion to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure, tests
3 the legal sufficiency of the complaint. The motion may be based on “the lack of a
4 cognizable legal theory” or “the absence of sufficient facts alleged under a cognizable
5 legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A
6 complaint need include “only enough facts to state a claim for relief that is plausible on
7 its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

8 All allegations of material fact are assumed to be true and construed in the light
9 most favorable to the non-moving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th
10 Cir. 2009). However, that does not apply to legal conclusions or conclusory factual
11 allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Threadbare recitals of the
12 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
13 *Id.* “A claim has facial plausibility when the plaintiff pleads factual content that allows
14 the court to draw the reasonable inference that the defendant is liable for the misconduct
15 alleged.” *Id.* “The plausibility standard is not akin to a ‘probability requirement,’ but it
16 asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* The
17 complaint must permit reasonable inference of more than the mere possibility of
18 misconduct. *Id.* If the plaintiff’s pleadings fall short of this standard, dismissal is
19 appropriate.

20
21 **II. FACTUAL ALLEGATIONS ASSUMED TO BE TRUE**

22 The following are Plaintiff’s allegations. On August 17, 2010, the Arizona
23 Secretary of State received a complaint accusing notary public Kristin Lindner of
24 improperly notarizing documents for Defendants when the signer was not present. (Doc.
25 1-1 at 11.) Plaintiff alleges on “information and belief” that Defendants became aware of
26 the complaint and the Secretary of State’s subsequent investigation “no later than
27 September 2010.” (*Id.*) Despite this knowledge, Defendants “took no steps to remove or
28 take any other action with respect to Ms. Lindner what [sic] would prevent her from the

1 performance of notarial services on their behalf.” (*Id.*) In a report dated December 6,
2 2010, the Secretary of State determined, among other things, that Lindner had “failed to
3 record requisite journal information,” “failed to properly perform the acknowledgment”
4 on the complainant’s document, “failed to state her commission-expiration date in the
5 notarial certificate,” and “executed a statement known to be false,” all in violation of
6 Arizona notary law. (*Id.* at 23-24.) The Secretary of State therefore revoked Lindner’s
7 commission, effective December 6, 2010. (*Id.* at 23.)

8 Plaintiff alleges, again on “information and belief,” that for three months after
9 learning of the revocation, Defendants permitted Lindner to continue notarizing
10 documents on their behalf, including assignments of deeds of trust, substitutions of
11 trustee, notices of default, and notices of trustee’s sale. (*Id.* at 12.) Defendants recorded
12 these post-revocation documents in county recorders’ offices across Arizona, California,
13 Nevada, Idaho, and Oregon and used them to institute trustee’s sales against hundreds of
14 properties. (*Id.*) Defendants have so far “made no attempt to reconstitute, re-do, or re-
15 notarize the invalid documentation properly, nor have they made any attempt to advise
16 any purported current owners of the properties or the Deeds of Trust purportedly
17 encumbering those properties that there is or may be an issue with the title they believe
18 they have.” (*Id.* at 13.)

19 On December 16, 2010, ten days after her commission had been revoked, Lindner
20 notarized an assignment of deed of trust, a substitution of trustee, and a notice of trustee’s
21 sale on Plaintiff’s property. (*Id.*) These three documents were recorded in the Maricopa
22 County recorder’s office, the last initiating a trustee’s sale of the property to satisfy the
23 defaulted note secured by the deed of trust. (*Id.*; *see* Doc. 16-1 at 3, 7, 10.)¹

24 Plaintiff filed this action in Maricopa County Superior Court on December 8,
25 2014. (Doc. 1 at 2.) His Amended Class Action Complaint, submitted on January 27,

26
27 ¹ Doc. 16-1 contains copies of these documents, as recorded. The complaint relies
28 on these documents and their authenticity is not disputed. Therefore they may be
considered in ruling on Defendants’ 12(b)(6) motion. *Swartz v. KPMG LLP*, 476 F.3d
756, 763 (9th Cir. 2007).

1 2015, requests certification of a class comprising “[a]ll property owners or beneficial title
2 holders whose properties were the subject of recordations by Defendants . . . in the Office
3 of the County Recorder wherever situated during the applicable statutory limitations
4 period that were notarized in the State of Arizona by employees of Defendants at a time
5 when their Notary Licenses had been revoked or suspended.” (Doc. 1-1 at 14, 18.)

6 The Complaint’s single cause of action is under A.R.S. § 33-420(A), which
7 penalizes persons claiming an interest or lien in real property for knowingly recording a
8 document that is “forged, groundless, contains a material misstatement or false claim or
9 is otherwise invalid”:

10 A. A person purporting to claim an interest in, or a lien or encumbrance
11 against, real property, who causes a document asserting such claim to be
12 recorded in the office of the county recorder, knowing or having reason to
13 know that *the document is forged, groundless, contains a material*
14 *misstatement or false claim or is otherwise invalid* is liable to the owner or
15 beneficial title holder of the real property for the sum of not less than five
thousand dollars, or for treble the actual damages caused by the recording,
whichever is greater, and reasonable attorney fees and costs of the action.

16 (Emphasis added.) The broader statutory section, A.R.S. § 33-420, is entitled “False
17 documents; liability; special action; damages; violation; classification.” It contains four
18 other subsections. Subsection B authorizes a special action to clear title, in addition to an
19 action for damages:

20 B. The owner or beneficial title holder of the real property may bring an
21 action pursuant to this section in the superior court in the county in which
22 the real property is located for such relief as is required to immediately
23 clear title to the real property as provided for in the rules of procedure for
24 special actions. This special action may be brought based on the ground
25 that the lien is forged, groundless, contains a material misstatement or false
26 claim or is otherwise invalid. The owner or beneficial title holder may
bring a separate special action to clear title to the real property or join such
action with an action for damages as described in this section. In either
case, the owner or beneficial title holder may recover reasonable attorney
fees and costs of the action if he prevails.

27 Subsection C further penalizes a person named in a document described in subsection A
28 if the person fails to timely correct the document upon request:

1 C. A person who is named in a document which purports to create an
2 interest in, or a lien or encumbrance against, real property and who knows
3 that the document is forged, groundless, contains a material misstatement or
4 false claim or is otherwise invalid shall be liable to the owner or title holder
5 for the sum of not less than one thousand dollars, or for treble actual
6 damages, whichever is greater, and reasonable attorney fees and costs as
7 provided in this section, if he willfully refuses to release or correct such
8 document of record within twenty days from the date of a written request
9 from the owner of beneficial title holder of the real property.

10 Subsection D creates a presumption that documents containing unauthorized property
11 interests or liens are groundless and invalid:

12 D. A document purporting to create an interest in, or a lien or
13 encumbrance against, real property not authorized by statute, judgment or
14 other specific legal authority is presumed to be groundless and invalid.

15 Subsection E renders a person in violation of subsection A guilty of a class 1
16 misdemeanor:

17 E. A person purporting to claim an interest in, or a lien or encumbrance
18 against, real property, who causes a document asserting such claim to be
19 recorded in the office of the county recorder, knowing or having reason to
20 know that the document is forged, groundless, contains a material
21 misstatement or false claim or is otherwise invalid is guilty of a class 1
22 misdemeanor.

23 Plaintiff alleges that revocation of the notary's commission rendered the three
24 documents relating to the trustee's sale of his property and hundreds or thousands of
25 other documents "forged, groundless, or otherwise invalid," triggering the \$5,000.00 per
26 document penalty of § 33-420(A) because Defendants knew the commission had been
27 revoked. (Doc. 1-1 at 17.) (Trustee's sales typically involve recordation of three
28 acknowledged documents, as in Plaintiff's case.) He further alleges that Defendants
violated the statute by "failing to correct and retract documents they recorded that they
knew or should have known had been recorded in violation of the statute," though he
does not allege that he asked them to do so. (*Id.*)

Plaintiff does not claim that these documents or transactions were substantively
invalid. Nor does he claim that the signatures on these documents were inauthentic or
unauthorized or that the notary did not in fact witness the signatures. He claims only that

1 the certificates of acknowledgment accompanying these documents were signed by a
2 notary whose commission had been revoked. (*See* Doc. 16-1 at 3, 7, 10.)

3 On February 27, 2015, Defendants removed the action to this court under the
4 Class Action Fairness Act. (Doc. 1 at 7.) There are no questions of federal law. No
5 class has yet been certified.

6
7 **III. A.R.S. § 33-420 REQUIRES MATERIALITY FOR A PENALTY.**

8 It is undisputed that the defect in the certificates of acknowledgment of the
9 trustee’s sale documents is immaterial to Plaintiff. Defendants say that is fatal to the
10 claim; Plaintiff says otherwise. The Court first addresses this central issue.²

11 **A. Textual Analysis**

12 Again, a penalty may arise under A.R.S. § 33-420(A) only if the recorded
13 document is flawed in one of the following ways: it is “forged, groundless, contains a
14 material misstatement or false claim or is otherwise invalid.”

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17 ² Neither party briefed the threshold question whether A.R.S. § 33-420 applies at
18 all to latent defects in certificates of acknowledgment asserted only after the trustee’s
19 sale. The statute combats a serious problem: recordation of false property claims. Its
20 title is aimed at “False documents.” It punishes violations with severe monetary liability
and misdemeanor criminal liability. A.R.S. § 33-420(A), (C), (E). This statute is a poor
fit for Plaintiff’s facts.

21 The trustee’s sale documents here are not “false,” as Plaintiff does not contest their
22 terms or legal effect. They are not “forged,” as Plaintiff does not claim any signatures are
23 inauthentic. And they do not seem “groundless” or otherwise “invalid,” as Plaintiff does
24 not dispute any underlying property claims. *See* A.R.S. § 33-420(D) (documents with
unauthorized property claims are presumed “groundless” and “invalid”); *cf. Whitman v.*
25 *Am. Trucking Assocs.*, 531 U.S. 457, 466 (2001) (“Words that can have more than one
meaning are given content . . . by their surroundings . . .”).

26 Another remedy for Plaintiff’s challenge already exists in the statutory scheme.
27 A.R.S. § 33-513 (“When an acknowledgment is properly made, but defectively certified,
any party interested may bring an action in the superior court to obtain a judgment
28 correcting the certificate.”). Thus, it is a fair question whether § 33-420 applies at all to
these latent defects in certificates of acknowledgment. But because other grounds are
dispositive, the Court does not decide this question.

1 Plaintiff reads the statutory text as allowing a penalty for *immaterial* flaws in a
2 recorded document—that is, flaws that do not affect him. He notes that the statute lists
3 various flaws disjunctively and that the word “material” only appears next to the words
4 “misstatement or false claim,” not the words “forged,” “groundless,” or “otherwise
5 invalid.” Plaintiff infers that materiality is not a necessary element of § 33-420(A) claims
6 that a document is “forged,” “groundless,” or “otherwise invalid.”

7 Plaintiff’s reading defies ordinary principles of statutory interpretation and
8 common sense. The words “forged,” “groundless,” and “invalid” each imply a sense of
9 materiality. One does not “forge” a document to no effect. A document cannot be
10 “groundless” or “invalid” without reference to a meaningful external standard of
11 “ground” or “validity.” The reason the word “material” does not appear next to each of
12 these words is that such drafting would be unnecessary and awkward. In contrast, the
13 words “misstatement” and “false claim” do not imply a sense of materiality. Both words
14 refer to innumerable communications within a document that the legislature would have
15 no reason to punish, such as a “false claim” that the third page of a document is page two.
16 For those words, “material” is a useful qualifier.

17 Context underscores the need for materiality here. This is a punitive and criminal
18 statute. Subsection A imposes a penalty of \$5,000 or treble actual damages for each
19 illegal document. Subsection C imposes an additional penalty of \$1,000 or treble actual
20 damages for willful failure to correct such documents upon request. Perhaps most
21 gravely, subsection E classifies a violation of subsection A as a class 1 misdemeanor.
22 These subsections “must be interpreted consistently” to the extent they use identical
23 language. *Wyatt v. Wehmueller*, 167 Ariz. 281, 285, 806 P.2d 870, 874 (1991). Thus,
24 Plaintiff’s interpretation would make the recording of a document with inconsequential
25 flaws not only unlawful and expensive, but criminal.

26 More generally, the purpose of A.R.S. § 33-420 is to “protect property owners
27 from actions clouding title to their property.” *Wyatt*, 167 Ariz. at 286, 806 P.2d at 875.
28 But an immaterial flaw in a property document, by definition, would not cloud Plaintiff’s

1 title. “Statutes must be given a sensible construction which accomplishes the legislative
2 intent behind them and which avoids absurd results.” *Collins v. State*, 166 Ariz. 409,
3 415, 803 P.2d 130, 136 (Ct. App. 1990). Plaintiff’s construction contorts the statute to
4 yield a harsh, purposeless result. Materiality must be an element of penalty claims under
5 A.R.S. § 33-420(A).

6 **B. Case Law**

7 The case authority does not read materiality out of the statute. Plaintiff relies
8 principally on *In re Mortgage Electronic Registration Systems, Inc.*, 754 F.3d 772 (9th
9 Cir. 2014), an action for penalties under § 33-420(A) for documents relating to a trustee’s
10 sale that were “notarized in blank and ‘robosigned’ with forged signatures.” *Id.* at 782.
11 The court did not discuss whether materiality is necessary for liability for invalid
12 recordations. Neither did the district court. Materiality was obvious.

13 Plaintiff also cites two Arizona cases that discussed § 33-420(A) without
14 discussing materiality and infers from this silence that materiality is not required under
15 the statute. *Delmastro & Eells v. Taco Bell Corp.*, 228 Ariz. 134, 263 P.3d 683 (Ct. App.
16 2011); *SWC Baseline & Crismon Inv’rs, LLC v. Augusta Ranch Ltd. P’ship*, 228 Ariz.
17 271, 265 P.3d 1070 (Ct. App. 2011). But the more reasonable inference is simply that
18 neither court needed to discuss materiality.

19 The most relevant case is *Sitton v. Deutsche Bank National Trust Co.*, 233 Ariz.
20 215, 311 P.3d 237 (Ct. App. 2013). There, like here, the plaintiff brought an action under
21 § 33-420 based on recorded documents relating to the trustee’s sale of her home. *Id.* at
22 216 ¶ 2, 311 P.3d at 238. She alleged, among other things, that assignments of a note and
23 deed of trust contained misstatements and other defects. *Id.* at 217 ¶¶ 6-8, 311 P.3d at
24 239. The court agreed that the assignments misrepresented certain dates and the
25 assignor’s identity and that these misrepresentations “could be material” to certain future
26 assignees. *Id.* at 221 ¶ 32, 311 P.3d at 243. But these misrepresentations were
27 immaterial to *the plaintiff* because, as explained below, they “could have had no effect on
28 [her] choice of actions.” *Id.* Because the plaintiff “could not show that the assignments

1 contained a *material* misstatement or false claim, she could not prevail on her
2 § 33-420(A) claims.” *Id.* at 222 ¶ 34, 311 P.3d at 244 (emphasis in original).

3 Plaintiff contends *Sitton*’s emphasis on materiality applies only to the “material
4 misstatement or false claim” prong of § 33-420(A), not the “forged,” “groundless,” or
5 “otherwise invalid” prongs. But the opinion itself is not expressly limited to any
6 statutory prong. In fact, part of the opinion characterized the plaintiff as attacking the
7 original lender’s “authority to make *valid* assignments.” *Id.* at 220 ¶ 27, 311 P.3d at 242
8 (emphasis added). And the opinion includes broad statements that seem applicable to the
9 entire statute. *See, e.g., id.* at 216 ¶ 2, 311 P.3d at 238 (“We affirm because . . . A.R.S.
10 § 33-420(A) does not support relief in favor of a person who could not have been harmed
11 by a recorded misrepresentation.”). *Sitton* thus suggests that materiality is a required
12 element of any § 33–420(A) claim. Nothing in *Sitton* suggests that materiality is not a
13 requirement.

14 **C. The Acknowledgment Defect Was Not Material to Plaintiff**

15 Again, it is undisputed that the acknowledgment defect in the documents relating
16 to the trustee’s sale of Plaintiff’s property was not material to Plaintiff. Nevertheless, it
17 merits explanation why.

18 A misrepresentation in a recorded document is “material” if “a reasonable person
19 would attach importance to its existence or nonexistence in determining [his or her]
20 choice of action in the transaction in question.” *Sitton*, 233 Ariz. at 221 ¶ 31, 311 P.3d at
21 243 (quoting *Caruthers v. Underhill*, 230 Ariz. 513, 521 ¶ 28, 287 P.3d 807, 815 (Ct.
22 App. 2012)).

23 In *Sitton* the misrepresentations in the recorded assignments of the note and deed
24 of trust were not material to the plaintiff because they could not have affected the
25 plaintiff’s choice of action in the transaction in question. The plaintiff was liable on the
26 note, and at the time of closing her “choices were to repay the money pursuant to the
27 terms of the note, renegotiate the terms of the note, or default and cause foreclosure.” *Id.*
28 at 222 ¶ 33, 311 P.3d at 244. The misrepresentations in the recorded assignments did not

1 affect these choices because the plaintiff’s “liability on the note remained the same no
2 matter who was assigned as beneficiary, or when.” *Id.* The misrepresentations about the
3 timing and sequence of the assignments were immaterial to the plaintiff as the
4 owner/trustor. *Id.* at 221-22 ¶¶ 32-33, 311 P.3d at 243-44.

5 The same is true here. The acknowledgment defect in the property documents
6 could not have affected Plaintiff’s choice of action as the owner/trustor. The purpose of
7 the acknowledgment here was to effect constructive notice to later buyers or
8 encumbrancers. A deed of trust recorded under the Deed of Trust Act “provides
9 constructive notice of the deed’s contents to ‘all persons,’ including subsequent
10 purchasers.” *Manicom v. CitiMortgage, Inc.*, 236 Ariz. 153, 156 ¶ 8, 336 P.3d 1274,
11 1277 (Ct. App. 2014) (quoting A.R.S. § 33-818). But such constructive notice is
12 effective only if the deed of trust or other document is properly acknowledged and
13 notarized:

14 Except as otherwise provided in this section, a trust deed, substitution of
15 trustee, notice of resignation of trustee, assignment of a beneficial interest
16 under a trust deed, notice of sale, cancellation of notice of sale, trustee’s
17 deed, deed of release, and any instrument by which a trust deed is
18 subordinated or waived as to priority, *if acknowledged as provided by law*,
shall from the time of being recorded impart notice of the content to all
persons, including subsequent purchasers and encumbrancers for value.

19 A.R.S. § 33-818 (emphasis added); *see also W. W. Planning, Inc. v. Clark*, 10 Ariz. App.
20 86, 88, 456 P.2d 406, 408 (1969) (“Before an instrument will be deemed to be lawfully
21 recorded and to impart constructive notice it must have been acknowledged.”).
22 Accordingly, defective acknowledgment does not invalidate the documents as such; at
23 most it defeats constructive notice.³

24 ³ It is not clear there was a failure of constructive notice here. That the documents
25 were acknowledged before a notary whose commission had expired is at most a latent
26 defect, as anyone searching county records would have thought the documents were
27 properly acknowledged and notarized. *See In re Wonderfair Stores, Inc. of Arizona*, 511
28 F.2d 1206, 1214 (9th Cir. 1975) (holding, under Arizona law, that even if certain pages of
a recorded lease were not properly acknowledged or notarized, lease gave constructive
notice because defect was “technical” and “not apparent from the instrument”); *accord In
re Bisbee*, 157 Ariz. 31, 35, 754 P.2d 1135, 1139 (1988) (citing *In re Wonderfair* with

1 Here any failure of constructive notice could not harm Plaintiff. He could lose no
2 right or interest. It would not reduce the number of bidders who appear at the trustee's
3 sale because only people with actual notice do that. Indeed, in usual commercial
4 circumstances it is hard to imagine practical harm to anybody from lack of constructive
5 notice of a pending trustee's sale. Admittedly, if an intervening buyer had no actual or
6 constructive notice of the pending trustee's sale, that buyer might prevail over a later
7 buyer at the trustee's sale. See *Phipps v. CW Leasing, Inc.*, 186 Ariz. 397, 401, 923 P.2d
8 863, 867 (Ct. App. 1996). But that circumstance is improbable. An intervening buyer
9 without notice of the pending sale would still have constructive notice of the previously
10 recorded deed of trust. That buyer could not get clear title without paying off the note,
11 which would cause the beneficiary to cancel the trustee's sale altogether.

12 Even if one can imagine circumstances in which someone else would be harmed,
13 all that matters here is that failure of constructive notice could not harm Plaintiff as the
14 owner/trustor. Even "an unrecorded instrument is fully enforceable between the parties
15 to the transaction," since "recording acts are intended to protect a later purchaser's
16 reliance on a seller's title and to provide a means of resolving competing title claims, not
17 to invalidate a transfer between the parties to the deeds of trust." *3502 Lending, LLC v.*
18 *CTC Real Estate Serv.*, 224 Ariz. 274, 277, 229 P.3d 1016, 1019 (Ct. App. 2010). The
19 documents relating to the trustee's sale of Plaintiff's house were substantively valid.
20 Plaintiff does not claim title to the house or seek to unwind the sale. Rather, he seeks a
21 windfall based on an immaterial acknowledgment defect. In the words of *Sitton*, the
22 acknowledgment defect could not have affected Plaintiff's choice of action in the
23 transaction in question. Therefore, it was immaterial to him as a matter of law and his
24 claim under A.R.S. § 44-420(A) fails.

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27 approval). This is not a case where acknowledgment was wholly lacking or flawed in a
28 recognizable way. E.g., *Phipps v. CW Leasing, Inc.*, 186 Ariz. 397, 399, 923 P.2d 863,
865 (Ct. App. 1996) (recorded document wholly lacked certificate of acknowledgment
and so gave no constructive notice). The parties have not briefed this question.

1 **IV. BY OPERATION OF LAW THE ACKNOWLEDGMENTS ARE FULLY**
2 **VALID.**

3 Even apart from the immateriality to Plaintiff of the acknowledgment defect, two
4 statutes validate the acknowledgments in any event. Under the governing recording
5 statutes and the Deed of Trust Act, the acknowledgments were fully validated after
6 having been recorded for one year and when the property passed to a purchaser for value
7 and without notice. Both those times have long passed. The acknowledgments have
8 been doubly redeemed. The Court need not decide what penalties Plaintiff would have if
9 he had filed an action before then.

10 **A. The Recording Statutes**

11 Under A.R.S. § 33-411, a document affecting real property must be properly
12 recorded in order to give constructive notice to subsequent purchasers:

13 A. No instrument affecting real property gives notice of its contents to
14 subsequent purchasers or encumbrance holders for valuable consideration
15 without notice, unless recorded as provided by law in the office of the
16 county recorder of the county in which the property is located.

17 A.R.S. § 33-411(A). Proper recordation, in turn, generally requires a proper certificate of
18 acknowledgment:

19 B. An instrument shall not be deemed lawfully recorded unless it has
20 been previously acknowledged in the manner prescribed in this chapter
21 except in the case of master mortgages as provided in § 33-415.

22 A.R.S. § 33-411(B). However, any “defect, omission or informality in the certificate of
23 acknowledgment” is cured when the document has been recorded for longer than one
24 year:

25 C. For purposes of this section, an instrument affecting real property
26 containing *any defect, omission or informality in the certificate of*
27 *acknowledgment* and which has been *recorded for longer than one year* in
28 the office of the county recorder of the county in which the property is
located *shall be deemed to have been lawfully recorded on and after the*
date of its recording.

A.R.S. § 33-411(C) (emphasis added).

1 Plaintiff's challenge here is for a "defect, omission or informality in the certificate
2 of acknowledgment" in the recorded documents. But this action was filed nearly four
3 years after the recordings. Therefore, even if the defective acknowledgments invalidated
4 the documents when originally recorded, in whole or in part, such invalidation has been
5 cured back to the date of the recording by the passage of a year. A.R.S. § 33-411(C).

6 Plaintiff argues § 33-411(C) does not apply here because it is explicitly limited
7 "[f]or purposes of this section." But "this section" includes subsection B's requirement
8 that an instrument be properly "acknowledged" in order to be lawfully recorded. Thus,
9 the one-year cure of "any defect, omission or informality in the certificate of
10 acknowledgment" reaches the documents Plaintiff claims were improperly recorded. The
11 very title of § 33-411—"acknowledgment required for proper recording"—supports this.

12 After one year, therefore, § 33-411(C) cures an acknowledgment defect as though
13 the document was "lawfully recorded on and after the date of its recording." The broad
14 purpose is to prevent belated objections based on mere defects in acknowledgments in
15 documents that are regular on their face. That purpose of saving honest transactions
16 cannot have the perverse effect of retroactively imposing constructive notice to a time
17 when there was none and invalidating transactions that were valid when made. *Phipps v.*
18 *CW Leasing, Inc.*, 186 Ariz. 397, 401, 923 P.2d 863, 867 (Ct. App. 1996) (document
19 recorded without acknowledgment "deemed to have been lawfully recorded on and after
20 the date of its recording as to anyone purchasing after the year's period, but not as to
21 someone who purchased during that period").

22 In *Phipps* a right of first refusal was not acknowledged at all and was unrecorded
23 for several years. *Id.* at 399, 923 P.2d at 865. A few months after it was recorded, the
24 owner sold to a different person without knowledge of the right of first refusal. *Id.* The
25 buyer prevailed over the holder of the unacknowledged right of first refusal because the
26 court concluded there was no constructive notice at the time he bought. *Id.* at 402, 923
27 P.2d at 868. Thus, the court excluded retroactive constructive notice from the retroactive
28 cure of defective acknowledgment, to avoid substantive injustice that would defeat, not

1 serve, the purpose of § 33-411(C). The court’s opinion does not limit the statute’s
2 otherwise broad instruction to deem defective documents “lawfully recorded on and after
3 the date of its recording.” Nor does the opinion govern the facts of this case. *Phipps*
4 dealt with the complete absence of any acknowledgment in a recorded document, not the
5 revocation of a notary’s commission in an acknowledgment otherwise valid on its face.
6 The court itself noted that a total absence of acknowledgment “may not even fall within
7 the language of A.R.S. section 33-411(C),” which addresses only a “defect, omission or
8 informality in the certificate of acknowledgment.” *Id.* at 402 n.1, 923 P.2d at 868 n.1.

9 Seizing on that distinction, Plaintiff argues § 33-411(C) does not apply here
10 because the revocation of the commission is more than just a “defect, omission or
11 informality” in the acknowledgment but rather a complete absence of acknowledgment.
12 This is unpersuasive because the acknowledgment was regular on its face. The defect
13 was exactly the kind that cannot be recognized and that people cannot be expected to
14 ferret out by checking the licensing status of every notary with whom they deal and
15 whose seal is facially valid.

16 The case Plaintiff relies on is of little help. In *Zrihan v. Wells Fargo Bank, N.A.*,
17 No. CV-12-02073-PHX-DGC, 2014 WL 348197 (D. Ariz. Jan. 31, 2014), the evidence
18 on summary judgment clashed on whether the principal’s signature itself was true or
19 forged. *Id.* at *4. There was no evidence on whether the notary was licensed or not at the
20 time, but the notary’s purported seal listed the expiration date of her commission beyond
21 what the statutes allowed. *See id.* *Zrihan* reached no legal conclusion and denied
22 summary judgment.

23 Plaintiff also argues A.R.S. § 12-550 provides a four-year statute of limitations for
24 his penalty claim. This is true. *Sitton v. Deutsche Bank Nat’l Tr. Co.*, 233 Ariz. 215,
25 219, 311 P.3d 237, 241 (Ct. App. 2013). But § 33-411(C) is not a statute of limitations.
26 Rather, it deems a document with a defective certificate of acknowledgment “to have
27 been lawfully recorded on and after the date of its recording.” This operates differently
28

1 from a statute of limitations: here the claims, if any, are erased. If there was a claim in
2 the beginning, now there is not and never was one.

3 This interpretation of § 33-411(C) is consistent with Arizona and federal cases
4 holding that minor technical defects in a notarization or the underlying property
5 document do not defeat an otherwise proper recording under Arizona law. *See Watson*
6 *Constr. Co. v. Amfac Mortg. Corp.*, 124 Ariz. 570, 575-76, 606 P.2d 421, 426-27 (1979)
7 (recorded deed of trust gave constructive notice despite missing caption and two pages);
8 *In re Bisbee*, 157 Ariz. 31, 35, 754 P.2d 1135, 1139 (1988) (recorded deed of trust gave
9 constructive notice despite failing to name trustee); *In re Wonderfair Stores, Inc. of*
10 *Arizona*, 511 F.2d 1206, 1214 (9th Cir. 1975) (recorded lease gave constructive notice
11 under Arizona law despite improper acknowledgment); *AA Am. Dev. Corp. v. United*
12 *States*, No. CIV06-2450-PHX-SMM, 2007 WL 2330869, at *5 (D. Ariz. Aug. 14, 2007)
13 (notice of lis pendens recorded for more than one year but lacking acknowledgment gave
14 constructive notice under Arizona law); *Robertson v. DLJ Mortg. Capital, Inc.*, No. CV-
15 12-8033-PCT-LOA, 2012 WL 4840033, at *11 (D. Ariz. Oct. 11, 2012), *aff'd* (Mar. 29,
16 2013) (rejecting “technical arguments” under Arizona law against documents recorded
17 for more than one year).

18 **B. The Deed of Trust Act**

19 The Deed of Trust Act itself independently cured the defect in the
20 acknowledgment years before Plaintiff brought this action. The original Deed of Trust
21 Act addressed procedural defects in trustee’s sales and documents, “including recording”:

22 The trustee’s deed shall raise the presumption of compliance with the
23 requirements of the deed of trust and this chapter relating to the exercise of
24 the power of sale and the sale of the trust property, *including recording*,
25 mailing, publishing and post of notice of sale and the conduct of sale. *A*
26 *trustee’s deed shall constitute conclusive evidence of the meeting of those*
requirements in favor of purchasers or encumbrancers for value and
without actual notice.

27 A.R.S. § 33-811(B) (emphasis added). Plaintiff alleges that he and the class members
28 lost their homes by foreclosure or forced sales. Unless the buyers knew of the revocation

1 of the notary's commission, they were purchasers "for value without notice." Plaintiff
2 does not allege that any buyers did know. In fact, at oral argument he conceded he has no
3 basis to allege that the third party who purchased his home was anyone other than a
4 purchaser for value and without actual notice. Thus, this statute independently renders
5 Plaintiff's claims non-existent by legislating that all such compliance is deemed to have
6 occurred (regardless of the historical facts). This extinguishes Plaintiff's penalty claims
7 under A.R.S. § 33-420(A).

8 This extinguishment of claims by A.R.S. § 33-811(B) is different from the
9 § 33-811(C) waiver of "all defenses and objections to the sale" not raised before sale:

10 The trustor, its successors or assigns, and all persons to whom the trustee
11 mails a notice of a sale under a trust deed pursuant to § 33-809 shall waive
12 all defenses and objections to the sale not raised in an action that results in
13 the issuance of a court order granting relief pursuant to rule 65, Arizona
rules of civil procedure, entered before 5:00 p.m. mountain standard time
on the last business day before the scheduled date of the sale.

14 A.R.S. § 33-811(C). This subsection protects the buyer's title from cloud by cutting off
15 the trustor's defenses and objections to the sale. A § 33-420(A) penalty is not a defense
16 or objection to the sale and so is not cut off by subsection 811(C):

17 [F]ailure to enjoin a trustee's sale does not waive claims for monetary
18 awards under § 33-420(A). Section 33-811(C) contemplates the waiver of
19 "defenses and objections to the sale" only, and nothing in § 33-420(A)
provides a defense to a sale or makes recovery contingent upon a sale.

20 *Sitton*, 233 Ariz. at 218 ¶ 13, 311 P.3d at 240.

21 But § 33-811(B) does what § 33-811(C) does not: it legislates that the procedural
22 requirement at issue, recording, was met. The premise for a § 33-420(A) penalty is
23 expunged *ab initio*. Subsection 811(B) legislates for the past as well as the future. That
24 must mean the then-unasserted § 33-420(A) penalty cannot be asserted after the sale
25 because it does not exist.

26 The Court need not address the legal effect of a plaintiff bringing this kind of
27 § 33-420(A) penalty claim before the sale concluded. The Plaintiff here did not. If he
28

1 had, the beneficiary would have cancelled the sale and re-noticed it. The noticed sale
2 would never have been completed.

3
4 **V. PLAINTIFF HAS ADEQUATELY PLED KNOWLEDGE.**

5 Plaintiff alleges “on information and belief” that Defendants knew the notary’s
6 commission had been revoked. Defendants argue this allegation is insufficient.

7 “Although there is no express authorization in the federal rules for pleading on
8 information and belief, allegations in this form have been held to be permissible, even
9 after the *Twombly* and *Iqbal* decisions.” 5 Charles Alan Wright et al., *Federal Practice*
10 & *Procedure* § 1224 (3d ed., Apr. 2015 update) (collecting cases). “Pleading on
11 information and belief is a desirable and essential expedient when matters that are
12 necessary to complete the statement of a claim are not within the knowledge of the
13 plaintiff but he has sufficient data to justify interposing an allegation on the subject.” *Id.*
14 The Ninth Circuit has adopted this approach after *Twombly* and *Iqbal* in at least one
15 context. *Carolina Cas. Ins. Co. v. Team Equip., Inc.*, 741 F.3d 1082, 1088 (9th Cir.
16 2014) (holding that “when information regarding a defendant that is necessary to
17 establish diversity of citizenship is not reasonably available to a plaintiff, the plaintiff
18 should be permitted to plead jurisdictional allegations as to those defendants on
19 information and belief and without affirmatively asserting specific details regarding the
20 citizenship of those defendants”).

21 “Some cases suggest that when allegations are made on the basis of information
22 and belief, the facts on which the pleader’s belief is founded should also be alleged.” 5
23 Wright et al., *Federal Practice & Procedure* § 1224, *supra*. That requirement may be
24 appropriate, depending on the circumstances. In *Menard v. CSX Transportation, Inc.*, for
25 example, the plaintiff alleged “upon information and belief” that a company’s employees
26 “knew” he was injured and “had sufficient time to take action to prevent further injury to
27 him.” 698 F.3d 40, 44 (1st Cir. 2012). The First Circuit noted that the complaint
28 provided no facts indicating that the plaintiff was seen by the company’s employees or

1 that he could have been rescued. *Id.* The court stated: “[I]f he had any facts to support
2 this assertion, they should have been set forth. ‘Information and belief’ does not mean
3 pure speculation.” *Id.* Ultimately, however, the First Circuit vacated the district court’s
4 dismissal of the complaint and remanded to give the plaintiff an opportunity to say more
5 if he could. *Id.* at 45-46.

6 Here, it is unlikely that the Defendant corporations knew on December 16 of
7 revocation of the notary’s commission on December 6. The most forceful inference from
8 these circumstances is that the notary kept her revocation secret to keep her job as long as
9 possible. It is difficult to believe highly regulated businesses would knowingly let a
10 revoked notary keep doing their notarizations. There would be no benefit, even illicit
11 benefit, for them to do that.

12 Nevertheless, whether Defendants in fact knew or had reason to know that the
13 notary’s commission had been revoked may not be a matter within Plaintiff’s knowledge.
14 Therefore Plaintiff’s allegation survives the minimal pleading standard.

15 In reaching this conclusion, the Court does not accept Plaintiff’s theory that the
16 notary’s own knowledge of her revocation may be “imputed” to Defendants under agency
17 law principles. The Arizona Supreme Court expressly foreclosed this sort of theory with
18 respect to the knowledge requirement under A.R.S. § 33-420(A). *Wyatt v. Wehmueller*,
19 167 Ariz. 281, 285, 806 P.2d 870, 874 (1991).

20
21 **VI. LEAVE TO AMEND WOULD BE FUTILE.**

22 Leave to amend should be freely given when justice so requires. Fed. R. Civ. P.
23 15(a)(2). In deciding whether to grant leave to amend, courts consider bad faith, undue
24 delay, prejudice to the opposing party, futility of amendment, and whether the party has
25 previously amended his pleadings. *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995).
26 Futility of amendment can, by itself, justify the denial of leave to amend. *Id.*

1 Here, Plaintiff's claim fails as a matter of law for the reasons explained above and
2 cannot be cured by amended pleadings. Therefore, this action must be dismissed without
3 leave to amend.

4
5 IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss Plaintiff's
6 Amended Class Action Complaint (Doc. 16) is granted.

7 IT IS FURTHER ORDERED that the Clerk enter judgment dismissing this action
8 with prejudice for failure to state a claim upon which relief can be granted.

9 The Clerk shall terminate this case.

10 Dated this 31st day of March, 2016.

11
12 
13 Neil V. Wake
14 United States District Judge