

1 WO

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

Kevin E. Thomas,

)

No. CV-16-02886-PHX-SPL

9

Plaintiff,

)

**ORDER**

10

vs.

)

11

Ally Bank, et al.,

)

12

13

Defendants.

)

14

\_\_\_\_\_

15

Before the Court are Defendants’ motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Docs. 7, 41.) The motions are fully briefed, and for the reasons that follow, will be granted.

16

17

18

**I. Background**

19

In March 2008, April Thomas borrowed \$94,100.00 from Home Loan Network Corporation, secured by a deed of trust on real property located at 6711 West Osborn Road #162, Phoenix, Arizona. The deed of trust named Mortgage Electronic Registration Systems, Inc. (“MERS”) as the beneficiary in a nominee capacity for the lender and its assigns. MERS assigned all beneficial interest under the deed of trust to GMAC Mortgage, LLC in June 2012. In 2015, GMAC Mortgage, LLC, through its attorney-in-fact Ocwen Loan Servicing, LLC, executed a corporate assignment of the deed of trust in favor of assignee Ally Bank. Ally, as beneficiary, caused the property to be sold at a trustee’s sale on January 19, 2016. Following the trustee’s sale, forcible detainer proceedings were instituted by Ally against the April Thomas and “Doe Occupants” for

20

21

22

23

24

25

26

27

28

1 failure to vacate the property. Ally retained Nathan Smith and Kevin Hahn, of Malcolm  
2 Cisneros, as counsel. The Maricopa County Superior Court entered judgment against  
3 April Thomas and her co-occupants on August 25, 2016. (Docs. 1, 19, 45.)<sup>1</sup>

4 On August 29, 2016, *pro se* Plaintiff Kevin Thomas filed a Complaint against Ally  
5 Bank, Ocwen Loan Servicing, LLC, Cenlar Central Loan Administration & Reporting,  
6 Malcolm Cisneros, Nathan Smith, and Kevin Hahn, bringing claims for (among other  
7 things): (1) breach of contract/good faith and fair dealing; (2) wrongful foreclosure; (3)  
8 fraudulent misrepresentation; (4) violations of the Home Owners Bill of Rights Act of  
9 2014 and the New Servicing Rules and the Dodd-Frank Wall Street Reform Consumer  
10 Protection Act; (5) lack of standing; (6) promissory estoppel; (7) breach of the deed of  
11 trust; (8) promissory estoppel; (9) dual tracking; (10) robo signing; (11) negligent  
12 concealment; (12) RICO; (13) violation of Ariz. Rev. Stat. § 44-1522; (14) violation of  
13 Ariz. Rev. Stat. § 33-420; (15) fraudulent concealment; (16) negligent infliction of  
14 emotional distress; (17) quiet title; and (18) unjust enrichment. (Doc. 1.) Plaintiff was  
15 granted permission to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a). (Doc.  
16 1.)

## 17 **II. Standard of Review**

18 To survive a motion to dismiss, a complaint must contain “a short and plain  
19 statement of the claim showing that the pleader is entitled to relief” such that the

---

20 <sup>1</sup> Although generally a court may not consider matters outside the pleadings in  
21 ruling on a motion to dismiss, the court may take judicial notice of matters of public  
22 record outside the pleadings. *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282  
23 (9th Cir. 1986) *overruled on other grounds by Astoria Fed. Sav. & Loan Ass’n. v.*  
24 *Solimino*, 501 U.S. 104 (1991); *see also Intri-Plex Techs., Inc. v. Crest Grp., Inc.*, 499  
25 F.3d 1048, 1052 (9th Cir. 2007) (“a court may take judicial notice of matters of public  
26 record without converting a motion to dismiss into a motion for summary judgment, as  
27 long as the facts noticed are not subject to reasonable dispute”) (internal citations and  
28 quotation marks omitted). In particular, a court may take judicial notice of pleadings,  
memoranda, and other verifiable documents from related litigation. *Reyn’s Pasta Bella,*  
*LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006). The court may also  
consider evidence where (1) the complaint refers to the document; (2) the document is  
central to the plaintiff’s claim; and (3) no party questions the authenticity of the copy.  
*Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). Lastly, “[u]nder the ‘incorporation  
by reference’ doctrine, ‘[e]ven if a document is not attached to a complaint, it may be  
incorporated by reference into a complaint if the plaintiff refers extensively to the  
document or the document forms the basis of the plaintiff’s claim.’” *Ecological Rights*  
*Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 511 (9th Cir. 2013) (citation omitted).

1 defendant is given “fair notice of what the . . . claim is and the grounds upon which it  
2 rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P.  
3 8(a)(2); *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). The Court may dismiss a complaint  
4 for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure for  
5 two reasons: (1) lack of a cognizable legal theory, and (2) insufficient facts alleged under  
6 a cognizable legal theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.  
7 1990).

8 In deciding a motion to dismiss, the Court must “accept as true all well-pleaded  
9 allegations of material fact, and construe them in the light most favorable to the non-  
10 moving party.” *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010).  
11 Thus, to defeat a motion to dismiss, a complaint must contain sufficient factual matter,  
12 which, if accepted as true, states a claim for relief that is “plausible on its face.” *Ashcroft*  
13 *v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). Facial  
14 plausibility requires the plaintiff to plead “factual content that allows the court to draw  
15 the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*  
16 Plausibility does not equal “probability,” but plausibility requires more than a sheer  
17 possibility that a defendant acted unlawfully. *Id.* “Where a complaint pleads facts that are  
18 ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between  
19 possibility and plausibility of entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at  
20 557).

21 Fraud claims are subject to Rule 9(b) of the Federal Rules of Civil Procedure,  
22 which requires that a plaintiff “state with particularity the circumstances constituting  
23 fraud or mistake.” Fed. R. Civ. P. 9(b). Rule 9(b) requires that the pleader “state the time,  
24 place, and specific content of the false representations as well as the identities of the  
25 parties to the misrepresentation.” *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*,  
26 806 F.2d 1393, 1401 (9th Cir. 1986). The plaintiff must also “set forth . . . an explanation  
27 as to why the disputed statement was untrue or misleading when made.” *Yourish v. Cal.*  
28 *Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999); *see also Vess v. Ciba-Geigy Corp. USA*,

1 317 F.3d 1097, 1106 (9th Cir. 2003) (“Averments of fraud must be accompanied by the  
2 who, what, when, where, and how of the misconduct charged.”) (citation and quotation  
3 marks omitted). “Rule 9(b) does not allow a complaint to merely lump multiple  
4 defendants together but requires plaintiffs to differentiate their allegations . . . and inform  
5 each defendant separately of the allegations surrounding his alleged participation in the  
6 fraud.” *United States v. Corinthian Colleges*, 655 F.3d 984, 997-98 (9th Cir. 2011)  
7 (citation omitted). The plaintiff must identify each defendant’s role in the “fraudulent  
8 scheme.” *Id.* at 998.

### 9 **III. Discussion**

#### 10 **A. Dismissal**

11 Here, Plaintiff’s complaint does not provide a short and plain statement of his  
12 claims, nor simple, concise, and direct allegations. Rather, the complaint is comprised of  
13 allegations that are largely incoherent, and at times, unintelligible. Plaintiff appears to  
14 claim that Defendants conspired against him in a scheme of fraud and deceit which  
15 ultimately concluded in the foreclosure of and eviction from his property. Plaintiff does  
16 not however set forth allegations that can be said to describe the conspiracy in any clear,  
17 comprehensible manner, or show that Defendants caused Plaintiff harm in a legally  
18 cognizable way that is sufficient to raise a plausible right to relief. Although Plaintiff  
19 cites various federal and state provisions, it is unclear how his various allegations  
20 correlate to those grounds. Nor does the complaint provide sufficient notice to  
21 Defendants as to how each of them allegedly violated Plaintiff’s legal rights. Instead, the  
22 allegations are chiefly and repeatedly lodged against “all defendants.” Thus, in lumping  
23 Defendants together in this manner, Plaintiff fails to “state with particularity the  
24 circumstances constituting fraud” pursuant to Rule 9(b). *Corinthian Colleges*, 655 F.3d at  
25 997-98.

26 Further, to the extent Plaintiff’s allegations can be deciphered, and accepting those  
27 allegations as true, they do not state a plausible claim for relief. *Iqbal*, 556 U.S. at 678;  
28 *Twombly*, 550 U.S. at 556; *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

1 For instance, the documents submitted by Plaintiff show that April Thomas, not Plaintiff,  
2 was the borrower of record; April Thomas could not unilaterally quiet title to Plaintiff in  
3 2011 because, among other things, there is no claim that Plaintiff paid the debt secured  
4 by the deed of trust; and Plaintiff cannot quiet title now because foreclosure of the  
5 property has already taken place. *See supra*. Thus, by example, Plaintiff cannot state a  
6 plausible claim for breach of contract, wrongful foreclosure, or quiet title. Therefore, the  
7 Court will grant Defendants' motions, and will dismiss the complaint.

### 8 **B. Amendment**

9 Rule 15 of the Federal Rules of Civil Procedure provides that the Court "should  
10 freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). When  
11 dismissing a complaint for failure to state a claim, "a district court should grant leave to  
12 amend even if no request to amend the pleading was made, unless it determines that the  
13 pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203  
14 F.3d 1122, 1130 (9th Cir. 2000) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.  
15 1995)).

16 Here, in response to the motions to dismiss, Plaintiff failed to address any of  
17 Defendants' arguments and instead simply reiterated the allegations in his complaint and  
18 cited to various legal standards. (Docs. 19, 45.) As cited by Plaintiff himself (*see* Doc. 45  
19 at 1), to survive a motion to dismiss, he was obligated to provide more than unreasonable  
20 inferences and legal conclusions. Given Plaintiff's prior unsuccessful attempt to amend  
21 the complaint (*see* Docs. 30, 34), and the fact that it appears that judgment on the same or  
22 substantially identical lawsuit has been entered in state court (*see* Docs. 23-24),<sup>2</sup> the  
23 Court finds that further opportunities to amend would be futile and will dismiss this  
24 action without leave to amend. *See AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465  
25 F.3d 946, 951 (9th Cir. 2006); *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708,  
26 713 (9th Cir. 2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*,

27 <sup>2</sup> *See Thomas v. Ally Bank, et al.*, CV2016-014100, Maricopa County Superior  
28 Court, Minute Entry Feb. 24, 2017, found at: <http://www.courtminutes.maricopa.gov/docs/Civil/022017/m7732674.pdf> and Minute Entry Dec. 6, 2017, found at <http://www.courtminutes.maricopa.gov/docs/Civil/122016/m7627755.pdf>

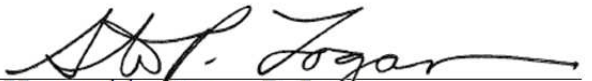
1 322 F.3d 1064, 1078 (9th Cir. 2003); *McHenry v. Renne*, 84 F.3d 1172, 1177 (9th Cir.  
2 1996); *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989)  
3 (“Leave to amend need not be given if a complaint, as amended, is subject to dismissal”).

4 Accordingly,

5 **IT IS ORDERED:**

- 6 1. That the Motions to Dismiss (Docs. 7, 41) are **granted**;
- 7 2. That this action is **dismissed** in its entirety;
- 8 3. That the Clerk of Court shall **terminate** this action and enter judgment  
9 accordingly; and
- 10 4. That the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3) and Rule  
11 24(a)(3)(A) of the Federal Rules of Appellate Procedure, that any appeal of this decision  
12 would not be taken in good faith.

13 Dated this 29th day of September, 2017.

14   
15 Honorable Steven P. Logan  
16 United States District Judge  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28