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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Bjorg Kopec,
10 Plaintiff,
11 v.
12 Wells Fargo Bank NA,
13 Defendant.
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No. CV-18-02406-PHX-JJT

ORDER

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16 At issue are Defendant Wells Fargo Bank NA's Motion to Dismiss (Doc. 7); and
17 *pro se* Plaintiff Bjorg Kopec's Motion for Temporary Restraining Order (Doc. 11), to
18 which Defendant filed a Response (Doc. 14).

19 As a threshold matter, the Court notes that it entered an Order (Doc. 10) advising
20 Plaintiff that she was required to file a Response to Defendant's Motion to Dismiss by
21 August 31, 2018, and failure to do so could result in dismissal of her case. Plaintiff failed
22 to file a Response, and Defendant is thus eligible for summary disposition of its Motion
23 to Dismiss. *See* LRCiv 7.2(i). Considering Plaintiff's *pro se* status, the Court will
24 nonetheless consider Plaintiff's Motion for Temporary Restraining Order (Doc. 11), filed
25 August 30, 2018, at the same time the Court addresses Defendant's Motion to Dismiss.
26 The Court will resolve the pending Motions without oral argument. *See* LRCiv 7.2(f).
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1 **I. BACKGROUND**

2 In October 2006, Plaintiff obtained a Loan for \$280,250.00 from Defendant
3 secured by a Deed of Trust on real property (“Property”) in Mesa, Arizona.¹ Defendant
4 assigned the Loan to Deutsche Bank National Trust Company but remained the loan
5 servicer. In March 2014, a Trustee’s Sale was noticed after Plaintiff defaulted on the
6 Loan. The sale did not take place, however, and Plaintiff filed for Chapter 13 bankruptcy
7 protection in January 2015.² In March 2016, during the course of her bankruptcy
8 proceedings, Plaintiff entered into a Loan Modification Agreement with Deutsche Bank.
9 Plaintiff defaulted on the Loan Modification Agreement in October 2016.

10 In June 2017, Deutsche Bank moved the Bankruptcy Court for relief from the
11 automatic stay to foreclose on the Property. The parties, including Plaintiff, stipulated to
12 an Order providing for a plan for Plaintiff to make payments under the Loan. The Order
13 also provided that Deutsche Bank could not hold a Trustee’s Sale on the Property unless
14 Plaintiff again defaulted and then failed to cure the default within 15 days of written
15 notice of default.

16 When Plaintiff defaulted again, Deutsche Bank provided written notice of default
17 to Plaintiff in March 2018. The Bankruptcy Court entered an Order lifting the automatic
18 stay due to Plaintiff’s failure to comply with the terms of the Stipulated Order and stating
19 that Deutsche Bank may exercise its rights in the Property. Defendant, as loan servicer,
20 recorded a Notice of Trustee’s Sale for a sale of the Property on September 5, 2018.

21 On July 12, 2018, Plaintiff filed suit against Defendant in Arizona state court, and
22 Plaintiff filed a motion for a Temporary Restraining Order, which the state court denied.
23 (Doc. 1-4 at 10.) Defendant then removed the action to this Court. (Doc. 1.) In the
24 Complaint (Doc. 1-2), Plaintiff raises three claims against Defendant: (1) negligence;

25 _____
26 ¹ Plaintiff attached to the Complaint the relevant documents pertaining to her
27 Loan.

28 ² The Court takes judicial notice of the records of Plaintiff’s bankruptcy
proceeding. *See Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861,
866 & n.1 (9th Cir. 2004).

1 (2) slander of title; and (3) wrongful foreclosure. Defendant has moved to dismiss
2 Plaintiff's claims, and Plaintiff has again moved for a Temporary Restraining Order in an
3 attempt to stop the scheduled Trustee's Sale.

4 **II. LEGAL STANDARDS**

5 **A. Motion to Dismiss**

6 A complaint must include "only 'a short and plain statement of the claim showing
7 that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the
8 . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S.
9 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *see also* Fed. R. Civ.
10 P. 8(a). A dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a
11 claim can be based on either (1) the lack of a cognizable legal theory or (2) insufficient
12 facts to support a cognizable legal claim. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696,
13 699 (9th Cir. 1990). "While a complaint attacked by a Rule 12(b)(6) motion does not need
14 detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his
15 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic
16 recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555
17 (citations omitted). The complaint must thus contain "sufficient factual matter, accepted as
18 true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662,
19 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "[A] well-pleaded complaint may proceed
20 even if it strikes a savvy judge that actual proof of those facts is improbable, and that
21 'recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (quoting *Scheuer v.*
22 *Rhodes*, 416 U.S. 232, 236 (1974)).

23 **B. Motion for Temporary Restraining Order**

24 To obtain preliminary injunctive relief, Plaintiff must show that "(1) she is likely
25 to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of
26 preliminary relief, (3) the balance of equities tips in her favor, and (4) an injunction is in
27 the public interest." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (citing
28 *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The Ninth Circuit Court of

1 Appeals, employing a sliding scale analysis, has also stated that “‘serious questions going
2 to the merits’ and a hardship balance that tips sharply toward the plaintiff can support
3 issuance of an injunction, assuming the other two elements of the *Winter* test are also
4 met.” *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1078 (9th Cir. 2013) *cert. denied*,
5 134 S. Ct. 2877 (2014) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
6 1132 (9th Cir. 2011)).

7 **III. ANALYSIS**

8 **A. Defendant’s Motion to Dismiss**

9 **1. Judicial Estoppel**

10 Defendant first argues that Plaintiff is judicially estopped from raising her claims
11 in this lawsuit by her representations and agreements before the Bankruptcy Court. The
12 doctrine of judicial estoppel exists to protect the integrity of the judicial process by
13 “prohibiting parties from deliberately changing positions according to the exigencies of
14 the moment.” *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (internal quotation
15 marks and citations omitted); see also *Baughman v. Walt Disney World Co.*, 685 F.3d
16 1131, 1133 (9th Cir. 2012). “[W]here a party assumes a certain position in a legal
17 proceeding, and succeeds in maintaining that position, he may not thereafter, simply
18 because his interests have changed, assume a contrary position.” *New Hampshire*, 532
19 U.S. at 749 (internal quotation marks and citations omitted). The application of judicial
20 estoppel is appropriate to bar litigants from taking inconsistent positions not only in the
21 same case, but also in two different cases. *Hamilton v. State Farm Fire & Cas. Co.*, 270
22 F.3d 778, 783 (9th Cir. 2001).

23 Several factors are relevant in determining whether this Court should exercise its
24 discretion to impose judicial estoppel. See *New Hampshire*, 532 U.S. at 750. Those
25 factors include: 1) whether the party’s later position is “clearly inconsistent with its
26 earlier position;” 2) whether the party succeeded in persuading the court to accept its
27 earlier position, creating a perception that the first or second court was misled; and 3)
28 whether the party seeking to assert an inconsistent position would “derive an unfair

1 advantage or impose an unfair detriment to the opposing party.” *Baughman*, 685 F.3d at
2 1133 (citing *New Hampshire*, 532 U.S. at 750-51).

3 The theories underlying Plaintiff’s claims against Defendant are that her loan was
4 improperly securitized and that Defendant must demonstrate it holds the Note before
5 foreclosing, both allegedly leading to the conclusion that Defendant does not have the
6 right to foreclose on the lien on the Property. However, Defendant shows that, in entering
7 into the Loan Modification Agreement—which the Bankruptcy Court approved—
8 Plaintiff acknowledged that the lien on the Property is valid and enforceable and that
9 Deutsche Bank has the right to foreclose on the lien. Specifically, Defendant points out
10 that Plaintiff agreed “the Note and Mortgage remain in full force and effect and are valid,
11 binding obligations upon Borrower, except as discharged in Bankruptcy, and are properly
12 secured by the Property.” Later in the Bankruptcy Court proceeding, after Plaintiff
13 defaulted on the modified Loan terms, Plaintiff again stipulated that Deutsche Bank was
14 the beneficiary of the Deed of Trust and had the authority to hold a Trustee’s Sale in the
15 event of another default. Defendant also demonstrates that Plaintiff recognized and
16 agreed to Defendant’s authority to act on behalf of Deutsche Bank in entering into and
17 enforcing the Loan Modification Agreement. Moreover, in her 2015 bankruptcy
18 schedules, Plaintiff reported no claims against Defendant or Deutsche Bank.

19 It is thus beyond dispute that Plaintiff’s current position with regard to the validity
20 and enforceability of the Note and Mortgage is clearly inconsistent with her position in
21 the Bankruptcy proceeding. Moreover, the Bankruptcy Court accepted Plaintiff’s earlier
22 position in approving the Loan Modification Agreement, which was to Plaintiff’s benefit
23 in modifying Plaintiff’s payment obligations under the Loan, and in ultimately
24 confirming Plaintiff’s Chapter 13 bankruptcy plan. It would be unfair to Defendant to
25 now let Plaintiff argue the opposite—that the lien on the Property is not valid and that
26 Defendant does not have the right to enforce the Note and Mortgage.

27 Plaintiff did not respond to Defendant’s Motion to Dismiss and does not meet, or
28 even mention, Defendant’s judicial estoppel argument in her Motion for Temporary

1 Restraining Order. Indeed, the content of Plaintiff's Motion has simply been cut and
2 pasted from her Complaint.

3 Accordingly, Plaintiff is judicially estopped from raising all three claims against
4 Defendant in this matter. *See Hamilton*, 270 F.3d at 783-84. For this reason alone, the
5 Court must grant Defendant's Motion and dismiss Plaintiff's claims with prejudice.

6 **2. Mortgage Securitization and Holder of the Note**

7 Even if Plaintiff was not estopped from bringing her claims, they lack merit. With
8 regard to Plaintiff's allegations regarding the propriety of the securitization of her loan,
9 the Ninth Circuit has concluded that a party such as Plaintiff has no standing to challenge
10 the validity of an assignment or the securitization of her loan. *Lial v. Bank of Am. Corp.*,
11 2016 WL 372098, at *1 (9th Cir. Jan. 29, 2016) (applying analogous Nevada law); *see*
12 *also Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1042 (9th Cir. 2011)
13 (concluding that the plaintiffs failed to demonstrate injury resulting from no party being
14 in a position to foreclose through, for example, affecting the terms of their loans, their
15 ability to repay their loans, or their obligations as borrowers); *Flournoy v. BAC Home*
16 *Loan Servicing LP*, No. CV-11-01234-PHX-NVW, 2011 WL 4482996, at *3 (D. Ariz.
17 Sept. 28, 2011) (noting that securitization does not excuse a borrower from making
18 payments on the note). Plaintiff does not cite any legal authority or argue to the contrary
19 in her Motion for Temporary Restraining Order. Moreover, even if Plaintiff was not
20 estopped from bringing her claims, amendment of the Complaint would be futile. *See*
21 *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (noting that leave to amend should
22 not be given when complaint's defects cannot be cured).

23 Likewise, Plaintiff's claim that Defendant is required to demonstrate it holds the
24 Note before initiating foreclosure proceedings is contrary to the applicable case law, and
25 Plaintiff provides no opposing authority or argument. The Supreme Court of Arizona and
26 this Court have rejected the "show me the note" or "holder of the note" argument
27 repeatedly. *See, e.g., Hogan v. Washington Mutual Bank, N.A.*, 277 P.3d 781, 782-83
28 (Ariz. 2012) (holding that "Arizona's non-judicial foreclosure statutes do not require the

1 beneficiary to prove its authority or ‘show the note’ before the trustee may commence a
2 non-judicial foreclosure.”); *Diessner v. MERS*, 618 F. Supp. 2d 1184, 1187 (D. Ariz.
3 2009) (holding that defendants had no obligation to prove they are the “owner of the Note
4 and Deed of Trust.”). While a creditor seeking to directly enforce a note in the face of
5 default under a Uniform Commercial Code action would be required to prove its
6 authority, Arizona’s non-judicial foreclosure statutory scheme was created specifically to
7 avoid the time and expense of that cumbersome procedure. Under A.R.S. §§ 33-801
8 *et seq.*, when the parties have executed a deed of trust and the debtor thereafter defaults
9 on the promissory note, a beneficiary or trustee need not prove they are entitled to
10 enforce the note or deed before holding a non-judicial foreclosure sale. That party merely
11 must do two things: record the notice of trustee’s sale pursuant to § 33-808; and then send
12 the trustor notice of the default, signed by the beneficiary or his agent, setting forth the
13 unpaid principal balance. A.R.S. § 33-809(C); *Hogan*, 277 P.3d at 783. Plaintiff’s holder-
14 of-the-note claim thus fails as a matter of law, and amendment of the Complaint would
15 again be futile.

16 **B. Plaintiff’s Motion for Temporary Restraining Order**

17 Because Plaintiff has not—and cannot—state a claim against Defendant, Plaintiff
18 also cannot demonstrate a likelihood of success on the merits, as required to obtain
19 preliminary injunctive relief. The Court must thus deny Plaintiff’s Motion for Temporary
20 Restraining Order and dismiss this case.

21 The Court would deny Plaintiff’s Motion for a second reason, namely, that
22 Plaintiff already brought the Motion and the state court denied it. As Defendant points
23 out, Plaintiff’s second Motion does not present the requisite “highly unusual
24 circumstances” to obtain reconsideration of the state court’s prior decision. *See*
25 *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999).

26 **IT IS THEREFORE ORDERED** granting Defendant Wells Fargo Bank NA’s
27 Motion to Dismiss (Doc. 7) and dismissing Plaintiff’s claims in this matter with
28 prejudice.

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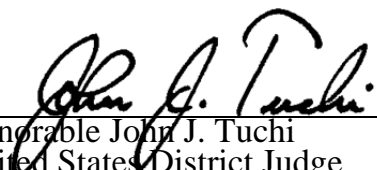
IT IS FURTHER ORDERED denying Plaintiff Bjorg Kopec's Motion for Temporary Restraining Order (Doc. 11).

IT IS FURTHER ORDERED that Defendant shall provide a copy of this Order to Plaintiff.

IT IS FURTHER ORDERED vacating all previously set hearings.

IT IS FURTHER ORDERED directing the Clerk of Court to enter judgment accordingly and close this case.

Dated this 4th day of September, 2018.



Honorable John J. Tuchi
United States District Judge