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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Renee Jewell,

No. CV 11-8042-PCT-JAT

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Plaintiff,

**ORDER**

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vs.

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Countrywide Home Loans, Inc.; BAC  
Home Loan Servicing LP; Mortgage  
Electronic Registration Services, Inc.;  
ReconTrust Company, NA; Bank of New  
York Mellon,

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Defendants.

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Currently pending before the Court is Defendants’ Motion to Dismiss (Doc. 21) Plaintiff’s Third Amended Complaint (the “TAC”)(Doc. 11). The Court now rules on the Motion.

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**I. BACKGROUND**

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On March 13, 2007, Plaintiff Renee C. Jewell borrowed \$149,250 (the “Loan”) from Defendant Countrywide Home Loans, Inc. (“Countrywide”) to refinance a mortgage on real property located at 1155 Avienda De Lao Golorina, Bullhead City, Arizona 86442 (the “Property”). A promissory note (the “Note”) and deed of trust (“Deed of Trust”) evidence the Loan.

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Plaintiff defaulted on the Loan in February 2009. (Orig. Compl., Doc. 1, Ex. F.) Defendant ReconTrust Company, N.A. (“ReconTrust”), as successor trustee, recorded a

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1 Notice of Trustee Sale on August 13, 2010. (Id. Ex. E.) After several postponements,  
2 ReconTrust foreclosed on the Property on February 11, 2011. (TAC ¶18.)

3 On March 14, 2011, Defendant Bank of New York Mellon (“Mellon”) initiated a  
4 forcible entry and detainer action in Mohave County Superior Court (Case No. S-8015-CV-  
5 2011-00425).<sup>1</sup> Mellon obtained a judgment in that action on May 20, 2011, and the Court  
6 issued a writ of restitution on June 21, 2011. (Doc. 27.) The writ of restitution was served  
7 on June 23, 2011, and Plaintiff was evicted from the Property. (Id.)

8 Plaintiff filed this case on March 18, 2011. He filed several motions for temporary  
9 restraining orders and motions for preliminary injunctions. On September 27, 2011, the  
10 Court denied all those motions as moot because the Property had already been sold and a  
11 forcible entry and detainer judgment against Plaintiff had been entered. Defendants filed the  
12 pending Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on July 26,  
13 2011.

## 14 II. LEGAL STANDARD

15 The Court may dismiss a complaint for failure to state a claim under 12(b)(6) for two  
16 reasons: 1) lack of a cognizable legal theory and 2) insufficient facts alleged under a  
17 cognizable legal theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.  
18 1990).

19 To survive a 12(b)(6) motion for failure to state a claim, a complaint must meet the  
20 requirements of Federal Rule of Civil Procedure 8(a)(2). Rule 8(a)(2) requires a “short and  
21 plain statement of the claim showing that the pleader is entitled to relief,” so that the  
22 defendant has “fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell*  
23 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)(quoting *Conley v. Gibson*, 355 U.S. 41,  
24 47 (1957)).

25 Although a complaint attacked for failure to state a claim does not need detailed

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27 <sup>1</sup>The Court may consider matters of public record, like judicial filings, on a motion  
28 to dismiss without converting the motion into a motion for summary judgment. *Coto*  
*Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010).

1 factual allegations, the pleader’s obligation to provide the grounds for relief requires “more  
2 than labels and conclusions, and a formulaic recitation of the elements of a cause of action  
3 will not do.” *Twombly*, 550 U.S. at 555 (internal citations omitted). The factual allegations  
4 of the complaint must be sufficient to raise a right to relief above a speculative level. *Id.*  
5 Rule 8(a)(2) “requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.  
6 Without some factual allegation in the complaint, it is hard to see how a claimant could  
7 satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also  
8 ‘grounds’ on which the claim rests.” *Id.* (citing 5 C. Wright & A. Miller, *Federal Practice*  
9 *and Procedure* §1202, pp. 94, 95(3d ed. 2004)).

10 Rule 8’s pleading standard demands more than “an unadorned, the-defendant-  
11 unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)(citing  
12 *Twombly*, 550 U.S. at 555). A complaint that offers nothing more than naked assertions will  
13 not suffice. To survive a motion to dismiss, a complaint must contain sufficient factual  
14 matter, which, if accepted as true, states a claim to relief that is “plausible on its face.” *Iqbal*,  
15 129 S.Ct. at 1949. Facial plausibility exists if the pleader pleads factual content that allows  
16 the court to draw the reasonable inference that the defendant is liable for the misconduct  
17 alleged. *Id.* Plausibility does not equal “probability,” but plausibility requires more than a  
18 sheer possibility that a defendant has acted unlawfully. *Id.* “Where a complaint pleads facts  
19 that are ‘merely consistent’ with a defendant’s liability, it ‘stops short of the line between  
20 possibility and plausibility of entitlement to relief.’” *Id.* (citing *Twombly*, 550 U.S. at 557).

21 In deciding a motion to dismiss under Rule 12(b)(6), the Court must construe the facts  
22 alleged in the complaint in the light most favorable to the drafter of the complaint and the  
23 Court must accept all well-pleaded factual allegations as true. *See Shwarz v. United States*,  
24 234 F.3d 428, 435 (9th Cir. 2000). Nonetheless, the Court does not have to accept as true  
25 a legal conclusion couched as a factual allegation. *Papasan v. Allain*, 478 U.S. 265, 286  
26 (1986).

1                   **III. ANALYSIS AND CONCLUSION**

2                   Defendants offer several reasons for dismissing the TAC: failure to state a claim for  
3 relief; failure to meet the pleading requirements of Federal Rules of Civil Procedure 8 and  
4 9; waiver pursuant to A.R.S. §33-811(C); and the Court’s previous rejection of Plaintiff’s  
5 legal theories. The Court will dismiss based on A.R.S. §33-811(C) waiver, failure to state  
6 a claim for wrongful foreclosure, and pursuant to the *Rooker-Feldman* doctrine. The Court  
7 need not address Defendants’ other arguments for dismissal.

8                   Section 33-811(C) of the Arizona Revised Statutes reads in pertinent part:

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

16 A.R.S. §33-811(C).

17                   Plaintiff did not even file this action until after the trustee sale had taken place. He  
18 therefore obviously did not obtain a TRO or other injunctive relief prior to the trustee sale.

19                   A trustor, such as Plaintiff, who receives notice of a trustee sale pursuant to A.R.S.  
20 §33-809 waives all defenses and objections to the trustee sale not raised in an action resulting  
21 in injunctive relief awarded at least one business day before the trustee sale. Plaintiff does  
22 not dispute that he received notice of the trustee sale. The TAC even references the first  
23 Notice of Trustee Sale.

24                   Because Plaintiff did not receive an order enjoining the sale of the Property, he  
25 waived all claims that would have provided defenses or objections to the sale. *Cettolin v.*  
26 *GMAC, et al.*, 2010 WL 3834628 \*3 (D. Ariz. September 24, 2010). All but two of  
27 Plaintiff’s attempted theories of legal relief – wrongful foreclosure and problems with the  
28 forcible entry and detainer action – would have provided defenses to the sale of the Property

1 if viable and successful. Plaintiff therefore waived all those theories – i.e., “show me the  
2 note,” holder in due course, cannot separate the deed and the note – when he failed to obtain  
3 injunctive relief before the trustee sale of the Property. Accordingly, pursuant to A.R.S. §33-  
4 811(C), the Court will grant the Defendants’ motion to dismiss all but Plaintiff’s wrongful  
5 foreclosure and forcible entry and detainer claims, which the Court will dismiss for different  
6 reasons.

7         The TAC is not a model of clarity, but Plaintiff seemingly attempts to allege a claim  
8 for wrongful foreclosure. Although Arizona state courts have not yet recognized a cause of  
9 action for wrongful foreclosure, this Court has. *See, e.g., Schrock v. Federal Nat’l Mortg.*  
10 *Assoc.*, 2011 WL 3348227 \*6 (D. Ariz. August 3, 2011). The Court has held that the tort of  
11 wrongful foreclosure is not waived by A.R.S. §33-811(C) because it is only ripe once a  
12 foreclosure sale has occurred. *Id.* To establish a claim for wrongful foreclosure, Plaintiff  
13 must prove that either he was not in default at the time of the foreclosure or that the  
14 foreclosing party caused the default. *See, e.g., Jada v. Wells Fargo Bank, N.A.*, 2011 WL  
15 3267330 \*3 (D. Ariz. July 29, 2011).

16         Plaintiff has never alleged that he was not in default on the Loan or that someone else  
17 caused his default. Rather, his allegations center on Defendants not being the appropriate  
18 parties, for various reasons, to foreclose on the Property. Because Plaintiff does not maintain  
19 that he was current on the Loan at the time of the trustee sale, he cannot state a claim for  
20 wrongful foreclosure. The Court therefore grants Defendants’ motion to dismiss the claim  
21 for wrongful disclosure.

22         Plaintiff makes several allegations regarding the impropriety of the forcible entry and  
23 detainer action in Mohave Superior Court. But this Court cannot act as an appellate court  
24 over a state court proceeding. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). As the  
25 Ninth Circuit Court of Appeals explained in *Bianchi v. Ryaarsdam*:

26                 *Rooker-Feldman* is a powerful doctrine that prevents federal  
27 courts from second-guessing state court decisions by barring the  
28 lower federal courts from hearing de facto appeals from state-  
court judgments: If claims raised in the federal court action are  
“inextricably intertwined” with the state court’s decision such

1           that the adjudication of the federal claims would undercut the  
2           state ruling or require the district court to interpret the  
3           application of state laws or procedural rules, then the federal  
          complaint must be dismissed for lack of subject matter  
          jurisdiction.

4   334 F.3d 895, 898 (9<sup>th</sup> Cir. 2003). This Court cannot interfere with the forcible entry and  
5   detainer judgment entered by the Arizona state court. All claims related to the forcible entry  
6   and detainer judgment therefore necessarily fail as a matter of law, and the Court will dismiss  
7   those claims.

8           At the end of his Response, Plaintiff seeks leave to amend the TAC. Plaintiff did not  
9   attach a proposed amended complaint to his Response as required by Local Rule of Civil  
10   Procedure 15.1. The Court denies the request to amend on this procedural basis. The Court  
11   also denies the request to amend because amendment would be futile. “A district court does  
12   not err in denying leave to amend where the amendment would be futile . . . or would be  
13   subject to dismissal.” *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991)(internal  
14   citations omitted).

15           As outlined above, almost all of Plaintiff’s claims were waived pursuant to A.R.S.  
16   §33-811(C) when he failed to obtain injunctive relief before the trustee sale of the Property.<sup>2</sup>  
17   Plaintiff cannot possibly cure this failure because the trustee sale already has taken place.  
18   Nor can Plaintiff save his wrongful foreclosure claim because does not dispute that he  
19   defaulted on the Loan. Finally, Plaintiff cannot allege any more facts about the forcible entry  
20   and detainer action that would help him because the Court cannot disturb the Arizona state  
21   court’s judgment. Because a Fourth Amended Complaint would be futile here, the Court will  
22   deny Plaintiff’s request for leave to amend.

23           Accordingly,

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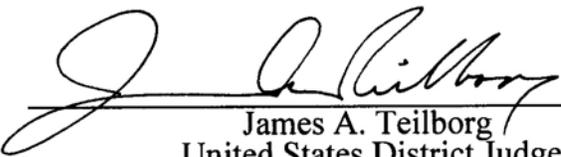
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27           <sup>2</sup>Even if Plaintiff had not waived those claims, Defendants correctly point out that the  
28   Court previously has rejected Plaintiff’s legal theories – the “show me the note” argument,  
          the impermissible separation of the note and the deed, etc.

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**IT IS ORDERED GRANTING** Defendants' Motion to Dismiss (Doc. 21). This case is dismissed in its entirety.

DATED this 20th day of January, 2012.

  
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James A. Teilborg  
United States District Judge