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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Judith D. Erickson, an unmarried woman,  
and as Trustee of The Erickson Family  
Trust,

Plaintiff,

v.

Ditech Financial, LLC, a Delaware limited  
liability company, f/k/a Green Tree  
Servicing, LLC, a Delaware Limited  
Liability Company; Federal National  
Mortgage Association, a District of  
Columbia corporation; John and Jane Does  
1-1000; XYZ Corporations 1-1000; ABC  
Limited Liability Companies 1-1000; and  
123 Banking Associations 1-1000,

Defendants.

Ditech Financial, LLC, a Delaware limited  
liability company,

Counterclaimant,

v.

Judith D. Erickson, an individual; Judith D.  
Erickson, as trustee of the Erickson Family  
Trust,

Counterdefendants.

No. CV-14-08089-PCT-NVW

**ORDER**

**[Not for Publication]**

1 Ditech Financial, LLC, a Delaware limited  
2 liability company,

3 Third-Party Plaintiff,

4 v.

5  
6 Holua, LLC, an Arizona limited liability  
7 company; John Darreld Erickson, an  
8 individual; Mortgage Electronic Registration  
9 Systems, Inc., a foreign corporation; The  
10 Bank of New York Mellon f/k/a The Bank of  
11 New York as successor Indenture trustee to  
12 JPMorgan Chase Bank, National Association  
13 for CWHEQ Revolving Home Equity Loan  
14 Trust, Series 2006-I; and ROES I through X,  
15 Inclusive,

16 Third-Party Defendants.

17 Before the Court is a Motion to Dismiss Counterclaim (Doc. 158) by Plaintiff and  
18 Counterdefendant Judith D. Erickson individually and as Trustee of The Erickson Family  
19 Trust.

20 **I. RULE 12(b)(6) LEGAL STANDARD**

21 On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), all  
22 allegations of material fact are assumed to be true and construed in the light most  
23 favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir.  
24 2009). Dismissal under Rule 12(b)(6) can be based on “the lack of a cognizable legal  
25 theory” or “the absence of sufficient facts alleged under a cognizable legal theory.”  
26 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). To avoid  
27 dismissal, a complaint need contain only “enough facts to state a claim for relief that is  
28 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The  
principle that a court accepts as true all of the allegations in a complaint does not apply to  
legal conclusions or conclusory factual allegations. *Ashcroft v. Iqbal*, 566 U.S. 662, 678

1 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that  
2 allows the court to draw the reasonable inference that the defendant is liable for the  
3 misconduct alleged.” *Id.*

4 **II. FACTUAL ALLEGATIONS ASSUMED TO BE TRUE**

5 The following facts are assumed to be true for the purpose of deciding the motion  
6 to dismiss Ditech Financial, LLC’s Counterclaim. The Court makes no determination of  
7 whether they are in fact true.

8 On June 24, 2006, Judith Erickson signed and delivered to Countrywide Home  
9 Loans, Inc., an Adjustable Rate Note in the original principal amount of \$338,000.00 to  
10 memorialize a loan to Erickson to purchase the Property at 2655 Skyview Way, Sedona,  
11 Arizona. The Note includes a promise from Erickson to pay the principal amount plus  
12 interest and her acknowledgement that Countrywide may transfer the Note. The Note  
13 states, “Lender or anyone who takes this Note by transfer and who is entitled to receive  
14 payments under this Note is called the ‘Note Holder.’”<sup>1</sup> The Note is in Ditech’s  
15 possession and is endorsed in blank by Countrywide.

16 As security for the amounts due and owing on the Note, Erickson executed and  
17 delivered a Deed of Trust to Countrywide, which was recorded on July 6, 2006, in the  
18 Official Records of the Yavapai County Recorder. The Deed of Trust granted a security  
19 interest in the Property. Federal National Mortgage Association (“Fannie Mae”) owns  
20 Erickson’s loan, and Ditech services the loan on behalf of Fannie Mae.

21 Erickson conveyed the Property to The Erickson Family Trust. In January 2013,  
22 Erickson failed to make payment pursuant to the terms of the Note and Deed of Trust.  
23 On February 15, 2013, Ditech commenced representation of Fannie Mae’s interests in  
24 foreclosure and began to initiate non-judicial foreclosure. On February 15, 2013,  
25 pursuant to its Single Family Servicing Guide, Fannie Mae automatically transferred  
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27 <sup>1</sup> Plaintiff incorrectly states that the Note Holder must be entitled to “keep  
28 payments” under the Note.

1 constructive possession of the Note to Ditech, and Ditech has continuously possessed the  
2 Note ever since. On April 30, 2015, Ditech received physical possession of the Note.

3 Ditech's Counterclaim alleges that the Note and Deed of Trust are in default  
4 because of nonpayment and also because Erickson conveyed the Property to The  
5 Erickson Family Trust. It alleges damages incurred because of Erickson's default.  
6 Ditech elects to judicially foreclose the Deed of Trust pursuant to A.R.S. § 33-807(B).

7 **III. ANALYSIS**

8 Under the Arizona Deed of Trust Act, a trustee or beneficiary may file and  
9 maintain an action for judicial foreclosure at any time before the trust property has been  
10 sold under the power of sale. A.R.S. § 33-807(B); *see* A.R.S. § 33-721 (foreclosure of  
11 mortgage by court action).

12 Ditech alleges that it is both the Note Holder and the Deed of Trust Beneficiary.  
13 “‘Negotiation’ means a transfer of possession, whether voluntary or involuntary, of an  
14 instrument by a person other than the issuer to a person who thereby becomes its holder.”  
15 A.R.S. § 47-3201(A). “If an instrument is payable to bearer, it may be negotiated by  
16 transfer of possession alone.” A.R.S. § 47-3201(B). “When indorsed in blank, an  
17 instrument becomes payable to bearer and may be negotiated by transfer of possession  
18 alone until specially indorsed.” A.R.S. § 47-3205(B). “Transfer of an instrument,  
19 whether or not the transfer is a negotiation, vests in the transferee any right of the  
20 transferor to enforce the instrument, including any right as a holder in due course, but the  
21 transferee cannot acquire rights of a holder in due course by a transfer, directly or  
22 indirectly, from a holder in due course if the transferee engaged in fraud or illegality  
23 affecting the instrument.” A.R.S. § 47-3203(B).

24 As alleged, the Note was endorsed in blank by Countrywide, and both constructive  
25 and physical possession of the Note was transferred to Ditech. Thus, Ditech became the  
26 Note Holder. As the Note Holder, Ditech is a “person entitled to enforce” the Note:

27 “Person entitled to enforce” an instrument means the holder of the  
28 instrument, a nonholder in possession of the instrument who has the rights

1 of a holder or a person not in possession of the instrument who is entitled to  
2 enforce the instrument pursuant to § 47-3309 or § 47-3418, subsection D.  
3 A person may be a person entitled to enforce the instrument even though  
4 the person is not the owner of the instrument or is in wrongful possession of  
the instrument.

5 A.R.S. § 47-3301. Therefore, Ditech has any right to enforce the Note that Countrywide  
6 held.

7 As alleged, Ditech is also the Beneficiary under the Deed of Trust because the  
8 transfer of a contract secured by a trust deed operates as a transfer of the trust deed.

9 A.R.S. § 33-817. A mortgage is a “mere incident” to the debt it secures:

10 The law seems to be well settled that the mortgage is a mere incident to the  
11 debt and that its transfer or assignment does not transfer or assign the debt  
12 or the note. The mortgage goes with the note. If the latter is transferred or  
13 assigned, the mortgage automatically goes along with the assignment or  
14 transfer. . . . The mortgage, being a mere incident of the debt, cannot be  
15 assigned separately from it, so as to give any beneficial interest. . . . A  
16 mortgage, as distinct from the debt it secures, is not a thing of value nor a  
fit subject of transfer; hence an assignment of the mortgage alone, without  
the debt, is nugatory, and confers no rights whatever upon the assignee. . . .  
An assignment of the note carries the mortgage with it, while the  
assignment of the latter alone is a nullity.

17 *Hill v. Favour*, 52 Ariz. 561, 568, 84 P.2d 575, 578 (1938); *accord Rodney v. Arizona*  
18 *Bank*, 172 Ariz. 221, 223, 836 P.2d 434, 436 (Ct. App. 1992). Thus, transfer of the Note  
19 from Countrywide to Ditech operated as a transfer of the Deed of Trust.

20 Erickson contends that Ditech is barred from seeking judicial foreclosure because  
21 it failed to assert that as a compulsory counterclaim in its Answer to the Second  
22 Amended Complaint. The Arizona Deed of Trust Act explicitly provides that a trustee or  
23 beneficiary may file and maintain an action for judicial foreclosure at *any* time before the  
24 trust property has been sold under the power of sale. A.R.S. § 33-807(B). Without any  
25 authority, it cannot be concluded that, by seeking declaratory judgment that Ditech was  
26 not the Note Holder or Beneficiary of the Deed of Trust, Erickson forced Ditech to elect  
27 judicial foreclosure or forever waive its right to do so.

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The Court does not consider Erickson’s additional arguments raised for the first time in her reply brief.

IT IS THEREFORE ORDERED that the Motion to Dismiss Counterclaim (Doc. 158) by Plaintiffs and Counterdefendants Judith D. Erickson individually and as Trustee of The Erickson Family Trust is denied.

Dated this 29th day of July, 2016.

  
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Neil V. Wake  
United States District Judge