

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

Ellery J. Pettit,
Plaintiff

Case No.: 2-11-cv-00149-JAD-PAL

vs.
Federal National Mortgage Association;
Mortgage Electronic Registration Systems, Inc.;
Seterus, Inc.,
Defendants

**Order Granting Motion to Dismiss and
to Expunge Lis Pendens [Doc. 47] and
Denying Motion to Strike [Doc. 62]**

This action arises out of pro se Plaintiff Ellery J. Pettit’s default on the mortgage on his condominium unit located at 6868 Skypointe Dr., Unit 2136, Las Vegas, Nevada. Plaintiff’s original Complaint for (1) Declaratory Relief; (2) Quiet Title; and (3) Money Damages for Fraudulent Attempt to Foreclose, Doc. 1, asserted claims against Pulte Mortgage, LLC, Chase Bank, Chase Home Finance, LLC, IBM Lender Business Process Services (now known as Seterus, Inc.), and the Mortgage Electronic Registration System (“MERS”). Construed liberally, as required in this Circuit,¹ Plaintiff’s 12-page original complaint seeks to prevent foreclosure upon his home on the factual theory that his original lender sold the note and that the method by which it was transferred has left no one with the legal right to enforce it. Doc. 1.

¹ See *Bernhardt v. Los Angeles Cnty.*, 339 F.3d 920, 925 (9th Cir. 2003) (courts must construe pro se motions and pleadings liberally); *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987).

1 Seterus and MERS successfully moved to dismiss all claims against them under Federal Rule
2 of Civil Procedure 12(b)(6). The Court² found that Plaintiff’s declaratory relief and quiet title claims
3 lacked a cognizable underlying claim: to the extent they were founded upon a wrongful foreclosure
4 theory, Plaintiff’s acknowledgment of default on the mortgage barred these claims, *see* Doc. 39 at 4
5 (noting “Plaintiff admits that he has ‘never denied that the loan is in default’”), while Plaintiff
6 offered no facts to give rise to any other viable legal theory to justify these forms of relief. Doc. 39.
7 Plaintiff’s accounting claim failed because he pled no special relationship between himself and the
8 defendants, and because his claim for “refund, fees, and costs” is not a substantive cause of action,
9 but is rather a remedy for which no cognizable legal claim was pled. *Id.* at 5–6. Though dismissing
10 the claims as to the moving defendants, the Court granted leave to amend to permit Plaintiff the
11 opportunity to cure—if possible—these deficiencies. *Id.* at 6–7. The Court denied the moving
12 defendants’ attendant request to expunge the lis pendens because claims remained against the non-
13 moving defendants. *Id.* at 7.

14 Plaintiff returned with an Amended Complaint for Declaratory Judgment. Doc. 44. The
15 new, three-page pleading asserts claims only against MERS, Seterus, and newly-named defendant
16 Federal National Mortgage Association (“Fannie Mae”). *Id.* Whereas the original complaint was
17 replete with factual allegations—just none stating a cognizable legal claim—the new version is
18 entirely devoid of any factual allegations whatsoever. It contains little more than a list of various
19 relief sought, which includes a handful of declarations of rights, “costs and disbursements,” an
20 “injunction to prevent any of the Defendants from moving in any way against” the “property,” and
21 “all other relief as this court finds lawful, just and equitable, including but not limiting to quieting
22 the title to the subject real property.” Doc. 44 at 2–3.

23 All three remaining defendants now move this Court for dismissal and expungement of the
24 lis pendens because Plaintiff’s Amended Complaint is even less viable than his first version. Docs.
25 47, 56. Plaintiff opposes the motion, citing a plethora of cases and statutes that highlight the
26 standards for dismissing pro se complaints and seeking declaratory relief. Doc. 59. He also moves

27
28 ² United States District Judge Gloria M. Navarro presided over this case before it was transferred to the undersigned on August 9, 2013. Doc. 67.

1 under Rule 12(f) to strike Defendants’ reply in support of their motion to dismiss primarily because
2 the reply brief characterizes his claim as one for wrongful foreclosure, although the “Amended
3 Complaint was *not* about ‘wrongful foreclosure.’ No form of the word ‘foreclose’ is used in
4 *anything* [Plaintiff has] filed with this court and served on defendants from [the] Amended
5 Complaint forward to [Plaintiff’s] last Response.” Doc. 62 at 2 (emphases in original).

6 Plaintiff has failed to cure any of the deficiencies that the Court identified when granting
7 leave to amend. Instead of supplementing the facts that the Court deemed “too bare and
8 conclusory,” “vague and fanciful,” and “insufficient to make Plaintiff’s claim plausible, not just
9 possible”—as required by the United States Supreme Court’s decisions in *Bell Atlantic Corp. v.*
10 *Twombly*, 550 U.S. 544 (2007), and by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)—Plaintiff has
11 completely eliminated them. Doc. 39 at 4–6. He has identified no viable legal theory upon which
12 the remedies he seeks could be awarded, and he vehemently denies that he intends to make out a
13 wrongful foreclosure case. Doc. 62. Despite many vehicles—opportunity to amend, an opposition
14 to a motion to dismiss, and a motion to strike—Plaintiff has failed to identify facts that give rise to a
15 legal right to the relief he seeks. Accordingly, the Court grants Defendants’ motion to dismiss and
16 to expunge the *lis pendens*. Doc. 47. Because Rule 12(f) only authorizes this Court to strike
17 material from pleadings (e.g., complaints and answers), not from motions, responses, or replies, the
18 Court denies Plaintiff’s motion to strike. Doc. 62.³

19 Discussion

20 A. Defendants’ Motion to Dismiss Mr. Pettit’s Amended Complaint

21 Defendants move this Court to dismiss the amended complaint in its entirety. They contend
22 that the revisions reflected in this new pleading fail to cure the deficiencies in the original complaint,
23 and they urge dismissal with prejudice based on FRCP 12(b)(6) and on “the law of the case” as
24 established by Judge Navarro’s prior dismissal order. Doc. 47. Mr. Pettit responds that he provided

25
26 ³ The Court finds these motions appropriate for resolution without oral argument. L.R. 78-2.
27 Plaintiff was timely provided with the notice required under *Rand v. Rowland*, 154 F.3d 952 (9th Cir.
28 1998) (en banc), *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003), and *Klinge v. Eikenberry*, 849 F.2d
409 (9th Cir. 1988). Doc. 48. The Court incorporates herein the facts and background from the previous
dismissal order as no new facts have been pled since the issuance of that order and the parties are
familiar with them. See Doc. 39 at 1–2.

1 the short and plain statement required by FRCP 8(a)(2)–(3). Doc. 59. He agrees that his sole claim
2 is for declaratory judgment and contends that “the question of who may enforce [his] Note is still an
3 open *and* threshold question” that the Court should answer. *See* Doc. 59 at 9–10 (emphasis in
4 original). In his motion to strike, Plaintiff expressly disclaims the notion that he is asserting a
5 wrongful-foreclosure claim. Doc. 62 at 2.

6
7 ***I. The Amended Complaint Fails to State an Independent Legal Cause of Action for
the Relief Mr. Pettit Seeks.***

8 Although Federal Rule of Civil Procedure 8(a)(2) requires “a short and plain statement of the
9 claim showing that the pleader is entitled to relief,” defending a complaint against a Rule 12(b)(6)
10 attack “requires more than labels and conclusions”; it calls on plaintiffs to plead factual allegations
11 that are “enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555
12 (quoting 5 Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1216 (3d ed.
13 2004)) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)) (internal quotation marks omitted).
14 This requires a plaintiff to state claims raising a plausible likelihood that the defendant engaged in
15 misconduct for which the law—and courts—can offer relief.

16 As Judge Navarro pointed out when dismissing Plaintiff’s claims against MERS and Seterus,
17 Plaintiff’s original complaint—which actually contained several pages of factual allegations—failed
18 to rise to this level because the factual allegations were “vague and fanciful” or too speculative and
19 conclusory” to support any viable claim. Doc. 39 at 5–6. Thus, Plaintiff was granted leave to
20 amend his claims to find and plead sufficient facts to give rise to a legal right to the types of relief
21 that he seeks. Unfortunately, the amendment falls even farther from the mark than the original
22 complaint. Plaintiff’s newly amended complaint has been stripped clean of facts that support any
23 theory whatsoever, let alone a legally cognizable one—and what has now become clear (if it was not
24 before) is that Plaintiff is essentially seeking an advisory opinion on affirmative defenses that he
25 might ultimately have in a future action brought by the holder of his note. Yet “federal courts have
26 never been empowered to issue advisory opinions.” *Coal. for a Healthy Cal. v. F.C.C.*, 87 F.3d 383,
27 386 (9th Cir. 1996) (citation omitted). Because this Court lacks the power to advise Plaintiff on the
28

1 legal questions raised by his fact-bare amended complaint, Plaintiff *still* has not pled a claim that
2 survives 12(b)(6) dismissal.

3 Plaintiff's three-page amended complaint is short and plain; unfortunately, it's too short and
4 plain. To be sure, Mr. Pettit states the type of remedy he desires: he "seek[s] this court's judgment
5 to declare all parties' rights and other legal relations" in four respects:

6 (A) Under the Note and Deed of Trust material to this case (copies
7 attached);

8 (B) Under any and all other instruments, agreements or contracts upon
9 which any Defendant or Defendants may base any claim to, or
10 enforcing anything against, [his] property;

11 (C) Under Nevada law governing negotiable instruments, and all other
12 applicable law; and

13 (D) Declare who are the real parties in interest and who are the strangers to
14 the Note and Deed of Trust.

15 Doc. 44 at 2. Under the heading "Relief entitlement - FRCP 8(a)(2)," Plaintiff writes only that
16 "[t]his court is authorized to grant this relief pursuant to 28 U.S.C.A. Chapter 151." *Id.* at 3. Under
17 the heading "6. Demand for relief - FRCP 8(a)(3)," Mr. Pettit elaborates at greater length that he
18 prays for the Court to:

19 (A) declare [his] and all Defendants' rights and other legal relations
20 according to the above;

21 (B) order the appropriate injunction to prevent any of the Defendants
22 from moving in any way against [his] property; and

23 (C) order and adjudge all other relief as this court finds lawful, just
24 and equitable, including but not limited to quieting the title to the
25 subject real property.

26 *Id.*

27 But it's what is *not* pled that remains the problem here. The amended complaint contains
28 absolutely no facts and, thus, no substantive claim on which relief can be granted. It does not
identify or allege any rights that Plaintiff holds and Defendants violated; it does not allege what
facts—if any—are in controversy. Instead, Plaintiff offers just bare labels without contentions; he
seeks relief but does not present a legal problem for the Court to resolve. *Cf. Twombly*, 550 U.S. at
555 (citations omitted). The United States Supreme Court's decisions in *Twombly* and *Iqbal* make it

1 clear that Rule 8 “demands more than an unadorned, the-defendant-unlawfully-harmed-me
2 accusation.” *Iqbal*, 556 U.S. at 678. “A complaint may survive a motion to dismiss only if, taking
3 all well-pleaded factual allegations as true, it contains enough facts to ‘state a claim to relief that is
4 plausible on its face.’” *Hebbe v. Pliler*, 611 F.3d 1202, 1205 (9th Cir. 2010) (quoting *Ashcroft v.*
5 *Iqbal*, 556 U.S. 662, 678 (2009)). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic
6 recitation of the elements of a cause of action will not do.’” *Iqbal*, 556 U.S. at 678 (quoting *Bell*
7 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Bare legal conclusions “are not entitled to
8 the assumption of truth” and cannot defeat a 12(b)(6) challenge. *Id.* at 664.

9 **2. Declaratory Relief is a Remedy, Not an Independent Legal Cause of Action.**

10 Plaintiff’s amended complaint alleges only a claim for declaratory relief. But as Judge
11 Navarro previously cautioned Mr. Pettit, a “claim” for declaratory relief is not a substantive cause of
12 action at all; it is merely a prayer for a remedy. Doc. 39 at 4 (citing *Stock West, Inc. v. Confederated*
13 *Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989)). Thus, asking the Court to
14 declare relief “[u]nder Nevada law” or to “[d]eclare who are the real parties in interest” does not
15 even approach a plausible claim for relief, even though this Court is liberally construing the
16 allegations in the complaint in favor of this pro se plaintiff. The federal Uniform Declaratory
17 Judgment Act is a “procedural” law that “provides an additional remedy, but only in cases resting on
18 some independent basis of federal jurisdiction.”⁴ *Miller-Wohl Co., Inc. v. Comm’r of Labor &*
19 *Indus., State of Mont.*, 685 F.2d 1088, 1091 (9th Cir. 1982) (citing *Alton Box Bd. Co. v. Esprit de*
20 *Corp.*, 682 F.2d 1267 (9th Cir. 1982)); *see also Staacke v. United States Sec’y of Labor*, 841 F.2d
21 278, 280 (9th Cir. 1988) (citations omitted) (writing that it is “well settled that the Declaratory
22 Judgment Act does not itself confer federal subject matter jurisdiction . . . but merely provides an
23 additional remedy in cases where jurisdiction is otherwise established.”). “Any non-frivolous
24 assertion of a federal claim suffices to establish federal question jurisdiction, even if that claim is

25 _____
26 ⁴This procedural nature is why the Court applies the federal Declaratory Judgment Act, rather
27 than the Nevada Declaratory Judgment Act, while it sits in diversity. *Krave Entm’t, LLC v. Liberty Mut.*
28 *Ins. Co.*, 667 F. Supp. 1232, 1237 (D. Nev. 2009). Neither act “grant[s] jurisdiction where it otherwise
would not exist,” but each “merely provides an additional procedural remedy to the court.” *Id.* (citing
Geni-Chlor Int’l, Inc. v. Multisonics Dev. Corp., 580 F.2d 981, 984 (9th Cir.1978); *Builders Ass’n of*
N. Nev. v. City of Reno, 105 Nev. 368, 776 P.2d 1234, 1234 (1989)).

1 later dismissed on the merits,” but some independently cognizable legal cause of action (such as
2 breach of contract, wrongful foreclosure, or fraud, for example) must first be asserted. *Cement*
3 *Masons Health & Welfare Trust Fund for N. Cal. v. Stone*, 197 F.3d 1003, 1008 (9th Cir. 1999).⁵

4 Had Plaintiff adopted the wrongful foreclosure claim that Judge Navarro suggested when
5 liberally construing his original complaint and—and had he fixed the deficiencies in that claim that
6 she identified (failure to allege he was not in default on his loan obligations; supporting the
7 defendants-are-not-holders-of-the-note theory with allegations that “are too bare and conclusory to
8 support a claim for wrongful foreclosure; and identifying no reason to justify varying from the
9 general rule in Nevada that foreclosing parties are not required to prove that they own the note prior
10 to initiating non-judicial foreclosure proceedings,” Doc. 39 at 4–5)—he might have a legal
11 foundation for some of the relief he seeks. *See* Doc. 39 at 4–5. But by deleting all factual
12 allegations from his amended complaint, Plaintiff has made it impossible for this Court to find
13 *Twombly* and *Iqbal* satisfied by this new effort. Further, his vehement disclaimer of any wrongful
14 foreclosure claim, *see* Doc. 62, prevents this Court from doing as Judge Navarro did and giving
15 Plaintiff the benefit of the doubt that he was intending to state a wrongful foreclosure claim but
16 simply missed the mark.

17 3. *Advisory Opinions Are Not Available.*

18 In his opposition, Plaintiff summarizes the goal of his lawsuit as seeking answers to the
19 questions “essentially ‘where’s my Note?’ and ‘who’s the Note Holder?’”, Doc. 59 at 16, and he
20 suggests that “[u]ltimately the burden is on Defendants to prove the facts supporting their claims to
21 [his] home.” *Id.* at 9. He argues that “[t]he burden of showing these factual predicates is on the
22 person attempting to enforce the negotiable instrument,” and “[h]ere, that’s Defendants, not me.” *Id.*
23 at 9 n.20. It appears this is the crux of the problem: Plaintiff is essentially seeking an advisory
24

25 ⁵ This rule also applies to Plaintiff’s prayer for injunctive relief because injunctive relief,
26 standing alone, is not a cause of action. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Jafbros Inc.*, 860
27 P.2d 176, 178 (Nev. 1993) (referring to an injunction as a remedy); *Cole v. CIT Grp./Consumer Fin.,*
28 *Inc.*, 2010 WL 5134999, at *1 n.1 (D. Nev. Dec. 9, 2010) (stating that injunctive relief is a remedy, not
a cause of action, and affirming grant of summary judgment in wrongful foreclosure action). Like
declaratory relief, injunctive relief is available only when a plaintiff is entitled to such a remedy on an
independent cause of action.

1 opinion on the viability of affirmative defenses that he may have to claims that the Defendants may
2 ultimately bring against him, but which are not the subject of this lawsuit. Without any actual cause
3 of action upon which relief can be granted, this Court's answers to these questions would be merely
4 advisory opinions that will have no effect on any judicial proceeding. *See, e.g., Coffman v. Breeze*
5 *Corps.*, 323 U.S. 316, 324 (1945) (rejecting declaratory relief claim that was "but a request for an
6 advisory opinion as to the validity of a defense to a" future suit for recovery of royalties); *accord,*
7 *Calderon v. Ashmus*, 523 U.S. 740, 747 (1998)). "Whether in actions for declaratory judgment or
8 other relief, federal courts established under Article III of the Constitution do not render advisory
9 opinions." *U. S. Servicemen's Fund v. Killeen Indep. Sch. Dist.*, 489 F.2d 693, 694 (5th Cir. 1974)
10 (citing *United Public Mine Workers v. Mitchell*, 330 U.S. 75, 89 (1947)).

11 **4. No Further Amendment Is Justified.**

12 Although amendment is liberally offered in federal courts, but it is not limitlessly offered.
13 Fed. R. Civ. P. 15(a)(2); *see also Sonoma Cnty. Ass'n of Retired Emps. v. Sonoma Cnty.*, 708 F.3d
14 1109, 1117 (9th Cir. 2013). If the district court finds that amendment would futile, the court has
15 discretion to foreclose amendment. *Forman v. Davis*, 371 U.S. 178, 182 (1962). The Declaratory
16 Judgment Act affords neither jurisdiction to this Court nor independently viable legal claims that
17 Mr. Pettit can test on their merits. *See id.* (noting that a plaintiff should "be afforded an opportunity
18 to test his claim on the merits" when "the underlying facts or circumstances relied upon" may "be a
19 proper subject of relief"). He vehemently disclaims any wrongful foreclosure theory despite Judge
20 Navarro's liberal construction in her order permitting amendment. Doc. 39 at 4. He has also
21 stripped his new complaint of factual allegations and has demonstrated an inability to identify any
22 set of facts that would support a cognizable claim in his case against MERS, Seterus, and Fannie
23 Mae, and, indeed, it appears what that he really seeks is an advisory opinion on potential affirmative
24 defenses to a future foreclosure action. A second amendment would therefore be futile. However,
25 because the Court does not wish to bar inadvertently any of Plaintiff's theories in the event they
26 ripen into affirmative defenses to future claims, the Court dismisses this action without prejudice.

1 **B. Defendants’ Motion to Expunge Lis Pendens**

2 Defendants also ask the Court to expunge the notice of lis pendens that Plaintiff recorded in
3 conjunction with this lawsuit. Doc. 47. A notice of lis pendens is literally a notice of a pending
4 lawsuit affecting real property. When the underlying litigation concludes, the need for the
5 notice—and justification for the cloud on title—evaporates. *See, e.g.*, Nev. Rev. Stat. §§ 14.010–
6 14.015(5) (authorizing the cancellation of a notice of lis pendens when, *inter alia*, the filing party
7 has failed to establish a likelihood of prevailing in the action). As the Court has dismissed this
8 action, the justification for the lis pendens has ceased. The motion to expunge the notice of lis
9 pendens is granted. Defendants are ordered to submit to the Court a proposed order expunging the
10 notice of lis pendens within ten days of this order in compliance with Local Rule 7-2(f).

11 **C. Plaintiff’s Motion to Strike**

12 Federal Rule of Civil Procedure 12(f) permits courts to “strike from a pleading an
13 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ.
14 P. 12(f). The target of Plaintiff’s request to strike is not a pleading, but rather the contents of
15 Defendants’ reply brief in support of their motion to dismiss and to expunge the lis pendens. *See*
16 Doc. 62. “Rule 12(f) cannot serve as the procedural vehicle for striking language contained in
17 motion papers.” *Parker v. CMRE Fin. Svcs, Inc.*, 2007 WL 3276322, at *4 (S.D. Cal. Nov. 5, 2007)
18 (citing *Sidney-VinSTEIN v. A.H. Robins Co.*, 697 F.2d 880, 885–86 (9th Cir. 1983) (“Under the
19 express language of the rule, only pleadings are subject to motions to strike”). As FRCP 12(f) does
20 not afford litigants a basis for moving to strike language from reply briefs, Plaintiff’s motion to
21 strike portions of Defendant’s reply brief (Doc. 62) is denied.

22 **Conclusion**

23 Based on the reasons fully set forth above and with good cause appearing,

24 **IT IS HEREBY ORDERED** that Defendants’ Motion to Dismiss and Motion to Expunge
25 Lis Pendens [#47] is **GRANTED**. Plaintiffs’ Amended Complaint is **DISMISSED** in its entirety
26 under FRCP 12(b)(6) for failure to state a cognizable claim for relief after having been afforded the
27 opportunity to cure the deficiencies identified in the Court’s previous dismissal order;

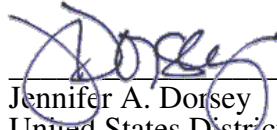
28 . . .

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS FURTHER ORDERED that Plaintiff's Motion to Strike [#62] is **DENIED**;

IT IS FURTHER ORDERED that within ten days of this order Defendants shall submit to the Court (in compliance with Local Rule 7-2(f)) a proposed order expunging the notice of lis pendens.

DATED February 11, 2014.



Jennifer A. Dorsey
United States District Judge