

1 Plaintiff Esther Gonzalez commenced an action in the Eighth Judicial District
2 Court of the District of Nevada on December 6, 2012, against BANA and ten Doe
3 Defendants.¹ Plaintiff brings three causes of action: (1) promissory estoppel; (2)
4 preliminary injunction; and (3) quiet title. Defendant claims it was never properly served
5 and that Plaintiff only attempted to serve Defendant by delivering copies of the
6 Summons and Complaint to an employee at a Las Vegas Bank of America retail branch.
7 (Dkt. no. 1 at 2.) Defendant filed a Petition for Removal on March 19, 2013. Because
8 Defendant has yet to be properly served, removal was timely.

9 III. LEGAL STANDARD

10 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which
11 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide
12 "a short and plain statement of the claim showing that the pleader is entitled to relief."
13 Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While
14 Rule 8 does not require detailed factual allegations, it demands more than "labels and
15 conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v.*
16 *Iqbal*, 556 US 662, 678 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).
17 "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550
18 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient
19 factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at
20 678 (internal citation omitted).

21 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
22 apply when considering motions to dismiss. First, a district court must accept as true all

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25 ¹As the federal rules of procedure allow for liberal amendments to pleadings, the
26 use of doe defendants in federal practice is disfavored. See *Gillespie v. Civiletti*, 629
27 F.2d 637, 642 (9th Cir. 1980). However, when a situation arises where the identities of
28 alleged defendants are unknown prior to filing the complaint, the plaintiff "should be
given an opportunity through discovery to identify the unknown defendants, unless it is
clear that discovery would not uncover the identities, or that the complaint would be
dismissed on other grounds." *Id.* As that situation has not arisen, the Court declines to
consider the Doe Defendants as valid parties to this suit.

1 well-pled factual allegations in the complaint; however, legal conclusions are not entitled
2 to the assumption of truth. *Id.* at 679. Mere recitals of the elements of a cause of action,
3 supported only by conclusory statements, do not suffice. *Id.* at 678. Second, a district
4 court must consider whether the factual allegations in the complaint allege a plausible
5 claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint
6 alleges facts that allow a court to draw a reasonable inference that the defendant is
7 liable for the alleged misconduct. *Id.* at 678. Where the complaint does not permit the
8 court to infer more than the mere possibility of misconduct, the complaint has “alleged –
9 but not shown – that the pleader is entitled to relief.” *Id.* at 679 (internal quotation marks
10 omitted). When the claims in a complaint have not crossed the line from conceivable to
11 plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570. A complaint
12 must contain either direct or inferential allegations concerning “all the material elements
13 necessary to sustain recovery under *some* viable legal theory.” *Twombly*, 550 U.S. at
14 562 (*quoting Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1989)
15 (emphasis in original)).

16 **IV. DISCUSSION**

17 At the outset, the Court notes that Plaintiff has failed to respond to the Motion to
18 Dismiss. On its own, Plaintiff’s failure to file points and authorities in opposition to a
19 motion constitutes consent that the motion be granted. Local Rule 7-2(d); *see Abbott v.*
20 *United Venture Capital, Inc.*, 718 F. Supp. 828, 831 (D. Nev. 1989).

21 Notwithstanding Plaintiff’s failure to oppose the Motion, the Court addresses the
22 merits of BANA’s request to dismiss Plaintiff’s claims. Plaintiff brings three causes of
23 action against BANA. First, she brings a promissory estoppel claim based on her
24 allegation that she reasonably relied on representations of the Defendant that a loan
25 modification was under review and foreclosure would not occur. (Dkt. no. 1-1 at 3.) In
26 order to establish a promissory estoppel claim, Plaintiff must demonstrate that a promise
27 existed “which the promisor should reasonably expect to induce action or forbearance on
28 the part of the promisee or a third person and which does induce such action or

1 forbearance” and where “injustice can be avoided only by enforcement of the promise.”
2 Restatement (Second) of Contracts § 90 (1981). A promise that is “vague, general or of
3 indeterminate application” is not enforceable. *Aguilar v. Int’l Longshoremen’s Union*
4 *Local No. 10*, 966 F.2d 443, 446 (9th Cir. 1992) (quoting *Hass v. Darigold Dairy Products*
5 *Co.*, 751 F.2d 1096, 1100 (9th Cir. 1985)). Here, Plaintiff states that two individuals,
6 “Brian B.” and “Rochetta,” communicated that her loan modification was under review.
7 (Dkt. no. 1-1 at 3.) Plaintiff does not explain who these individuals are or what
8 specifically they promised her. Because she does not allege sufficient facts to conclude
9 that there was a clear promise, that the promisor would reasonably have expected it to
10 induce reliance, or that she did in fact rely on the promise, her promissory estoppel claim
11 must be dismissed.

12 Second, Plaintiff brings a quiet title claim. “In a quiet title action, the burden of
13 proof rests with the plaintiff to prove good title in himself. Additionally, an action to quiet
14 title requires a plaintiff to allege that she has paid any debt owed on the property.”
15 *Wensley v. First Nat. Bank of Nevada*, 874 F. Supp. 2d 957, 966 (2012) (internal
16 citations and quotations omitted). Not only has Plaintiff failed to demonstrate that she
17 has paid off any debts owed on the property, she concedes in the Complaint that she fell
18 behind on her mortgage payments. (Dkt. no. 1-1 at 2.) Accordingly, the quiet title claim
19 must fail.

20 Finally, Plaintiff brings an injunctive relief claim. Injunctive relief is a remedy
21 dependent on a viable cause of action, not a cause of action itself. To qualify for a
22 preliminary injunction, a plaintiff must demonstrate: (1) a likelihood of success on the
23 merits; (2) a likelihood of irreparable harm; (3) that the balance of hardships favors the
24 plaintiff; and (4) that the injunction is in the public interest. *Winter v. Nat. Res. Def.*
25 *Council, Inc.*, 555 U.S. 7, 20 (2008). Because Plaintiff has not alleged a viable cause of
26 action, Plaintiff fails the first prong of the test.

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V. CONCLUSION

IT IS THEREFORE ORDERED that Defendant Bank of America, N.A.'s Motion to Dismiss and to Expunge Lis Pendens (dkt. no. 5.) is GRANTED.

The Clerk of the Court shall close this case.

DATED THIS 24th day of July 2013.



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE