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10 Counsel for Defendants

11 **IN THE UNITED STATES BANKRUPTCY COURT**
12 **FOR THE DISTRICT OF ARIZONA**

13 In re:

14 ANDREW C. BAILEY,
15
16 Debtor

Chapter 11 Proceedings

Case No. 2:09-bk-06979-PHX-RTBP

17 ANDREW C. BAILEY,
18 Plaintiff

Adv. Proceeding No. 2:09-ap- 01728-RTBP

19 vs.

20 THE BANK OF NEW YORK MELLON, as
21 trustee of the CWALT, INC.
22 ALTERNATIVE LOAN TRUST 2007-HY4
23 MORTGAGE PASS-THROUGH
24 CERTIFICATES, SERIES 2007-HY4; BAC
25 HOME LOANS SERVICING, LP F/K/A
26 COUNTRYWIDE HOME LOANS,
27 SERVICING, LP; COUNTRYWIDE BANK,
28 FSB; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS INC; JOHN
DOES 1-10 inclusive,
Defendants.

**DEFENDANTS' MOTION TO DISMISS,
WITH PREJUDICE, PLAINTIFF'S
FOURTH AMENDED COMPLAINT TO
DETERMINE THE VALIDITY,
PRIORITY OR EXTENT OF A LIEN OR
OTHER INTEREST IN REAL PROPERTY
AND PETITION FOR INJUNCTIVE
RELIEF**

Hearing Date: Not yet set.

Hearing Time: Not yet set.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), as incorporated into this adversary proceeding by Federal Rule of Bankruptcy Procedure 7012, defendants The Bank of New York

1 Mellon (“BNY”), in its capacity as trustee of the CWALT, Inc. Alternative Loan Trust 2007-
2 HY4 Mortgage Pass-Through Certificates, Series 2007-HY4; BAC Home Loans Servicing, LP,
3 formerly known as Countrywide Home Loans Servicing, LP (“BAC”); **Countrywide Bank,**
4 **FSB** (“CB”) and Mortgage Electronic Registration Systems Inc. (“MERS”) (collectively,
5 “Defendants”) hereby move to dismiss, with prejudice, the Fourth Amended Complaint (“Fourth
6 Complaint”) filed by the plaintiff, Chapter 11 debtor Andrew C. Bailey (“Plaintiff”), for failure
7 to state a claim upon which relief can be granted. This Motion is supported by the
8 accompanying Memorandum of Points and Authorities and the Court’s entire record in this
9 adversary proceeding.

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. INTRODUCTION.**

12 Plaintiff continues to drain this Court’s and Defendants’ valuable time and resources. On
13 July 30, 2010, this Court entered its Memorandum Decision (“Memorandum Decision”)
14 dismissing the Plaintiff’s Third Amended Complaint without prejudice. The Memorandum
15 Decision meticulously establishes Defendants’ rights to enforce the underlying loan obligations
16 and to foreclose on the real property securing same, but allowed the Plaintiff with one final
17 opportunity to amend his complaint to properly plead allegations relating specifically to the
18 narrow issue of federal borrower protection laws.

19 The Fourth Complaint, however, like the prior complaints filed in this adversary
20 proceeding, fails to state a cognizable claim for relief. Plaintiff has been urged by the Court to
21 retain legal counsel, but has brazenly continued to represent himself in pro per. Accordingly,
22 and like the several complaints filed by the Plaintiff in this adversary proceeding, the Fourth
23 Complaint cannot survive dismissal as a matter of law. The Fourth Complaint contains
24 meandering allegations and seeks nine (9) separate requests for relief (including injunctive relief)
25 without asserting a single cause of action. The relief sought in the Fourth Complaint (including
26 injunctive relief) relates specifically to issues that this Court has already decided, namely the
27 Defendants’ entitlement to enforce Plaintiff’s loan obligations and default remedies, which
28

1 therefore cannot be attacked anew. Most strikingly, the Fourth Complaint does not seek any
2 relief relating to federal borrower protection laws.

3 The Plaintiff has been given ample opportunities to properly plead his case. The Court
4 provided Plaintiff one final chance, which Plaintiff has squandered. The Fourth Complaint fails
5 to satisfy the minimal pleading standards, and dismissal with prejudice is imperative.

6 **II. FACTUAL AND PROCEDURAL BACKGROUND.**

7 Because a motion to dismiss is directed solely to the facts asserted in the Fourth
8 Complaint, Defendants recite only facts alleged by the Plaintiff in the Fourth Complaint¹ and
9 matters of record in this adversary proceeding.

10 1. The Plaintiff is the debtor in bankruptcy under proceedings that commenced on or
11 about April 8, 2009 as involuntary Chapter 7 proceedings converted by order dated May 28,
12 2009 to Chapter 11 proceedings. [Complaint, ¶¶ 13-14]

13 2. Plaintiff executed a Promissory Note on or about March 29, 2007 (“Note”),
14 secured by a Deed of Trust (“Deed of Trust”) on the real property located at 2560 N. Page
15 Springs Road, Cornville, Arizona (“Property”). [Complaint, ¶¶ 16-18]

16 3. The Court entered the Memorandum Decision on July 30, 2010 at Docket Entry
17 #48, which included findings of fact and conclusions of law pursuant to Federal Rule of
18 Bankruptcy Procedure 7052. [Memorandum Decision, at 2 lines 18-19]

19 4. The Court acknowledges the validity of Defendants’ collective rights in and to the
20 Note and the Deed of Trust, including enforcement of the remedies set forth therein.
21 [Memorandum Decision, at 2-5]

22 5. The Court afforded “the Plaintiff with a final opportunity to file an amended
23 complaint” to determine whether there has been a violation of the Plaintiff’s rights under the Fair
24 Debt Collection Practices Act, 15 U.S.C/§1692; the Federal Truth-in-Lending Act, 15 U.S.C.

25
26 ¹ The Defendants dispute facts asserted in the Fourth Complaint, but for purposes of this Motion
27 only, Defendants assume the truth of any properly pleaded factual allegations (but not conclusory
28 allegations, conclusions of law disguised as allegations, or allegations of fact contradicted by
facts of which the Court may take judicial notice).

1 §§1601-1665; and/or the Real Estate Settlement Procedures Act, 12 U.S.C. §2605.
2 [Memorandum Decision, at 7-8]

3 6. On August 20, 2010, Plaintiff filed the Fourth Complaint, seeking nine (9) counts
4 of relief including an injunction preventing Defendants from exercising their rights to non-
5 judicial foreclosure of the Property “unless and until such time that the Defendant can establish
6 to this Court that they are qualified to act and exercise the powers and remedies of the Trustee
7 and Beneficiary pursuant to A.R.S. §33-801 et seq.” [Complaint, at 17-19]

8 7. The Fourth Complaint asserts no causes of action² and seeks no relief premised on
9 violations of federal borrower protection laws.

10 **III. THE APPLICABLE LEGAL STANDARD.**

11 A complaint should be dismissed under Rule 12(b)(6) if it fails to state a “plausible claim
12 for relief.” *See Aschcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009) (quotations and
13 citation omitted). This plausibility standard tests the sufficiency of the “short and plain
14 statement of the claim showing that the pleader is entitled to relief” required under Federal Rule
15 of Civil Procedure 8 (“Rule 8”). *See Fed. R. Civ. P. 8(a)(2); Fed. R. Bankr. P. 7008.*

16 Two principles underlie the minimal pleading requirements. Rule 8 “demands more than
17 an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 129 S. Ct. at 1949
18 (citation omitted). “Threadbare recitals of the elements of a cause of action, supported by mere
19 conclusory statements, do not suffice” and need not be accepted as true. *Id.* at 1949-50. After
20 the Court eliminates the conclusory allegations, the remaining allegations of the complaint must
21 state a facially plausible claim for relief. *Id.* at 1950.

22 The Court is not “required to accept as true conclusory allegations which are contradicted
23 by documents referred to in the complaint.” *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293,
24 1295-96 (9th Cir. 1998). Rather, the Court may also consider matters subject to judicial notice in
25 connection with deciding a motion to dismiss. *Pesci v. IRS*, 67 F.Supp.2d 1189, 1191-92. A
26

27 ² To the extent Plaintiff’s request for injunctive relief constitutes a “cause of action,” no other
28 cause of action is asserted in the Fourth Complaint.

1 court may take judicial notice of facts “capable of accurate and ready determination by resort to
2 sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Judicial notice
3 is mandatory “if requested by a party and [the Court is] supplied with the necessary
4 information.” Fed. R. Evid. 201(c). Matters of public record are properly subject to judicial
5 notice. *Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001) (district court may
6 properly take judicial notice of undisputed matters of public record). Court records, whether
7 from the presiding court or from other courts, are also appropriate documents for judicial notice.
8 *United States v. Author Servs., Inc.*, 804 F.2d 1520, 1523 (9th Cir. 1986) (“It is well established
9 that a court may take judicial notice of its own records.”), as amended, 811 F.2d 1264 (9th Cir.
10 1987).

11 **IV. ARGUMENT.**

12 The Fourth Complaint fails to meet the threshold pleading requirements sufficient to
13 defeat dismissal, and under the circumstances, dismissal with prejudice is justified.

14 **A. Failure To Assert Any Causes Of Action.**

15 The Plaintiff has pled no causes of action in the Fourth Complaint, so there is no basis in
16 law for the relief requested. Accordingly, the Complaint fails to state any claim for which relief
17 can be granted and dismissal is appropriate.

18 **B. Injunctive Relief Is Unjustified Based On Law Of The Case.**

19 To the extent the Plaintiff’s “Petition For Temporary Restraining Order And Preliminary
20 Injunction” constitutes a cause of action, Plaintiff cannot establish a right to the relief requested.
21 Plaintiff seeks injunctive relief “unless and until such time that the Defendant can establish to
22 this Court that they are qualified to act and exercise the powers and remedies of the Trustee and
23 Beneficiary pursuant to A.R.S. §33-801 et seq.” [Complaint, at 19] No claim for relief is
24 plausible.
25

26 In the Memorandum Decision, the Court made specific findings regarding the
27 Defendants’ rights in and to the loan obligation. The Court’s findings are law of the case, a
28 judicial invention designed to aid in the efficient operation of court affairs. *Herrington v. County*

1 of *Sonoma*, 12 F.3d 901, 904 (9th Cir.1993). “Under the doctrine, a court is generally precluded
2 from reconsidering an issue previously decided by the same court, or a higher court in the
3 identical case. For the doctrine to apply, the issue in question must have been decided explicitly
4 or by necessary implication in the previous disposition.” *Id.* Plaintiff has not challenged the
5 findings set forth in the Memorandum Decision, and the time for doing so through a motion for a
6 new trial or to alter or amend a judgment under Federal Rule of Bankruptcy Procedure 9023 or
7 by appeal under Federal Rule of Bankruptcy Procedure 8001 and 8002 has expired. *See* Fed. R.
8 Bankr. P. 9023 (incorporating Federal Rule of Civil Procedure 59, which provides for a fourteen-
9 day period for filing such motion); Fed. R. Bankr. P. 8001, 8002 (setting forth the process for
10 appealing a final judgment or order, including a fourteen-day period within which to file the
11 notice of appeal).

12 Plaintiff cannot use the Fourth Complaint to challenge the specific findings of this Court.
13 Law of the case establishes that Defendants are entitled to enforce the loan obligation, including
14 the right to foreclose as set forth in the Deed of Trust. Plaintiff has failed to set forth a plausible
15 claim for injunctive relief, and denial of the Plaintiff’s request for injunctive relief is justified.

16 **C. Dismissal With Prejudice Is Justified.**

17 The Plaintiff has been afforded with the chance to amend his complaint several times to
18 satisfy the lenient standards for withstanding a motion to dismiss, and has even been guided by
19 the Memorandum Decision as to what properly pled claims may survive to be decided on the
20 merits. Yet once again, the Plaintiff has failed to properly plead.

21 Plaintiff has demonstrated, time and time again, his inability to articulate any cognizable
22 cause of action against Defendants, and Plaintiff has either refused, neglected, or been unable to
23 retain legal counsel. Everyone involved is suffering – Plaintiff cannot proceed, the Court and its
24 staff is burdened with dismissal proceedings, and Defendants remain embroiled in defending
25 against severely flawed and generally incomprehensible complaints. Plaintiff should not, and
26 cannot, be allowed another bite at what is now an apple core.

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1 Each time Plaintiff has filed an amended complaint, Defendants have successfully
2 obtained dismissal, while incurring significant expense. This “final opportunity” is no different,
3 as Plaintiff has failed, again, to properly plead and Defendants, again, incur significant expense
4 seeking dismissal of the Fourth Complaint.

5 The circumstances here provide ample justification for dismissing with prejudice. The
6 Plaintiff’s Chapter 11 case does not appear destined for any realistic reorganization or payout to
7 creditors, and even if creditors were paid, Defendants are hamstrung by the state’s antideficiency
8 laws and are not likely to recover any of the legal fees incurred in connection with this adversary
9 proceeding. Additionally, Plaintiff was given a final chance to plead specific causes of action
10 based in federal borrower protection law violations, but instead used the opportunity to file
11 another incoherent and legally deficient complaint lacking any specific grounds for relief.
12 Unless dismissal is with prejudice, Plaintiff will continue to amend without the proper legal
13 guidance, which will cause Defendants to incur additional legal expenses which cannot be
14 recovered under any circumstances. Accordingly, allowing Plaintiff even one more opportunity
15 to amend in this Court or the ability to seek relief anew in another forum is unfairly harmful to
16 Defendants.

17 Under the circumstances, dismissal of the Fourth Complaint and of this adversary
18 proceeding with prejudice is justified to prevent Plaintiff from seeking any relief relating to the
19 Deed Of Trust, the Note, or any matter relating thereto including but not limited to alleged
20 violations of federal borrower protection laws.

21 **V. RELIEF REQUESTED.**

22 WHEREFORE, Defendants request that the Court enter an order:

- 23 a. dismissing this adversary proceeding in its entirety pursuant to Federal
24 Rule of Civil Procedure 12(b)(6), **with prejudice**; and
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1 b. granting such further relief as the Court deems just and proper under the
2 circumstances.

3 RESPECTFULLY SUBMITTED this 13th day of September, 2010.

4 **BRYAN CAVE LLP**

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6 By: /s/ KSH, 024155

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8 Kyle S. Hirsch
9 Two North Central Avenue, Suite 2200
10 Phoenix, Arizona 85004
11 Attorneys for Defendants

12 COPY of the foregoing served via **email**
13 this 13th day of September, 2010, upon:

14 Andrew C. Bailey
15 2500 N. Page Springs Rd.
16 Cornville, AZ 86325
17 Email: andrew@cameronbaxter.net
18 Debtor in Pro Per

19 /s/ Donna McGinnis
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