

1 Robert J. Miller (#013334)
2 Kyle S. Hirsch (#024155)
3 BRYAN CAVE LLP
4 Two N. Central Avenue, 22nd Floor
5 Phoenix, Arizona 85004-4406
6 Telephone: (602) 364-7000
7 Telecopier: (602) 364-7070
8 Internet: rjmiller@bryancave.com
9 kyle.hirsch@bryancave.com

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
19 Plaintiff

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

20 vs.

21 THE BANK OF NEW YORK MELLON,
22 f/k/a THE BANK OF NEW YORK; CWALT
23 INC. ALTERNATIVE LOAN TRUST; BAC
24 HOME LOANS SERVICING LP, f/k/a
25 COUNTRYWIDE HOMES LOANS;
26 COUNTRYWIDE HOME LOANS; THE
27 MORTGAGE ELECTRONIC
28 REGISTRATION SERVICE,

**DEFENDANTS' MOTION TO DISMISS
OR, WITH RESPECT TO CERTAIN
CAUSES OF ACTION AND RELIEF
SOUGHT, FOR A MORE DEFINITE
STATEMENT**

Defendants.

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and (e), as incorporated into
this adversary proceeding by Federal Rule of Bankruptcy Procedure 7012, defendants

1 BAC Home Loans Servicing, LP (“BAC”); The Bank of New York Mellon (“BONY”),
2 in its capacity as trustee of the CWALT, Inc. Alternative Loan Trust 2007-HY4
3 Mortgage Pass-Through Certificates, Series 2007-HY4; Countrywide Home Loans
4 Servicing, LP (erroneously named as Countrywide Home Loans) (“CHL”), and
5 Mortgage Electronic Registration Service (erroneously named as The Mortgage
6 Electronic Registration Service) (“MERS”) (collectively, “Defendants”) hereby move to
7 dismiss this action commenced by the plaintiff, Chapter 11 debtor Andrew C. Bailey
8 (“Plaintiff”) or, in the alternative, to order Plaintiff to provide a more definite statement.
9 This Motion is supported by the accompanying Memorandum of Points and Authorities.

10 MEMORANDUM OF POINTS AND AUTHORITIES

11 Introduction

12 The plaintiff, chapter 11 debtor Andrew C. Bailey (“Plaintiff”), has defaulted on
13 his obligations under an adjustable rate loan made around March 2007 in the original
14 principal amount of \$425,000. After Defendants sought permission from the Court to
15 proceed with foreclosing on the property securing Plaintiff’s obligations under the loan,
16 Plaintiff (who is appearing in *pro se*) commenced this adversary proceeding. However,
17 the Plaintiff’s amended complaint fails to allege sufficient facts or valid causes of action
18 upon which relief can be granted. To the extent Plaintiff has plead sufficient facts to
19 warrant relief of some kind, Defendant seeks an order requiring Plaintiff to provide a
20 more definite statement of the precise cause(s) of action asserted and relief requested to
21 enable Defendants to appropriately defend.

22 I. FACTUAL AND PROCEDURAL BACKGROUND.

23 Because a motion to dismiss is directed solely to the facts asserted in the
24 Complaint, Defendants recite only facts alleged by the Plaintiff in the Complaint.¹

25 _____
26 ¹ The Defendants dispute facts asserted in the Plaintiff’s Amended Complaint
27 (“Complaint”), but for purposes of this Motion only, Defendants assume the truth of any
28 properly pleaded factual allegations (but not conclusory allegations or conclusions of law
disguised as allegations).

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

4 Plaintiff entered into that certain transaction described by Plaintiff as a “mortgage
5 loan transaction,” consisting of, among other things, an Interest Only ADJUSTABLE
6 RATE NOTE in the original principal amount of \$425,000 dated March 27, 2009
7 executed by the Plaintiff (“Note”) and a DEED OF TRUST securing the performance and
8 payment obligations of Plaintiff under the Note (“Deed of Trust”). [Complaint, ¶ 17 &
9 Exhibit A²]

10 On or about September 21, 2009, Plaintiff alleges that he served on certain of the
11 Defendants or their counsel a Qualified Written Request under federal law, to which
12 Defendants have not responded. [Complaint, ¶ 19]

13 Plaintiff apparently challenges the validity of, and the Defendants’ right to enforce
14 rights under, the Note and the Deed of Trust. [Complaint, ¶¶ 22-30]

15 By and through this adversary proceeding, Plaintiff seeks the following:

- 16 1. “an evidentiary hearing on the merits;”
- 17 2. “discovery and enforcement in obtaining all relevant information;”
- 18 3. “enforcement of the disclosure requirements and default clauses of
19 the Real Estate Settlement Procedures Act and the Fair Debt
20 Collection Practices Act;”
- 21 4. “the production of documents;”
- 22 5. “the opportunity to bring an expert witness or witnesses before the
23 court;”
- 24 6. “declaratory judgment relating to the foregoing;”
- 25 7. “a temporary restraining order [‘enjoining Defendants from taking
26 any further foreclosure or other action before the resolution of the
27 foregoing’];” and
- 28 8. “such other and further relief as may be just and proper.”

[Complaint, at 10]

² In considering a motion to dismiss, the Court may consider documents presented as part
of the complaint. Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001).

1 **II. THE APPLICABLE LEGAL STANDARD.**

2 **A. Standard For Dismissal.**

3 A complaint should be dismissed under Rule 12(b)(6) if it fails to state a
4 “plausible claim for relief.” *See Aschcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949
5 (2009) (quotations and citation omitted). This plausibility standard tests the sufficiency
6 of the “short and plain statement of the claim showing that the pleader is entitled to
7 relief” required under Federal Rule of Civil Procedure 8 (“Rule 8”). *See Fed. R. Civ. P.*
8 *8(a)(2); Fed. R. Bankr. P. 7008.*³

9 Two principles underlie the minimal pleading requirements. Rule 8 “demands
10 more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 129
11 S. Ct. at 1949 (citation omitted). “Threadbare recitals of the elements of a cause of
12 action, supported by mere conclusory statements, do not suffice” and need not be
13 accepted as true. *Id.* at 1949-50.

14 After the Court eliminates the conclusory allegations, the remaining allegations of
15 the complaint must state a facially plausible claim for relief. *Id.* at 1950.

16 **B. Standard For A More Definite Statement.**

17 When a pleading “is so vague or ambiguous that the party cannot reasonably
18 prepare a response,” a more definite statement of a pleading is warranted. *See Fed. R.*
19 *Civ. P. 12(e)* (incorporated herein by and through *Fed. R. Bankr. P. 7012(b)*).

20
21
22
23 ³ Under outdated standards, a complaint previously could withstand a motion to dismiss
24 under Rule 12(b)(6) unless it appeared “beyond doubt that the plaintiff can prove no set
25 of facts in support of his claim which would entitle him to relief.” *E.g., Pillsbury,*
26 *Madison & Sutro v. Lerner*, 31 F.3d 924, 928 (9th Cir. 1994) (citing *Conley v. Gibson*,
27 355 U.S. 41 (1957)). Recently, however, the Supreme Court announced that the “no set
28 of facts” test had “earned its retirement,” and adopted a revised standard for claims to
survive a motion to dismiss under Rule 12(b)(6). *Bell Atl. Corp. v. Twombly*, 550 U.S.
544, 562-63 (2007).

1 **III. ARGUMENT.**

2 **A. Certain Relief Sought By Plaintiff Is Unsupported By A Viable Cause**
3 **Of Action.**

4 Several forms of relief that Plaintiff seeks by and through this adversary
5 proceeding are unsupported by a claim authorizing such relief. Accordingly, such
6 requests for relief must be dismissed.

7 Plaintiff seeks “an evidentiary hearing” and “the opportunity to bring an expert
8 witness or witnesses before the court.” Such relief is redundant in the context of an
9 adversary proceeding, which contemplates that, to the extent a justiciable controversy
10 exists, the Court will conduct a trial. Defendants are entitled to request that the Court
11 dispose of this adversary proceeding in summary fashion, whether by a motion to dismiss
12 or for judgment on the pleadings as provided under Federal Rule of Bankruptcy
13 Procedure 7012 or a motion for summary judgment under Federal Rule of Bankruptcy
14 Procedure 7056. Authorizing the Plaintiff to proceed to an evidentiary hearing and to
15 present witnesses (expert or otherwise) simply because a request for such relief is set
16 forth in the Complaint is inconsistent with the applicable rules of civil procedure.

17 Plaintiff seeks “discovery and enforcement in obtaining information” and “the
18 production of documents.” Such request for relief is premature, given that the discovery
19 process in this adversary proceeding is in its infancy stages. Moreover, Federal Rule of
20 Bankruptcy Procedure 7037 specifically provides that a party may compel compliance
21 with discovery by motion. Accordingly, Plaintiff’s requests for relief in his Amended
22 Complaint seeking compliance with discovery obligations is unwarranted and ripe for
23 dismissal.

24 **B. Plaintiff Cannot Meet His Obligations For Issuance Of A Temporary**
25 **Injunction.**

26 A temporary restraining order is typically the precursor to a preliminary
27 injunction, which requires that the Plaintiff establish:
28

1 (1) a strong likelihood of success on the merits, (2) the possibility of
2 irreparable injury to plaintiff if preliminary relief is not granted, (3) a
3 balance of hardships favoring the plaintiff, and (4) advancement of the
4 public interest (in certain cases). Alternatively, a court may grant the
injunction if the plaintiff demonstrates *either* a combination of probable
success on the merits and the possibility of irreparable injury *or* that
serious questions are raised and the balance of hardship tips sharply in his
favor.

5 *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1093 (9th Cir. 2007) (quoting *Save*
6 *Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005)) (emphasis in
7 original). Plaintiff’s failure to sufficiently plead facts or causes of action justifying relief
8 in this adversary prevents the Court from appropriately considering any request for
9 injunctive relief. The allegations contained in the Complaint do not allow the Court to
10 assess whether Plaintiff is likely to succeed on the merits; whether he will suffer any
11 injury, let alone immediate, irreparable injury; what hardships are to be balanced; or
12 whether any matters of public interest are to be considered. Moreover, the Plaintiff’s
13 Complaint is technically deficient, in that Plaintiff has failed to present specific facts in
14 an affidavit of a verified complaint to clearly show that immediate and irreparable injury,
15 loss or damage will result as required under Federal Rule of Bankruptcy Procedure 7065.
16 Therefore, dismissal of Plaintiff’s request for injunctive relief is appropriate.

17 **C. Plaintiff Has Failed To Specify The Precise Declaratory Judgment**
18 **Sought.**

19 Plaintiff’s Complaint seeks “declaratory relief relating to the foregoing.” Plaintiff
20 is altogether unclear in his pleading what “the foregoing” refers to. The existing
21 allegations do not form a plausible claim for relief, thereby justifying dismissal.

22 To the extent the Court believes the Complaint does, in fact, contain allegations
23 sufficient to form a plausible claim for declaratory relief, Defendants hereby move for the
24 Court to order Plaintiff to provide a more definite statement to specify precisely what
25 declaratory judgment he is seeking. Otherwise, Defendants are unable to proffer a
26 defense based on Plaintiff’s vague request for “declaratory relief relating to the
27 foregoing.”
28

1
2 **IV. RELIEF REQUESTED.**

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

4 a. dismissing this adversary proceeding in its entirety pursuant to
5 Federal Rule of Civil Procedure 12(b)(6); or in the alternative,

6 b. dismissing all requests for relief other than Plaintiff's request for
7 declaratory judgment, and ordering the Plaintiff to provide a more definite statement
8 therefor; and

9 c. granting such further relief as the Court deems just and proper under
10 the circumstances.

11 RESPECTFULLY SUBMITTED this 22nd day of February, 2010.

12
13 **BRYAN CAVE LLP**

14
15 By: /s/ KSH #024155

16 Robert J. Miller

17 Kyle S. Hirsch

18 Two North Central Avenue, Suite 2200

19 Phoenix, Arizona 85004

20 Attorneys for Defendants

21 COPY of the foregoing served via **email**
22 this 22nd day of February, 2009, upon:

23 Andrew C. Bailey

24 2500 N. Page Springs Rd.

25 Cornville, AZ 86325

26 Email: andrew@cameronbaxter.net

27 Debtor in Pro Per

28 /s/ Corkey C. Beckstead