

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 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' REPLY IN SUPPORT OF
ITS 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: November 9, 2010
Hearing Time: 10:00 a.m.**

Defendants The Bank of New York Mellon ("BNY"), in its capacity as trustee of the
CWALT, Inc. Alternative Loan Trust 2007-HY4 Mortgage Pass-Through Certificates, Series

1 2007-HY4; BAC Home Loans Servicing, LP, formerly known as Countrywide Home Loans
2 Servicing, LP (“BAC”); Bank of America, N.A., as successor-in-interest by merger to
3 Countrywide Bank, FSB (“CB”)¹ and Mortgage Electronic Registration Systems Inc. (“MERS”)
4 (collectively, “Defendants”) submit this reply in support of their motion (“Motion”) to dismiss,
5 with prejudice, the Fourth Amended Complaint (“Fourth Complaint”) filed by the plaintiff,
6 Chapter 11 debtor Andrew C. Bailey (“Plaintiff”), for failure to state a claim upon which relief
7 can be granted.

8 With the exception of a single conclusory sentence, Plaintiff’s Opposition And Response
9 To Defendants’ Motion To Dismiss Plaintiff’s Fourth Amended Complaint (“Opposition”)
10 completely fails to address the standard for a motion to dismiss². The Fourth Complaint, like the
11 several prior versions of the Plaintiff’s complaint that the Court has consistently dismissed for
12 failing to state a claim upon which relief could be granted, is replete with allegations but fails to
13 state a plausible claim for relief. The Plaintiff cannot articulate a valid cause of action against
14 Defendants, warranting dismissal with prejudice.

15 **I. NO CAUSES OF ACTION HAVE BEEN ASSERTED.**

16 Dismissal is justified when the complaint fails to contain a “short and plain statement of
17 the claim showing that the pleader is entitled to relief.” *See* Fed. R. Civ. P. 8(a)(2); Fed. R.
18 Bankr. P. 7008. In short, the plaintiff must state a “plausible claim for relief.” *See Aschcroft v.*
19 *Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009) (quotations and citation omitted). Plaintiff has
20 failed to articulate any cause of action³ in the Fourth Complaint, such that Defendants cannot
21

22 _____
23 ¹ CB was mistakenly referred to in the Motion solely as “Countrywide Bank, FSB.”

24 ² “Plaintiff has adequately stated a number of cognizable claims, including the allegation that
25 Defendants failed to provide disclosures pursuant to the federal FDCPA.” *Opposition*, at 5 lines
26 22-24. Even this conclusory sentence confuses the concept of a claim and that of an allegation,
27 and reflects the Plaintiff’s inability to articulate a plausible claim for relief.

28 ³ To the extent Plaintiff’s request for injunctive relief constitutes a “cause of action,” that is the
only cause of action asserted in the Fourth Complaint. Defendants hereby reincorporate the
arguments asserted in the Motion in support of dismissal and/or denial of Plaintiff’s request for
injunctive relief.

1 reasonably ascertain the basis for the relief sought by Plaintiff. Accordingly, the Fourth
2 Complaint fails to satisfy the minimal pleading requirements established by law.

3 **II. DEFENDANTS ARE NOT OBLIGATED TO RESPOND TO ALLEGATIONS.**

4 Plaintiff's Opposition is primarily devoted to arguing that dismissal should be denied
5 because Defendants have failed to respond to the allegations in the Fourth Complaint. A motion
6 to dismiss is a valid responsive pleading, and suspends any obligation to respond to the factual
7 allegations in a complaint. *See* Fed. R. Bankr. P. 7012 (providing that a responsive pleading
8 shall be served within 14 days after notice of a court's denial of a motion to dismiss).⁴

9 **III. DISMISSAL WITH PREJUDICE IS WARRANTED.**

10 As set forth in the Motion, dismissal with prejudice is warranted. Plaintiff continues to
11 burden the Court with legally insufficient pleadings, and Defendants continue to needlessly incur
12 expenses seeking dismissal thereof. While a pro per plaintiff may be afforded some leniency, the
13 Court has given Plaintiff ample opportunities to satisfy the minimal threshold for surviving a
14 motion to dismiss.

15 Contrary to Plaintiff's accusation that Defendants put "words into the Court's mouth,"
16 *see* Opposition, at 5 para. 10, the Court authorized the filing of the Fourth Amended Complaint
17 as the Plaintiff's final opportunity to submit a legally sufficient complaint to assert claims under
18 the federal borrower protection laws. In the Discussion section of the Memorandum Decision,
19 the Court first acknowledges appreciation for "the frustration of Defendants, since the Plaintiff
20 has been given three opportunities to amend his complaint and present a cognizable claim to this
21 Court." Memorandum Decision, at 7. The Court admits that "[i]t is still unclear what type of
22 action the Plaintiff is asserting of the Defendants." *Id.* The Court notes that "Plaintiff is entitled
23 to certain information" pursuant to certain federal borrower protection laws, but that Defendants
24 may have defenses to such assertions. *Id.* at 7-8. The Discussion section of the Memorandum
25

26 _____
27 ⁴ Though not required to do so, Defendants deny any wrongdoing, including but not limited to
28 the allegations in the Fourth Complaint regarding presentation of false or fraudulent loan and
security documents to the Court.

1 Decision concludes: “However, rather than dismiss this action with prejudice, the Court will
2 provide the Plaintiff **with a final opportunity to file an amended complaint.**” *Id.*, at 8, lines 2-
3 4 (emphasis added).

4 Plaintiff has squandered his “final opportunity” by submitting a fatally flawed complaint
5 that fails to assert any cognizable claims, much less any claims under the federal borrower
6 protection laws. Plaintiff has further squandered his “final opportunity” by failing to retain
7 counsel, a strategy the Court strongly discouraged and which has consistently resulted in the
8 inability to assert legally cognizable claims against Defendants. Defendants’ legal fees continue
9 to mount with no reasonable prospect of recovering such fees. This Court cannot allow the legal
10 system to reward Plaintiff’s irresponsible pursuit of incomprehensible claims, and must dismiss
11 the Fourth Complaint with prejudice.

12 **IV. RELIEF REQUESTED.**

13 WHEREFORE, Defendants request that the Court enter an order granting the relief
14 requested in the Motion.

15 RESPECTFULLY SUBMITTED this 8th day of October, 2010.

16 **BRYAN CAVE LLP**

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18 By: /s/ KSH, 024155
19 Robert J. Miller
20 Kyle S. Hirsch
21 Two North Central Avenue, Suite 2200
22 Phoenix, Arizona 85004
23 Attorneys for Defendants
24
25
26
27
28

BRYAN CAVE LLP
TWO NORTH CENTRAL AVENUE, SUITE 2200
PHOENIX, ARIZONA 85004-4406
(602) 364-7000

1 COPY of the foregoing served via **email**
2 this 8th day of October, 2010, upon:

3 Andrew C. Bailey
4 2560 N. Page Springs Rd.
5 Cornville, AZ 86325
6 Email: andrew@cameronbaxter.net
7 Debtor in Pro Per

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/s/ Donna McGinnis
