

1 Douglas C. Erickson, No. 012130
 derickson@mmcec.com
 2 Jennifer A. Sparks, No. 017502
 jsparks@mmcec.com
 3 **MAYNARD CRONIN ERICKSON**
CURRAN & SPARKS, P.L.C.
 4 3200 North Central Avenue, Ste. 1800
 Phoenix, Arizona 85012
 5 (602) 279-8500

6 Attorneys for Defendant EMC Mortgage Corporation

7 **UNITED STATES DISTRICT COURT**
 8 **FOR THE DISTRICT OF ARIZONA**

9 Les Grennell and Robin Grennell, a married
10 couple,

No. 09-02148-PHX-MHB

11 Plaintiff,

MOTION TO DISMISS

12 v.

13 EMC Mortgage Corporation; Pulte Mortgage
 LLC; John Does 1-1000; Jane Does 1-1000;
 14 ABC Corporations I-XX; and XYZ
 Partnerships I-XX,

15 Defendants.

16 Defendant EMC Mortgage Corporation ("EMC") respectfully moves this Court to
 17 dismiss the Complaint, pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, because
 18 the Complaint fails to state any claim upon which relief may be granted. This motion is
 19 supported by the following memorandum of points and authorities, and the Court's record,
 20 which are incorporated herein.

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 Plaintiffs' claims stem from a loan they took out in December 2006 from Pulte
 23 Mortgage, LLC ("Pulte"). See Complaint, ¶ 16. That loan¹ was secured by one of two deeds
 24 of trust, copies of which are attached hereto as Exhibits A and B. There is no allegation that
 25

MAYNARD CRONIN ERICKSON CURRAN & SPARKS, P.L.C.
 ATTORNEYS AT LAW
 3200 NORTH CENTRAL AVENUE • SUITE 1800 • PHOENIX, ARIZONA 85012
 TELEPHONE 602.279.8500 • FACSIMILE 602.263.8185

1 EMC took part in the loan's origination. Even if it had, the statutes of limitations on the
2 majority of Plaintiffs' claims have run, and those claims alleging fraud lack specificity to state
3 a cause of action under federal law.

4 Counts Two and Four are based on federal statutes commonly referred to as RESPA,
5 TILA, and FDCPA. Count One, Three, and Seven are based on theories (like "show me the
6 note") that have been resoundingly rejected. Counts Five, Six, Nine, and Ten are based largely
7 on defective allegations of fraud. Count Eight erroneously asserts violation of non-existent
8 fiduciary duties. As explained below, all claims should be dismissed.

9 **I. The Motion to Dismiss Standard.**

10 Assuming every fact stated in the Complaint to be true for purposes of this Motion to
11 Dismiss, Plaintiffs nevertheless fail to state a claim upon which relief may be granted. The
12 pertinent rule provides:

13 Every defense to a claim for relief in any pleading must be
14 asserted in the responsive pleading if one is required. But a party
may assert the following defenses by motion:

- 15 (1) lack of subject-matter jurisdiction;
16 (2) lack of personal jurisdiction;
17 (3) improper venue;
18 (4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.

19 Rule 12(b), Federal Rules of Civil Procedure. The focus of this motion is Rule 12(b)(6).

20 As the Court held in *Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167
L. Ed. 2d 929, the pleading standard Rule 8 announces does not
21 require "detailed factual allegations," but it demands more than an
unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.*,
22 at 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (citing *Papasan v.*
Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209
23 (1986)). A pleading that offers "labels and conclusions" or "a
formulaic recitation of the elements of a cause of action will not
24 do." 550 U.S. at 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929. Nor
25 does a complaint suffice if it tenders "naked assertion[s]" devoid
of "further factual enhancement." *Id.*, at 557, 127 S. Ct. 1955,
167 L. Ed. 2d 929.

26

1 To survive a motion to dismiss, a complaint must contain
2 sufficient factual matter, accepted as true, to "state a claim to relief
3 that is plausible on its face." *Id.*, at 570, 127 S. Ct. 1955, 167 L.
4 Ed. 2d 929. *A claim has facial plausibility when the plaintiff*
5 *pleads factual content that allows the court to draw the*
6 *reasonable inference that the defendant is liable for the*
7 *misconduct alleged.* *Id.*, at 556, 127 S. Ct. 1955, 167 L. Ed. 2d
8 929. The plausibility standard is not akin to a "probability
9 requirement," but it asks for more than a sheer possibility that a
10 defendant has acted unlawfully. *Ibid.* Where a complaint pleads
11 facts that are "merely consistent with" a defendant's liability, it
12 "stops short of the line between possibility and plausibility of
13 'entitlement to relief.'" *Id.*, at 557, 127 S. Ct. 1955, 167 L. Ed. 2d
14 929 (brackets omitted).

* * *

15 Rule 8 marks a notable and generous departure from the hyper-
16 technical, code-pleading regime of a prior era, but it does not
17 unlock the doors of discovery for a plaintiff armed with nothing
18 more than conclusions. Second, only a complaint that states a
19 plausible claim for relief survives a motion to dismiss.

20 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50, ____ U.S. ____ (2009)(emphasis added).

21 In *Iqbal*, the United States Supreme Court further reiterated:

22 [T]he tenet that a court must accept as true all of the allegations
23 contained in a complaint is inapplicable to legal conclusions.
24 Threadbare recitals of the elements of a cause of action, supported
25 by mere conclusory statements, do not suffice. *Id.*, at 555, 127 S.
26 Ct. 1955, 167 L. Ed. 2d 929 (Although for the purposes of a
motion to dismiss we must take all of the factual allegations in the
complaint as true, we "are not bound to accept as true a legal
conclusion couched as a factual allegation" (internal quotation
marks omitted)).

Id. With these standards in mind, the Complaint should be dismissed.

II. No Claims Against EMC.

There is no allegation that EMC was involved in the origination or closing of the loans at issue. That defect (or fact) requires dismissal of many of Plaintiffs' claims. Each of Counts Two, Five, Eight, Nine, and Ten has its alleged origin at the origination or closing of the loan. Therefore, no cause of action is stated as to EMC. To the extent other theories are based on

1 representations, disclosures (or non-disclosures), and other events at the time the loan was
2 made, they, too, must be dismissed as against EMC.

3 **III. Rights of Holders of Notes Not Limited (Count One).**

4 Plaintiffs attempt to plead a cause of action based on the transfers and assignments that
5 may have occurred with respect to their mortgage, and documents recorded (or not) related
6 thereto. They complain that EMC has "not satisfied the burden of demonstrating standing"
7 (Complaint, ¶ 25) or "proven a conveyance recorded before foreclosure proceedings began."
8 Complaint, ¶ 26. This so-called "show me the note" argument is insufficient to state a cause
9 of action.

10 Counts One, Two and Three all revolve around Plaintiff's
11 allegation that because Defendants have not produced the original
12 note securing the mortgage, they have no valid ownership interest
13 and therefore may not foreclose on the property. Dkt. # 15, PP
14 21-34. This argument misapprehends the law. The UCC
15 pertaining to negotiable instruments, as codified in Arizona at title
16 47, chapter 3, provides that "persons entitled to enforce" an
17 instrument [include] the holder of the instrument, a nonholder in
18 possession of the instrument who has the rights of a holder or a
19 person not in possession of the instrument who is entitled to
20 enforce the instrument pursuant to §47-3309." A.R.S. § 47-3301.

21 Although no reported cases address the applicability of A.R.S. §
22 47-3301 in a factually analogous situation, *courts have routinely*
23 *held that Plaintiff's "show me the note" argument lacks merit.*
24 *See Ernestberg v. Mortgage Investors Group*, No. 2:08-cv-01304-
25 RCJ-RJJ, 2009 U.S. Dist. LEXIS 4560, 2009 WL 160241, at *5
26 (D. Nev. Jan. 22, 2009); *Putkkuri v. Recontrust Co.*, No.
08cv1919 WQH (AJB), 2009 U.S. Dist. LEXIS 32, 2009 WL
32567, at *2 (S.D. Cal. Jan. 5, 2009); *San Diego Home Solutions,*
Inc. v. Recontrust Co., No. 08cv1970 L(AJB), 2008 U.S. Dist.
LEXIS 99684, 2008 WL 5209972, at *2 (S.D. Cal. Dec. 10,
2008); *Wayne v. HomeEq Servicing, Inc.*, No. 2:08-cv-00781-RCJ-
LRL, 2008 U.S. Dist. LEXIS 83324, 2008 WL 4642595, at *3 (D.
Nev. Oct. 16, 2008). Plaintiff presents no contradictory authority.
The Nevada cases are particularly instructive because Nevada's
UCC enforcement statute is identical to Arizona's. See NEV.
REV. STAT. § 104.3301. Further, *Arizona's judicial foreclosure*
statutes, like Nevada's, do not require presentation of the
original note before commencing foreclosure proceedings.

1 *Mansour v. Cal-Western Reconveyance Corp.*, 618 F. Supp. 2d 1178, 1181 (D. Ariz. 2009)
2 (emphasis added).

3 Plaintiffs implicitly acknowledge that they are in default on their mortgage obligations.
4 Under such circumstances, the statutory trustee's sale process does not require the trustee to
5 produce the documents Plaintiffs identify.

6 By virtue of his position, a power of sale is conferred upon the
7 trustee of a trust deed under which the trust property may be sold,
8 in the manner provided in this chapter, after a breach or default in
9 performance of the contract or contracts, for which the trust
10 property is conveyed as security, or a breach or default of the trust
11 deed. At the option of the beneficiary, a trust deed may be
12 foreclosed in the manner provided by law for the foreclosure of
13 mortgages on real property in which event chapter 6 of this title
14 governs the proceedings. The beneficiary or trustee shall
15 constitute the proper and complete party plaintiff in any action to
16 foreclose a deed of trust. The power of sale may be exercised by
17 the trustee without express provision therefor in the trust deed.

18 A.R.S. § 33-807(A).

19 Plaintiffs also mention A.R.S. § 33-420(A), which provides:

20 A person purporting to claim an interest in, or a lien or
21 encumbrance against, real property, who causes a document
22 asserting such claim to be recorded in the office of the county
23 recorder, knowing or having reason to know that the document is
24 forged, groundless, contains a material misstatement or false claim
25 or is otherwise invalid is liable to the owner or beneficial title
26 holder of the real property for the sum of not less than five
thousand dollars, or for treble the actual damages caused by the
recording, whichever is greater, and reasonable attorney fees and
costs of the action.

27 Plaintiffs do not identify any recorded document that is allegedly forged or groundless, that
28 contains a material misstatement or false claim, or that is otherwise invalid.² Thus, the statute
29 provides no basis for a cause of action.

30 ² The Complaint is silent as to the basis for asserting that an unrecorded "assignment" renders
31 the original deed of trust, for example, invalid.

1 **IV. Truth-in-lending Act (TILA) Claims Are Barred (Count Two).**

2 Plaintiffs allege that their loan was consummated on or about December 6, 2006.³
3 Complaint, ¶ 16. There are no factual allegations, which if proven true, could establish any
4 defendant's liability to Plaintiff under TILA. *See, e.g., Putkkuri v. Reconstruct Co.*, 2009 WL
5 32567, at * 3 (S.D. Cal. Jan. 2009) (dismissing plaintiff's claims under TILA, HOEPA,
6 Regulation Z and the FTC where plaintiff failed to allege that defendants engaged in deceptive
7 practices or that defendants were involved in the origination of plaintiff's loan). It is clear
8 from the allegations that EMC was not involved in originating Plaintiffs' loan. Therefore, it
9 could not be liable for any alleged TILA violations.

10 Additionally, the statute of limitations on such claims has run. "Any action under this
11 section may be brought in any United States district court, or in any other court of competent
12 jurisdiction, *within one year* from the date of the occurrence of the violation." 15 U.S.C. §
13 1640(e)(emphasis added). Thus, TILA claims are subject to a one year statute of limitations.
14 *See, e.g., Monaco v. Bear Stearns Residential Mortg. Corp.*, 554 F. Supp. 2d 1034, 1039 (C.D.
15 Cal. 2008) (dismissing complaint without leave to amend; TILA action must be brought within
16 one year from alleged violation; limitations period runs from date of consummation of
17 transaction). *See also Meyer v. Ameriquest Mortgage Co.*, 342 F.3d 899, 902 (9th Cir.
18 2003)(affirming TILA damages claim as time-barred; date of violation is the date "the loan
19 documents were signed"). The loan transaction that Plaintiffs are complaining about is alleged
20 to have closed on December 6, 2006. Complaint, ¶ 16. Thus, any TILA claim against any of
21 these defendants is time-barred because it was not brought within one year after the close of
22 the transaction.

23
24
25
26 ³ The documents themselves are dated December 7, 2006.

1 **V. RESPA Claims Are Barred (Count Two).**

2 The first flaw in Plaintiffs' Real Estate Settlement Practices Act ("RESPA") claim as
3 to EMC is that EMC was not involved in the origination. The second problem is that the non-
4 disclosures Plaintiffs identify, for the most part, are not addressed by the statute. *Compare*
5 *Complaint*, ¶ 34 and 12 U.S.C. §§ 2601, *et seq.* The third defect is that the claims would be
6 time-barred.

7 RESPA provides a three-year statute of limitations for violations
8 of section 2605 and a one-year statute of limitations for violations
9 of section 2607 or 2608. Diessner obtained the loan to acquire the
10 subject property on March 26, 2004. The deed of trust was
11 recorded on April 4, 2004. Diessner commenced this action on
December 16, 2008, over four years later. Thus, any claim
Diessner may have alleged under RESPA is time barred.
Accordingly, the court will dismiss Diessner's RESPA claim with
prejudice.

12 *Diessner v. Mortgage Elec. Registration Sys.*, 618 F. Supp. 2d 1184, 1189 (D. Ariz. 2009)
13 (footnote omitted). Here, although they mention a "Qualified Written Request" (and the fact
14 that EMC responded to it) (*Complaint*, ¶¶ 18-19), Plaintiffs do not assert a violation of section
15 2605. Therefore, a one year statute of limitations applies, and any RESPA claims are barred.

16 **VI. Commercial Code and Real Estate Conveyance Statutes Do Not Create a Cause**
17 **of Action (Count Three).**

18 The statute Plaintiffs cite (*Complaint*, ¶ 36) was repealed in 1984. To the extent other
19 provisions of the Uniform Commercial Code could be argued to apply to real estate mortgages
20 and deeds of trust, such theories have no support in the law and have been generally rejected.
21 *See Mansour, supra* at 1181.

22 **VII. FDCPA Claims Are Speculative and Time-Barred (Count Four).**

23 Count Four of the *Complaint* alleges that EMC violated the Fair Debt Collection
24 Practices Act ("FDCPA"), 15 U.S.C. § 1692f and § 1692d(1), (5), and (6). Plaintiffs,
25 however, fail to allege that EMC is a "debt collector" within the provisions of the FDCPA.
26

1 In order to fall within the prohibitions of the FDCPA, a party must be a "debt collector,"
2 defined as follows:

3 (6) The term "debt collector" means any person who uses any
4 instrumentality of interstate commerce or the mails in any business
5 the principal purpose of which is the collection of any debts, or
6 who regularly collects or attempts to collect, directly or indirectly,
7 debts owed or due or asserted to be owed or due another.
8 Notwithstanding the exclusion provided by clause (F) of the last
9 sentence of this paragraph, the term includes any creditor who, in
10 the process of collecting his own debts, uses any name other than
11 his own which would indicate that a third person is collecting or
12 attempting to collect such debts. For the purpose of section
13 808(6) [15 USCS § 1692f(6)], such term also includes any person
14 who uses any instrumentality of interstate commerce or the mails
15 in any business the principal purpose of which is the enforcement
16 of security interests. The terms does not include –

11 (A) any officer or employee of a creditor while, in
12 the name of the creditor, collecting debts for such
13 creditor;

13 (B) any person while acting as a debt collector for
14 another person, both of whom are related by
15 common ownership or affiliated by corporate
16 control, if the person acting as a debt collector does
17 so only for persons to whom it is so related or
18 affiliated and if the principal business of such
19 person is not the collection of debts;

17 (C) any officer or employee of the United States or
18 any State to the extent that collecting or attempting
19 to collect any debt is in the performance of his
20 official duties;

19 (D) any person while servicing or attempting to
20 serve legal process on any other person in
21 connection with the judicial enforcement of any
22 debt;

22 (E) any nonprofit organization which, at the request
23 of consumers, performs bona fide consumer credit
24 counseling and assists consumers in the liquidation
25 of their debts by receiving payments from such
26 consumers and distributing such amounts to
creditors;

1 (F) any person collecting or attempting to collect
2 any debt owed or due or asserted to be owed or due
3 another to the extent such activity (i) is incidental to
4 a bona fide fiduciary obligation or a bona fide
5 escrow arrangement; (ii) concerns a debt which was
6 organized by such person; (iii) concerns a debt
7 which was not in default at the time it was obtained
8 by such person; or (iv) concerns a debt obtained by
9 such person as a secured party in a commercial
10 credit transaction involving the creditor.

11 15 U.S.C. § 1692a(6). In fact, a debt collector does *not* include a mortgage servicing company
12 or an assignee of a debt, as long as the debt was not in default at the time it was assigned.
13 *Perry v. Stewart Title*, 756 F.2d 1197, 1208 (5th Cir. 1985). Thus, any cause of action as to
14 EMC should be dismissed.

15 **VIII. Fraud and Related Claims Must Fail (Count Five -- and Six, Nine, and Ten).**

16 The Complaint generally and vaguely attempts to recite elements of a fraud claim. It
17 does not allege specific misrepresentations, specific speakers, specific intent or otherwise meet
18 the minimum pleading requirements for fraud. Fraud must be pled with particularity. Rule
19 9(b), Federal Rules of Civil Procedure. A claim for fraud, under Arizona law, requires the
20 following nine elements:

21 (1) A representation; (2) its falsity; (3) its materiality; (4) the
22 speaker's knowledge of its falsity or ignorance of its truth; (5) his
23 intent that it be acted upon by the [hearer] and in the manner
24 reasonably contemplated; (6) the hearer's ignorance of its falsity;
25 (7) his reliance on its truth; (8) the right to rely thereon; and (9)
26 his consequent and proximate injury.

27 *Nielson v. Flashberg*, 101 Ariz. 335, 338, 419 P.2d 514, 517 (1966). Under federal law, a
28 plaintiff "must state the time, place, and specific content of the false representations as well
29 as the identities of the parties to the misrepresentation." *Schreiber Distrib. Co. v. ServWell*
30 *Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). *See also Lancaster Community Hosp. v.*
31 *Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991) (averments of fraud must be
32 accompanied by the who, what, when, where, and how of the misconduct charged); *A.G.*
33 *Edwards & Sons, Inc. v. Smith*, 736 F. Supp. 1030, 1033 (D. Ariz. 1989) ("Mere conclusory

1 allegations of fraud will not suffice; the complaint must contain statements of the time, place,
2 and nature of the alleged fraudulent activities.”).

3 The elements of a fraud (as well as “misrepresentation” or “conspiracy”) claim are not
4 properly pled, and any such claims must be dismissed. See Complaint, ¶¶ 48-58.
5 (Additionally, in Arizona, there is no independent tort of “conspiracy.” See *Hansen v. Stoll*,
6 130 Ariz. 454, 460, 636 P.2d 1236, 1242 (Ct. App. 1981).)

7 **VIII. The Rico Allegations Fail to State Claims (Count Six).**

8 Count Six of the Complaint alleges violations of the federal and Arizona RICO statutes,
9 18 U.S.C. §§ 1961, *et seq.*, and A.R.S. §§ 13-2314, *et seq.* Except in conclusory and general
10 terms, Plaintiffs do not set forth the elements of a RICO claim. There are no specific acts, no
11 pattern of conduct, no multiple acts. Furthermore, this claim appears to rely primarily on fraud
12 as the underlying predicate acts, and Rule 9(b) requires that such claims be set forth with
13 particularity. The Complaint also asserts that “collect[ing] on the unsubstantiated debt is
14 extortion.” Complaint, ¶ 61. As explained, *supra*, the premise that the debt is
15 “unsubstantiated” is false and irrelevant.

16 Further, Plaintiffs appear to have failed to comply with the requirements for bringing
17 Arizona RICO claims. A.R.S. § 13-2314.04 provides:

18 H. A person who files an action under this section shall serve
19 notice and one copy of the pleading on the attorney general within
20 thirty days after the action is filed with the superior court. **This
requirement is jurisdictional.** The notice shall identify the
action, the person and the person’s attorney.

21 * * *

22 R. If any pleading, motion or other paper includes an averment of
23 fraud or coercion, it shall state these circumstances with
particularity with respect to each defendant.

24 S. In any civil action or proceeding under this section in which
25 the pleading, motion or other paper does not allege a crime of
violence as a racketeering act;

26

- 1 1. The term "racketeer" shall not be used in referring to any person.
- 2 2. The terms used to refer to acts or racketeering or a pattern of racketeering activity shall be "unlawful acts" or "a pattern of unlawful activity."

3
4 A.R.S. § 13-2314.04 (emphasis added). Upon information and belief, Plaintiffs failed to serve
5 a copy of the Complaint on the Attorney General -- a jurisdictional requirement. In addition,
6 and significantly, Plaintiffs have failed to state with particularity, throughout the Complaint,
7 the circumstances of fraud, coercion, or extortion with regard to each defendant. These
8 additional flaws require dismissal of Count Six.

9 **X. There Is No Viable Claim to Quiet Title (Count Seven).**

10 Count Seven of the Complaint is to quiet title. The amorphous assertion that
11 "Defendants make a claim adverse to Plaintiff [sic]" (Complaint, ¶ 66) does not provide
12 sufficient notice of the theories upon which the claim is based and provide EMC with an
13 opportunity to defend. To the extent the basis for quieting title is a theory otherwise asserted
14 in the Complaint (as it must be), it is meritless as explained throughout this memorandum.
15 Plaintiffs are apparently complaining that the property should not be foreclosed upon even
16 though they have failed to meet their obligations under the note and deed of trust. To the
17 extent any defendant asserts an interest adverse to Plaintiffs, for the reasons stated herein, that
18 interest is legitimate and cannot support a quiet title action.

19 **XI. There Is No Legal Basis for Breach of Fiduciary Duty (Count Eight).**

20 The vague assertions of breach of fiduciary duty (see Complaint, ¶¶ 69-74) also fail as
21 a matter of law. There is no confidential or fiduciary relationship between Plaintiff and any
22 defendant, especially EMC. In Arizona, the lender-borrower relationship, including a loan
23 servicer, is not fiduciary in nature. See, e.g., *McAlister v. Citibank*, 171 Ariz. 207, 212, 829
24 P.2d 1253, 1259 (1992) (citing *Valley Nat'l. Bank v. Elect. Dist. 4*, 90 Ariz. 306, 316, 367 P.2d
25 655, 662 (Ct. App. 1961); *Travelers Indemn. Co. v. State*, 140 Ariz. 194, 196, 680 P.2d 1255,
26 1257 (Ct. App. 1984)). See also *Urias v. PCS Health Sys.*, 211 Ariz. 81, 87-88, 118 P.3d 29,

1 35-36 (Ct. App. 2005) (holding that a debtor/creditor relationship is not a fiduciary
2 relationship).

3 Nor is a "trustee" under a deed of trust a fiduciary as to Plaintiffs.

4 A trustee under a deed of trust has neither the powers nor the
5 obligations of a strict trustee; rather, he serves as a kind of
6 common agent for the trustor and the beneficiary. (3 Witkin,
7 Summary of Cal. Law (9th ed. 1987) Security Transactions in Real
8 Property, § 7, p. 520; *Stephens, Partain & Cunningham v. Hollis*
9 (1987) 196 Cal.App.3d 948, 955 [242 Cal.Rptr. 251] (Hollis).)
10 His agency is a passive one, for the limited purpose of conducting
11 a sale in the event of the trustor's default or reconveying the
12 property upon satisfaction of the debt. (4 Miller & Starr, *op. cit.*
13 *supra*, § 9.3, p. 16; see *Fleisher v. Continental Auxiliary Co.*
14 (1963) 215 Cal.App.2d 136, 139 [30 Cal.Rptr. 137].) Often the
15 trustee is a title company, which is unaware of its selection as
16 trustee and has no knowledge of either the transaction or the
17 identity of the beneficiary. (4 Miller & Starr, *op. cit. supra*, § 9.3,
18 p. 15.) Consequently, ***"The use of the term 'trustee' in the deed
19 of trust is unfortunate and misleading. The 'trustee' of a deed
20 of trust is not a trustee at all in a technical or strict sense. . . . He
21 does not assume the obligations which are imposed on a trustee
22 by operation of law, and the statutes applicable to trustees of
23 express trusts do not apply to deeds of trust. The trustee of a
24 deed of trust does not possess the personal confidence for the
25 benefit of another required for a true trust relationship."*** (4 Miller
26 & Starr, *op. cit. supra*, § 9.3, at pp. 13-14, italics added; see also
Hollis, supra, 196 Cal.App.3d at pp. 955-956, holding that trustee
may acquire the property at a foreclosure sale for his own benefit.)
***A trustee therefore, while an agent for both the beneficiary and
the trustor, does not stand in a fiduciary relationship to either.***

18 *Hatch v. Collins*, 275 Cal. Rptr. 476, 480 (Cal. App. 1990)(emphasis added). Additionally,
19 even if it were alleged (and it is not), one party cannot unilaterally transform a business
20 relationship into a fiduciary relationship by reposing trust and confidence in another. See
21 *Flaherty v. Baybank Merrimack Valley, N.A.*, 808 F. Supp. 55, 64 (D. Mass. 1992).

22 Because there are no factual allegations in the Complaint, which if proven true, could
23 give rise to any fiduciary relationship between Plaintiffs and EMC, any breach of fiduciary
24 duty claim fails as a matter of law.
25
26

1 **XII. The Consumer Fraud Claim Is Barred (Count Nine).**

2 Count Nine alleges that Defendants violated the Arizona Consumer Fraud Act, A.R.S.
3 §§ 44-1521, *et seq.* The elements of a private cause of action for consumer fraud are “a false
4 promise or misrepresentation made in connection with the sale or advertisement of
5 merchandise and the hearer’s consequent and proximate injury.” *Parks v. Macro-Dynamics,*
6 *Inc.*, 121 Ariz. 517, 520, 591 P.2d 1005, 1008 (Ct. App. 1979). Plaintiffs fail to allege any
7 specific falsities with particularity. They do not allege that any specific defendant intentionally
8 made any false statement. Nor do they identify any “merchandise” at issue.

9 Even assuming a claim for relief was stated, the statute of limitations ran before suit was
10 filed.

11 A consumer fraud claim is created by statute. A.R.S. §§ 44-1521
12 *et seq.*; *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz.
13 573, 575-76, 521 P.2d 1119, 1121-22 (1974). As a liability
created by statute, a consumer fraud action must be initiated
within one year after the cause of action accrues.

14 *Alaface v. National Inv. Co.*, 181 Ariz. 586, 591, 892 P.2d 1375, 1380 (Ct. App. 1994). For
15 each of these reasons, Count Nine should be dismissed.

16 **XIII. Appraisal Fraud Cannot Be Asserted Against EMC (Count Ten).**

17 The allegations of Count Ten appear to be directed solely against Pulte. Since EMC
18 is not alleged to have participated in the origination of Plaintiffs’ mortgage, any claim based
19 on the impropriety or inaccuracy of the associated appraisal as to EMC should be dismissed.

20 **XIV. Conclusion**

21 Plaintiffs fail to sufficiently allege *any* wrongdoing, and even if they were able to
22 articulate wrongdoing, the claims are barred by statutes of limitations. Therefore, EMC
23 requests that this Court dismiss the Complaint. Because the claims are not remotely supported
24 by the facts or the law, EMC also requests an award of its fees and costs incurred herein.

25

26

