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2
3 **UNITED STATES BANKRUPTCY COURT**

4
5 **FOR THE DISTRICT OF ARIZONA**

6
7 **In re**)

8 **EMILY CARROLL**)

9 **Debtor.**)

10
11 _____)
12 **EMILY CARROLL**)

13 **Plaintiff,**)

14 **v.**)

15 **GMAC et. al.**)

16 **Defendants.**)

In Chapter 13 proceedings

Case No. 2:10-bk-17711-CGC

Adv. Case No. 2:10-ap-01982-CGC

**UNDER ADVISEMENT DECISION
REGARDING MOTION TO DISMISS
BY DEUTSCHE BANK TRUST
COMPANY AND GMAC MORTGAGE
FOR FAILURE TO STATE A CLAIM**

17
18 **I. Introduction**

19 In 2007, Plaintiff and her husband refinanced their home with Sierra Pacific Mortgage.
20 Thereafter, in July of 2010, Plaintiff and her husband divorced and Plaintiff received the home under
21 the terms of a dissolution decree. Shortly after the divorce, Plaintiff filed for bankruptcy and was
22 surprised to see that Deutsche Bank, not Sierra Pacific, filed a proof of claim asserting a deed of
23 trust on her home. After reviewing the proof of claim, the Plaintiff filed this adversary claiming that
24 Sierra Pacific, Deutsche Bank, and GMAC Mortgage violated provisions of the Truth in Lending
25 Act and Real Estate Settlement Procedures Act, and falsified documents included with Deutsche
26 Bank's proof of claim. Deutsche Bank and GMAC Mortgage filed this motion to dismiss the
27 adversary for failure to state a claim upon which relief may be granted.
28

1 a claim that Deutsche Bank’s proof of claim should be disallowed. On December 9, 2010,
2 Defendants responded by filing a motion to dismiss (Motion) Plaintiff’s complaint (Complaint)
3 under Fed. R. Civ.P. 12(b)(6)² for failure to state a claim upon which relief may be granted.

4 The Motion also seeks dismissal under Fed. R. Civ. P. 12(b)(4), citing Plaintiff’s improper
5 service of the summons and complaint on Defendants’ attorney, rather than on officers of the
6 companies as required by Fed. R. Bankr. P. 7004(b)(3) or (h). At the Court’s February 1, 2011
7 hearing, however, counsel for Defendants indicated that the parties would prefer to have the Court
8 rule on the merits of Defendants’ Motion rather than dismissing the Complaint based on deficiency
9 of service. As requested, the Court has considered the Motion on the merits and will dismiss all of
10 Plaintiff’s claims against Deutsche Bank and GMAC, without prejudice, and with leave to amend,
11 except that the Court will dismiss Plaintiff’s TILA claim for rescission under a 15 U.S.C. § 1635(f)
12 with prejudice.³

13 **III. Analysis**

14 Defendants allege that they are entitled to dismissal of the Complaint under Fed. R. of Civ.
15 P. 12(b)(6) because Plaintiff fails to state a claim upon which relief may be granted. A complaint
16 may be dismissed under Fed. R. Civ. P. 12(b)(6) if it fails to meet the pleading standards of Fed. R.
17 Civ. P. 8,⁴ as recently explained by the Supreme Court in *Ashcroft v. Iqbal*. 129 S.Ct. 1937 (2009).
18 Fed. R. Civ. P. 8(a)(2) requires that a complaint allege a “short and plain statement of the claim
19 showing that the pleader is entitled to relief.”

20 The Supreme Court, in *Iqbal*, explained that the Rule 8 pleading standard does not require
21 “detailed factual allegations, but requires more than an unadorned, the-defendant-unlawfully-
22 harmed-me accusation.” *Id.* at 1949. A bare allegation of legal liability is insufficient. *Id.* at 1950.
23 Likewise, a plaintiff must do more than allege that each element required to make out a claim is
24 satisfied. *Id.* at 1949. Instead, a plaintiff must allege factual matter that, if taken as true, is sufficient

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26 ² Fed. R. Bankr. P. 7012 makes Fed. R. Civ. P. 12 applicable in adversary proceedings.

27 ³ Sierra did not join in the Motion, and this Decision shall not be construed as dismissing any of Plaintiff’s claims
28 against Sierra.

⁴ Fed. R. Bankr. P. 7008 makes Fed. R. Civ. P. 8 applicable in adversary proceedings.

1 “to state a claim that is plausible on its face.” The plaintiff need not show that it is likely that a
2 defendant is liable, or even that it is probable; only that liability is plausible. *Id.* at 1949.

3 A plaintiff meets the pleading standards of Rule 8, if the complaint “contains sufficient
4 factual allegations, accepted as true, to state a claim to relief that is plausible on its face.” *Iqbal* 129
5 S. Ct. at 1949 (internal quotations omitted). However, even where dismissal is appropriate, a
6 “plaintiff should be given an opportunity to amend `where justice requires, there is no evidence of
7 bad faith, and the opposing party would not be unduly prejudiced.” *In re Jenkin*, 83 B.R. 733, 734
8 (B.A.P. 9th Cir. 1988). The Court will consider each of the Plaintiffs claims, or “counts,” in turn to
9 determine if they meet the Rule 8 pleading requirements under *Iqbal*.

10 A. *Violations of the Federal Truth in Lending Act (TILA)*

11 Count I of the Complaint alleges that Defendants failed to provide Plaintiff with the
12 disclosures required by 12 C.F.R. § 226.31, which include the annual percentage rate, regular
13 payment, and any balloon payment under a closed-end mortgage. Plaintiff also alleges that she did
14 not receive the notices required by 12 C.F.R. § 226.39 regarding transfers of the Note. For their part,
15 Defendants claim that Plaintiff’s TILA claims are time barred, and that in any event, Plaintiff has
16 not alleged facts sufficient to make her claims facially plausible.

17 1. TILA Rescission Claim

18 Any right to rescission the Plaintiff may have had under TILA has expired. The Ninth Circuit
19 has held that § 1635(f), providing a right to rescission under TILA, is a statute of repose, which
20 deprives the court of subject matter jurisdiction when a claim is brought under § 1635(f) outside the
21 three year limitation period. *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1164-65 (9th Cir.
22 2002). *See also Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998) (holding, under different
23 circumstances, that “section 1635(f) completely extinguishes the right of rescission at the end of the
24 3 year period.”). Here, the Note and DOT were entered into in March 2007⁵ and this action was not
25 commenced until November 2010. The Court has no jurisdiction to grant rescission because Plaintiff

26 ⁵ Although the Complaint does not list the date on which the Plaintiff believes the Note and DOT were executed,
27 Plaintiff’s statement of facts in response to the Motion indicates that Plaintiff and her ex-husband signed the
documents on March 22, 2007.

1 must prove that 1) Defendants are “creditors” as defined in 15 U.S.C. § 1602(f)⁷ and 2) that
2 Defendants failed to comply with the requirements imposed by TILA, which may include failure to
3 provide the required disclosures under 15 U.S.C. §§ 1631, 1639 or 12 C.F.R. § 226.31. Additionally,
4 if Plaintiff seeks actual damages, in addition to the statutory damages provided under 15 U.S.C. §
5 1640(a)(2)(A), Plaintiff must prove detrimental reliance; that is, Plaintiff must prove that she would
6 have secured a better interest rate elsewhere or foregone the loan completely if she were provided
7 with the proper disclosures. *In re Smith*, 289 F.3d 1155, 1157 (9th Cir. 2002).

8 As a result, in order for Plaintiff to survive a motion to dismiss for failure to state a claim,
9 Plaintiff must allege sufficient factual allegations as to each element of the claim, so that if all the
10 factual allegations are taken as true, the Complaint states a “claim to relief that is plausible on its
11 face.” *Iqbal* 129 S. Ct. at 1949. It is also important to note that “formulaic recitation of the elements
12 of a cause of action will not do.” *Id.* In order to show plausibility of success on her TILA damages
13 claim, Plaintiff must provide facts that, if assumed true, could reasonably be read to suggest that one
14 of the Defendants involved in this Motion are “creditors” under TILA, and that Defendants failed
15 to provide the required disclosures. Plaintiff states only that Defendants “failed to provide
16 disclosures.” Plaintiff must specify which disclosures she is alleging that Defendants failed to
17 provide and under which provisions the Defendants were required to provide those disclosures.

18 Because Plaintiff failed to plead equitable tolling and her TILA damages claim would
19 otherwise be barred by the statute of limitations, the Court will dismiss Plaintiff’s Count I, to the
20 extent that it seeks damages under TILA, without prejudice to file an amended complaint in
21 accordance with the pleading requirements of Rule 8, as discussed above.

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23 ⁷ The term “creditor” under TILA, includes:

24 only to a person who both (1) regularly extends, whether in connection with loans, sales of
25 property or services, or otherwise, consumer credit which is payable by agreement in more than
26 four installments or for which the payment of a finance charge is or may be required, and (2) is the
27 person to whom the debt arising from the consumer credit transaction is initially payable on the
28 face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by
agreement.

15 U.S.C. § 1602(f). In this case, Defendants have raised some issue as to whether they fit within this definition
because Sierra, and not the Defendants involved in this Motion, originated the Note.

1 B. *Violations of the Helping Families Save their Homes Act of 2009 (HFSTHA) and*
2 *Real Estate Settlement Procedures Act (RESPA)*

3 Plaintiff's Count II, entitled "Violation of HFSTHA and RESPA," contains only a
4 conclusory allegation that Defendants failed to provide notices in regards to numerous transfers of
5 the Note. It is unclear which provisions of HFSTHA and RESPA Plaintiff alleges were violated by
6 Defendants. Plaintiff mentions 12 C.F.R. § 226.39 in her Count I, which implements 15 U.S.C. §
7 1641(g), added to TILA under HFSTHA. However, in order to succeed in an action under these
8 provisions, Plaintiff must prove 1) that Defendants qualify as a "covered person" under 12 C.F.R.
9 § 226.39(a)(1)(A),⁸ and 2) that Defendants failed to make a disclosure required by 12 C.F.R. §
10 226.39, involving a transfer of the Note after the enactment of HFSTHA in 2009. Once again, in
11 order to obtain actual damages for a claim involving a breach of 12 C.F.R. § 229.39, Plaintiff would
12 have to show detrimental reliance. This requires a showing that she would have secured a better
13 interest rate elsewhere or foregone the loan completely if she were provided with the proper
14 disclosures. *In re Smith*, 289 F.3d 1155, 1157 (9th Cir. 2002). The Complaint contains no facts in
15 any way suggesting that a transfer of the Note occurred after the enactment of HFSTHA, and
16 contains only a conclusory allegation that Defendants failed to "provide notices to Plaintiff in
17 regards to the numerous transfers of note obligations." Plaintiff must allege fact sufficient to
18 provide a facially plausible claim that satisfies the requirements for liability under 12 C.F.R. §
19 226.39. The Court will grant Defendants' Motion as to Count II, with leave to file an amended
20 complaint which alleges legal theories and facts sufficient to satisfy the requirements of Rule 8.

21 C. *Avoidance or Rescission of Lien*

22
23 ⁸ Under 12 C.F.R. § 226.39(a)(1)(A):
24 [a] "covered person" means any person, as defined in § 226.2(a)(22), that becomes the owner of an
25 existing mortgage loan by acquiring legal title to the debt obligation, whether through a purchase,
26 assignment or other transfer, and who acquires more than one mortgage loan in any twelve-month
27 period. For purposes of this section, a servicer of a mortgage loan shall not be treated as the owner
28 of the obligation if the servicer holds title to the loan, or title is assigned to the servicer, solely for
the administrative convenience of the servicer in servicing the obligation." Defendants claim that
they are not a "covered person" under HFSTHA because the act was not passed until 2009, and
there has been no transfer of the Note since then which would require disclosure.

1 Count III of the Complaint alleges that Plaintiff is entitled to “avoid and/or rescind” the
2 mortgage debt because the DOT was not properly perfected and because none of the adversary
3 proceeding defendants qualify as a holder in due course. A finding that the DOT is not properly
4 perfected, or that Defendants are not holders of the Note in due course, are legal conclusions, to be
5 drawn from factual allegations regarding the actions of the parties and the circumstance surrounding
6 those actions. Plaintiff must provide factual allegations supporting the legal conclusions she
7 contends result. *Iqbal*, 129 S. Ct. at 1950.

8 Additionally, Plaintiff again fails to provide any legal basis upon which the Court may grant
9 avoidance or rescission of the DOT. It is unclear whether the Plaintiff seeks to avoid the DOT as a
10 fraudulent transfer under Section 548 of the Bankruptcy Code, under Arizona state law, or whether
11 Plaintiff reiterates her claim for rescission under TILA. In order to survive a motion to dismiss,
12 Plaintiff must supply the basis upon which she seeks relief and facts making out a facially plausible
13 claim. If the claims include allegations of fraud, those allegations must meet the heightened pleading
14 standards of Rule 9(b),⁹ pleading facts with particularity, that indicate the “time, place, and specific
15 content of the false representations as well as the identities of the parties to the misrepresentation.”
16 Fed. R. Civ. P. 9(b); *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 558 (9th Cir. 2010). Plaintiff has
17 failed to properly plead a claim for avoidance or rescission of the DOT, and the Court will grant the
18 Defendants’ Motion as to Count III, with leave to file an amended complaint complying with Rule
19 8.

20 D. *Fraudulent Transfer Claim to Disallow Defendants’ Claims under 11 U.S.C. §*
21 *502(d)*

22 Plaintiff’s Count IV alleges that the Defendants actions or inactions regarding the mortgage
23 debt constitute a fraudulent transfer, permitting the court to deny Defendants’ claims in the
24 bankruptcy proceeding. Again, Plaintiff alleges only legal conclusions -- that the Defendants’ action
25 or inactions amount to a fraudulent transfer and that this fraudulent transfer entitle Plaintiff to
26 disallowance of Defendants’ claims. Plaintiff must allege facts to support these legal conclusions.

27 ⁹ Fed. R. Bankr. P. 7009 makes Fed. R. Civ. P. 9 applicable in adversary proceedings.

1 *Iqbal*, 129 S. Ct. at 1950. Additionally, to the extent that Plaintiff alleges actual fraud in her claim
2 for a fraudulent transfer, she is required to meet the requirements of Rule 9(b) and allege the “time,
3 place, and specific content of the false representations as well as the identities of the parties to the
4 misrepresentation.” *Sanford v. MemberWorks.*, 625 F.3d at 558; *In re Sharp Int’l Corp.*, 403 F.3d
5 43, 56 (2d Cir. 2005). The Court will grant Defendants’ Motion as to Count IV, with leave to file
6 an amended complaint in accordance with the requirements of Rule 8 set out above.

7 E. *Fraud, Forgery and Failure to Act in Good Faith*

8 Plaintiff’s last count, Count V, alleges claims for fraud, forgery and failure to act in good
9 faith. Count V consists of two sentences which allege, generally, that someone involved with
10 Plaintiff’s mortgage transaction committed fraud and forgery and that one of the defendants to her
11 adversary complaint failed to act in good faith with regard to the mortgage transaction. Once again,
12 these allegations are legal conclusions, not entitled to the assumption of truth, and the bare legal
13 conclusions are not sufficient to survive a motion to dismiss. *See Iqbal*, 129 S. Ct. at 1950.

14 1. Fraud

15 In order to survive a motion to dismiss, Plaintiff must provide particular facts tending to
16 show that some particular party satisfied the elements of fraud under Arizona law, including: 1) a
17 representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity or ignorance
18 of its truth; 5) the speaker's intent that it be acted upon by the recipient in the manner reasonably
19 contemplated; 6) the hearer's ignorance of its falsity; 7) the hearer's reliance on its truth; 8) the right
20 to rely on it; and 9) Plaintiff’s consequent and proximate injury. *Echols v. Beauty Built Homes, Inc.*,
21 647 P.2d 629, 631 (Ariz. 1982). In her statement of facts, Plaintiff alleges that the documents
22 submitted with Defendant’s proof of claim were not the documents she and her ex-husband signed.
23 Possibly, the creation of false documents, and submission of those documents to the Court, in some
24 way relate to Plaintiff’s claims for fraud or forgery. However, Plaintiff has not provided factual
25 allegations sufficient to make a showing that the allegations of fraud are plausible, stating only that

1 “Defendant, and/or Mortgage Broker, and/or Title Company, and/or other third parties” engaged in
2 fraud . *Iqbal* 129 S. Ct. at 1949.

3 Further, Plaintiff fails to plead allegations of fraud with particularity as required by Fed. R.
4 Civ. P. 9(b). In order to comply with Rule 9(b), Plaintiff must allege the “time, place, and specific
5 content of the false representations as well as the identities of the parties to the misrepresentation.”
6 *Sanford v. MemberWorks.*, 625 F.3d at 558. Plaintiff has not plead any particular facts regarding the
7 time, place, or content of a misrepresentation amounting to fraud under Arizona law, and has further
8 not identified the parties to which any misrepresentation was made. For this reason, Plaintiff’s claim
9 for fraud must be dismissed under Rule 12(b)(6), but it will be dismissed without prejudice to file
10 an amended complaint.

11 2. Forgery

12 Likewise, Plaintiff’s claim for forgery fails to meet the pleading standards of either Rule 8
13 or Rule 9(b). In order to prove forgery, Plaintiff must show that Defendants 1) falsely made,
14 completed or altered a written instrument; 2) knowingly possessed a forged instrument; or 3) offered
15 or presented, whether accepted or not, a forged instrument or one that contained false information.
16 A.R.S. § 13-2002. Thus, in order to survive a motion to dismiss, Plaintiff must allege facts which,
17 if taken as true, state a plausible claim under the above requirements. *Iqbal*, 129 S. Ct. at 1950.
18 Additionally, because forgery is a species of fraud, any factual allegations related to the fraudulent
19 actions of the Defendants must be pled with particularity under Rule 9, setting forth the “time, place,
20 and specific content of the false representations as well as the identities of the parties to the
21 misrepresentation.” *Sanford v. MemberWorks.*, 625 F.3d at 558.

22 Again, Plaintiff only alleges that some party involved with her mortgage engaged in forgery.
23 Although plaintiff claims that the Note attached to Deutsche Bank’s proof of claim was not the one
24 signed by Plaintiff and her ex-husband, she does not indicate whether that document relates to the
25 forgery alleged, nor does she indicate who committed the forgery. Plaintiff’s claim for forgery will
26 be dismissed with leave to file an amended complaint.

1 “special relationship” between the parties. Because Plaintiff has failed to do so, the Court will
2 dismiss her claim for breach of covenant of good faith and fair dealing, without prejudice to file an
3 amended complaint.

4 **IV. Conclusion**

5 For the foregoing reasons, Plaintiff’s claim for rescission under 15 U.S.C. § 1635(f) shall be
6 dismissed with prejudice because it is barred by the statute of repose contained in that section. The
7 Court will dismiss all remaining claims without prejudice, with leave to file an amended complaint.
8 Any amended complaint must be filed within 14 days of the date of entry of the order incorporating
9 this decision. In the event an amended complaint is not timely filed, or a claim dismissed by this
10 decision is not timely re-pleaded, the complaint, or claim, as the case may be, will be dismissed with
11 prejudice.

12 Defendants are to upload a form of order.

13
14 **DATED:** February 14, 2011

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16 
17 CHARLES G. CASE II
18 UNITED STATES BANKRUPTCY JUDGE

19 **COPY** of the foregoing mailed by the BNC and/or
20 sent by auto-generated mail to:

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