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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Federal Deposit Insurance Corporation,) No. CV 08-2360-PHX-JAT

10 Plaintiff,) **ORDER**

11 vs.)

12)

13 Spectrum Mortgage Services, LLC,)

14 Defendant.)

15

16 Pending before the Court are Cross Motions for Summary Judgment (Docs. 34 & 50).

17 The Court now rules on the Motions.

18 **I. BACKGROUND**

19 First National Bank of Arizona (“FNBA”) entered into a Broker Agreement (the
20 “Contract”) with Defendant Spectrum Mortgage Services, LLC (“Spectrum” or Defendant)
21 on October 10, 2006. Pursuant to the Contract, FNBA would originate mortgage loans
22 processed and/or packaged by Spectrum and submitted to FNBA for underwriting approval
23 and funding. Among other loans, Spectrum submitted loan number 5300031241 (the
24 “Loan”) to FNBA.

25 On November 20, 2006, Carolyn F. Singer (the “Borrower”) executed a promissory
26 note (the “Note”) in the principal amount of \$48,750 to evidence the Loan. Section 6 of the
27 Note provided that a default would occur if the Borrower did not pay the full amount of each
28 monthly payment on the due date. On January 1, 2007, the Borrower defaulted on the Loan

1 by failing to make her first mortgage payment.

2 At the time the Note was executed, as was customary, FNBA sold the loan to the First
3 National Bank of Nevada (“FNBN”), FNBA’s sister bank. (Doc. 54 Exs. F&G.) FNBA and
4 FNBN were both owned and controlled by First National Bank Holding Company. FNBN
5 then packaged the Loan with other mortgages for sale to Morgan Stanley. (Doc. 54 Ex.E.)
6 When the Borrower failed to cure her default, FNBN repurchased the Loan from Morgan
7 Stanley upon request. (Doc. 54 DSOF 37.) FNBA then repurchased the Loan from FNBN
8 and thereafter submitted the repurchase demand letters to Spectrum.

9 Around June 28, 2007, FNBA sold an interest in the Loan to Lamb, NPA, LLC, but
10 claims it retained an interest in the Loan. Plaintiff FDIC characterizes the transaction
11 between FNBA and Lamb LLC as a loan participation agreement.¹ Spectrum asserts that
12 NPA LLC apparently paid nothing for its interest in the loan package. Spectrum also argues
13 that the sale to Lamb NPA, LLC, which was owned and operated by Robert A. Lamb – who
14 also owned and operated FNBA – could not constitute a sale to an unaffiliated party.

15 On July 25, 2007, July 30, 2007, and August 10, 2007, FNBA sent letters to Spectrum
16 demanding that Spectrum repurchase the Loan. The demand letters read, in pertinent part:

17 Pursuant to the contractual agreement (the “Agreement”) by and
18 between Spectrum Mortgage Services LLC (the “Client”) and
19 First National Bank of Arizona (the “Bank”), the Bank requests
20 that the Client provide a remedy for the breach by the Client of
21 various representations, warranties, covenants or conditions
22 contained in the Agreement, including without limitation such
23 breaches and defaults associated with the Loan that are set for
24 below. Specifically, the Bank demands that the Client
25 repurchase the Loan within thirty (30) days of the date of this
26 notice.

27 ¹A loan participation agreement is a shared loan, an undertaking by one financial
28 institution, the “lead,” to divide a large loan that it has or will have on its books into shares,
which the lead then offers for sale to other participant financial institutions. *FDIC v. Adams*,
931 P.2d 1095, 1104 (Ariz. Ct. App. 1996). The lead bank originates and consummates the
loan and retains all loan documents. *Id.* The participant institutions then enjoy the benefits
accompanying a loan without having to deal directly with borrowers or with servicing the
loan. *Id.*

1 Debt and real estate owned misrepresentation. FNBA
2 found using Internet sources such as Win2Date . . . that all REO
3 was not disclosed, the borrower has ownership in properties
4 located at . . ., which was purchased on FNBA found that
5 Mersopline.com disclosed that the property located at . . . has a
6 mortgage that opened on 06/30/2006 in the amount of \$63,000
7 . . ., however the lenders were not disclosed and the monthly
8 payment amounts are unknown.

9 Notwithstanding this repurchase demand, the Bank will
10 immediately begin the process of selling the Loan to an
11 unaffiliated third party, likely at a discounted price due to the
12 defaults/breaches identified above. . . .

13 (Doc. 35 Ex.F.) In essence, the demand letters accuse Spectrum of not exercising due care
14 in recommending the Loan. The demand letters never mention that the Borrower had
15 defaulted on the Loan.

16 Spectrum refused in writing to repurchase the Loan on November 12, 2007. Spectrum
17 claims it refused to repurchase the Loan because it did not violate its duty of care in
18 recommending the Loan to FNBA, the only specific “breach” mentioned in the demand
19 letters.

20 A Decree of Foreclosure was entered by the Marion Superior Court of Indiana against
21 the property securing the Loan on January 16, 2008. (Doc. 54 Ex.L.) FNBA filed the
22 Complaint roughly four months later on April 28, 2008. The Complaint specifically
23 mentioned Borrower’s default on the Loan. Spectrum filed its Answer on May 19, 2008.
24 On June 18, 2008, FNBA foreclosed on the property securing the Loan and sold it to a Ms.
25 Converse for \$11,000.

26 FNBA merged with FNBN, which became the successor in interest to FNBA. (Doc.
27 35 ¶18.) On July 25, 2009, FNBN was declared insolvent, and the Federal Deposit Insurance
28 Corporation (“FDIC” or Plaintiff) was appointed as FNBN’s receiver. (Doc. #35 Ex.J.) The
FDIC was substituted as the proper plaintiff here on October 20, 2008. (Doc. 35 ¶19.)

This case was removed to this Court on December 29, 2008. Plaintiff filed a Motion
for Summary Judgment on September 24, 2009. (Doc. 34.) Spectrum filed its Motion for
Summary Judgment on February 12, 2010. (Doc. 50.)

1 **II. LEGAL STANDARD**

2 Summary judgment is appropriate when “the pleadings, depositions, answers to
3 interrogatories, and admissions on file, together with affidavits, if any, show that there is no
4 genuine issue as to any material fact and that the moving party is entitled to summary
5 judgment as a matter of law.” Fed. R. Civ. P. 56(c). Thus, summary judgment is mandated,
6 “...against a party who fails to make a showing sufficient to establish the existence of an
7 element essential to that party’s case, and on which that party will bear the burden of proof
8 at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

9 Initially, the movant bears the burden of pointing out to the Court the basis for the
10 motion and the elements of the causes of action upon which the non-movant will be unable
11 to establish a genuine issue of material fact. *Id.* at 323. The burden then shifts to the non-
12 movant to establish the existence of material fact. *Id.* The non-movant “must do more than
13 simply show that there is some metaphysical doubt as to the material facts” by “com[ing]
14 forward with ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita Elec.*
15 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (quoting Fed. R. Civ. P.
16 56(e)). A dispute about a fact is “genuine” if the evidence is such that a reasonable jury
17 could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
18 242, 248 (1986). The non-movant’s bare assertions, standing alone, are insufficient to create
19 a material issue of fact and defeat a motion for summary judgment. *Id.* at 247-48. However,
20 in the summary judgment context, the Court construes all disputed facts in the light most
21 favorable to the non-moving party. *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir.
22 2004).

23 **III. ANALYSIS**

24 Because Plaintiff has abandoned any claim that Spectrum violated the standard of care
25 in recommending the Loan (Doc. 46 pp.4-5), the Court finds that no issues remain for a jury
26 to resolve. The parties agree regarding all the facts the Court finds necessary to resolve the
27 case. The cross motions for summary judgment call for contract interpretation, which is a
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1 question of law for the Court to decide. *Rand v. Porsche Fin. Servs.*, 167 P.3d 111, 121
2 (Ariz. Ct. App. 2007).

3 The following Contract provisions are at issue in this case:

4 **6. Remedies for Breach.** Upon the occurrence of any breach
5 of the representations, warranties, covenants or conditions contained
6 in this Agreement by Broker, or upon the occurrence of any event
7 of default by borrower under the terms or conditions of a mortgage
8 or Note within 120 days after the date on which the first payment on
9 the applicable Loan was due to Lender, Lender shall have the right
10 to require Broker to repurchase the Loan or Loans affected by such
11 breach for a price equal to the then outstanding principal balance of
12 such Loan(s) plus (i) all accrued and unpaid interest due on such
13 Loans(s) as of the date of repurchase, (ii) any premium or above par
14 pricing paid by Lender for such Loan and (iii) all other fees,
15 penalties, charges or expenses (including reasonable attorney fees)
16 assessed against or incurred by Lender in connection with the
17 Loan(s) (the sum of such amounts, the "Repurchase Price").

18 Lender may, in its sole discretion, elect to sell any Loan(s) subject
19 to repurchase pursuant to this Agreement to an unaffiliated third
20 party in lieu of requiring Broker to repurchase such Loan(s). Upon
21 the occurrence of such a third party sale, Broker's liability to lender
22 for such Loan(s) shall be equal to the amount of the Repurchase
23 Price less the actual amount received by Lender in such third party
24 sale (which amount shall conclusively be deemed to be a reasonable
25 mitigation of Lender's damages). Lender shall have the right of
26 setoff for all amounts owed to it from Broker pursuant to this
27 Section 6. Such right of offset shall be from any funds of Broker
28 held by Lender or due to Broker from Lender. In addition, Lender
shall have the right to specific performance in enforcing Broker's
obligation to repurchase any Loan pursuant to this Agreement. . . .

19 **7. Indemnity.** Broker shall indemnify and hold harmless
20 Lender, its . . . successors and assigns against any loss, damage,
21 claim, expense, liability or cost (including reasonable attorney fees)
22 arising from any breach by Broker of the provisions of this
23 Agreement.

24 (Doc. 35 Ex.A p. 5.)

25 The parties do not dispute that Borrower defaulted on her Loan within 120 days of the
26 date her first mortgage payment was due. Borrower's default triggered FNBA's right to
27 relief under Section 6 of the Contract. FNBA could either: 1) demand that Spectrum
28 repurchase the Loan under the terms set out in the first paragraph of Section 6 or 2) sell the
Loan to a non-affiliated third party and seek any deficit from Spectrum.

1 FNBA had sold the Loan to FNBN, which had sold the loan to Morgan Stanley. But
2 FNBA again owned the Loan, through repurchase, at the time FNBA demanded that
3 Spectrum repurchase the Loan. FNBA had the contractual right to force FNBA to repurchase
4 the Loan. If FNBA had proceeded under paragraph two of Section 6 by selling the Loan to
5 an unaffiliated party, then its right to relief would have been governed by that paragraph,
6 rather than paragraph 1.

7 Spectrum argues that FNBA waived its right to demand repurchase under paragraph
8 1 of Section 6 by twice selling the Loan before it foreclosed on the Borrower's property.
9 Spectrum further argues that Plaintiff cannot recover under paragraph two of Section 6
10 because the only sales of the Loan were to affiliated parties and the foreclosure does not
11 qualify as a sale of the Loan.

12 The Court agrees with Spectrum that the only sale, presuming for the purposes of
13 these motions that the participation agreement can be characterized as a "sale," to an
14 unaffiliated third party was a sale of the property securing the Loan, not the sale of the Loan
15 itself.² Section 6 does not mention sale of the property underlying a mortgage loan as a
16 remedy. The Court therefore finds that Plaintiff cannot recover under paragraph 2 of Section
17 6.

18 But Spectrum cannot have it both ways. An event of default definitely occurred. If
19 FNBA did not avail itself of the remedy provided in paragraph 2 because it did not sell the
20 Loan to an unaffiliated third party, then FNBA did not cut off its right to relief under
21 paragraph 1. Even though FNBA sold the property securing the Loan, the parties have not
22 asserted that FNBA or its successors extinguished or otherwise forgave the Loan. Plaintiff
23 therefore can recover under paragraph 1 of Section 6.³

25 ²Plaintiff concedes that FNBA, FNBN, and Lamb, NPA, LLC were all affiliated
26 parties.

27 ³The Court does not agree with Spectrum's "unclean hands" argument.

1 Borrower's default once the Complaint was filed. Spectrum could have chosen to repay the
2 Loan rather than continuing to defend this lawsuit. The Court therefore determines that
3 Spectrum shall pay pre-judgment interest on the \$37,750 at the rate of 8.25% from April 28,
4 2008 until Spectrum satisfies this judgment. Plaintiff shall receive post-judgment interest at
5 the applicable federal rate.

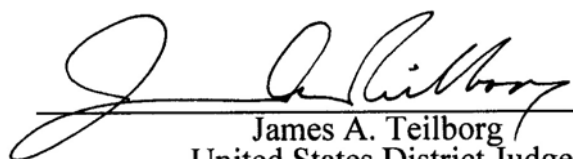
6 Plaintiff also seeks its attorneys' fees. The Court will not make a determination
7 regarding attorneys' fees at this time. Plaintiff can file a motion for attorneys' fees pursuant
8 to Federal Rule of Civil Procedure 54(d)(2) and Local Rule of Civil Procedure 54.2 at the
9 appropriate time.

10 Accordingly,

11 IT IS ORDERED GRANTING Plaintiff's Motion for Summary Judgment (Doc. 34)
12 and awarding Plaintiff damages in the principal amount of \$37,750, plus pre-judgment
13 interest at the rate of 8.25% from April, 28, 2008, plus post-judgment interest at the
14 applicable federal rate.

15 IT IS FURTHER ORDERED DENYING Defendant's Motion for Summary Judgment
16 (Doc. 50).

17 DATED this 3rd day of August, 2010.

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22 James A. Teilborg
23 United States District Judge
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