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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Mirella Tamayo Puga and Martin Puga,)

No. CV09-2501-PHX-NVW

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Plaintiffs,)

ORDER

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vs.)

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One West Bank, et al.,)

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Defendants.)

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Before the Court is Defendant OneWest Bank, FSB’s Motion to Dismiss Plaintiffs’

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Second Amended Complaint (doc. # 19).

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I. Background

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For this motion to dismiss, Plaintiffs’ allegations of material fact are assumed to be

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true and construed in the light most favorable to them. *See Cousins v. Lockyer*, 568 F.3d

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1063, 1067 (9th Cir. 2009). Stated here are the allegations of the Second Amended

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Complaint, and the Court does not determine whether they are true.

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As alleged, Defendant OneWest Bank (“OneWest”) is a national banking

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institution authorized to do business in the State of Arizona. Defendant IndyMac Federal

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Bank, FSB (“Defendant IndyMac”) is a banking institution chartered as a bridge between

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the defunct IndyMac Bank, FSB (“IndyMac Bank”), and OneWest, the current owner of

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the remnants of Defendant IndyMac. Defendant IndyMac is an insolvent banking

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1 institution under receivership. Defendant IMB REO, LLC (“IMB”) is an affiliate or
2 owned subsidiary of OneWest.

3 In June 2007, Plaintiff Mirella Tamayo Puga (“Mrs. Puga”) borrowed funds from
4 IndyMac Bank to build a six-bedroom home on a lot located on North 185th Avenue,
5 Waddell, Arizona 85355, which she and her husband had previously purchased for
6 \$60,000 (the “Property”). In applying for the loan, Mrs. Puga submitted information
7 about her income of \$15.00 per hour and no information about her husband. In return for
8 a loan of \$820,000.00, Mrs. Puga signed an adjustable rate note (“Note”) promising to
9 repay the loan plus interest. She is the only obligor on the Note. Mr. and Mrs. Puga
10 signed a Deed of Trust as husband and wife, which appointed LandAmerica Transnation
11 Title as Trustee and “irrevocably grants and conveys to Trustee, in trust, with power of
12 sale,” the Property, including all improvements made or to be made on the Property.

13 Mrs. Puga defaulted on the loan. The Notice of Trustee’s Sale, dated June 8, 2009,
14 identifies the successor trustee as Quality Loan Service Corporation and the current
15 beneficiary as IndyMac Bank. On October 6, 2009, the Property was sold for \$352,500 at
16 a trustee’s sale to IMB, which is identified in the Trustee’s Deed Upon Sale as the
17 foreclosing beneficiary. The designated trustee was Quality Loan Service Corporation.
18 The assignment of the Deed of Trust for the Property to OneWest from the Federal
19 Deposit Insurance Corporation (“FDIC”) as receiver for Defendant IndyMac is dated
20 February 17, 2010.

21 On October 14, 2009, Mrs. Puga filed a complaint against OneWest and Defendant
22 IndyMac in the Maricopa County Superior Court. On December 1, 2009, OneWest
23 removed the case to this Court. On December 8, 2009, OneWest moved to dismiss the
24 case. On December 29, 2009, Mrs. Puga filed her First Amended Complaint. On January
25 25, 2010, OneWest again moved to dismiss the case. The Court dismissed with prejudice
26 a count alleging violation of both the Real Estate Settlement Procedures Act and the Truth
27 in Lending Act and dismissed the remaining counts with leave to amend.

1 The Second Amended Complaint filed April 1, 2010, names Mr. Puga as a second
2 plaintiff, but is verified by only Mrs. Puga. (Doc. # 20.) Mr. Puga did not sign the
3 Second Amended Complaint, and it does not appear from the face of the Second
4 Amended Complaint that Mr. Puga is represented by Mrs. Puga’s counsel.

5 The Second Amended Complaint includes the following counts: (1) Breach of
6 Contract – Covenant of Good Faith and Fair Dealing, (2) Fraud, (3) Negligent
7 Misrepresentation, (4) Declaratory Judgment, (5) Quiet Title, and (6) Rescission. On
8 April 19, 2010, OneWest moved to dismiss the Second Amended Complaint. (Doc.
9 # 19.) On May 6, 2010, Mrs. Puga responded to OneWest’s motion to dismiss. (Doc.
10 # 20.) No response from Mr. Puga has been filed. On May 17, 2010, OneWest filed its
11 reply. (Doc. # 21.)

12 **II. Legal Standard**

13 On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), all allegations of material
14 fact are assumed to be true and construed in the light most favorable to the nonmoving
15 party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Dismissal under Rule
16 12(b)(6) can be based on “the lack of a cognizable legal theory” or “the absence of
17 sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police*
18 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). To avoid dismissal, a complaint must contain
19 “only enough facts to state a claim for relief that is plausible on its face.” *Bell Atl. Corp.*
20 *v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff
21 pleads factual content that allows the court to draw the reasonable inference that the
22 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct.
23 1937, 1949 (2009). “The plausibility standard is not akin to a ‘probability requirement,’
24 but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

25 First, the Court must identify allegations in the complaint that are not entitled to
26 the assumption of truth. *Id.* at 1949, 1951. The principle that a court accepts as true all of
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1 the allegations in a complaint does not apply to legal conclusions or conclusory factual
2 allegations. *Id.* at 1949, 1951.

3 Second, the Court must determine whether the factual allegations plausibly
4 suggest an entitlement to relief. *Id.* at 1950, 1951. This determination is “a context-
5 specific task that requires the reviewing court to draw on its judicial experience and
6 common sense.” *Id.* at 1950. To show that the plaintiff is entitled to relief, the complaint
7 must permit the court to infer more than the mere possibility of misconduct. *Id.*

8 Generally, material beyond the pleadings may not be considered in deciding a Rule
9 12(b)(6) motion. However, material properly submitted as part of the complaint and
10 documents not physically attached to the complaint whose contents are alleged in a
11 complaint and whose authenticity no party questions may be considered. *Branch v.*
12 *Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v.*
13 *County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

14 **III. Analysis**

15 **A. Count I: Breach of Contract – Covenant of Good Faith and Fair** 16 **Dealing**

17 “The law implies a covenant of good faith and fair dealing in every contract,”
18 which requires that “neither party will act to impair the right of the other to receive the
19 benefits which flow from their agreement or contractual relationship.” *Rawlings v.*
20 *Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986). Count I of the Second Amended
21 Complaint does not allege that Mrs. Puga did not receive the loan she was promised or
22 that she was prevented from using the loan proceeds to build a house as she had intended.
23 It does not allege that any of the Defendants did something after the contract was
24 executed that prevented her from obtaining the benefits that were expected to flow from
25 the contract. It does allege that Mrs. Puga defaulted on the loan.

26 Count I alleges that Mrs. Puga intended to have monthly payments of \$4,000 or
27 less, the maximum interest rate on the loan was 12.95%, she did not know the amount of
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1 her monthly payment when she signed the Note, and the initial loan payment, including
2 principal, interest, taxes, and insurance, was approximately \$5,300. It further alleges that
3 Defendant IndyMac “knowingly set the payment amount at an amount that would injure
4 Plaintiff’s right to receive the benefit of her bargain and did not disclose the payment
5 amount to her in advance of signing the note.”

6 Although Defendant IndyMac is the entity that Mrs. Puga alleges knew or should
7 have known that she could not afford the payment determined under the terms of the
8 Note, Mrs. Puga alleges that because OneWest is the entity that foreclosed on the
9 Property, OneWest holds Defendant IndyMac’s obligations under the Note. Mrs. Puga
10 also alleges that although there is no pre-sale assignment of the Note and Deed of Trust
11 from IndyMac Bank to OneWest, IMB, or any other entity, “IMB (a OneWest company)
12 appears to be identical to IndyMac, or in possession of IndyMac’s assets and obligations,
13 since only the beneficiary may foreclose on real property.” Nevertheless, the
14 relationships and transfers of assets and liabilities among the various entities need not be
15 determined to decide that Mrs. Puga has not stated a claim for breach of the implied
16 covenant of good faith and fair dealing by any of the Defendants.

17 Therefore, Count I will be dismissed for failure to state a claim upon which relief
18 can be granted.

19 **B. Count II: Fraud**

20 Count II alleges that “IndyMac fraudulently induced Plaintiff into entering into the
21 loan at issue by implicitly and explicitly representing that she qualified for and could pay
22 for the loan at issue” and “Defendants knew or should have known that Plaintiff could not
23 afford the loan, and yet made the loan.” Count II alleges that Mrs. Puga “relied on
24 IndyMac to give her a loan that she could afford, and believed that the lender would tell
25 her if she didn’t qualify for an affordable term.” It further alleges she “had a right to rely
26 on the fact that Indy Mac should not make a loan that she could not repay.” Mrs. Puga
27 offers no authority to support her legal theory that a lender commits fraud, without
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1 making any false statements, by making a loan to an applicant without advising her not to
2 accept the loan she seeks.

3 Although no specific language is required in pleading fraud, elements constituting
4 fraud must be found considering the pleading as a whole. *Spudnuts, Inc. v Lane*, 131
5 Ariz. 424, 426, 641 P.2d 912, 914 (Ct. App. 1982). Arizona law requires proof of nine
6 elements of fraud: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's
7 knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it be acted
8 upon by the recipient in the manner reasonably contemplated; (6) the hearer's ignorance
9 of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely on it; and
10 (9) the hearer's consequent and proximate injury. *Marcus v. Fox*, 150 Ariz. 341, 344, 723
11 P.2d 691, 693 (Ct. App. 1985), *vacated in part by* 150 Ariz. 333, 723 P.2d 682 (1986). In
12 essence, Mrs. Puga contends the elements of fraud are satisfied by alleging IndyMac gave
13 her an \$820,000 loan but failed to tell her that if she had no assets or income other than
14 her \$15.00/hour job, she could not afford an \$820,000 loan, and if IndyMac gave her a
15 loan for \$820,000 based on the income information she supplied, then she had the right to
16 rely on the loan offer as communicating that she would be able to repay the loan under its
17 stated terms—which constituted an implied false representation. But a lender's
18 willingness to provide a loan does not assure a borrower that she will be able to satisfy
19 the loan's repayment terms; it represents only that the borrower meets the lender's
20 conditions for the loan, however minimal they may be. She had no right to rely on any
21 representation implied by IndyMac's loan offer to her.

22 Therefore, Count II will be dismissed for failure to state a claim upon which relief
23 can be granted.

24 **C. Count III: Negligent Misrepresentation**

25 For Count III, the Second Amended Complaint alleges only the following: “To the
26 extent that any acts by Defendants in Count II above constitute negligence rather than
27 intention[al] conduct; said conduct as set forth constitutes Negligent Misrepresentation.”
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1 For reasons stated regarding Count II, Count III also will be dismissed for failure to state
2 a claim upon which relief can be granted.

3 **D. Count IV: Declaratory Judgment, Count V: Quiet Title, and Count**
4 **VI: Rescission**

5 Counts IV (Declaratory Judgment), V (Quiet Title), and VI (Rescission) seek relief
6 based on Plaintiff prevailing on one or more of the other claims. As pled, both the
7 contract and the fraud claims must be dismissed, and the Second Amended Complaint
8 does not include any other substantive basis for granting Mrs. Puga the relief sought in
9 Counts IV, V, and VI.

10 The Second Amended Complaint does not allege a cause of action based on the
11 failure to record documents regarding the transfer of beneficial interest in the Note before
12 the trustee's sale. Instead, in Count V (Quiet Title), it alleges that either (a) one of the
13 Defendants, whichever was the appropriate beneficiary at the time of the trustee's sale, is
14 subject to Mrs. Puga's claims, or (b) the trustee's sale was invalid:

15 51. IMB has represented itself as the beneficiary of the note.
16 Either IMB (and therefore OneWest Bank) was the appropriate beneficiary
17 at the time of the sale (and therefore shares the identity of IndyMac Bank,
18 FSB and is subject to the claims set forth herein); or it was not the
19 beneficiary, in which case the purported sale is invalid.

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21 53. In [the Corporate Assignment of Deed of Trust], IndyMac
22 Federal Bank, FSB purports to be the holder of the Deed of Trust and to
23 transfer its interest to Defendant OneWest. If the purported Trustee's Deed
24 is valid, the attempted assignment is a nullity, as the sale extinguished all
25 rights under the Deed of Trust. A.R.S. § 33-811(E). If however, IndyMac
26 Federal Bank, FSB remained the holder at all relevant times, then the
27 purported transfer by Trustee's sale to IMB REO, LLC is invalid, the sale
28 was improper and should be reversed, with title restored to Plaintiffs.

(Doc. # 18.) Both parties' briefs discuss matters beyond the record concerning these
allegations. Count V on quiet title does not state any claim upon which relief can be
granted, but Plaintiff will be given one last chance to amend Count V to attempt to state a
claim.

