

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9

Olga C. Vega, individually,

)

No. CV-10-02087-PHX-NVW

10

Plaintiff,

)

**ORDER**

11

vs.

)

12

American Home Mortgage Servicing, Inc.,  
a foreign corporation doing business in  
Arizona; JP Morgan Chase Bank, National  
Association, not individually but solely as  
trustee for the holders of Structured Asset  
Mortgage Investments II In, Mortgage  
Pass-Through Certificates, Series 2006-  
AR5; Fidelity National Title Insurance  
Company; ABC Corporations I through V;  
John and Jane Does I through V,

)

)

)

)

)

)

)

)

)

)

18

Defendants.

)

)

19

\_\_\_\_\_

20

21

Before the Court is Defendant American Home Mortgage Servicing, Inc.’s (“AHMSI”) Motion to Dismiss (Doc. 3), Plaintiff’s Response to Defendant’s Motion to Dismiss (Doc. 12), and Defendant’s Reply in Support of Motion to Dismiss (Doc. 14). For the following reasons, Defendant’s motion will be granted.

25

**I. Background**

26

On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), all allegations of material fact are assumed to be true and construed in the light most favorable to the non-moving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Generally, material beyond the

27

28

1 complaint may not be considered in deciding a Rule 12(b)(6) motion. However, evidence  
2 on which the complaint “necessarily relies” may be considered if: “(1) the complaint refers  
3 to the document; (2) the document is central to the plaintiff’s claim; and (3) no party  
4 questions the authenticity of the copy attached to the 12(b)(6) motion.” *Marder v. Lopez*,  
5 450 F.3d 445, 448 (9th Cir. 2006). The facts stated here represent the allegations in the  
6 complaint and are assumed to be true for purposes of deciding Defendant’s motion to  
7 dismiss.

8         The complaint is not clear regarding when exactly Plaintiff obtained a loan, or what  
9 amount Plaintiff borrowed, secured by property located at 1524 West Moody Trail, Phoenix,  
10 Arizona, 85041. Plaintiff alleges that she borrowed \$630,000.00 from “the Lender  
11 Defendants” in March 2006. However, Plaintiff attaches to her complaint as “Exhibit A” the  
12 “true and correct copy” of the written adjustable rate note for this loan. The attached note,  
13 dated March 25, 2005, shows Plaintiff’s obligation to pay \$407,000.00 to Lender Downey  
14 Savings and Loan Association, F.A. Whenever the loan actually originated, it was secured  
15 by a Deed of Trust dated March 17, 2006 and recorded on March 24, 2006. The Deed of  
16 Trust lists AHM Mortgage as the lender, Grand Canyon Title as the trustee, and states the  
17 loan obligation as \$630,000.00.

18         Presumably at some point before January 2010, Plaintiff stopped making payments  
19 on her loan. Fidelity National Title Insurance Company<sup>1</sup> recorded a Notice of Trustee’s Sale  
20 on January 21, 2010, scheduling a trustee’s sale of the property on April 22, 2010. The  
21 Notice lists JPMorgan Chase Bank, National Association as trustee for Structured Asset  
22 Mortgage Investments II Inc., Mortgage Pass-Through Certificates, Series 2006-AR5 as the  
23 beneficiary and Fidelity National Title Insurance Company as the trustee. The complaint  
24 states that the trustee’s sale was rescheduled for October 27, 2010, but it is not clear from the  
25 briefing whether that trustee’s sale actually occurred. Accordingly, it is unclear whether  
26

---

27 <sup>1</sup>It is not clear from the facts in the complaint when or how Fidelity National Title Insurance  
28 Company became a trustee.

1 there remains a pending trustee’s sale on the property.

2 Plaintiff filed her complaint on September 29, 2010, seeking declaratory relief,  
3 injunctive relief, damages, and to enjoin the foreclosure of the property. (Doc. 1.)

4 **II. Motion to Dismiss**

5 **1. Legal Standard**

6 **A. Rule 8, Federal Rules of Civil Procedure**

7 A complaint must contain “a short and plain statement of the claim showing that the  
8 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “Each allegation must be simple,  
9 concise, and direct.” Fed. R. Civ. P. 8(d)(1). A complaint having the factual elements of a  
10 cause of action present but scattered throughout the complaint and not organized into a “short  
11 and plain statement of the claim” may be dismissed for failure to satisfy Rule 8(a). *Sparling*  
12 *v. Hoffman Constr. Co.*, 864 F.2d 635, 640 (9th Cir. 1988). A claim must be stated clearly  
13 enough to provide each defendant fair opportunity to frame a responsive pleading. *McHenry*  
14 *v. Renne*, 84 F.3d 1172, 1176 (9th Cir. 1996). “Something labeled a complaint . . . , yet  
15 without simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs,  
16 fails to perform the essential functions of a complaint.” *Id.* at 1180.

17 **B. Rule 12(b)(6), Federal Rules of Civil Procedure**

18 On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), all allegations of material fact  
19 are assumed to be true and construed in the light most favorable to the non-moving party.  
20 *Cousins*, 568 F.3d at 1067. Dismissal under Rule 12(b)(6) can be based on “the lack of a  
21 cognizable legal theory” or “the absence of sufficient facts alleged under a cognizable legal  
22 theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). To avoid  
23 dismissal, a complaint must contain “only enough facts to state a claim for relief that is  
24 plausible on its face.” *Twombly*, 550 U.S. at 570. The principle that a court accepts as true  
25 all of the allegations in a complaint does not apply to legal conclusions or conclusory factual  
26 allegations. *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 149 S.Ct. 2615, 135 S.Ct. 831 (2009). “Threadbare recitals of the  
27 elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

28 “A claim has facial plausibility when the plaintiff pleads factual content that allows

1 the court to draw the reasonable inference that the defendant is liable for the misconduct  
2 alleged.” *Id.* “The plausibility standard is not akin to a ‘probability requirement,’ but it asks  
3 for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* To show that  
4 the plaintiff is entitled to relief, the complaint must permit the court to infer more than the  
5 mere possibility of misconduct. *See id.*

## 6 **2. Analysis**

7 None of the allegations in Plaintiff’s complaint state a claim for which relief can be  
8 granted against AHMSI.

### 9 **A. Violations of the Fair Housing Act**

10 Plaintiff’s complaint is based largely on alleged violations of the Fair Housing Act  
11 (“FHA”), 42 U.S.C. §§3601-3619. Specifically, Plaintiff alleges that she has been unable  
12 to secure a loan modification, she was denied being given a loan she had the ability to repay,  
13 she was preyed upon because of her national origin, the loan is predatory, and that a Forensic  
14 Mortgage Audit revealed that the loan “had a number of minor, major and material violations  
15 of statutes, laws and established industry standards.” (Doc. 1.) However, Plaintiff makes  
16 no specific allegations against AHMSI for any wrongdoing under the FHA. Indeed, the  
17 complaint nowhere specifies which individual defendants took which wrongful actions  
18 against Plaintiff, other than to refer at certain points to charges against the “Lender  
19 Defendants.” (*Id.*) As AHMSI is merely the loan servicer, and did not take part in the loan  
20 origination, it cannot be said to be a “Lender Defendant.”

21 Plaintiff claims that AHMSI is in violation of the FHA by failing to grant her a loan  
22 modification. Although it is not clear whether Plaintiff is alleging disparate treatment or  
23 disparate impact under the FHA, Plaintiff has failed to state a claim under either theory. In  
24 order to state a disparate treatment claim, a plaintiff must allege that she 1) is a member of  
25 a protected class; (2) applied and qualified for a loan modification; (3) the loan modification  
26 was denied despite her being qualified; and (4) defendant approved a loan modification for  
27 a similarly situated party during a period relatively near the time plaintiff was denied the  
28 modification. *See Cervantes v. Countrywide Home Loans, Inc.*, No. CV09-0517, 2009 WL

1 3157160 \*1, \*6 (D. Ariz. Sept. 24, 2009) (citing *McDonald v. Coldwell Banker*, 543 F.3d  
2 498, 505 (9th Cir. 2008)). Plaintiff here only alleges that she “believes that the Lender  
3 defendants are taking discriminatory action toward her because she is Hispanic,” “believes  
4 that defendants treated her differently because of her national origin, Hispanic,” and that  
5 Defendants “preyed upon” her because of her national origin. (Doc. 1.) Such allegations are  
6 mere legal conclusions and do not satisfy the federal pleading requirements. Plaintiff has not  
7 alleged that she qualified for a loan modification based upon objective indicators, that  
8 Defendants offered similarly situated non-Hispanic borrowers a more beneficial loan  
9 modification, or any other facts to support a claim for disparate treatment.

10 Similarly, Plaintiff has not stated a claim for disparate impact under the FHA. To  
11 state a disparate impact claim, a plaintiff must allege: “1) the occurrence of certain outwardly  
12 neutral practices, and 2) a significantly adverse or disproportionate impact on persons of a  
13 particular type produced by the defendant’s facially neutral acts or practices.” *McDonald*,  
14 543 F.3d at 505, n. 7 (citing *Gamble v. City of Escondido*, 104 F.3d 300, 304-05 (9th Cir.  
15 1997)). Plaintiff has not included any facts supporting a claim for disparate impact, such as  
16 any specific outwardly neutral practices that AHMSI took that had a disproportionate impact  
17 upon her based on her race. The mere legal conclusion that Plaintiff believes Defendants  
18 violated the FHA, unsupported by any factual allegations, do not state a plausible claim for  
19 relief as required under the *Twombly* and *Iqbal*.

20 Finally, even if Plaintiff were to state a plausible claim for relief under the FHA, such  
21 a claim would likely be time-barred. Discrimination claims under FHA have a two-year  
22 statute of limitations time period. 42 U.S.C. § 3613(a)(1)(A). Plaintiff obtained her loan, at  
23 the latest, in 2006; she did not bring this action until September 2010. Most of the alleged  
24 violations asserted in Plaintiff’s complaint relate to the loan origination, and would  
25 accordingly be time-barred. Plaintiff alleges, however, that AHMSI’s failure to provide her  
26 a loan modification constitutes a continuing violation. Under the FHA, if a violation is not  
27 just one unlawful incident “but an unlawful practice that continues into the limitations period,  
28 the complaint is timely when it is filed within ... the last asserted occurrence of that practice.”

1 *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81, 102 S.Ct. 1114 (1982). However,  
2 a “continuing violation is occasioned by continual unlawful acts, not by continual ill effects  
3 from an original violation.” *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981). To the  
4 extent Plaintiff’s claims regarding her inability to obtain a loan modification stem from any  
5 unlawful action related to the loan’s origination, those claims would also likely be time-  
6 barred.

### 7 **B. Contract Claims**

8 Plaintiff’s complaint also contains the vague allegation that “Defendants breached  
9 their agreements with plaintiff” and asserts that “Defendants breached the covenant of good  
10 faith and fair dealing . . . .” (Doc. 1.) In order to state a claim for breach of contract, a  
11 plaintiff must allege “the existence of a contract between the plaintiff and defendant, a breach  
12 of the contract by the defendant, and resulting damage to the plaintiff.” *Frank Lloyd Wright*  
13 *Foundation v. Kroeter*, 697 F.Supp.2d 1118, 1125 (D. Ariz. 2010) (citations omitted).  
14 Plaintiff has failed to identify any specific agreement forming a contractual relationship  
15 between her and AHMSI. None of the agreements attached to or referred to in the complaint  
16 identify AHMSI as a party. (See Doc. 1.) Without any facts to support an allegation that  
17 Plaintiff has a contract with AHMSI, and without putting AHMSI on notice of which  
18 agreement it purportedly breached, there can be no claim for breach of contract. Further,  
19 absent the showing of any contractual relationship with AHMSI, Plaintiff cannot assert a  
20 claim for breach of the implied covenant of good faith and fair dealing. See *Rawlings v.*  
21 *Apodaca*, 151 Ariz. 149, 153 726 P.2d 565, 569 (1986) (noting duty of good faith and fair  
22 dealing “arises by virtue of a contractual relationship”).

### 23 **C. Declaratory Relief, Injunctive Relief, and Damages**

24 To the extent that the three separate counts listed in Plaintiff’s complaint for  
25 declaratory relief, injunctive relief, and damages seek to raise independent causes of action,  
26 those claims also fail. Injunctive and declaratory relief are “remedies for underlying causes  
27 of action . . . not separate causes of action [.]” *Silvas v. GMAC Mortgage, LLC*, No. CV09-  
28 0265-PHX-GMS, 2009 WL 4573234, at \*6 (D.Ariz. Dec. 1, 2009) (citations omitted). A

1 claim for damages is similarly not an independent cause of action. *See Fromkin v. Indymac*  
2 *Bank FSB*, No. CV10-8014-PCT-PGR, 2010 WL 2541167 \*1, \*7 n. 17 (D. Ariz. Jun. 18,  
3 2010). Because Plaintiff has not sufficiently pled any underlying cause of action, she is not  
4 entitled to these equitable remedies.

### 5 **III. Leave to Amend**

6 Leave to amend should be freely given “when justice so requires.” Fed. R. Civ. P.  
7 15(a)(2). Plaintiff will be given an opportunity to amend her complaint to make clear her  
8 allegations in short, plain statements. Any amended complaint must conform to the  
9 requirements of Rule 8(a), 8(d)(1), and 9(b) of the Federal Rules of Civil Procedure. Plaintiff  
10 is warned that if she elects to file an amended complaint and fails to comply with the Court’s  
11 instructions explained in this order, the action will be dismissed pursuant to Rule 41(b) of the  
12 Federal Rules of Civil Procedure. *See McHenry*, 84 F.3d at 1177 (affirming dismissal with  
13 prejudice of prolix, argumentative, and redundant amended complaint that did not comply  
14 with Rule 8(a)); *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 673-74 (9th Cir. 1981)  
15 (affirming dismissal of amended complaint that was “equally as verbose, confusing, and  
16 conclusory as the initial complaint”); *Corcoran v. Yorty*, 347 F.2d 222, 223 (9th Cir. 1965)  
17 (affirming dismissal without leave to amend of second complaint that was “so verbose,  
18 confused and redundant that its true substance, if any, [was] well disguised”). ]

### 19 **IV. Attorneys’ Fees**

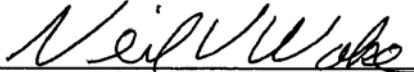
20 Defendants request an award of attorneys’ fees and costs incurred defending this  
21 action under A.R.S. §§ 12-341 and 12-341.01. It is premature to decide the extent to which  
22 Defendants have prevailed before Plaintiff has an opportunity to amend her complaint. The  
23 request for an award of fees and costs will accordingly be denied without prejudice to  
24 seeking fees as provided in L.R.Civ 54.2 after entry of judgment.

25 IT IS THEREFORE ORDERED that Defendant’s Motion to Dismiss (Doc. 3) is  
26 granted.

27 IT IS FURTHER ORDERED that Plaintiff may file an amended complaint by  
28 February 17, 2011. If Plaintiff does not file an amended complaint by February 17, 2011,

1 the Clerk is directed to enter judgment dismissing this case and terminate this case without  
2 further order.

3 DATED this 1<sup>st</sup> day of February, 2011.

4  
5 

6 \_\_\_\_\_  
Neil V. Wake  
United States District Judge

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28