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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 LREP Arizona LLC,  
10 Plaintiff,

11 v.

12 597 Broadway Realty LP, et al.,  
13 Defendants.  
14

No. CV-16-04015-PHX-DLR

**ORDER**

15  
16 At issue is Plaintiff's motion to dismiss Defendants' counterclaims, which is fully  
17 briefed. (Docs. 71, 74, 77.) Defendants' request for oral argument is denied because the  
18 issues are adequately briefed, and oral argument will not help the Court resolve the motion.  
19 *See* Fed. R. Civ. P. 78(b); LRCiv. 7.2(f); *Lake at Las Vegas Investors Grp., Inc. v. Pac.*  
20 *Malibu Dev.*, 933 F.2d 724, 729 (9th Cir. 1991). For the following reasons, Plaintiff's  
21 motion is granted, and Defendants' counterclaims are dismissed.

22 **I. Background**

23 Defendants are the guarantors of a \$4 million loan made by Plaintiff to non-party G  
24 Companies Management, LLC ("GCM"). The loan was secured by property owned by  
25 GCM ("the Property") and by Defendants' guaranties. After GCM defaulted on the loan,  
26 Plaintiff acquired the Property at a trustee's sale for a credit bid of \$315,000. Plaintiff then  
27 notified Defendants that it intended to file a lawsuit against them to enforce the guaranties  
28 and recover the deficiency.

1           Instead of proceeding with the lawsuit, however, the parties entered into a  
2 Forbearance Agreement, under which Plaintiff agreed, among other things, to delay suit  
3 and partially waive default interest. In exchange, Defendants agreed, among other things,  
4 (1) to waive any defenses to Plaintiff’s collection of the deficiency under Arizona’s anti-  
5 deficiency laws and, in the event they defaulted on the terms of the Forbearance  
6 Agreement, (2) to consent to the filing of a pre-prepared lawsuit and to the filing of a  
7 Stipulated Motion for Entry of Judgment and Order of Judgment, both of which were  
8 attached to the Forbearance Agreement. The waiver provision added: “For sake of clarity,  
9 Guarantors agree to admit all of the allegations of the Lawsuit, waive any defenses thereto,  
10 and consent to the entry of judgment against them upon Guarantor’s breach [of] their  
11 obligations . . . as set forth in this Agreement.” (Doc. 9-2 at 28.)

12           Defendants eventually defaulted, leading Plaintiff to file the stipulated lawsuit,  
13 Stipulated Motion for Entry of Judgment, and stipulated Order of Judgment referenced in  
14 the Forbearance Agreement. Magistrate Judge Fine issued a report and recommendation  
15 (“R&R”) recommending that the Court deny the stipulated motion without prejudice.  
16 Plaintiff objected to the R&R, but before the Court could rule on the objections Plaintiff  
17 moved to stay the case while the parties pursued an out-of-court resolution of their dispute.  
18 The Court obliged and stayed the matter for three months.

19           Plaintiff moved to reactivate the case when the parties were unable to resolve the  
20 matter. The Court held a telephonic conference to discuss the motion in June 2017, during  
21 which only counsel for Plaintiff appeared. Counsel for Plaintiff confirmed that Defendants  
22 had not been formally served. The Court therefore granted the motion to reactivate the  
23 case but ordered that Plaintiff serve Defendants within 60 days. Before the expiration of  
24 this 60-day service deadline, however, the Court inadvertently issued an order sustaining  
25 Plaintiff’s objections to the R&R and granting the Stipulated Motion for Entry of Judgment  
26 in a modified form. Defendants then moved to vacate the judgment pursuant to Federal  
27 Rule of Civil Procedure 60. The Court granted the motion after concluding that it lacked  
28 personal jurisdiction to enter a judgment against Defendants until they had been properly

1 served.

2 Plaintiff has since served Defendants. Instead of admitting all allegations, waiving  
3 all defenses, and consenting to the entry of judgment as contemplated by the Forbearance  
4 Agreement, Defendants filed an answer and brought counterclaims for restitution, unjust  
5 enrichment, and fraud in the inducement. The thrust of Defendants counterclaims is that  
6 Defendants are not liable to Plaintiff for any amounts (and are, in fact, entitled to recover  
7 amounts previously paid) because their guaranties were procured by fraud. Specifically,  
8 Defendants allege that Plaintiff did not actually expect GCM to repay the loan, that Plaintiff  
9 knew the Property was not worth much, and consequently Plaintiff lured Defendants into  
10 a false sense of security that they never would be called upon to fulfill their guaranties  
11 because, if GCM were to default, the sale of the Property would be more than adequate to  
12 satisfy the loan.

13 Unsurprisingly, Plaintiff now moves to dismiss the counterclaims, principally  
14 because Defendants waived their rights to challenge their guaranties or the allegations  
15 against them in this lawsuit when they entered into the Forbearance Agreement. Plaintiff  
16 also argues, in the alternative, that Defendants have not adequately alleged fraud under  
17 Federal Rule of Civil Procedure 9(b). The Court does not address this alternative argument  
18 because it concludes that the Forbearance Agreement precludes Defendants from  
19 challenging their guaranties.

## 20 **II. Discussion**

21 The Court should dismiss counterclaims that are not based on a cognizable legal  
22 theory or that are not pled with enough factual detail to state a plausible entitlement to relief  
23 under an otherwise cognizable legal theory. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678  
24 (2009); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). Here,  
25 Plaintiff's primary argument is that Defendants counterclaims are not cognizable because  
26 Defendants waived their right to challenge the enforceability of their guaranties or to  
27 otherwise dispute the allegations against them in this lawsuit when they entered into the  
28 Forbearance Agreement. The Court agrees.

1 A forbearance agreement of the type entered into by the parties is essentially a pre-  
2 litigation settlement of an impending legal dispute, which the Court may enforce. *See W.*  
3 *All. Bank v. Jefferson*, 698 Fed. App'x 914, 914 (9th Cir. 2017). Indeed, the Court was  
4 prepared to enforce the Forbearance Agreement and enter the stipulated judgment once it  
5 obtained jurisdiction over Defendants through proper service of process. But for  
6 Defendants' disregard of their waivers, this litigation probably would have long since been  
7 over.

8 Defendants argue that the Court should not enforce the waivers in the Forbearance  
9 Agreement and, instead, should permit them to challenge their guaranties and the  
10 allegations against them for four reasons (some of which at times blend together in the  
11 briefing): (1) the Forbearance Agreement itself was procured by fraud; (2) the waiver is  
12 insufficiently specific to waive a fraud in the inducement claim; (3) the guaranties are so  
13 substantively and procedurally unconscionable that the unconscionability permeates the  
14 entire transaction, including the Forbearance Agreement, rendering it unenforceable; and  
15 (4) the Forbearance Agreement has already been satisfied because the statute of repose for  
16 collecting a deficiency has expired. None of these arguments are persuasive.

17 First, Defendants' contention that they were fraudulently induced into signing the  
18 Forbearance Agreement by misrepresentations about the Property's value is meritless. The  
19 allegations in the counterclaims make clear that Defendants entered into the Forbearance  
20 Agreement after they knew that the Property, allegedly represented to be worth between  
21 \$10 million and \$27 million, fetched a meager \$315,000 at auction. When they entered  
22 into the Forbearance Agreement, Defendants knew or should have known that Plaintiff,  
23 GCM, and/or their agents might have misrepresented the value of the Property. Perceived  
24 fraud in the inducement of the *guaranties* does not allow the Defendants to avoid their  
25 obligations and waivers under the separately negotiated and executed Forbearance  
26 Agreement when the fundamental factual basis for the alleged fraud either was known or  
27 should have been known by Defendants before they entered in the Forbearance Agreement.

28 Second, the waiver provisions in the Forbearance Agreement are sufficiently clear

1 to include waiver of Defendants’ fraud in the inducement claim, especially considering the  
2 sequence of events. As noted, the parties negotiated a separate Forbearance Agreement  
3 that included broad waiver provisions after Defendants knew that the Property was not as  
4 valuable as Plaintiff had allegedly represented. The waiver provision went as far as to add,  
5 “[f]or sake of clarity,” that if Defendants defaulted and Plaintiff thereafter pursued legal  
6 recourse, Defendants would “agree to admit all of the allegations of the Lawsuit, waive  
7 any defenses thereto, and consent to the entry of judgment against them[.]” (Doc. 9-2 at  
8 28.) Defendants’ argument that they could not waive their fraud in the inducement claim  
9 because they did not know they had such a claim simply is not borne out by the factual  
10 allegations and sequence of events. Indeed, there is a critical difference between, on the  
11 one hand, discovering the *facts* necessary to bring a claim and, on the other, appreciating  
12 that the *law* might support a claim based on the facts previously available to you. Although  
13 whether Defendants’ knowingly waived their fraud claim might present a more difficult  
14 question had Plaintiff concealed the fundamental, essential facts until after Defendants  
15 executed the Forbearance Agreement, here Defendants entered into the Forbearance  
16 Agreement, including its broad waivers, after knowing that the Property was overvalued,  
17 and they consequently would be called upon to satisfy their guaranties.

18 Third, Defendants’ unconscionability argument is misguided. Relying almost  
19 entirely on a single case about novation—which is not at issue here—Defendants  
20 essentially contend that the guaranties are so unconscionable that the separate Forbearance  
21 Agreement should also be found unconscionable. But the Forbearance Agreement is a  
22 separate agreement negotiated under different circumstances, most notably after  
23 Defendants knew they would be called upon to satisfy their guaranties and that the  
24 outstanding balance would be substantial. Though Defendants might believe that the  
25 guaranties are unconscionable, they waived their right to make that challenge when they  
26 entered into the Forbearance Agreement.

27 Lastly, Defendants argue that the Forbearance Agreement already has been satisfied  
28 because A.R.S. § 33-814(A)’s 90-day statute of repose on deficiency actions has elapsed

1 and a statute of repose cannot be waived or tolled. But the Arizona Supreme Court has  
2 made clear that, although the protections of A.R.S. § 33-814(A) may not be *prospectively*  
3 waived, a borrower may agree to waive these protections *after* a non-judicial foreclosure  
4 sale. *See CSA 13-101 Loop, LLC v. Loop 101, LLC*, 341 P.3d 452, 457 (Ariz. 2014).  
5 Further, the Court is persuaded by the authorities cited by Plaintiff explaining that, although  
6 a statute of repose cannot be *equitably* tolled, parties may waive or agree to toll such  
7 periods though an *express* agreement. *See, e.g., Bullington v. Precise*, 698 Fed. App'x 565,  
8 570-71 (11th Cir. 2017); *In re Lehman Bros. Sec. & ERISA Litig.*, No. 09 MD 2017 LAK,  
9 2012 WL 6584524, at \*2 (S.D.N.Y. Dec. 18, 2012); *Lewis v. Taylor*, 375 P.3d 1205, 1210  
10 (Colo. 2016). Although these cases are from other jurisdictions, Defendants cite no  
11 Arizona authority indicating that parties cannot expressly waive or agree to toll a statute of  
12 repose, and the Court sees no reason why such express agreements should not be enforced.

### 13 **III. Conclusion**

14        Though much ink has been spilled in this case, the outcome is straightforward.  
15 When GCM defaulted, the sale of the Property left a substantial deficiency, and Defendants  
16 were called upon to satisfy their guaranties, Defendants had choices: they could have paid;  
17 they could have refused to pay, allowed Plaintiff to file a breach of contract action, and  
18 then raised the fraud and unconscionability defenses/counterclaims they are raising now;  
19 or they could have negotiated and agreed to a different resolution, which is the route they  
20 chose here. In exchange for Plaintiff's agreement to defer filing a lawsuit and to waive  
21 certain interest, Defendants recommitted to satisfying their guaranties and, in the event  
22 they failed to do so, to waive all defenses and stipulate to the entry of judgment against  
23 them. After Defendants defaulted on their obligations, Plaintiff sought to effectuate the  
24 terms of the Forbearance Agreement by filing this action along with the Stipulated Motion  
25 for Entry of Judgment and stipulated Order of Judgment. But rather than abide by the  
26 Forbearance Agreement, Defendants seek to litigate (in the form of counterclaims)  
27 defenses to the enforceability of their guaranties and to otherwise dispute the allegations  
28 against them. For the reasons explained in this order, the Forbearance Agreement's broad

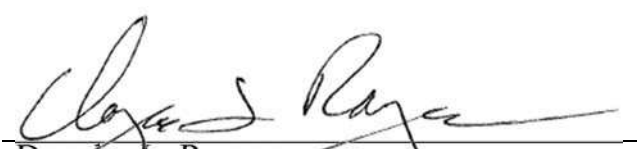
1 waiver provisions preclude Defendants from doing so.

2 **IT THEREFORE IS ORDERED** that Plaintiff's motion to dismiss Defendants'  
3 counterclaims (Doc. 71) is **GRANTED**.

4 **IT IS FURTHER ORDERED** that Defendants' motion to amend their  
5 counterclaim and file a third-party complaint (Doc. 89) is **DENIED** as moot in light of the  
6 Court's determination that Defendants waived their rights to challenge their guaranties or  
7 the allegations made against them in this lawsuit.

8 Dated this 27th day of March, 2019.

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Douglas L. Rayes  
United States District Judge