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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Gaye Frank,

No. CV-11-08035-PCT-NW

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Plaintiff,

ORDER

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vs.

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Wells Fargo Bank National Association;)
Tiffany and Bosco, P.A.; Michael J.)
Laughlin EVP/CCO, Wells Fargo and)
Company; Mark C. Oman EVP, Wells)
Fargo and Company; Howard I. Atkins Sr.)
EVP/CFO, America's Servicing Company;)
David M. Carrols Sr. EVP, Wells Fargo)
And Company; Kevin A. Rhein EVP,)
Wells Fargo and Company; James M.)
Strother EVP, Wells Fargo and Company;)
Mark S. Bosco P.A., Tiffany and Bosco,)
P.A.; Michael A. Bosco P.A., Tiffany and)
Bosco, P.A.; Carrie L. Tolstedt EVP,)
Wells Fargo Home Mortgage; Wells Fargo)
Home Mortgage Company, Patricia)
Callahan Sr EVP, Wells Fargo Home)
Mortgage; John G. Stumpf President/CEO)
Wells Fargo and Company,

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Defendants.

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Before the Court is Defendants Wells Fargo Bank, National Association, Wells Fargo
and Company, Michael J. Laughlin, Mark C. Oman, Howard I. Atkins, David M. Carrols,
Kevin A. Rhein, James M. Strother, Carrie L. Tolstedt, Patricia Callahan, and John G.

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1 Stumpf's (collectively "Wells Fargo Defendants") Motion to Dismiss (Doc. 8) and
2 Defendants Tiffany & Bosco, P.A., Marks S. Bosco, and Michael A. Bosco, Jr.'s
3 (collectively "Bosco Defendants") Motion to Dismiss (Doc. 10). For the reasons stated
4 below, Defendants' motions to dismiss will be granted.

5 **I. Background**

6 Plaintiff was loaned \$187,000 for the purchase of real property located at 2834 South
7 Tissaw Road, Cornville, Arizona 86325. Plaintiff claims that the property's address has
8 since changed to 6217 East Homestead Trail, Cornville, Arizona 86325. The promissory
9 note on the loan was signed on August 28, 2006 and lists Plaintiff as the borrower and
10 American Brokers Conduit as the lender. Plaintiff also signed a deed of trust on the property
11 securing the note.

12 Presumably Plaintiff fell behind on her mortgage payments, because Plaintiff's
13 property was sold at a deed of trust public auction on December 17, 2010. Plaintiff filed a
14 complaint in Arizona Superior Court for Yavapai County on February 14, 2011. She also
15 filed an "Ex parte Motion For emergency temporary injunction as to eviction of real
16 property," which the superior court denied on February 15, 2011. On March 8, 2011, Wells
17 Fargo Defendants removed the case to this Court (Doc. 1).

18 Wells Fargo Defendants moved to dismiss Plaintiff's complaint on March 15, 2011
19 (Doc. 14). On that same day, Bosco Defendants also filed a motion to dismiss Plaintiff's
20 complaint (Doc. 10). Although Plaintiff's responses to Defendants' motions to dismiss were
21 due on April 1, 2011, no response has been filed with this Court. Failure to respond alone
22 is grounds for the Court to grant Defendants' motions to dismiss. LRCiv. 7.2(i). The Court
23 finds Plaintiff's failure to respond to Defendants' motions constitutes acquiescence to the
24 motions being granted. Nevertheless, the Court agrees with Defendants' substantive analyses
25 and will therefore grant Defendants' motions to dismiss (Docs. 8, 10) on the merits.

1 **II. Legal Standard**

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

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

13 **B. Rule 9(b), Federal Rules of Civil Procedure**

14 “In alleging fraud or mistake, a party must state with particularity the circumstances
15 constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Rule 9(b) requires allegations of fraud
16 to be “specific enough to give defendants notice of the particular misconduct which is alleged
17 to constitute the fraud charged so that they can defend against the charge and not just deny
18 that they have done anything wrong.” *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th
19 Cir. 2001). “While statements of the time, place and nature of the alleged fraudulent
20 activities are sufficient, mere conclusory allegations of fraud are insufficient.” *Moore v.*
21 *Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). Further,

22 Rule 9(b) does not allow a complaint to merely lump multiple defendants
23 together but requires plaintiffs to differentiate their allegations when suing
24 more than one defendant and inform each defendant separately of the
25 allegations surrounding his alleged participation in the fraud. In the context
of a fraud suit involving multiple defendants, a plaintiff must, at a minimum,
identify the role of each defendant in the alleged fraudulent scheme.

26 *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (internal quotation marks,
27 alteration marks, and citations omitted).

1 **C. Rule 12(b)(6), Federal Rules of Civil Procedure**

2 On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), all allegations of material fact
3 are assumed to be true and construed in the light most favorable to the non-moving party.
4 *Cousins*, 568 F.3d at 1067. Dismissal under Rule 12(b)(6) can be based on “the lack of a
5 cognizable legal theory” or “the absence of sufficient facts alleged under a cognizable legal
6 theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). To avoid
7 dismissal, a complaint must contain “only enough facts to state a claim for relief that is
8 plausible on its face.” *Twombly*, 550 U.S. at 570. The principle that a court accepts as true
9 all of the allegations in a complaint does not apply to legal conclusions or conclusory factual
10 allegations. *Ashcroft v. Iqbal*, __ U.S. __, 149 S.Ct. 2615, 135 S.Ct. 831 (2009). “Threadbare recitals of the
11 elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*
12 “A claim has facial plausibility when the plaintiff pleads factual content that allows the court
13 to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*
14 “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than
15 a sheer possibility that a defendant has acted unlawfully.” *Id.* To show that the plaintiff is
16 entitled to relief, the complaint must permit the court to infer more than the mere possibility
17 of misconduct. *Id.*

18 **III. Analysis**

19 Plaintiff’s complaint lists twelve causes of action: 1) Fraudulent Misrepresentation;
20 2) Fraudulent Concealment; 3) Breach of Contract; 4) Default on Contract; 5) Deceptive
21 Business Practices; 6) Issuance on Counterfeit Security; 7) Fair Credit Billing Act Violations;
22 8) Fair Debt Collection Practices Act Violations; 9) Real Estate Settlement Procedures Act
23 Violations; 10) Truth in Lending Act Violations; 11) Conspiracy with Intent to Commit
24 Fraud Against Plaintiff; and 12) Conspiracy to Commit Fraud Against Plaintiff. However,
25 Plaintiff has failed to comply with various requirements of the Federal Rules of Civil
26 Procedure, warranting dismissal of her complaint.

27 First, Plaintiff’s complaint fails to include plausible facts to support her allegations.
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1 All of Plaintiff's claims list allegations without any factual specificity as to purported
2 wrongdoing. A complaint must contain more than just "labels and conclusions" or a
3 "formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555.
4 Additionally, Plaintiff has not sufficiently pled her claims in order to put each defendant on
5 notice of its alleged wrongdoing in order to frame a responsive pleading. *See McHenry*, 84
6 F.3d at 1176, 1180 (noting a complaint must identify "whom plaintiffs are suing for what
7 wrongs"). Plaintiff has named fifteen defendants, but has not specified within her complaint
8 which defendant committed which actions; rather, all of her allegations are directed at
9 "defendant(s)." In addition to these procedural defects, Plaintiff's complaint fails to
10 substantively state any plausible claim for relief.

11 **A. Fraudulent Misrepresentation, Fraudulent Concealment, Deceptive**
12 **Business Practices, Conspiracy with Intent to Commit Fraud Against**
13 **Plaintiff, and Conspiracy to Commit Fraud Against Plaintiff**

14 To state a claim for fraud in Arizona, nine elements must be shown: "1) a
15 representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity or
16 ignorance of its truth; 5) the speaker's intent that it be acted upon by the person and in a
17 manner reasonably contemplated; 6) the hearer's ignorance of its falsity; 7) his reliance on
18 its truth; 8) his right to rely thereon; and 9) his consequent and proximate injury." *Wagner*
19 *v. Casteel*, 136 Ariz. 29, 31, 663 P.2d 1020, 1022 (1983) (citation omitted). Because counts
20 one, two, five, eleven, and twelve all allege fraud, Plaintiff is required to plead these claims
21 with particularity under Fed. R. Civ. P. 9(b). To satisfy Rule 9(b), a complaint must state the
22 time, place, and specific content of the false representations and the identities of the parties
23 to the misrepresentation. *See Schreiber Distrib. Co. v. Sery-Well Furniture Co.*, 806 F.2d
24 1393, 1401 (9th Cir. 1986); *Vess v. Ciba-Geigy Corp., USA*, 317 F.3d 1097, 1106
25 ("Averments of fraud must be accompanied by the who, what, when, where, and how of the
26 misconduct charged."). "While statements of the time, place and nature of the alleged
27 fraudulent activities are sufficient, mere conclusory allegations of fraud are insufficient."
28 *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).

1 Plaintiff has not included any facts to support her claims for fraud. It is not clear from
2 the complaint which party made which alleged misrepresentations, how such representations
3 were false or material, nor is it even evident exactly what misrepresentations Plaintiff claims
4 were made. Plaintiff's allegations seem premised on the notion that the loan agreement was
5 not supported by consideration and that it was fraudulently concealed that "Plaintiff was the
6 creditor" in the loan agreement. These allegations are unclear and confusing, and fail to
7 satisfy the pleading requirements of Fed. R. Civ. P. 9(b). Plaintiff has also failed to show
8 how any Defendants acted together in a conspiracy to defraud her, nor has she stated a
9 plausible claim in her unintelligible fifth cause of action for deceptive business practices.

10 **B. Breach of Contract and Default on Contract**

11 In order to state a claim for breach of contract, a plaintiff must prove the existence of
12 a contract between the plaintiff and defendant, a breach of the contract by the defendant, and
13 resulting damage to the plaintiff. *See Chartone, Inc. v. Bernini*, 207 Ariz. 162, 170, 83 P.3d
14 1103, 1111 (Ariz. App. Ct. 2004). To allege a contract claim, Plaintiff must plead more
15 specific factual allegations that would "allow[] the court to draw the reasonable inference that
16 the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. Here, Plaintiff
17 has failed to provide any plausible, specific facts to support her contract claims, or given any
18 explanation for how any of Defendants' purported actions breach the loan agreement.

19 Plaintiff alleges the following: Defendants did not provide Plaintiff with consideration
20 at the time of closing, Defendants issued and failed to remove derogatory credit reports to
21 three national credit reporting agencies, Defendants failed to accept "funds tendered by
22 Gayle L. Sullivan, Notary Public, to immediately release [Defendants'] fraudulent claim of
23 \$187,000" (Compl. ¶ 3), Defendants defaulted on the contract by failing to collect \$187,000
24 provided by Plaintiff in exchange for the original contract, Defendants failed to produce
25 Plaintiff's original promissory note or their public hazard bonds, and Defendants failed to
26 pay damages for defaulting on the contract. Each allegation fails to state a plausible claim
27 for relief. The consideration argument is repeated from Plaintiff's causes of action sounding
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1 in fraud, and is not supported by any facts. Plaintiff has failed to allege why any derogatory
2 credit reporting is wrongful, since it appears she defaulted on her loan agreement. Plaintiff's
3 allegations regarding funds purportedly tendered by Gayle Sullivan fail to explain how
4 acceptance of these funds would have satisfied her loan obligation. Plaintiff has also failed
5 to allege to which defendant she purportedly tendered the full amount of the loan, nor has she
6 given any explanation for why "Defendants" failed to accept this payment. With respect to
7 the allegation that Defendants are required to produce the original promissory note, this
8 "show me the note" theory has been repeatedly rejected in this district. *See, e.g., Contreras*
9 *v. U.S. Bank*, No. CV09-0137-PHX-NVW, 2009 WL 4827016 (D. Ariz. Dec. 15, 2009);
10 *Diessner v. Mortgage Elec. Registration Sys.*, 618 F. Supp. 2d 1184 (D. Ariz. 2009);
11 *Mansour v. Cal-Western Reconveyance Corp.*, 618 F. Supp. 2d 1178 (D. Ariz. 2009). Nor
12 has Plaintiff provided any support for her allegation that Defendant was required and failed
13 to produce their public hazard bonds. Finally, because Plaintiff has not alleged any plausible
14 breach or default by Defendants, her claim for damages under the contract is similarly
15 unsupported.

16 **C. Issuance on Counterfeit Security, Fair Credit Billing Act ("FCBA")**
17 **Violations, Fair Debt Collection Practices Act ("FDCPA") Violations,**
18 **Real Estate Settlement Procedures Act ("RESPA") Violations, and Truth**
19 **in Lending Act ("TILA") Violations**

19 In counts six, seven, eight, nine and ten, Plaintiff claims various statutory violations.
20 However, Plaintiff asserts only bare conclusions that Defendants have violated these statutes
21 without providing any basis that these statutes even apply. Plaintiff's conclusory allegation
22 that Defendants attempted to utter a counterfeit security, once on October 26, 2010 in the
23 amount of \$184, 015.53 and again on December 2, 2010 in the amount of \$188,230.45 fails
24 because Plaintiff's note does not constitute a security, *see Reves v. Ernst & Young*, 494 U.S.
25 56, 65 (1990), and because utterance of a counterfeit security does not create a private civil
26 right of action. Plaintiff's allegation that Defendants violated the FCBA by reporting
27 derogatory credit ratings to national credit reporting agencies and failing to respond to
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1 Plaintiff's written complaint fails because the FCBA's prohibitions on reporting a defaulting
2 debtor apply only in cases of open-end credit accounts, not mortgage transactions and, in any
3 event, Plaintiff has not shown that her notice of written complaint complies with the
4 requirements of 15 U.S.C. §1666(a). Plaintiff's allegations that Defendants violated the
5 FDCPA by communicating with Plaintiff by telephone and proceeding with the foreclosure
6 even though Plaintiff disputed it fail because Plaintiff has not alleged that she informed
7 Defendants in writing that she disputed the debt, 15 U.S.C. §1692g(b), and because the
8 FDCPA applies only to debt collectors, and not officers or employees of a creditor, 15 U.S.C.
9 §1692a(6)(A).

10 Plaintiff's claims under RESPA and TILA are similarly conclusory and unsupported.
11 Plaintiff's allegations regarding RESPA are rambling and appear to seek remedies that are
12 not available under RESPA. To the extent Plaintiff has alleged that Defendants violated
13 RESPA by failing to respond to her written complaint, she has not attached the complaint,
14 alleged with any specificity which Defendant she complained to, or otherwise alleged that
15 she submitted the required written statement of complaint under 12 U.S.C. §2605(e).
16 Plaintiff also alleges that Defendants violated TILA by not responding to Plaintiff's "Notice
17 of Right to Cancel" that she sent on September 23, 2010. However, Plaintiff has not alleged
18 what specific TILA provisions were violated, nor has she provided any reason why the one-
19 year limitations period for TILA violations has tolled. Rather, it appears Plaintiff's time for
20 bringing a claim under TILA expired in August 2007. 15 U.S.C. § 1640(e).

21 **IV. Bosco Defendants**

22 Although Plaintiff has named the Bosco Defendants in her suit, presumably because
23 of their role as substitute trustee, she neither mentions them specifically in her complaint nor
24 makes any allegations related to their actions as substitute trustee. Rather, all of the
25 allegations appear directed at the original lender and loan servicer. Actions against the
26 substitute trustee are governed by A.R.S. §33-807(E), which provides that "a trustee should
27 only be joined in legal actions pertaining to a breach of the trustee's obligation under this
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1 chapter or under the deed of trust.” Where a trustee is named in an action that does not allege
2 a breach of the trustee’s duties, “the trustee is entitled to be immediately dismissed and to
3 recover costs and reasonable attorney fees[.]” A.R.S. §33-807(E). Because Plaintiff has not
4 alleged any breach of the trustee’s duties, the Bosco Defendants, as substitute trustee, are
5 entitled to dismissal with prejudice.

6 **IV. Leave to Amend**

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

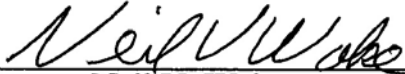
21 IT IS THEREFORE ORDERED that Defendants Wells Fargo Bank, National
22 Association, Wells Fargo and Company, Michael J. Laughlin, Mark C. Oman, Howard I.
23 Atkins, David M. Carrols, Kevin A. Rhein, James M. Strother, Carrie L. Tolstedt, Patricia
24 Callahan, and John G. Stumpf’s Motion to Dismiss (Doc. 8) is granted.

25 IT IS FURTHER ORDERED that Defendants Tiffany & Bosco, P.A., Mark S. Bosco,
26 and Michael A. Bosco, Jr.’s Motion to Dismiss (Doc. 10) is granted with prejudice.

27 IT IS FURTHER ORDERED that Plaintiff may file an amended complaint by May
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1 13, 2011. The Clerk is directed to terminate this case without further order if Plaintiff does
2 not file an amended complaint by May 13, 2011.

3 DATED this 19th day of April, 2011.

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6 Neil V. Wake
7 United States District Judge
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