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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Rozann G. Bergdale,

10 Plaintiff,

11 vs.

12 Countrywide Bank FSB; Bank of America,
13 National Association; and John Does,

14 Defendants.

No. CV-12-8057-PCT-GMS

ORDER

15 Pending before the Court is a Motion to Dismiss Second Amended Complaint
16 (Doc. 27) filed by Defendants Countrywide Home Loans, Inc., Bank of America, N.A.,
17 BAC Home Loan Servicing LP, Mortgage Electronic Registration Systems, Inc., and
18 ReconTrust. For the following reasons, the Court grants in part and denies in part the
19 motion.

20 **BACKGROUND**

21 Plaintiff Rozann Bergdale purchased a home in Yavapai County, Arizona, around
22 October 26, 2007. (Doc. 21 ¶ 14; *id.*, Ex. A at 1-3.)¹ To finance this purchase, she
23 obtained a loan of \$576,000.00 from Defendant Countrywide Bank. (*Id.*, Ex. A at 1-2.)
24 The parties executed and recorded the Deed of Trust (“DOT”) in the office of the
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26
27 ¹ The Court takes judicial notice of the DOT and subsequent assignments because
28 they are documents “whose contents are alleged in a complaint and whose authenticity no
party questions, but which are not physically attached to the [plaintiff's] pleading,”
Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir.2005) (quoting *In re Silicon Graphics Inc.*
Sec. Litig., 183 F.3d 970, 986 (9th Cir.1999) (alteration in original).

1 Yavapai County Recorder on Oct. 31, 2007. (*Id.* ¶ 14.) The DOT designates Countrywide
2 as the “Lender,” Fidelity National Title Insurance as the “Trustee,” and Defendant
3 Mortgage Electronic Registration Systems, Inc. (“MERS”) as “the beneficiary under this
4 Security Instrument” and “nominee for Lender and Lender’s successors and assigns.” (*Id.*
5 Ex. A at 1-2.) Subsequently, Defendant Bank of America acquired Countrywide, and
6 Defendant BAC Home Loan Servicing, a Bank of America subsidiary, began servicing
7 the loan. (*Id.* ¶¶ 2, 5-6.)

8 Bergdale’s monthly payment, including principal, interest, escrow, and other
9 charges was originally \$3,195.50. (*Id.* ¶ 29.) At some point, Bergdale missed a monthly
10 payment, but she alleges that she made up for that missed payment in various monthly
11 “installments,” totaling \$2,500.00. (*Id.* ¶¶ 30, 37.) In October 2009, Bergdale entered into
12 a three-month “Trial Modification Program” with BAC that temporarily reduced her
13 monthly payment to \$2,325.00. (*Id.* ¶ 31.) She negotiated with BAC for her first trial
14 program payment to occur on November 17, 2009. (*Id.*) Bergdale contacted BAC on
15 November 13 to determine whether check she sent for the first trial payment had posted.
16 (*Id.* ¶ 34.) The BAC representative could not see the payment and recommended that
17 Bergdale send another check. (*Id.*) The BAC representative assured her that any previous
18 check she had sent for the November payment, if found, would be cancelled to avoid
19 duplicate payments. (*Id.*)

20 On November 23, 2009, BAC delivered a Notice of Intent to Accelerate that
21 claimed Bergdale owed \$9,007.80 on the loan and threatened to institute foreclosure if
22 she did not cure. (*Id.* ¶ 36.) Bergdale alleges that “NO PAYMENT WAS LATE AT
23 ALL”, and claims she was current on her payments. (*Id.* ¶ 37.) She reached out to BAC
24 and was informed that her balance was now \$4,650.00 because BAC had applied two
25 payments of \$2,325.00 to her account. (*Id.* ¶¶ 38-39.) Bergdale filed a letter of dispute
26 asserting that BAC had posted the second November payment in error and requesting
27 reimbursement for the overdraft fees she incurred as a result of the second November
28 payment. (*Id.* ¶ 40.) After Bergdale sent her letter of dispute, BAC told her that she

1 actually owed \$4,372.80 on her loan. (*Id.*) Subsequently, she received a second Notice of
2 Intent to Accelerate that stated she owed \$4,372.00, but was then told on a phone call that
3 she actually owed \$7,568.30. (*Id.* ¶¶ 40-41.) The dispute over what Bergdale owed
4 stretched into December. (*Id.* ¶¶ 43-45, 47.) There was also a dispute between Bergdale
5 and BAC as to whether she had been paying property taxes. (*Id.* ¶¶ 33, 41-42.)
6 Throughout the back-and-forth with BAC, Bergdale denied any delinquency. (*Id.*)
7 Outside of phone calls, though, no specific action was taken by either party at this time.

8 Bergdale made six months of payments in the amount specified in the previous
9 three-month trial program. (*Id.* ¶¶ 48-49.) The following November, BAC and Bergdale
10 agreed to a permanent loan modification. (Doc. 21-5, Ex. E at 1.)² Bergdale agreed that
11 she owed \$604,324.81, an addition of about \$25,000 to the principal. (*Id.*; *id.* ¶ 50.) The
12 parties also agreed that, beginning December 1, 2010, Bergdale’s monthly principal and
13 interest payment would be \$2,163.39 until December 2013, when it would increase.
14 (Doc. 21-5, Ex. E at 3.)

15 When Bergdale received her statement on December 20, it offered three payment
16 choices for the month of January: (1) An interest only payment of \$2,395.39, consisting
17 of a \$1,510.81 interest payment plus \$884.58 of “outstanding late charges” and “amounts
18 collected for escrow items such as taxes and insurance premiums”; (2) a 15-year
19 Amortized Payment Choice of \$5,916.17, consisting of a principal and interest payment
20 of \$5,031.59 plus charges; and (3) an Amortized Payment Choice of \$3,047.97,
21 consisting of a \$2,163.39 principal and interest payment plus charges. (Doc. 21-6, Ex. F
22 at 3.)³ Bergdale selected the interest-only payment and made the \$2,395.39 payment for
23 both January and February. (*Id.* ¶¶ 52-53.)

24 She received a letter informing her that her March payment would increase to
25 offset the interest-only payments she made for both January and February. (*Id.* ¶ 54.) The

27 ² The Court takes judicial notice of the Loan Modification Agreement.

28 ³ The Court likewise takes judicial notice of the December 20 statement.

1 SAC does not allege what the revised payment was in March or anytime subsequent to
2 that notice. Bergdale did, however, send a check in April for \$3,156.14. (*Id.*) A Notice of
3 Intent to Accelerate arrived on April 18, 2011, that claimed Bergdale owed \$3,808.71.
4 (*Id.* ¶ 55.)

5 On October 18, 2011, MERS assigned all of its beneficial interest under the DOT
6 to Bank of America. (Doc. 21-2, Ex. B.) Bank of America then exercised its power as
7 beneficiary to appoint ReconTrust Company as the successor trustee on November 29,
8 2011. (Doc. 21-3, Ex. C.) That same day, ReconTrust filed a Notice of Trustee’s Sale to
9 take place on March 7, 2012. (Doc. 21-4, Ex. D.) Bergdale received a copy of this Notice
10 of Trustee’s Sale. (*Id.* ¶ 56.) No sale appears to have taken place as of yet.

11 Bergdale filed a complaint against the Defendants in Arizona Superior Court on
12 Mar. 2, 2012. (Doc. 1, Ex. 1), and the action was subsequently removed to this Court
13 (Doc. 1). The Court granted Defendants’ Motion to Dismiss the First Amended
14 Complaint on September 18, 2012 (Doc. 20), giving Bergdale a “very limited opportunity
15 to amend.” She filed her SAC on October 17, 2012, and all Defendants filed the current
16 Motion to Dismiss on November 5, 2012. (Doc. 27.)

17 DISCUSSION

18 I. LEGAL STANDARD

19 To survive dismissal for failure to state a claim pursuant to Federal Rule of Civil
20 Procedure 12(b)(6), a complaint must contain more than “labels and conclusions” or a
21 “formulaic recitation of the elements of a cause of action”; it must contain factual
22 allegations sufficient to “raise a right to relief above the speculative level.” *Bell Atl.*
23 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While “a complaint need not contain
24 detailed factual allegations . . . it must plead ‘enough facts to state a claim to relief that is
25 plausible on its face.’” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir.
26 2008) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the
27 plaintiff pleads factual content that allows the court to draw the reasonable inference that
28 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678

1 (2009) (citing *Twombly*, 550 U.S. at 556). The plausibility standard “asks for more than a
2 sheer possibility that a defendant has acted unlawfully.” *Id.* When a complaint does not
3 “permit the court to infer more than the mere possibility of misconduct, the complaint has
4 alleged—but it has not shown—that the pleader is entitled to relief.” *Id.* at 679 (internal
5 quotation omitted).

6 When analyzing a complaint for failure to state a claim under Rule 12(b)(6), “[a]ll
7 allegations of material fact are taken as true and construed in the light most favorable to
8 the nonmoving party.” *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). However,
9 legal conclusions couched as factual allegations are not given a presumption of
10 truthfulness, and “conclusory allegations of law and unwarranted inferences are not
11 sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir.
12 1998).

13 **II. ANALYSIS**

14 Bergdale’s SAC contains five counts against the Defendants: (1) Consumer Fraud,
15 (2) Quiet Title, (3) Breach of the Duty of Good Faith and Fair Dealing, (4) Negligent
16 Performance of an Undertaking, and (5) Violations of the Fair Debt Collection Practices
17 Act. (Doc. 21 ¶¶ 93-180.) Bergdale requests declaratory, injunctive, and monetary relief.
18 For the reasons discussed below, Bergdale has stated a claim against Bank of America
19 and BAC for consumer fraud and breach of the duty of good faith and fair dealing. She
20 has failed to state a claim with regard to the remaining Counts and Defendants.

21 **A. Consumer Fraud**

22 Bergdale alleges that Bank of America and BAC violated Arizona’s Consumer
23 Fraud Act (“CFA”), A.R.S. § 44-1522A, which prohibits the use of “any deception,
24 deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or
25 concealment, suppression or omission of any material fact with intent that others rely
26 upon such concealment, suppression or omission, in connection with the sale or
27 advertisement of any merchandise.” “To succeed on a claim of consumer fraud, a
28 plaintiff must show a false promise or misrepresentation made in connection with the sale

1 or advertisement of merchandise and consequent and proximate injury resulting from the
2 promise.” *Kuehn v. Stanley*, 208 Ariz. 124, 129, 91 P.3d 346, 351 (Ct. App. 2004). A
3 plaintiff must also allege reliance—though it need not be reasonable—on the
4 misrepresentations. *Id.* As discussed in the previous Order, the CFA applies to the
5 origination or modification of a loan. (Doc. 20 at 8-9.)

6 Because Bergdale is bringing a fraud claim, she must “state with particularity the
7 circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). “Rule 9 requires
8 allegations of fraud be pled with particularity, even if they are brought under the [CFA].”
9 *Silving v. Wells Fargo Bank, NA*, 800 F. Supp. 2d 1055, 1075 (D. Ariz. 2011); *Vess v.*
10 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003) (“It is established law, in
11 this circuit and elsewhere, that Rule 9(b)’s particularity requirement applies to state-law
12 causes of action. While a federal court will examine state law to determine whether the
13 elements of fraud have been pled sufficiently to state a cause of action, the Rule 9(b)
14 requirement that the circumstances of the fraud must be stated with particularity is a
15 federally imposed rule.”) (internal quotation marks and citation omitted, alterations
16 removed).

17 **1. Lack of Authority to Foreclose**

18 Part of the CFA claim rests on the theory that that Bank of America and BAC
19 “engaged in deceptive acts or practices in servicing of Plaintiff’s loan by representing
20 that it had authority to enforce her Note and to foreclose on behalf of the claimed Trust,
21 when it had knowingly failed to properly transfer the interest in the Note to the Trust.”
22 (Doc. 21 ¶ 94.) The Court has previously recognized that the documents attached to the
23 SAC (whose authenticity Bergdale does not contest) refute the claim that Bank of
24 America lacked authority to foreclose. (Doc. 20 at 5-7.) As Bergdale herself alleges,
25 Bank of America acquired Countrywide, her original lender. (Doc. 21 ¶ 2.) Bank of
26 America therefore succeeded to Countrywide’s interest in the Note, and then became the
27 beneficiary under the DOT via assignment. Bergdale attempts to challenge the validity of
28 these transactions by once again mounting sweeping arguments against the MERS

1 system. The Court need not cover the same ground, except to note again that there is no
2 “legal support for the proposition that the MERS system of securitization is so inherently
3 defective so as to render every MERS deed of trust completely unenforceable and
4 unassignable.” *In re Mortgage Elec. Registration Sys. (MERS) Litig.*, MDL 09-2119-JAT,
5 2011 WL 4550189 at *4 (D. Ariz. Oct. 3, 2011); *see also Hogan v. Wash. Mutual Bank,*
6 *N.A.*, ___ Ariz. ___, ___, 277 P.3d 781, 783 (2012); *Cervantes v. Countrywide Home*
7 *Loans, Inc.*, 656 F.3d 1034, 1042 (9th Cir. 2011) (“None of their allegations indicate that
8 the plaintiffs were misinformed about MERS’s role as a beneficiary, or the possibility
9 that their loans would be resold and tracked through the MERS system By signing
10 the deeds of trust, the plaintiffs agreed to the terms and were on notice of the contents.”).
11 Bergdale has not shown that statements of authority at the origination and modification
12 stages of the loan were fraudulent or misrepresentations. Bergdale’s consumer fraud
13 claim fails to the extent it relies on these discredited theories.

14 **2. Practices in Servicing Loan**

15 Another part of Bergdale’s claim is based on allegations that Bank of America and
16 BAC engaged in deceptive practices while servicing her loan. (*Id.* ¶ 96.) Bergdale
17 complains of the following actions of Bank of America and BAC in November and
18 December 2009: threatening foreclosure even though Bergdale was making timely
19 payments, misapplying her payments, misrepresenting amounts owed, and declaring a
20 false default. (*Id.*) Specifically, over the course of two weeks in November 2009,
21 different BAC representatives told Bergdale that she owed anywhere from \$4,650.00 to
22 \$4,372.80 to \$4,372.00 to \$7,568.30 to \$7,712.30. (*Id.* ¶¶ 36-48). Throughout this
23 process, Bergdale received notices of intent to accelerate. (*Id.*) Bergdale maintains that
24 she was not in default at the time. (*Id.* ¶¶ 37, 40, 42.)

25 Taking the allegations of the SAC as true at this stage, Bergdale does not have a
26 viable CFA claim. Assuming the CFA applies to servicing activity, Bergdale failed to
27 allege detrimental reliance on the alleged misrepresentations in November and December
28 2009. *See Kuehn*, 208 Ariz. at 129. Bergdale continued to pay the \$2,325.00 trial

1 payment throughout this period—there is not allegation of a material change in position
2 or additional, unwarranted payments made as a result of Bank of America and BAC’s
3 alleged false claims. (*Id.* ¶¶ 48-49.) Bergdale attempts to connect the Fall 2009 activity to
4 the Final Loan Modification Agreement in November of 2010 (*id.* ¶¶ 50-51, 97-100), but
5 she does not allege how those statements influenced the modification agreement, or how
6 she was in any way damaged by them, other than to say, apparently, that the statements
7 reflected that she held unequal bargaining power. Such allegations are insufficient under
8 Rule 9’s heightened pleading requirement. The alleged misrepresentations of November
9 and December 2009 regarding the amount owed cannot support a claim under the CFA.

10 **3. Double-posting November 2009 Payment**

11 Bergdale also claims she was defrauded when the Defendants double-posted her
12 November 2009 trial payment. She alleges that she had made one payment in mid-
13 November of \$2,325.00 that did not show up in BAC’s computers. (*Id.* ¶ 34.) A BAC
14 representative then asked her to submit another payment and stated that her previous
15 payment, if it came through, would be cancelled. (*Id.*) Instead, BAC posted both
16 payments, despite Bergdale’s alleged lack of default at the time. (*Id.* ¶¶ 38-39.)

17 Defendants’ only argument for dismissing this claim is that there was no loss
18 because the trial program required three monthly payments and Bergdale’s account was
19 credited for both. On the contrary, assuming application of the CFA to these claims,
20 Bergdale has alleged a misrepresentation, reliance, and consequent damage. BAC
21 allegedly misrepresented that it would apply only one payment, when it actually applied
22 two. She relied on that misrepresentation and submitted a second payment. When both
23 payments were applied, she suffered overdraft charges and was unable to pay her bills.
24 (*Id.* ¶ 39.) BAC’s solitary argument to the contrary is unpersuasive, and Bergdale may
25 proceed with a CFA claim on this theory.

26 **4. Loan Modification**

27 Bergdale also alleges that Bank of America and BAC violated the CFA by
28 misrepresenting the terms of the loan modification. (*Id.* ¶ 96.) Under the final

1 modification, Bergdale’s principal and interest payment was set at \$2,163.39. (Doc. 21-5,
2 Ex. E at 3.) Her December 2010 statement, however, offered three payment choices, all
3 of which differed from the \$2,163.39 specified in the final modification: (1) \$2,395.39
4 (interest-only), (2) \$5,916.17 (15-year amortized payment), and (3) \$3,047.97 (amortized
5 payment). (Doc. 21-6, Ex. F at 3.) Nevertheless, the third choice—the “Amortized
6 Payment Choice”—references the principal and interest payment agreed upon in the
7 modification: \$2,163.39. (*Id.*) The confusion arises because the “Total Payment Amount”
8 included certain “Outstanding Late Charges” and an escrow payment. (*Id.*) As Bank of
9 America and BAC point out, nowhere in the Final Modification Agreement does Bank of
10 America represent that Bergdale’s *total* payment would be \$2,163.39. Indeed, the DOT
11 specifies that escrow items and late charges can be included in the total payment. (Doc.
12 21-1, Ex. A ¶ 1.)

13 Bergdale alleges, however, that her total payment, including escrow, should have
14 been “approximately \$2,450/month”, several hundred dollars less than the amount
15 appearing on her December statement. (Doc. 21 ¶ 51.)⁴ Bergdale alleges that BANK OF
16 AMERICA and BAC made numerous miscalculations regarding the required escrow
17 payment, and those miscalculations could have resulted in requiring her to pay more for
18 escrow than she needed to. (*Id.* ¶¶ 33, 42-43.) Here, therefore, Bergdale has alleged both
19 a misrepresentation—claiming that she owed more for escrow than she actually did—and
20 detrimental reliance—making the wrong payment for two months, which led to increased
21 payments she was unable to afford. (*Id.* ¶ 55.) Bank of America and BAC’s arguments to
22 the contrary go to the question of the amount of the escrow payment, a factual issue
23 inappropriate for consideration on a motion to dismiss.

24 In short, Bergdale’s SAC alleges a viable CFA claim with respect to the claims of
25 double payment and misrepresenting the amount owed under the Final Loan
26 Modification. The remaining allegations of fraud are dismissed.

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28 ⁴ The statement references an escrow balance of \$1,617.30, but not how much was
included in a given payment. (Doc. 21-6, Ex. F at 3.)

1 **C. Quiet Title**

2 Bergdale reasserts her quiet title claim against the Defendants under A.R.S. § 12-
3 1101, which states that “[a]n action to determine and quiet title to real property may be
4 brought by anyone having or claiming an interest therein, whether in or out of possession,
5 against any person or the state when such person or the state claims an estate or interest
6 in the real property which is adverse to the party bringing the action.” Most of Bergdale’s
7 supporting allegations are based on the theory that Defendants lack authority to initiate
8 foreclosure proceedings because they are unable to produce the note at foreclosure or that
9 the documents purporting to transfer the interest were false. The Court’s previous Order
10 rejected the grounds on which Bergdale is claiming a lack of authority. (Doc. 20 at 6-7.)
11 Once again, Bergdale’s claim is really a challenge to the MERS system surrounding
12 securitization of mortgages. The Defendants are not required to record changes in
13 ownership of the note between MERS members within the MERS system as the
14 securitization process unfolds. *See Cervantes*, 656 F.3d at 1038-40. The remaining
15 allegations set forth by Bergdale address the loan servicing and modification process and
16 cannot support a quiet title claim. That claim is dismissed.

17 **D. Breach of Good Faith and Fair Dealing**

18 Bergdale also contends that Bank of America and BAC breached their duty of
19 good faith and fair dealing. (Doc. 21 ¶¶ 125-45.) “Arizona law implies a covenant of
20 good faith and fair dealing in every contract.” *Wells Fargo Bank v. Ariz. Laborers,*
21 *Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 490, 38
22 P.3d 12, 28 (2002). “The implied covenant of good faith and fair dealing prohibits a party
23 from doing anything to prevent other parties to the contract from receiving the benefits
24 and entitlements of the agreement.” *Id.*

25 Bergdale’s good faith claim sounds in both tort and contract. She asserts that Bank
26 of America and BAC, “exercising the threat of foreclosure at all times, used a contract
27 negotiation to manipulate bargaining power to their own advantage”. (Doc. 21 ¶ 127.)
28 Beyond these conclusory statements, however, Bergdale has offered no supporting

1 allegations. She does not describe how she was injured, other than general assertions that
2 she was harmed by entering into a modification agreement that was less than ideal. (*Id.* ¶
3 145.) Moreover, “[a] party may bring an action in tort claiming damages for breach of the
4 implied covenant of good faith . . . only where there is a ‘special relationship between the
5 parties arising from elements of public interest, adhesion, and fiduciary responsibility.’”
6 *Ariz. Laborers*, 201 Ariz. at 491 (quoting *Burkons v. Ticor Title Ins. Co. of Cal.*, 168
7 Ariz. 345, 355, 813 P.2d 710, 720 (1991)). Bergdale has not pled the existence of a such
8 a special relationship arising from “elements of public interest, adhesion, and fiduciary
9 responsibility.” *Burkons*, 168 Ariz. at 355. She cannot assert a tort claim.

10 On the other hand, Bergdale has stated a claim under a contract theory. “When the
11 remedy for breach of the covenant sounds in contract, it is not necessary for the
12 complaining party to establish a special relationship.” *Ariz. Laborers*, 201 Ariz. at 491.
13 She contends that the Defendants “did not honor the terms of the Final Loan
14 Modification” by issuing the December 2010 statement that required escrow payments
15 allegedly in excess of what she owed, as discussed above. (Doc. 21 ¶ 128.) That
16 allegation, taken to be true, states a claim that Defendants breached the modification
17 agreement. Consequently, Bergdale’s good faith claim survives on this basis alone.

18 The remaining allegations are a list of apparent practices of the Defendants. (*Id.* ¶¶
19 132-144.) Bergdale does not allege how she was harmed by some of these practices and
20 cites inapplicable, non-binding settlement agreements for others. As for the claims of
21 misapplication of payments, discussed above, simple negligence does not amount to a
22 breach of the duty of good faith. *See Ariz. Laborers*, 201 Ariz. at 491. Bergdale may,
23 however, advance her claim on the theory that Bank of America and BAC did not honor
24 the terms of the Final Loan Modification.

25 **E. Negligent Performance of Undertaking**

26 Bergdale’s fourth claim for relief is for negligent performance of undertaking.
27 (Doc. 10 ¶¶ 165-80.) This “Good Samaritan” doctrine allows recovery from those who
28 undertake “to render services to another which he should recognize as necessary for the

1 protection of the other's person or things” but fail to exercise reasonable care in the
2 performance of the undertaking. *Lloyd v. State Farm Mut. Auto. Ins. Co.*, 176 Ariz. 247,
3 250, 860 P.2d 1300, 1303 (Ct. App. 1992); Restatement (Second) of Torts § 323. The
4 Good Samaritan doctrine applies to allegations of both physical and economic harm. *Id.*
5 Liability attaches when the party’s “failure to exercise [reasonable] care increases the risk
6 of [physical or economic harm] or [t]he harm is suffered because of the other’s reliance
7 upon the undertaking.” *Id.*

8 Bergdale’s chief accusation is that Defendants “encourage[d] her to make
9 payments under the Trial Modification Plan so she could obtain a similar Permanent
10 Modification on the same terms.” (Doc. 21 ¶ 152.) Her payment under the permanent
11 modification, however, differed from the terms of the trial modification. Bergdale does
12 not allege how the Defendants failed to exercise reasonable care in crafting a
13 modification for her. Indeed, the fact that she received a modification indicates that
14 Defendants sought to help Bergdale avoid foreclosure. The remaining allegations go to
15 the breach of contract claim considered earlier. The Court does not see how those claims
16 fit within the parameters of the Good Samaritan doctrine. Therefore, Bergdale’s Good
17 Samaritan claim is dismissed.

18 **F. Fair Debt Collection Practices Act**

19 Bergdale alleges that the Defendants violated the Fair Debt Collection Practices
20 Act (“FDCPA”), 15 U.S.C. § 1692, et. seq (2006). But the Court dismissed this claim as a
21 matter of law in the prior order, and Bergdale was not at leave to bring it again. (Doc. 20
22 at 14) (“Any count that has been dismissed as a matter of law, should not be amended.”)
23 As the Court previously held, the FDCPA does not apply to any of the alleged actions by
24 the Defendants because mortgagees and their beneficiaries are not debt collectors and a
25 non-judicial foreclosure proceeding is not the collection of a debt under the FDCPA. *See*
26 *Mansour v. Cal-W. Reconveyance Corp.*, 618 F. Supp. 2d 1178, 1182 (D. Ariz. 2009);
27 *Diessner v. Mortgage Elec. Registration Sys.*, 618 F. Supp. 2d 1184, 1188-89 (D. Ariz.
28 2009) *aff’d sub nom. Diessner v. Mortgage Elec. Registration Sys., Inc.*, 384 F. App’x 609

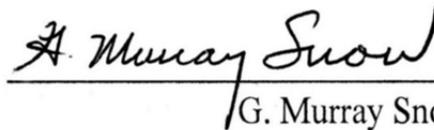
1 (9th Cir. 2010). Bergdale's FDCPA claim is also dismissed.

2 **CONCLUSION**

3 Two of Bergdale's claims survive. She may proceed on a theory that BAC and
4 BANK OF AMERICA violated the CFA and breached their duty of good faith by (1)
5 double posting her November 2009 trial modification payment and (2) offering her
6 materially different terms in the December 2010 invoice than were required by the Final
7 Loan Modification. The remainder of the SAC fails to state a claim as a matter of law,
8 and the remaining Defendants are dismissed.

9 **IT IS HEREBY ORDERED** that the Motion to Dismiss filed by the Defendants
10 (Doc. 27) is **granted in part and denied in part.**

11 Dated this 9th day of January, 2013.

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14 G. Murray Snow
15 United States District Judge
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