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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

YVETTE WEINSTEIN, Chapter 7 Trustee )  
of the Ariel Jaime Bankruptcy Estate, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
MORTGAGE CAPITAL ASSOCIATES, )  
INC.; EMC MORTGAGE )  
CORPORATION; and BAC HOME )  
LOANS SERVICING, LP, )  
 )  
Defendants. )

2:10-CV-01551-PMP-PAL  
BASE FILE  
2:10-CV-1562-PMP-LRL

ORDER

Presently before the Court is Defendant BAC Home Loans Servicing, LP's Motion to Dismiss (Doc. #12), filed on September 30, 2010. Plaintiff filed an Opposition (Doc. #28) on October 26, 2010, and an Errata (Doc. #31) on November 2, 2010. Defendant filed a Reply (Doc. #33) on November 5, 2010.

Also before the Court is Defendant Mortgage Capital Associates, Inc.'s Motion to Dismiss Plaintiff's Complaint (Doc. #14), filed on September 30, 2010. Plaintiff filed an Opposition (Doc. #25) on October 18, 2010. Defendant filed a Reply (Doc. #29) on October 28, 2010.

Also before the Court is Plaintiff's Motion to Remand (Doc. #16), filed on October 8, 2010. Defendant BAC Home Loans Servicing, LP filed an Opposition (Doc. #26) on October 25, 2010. Defendant EMC Mortgage Corporation filed a Joinder in the Opposition (Doc. #27) on October 25, 2010. Plaintiff filed a Reply (Doc. #32) on November 4, 2010.

1 Also before the Court is Defendant EMC Mortgage Corporation's Motion to  
2 Dismiss Plaintiff's Complaint (Doc. #23), filed on October 15, 2010. Plaintiff filed an  
3 Opposition (Doc. #30) on November 1, 2010. Defendant filed a Reply (Doc. #36) on  
4 November 12, 2010.

## 5 **I. BACKGROUND**

6 Plaintiff Yvette Weinstein is the trustee of the bankruptcy estate of Ariel Jaime  
7 ("Jaime"), who filed for bankruptcy in September 2008. (Pet. for Removal (Doc. #1),  
8 Compl. at 3.) In late 2006, Jaime acquired real property in Clark County, Nevada at the  
9 address 8039 Anasazi Ranch Avenue. (Id. at 5.) Plaintiff alleges that in connection with  
10 the acquisition of two loans to purchase the property, the mortgage broker, who is not  
11 currently named as a defendant in this action, submitted to Defendant Mortgage Capital  
12 Associates, Inc. ("Mortgage Capital") documents which contained erroneous factual  
13 statements about Jaime, or which omitted material information. (Id. at 6-7.) Plaintiff  
14 alleges the mortgage company did not take reasonable commercial steps to confirm the  
15 statements in the loan documents were true and complete, and failed to identify and correct  
16 errors. (Id. at 7.) Plaintiff alleges Mortgage Capital knew or should have known of these  
17 errors and omissions, and failed to take commercially reasonable steps to assure these errors  
18 and omissions were detected and corrected. (Id.) According to the Complaint, Mortgage  
19 Capital knew or should have known that Jaime could not reasonably repay the loan under  
20 the loan agreement's terms. (Id. at 8.) Plaintiff further alleges that Mortgage Capital and  
21 the mortgage broker did not inform Jaime of the loan's material provisions, including the  
22 loan's terms, the consequences of entering into the loan, available alternatives, and Jaime's  
23 right to rescind. (Id. at 8-9.)

24 The loan closed on December 14, 2006. (Id. at 9.) Plaintiff contends that Jaime  
25 was not provided with certain documents, including the Residential Purchase Contract,  
26 disclosure documents, 1003 loan applications, title report documents, an appraisal, a 1008

1 Form, a good faith estimate, escrow instructions, HUD documents, and title documents.  
2 (Id. at 10.) According to the Complaint, these documents failed to fully disclose the loans'  
3 terms, the applicable interest rates, and the highest possible interest rate that could be  
4 charged on the loans, and these documents were “defective on their face.” (Id.)

5           Following the closing, Mortgage Capital had the loans rated by an unidentified  
6 “Rating Company,” and sold the loans to the “Mortgage Purchaser Company.” (Id. at 11.)  
7 The Complaint identifies both Defendant EMC Mortgage Corporation (“EMC”) and BAC  
8 Home Loans Servicing, LP as “Mortgage Purchaser Company,” but does not specify which  
9 of these Defendants purchased which of Jaime’s two loans. Plaintiff alleges that prior to  
10 purchasing the loans, the Mortgage Purchaser Companies knew or should have know that  
11 the Rating Company’s rating was unreliable, that Jaime was likely to default on the loans,  
12 and that the related loan documents were “defective on their face.” (Id. at 11.)

13           Jaime defaulted on the loan, and the “Mortgage Purchaser Company” foreclosed  
14 on the property. (Id. at 12.) Plaintiff alleges the property was sold at auction. (Id.)

15           Plaintiff thereafter brought this action in Nevada state court, asserting against  
16 Mortgage Capital claims for breach of contract (count one), breach of the covenant of good  
17 faith and fair dealing (count two), and tortious interference with contract (count nine).  
18 Plaintiff asserts against Mortgage Capital, EMC, and BAC claims for violation of Nevada  
19 Revised Statutes regarding unfair lending practices (count three), consumer fraud under  
20 Nevada deceptive trade practices law (count four), fraud (count five), constructive fraud  
21 (count six), negligent misrepresentation (count seven), negligence (count eight), and civil  
22 conspiracy (count ten). Defendants removed the action to this Court based on diversity and  
23 federal question jurisdiction. (2:10-CV-01551-PMP-PAL, Pet. for Removal; 2:10-CV-  
24 01562-PMP-LRL, Pet. for Removal (Doc. #1).)

25           Plaintiff now moves to remand. Defendants move to dismiss the Complaint on  
26 various grounds.

1 **II. MOTION TO REMAND (Doc. #16)**

2 Plaintiff moves to remand, asserting this Court lacks subject matter jurisdiction.  
3 Plaintiff contends that diversity jurisdiction does not exist because she intends to name as a  
4 defendant the mortgage broker, who she suspects is a Nevada resident. Plaintiff also  
5 contends federal question jurisdiction does not exist because Plaintiff pled her Complaint to  
6 assert only state law claims. Defendants respond that diversity jurisdiction presently exists  
7 between the named parties to this action. Defendants also argue Plaintiffs' claims  
8 necessarily rely upon federal law, as they relate to disclosures at closing required under  
9 federal law.

10 Pursuant to 28 U.S.C. § 1332, federal district courts have original jurisdiction  
11 over civil actions in diversity cases "where the matter in controversy exceeds the sum or  
12 value of \$75,000" and where the matter is between "citizens of different States." "Section  
13 1332 requires complete diversity of citizenship; each of the plaintiffs must be a citizen of a  
14 different state than each of the defendants." Morris v. Princess Cruises, Inc., 236 F.3d  
15 1061, 1067 (9th Cir. 2001).

16 As the Complaint currently is pled, Plaintiff concedes complete diversity exists,  
17 as Plaintiff and Jaime are Nevada citizens, and each Defendant is not a Nevada citizen.  
18 Plaintiff also does not dispute that given the amounts of the mortgages, more than \$75,000  
19 is in dispute. This Court therefore has diversity jurisdiction. Plaintiff's stated intent to  
20 name another party whom Plaintiff suspects, but does not know, might be a Nevada citizen  
21 does not deprive the Court of jurisdiction. The Court will deny Plaintiff's motion to  
22 remand.

23 **III. BAC'S MOTION TO DISMISS (Doc. #12)**

24 In considering a motion to dismiss, "all well-pleaded allegations of material fact  
25 are taken as true and construed in a light most favorable to the non-moving party." Wylor  
26 Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation

1 omitted). However, the Court does not necessarily assume the truth of legal conclusions  
2 merely because they are cast in the form of factual allegations in the plaintiff's complaint.  
3 See Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). There is a  
4 strong presumption against dismissing an action for failure to state a claim. Ileto v. Glock  
5 Inc., 349 F.3d 1191, 1200 (9th Cir. 2003). A plaintiff must make sufficient factual  
6 allegations to establish a plausible entitlement to relief. Bell Atl. Corp. v Twombly, 550  
7 U.S. 544, 556 (2007). Such allegations must amount to "more than labels and conclusions,  
8 [or] a formulaic recitation of the elements of a cause of action." Id. at 555.

9 **A. Failure to State a Claim - Count Three**

10 BAC argues Plaintiff fails to state a claim under Nevada Revised Statutes  
11 § 598D.100(1)(b) because the statute does not apply to residential mortgage transactions,  
12 which are statutorily defined as purchase money loans such as Plaintiff's loans on the  
13 subject property. Plaintiff responds that even if the statute does not explicitly cover  
14 Plaintiff's claims, the legislative history suggests subprime lenders owe a duty to borrowers.

15 Section 598D.100(1)(b) as it existed in 2003 provided:

16 It is an unfair lending practice for a lender to . . . [k]nowingly or  
17 intentionally make a home loan to a borrower based solely upon the  
18 equity of the borrower in the home property and without determining  
that the borrower has the ability to repay the home loan from other  
assets, including, without limitation, income.

19 Section 598D.100(1)(b) was amended in 2007 to state:

20 It is an unfair lending practice for a lender to . . . [k]nowingly or  
21 intentionally make a home loan, other than a reverse mortgage, to a  
22 borrower, including, without limitation, a low-document home loan,  
23 no-document home loan or stated-document home loan, without  
determining, using any commercially reasonable means or mechanism,  
that the borrower has the ability to repay the home loan.

24 Section 598D.040 of the 2003 Act defined "home loan" as:

25 a consumer credit transaction that:

26 1. Is secured by a mortgage loan which involves real property located  
within this State; and

1 2. Constitutes a mortgage under § 152 of the Home Ownership and  
2 Equity Protection Act of 1994, 15 U.S.C. § 1602(aa), and the  
3 regulations adopted by the Board of Governors of the Federal Reserve  
System pursuant thereto, including, without limitation, 12 C.F.R.  
§ 226.32.

4 The 2007 version contains the same definition.<sup>1</sup>

5 Section 152 of the Home Ownership and Equity Protection Act of 1994  
6 (“HOEPA”) defines a mortgage as “a consumer credit transaction that is secured by the  
7 consumer’s principal dwelling, other than a residential mortgage transaction, a reverse  
8 mortgage transaction, or a transaction under an open end credit plan . . . .” 15 U.S.C.  
9 § 1602(aa). The HOEPA excludes “residential mortgage transaction” from the definition of  
10 “mortgage.” A residential mortgage transaction is defined as “a transaction in which a  
11 mortgage, deed of trust, purchase money security interest arising under an installment sales  
12 contract, or equivalent consensual security interest is created or retained against the  
13 consumer’s dwelling to finance the acquisition or initial construction of such dwelling.” 15  
14 U.S.C. § 1602(w).

15 Here, Plaintiff’s loans were taken against his dwelling<sup>2</sup> to finance the purchase of  
16 the residence. Therefore, regardless of whether Plaintiff’s claim arises under the 2003 or  
17 2007 version of the Act, the loans are residential mortgage transactions as defined by the  
18 HOEPA, are therefore not “mortgages” under HOEPA, and as a result are excluded from  
19 the definition of mortgage under § 598D.040. Accordingly, Plaintiff’s loans are not  
20 qualified as home loans under § 598D.100(1)(b), and Plaintiff has no claim under that

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21  
22 <sup>1</sup> Defining a home loan as “a consumer credit transaction that is secured by a mortgage loan  
23 which involves real property located within this State and includes, without limitation, a consumer  
24 credit transaction that constitutes a mortgage under § 152 of the Home Ownership and Equity  
Protection Act of 1994, 15 U.S.C. § 1602(aa), and the regulations adopted by the Board of Governors  
of the Federal Reserve System pursuant thereto, including, without limitation, 12 C.F.R. § 226.32.”

25 <sup>2</sup> Plaintiff does not explicitly allege this property was Jaime’s dwelling, however, in listing the  
26 injuries Jaime suffered, Plaintiff includes the “costs of changing residence, including of moving  
personal property and utility deposits.” (Compl. at 12.)

1 statute. The Court therefore will dismiss this claim with prejudice.

2 **B. Failure to State a Claim - Count Four**

3 BAC argues Plaintiff fails to plead violation of the consumer fraud statutes with  
4 particularity. BAC also argues that even if Plaintiff could plead with particularity, the  
5 Nevada Deceptive Trade Practices Act to which Plaintiff refers does not apply to home  
6 loans. Plaintiff responds that Nevada Revised Statutes § 598.0915 makes it a deceptive  
7 trade practice to knowingly make a false representation in a transaction. Plaintiff contends  
8 that the parties who dealt with Jaime regarding the loan misrepresented to him the loan's  
9 terms and his ability to repay the loan. Plaintiff argues that as a co-conspirator, BAC is  
10 liable for the misrepresentations made to Jaime by other parties.

11 Pursuant to Nevada Revised Statutes § 598.0915(15), it is a deceptive trade  
12 practice to “[k]nowingly make[] any . . . false representation in a transaction” in the course  
13 of the defendant’s business or occupation. Federal Rule of Civil Procedure 9(b) requires  
14 that “the circumstances constituting fraud or mistake shall be stated with particularity” in  
15 the complaint. To satisfy this burden, the complaint ““must set forth more than the neutral  
16 facts necessary to identify the transaction.”” Yourish v. Cal. Amplifier, 191 F.3d 983, 993  
17 (9th Cir. 1999) (footnote omitted) (quoting In re GlenFed Sec. Litig., 42 F.3d 1541, 1548  
18 (9th Cir. 1994) (en banc)). The “neutral facts” mean the ““time, place, and content of an  
19 alleged misrepresentation.”” Id. at 993 n.10 (quoting GlenFed, 42 F.3d at 1547-48). In  
20 addition to pleading these neutral facts, the plaintiff ““must set forth what is false or  
21 misleading about a statement, and why it is false. In other words, the plaintiff must set forth  
22 an explanation as to why the statement or omission complained of was false or  
23 misleading.”” Id. (quoting GlenFed, 42 F.3d at 1548). However, “[m]alice, intent,  
24 knowledge, and other condition of mind of a person may be averred generally.” Fed. R.  
25 Civ. P. 9(b). Plaintiff’s claim that BAC made a false representation sounds in fraud, and  
26 therefore is subject to the particularity requirement. In re Daou Sys., Inc., 11 F.3d 1006,

1 1027 (9th Cir. 2005).

2 Plaintiff has failed to allege consumer fraud with particularity. Plaintiff groups  
3 all Defendants together, along with unnamed parties, without identifying which Defendant  
4 or non-party engaged in what conduct. Plaintiff does not identify a single representation  
5 BAC allegedly made, to whom, when it was made, how it was communicated, or why it is  
6 false. Plaintiff relies on conspiracy allegations to contend that the parties who made the  
7 alleged representations were BAC's co-conspirators. However, as discussed below,  
8 Plaintiff fails to allege a conspiracy.

9 Moreover, this claim is barred by the statute of limitations. Pursuant to Nevada  
10 Revised Statutes § 11.190(3)(a), Plaintiff had to bring this claim within three years. To the  
11 extent Plaintiff identifies the substance of the alleged misrepresentations made to Jaime,  
12 those misrepresentations occurred prior to or at the time of closing in December 2006.  
13 Consequently, Plaintiff had to bring this claim no later than December 2009. However,  
14 Plaintiff did not initiate this action until August 2010. Plaintiff's claim therefore is barred  
15 unless a tolling provision applies.

16 Plaintiff asserts the discovery rule tolls the limitations period. Nevada recognizes  
17 the discovery rule, which tolls the statutory limitations period until “the injured party  
18 discovers or reasonably should have discovered facts supporting a cause of action.” Bemis  
19 v. Estate of Bemis, 967 P.2d 437, 440 (Nev. 1998) (quoting Petersen v. Bruen, 792 P.2d 18,  
20 20 (Nev. 1990)). The discovery rule also applies to discovering the identity of the  
21 defendant. Siragusa v. Brown, 971 P.2d 801, 807 (Nev. 1998). Under the discovery rule,  
22 the plaintiff must exercise reasonable diligence to discover the existence of a cause of  
23 action. Bemis, 967 P.2d at 440. Whether the plaintiff exercised reasonable diligence is a  
24 question of fact for the fact finder. Id. Consequently, “[d]ismissal on statute of limitations  
25 grounds is only appropriate when uncontroverted evidence irrefutably demonstrates plaintiff  
26 discovered or should have discovered the facts giving rise to the cause of action.” Id.



1 (quotations omitted).

2 Here, Jaime avers that he did not discover BAC's alleged predatory lending  
3 practices until advised by his bankruptcy attorney in 2008. However, Jaime further avers  
4 that upon reviewing the loan documents, he noticed they contained terms "that I had never  
5 heard of and would not have agreed to had I been informed of them." (Opp'n (Doc. #28),  
6 Aff. of Ariel Jaime at 2.) Further, the Complaint alleges the loan documents' deficiencies  
7 are apparent on their face. Consequently, even if Jaime did not actually discover his claim  
8 until 2008, a review of his loan documents in December 2006 would have brought these  
9 alleged discrepancies to his attention. Plaintiff therefore reasonably should have discovered  
10 this claim in December 2006. The Court will dismiss this claim with prejudice.

### 11 **C. Failure to State a Claim - Counts Five, Six, and Seven**

12 BAC argues Plaintiff fails to allege fraud with particularity. BAC also argues  
13 Plaintiff fails to plead any representation BAC made, or any duty to disclose to support a  
14 fraud by omission theory. BAC further contends Plaintiff cannot show reliance as a matter  
15 of law because, by the Complaint's allegations, BAC did nothing prior to the loan closing  
16 that would have induced Jaime to enter into the loan agreement. BAC argues that Plaintiff  
17 fails to state a claim for constructive fraud because BAC was not in a fiduciary relationship  
18 with Jaime. Plaintiff responds that she adequately has alleged BAC failed to verify false  
19 and inconsistent information that was apparent from the face of the loan documents.  
20 Plaintiff also argues that as a co-conspirator, BAC is liable for the actions of whoever  
21 represented to Jaime that he could repay the loans. Plaintiff contends the Court should relax  
22 the pleading standard where, as here, the facts are peculiarly within Defendants' knowledge  
23 or possession.

#### 24 1. Fraud - Count Five

25 Under Nevada law, a plaintiff asserting a fraud claim must prove that (1) the  
26 defendant made a false representation (2) knowing or believing that the representation was

1 false (or lacking a sufficient basis for making the representation), (3) intending to induce  
2 the plaintiff to act or to refrain from acting in reliance on the misrepresentation; (4) the  
3 plaintiff justifiably relied on the misrepresentation; and (5) damage to the plaintiff resulted  
4 from such reliance. Albert H. Wohlers & Co. v. Bartgis, 969 P.2d 949, 957-58 (Nev. 1998).  
5 The plaintiff must make this showing by clear and convincing evidence. Id.

6 As stated previously, Plaintiff has failed to allege with particularity any false  
7 representation made by BAC and groups all Defendants together without distinguishing  
8 who did what, when, and why any representations made were false. Although Plaintiff  
9 asserts the deficiencies in the loan documents are apparent on the face of those documents,  
10 Plaintiff does not identify a single instance of such alleged deficiencies. Additionally,  
11 because the Complaint alleges BAC did not become involved with Jaime's loan until after  
12 Jaime entered into the loan agreements, Jaime could not have relied on any representation  
13 by BAC when deciding whether to enter into the loans. To the extent Plaintiff relies upon  
14 any representations made by BAC's alleged co-conspirators, Plaintiff fails to allege a  
15 conspiracy.

16 Moreover, this claim is barred by the statute of limitations. Pursuant to Nevada  
17 Revised Statutes § 11.190(3)(d), Plaintiff had to bring this claim within three years. As  
18 stated above, to the extent Plaintiff identifies the substance of the alleged  
19 misrepresentations made to Jaime, those misrepresentations occurred prior to or at the time  
20 of closing in December 2006. Consequently, Plaintiff had to bring this claim no later than  
21 December 2009. However, Plaintiff did not initiate this action until August 2010. The  
22 discovery rule does not save Plaintiff's claim because even if Jaime did not actually  
23 discover his claim until 2008, a review of his loan documents in December 2006 would  
24 have brought these alleged discrepancies to his attention. Plaintiff therefore reasonably  
25 should have discovered this claim in December 2006. The Court will dismiss this claim  
26 with prejudice.

1                                    2. Constructive Fraud - Count Six

2                    Under Nevada law, constructive fraud is “the breach of some legal or equitable  
3 duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency  
4 to deceive others or to violate confidence.” Perry v. Jordan, 900 P.2d 335, 337 (Nev. 1995).  
5 “Constructive fraud is characterized by a breach of duty arising out of a fiduciary or  
6 confidential relationship.” Id. A confidential relationship exists “when one reposes a  
7 special confidence in another so that the latter, in equity and good conscience, is bound to  
8 act in good faith and with due regard to the interests of the one reposing the confidence.”  
9 Id. Absent other facts, such as a familial relationship, a lender or loan servicer generally  
10 owes no duty to a borrower beyond contractual obligations. Yerington Ford, Inc. v. Gen.  
11 Motors Acceptance Corp., 359 F. Supp. 2d 1075, 1090 (D. Nev. 2004), overruled on other  
12 grounds by Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865 (9th Cir. 2007).

13                    Plaintiff fails to allege facts supporting a confidential relationship between Jaime  
14 and BAC. Plaintiff alleges BAC purchased and/or serviced Jaime’s loan, which does not  
15 give rise to a confidential relationship. Plaintiff alleges no other facts which would support  
16 a confidential relationship between BAC and Jaime.

17                    Moreover, this claim is barred by the statute of limitations. Pursuant to Nevada  
18 Revised Statutes § 11.190(3)(d), Plaintiff had to bring this claim within three years. As  
19 stated above, to the extent Plaintiff identifies the substance of the alleged  
20 misrepresentations made to Jaime, those misrepresentations occurred prior to or at the time  
21 of closing in December 2006. Consequently, Plaintiff had to bring this claim no later than  
22 December 2009. However, Plaintiff did not initiate this action until August 2010. The  
23 discovery rule does not save Plaintiff’s claim because even if Jaime did not actually  
24 discover his claim until 2008, a review of his loan documents in December 2006 would  
25 have brought these alleged discrepancies to his attention. Plaintiff therefore reasonably  
26 should have discovered this claim in December 2006. The Court will dismiss this claim

1 with prejudice.

2 3. Negligent Misrepresentation - Count Seven

3 Nevada follows the definition in Restatement (Second) of Torts § 552 for  
4 negligent misrepresentation:

5 One who, in the course of his business, profession or employment, or  
6 in any other action in which he has a pecuniary interest, supplies false  
7 information for the guidance of others in their business transactions, is  
8 subject to liability for pecuniary loss caused to them by their justifiable  
9 reliance upon the information, if he fails to exercise reasonable care or  
10 competence in obtaining or communicating the information.

11 Scaffidi v. United Nissan, 425 F. Supp. 2d 1159, 1169-70 (D. Nev. 2005). “The difference  
12 between fraud and negligent misrepresentation is that a negligent misrepresentation is made  
13 without a reasonable basis for believing its truthfulness.” Id. Nevada also recognizes  
14 negligent misrepresentation by omission where the defendant had a duty to speak. In re  
15 Agribiotech, Inc., 291 F. Supp. 2d 1186, 1191-92 (D. Nev. 2003). Such a duty exists where  
16 there is a special relationship between the parties. Id.

17 As with Plaintiff’s fraud claim, Plaintiff has failed to allege with particularity any  
18 false representation made by BAC and groups all Defendants together without identifying  
19 any specific representation, who made it, when and where it was made, and why it was  
20 false. Additionally, because the Complaint alleges BAC did not become involved with  
21 Jaime’s loan until after Jaime entered into the loan agreements, Jaime could not have relied  
22 on any representation by BAC when deciding whether to enter into the loans. To the extent  
23 Plaintiff relies upon any representations made by BAC’s alleged co-conspirators, Plaintiff  
24 fails to allege a conspiracy.

25 Moreover, this claim is barred by the statute of limitations. Pursuant to Nevada  
26 Revised Statutes § 11.190(3)(d), Plaintiff had to bring this claim within three years. As  
stated above, to the extent Plaintiff identifies the substance of the alleged  
misrepresentations made to Jaime, those misrepresentations occurred prior to or at the time

1 of closing in December 2006. Consequently, Plaintiff had to bring this claim no later than  
2 December 2009. However, Plaintiff did not initiate this action until August 2010. The  
3 discovery rule does not save Plaintiff's claim because even if Jaime did not actually  
4 discover his claim until 2008, a review of his loan documents in December 2006 would  
5 have brought these alleged discrepancies to his attention. Plaintiff therefore reasonably  
6 should have discovered this claim in December 2006. The Court will dismiss this claim  
7 with prejudice.

#### 8 **D. Negligence - Count Eight**

9 BAC argues Plaintiff fails to state a negligence claim because BAC owed no duty  
10 to Plaintiff and a negligence claim is barred by the economic loss doctrine. Plaintiff  
11 responds that the mortgage broker acted as the lender's agent, and thereby acted as the  
12 agent for subsequent purchasers or loan services as well. Plaintiff contends Jaime placed  
13 confidence in the mortgage broker and a special relationship thereby existed between Jaime  
14 and BAC. Plaintiff also argues that by purchasing the loan, BAC represented that it was an  
15 entity with superior knowledge and experience and would protect the interest of borrowers  
16 whose loans it was servicing. As to the economic loss doctrine, Plaintiff argues that Jaime  
17 suffered emotional distress and thus his damages are not purely economic.

18 The Court will dismiss this claim because a loan servicer owes no duties to the  
19 borrower beyond those set out in the relevant agreements. Because BAC owed no duty,  
20 Plaintiff fails to state a negligence claim as a matter of law. See Butler ex rel. Biller v.  
21 Bayer, 168 P.3d 1055, 1063 (Nev. 2007) (listing duty as essential element of negligence  
22 claim). The Court therefore will dismiss this claim with prejudice.

#### 23 **F. Civil Conspiracy - Count Ten**

24 BAC argues Plaintiff fails to allege a conspiracy and fails to allege with  
25 particularity a conspiracy to defraud. Plaintiff responds she adequately has alleged BAC  
26 was involved in a conspiracy to engage in predatory lending practices.

1 In Nevada, ““an actionable conspiracy consists of a combination of two or more  
2 persons who, by some concerted action, intend to accomplish an unlawful objective for the  
3 purpose of harming another, and damage results from the act or acts.”” Hilton Hotels Corp.  
4 v. Butch Lewis Prods., Inc., 862 P.2d 1207, 1210 (Nev. 1993) (quoting Sutherland v. Gross,  
5 772 P.2d 1287, 1290 (Nev. 1989)). Use of a term such as conspiracy by itself is insufficient  
6 to survive a motion to dismiss, but may be sufficient if accompanied with specific  
7 allegations, such as identifying a written agreement giving rise to the conspiracy or alleging  
8 the conspirators “committed acts that are unlikely to have been undertaken without an  
9 agreement.” Mendocino Env'tl. Ctr. v. Mendocino Cnty., 192 F.3d 1283, 1301 (9th Cir.  
10 1999) (quotation omitted); see also Twombly, 550 U.S. at 557. A complaint for civil  
11 conspiracy must plead the “specific time, place, [and] person involved in the alleged  
12 conspiracies.” Twombly, 550 U.S. at 565 n.10 (holding the plaintiff’s complaint was  
13 insufficient because it merely identified a general seven year period in which the conspiracy  
14 allegedly occurred without alleging a specific time, place, or person involved).

15 Plaintiff has failed to allege facts giving rise to a plausible entitlement to relief on  
16 a civil conspiracy claim. The Complaint contains only conclusory allegations of a  
17 conspiracy involving BAC, Mortgage Capital, EMC, and unidentified other parties,  
18 including a mortgage broker, the mortgage broker company, and a ratings agency. Plaintiff  
19 does not state when the conspiracy began or ended, the geographic scope of the conspiracy,  
20 what persons were involved, or any other facts supporting a meeting of the minds. Plaintiff  
21 does not allege facts which suggest Defendants would not have acted as they did absent a  
22 conspiracy. Plaintiff does not allege any facts at all, but rather sets forth conclusory  
23 allegations of conspiracy.

24 Moreover, a civil conspiracy is not an independent claim, and does not give rise  
25 to a cause of action unless a civil wrong has been committed resulting in damage. Jordan v.  
26 State ex rel. Dep’t of Motor Vehicles & Pub. Safety, 110 P.3d 30, 51 (Nev. 2005) (per

1 curiam) (stating that “an underlying cause of action for fraud is a necessary predicate to a  
2 cause of action for conspiracy to defraud”), abrogated on other grounds by Buzz Stew, LLC  
3 v. City of N. Las Vegas, 181 P.3d 670, 672 n.6 (Nev. 2008). The Court has dismissed all of  
4 Plaintiff’s other claims against BAC with prejudice. Plaintiff cannot circumvent the statute  
5 of limitations or other defects of the substantive claims by alleging conspiracy. The Court  
6 therefore will dismiss this claim with prejudice as well.

#### 7 **IV. DEFENDANT MORTGAGE CAPITAL’S MOTION TO DISMISS (Doc. #14)**

##### 8 **A. Breach of Contract - Count One**

9 Mortgage Capital argues Plaintiff fails to allege what the breach was, that the  
10 breach was material, that Mortgage Capital is responsible for the breach, or that Jaime did  
11 not breach the contract first. Plaintiff responds that Jaime entered into a contract with the  
12 “broker/lender” to obtain financing he could afford, and the “broker/lender” breached that  
13 contract by offering him a mortgage he could not afford. Plaintiff states that she does not  
14 know at this point whether Mortgage Capital acted as the broker, but concedes that if  
15 Mortgage Capital did not, this claim should be dismissed.

16 Plaintiff makes no allegations in the Complaint that Mortgage Capital was the  
17 broker. The Complaint identifies Mortgage Capital as “Lender,” and identifies the broker  
18 as an unknown person or entity. The Court will dismiss this claim without prejudice.

##### 19 **B. Breach of Covenant of Good Faith and Fair Dealing - Count Two**

20 Mortgage Capital argues Plaintiff does not identify what contract between  
21 Mortgage Capital and Jaime is at issue, who breached the covenant, or how the covenant  
22 was breached. Plaintiff argues that the loan documents on their face contain deficiencies,  
23 inconsistencies, and misstatements which Mortgage Capital should have investigated to  
24 determine Jaime’s ability to repay the loan, and its failure to do so violates the covenant.

25 Under Nevada law, every contract or agreement contains an implied promise of  
26 good faith and fair dealing. Hilton Hotels Corp. v. Butch Lewis Prods., Inc., 808 P.2d 919,

1 923 (Nev. 1991). “Where the terms of a contract are literally complied with but one party  
2 to the contract deliberately countervenes the intention and spirit of the contract, that party  
3 can incur liability for breach of the implied covenant of good faith and fair dealing.” Id. at  
4 922-23. “Whether the controlling party’s actions fall outside the reasonable expectations of  
5 the dependent party is determined by the various factors and special circumstances that  
6 shape these expectations.” Id. at 923-24.

7 Plaintiff cites no authority for the proposition that a lender in an arms-length  
8 negotiation with a borrower breaches the covenant of good faith and fair dealing implied in  
9 a contract if it does not advise the borrower, prior to contract formation, as to whether  
10 entering into the loan is in the borrower’s interest. Ordinarily, no special relationship exists  
11 between a lender and a borrower that would impose any such duty on Mortgage Capital.  
12 Plaintiff does not plead any facts that would suggest such a special relationship existed in  
13 this case. Plaintiff’s Complaint does not identify any acts taken by Mortgage Capital  
14 following the contract’s formation which would breach the covenant of good faith and fair  
15 dealing implied therein. The Court will dismiss this claim without prejudice.

### 16 **C. Unfair Lending Practices - Count Three**

17 Mortgage Capital argues Plaintiff’s loan does not fall within the statutory  
18 protection of Nevada’s unfair lending practices statute. Plaintiff responds that the  
19 legislative history suggests subprime lenders owe a duty to borrowers. The Court’s ruling  
20 on this claim with respect to BAC applies equally to Plaintiff’s claim against Mortgage  
21 Capital. The Court will dismiss this claim with prejudice.

### 22 **D. Consumer Fraud - Count Four**

23 Mortgage Capital argues Chapter 598 does not apply to a home loan or mortgage,  
24 Plaintiff failed to plead fraud with particularity, and Plaintiff’s own allegations show  
25 Mortgage Capital did not receive accurate information on which to base its lending decision  
26 and thus it, not Jaime, was the victim of fraud. Plaintiff responds that Nevada case law



1 establishes Chapter 598 applies to real estate transactions and Mortgage Capital was  
2 involved in a conspiracy to engage in predatory loan practices.

3 Chapter 598 applies to “the deceptive sale of real property.” Betsinger v. D.R.  
4 Horton, Inc., 232 P.3d 433, 436 n.4 (Nev. 2010). Although Mortgage Capital argues  
5 Betsinger applies only to real estate transactions, and not mortgages, Betsinger rejected the  
6 argument by a home builder and the home builder’s financing division that Chapter 598 did  
7 not apply to the financing division’s “bait and switch” of the offered mortgage rate as well  
8 as the builder’s broken promise to return the plaintiff’s deposit. Betsinger applied Chapter  
9 598 to the home lender’s conduct in offering to finance the plaintiff’s purchase of the home.  
10 Thus, the Court rejects Mortgage Capital’s argument that Chapter 598 categorically cannot  
11 apply to mortgage transactions.

12 However, as discussed with respect to BAC’s motion, Plaintiff fails to allege this  
13 claim with particularity. Plaintiff does not allege which Defendant engaged in what  
14 conduct, when, and why it is fraudulent. Plaintiff cannot lump all Defendants together and  
15 make generalized and conclusory allegations to support a consumer fraud claim. Although  
16 Betsinger held that consumer fraud claims under Chapter 598 need not be proven by clear  
17 and convincing evidence, id. at 436, Plaintiff’s consumer fraud claim here sounds in fraud  
18 and thus still must meet the particularity requirement of Rule 9(b). The Court therefore will  
19 dismiss this claim without prejudice.

20 **E. Fraud, Constructive Fraud, and Negligent Misrepresentation - Counts**  
21 **Five, Six, and Seven**

22 Mortgage Capital argues that Plaintiff fails to allege fraud or negligent  
23 misrepresentation with particularity, and Mortgage Capital owes no duty to Jaime  
24 supporting a constructive fraud claim. Plaintiff responds that a special relationship existed  
25 because Jaime placed trust in the broker and the lender to help him understand the loans’  
26 terms and whether he could afford to repay them. As to the fraud claim, Plaintiff argues

1 that the broker made representations to Jaime that he could afford the loan when that was  
2 not true.

3 As set forth above, Plaintiff fails to plead these claims with particularity. Further,  
4 Mortgage Capital, as lender, ordinarily owes no duty to Jaime as the borrower, absent  
5 special circumstances. As set forth above, Plaintiff does not plead any facts evincing a  
6 special relationship that would support a constructive fraud claim. The Court therefore will  
7 dismiss these claims without prejudice.

#### 8 **F. Negligence - Count Eight**

9 Mortgage Capital argues that no independent duty exists between Mortgage  
10 Capital and Jaime beyond the contract. Plaintiff responds that a duty existed because Jaime  
11 placed trust in the broker to provide him with a loan he could afford.

12 As set forth above, a lender ordinarily owes no duty to a borrower, and Plaintiff  
13 has not pled any facts suggesting Mortgage Capital, as opposed to the broker, owed any  
14 duty to Jaime. The Court therefore will dismiss this claim without prejudice.

#### 15 **G. Tortious Interference with Contract - Count Nine**

16 Mortgage Capital argues this claim is barred by the statute of limitations, and  
17 Plaintiff has failed to allege who the third parties are or how Mortgage Capital knew or  
18 should have known of Jaime's contracts with these third parties. Plaintiff concedes this  
19 claim should be dismissed. The Court will dismiss this claim with prejudice.

#### 20 **H. Civil Conspiracy - Count Ten**

21 The Court already has identified the pleading deficiencies associated with this  
22 claim. The Court therefore will dismiss this claim without prejudice.

### 23 **V. DEFENDANT EMC'S MOTION TO DISMISS (Doc. #23)**

#### 24 **A. Unfair Lending Practices - Count Three**

25 Defendant EMC argues this claim is barred by the two-year statute of limitations,  
26 Plaintiff fails to plead fraud with particularity, the statute does not apply to Plaintiff's

1 residential mortgage, and EMC is not a “lending institution” as set forth in the statute. The  
2 Court’s ruling on this claim with respect to BAC applies equally to Plaintiff’s claim against  
3 Mortgage Capital. The Court will dismiss this claim with prejudice.

4 **B. Consumer Fraud - Count Four**

5 EMC argues Plaintiff fails to allege this claim with particularity. As set forth  
6 above with respect to BAC’s and Mortgage Capital’s motions, Plaintiff fails to plead this  
7 claim with particularity. Plaintiff lumps all Defendants together and does not identify the  
8 particulars of the alleged fraud. The Court will dismiss this claim without prejudice.

9 **C. Fraud and Negligent Misrepresentation - Counts Five and Seven**

10 EMC argues Plaintiff fails to plead fraud and negligent misrepresentation with  
11 particularity and the fraud claim is barred by the statute of limitations. As set forth above  
12 with respect to BAC’s and Mortgage Capital’s motions, Plaintiff fails to plead fraud and  
13 negligent misrepresentation with particularity. Moreover, the fraud claim is barred by the  
14 statute of limitations, as Plaintiff did not bring the claim within three years and the  
15 discovery rule does not toll the limitations period because Plaintiff reasonably should have  
16 discovered the alleged fraud in December 2006. The Court therefore will dismiss the fraud  
17 claim with prejudice, and will dismiss the negligent misrepresentation claim without  
18 prejudice.

19 **D. Constructive Fraud - Count Six**

20 EMC argues that as a subsequent loan servicer, it owed no duty to Jaime that  
21 could support a confidential relationship in the context of a constructive fraud claim. As set  
22 forth with respect to BAC’s and Mortgage Capital’s motions, lenders and servicers  
23 ordinarily are not in a special or confidential relationship with borrowers absent other facts.  
24 Plaintiff has not alleged any facts that would change the usual relationship into a  
25 confidential relationship. The Court will dismiss this claim without prejudice.

26 ///

1                   **E. Negligence - Count Eight**

2                   EMC argues Plaintiff's negligence claim fails because EMC owes no duty to  
3 Jaime. As discussed above, a lender or loan servicer generally owes no duties to a borrower  
4 and Plaintiff has not alleged facts of a special relationship. The Court therefore will dismiss  
5 this claim without prejudice.

6                   **F. Civil Conspiracy - Count Ten**

7                   EMC argues Plaintiff fails to allege conspiracy to commit fraud claims with  
8 particularity, and because Plaintiff fails to allege any underlying tort, the civil conspiracy  
9 claim necessarily fails. As set forth with respect to BAC's and Mortgage Capital's motions,  
10 Plaintiff fails to allege facts in support of her civil conspiracy claim and Plaintiff fails to  
11 allege an underlying tort with respect to Defendant EMC. The Court therefore will dismiss  
12 this claim without prejudice.

13 **VI. CONCLUSION**

14                   IT IS THEREFORE ORDERED that Defendant BAC Home Loans Servicing,  
15 LP's Motion to Dismiss (Doc. #12) is hereby GRANTED. Plaintiff's claims against  
16 Defendant BAC Home Loans Servicing, LP are hereby dismissed with prejudice.

17                   IT IS FURTHER ORDERED that Defendant Mortgage Capital Associates, Inc.'s  
18 Motion to Dismiss Plaintiff's Complaint (Doc. #14) is hereby GRANTED. Plaintiff's  
19 claims against Defendant Mortgage Capital Associates, Inc. are dismissed without  
20 prejudice, except for Plaintiff's claims for unfair lending practices (count three) and tortious  
21 interference (count nine) which are dismissed with prejudice.


22                   IT IS FURTHER ORDERED that Plaintiff's Motion to Remand (Doc. #16) is  
23 hereby DENIED.

24                   IT IS FURTHER ORDERED that Defendant EMC Mortgage Corporation's  
25 Motion to Dismiss Plaintiff's Complaint (Doc. #23) is hereby GRANTED. Plaintiff's  
26 claims against Defendant EMC Mortgage Corporation are hereby dismissed without

1 prejudice, except for Plaintiff's claims for unfair lending practices (count three) and fraud  
2 (count five) which are dismissed with prejudice.

3 IT IS FURTHER ORDERED that Plaintiff shall file an amended complaint no  
4 later than February 17, 2011.

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6 DATED: January 11, 2011

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9 PHILIP M. PRO  
United States District Judge

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