UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re	In Chapter 13 proceedings
EMILY CARROLL) Case No. 2:10-bk-17711-CGC
Debtor.) Adv. Case No. 2:10-ap-01982-CGC
) UNDER ADVISEMENT DECISION
	REGARDING MOTION TO DISMISS
EMILY CARROLL	BY DEUTSCHE BANK TRUST
Plaintiff,	COMPANY AND GMAC MORTGAGE
v.)	FOR FAILURE TO STATE A CLAIM
GMAC et. al.	
Defendants.	

I. Introduction

In 2007, Plaintiff and her husband refinanced their home with Sierra Pacific Mortgage. Thereafter, in July of 2010, Plaintiff and her husband divorced and Plaintiff received the home under the terms of a dissolution decree. Shortly after the divorce, Plaintiff filed for bankruptcy and was surprised to see that Deutsche Bank, not Sierra Pacific, filed a proof of claim asserting a deed of trust on her home. After reviewing the proof of claim, the Plaintiff filed this adversary claiming that Sierra Pacific, Deutsche Bank, and GMAC Mortgage violated provisions of the Truth in Lending Act and Real Estate Settlement Procedures Act, and falsified documents included with Deutsche Bank's proof of claim. Deutsche Bank and GMAC Mortgage filed this motion to dismiss the adversary for failure to state a claim upon which relief may be granted.

II. Facts

The facts leading to this dispute are not altogether clear. In 1997, Plaintiff married Chad Carroll, and the two later purchased a house at 5324 North 6th Street, Phoenix, AZ 85012 (Property). On March 23, 2007, Plaintiff and her husband took out a mortgage and signed a note in the amount of \$476,000 (Note) to refinance the existing mortgage, and granted a deed of trust (DOT) on the Property in favor of Sierra Pacific Mortgage Company (Sierra). It is unclear whether the mortgage was obtained in the name of Mr. Carroll alone, or with the Plaintiff jointly. However, this distinction is unimportant for purposes of this motion, because, on May 6, 2010, Mr. Carroll quitclaimed his interest in the Property to Plaintiff as part of a dissolution decree related to the Carrolls' divorce.

At some point, Sierra endorsed the Note to Residential Funding Company, LLC. Thereafter, as with a majority of mortgage notes in this age of securitization, the Note was transferred to a securitization trust, and endorsed to Deutsche Bank Trust Company Americas as trustee, with GMAC Mortgage (GMAC, and together with Deutsche Bank, Defendants) acting as servicing agent. Defendants claim that the transfer of the Note was made at some point in 2007, in conjunction with the creation of the securitization trust, but the DOT was not transferred to Deutsche Bank until March 23, 2010.

Plaintiff filed for Chapter 13 on June 7, 2010, approximately one month after Mr. Carroll quitclaimed his interest in the Property to her. After Deutsche Bank filed a proof of claim in Plaintiff's bankruptcy, Plaintiff filed this adversary, on November 18, 2010, alleging: 1) violations of the Truth in Lending Act (TILA), 2) violations of the Helping Families Save Their Homes Act of 2009 (HFSTHA), 3) violations of the Real Estate Settlement Procedures Act (RESPA), 4) fraud, 5) forgery, 6) failure to act in good faith, 7) claims for rescission or avoidance of the DOT, and 8)

¹ There are no dates on the endorsements, making it impossible to determine exactly when the transfers occurred. The page with the assignments of the Note was not even included with Deutsche Bank's original exhibits. Deutsche Bank uploaded an erratum containing a copy of the Note, with endorsements. Counsel indicated at the hearing that when counsel uploaded the Note originally, it failed to scan the back of the last page. Notably, each of the scanned pages, except the last page in the erratum, containing the endorsements, show two black circles at the top presumably from hole punches in the original. These hole punches are missing from the endorsement page, which is allegedly on the back of a page that *does* contain the hole punches.

a claim that Deutsche Bank's proof of claim should be disallowed. On December 9, 2010, Defendants responded by filing a motion to dismiss (Motion) Plaintiff's complaint (Complaint) under Fed. R. Civ.P. 12(b)(6)² for failure to state a claim upon which relief may be granted.

The Motion also seeks dismissal under Fed. R. Civ. P. 12(b)(4), citing Plaintiff's improper service of the summons and complaint on Defendants' attorney, rather than on officers of the companies as required by Fed. R. Bankr. P. 7004(b)(3) or (h). At the Court's February 1, 2011 hearing, however, counsel for Defendants indicated that the parties would prefer to have the Court rule on the merits of Defendants' Motion rather than dismissing the Complaint based on deficiency of service. As requested, the Court has considered the Motion on the merits and will dismiss all of Plaintiff's claims against Deutsche Bank and GMAC, without prejudice, and with leave to amend, except that the Court will dismiss Plaintiff's TILA claim for rescission under a 15 U.S.C. § 1635(f) with prejudice.³

III. Analysis

Defendants allege that they are entitled to dismissal of the Complaint under Fed. R. of Civ. P. 12(b)(6) because Plaintiff fails to state a claim upon which relief may be granted. A complaint may be dismissed under Fed. R. Civ. P. 12(b)(6) if it fails to meet the pleading standards of Fed. R. Civ. P. 8,⁴ as recently explained by the Supreme Court in *Ashcroft v. Iqbal.* 129 S.Ct. 1937 (2009). Fed. R. Civ. P. 8(a)(2) requires that a complaint allege a "short and plain statement of the claim showing that the pleader is entitled to relief."

The Supreme Court, in *Iqbal*, explained that the Rule 8 pleading standard does not require "detailed factual allegations, but requires more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 1949. A bare allegation of legal liability is insufficient. *Id.* at 1950. Likewise, a plaintiff must do more than allege that each element required to make out a claim is satisfied. *Id.* at 1949. Instead, a plaintiff must allege factual matter that, if taken as true, is sufficient

² Fed. R. Bankr. P. 7012 makes Fed. R. Civ. P. 12 applicable in adversary proceedings.

³ Sierra did not join in the Motion, and this Decision shall not be construed as dismissing any of Plaintiff's claims against Sierra.

⁴ Fed. R. Bankr. P. 7008 makes Fed. R. Civ. P. 8 applicable in adversary proceedings.

"to state a claim that is plausible on its face." The plaintiff need not show that it is likely that a defendant is liable, or even that it is probable; only that liability is plausible. *Id.* at 1949.

A plaintiff meets the pleading standards of Rule 8, if the complaint "contains sufficient factual allegations, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal* 129 S. Ct. at 1949 (internal quotations omitted). However, even where dismissal is appropriate, a "plaintiff should be given an opportunity to amend 'where justice requires, there is no evidence of bad faith, and the opposing party would not be unduly prejudiced." *In re Jenkin*, 83 B.R. 733, 734 (B.A.P. 9th Cir. 1988). The Court will consider each of the Plaintiffs claims, or "counts," in turn to determine if they meet the Rule 8 pleading requirements under *Iqbal*.

A. *Violations of the Federal Truth in Lending Act (TILA)*

Count I of the Complaint alleges that Defendants failed to provide Plaintiff with the disclosures required by 12 C.F.R. § 226.31, which include the annual percentage rate, regular payment, and any balloon payment under a closed-end mortgage. Plaintiff also alleges that she did not receive the notices required by 12 C.F.R. § 226.39 regarding transfers of the Note. For their part, Defendants claim that Plaintiff's TILA claims are time barred, and that in any event, Plaintiff has not alleged facts sufficient to make her claims facially plausible.

1. <u>TILA Rescission Claim</u>

Any right to rescission the Plaintiff may have had under TILA has expired. The Ninth Circuit has held that § 1635(f), providing a right to rescission under TILA, is a statute of repose, which deprives the court of subject matter jurisdiction when a claim is brought under § 1635(f) outside the three year limitation period. *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1164-65 (9th Cir. 2002). *See also Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998) (holding, under different circumstances, that "section 1635(f) completely extinguishes the right of rescission at the end of the 3 year period."). Here, the Note and DOT were entered into in March 2007⁵ and this action was not commenced until November 2010. The Court has no jurisdiction to grant rescission because Plaintiff

⁵ Although the Complaint does not list the date on which the Plaintiff believes the Note and DOT were executed, Plaintiff's statement of facts in response to the Motion indicates that Plaintiff and her ex-husband signed the documents on March 22, 2007.

failed to bring an action for rescission under TILA within the three year time limit set by 15 U.S.C. § 1635(f). For this reason, the Court will dismiss, with prejudice, Plaintiff's TILA claim, to the extent that she seeks rescission of the Note or DOT under 15 U.S.C. § 1635(f).

2. <u>TILA Damages Claim</u>

Defendants allege that Plaintiff's claim for damages under TILA is also time barred. The claim may be time barred, but that is not a certainty. Defendants cited *Meyer v. Ameriquest Mortgage Co.*, 342 F.3d 899 (9th Cir. 2003), claiming that *Meyer* "held that the limitations period on a TILA claim begins running on the date the loan documents are signed." Def.'s Mot. at 6-7. Defendants misstate the *Meyer* holding. Defendants failed to note that *Meyer* acknowledged a split of authority exists regarding "whether the period of limitations commences on the date the credit contract is executed, or at the time the plaintiff discovered, or should have discovered, the acts constituting the violation." *Id.* at 902 (internal citations omitted). Moreover, *Meyer* explicitly stated "we need not decide this question here." *Id.*

Defendants also failed to disclose that the Ninth Circuit held, on a previous occasion, "that the limitations period in Section 1640(e)⁶ runs from the date of consummation of the transaction[,] but that the doctrine of equitable tolling may, in the appropriate circumstances, suspend the limitations period until the borrower discovers or had reasonable opportunity to discover the fraud or nondisclosures that form the basis of the TILA action." *King v. State of Cal.*, 784 F.2d 910, 915 (9th Cir. 1986). While Plaintiff has not met her burden of pleading facts that support a finding of equitable tolling, *Hinton v. Pacific Enterprises*, 5 F.3d 391, 395 (9th Cir. 1993) (plaintiff has this burden), the Ninth Circuit never held that the one-year limit for bringing a claim under TILA *always* runs from the date the loan documents were signed. In fact, the Ninth Circuit has held just the opposite. *King v. State of Cal.*, 784 F.2d at 915. For this reason, dismissal with prejudice of Plaintiff's TILA claim for damages is inappropriate.

Plaintiff's failure to allege facts giving rise to equitable tolling is not the only deficiency in her claim for damages under TILA. In order to prove a claim for damages under TILA, a Plaintiff

6 15 U.S.C. § 1640(e) (providing the statute of limitations for bringing damages actions under TILA).

must prove that 1) Defendants are "creditors" as defined in 15 U.S.C. § 1602(f)⁷ and 2) that Defendants failed to comply with the requirements imposed by TILA, which may include failure to provide the required disclosures under 15 U.S.C. §§ 1631, 1639 or 12 C.F.R. § 226.31. Additionally, if Plaintiff seeks actual damages, in addition to the statutory damages provided under 15 U.S.C. § 1640(a)(2)(A), Plaintiff must prove detrimental reliance; that is, Plaintiff must prove that she would have secured a better interest rate elsewhere or foregone the loan completely if she were provided with the proper disclosures. *In re Smith*, 289 F.3d 1155, 1157 (9th Cir. 2002).

As a result, in order for Plaintiff to survive a motion to dismiss for failure to state a claim, Plaintiff must allege sufficient factual allegations as to each element of the claim, so that if all the factual allegations are taken as true, the Complaint states a "claim to relief that is plausible on its face." *Iqbal* 129 S. Ct. at 1949. It is also important to note that "formulaic recitation of the elements of a cause of action will not do." *Id.* In order to show plausibility of success on her TILA damages claim, Plaintiff must provide facts that, if assumed true, could reasonably be read to suggest that one of the Defendants involved in this Motion are "creditors" under TILA, and that Defendants failed to provide the required disclosures. Plaintiff states only that Defendants "failed to provide disclosures." Plaintiff must specify which disclosures she is alleging that Defendants failed to provide and under which provisions the Defendants were required to provide those disclosures.

Because Plaintiff failed to plead equitable tolling and her TILA damages claim would otherwise be barred by the statute of limitations, the Court will dismiss Plaintiff's Count I, to the extent that it seeks damages under TILA, without prejudice to file an amended complaint in accordance with the pleading requirements of Rule 8, as discussed above.

⁷ The term "creditor" under TILA, includes:

only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement.

¹⁵ U.S.C. § 1602(f). In this case, Defendants have raised some issue as to whether they fit within this definition because Sierra, and not the Defendants involved in this Motion, originated the Note.

B. Violations of the Helping Families Save their Homes Act of 2009 (HFSTHA) and Real Estate Settlement Procedures Act (RESPA)

Plaintiff's Count II, entitled "Violation of HFSTHA and RESPA," contains only a conclusory allegation that Defendants failed to provide notices in regards to numerous transfers of the Note. It is unclear which provisions of HFSTHA and RESPA Plaintiff alleges were violated by Defendants. Plaintiff mentions 12 C.F.R. § 226.39 in her Count I, which implements 15 U.S.C. § 1641(g), added to TILA under HFSTHA. However, in order to succeed in an action under these provisions, Plaintiff must prove 1) that Defendants qualify as a "covered person" under 12 C.F.R. § 226.39(a)(1)(A),8 and 2) that Defendants failed to make a disclosure required by 12 C.F.R. § 226.39, involving a transfer of the Note after the enactment of HFSTHA in 2009. Once again, in order to obtain actual damages for a claim involving a breach of 12 C.F.R. § 229.39, Plaintiff would have to show detrimental reliance. This requires a showing that she would have secured a better interest rate elsewhere or foregone the loan completely if she were provided with the proper disclosures. In re Smith, 289 F.3d 1155, 1157 (9th Cir. 2002). The Complaint contains no facts in any way suggesting that a transfer of the Note occurred after the enactment of HFSTHA, and contains only a conclusory allegation that Defendants failed to "provide notices to Plaintiff in regards to the numerous transfers of note obligations." Plaintiff must allege fact sufficient to provide a facially plausible claim that satisfies the requirements for liability under 12 C.F.R. § 226.39. The Court will grant Defendants' Motion as to Count II, with leave to file an amended complaint which alleges legal theories and facts sufficient to satisfy the requirements of Rule 8.

C. Avoidance or Rescission of Lien

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⁸ Under 12 C.F.R. § 2226.39(a)(1)(A):

[[]a] "covered person" means any person, as defined in § 226.2(a)(22), that becomes the owner of an existing mortgage loan by acquiring legal title to the debt obligation, whether through a purchase, assignment or other transfer, and who acquires more than one mortgage loan in any twelve-month period. For purposes of this section, a servicer of a mortgage loan shall not be treated as the owner of the obligation if the servicer holds title to the loan, or title is assigned to the servicer, solely for the administrative convenience of the servicer in servicing the obligation." Defendants claim that they are not a "covered person" under HFSTHA because the act was not passed until 2009, and there has been no transfer of the Note since then which would require disclosure.

Count III of the Complaint alleges that Plaintiff is entitled to "avoid and/or rescind" the mortgage debt because the DOT was not properly perfected and because none of the adversary proceeding defendants qualify as a holder in due course. A finding that the DOT is not properly perfected, or that Defendants are not holders of the Note in due course, are legal conclusions, to be drawn from factual allegations regarding the actions of the parties and the circumstance surrounding those actions. Plaintiff must provide factual allegations supporting the legal conclusions she contends result. *Iqbal*, 129 S. Ct. at 1950.

Additionally, Plaintiff again fails to provide any legal basis upon which the Court may grant avoidance or rescission of the DOT. It is unclear whether the Plaintiff seeks to avoid the DOT as a fraudulent transfer under Section 548 of the Bankruptcy Code, under Arizona state law, or whether Plaintiff reiterates her claim for rescission under TILA. In order to survive a motion to dismiss, Plaintiff must supply the basis upon which she seeks relief and facts making out a facially plausible claim. If the claims include allegations of fraud, those allegations must meet the heightened pleading standards of Rule 9(b), pleading facts with particularity, that indicate the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." Fed. R. Civ. P. 9(b); Sanford v. MemberWorks, Inc., 625 F.3d 550, 558 (9th Cir. 2010). Plaintiff has failed to properly plead a claim for avoidance or rescission of the DOT, and the Court will grant the Defendants' Motion as to Count III, with leave to file an amended complaint complying with Rule 8.

D. Fraudulent Transfer Claim to Disallow Defendants' Claims under 11 U.S.C. § 502(d)

Plaintiff's Count IV alleges that the Defendants actions or inactions regarding the mortgage debt constitute a fraudulent transfer, permitting the court to deny Defendants' claims in the bankruptcy proceeding. Again, Plaintiff alleges only legal conclusions -- that the Defendants' action or inactions amount to a fraudulent transfer and that this fraudulent transfer entitle Plaintiff to disallowance of Defendants' claims. Plaintiff must allege facts to support these legal conclusions.

⁹ Fed. R. Bankr. P. 7009 makes Fed. R. Civ. P. 9 applicable in adversary proceedings.

Iqbal, 129 S. Ct. at 1950. Additionally, to the extent that Plaintiff alleges actual fraud in her claim for a fraudulent transfer, she is required to meet the requirements of Rule 9(b) and allege the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." Sanford v. MemberWorks., 625 F.3d at 558; In re Sharp Int'l Corp., 403 F.3d 43, 56 (2d Cir. 2005). The Court will grant Defendants' Motion as to Count IV, with leave to file an amended complaint in accordance with the requirements of Rule 8 set out above.

E. Fraud, Forgery and Failure to Act in Good Faith

Plaintiff's last count, Count V, alleges claims for fraud, forgery and failure to act in good faith. Count V consists of two sentences which allege, generally, that someone involved with Plaintiff's mortgage transaction committed fraud and forgery and that one of the defendants to her adversary complaint failed to act in good faith with regard to the mortgage transaction. Once again, these allegations are legal conclusions, not entitled to the assumption of truth, and the bare legal conclusions are not sufficient to survive a motion to dismiss. *See Iqbal*, 129 S. Ct. at 1950.

1. Fraud

In order to survive a motion to dismiss, Plaintiff must provide particular facts tending to show that some particular party satisfied the elements of fraud under Arizona law, including: 1) a representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity or ignorance of its truth; 5) the speaker's intent that it be acted upon by the recipient in the manner reasonably contemplated; 6) the hearer's ignorance of its falsity; 7) the hearer's reliance on its truth; 8) the right to rely on it; and 9) Plaintiff's consequent and proximate injury. *Echols v. Beauty Built Homes, Inc.*, 647 P.2d 629, 631 (Ariz. 1982). In her statement of facts, Plaintiff alleges that the documents submitted with Defendant's proof of claim were not the documents she and her ex-husband signed. Possibly, the creation of false documents, and submission of those documents to the Court, in some way relate to Plaintiff's claims for fraud or forgery. However, Plaintiff has not provided factual allegations sufficient to make a showing that the allegations of fraud are plausible, stating only that

"Defendant, and/or Mortgage Broker, and/or Title Company, and/or other third parties" engaged in fraud . *Iqbal* 129 S. Ct. at 1949.

Further, Plaintiff fails to plead allegations of fraud with particularity as required by Fed. R. Civ. P. 9(b). In order to comply with Rule 9(b), Plaintiff must allege the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Sanford v. MemberWorks.*, 625 F.3d at 558. Plaintiff has not plead any particular facts regarding the time, place, or content of a misrepresentation amounting to fraud under Arizona law, and has further not identified the parties to which any misrepresentation was made. For this reason, Plaintiff's claim for fraud must be dismissed under Rule 12(b)(6), but it will be dismissed without prejudice to file an amended complaint.

2. <u>Forgery</u>

Likewise, Plaintiff's claim for forgery fails to meet the pleading standards of either Rule 8 or Rule 9(b). In order to prove forgery, Plaintiff must show that Defendants 1) falsely made, completed or altered a written instrument; 2) knowingly possessed a forged instrument; or 3) offered or presented, whether accepted or not, a forged instrument or one that contained false information. A.R.S. § 13-2002. Thus, in order to survive a motion to dismiss, Plaintiff must allege facts which, if taken as true, state a plausible claim under the above requirements. *Iqbal*, 129 S. Ct. at 1950. Additionally, because forgery is a species of fraud, any factual allegations related to the fraudulent actions of the Defendants must be pled with particularity under Rule 9, setting forth the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Sanford v. MemberWorks.*, 625 F.3d at 558.

Again, Plaintiff only alleges that some party involved with her mortgage engaged in forgery. Although plaintiff claims that the Note attached to Deutsche Bank's proof of claim was not the one singed by Plaintiff and her ex-husband, she does not indicate whether that document relates to the forgery alleged, nor does she indicate who committed the forgery. Plaintiff's claim for forgery will be dismissed with leave to file an amended complaint.

3. Breach of Covenant of Good Faith and Fair Dealing

Plaintiff's allegations of breach of implied covenant of good faith and faith dealing under Arizona law also fails to plead facts sufficient to allow the Court to find the claim is plausible on its face. Plaintiff simply makes the legal conclusion that someone breached the implied covenant of good faith. This legal conclusion is not entitled to the assumption of truth. *Iqbal*, 129 S. Ct. at 1950. However, the Court cannot even determine which particular parties Plaintiff alleges breached this duty, and no facts regarding any breach have been provided. Under Arizona law, a party can breach the implied covenant of good faith and fair dealing either by exercising express discretion in a way inconsistent with another party's reasonable expectations or by acting in ways not expressly excluded by the contract's terms but which nevertheless bear adversely on the party's reasonably expected benefits of the bargain. *Bike Fashion Corp. v. Kramer*, 46 P.3d 431, 435 (Ariz. Ct. App. 2002). Plaintiff must allege facts which raise a facially plausible claim under the standards discussed in *Bike Fashion*.

Defendants also claim that Plaintiff's allegation of breach of covenant of good faith and fair dealing is deficient because Plaintiff fails to allege a "special relationship" between the parties. Defendants claim that the relationship between a bank and its depositor is not the type of "special relationship" required under Arizona law to maintain an action for breach of this covenant. However, the case cited by Defendants, *Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons*, 38 P.3d 12 (Ariz. 2002) states only that a "special relationship" must exist in a *tort* action for breach of the implied covenant or good faith, not a contract action. Arizona law implies a covenant of good faith and fair dealing in every contract, *Arizona Laborers*, 38 P.3d at 28, and the *Arizona Laborers* Court explicitly stated that "when the breach of covenant sounds in contract, it is not necessary for the complaining party to establish a special relationship." Plaintiff need not allege a special relationship to maintain an action for breach of the covenant of good faith and fair dealing sounding in contract, but must allege facts making a plausible claim for breach of the implied covenant. If she chooses to pursue a claim in tort, she must also allege facts suggesting a

"special relationship" between the parties. Because Plaintiff has failed to do so, the Court will dismiss her claim for breach of covenant of good faith and fair dealing, without prejudice to file an amended complaint.

IV. Conclusion

For the foregoing reasons, Plaintiff's claim for rescission under 15 U.S.C. § 1635(f) shall be dismissed with prejudice because it is barred by the statute of repose contained in that section. The

Court will dismiss all remaining claims without prejudice, with leave to file an amended complaint.

Any amended complaint must be filed within 14 days of the date of entry of the order incorporating this decision. In the event an amended complaint is not timely filed, or a claim dismissed by this decision is not timely re-pleaded, the complaint, or claim, as the case may be, will be dismissed with

CHARLES G. CASE II
UNITED STATES BANKRUPTCY JUDGE

prejudice.

Defendants are to upload a form of order.

COPY of the foregoing mailed by the BNC and/or

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DATED: February 14, 2011

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