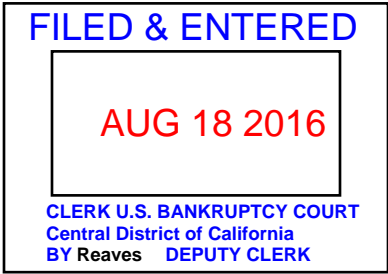


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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SAN FERNANDO VALLEY DIVISION

In re:

ALLANA BARONI,
Debtor.

ALLANA BARONI,

Plaintiff,

vs.

GREEN TREE SERVICING, LLC, a
Delaware limited liability company,
BANK OF AMERICA, N.A. fdba BAC
HOME LOANS SERVICING, LP and as
successor in interest to Countrywide
Home Loans Servicing, LP; BANK OF
AMERICA CORPORATION, as
successor in interest to Countrywide
Home Loans, Inc. and Countrywide Home
Loans Servicing, LP, and THE BANK OF NEW
YORK MELLON as Trustee for the Certificate
Holders of CWHEQ Revolving Home Equity
Loan Trust, Series 2005-D,

Defendants.

Case No.: 1:12-bk-10986-MB

Chapter 11

Adv. Proc. No. 1:13-ap-01070-MB

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR SUMMARY
ADJUDICATION (Dkt. 107)**

Hearing
Date: June 24, 2016
Time: 1:30 p.m.
Place: Courtroom 303
21041 Burbank Blvd
Woodland Hills, CA 91367

1 The *Motion for Summary Adjudication or, in the Alternative, Partial Summary Adjudication*
2 filed by Plaintiff Allana Baroni (“Baroni”) came on for hearing on October 29, 2015, January 21,
3 2016, April 29, 2016 and June 24, 2016. Appearances were as noted in the record. Baroni seeks
4 summary adjudication of the following issues regarding the Home Equity Credit Line Agreement
5 (“HELOC”) attached to proof of claim 4-2 filed by Defendant Green Tree Servicing LLC (“Green
6 Tree” and the “Green Tree POC”):

- 7 (1) The HELOC is not a negotiable instrument within the meaning of California
8 Commercial Code § 3104, and the endorsement appearing on the HELOC fails to render it a
9 bearer instrument within the meaning of California Commercial Code § 3205(b);
10 (2) The Bank of New York Mellon (“BONYM”) as indenture trustee for the Certificate
11 Holders of CWHEQ Revolving Home Equity Loan Trust, Series 20058-D (the “Trust”) is
12 not the owner of the HELOC, and the HELOC on its face does not establish that BONYM
13 owns the HELOC;
14 (3) BONYM is judicially estopped from claiming to own the HELOC; and
15 (4) The HELOC has been rescinded by operation of law.

16 Baroni seeks summary adjudication of the following issues regarding the deed of trust (the
17 “Green Tree DOT”) attached to the Green Tree POC:

- 18 (a) BONYM is not the beneficiary of the Green Tree DOT;
19 (b) The Green Tree DOT does not establish on its face that BONYM is the beneficiary of
20 the Green Tree DOT;
21 (c) Baroni can challenge the secured status of the Green Tree POC in her bankruptcy case;
22 (d) BONYM is judicially estopped from claiming “to be the secured creditor of” the Green
23 Tree POC; and
24 (e) The Green Tree DOT has been rescinded by operation of law.

25 The Court grants in part, and denies in part, summary adjudication on these issues as
26 follows:

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1 **BACKGROUND FACTS**

2 Baroni commenced this bankruptcy case on February 1, 2012, by filing a voluntary chapter
3 13 petition. Case Dkt. 1. Later that same month, Baroni voluntarily converted her case from
4 chapter 13 to chapter 11. The *Order Setting Bar Date for Filing Proofs of Claim in an Individual*
5 *Chapter 11 Case* set September 17, 2012, as the deadline for creditors of Baroni to file proofs of
6 claim. Case Dkt. 96.

7 **The Green Tree POC Secured by a Junior DOT on the Henderson Property**

8 Green Tree filed a proof of claim on or about March 30, 2012, for \$135,395.60, asserting a
9 secured claim against Baroni and her real property located at 2240 Village Walk Drive, Unit 2311,
10 Henderson, Nevada, 89052 (the “Henderson Property”). Proof of Claim 4-1. Green Tree amended
11 this proof of claim on February 1, 2013 (the “Green Tree POC”). Thereafter, on May 15, 2015, a
12 *Transfer of Claim other than for Security* was filed describing a transfer of the Green Tree POC
13 from Green Tree to Specialized Loan Servicing LLC, as servicing agent for The Bank of New York
14 Mellon f/k/a The Bank of New York as successor Indenture Trustee to JPMorgan Chase Bank,
15 National Association for CWHEQ Revolving Home Equity Loan Trust, Series 2005-D (“SLS”).
16 Case Dkt. 679.

17 The Green Tree POC includes a copy of a deed of trust in favor of Countrywide Home
18 Loans, Inc. dated May 19, 2005, and recorded on May 26, 2005, in Clark County, Nevada (the
19 “Green Tree DOT”). Green Tree POC, p. 16. The Green Tree POC includes a “Home Equity
20 Credit Line Agreement” dated May 19, 2005, under which Countrywide Home Loans, Inc.
21 promised to lend Baroni money “from time to time” upon her request, up to a credit limit of
22 \$134,998.00. Green Tree POC, pp. 7-8.

23 **The Wells Fargo POC Secured by a Senior DOT on the Henderson Property**

24 On or about June 4, 2012, Wells Fargo Bank, National Association as Trustee for the
25 Structured Adjustable Rate Mortgage Loan Trust Mortgage Pass-Through Certificates, Series
26 2005-17 (“Wells Fargo”) asserted a secured claim (the “Wells Fargo POC”) for \$801,712.00
27 against Baroni and the Henderson Property. Proof of Claim 7-1. The Wells Fargo POC includes a
28 copy of a deed of trust in favor of Countrywide Home Loans, Inc. dated May 19, 2005, and

1 recorded on May 26, 2005, in Clark County, Nevada (the “Wells Fargo DOT”). Wells Fargo POC,
2 p. 12.

3 The Green Tree DOT includes a provision that it is subject to, and subordinate to, a prior
4 deed of trust dated May 19, 2005, for the benefit of Countrywide Home Loans. Green Tree POC,
5 p. 19. Therefore, on its face, the Green Tree DOT appears to be subordinated to the Wells Fargo
6 DOT.

7 **The Confirmed Plan**

8 On April 15, 2013, the Court entered its order confirming Debtor’s *Second Amended Plan*
9 *of Reorganization*. Case Dkt. 423. Baroni’s Second Amended Plan of Reorganization is combined
10 in a single document with her Second Amended Disclosure Statement (collectively, the “Plan”) and
11 was filed on March 20, 2013. Case Dkt. 376. The Plan lists the amount of the Wells Fargo POC
12 as \$801,712.00, of which only \$196,000.00 is secured. Case Dkt. 376, p. 26. The Plan places the
13 Green Tree POC in Class Nine, describes the claim as “a wholly unsecured junior lienholder of a
14 second positioned deed of trust encumbering the Henderson Property in the amount of \$135,395.60
15 . . .” and provides for it to share pro-rata with other general unsecured claims from the distributions
16 to Class Nine. Case Dkt. 376, pp. 33-34. Therefore, pursuant to the provisions of the Plan, the
17 Green Tree POC is a wholly unsecured claim.

18 In her Plan, Baroni alleges that prepetition, and in the course of trying to restructure the
19 debts encumbering her various real properties, including the Henderson Property, the lenders
20 claiming an interest in her real properties engaged in loan securitization and pledged their position
21 as deed of trust lienholders into multiple income streams, fabricating notes and conveying them to
22 numerous domestic and offshore trusts. By doing so, Baroni alleges that the lenders violated
23 numerous state and federal statutes, as well as common law duties to her, entitling her to damages
24 which she may be able to set off against the lenders’ claims asserted in the bankruptcy case. Case
25 Dkt. 376, pp. 9-10. Baroni discloses and preserves potential causes of action arising from these
26 allegations in Exhibit 2 to her Plan. With respect to the Henderson Property, Exhibit 2 to her Plan
27 expressly discloses that she has potential claims for [a] violations of the Real Estate Settlement and
28 Procedures Act (RESPA); 12 U.S.C. § 2601 *et seq.*, [b] violations of the Truth-in-Lending Act

1 (TILA) 15 U.S.C. § 1638, [c] violations of the Fair Debt Collection Practices Act (FDCPA); 15
2 U.S.C. § 1692 *et seq.*; [d] violations of the Nevada Deceptive Trade Practices Act Nev. Rev. Stat.
3 598 *et seq.*; [e] fraudulent inducement; [f] negligence; [g] intentional infliction of emotional
4 distress; [h] breach of fiduciary duties; [i] wrongful foreclosure; [j] slander of title; [k] common
5 law fraud and [l] unjust enrichment. Case Dkt. 376, Exh. 2, pp. 5-6. Baroni did not disclose or
6 preserve a cause of action for rescission. *Id.*

7 **Baroni's Operative Complaint in this Adversary Proceeding**

8 On December 30, 2014, Baroni filed her *Reorganized Debtor's Third Amended Complaint*
9 *For: 1. Declaratory Relief to Determine the Nature, Extent and Validity of Lien; 2. Unjust*
10 *Enrichment Through Quasi Contract; 3. Violation of 15 U.S.C. §1692, et seq.; 4. Violation of 12*
11 *U.S.C. §2605; 5. Violation of California Business and Professions Code Section §17200, et seq.; 6.*
12 *Accounting; 7. Violation of the Automatic Stay and; 8. Violation of California Civil Code Sections*
13 *§1709 and §1710 and Demand for Jury Trial* (Adv. Dkt. No. 55, the "Third Amended Complaint").
14 The Third Amended Complaint does not plead a cause of action for rescission nor pray for
15 rescission as a remedy.

16 **THE HELOC ATTACHED TO THE GREEN TREE POC**

17 **Nevada Law Governs Issues Related to the HELOC**

18 The Court requested supplemental briefing from the parties on choice of law, including
19 which jurisdiction's laws govern the HELOC. The Court will apply Nevada law for the following
20 reasons:

21 The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334. Baroni's claims for
22 relief are core proceedings under 28 U.S.C. § 157(b)(2)(B) and (K).¹ Because this Court is
23 exercising federal question jurisdiction pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2)(B)

24 _____
25 ¹ The Court has constitutional authority to enter final judgment. Further, though no jurisdictional
26 defects exist, the parties' failure to object to the Court's jurisdiction constitutes implied consent to
27 the entry of final judgment. See *Wellness Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932, 1948
28 (2015).

1 and (K), federal choice of law rules apply in this adversary proceeding. *Liberty Tool & Mfg. v.*
2 *Vortex Fishing Sys., Inc. (In re Vortex Fishing Sys., Inc.)*, 277 F.3d 1057, 1069 (9th Cir. 2002);
3 *Lindsay v. Beneficial Reinsurance Co. (In re Lindsay)*, 59 F.3d 942, 948 (9th Cir. 1995). Baroni
4 contends that California choice of law rules apply as it is the forum state and that this Court should
5 apply California law to issues regarding the HELOC. But the choice of law rules of the forum state
6 are irrelevant in answering choice of law questions in federal question cases. *Lindsay*, 59 F.3d. at
7 948 (“The rule in diversity cases, that federal courts must apply the conflict of laws principles of
8 the forum state . . . does not apply to federal question cases such as bankruptcy”); *In re Zukerkorn*,
9 591 Fed.Appx. 631, 632 (9th Cir. 2015) (same).

10 Federal choice of law rules generally follow the Restatement (Second) of Conflict of Laws
11 (“Restatement”). *Vortex Fishing Sys., Inc.*, 277 F.3d at 1069. Restatement § 187 governs
12 contractual choice of law provisions. Under Restatement § 187, this Court generally can and should
13 enforce the parties’ contractual choice of law provisions as long as: [1] the chosen state has a
14 “substantial relationship” to the parties or the transaction; and [2] the forum state has no
15 “fundamental policy” that is inconsistent with the chosen state's law. Restatement § 187;
16 *Zukerhorn*, 591 Fed. Appx. at 632. Paragraph 17.D of the HELOC provides that “this Agreement
17 is to be governed by federal law and, to the extent not preempted by federal law, by the laws of the
18 state where the Real Property is located.” Green Tree POC, p. 14. The Henderson Property is
19 located in Nevada. Baroni has not identified any “fundamental policy” of the state of California
20 that is inconsistent with Nevada law, nor has she identified any issue related to the HELOC on
21 which the laws of the states of California and Nevada conflict. Therefore this Court will apply
22 Nevada law.

23 **The HELOC Is Not a Negotiable Instrument**

24 Section 104.3104 of Nevada’s Uniform Commercial Code provides that, among other
25 things, “‘negotiable instrument’ means an unconditional promise or order to pay a fixed amount of
26 money.” Nev. Rev. Stat. Ann. § 104.3104(1). Neither of the parties has cited to any Nevada
27 authorities dealing with the issue of whether a note evidencing a line of credit qualifies as a
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1 negotiable instrument under section 104.3104, and the Court has not located any relevant Nevada
2 authority either.

3 Courts applying other states’ versions of UCC § 3-104 have held that lines of credit or
4 revolving loans are not negotiable instruments as they fail the “fixed amount” requirement. *Am*
5 *First Fed. v. Gordon*, 2015 WL 3798210 (Conn. Super. Ct. May 26, 2015); *Heritage Bank v.*
6 *Bruha*, 812 N.W.2d 260 (2012); *Yin v. Society Nat’l Bank Ind.*, 665 N.E.2d 58 (1996); *Resolution*
7 *Trust Corp. v. Oaks Apts. Joint Venture*, 966 F.2d 995 (5th Cir. 1992); *Cadle Co. v. Richardson*,
8 597 So. 2d 1052 (1992). Under the terms of the HELOC, the obligee promises to lend Baroni
9 money “from time to time” upon her request, up to a credit limit of \$134,998.00, and Baroni
10 promises to pay “when and as due, all loans made under this Agreement” pursuant to periodic
11 monthly statements. The HELOC, however, does not state “a fixed amount of money” that Baroni
12 is required to pay and the revolving nature of the agreement demonstrates Baroni would owe
13 different amounts at different points in time depending upon her requests for loans and payments
14 on account of those loans. Therefore, the HELOC does not qualify as a negotiable instrument
15 within the meaning of section 104.3104.² Because the HELOC is not a negotiable instrument,
16 section 104.3205 does not apply to the HELOC. Nev. Rev. Stat. § 104.3205.³

17 **Defendants Acknowledge BONYM Is Not the Owner of the HELOC**

18 Defendants concede that BONYM, as indenture trustee, is not the owner of the HELOC and
19 that the Trust owns the HELOC. However, as Defendants correctly point out, this determination
20 does not necessarily result in disallowance of the Green Tree POC as BONYM may be able to
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22 _____
23 ² The Court notes that a variable, or adjustable, interest rate does not destroy the negotiability of
24 the instrument as UCC 3-112 expressly permits variable interest rates even if they require reference
25 to information not included in the instrument. *See e.g.*, Nev. Rev. Stat. Ann. § 104.3112(2); Cal.
Comm. Code § 3112(b). No analogous provision preserves the negotiability of an instrument with
a variable principal amount.

26 ³ The Court makes no determination on whether, as Defendants contend, the HELOC qualifies as
27 a bearer instrument at common law, as opposed to under Article 3 of the Nevada Uniform
28 Commercial Code.

1 establish the right to enforce the HELOC as a pledgee under Article 9, or as the holder or assignee
2 of a bearer instrument at common law.

3 Because there are multiple theories under which BONYM and other Defendants may prove
4 they have a right to enforce the HELOC and the Green Tree POC – irrespective of whether
5 BONYM “owns” the HELOC – making a determination that BONYM does not own the HELOC
6 would do little to move this case forward or make trial any less complex. This is especially true
7 where, as here, discovery and the production of documents is ongoing. Under these circumstances,
8 making the requested determination regarding ownership of the HELOC would constitute the kind
9 of partial and piecemeal litigation that is not appropriate for summary judgment.

10 Accordingly, because a determination that the HELOC is not a negotiable instrument
11 applies to all of the Defendants and eliminates legal theories based on the provisions of UCC
12 Article 3, the Court will grant summary adjudication to Baroni on this issue, but deny without
13 prejudice summary judgment on Baroni’s “ownership of the HELOC” theories.

14 **THE DOT ATTACHED TO THE GREEN TREE POC**

15 **The Secured Status of the Green Tree POC Pursuant to the Confirmed Plan**

16 Pursuant to the provisions of the Plan, the Green Tree POC is a wholly unsecured claim.
17 Defendants concede the Green Tree POC is unsecured pursuant to the Plan. Even if the Defendants
18 did not concede this point, the parties are bound by the terms of the Plan. 11 U.S.C. § 1141(a);
19 *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1995). Summary adjudication is granted on the
20 unsecured status of the Green Tree POC pursuant to the Plan.

21 Because there is no dispute that under the Plan the Green Tree POC is unsecured, it is
22 immaterial whether BONYM is the beneficiary of the Green Tree DOT or is estopped from
23 claiming to be a secured creditor. Adjudication of these facts will not affect the outcome of this
24 adversary proceeding, and, on that basis, summary adjudication on these issues is denied.

25 **BARONI IS BARRED FROM ASSERTING HER RESCISSION CLAIM**

26 **Baroni’s Complaint Is Silent Regarding Rescission**

27 Baroni did not allege either a cause of action for rescission or pray for rescission as a
28 remedy in the operative Third Amended Complaint. Adv. Dkt. No. 55. “In this circuit, a party

1 cannot move for summary judgment if it has not given notice of the claim in the complaint.” *Wasco*
2 *Products, Inc. v. Southwall Technologies, Inc.*, 435 F.3d 989, 992 (9th Cir. 2006). Baroni cannot
3 seek summary adjudication on a rescission claim which she failed to include in her Third Amended
4 Complaint.

5 **Confirmation of her Plan Precludes Baroni from Asserting her Rescission Claim**

6 Baroni is precluded from asserting her rescission claim post-confirmation. The Plan did not
7 contemplate rescission of the debt described in the Green Tree POC. The Plan provides a specific
8 treatment for that claim that includes sharing pro-rata in distributions to the Class Nine general
9 unsecured class. Case Dkt. 376, pp. 33-34. Nothing in the treatment of the Green Tree POC
10 preserved the option of Baroni rescinding the debt.

11 Neither the Plan nor Exhibit 2 to the Plan, in which Baroni listed and preserved her claims
12 against various defendants related to the Henderson Property, included the rescission claim she
13 now asserts. The confirmation of her Plan is binding on Baroni and precludes her from asserting
14 such a post-confirmation rescission claim. 11 U.S.C. § 1141(a); *Balser v. Dept. of Justice, Office*
15 *of U.S. Trustee*, 327 F.3d 903, 911 n.6 (9th Cir. 2003); *In re Kelley*, 199 B.R. 698, 704-05 (B.A.P.
16 9th Cir. 1996) (“If a confirmed plan expressly reserves the right to litigate a specific cause of action
17 after confirmation, then res judicata does not apply . . . On the other hand, if the debtor fails to
18 mention the cause of action in either his schedules, disclosure statement, or plan, then he will be
19 precluded from asserting it postconfirmation”); *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1995).

20 **Baroni’s Rescission Claim Is Time-Barred**

21 Even if Baroni had alleged a rescission claim in her Third Amended Complaint, and even if
22 she were not precluded from asserting a post-confirmation rescission claim, Baroni’s Truth-in-
23 Lending-Act claim for rescission of the 2005 line of credit memorialized by the HELOC, based on
24 notices of rescission dated in 2015, is time-barred. 15 U.S.C. § 1635(f); *Beach v. Ocwen Fed.*
25 *Bank*, 523 U.S. 410, 413 (1998) (“The Act provides, however, that the borrower’s right of
26 rescission ‘shall expire three years after the date of consummation of the transaction or upon the
27 sale of the property, whichever occurs first,’ even if the required disclosures have never been made.
28 § 1635(f). The Act gives a borrower no express permission to assert the right of rescission as an

1 affirmative defense after the expiration of the 3-year period”); *Major v. Imortgage.com, Inc.*, 5:15-
2 cv-02592-CAS(DTBx), 2016 WL 2904969, *2 (C.D. Cal. May 16, 2016) (notice of rescission
3 dated in 2015 was untimely where loan transaction was consummated in 2006).

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5 Having considered the parties’ papers filed in support of and in opposition to the Motion for
6 Summary Adjudication, oral arguments as well as other pleadings and papers on file in this
7 Adversary Proceeding, as well as the main bankruptcy case, and based on the foregoing and for the
8 reasons stated on the record, the Court now rules as follows:

9 1. Baroni is **GRANTED** summary adjudication on the following issues:

10 a. The HELOC is not a negotiable instrument within the meaning of Nev. Rev.
11 Stat. Ann. § 104.3104.

12 b. Under the terms of the Plan, the Green Tree POC is an unsecured claim.

13 2. Partial summary judgment is **DENIED** on all other issues, including:

14 a. whether BONYM is the beneficiary of the Green Tree DOT.

15 b. whether BONYM is the “owner” of the HELOC.

16 c. whether the HELOC and Green Tree DOT “on their face” establish that
17 BONYM is the owner of the HELOC or beneficiary of the Green Tree DOT.

18 d. whether Baroni can challenge the secured status of the Green Tree POC in
19 her bankruptcy case. As Plaintiff is granted summary adjudication on the issue that the Green Tree
20 POC is wholly unsecured under the terms of the Plan, this issue is moot.

21 e. whether BONYM is judicially estopped from claiming to “own” the HELOC
22 and claiming “to be the secured creditor of” the Green Tree POC.

23 f. whether in March 2015 Baroni and / or her husband mailed notices of
24 rescission of the loan memorialized by the HELOC.

25 g. whether the HELOC and the Green Tree DOT were rescinded by Baroni in
26 2015.

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1 3. As none of the Court’s rulings rely upon evidence submitted in connection with the
2 Motion for Summary Adjudication to which evidentiary objections were asserted, the parties’
3 evidentiary objections are overruled as moot.

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23 Date: August 18, 2016



Martin R Barash
United States Bankruptcy Judge