

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
DAVID L. CROOKS,	)	CASE NO. 05-35063 HCD
	)	CHAPTER 7
	)	
DEBTOR.	)	
	)	
	)	
DAVID L. CROOKS,	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 08-3023
	)	
HSBC MORTGAGE SERVICES and	)	
HOUSEHOLD FINANCE CORP., III	)	
DEFENDANTS.	)	

Appearances:

James L. McCaslin, Esq., attorney for plaintiff, McCaslin & McCaslin, 228 West High Street, Elkhart, Indiana 46516; and

Darren A. Craig, Esq., and Melanie D. Margolin, Esq., attorneys for defendants, Locke Reynolds LLP, 201 North Illinois Street, Suite 1000, P.O. Box 44961, Indianapolis, Indiana 46244-0961.

MEMORANDUM OF DECISION

At South Bend, Indiana, on October 31, 2008.

Before the court is the Defendants' Motion to Dismiss Plaintiff's Adversary Complaint, filed by HSBC Mortgage Services and Household Finance Corp., III (collectively, "HSBC" or "defendants"). The underlying Adversary Complaint was filed by the chapter 7 debtor David L. Crooks ("debtor" or "plaintiff"), seeking a declaratory judgment, rescission, and other relief against the defendants. The defendants request a dismissal pursuant to Federal Rule of Bankruptcy Procedure 7012(b) and Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The plaintiff filed no response to the defendants' Motion. For the reasons that follow, the court grants dismissal of the plaintiff's Complaint.

### Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(A) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

### Background

The following facts are taken from the court's record of the debtor's original bankruptcy case, Case Number 05-35063. David L. Crooks filed a voluntary chapter 7 petition on August 31, 2005. On September 30 of that year, after the 341 meeting was held, the Trustee issued a no-asset report. On October 31, 2005, the debtor signed a reaffirmation agreement with HSBC, reaffirming the mortgage debt he owed to HSBC, and filed it with the court. His attorney represented him during those negotiations and certified the agreement. The Order discharging the debtor was issued on December 5, 2005, and three days later the case was closed. However, on January 16, 2008, the court permitted the debtor to reopen the case in order to challenge the reaffirmation agreement and the underlying mortgage.

The debtor's Complaint, filed on April 7, 2008, states that "the root of this case" is the mortgage loan transaction between the plaintiff and the defendants.<sup>1</sup> R. 1 at 3. On November 19, 2004, the plaintiff executed the promissory note and mortgage to purchase his residential real estate. The Complaint presents, in seven counts,

---

<sup>1</sup> The Complaint states that the plaintiff executed the promissory note and mortgage with Accredited Home Lenders, Inc. The note and mortgage were ultimately assigned to the defendant Household Finance Corp., III. The second defendant, HSBC, was and is the servicer of the note and mortgage. See R 1, ¶¶ 5, 6; R. 14, p. 2.

allegations of the defendants' failings concerning the closing of the loan. Count One alleges that HSBC's foreclosure action "would be wrong due to the circumstances of rescission" and should be set aside. *Id.* at 5. Count Two alleges that the defendants did not give required disclosures in violation of the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1638, 1640, and 1641 and the corresponding regulations. Count Three alleges a TILA violation and damages based on the defendants' failure to respond to the plaintiff's attempted rescission. Count Four alleges that the defendants charged an illegal \$1,320 kickback in violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607. Count Five alleges that the defendants, by charging the plaintiff a "yield spread premium" of \$1,320 without sufficient disclosure of that charge, received an unjust enrichment in that amount. Count Six seeks a declaratory judgment that the plaintiff has the right of rescission of the loan under TILA, 15 U.S.C. § 1635(a). The last section of the Complaint, Count Seven, seeks a declaratory judgment that the reaffirmation agreement is void because HSBC was not the Holder in Due Course of the promissory note at the time the parties entered into the reaffirmation agreement. In his prayer for relief, the plaintiff requests rescission of the consumer loan transaction and reaffirmation agreement, a setting aside of any foreclosure action, injunctive relief, declarations of TILA and RESPA violations, and damages.

The defendants' motion for dismissal presents four grounds for dismissal pursuant to Federal Rule of Bankruptcy Procedure 7012(b) and Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The motion first argues that only the chapter 7 trustee, and not the plaintiff debtor, has standing to assert most of the claims alleged against the defendants. It also contends that the alleged causes of action arising under TILA and RESPA are now time-barred. The third ground for dismissal is that the plaintiff failed to request rescission of the reaffirmation agreement within the time period provided by the Bankruptcy Code. Finally, the defendants' motion insists that the plaintiff's claim for unjust enrichment is also barred under Indiana law.

The plaintiff failed to file a response to the Motion to Dismiss.

## Discussion

The question before the court is whether the plaintiff's Complaint must be dismissed as a matter of law pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure and Rule 12(b)(1) or (6) of the Federal Rules of Civil Procedure.<sup>2</sup> In order to state a claim for relief, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).<sup>3</sup> The Supreme Court restated the federal pleading requirements of Rule 8(a) in *Bell Atlantic Corp. v. Twombly*, U.S. , 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007) and *Erickson v. Pardus*, U.S. , 127 S. Ct. 2197, 167 L.Ed.2d 1081 (2007). In *Bell Atlantic*, the Court explained:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

*Bell Atlantic*, 127 S. Ct. at 1964-65 (citations omitted). According to the Court, "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Id.* at 1965 n.3. *Erickson* stated that "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson*, 127 S. Ct. at 2200 (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957)); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, U.S. , 127 S. Ct. 2499, 2507, 168 L.Ed.2d 179 (2007) ("Although the rule encourages brevity, the complaint must say enough to give the defendant 'fair notice . . . .'").

---

<sup>2</sup> Federal Rule of Bankruptcy Procedure 7012(b) states that Rule 12(b)-(h) of the Federal Rules of Civil Procedure are applicable in adversary proceedings. Rule 12(b)(1) is the affirmative defense that the complaint must be dismissed for "lack of subject-matter jurisdiction." Rule 12(b)(6) is another affirmative defense that seeks dismissal of the complaint for "failure to state a claim upon which relief can be granted."

<sup>3</sup> Federal Rule of Bankruptcy Procedure 7008 states that Rule 8 of the Federal Rules of Civil Procedure applies in adversary proceedings. Rule 8(a) states that a pleading "shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . , (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." Fed. R. Civ. P. 8(a).

The Seventh Circuit Court of Appeals, in analyzing the Supreme Court’s retooling of the federal pleading standards, observed: “[W]e understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8.” *Killingsworth v. HSBC Bank Nevada, N.A.*, 507 F.3d 614, 619 (7th Cir. 2007) (quoting *Airborne Beepers & Video, Inc. v. A.T. & T Mobility, LLC*, 499 F.3d 663, 667 (7th Cir. 2007)); *see also* *George v. Smith*, 507 F.3d 605, 608 (7th Cir. 2007) (requiring plaintiffs to “give enough detail to illuminate the nature of the claim and allow defendants to respond”) (citing *Bell Atlantic*). Following the Supreme Court and the Seventh Circuit, therefore, this court accepts as true the factual allegations of the complaint and will dismiss the complaint only if it “fails to set forth ‘enough facts to state a claim to relief that is plausible on its face.’” *St. John’s United Church of Christ v. Chicago*, 502 F.3d 616, 625 (7th Cir. 2007) (quoting *Bell Atlantic*, 127 S. Ct. at 1974). “[H]ow many facts are enough will depend on the type of case.” *Limestone Dev. Corp. v. Village of Lemont, Ill.*, 520 F.3d 797, 803 (7th Cir. 2008).

Thus, when considering whether to dismiss a complaint, the court takes all well-pled facts as true and construes all inferences in favor of the plaintiff. *See Massey v. Merrill Lynch & Co., Inc.*, 464 F.3d 642, 645 (7th Cir. 2006). It reviews the pleadings and the attached documents, since they can be independently examined. *See McCready v. eBay, Inc.*, 453 F.3d 882, 891 (7th Cir. 2006). In addition, the court is entitled to augment the pleadings by taking judicial notice of matters in the public record. *See Palay v. United States*, 349 F.3d 418, 425 n.5 (7th Cir. 2003) (citing cases).

In this case, the defendants seek dismissal based, in part, on the statutes of limitations of RESPA and TILA. “Although the statute of limitations is ordinarily an affirmative defense that must be pleaded under Federal Rule of Civil Procedure 8(c), a court may dismiss under Rule 12(b)(6) something that is indisputably time-barred.” *Small v. Chao*, 398 F.3d 894, 898 (7th Cir. 2005). The Seventh Circuit explained further:

Under Federal Rule of Civil Procedure 8, a complaint need not anticipate or overcome affirmative defenses such as the statute of limitations. As a result, a federal complaint does not fail to state a claim simply because it omits facts that would defeat a statute of limitations defense. However, .

. . . dismissal under Rule 12(b)(6) on the basis of a limitations defense may be appropriate when the plaintiff effectively pleads herself out of court by alleging facts that are sufficient to establish the defense.

*Hollander v. Brown*, 457 F.3d 688, 691 n.1 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 1912 (2007) (internal citations omitted); *see also United States v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005) (affirming dismissal on ground that the complaint’s allegations “set forth everything necessary to satisfy the affirmative defense”); *Leavell v. Kieffer*, 189 F.3d 492, 495-96 (7th Cir. 1999) (affirming dismissal because the limitations period was “long gone” when the lawsuit was filed). The rule therefore is clear: “If the allegations . . . show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim; that does not make the statute of limitations any less of an affirmative defense, *see Fed. Rule Civ. Proc. 8(c)*.” *Jones v. Bock*, 549 U.S. 199, \_\_\_, 127 S. Ct. 910, 920-21, 166 L.Ed.2d 798 (2007).

One other factor in this proceeding must be considered: The motion to dismiss is uncontested. The plaintiff neither responded to the motion nor requested an extension of time in which to respond. Despite that lack of opposition, the court still is obliged to examine the Complaint’s sufficiency by “consider[ing] whether a plaintiff could prevail under any legal theory or set of facts.” *County of McHenry v. Insurance Co. of the West*, 438 F.3d 813, 818 (7th Cir. 2006). Nevertheless, “when presented with a motion to dismiss, the nonmoving party must proffer some legal basis to support his cause of action” and the court “will not invent legal arguments for the litigants.” *Id.* (citing *Stransky v. Cummins Engine Co.*, 51 F.3d 1329, 1335 (7th Cir. 1995)).

Moreover, when the court’s local rules require a response, the court has discretion to dismiss the action. *See Issa v. Comp USA*, 354 F.3d 1174, 1178 (10th Cir. 2003). Under this court’s local rule, a party opposing a dismissal motion “shall have thirty (30) days” to file a response, and a “failure to respond or reply within the time required will be deemed a waiver of the opportunity to do so and may subject the motion to a ruling without further submissions.” N.D. Ind. L.B.R. B-7007-1. The plaintiff failed to respond at all. *See, e.g., Eglinton v. Loyer (In re G.A.D., Inc.)*, 340 F.3d 331, 335 (6th Cir. 2003) (affirming dismissal order on ground that the procedural rules concerning failure to respond are straightforward and clear). The court deems this

plaintiff's lack of response to be a waiver of the opportunity to do so. *See* N.D. Ind. L.B.R. B-7007-1; *see also County of McHenry*, 438 F.3d at 819 (affirming district court's dismissal of waived argument).

Having set forth the procedural rules guiding the dismissal of a complaint, the court turns to this debtor's Complaint. The first count reports that defendant HSBC "is proceeding to conduct a foreclosure" and pronounces that "foreclosure would be wrong due to the circumstances of rescission" and "should be set aside, adjudged or declared void." R. 1, ¶ 18. Count One gives no legal justification, however, for setting aside a potential foreclosure, and no explanation of "the circumstances of rescission." The court takes judicial notice that no rescission of the reaffirmation agreement was attempted in this court. It finds that the factual allegation of foreclosure is speculative and the legal argument is cursory, perfunctory, and unsupported by pertinent authority. *See Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 726-27 n.2 (7th Cir. 1998) (deeming such an argument waived) (citing cases). Without presenting solid factual and legal grounds upon which the claim rests, and without presenting even a "formulaic recitation of the elements of a cause of action," the defendant has not offered sufficient allegations "to raise a right to relief above the speculative level." *Bell Atlantic*, 127 S. Ct. at 1964-65. Count One, therefore, is dismissed pursuant to Rule 12(b)(6).

Counts Two and Three of the Complaint charge TILA violations, based on the defendants' alleged failures to disclose or to respond to the plaintiff's attempted rescission. Count Six seeks a declaratory judgment that the debtor has the right to rescind the mortgage loan under TILA, 15 U.S.C. § 1635(a). However, the time limit for exercise of a right of rescission has passed. Pursuant to § 1635(f), a cause of action for rescission "shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first." 15 U.S.C. § 1635(f). The three-year time limit, measured from the closing of the loan transaction on November 19, 2004, expired on November 19, 2007. After that date, the plaintiff's right to rescind was extinguished, whether or not the disclosures or other required information had been delivered to the plaintiff. Section 1635(f) "completely extinguishes the right of rescission at the end of the three-year period." *Beach v.*

*Ocwen Fed'l Bank*, 523 U.S. 410, 412, 118 S. Ct. 1408, 140 L.Ed.2d 566 (1998).<sup>4</sup> Thus the Complaint, filed April 7, 2008, was untimely and Counts Two, Three and Six, the rescission claims under TILA, are time-barred. See *Dye v. Ameriquest Mtg. Co.*, 2008 WL 3820445 at \*3 (7th Cir. 2008) (finding that the adversary action seeking rescission was time-barred under § 1635(f)).

In addition, to prevail on a claim for damages, TILA requires the cause of action to be brought “within one year from the date of the occurrence of the violation.” 15 U.S.C. § 1640(e). The execution of the mortgage loan agreement “at the root of this case,” R. 1 at 3, occurred on November 19, 2004. Thus, the debtor’s TILA claim for damages was barred after November 19, 2005. See *Leibowitz v. Barnes Auto Group, Inc. (In re Black)*, 390 B.R. 357, 365 (Bankr. N.D. Ill. 2008) (finding that § 1640(e) barred the trustee’s claim). The plaintiff has offered no response to the defendants’ contention that the claims are time-barred; he has proffered no legal or equitable justification for tolling the applicable statute of limitation. Because the plaintiff, by failing to respond to the motion to dismiss, is deemed to have conceded this point, the court finds that the TILA claims therefore are time-barred as a matter of law. The defendants’ motion to dismiss Counts Two, Three, and Six is granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Count Four alleges that an illegal kickback was paid at closing, in violation of § 8 of RESPA, 12 U.S.C. § 2607. However, RESPA’s one-year statute of limitations, found at 12 U.S.C. § 2614, requires an action under § 2607 to be brought within one year “from the date of the occurrence of the violation.” In this case, the violation, a kickback payment, is alleged to have occurred at closing, November 19, 2004. Section 2614 applies to restitution actions arising from claims of improper kickbacks. See *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.3d 1157, 1165 (7th Cir. 1997). Count Four’s allegations, therefore, were time-barred after November 19, 2005. The plaintiff did not respond or suggest any reason for an equitable tolling of the statute.

---

<sup>4</sup> This court need not consider whether § 1635(f) is a statute of limitations (“a bar to bringing suit,” *Beach*, 523 U.S. at 417) or a statute of repose (“a substantive right in those protected to be free from liability after a legislatively-determined period of time,” *Jones v. Saxon Mtg., Inc.*, 537 F.3d 320, 326-27 (4th Cir. 1998)). In this case, no defensive right or equitable tolling claim has been asserted, and the court is asked only to consider whether the complaint is time-barred.

Indeed, his failure to respond suggests his recognition that RESPA's statute of limitations bars this claim. Dismissal of Count Four of the Complaint therefore is granted as a matter of law under Rule 12(b)(6).

Count Five is entitled "unjust enrichment." In that count, the plaintiff asserted several factual allegations to demonstrate that the defendants were unjustly enriched, to the plaintiff's detriment. He first alleged that he was charged "a 'yield spread premium' ('YSP') of \$1,320" and that it was not disclosed to him before the closing.<sup>5</sup> However, there is no requirement that the YSP be disclosed before closing. *See Abbott v. Washington Mut. Fin., Inc.*, 2008 WL 756069 at \*2 (E.D. Pa. March 20, 2008) (finding that yield spread premiums do not require TILA disclosures); *Bell v. Parkway Mortgage, Inc. (In re Bell)*, 309 B.R. 139, 153 (Bankr. E.D. Pa. 2004) (finding that the YSP is not a prepaid finance charge paid by the borrower-debtor at closing and thus is not disclosed as a finance charge or included in the points and fees calculation).

The plaintiff next alleged that he was not told, at closing, that the YSP was paid by the lender and that it would increase the mortgage interest rate. In considering that allegation, the court reviewed the HUD-1 Settlement Statement ("HUD-1"), the instrument the plaintiff executed contemporaneously with the mortgage and promissory note, which was attached to the Complaint as an exhibit. Under Indiana law, "a mortgage agreement is a contract," the meaning of which "is to be ascertained by an examination of the entire contract." *Huntington Mortgage Co. v. DeBrotta*, 703 N.E.2d 160, 164 (Ind. App. 1998).

It is commonly accepted that where other instruments are executed contemporaneously with a mortgage and are part of the same transaction, a mortgage may be modified by other instruments and all the documents are to be read together to determine and give effect to the intention of the parties. The language of the mortgage and supporting instruments, unless it is ambiguous, represents the intention of the parties and is controlling.

*Id.* (citations, quotation marks omitted).

---

<sup>5</sup> In Count Four, the plaintiff alleged an "illegal kickback in the amount of \$1,320," and in Count Five he alleged a "yield spread premium" of \$1,320. If the plaintiff meant, in those two counts of the Complaint, that the \$1,320 YSP charged at the closing was an illegal kickback under RESPA, the Eleventh Circuit has found that "the plain language of RESPA does not 'speak to the standard for determining whether the payment of a [yield spread premium] violates the Act.'" *Friedman v. Market St. Mortgage Corp.*, 520 F.3d 1289, 1298 (11th Cir. 2008) (citing *Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257, 1261 (11th Cir. 2002)). Moreover, this court found, *supra*, that any RESPA claim alleging an illegal kickback was time-barred.

HUD-1 is a standardized form identifying all the closing costs of the mortgage loan transaction. RESPA requires that the borrower be given this detailed information. *See* 12 U.S.C. § 2603. The statute also requires that the lender provide to the borrower “an information booklet prepared by HUD that counsels borrowers on how mortgage transactions work and how to recognize inflated charges.” *Schuetz v. BancOne Mortgage Corp.*, 292 F.3d 1004, 1008-09 (9th Cir. 2002), *cert. denied*, 537 U.S. 1171 (2003) (citing 12 U.S.C. § 2604). In this case, the HUD-1 signed by the debtor disclosed that the YSP was a “Rebate to Broker” in the amount of \$1,320. The form also provided that the borrower, by signing the document, “acknowledge[d] receipt of the booklet ‘Settlement Costs,’ and the Consumer Handbook on ARM Mortgages, if applicable.” Such informative booklets contain HUD’s policy statements and additional explanations concerning the estimated settlement charges on HUD-1. For example, they typically advise borrowers that the broker may be paid by the lender, the borrower, or both, and may be paid after closing by including the fees in the interest rate or other settlement charges. *See Moses v. Citicorp Mortgage, Inc.* 982 F. Supp. 897, 902 (E.D.N.Y. 1997); *cf. Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1321 (11th Cir. 2008) (describing HUD’s policy statement “that a YSP can be a ‘useful means to pay some or all of a borrower’s settlement costs’ as well as ‘a legitimate tool to assist the borrower’”); *Glover v. Standard Fed’l Bank*, 283 F.3d 953, 957 (8th Cir.), *cert. denied*, 537 U.S. 943 (2002) (stating HUD’s policy statement that “[t]he payment of a YSP from the lender to the broker permits homebuyers to pay some or all of the up-front settlement costs over the life of the mortgage through a higher interest rate”). “[T]he law is well settled that the payment of a yield spread premium is not improper.” *Tidwell v. Homestar Real Estate Servs.*, 290 F. Supp. 2d 729, 733 (S.D. Miss. 2003) (citing cases, regulations). The plaintiff asserted, nevertheless, that the YSP increased the interest rate and caused the plaintiff’s higher monthly payments. His concluding allegation, in Count Five, was that the defendants unjustly gained a benefit and that the plaintiff suffered damages.

“Unjust enrichment” and “restitution” are common law equitable principles. “Courts of equity invoke the remedy of restitution in order to avoid unjust enrichment, and unjust enrichment is an ‘indispensable element’

of such a quasi-contractual action.” *Community Care Centers, Inc. v. Sullivan*, 701 N.E.2d 1234, 1239 (Ind App. 1998). The court finds, however, that under Indiana law a plaintiff cannot seek damages on the quasi-contractual theory of unjust enrichment when his relationship with the defendants is governed by an express contract. *See Bayh v. Sonnenburg*, 573 N.E.2d 398, 409 (Ind. 1991), *cert. denied*, 502 U.S. 1094 (1992) (stating the general rule that “recovery cannot be grounded on a claim of unjust enrichment where a contract controls the rights of the parties”); *Community Care Centers, Inc.*, 701 N.E.2d at 1243 (affirming trial court’s dismissal of quasi-contractual counterclaim); *cf. Prima Tek II, L.L.C. v. Klerk’s Plastic Industries, B.V.*, 525 F.3d 533, 541 (7th Cir. 2008) (holding that, under Illinois law, damages for unjust enrichment cannot be awarded “when there is a contract between the parties on the subject in dispute”). In this case, no relief can be granted to the debtor by basing a claim upon the Indiana common law doctrine of unjust enrichment. Therefore Count Five is dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

The final count of the plaintiff’s Complaint seeks a declaration that the reaffirmation agreement between the plaintiff and HSBC is void. Section 524(c) of the Bankruptcy Code “permits the debtor to voluntarily reaffirm a pre-petition debt.” *In re Turner*, 156 F.3d 713, 717 (7th Cir. 1998).

Because section 524 permits the debtor to reassume debts of which he would otherwise be relieved, it is in tension with the fresh start that the discharge of indebtedness is intended to give the debtor. The statute thus imposes a variety of conditions upon reaffirmation designed to ensure that the debtor who elects to reaffirm a pre-petition debt does so knowingly and in his own best interest.

*Id.* at 718 (citation omitted). In this case, the debtor complied with all the requirements for a reaffirmation to be deemed binding. When he negotiated and signed the reaffirmation agreement between himself and HSBC during his bankruptcy proceeding, he was represented by a bankruptcy attorney. The attorney certified that it was a fully informed, voluntary agreement, that it did not impose an undue hardship on the debtor or his dependents, and that he had advised the debtor of the legal effects and consequences of the agreement and of default under the agreement. The agreement itself provided a clear statement notifying the debtor of the repercussions of entering into the agreement. The creditor and debtor consented to the reaffirmation. *See In re Turner*, 156 F.3d at 719

(requiring the consent of both creditor and debtor). When the agreement was filed with this court on October 31, 2005, before the debtor's discharge, it fully complied with the mandates of § 524(c)(3). *See Cox v. Zale Delaware, Inc.*, 239 F.3d 910, 912 (7th Cir. 2001) (holding that a reaffirmation agreement not filed in court is invalid).

The court finds that the debtor, after knowingly and voluntarily reaffirming the mortgage debt and filing it with the court, did nothing to rescind the agreement. He did not notify HSBC of his desire to cancel the agreement, either before the court entered the discharge or within 60 days after the agreement was filed with the court, whichever was later. *See* § 524(c)(4). Pursuant to § 524(c)(3) and (4), therefore, the reaffirmation agreement was validly executed and it became enforceable and legally binding on the debtor and HSBC. *See In re Turner*, 156 F.3d at 718; *In re Saunders*, 169 B.R. 192, 195 (Bankr. W.D. Mo. 1994). Once the allowable time period for setting aside the agreement had expired, the agreement became “enforceable to the same extent as if the Debtor had never filed bankruptcy.” *In re Curcio*, 242 B.R. 192, 192 (Bankr. S.D. Fla. 1999) (citing *In re McCreless*, 141 B.R. 223, 224 (Bankr. N.D. Fla. 1992)). This court is without power to provide a remedy to the debtor after the time for rescission lapses. *See In re Curcio*, 242 B.R. at 192-93; *In re Saunders*, 169 B.R. at 195. For this reason, the plaintiff cannot now obtain relief by claiming that the reaffirmation agreement must be set aside as void, and Count Seven of the plaintiff's Complaint must be dismissed pursuant to Rule 12(b)(6).

In the view of this court, the plaintiff's failure to respond to the defendants' Motion to Dismiss is a concession that the debtor waives the opportunity to oppose the relief requested. *See* N.D. Ind. L.B.R. 7007-1. Nevertheless, the court has made separate determinations that the defendants have demonstrated entitlement to the dismissal of each count of the plaintiff's Complaint as a matter of law. The defendants have succeeded in their burden of establishing that each count is subject to dismissal for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Because it is clear that the plaintiff has neither set forth “enough facts to state a claim to relief that is plausible on its face,” *Bell Atlantic*, 127 S. Ct. at 1974, nor responded by

“proffer[ing] some legal basis to support his cause of action,” *County of McHenry*, 438 F.3d at 818, the court determines that the plaintiff cannot prevail and that dismissal of the Complaint is required.

#### CONCLUSION

For the reasons set forth in this Memorandum of Decision, the court grants the Defendants’ Motion to Dismiss Plaintiff’s Adversary Complaint, filed by defendants HSBC Mortgage Services and Household Finance Corp., III. The Adversary Complaint of the plaintiff David L. Crooks is dismissed as a matter of law pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure and Rule 12(b)(6) of the Federal Rules of Civil Procedure.

SO ORDERED.

/s/ Harry C. Dees, Jr.  
HARRY C. DEES, JR., CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT