Dated: January 07, 2015
The following is ORDERED:

Jennie D. Latta
Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re MILDRED B. COLE, Debtor.	Case No. 13-24387-L Chapter 13

MILDRED B. COLE, Plaintiff, v. INSOUTH BANK, Defendant.	Adv. Proc. No. 13-00247

REPORT AND RECOMMENDATION ON
MOTION TO DISMISS COMPLAINT

Defendant InSouth Bank asks that the court dismiss the Complaint of the Plaintiff, Mildred B. Cole, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure made applicable to this proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure. The Plaintiff believes that the Defendant has harmed her by failing to refinance certain loans secured by rental property. The court previously denied the Plaintiff's request for permanent injunctive relief as the result of her

failure to satisfy the conditions of a preliminary injunctive order. (Adv. Dkt. No. 25). The Defendant now asks that the court dismiss the Complaint, which contains four counts: Count I. Violation of the Tennessee Consumer Protection Act; Count II. Breach of Covenant of Good Faith and Fair Dealing; Count III. Violation of Fair Housing Act; and Count IV. Violation of Tennessee Human Rights Act.

JURISDICTION AND AUTHORITY OF THE BANKRUPTCY COURT

The Complaint was filed as an adversary proceeding ancillary to the Chapter 13 bankruptcy case of the Plaintiff, Mildred B. Cole. The federal district courts "have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). The district courts may refer "any and all proceedings under title 11 or arising in or related to a case under title 11 ... to the bankruptcy judges for the district." 28 U.S.C. § 157(a). The United States District Court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984).

Jurisdiction over the remaining causes of action in this adversary proceeding is problematic. In fact, the court ordered additional briefing on the issues of federal jurisdiction and the authority of the bankruptcy court to determine the parties' dispute. (Adv. Proc. Dkt. No. 54). Both the Plaintiff and the Defendant have filed briefs arguing that federal jurisdiction is present and that the bankruptcy court may at least prepare proposed findings of fact and conclusions of law. In both cases, the briefs allude to the claims' determination process as the foundation for federal bankruptcy jurisdiction. (See Adv. Proc. Dkt. 52, p. 4; Adv. Proc. Dkt. No. 65, p. 3). Although InSouth Bank

has filed three proofs of claim against the bankruptcy estate (Claim Nos. 3, as amended; 4, as amended; and 12), the Plaintiff/Debtor has not objected to any of those claims. Thus, this case raises the question of federal bankruptcy jurisdiction over a complaint that arises under state and federal (non-bankruptcy) law seeking damages and declaratory relief against a creditor of the bankruptcy estate whose claim is deemed allowed as the result of section 502(a) of the Bankruptcy Code. At least one court has treated a similar complaint as an objection to claim and this court will do so as well. *See Bavelis v. Doukas (In re Bavelis),* 453 B.R. 832, 852 (S.D. Ohio 2011), aff'd without discussing this point at ___ F.3d ___, 2014 WL 6678378 (6th Cir. Nov. 26, 2014).

When the complaint is treated as an objection to a proof of claim, the otherwise merely ancillary proceeding becomes a proceeding at the "core of federal bankruptcy jurisdiction." *See Northern Pipeline Const. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 71, 102 S. Ct. 2858, 2871 (1982). The allowance or disallowance of claims against the bankruptcy estate is a proceeding that arises under the Bankruptcy Code and arises in a bankruptcy case. But for the filing of a bankruptcy petition, there would be no cause of action for the determination of a claim in bankruptcy. As a result, federal bankruptcy jurisdiction is present with respect to the allowance or disallowance of InSouth Bank's proofs of claim. *See* 28 U.S.C. § 1334(b). Moreover, the claims' adjudication process is within the statutorily denominated "core proceedings" listed at 28 U.S.C. § 157(b)(2) over which the bankruptcy courts have authority to enter final orders subject only to appellate review by the district court or Bankruptcy Appellate Panel. *See* 28 U.S.C. § 157(b)(1) and (b)(2)(B).

The Complaint asks for more than the mere determination of InSouth Bank's proofs of claim, however. It asks that the court award damages, both compensatory and punitive, together with attorney fees, in unspecified amounts under both state and federal statutes. For example, the

Plaintiff asks for "judgment, including treble damages, against the Defendant and in favor of the Plaintiffs [sic] for willful violation of the Tennessee Consumer Protection Act"; "judgment against the Defendant and in favor of the Plaintiff for damages for breach of the covenant of good faith in performance of the contract entered between the parties"; "judgment against the Defendant and in favor of the Plaintiff for damages for violations of the Fair Housing Act, including compensatory and punitive damages and attorney fees"; "judgment against the Defendant and in favor of the Plaintiff for damages for violations of the Tennessee Human Rights Act, including compensatory and punitive damages and attorney fees"; and an award of "all costs and expenses, including attorney fees, incurred as a result of this action, pursuant to Tenn. Code Ann. §47-18-101 *et seq.*" Complaint, pp. 13-14. In other words, the Plaintiff not only seeks a determination of the Defendant's claims, but seeks affirmative relief that would not only be set off against the claim, but might well exceed it. Put in this light, the affirmative relief sought in the Complaint looks for all the world like a "counterclaim by the estate against persons filing claims against the estate" (28 U.S.C. § 157(b)(2)(C)), the very type of claim that was at issue in *Stern v. Marshall.* This "*Stern* claim" is one which is "related to" a bankruptcy case and thus provides a basis for federal bankruptcy jurisdiction because its outcome could alter the Plaintiff's liabilities as a bankruptcy debtor (s*ee Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3d Cir. 1984)), but is also one which requires the exercise of the judicial power of the United States because it is a matter of private rather than public right. *See Stern v. Marshall,* 564 U.S. ____, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011). The judicial power of the United States can only be exercised by an Article III judge. The bankruptcy court may, however, issue proposed findings of fact and conclusion of law to be reviewed *de novo* by the District Court. *See Executive Benefits Ins. Agcy. v. Arkison,* ___ U.S. ___, 134 S. Ct. 2165,

2168 (2014); and 28 U.S.C. § 157(c)(1). Thus, this bankruptcy court will issue this report and recommendation for review by the district court.

FACTUAL BACKGROUND

According to the Complaint, beginning around the year 2004, InSouth Bank made a series of loans to the Plaintiff and her husband, Charles Cole, for the purchase of rental properties in and around Brownsville, Tennessee. Mr. and Mrs. Cole invested in real estate for a number of years prior to their dealings with InSouth Bank. Prior to their relationship with InSouth Bank, the Coles had financed their real estate purchases through the Bank of Brownsville and Union Planters Bank. InSouth Bank purchased the Bank of Brownsville at some point. The Coles continued their business relationship with InSouth Bank and had their Union Planters loans refinanced by InSouth Bank.

The Complaint alleges that Mr. and Mrs. Cole are prominent African-American citizens in Brownsville, having served respectively as a school principal and teacher until their retirement. The Complaint further states that Mr. Cole is in a nursing home and unable to attend to business matters. The rental properties owned by the Coles at the time that the Plaintiff's bankruptcy petition was filed (March 22, 2013), were acquired prior to 2004. According to the Complaint, these properties were personal investments which the family intended to maintain and rent for the long term, and this intention was known to InSouth Bank. Nevertheless, according to the Complaint, InSouth Bank financed these properties with short-term loans, which were "flipped" repeatedly. In addition, the properties were "cross-collateralized," meaning that each loan was secured by all the properties. Twelve properties owned by the Coles secured the InSouth loans at the time that the Plaintiff's bankruptcy petition was filed. Three of these properties, previously owned by Mr. and Mrs. Cole,

were transferred to their daughters, Cheryl Cole and Deborah Freeman, prior to the filing of the bankruptcy petition.

The Complaint further alleges that as a result of the serial short-term financing, the Coles were unable to acquire equity in their properties. Their loan balances grew from approximately $90,000 to more than $300,000, and their monthly payments increased from $1,592 per month in 2005 to approximately $3,117 in 2011. The Complaint alleges that although the notes were amortized over fifteen or twenty years, they typically matured in only two to five years; i.e., they were "balloon" notes. The Complaint alleges that InSouth Bank was aware that the Coles were totally dependent upon refinancing and would not have been able to pay the notes at maturity. The Complaint alleges that with each refinance, the Coles were required to pay closing costs, appraisal fees, and other expenses that resulted in no principal reduction in the notes. As a result, although the Coles have paid approximately $250,000 to InSouth Bank over the years, they continue to owe more money with each refinance.

The Complaint further alleges that in 2011, the Coles' daughters met with Sandy McNeal, an InSouth Bank loan officer from Memphis, in the Coles' home. At that meeting, the Coles expressed their desire to convert their notes to a long-term, fully amortized loan. According to the Complaint, "the loan officer was encouraging and told the Cole family that they should be able to do this." Later, however, the Coles were told by another loan officer, Emily Davis of the Brownsville branch, that their loans could not be converted because the bank did not maintain long-term debts in its portfolio or service them. The Complaint alleges that the bank later, "in response to inquiries from the Federal Deposit Insurance Corporation," took the position that the notes could not be refinanced because of unfavorable loan to collateral ratios and an insufficient income stream.

The Coles allege that contrary to the statement of Ms. Davis, InSouth Bank does sometimes make long-term loans for investor-owned houses and duplexes.

The Complaint further alleges that as the result of pressure from InSouth Bank, Mrs. Cole agreed to surrender an apartment building for sale to reduce the outstanding debt. The Plaintiff alleges that the building was sold for much less than its fair market value. The Complaint alleges that InSouth Bank continued to deduct loan payments from the account that the Coles maintained at the bank for the deposit of rents and other revenues from the properties until November 2011, when, as the result of the Coles' refusal to provide additional collateral, InSouth Bank stopped deducting payments and commenced foreclosure proceedings. The Complaint alleges that InSouth Bank has refused to negotiate in good faith with the Coles because they are African-American and their properties are in identifiably African-American neighborhoods.

The Complaint further alleges that, in order to stop the foreclosure proceedings, on July 25, 2012, the Plaintiff filed a voluntary petition under Chapter 13 of the Bankruptcy Code. That case was dismissed in February of 2013 because of the Plaintiff's inability to make the required plan payments. InSouth Bank recommenced foreclosure proceedings, and the Plaintiff filed a second bankruptcy petition on March 22, 2013, initiating the presently pending case. The Complaint alleges that as the result of InSouth Bank's refusal to convert the loans to long-term amortized debt or to refinance them on a short-term basis without additional collateral, including the Plaintiff's home and laundromat, the Plaintiff is compelled to pay the entire debt of $300,000 in her bankruptcy plan, which is extremely difficult, if not impossible, for her to do.

The Complaint alleges that InSouth Bank exercised the assignment of rents provision in its loan documents and directed tenants to make payments directly to the bank. The Complaint alleges

that InSouth Bank's actions have resulted in decreased occupancy and ineffective collection of rents. This interruption of revenue, it alleges, has rendered the Plaintiff unable to make her plan payments.

PROCEDURAL HISTORY

The Plaintiff filed her Chapter 13 bankruptcy petition on March 22, 2013. The petition was originally filed in the Eastern Division of the Western District of Tennessee, but was transferred to the Western Division upon motion of the Debtor. InSouth Bank filed three proofs of claim: Claim No. 3 filed on April 12, 2013, in the amount if $299,651.06 (subsequently amended to $154,030.41); Claim No. 4 filed April 12, 2013, in the amount of $98,473.25, subsequently amended to $54,947.27; and Claim No. 12 filed on January 17, 2014, in the amount of $18,309.57. InSouth Bank also filed a motion for relief from the automatic stay with respect to eleven properties on April 24, 2013. The motion recited that the Debtor had little or no equity in the properties, that the income from the properties was insufficient to pay the related note, fire and comprehensive insurance premiums, and city and county taxes. The motion also recited that this was the second bankruptcy petition filed by the Debtor and that her financial circumstances had not changed since the dismissal of the prior case.

The Plaintiff responded to the motion for relief by filing her Complaint on June 5, 2013, seeking, among other relief, a temporary restraining order and preliminary injunction. The motion for preliminary injunction was granted, imposing certain conditions on the Plaintiff, which she was not able to fulfill. As a result, InSouth Bank was given relief from the automatic stay on June 13, 2013. It has reportedly foreclosed on its collateral. It is further reported that these properties were purchased by InSouth Bank at the foreclosure sale and Substitute Trustee Deeds have been recorded.

STANDARD FOR EVALUATING MOTION TO DISMISS

Rule 12(b)(6) permits a court to dismiss a complaint when it fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In order to survive a motion to dismiss for failure to state a claim, "[f]actual allegations must be enough to raise a right to relief above the speculative level and to state a claim for relief that is plausible on its face." *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 674 (2009). Plausibility requires "[m]ore than a sheer possibility that a defendant has acted unlawfully." *Id.*

COUNT I
(Tennessee Consumer Protection Act)

The Complaint alleges that InSouth Bank engaged in unfair and deceptive practices, and therefore violated the Tennessee Consumer Protection Act, Tennessee Code Annotated section 47-18-104 (the "TCPA") in the following three ways: (1) by executing short-term balloon loans to finance long-term investment properties; (2) by refusing to refinance the debt to long-term loans; and (3) by refusing to refinance the loans at maturity without requiring the Plaintiff to pledge her home as collateral. The Complaint does not point to any of the specifically prohibited practices enumerated in the TCPA, but instead states only that the practices of the Defendant were unfair and deceptive.

The Defendant asserts that the Complaint fails to state a claim for relief under the TCPA for two reasons: because the acts complained of arise out of an extension of credit, and because the acts

complained of fall outside the applicable statute of limitations. The court will consider these arguments in reverse order.

The Plaintiff's TCPA Claim is Barred by the Statute of Limitations

The TCPA provides in pertinent part that "any action commenced pursuant to § 47-18-109 must be brought within one year after the unlawful act or practice ...." Tenn. Code Ann. § 47-18-110. The TCPA claim was asserted by the Plaintiff with the filing of the Complaint on June 5, 2013. Thus any claim based upon unlawful acts or practices that occurred prior to June 5, 2012, is time-barred.

The Complaint complains of a series of acts that occurred between 2004 and November 2011. During that period, according to the Complaint, the Defendant acquired loans made to the Plaintiff and her husband secured by rental properties owned by them and refinanced these loans at maturity. The Complaint alleges that these loans were generally balloon notes with an amortization schedule for fifteen to twenty years, but a maturity date between two and five years. The Complaint alleges that the Defendant knew that the Coles would not have been able to pay these loans at maturity, and that, as a result of closing costs, appraisal fees, and other expenses of refinancing, the principal of the loans was not reduced appreciably over the course of this relationship. The Complaint alleges that the Coles' daughters realized that this was the situation in or around 2011 and requested a meeting with bank officers in an attempt to convert the loans to a long-term fully amortized loan. The Complaint acknowledges that the Defendant denied this request and alleges that the Defendant refused to refinance the loans unless additional collateral was provided by the Coles. The Complaint acknowledges that the Defendant stopped deducting loan payments from an account established by the Coles for this purpose in November of 2011 when the loans matured. The

Complaint acknowledges that thereafter the Defendant commenced foreclosure proceedings. The Complaint complains that "the bank has continued to refuse to negotiate a refinancing of the loans in question without additional collateral or a large lump sum payment." Complaint, ¶ 50. In other words, the Complaint acknowledges that the Defendant has not changed its position since at least November of 2011. Even if a court were to find that the activities of the Defendant were objectionable, the acts complained of by the Plaintiff – "(1) ... executing short-term balloon loans to finance long-term investment properties; (2) ... refusing to refinance the debt to long-term loans; and (3) ... refusing to refinance the loans at maturity without requiring the Plaintiff to pledge her home as collateral" – occurred more than one year prior to the filing of the Complaint, and thus outside the applicable limitations period for the TCPA.

The Plaintiff's Claim Arises out of a Request for Extension of Credit and is thus Excluded from the TCPA

Specifically excluded from the TCPA are "[c]redit terms of a transaction which may be otherwise subject to this part, except insofar as the Tennessee Equal Consumer Credit Act of 1974, compiled in part 8 of this chapter may be applicable." Tenn. Code Ann. § 47-18-111(a)(3). The Tennessee Court of Appeals has found that this section excludes the renegotiation of a loan from the reach of the Tennessee Consumer Protection Act. *See Silvestro v. Bank of America, N.A.,* 2013 WL 1149301, at *5 (Tenn. Ct. App. March 19, 2013).

The Plaintiff responds that there is a distinction to be drawn between the loan terms and the conduct of the lender. She explains that "[t]he gravamen of [her] TCPA claim is that the bank's acts in demanding Mrs. Cole's home be given as additional collateral and then proceeding to foreclose on all her investment properties when she refused was unfair within the meaning of the TCPA in light of all the relevant circumstances." Plaintiff's Response to Motion to Dismiss For Failure to

State a Claim, p. 14. For the reasons stated above, the Defendant's demand for additional collateral fell well outside the applicable limitations period and cannot now be the subject of the Plaintiff's claims.

To be sure, some of the Defendant's acts leading to the foreclosure of its interest in the Plaintiff's properties did occur within the year preceding the filing of her Complaint. The Tennessee Supreme Court has held, however, that acts taken to recover possession and dispose of collateral used to secure a loan are not acts affecting the conduct of "trade or commerce," as those terms are defined by the TCPA, and thus fall outside of its application. *Pursell v. First American Natl Bank*, 937 S.W.2d 838 (Tenn. 1996); *see also Greer v. Gateley (In re Greer)*, 2010 WL 4817993, at *4 (Bankr. M.D. Tenn. 2010) and cases gathered therein. This is so because the repossession and/or foreclosure of collateral "does not affect the 'advertising, offering for sale, lease or rental, or distribution of any goods, services, or property' as required by the TCPA." *Hunter v. Wash. Mut. Bank*, 2008 WL 4206604, at *5 (E.D. Tenn. Sept. 10, 2008).

For the foregoing reasons, Count I of the Complaint should be dismissed.

COUNT II
(Breach of Covenant of Good Faith and Fair Dealing)

The Complaint alleges that "by committing the acts complained of ... specifically, by refusing to refinance the debt to long term loans" as well as "by refusing to refinance the loans at maturity without requiring the Plaintiff to put her home at risk by offering it as collateral," the Defendant "acted in bad faith in contravention of the covenant of good faith and fair dealing." Complaint ¶¶ 70-72. The Defendant asserts that Count II of the Complaint should be dismissed because the Complaint alleges no breach of contract claim, but only a stand alone claim for breach of an implied covenant of good faith and fair dealing. The Defendant asserts that there is no cause

of action for breach of the covenant of good faith and fair dealing independent of a claim for breach of contract.

The Plaintiff responds that it is not necessary to plead a *breach* of contract, but merely the *existence* of an underlying, enforceable contract, in support of a claim for breach of the covenant of good faith and fair dealing.

The Defendant relies upon the decision of the Tennessee Court of Appeals in *Barnes & Robinson Co, Inc. v. OneSource Facility Servs., Inc.,* 195 S.W.3d 637, 642 (Tenn. Ct. App. 2006), in which the court of appeals reviewed the law concerning the covenant of good faith and fair dealing. The court of appeals states:

> Parties to a contract owe each other a duty of good faith and fair dealing as it pertains to the performance of the contract. Thus, each party to a contract promises to perform its part of the contract in good faith. The purpose of this implied-in-law covenant is two-fold.
>
> > First it honors the contracting parties' reasonable expectations. Second, it protects the rights of parties to receive the benefit of the agreement they entered into. *The implied obligation of good faith and fair dealing does not, however, create new contractual rights or obligations, nor can it be used to circumvent or alter the specific terms of the parties' agreement.*

Id. at 642-43, quoting *Goot v. Metropolitan Government of Nashville and Davidson County,* 2005 WL 3031638, *7 (Tenn Ct. App. November 9, 2005) (other citations omitted) (emphasis added in *Barnes & Robinson*). Moreover, the Defendant relies upon the decision in *Upperline Equipment Co. v. J & M, Inc.,* 724 F. Supp. 2d 883, 892 (E.D. Tenn. 2009), which states: "a breach of the implied covenant of good faith and fair dealing is not an independent basis for relief, but rather 'may be an element or circumstance of recognized torts, or breaches of contract,'" (quoting *Solomon v. First Am. Nat'l Bank of Nashville,* 774 S.W.2d 935, 945 (Tenn. Ct. App. 1989)). *Upperline Equipment*

includes references to a second case which supports the Defendant's position, *Envoy Corp. v. Quintiles Transnat'l Corp.*, 2007 WL 2173365, at *8 (M.D. Tenn. July 26, 2007), which specifically holds that "absent a valid claim for breach of contract, there is no cause of action for breach of an implied covenant of good faith and fair dealing" (interpreting analogous North Carolina law).

In response, the Plaintiff points to the decision of the United States District Court for the Eastern District of Tennessee, *Weese v. Wyndham Vacation Resorts,* 2009 WL 1884058 (E.D. Tenn. June 30, 2009), which she says supports her position that an action for breach of the covenant of good faith and fair dealing does not rely upon the allegation of a breach of contract, but merely upon the existence of a contract between the parties.

Weese does not support the Plaintiff's position. Indeed, after citing the very cases relied upon by the Defendant, the *Weese* court states: "A claim for the breach of the implied covenant of good faith and fair dealing does not provide an independent basis for relief and is, rather, a potential 'element or circumstance of recognized torts, or breaches of contract' (citing *Solomon*); [i]n other words, this claim is just 'part and parcel' of the breach of contract claim" (citing *Envoy Corp.*). *Weese* at *5. It is true that in *Weese*, the court found that the plaintiff had failed to establish the existence of an enforceable contract, and that the plaintiff's "negligence" claim, which actually was a claim for breach of the implied covenant of good faith and fair dealing, should be dismissed as a result, but the court never stated or implied that the mere existence of a contract would support an independent action for breach of the implied covenant of good faith and fair dealing. Instead, it summarized its holding by saying, "the Court will grant summary judgment in favor of Defendant Wyndham to the extent their 'negligence' claim is actually one for a breach of the implied covenant of good faith and fair dealing *based on a breach of contract claim*." *Id.* (emphasis added).

As the Plaintiff has failed to allege a breach of contract claim that would support her claim for breach of the implied covenant of good faith and fair dealing, Count II of the Complaint should be dismissed.

Count III
(Fair Housing Act)

The Complaint alleges that, "the Defendant, in violation of 42 U.S.C. § 3604(b) [the Fair Housing Act ("FHAct")] ... intentionally discriminated against the Plaintiff in the terms, conditions, and privileges of housing, by failing to offer financing of properties owned by the Plaintiff in predominantly African-American neighborhoods on as advantageous terms and conditions as offered to other borrowers and regarding properties in other neighborhoods." Complaint ¶ 74.

The Defendant asserts that this count should be dismissed because the FHAct does not apply to commercial transactions, citing *Mitchell v. Citizens Bank*, 2011 WL 101688, at *2 (M.D. Tenn. Jan. 11, 2011), which holds that where the transaction at issue is commercial in nature and does not involve property in which the plaintiff resides, the FHAct does not apply. *Mitchell* cites *Home Quest Mortgage LLC v. Am. Family Mut. Ins. Co.*, 340 F. Supp. 2d 1177, 1185 (D. Kan. 2004), which states that a plaintiff who did not use the dwelling at issue for herself, but rather purchased the dwelling for a commercial venture, cannot maintain an FHAct claim on her behalf, but could maintain an action on behalf of a person or class of persons who reside or would reside in the dwelling at issue. The court in *Mitchell* explains that to establish a FHAct claim, "the commercial property owner must allege that 'the defendant engaged in unlawful discrimination against a person or class of person who reside or would reside in the dwelling absent the unlawful discrimination.'" *Mitchell*, at * 2, citing *Home Quest Mortgage* and *Shaikh v. City of Chicago*, 2001 WL 123784, at *2-4 (N.D. Ill. Feb. 13, 2001).

The Complaint acknowledges that the properties in question were rental properties, none of which was occupied by the Plaintiff as her dwelling. Complaint ¶¶ 3, 5, 13, 14, 18. The Defendant correctly states that the Complaint makes a claim of discrimination on behalf of the Plaintiff alone, and not on behalf of her tenants. Complaint ¶ 74. Accordingly, the Complaint fails to state a claim under the FHAct.

The Plaintiff mistakes the argument of the Defendant, emphasizing the right of the Plaintiff to bring the action, i.e., the *standing* of the Plaintiff under the FHAct. The Defendant does not challenge the standing of the Plaintiff,[1] but rather challenges the claim of discrimination that she makes. As stated above, the Plaintiff complains solely that the acts of the Defendant were discriminatory as to her. Because she was engaged in a commercial enterprise and did not live in any of the properties financed by the Defendant as her dwelling, she has failed to state a cause of action under the FHAct.

Count III of the Complaint should be dismissed.

COUNT IV
(The Tennessee Human Rights Act)

The Complaint alleges that the "Defendant, in violation of T.C.A. § 4-21-601(2) [The Tennessee Human Rights Act ("THRA")], has intentionally and maliciously discriminated against Plaintiff in the terms and conditions of housing, by failing to offer financing of properties owned by the Plaintiff in predominantly African-American neighborhoods on as advantageous terms and conditions as offered to other borrowers and regarding properties in other neighborhoods."

[1] The Defendant does make reference to a lack of standing in the last paragraph of its Supplemental Reply Brief (Adv. Dkt. No. 61), but this appears to have been an afterthought. The gravamen of the Defendant's challenge is that the Plaintiff fails to allege discrimination against the persons or class of persons who reside or would reside in her rental properties.

Complaint ¶ 76. The Plaintiff concedes that "the analysis under the THRA is identical to that under the FHA[ct]." Plaintiff's Response to Motion to Dismiss for Failure to State a Claim, p. 16. For the reasons stated above in connection with the discussion of Count III of the Complaint, Count IV should likewise be dismissed.

CONCLUSION

The Complaint which commenced this adversary proceeding complains about acts of the Defendant bank in failing to renew or extend credit on terms acceptable to the Plaintiff in connection with a commercial loan. The Complaint alleges that the Defendant's refusal to renew or extend credit to the Plaintiff resulted from discrimination against the Plaintiff because of her race. None of the theories articulated by the Plaintiff provide relief to her. Count I, based upon the Tennessee Consumer Protection Act, should be dismissed because it is time-barred and because the TCPA does not apply to the credit terms of a transaction otherwise subject to the act. Count II, alleging a breach of the implied covenant of good faith and fair dealing, should be dismissed because the Complaint fails to allege an underlying breach of contract. Counts III and IV, based upon the Fair Housing Act and the Tennessee Human Rights Act, should be dismissed because those acts do not apply to prevent discrimination against commercial property owners.

The Complaint should be dismissed without prejudice to amendment.

cc: Debtor/Plaintiff
Attorneys for Debtor/Plaintiff
Defendant
Attorney for Defendant
Chapter 13 Trustee