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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

HARRIET DAVIDSON,  
  
vs.  
  
COUNTRYWIDE HOME LOANS, INC.,  
BAC HOME LOANS SERVICING, LP,  
MORTGAGE ELECTRONIC  
REGISTRATION SYSTEM, INC.,  
LANDSAFE TITLE CORPORATION,  
RECONTRUST COMPANY, N.A. AS  
TRUSTEE, and DOE’S 1-5,  
  
Defendants.

CASE NO. 09-CV-2694-IEG (JMA)

**ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANTS’ MOTION TO  
DISMISS FIRST AMENDED  
COMPLAINT**

[Doc. No. 7]

Presently before the Court is Defendants Countrywide Home Loans, Inc., BAC Home Loans Servicing, LP, Mortgage Electronic Registration System, Inc., Landsafe Title Corporation, and ReconTrust Company, N.A.’s (collectively, “Defendants”) motion to dismiss Plaintiffs Harriet Davidson and KAP CA, LLC (collectively, “Plaintiffs”) First Amended Complaint. (Doc. No. 27.)

Plaintiffs filed an opposition, and Defendants have not filed a reply. This motion is suitable for disposition without oral argument pursuant to Local Civil Rule 7.1(d)(1). For the reasons stated herein, the Court GRANTS IN PART and DENIES IN PART Defendants’ motion to dismiss.

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1 **FACTUAL BACKGROUND**

2 The following facts are drawn from Plaintiffs' First Amended Complaint ("FAC"). On or  
3 about February 13, 2007, Plaintiff Harriet Davidson ("Davidson") obtained two loans in the total  
4 amount of \$528,650, secured by property located at 3731 Ruelle De Ville, San Diego, California  
5 92130 ("the Property"). Two deeds of trust were recorded on February 21, 2007.

6 Davidson applied for the loans with Kate Sappenfield, an agent for Defendant Countrywide  
7 Home Loans, Inc ("Countrywide"). Plaintiffs alleges Countrywide, through its agent, misrepresented  
8 the loan terms, failed to make certain disclosures or made inaccurate disclosures, and fraudulently  
9 induced Davidson into obtaining loans for which she was not qualified.

10 On October 9, 2009, Davidson mailed a "qualified written request" to Defendant BAC Home  
11 Loans Servicing, LP ("BAC"), requesting information related to the servicing of the loans. Plaintiffs  
12 allege BAC did not acknowledge receipt of the request within 20 days or take action within 60 days,  
13 as required by federal law. On October 14, 2009, Davidson mailed a written notice of rescission of  
14 the loans to BAC. Davidson mailed an amended notice of rescission on February 10, 2010.

15 On May 8, 2009, Defendant LandSafe Title Corporation ("LandSafe") published and recorded  
16 a Notice of Default ("NOD") and Election to Sell against the Property. The NOD listed the  
17 information of BAC, as agent for Defendant Mortgage Electronic Registration System, Inc.  
18 ("MERS").

19 On November 16, 2009, a Notice of Trustee's Sale was recorded against the Property. On May  
20 13, 2009, Davidson conveyed title of the Property to Plaintiff KAP CA, LLC ("KAP") pursuant to a  
21 grant deed. On July 21, 2009, Plaintiffs tendered a short sale offer to BAC based upon the Property's  
22 reasonable market value, and BAC denied the offer. The Trustee's Sale was scheduled for June 4,  
23 2010. Plaintiffs allege none of the Defendants have an interest in the deeds of trust or the Property,  
24 because the notes and deeds of trust have been split. Therefore, none of the Defendants have authority  
25 to foreclose.

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**PROCEDURAL HISTORY**

On December 2, 2009, Davidson filed the Complaint, naming Defendants Countrywide, BAC, MERS, ReconTrust Company, N.A., and LandSafe. The Complaint alleged four causes of action: (1) violation of the Real Estate Settlement Procedures Act ("RESPA"), (2) violation of California Civil Code § 2943, (3) quiet title, and (4) declaratory relief. (Doc. No. 1.) On March 16, 2010, the Court granted in part Defendants' motion to dismiss the Complaint for failure to state a claim, with respect to all the claims except Plaintiff's RESPA claim, and granted leave to amend. (Doc. No. 23.)

On April 5, 2010, Plaintiffs timely filed the FAC. The FAC added a new Plaintiff, KAP, and a new Defendant, Wells Fargo Bank.<sup>1</sup> The FAC alleges ten causes of action: (1) equitable wrongful foreclosure; (2) cancellation of trust deeds; (3) quiet title; (4) violation of California Civil Code § 789.3; (5) violation of the Fair Debt Collection Practices Act; (6) violation of the Real Estate Settlement Procedures Act, 12 U.S.C. 2605; (7) violation of the Truth and Lending Act ("TILA"); (8) violation of California Business & Professions Code § 17200; (9) breach of fiduciary duty; and (10) fraud in the inducement.<sup>2</sup>

On May 6, 2010, Defendants filed the instant motion to dismiss the FAC. (Doc. No. 27.)

**DISCUSSION**

**I. Legal Standard**

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) (2009). A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); Navarro v. Block, 250 F.3d 729, 731 (9th Cir. 2001). The court must accept all factual allegations pled in the complaint as true, and must construe them and draw all reasonable

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<sup>1</sup>Plaintiffs allege the promissory note for the first loan was assigned and ultimately bundled with other notes and sold to the certificate-holders of the Bear Stearns ARM Trust 2007-3. Defendant Wells Fargo is trustee for the Holders of Bear Sterans ARM Trust, and purports to currently own the note.

<sup>2</sup>Defendants argue Davidson cannot add new parties and causes of action. However, the new party and claims relate to the same loans at issue in the original Complaint, and the Court declines to grant Defendants' motion to dismiss on this basis.

1 inferences from them in favor of the nonmoving party. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336,  
2 337-38 (9th Cir.1996). To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed  
3 factual allegations, rather, it must plead “enough facts to state a claim to relief that is plausible on its  
4 face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has “facial plausibility when  
5 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
6 defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, --- U.S. ---, 129 S.Ct. 1937, 1949  
7 (2009) (citing Twombly, 550 U.S. at 556).

8 However, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’  
9 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of  
10 action will not do.” Twombly, 550 U.S. at 555 (citation omitted). A court need not accept “legal  
11 conclusions” as true. Ashcroft v. Iqbal, --- U.S. ---, 129 S.Ct. 1937, 1949 (2009). In spite of the  
12 deference the court is bound to pay to the plaintiff’s allegations, it is not proper for the court to assume  
13 that “the [plaintiff] can prove facts that [he or she] has not alleged or that defendants have violated the  
14 . . . laws in ways that have not been alleged.” Associated Gen. Contractors of Cal., Inc. v. Cal. State  
15 Council of Carpenters, 459 U.S. 519, 526 (1983).

## 16 **II. Analysis**

### 17 **A. Tender**

18 Defendants contend Plaintiffs must tender the outstanding amount of debt in order to bring  
19 their first, second, and third causes of action – for wrongful foreclosure, cancellation of the Trust  
20 Deeds, and quiet title - which challenge the foreclosure of the Property.<sup>3</sup>

21 The Court agrees that tender is required to maintain these causes of action. Under California  
22 law, “[i]n obtaining rescission or cancellation, the rule is that the complainant is required to do equity,  
23 as a condition to his obtaining relief, by restoring to the defendant everything of value which the  
24 plaintiff has received in the transaction.” Fleming v. Kagan, 11 Cal. Rptr. 737, 740 (Ct. App. 1961);  
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26 <sup>3</sup>Plaintiffs’ first cause of action against BAC, MERS, and Wells Fargo is for wrongful  
27 foreclosure, seeking an order stopping the Trustee’s Sale. The second cause of action is for  
28 cancellation of the Trust Deeds against BAC, MERS, and Wells Fargo. The third cause of action is  
for quiet title against MERS and Wells Fargo. These causes of action are based on Plaintiffs’ claim  
that the notes and mortgages were split when the notes were assigned, leaving the debt unsecured.

1 see also Karlsen v. Am. Sav. & Loan Assn., 92 Cal. Rptr. 851, 854 (Ct. App. 1971) ("A valid and  
2 viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale  
3 under a deed of trust.") "The rule applies although the plaintiff was induced to enter into the contract  
4 by the fraudulent representations of the defendant." Fleming, 11 Cal. Rptr. at 740. Also, "[i]t is  
5 settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the  
6 debt secured." Shimpones v. Stickney, 219 Cal. 637, 649 (1934).

7 Plaintiffs argue they have satisfied any tender requirement by tendering the reasonable value  
8 of the Property, which Defendants declined to accept, and that it would be inequitable to require tender  
9 of the full loan value. However, the cases which Plaintiffs rely on for the proposition that tender of  
10 the reasonable value of the Property is sufficient do not support their position. See United States Cold  
11 Storage v. Great Western Savings & Loan Ass'n, 165 Cal.App.3d 1223 (1985) (explaining "the law  
12 is long-established that a *trustor* or his successor must tender the obligation in full as a prerequisite  
13 to challenge of the foreclosure sale.") (emphasis in original); American Mortg. Network, Inc. v.  
14 Shelton, 486 F.3d 815, 822 (4th Cir. 2007) (holding "[t]he trial court properly denied rescission, given  
15 the appellants' inability to tender payment of the loan amount"). Plaintiff also relies on language from  
16 the rescission provision in TILA, 15 U.S.C. § 1635(b), but the causes of action for wrongful  
17 foreclosure, cancellation of trust deeds, and quiet title, are brought under California law, not TILA.

18 Accordingly, the Court grants the motion to dismiss as to Plaintiffs' first, second, and third  
19 causes of action. Because it is possible for Plaintiffs to allege tender of the outstanding amount of the  
20 debt, these causes of action are dismissed without prejudice.

21 **B. Violation of California Civil Code § 789.3**

22 Plaintiffs list violation of California Civil Code § 789.3 in the caption of the FAC, but the FAC  
23 itself does not contain any allegations relating to this provision. Therefore, the Court dismisses this  
24 cause of action without prejudice.

25 **C. Violation of the Fair Debt Collection Practices Act**

26 Plaintiffs' fourth cause of action (listed as fifth in the caption) is for violation of the Federal  
27 Fair Debt Collection Practices Act ("FDCPA"), against MERS and Wells Fargo. Plaintiffs allege  
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1 these defendants “falsely represented the status of the debt, in particular, that it was due and owing  
2 to MERS at the time the NOD was filed when in fact the debt was unsecured.” (FAC ¶ 199.)

3 Defendants correctly argue that the activity of foreclosing on a property pursuant to a deed of  
4 trust is not “collection of a debt” within the meaning of the FDCPA. See, e.g., Diessner v. Mortgage  
5 Elec. Reg. Sys., 618 F. Supp. 2d 1184, 1189 (D. Ariz. 2009); Izenberg v. ETS Servs., LLC, 589 F.  
6 Supp. 2d 1193, 1199 (C.D. Cal. 2008); Hulse v. Ocwen Fed. Bank, FSB, 195 F. Supp. 2d 1188, 1204  
7 (D.Or. 2002); Ricon v. Recontrust Co., 2009 WL 2407396, at \*3 (S.D. Cal. Aug. 4, 2009). As one  
8 court explained:

9 Foreclosing on a trust deed is distinct from the collection of the obligation to pay  
10 money. The FDCPA is intended to curtail objectionable acts occurring in the process  
11 of collecting funds from a debtor. But, foreclosing on a trust deed is an entirely  
12 different path. Payment of funds is not the object of the foreclosure action. Rather, the  
13 lender is foreclosing its interest in the property.

14 . . . .

15 Foreclosure by the trustee is not the enforcement of the obligation because it is not an  
16 attempt to collect funds from the debtor.

17 Hulse, 195 F. Supp. 2d at 1204.

18 Accordingly, because MERS’ and Wells Fargo’s actions are not covered by FDCPA, the Court  
19 dismisses Plaintiffs’ cause of action for violation of the FDCPA with prejudice.

20 **D. Violation of the Real Estate Settlement Procedures Act, Section 2605(e)**

21 Plaintiff’s fifth cause of action (listed as sixth in the caption) is for violation of the Real Estate  
22 Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2605(e), against BAC.

23 Pursuant to RESPA, a borrower may send a "qualified written request" ("QWR") to the loan  
24 servicer of a federally related mortgage loan requesting information relating to the servicing of such  
25 loan. Id. § 2605(e)(1)(B). If a loan servicer receives a QWR, it must "provide a written response  
26 acknowledging receipt of the correspondence within 20 days." Id. § 2605(e)(1)(A). Then, the loan  
27 servicer must either correct the borrower’s account, or, after conducting an investigation, provide the  
28 borrower with a written explanation of: (1) why the loan servicer believes the account is correct, or  
(2) why the requested information is unavailable. See id. § 2605(e)(2).

Here, Plaintiffs allege “[o]n October 9, 2009, [Davidson's previous counsel] properly submitted  
a Qualified Written Request (“QWR”) to Servicer pursuant to 12 U.S.C. § 2605,” which “requested

1 information regarding servicing.” (FAC ¶¶ 125-26.) Plaintiffs allege BAC did not acknowledge  
2 receipt of the QWR within 20 days or take action within 60 days. (FAC ¶ 204.)

3 Defendants argue BAC took action with respect to the QWR within 60 days, as evidenced by  
4 a responsive letter from BAC, dated January 11, 2010, which is attached to the FAC. (FAC, Ex. D.)  
5 This letter from BAC responds to the inquiries “which were consistent with 12 U.S.C. § 2605.” (FAC,  
6 Ex. D.) This letter directly controverts Plaintiffs' claim that BAC failed to take action within 60 days,  
7 and Plaintiffs fail to allege BAC's response was insufficient. Therefore, to the extent the RESPA  
8 claim is based on BAC's failure to respond within 60 days, Plaintiffs fail to state a claim.

9 However, Plaintiffs have sufficiently alleged Defendants' failure to acknowledge receipt of  
10 the QWR within 20 days, in violation of Section 2605(e)(1)(A). Contrary to Defendants' assertions,  
11 Plaintiffs are not required to allege damage to establish a violation of Section 2605. *See id.* § 2605(f)  
12 (“Whoever fails to comply with any provision of this section shall be liable to the borrower . . .”).

13  
14 Accordingly, the Court denies Defendants' motion to dismiss Plaintiffs' claim for violation of  
15 RESPA, Section 2605.

16 **E. Violation of the Real Estate Settlement Procedures Act, Section 2604**

17 Plaintiffs' sixth cause of action (not listed on the caption) is for violation of RESPA, 12 U.S.C.  
18 § 2604, against Countrywide. Plaintiffs allege Countrywide failed to provide or did not timely provide  
19 certain disclosures required by Section 2604. (FAC ¶ 209.)

20 Section 2604(d) provides that lenders covered under RESPA shall provide certain information  
21 to each person from whom it receives an application to borrow money to finance the purchase of  
22 residential real estate. 12 U.S.C. § 2604(d). The lender must provide this information no later than  
23 three business days after receiving the application. *Id.* In relevant part, Section 2604 requires lenders  
24 to provide a good faith estimate of the amount or range of charges for specific settlement services the  
25 borrower is likely to incur in connection with the settlement. *Id.* § 2604(c). In addition, Section  
26 2607(c)(4) provides that in the case of an “affiliated business arrangement,” involving a referral by  
27 a lender, the lender must provide disclosure “of the existence of such an arrangement to the person  
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1 being referred and a written estimate of the charge or range of charges generally made,” at the time  
2 the estimates required under Section 2604(c) are provided. *Id.* § 2607(c)(4).

3 Here, Plaintiffs allege Countrywide did not provide the required disclosure regarding affiliated  
4 business arrangements. (FAC ¶ 144.) Plaintiffs also allege the good faith estimates were not provided  
5 in a timely manner, as Davidson applied for the loans on January 11, 2007, and was not provided a  
6 good faith estimate until closing on February 13, 2007. (FAC, Exs. O, P.) Finally, Plaintiffs allege  
7 the good faith estimates do not provide the required disclosures and “do not bear a reasonable  
8 relationship to the final charges incurred as a result of the Loan Closing.” (FAC ¶ 144.)

9 Defendants request judicial notice of two Loan Application Disclosure Acknowledgements,  
10 signed and dated by Plaintiff on February 14, 2007, which indicate Plaintiffs received a “Affiliated  
11 Business Arrangement Disclosure Statement” in connection with each loan.<sup>4</sup> (RJN, Exs. D, E.)  
12 Plaintiffs do not contest the accuracy of these documents. However, Defendants’ arguments do not  
13 address Plaintiffs’ allegations that the good faith estimates were untimely and inaccurate.

14 Therefore, the Court denies Defendants’ motion to dismiss as to Plaintiffs’ claim for violation  
15 of Section 2604, to the extent it is based on failure to provide timely and accurate good faith estimates.

16 **F. Violation of the Truth and Lending Act**

17 Plaintiffs’ seventh cause of action is for rescission and damages under TILA, against  
18 Countrywide, MERS, and Wells Fargo. The only issue addressed in Defendants’ motion is whether  
19 Plaintiffs timely delivered notice of rescission pursuant to TILA, 15 U.S.C. § 1635.

20 Subject to certain statutory limitations, TILA provides that in the case of any consumer credit  
21 transaction in which the loan is secured by the principal dwelling of the obligor, the obligor has the  
22 right to rescind the transaction for a limited amount of time. *Id.* TILA and its regulations require “a  
23 creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to  
24 rescind.” *Id.* § 1635(a); 12 C.F.R. § 226.23(b)(1). If the creditor provides such notice, TILA’s  
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26 \_\_\_\_\_  
27 <sup>4</sup> “[A] court may consider a writing referenced in a complaint but not explicitly incorporated  
28 therein if the complaint relies on the document and its authenticity is unquestioned.” *Swartz v. KPMG  
LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (quoting *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th  
Cir.1998), *superseded by statute on other grounds as stated in Abrego v. Dow Chem. Co.*, 443 F.3d  
676 (9th Cir. 2006)).



1 “buyer’s remorse” provision allows borrowers three business days to rescind the loan without penalty.  
2 Id. § 1635(a). If the creditor fails to deliver the notice, the borrower may rescind the loan within three  
3 years after it was consummated. Id. § 1635(f); 12 C.F.R. § 226.23(a)(3). The rescission period is also  
4 extended to three years if the lender fails to provide the borrower with “material disclosures.”<sup>1</sup> See  
5 id. § 1635(f); 12 C.F.R. §§ 226.15(a)(3), 226.23(a)(3). The right of rescission expires at the latest,  
6 “three years after the date of consummation of the transaction or upon the sale of the property,  
7 whichever occurs first.” 15 U.S.C. § 1635(f).

8 Plaintiffs allege Countrywide failed to disclose or did not accurately disclose the following  
9 information: (1) finance charges and yield spread premiums in the Truth in Lending Disclosure  
10 Statement (“TILDS”) for the first loan; (2) a TILDS for the second loan; (3) the annual interest rate;  
11 (4) scheduled payment amounts and annual percentage rate in the Good Faith Estimate for the second  
12 loan; (5) the composite annual interest rate for the second loan, inasmuch as it has a discounted initial  
13 rate; and (6) the composite annual percentage rate for the second loan. (FAC ¶¶ 147, 152, 153, 157.)  
14 Plaintiffs further allege they initially rescinded the loans in writing on November 10, 2009, which is  
15 within three years of the date of the loan transactions (February 13, 2007).<sup>2</sup> (FAC ¶¶ 182, 216.)

16 Defendants argue Countrywide timely provided the notices of right to cancel and material  
17 disclosures, and therefore Davidson was required to rescind during the three-day rescission period.  
18 Defendants request judicial notice of documents indicating that Davidson received a TILDS for the  
19 first loan, which states the finance charge, and received the notices of right to counsel for the first and  
20 second loans. (RJN, Exs. C, F, G.) These disclosures were provided on February 14, 2007, before  
21 the loans closed on February 21, 2007. (RJN, Exs. C, F, G.)

22  
23 <sup>1</sup> The term “material disclosures” means “the information that must be provided to satisfy the  
24 requirements in § 226.6 with regard to the method of determining the finance charge and the balance  
25 upon which a finance charge will be imposed, the annual percentage rate, the amount or method of  
26 determining the amount of any membership or participation fee that may be imposed as part of the  
27 plan, and the payment information described in § 226.5b(d)(5)(i) and (ii) that is required under §  
28 226.6(e)(2).” 12 C.F.R. § 226.15(a)(3).

<sup>2</sup>The Court notes the initial rescission letter is actually dated October 14, 2009, and the  
certified mail receipt is dated October 2009 (the exact date is illegible). (FAC, Ex. AF.) Also,  
Plaintiffs allege the amended rescission letter was sent on February 10, 2009 (FAC 216, but the  
amended rescission letter is dated February 10, 2010, and the certified mail receipt is dated February  
10, 2010. (FAC, Ex. AG.)

1           However, Plaintiffs' allegations that Countrywide failed to provide material disclosures, or  
2 provided inaccurate disclosures, if true, would allow Plaintiffs to rescind the loan within the three-year  
3 rescission period. See 15 U.S.C. § 1635(f); 12 C.F.R. § 226.15(a)(3). The documents Defendants  
4 have submitted are not conclusive on this issue. Notably, Defendants did not produce a TILDS for  
5 the second loan.

6           Accordingly, the Court denies Defendants' motion as to Plaintiffs' cause of action for violation  
7 of TILA.

8           **G.    Violation of California Business & Professions Code § 17200**

9           Plaintiffs' eighth cause of action is for violation of California's unfair competition statute,  
10 California Business & Professions Code §17200, against Countrywide.

11           Section 17200 prohibits "any unlawful, unfair or fraudulent business act or practice." Cal.  
12 Bus. & Prof. Code § 17200. Because Section 17200 is written in the disjunctive, it prohibits three  
13 separate types of unfair competition: (1) unlawful acts or practices, (2) unfair acts or practices, and  
14 (3) fraudulent acts or practices. Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 83 Cal.  
15 Rptr. 2d 548, 561 (Cal. 1999). By proscribing "unlawful" acts or practices, "Section 17200 'borrows'  
16 violations of other laws and treats them as unlawful practices independently actionable." Id. at 539-  
17 40.

18           The definition of "unfair" acts or practices in consumer actions is uncertain. There are two  
19 opposing lines of California appellate court opinions. See, e.g., Morgan v. Harmonix Music Sys, Inc.,  
20 2009 WL 2031765, at \*4 (N.D. Cal. July 7, 2009) (noting the split in authority); Bardin v.  
21 DaimlerChrysler Corp., 39 Cal. Rptr. 3d 634, 639-48 (Ct. App. 2006) (same). "One line defines  
22 'unfair' as prohibiting conduct that is immoral, unethical, oppressive, unscrupulous or substantially  
23 injurious to consumers and requires the court to weigh the utility of the defendant's conduct against  
24 the gravity of the harm to the alleged victim." Id. (citing Smith v. State Farm Mut. Auto. Ins. Co. 113  
25 Cal. Rptr. 2d 399, 415 (Ct. App. 2001). "The other line of cases holds that the public policy which  
26 is a predicate to a consumer unfair competition action under the 'unfair' prong of the UCL must be  
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1 tethered to specific constitutional, statutory, or regulatory provisions.” Bardin, 39 Cal. Rptr. 3d at 636  
2 (citing Scripps Clinic v. Superior Court, 134 Cal. Rptr. 2d 101, 116 (Ct. App. 2003)).

3         The term “fraudulent” as used in Section 17200 “does not refer to the common law tort of  
4 fraud” but only requires a showing that members of the public “are likely to be deceived.” Puentes  
5 v. Wells Fargo Home Mortg., Inc., 72 Cal. Rptr. 3d 903, 909 (Ct. App. 2008) (quoting Saunders v.  
6 Superior Court, 33 Cal. Rptr. 2d 438, 441 (Ct. App. 1994). “Unless the challenged conduct ‘targets  
7 a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable  
8 consumer.’” Puentes, 72 Cal. Rptr. 3d at 909 (quoting Aron v. U-Haul Co. of Cal., 49 Cal. Rptr. 3d  
9 555, 562 (Ct. App. 2006)).

10         Plaintiffs allege Countrywide, through its agent, violated Section 17200 by (1)“fabricat[ing]”  
11 the loan applications; (2) concealing the fact that Davidson was not qualified for the loans, (3) failing  
12 to fully disclose loan terms, including misleading Davidson as to the terms of the second loan, (4)  
13 failing to make RESPA disclosures, (5) failing to make TILA disclosures, including failing to  
14 conspicuously disclose the annual percentage rate for the second loan. Plaintiffs further allege  
15 Countrywide concealed the existence of a securitization scheme and payment of profits, kick-backs,  
16 and other financial incentives relating to the loans. (FAC ¶ 229.)

17         The Section 17200 allegations are nearly identical to those allegations underlying Plaintiffs’  
18 causes of action for fraudulent inducement, violation of TILA, and violation of RESPA. Therefore,  
19 the Court interprets those causes of action as the predicate violations of Plaintiffs' "unlawful" business  
20 act or practice claim. Because these causes of action are not dismissed from the FAC, they can serve  
21 as the predicate violations under the "unlawful" prong. Although Defendants argue Plaintiffs fail to  
22 allege which defendants engaged in what conduct, Plaintiffs specifically allege Countrywide engaged  
23 in all the above conduct. (FAC ¶¶ 229.) The Court further finds this conduct may also form the basis  
24 for Plaintiffs' claims of "unfair" and "fraudulent" business acts or practices.

25         Therefore, the Court denies the motion to dismiss as to the Section 17200 cause of action.

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1                   **H. Breach of Fiduciary Duty**

2                   Plaintiffs’ ninth cause of action is for breach of fiduciary duty, against Countrywide.  
3                   Plaintiffs allege Countrywide violated its fiduciary duty by failing to disclose material terms and  
4                   “securing a secret profit.” (FAC ¶ 241.)

5                   It is well established that a financial institution owes no duty of care to a borrower when  
6                   the institution’s involvement in the loan transaction does not exceed the scope of its conventional  
7                   role as a mere lender of money. Nymark v. Heart Fed. Sav. & Loan Assn., 283 Cal. Rptr. 53, 56  
8                   (Ct. App. 1991); see also Price v. Wells Fargo Bank, 261 Cal.Rptr. 735, 740 (Ct. App. 1989)  
9                   (citing Downey v. Humphreys, 227 P.2d 484 (Cal. 1951)) (“‘A debt is not a trust and there is not a  
10                  fiduciary relation between debtor and creditor as such.’ The same principle should apply with even  
11                  greater clarity to the relationship between a bank and its loan customers.”). “Without a fiduciary  
12                  relationship, there can be no breach of fiduciary duty.” Tina v. Countrywide, 2008 U.S. Dist.  
13                  LEXIS, at \*11, 2008 WL 4790906, at \*4 (S.D. Cal. Oct. 30, 2008). The case Plaintiffs rely on,  
14                  Cicone v. URS Corporation, 183 Cal. App. 3d 194, 201 (1986), does not address the issue of  
15                  fiduciary duty, and therefore does not compel a different result.

16                  Plaintiffs allege Countrywide “exceeded its scope as a mere money lender” by  
17                  “representing [Davidson’s] interests” regarding the loan, modifying and presenting Davidson’s  
18                  information on the credit application, and making decisions regarding loan terms. (FAC ¶¶ 234,  
19                  235.) However, this conduct does not exceed the scope of Countrywide’s conventional role as a  
20                  lender.

21                  Accordingly, because Countrywide does not owe a fiduciary duty to Plaintiffs, the Court  
22                  dismisses this cause of action with prejudice.

23                   **I. Fraud in the Inducement**

24                   Plaintiffs’ tenth cause of action is for fraud in the inducement against Countrywide.

25                   Under California law, there are five elements of common law fraud: (1) misrepresentation,  
26                   (2) knowledge of its falsity, (3) intent to defraud, (4) justifiable reliance, and (5) resulting damage.  
27                   Gil v. Bank of Am., N.A., 42 Cal. Rptr. 3d 310, 317 (Ct. App. 2006). Federal Rule of Civil  
28

1 Procedure 9(b) requires: “In all averments of fraud or mistake, the circumstances constituting  
2 fraud or mistake shall be stated with particularity.” Fed. R. Civ. P. 9(b). In the Ninth Circuit, this  
3 rule has been interpreted as requiring the plaintiff to allege “the who, what, when, where, and  
4 how” of the misconduct charged. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir.  
5 2003) (quoting Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)). Plaintiffs must  
6 allege circumstances constituting the alleged fraud that are “specific enough to give defendants  
7 notice of the particular misconduct . . . so that they can defend against the charge and not just deny  
8 that they have done anything wrong.” Id. “[A] plaintiff must set forth more than the neutral facts  
9 necessary to identify the transaction. The plaintiff must set forth what is false or misleading about  
10 a statement, and why it is false.” Id. (quoting Decker v. GlenFed, Inc. (In re GlenFed, Inc. Sec.  
11 Litig.), 42 F.3d 1541, 1548 (9th Cir. 1994)).

12 Plaintiffs allege Defendants fraudulently induced Davidson into entering into loans she  
13 could not afford by failing to disclose material information. Plaintiffs allege Countrywide failed to  
14 disclose the material terms of the loan by: (1)“fabricat[ing]” the loan application; (2) concealing  
15 the fact that Davidson was not qualified for the Loans, (3) failing to fully disclose loan terms,  
16 including misleading her as to the terms of the second loan, (4) failing to make RESPA  
17 disclosures, (5) and failing to make TILA disclosures. (FAC ¶ 246.) Plaintiffs further allege  
18 Countrywide concealed the existence of a securitization scheme. (FAC ¶ 246.) Plaintiffs allege  
19 Countrywide intended to induce Davidson into entering into the loans, and but for the failure to  
20 disclose the true terms of the transaction, she would have been alerted to the risk of entering into  
21 the loans. (FAC ¶¶ 247-250.)

22 Defendants argue Plaintiffs have not pled this cause of action with particularity. The Court  
23 agrees that Plaintiffs fail to allege with particularity how Countrywide fabricated the loan  
24 applications, and the allegation that Countrywide concealed the fact that Plaintiff was not qualified  
25 for the loans is purely conclusory. As Defendants argue, to the extent Plaintiffs base this claim on  
26 the contention that Countrywide gave Davidson a loan she could not afford, this claim would fail.  
27  
28

1 See, e.g., Cross v. Downey Savings & Loan Ass'n, 2009 WL 481482 (C.D. Cal. Feb. 23, 2009)  
2 (explaining a lender has no duty to determine the borrower's ability to repay the loan).

3 However, Plaintiffs's FAC alleged with sufficient particularity the failure to fully disclose  
4 certain loan terms and make certain disclosures, as well as the purported securitization scheme.  
5 Defendants do not address these allegations, or explain how these allegations cannot form the basis  
6 for Plaintiffs' fraud in the inducement claim.

7 Therefore, the Court denies the motion to dismiss as to Plaintiffs' cause of action for fraud  
8 in the inducement.

9 **CONCLUSION**

10 Accordingly, the Court GRANTS IN PART and DENIES IN PART Defendant's motion to  
11 dismiss.


12 The Court GRANTS the motion to dismiss WITHOUT PREJUDICE as to Plaintiffs' causes  
13 of action for: (1) wrongful foreclosure, (2) cancellation of the Trust Deeds, (3) quiet title, and  
14 (4) violation of California Civil Code § 789.3. Plaintiffs' cause of action for breach of fiduciary  
15 duty is dismissed WITH PREJUDICE.

16 The Court DENIES the motion to dismiss as to the causes of action for: (1) violation of  
17 RESPA, Section 2605, (2) violation of RESPA, Section 2604, (3) violation of TILA, (4) violation  
18 of California Business and Professions Code § 17200, and (5) fraud in the inducement.

19 If Plaintiffs' choose to amend their complaint, Plaintiffs shall not add additional parties or  
20 causes of action without first filing a motion for leave to amend.

21 **IT IS SO ORDERED.**

22  
23 **DATED: July 23, 2010**

24   
25 **IRMA E. GONZALEZ, Chief Judge**  
26 **United States District Court**