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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ANNETTE BRITTON CORDERO,	)	Case No. CV 11-08921 DDP (MRWx)
	)	
Plaintiff,	)	
	)	<b>ORDER GRANTING DEFENDANT'S MOTION</b>
v.	)	<b>TO DISMISS</b>
	)	
BANK OF AMERICA N.A., As	)	
Successor By Merger to BAC	)	
HOME LOANS SERVICING, LP,	)	
f/k/a COUNTRYWIDE HOME LOANS	)	
SERVICING, LP,	)	[Dkt. No. 9]
Defendants.	)	

Presently before the court is Defendant Bank of America's Motion to Dismiss. Having considered the submissions of the parties, the court grants the motion and adopts the following order.

**I. Background**

On March 15, 2006, Angela Britton Del Rio (Ms. Del Rio) and her late husband executed a \$650,000 promissory note in favor of Instant Capital Funding Group, Inc. for the purchase of property at 17031 Paulette Place, Granada Hills, California. (First Amended Complaint ¶1.) The loan was secured by a Deed of Trust

1 listing Mortgage Electronic Registration Systems, Inc. ("MERS")  
2 as beneficiary. (Id., Ex. F.) Plaintiff, as Attorney in Fact for  
3 Ms. Del Rio, alleges that the loan was later transferred and  
4 securitized.<sup>1</sup> (FAC ¶¶ 17, 21.) On September 22, 2010, MERS  
5 executed an Assignment ("the Assignment") of all beneficial  
6 interest in the Deed to Defendant's predecessor in interest. (FAC  
7 ¶ 40.) The Assignment was recorded by MERS Assistant Secretary  
8 Flor Valerio on October 6. (Id.)

9 On September 24, 2010, Defendant's agent recorded a Notice of  
10 default against Plaintiff's property. (FAC ¶ 41.) Defendant's  
11 agent recorded a Notice of Trustee's Sale on July 29, 2011.  
12 Plaintiff's First Amended Complaint alleges that the September 22  
13 Assignment of her note and Deed to Defendant was void, and that  
14 the Notice of Default and Notice of Trustee's Sale are therefore  
15 deficient. (FAC ¶ 30.)

16 The FAC alleges ten causes of action for declaratory relief,  
17 quasi contract, violations of the Fair Debt Collection Practices  
18 Act ("FDCPA"), Truth in Lending Act ("TILA"), and Real Estate  
19 Settlement Procedures Act ("RESPA"), an accounting, breach of  
20 contract, breach of the implied covenant of good faith and fair  
21 dealing, unfair business practices, and violation of California  
22 Civil Code Sections 2923.5 and 2924. Defendant now moves to  
23 dismiss the FAC in its entirety.

24 **II. Legal Standard**

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27 <sup>1</sup> Hereinafter, the court refers to Plaintiff and Ms. Del Rio  
28 interchangeably, with the exception of Section III(D), infra.

1           A complaint will survive a motion to dismiss when it contains  
2 "sufficient factual matter, accepted as true, to state a claim to  
3 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.  
4 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,  
5 570 (2007)). When considering a Rule 12(b)(6) motion, a court  
6 must "accept as true all allegations of material fact and must  
7 construe those facts in the light most favorable to the  
8 plaintiff." Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000).  
9 Although a complaint need not include "detailed factual  
10 allegations," it must offer "more than an unadorned, the-  
11 defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at  
12 678. Conclusory allegations or allegations that are no more than  
13 a statement of a legal conclusion "are not entitled to the  
14 assumption of truth." Id. at 679. In other words, a pleading that  
15 merely offers "labels and conclusions," a "formulaic recitation of  
16 the elements," or "naked assertions" will not be sufficient to  
17 state a claim upon which relief can be granted. Id. at 678  
18 (citations and internal quotation marks omitted).

19           "When there are well-pleaded factual allegations, a court  
20 should assume their veracity and then determine whether they  
21 plausibly give rise to an entitlement of relief." Id. at 679.  
22 Plaintiffs must allege "plausible grounds to infer" that their  
23 claims rise "above the speculative level." Twombly, 550 U.S. at  
24 555. "Determining whether a complaint states a plausible claim for  
25 relief" is a "context-specific task that requires the reviewing  
26 court to draw on its judicial experience and common sense."  
27 Iqbal, 556 U.S. at 679.

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1 **III. Discussion**

2 A. Quasi-Contract

3 Plaintiff's cause of action for quasi-contract is premised  
4 upon the allegation that Defendant was not entitled to receive  
5 Plaintiff's loan payments because the Assignment was invalid.  
6 (FAC ¶¶ 66-69.) Defendant argues that even if Plaintiff is  
7 correct that Bank of America lacks a beneficial interest in her  
8 Deed, Defendant was entitled to collect payments as the servicer  
9 of Plaintiff's loan. (Mot. at 7; Reply at 12-13.) Plaintiff's  
10 opposition focuses solely on Defendant's lack of beneficial  
11 interest, without addressing the loan servicer argument.  
12 Furthermore, the FAC itself alleges that Defendant is Plaintiff's  
13 loan servicer, a fact upon which certain of other causes of action  
14 (i.e. RESPA violation) depend. (FAC ¶¶ 110-117.) Plaintiff's  
15 claim for quasi contract is dismissed.

16 B. FDCPA

17 The FDCPA seeks to curtail abusive collection practices by  
18 debt collectors. 15 U.S.C. § 1692. The term "debt collector,"  
19 and thus the FDCPA, does not apply, however, to mortgage holders,  
20 mortgage loan servicers, or foreclosure activities. Usher v.  
21 Greenpoint Mortgage Funding, Inc., No. CIV S-10-0952 LKK DAD, 2010  
22 WL 4983468 at \*7 (E.D. Cal. Dec. 2, 2010); Lobato v. Acqura Loan  
23 Servs., No. 11cv2601 WDH, 2012 WL 607624 at \*5 (S.D. Cal. Feb. 23,  
24 2012). As discussed above, even if Bank of America is not the  
25 beneficiary of the Deed, it is Plaintiff's loan servicer.  
26 Plaintiff's FDCPA claim is, therefore, dismissed.

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1 C. TILA

2 Congress enacted TILA "to assure a meaningful disclosure of  
3 credit terms so that the consumer will be able to compare more  
4 readily the various credit terms available to him and avoid the  
5 uninformed use of credit, and to protect the consumer against  
6 inaccurate and unfair credit billing and credit card practices."  
7 15 U.S.C. § 1601(a). Accordingly, TILA "requires creditors to  
8 provide borrowers with clear and accurate disclosures of terms  
9 dealing with things like finance charges, annual percentage rates  
10 of interest, and the borrower's rights." Beach v. Ocwen Fed.  
11 Bank, 523 U.S. 410, 412 (1998).

12 TILA provides that an "action [for damages] . . . may be  
13 brought in any United States district court, or in any other court  
14 of competent jurisdiction, within one year from the date of the  
15 occurrence of the violation." 15 U.S.C. § 1640(e). The Ninth  
16 Circuit has held that the one-year window for filing a TILA  
17 damages claim generally "runs from the date of consummation of the  
18 transaction." King v. California, 784 F.2d 910, 915 (9th Cir.  
19 1986).

20 Here, Plaintiff alleges that, although she disputes the  
21 validity of the Assignment to Bank of America, Defendant was  
22 nonetheless required to follow TILA's disclosure provisions. (FAC  
23 ¶ 92.) The Assignment was executed on September 22, 2010 and  
24 recorded on October 6, 2010. Plaintiff did not file her initial  
25 complaint until October 27, 2011, over one year later.

26 In some cases, the doctrine of equitable tolling suspends the  
27 applicable limitations period "until the borrower discovers or had  
28 reasonable opportunity to discover the fraud or nondisclosures

1 that form the basis of the TILA action." King, 784 F.2d at 915.  
2 Courts must consider the applicability of equitable tolling  
3 whenever a complaint, liberally construed, alleges facts showing  
4 the "potential applicability of the equitable tolling doctrine."  
5 Cervantes v. City of San Diego, 5 F.3d 1273, 1277 (9th Cir. 1993).

6 Where a borrower does not allege that she was somehow  
7 prevented from comparing her loan documents with TILA's disclosure  
8 requirements within the limitation period, equitable tolling is  
9 not available. See Hubbard v. Fidelity Fed. Bank, 91 F.3d 75, 79  
10 (9th Cir. 1996); Feliciano v. Wash. Mut. Bank, F.A., No. 09-CV-  
11 01304, 2009 WL 2390842, at \*4 (E.D. Cal. August 3, 2009). Here,  
12 Plaintiff has not alleged any facts that would warrant equitable  
13 tolling of her claim. Though Plaintiff argues that Defendant  
14 fraudulently concealed that fact that it was assigned a beneficial  
15 interest in the Deed, the FAC itself acknowledges that the  
16 Assignment was recorded on October 6.<sup>2</sup> Because equitable tolling  
17 is not warranted, Plaintiff's TILA claim is time-barred, and is  
18 therefore dismissed.

19 D. RESPA

20 Plaintiff alleges that Defendant did not respond to her  
21 "Qualified Written Request" ("QWR") for information about her loan  
22 within the time limits set forth by RESPA, 12 U.S.C. § 2605. (FAC  
23 ¶ 114.) On September 14, 2011, Plaintiff's counsel sent a  
24 purported QWR ("the Letter") to Defendant. (FAC ¶ 109-110; Ex.  
25 M.) The Letter explained that counsel had been retained by  
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28 <sup>2</sup> The FAC does not allege a cause of action for fraud.

1 Augusto Britton Del Rio, Plaintiff's father. (FAC Ex. M.) All  
2 requests were made on behalf of Mr. Del Rio alone. (Id.)

3 Mr. Del Rio died in 2007, over four years before counsel sent  
4 the Letter on his behalf. (FAC ¶ 15.) The QWR made no mention of  
5 either Ms. Del Rio or Plaintiff. On September 30, 2011, Defendant  
6 responded to the Letter, stating that they could not release the  
7 requested information without the approval of the executor of Mr.  
8 Del Rio's estate. (FAC Ex. N.) On October 14, Defendant sent  
9 another letter to counsel, indicating that Defendant had received  
10 an "application for executor" from Plaintiff, but that Plaintiff's  
11 application did not constitute acceptable borrower authorization  
12 sufficient to release loan information. (Id.)

13 Under RESPA, mortgage loan servicers must respond to QWRs  
14 from a borrower or an agent of the borrower. 12 U.S.C. §  
15 2605(e)(1)(A). Here, however, the Letter was sent solely on  
16 behalf of the late Mr. Del Rio. Because the FAC fails to allege  
17 that Defendant received a valid QWR, Plaintiff's RESPA claim is  
18 dismissed.

19 E. Accounting

20 Generally, an accounting is a remedy rather than a cause of  
21 action. Aranqo v. Recontrust Co., N.A., No. 09 CV 01754 MMA, 2010  
22 WL 2404652 at \*6 (S.D. Cal. Jun. 14, 2010). "In rare cases, an  
23 accounting can be a cause of action when a defendant has a  
24 fiduciary duty to a plaintiff which requires an accounting . . .  
25 and that some balance is due to the plaintiff that can only be  
26 ascertained by an accounting." Pantoja v. Countrywide Home Loans,  
27 Inc., 640 F.Supp.2d 1177, 1191 (N.D. Cal. 2009). In most cases,  
28 however, a lending institution does not owe a fiduciary duty to a

1 borrower. Brown v. Bank of Am., N.A., No. CIV S-10-1758 LKK DAD,  
2 2011 WL 1253844 at \*7 (E.D. Cal. Mar. 31, 2011). Absent any  
3 allegations of special circumstances creating a fiduciary duty,  
4 Plaintiff's claim for an accounting is dismissed.

5 F. Breach of Contract

6 The FAC alleges that Bank of America breached the Deed of  
7 Trust by failing to apply Plaintiff's loan payments in the order  
8 of priority set out in the Deed. (FAC ¶ 159.) This allegation is  
9 no more than a bare recitation of an element of a breach of  
10 contract claim. The FAC does not identify which payments were  
11 misallocated, when the misallocation occurred, or how Defendant's  
12 allocation of payments was improper. Plaintiff's breach of  
13 contract claim is therefore dismissed, with leave to amend. See  
14 Derusseau v. Bank of America, N.A., No. 11 CV 1766 MMA, 2011 WL  
15 5975821 at \*7 (S.D. Cal. Nov. 29, 2011).

16 G. Breach of Implied Covenant of Good Faith and Fair  
17 Dealing

18 The FAC alleges that Bank of America's improper allocation of  
19 her loan payments made it impossible for her to carry out her  
20 obligations under the contract. (FAC ¶ 164.) This allegation  
21 contradicts her allegation, made in the context of her breach of  
22 contract claim, that she substantially performed all conditions in  
23 the Deed. (FAC ¶ 158.) Accordingly, this claim is dismissed,  
24 with leave to amend. See Armeni, 2012 WL at \*5.

25 H. California Civil Code Sections 2923.5 and 2924

26 Plaintiff further contends that Defendant is not entitled to  
27 utilize California's non-judicial foreclosure scheme, California  
28 Civil Code Section 2924 et seq., because Defendant failed to



1 comply with the notice requirements of California Civil Code  
2 section 2923.5. (FAC ¶¶ 176-177.)

3 A foreclosure sale cannot proceed without a valid Notice of  
4 Default. Mabry v. Superior Court, 185 Cal.App.4th 208, 223  
5 (2010). California Civil Code section 2923.5 requires a lender or  
6 its agent to contact, or attempt to contact, a defaulting borrower  
7 prior to recording a notice of default. Cal. Civil Code §  
8 2923.5(a)(1). Under Section 2923.5(a)(2), a "mortgagee,  
9 beneficiary or authorized agent shall contact the borrower in  
10 person or by telephone in order to assess the borrower's financial  
11 situation and explore options for the borrower to avoid  
12 foreclosure." Cal. Civil Code § 2923.5(a)(2). However, a  
13 mortgage servicer need not necessarily make actual contact with a  
14 borrower, provided that the servicer exercises due diligence in  
15 its attempt to contact the borrower. Cal. Civil Code § 2923.5(e).

16 Here, the FAC only alleges that Defendant failed to contact  
17 Plaintiff. Failure to contact a borrower is insufficient to  
18 establish a violation of Section 2923.5. Accordingly, Plaintiff's  
19 Tenth Cause of Action is dismissed, with leave to amend.

20 I. Remaining Claims

21 Plaintiff's First Cause of Action for Declaratory Relief is  
22 duplicative of and commensurate with relief Plaintiff seeks  
23 through her other causes of action, and is therefore dismissed.  
24 See Permpoon v. Wells Fargo Bank Nat'l Ass'n, No. 09-CV-01140-H,  
25 2009 WL 3214321 at \*5 (S.D. Cal. Sept. 29, 2009). Having  
26 dismissed all other claims, the court also dismisses Plaintiff's  
27 Sixth Cause of Action for unfair business practices in violation

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1 of California Business and Professions Code Section 17200, without  
2 prejudice.

3 **IV. Conclusion**

4 For the reasons stated above, Defendant's Motion to Dismiss  
5 is GRANTED. Plaintiff's Sixth, Eighth, Ninth, and Tenth Causes of  
6 Action (unfair business practices, breach of contract, breach of  
7 implied covenant, and Section 2923.5/2924) are dismissed, with  
8 leave to amend. All other causes of action are dismissed with  
9 prejudice. Any amended complaint shall be manually filed within  
10 twenty days of the date of this order.

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12 IT IS SO ORDERED.

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15 Dated: February 14, 2013



16 DEAN D. PREGERSON  
17 United States District Judge  
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