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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

MARINA RIOS RANGEL,  
  
Plaintiff,  
  
vs.

CASE NO. CV F 09-1035 LJO GSA  
  
**ORDER ON DEFENDANTS’ MOTIONS TO  
DISMISS (Docs. 4,6)**

DHI MORTGAGE COMPANY, LTD.,  
et al.,  
  
Defendants.

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**INTRODUCTION**

Defendants, lender DHI Mortgage Company, Ltd. (“DHI Mortgage”) and deed of trust trustee Chicago Title Company (“Chicago Title”) (collectively “defendants”), move separately to dismiss as meritless pro se plaintiff Marina Rios Rangel’s (“Ms. Rangel’s”) 13 claims arising from default and foreclosure on her first mortgage which was secured by a deed of trust on real property located at 644 Mt. Rushmore Drive, Newman, California 95360; APN: 026-061-034 (“property”). Ms. Rangel failed to oppose both motions to dismiss. This Court considered defendants’ Fed. R. Civ. P. 12(b)(6) motions to dismiss on the record and VACATES the July 28 and July 30, 2009 hearings, pursuant to Local Rule 78-230(c), (h). For the reasons discussed below, this Court DISMISSES this action against DHI Mortgage and Chicago Title and ORDERS Ms. Rangel to show cause why this Court should not dismiss all defendants in this action no later than July 30, 2009.

1 **BACKGROUND**

2 **Ms. Rangel's Loans And Default**

3 On September 1, 2005, Mr. Rangel purchased the property with funds obtained from DHI  
4 Mortgage's first mortgage, and secured by a deed of trust and promissory note. A December 4, 2008  
5 notice of default and intention to sell was recorded for the property with the Stanislaus County Recorder.

6 **Ms. Rangel's Claims**

7 Ms. Rangel's complaint challenges the mortgage industry's practice of sub-prime lending. Ms.  
8 Rangel alleges that defendants participated in "unethical business practices" and "violated both State  
9 and Federal Law" by selling and distributing loans "that would ultimately be sold to unqualified  
10 applicants." Ms. Rangel contends that defendants had information that "reflected her inability to pay  
11 for the risky loan," and that "defendants knew or should have known [the sale of such loans] may result  
12 in foreclosure, absent serial refinancing into even higher cost loans." The complaint further alleges:

13 These loans were neither proper nor suitable for [plaintiff's'] condition and station in  
14 life. These loans exceeded the reasonable expected value of the property at that time and  
15 in the foreseeable future, based upon expected market changes. Those loans were an  
16 attempt to acquire mortgage broker premiums, appraiser fees, lender service fees and  
17 sub-prime loans, all to the advantage of the defendants and disadvantage of the plaintiff.  
18 T his was done as a group of individuals in this industry through concerted action or  
19 through civil conspiracy, all to the disadvantage of the Plaintiff.

20 On March 24, 2009, Ms. Rangel filed her complaint ("complaint") in the Stanislaus County  
21 Superior Court to allege the following causes of action against defendants<sup>1</sup>:

- 22 1. Suitability
- 23 2. Negligence
- 24 3. Negligence Per se
- 25 4. Breach of Fiduciary Duty
- 26 5. Negligent Misrepresentation
- 27 6. Intentional Misrepresentation
- 28 7. Breach of the Covenant of Good Faith and Fair Dealing
8. Failure to Produce the Notes
9. Unfair Lending Practices
10. Restoral of Good Credit History
11. Violation of Cal. Civ. Code 2923.5
12. Fraud
13. Wrongful Foreclosure

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1 In addition to DHI Mortgage and Chicago Title, the complaint names as defendants Mortgage Electronic  
2 Registration Systems, America's Servicing Company, NDEX West, LLC, Wells Fargo, HSBC Bank USA, and Citimortgage.  
3 Each defendant is either a loan service provider or deed of trust provider. These defendants are "somewhere in the chain  
4 of loan service providers and [have] no other interest in this Note."

1 Ms. Rangel seeks to recover “personal, mental, physical and economic damages.”

2 DHI Mortgage removed this action to this Court on June 11, 2009. On June 22, 2009, Chicago  
3 Title moved to dismiss this action. DHI Mortgage moved to dismiss on June 22, 2009. Ms. Rangel  
4 failed to file oppositions papers to either motion.

5 **DISCUSSION**

6 **Pleading And Rule 12(b)(6) Motion Standards**

7 DHI Mortgage attacks Ms. Rangel’s claims as incognizable and lacking necessary elements and  
8 factual allegations. A motion to dismiss pursuant to Fed R. Civ. P. 12(b)(6) is a challenge to the  
9 sufficiency of the pleadings set forth in the complaint. A Fed. R. Civ. P. 12(b)(6) dismissal is proper  
10 where there is either a “lack of a cognizable legal theory” or “the absence of sufficient facts alleged  
11 under a cognizable legal theory.” *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).  
12 In considering a motion to dismiss for failure to state a claim, the court generally accepts as true the  
13 allegations of the complaint in question, construes the pleading in the light most favorable to the party  
14 opposing the motion, and resolves all doubts in the pleader's favor. *Lazy Y. Ranch LTD v. Behrens*, 546  
15 F.3d 580, 588 (9th Cir. 2008); *Jenkins v. McKeithen*, 395 U.S. 411, 421, *reh'g denied*, 396 U.S. 869  
16 (1969).

17 To survive a motion to dismiss, the plaintiff must allege “enough facts to state a claim to relief  
18 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1974 (2007).  
19 Nonetheless, a court is “free to ignore legal conclusions, unsupported conclusions, unwarranted  
20 inferences and sweeping legal conclusions cast in the form of factual allegations.” *Farm Credit Services*  
21 *v. American State Bank*, 339 F.3d 765, 767 (8th Cir. 2003) (citation omitted). “While a complaint  
22 attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s  
23 obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and  
24 conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550  
25 U.S. 554, 127 S. Ct. 1955, 1964-65 (internal citations omitted). Moreover, a court “will dismiss any  
26 claim that, even when construed in the light most favorable to plaintiff, fails to plead sufficiently all  
27 required elements of a cause of action.” *Student Loan Marketing Ass'n v. Hanes*, 181 F.R.D. 629, 634  
28 (S.D. Cal. 1998). In practice, “a complaint . . . must contain either direct or inferential allegations

1 respecting all the material elements necessary to sustain recovery under some viable legal theory.”  
2 *Twombly*, 550 U.S. at 562, 127 S.Ct. at 1969 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d  
3 1101, 1106 (7th Cir. 1984)). If a plaintiff fails to state a claim, a court need not permit an attempt to  
4 amend a complaint if “it determines that the pleading could not possibly be cured by allegation of other  
5 facts.” *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990).

6 With these standards in mind, this Court turns to DHI Mortgage’s challenges to Ms. Rangel’s  
7 claims.

### 8 Suitability

9 The complaint’s (first) suitability claim alleges that “defendants breached their professional  
10 duties and obligations by providing a sub-prime loan that was neither suitable nor appropriate for the  
11 plaintiff’s personal financial condition and well-being.”

12 DHI Mortgage notes that suitability is an incognizable claim by a borrower against a lender.  
13 “The unsuitability doctrine is premised on New York Stock Exchange Rule 405-Know Your Customer  
14 Rule FN3 and the National Association of Securities Dealers Rules of Fair Practice.” *O’Connor v. R.F.*  
15 *Lafferty & Co., Inc.*, 965 F.2d 893, 897 (10th Cir. 1992). DHI Mortgage further correctly notes that  
16 California law does not extend the suitability doctrine to the mortgage lender-borrower relationship.  
17 “Public policy does not impose upon the Bank absolute liability for the hardships which may befall the  
18 [borrower] it finances.” *Wagner v. Benson*, 101 Cal.App.3d 27, 34, 161 Cal.Rptr. 516 (1980). The  
19 success of a borrower’s investment “is not a benefit of the loan agreement which the Bank is under a  
20 duty to protect.” *Wagner*, 101 Cal.App.3d at 34, 161 Cal.Rptr. 516 (lender lacked duty to disclose “any  
21 information it may have had”). For these reasons, Ms. Rangel’s suitability claim fails as incognizable  
22 against DHI Mortgage and Chicago Title.

### 23 Negligence

24 The complaint’s (second) negligence claim alleges that defendants breached their “professional  
25 services” duty in that “plaintiff was placed into a loan that were inappropriate for her personal financial  
26 circumstances.” DHI Mortgage contends that the negligence claim fails in absence of “a legally  
27 recognized duty that a lender has to a borrower.” “The elements of a cause of action for negligence are  
28 (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate [or legal] cause

1 between the breach and (4) the plaintiff's injury.” *Mendoza v. City of Los Angeles*, 66 Cal.App.4th 1333,  
2 1339, 78 Cal.Rptr.2d 525 (1998) (citation omitted). “The existence of a legal duty to use reasonable care  
3 in a particular factual situation is a question of law for the court to decide.” *Vasquez v. Residential*  
4 *Investments, Inc.*, 118 Cal.App.4th 269, 278, 12 Cal.Rptr.3d 846 (2004) (citation omitted).

5 DHI Mortgage correctly notes the absence of an actionable duty between a lender and borrower  
6 in that loan transactions are arms-length and do not invoke fiduciary duties. Absent “special  
7 circumstances” a loan transaction “is at arms-length and there is no fiduciary relationship between the  
8 borrower and lender.” *Oaks Management Corp. v. Superior Court*, 145 Cal.App.4th 453, 466, 51  
9 Cal.Rptr.3d 561 (2006). Moreover, a lender “owes no duty of care to the [borrowers] in approving their  
10 loan. Liability to a borrower for negligence arises only when the lender ‘actively participates’ in the  
11 financed enterprise ‘beyond the domain of the usual money lender.’” *Wagner*, 101 Cal.App.3d at 35, 161  
12 Cal.Rptr. 516 (citations several cases). “[A]s a general rule, a financial institution owes no duty of care  
13 to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its  
14 conventional role as a mere lender of money.” *Nymark v. Heart Fed. Savings & Loan Assn.*, 231  
15 Cal.App.3d 1089, 1096, 283 Cal.Rptr. 53 (1991).

16 DHI Mortgage further notes the absence of a lender’s duty to ensure a loan is suitable for a  
17 borrower. “No such duty exists” for a lender “to determine the borrower's ability to repay the loan. . .  
18 . The lender's efforts to determine the creditworthiness and ability to repay by a borrower are for the  
19 lender's protection, not the borrower's.” *Renteria v. United States*, 452 F.Supp.2d 910, 922-923 (D. Ariz.  
20 2006) (borrowers “had to rely on their own judgment and risk assessment to determine whether or not  
21 to accept the loan”).

22 The negligence claim lacks a recognized legal duty owed by DHI Mortgage or Chicago Title.  
23 The complaint lacks allegations that Ms. Rangel relied on DHI Mortgage’s loan processing to ensure  
24 her ability to repay the loan. The complaint further lacks facts of special circumstances to impose duties  
25 on DHI Mortgage or Chicago Title in that the complaint depicts an arms-length home loan transaction,  
26 nothing more.

27 DHI Mortgage contends that the economic loss doctrine further bars the negligence claim in that  
28 Ms. Rangel seek only unrecoverable “purely economic damages.”

1 “[P]laintiffs may recover in tort for physical injury to person or property, but not for purely  
2 economic losses that may be recovered in a contract action.” *W.R. Grace & Company*, 37 Cal.App.4th  
3 1318, 1327, 44 Cal.Rptr.2d 305 (1995). “In California, plaintiffs may seek remedies for strict liability  
4 and negligence only for physical injury to person or property, and not for pure economic losses.” *Cal.*  
5 *Dept. Of Toxic Substances v. Payless Cleaners*, 368 F.Supp.2d 1069, 1084 (E.D. Cal. 2005) (citing *Seely*  
6 *v. White Motor Co.*, 63 Cal.2d 9, 18-19, 45 Cal.Rptr. 17, 403 P.2d 145 (1965)). “Therefore, unless  
7 physical injury occurs, a plaintiff cannot state a cause of action for strict liability or negligence.” *Payless*  
8 *Cleaners*, 368 F.Supp.2d at 1084.

9 Since Ms. Rangel’s alleged damages are economic, the economic loss doctrine further warrants  
10 dismissal of the negligence claim.

### 11 Negligence Per Se

12 The complaint’s (third) negligence per se claim alleges that defendants are “subject to California  
13 Statutes and Provisions that govern and direct their conduct. Plaintiff is a member of the class of  
14 citizens of the State of California for whose benefit the Statutes and Codes are enacted, and for whose  
15 protection the Statutes dealing with the Fair Lending Act under California Law are meant to provide.”

16 DHI Mortgage contends that the negligence per se claim fails as a matter of law. California  
17 Evidence Code section 669(a) addresses negligence per se and provides that a presumption of failure to  
18 exercise due care if:

- 19 1. Defendant “violated a statute, ordinance, or regulation of a public entity”;
- 20 2. “The violation proximately caused death or injury to person or property”;
- 21 3. “The death or injury resulted from an occurrence of the nature which the statute,  
22 ordinance or regulation was designed to prevent”; and
- 23 4. “The person suffering the death or injury to his person or property was one of the class  
24 of persons for whose protection the statute, ordinance, or regulation was adopted.”

25 DHI Mortgage correctly notes that the negligence per se doctrine does not establish a cause of  
26 action distinct from negligence. “[A]n underlying claim of ordinary negligence must be viable before  
27 the presumption of negligence of Evidence Code section 669 can be employed.” *Cal. Service Station*  
28 *and Auto. Repair Ass’n v. American Home Assurance Co.*, 62 Cal.App.4th 1166, 1178 (1998). The

1 negligence per se doctrine assists as evidence to prove negligence. “[I]t is the tort of negligence, and  
2 not the violation of the statute itself, which entitles a plaintiff to recover civil damages. In such  
3 circumstances the plaintiff is not attempting to pursue a private cause of action for violation of the  
4 statute; rather, he is pursuing a negligence action and is relying upon the violation of a statute, ordinance,  
5 or regulation to establish part of that cause of action.” *Sierra-Bay Fed. Land Bank Assn. v. Superior*  
6 *Court*, 227 Cal.App.3d 318, 333, 277 Cal.Rptr. 753 (1991).

7 DHI Mortgage correctly notes that in the absence of its viable duty, Ms. Rangel’s negligence per  
8 se claim fails just as her negligence claim fails. DHI Mortgage further faults the negligence per se  
9 claim’s failure to identify a specific statute that DHI Mortgage violated and the class of persons that the  
10 unidentified statute was intended to protect. DHI Mortgage is correct, and for these reasons, the  
11 negligence per se claim fails against DHI Mortgage and Chicago Title.

#### 12 **Breach Of Fiduciary Duty**

13 The complaint’s (fourth) breach of fiduciary duty claim alleges that defendants breached their  
14 fiduciary duty to Ms. Rangel “to perform their duties, obligations and functions in a fair, upstanding,  
15 honest and forthright manner, to conduct themselves so that the plaintiff would experience the benefit  
16 or [sic] their professional education and training, and to place plaintiff’s interests above and before the  
17 interest of the defendants.”

18 DHI Mortgage points to the absence of a fiduciary duty between lender and borrower.

19 “The relationship between a lending institution and its borrower-client is not fiduciary in nature.”  
20 *Nymark*, 231 Cal.App.3d at 1093, n. 1, 283 Cal.Rptr. 53 (citing *Price v. Wells Fargo Bank*, 213  
21 Cal.App.3d 465, 476-478, 261 Cal.Rptr. 735 (1989)). A commercial lender is entitled to pursue its own  
22 economic interests in a loan transaction. *Nymark*, 231 Cal.App.3d at 1093, n. 1, 283 Cal.Rptr. 53(citing  
23 *Kruse v. Bank of America*, 202 Cal.App.3d 38, 67, 248 Cal.Rptr. 217 (1988)). Absent “special  
24 circumstances” a loan transaction is “at arms-length and there is no fiduciary relationship between the  
25 borrower and lender.” *Oaks Management*, 145 Cal.App.4th at 466, 51 Cal.Rptr.3d 561 (“the bank is in  
26 no sense a true fiduciary”).

27 “[T]o plead a cause of action for breach of fiduciary duty, there must be shown the existence of  
28 a fiduciary relationship, its breach, and damage proximately caused by that breach. The absence of any

1 one of these elements is fatal to the cause of action.” *Pierce v. Lyman*, 1 Cal.App.4th 1093, 1101, 3  
2 Cal.Rptr.2d 236 (1991).

3 In the absence of alleged special circumstances and a legal duty owed by DHI Mortgage or  
4 Chicago Title, the breach of fiduciary duty claim fails. For the reasons set forth above, the complaint  
5 fails to demonstrate existence of a fiduciary duty.

### 6 Negligent And Intentional Misrepresentation

7 The complaint’s (fifth) negligent misrepresentation claim alleges that defendant breached their  
8 duty “to provide accurate, truthful and complete information by failing to provide the information to the  
9 plaintiff in a manner that they could understand” and “failed to provide all the information necessary for  
10 the plaintiff to make a complete, accurate and well-thought decision.” The complaint’s (sixth)  
11 intentional misrepresentation claims alleges that defendants “intentionally misrepresented the nature of  
12 loans.”

13 DHI Mortgage and Chicago Title faults the negligent and intentional misrepresentation claims’  
14 failure to meet Fed. R. Civ. P. 9’s particularity requirement.

15 Fed. R. Civ. P. 9(b) requires a party to “state with particularity the circumstances constituting  
16 fraud.”<sup>2</sup> In the Ninth Circuit, “claims for fraud and negligent misrepresentation must meet Rule 9(b)’s  
17 particularity requirements.” *Neilson v. Union Bank of California, N.A.*, 290 F.Supp.2d 1101, 1141 (C.D.  
18 Cal. 2003). A court may dismiss a claim grounded in fraud when its allegations fail to satisfy Fed. R.  
19 Civ. P. 9(b)’s heightened pleading requirements. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107  
20 (9th Cir. 2003). A motion to dismiss a claim “grounded in fraud” under Fed. R. Civ. P. 9(b) for failure  
21 to plead with particularity is the “functional equivalent” of a Fed. R. Civ. P. 12(b)(6) motion to dismiss  
22 for failure to state a claim. *Vess*, 317 F.3d at 1107. As a counter-balance, Fed. R. Civ. P. 8(a)(2) requires  
23 from a pleading “a short and plain statement of the claim showing that the pleader is entitled to relief.”

24 Fed. R. Civ. P. 9(b)’s heightened pleading standard “is not an invitation to disregard Rule 8’s

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26 <sup>2</sup> F.R.Civ.P. 9(b)’s particularity requirement applies to state law causes of action: “[W]hile a federal court  
27 will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the  
28 Rule 9(b) requirement that the *circumstances* of the fraud must be stated with particularity is a federally imposed rule.” *Vess*  
*v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9<sup>th</sup> Cir. 2003) (quoting *Hayduk v. Lanna*, 775 F.2d 441, 443 (1<sup>st</sup> Cir.  
1995)(italics in original)).



1 requirement of simplicity, directness, and clarity” and “has among its purposes the avoidance of  
2 unnecessary discovery.” *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996). “A pleading is  
3 sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can  
4 prepare an adequate answer from the allegations.” *Neubronner v. Milken*, 6 F.3d 666, 671-672 (9th Cir.  
5 1993) (internal quotations omitted; citing *Gottreich v. San Francisco Investment Corp.*, 552 F.2d 866,  
6 866 (9th Cir. 1997)). The Ninth Circuit Court of Appeals has explained:

7 Rule 9(b) requires particularized allegations of the circumstances *constituting* fraud. The  
8 time, place and content of an alleged misrepresentation may identify the statement or the  
9 omission complained of, but these circumstances do not “constitute” fraud. The  
10 statement in question must be false to be fraudulent. Accordingly, our cases have  
11 consistently required that circumstances indicating falseness be set forth. . . . [W]e [have]  
12 observed that plaintiff must include statements regarding the time, place, and *nature* of  
13 the alleged fraudulent activities, and that “mere conclusory allegations of fraud are  
14 insufficient.” . . . The plaintiff must set forth what is false or misleading about a  
15 statement, and why it is false. In other words, the plaintiff must set forth an explanation  
16 as to why the statement or omission complained of was false or misleading. . . .

17 In certain cases, to be sure, the requisite particularity might be supplied with great  
18 simplicity.

19 *In Re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541, 1547-1548 (9th Cir. 1994) (en banc) (italics in  
20 original) *superseded by statute on other grounds as stated in Marksman Partners, L.P. v. Chantal*  
21 *Pharm. Corp.*, 927 F.Supp. 1297 (C.D. Cal. 1996); *see Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir.  
22 1997) (“fraud allegations must be accompanied by “the who, what, when, where, and how” of the  
23 misconduct charged).

24 As to multiple fraud defendants, a plaintiff “must provide each and every defendant with enough  
25 information to enable them ‘to know what misrepresentations are attributable to them and what  
26 fraudulent conduct they are charged with.’” *Pegasus Holdings v. Veterinary Centers of America, Inc.*,  
27 38 F.Supp.2d 1158, 1163 (C.D. Ca. 1998) (quoting *In re Worlds of Wonder Sec. Litig.*, 694 F.Supp.  
28 1427, 1433 (N.D. Ca. 1988)).

29 The elements of a California fraud claim are: (1) misrepresentation (false representation,  
30 concealment or nondisclosure); (2) knowledge of the falsity (or “scienter”); (3) intent to defraud, i.e.,  
31 to induce reliance; (4) justifiable reliance; and (5) resulting damage. *Lazar v. Superior Court*, 12 Cal.4th  
32 631, 638, 49 Cal.Rptr.2d 377 (1996). The same elements comprise a cause of action for negligent  
33 misrepresentation, except there is no requirement of intent to induce reliance. *Caldo v. Owens-Illinois*,

1 *Inc.*, 125 Cal.App.4th 513, 519, 23 Cal.Rptr.3d 1 (2004).

2 “[T]o establish a cause of action for fraud a plaintiff must plead and prove in full, factually and  
3 specifically, all of the elements of the cause of action. *Conrad v. Bank of America*, 45 Cal.App.4th 133,  
4 156, 53 Cal.Rptr.2d 336 (1996). There must be a showing “that the defendant thereby intended to induce  
5 the plaintiff to act to his detriment in reliance upon the false representation” and “that the plaintiff  
6 actually and justifiably relied upon the defendant’s misrepresentation in acting to his detriment.”  
7 *Conrad*, 45 Cal.App.4th at 157, 53 Cal.Rptr.2d 336.

8 The complaint is severely lacking and fails to satisfy Fed. R. Civ. P. 9(b) “who, what, when,  
9 where and how” requirements as to DHI Mortgage, Chicago Title, and the other defendants. *See*  
10 *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal.App.4th 153, 157, 2 Cal.Rptr.2d 861 (1991) (a  
11 plaintiff asserting fraud against a corporate employer must “allege the names of the persons who made  
12 the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said  
13 or wrote, and when it was said or written.”) The complaint fails to establish fraud elements. The fraud  
14 allegations do not target particular defendants, and the complaint’s global approach is unsatisfactory.  
15 The fraud claims’ deficiencies are so severe to suggest no potential improvement from an attempt to  
16 amend. Accordingly, the fifth and sixth causes of action are dismissed against DHI Mortgage and  
17 Chicago Title.

### 18 **Breach Of The Implied Covenant Of Good Faith And Fair Dealing**

19 The complaint’s seventh claim alleges that defendants breached the covenant of good faith and  
20 fair dealing with Ms. Rangel which required defendants to “deal fairly and in good faith with the plaintiff  
21 and not seek to take an undue advantage of the plaintiff in their weakened bargaining position and with  
22 their lesser knowledge, skill, education and ability regarding the loan transactions.”

23 DHI Mortgage notes the uncertainty whether the claim proceeds under contract or tort law.

### 24 ***Contract***

25 “The prerequisite for any action for breach of the implied covenant of good faith and fair dealing  
26 is the existence of a contractual relationship between the parties, since the covenant is an implied term  
27 in the contract.” *Smith v. City and County of San Francisco*, 225 Cal.App.3d 38, 49, 275 Cal.Rptr. 17  
28 (1990). The “implied covenant of good faith and fair dealing is limited to assuring compliance with the

1 express terms of the contract, and cannot be extended to create obligations not contemplated by the  
2 contract.” *Pasadena Live, LLC v. City of Pasadena*, 114 Cal.App.4th 1089, 1093-1094, 8 Cal.Rptr.3d  
3 233 (2004) (citation omitted.) “Without a contractual relationship, [a plaintiff] cannot state a cause of  
4 action for breach of the implied covenant.” *Smith*, 225 Cal.App.3d at 49, 275 Cal.Rptr. 17.

5 DHI Mortgage correctly notes the absence of allegations to identify a particular contract or  
6 breach. The complaint references “oral and/or written agreements with all defendants” but fails to  
7 specify or detail such agreements. The complaint’s conclusory allegations fail to support a contractual  
8 relationship upon which to base an alleged breach of the implied covenant of good faith and fair dealing.  
9 DHI Mortgage further faults the breach of implied covenant of good faith and fair dealing claim for  
10 addressing alleged wrongs prior to contract formation. DHI is correct that it could not have breached  
11 a contractual obligation prior to contract formation. The Court notes an absence of facts related to  
12 Chicago Title, as well. As such, a purported claim under contract law fails.

### 13 *Tort*

14 DHI Mortgage further attacks the breach of covenant of good faith and fair dealing claim’s  
15 failure to allege a special relationship to invoke tort liability. “Generally, no cause of action for the  
16 tortious breach of the implied covenant of good faith and fair dealing can arise unless the parties are in  
17 a ‘special relationship’ with ‘fiduciary characteristics.’” *Pension Trust Fund v. Federal Ins. Co.*, 307  
18 F.3d 944, 955 (9th Cir. 2002) (applying California law). “Moreover, even if there were a contractual  
19 relationship between the parties, [a plaintiff] have pled no facts establishing a ‘special relationship’  
20 between them which could justify extending tort liability for bad faith to the present context.” *Smith*,  
21 225 Cal.App.3d at 49, 275 Cal.Rptr. 17.

22 The “implied covenant tort is not available to parties of an ordinary commercial transaction  
23 where the parties deal at arms’ length.” *Pension Trust Fund*, 307 F.3d at 955. California courts do not  
24 invoke a special relationship between a lender and borrower. *See Kim v. Sumitomo Bank*, 17  
25 Cal.App.4th 974, 979, 21 Cal.Rptr.2d 834 (1993) (“the relationship of a bank-commercial borrower does  
26 not constitute a special relationship for the purposes of the covenant of good faith and fair dealing”);  
27 *Mitsui Manufacturers Bank v. Superior Court*, 212 Cal.App.3d 726, 729 (borrower precluded to assert  
28 tortious breach of implied covenant of good faith and fair dealing claim against lender). As discussed

1 above, a lender generally owes no fiduciary duty to a borrower unless “it excessively controls or  
2 dominates the borrower.” *Pension Trust Fund*, 307 F.3d at 955.

3 No special relationship arises between mortgage lender DHI Mortgage and the borrower plaintiff.  
4 No special relationship arises between the title company and the borrower plaintiff, either. The  
5 complaint makes no attempt to allege such a special relationship with meaningful facts. The breach of  
6 implied covenant of good faith and fair dealing claim fails in absence of allegations of a sufficient  
7 contractual or special relationship between DHI Mortgage and Chicago Title, and Ms. Rangel.

### 8 **Failure To Produce Note**

9 The complaint’s (eighth) failure to produce note claim alleges that defendants “have not  
10 produced the Note to prove who the real party in interest is” and “[n]one of the defendants are the real  
11 party in interest as they have not provided nor can they provide the Note.”

12 DHI Mortgage challenges the claim as incognizable in that it lacks sufficient facts or allegation  
13 to permit DHI Mortgage to respond meaningfully. DHI Mortgage further attacks the claim’s lack of  
14 grounds for relief against DHI Mortgage.

15 Like many other borrowers subject to foreclosure, Ms. Rangel appears to claim defendants need  
16 to possess the original promissory note to permit foreclosure. Such is not the case in California.

17 “If the trustee's deed recites that all statutory notice requirements and procedures required by law  
18 for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has  
19 been conducted regularly and properly.” *Nguyen v. Calhoun*, 105 Cal.App.4th 428, 440, 129 Cal.Rptr.2d  
20 436 (2003). The California Court of Appeal has explained non-judicial foreclosure under California  
21 Civil Code sections 2924-2924i:

22 The comprehensive statutory framework established to govern nonjudicial  
23 foreclosure sales is intended to be exhaustive. . . . It includes a myriad of rules relating  
24 to notice and right to cure. It would be inconsistent with the comprehensive and  
exhaustive statutory scheme regulating nonjudicial foreclosures to incorporate another  
unrelated cure provision into statutory nonjudicial foreclosure proceedings.

25 *Moeller v. Lien*, 25 Cal.App.4th 822, 834, 30 Cal.Rptr.2d 777 (1994).

26 Under California Civil Code section 2924(a)(1), a “trustee, mortgagee or beneficiary or any of  
27 their authorized agents” may conduct the foreclosure process. Under California Civil Code section  
28 2924b(4), a “person authorized to record the notice of default or the notice of sale” includes “an agent

1 for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed  
2 substitution of trustee, or an agent of that substituted trustee.” “Upon default by the trustor, the  
3 beneficiary may declare a default and proceed with a nonjudicial foreclosure sale.” *Moeller*, 25  
4 Cal.App.4th at 830, 30 Cal.Rptr.2d (1994).

5 “Under Civil Code section 2924, no party needs to physically possess the promissory note.”  
6 *Sicairos v. NDEX West, LLC*, 2009 WL 385855, \*3 (S.D. Cal. 2009) (citing Cal. Civ. Code, §  
7 2924(a)(1)). Rather, “[t]he foreclosure process is commenced by the recording of a notice of default and  
8 election to sell by the trustee.” *Moeller*, 25 Cal.App.4th at 830, 30 Cal.Rptr.2d 777. An “allegation that  
9 the trustee did not have the original note or had not received it is insufficient to render the foreclosure  
10 proceeding invalid.” *Neal v. Juarez*, 2007 WL 2140640, \*8 (S.D. Cal. 2007).

11 Ms. Rangel’s failure to produce note claim is incognizable and fails.

### 12 **Unfair Lending Practices**

13 The complaint’s (ninth) unfair lending practices claim alleges that defendants “violated various  
14 California Statutes defining unfair lending practices” and “made a home loan to the plaintiff without  
15 determining or using commercially reasonable means or mechanisms that the borrowers had the ability  
16 to repay the loan.”

17 DHI Mortgage faults the claim’s failure to identify specific violated statutes and DHI Mortgage’s  
18 wrongs to violate statutes. DHI Mortgage notes that “[p]laintiffs’ recent inability to meet their mortgage  
19 obligation does not, in and of itself, mean that DHI Mortgage violated California’s unfair lending  
20 practices statutes.”

21 The (ninth) unfair lending practices claim fails far short of an identifiable claim and fails.

### 22 **Restoral Of Good Credit History**

23 The complaint’s (tenth) “restoral [sic] of good credit history” claim requests “restoral” of Ms.  
24 Rangel’s “reputation and good credit history.” DHI Mortgage correctly notes that the claim merely states  
25 a remedy, not a cause of action, and fails since it is premised on Ms. Rangel’s other flawed claims.

### 26 **Wrongful Foreclosure**

27 The complaint’s eleventh claim is untitled but appears to claim wrongful foreclosure in that  
28 defendants “were aware of senate [sic] Bill 1137, which became law September 8, 2008 and as stated

1 in [California Civil Code] 2923.5, due diligence, which set forth the requirement that any or all notice  
2 of default and or [sic] Notice of Trustee Sale must include a statement of affirmation reflecting that the  
3 Beneficiary and or [sic] its authorize [sic] trustee has complied within the herein above statute. Plaintiff  
4 state [sic] that the Notice of Default filed on DECEMBER 08, 2008 must be set aside for willful failure  
5 to comply with the law.”

6 California Civil Code section 2923.5 (“section 2923.5”) requires a lender or its agent to attempt  
7 to contact a defaulted borrower prior to foreclosure. Section 2923.5(a)(2) requires a “mortgagee,  
8 beneficiary or authorized agent” to “contact the borrower in person or by telephone in order to assess  
9 the borrower’s financial situation and explore options for the borrower to avoid foreclosure.” Section  
10 2923.5(b) requires a default notice to include a declaration “from the mortgagee, beneficiary, or  
11 authorized agent” of compliance with section 2923.5, including attempt “with due diligence to contact  
12 the borrower as required by this section.”

13 DHI Mortgage notes the absence of allegations that it participated in the notice of default or  
14 notice of trustee sale and that the complaint fails to identify who issued and recorded the notice of  
15 default. DHI Mortgage is correct that the claim lacks sufficient allegations for a viable claim.  
16 Accordingly, this cause of action is dismissed against DHI Mortgage and Chicago Title.

#### 17 **Further Fraud And Breach Of Fiduciary Duty**

18 The complaint’s (twelfth) claim is entitled “Unfair Lending Practices” but appears to attempt to  
19 re-allege fraud and breach of fiduciary claims. The claim alleges that “defendants committed acts of  
20 misrepresentations and fraud as so [sic] the terms of the loans, mortgage, and sale of the property with  
21 the intent to exert undue influence.” The claim further alleges: “Due the defendants [sic] undue  
22 influence, they received a deed of trust to the property for a loan that plaintiff should not have given or  
23 been allowed to take.”

24 To the extent the claim seeks to recover for fraud and breach of fiduciary duty, it fails for the  
25 reasons discussed above. To the extent it attempts to allege undue influence, it also fails.

26 Undue influence “involves a type of mismatch.” *Myerchin v. Family Benefits, Inc.*, 162  
27 Cal.App.4th 1526, 1540, 76 Cal.Rptr.3d 816 (2008). Undue influence is “generally accompanied by  
28 certain characteristics which tend to create a pattern. The pattern usually involves several of the

1 following elements: (1) discussion of the transaction at an unusual or inappropriate time, (2)  
2 consummation of the transaction in an unusual place, (3) insistent demand that the business be finished  
3 at once, (4) extreme emphasis on untoward consequences of delay, (5) the use of multiple persuaders  
4 by the dominant side against a single servient party, (6) absence of third-party advisers to the servient  
5 party, (7) statements that there is no time to consult financial advisers or attorneys.” *Myerchin*, 162  
6 Cal.App.4th at 1540.

7 DHI Mortgage correctly notes the absence of allegations of a pattern of activity to support undue  
8 influence. The twelfth claim fails against both defendants.

### 9 **Restrain Wrongful Foreclosure**

10 The complaint’s (thirteenth) claim “To restrain a Wrongful Foreclosure” alleges that the  
11 “representation as stated on the Notice of Default were [sic] a false representation” and that defendants  
12 “have foreclosed on a property that they had no right to foreclose upon.” The claim includes identical  
13 allegations as the (eighth) failure to produce note claim regarding lack of physical possession of the  
14 promissory notes.

15 Like similar claims, the restrain wrongful foreclosure claim is deficient. The claim fails to allege  
16 that DHI Mortgage commenced foreclosure and to identify the text, source and alleged reliance on a  
17 misrepresentation. The claim pinpoints no alleged wrongdoing to a specific defendant with requisite  
18 sufficiency. To the extent the claim seeks equitable relief, it fails in that it is premised on the other  
19 flawed claims.

### 20 **Punitive Damages**

21 The (sixth) intentional misrepresentation and (twelfth) unfair lending practices claims, and the  
22 complaint’s prayer, reference punitive damages. DHI Mortgage seeks to strike the punitive damages  
23 claims in the absence of viable fraud and undue influence claims.

24 Fed. R. Civ. P. 12(f) empowers a court to strike from a pleading “any redundant, immaterial,  
25 impertinent, or scandalous matter.” Motions to strike may be granted if “it is clear that the matter to be  
26 stricken could have no possible bearing on the subject matter of the litigation.” *LeDuc v. Kentucky*  
27 *Central Life Ins. Co.*, 814 F.Supp. 820, 830 (N.D. Cal. 1992); *Colaprico v. Sun Microsystems, Inc.*, 758  
28 F.Supp. 1335, 1339 (N.D. Cal. 1991). “[T]he function of a Rule 12(f) motion to strike is to avoid the

1 expenditure of time and money that must arise from litigating spurious issues by dispensing with those  
2 issues prior to trial.” *Sidney-Vinsein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9<sup>th</sup> Cir. 1983); *Fantasy,*  
3 *Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev’d on other grounds, Fogerty v. Fantasy, Inc.*,  
4 510 U.S. 517, 114 S.Ct. 1023 (1994). “[A] motion to strike may be used to strike any part of the prayer  
5 for relief when the damages sought are not recoverable as a matter of law.” *Bureerong v. Uvawas*, 922  
6 F.Supp. 1450, 1479, n. 34 (C.D. Cal. 1996). In the absence of viable claims, Ms. Rangel’s lack a claim  
7 for punitive damages to warrant striking references to and prayer for punitive damages.

8 **Attempt At Amendment**

9 Ms. Rangel’s claims are incognizable or barred as a matter of law. Ms. Rangel is unable to cure  
10 her claims by allegation of other facts and thus is not granted an attempt to amend.

11 **CONCLUSION AND ORDER**

12 For the reasons discussed above, this Court:

- 13 1. DISMISSES this action with prejudice against DHI Mortgage;
- 14 2. DISMISSES this action with prejudice against Chicago Title
- 15 3. DIRECTS the clerk to enter judgment in favor of defendants DHI Mortgage Company,  
16 Ltd. and Chicago Title Company and against plaintiff Marina Rios Rangel; and
- 17 4. ORDERS Ms. Rangel, no later than July 30, 2009, to file papers to show cause why this  
18 Court should not dismiss this action against defendants Mortgage Electronic Registration  
19 Systems, America's Servicing Company, NDEX West, LLC, Wells Fargo, HSBC Bank  
20 USA, and Citimortgage.

21 **This Court ADMONISHES Ms. Rangel that this Court will dismiss this action against**  
22 **defendants Mortgage Electronic Registration Systems, America's Servicing Company, NDEX**  
23 **West, LLC, Wells Fargo, HSBC Bank USA, and Citimortgage if she fails to comply with this order**  
24 **and fails to file timely papers to show cause why this Court should not dismiss these defendants.**

25 IT IS SO ORDERED.

26 **Dated: July 20, 2009**

**/s/ Lawrence J. O'Neill**  
**UNITED STATES DISTRICT JUDGE**