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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

ERIN BOGDAN,)
)
 Plaintiff,)
)
 v.)
)
 COUNTRYWIDE HOME LOANS,)
 SELECT PORTFOLIO SERVICING,)
 DECISION ONE MORTGAGE)
 COMPANY, RECONTRUST COMPANY,)
 N.A., MORTGAGE ELECTRONIC)
 REGISTRATION SYSTEMS, INC.,)
 HOME SWEET HOME REALTY AND)
 MORTGAGE, ANITA ROMAN, ERIC)
 MORALES, and DOES 1-20 inclusive,)
)
 Defendants.)

CIV-F-09-1055 AWI SMS

ORDER RE: MOTIONS TO DISMISS

(Docs. 15 and 17)

I. History¹

The claims in this suit arise from two mortgages Plaintiff Erin Bogdan (“Plaintiff”) obtained for the purchase of her home at 4684 N. Windward Way, Clovis, CA. In June 2005, Defendant Eric Morales (“Morales”) approached Plaintiff about financing a home loan. Morales

¹The factual history is provided for background only and does not form the basis of the court’s decision; the assertions contained therein are primarily based on the complaint and not necessarily taken as adjudged to be true. The legally relevant facts relied upon by the court are discussed within the analysis.

1 informed Plaintiff that he was a loan officer for Defendant Home Sweet Home Realty and
2 Mortgage (“Home Sweet”), and that he could get her the best rates and deal for a mortgage.
3 Plaintiff utilized Morales’s services in procuring a loan. Plaintiff claims Defendant Anita Roman
4 (“Roman”) is the real estate broker of record for Home Sweet. Plaintiff provided Roman with
5 information which showed her monthly income as \$3,600. Roman filled out Plaintiff’s loan
6 application on which Roman stated (without Plaintiff’s knowledge) monthly income as \$7,950.
7 Morales advised Plaintiff that she could get financing for 100% of the sale price of the home at a
8 low fixed rate of interest. Plaintiff ultimately got two loans: the first loan had an initial 7.27%
9 rate and the second loan had an initial 11.49% rate, both of which were adjustable. Morales told
10 Plaintiff that if the loan ever became unaffordable, she could refinance.

11 On June 9, 2006, Plaintiff completed the loans on the Property. Plaintiff was not given a
12 copy of the loan documents prior to closing. At closing, Plaintiff was only given a few minutes
13 to sign; Plaintiff did not have much time to review them. On June 16, 2006, two deeds of trust
14 were filed with the Fresno County Recorder’s Office, numbered 2006-0126653 and 2006-
15 0126654. On both deeds, the lender was Defendant Decision One Mortgage Company, LLC
16 (“Decision One”) with Defendant Mortgage Electronic Registration Systems, Inc. (“MERS”) as
17 the beneficiary and nominee for the lender. The trustee on both was non-party First American
18 Title Insurance Company. On May 29, 2009, Defendant Recontrust Company (“Recontrust” and
19 occasionally referred to by Plaintiff erroneously as Reconstruct) filed a substitution of trustee as
20 to the first deed. The servicer of the first loan is Defendant Countrywide Home Loans, Inc.
21 (“Countrywide”); the servicer of the second loan is Defendant Select Portfolio Servicing, Inc.
22 (“Select Portfolio”). On November 5, 2007, and February 25, 2009, Recontrust filed notice of
23 defaults. Recontrust sent Plaintiff notices of trustee sales on February 6, 2008, and May 27,
24 2009.

25 Plaintiff initially filed suit on June 16, 2009. Her amended complaint alleges causes of
26 action for: (1) violation of Truth-in-Lending Act (“TILA”) against Decision One; (2) violation of
27 California’s Rosenthal Fair Debt Collection Practices Act (“RFDCPA”) against Countrywide,
28 Select Portfolio, Decision One, and Recontrust; (3) negligence against all Defendants; (4)

1 violation of Real Estate Settlement Procedures Act (“RESPA”) against Countrywide, Select
2 Portfolio, and Decision One; (5) breach of fiduciary duty against Morales, Home Sweet, Decision
3 One, and Roman; (6) fraud against all Defendants; (7) violation of California’s Business &
4 Professions Code § 17200 (“UCL”) against all Defendants ; (8) breach of contract against
5 Countrywide and Decision One; (9) breach of implied covenant of good faith and fair dealing
6 against Countrywide and Decision One; and (10) wrongful foreclosure against Countrywide,
7 Select Portfolio, and Recontrust.

8 Select Portfolio has filed a motion to dismiss for failure to state a claim. Separately,
9 Countrywide, Recontrust, and MERS (collectively “Moving Defendants”) have also filed a
10 motion to dismiss. Plaintiff opposes the motions. The court took the matters under submission
11 without oral argument.

12 13 **II. Legal Standards**

14 Under Federal Rule of Civil Procedure 12(b)(6), a claim may be dismissed because of the
15 plaintiff’s “failure to state a claim upon which relief can be granted.” A dismissal under Rule
16 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient
17 facts alleged under a cognizable legal theory. Navarro v. Block, 250 F.3d 729, 732 (9th Cir.
18 2001). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed
19 factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’
20 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause
21 of action will not do. Factual allegations must be enough to raise a right to relief above the
22 speculative level, on the assumption that all the allegations in the complaint are true (even if
23 doubtful in fact)....a well-pleaded complaint may proceed even if it strikes a savvy judge that
24 actual proof of those facts is improbable” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56
25 (2007), citations omitted. “[O]nly a complaint that states a plausible claim for relief survives a
26 motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the
27 Court of Appeals observed, be a context-specific task that requires the reviewing court to draw
28 on its judicial experience and common sense. But where the well-pleaded facts do not permit the

1 court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it
2 has not shown that the pleader is entitled to relief.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950
3 (2009), citations omitted. The court is not required “to accept as true allegations that are merely
4 conclusory, unwarranted deductions of fact, or unreasonable inferences.” Sprewell v. Golden
5 State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). The court must also assume that “general
6 allegations embrace those specific facts that are necessary to support the claim.” Lujan v. Nat’l
7 Wildlife Fed’n, 497 U.S. 871, 889 (1990), citing Conley v. Gibson, 355 U.S. 41, 47 (1957),
8 overruled on other grounds at 127 S. Ct. 1955, 1969. Thus, the determinative question is
9 whether there is any set of “facts that could be proved consistent with the allegations of the
10 complaint” that would entitle plaintiff to some relief. Swierkiewicz v. Sorema N.A., 534 U.S.
11 506, 514 (2002). At the other bound, courts will not assume that plaintiffs “can prove facts
12 which [they have] not alleged, or that the defendants have violated...laws in ways that have not
13 been alleged.” Associated General Contractors of California, Inc. v. California State Council of
14 Carpenters, 459 U.S. 519, 526 (1983).

15 In deciding whether to dismiss a claim under Rule 12(b)(6), the Court is generally limited
16 to reviewing only the complaint. “There are, however, two exceptions....First, a court may
17 consider material which is properly submitted as part of the complaint on a motion to dismiss...If
18 the documents are not physically attached to the complaint, they may be considered if the
19 documents’ authenticity is not contested and the plaintiff’s complaint necessarily relies on them.
20 Second, under Fed. R. Evid. 201, a court may take judicial notice of matters of public record.”
21 Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001), citations omitted. The Ninth
22 Circuit later gave a separate definition of “the ‘incorporation by reference’ doctrine, which
23 permits us to take into account documents whose contents are alleged in a complaint and whose
24 authenticity no party questions, but which are not physically attached to the plaintiff’s pleading.”
25 Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005), citations omitted. “[A] court may not
26 look beyond the complaint to a plaintiff’s moving papers, such as a memorandum in opposition
27 to a defendant’s motion to dismiss. Facts raised for the first time in opposition papers should be
28 considered by the court in determining whether to grant leave to amend or to dismiss the

1 complaint with or without prejudice.” Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003),
2 citations omitted.

3 If a Rule 12(b)(6) motion to dismiss is granted, claims may be dismissed with or without
4 prejudice, and with or without leave to amend. “[A] district court should grant leave to amend
5 even if no request to amend the pleading was made, unless it determines that the pleading could
6 not possibly be cured by the allegation of other facts.” Lopez v. Smith, 203 F.3d 1122, 1127 (9th
7 Cir. 2000) (en banc), quoting Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995). In other
8 words, leave to amend need not be granted when amendment would be futile. Gompper v. VISX,
9 Inc., 298 F.3d 893, 898 (9th Cir. 2002).

11 III. Discussion

12 In the FAC (the operative complaint), Plaintiff lists six causes of action against Select
13 Portfolio: RFDCPA, negligence, RESPA, fraud, UCL, and wrongful foreclosure. Plaintiff lists
14 eight causes of action against Moving Defendants: RDFCPA, negligence, RESPA, fraud, UCL,
15 breach of contract, breach of implied covenant of good faith and fair dealing, and wrongful
16 foreclosure. The TILA and breach of fiduciary duty claims need not be addressed as they are
17 charged against Defendants who have not made any motion to dismiss. Plaintiff has agreed to
18 dismiss the breach of contract and breach of implied covenant of good faith and fair dealing
19 claims against Moving Defendants, so those claims need not be addressed. Plaintiff has also
20 agreed to dismiss the wrongful foreclosure claim against Select Portfolio, but maintains that the
21 cause of action is adequately plead as to Moving Defendants.

22 Plaintiff’s allegations in the FAC are generally vague. Upon review of the remaining six
23 causes of action at issue, the court finds that Plaintiff has failed to state a claim against Select
24 Portfolio and the Moving Defendants. The dismissal of the claims are without prejudice and
25 Plaintiff is granted leave to amend to give additional detail that might support her claims.

27 A. Rosenthal Fair Debt Collection Practices Act

28 Plaintiff alleges Defendants violated the RFDCPA generally without citing any specific

1 provision: “Defendants Countrywide, Select Portfolio, Decision, and Reconstruct’s actions
2 constitute a violation of the Rosenthal Act in that they threatened to take actions not permitted by
3 law, including but not limited to: collecting on a debt not owed to Defendants Countrywide,
4 Select Portfolio, Decision, and Reconstruct, making false reports to credit reporting agencies,
5 foreclosing upon a void security interest, foreclosing upon a Note of which they were not in
6 possession nor otherwise entitled to payment, falsely stating the amount of a debt, increasing the
7 amount of a debt by including amounts that are not permitted by law or contract, and using unfair
8 and unconscionable means in an attempt to collect a debt.” Doc. 13, FAC, at 14:9-16. Select
9 Portfolio claims that it is not a debt collector and therefore is not covered by the RFDCPA. The
10 Moving Defendants claim that foreclosure does not constitute an act of debt collection, and
11 therefore their actions are not covered by the RFDCPA.

12 The RFDCPA includes the following relevant definitions: “The term ‘debt collection’
13 means any act or practice in connection with the collection of consumer debts. The term ‘debt
14 collector’ means any person who, in the ordinary course of business, regularly, on behalf of
15 himself or herself or others, engages in debt collection. The term includes any person who
16 composes and sells, or offers to compose and sell, forms, letters, and other collection media used
17 or intended to be used for debt collection, but does not include an attorney or counselor at law.”
18 Cal. Civ. Code § 1788.2(b) and (c). Generally, RFDCPA prohibits debt collectors from engaging
19 in harassment, making threats, using profane language, falsely simulating the judicial process,
20 and cloaking its true nature in collecting debt. See Cal. Civ. Code §§ 1788.10-1788.18.

21 Recontrust is the substitute trustee under the deed of trust. Doc. 17, Part 2, Ex. G, at 41.
22 Countrywide and Select Portfolio are loan servicers. “[T]he law is clear that foreclosing on a
23 property pursuant to a deed of trust is not a debt collection within the meaning of the RFDCPA
24 or the FDCA. Therefore, as the trustee under the Deed of Trust with the power to sell the
25 foreclosed property, Trustee Corps cannot have violated the RFDCPA and the FDCA.” Gamboa
26 v. Tr. Corps & Cent. Mortg. Loan Servicing Co., 2009 U.S. Dist. LEXIS 19613, *11 (N.D. Cal.
27 Mar. 12, 2009). Plaintiff argues that some of her allegations against Countrywide and Select
28 Portfolio do not involve foreclosure. Plaintiff’s allegations regarding increasing the amount of

1 debt, contacting credit reporting agencies, and using unfair/unconscionable means to collect debt
2 are not specific enough to state a cause of action under RFDCPA. The court can not determine
3 which parts of the RFDCPA the Defendants are alleged to have violated. Regarding the
4 allegations of communication with credit reporting agencies, “the disclosure, publication or
5 communication by a debt collector of information relating to a consumer debt or the debtor to a
6 consumer reporting agency or to any other person reasonably believed to have a legitimate
7 business need for such information shall not be deemed to violate this title.” Cal. Civ. Code §
8 1788.12(e). In at least two other cases, complaints with largely identical language were found to
9 insufficiently state an RFDCPA cause of action. See Sipe v. Countrywide Bank, 2010 U.S. Dist.
10 LEXIS 12951, *19-20 (E.D. Cal. Feb. 16, 2010); Gonzalez v. First Franklin Loan Servs., 2010
11 U.S. Dist. LEXIS 1657, *17-18 (E.D. Cal. Jan. 9, 2010).

12 13 **B. Negligence**

14 Plaintiff alleges “Defendants Countrywide, Select Portfolio, Decision, Reconstruct, and
15 MERS owed a duty to the Plaintiff to perform acts in such a manner as to not cause Plaintiff
16 harm. Plaintiff is informed and believes and thereupon alleges that Defendants breached their
17 duty of care to the Plaintiff when they failed to maintain the original Mortgage Notes, failed to
18 properly create original documents, and failed to make the required disclosures to the Plaintiff.”
19 Doc. 13, FAC, at 15:15-20. Moving Defendants argue that there is no duty of care owed to
20 Plaintiff. Under California law, the elements of a cause of action for negligence are “(1) a legal
21 duty to use reasonable care, (2) breach of that duty, and (3) proximate [or legal] cause between
22 the breach and (4) the plaintiff’s injury.” Mendoza v. City of Los Angeles, 66 Cal. App. 4th
23 1333, 1339 (Cal. Ct. App. 1998). “The existence of a legal duty to use reasonable care in a
24 particular factual situation is a question of law for the court to decide.” Vasquez v. Residential
25 Investments, Inc., 118 Cal. App. 4th 269, 278 (Cal. Ct. App. 2004).

26 The allegations that Defendants were negligent in failing to maintain the original
27 promissory note and in failing to properly create original documents do not state a claim. Plaintiff
28 has not identified any defect in the promissory note, deed of trust, or attached documents.

1 Moreoever, possession of the note is not required in a non-judicial foreclosure. Brosnan v.
2 Countrywide Home Loans Inc., 2009 U.S. Dist. LEXIS 92480, *19 (N.D. Cal. Oct. 5, 2009);
3 Smith v. Wachovia, 2009 U.S. Dist. LEXIS 57553, *6 (N.D. Cal. July 6, 2009). Regarding the
4 claims concerning disclosures, that appears to be a reference to Plaintiff’s RESPA cause of
5 action. See Doc. 22, Plaintiff’s Opposition, at 19:25-20:7. As discussed below, Plaintiff has not
6 yet stated a valid cause of action under RESPA.

7
8 **C. Real Estate Settlement Procedures Act**

9 Under RESPA, a qualified written request (“QWR”) is “a written correspondence, other
10 than notice on a payment coupon or other payment medium supplied by the servicer, that- (i)
11 includes, or otherwise enables the servicer to identify, the name and account of the borrower; and
12 (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable,
13 that the account is in error or provides sufficient detail to the servicer regarding other information
14 sought by the borrower.” 12 U.S.C. § 2605(e)(1)(B). When a borrower sends a QWR to a loan
15 servicer, the servicer must provide a written explanation of any action taken in response to the
16 QWR “Not later than 60 days (excluding legal public holidays, Saturdays, and Sundays) after the
17 receipt from any borrower of any qualified written request.” 12 U.S.C. § 2605(e)(2).

18 Plaintiff alleges, “On or about June 10, 2009, a Qualified Written Request under
19 RESPA...was mailed to Defendant Countrywide and Select Portfolio. The QWR included a
20 demand to rescind the loans under the TILA provisions. Defendant Countrywide and Select
21 Portfolio has yet to properly respond to this Request.... Defendant Countrywide and Select
22 Portfolio violated RESPA, 12 U.S.C. §2605(e)(2), by failing and refusing to provide a proper
23 written explanation or response to Plaintiff’s QWR.” Doc. 13, FAC, at 8:1-4 and 16:21-23. The
24 FAC was filed August 14, 2009. By Plaintiff’s own admission, it is uncertain when she sent the
25 QWRs and when Select Portfolio and Countrywide received them. Given the timing, it is clear
26 that the 60 workday period had not yet run. The wording of the FAC correctly states that Select
27 Portfolio and Countrywide have “yet” to comply with RESPA, granting that they still have time
28 to do so. Both Select Portfolio and Moving Defendants point out that no claim can be stated

1 before the deadline passes. See Doc. 15, Select Portfolio’s Brief, at 6:7; Doc. 24, Moving
2 Defendants’ Reply, at 17:17-19. A complaint may not state a claim until the deadline has passed.
3 See Jones v. ABN AMRO Mortg. Group, Inc., 551 F. Supp. 2d 400, 411 (E.D. Pa. 2008) (“The
4 response deadline had not passed when Plaintiffs filed their Complaint on November 9, 2007.
5 The QWR claim fails as a matter of law and fact”).

6 Plaintiff also states “it remains unclear whether Defendants named in this lawsuit, CHL
7 included, received ‘kickbacks’ or referral fees disproportional to the work performed, which is
8 prohibited under 12 U.S.C. §2607(a).” Doc. 22, Plaintiff’s Opposition, at 23:5-8. Such an
9 allegation is not included in the FAC and so will not be considered. As Plaintiff is granted leave
10 to amend, Plaintiff can clarify her potential RESPA claims.

11 12 **D. Fraud**

13 Under California law, the “elements of fraud are: (1) a misrepresentation (false
14 representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent
15 to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage.” Robinson
16 Helicopter Co., Inc. v. Dana Corp., 34 Cal.4th 979, 990 (2004). Federal Rule of Civil Procedure
17 9(b) requires that, when averments of fraud are made, the circumstances constituting the alleged
18 fraud must be “specific enough to give defendants notice of the particular misconduct...so that
19 they can defend against the charge and not just deny that they have done anything wrong.”
20 Though the substantive elements of fraud are set by a state law, those elements must be pled in
21 accordance with the requirements of Rule 9(b). See Vess v. Ciba-Geigy Corp. USA, 317 F.3d
22 1097, 1103 (9th Cir. 2003). Allegations of fraud should specifically include “an account of the
23 time, place, and specific content of the false representations as well as the identities of the parties
24 to the misrepresentations.” Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007). “The
25 plaintiff must set forth what is false or misleading about a statement, and why it is false.” Vess v.
26 Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003). Stated differently, the complaint
27 must identify “the who, what, when, where, and how” of the fraud. Kearns v. Ford Motor Co.,
28 567 F.3d 1120, 1124 (9th Cir. 2009).

1 Plaintiff generally alleges “Defendants Countrywide, Select Portfolio, Decision,
2 Reconstruct, MERS Home Sweet, Roman, and Morales, and each of them, have made several
3 representations to Plaintiff with regard to material facts....[They] knew that these material
4 representations were false when made, or these material representations were made with reckless
5 disregard for the truth.” Doc. 13, FAC, at 18:19-26. In the briefing, Plaintiff presents two
6 theories for a fraud claim. The first theory alleges “on June 9, 2006 she was induced into
7 accepting two predatory mortgage loans that were based on overstated income information on her
8 loan application by broker Defendants and resulted in terms that were detrimental to her.” Doc.
9 18, Plaintiff’s Opposition, at 17:11-14. In the FAC, Plaintiff alleges that only Morales, as a
10 representative of Home Sweet, advised her concerning the suitability of the mortgages. See Doc.
11 13, FAC, at 6:7-7:5. The allegations do not involve Select Portfolio or Moving Defendants; no
12 applicable misrepresentation is identified and so the allegations fail to state a fraud claim. The
13 second theory alleges

14 18. Plaintiff is informed and believes and thereon alleges that beginning in 1998, lenders,
15 their agents, employees, and related servicers, including Defendants, developed a scheme
16 to rapidly infuse capital into the home mortgage lending system by selling mortgages on
17 the secondary market, normally three to five times, to create a bankruptcy remote
18 transaction. The lenders, their agents, employees, and related servicers, including
19 Defendants, then pooled these mortgages into large trusts, securitizing the pool and
20 selling these securities on Wall Street as mortgage backed securities, bonds, derivatives
21 and insurances, often for twenty or thirty times the original mortgage.

19 19. Plaintiff is informed and believes and thereon alleges that in ‘selling’ these mortgage
20 notes on the secondary market, Defendants failed to follow the basic legal requirements
21 for the transfer of a negotiable instrument and an interest in real property. While lenders
22 could have simply gone to Congress to amend existing law so that it would allow for their
23 envisioned transfers, they did not. Instead the lenders, Defendants included, simply
24 ignored the legal requirements.

22 20. Plaintiff is informed and believes and thereon alleges that in fact, no interest in the
23 Mortgage Note, Deed of Trust or Property was ever legally transferred to any of the
24 Defendants, and that the Defendants are in effect legal strangers to this contractual
25 transaction.

25 Doc. 13, FAC, at 5:6-22. Plaintiff “does not identify which legal requirements were not
26 followed, when the representations were made, or how the representations were made.” Johnson
27 v. Wash. Mut., 2010 U.S. Dist. LEXIS 22959, *24 (E.D. Cal. Feb. 24, 2010). These allegations
28 are insufficient to state a fraud cause of action.

1 **E. Unfair Competition Law**

2 “The UCL defines unfair competition as ‘any unlawful, unfair or fraudulent business act
3 or practice.’ Therefore, under the statute there are three varieties of unfair competition: practices
4 which are unlawful, unfair or fraudulent.” In re Tobacco II Cases, 46 Cal. 4th 298, 311 (Cal.
5 2009), citations and quotations omitted. Plaintiff alleges generally that “Defendants
6 Countrywide, Select Portfolio, Decision, Reconstruct, MERS, Home Sweet, Roman, and Morales
7 acts as alleged herein constitute unlawful, unfair, and/or fraudulent business practices, as defined
8 in the California Business and Professions Code §17200 et seq.” Doc. 13, FAC, at 19:21-24.

9 In briefing, Plaintiff presents two theories. First, “Plaintiff alleged multiple violations
10 (‘hooks’) of specific statutory and common law provisions under the federal and state laws,
11 including claims for RESPA violations, fraud, negligence, and Rosenthal Act violations, among
12 others, against the Moving Defendants. The latter in turn are incorporated into Plaintiff’s UCL
13 claim.” Doc. 22, Plaintiff’s Opposition, at 25:5-11. Plaintiff appears to be seeking to state a
14 claim for unlawful business practices which “include[] anything that can properly be called a
15 business practice and that at the same time is forbidden by law...in essence, an action based on
16 Business and Professions Code section 17200 to redress an unlawful business practice ‘borrows’
17 violations of other laws and treats these violations, when committed pursuant to business
18 activity, as unlawful practices independently actionable under section 17200 et seq. and subject
19 to the distinct remedies provided thereunder.” Farmers Ins. Exchange v. Superior Court, 2 Cal.
20 4th 377, 383 (Cal. 1992), citations and quotations omitted. As all other claims against Select
21 Portfolio and Moving Defendants are being dismissed, there is no violation that can be
22 “borrowed” to support a UCL cause of action.

23 Second, Plaintiff claims she has “made viable charging allegations that Defendant MERS
24 engaged in unfair and fraudulent business practices. Plaintiff has clearly pled that Defendant
25 MERS engaged in transacting business in the state of California, in violation of Cal. Corp. Code
26 §2105(a). Further, Defendant MERS’ practice of foreclosing as a beneficiary against borrowers,
27 Plaintiff included, without any legal right to do so purportedly in the name of efficiency, is
28 deceiving to the public and far outweighs the resulting harmful impact on the Plaintiff.” Doc. 22,

1 Plaintiff's Opposition, at 25:19-26, citations omitted. Cal. Corp. Code §2105(a) states "A
2 foreign corporation shall not transact intrastate business without having first obtained from the
3 Secretary of State a certificate of qualification." As Moving Defendants point out, the courts
4 have rejected the argument that MERS may not foreclose on property because its activities are
5 not considered intrastate business. See Lomboy v. SCME Mortg. Bankers, 2009 U.S. Dist.
6 LEXIS 44158, *7 (N.D. Cal. May 26, 2009); Swanson v. EMC Mortg. Corp., 2009 U.S. Dist.
7 LEXIS 107912, *26-27 (E.D. Cal. Oct. 29, 2009).

8 9 **F. Wrongful Foreclosure**

10 Under this cause of action, Plaintiff makes several separate allegations. First, Plaintiff's
11 tenth cause of action is entitled "wrongful foreclosure" but she does not allege that a foreclosure
12 sale has taken place. "[A] purported wrongful foreclosure claim is premature given there has
13 been no foreclosure of the property. The wrongful foreclosure claim fails to allege a cognizable
14 cause of action in absence of a foreclosure sale." Vega v. JP Morgan Chase Bank, N.A., 654 F.
15 Supp. 2d 1104, 1113 (E.D. Cal. 2009), citing Munger v. Moore, 11 Cal. App. 3d 1, 7 (Cal. Ct.
16 App. 1970).

17 Second, Plaintiff alleges that "Defendants Countrywide, Select Portfolio, and Reconstruct
18 were not and are not in possession of the Notes and are not beneficiaries assignees or employees
19 of the person or entity in possession of the Notes, and are not beneficiaries, assignees or
20 employees of the person or entity in possession of the Notes, and are not otherwise entitled to
21 payment. Moreover, Defendants Countrywide, Select Portfolio, and Reconstruct are not
22 'person[s] entitled to enforce' the security interest on the Property, as that term is defined in
23 Commercial Code §3301." Doc. 13, FAC, at 23:12-18. However, Cal. Com. Code §3301 does
24 not apply in this case as it "reflects California's adoption of the Uniform Commercial Code, and
25 does not govern non-judicial foreclosures, which is governed by California Civil Code §2924."
26 Pok v. American Home Mortg. Servicing, Inc., 2010 U.S. Dist. LEXIS 9016, *19 (E.D. Cal. Feb.
27 3, 2010). As numerous courts have held, production of the original note is not required to initiate
28 non-judicial foreclosures in California. See Pagtalunan v. Reunion Mortg., Inc., 2009 U.S. Dist.

1 LEXIS 34811, *6 (N.D. Cal. Apr. 8, 2009); Putkkuri v. ReconTrust Co., 2009 U.S. Dist. LEXIS
2 32, *5 (S.D. Cal. Jan 5, 2009).

3 Third, Plaintiff alleges, “Defendants Countrywide, Select Portfolio, and Reconstruct also
4 failed to properly record and give notice of the Notice of Default, which apparently occurred on
5 or about November 05, 2007 and February 25, 2009. Said failures are in direct violation of the
6 notice and recording requirements set forth in California Civil Code §2923.5. As a result,
7 trustors, Plaintiff included, who are not properly informed regarding a pending substitution of
8 trustee cannot exercise their rights to investigate the circumstances of the foreclosure
9 proceedings.” Doc. 13, FAC, at 23:24-24:3. Plaintiff clarifies her position to be that “Moving
10 Defendants initiated foreclosure against Plaintiff’s Property without authority rendering their
11 purported compliance with Cal. Civ. Code §2923.5 immaterial....Plaintiff’s position is that the
12 Moving Defendants initiated foreclosure proceedings against Plaintiff’s Property without any
13 right to do so, as discussed *supra*.” Doc. 22, Plaintiff’s Opposition, at 30:21-26. In this manner,
14 the theory of the claim collapses into the second argument (no possession of note and no
15 compliance with Section 3301). As stated above, there is no requirement for production of the
16 original note and non-judicial foreclosure is not governed by Cal. Com. Code §3301.

17 Fourth, Plaintiff alleges that the Emergency Economic Stabilization Act of 2008 and the
18 Troubled Asset Relief Program require that foreclosures ““be temporarily suspended during the
19 trial period, or while borrowers are considered for alternative foreclosure prevention options. In
20 the event that the Home Affordable Modification or alternative foreclosure options fail, the
21 foreclosure action may be resumed.’ Defendants have failed to suspend the foreclosure action to
22 allow the Plaintiff to be considered for alternative foreclosure prevention options.” Doc. 13,
23 FAC, at 24:23-25:1. There is no indication that these government programs were designed to
24 grant individuals the right to sue over a failure to suspend foreclosure proceedings. Moving
25 Defendants point out that while statute allows for judicial review of the Secretary of the
26 Treasury’s actions, there is no mention of any individual right to sue. See Pub. L. No. 110-343
27 §119 (2008). Plaintiff does not address this issue in her opposition.

IV. Order

Defendants Select Portfolio Servicing, Inc.'s, Mortgage Electronic Registration Systems's, Inc., Recontrust Company's, and Countrywide Home Loans, Inc.'s motions to dismiss are GRANTED. All claims against these Defendants are DISMISSED without prejudice. Plaintiff Erin Bogdan may file an amended complaint within twenty (20) days of the service of this order. If she fails to do so, the court will dismiss these Defendants from this case.

IT IS SO ORDERED.

Dated: March 25, 2010

/s/ Anthony W. Ishii
CHIEF UNITED STATES DISTRICT JUDGE