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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CARMENCITA DORADO, an individual,

Plaintiff,

v.

SHEA HOMES LIMITED PARTNERSHIP, a
California Limited Partnership,
CHICAGO TITLE COMPANY, a Business
Entity, form unknown; BAC HOMES
LOANS SERVICING, LP, A Business
Entity, form unknown; RECONTRUST
COMPANY, a Business Entity, form
unknown; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., a
Delaware Corporation; and DOES 1
through 50, inclusive,

Defendants.

1:11-cv-01027 OWW SKO

ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS COMPLAINT
(DOC. 5, 7 and 12)

I. INTRODUCTION.

Carmencita Dorado ("Plaintiff"), appearing *in propria persona*, asserts twenty-nine (29) causes of action arising out of an adjustable-rate home loan she entered into approximately four years ago. BAC Home Loans Servicing, L.P., Recontrust Company, Mortgage Electronic Registration Systems, Inc. ("BAC

1 Defendants"), Shea Homes, LP ("Shea Homes"), and Chicago Title
2 Company ("Chicago Title") (collectively "Defendants") move to
3 dismiss all of Plaintiff's claims.

4 All Defendants allege that Plaintiff's Complaint is
5 "incomprehensible," "conclusory" and most of what is pleaded is
6 irrelevant. The Complaint, Defendants assert, fails to give fair
7 notice of the claims asserted against Defendants; fails to state
8 any valid cause of action; and most or all of Plaintiff's claims
9 are barred by the applicable statutes of limitation.
10

11 BAC Defendants additionally assert that Plaintiff has a
12 Chapter 13 bankruptcy case pending in the Northern District of
13 California and lacks standing to file this action as the trustee
14 and not Plaintiff is the "real party in interest." (Doc. 12 at
15 4.)
16

17 Shea Homes specifically asserts that it has been mistakenly
18 named and has nothing to do with Plaintiff's mortgage. "Shea
19 Homes, a California limited partnership, sold the home to
20 Plaintiff, [and is an] entirely separate entity [from] Shea
21 Mortgage Inc., a California corporation, [who] was Plaintiff's
22 lender." (Doc. 5 at 1.)
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24 Chicago Title adds that "it is not Plaintiff's lender, loan
25 broker, or loan servicer, and Chicago [Title] has no role in the
26 foreclosure process." (Doc. 7 at 9.)

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II. PROCEDURAL HISTORY

Plaintiff filed this action in California state court on April 27, 2011. The case was removed to this court on June 17, 2011. (Doc. 1.) Defendants' filed motions to dismiss Plaintiff's Complaint on June 24, 2011, (doc. 5, 7), and July 11, 2011, (doc. 12). Plaintiff filed oppositions to Defendants' motions on July 29, 2011. (Doc. 14, 15, 16.)

III. BACKGROUND FACTS

Plaintiff is the owner of real property located at 209 Abelia Lane, Patterson, California 95363 (the "Property"). (Compl. ¶ 22.) Plaintiff obtained a loan for \$421,650.00 on September 5, 2006 from Shea Mortgage, Inc. She executed a deed of trust ("Deed of Trust") against the Property, with MERS appointed as beneficiary and Chicago Title Company as the original Trustee. (Compl. ¶ 33; Chicago Title RJN, Ex. A.)

Plaintiff's native language is Tagalog. (Compl. ¶ 38.) The terms of the loan were explained to Plaintiff in English. (Compl. ¶ 38.)

The loan contained an adjustable rate rider which Plaintiff executed on September 8, 2006. (Chicago Title RJN, Ex. A.) Plaintiff stopped paying her mortgage. As a result, Defendant Recontrust issued a Notice of Default, which was recorded in Stanislaus County on June 1, 2009. (Compl. ¶ 12; Chicago Title RJN, Ex. B, C.) It does not appear that a Notice of Trustee's

1 Sale was ever issued or recorded. Plaintiff alleges in her
2 Complaint at paragraph 118 that unspecified Defendants "have
3 completed a foreclosure action under the Note [sic] by way of
4 non-judicial sale"; however, at paragraph 119, she seeks an
5 injunction to prevent the same trustee's sale.
6

7 On May 25, 2011, Defendant MERS substituted Recontrust as
8 trustee under the Deed of Trust, and assigned the Deed of Trust
9 to Citibank, N.A., as Trustee for the Holders of Bear Stearns
10 ALT-A Trust 2006-7 Mortgage Pass-Through Certificates, Series
11 2006-7. (See Chicago RJN, Ex. D, E.)

12 Plaintiff filed for bankruptcy in the Northern District of
13 California on August 7, 2009, approximately one month after the
14 Notice of Default was recorded. (BAC Defendants RJN, Ex. 3.) The
15 Second Amended Chapter 13 Plan was filed by Plaintiff on June 6,
16 2011 and the bankruptcy court's docket reflects that confirmation
17 of Plaintiff's bankruptcy plan is still pending. (BAC Defendants
18 RJN, Ex. 3, 4.) This explains why a notice of sale was not
19 recorded, absent lifting of the automatic stay.
20
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22 IV. STANDARD OF DECISION

23 A motion to dismiss brought under Federal Rule of Civil
24 Procedure 12(b)(6) "tests the legal sufficiency of a claim."
25 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.2001). In deciding
26 whether to grant a motion to dismiss, the court "accept[s] all
27 factual allegations of the complaint as true and draw[s] all
28

1 reasonable inferences" in the light most favorable to the
2 nonmoving party. *Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9th
3 Cir.2002). To survive a motion to dismiss, a complaint must
4 "contain sufficient factual matter, accepted as true, to 'state a
5 claim to relief that is plausible on its face.'" *Ashcroft v.*
6 *Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v.*
7 *Twombly*, 550 U.S. 544, 570 (2007)).

9 A claim has facial plausibility when the plaintiff pleads
10 factual content that allows the court to draw the reasonable
11 inference that the defendant is liable for the misconduct
12 alleged. The plausibility standard "is not akin to a 'probability
13 requirement,' but it asks for more than a sheer possibility that
14 defendant has acted unlawfully. Where a complaint pleads facts
15 that are 'merely consistent with' a defendant's liability, it
16 'stops short of the line between possibility and plausibility of
17 entitlement to relief.'" *Id.* (citing *Twombly*, 550 U.S. 556-57).

19 Nevertheless, the court "need not assume the truth of legal
20 conclusions cast in the form of factual allegations." *United*
21 *States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th
22 Cir. 1986). While the standard does not require detailed factual
23 allegations, "it demands more than an unadorned, the defendant-
24 unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949. A
25 pleading is insufficient if it offers mere "labels and
26 conclusions" or "a formulaic recitation of the elements of a
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1 cause of action." *Twombly*, 550 U.S. at 555; *Iqbal*, 129 S. Ct. at
2 1950 ("Threadbare recitals of the elements of a cause of action,
3 supported by mere conclusory statements, do not suffice.").

4 In ruling upon a motion to dismiss, the court may consider
5 only the complaint, any exhibits thereto, and matters which may
6 be judicially noticed pursuant to Federal Rule of Evidence 201.
7 See *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir.
8 1988).

10 V. DISCUSSION

11 A. Standing.

12 1. Creation of Bankruptcy Estate.

13 BAC Defendants contend that Plaintiff has a Chapter 13
14 bankruptcy case pending in the Northern District of California
15 and lacks standing to file this action as the trustee and not
16 Plaintiff is the "real party in interest" under Fed. Civ. Pro. R.
17 17(a) to prosecute this action Plaintiff does not address the
18 bankruptcy issue.
19

20 In general, the court may not consider materials other than
21 the facts alleged in the complaint when ruling on a motion to
22 dismiss. *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir.1996).

23 "[A]mple authority exists," however, "which recognizes that
24 matters of public record, including court records in related or
25 underlying cases which have a direct relation to the matters at
26 issue, may be looked to when ruling on a 12(b)(6) motion to
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1 dismiss." *In re Am. Continental Corp./Lincoln Sav. & Loan Sec.*
2 *Litig.*, 102 F.3d 1524, 1537 (9th Cir.1996) (collecting cases),
3 *rev'd on other grounds by Lexecon, Inc. v. Milberg Weiss Bershad*
4 *Hynes & Lerach*, 523 U.S. 26 (1998). Here, Defendants have
5 provided the court with Plaintiff's petition for Chapter 13
6 bankruptcy protection dated August 2, 2009. (BAC Defendants RJN,
7 Ex. 4, Dorado Bankruptcy Case Summary.) Hearing no objection
8 from Plaintiff the bankruptcy documents will be consider this
9 document in deciding Defendants' motion to dismiss.
10

11 The filing of a bankruptcy petition creates an estate in
12 bankruptcy. See 11 U.S.C. § 541(a); *In re Raintree Healthcare*
13 *Corp.*, 431 F.3d 685, 688 (9th Cir.2005). A bankruptcy estate
14 consists of "all legal or equitable interests of the debtor in
15 property as of the commencement of the case." 11 U.S.C. §
16 541(a)(1). In a Chapter 13 case, the estate also includes
17 property acquired by the debtor after the commencement of the
18 case. 11 U.S.C. § 1306(a)(1). The property of the estate
19 includes causes of action that arise after the commencement of
20 the case and until the case is closed, dismissed or converted.
21 *Donato v. Metropolitan Life Ins. Co.*, 230 B.R. 418, 421 (N.D.Cal.
22 1999) (citing *In re Fleet*, 53 B.R. 833, 838 (Bankr. E.D.Pa.
23 1985)).¹
24
25

26
27 ¹ The debtor must disclose any litigation likely to arise in a non-bankruptcy
28 context. See *Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555,
557 (9th Cir. 1992). If the debtor is not knowledgeable of all the facts
giving rise to a civil action before the filing of his or her petition and

1 The Code expressly provides that Chapter 13 debtors retain
2 possession of property in the bankruptcy estate. See 11 U.S.C. §
3 1306(b) (“[e]xcept as provided in a confirmed plan or order
4 confirming a plan, the debtor shall remain in possession of all
5 property of the estate”); see also, e.g., 11 U.S.C. § 1303
6 (providing that debtors under Chapter 13 shall have substantially
7 the same powers as do trustees of the estate). The Bankruptcy
8 Code provides that a debtor in possession, such as a debtor
9 filing for the protections of Chapter 13, enjoys express
10 authority to sue or to be sued on behalf of the bankruptcy
11 estate:
12

13 With or without court approval, the trustee or debtor in
14 possession may prosecute or may enter an appearance and
15 defend any pending action or proceeding by or against the
16 debtor, or commence and prosecute any action or proceeding
in behalf of the estate before any tribunal.

17 Fed. R. Bankr.P. 6009 (emphasis supplied).

18 The Ninth Circuit has stated:

19 In [Chapter 7] liquidation proceedings, *only* the trustee has
20 standing to prosecute or defend a claim belonging to the
21 estate. The same cannot be said for trustees under the
22 reorganization chapters. In those regimes, the debtor has
23 express authority to sue and be sued. Bankruptcy Rule 6009,
24 which applies to Chapters 7, 11 and 13, directs that “[w]ith
25 or without court approval, the trustee or debtor in
26 possession may prosecute or may enter an appearance and
defend any pending action or proceeding by or against the
debtor, or commence and prosecute any action or proceeding
in behalf of the estate before any tribunal.” Fed. R.
Bankr.P. 6009 (emphasis added). [T]he Chapter 13 debtor has

27 financial schedules, the debtor must amend those schedules when he or she
28 becomes aware of the existence of the action because it is an asset of the
bankruptcy estate. See *id.*; Fed.R.Bankr.P. 1009(a) (schedules may be amended
before the case is closed).

1 been considered analogous to Chapter 11, which grants the
2 debtor full authority as representative of the estate
 typical of a trustee. See 11 U.S.C. § 1107.

3 *In re DiSalvo*, 219 F.3d 1035, 1039 (9th Cir. 2000) (emphasis in
4 original) (quoting *Cable v. Ivy Tech State College*, 200 F.3d 467,
5 472 (7th Cir. 1999)).

6 The Seventh Circuit is in accord. *Cable v. Ivy Tech State*
7 *College* further explains:

9 Chapter 7 establishes a much more radical solution to
10 indebtedness, requiring the liquidation of the debtor's
11 property, to which end Congress granted the trustee broad
12 powers without interference from the debtor. The trustee has
13 sole authority to dispose of property, including managing
14 litigation related to the estate. See 11 U.S.C. §§
15 541(a)(1), 704(1). Chapter 13, on the other hand, encourages
16 the debtor to pay his debts over time by establishing a
 court-approved payment plan but leaving the debtor in
 possession of the estate. See 11 U.S.C. § 1303 (debtor-in-
 possession has substantially same powers as the trustee in
 other chapters); § 1306(b) (debtor retains possession of
 estate except as limited by plan). The trustee acts as an
 adviser and administrator to facilitate the repayment of
 debts according to the plan. See *id.* § 1302.

17 200 F.3d at 472; see also *Whitworth v. National Enterprise*
18 *Systems, Inc.*, 2009 WL 650357, *2 n.1 (D.Or. 2009) ("the Chapter
19 7 debtor, who has selected a severe remedy to the problem of
20 indebtedness, is not permitted to interfere in the disposal of
21 assets in which he or she no longer has any significant interest,
22 but the Chapter 13 debtor, who contemplates resuming exclusive
23 control of his or her assets after successfully repaying all
24 creditors, is permitted to retain possession of and a part in
25 managing the estate.")

26 The Second Circuit is also in accord that it would frustrate
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1 the purposes of Section 1306 to leave the debtor in possession of
2 his causes of action and yet to prohibit him from prosecuting
3 them in his own name. See *Olick v. Parker & Parsley Petroleum*
4 *Co.*, 145 F.3d 513, 515, 515-516 (2d Cir.1998) (holding that "a
5 Chapter 13 debtor ... has standing to litigate causes of action
6 that are not part of a case under title 11" and deriving support
7 from the legislative history of Chapter 13 for the proposition
8 that Section 1303 was drafted to permit Chapter 13 debtors to sue
9 and be sued on behalf of the bankruptcy estate); see also *Donato*
10 *v. Metropolitan Life Ins. Co.*, 230 B.R. 418, 425 (N.D.Cal.1999)
11 ("under 11 U.S.C. § 1303, a Chapter 13 debtor retains the
12 capacity to sue on prepetition causes of action").
13

14
15 Although a Chapter 13 debtor has standing to sue in her own
16 name, such standing is concurrent with that of the trustee in
17 bankruptcy, and any such suit must necessarily be on behalf of
18 the bankruptcy estate. See Fed. R. Bankr. P. 6009. In this case
19 pursuant to Plaintiff's bankruptcy documents, Plaintiff's
20 mortgage is "submitted to the supervision and control of the
21 Trustee." (BAC Defendants RJN, Ex. 3.)² Plaintiff does not appear
22

23 ² Plaintiff does not allege or provide evidence that the trustee is aware of
24 this action. Likewise, the bankruptcy docket does not reflect notice of this
25 action. In Chapter 13, the bankruptcy estate includes claims which are
26 acquired "after the commencement of the case but before the case is closed,
27 dismissed, or converted." 11 U.S.C. 1306(a)(1). The Bankruptcy Code subjects
28 debtors to a "continuing duty to disclose all pending and potential claims."
Kane v. National Union Fire Ins. Co., 535 F.3d 380, 384-85 (2008); *Hamilton v.*
State Farm Fire & Cas. Co., 270 F.3d 778, 785 (2001) ("The debtor's duty to
disclose potential claims as assets does not end when the debtor files
schedules, but instead continues for the duration of the bankruptcy
proceeding."); see *In re Coastal Plains, Inc.*, 179 F.3d 197, 207-08 (1999).

1 to be "a debtor in possession" and does not have standing to
2 bring this suit.

3
4 B. Shea Homes Is Not A Proper Defendant.

5 Plaintiff alleges that Shea Homes was the original lender
6 for the purchase of her home. (Compl. ¶¶ 8, 17, 33.) In reality,
7 Shea Homes, a California limited partnership, sold the home to
8 Plaintiff. (See Shea Home's RJN, Ex.3.) An entirely separate
9 entity, Shea Mortgage Inc., a California corporation, was
10 Plaintiff's lender. (See Shea Home's RJN, Ex. 1, 2, 4.) This is
11 established in the recorded trust deeds for the Plaintiff's first
12 and second mortgages. (See *id.* at Ex. 1, 2.) Because Shea Homes
13 did not originate and does not now, and has not ever asserted any
14 interest in Plaintiff's mortgage, Shea Homes is DISMISSED from
15 this action and Shea Home's motion to dismiss is GRANTED.
16

17
18 C. Plaintiff's Claims.

19 1. Violation of Cal. Com. Code § 9313 (Third Claim).

20 Plaintiff's third cause of action seeks to determine the
21 nature, extent, and validity of the lien under Cal. Com. Code
22 9313. Plaintiff apparently alleges that since neither Shea Homes
23 nor BAC Defendants possess the original promissory note, neither
24 one has perfected its lien.

25 Defendants correctly contend that Cal. Com. Code 9313 is
26

27 "[T]he integrity of the bankruptcy system depends on full and honest
28 disclosure by debtors of all their assets." *Hamilton*, 270 F.3d at 785 (*quoting*
In re Coastal Plains, 179 F.3d at 208 (emphasis in original)).

1 part of the codification of UCC Article 9, which deals with
2 security interests in *personal* property and fixtures. See Cal.
3 Com. Code 9109(d)(11) ("this division does not apply to. . . :
4 The creation or transfer of an interest in or lien on real
5 property.") This section of law has no application to Plaintiff's
6 loan.
7

8 Defendants further correctly contend that Plaintiff's
9 "holder of the note theory" is not the law in California.

10 "Financing or refinancing of real property is generally
11 accomplished in California through a deed of trust. The borrower
12 (trustor) executes a promissory note and deed of trust, thereby
13 transferring an interest in the property to the lender
14 (beneficiary) as security for repayment of the loan." *Bartold v.*
15 *Glendale Federal Bank*, 81 Cal.App.4th 816, 821 (2000). A deed of
16 trust "entitles the lender to reach some asset of the debtor if
17 the note is not paid." *Alliance Mortgage Co. v. Rothwell*, 10
18 Cal. 4th 1226, 1235 (1995).
19

20 The California Court of Appeal has explained non-judicial
21 foreclosure under the applicable California Civil Code sections:
22

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

Moeller v. Lien, 25 Cal.App.4th 822, 834 (1994); see *I.E. Assoc.*

1 v. *Safeco Title Ins. Co.*, 39 Cal.3d 281, 285 (1985) ("These
2 provisions cover every aspect of exercise of the power of sale
3 contained in a deed of trust.")

4 Under California Civil Code section 2924(a)(1), a "trustee,
5 mortgagee or beneficiary or any of their authorized agents" may
6 conduct the foreclosure process. Under Cal. Civ. Code section
7 2924b(4), a "person authorized to record the notice of default or
8 the notice of sale" includes "an agent for the mortgagee or
9 beneficiary, an agent of the named trustee, any person designated
10 in an executed substitution of trustee, or an agent of that
11 substituted trustee."
12

13 "Under Civil Code section 2924, no party needs to physically
14 possess the promissory note." *Sicairos v. NDEX West, LLC*, 2009 WL
15 385855, *3 (S.D. Cal. 2009) (citing Cal. Civ. Code, § 2924(a)
16 (1)). Rather, "[t]he foreclosure process is commenced by the
17 recording of a notice of default and election to sell by the
18 trustee ." *Moeller*, 25 Cal. App. 4th at 830. An "allegation that
19 the trustee did not have the original note or had not received it
20 is insufficient to render the foreclosure proceeding invalid."
21 *Neal v. Juarez*, 2007 WL 2140640, *8 (S.D. Cal. 2007).
22

23 Plaintiff offers no response.
24

25 A "purported holder" argument fails as a matter of law.
26 Defendants' motion to dismiss Plaintiff's Cal. Com. Code 9313 is
27 GRANTED.
28

1 2. Contract Claims Based on Origination of Loan.

2 a. Implied Covenant of Good Faith and Fair Dealing
3 (Fourth Claim).

4 (1) Timeliness.

5 BAC Defendants correctly argue that Plaintiff's fourth cause
6 of action for violation of the implied covenant of good faith and
7 fair dealing is subject to the four year contract statute of
8 limitation. Code Civ. Proc. § 337(1) (stating that a plaintiff
9 must bring an action "[w]ithin four years. . . upon any contract,
10 obligation or liability founded upon an instrument in writing.")

11 Plaintiff asserts that "[Defendants] willfully breached
12 their implied covenant of good faith and fair dealing with
13 [Plaintiff] when [Defendants]:

14 I. Willfully withheld numerous disclosures;

15 II. Willfully withheld notices in regard to Underwriting
16 standards, the use of English as the only language
17 within the written instruments of the loan while
18 [Plaintiff's] native language is Tagalog, Disclosures
19 of additional income due to interest rate increases,
20 and failure to disclose when negative credit scores
21 were disseminated;

22 III. Willfully placed [Plaintiff] in a loan that she did
23 not qualify for, [and] could not afford. . .

24 IV. Requiring a minimal down payment, subjecting 95% of the
25 loan to amortization and a detrimental if not dire
26 financial situation for [Plaintiff].

27 (Compl. ¶ 130.)

28 Defendants contend these claims arise from the execution of
the loan which took place in September 2006, well over four years
ago. Plaintiff does not refute this argument; her fourth claim is

1 untimely.

2
3 b. Merits.

4 The thrust of Plaintiff's fourth claim for breach of implied
5 covenant of good faith and fair dealing claim alleges that
6 Defendants willfully withheld disclosures and notices regarding
7 an increase on interests rates on her loan and placed Plaintiff
8 in a loan that she did not qualify for and could not afford.

9 Defendants correctly rejoin that the implied covenant
10 applies to conduct occurring *after* an agreement has been entered,
11 and not conduct leading up to the agreement's formation, i.e.,
12 that Plaintiff has not alleged any specific term of the contract
13 performed in bad faith.
14

15 "There is an implied covenant of good faith and fair dealing
16 in every contract that neither party will do anything which will
17 injure the right of the other to receive the benefits of the
18 agreement." *Kransco v. American Empire Surplus Lines Ins. Co.*,
19 23 Cal. 4th 390, 400 (2000) (quoting *Comunale v. Traders &*
20 *General Ins. Co.*, 50 Cal.2d 654, 658 (1958)). The "implied
21 covenant of good faith and fair dealing is limited to assuring
22 compliance with the express terms of the contract, and cannot be
23 extended to create obligations not contemplated by the contract."
24 *Pasadena Live, LLC v. City of Pasadena*, 114 Cal. App. 4th 1089,
25 1093-1094 (2004) (citation omitted). The "scope of conduct
26 prohibited by the covenant of good faith is circumscribed by the
27
28

1 purposes and express terms of the contract." *Carma Developers*
2 *(Cal.), Inc. v. Marathon Development California, Inc.*, 2 Cal. 4th
3 342, 373 (1992). "[T]he implied covenant will only be recognized
4 to further the contract's purpose; it will not be read into a
5 contract to prohibit a party from doing that which is expressly
6 permitted by the agreement itself." *Wolf v. Walt Disney Pictures*
7 *and Television*, 162 Cal. App. 4th 1107, 1120 (2008). "The
8 covenant 'cannot impose substantive duties or limits on the
9 contracting parties beyond those incorporated in the specific
10 terms of their agreement.'" *Agosta v. Astor*, 120 Cal.App.4th
11 596, 607 (2004) (quoting *Guz v. Bechtel Nat. Inc.* 24 Cal. 4th
12 317, 349-350 (2000)).

14 The Complaint fails to allege or identify a contract
15 provision to invoke an implied covenant to impose liability on
16 any Defendant for alleged wrongs. Plaintiff is unable to resort
17 to an implied covenant to manufacture non-existent obligations.
18 Further, there is no special relationship between a lender and
19 borrower. *Spencer v. DHI Mortg. Co., Ltd.*, 642 F. Supp. 2d 1153,
20 1162 (E.D. Cal. 2009) (citing *Oaks Mgmt. Corp. v. Superior Court*,
21 145 Cal. App. 4th 453 (Cal. Ct. App. 2006)).

22 Defendants' motion to dismiss Plaintiff's fourth claim is
23 GRANTED.

24
25
26 3. Unconscionable Contract (Sixteenth Claim).

27 In her sixteenth cause of action Plaintiff asserts the loan
28

1 agreement and trust deed are unconscionable because at the time
2 of execution, Defendants were "decepti[ve], [had an] unfair
3 bargaining position, [and did not] adhere[] to the regulations,
4 civil codes and federal standards that [Defendants] were required
5 to follow." (Compl. ¶ 210.)
6

7 a. Timeliness.

8 Plaintiff's contract claim is subject to the four year
9 contract statute of limitation. Code Civ. Proc. § 337(1).
10 Defendants assert Plaintiff's unconscionably claim arises from
11 the execution of the loan which took place over four years ago in
12 September 2006. Plaintiff does not refute this argument; her
13 sixteenth claim is untimely.
14

15 b. Merits.

16 Plaintiff alleges unconscionability pursuant to Uniform
17 Commercial Code section ("UCC") 2-3202, asserting that "based on
18 the deception, unfair bargaining position, lack of adherence to
19 the regulations, civil codes and federal standards ... the court
20 may find that the loan agreement and trust deed are
21 unconscionable and of no force or effect." (Compl. ¶ 210.)
22

23 Defendants state that the Complaint's citation to "[UCC] §
24 2-3202" appears intended to apply to [Cal. Civ. Code §] 1670.5
25 ("section 1670.5"), which codifies [UCC] § 2-302." (See Doc. 7
26 at 18.) Defendants point out that section 1670.5 is "a common law
27 defense to a breach of contract action, permitting a defendant to
28

1 present evidence of a commercial setting, purpose and effect of a
2 contract or clause to aid a court in making a determination."

3 (*See id.*) Defendants further contend that section 1670.5 does
4 not create a private right of action.

5
6 Section 1670.5(a) provides:

7 If the court as a matter of law finds the contract or any
8 clause of the contract to have been unconscionable at the
9 time it was made the court may refuse to enforce the
10 contract, or it may enforce the remainder of the contract
11 without the unconscionable clause, or it may so limit the
12 application of any unconscionable clause as to avoid any
13 unconscionable result.

14 Unconscionability has "procedural" and "substantive"
15 elements. *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473,
16 486 (1982). The procedural element focuses on: (1) "oppression,"
17 which "arises from an inequality of bargaining power which
18 results in no real negotiation and 'an absence of meaningful
19 choice'"; and (2) "surprise" which "involves the extent to which
20 the supposedly agreed-upon terms of the bargain are hidden in a
21 prolix printed form drafted by the party seeking to enforce the
22 disputed terms." *A & M Produce*, 135 Cal. App. 3d at 486
23 (citations omitted). The substantive element turns on
24 "allocation of risks between the parties, and therefore that a
25 contractual term is substantively suspect if it reallocates the
26 risks of the bargain in an objectively unreasonable or unexpected
27 manner" to constitute a "one-sided" result without
28 "justification" for it. *Id.* at 487 (citations omitted).

Plaintiff's Complaint is does not plead any facts alleging

1 any Defendant engaged in "oppression, surprise, or overly-harsh
2 conduct" to suggest the availability of the unconscionability
3 defense. Defendant's motion to dismiss Plaintiff's
4 unconscionability claim is GRANTED.

5
6 4. Breach of Contract (Twenty-Ninth Claim).

7 Plaintiff's twenty-ninth cause of action for breach of
8 contract contends that there was "no fair and reasonable
9 consideration" for the contract. This is absurd. Plaintiff was
10 loaned over \$400,000 to purchase a residence.

11
12 a. Timeliness.

13 Defendants again assert that Plaintiff's contract claim for
14 breach is subject to the four year statute of limitations, Code
15 Civ. Proc. § 337(1), and that Plaintiff's claim arises from the
16 execution of the loan which took place in September 2006, over
17 four years ago. Plaintiff does not refute this argument; her
18 twenty-ninth claim is untimely.

19
20 b. Merits.

21 Plaintiff's claim for breach of contract asserts "there was
22 no fair and reasonable consideration." (Compl. ¶ 288.) Plaintiff
23 appears to allege rescission of the contract, and not breach of
24 contract.

25
26 California law allows a party to seek rescission for failure
27 of consideration. See Cal. Civ. Code § 1689(b)(2), (3), (4). The
28

1 right to rescind exists even if "there has been a partial
2 performance by the party against whom the right is exercised."
3 *Coleman v. Mora*, 263 Cal.App.2d 137, 150 (1968) (citations
4 omitted). "[A] failure of consideration must be 'material,' or go
5 to the 'essence' of the contract before rescission is
6 appropriate." *Wylar v. Feuer*, 85 Cal.App.3d 392, 403-04 (1978)
7 (citations omitted).
8

9 Plaintiff's Complaint does not plead facts which demonstrate
10 how consideration is lacking in the Loan contract or whether the
11 alleged lack of consideration is material or essential to the
12 contract. Her Complaint merely states that there was no fair and
13 reasonable consideration.
14

15 Defendant's motion to dismiss Plaintiff's twenty-ninth
16 claim is GRANTED.

17 5. TILA Claims.

18 a. Damages (Fifth Claim).

19 TILA provides that a plaintiff can bring an action to
20 recover damages "within one year from the date of the occurrence
21 of the violation." 15 U.S.C. § 1640(e). Plaintiff's TILA claim
22 for damages is time-barred.
23

24 (1) Equitable Tolling.

25 Plaintiff apparently argues equitable tolling applies
26 because (1) the loan documents she received were only in English,
27 despite that her native language is Tagalog and (2) because the
28

1 increase in her initial low interest rate only lasted one month
2 when she believe it would last a year. (See Compl. ¶ 136; Doc. 15
3 at 3.) The increase in the interest rate was never explained to
4 her and "[b]y the time she realized what had occurred, it was too
5 late and the amounts owed could not be satisfied by her." (Doc.
6 15 at 3.)
7

8 The equitable tolling doctrine requires more. "Equitable
9 tolling may be applied if, despite all due diligence, a plaintiff
10 is unable to obtain vital information bearing on the existence of
11 [her] claim." *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178
12 (9th Cir. 2000). *Santa Maria* explains:

13 Unlike equitable estoppel, equitable tolling does not depend
14 on any wrongful conduct by the defendant to prevent the
15 plaintiff from suing. Instead it focuses on whether there
16 was excusable delay by the plaintiff. If a reasonable
17 plaintiff would not have known of the existence of a
18 possible claim within the limitations period, then equitable
19 tolling will serve to extend the statute of limitations for
20 filing until the plaintiff can gather what information he
21 needs... However, equitable tolling does not postpone the
22 statute of limitations until the existence of a claim is a
23 virtual certainty.

24 202 F.3d at 1178 (citation omitted).

25 Courts are reluctant to invoke equitable tolling:

26 A statute of limitations is subject to the doctrine of
27 equitable tolling; therefore, relief from strict
28 construction of a statute of limitations is readily
available in extreme cases and gives the court latitude in a
case-by-case analysis... The equitable tolling doctrine has
been applied by the Supreme Court in certain circumstances,
but it has been applied sparingly; for example, the Supreme
Court has allowed equitable tolling when the statute of
limitations was not complied with because of defective
pleadings, when a claimant was tricked by an adversary into

1 letting a deadline expire ... Courts have been generally
2 unforgiving, however, when a late filing is due to
3 claimant's failure "to exercise due diligence in preserving
his legal rights." ...

4 *Scholar v. Pac. Bell*, 963 F.2d 264, 267-268 (9th Cir.1992) (bold
5 added; citations omitted).

6 A plaintiff "must specifically plead facts to show (1) the
7 time and manner of discovery and (2) the inability to have made
8 earlier discovery despite reasonable diligence." *Fox v. Ethicon*
9 *Endo-Surgery, Inc.*, 35 Cal.4th 797, 808 (2005) (quoting *McKelvey*
10 *v. Boeing North American, Inc.*, 74 Cal. App. 4th 151, 160
11 (1999)). "[T]o adequately allege facts supporting a theory of
12 delayed discovery, the plaintiff must plead that, despite
13 diligent investigation of the circumstances of the injury, he or
14 she could not have reasonably discovered facts supporting the
15 cause of action within the applicable statute of limitations
16 period." *Fox*, 35 Cal. 4th at 809.

17 Here, both of Plaintiff's tolling arguments fail. First,
18 "[B]are assertions [of language barriers] are [] insufficient to
19 provide a basis for equitable tolling." *Pica v. Wachovia Mortg.*,
20 No. CV 09-02372 GEB, 2010 WL 1525069, at *4 (E.D. Cal. Apr. 15,
21 2010). Even if loan documents were not provided in Plaintiff's
22 native language, a reasonable Plaintiff, taking out a \$421,650.00
23 mortgage is reasonably expected to seek a translation of the
24 documents at inception of the loan or at least sometime before
25 the limitations period ended. *See Lucero v. Diversified*

1 *Investments Inc.*, No. CV 09-1742 BTM, 2010 WL 3463607, at *3
2 (S.D. Cal. Aug. 31, 2010) (dismissing Plaintiffs' TILA claim,
3 stating, "a diligent plaintiff would have the documents
4 translated before the statute of limitations had expired.").

5 Second, Plaintiff's late discovery of her Loan's interest
6 rate increase is unreasonable. Plaintiff asserts that the
7 initial interest rate became more than she could afford within
8 the first month of her loan payment was due, despite her belief
9 that the "low interest rates would remain in place for at least a
10 year." These circumstances, at a minimum, put Plaintiff on
11 notice within a few months of execution of the note that
12 something was amiss with the loan. Nonetheless, Plaintiff
13 performed on the contract and did nothing to attempt to discover
14 the alleged violations until she stopped payment on her loan and
15 fell into default. *See Ortega v. Wells Fargo Bank*, No. CV 09-
16 1531 JM, 2010 WL 1904878, at *3 (S.D. Cal. May 11, 2010) (denying
17 equitable tolling where Plaintiff "did not question the propriety
18 of his loan documents until months after he stopped paying his
19 mortgage").

20 Equitable tolling does not apply and Plaintiff's claims are
21 untimely. Defendant's motion to dismiss Plaintiff's fifth claim
22 for damages for violation of TILA is GRANTED.

23
24
25
26 a. Rescission (Ninth and Twelfth Claim).³
27

28

³ Plaintiff alleges a "rescission" claim generally under TILA, 15 U.S.C. §

1 Defendants contend that Plaintiff rescission claim is subject
2 to, at most, a three year statute of limitations. The consumer's
3 right to rescission is absolute only for a period of three days
4 after the loan is consummated, 15 U.S.C. 1635(a); 12 C.F.R.
5 226.23(a)(3), unless the lender fails to provide "material
6 disclosures" at the closing, in which case the period is extended
7 to three years, 15 U.S.C. 1635(f); 12 C.F.R. 226.23(a)(3). It has
8 been more than three years since Plaintiff's Loan was executed.
9 Her rescission claims are time-barred as a matter of law.
10

11
12 (1) Equitable Tolling.

13 Plaintiff alleges the doctrine of equitable tolling applies
14 to her rescission claim because her loan documents were not in
15 her native language. A "language barrier" excuse is not
16 sufficient and is unjustified.

17 Nonetheless, equitable tolling does not apply to rescission
18 under this provision of TILA. If the borrower files his or her
19 suit over three years from the date of a loan's consummation, a
20 court is powerless to grant rescission. *Miguel v. Country*
21 *Funding Corp.*, 309 F.3d 1161, 1164 (9th Cir.2002) ("[S]ection
22 1635(f) represents an 'absolute limitation on rescission actions'
23 which bars any claims filed more than three years after the
24 consummation of the transaction." (quoting *King v. California*,
25 784 F.2d 910, 913 (9th Cir. 1986)); accord *Beach v. Ocwen Fed.*

26
27
28 1601, *et. seq.* (fifth claim) and a separate claim under the TILA regulation,
12 C.F.R. § 226.23(a)(3), which directly relates to rescission (ninth claim).

1 *Bank*, 523 U.S. 410, 412 (1998) (“[Section] 1635(f) completely
2 extinguishes the right of rescission at the end of the 3-year
3 period.”).

4 Plaintiff executed the Loan on September 5, 2006, over three
5 years ago. Defendants’ motion to dismiss Plaintiffs’ rescission
6 claim is GRANTED.
7

8 6. Fraud (Thirteenth Claim).

9 The Complaint’s fraud claim alleges fraudulent loans because
10 Defendants “deceiv[ed] [Plaintiff] and [induc[ed] them [sic] to
11 part with their personal and real property.” (Compl. ¶ 180.)
12

13 a. Timeliness.

14 Defendants contend that Plaintiff’s thirteenth cause of
15 action for fraud and misrepresentation are barred by the three-
16 year statute of limitations. Cal. Code of Civ. Pro. § 338(d)
17 imposes a three-year statute of limitations on actions based upon
18 fraud. Plaintiff’s fraud claim is time-barred. In view of the
19 bar of the statute of limitation, amendment would be futile.
20

21 b. Merits.

22 Defendants challenge the fraud claim’s lack of necessary
23 particularity required by Fed. R. Civ. Pro. 9(b).
24

25 (1) Elements.

26 The elements of a California fraud claim are: (1)
27 misrepresentation (false representation, concealment or
28

1 nondisclosure); (2) knowledge of the falsity (or "scienter"); (3)
2 intent to defraud, i.e., to induce reliance; (4) justifiable
3 reliance; and (5) resulting damage. *Lazar v. Superior Court*, 12
4 Cal. 4th 631, 638 (1996). The same elements comprise a cause of
5 action for negligent misrepresentation, except there is no
6 requirement of intent to induce reliance. *Caldo v. Owens-*
7 *Illinois, Inc.*, 125 Cal. App. 4th 513, 519 (2004).

9 "[T]o establish a cause of action for fraud a plaintiff must
10 plead and prove in full, factually and specifically, all of the
11 elements of the cause of action." *Conrad v. Bank of America*, 45
12 Cal. App. 4th 133, 156 (1996). There must be a showing "that the
13 defendant thereby intended to induce the plaintiff to act to his
14 detriment in reliance upon the false representation" and "that
15 the plaintiff actually and justifiably relied upon the
16 defendant's misrepresentation in acting to his detriment." *Id.* at
17 157. "The absence of any one of these required elements will
18 preclude recovery." *Wilhelm v. Pray, Price, Williams & Russell*,
19 186 Cal. App. 3d 1324, 1332 (1986).

21
22 (2) Particularity Pleading Standard.

23 Fed. R. Civ. Pro. 9(b) requires a party to "state with
24 particularity the circumstances constituting fraud."⁴ In the
25

26
27
28 ⁴ F.R.Civ.P. 9(b)'s particularity requirement applies to state law causes of action: "[W]hile a federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the 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*,

1 Ninth Circuit, "claims for fraud and negligent misrepresentation
2 must meet Rule 9(b)'s particularity requirements." *Neilson v.*
3 *Union Bank of California, N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D.
4 Cal. 2003). A court may dismiss a claim grounded in fraud when
5 its allegations fail to satisfy Rule 9(b)'s heightened pleading
6 requirements. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107
7 (9th Cir. 2003). A motion to dismiss a claim "grounded in fraud"
8 under Rule 9(b) for failure to plead with particularity is the
9 "functional equivalent" of a Fed. R. Civ. Pro. 12(b)(6) motion to
10 dismiss for failure to state a claim. *Vess*, 317 F.3d at 1107.

11
12 Rule 9(b) requires "specific" allegations of fraud "to give
13 defendants notice of the particular misconduct which is alleged
14 to constitute the fraud charged so that they can defend against
15 the charge and not just deny that they have done anything wrong."
16 *Semegen v. Weidner*, 780 F.2d 727,731 (9th Cir. 1985). "A pleading
17 is sufficient under Rule 9(b) if it identifies the circumstances
18 constituting fraud so that the defendant can prepare an adequate
19 answer from the allegations." *Neubronner v. Milken*, 6 F.3d 666,
20 671-672 (9th Cir. 1993) (internal quotations omitted; *citing*
21 *Gottreich v. San Francisco Investment Corp.*, 552 F.2d 866, 866
22 (9th Cir. 1997)). The Ninth Circuit has explained:

23
24
25 Rule 9(b) requires particularized allegations of the
26 circumstances constituting fraud. The time, place and
27 content of an alleged misrepresentation may identify the
statement or the omission complained of, but these

28 317 F.3d 1097, 1103 (9th Cir. 2003) (*quoting Hayduk v. Lanna*, 775 F.2d 441,
443 (1st Cir. 1995) (italics in original)).

1 circumstances do not "constitute" fraud. The statement in
2 question must be false to be fraudulent. Accordingly, our
3 cases have consistently required that circumstances
4 indicating falseness be set forth.... [W]e [have] observed
5 that plaintiff must include statements regarding the time,
6 place, and nature of the alleged fraudulent activities, and
7 that "mere conclusory allegations of fraud are
8 insufficient." ... The plaintiff must set forth what is
9 false or misleading about a statement, and why it is false.
10 In other words, the plaintiff must set forth an explanation
11 as to why the statement or omission complained of was false
12 or misleading....

8 *In Re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541, 1547-
9 1548 (9th Cir. 1994) (en banc) (italics in original) *superseded*
10 *by statute on other grounds as stated in Marksman Partners, L.P.*
11 *v. Chantal Pharm. Corp.*, 927 F. Supp. 1297 (C.D. Cal. 1996).

13 In a fraud action against a corporation, a plaintiff must
14 "allege the names of the persons who made the allegedly
15 fraudulent representations, their authority to speak, to whom
16 they spoke, what they said or wrote, and when it was said or
17 written." *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App.
18 4th 153, 157 (1991).

20 The Complaint's conclusory allegations fail to meet Rule
21 9(b)'s strict standard. The Complaint lacks precise allegations
22 as to what the lender defendants allegedly promised or
23 represented. The Complaint alleges no facts to support fraud
24 elements let alone the who, what, when, when and how of alleged
25 misconduct. Mere allegations of "deceiving Plaintiff," and
26 "selling a mortgage loan that will fail" are insufficient to
27 state a claim for fraud.
28

1 Defendants' motion to dismiss Plaintiff's thirteenth claim
2 is GRANTED.

3
4 7. FACTA Claim (Eleventh Claim).

5 a. Timeliness.

6 Defendants assert that Plaintiff's eleventh claim for
7 violation of the Fair and Accurate Credit Transaction Act
8 ("FACTA") is untimely because it was not brought within the four
9 year statute of limitations. The statute of limitations under
10 FACTA is two years. 15 U.S.C. § 1681p (stating that a plaintiff
11 must bring a FACTA action within "2 years after the date of
12 discovery by the plaintiff of the violation that is the basis for
13 such liability.").

14
15 "Under federal law a cause of action accrues when the
16 plaintiff is aware of the wrong." *Acri v. International Ass'n of*
17 *Machinists & Aerospace Workers*, 781 F.2d 1393, 1396 (1986). That
18 is, "when the plaintiff 'knows or has reason to know of the
19 injury which is the basis of the action.'" *Kemp v. Regents of*
20 *University of Cal.*, No. C-09-4687 PJH, 2010 WL 2889224 (N.D.Cal.
21 July 22, 2010) (citing *TwoRivers v. Lewis*, 174 F.3d 987, 991-992
22 (9th Cir.1999); *Trotter v. Int'l Longshoremen's & Warehousemen's*
23 *Union*, 704 F.2d 1141, 1143 (9th Cir.1983)).

24
25 Plaintiff alleges she did not receive the requisite
26 disclosures when she executed the Loan September 5, 2006. Yet,
27 she did not file the current action until about five years later,
28

1 April 27, 2011. Plaintiff has not shown anything which prevented
2 her from comparing the loan documents and the statutory and
3 regulatory requirement within the statutory period. See *Kelley*
4 *v. Countrywide Home Loans*, 2009 WL 3489422, *5-6 (E.D. Cal. Oct.
5 26, 2009).

6 Plaintiff's FACTA claim is barred by the statute of
7 limitations.
8

9 b. Merits.

10 Defendants assert that FACTA does not apply to any
11 Defendant.
12

13 FACTA only applies to consumer reporting agencies, which at
14 least one district court has found does not include lenders. See
15 *Kakogui v. American Brokers Conduit*, No. C 09-4841 JF (HRL), 2010
16 WL 1265201, *5 (N.D. Cal. Mar.30, 2010) ("Plaintiff misapprehends
17 the nature of [FACTA] in reading the statute to require that
18 lenders and brokers [must] make credit scoring information
19 available to borrowers.") (internal quotations omitted).
20

21 Further, the section cited in Plaintiff's Complaint explains that
22 a consumer must request credit information in order to obtain
23 credit disclosures. 15 USC 1618g(a) ("Every consumer reporting
24 agency shall, *upon request*. . . clearly and accurately disclose
25 to the consumer:. . .") (emphasis added.) Plaintiff does not
26 allege she requested any credit scoring information from
27 Defendants; rather, she alleges that Defendants were obligated
28

1 to, *sua sponte*, provide her with credit scoring information. This
2 is not the law.

3 Defendants' motion to dismiss Plaintiff's FACTA claim is
4 GRANTED.

5
6 8. RESPA (Tenth and Twenty-First Claim).⁵

7 a. Timeliness.

8 An action for violation of RESPA is subject to, at most, a
9 three year statute of limitations. 12 U.S.C. § 2614 ("Any action
10 pursuant to the provisions of section 2605, 2607, or 2608 of this
11 title may be brought . . . within 3 years in the case of a
12 violation of section 2605 of this title and 1 year in the case of
13 a violation of section 2607 or 2608 of this title from the date
14 of the occurrence of the violation."). Plaintiff's RESPA claim
15 is time-barred.
16

17
18 b. Merits.

19 Plaintiff asserts she is (1) entitled to rescission of the
20 loan based on Defendants' failure to make clear, conspicuous, and
21 accurate material disclosures and (2) entitled to damages because
22 Defendants were paid "unearned fees, which were hidden from
23 [Plaintiff] in the form of Yield Spread Premium." (Compl. ¶ 243.)
24

25 (1) Rescission.

26 "[R]escission, whether under statute or common law, is
27

28 _____
⁵ Plaintiff's tenth claim is pursuant to 24 C.F.R. 3500.10 which is a
regulation under RESPA.

1 barred by limitations defenses and failure to tender amounts owed
2 under [Plaintiff's] loans. *Estillore v. Countrywide Bank FSB*,
3 2011 WL 348832, *22 (E.D. Cal. 2011). To obtain "rescission or
4 cancellation, the rule is that the complainant is required to do
5 equity, as a condition to his obtaining relief, by restoring to
6 the defendant everything of value which the plaintiff has
7 received in the transaction.... The rule applies although the
8 plaintiff was induced to enter into the contract by the
9 fraudulent representations of the defendant." *Fleming v. Kagan*,
10 189 Cal.App.2d 791, 796 (1961). "A valid and viable tender of
11 payment of the indebtedness owing is essential to an action to
12 cancel a voidable sale under a deed of trust." *Karlsen v.*
13 *American Sav. & Loan Assn.*, 15 Cal. App. 3d 112, 117. "The rules
14 which govern tenders are strict and are strictly applied."
15 *Nguyen v. Calhoun*, 105 Cal. App. 4th 428, 439 (2003).

16
17
18 In the absence of Plaintiff's meaningful tender, rescission
19 is an empty remedy. Defendants' motion to dismiss Plaintiff's
20 tenth claim for rescission based on violation of RESPA is
21 GRANTED.

22
23 (2) Damages.

24 Defendants point out that Plaintiff asserts no private right
25 of action for disclosure violations alleged in the Complaint, in
26 that RESPA creates a private right of action only "for violations
27 of specific, limited provisions."
28

1 RESPA's purpose is to "curb abusive settlement practices in
2 the real estate industry. Such amorphous goals, however, do not
3 translate into a legislative intent to create a private right of
4 action." *Estillore*, 2011 WL 348832, *13 (citing *Bloom v. Martin*,
5 865 F. Supp. 1377, 1385 (N.D.Cal.1994), *aff'd*, 77 F.3d 318
6 (1996). "The structure of RESPA's various statutory provisions
7 indicates that Congress did not intend to create a private right
8 of action for disclosure violations under 12 U.S.C. § 2603 ...
9 Congress did not intend to provide a private remedy ..." *Bloom*,
10 865 F. Supp. at 1384.

11 The absence of a private right of action for RESPA
12 disclosure violations dooms a purported RESPA claim based on
13 disclosure violations.
14

15 Defendants' motion to dismiss Plaintiff's twenty-first claim
16 for damages based on violation of RESPA is GRANTED.
17

18
19 9. Violation of Cal. Civ. Code § 1916.7 (Sixth, twenty-
20 second, twenty-third and twenty-fifth Claims).

21 Defendants argue Plaintiff's Cal. Civ. Code § 1916.7 claims
22 fail because section 1916.7, by its own terms, establishes that
23 it only applies to mortgage loans made under that particular
24 section. *See* Cal. Civ. Code § 1916.7(b) ("A mortgage loan *made*
25 *pursuant to the provisions of this section. . .*") (emphasis
26 added); *see also Mendoza v. Countrywide Home Loans, Inc.*, 2009
27 U.S. Dist. LEXIS 112423, at *16 (N.D. Cal. Dec. 3, 2009).
28

1 Plaintiff does not respond to Defendants' argument and her
2 Complaint is devoid of any facts asserting that her loan is one
3 to which 1916.7 applies.

4 Defendants' motions to dismiss Plaintiff's Cal. Civ. Code
5 section 1916.7 claims are GRANTED as to claims six, twenty-two,
6 twenty-three and twenty five.
7

8 10. Violation of Cal. Civ. Code §§ 1918-21 (Seventh Claim).
9

10 Defendants assert that Cal. Civ. Code §§ 1918-21 do not
11 create a private right of action⁶ and even if they did,
12 Plaintiff's conclusory statements insufficiently plead a claim.

13 California Civil Code section 1920 sets forth the
14 requirements of a "mortgage instrument." See Cal. Civ. Code §
15 1920. Among the requirements is the mandate that lenders
16 consider a borrower's ability to meet her mortgage obligations
17 before they adjust interest rates and monthly payments, and that
18 proper notice and disclosure be given to borrowers before lenders
19 change loan rates or payments. See *id.* Section 1920 does not
20 explicitly authorize a private right of action. See *Marks v.*
21 *Chicoine*, 2007 WL 1056779, *8 (N.D. Cal. 2007).
22

23 Plaintiff's section 1920 claim also falls short on the
24 merits. Plaintiff concedes in her Complaint that Defendants
25 considered her ability to meet her mortgage obligations.
26

27
28 ⁶ Section 1918 a definitions section and section 1919 was repealed by Stats.
1997, c. 232 (A.B. 447), § 23.

1 Plaintiff states the Loan was based on her "credit score, stated
2 income. . . and belief that the property would continue to
3 increase in value." (Compl. ¶ 152.)

4 California Civil Code section 1921 provides that any lender
5 offering adjustable-rate residential mortgages has to provide
6 prospective borrowers with a copy of the Consumer Handbook on
7 Adjustable Rate Mortgages. See Cal. Civ. Code § 1921. This
8 Section also does not explicitly authorize a private right of
9 action. In any case, Plaintiff does not allege that Defendants
10 failed to provide her with the handbook.
11

12 Defendants' motion to dismiss Plaintiff's claim for
13 violation of Cal. Civ. Code §§ 1918-21 is GRANTED.
14

15
16 11. Violation of Cal. Civ. Code, Section 1632 (Eighth
17 Claim).

18 Cal. Civ. Code § 1632, the Foreign Language Contract Act
19 ("FLCA"), provides in relevant part:

20 (b) Any person engaged in a trade or business who negotiates
21 primarily in. . . Tagalog, . . . orally or in writing, . . .
22 shall deliver to the other party to the contract or
23 agreement and prior to the execution thereof, a translation
24 of the contract or agreement in the language in which the
25 contract or agreement was negotiated, which includes a
26 translation of every term and condition in that contract or
27 agreement:

28 . . .

(2) A loan or extension of credit secured other than by real
property, or unsecured, for use primarily for personal,
family or household purposes.

Id. (emphasis added.)

1
2 Defendants assert this claim fails because "Plaintiff does
3 not allege she negotiated any part of the loan transaction in any
4 language but English." (Doc. 7 at 14.) Defendants further assert
5 "section 1632 only applies to '[a] loan or extension of credit
6 secured *other* than by real property." Cal. Civ. Code §
7 1632(b)(2) (" (emphasis added.) Plaintiff does not address
8 either argument.

9
10 Because Plaintiff has not alleged that her transactions were
11 in Tagalog and because Plaintiff's loans are secured by real
12 property, they are expressly excluded from Section 1632's
13 provisions.

14 Defendants' motion to dismiss Plaintiff's claim for
15 violation of Cal. Code Civ. Pro. Section 1632 is GRANTED.

16
17 12. Breach of Fiduciary Duty (Fifteenth Claim).

18 Defendants contend that Plaintiff's claim for breach of
19 fiduciary duty must fail because a lender owes no fiduciary duty
20 to its loan customers.

21 To state a claim for breach of fiduciary duty, a plaintiff
22 must show: (1) the existence of a fiduciary relationship; (2) the
23 breach of that relationship; and (3) damage proximately caused by
24 the breach. *Roberts v. Lomanto*, 112 Cal.App.4th 1553, 1562
25 (2003). However, "[a]bsent special circumstances ... a loan
26 transaction is [an] at arms-length [transaction] and there is no
27 fiduciary relationship between the borrower and lender." *Oaks*

1 *Mgmt. Corp.*, 145 Cal. App. 4th at 466. "A commercial lender is
2 entitled to pursue its economic interest in a loan transaction.
3 This right is inconsistent with the obligations of a fiduciary,
4 which require that the fiduciary knowingly agree to subordinate
5 its interests to act on behalf of and for the benefit of
6 another." *Gonzalez v. First Franklin Loan Services*, No. 1:09-CV-
7 00941 AWI-GSA, 2010 WL 144862, *13 (E.D. Cal. Jan. 11, 2010).

9 Plaintiff offers no response to Defendants' argument.
10 Defendants' motion to dismiss Plaintiff's fifteenth claim is
11 GRANTED.

12
13 13. Trespass and Conversion (Eighteenth and Nineteenth
Claims.)

14 a. Trespass.

15 Trespass to property includes an intrusion onto property,
16 and damages. *Girard v. Ball*, 125 Cal. App. 3d 772, 788 (1981).
17 Here, Plaintiff seems to conceded that no trespass or conversion
18 has yet occurred, only that she fears the foreclosure process
19 will result in her loss of the Property. (Compl. ¶ 225.) However,
20 at paragraph 118 of the Complaint she asserts that Defendants
21 "have completed a foreclosure action under the Note [sic] by way
22 of non-judicial sale." Plaintiff's contradictory allegations
23 equate to an insufficiently pled trespass claim.
24

25 Defendants' motion to dismiss Plaintiff trespass claim is
26 GRANTED and are so factually inconsistent as to be fatal to the
27 claim.
28

1 b. Conversion.

2 "The elements of a conversion are the plaintiff's ownership
3 or right to possession of the property at the time of the
4 conversion; the defendant's conversion by a wrongful act or
5 disposition of property rights; and damages." *Oakdale Village*
6 *Group v. Fong*, 43 Cal. App. 4th 539, 544 (1996). Based on
7 Plaintiff's contradictory statements regarding whether a
8 foreclosure sale has taken place, she fails to plead a conversion
9 claim.
10

11 Defendant's motion to dismiss Plaintiff's nineteenth claim
12 is GRANTED.
13

14 14. Quiet Title (Twentieth Claim).

15 Defendants contend that Plaintiff's quiet title claim is
16 fatally defective because Plaintiff has failed to allege a
17 tender. Plaintiff rejoins that the court has discretion as to
18 whether tender is necessary. California law is not in accord
19 with Plaintiff's assertion.
20

21 Under California a law defaulted borrower is "required to
22 allege tender of the amount of [the lender's] secured
23 indebtedness in order to maintain any cause of action for
24 irregularity in the sale procedure." *Abdallah v. United Savings*
25 *Bank*, 43 Cal. App. 4th 1101, 1109 (1996). "A party may not
26 without payment of the debt, enjoin a sale by a trustee under a
27 power conferred by a deed of trust, or have his title quieted
28

1 against the purchaser at such a sale, even though the statute of
2 limitations has run against the indebtedness." *Sipe v. McKenna*,
3 88 Cal. App. 2d 1001, 1006 (1948).

4 *FPCI RE-HAB 01 v. E & G Investments, Ltd.*, 207 Cal. App. 3d
5 1018, 1021 (1989) (citations omitted) explains:

6
7 [G]enerally "an action to set aside a trustee's sale for
8 irregularities in sale notice or procedure should be
9 accompanied by an offer to pay the full amount of the debt
10 for which the property was security.".... This rule ... is
11 based upon the equitable maxim that a court of equity will
12 not order a useless act performed.... "A valid and viable
13 tender of payment of the indebtedness owing is essential to
14 an action to cancel a voidable sale under a deed of trust."
15 ... The rationale behind the rule is that if plaintiffs
16 could not have redeemed the property had the sale procedures
17 been proper, any irregularities in the sale did not result
18 in damages to the plaintiffs.

14 An action to set aside a foreclosure sale, unaccompanied by
15 an offer to redeem, does not state a cause of action which a
16 court of equity recognizes. *Karlsen*, 15 Cal. App. 3d at 117. The
17 basic rule is that an offer of performance is of no effect if the
18 person making it is not able to perform. *Id.* at 118 (*citing* Cal.
19 Civ. Code, § 1495). "It would be futile to set aside a
20 foreclosure sale on the technical ground that notice was
21 improper, if the party making the challenge did not first make
22 full tender and thereby establish his ability to purchase the
23 property." *United States Cold Storage v. Great Western Savings &*
24 *Loan Assn.*, 165 Cal. App. 3d 1214, 1224 (1985); *see Mix v. Sodd*,
25 126 Cal. App. 3d 386, 390 (1981) ("a mortgagor in possession may
26 not maintain an action to quiet title, even though the debt is
27
28

1 unenforceable"); *Aguilar v. Bocci*, 39 Cal. App. 3d 475, 477
2 (1974) (trustor is unable to quiet title "without discharging his
3 debt").

4 Here, Plaintiff does not allege tender. Defendants' motion
5 to dismiss Plaintiff's twentieth claim is GRANTED.
6

7 15. Violation of Cal. Civ. Code § 2079.19 (twenty-fourth
8 claim).

9 Defendants contend Plaintiff's claim for violation of Cal.
10 Civ. Code § 2079.19 should be dismissed. Section 2079, *et seq.*
11 pertains to the duties of a real estate broker or sales person.
12 Section 2079.19 states in full:
13

14 The payment of compensation or the obligation to pay
15 compensation to an agent by the seller or buyer is not
16 necessarily determinative of a particular agency
17 relationship between an agent and the seller or buyer. A
18 listing agent and a selling agent may agree to share any
19 compensation or commission paid, or any right to any
20 compensation or commission for which an obligation arises as
21 the result of a real estate transaction, and the terms of
22 any such agreement shall not necessarily be determinative of
23 a particular relationship.

19 Plaintiff's claim it is wholly inapplicable here because
20 Plaintiff does not allege any Defendants acted as a real estate
21 broker or agent, nor does Plaintiff make any mention whatsoever
22 to Section 2079.19 in her Opposition.
23

24 Defendants' motion to dismiss Plaintiff's claim for
25 Violation of Cal. Civ. Code § 2079.19 is GRANTED.
26

26 16. Failure to Modify Loan (Twenty-Seventh and Twenty-
27 Eighth Claims).

28 Plaintiff asserts Defendants failed to modify her loan in

1 violation of Cal. Civ. Code § 2923.5 and failed to attach the
2 "requisite declaration" under Section 2923.5 to the Notice of
3 Default. (Compl. ¶ 227, 282.)

4 First, Defendants correctly point out that Plaintiff
5 misunderstands the purpose of the statute. Cal. Civ. Code
6 section 2923.5 does not require modification. While section
7 2923.5 requires the mortgagor to discuss options to prevent
8 foreclosure, it does not require that any loan modification take
9 place. *See, e.g.* Cal. Civ. Code § 2923.5(b) ("A notice of
10 default. . . shall include a declaration that the mortgagee,
11 beneficiary, or authorized agent has contacted the borrower, has
12 tried with due diligence to contact the borrower as required by
13 this section.) (emphasis added.) By Plaintiff's own Complaint she
14 concedes that she and her mortgagor attempted to "achieve a
15 meaningful and substantial modification of the terms of her
16 loan." (Compl. 275).

17
18
19 Second, by Chicago Title's RJN, Ex. B, Plaintiff's
20 mortgagor, Countrywide, did include a declaration in the Notice
21 of Default that "Countrywide tried with due diligence to contact
22 the borrower in accordance with California Civil Code Section
23 2923.5."

24
25 Defendants' motion to dismiss Plaintiff's claim for
26 violation of Cal. Civ. Code 2923.5 is GRANTED. This includes
27 Plaintiff's twenty-seventh and twenty-eighth claims.
28

1 17. Unjust Enrichment (Twenty-Sixth Claim).

2 Plaintiff brings a separate "cause of action" for unjust
3 enrichment which asserts that "[a] forced sale of [Plaintiff's]
4 home, and allowance for Defendant's to recoup the [] profits. . .
5 would be inequitable and unconscionable."

6 Unjust enrichment "is not a separate cause of action," but,
7 rather, must rely on some other claim that is cognizable. See
8 *Jogani v. Superior Court*, 165 Cal. App. 4th 901, 911 (2008)
9 ("[U]njust enrichment is not a cause of action[;] [r]ather it is
10 a general principle underlying various doctrines and
11 remedies[.]"); see also *Ib Melchior v. New Line Prods., Inc.* 106
12 Cal. App. 4th 779, 793 (2003) ("[T]here is no cause of action in
13 California for unjust enrichment[;] [t]he phrase 'Unjust
14 Enrichment' does not describe a theory of recovery, but an
15 effect: the result of a failure to make restitution under
16 circumstances where it is equitable to do so.") (internal
17 quotation and citation omitted).

18 Unjust enrichment is not a cause of action and nonetheless
19 Plaintiff asserts no cognizable claim upon which to assert
20 Defendants were unjustly enriched.

21 Defendants' motion to dismiss Plaintiff's twenty-sixth
22 "claim" for unjust enrichment is GRANTED.

23 18. Violation Of Cal. Bus. and Prof. Code § 17200
24 (Fourteenth and Seventeenth Claims).

25 The Complaint attempts to allege claims under the Unfair
26

1 Competition Law ("UCL"), Cal. Bus. and Prof. Code, §§ 17200, *et*
2 *seq.* The Complaint's fourteenth claim alleges "[D]efendants
3 failed to undergo a diligent underwriting process" to consummate
4 "an unlawful, unfair, and fraudulent business practice, designed
5 to deprive Plaintiff of her home, equity, as well as her past and
6 future investment." (Compl. ¶ 195.) The Complaint's seventeenth
7 claim alleges: "This loan is marketed in whole or in part on the
8 basis of fraud, exaggeration, misrepresentation or the
9 concealment of a material fact and was underwritten without due
10 diligence by the party originating the loan." (Compl. ¶ 214.)

11
12 Defendants fault the claims' failure to plead the requisite
13 statutory violation or act of fraud for a UCL claim.

14
15 "Unfair competition is defined to include 'unlawful, unfair
16 or fraudulent business practice and unfair, deceptive, untrue or
17 misleading advertising.'" *Blank v. Kirwan*, 39 Cal. 3d 311, 329
18 (1985) (*quoting* Cal. Bus. & Prof. Code, § 17200). The UCL
19 establishes three varieties of unfair competition—"acts or
20 practices which are unlawful, or unfair, or fraudulent." *Shvarts*
21 *v. Budget Group, Inc.*, 81 Cal. App. 4th 1153, 1157 (2000). An
22 "unlawful business activity" includes anything that can properly
23 be called a business practice and that at the same time is
24 forbidden by law. *Blank*, 39 Cal. 3d at 329 (*citing* *People v.*
25 *McKale*, 25 Cal. 3d 626, 631-632 (1979)). "A business practice is
26 'unlawful' if it is 'forbidden by law.'" *Walker v. Countrywide*
27
28

1 *Home Loans, Inc.*, 98 Cal. App. 4th 1158, 1169 (2002).

2 The UCL "creates an independent action when a business
3 practice violates some other law." *Walker*, 98 Cal. App. 4th at
4 1169. The UCL "borrows" violations of other laws and treats them
5 as unlawful practices independently actionable under the UCL.
6 *Farmers Ins. Exchange v. Superior Court*, 2 Cal. 4th 377, 383
7 (1992). Where a plaintiff cannot state a claim under the
8 "borrowed" law, she cannot state a UCL claim either. *See, e.g.*,
9 *Smith v. State Farm Mutual Automobile Ins. Co.*, 93 Cal. App. 4th
10 700, 718 (2001).

12 Here, Plaintiff does not predicate her "unlawful" business
13 claim on any other claim. Notwithstanding, Plaintiff's Complaint
14 fails to state any viable cause of action. Plaintiff has stated
15 no "unlawful" UCL claim. Defendants' motion to dismiss
16 Plaintiff's fourteenth and seventeenth claims is GRANTED.

18 D. Declaratory and Injunctive Relief (First and Second
19 "Claims").

20 Under 28 U.S.C. § 2201, "any court of the United States,
21 upon the filing of an appropriate pleading, may declare the
22 rights and other legal relations of any interested party seeking
23 such declaration, whether or not further relief is or could be
24 sought." A party seeking declaratory relief must establish that
25 there is a present and actual controversy between the parties.
26 *City of Cotati v. Cashman*, 29 Cal. 4th 69, 80 (2002). Declaratory
27 relief is only appropriate "(1) when the judgment will serve a
28

1 useful purpose in clarifying and settling the legal relations in
2 issue, and (2) when it will terminate and afford relief from the
3 uncertainty, insecurity, and controversy giving rise to the
4 proceeding." *Guerra v. Sutton*, 783 F.2d 1371, 1376 (9th Cir.
5 1986).

6
7 Declaratory relief is ultimately a request for relief,
8 rather than a cause of action, and in order to weigh it the
9 underlying claims must be valid. *See, e.g., Weiner v. Klais &*
10 *Co.*, 108 F.3d 86, 92 (6th Cir. 1997) ("With regard to Count IV,
11 in which plaintiff seeks declaratory relief, plaintiff has merely
12 asserted a form of relief, not a cause of action. Plaintiff is
13 not entitled to this relief in the absence of a viable claim.");
14 *Lane v. Vitek Real Estate Indus. Group*, 713 F. Supp. 2d 1092,
15 1104 (E.D. Cal. 2010) (*citing McDowell v. Watson*, 59 Cal. App.
16 4th 1155, 1159 (1997) ("Injunctive relief is a remedy and not, in
17 itself a cause of action." (internal quotation marks omitted)).
18

19 Since Plaintiff's other claims have been dismissed and
20 declaratory relief is not a cause of action in and of itself,
21 there is no basis for declaratory relief. Defendants' motion to
22 dismiss Plaintiff's first and second "causes of action" is
23 GRANTED.
24

25 26 VI. CONCLUSION

27 While leave to amend is usually freely given, it need not be
28 when it is plain that the complaint is without merit for reasons

1 that cannot be cured by amendment. *See, e.g., Sparling v. Daou,*
2 411 F.3d 1006, 1013 (9th Cir. 2005). Such is the case here. No
3 matter what amendment Plaintiff might offer, her claims are
4 either time-barred, barred by their inability to tender, based
5 upon inapplicable and discredited legal theories or devoid of any
6 meaningful factual allegations.
7

8 The Complaint's blizzard of purported violations under
9 federal and California law is insufficient. The Complaint is a
10 conglomeration of statutory quotations, formulaic recitations and
11 vague assertions of misconduct. It lacks any cognizable claims or
12 legal theories upon which to premise liability. The Complaint
13 lacks specific, clearly defined allegations to give fair notice
14 of claims plainly and succinctly to warrant dismissal of this
15 action.
16

17 For all the reasons state above, Defendants' Motion to
18 Dismiss is GRANTED WITHOUT LEAVE TO AMEND in its entirety.

19 Defendants shall submit a form of judgment consistent with
20 this decision within five (5) days following electronic service
21 of this decision.

22 SO ORDERED.

23
24 Dated: August 31, 2011

/s/ Oliver W. Wanger

25 Oliver W. Wanger
26 United States District Judge
27
28