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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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YASMIN SMITH

NO. CIV. 2-09-00607 FCD/KJM

Plaintiff,

v.

MEMORANDUM AND ORDER

COUNTRYWIDE FINANCIAL  
CORPORATION, COUNTRYWIDE HOME  
LOANS, INC., COUNTRYWIDE BANK,  
MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC., a  
suspended California  
corporation, DEBRA DELGADO,  
RECONSTRUST COMPANY, N.A. and  
DOES 1-20 inclusive,

Defendants.

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This matter is before the court on defendants Countrywide Bank ("CB"), Countrywide Home Loans, Inc. ("CHL"), Mortgage Electronic Registration Systems, Inc. ("MERS"), and Countrywide Financial Corporation's ("CFC") (collectively "defendants") motions to dismiss plaintiff's First Amended Complaint ("FAC")

1 for failure to state a claim on which relief may be granted  
2 pursuant to Federal Rule of Civil Procedure 12(b)(6) and for  
3 failure to allege the purported causes of action based on fraud  
4 or concealment with particularity pursuant to Rule 9(b).  
5 Plaintiff Yasmin Smith ("plaintiff") opposes the motions. For  
6 the reasons set forth below,<sup>1</sup> defendants' motion to dismiss is  
7 GRANTED.<sup>2</sup>

#### 8 BACKGROUND

9 In July 2007, plaintiff was looking to relocate her day care  
10 business to California and was in need of a home loan. (First Am.  
11 Compl. ("FAC"), filed June 8, 2009, 6:5-6.) Plaintiff alleges  
12 she met with CHL loan officer Debra Delgado ("Delgado"), who  
13 informed plaintiff that she qualified for the loan based upon her  
14 credit score alone and that Delgado could get her the "best deal"  
15 and the "best interest rates." (Id. at 6:6-12.) Relying on this  
16 representation, plaintiff entered into a "consumer credit  
17 transaction" with defendants and also "entered into one loan as  
18 part of the loan transaction, a first deed." (Id. at 7:2-5.)  
19 Plaintiff claims that she was not only advised that defendants  
20 would refinance to a lower interest rate and payment after a  
21 year, but that she could refinance if the loan became  
22 unaffordable. (Id. at 6:15-17) Plaintiff alleges that she relied  
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24 <sup>1</sup> Because oral argument will not be of material  
25 assistance, the court orders this matter submitted on the briefs.  
E.D. Cal. L.R. 78-230(h).

26 <sup>2</sup> Defendants also move to strike all allegations that are  
27 allegedly copied from other complaints pursuant to Rule 12(f) and  
28 for a more definite statement pursuant to Rule 12(e). Because  
the court grants defendants' motion to dismiss, the court does  
not reach the merits of these motions.

1 on this representation to her detriment. (Id. at 6:11-14.)  
2 Plaintiff claims that she was not given a copy of the loan  
3 documents prior to closing as required, and that at the time of  
4 closing, she was rushed to sign the documents (Id. at 6:20-24)  
5 She further alleges that the loan documents were never explained  
6 to her, she was never given the opportunity to review them, and  
7 she never received the required copies of the notice of  
8 cancellation. (Id.)

9 Plaintiff asserts that on or about August 21, 2007, she  
10 completed the loan transaction. The terms of the loan were  
11 included in the promissory note, secured by a deed of trust on  
12 the property, which identified Recontrust Company as trustee, and  
13 Countrywide Bank ("CB") as the lender. (Id. at 7:1-4.)  
14 Plaintiff claims that Mortgage Electronic Registration Systems,  
15 Inc. ("MERS") was also the named nominee and beneficiary. (Id. at  
16 7:5-6) Plaintiff alleges that when the loan was completed, she  
17 did not receive "the required documents and disclosures,  
18 including, but not limited to, the Truth in Lending Disclosure  
19 Statement containing real disclosures and the required number of  
20 copies of the Notice of Right to Cancel." (Id. at 8:9-13.)

21 On February 10, 2009, plaintiff allegedly sent a Qualified  
22 Written Request to defendants pursuant to the Real Estate  
23 Settlement Procedures Act ("RESPA"), which demanded cancellation  
24 of the pending Trustee Sale and rescission of the loan pursuant  
25 to the provisions of the Truth in Lending Act ("TILA"). (Id. at  
26 7:13-16.) Plaintiff claims that as a direct and proximate result  
27 of the CHL and CB's actions of malice, oppression and fraud,  
28 /////

1 plaintiff is entitled to damages for direct monetary loss,  
2 consequential damages, and emotional distress.

3 In her First Amended Complaint, plaintiff asserts claims for  
4 1) violation of TILA, 15 U.S.C. §§ 1601 *et seq.*; 2) violation of  
5 the Rosenthal Fair Debt Collection Practices Act ("RFDCPA"), 3)  
6 negligence, 4) violation of RESPA, 12 U.S.C. §§ 2601 *et seq.*, 5)  
7 breach of fiduciary duty, 6) fraud, 7) violation of California  
8 Business and Professions Code § 17200; 8) breach of contract, 9)  
9 breach of implied covenant of good faith and fair dealing, and  
10 10) wrongful foreclosure.

11 Defendants now move to dismiss plaintiff's claims for  
12 failure to state cognizable claims on which relief can be  
13 granted. (Defs.' P. & A. In Supp. of MTD ("MTD"), June 24, 2009,  
14 4:23-25.) Defendants also move to strike portions of plaintiff's  
15 First Amended Complaint or in the alternative, for a more  
16 definite statement.

#### 17 **STANDARDS**

18 Under Federal Rule of Civil Procedure 8(a), a pleading must  
19 contain "a short and plain statement of the claim showing that  
20 the pleader is entitled to relief." See Ashcroft v. Iqbal, 129  
21 S. Ct. 1937, 1949 (2009). Under notice pleading in federal  
22 court, the complaint must "give the defendant fair notice of what  
23 the claim is and the grounds upon which it rests." Bell Atlantic  
24 v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations  
25 omitted). "This simplified notice pleading standard relies on  
26 liberal discovery rules and summary judgment motions to define  
27 disputed facts and issues and to dispose of unmeritorious  
28 claims." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).

1 On a motion to dismiss, the factual allegations of the  
2 complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319,  
3 322 (1972). The court is bound to give plaintiff the benefit of  
4 every reasonable inference to be drawn from the "well-pleaded"  
5 allegations of the complaint. Retail Clerks Int'l Ass'n v.  
6 Schermerhorn, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not  
7 allege "'specific facts' beyond those necessary to state his  
8 claim and the grounds showing entitlement to relief. Twombly,  
9 550 U.S. at 570. "A claim has facial plausibility when the  
10 plaintiff pleads factual content that allows the court to draw  
11 the reasonable inference that the defendant is liable for the  
12 misconduct alleged." Iqbal, 129 S. Ct. at 1949.

13 Nevertheless, the court "need not assume the truth of legal  
14 conclusions cast in the form of factual allegations." United  
15 States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th  
16 Cir. 1986). While Rule 8(a) does not require detailed factual  
17 allegations, "it demands more than an unadorned, the defendant-  
18 unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at 1949. A  
19 pleading is insufficient if it offers mere "labels and  
20 conclusions" or "a formulaic recitation of the elements of a  
21 cause of action." Twombly, 550 U.S. at 555; Iqbal, 129 S. Ct. at  
22 1950 ("Threadbare recitals of the elements of a cause of action,  
23 supported by mere conclusory statements, do not suffice.").  
24 Moreover, it is inappropriate to assume that the plaintiff "can  
25 prove facts which it has not alleged or that the defendants have  
26 violated the . . . laws in ways that have not been alleged."  
27 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council  
28 of Carpenters, 459 U.S. 519, 526 (1983).



1 doctrine is one exception to the rule where a parent corporation  
2 will be found liable for the actions of its subsidiary when there  
3 is (1) such unity of interest and ownership that the separate  
4 personalities of the corporation and the individual no longer  
5 exist, and (2) that if the acts are treated as those of the  
6 corporation alone, an inequitable result will follow." Pantoja  
7 v. Countrywide Home Loans, Inc., 2009 U.S. Dist. LEXIS 70856  
8 (N.D. Cal. July 9, 2009) (citing Automotriz Del Golfo De  
9 California v. Resnick, 47 Cal. 2d 792, 796 (1957); United States  
10 v. Healthwin-Midtown Convalescent, 511 F. Supp. 416, 418 (C.D.  
11 Cal. 1981) *affirmed* 685 F.2d 448 (9th Cir. 1982). Another  
12 exception to the general rule is when the subsidiary is the agent  
13 of the parent, which requires a showing that the parent so  
14 controls the subsidiary as to cause the subsidiary to be become  
15 merely the instrumentality of the parent. Laird, 68 Cal. App.  
16 4th at 741. A parent corporation contributing funds to a  
17 subsidiary is not enough to find alter ego or agency liability.  
18 Sonora Diamond Corp. v. Superior Court, 83 Cal. App. 4th 523,  
19 539, 541 (5th Dist. 2000).

20 While plaintiff references defendant CFC as a wrongdoer in  
21 the overall conspiracy of providing unaffordable home loans and  
22 initiating in unfair business practices, the FAC fails to allege  
23 any facts supporting a connection between CFC and the various  
24 claims for relief asserted. Further, plaintiff fails to allege  
25 any factual assertions which would implicate CFC's liability as  
26 an alter ego or agent of other named corporate defendants.  
27 Accordingly, defendants' motion to dismiss all claims asserted  
28 against CFC is GRANTED.

1 **B. TILA**

2 **1. Damages**

3 Plaintiff's first claim for relief alleges a violation of  
4 the Truth in Lending Act ("TILA") against defendants CHL and CB.  
5 Defendants argue that the civil damages portion of plaintiff's  
6 TILA violation claim is time barred. Plaintiff asserts that the  
7 statutory period has not expired based on equitable tolling.

8 TILA provides that a plaintiff can bring an action to  
9 recover damages "within one year from the date of the occurrence  
10 of the violation." 15 U.S.C. § 1640(e). In King, the Ninth  
11 Circuit held that equitable tolling of civil damages claims  
12 brought under TILA might be appropriate "in certain  
13 circumstances." King v. State of California, 784 F.2d 910, 915  
14 (9th Cir. 1986). The court noted that a borrower may not have a  
15 reasonable opportunity within one year to discover the fraud or  
16 nondisclosures that form the basis of a TILA action and that,  
17 through TILA, Congress "sought to protect consumer's choice  
18 through full disclosure and to guard against the divergent and at  
19 times fraudulent practices stemming from uninformed use of  
20 credit." Id. As such, the Ninth Circuit explained that  
21 "district courts . . . can evaluate specific claims of fraudulent  
22 concealment and equitable tolling to determine if the general  
23 rule would be unjust or frustrate the purpose of the Act and  
24 adjust the limitations period accordingly." Id. When  
25 determining whether the statute of limitations period has expired  
26 for the purposes of a motion to dismiss, a court can only grant  
27 the motion "if the assertions of the complaint, read with the  
28 required liberality, would not permit the plaintiff to prove that



1 the statute was tolled." Supermail Cargo, Inc. v. U.S., 68 F.3d  
2 1204, 1206 (9th Cir. 1995).

3 In this case, defendants contend, and plaintiff does not  
4 dispute, that the alleged TILA violations occurred no later than  
5 August 21, 2007, the date plaintiff entered into the loan  
6 agreement with defendants. (MTD 8:3-4.) Accordingly, since  
7 plaintiff did not bring her claim until March 3, 2009, more than  
8 one year has elapsed since the alleged TILA violation.

9 Plaintiff argues that equitable tolling may apply to her  
10 TILA claim because it based upon defendants' alleged failure to  
11 clearly and conspicuously disclose various terms of the loan.  
12 (FAC at 8:17-20; 9:19-23.) However, plaintiff pleads no other  
13 facts to explain how defendants concealed the true facts or why  
14 plaintiff could not otherwise have discovered the TILA violations  
15 at the consummation of her loan. "Such factual underpinnings are  
16 all the more important . . . since the vast majority of  
17 [p]laintiff's alleged violations under TILA are violations that  
18 are self-apparent at the consummation of the transaction."

19 Cervantes v. Countrywide Home Loans, Inc., 2009 U.S. Dist. LEXIS  
20 87997, at \*\* 13-14 (D. Ariz. Sept. 23, 2009) (holding that  
21 equitable tolling was not appropriate when plaintiffs simply  
22 alleged that defendants "fraudulently misrepresented and  
23 concealed the true facts related to the items subject to  
24 disclosure").

25 Accordingly, defendants' motion to dismiss plaintiff's claim  
26 for civil damages based on violation of TILA is GRANTED.

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1           **2.    Rescission**

2           In her claim for rescission under TILA, plaintiff contends  
3 that, as a result of defendants' failure to provide the required  
4 disclosure statements, she has a continuing right to rescission.  
5 (FAC 11:20-22.) Defendants CHL and CB assert that plaintiff's  
6 rescission claim under TILA must be dismissed because, under  
7 TILA, rescission is dependent on the borrower's ability to return  
8 the loan principal, which plaintiff has not adequately alleged.

9           15 U.S.C. § 1635(b) "adopts a sequence of rescission and  
10 tender that must be followed unless the court orders otherwise:  
11 within twenty days of receiving a notice of rescission, the  
12 creditor is to return any money or property and reflect  
13 termination of the security interest; when the creditor has met  
14 these obligations, the borrower is to tender the property."

15 Yamamoto v. Bank of N.Y., 329 F. 3d 1167, 1170 (9th Cir. 2003).

16 The Ninth Circuit has held that rescission under TILA "*should* be  
17 conditioned on repayment of the amounts advanced by the lender."

18 Id. (emphasis in original). A number of California district  
19 courts have required a plaintiff to plead facts relating to the  
20 ability to tender the loan principal in order to withstand a  
21 12(b)(6) motion to dismiss and proceed with a claim for

22 rescission under TILA. Garza v. Am. Home Mortgage, 2009 WL  
23 188604 at \*5 (E.D. Cal. Jan. 27, 2009) ("rescission is an empty  
24 remedy without [plaintiff's] ability to pay back what she has  
25 received"); Serrano v. Sec. Nat'l Mortg. Co., 2009 U.S. Dist.

26 Lexis 71725 (S.D. Cal. Aug. 14, 2009) ("If Plaintiff continues to  
27 seek rescission under TILA, he must tender the owed amount or  
28 provide proof of his ability to tender"); Pesayco v. World Say.,

1 Inc., 2009 U.S. Dist. LEXIS 73299 (C.D. Cal. July 29, 2009) (“[A]  
2 claim for TILA rescission will only be able to succeed if  
3 Plaintiff can show the ability to tender the principal of the  
4 subject loan.”).

5 Plaintiff has failed to allege any facts relating to her  
6 ability to tender the loan principal. Accordingly, defendants’  
7 motion to dismiss plaintiff’s claim for rescission under TILA is  
8 GRANTED.

9 **C. RFDCPA**

10 Plaintiff’s second claim for relief alleges that defendants  
11 CHL, CB, CFC, and MERS violated the California Rosenthal Act  
12 (“RFDCPA”). Specifically, plaintiff claims that defendants  
13 threatened to take actions not permitted by law, including but  
14 not limited to: foreclosing upon a void security interest;  
15 foreclosing upon a note of which they were not in possession nor  
16 otherwise entitled to payment; falsely stating the amount of a  
17 debt; increasing the amount of a debt by including amounts that  
18 are not permitted by law or contract; and using unfair and  
19 unconscionable means in an attempt to collect a debt. (FAC at  
20 12:22-27.)

21 The purpose of the RFDCPA is “to prohibit debt collectors  
22 from engaging in unfair or deceptive acts or practices in the  
23 collection of consumer debts and to require debtors to act fairly  
24 in entering into and honoring such debts.” Cal. Civ. Code §  
25 1788.1(b). Under the RFDCPA, a “debt collector” is defined as  
26 “any person who, in the ordinary course of business, regularly,  
27 on behalf of himself or herself or others, engages in debt  
28 collection.” (Cal. Civ. Code. § 1788.2(c)). A debt collector

1 violates the act when it engages in harassment, threats, the use  
2 of profane language, false simulation of the judicial process, or  
3 when it cloaks its true nature as a licensed collection agency in  
4 an effort to collect a debt. See Cal. Civ. Code §§ 1788.10-  
5 88.18; see also Hernandez v. Cal. Reconveyance Co., 2009 U.S.  
6 Dist. LEXIS 13936, at \* 13 (E.D. Cal. Feb. 23, 2009) (holding  
7 that a RFDCPA claim failed because the complaint lacked  
8 allegations of harassment or abuse, false or misleading  
9 representations of the debt collector's identity, or unfair  
10 practices during the process of collecting debt). The RFDCPA is  
11 not applicable until after a loan is made and does not constitute  
12 a lending regulation. See Alkan v. Citimortgage, Inc., 336 F.  
13 Supp. 2d 1061, 1064 (N.D. Cal. 2004). Moreover, foreclosing on a  
14 deed of trust does not implicate the RFDCPA. See e.g. Benham v.  
15 Aurora Loan Servs., 2009 U.S. Dist. LEXIS 78384, at \*6 (N.D. Cal.  
16 Sept. 1, 2009) (dismissing plaintiff's complaint "because  
17 foreclosing on a property pursuant to a deed of trust is not the  
18 collection of a debt within the meaning of the RFDCPA"); Ricon v.  
19 Recontrust Co., 2009 U.S. Dist. LEXIS 67807, at \*9 (S.D. Cal.  
20 Aug. 4, 2009); Hepler v. Wash. Mut. Bank, F.A., 2009 U.S. Dist.  
21 LEXIS 33883, at \*11 (C.D. Cal. April 17, 2009).

22 Plaintiff's complaint fails to allege any facts supporting  
23 how defendants violated the RFDCPA. Rosal v. First Fed. Bank of  
24 Cal., 2009 U.S. Dist. Lexis 60400 (N.D. Cal. July 15, 2009)  
25 (dismissing the plaintiff's complaint where it did not allege  
26 facts giving rise to the inference that any of the defendants is  
27 a debt collector as defined by the RFDCPA" nor assert what  
28 provisions of the RFDCPA defendants allegedly violated).

1 Plaintiff does not allege that defendants used threats,  
2 harassment, or profane language to collect a debt after the loan  
3 was made. Further, plaintiff fails identify who among defendants  
4 acted as a debt collector pursuant to the RFDCPA. See Fuentes v.  
5 Deutsche Bank, 2009 U.S. Dist. LEXIS 57931 (S.D. Cal. July 8,  
6 2009) (granting defendant's motion for judgment "[s]ince a  
7 residential mortgage is not a debt and a home foreclosure is not  
8 debt collection within the meaning of the statute"); Gamboa v.  
9 Trustee Corps, 2009 WL 656285 (N.D. Cal. March 12, 2009) ("[T]he  
10 law is clear that foreclosing on a property pursuant to a deed of  
11 trust is not a debt collection within the meaning of the  
12 RFDCPA.").

13 Accordingly, defendants' motion to dismiss plaintiff's  
14 second claim for violation of RFDCPA is GRANTED.

#### 15 **D. Negligence**

16 Plaintiff's third claim for relief alleges that all  
17 defendants were negligent in directing her into a loan  
18 transaction against industry standards, resulting in  
19 unnecessarily increased fees, which defendants knew were in  
20 excess of what plaintiff could afford. (FAC at 13:16-19.)  
21 Further, plaintiff alleges that defendants failed to maintain the  
22 original mortgage note and to make the statutorily required  
23 disclosures to plaintiff. Defendants contend that plaintiff's  
24 claim fails because she has failed to plead sufficient facts  
25 supporting a duty owed by them to plaintiff.

26 The elements of a cause of action for negligence are (1) a  
27 legal duty to use reasonable care, (2) breach of that duty, and  
28 (3) proximate [or legal] cause between the breach and (4) the

1 plaintiff's injury." Mendoza v. City of Los Angeles, 66 Cal.  
2 App. 4th 1333, 1339 (1998). "The question of the existence of a  
3 legal duty of care . . . presents a question of law which is to  
4 be determined by the courts alone." First Interstate Bank of  
5 Ariz., N.A. v. Murphy, Weir & Butler, 210 F.3d 983, 987 (9th Cir.  
6 2000). "Absent the existence of duty . . . , there can be no  
7 breach and no negligence." Nichols v. Keller, 15 Cal. App. 4th  
8 1672, 1683 (1993); Nymark v. Heart Fed. Savings & Loan Assn., 231  
9 Cal. App. 3d 1089, 1096 (Cal. App. 3d Dist. 1991) ("The existence  
10 of a duty of care owed by a defendant to a plaintiff is a  
11 prerequisite to establishing a claim for negligence.") (citations  
12 omitted).

13 "Under California law, a lender does not owe a borrower or  
14 third party any duties beyond those expressed in the loan  
15 agreement, except[] those imposed due to special circumstance."  
16 Resolution Trust Corp. v. BVS Dev., 42 F.3d 1206, 1214 (9th Cir.  
17 1994) (citing Nymark, 231 Cal. App. 3d at 1096 (1991)); see also  
18 Cataulin v. Wash. Mut. Bank, 2009 U.S. Dist. LEXIS 59708, at \*6  
19 (S.D. Cal. July 13, 2009); Spencer v. DHI Mortgage Co., 2009 U.S.  
20 Dist. LEXIS 55191, at \*8 (E.D. Cal. June 30, 2009); Mangindin v.  
21 Wash. Mut. Bank, 2009 U.S. Dist. LEXIS 51231, at \*21 (N.D. Cal.  
22 June 17, 2009). Special circumstances arise when a lender  
23 actively participates in the financed enterprise. See Nymark,  
24 231 Cal. App. 3d at 1096; Wagner v. Benson, 101 Cal. App. 3d 27,  
25 35 (1980) ("Liability to a borrower for negligence arises only  
26 when the lender 'actively participates' in the financed  
27 enterprise beyond the domain of the usual money lender."). A  
28 lender may also be secondarily liable through the actions of a

1 mortgage broker, who has a fiduciary duty to its borrower-client,  
2 if there is an agency relationship between the lender and the  
3 broker. See Plata v. Long Beach Mortg. Co., 2005 U.S. Dist.  
4 LEXIS 38807, at \*23 (N.D. Cal. Dec. 13, 2005).

5 In her complaint, plaintiff describes nothing more than an  
6 arms-length loan transaction between defendants and herself.  
7 Plaintiff also does not allege that defendant actively  
8 participated in the financed enterprise beyond the usual  
9 practices associated with the lending business. As such, under  
10 the facts pled in the complaint, defendants owe plaintiff no duty  
11 of care. Therefore, defendants' motion to dismiss plaintiff's  
12 negligence claim is GRANTED.

13 **E. RESPA**

14 Plaintiff's fourth claim for relief alleges that defendants  
15 CHL and CB violated the Real Estate Settlement Procedures Act  
16 ("RESPA") pursuant to 12 U.S.C. § 2605 et seq. by failing to  
17 correctly and accurately comply with disclosure requirements at  
18 the time of closing on the sale of the property. Plaintiff  
19 specifically alleges that defendants violated 12 U.S.C. §  
20 2605(e)(2) by failing to provide a written explanation or  
21 response to plaintiff's qualified written request ("QWR").  
22 Defendants move to dismiss plaintiff's RESPA claim because the  
23 allegations reflect that the "QWR" did not challenge the accuracy  
24 of the account or information regarding servicing of the loan and  
25 thus, do not meet the description in Section 2605(e)(1).

26 Section 2605 requires a loan servicer to provide disclosures  
27 relating to the assignment, sale, or transfer of loan servicing  
28 to a potential or actual borrower: (1) at the time of the loan

1 application, and (2) at the time of transfer. 12 U.S.C. § 2605.  
2 The loan servicer also has a duty to respond to a borrower's  
3 inquiry or "qualified written request." 12 U.S.C. § 2605(e). A  
4 qualified written request is a written correspondence that  
5 enables the servicer to identify the name and account of the  
6 borrower. 12 U.S.C. § 2605(e)(1). It also either includes a  
7 statement describing why the borrower believes that the account  
8 is in error or provides sufficient detail to the servicer  
9 regarding other information sought by the borrower. Id. The  
10 loan servicer is required to respond by making appropriate  
11 corrections to the borrower's account, if necessary and, after  
12 conducting an investigation, providing the borrower with a  
13 written clarification or explanation. 12 U.S.C. § 2605(e)(2).  
14 Pursuant to § 2605(i), "'servicing' means receiving any scheduled  
15 periodic payments from a borrower . . . and making the payments  
16 of principal and interest and such other payments with respect to  
17 the amounts received from the borrower."

18 Plaintiff alleges that on February 10, 2009, she mailed a  
19 QWR to defendant CHL, which included a demand to cancel the  
20 pending Trustee Sale and for rescission pursuant to TILA. (FAC at  
21 7:13-15.) According to the allegations in the complaint, the  
22 February 10, 2009 letter "simply disputed the validity of the  
23 loan and not its servicing." Consumer Solutions REO, LLC v.  
24 Hillery, -- F. Supp. 2d --, 2009 WL 2711264 (Aug. 26, 2009 N.D.  
25 Cal. 2009); see MorEquity, Inc. v. Naeem, 118 F. Supp. 2d 885,  
26 900-01 (N.D. Ill.2000) (noting that the "[t]he counterclaim  
27 alleges [that the request alleged] a forged deed, and  
28 irregularities with respect to the recoding of the two loans, but



1 [made] no claim with respect to improper servicing" and therefore  
2 dismissing claim pursuant to § 2605(e)). As such, plaintiff has  
3 failed to set forth facts alleging that she sent a valid and  
4 actionable QWR to defendant.

5 Accordingly, defendants' motion to dismiss plaintiff's RESPA  
6 claim is GRANTED.<sup>3</sup>

7 **F. Breach of Fiduciary Duty**

8 Plaintiff's fifth claim for relief alleges that defendant CB  
9 breached its fiduciary duties to act primarily for plaintiff's  
10 benefit by allegedly obtaining a loan with unfavorable terms,  
11 failing to disclose the negative consequences of the loan, and  
12 securing a secret profit by failing to comply with TILA, RESPA  
13 and engaging in unfair business practices. Defendants move to  
14 dismiss the claim on the basis that a lending institution does  
15 not owe a fiduciary duty to a borrower.

16 Plaintiff's claim fails for the same reason the negligence  
17 claim fails. In order to sustain a claim for breach of a  
18 fiduciary duty, "a plaintiff must demonstrate the existence of a  
19 fiduciary relationship, breach of that duty and damages."

20 Serrano v. Sec. Nat'l Mortg. Co., 2009 U.S. Dist. LEXIS 71725  
21 (S.D. Cal. Aug. 14, 2009) (citing Shopoff & Cavallo LLP v. Hyon,  
22 167 Cal. App. 4th 1489, 85 Cal. Rptr.3d 268, 285 (Cal. Ct. App.

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23  
24 <sup>3</sup> Plaintiff also asserts that defendants violated RESPA  
25 at the time of closing on the sale of the property by failing to  
26 correctly and accurately comply with disclosure requirements.  
27 However, plaintiff fails to allege any facts pertaining to which  
28 defendant(s) failed to correctly and accurately comply with  
disclosure requirements and what documents the defendant(s)  
failed to provide. In the absence of any facts supporting  
plaintiff's contention that defendants failed to comply with  
disclosure requirements, plaintiff fails to allege a cognizable  
RESPA cause of action on this basis.

1 2008). "Absent special circumstances, a loan transaction is at  
2 arms-length and there is no fiduciary relationship between the  
3 borrower and lender." Rangel v. DHI Mortgage Co., Ltd., 2009  
4 U.S. Dist. LEXIS 65674, at \*8 (E.D. Cal. July 20, 2009); see also  
5 e.g. Tasaranta v. Homecomings Fin., 2009 U.S. Dist. LEXIS 87372,  
6 at \*15 (S.D. Cal. Sept. 21, 2009); Brittain v. IndyMac Bank, FSB,  
7 2009 U.S. Dist. LEXIS 84863, at \* 14 (N.D. Cal. Sept. 16, 2009);  
8 Dinsmore-Thomas v. Ameriprise Fin., Inc., 2009 U.S. Dist. LEXIS  
9 68882, at \*29 (C.D. Cal. Aug. 3, 2009); Fox & Carskadon Financial  
10 Corp. v. San Francisco Fed. Sav. & Loan Assn. 52 Cal. App. 3d  
11 484, 488, 489 (1st Dist. 1975); Bradler v. Craiq, 274 Cal. App.  
12 2d 466, 473, 476 (2d Dist. 1969).

13 Because, as set forth above, plaintiff has failed to allege  
14 any facts that would give rise to a fiduciary relationship  
15 between defendants and herself, defendants' motion to dismiss  
16 plaintiff's claim for breach of fiduciary duty is GRANTED.

17 **G. Fraud**

18 Plaintiff's sixth claim for relief alleges that all  
19 defendants committed fraud by intentionally and falsely  
20 representing to plaintiff that she qualified for a loan based  
21 upon her credit score alone and that defendants would refinance  
22 to a lower interest rate and payment in one year. Plaintiff  
23 claims that she relied upon such representations in purchasing  
24 the property, but that on or about June 10, 2008, defendants  
25 caused a Notice of Default to be issued and recorded and executed  
26 a foreclosure. Defendants move to dismiss plaintiff's fraud  
27 claim for failure to satisfy Rule 9(b)'s heightened pleading  
28 requirements.

1 Under California law, the elements of common law fraud are  
2 "misrepresentation, knowledge of its falsity, intent to defraud,  
3 justifiable reliance, and resulting damages." Gil v. Bank of  
4 Am., Nat'l Ass'n, 138 Cal. App. 4th 1371, 1381 (2006). A court  
5 may dismiss a claim grounded in fraud when its allegations fail  
6 to satisfy Rule 9(b)'s heightened pleading requirements. Vess v.  
7 Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107 (9th Cir. 2003).  
8 Therefore, plaintiff "must state with particularity the  
9 circumstances constituting fraud." Fed. R. Civ. P. 9(b). In  
10 other words, the plaintiff must include "the who, what, when,  
11 where, and how" of the fraud. Id. at 1106 (citations omitted).  
12 "The plaintiff must set forth what is false or misleading about a  
13 statement, and why it is false." Decker v. Glenfed, Inc., 42  
14 F.3d 1541, 1548 (9th Cir. 1994). The purpose of Rule 9(b) is to  
15 ensure that defendants accused of the conduct specified have  
16 adequate notice of what they are alleged to have done, so that  
17 they may defend against the accusations. Concha v. London, 62  
18 F.3d 1493, 1502 (9th Cir. 1995). "Without such specificity,  
19 defendants in these cases would be put to an unfair advantage,  
20 since at the early stages of the proceedings they could do no  
21 more than generally deny any wrongdoing." Id. (citing Semegen v.  
22 Weidner, 780 F.2d 727, 731 (9th Cir. 1985)).

23 Furthermore, "Rule 9(b) does not allow a complaint to merely  
24 lump multiple defendants together but require[s] plaintiffs to  
25 differentiate their allegations when suing more than one  
26 defendant . . . and inform each defendant separately of the  
27 allegations surrounding his alleged participation in the fraud."  
28 Swartz v. KPMG LLP, 476 F.3d 756, 765-66 (9th Cir. 2007). When

1 asserting a fraud claim against a corporation, "the plaintiff's  
2 burden . . . is even greater. . . . The plaintiff must 'allege  
3 the names of the persons who made the allegedly fraudulent  
4 representations, their authority to speak, to whom they spoke,  
5 what they said or wrote, and when it was said or written.'" Lazar v. Superior Court, 12 Cal. 4th 631, 645 (1996) (quoting  
6 Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal. App. 4th 153,  
7 157 (1991)); see also Edejer, 2009 U.S. Dist. LEXIS 52900 at \*36  
8 (dismissing the fraud claim where the plaintiff did not allege  
9 any misrepresentation or false statements made by the defendants;  
10 did not allege the names of the persons who made the allegedly  
11 fraudulent representations and their authority to speak; and did  
12 not allege with sufficient particularity or clarity what was  
13 false or misleading about the statements); Mohammad Akhavein v.  
14 Argent Mortgage Co., 2009 U.S. Dist. LEXIS 61796, at \*10 (N.D.  
15 Cal. July 17, 2009); Spencer v. DHI Mortgage Co., 2009 U.S. Dist.  
16 LEXIS 55191, at \*18 (E.D. Cal. June 30, 2009) (dismissing the  
17 plaintiff's fraud claim without leave to amend because it failed  
18 to satisfy Rule 9(b)'s "'who, what, when, where and how'  
19 requirements" and was so deficient as to "suggest no potential  
20 improvement from an attempt to amend").

21  
22 In this case, plaintiff fails to satisfy the heightened  
23 pleading requirements of Rule 9(b) with respect to her  
24 allegations against defendants. Plaintiff fails to allege what  
25 false statements were made by CHL or MERS. Assuming plaintiff  
26 alleges that Delgado made the allegedly false statements on  
27 behalf of CB, plaintiff fails to allege any facts relating to  
28 Delgado's authority to make such representations on its behalf.

1 Nor did plaintiff allege with sufficient particularity or clarity  
2 what is false or misleading about the statement or why it is  
3 false. Accordingly, defendant motion to dismiss plaintiff's  
4 sixth claim for relief is GRANTED.

5 **H. Breach Of Contract**

6 Plaintiff's eighth claim for relief alleges breach of  
7 contract against defendants Delgado and CB. Defendants argue  
8 that plaintiff's claims must be dismissed for failure to state a  
9 claim upon which relief may be granted.

10 In California, "[a] cause of action for breach of contract  
11 requires proof of the following elements: (1) existence of the  
12 contract; (2) plaintiff's performance or excuse for  
13 nonperformance; (3) defendant's breach; and (4) damages to  
14 plaintiff as a result of the breach." CDF Firefighters v.  
15 Maldonado, 158 Cal. App. 4th 1226, 1239 (2008). "Resolution of  
16 contractual claims on a motion to dismiss is proper if the terms  
17 of the contract are unambiguous." Monaco v. Bear Stearns  
18 Residential Mortgage Corp., -- F. Supp. 2d --, No. CV 07-05607  
19 SJO (CTX), 2008 WL 867727, at \*5 (C.D. Cal. 2008). "A contract  
20 provision will be considered ambiguous when it is capable of two  
21 or more reasonable interpretations." Id. (citing Bay Cities  
22 Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co., 855 P.2d 1263,  
23 1271 (Cal. 1993)). "[T]he language of a contract should be  
24 interpreted most strongly against the party who caused the  
25 uncertainty to exist." Cal. Civ. Code § 1654.

26 With respect to an oral contract to restructure the terms of  
27 a loan, the agreement must embody definite terms, capable of  
28 enforcement, in order to constitute a legal contract. Price v.

1 Wells Fargo Bank, 213 Cal. App. 3d 465, 483 (1st Dist. 1989)  
2 (noting that "the terms of a restructuring agreement obviously  
3 may vary as widely as the terms of the original agreement").  
4 "Preliminary negotiations or an agreement for future negotiations  
5 are not the functional equivalent of a valid, subsisting  
6 agreement." Id. (quoting Kruse v. Bank of Am., 202 Cal. App. 3d  
7 38, 59 (1st Dist. 1988)). Moreover, the mere "understanding"  
8 that a loan or mortgage would be restructured is insufficient to  
9 state a claim for breach of contract. Id.

10 In this case, plaintiff merely alleges that defendant  
11 promised to refinance plaintiff's loan to a lower rate after a  
12 year or when the loan became unaffordable. Plaintiff contends  
13 that defendant CB breached this contract by failing to refinance  
14 the loan. Because plaintiff's allegations fail to set forth any  
15 facts alleging a valid, enforceable contract under California  
16 law, she has failed to state a viable claim for breach of such a  
17 contract. Accordingly, defendants' motion to dismiss plaintiff's  
18 eighth claim for relief is GRANTED.

19 **I. Wrongful Foreclosure**

20 Plaintiff's tenth cause of action alleges a wrongful  
21 foreclosure claim against defendants CHL and Recontrust.  
22 Defendants contend that plaintiff's claim must fail because it is  
23 based solely upon defendants' lack of possession of the note.

24 Section 3301 of the California Commercial Code defines a  
25 "[p]erson entitled to enforce" as "(a) the holder of the  
26 instrument, (b) a nonholder in possession of the instrument who  
27 has the rights of a holder, or (c) a person not in possession of  
28 the instrument who is entitled to enforce the instrument ..."

1 However, possession of the original promissory note is not  
2 required to permit foreclosure. See e.g. Rangel v. DHI Mortg.  
3 Co., Ltd., U.S. Dist. LEXIS 65674, at \*24 (E.D. Cal. July 20,  
4 2009); Pantoja v. Countrywide Home Loans, Inc., 2009 U.S. Dist.  
5 LEXIS 70856, at \*14 (N.D. Cal. July, 9 2009); Calderon v. Endres,  
6 2009 U.S. Dist. LEXIS 57936, at \*8 (S.D. Cal. July 7, 2009). A  
7 mere allegation that a trustee or lender does not have the  
8 original note or has not received it is insufficient to render  
9 the foreclosure proceeding invalid. See Neal v. Juarez, 2007 U.S.  
10 Dist. LEXIS 98068, WL 2140640, \*8 (S.D. Cal. July, 23 2007).

11 In her complaint, plaintiff merely alleges that defendants  
12 are not in possession of the note and are therefore not entitled  
13 to enforce the security interest on the property. (FAC 7:17-19.)  
14 The allegation fails to support plaintiff's claim as a matter of  
15 law. Plaintiff fails to set forth any facts to support her claim  
16 that defendants were not entitled to enforce the security  
17 interest pursuant to § 3301. Accordingly, defendants' motion to  
18 dismiss the tenth claim for relief for wrongful foreclosure is  
19 GRANTED.<sup>4</sup>

20 /////

21 /////

22 \_\_\_\_\_  
23 <sup>4</sup> Plaintiff also asserts that defendants failed to record  
24 and give Notice of Default as required by California Civil Code §  
25 2923.5(b). Section 2923.5(b) provides that a declaration shall  
26 be included in a notice of default stating that "the mortgagee,  
27 beneficiary, or authorized agent . . . has contacted the borrower  
28 . . . or tried with due diligence to contact the borrower."  
However, this section did not become "effective" until July 8,  
2008, a month after the alleged default. Furthermore, aside from  
the conclusory allegations that defendants failed to comply with  
statutory notice requirements, plaintiff alleges no facts to  
support this claim. Accordingly, plaintiff has failed state a  
claim pursuant to this section.

1 **J. Breach of Implied Covenant of Good Faith and Fair Dealing**

2 Additionally, plaintiff's ninth claim for relief asserts  
3 that all defendants breached the implied covenant of good faith  
4 and fair dealing. Plaintiff specifically alleges that defendants  
5 collectively breached the implied covenant of good faith when  
6 they: (1) failed to put as much consideration to plaintiff's  
7 interest as their own interests; (2) initiated foreclosure  
8 proceedings on the property despite not having the right to do so  
9 and failure to comply with California law; (3) failed to give  
10 proper notice before commencing foreclosure; (4) sent deceptive  
11 letters to plaintiff advising plaintiff of her ability to short  
12 sale her property when defendant had no intention to act. (FAC  
13 at 19:7-12.)

14 "The prerequisite for any action for breach of the implied  
15 covenant of good faith and fair dealing is the existence of a  
16 contractual relationship between the parties." Smith v. City &  
17 County of San Francisco, 225 Cal. App. 3d 38, 49 (1990). "To  
18 establish a breach of an implied covenant of good faith and fair  
19 dealing, a plaintiff must establish the existence of a  
20 contractual obligation, along with conduct that frustrates the  
21 other party's rights to benefit from the contract." Fortaleza v.  
22 PNC Fin. Servs. Group, Inc., 2009 U.S. Dist. LEXIS 64624, at  
23 \*\*15-16 (N.D. Cal. July 27, 2009). Furthermore, "a breach of the  
24 implied covenant of good faith and fair dealing involves  
25 something beyond breach of the contractual duty itself." Careau  
26 & Co. v. Security Pacific Business Credit, Inc., 222 Cal. App. 3d  
27 1371, 1394 (1990). The "implied covenant of good faith and fair  
28 dealing is limited to assuring compliance with the express terms



1 of the contract, and cannot be extended to create obligations not  
2 contemplated by the contract." Pasadena Live, LLC v. City of  
3 Pasadena, 114 Cal. App. 4th 1089, 1093-1094 (2004). "[T]he  
4 implied covenant will only be recognized to further the  
5 contract's purpose; it will not be read into a contract to  
6 prohibit a party from doing that which is expressly permitted by  
7 the agreement itself." Wolf v. Walt Disney Pictures and  
8 Television, 162 Cal. App. 4th 1107, 1120 (2008).

9 Plaintiff contends that this claim is a derivative of her  
10 breach of contract claim. However, while plaintiff's breach of  
11 contract claim is alleged against only defendants CB and Delgado,  
12 plaintiff alleges this claim against all defendants. It is  
13 unclear from the allegations in the complaint what contract  
14 plaintiff is referring to and which defendant was a party to  
15 those specific contracts. Further, to the extent plaintiff's  
16 claims are based upon the same conduct giving rise to her  
17 wrongful foreclosure claims, as set forth above, plaintiff has  
18 failed to set forth sufficient facts to state a claim. Finally,  
19 plaintiff's allegation regarding the defendants sending deceptive  
20 letters regarding her ability to short sale her property is not  
21 supported by any factual allegations in the FAC and bears no  
22 relation to any contract described therein.

23 Accordingly, defendants' motion to dismiss plaintiff's ninth  
24 claim for relief for breach of implied covenant of good faith and  
25 fair dealing is GRANTED.

26 /////

27 /////

28 /////

1 **K. Violations of UCL**

2 Finally, plaintiff's seventh claim alleges that all  
3 defendants violated California Business & Professions Code §  
4 17200 by participating in unfair and fraudulent business  
5 practices. Defendant argues that plaintiff fails to state a  
6 claim as she merely relies upon a conclusory assertion of  
7 unlawful, unfair, and fraudulent business practices and bases her  
8 claims upon the foregoing violations, which fail to state a  
9 claim.

10 The Unfair Competition Law ("UCL"), California Business and  
11 Professions Code §§ 17200, *et seq.*, forbids acts of unfair  
12 competition, which includes "any unlawful, unfair or fraudulent  
13 business act or practice." Cal. Bus. & Prof. Code § 17200. "The  
14 UCL is broad in scope, embracing anything that can properly be  
15 called a business practice and that at the same time is forbidden  
16 by law." People ex rel. Gallegos v. Pacific Lumber Co., 158 Cal.  
17 App. 4th 950, 959 (2008) (internal citations omitted). Section  
18 17200 "'borrows' violations of other laws and treats" them as  
19 unlawful business practices "independently actionable under  
20 section 17200." Farmers Ins. Exch. V. Superior court, 2 Cal. 4th  
21 377, 383 (1992). Violation of almost any federal, state, or  
22 local law may serve as the basis for a[n] [unfair competition]  
23 claim." Plascencia v. Lending 1st Mortg., 583 F. Supp. d 1090,  
24 1098 (9th Cir. 2008) (citing Suanders v. Superior Court, 27 Cal.  
25 App. 4th 832, 838-39 (1994)); see Hauk v. JP Morgan Chase Bank  
26 United States, 552 F.3d 1114 (9th Cir. 2009) ("California's UCL  
27 has a broad scope that allows for 'violations of other laws to be  
28 treated as unfair competition that is independently actionable'

1 while also 'sweep[ing] within its scope acts and practices not  
2 specifically proscribed by any other law.").


3 Because plaintiff's UCL claim is predicated on facts  
4 supporting plaintiff's other claims, all of which the court has  
5 dismissed, defendants' motion to dismiss plaintiff's seventh  
6 cause of action for violations of California Business &  
7 Professions Code § 17200 is GRANTED.

8 **CONCLUSION**

9 For the foregoing reasons, defendants' motion to dismiss is  
10 GRANTED. Plaintiff is granted fifteen (15) days from the date of  
11 this order to file a second amended complaint in accordance with  
12 this order. Defendants are granted thirty (30) days from  
13 the date of service of plaintiff's second amended complaint to  
14 file a response thereto.

15 IT IS SO ORDERED.

16 DATED: October 21, 2009

  
FRANK C. DAMRELL, JR.  
UNITED STATES DISTRICT JUDGE