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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ELENA YULAEVA,

NO. CIV. S-09-1504 LKK/KJM

Plaintiff,

v.

O R D E R

GREENPOINT MORTGAGE FUNDING,  
INC.; MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC.;  
EMC MORTGAGE CORPORATION; and  
DOES 1 through 10, inclusive,

Defendants.

\_\_\_\_\_ /

Plaintiff in this suit brings various claims arising out of foreclosure on her mortgage. Plaintiff's first amended complaint ("FAC") names three defendants: Mortgage Electronic Registration Systems Inc. ("MERS"), EMC Mortgage Corporation ("EMC"), and Greenpoint Mortgage Funding, Inc. ("Greenpoint"). Greenpoint moves to dismiss all claims against it, while MERS and EMC, in a joint motion, move to dismiss the majority of claims against them. The court resolves both motions on the papers. For the reasons stated below, the motions to dismiss are granted in part.

1  
2 **I. BACKGROUND**

3 **A. Procedural History**

4 These motions concern plaintiff's FAC. Plaintiff's prior  
5 complaint was filed in state court and removed by MERS and EMC.  
6 MERS and EMC then moved to dismiss the initial complaint. The  
7 court denied that motion as to some claims and dismissed the  
8 remaining claims without prejudice. Order of Sept. 3, 2009, 2009  
9 WL 2880393, 2009 U.S. Dist. LEXIS 79094. Greenpoint had not stated  
10 an appearance at that time. Plaintiff then filed her FAC. The FAC  
11 abandons some claims found to be insufficient (the rescission,  
12 conspiracy, and Cal. Civ. Code section 2923.5 causes of action),  
13 attempts to cure deficiencies in others (TILA, RESPA, and  
14 misrepresentation), re-alleges the remaining claims, and adds a  
15 claim for wrongful foreclosure.

16 All defendants now move to dismiss the FAC. EMC and MERS move  
17 to dismiss only those claims previously dismissed, together with  
18 the newly added wrongful foreclosure claim. Greenpoint, which was  
19 not party to the prior motion, moves to dismiss all claims against  
20 it.

21 **B. Plaintiff's Initial Loan<sup>1</sup>**

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22 <sup>1</sup> MERS requests that this court take judicial notice of  
23 documents titled "grant deed", "deed of trust", and "notice of  
24 default and election to sell under deed of trust." These documents  
25 are public records, recorded in the Sacramento County Recorder's  
26 Office, and properly subject to judicial notice. Fed. R. Evid.  
210(d). The court may take judicial notice of these documents  
without converting MERS's motion to dismiss into a motion for  
summary judgment. Plaintiff has not objected to the request for  
judicial notice. Accordingly, the court GRANTS MERS's request for  
judicial notice.

1           In October 2005, plaintiff obtained a home loan from  
2 defendant Greenpoint. FAC ¶ 11. In entering the loan transaction  
3 plaintiff purports to have relied upon Greenpoint's promises that  
4 her payments and interest rate would remain fixed for the first 360  
5 months of the loan. FAC ¶ 13. At the time of loan origination  
6 plaintiff believed that she would be given an opportunity to  
7 refinance the loan before it reset. FAC ¶ 15.

8           The loan was finalized on October 20, 2005. FAC ¶ 11. The  
9 loan's terms were memorialized with a promissory note, which was  
10 secured by a deed of trust. MERS's RFJN Ex. 2; see also Order of  
11 Sept. 3, 2009 at 3 (summarizing California law regarding deeds of  
12 trust). The deed of trust named defendant Greenpoint as lender.  
13 MERS's RFJN Ex. 2. MERS is listed as the beneficiary, acting  
14 solely as nominee for the lender. Id. After the loan was made and  
15 the deed of trust was recorded, defendant EMC became the servicer  
16 of the loan. FAC ¶ 4.

17           Plaintiff could not review any loan documents prior to  
18 closing because she was not given copies of these documents  
19 beforehand, and while some documents were present at closing,  
20 plaintiff was not given time to read them at that time. FAC ¶¶ 21,  
21 22. Plaintiff speaks English as a second language and claims that  
22 her limited English proficiency made it difficult to understand the  
23 documents and the terms of the loan. FAC ¶ 22. "Much later" than  
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25           Aside from the judicially noticed documents, these facts are  
26 taken from the FAC's allegations, which are taken as true for the  
purpose of the pending motion only.

1 the October 20, 2005 closing, plaintiff examined the loan  
2 documents. FAC ¶ 26. Only at that time did she discover that  
3 defendants misstated her income on the application. Id.

4 **C. Subsequent Events**

5 Plaintiff alleges that absent parties have acquired an  
6 interest in the loan, but that the nature of these interests and  
7 details of the acquisition are unclear. Plaintiff alleges that the  
8 loan has been securitized, and that the effect of this is that “the  
9 mortgage is currently owned by a number of unknown investors.” FAC  
10 ¶ 27. Plaintiff alleges that she learned of these investors when  
11 EMC informed plaintiff that EMC did “not have the power to enter  
12 into a loan modification without investors’ approval.” FAC ¶ 14.<sup>2</sup>

13 In September of 2008, the loan’s fixed payment period expired,  
14 and plaintiff’s monthly payments increased from \$1,561.11 to  
15 \$2871.50.<sup>3</sup> FAC ¶ 13, Pl.’s RFJN Ex. 1. Plaintiff was unable to  
16 make the higher payments. Plaintiff states that until this  
17 adjustment, she did not believe that she had any reason to worry  
18 about her loan. FAC ¶ 23.

19 On February 11, 2009, Aztec Foreclosure Corporation (“Aztec”),  
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21 <sup>2</sup> Plaintiff alleges that this communication occurred in mid-  
22 September 2009. FAC ¶ 14. It appears that plaintiff means  
23 September 2008, in that plaintiff alleges that she followed up on  
24 this communication in November 2008, and the FAC was filed on  
25 September 23, 2009.

26 <sup>3</sup> Again, the FAC’s allegations are inconsistent, alleging that  
the loan adjusted in September of 2008, FAC ¶ 13, and alternatively  
in September of 2009, FAC ¶ 23. The court adopts the earlier date,  
as this is the only one consistent with the complaint’s remaining  
allegations, and therefore the interpretation most favorable to the  
plaintiff.

1 purportedly acting as agent for the beneficiary under the deed of  
2 trust, filed a notice of default as to the mortgage. MERS's RFJN  
3 Ex. 4. On February 26, 2009, MERS substituted Aztec as trustee on  
4 the deed of trust. MERS's RFJN Ex. 6.<sup>4</sup> Plaintiff sent defendant  
5 EMC a purported qualified written request ("QWR") on April 10,  
6 2009. FAC ¶ 24. On May 13, 2009, Aztec issued a notice of trustee's  
7 sale, indicating that the mortgaged property would be sold at  
8 auction on June 4, 2009. MERS's RFJN Ex. B. This notice was  
9 recorded on May 18 2009. Id.

10 Concurrent with these proceedings, plaintiff filed the initial  
11 complaint in this lawsuit in state court on April 30, 2009. EMC  
12 and MERS removed the suit on June 1, 2009. EMC and MERS then moved  
13 for dismissal. As noted above, the court granted that motion in  
14 part on September 3, 2009.

## 15 II. STANDARD

16 A Fed. R. Civ. P. 12(b)(6) motion challenges a complaint's  
17 compliance with the pleading requirements provided by the Federal  
18 Rules. In general, these requirements are provided by Fed. R. Civ.  
19 P. 8, although claims that "sound[] in" fraud or mistake must meet  
20 the requirements provided by Fed. R. Civ. P. 9(b). Vess v.  
21 Ciba-Geigy Corp., 317 F.3d 1097, 1103-04 (9th Cir. 2003).

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24 <sup>4</sup> While plaintiff does not specifically rely on this series  
25 of events, it appears that Aztec was a stranger to the transaction  
26 at the time it filed the notice of default, thus possibly putting  
the propriety of the entire foreclosure in doubt. The problem is  
discussed in some detail, infra. See footnote 19.

1 **A. Dismissal of Claims Governed by Fed. R. Civ. P. 8**

2 Under Federal Rule of Civil Procedure 8(a)(2), a pleading must  
3 contain a "short and plain statement of the claim showing that the  
4 pleader is entitled to relief." The complaint must give defendant  
5 "fair notice of what the claim is and the grounds upon which it  
6 rests." Twombly, 550 U.S. at 555 (internal quotation and  
7 modification omitted).

8 To meet this requirement, the complaint must be supported by  
9 factual allegations. Iqbal, 129 S. Ct. at 1950. "While legal  
10 conclusions can provide the framework of a complaint," neither  
11 legal conclusions nor conclusory statements are themselves  
12 sufficient, and such statements are not entitled to a presumption  
13 of truth. Id. at 1949-50. Iqbal and Twombly therefore prescribe  
14 a two step process for evaluation of motions to dismiss. The court  
15 first identifies the non-conclusory factual allegations, and the  
16 court then determines whether these allegations, taken as true and  
17 construed in the light most favorable to the plaintiff, "plausibly  
18 give rise to an entitlement to relief." Id.; Erickson v. Pardus,  
19 551 U.S. 89 (2007).

20 "Plausibility," as it is used in Twombly and Iqbal, does not  
21 refer to the likelihood that a pleader will succeed in proving the  
22 allegations. Instead, it refers to whether the non-conclusory  
23 factual allegations, when assumed to be true, "allow[] the court  
24 to draw the reasonable inference that the defendant is liable for  
25 the misconduct alleged." Iqbal, 129 S.Ct. at 1949. "The  
26 plausibility standard is not akin to a 'probability requirement,'

1 but it asks for more than a sheer possibility that a defendant has  
2 acted unlawfully." Id. (quoting Twombly, 550 U.S. at 557). A  
3 complaint may fail to show a right to relief either by lacking a  
4 cognizable legal theory or by lacking sufficient facts alleged  
5 under a cognizable legal theory. Balistreri v. Pacifica Police  
6 Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

7 **B. Dismissal of Claims Governed by Fed. R. Civ. P. 9(b)**

8 A Rule 12(b)(6) motion to dismiss may also challenge a  
9 complaint's compliance with Fed. R. Civ. P. 9(b). See Vess, 317  
10 F.3d at 1107. This rule provides that "In alleging fraud or  
11 mistake, a party must state with particularity the circumstances  
12 constituting fraud or mistake. Malice, intent, knowledge, and  
13 other conditions of a person's mind may be alleged generally."  
14 These circumstances include the "time, place, and specific content  
15 of the false representations as well as the identities of the  
16 parties to the misrepresentations." Swartz v. KPMG LLP, 476 F.3d  
17 756, 764 (9th Cir. 2007) (quoting Edwards v. Marin Park, Inc., 356  
18 F.3d 1058, 1066 (9th Cir. 2004)). "In the context of a fraud suit  
19 involving multiple defendants, a plaintiff must, at a minimum,  
20 'identif[y] the role of [each] defendant[] in the alleged  
21 fraudulent scheme.'" Id. at 765 (quoting Moore v. Kayport Package  
22 Express, 885 F.2d 531, 541 (9th Cir. 1989)). Claims subject to  
23 Rule 9(b) must also satisfy the ordinary requirements of Rule 8.

24 **III. ANALYSIS**

25 The FAC presents two federal claims: a claim under the Truth  
26 in Lending Act ("TILA") against EMC and Greenpoint and a claim

1 under the Real Estate Settlement Procedures Act ("RESPA") against  
2 all defendants. The court denies the motion to dismiss in part as  
3 to these claims. Because federal claims remain, the court  
4 continues to exercise supplemental jurisdiction over the eight  
5 state law claims pursuant to 28 U.S.C. § 1367.

6 **A. TILA**

7 Plaintiff's third claim seeks civil damages from Greenpoint  
8 and EMC under TILA. Both of these defendants argue that this claim  
9 is barred by the applicable one year statute of limitations.<sup>5</sup> The  
10 court concludes that the FAC reveals a possible entitlement to  
11 equitable estoppel as to only some bases of the TILA claim. The  
12 motions to dismiss are therefore granted in part and denied in part  
13 in this regard.

14 Before reaching the limitations question, the court begins  
15 with the allegations underlying the TILA claim. First, plaintiff  
16 alleges that defendants lowered their underwriting standards and  
17 issued the loan without regard for plaintiff's ability to repay it.  
18 FAC ¶¶ 47, 48. TILA prohibits creditors from adopting "a pattern  
19 or practice of extending credit to consumers under [covered]  
20 mortgages . . . based on the consumer's collateral without regard  
21 to the consumer's repayment ability, including the consumer's  
22 current and expected income, current obligations, and employment."

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24 <sup>5</sup> EMC further argues that it is not liable under TILA because  
25 EMC is only a loan servicer and not an assignee of the loan. The  
26 court rejected this argument in the September 3, 2009 order, and  
EMC has not offered any new argument here. Order of Sept. 3, 2009  
at 29-30.



1 15 U.S.C. § 1639(h). Read liberally, plaintiff has alleged a  
2 violation of this section. Second, plaintiff alleges that  
3 defendants failed to make timely disclosures regarding "the  
4 calculation of interest prior and after [the loan's] adjustment."  
5 FAC ¶ 46. TILA mandates these disclosures. 15 U.S.C. §§  
6 1639(a)(2)(A)-(B). Plaintiff's remaining allegations are that "the  
7 purchase price of the property and the loan amount were based on  
8 the inflated appraisal, not on the real value of the [p]remises"  
9 and that defendants "failed to provide [p]laintiff with information  
10 with respect to reasonable alternatives and/or more conventional  
11 loan terms." FAC ¶ 47. TILA does not prohibit this conduct.  
12 Although defendants have not moved for dismissal of the TILA claim  
13 on this ground, "[a] trial court may dismiss a claim sua sponte  
14 under Fed. R. Civ. P. 12(b)(6) [, and] [s]uch a dismissal may be  
15 made without notice where the claimant cannot possibly win relief."  
16 Omar v. Sea-Land Service, Inc., 813 F.2d 986, 991 (9th Cir. 1987)  
17 (citing Wong v. Bell, 642 F.2d 359, 361-62 (9th Cir. 1981)); see  
18 also Lee v. City of Los Angeles, 250 F.3d 668, 683 (9th Cir. 2001).  
19 Here, it is appropriate to first address whether facts actually  
20 support a claim before addressing whether inability to discover  
21 those facts entitles plaintiff to tolling or estoppel with respect  
22 to that claim.<sup>6</sup> Because this issue was not discussed in the prior

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24 <sup>6</sup> To clarify, the court addresses this ground for dismissal  
25 sua sponte because the question of whether plaintiff has stated a  
26 claim facilitates the equitable tolling and estoppel analyses, and  
the Ninth Circuit has instructed the courts to engage in the latter  
analyses regardless of whether the plaintiff invokes these  
doctrines. Cervantes v. City of San Diego, 5 F.3d 1273, 1277 (9th

1 order, dismissal of these allegations is without prejudice.  
2 Plaintiff's FAC states two factual bases for the TILA claim: that  
3 (1) defendants failed to make initial timely disclosures under 15  
4 U.S.C. §§ 1639(a)-(b), and (2) issued the loan without regard for  
5 plaintiff's ability to repay it under 15 U.S.C. § 1639(h).

6 Both factual bases were complete at the time the loan closed,  
7 on or around October 20, 2005. FAC ¶ 11. TILA provides a one-year  
8 statute of limitations for claims for civil damages. 15 U.S.C. §  
9 1640(e). The TILA limitations period began to run at that time,  
10 King v. California, 784 F.2d 910, 914 (9th Cir. 1986), and normally  
11 would have expired in October of 2006. Plaintiff filed her claim  
12 roughly thirty months later, on April 30, 2009.

13 Section 1640(e)'s limitations period may be equitably tolled,  
14 King, 784 F.2d at 915, and equitably estopped, Ayala v. World Sav.  
15 Bank, FSB, 616 F. Supp. 2d 1007 (C.D. Cal. 2009). The court must  
16 consider both of these doctrines in evaluation of a motion to  
17 dismiss based on a statute of limitations grounds, and such a  
18 motion must be denied if the complaint "adequately alleges facts  
19 showing the potential applicability" of either doctrine. Cervantes

20 \_\_\_\_\_  
21 Cir. 1993). Absent such a circumstance, the court typically  
22 confines its analysis to the issues raised by the movant. See,  
23 e.g., post section III(E) n.21 (declining to address sua sponte  
24 whether the Rosenthal Act and Federal Fair Debt Collection  
25 Practices Act prohibit defendants' alleged conduct). This point  
26 bears repeating in the context of the recent mortgage cases in this  
district, where the quality of briefing indicates that the quantity  
of cases has overwhelmed the relevant segments of the plaintiff and  
defense bars. To summarize, although the court *may* dismiss claims  
sua sponte, in general, the court's silence on a potential weakness  
in a claim should not be taken as a tacit endorsement of the  
claim's merits.

1 v. City of San Diego, 5 F.3d 1273, 1277 (9th Cir. 1993); see also  
2 Lien Huynh v. Chase Manhattan Bank, 465 F.3d 992, 1003-04 (9th Cir.  
3 2006), Supermail Cargo, Inc. v. United States, 68 F.3d 1204, 1206  
4 (9th Cir. 1995). Although the FAC invokes only equitable tolling,  
5 the court must consider both tolling and estoppel if they are  
6 supported by the facts alleged. Cervantes, 5 F.3d at 1277. More  
7 generally, because the statute of limitations is an affirmative  
8 defense, resolution of a motion predicated on this defense requires  
9 the court to look beyond the complaint.<sup>7</sup>

10 "Equitable estoppel focuses primarily on the actions taken by  
11 the defendant in preventing a plaintiff from filing suit, whereas  
12 equitable tolling focuses on the plaintiff's excusable ignorance  
13 of the limitations period and on lack of prejudice to the  
14 defendant." Santa Maria v. Pacific Bell, 202 F.3d 1170, 1176 (9th  
15 Cir. 2000), overruled on other grounds by Socop-Gonzalez v. INS,  
16 272 F.3d 1176, 1196 (9th Cir. 2001) (en banc).<sup>8</sup> To benefit from  
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18 <sup>7</sup> The rules recently announced in Twombly and Iqbal appear not  
19 to abrogate the above cases. See Champlaie v. BAC Home Loans  
20 Servicing, LP, No. CIV. S-09-1316, 2009 U.S. Dist. LEXIS 102285,  
21 \*50-51 (E.D. Cal. Oct. 22, 2009) (citing Plascencia v. Lending 1st  
Mortg., 583 F. Supp. 2d 1090, 1098 (N.D. Cal. 2008), Nava v.  
Virtualbank, No. 2:08-CV-00069, 2008 U.S. Dist. LEXIS 72819 (E.D.  
22 Cal. July 16, 2008)).

23 <sup>8</sup> Santa Maria held in part that when a plaintiff showed facts  
24 that would entitle her to equitable tolling or equitable estoppel  
25 for a portion of the limitations period, the plaintiff nonetheless  
26 needed to show that the remainder of the limitations period was  
inadequate to enable the plaintiff to file. 202 F.3d at 1179.  
Socop-Gonzalez rejected this approach, instead holding that tolling  
stopped the clock, allowing the plaintiff the benefit of the full  
limitations period once the impediment to suit has been resolved.  
272 F.3d at 1195-96.

1 equitable tolling, plaintiff must show that "it would be unfair or  
2 unjust to allow the statute of limitations to act as a bar" to a  
3 claim. Lien Huynh, 465 F.3d at 1004. Such unfairness exists where  
4 "extraordinary circumstances beyond [plaintiff's] control made it  
5 impossible to file the claims on time," Seattle Audubon Soc'y v.  
6 Robertson, 931 F.2d 590, 595 (9th Cir. 1991) or where "despite all  
7 due diligence, a plaintiff is unable to obtain vital information  
8 bearing on the existence of his claim," Santa Maria, 202 F.3d at  
9 1178. Although equitable estoppel similarly defies rigid tests,  
10 the Ninth Circuit has held that a plaintiff may show (1) actual and  
11 reasonable reliance on defendant's conduct or representations, (2)  
12 improper purpose, or knowledge of potential for deception, on the  
13 part of defendant, and (3) satisfaction of the purposes underlying  
14 the limitations period. Santa Maria, 202 F.3d at 1176. These  
15 doctrines partially overlap. For example, a plaintiff might be  
16 unable to discover the facts despite due diligence because those  
17 facts are concealed by the defendant. Id. at 1177 ("Equitable  
18 estoppel may apply against an employer when the employer  
19 misrepresents or conceals facts necessary to support a  
20 discrimination charge.").

21 The first fact potentially excusing plaintiff's delay in  
22 filing suit was defendants' failure to disclose the loan's interest  
23 rate.<sup>9</sup> Equitable estoppel requires wrongful conduct beyond the

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25 <sup>9</sup> The other alleged initial omissions, concerning the  
26 appraisal used to value the house and the availability of other  
forms of loans, appear to have no bearing on plaintiff's ability  
to bring the claims here.

1 wrongdoing upon which the plaintiff's claim is based. Lukovsky v.  
2 City & County of San Francisco, 535 F.3d 1044, 1052 (9th Cir. 2008)  
3 (quoting Guerrero v. Gates, 442 F.3d 697, 706 (9th Cir. 2006)),  
4 Santa Maria, 202 F.3d at 1177 (citing Cada v. Baxter Healthcare  
5 Corp., 920 F.2d 446, 450-51 (7th Cir. 1990)). That is, the failure  
6 to make a disclosure cannot be both the basis for a TILA claim and  
7 the ground for estopping assertion of the statute of limitations  
8 with respect to the same TILA claim. The alleged violation of  
9 section 1639(h), however, concerns lending without regard to  
10 plaintiff's ability to repay rather than any disclosure  
11 requirement. As to this theory of liability, the conduct  
12 potentially giving rise to estoppel is separate from the conduct  
13 underlying the claim itself. Moreover, plaintiff alleges that  
14 defendants concealed the actual interest rate and gave plaintiff  
15 a mistaken impression as to the terms of the loan. Plaintiff  
16 alleges that she relied upon this incorrect characterization of her  
17 loan. FAC ¶¶ 13, 26. At this stage, the court concludes that  
18 plaintiff has shown a possibility of defendants' knowing  
19 concealment, of plaintiff's actual and reasonable reliance on  
20 defendants' characterization of the loan, and of this concealment  
21 preventing plaintiff from learning that the loan was one she would  
22 be unable to pay (the predicate of her section 1639(h) claim).<sup>10</sup>

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23  
24 <sup>10</sup> The court notes that this case is factually distinct from  
25 Santa Maria. One argument plaintiff raised for equitable estoppel  
26 in Santa Maria was that defendant had concealed the existence of  
a letter sent by plaintiff's physician. 202 F.3d at 1178. The  
court held that although defendant had not given plaintiff a copy  
of this letter, this fact did not entitle plaintiff to equitable

1 This concealment allegedly continued until plaintiff's interest  
2 rate increased in September of 2008. FAC ¶ 13. Accordingly,  
3 plaintiff has shown a *possibility* that her section 1639(h) claim  
4 filed roughly eight months later, on April 30, 2009, was timely.

5 As to the other basis for the TILA claim, inadequate  
6 disclosures under 15 U.S.C. §§ 1639(a)-(b), plaintiff's timeliness  
7 argument must rest on other facts. The next fact plaintiff invokes  
8 is her limited English proficiency together with the fact that the  
9 loan documents were prepared in English. FAC ¶ 22. The instant  
10 case raises the following issue: whether the verbal assurance as  
11 to the loan rate, the lack of English proficiency, the fact that  
12 the documents were not given to her in advance and the fact she did  
13 not have an opportunity to read them at the time of signing, all  
14 combine to justify delay until the time of readjustment. The court  
15 concludes that that is a question for the jury and thus denies the  
16 motion.<sup>11</sup>

17 The next fact cited by plaintiff is defendants' failure to  
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19 estoppel because plaintiff nonetheless knew that the letter  
20 existed, the letter was sent by plaintiff's own doctor, plaintiff  
21 never attempted to get a copy of the letter from defendant, and  
22 nothing indicated that plaintiff was otherwise unable to obtain a  
23 copy of the letter. *Id.* Here, it is possible that plaintiff was  
24 unaware of the missing facts, the facts were not in the control of  
25 plaintiff's agent or some analogous person, and there is some  
26 reason to believe that plaintiff could not have gotten these facts,  
insofar as defendants allegedly violated a statutory command to  
provide them.

<sup>11</sup> The court must confess to having vacillated on this  
question during the writing of this opinion. Having concluded that  
the totality of the circumstances does not justify delay as a  
matter of law, the question appears as one for the trier of fact.

1 respond to a QWR and defendants' concurrent refusal to provide  
2 copies of loan documents. Plaintiff sent the qualified written  
3 request on April 10, 2009. FAC ¶ 24, FAC Ex. C. The request for  
4 copies of loan documents was included in this request. FAC Ex. C.  
5 Assuming that defendants failed to respond to these requests, this  
6 failure could only entitle plaintiff to estoppel or tolling after  
7 such failure, but the refusal to respond in April 2009 does not  
8 excuse earlier delays by plaintiff.

9 Finally, plaintiff alleges that her delay is excused by  
10 defendants' intentional obfuscation of the chain of assignment of  
11 the interests in the loan. FAC ¶ 22. Plaintiff has not specified  
12 the dates of such assignment and obfuscation. Assuming that these  
13 acts occurred prior to the expiration of the limitations period,  
14 these acts nonetheless may not raise a possibility of tolling or  
15 estoppel. Admittedly, the roles of the individual defendants in  
16 this suit are unclear. Plaintiff has not alleged that she was able  
17 to file suit only upon piercing this obscurity. Instead, plaintiff  
18 filed suit despite the ongoing obscurity. As such, any concealment  
19 regarding the chain of assignment was not a barrier to the filing  
20 of the complaints in this suit.

21 No other facts appear relevant to the timeliness of  
22 plaintiff's claims under either equitable framework. Accordingly,  
23 for the reason set forth, defendants' motions to dismiss  
24 plaintiff's TILA claims are granted in part, and denied inasmuch  
25 as the claim alleges violations of sections 1639(a), (b), and (h).  
26 Plaintiff may proceed on the theories of estoppel and tolling found

1 to raise a "possibility" above.

2 **B. RESPA**

3 Plaintiff's fourth claim, brought against all defendants,  
4 alleges that defendants violated sections 6 and 8 of RESPA, 12  
5 U.S.C. sections 2605 and 2607. Because the claims under these  
6 sections are subject to separate requirements and concern different  
7 factual allegations, the court discusses each separately.

8 **1. Qualified Written Requests, 12 U.S.C. § 2605**

9 Plaintiff alleges that defendants violated RESPA by failing  
10 to respond to a "qualified written request" ("QWR") within 20 days,  
11 as required by 12 U.S.C. section 2605(e)(1)(A).<sup>12</sup> A threshold  
12 issue with respect to this claim is that plaintiff only alleges  
13 that the QWR was sent to defendant EMC. FAC ¶ 24. Plaintiff has  
14 not offered any cognizable theory as to how MERS and Greenpoint  
15 were required to respond to a QWR that they did not receive.  
16 Accordingly, this claim is dismissed as to MERS and Greenpoint.

17 EMC argues that this claim is untimely. The claim did not  
18 accrue until the statute was violated, 20 days after the QWR was  
19 sent. Plaintiff alleges that the QWR was sent on April 10, 2009.  
20 FAC ¶ 24. Claims enforcing section 2605, unlike those enforcing  
21 2607, are subject to a three year statute of limitations. 12  
22 U.S.C. § 2614. Thus, the limitations period for this claim has not  
23 yet expired.

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24  
25 <sup>12</sup> The court notes that this violation was not alleged in the  
26 initial complaint, and that it apparently had not accrued at the  
time the initial complaint was filed. Nonetheless, defendants have  
not argued that it was improperly added in the FAC.



1           EMC separately argues that RESPA requires an allegation of  
2 actual damages. EMC relies on section 2605(f), which provides the  
3 following:

4           Whoever fails to comply with any provision of  
5 this section shall be liable to the borrower  
6 for each such failure in the following  
7 amounts:

8           (1) Individuals: In the case of any action by  
9 an individual, an amount equal to the sum of--

10                   (A) any actual damages to the borrower as  
11 a result of the failure; and

12                   (B) any additional damages, as the court  
13 may allow, in the case of a pattern or  
14 practice of noncompliance with the  
15 requirements of this section, in an  
16 amount not to exceed \$1,000.

17 12 U.S.C. § 2605(f). Other courts have held that section  
18 2605(f) (1) (A), which allows recovery of actual damages, "has the  
19 effect of limiting the cause of action to circumstances in which  
20 plaintiffs can show that a failure to respond or give notice has  
21 caused them actual harm." Pok v. American Home Mortg. Servicing,  
22 Inc., No. CIV 2:09-2385, 2010 WL 476674, \*5 (E.D. Cal. Feb. 3,  
23 2010). Here, plaintiff has not identified any harm specifically  
24 attributable to the failure to respond to the QWR.<sup>13</sup> Although  
25 section 2605(f) (1) (B) appears to allow statutory damages even

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26           <sup>13</sup> Plaintiff's sole allegation of damages in connection with  
her RESPA claim is that "As a proximate result of these violations  
of RESPA, Defendants are liable to Plaintiff for monetary damages  
in the amount of three times the amount of any and all settlement  
services paid directly or indirectly by Plaintiff pursuant to 12  
U.S.C. § 2607(d) (2) and costs under 12 U.S.C. § 2607(d) (5)." FAC  
¶ 56.

1 absent actual damages, plaintiff has not alleged a pattern or  
2 practice of failures to respond to QWRs. FAC ¶¶ 24, 55; see also  
3 Garcia v. Wachovia Mortg. Corp., No. 2:09-cv-03925, 2009 U.S. Dist.  
4 LEXIS 99308, \*36 (C.D. Cal. Oct. 14, 2009) (pattern or practice  
5 requires more than a single failure to respond to a QWR), accord  
6 Pelayo v. Home Capital Funding, No. 08-CV-2030, 2009 U.S. Dist.  
7 LEXIS 44453, \*11 (S.D. Cal. May 22, 2009). Moreover, neither  
8 plaintiff's FAC nor plaintiff's oppositions to the pending motions  
9 invoke section 2605(f)(1)(B)'s statutory damages provision.  
10 Accordingly, plaintiff's RESPA claim for failure to respond to a  
11 QWR is dismissed without prejudice.

12 **2. Claims under 12 U.S.C. § 2607.**

13 Plaintiff's remaining RESPA allegations concern conduct  
14 contemporaneous with the loan, in October 2005. Plaintiff alleges  
15 that defendants violated 12 U.S.C. section 2607(a) and 24 C.F.R.  
16 section 3500.14(b), which prohibit fees or kickbacks in exchange  
17 for referrals.<sup>14</sup> Plaintiff relatedly alleges that defendants  
18 violated 12 U.S.C. section 2607(b) and 24 C.F.R. section  
19 3500.14(c), which prohibit payment or acceptance of fee sharing  
20 other than for services actually performed. See FAC ¶ 53.

21 Defendants argue that this claim is untimely. Private actions  
22 enforcing sections 2607(a) and (b) are subject to a one year  
23 statute of limitations. 12 U.S.C. § 2614. Accordingly, the  
24 statute of limitations for these claims ordinarily would have

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25 <sup>14</sup> Unlike many other provisions of the federal lending  
26 statutes, 12 U.S.C. sections 2607(a) and (b) are substantive  
prohibitions, rather than mere disclosure requirements.

1 expired in October 2006, over two years before plaintiff filed  
2 suit. This court, however, concludes that plaintiff's claims under  
3 section 2607 reveal a possible entitlement to equitable estoppel.

4 While the Ninth Circuit has not decided whether the RESPA  
5 statute of limitations is jurisdictional, and thus whether  
6 equitable tolling or estoppel are available under RESPA, district  
7 courts in this circuit have held that tolling is available. See  
8 Brewer v. IndyMac Bank, 609 F. Supp. 2d 1104, 1118 (E.D. Cal. 2009)  
9 (following Lawyers Title Ins. Corporation v. Dearborn Title Corp.,  
10 118 F.3d 1157, 1166-67 (7th Cir. 1997)); but see Hardin v. City  
11 Title & Escrow Co., 797 F.2d 1037, 1040-41 (D.C. Cir. 1986)  
12 (holding that the RESPA statute of limitations is jurisdictional  
13 and not subject to equitable tolling). District courts have  
14 applied the King test for equitable tolling under TILA to tolling  
15 under RESPA. Brewer, 609 F. Supp. 2d. at 1118 (citing King, 784  
16 F.2d at 915). In this case, application of equitable tolling and  
17 estoppel doctrines to plaintiff's section 2607 claims is similar  
18 to, but simpler than, the doctrines' application to plaintiffs'  
19 TILA claims. Here the complained-of conduct under section 2607  
20 contains no danger of merging with an attempt to conceal it.

21 Again, plaintiff contends that defendants concealed the terms  
22 of her loan, refused to respond to her inquiries regarding the  
23 terms of her loan, and attempted to hide the identity of the  
24 current beneficiary of the loan. Id. The court construes these  
25 allegations to allege that defendants concealed their system of  
26 kick-backs and charge splitting from plaintiff. As noted above,

1 some of this concealment may have occurred at the time of the  
2 initial transaction, including representations made during the loan  
3 process. FAC ¶ 54. Plaintiff again alleges that she relied upon  
4 these representations. On these facts, plaintiff has shown a  
5 possibility of knowing concealment, actual and reasonable reliance  
6 on defendants' characterization of the loan, and of this  
7 concealment preventing plaintiff from investigating the loan or  
8 discovering her RESPA claim.

9 Defendants separately contend that this claim fails because  
10 plaintiff has failed to allege actual damages resulting from  
11 alleged violations. Defendants again invoke 12 U.S.C. section  
12 2605(f). As a threshold matter, it is unclear why subsection (f)  
13 of section 2605, which refers to violations of "this section,"  
14 applies to an action enforcing section 2607. Indeed, section 2607  
15 provides a separate private liability provision, subsection (d)(2)  
16 ("Any person or persons who violate the prohibitions or limitations  
17 of this section shall be jointly and severally liable to the person  
18 or persons charged for the settlement service involved in the  
19 violation in an amount equal to three times the amount of any  
20 charge paid for such settlement service.").<sup>15</sup> Nonetheless, even  
21 assuming that an allegation of actual damages is required for the  
22

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23 <sup>15</sup> In the prior order in this case, the court assumed without  
24 discussion that an allegation of actual damages was required for  
25 a claim under 12 U.S.C. section 2607. Order of Sept. 3, 2009, 2009  
26 U.S. Dist. LEXIS 79094, at \*44, 2009 WL 2990393, at \*15. For the  
reason stated above, the court now doubts that this assumption was  
correct. Because plaintiff has alleged actual damages, however,  
the court need not reach the issue.

1 section 2607 claim, plaintiff's allegations permit a reasonable  
2 inference of damages, as stated by this court's prior order. Order  
3 of Sept. 3, 2009, 2009 U.S. Dist. LEXIS 79094, at \*44, 2009 WL  
4 2990393, at \*15 ("where plaintiff alleges that she was required to  
5 pay a referral fee that was prohibited under RESPA, plaintiff has  
6 adequately alleged pecuniary loss."). Accordingly, defendants'  
7 motions to dismiss plaintiff's RESPA claim are denied insofar as  
8 the RESPA claim is predicated on violations of 12 U.S.C. section  
9 2607(a) and (b).

### 10 **C. Wrongful Foreclosure**

11 Plaintiff's second claim alleges wrongful foreclosure against  
12 MERS and EMC, on the ground that defendants were not authorized to  
13 conduct the foreclosure proceedings, thereby violating California  
14 Civil Code §§ 2924 et seq. and 2923.5. Defendants argue that they  
15 have such authority. Defendants further argue that this claim is  
16 premature because no trustee's sale has yet occurred. This claim  
17 is dismissed in part.

#### 18 **\_\_\_\_\_ 1. Ripeness of The Claim**

19 \_\_\_\_\_ California courts have not clearly defined the contours of a  
20 claim for wrongful foreclosure. Defendants MERS and EMC argue that  
21 "[i]t is clear that a lender or foreclosure trustee may only be  
22 liable to the mortgagor or trustor for 'wrongful foreclosure' if  
23 the property was fraudulently or illegally sold under a power of  
24 sale in a deed of trust." Reply at 2 (citing Munger v. Moore, 11  
25 Cal. App. 3d 1, 7-8 (1970)). Defendants argue that such a claim  
26 is only available once a sale has actually occurred.

1           Such a rule would be nonsensical where, as here, the claim for  
2 “wrongful foreclosure” is in essence a claim for a declaratory  
3 judgment that defendants lack the authority to foreclose. See  
4 Pl.’s Opp’n to MERS and EMC’s Mot., 8 (reiterating that this claim  
5 seeks solely declaratory and injunctive relief). Actual  
6 foreclosure is not a prerequisite to such a claim. Tellingly,  
7 Munger concerned a claim for tort damages, rather than equitable  
8 relief. 11 Cal. App. 3d at 7-8. The court further notes that in  
9 at least some circumstances, California courts have allowed  
10 wrongful foreclosure claims to proceed even when there was not  
11 actual foreclosure. Garretson v. Post, 156 Cal. App. 4th 1508,  
12 1514 (2007). Accordingly, the court rejects this ground for  
13 dismissal.

14           **2. Authority to Foreclose**

15           Plaintiff raises four arguments as to why defendants lacked  
16 the authority to foreclose. She first contends that defendants  
17 must produce or demonstrate ownership of the note in order to  
18 demonstrate authority to foreclose. FAC ¶¶ 39-41. Production of  
19 the note is not required under California’s non-judicial  
20 foreclosure process. Champlaine v. BAC Home Loans Servicing, LP,  
21 2009 WL 3429622 at \*13 (E.D. Cal. Oct. 22, 2009). A party may  
22 validly own a beneficial interest in a promissory note or deed of  
23 trust without possession of the physical promissory note itself.  
24 Id. at \*13-14. Consequently, although defendants must prove that  
25 they have the right to foreclose, this proof does not require proof  
26 of possession of the note.

1 \_\_\_\_\_Plaintiff next contends that California Law does not permit  
2 a deed of trust to designate a "nominal" beneficiary, as the deed  
3 of trust here purported to do. FAC ¶¶ 17-19. A "nominee" is, in  
4 pertinent senses, "2. a person designated to act in place of  
5 another, [usually] in a very limited way [or] 3. A party who holds  
6 bare legal title for the benefit of others or who receives and  
7 distributes funds for the benefit of others." Black's Law  
8 Dictionary, Eighth Edition, 1076 (2004). In Parkmerced Co. v.  
9 City, 149 Cal. App. 3d 1091, 1095 (1983), the California Court of  
10 Appeal discussed, and endorsed, nominal ownership of real property,  
11 wherein a corporation owned the property as nominee for a distinct  
12 partnership. See also Fashion Valley Mall, LLC v. County of San  
13 Diego, 176 Cal. App. 4th 871, 886 n.16 (2009) (quoting and  
14 following the above definition from Black's and following  
15 Parkmerced), People v. Honig, 48 Cal. App. 4th 289, 308, 319 (1996)  
16 (recognizing a party's nominal status as a contracting party). As  
17 explained by the court's prior order in this case, the beneficial  
18 interest under a deed of trust is a real property interest. Order  
19 of Sept. 3, 2009 at 21 (citing, inter alia, Monterey S. P. P'ship  
20 v. W. L. Bangham, 49 Cal. 3d 454, 460 (1989)). Accordingly, the  
21 deed of trust's initial designation of MERS as a nominal  
22 beneficiary was not a per se violation of California law, and did  
23 not render the deed of trust invalid ab initio.

24 Third, plaintiff argues that subsequent assignment of the  
25 actual (contra nominal) beneficial interest deprived MERS of the  
26 authority to foreclose. Plaintiff alleges that Greenpoint is no

1 longer the actual beneficiary.<sup>16</sup> Under California law, “[t]he  
2 assignment of a debt secured by mortgage carries with it the  
3 security.” Cal. Civ. Code § 2936. At least one court has  
4 concluded that under this statute, transfer of the actual  
5 beneficial interest also automatically transfers the nominal  
6 interest, such that even if the two were previously held by  
7 separate parties, the transferee receives both. In re Vargas, 396  
8 B.R. 511, 516 (Bankr. C.D. Cal. 2008). Vargas held that the  
9 transferee could re-designate MERS as the nominal beneficiary, but  
10 that this would require a new agency agreement between MERS and the  
11 transferee. Id. at 517. Plaintiff alleges that no such agreement  
12 is present here. In summary, plaintiff alleges that Greenpoint  
13 transferred the actual beneficial interest in the promissory note,  
14 that this transfer stripped MERS of its role as nominal  
15 beneficiary, and that there has been no subsequent agreement re-  
16 conferring nominal beneficiary status upon MERS. See Vargas, 396  
17 B.R. at 517 (“if [the lender] has transferred the note, MERS is no  
18 longer an authorized agent of the holder unless it has a separate  
19 agency contract with the new undisclosed principal.”). Plaintiff  
20 similarly alleges that there is no servicing agreement between EMC  
21 and the actual beneficiaries to the note and deed of trust.

22 Defendants have neither acknowledged nor responded to this  
23 argument. Instead, defendants state that the recorded documents  
24 identify MERS as the nominal beneficiary. As stated above, at

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25  
26 <sup>16</sup> The court credits plaintiff’s allegation at this stage. Moreover, defendants apparently concede this particular fact.



1 least one court has held that MERS's "nomination" at the time of  
2 the initial transaction is irrelevant if a subsequent assignment  
3 of the actual beneficial interest has occurred. The only other  
4 document cited by defendants identifies MERS as EMC's nominee, but  
5 it is not itself an agency agreement, and the defendants do not  
6 contend that EMC is the actual party in interest. More generally,  
7 defendants note that under the California statutes "the trustee,  
8 mortgagee, or beneficiary, or any of their authorized agents" may  
9 file the notice of default. Cal. Civ. Code § 2924(a)(1). This  
10 observation does not respond to plaintiff's allegation that as a  
11 result of assignments, neither MERS nor EMC was the beneficiary nor  
12 an authorized agent thereof.<sup>17</sup> Thus, defendants completely failed  
13 to respond to plaintiff's discussion of Vargas and the related  
14 legal theories.

15 The court need not conclude that Vargas provides the proper  
16 rule in this context. On defendants' motion, however, defendants  
17 bear the burden of demonstrating that plaintiff has failed to  
18 provide a plausible legal theory. Defendants cannot satisfy this  
19 burden while ignoring the theory actually offered by plaintiff.<sup>18</sup>

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20  
21 <sup>17</sup> Although the notice of default and notice of trustee sale  
22 were issued by Aztek, Aztek's authority purportedly derives from  
23 that of MERS and EMC. See, e.g., MERS's RFJN Exs. 4, 6, and as  
24 previously noted, it appears at least initially, unauthorized.

25 <sup>18</sup> In light of defendant's failure to meet their burden, the  
26 court has not extensively researched this issue. With this caveat,  
the court notes that it is not aware of any other opinions  
addressing a similar argument under California law. The apparent  
dearth of caselaw on this argument should not be taken as an  
indication that the argument is without merit. The district  
courts--and especially the courts in California, and especially the

1 Plaintiff's fourth argument is closely related to the third,  
2 and alleges that the notice of default and notice of trustee's sale  
3 were defective because they failed to identify the actual  
4 beneficiary. The non-judicial foreclosure statutes require that  
5 the notices explicitly identify the beneficiary or mortgagee, even  
6 if foreclosure is actually initiated by another party. Cal. Civ.  
7 Code § 2924c. Plaintiff argues that this requires identification  
8 of the actual beneficiary, in that their purpose is to identify the  
9 party with the power to stop foreclosure or modify the loan. FAC  
10 ¶ 35. Plaintiff alleges that when she tried to contact EMC and  
11 MERS, the parties listed on the notices, and was informed that  
12 these parties lacked the power to modify the loan. FAC ¶ 14.  
13 Again, defendants have not addressed this argument.<sup>19</sup>

14 \_\_\_\_\_  
15 courts in the Eastern District--have been flooded with mortgage and  
16 foreclosure cases in the past year. In general, the briefing  
17 tendered in these cases has been poor. As explained elsewhere in  
18 this order, it is generally appropriate for courts to confine their  
19 analysis to arguments raised by the moving party. The quantity and  
20 quality of these cases therefore creates a context particularly  
21 unsuited to broad analysis. Accordingly, other courts' silence on  
22 the Vargas argument should not be taken as an implicit rejection  
23 thereof.

24 <sup>19</sup> Instead, defendants respond to an argument plaintiff did  
25 not make. Aztec apparently issued the notice of default on  
26 February 11, 2009, but Aztec was not substituted as trustee until  
February 26, 2009. MERS's RFJN Ex. 4. Under California law, the  
notice of default can be filed by "The trustee, mortgagee, or  
beneficiary, or any of their authorized agents." Cal. Civ. Code  
§ 2924(a)(1). Thus, Aztec could issue the notice of default prior  
to becoming a trustee if Aztec was an "authorized agent" of the  
trustee or beneficiary. See also MERS's RFJN Ex. 4, page 2  
(identifying Aztec "as agent for the beneficiary," and identifying  
EMC as the beneficiary and MERS as EMC's nominee).

Any entity purporting to foreclose must derive its authority  
from the trustee and/or beneficiary. Defendants argue that the  
link between Aztec and MERS/EMC was established, but plaintiff has

1           Accordingly, defendants' motion to dismiss plaintiff's claim  
2 for wrongful foreclosure is granted in part. The wrongful  
3 foreclosure claim is dismissed insofar as it is predicated on the  
4 first two theories identified above, but the court does not dismiss  
5 the claim insofar as it is predicated on the third and fourth  
6 theories.

7 **D. Misrepresentation**

8           Plaintiff's fifth and sixth claims are for intentional and  
9 negligent misrepresentation. These allegations fall short of the  
10 standard required by Fed. R. Civ. P. 9(b).

11           The FAC's allegations supporting a claim for intentional  
12 misrepresentation are that defendants misrepresented the material  
13 terms of the loan, including representing that

14           [] It was the most advantageous loan for which  
15 Plaintiff qualified. [] It was a fixed-rate  
16 low-interest loan as Plaintiff believed it was  
17 . . . Plaintiff's mortgage application  
18 provided for 2% interest for 360 months and  
19 Plaintiff was led to believe those were the  
20 real terms of her loan . . . [] The cited low  
21 rate interest rate was the actual interest  
22 rate. [] Plaintiff's initial teaser payments  
23 would cover all of the interest.

24           [] Making the stated payments would not result  
25 in negative amortization. [] The cited low  
26 interest rate was the regular rate, not merely  
a teaser. [] Plaintiff would be able to afford  
to make the required payments. [] That  
Plaintiff's debt-to-income ratio was  
sufficient to justify the loan. The loans  
would not automatically reset when the  
principal balance of the loan exceeded certain  
specified percentage of the loan amounts,

---

not challenged this link. Instead, plaintiff argues that MERS and  
EMC had no authority to delegate, because they were not authorized  
by the actual beneficiary.

1 requiring Plaintiff to pay double the amount  
2 Defendants represented she would have to pay.  
3 [] There was no prepayment penalty. [] The  
4 amount of the prepayment penalty was not so  
5 exorbitant that it made it economically  
6 impracticable and/or impossible for the  
7 Plaintiff to refinance the Premises.  
8 [] The existence, type, and amount of points  
9 and other brokerage fees paid to broker(s). []  
10 The points and other brokerage fees paid to  
11 broker(s) were lawful and reasonable. [] The  
12 loan satisfied generally accepted underwriting  
13 standards. [] The loan comported with prudent  
14 lending standards.

15 FAC ¶ 60. These allegations also serve as the foundation for the  
16 claim of negligent misrepresentation. FAC ¶ 74.

17 These allegations are more detailed than those found in the  
18 initial complaint, and are considerably more detailed than the  
19 allegations offered by many other plaintiffs bringing analogous  
20 claims. Plaintiff has largely specified the content of the alleged  
21 misrepresentations, and has identified these representations as  
22 having been made at the time and place the loan was negotiated  
23 (although this place is not further specified). Nonetheless,  
24 plaintiff brings these claims against three defendants, yet  
25 plaintiff fails to specify "the role of each defendant in each  
26 scheme." Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940  
27 F.2d 397, 405 (9th Cir. 1991); see also Swartz v. KPMG LLP, 476  
28 F.3d 756, 765 (9th Cir. 2007). Accordingly, the court dismisses  
29 this claim without prejudice. Plaintiff may amend this claim by  
30 specifying the various defendants' roles in the misrepresentations.  
31 Alternatively, plaintiff may seek to argue why such allegations are  
32 not required, despite Swartz and Lancaster.

1 **E. Rosenthal Act**

2 Plaintiff's seventh claim alleges that all defendants violated  
3 California's Rosenthal Fair Debt Collection Practices Act  
4 ("Rosenthal Act").

5 The Rosenthal Act prohibits creditors and debt collectors  
6 from, among other acts, making false, deceptive, or misleading  
7 representations in an effort to collect a debt. Cal. Civ. Code §  
8 1788, et seq. A "debt collector" is "any person who, in the  
9 ordinary course of business, regularly, on behalf of himself or  
10 herself or others, engages in debt collection." Cal. Civ. Code §  
11 1788.2(c); see also Izenberg v. ETS Services, LLC, 589 F. Supp. 2d  
12 1193, 1199 (C.D. Cal. 2008). Plaintiff alleges that defendants

13 violated provisions of . . . section 1788(e)  
14 and (f) of the California Civil Code, and the  
15 Federal Fair Debt Collection Act, 15 U.S.C.  
16 Title 431, Subchap. V Section 1692 et seq. . .  
17 . by reporting past due payments even though  
18 Plaintiff has been working in good faith to  
19 reasonably modify loan payment terms in  
20 accordance with the received instructions and  
21 after when Plaintiff specifically disputed  
22 certain amounts due under the loan.

23 FAC ¶ 83.<sup>20</sup> Plaintiff has not identified any other conduct as the  
24 basis for this claim.

25 EMC and MERS previously moved to dismiss this claim on the  
26 ground that they were not "creditors" within the meaning of the  
statutes and on the ground that their activities were removed from  
the ambit of the statutes because they were connected with a

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<sup>20</sup> The court notes that the California Civil code does not  
contain a section 1788(e) or 1788(f).

1 foreclosure. The court rejected both arguments, and EMC and MERS  
2 have not renewed their motion to dismiss this claim.

3 Greenpoint moves to dismiss on the ground that plaintiff has  
4 not alleged that Greenpoint participated in the modification  
5 negotiations or that Greenpoint had an interest in the loan at the  
6 time the negotiations and reporting occurred. In opposing  
7 Greenpoint's motion, plaintiff speculates that it may be the case  
8 that the loan was re-assigned back to Greenpoint, but plaintiff  
9 does not allege that this occurred, and plaintiff does not address  
10 the argument that Greenpoint is not alleged to have participated  
11 in the negotiation. The court therefore dismisses this claim as  
12 to Greenpoint without prejudice.<sup>21</sup>

13 **F. Unfair Competition**

14 California's Unfair Competition Law, Cal. Bus. & Prof. Code  
15 § 17200, proscribes "unlawful, unfair or fraudulent" business acts  
16 and practices. Plaintiff's ninth claim alleges that all defendants  
17 violated the UCL through unlawful practices alleged elsewhere in  
18 the complaint. FAC ¶ 92.<sup>22</sup>

19 The incorporated allegations fail to state a UCL claim based  
20

---

21 <sup>21</sup> No party has addressed whether either the Rosenthal Act or  
22 the FFDCA prohibit the alleged conduct, i.e., truthful reporting  
23 to credit agencies that a loan is in default despite the pendency  
of modification negotiations. The court declines to address this  
issue sua sponte.

24 <sup>22</sup> Plaintiff additionally alleges that EMC and MERS failed to  
25 comply with Cal. Civ. Code Section 2923.5, and that this unlawful  
26 activity provides an additional predicate for the UCL claim. FAC  
¶ 93. Presently only Greenpoint moves to dismiss this claim, so  
the section 2923.5 allegations are not pertinent to this motion.

1 on fraudulent or unfair business practices. As to fraud, Fed. R.  
2 Civ. P. 9(b) applies to UCL claims sounding in fraud, and as  
3 previously discussed plaintiff has failed to meet this standard.  
4 As to unfair business practices, plaintiff fails to provide  
5 defendants with any notice as to which alleged acts, if any,  
6 constitute such practices, beyond a conclusory statement that the  
7 "negative amortization loan at issue" is an unfair business  
8 practice. FAC ¶ 92

9 As pleaded, plaintiff's UCL claim must proceed on the theory  
10 that defendants acted unlawfully. As discussed elsewhere in this  
11 order, plaintiff has stated a claim against all defendants for  
12 violations of RESPA and against EMC and Greenpoint under TILA.  
13 These claims provide the "unlawful" predicate activity that may  
14 support a UCL claim.<sup>23</sup> Accordingly, defendants' motion to dismiss  
15 is denied as to this claim.

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

17 Plaintiff's eighth claim alleges a breach of the implied  
18 covenant of good faith and fair dealing against all defendants. In  
19 the instant motion only defendant Greenpoint moves to dismiss,  
20 arguing that plaintiff has not stated a claim upon which relief can  
21 be granted. Plaintiff claims that defendants violated the implied  
22 covenant of good faith and fair dealing

23 when they used their superior knowledge in,  
24 and inside information with respect to, real

---

25 <sup>23</sup> At this juncture, the court does not decide whether the  
26 declaratory claim for wrongful foreclosure may support an unfair  
competition claim.

1 estate, lending, securities and finance  
2 industries, and further when they used their  
3 superior bargaining power to, among other  
4 thing, conceal and misrepresent certain  
5 material facts, depriving Plaintiff of an  
6 opportunity to properly review, analyze and  
7 negotiate the loan terms, and ultimately loan  
8 modification terms intentionally forcing  
9 Plaintiff into default and eventually into  
10 foreclosure proceedings.

11 FAC ¶ 88. A claim for breach of the implied covenant of good faith  
12 and fair dealing requires a plaintiff to establish the existence  
13 of a contractual obligation and conduct that frustrates the other  
14 party's rights to benefit from the contract. Foley v. Interactive  
15 Data Corp., 47 Cal.3d 654, 683-684, 689-690 (1988). Accordingly,  
16 entry into a contract itself cannot constitute a violation of the  
17 duty of good faith, and plaintiff's claim must identify conduct  
18 occurring post contract formation.

19 The only conduct plaintiff identifies that occurred post  
20 contract is deprivation of an opportunity to review loan  
21 modification terms with the purpose of intentionally forcing  
22 plaintiff into default. Here, however, plaintiff has not alleged  
23 that Greenpoint played any role in the foreclosure proceedings or  
24 discussions of loan modification. FAC ¶¶ 14, 28, 29. Accordingly,  
25 the plaintiff's claim for a breach of the implied covenant of good  
26 faith and fair dealing is dismissed as to Greenpoint with leave to  
amend.

#### 24 **H. Declaratory and Injunctive Relief**

25 Plaintiff's tenth cause of action, only opposed in the instant  
26 motion by Greenpoint, is a plea for injunctive and declaratory



1 relief against all defendants. Inasmuch as plaintiff requests a  
2 preliminary injunction and restraining order, FAC ¶ 105,  
3 plaintiff's request is not properly before the court. Although  
4 including such a request as part of a complaint is proper in state  
5 court, Federal rules requires a separate filing pursuant to Fed.  
6 R. Civ. P. 65. Accordingly, plaintiff's request for injunctive  
7 relief is dismissed.

8 **I. Joinder**

9 As a final argument, Greenpoint argues that the mortgage  
10 broker is a necessary party, and that all claims should be  
11 dismissed for failure to join the broker.<sup>24</sup> The Ninth Circuit has  
12 interpreted Fed. R. Civ. P. 19(a) as "provid[ing] that a party is  
13 'necessary' in two circumstances: (1) when complete relief is not  
14 possible without the absent party's presence, or (2) when the  
15 absent party claims a legally protected interest in the action."  
16 United States v. Bowen, 172 F.3d 682, 688 (9th Cir. 1999). The  
17 instant case does not present either circumstance.

18 As to the first, Greenpoint argues that the broker should be  
19 joined because many of the duties were owed by the broker rather  
20 than the lender. This argument speaks to defenses and liability,  
21 and not to the court's ability to afford relief on claims found to  
22 be meritorious, if any. The Northern District of California  
23

---

24 <sup>24</sup> The court notes that although Greenpoint's motion is styled  
25 as a motion under Fed. R. Civ. P. 12(b)(6), dismissal for failure  
26 to join a necessary party arises under Fed. R. Civ. P. 12(b)(7).  
Rule 12(b)(7), like Rule 12(b)(6), requires the court to treat the  
complaint's allegations as true.

1 recently held, in a case where borrowers alleged that a lender  
2 engaged in discriminatory lending practices, that while the  
3 brokers' conduct might be relevant to the lender's defense, there  
4 was no reason why the brokers needed to be named as parties rather  
5 than merely called as witnesses. In re Wells Fargo Mortg. Lending  
6 Discrimination Litig., No. M: 08-CV-1930, 2009 WL 2473684, \*3, 2009  
7 U.S. Dist. LEXIS 72806, \*13 (N.D. Cal. Aug. 11, 2009). The court  
8 follows this approach here.

9       The second circumstance applies only when the absent party  
10 "claims an interest relating to the subject of the action." Fed.  
11 R. Civ. P. 19(a)(1)(B). In a contract dispute, the Ninth Circuit  
12 has held that an absentee did not satisfy this language where the  
13 absentee was "not a party to any of the [contracts], and ha[d]  
14 never asserted a formal interest in either the subject matter of  
15 this action or the action itself." Northrop Corp., 705 F.2d at  
16 1043-44. Nothing indicates that the brokers have an interest in  
17 the litigation here. Nor is this a case where "the action might  
18 detrimentally affect a party's or the absentee's ability to protect  
19 his property or to prosecute or defend any subsequent litigation  
20 in which the absentee might become involved." Charles Alan Wright,  
21 Arthur R. Miller, Mary Kay Kane, 7 Fed. Prac. & Proc. Civ. § 1604  
22 (3d ed.). See also In re Wells Fargo Mortg. Lending Discrimination  
23 Litig., 2009 WL 2473684, \*3, 2009 U.S. Dist. LEXIS 72806, \*13  
24 (brokers not necessary parties under either prong), accord Moses  
25 v. Citicorp Mortg., 982 F. Supp. 897, 903 (E.D.N.Y. 1997) (broker  
26 not necessary party to borrower's claim against lender).

1 The court acknowledges that one court has found that brokers  
2 were necessary parties to borrowers' claims against lenders.  
3 Steele v. GE Money Bank, No. 08 C 1880, 2009 WL 393860, \*9, 2009  
4 U.S. Dist. LEXIS 11536, \*25 (N.D. Ill. Feb. 17, 2009). In Steele,  
5 the "complaint [was] based on the existence of an interrelationship  
6 between the defendant lenders and the non-party brokers and actions  
7 taken by the brokers allegedly at the direction of the defendants."  
8 Insofar as the present complaint involves similar allegations, such  
9 allegations pertain to claims that the court otherwise dismisses.  
10 If plaintiff amends the complaint to state claims seeking to hold  
11 defendants liable for the actions of non-parties, the parties may  
12 revisit the joinder issue. On the present motion, Greenpoint's  
13 motion to dismiss for failure to join a necessary party is denied.

#### 14 **IV. CONCLUSION**

15 For the reasons stated above, the court GRANTS IN PART  
16 defendants' motions to dismiss (Dkt. Nos. 18, 20).

17 The court DISMISSES WITHOUT PREJUDICE the following claims:

- 18 1. Plaintiff's third claim, for TILA damages, insofar as  
19 this claim is predicated on an inflated appraisal or  
20 information regarding alternative loans.
- 21 2. Plaintiff's fourth claim, under RESPA, insofar as this  
22 claim is predicated on 12 U.S.C. § 2605 and failure to  
23 respond to a qualified written request.
- 24 3. Plaintiff's second claim, for wrongful foreclosure,  
25 insofar as it is predicated on the "produce the note"  
26 theory or the argument that MERS could not be named as

1 a nominal beneficiary at the time of the initial  
2 transaction.

3 4. Plaintiff's fifth claim, for fraud.

4 5. Plaintiff's sixth claim, for negligent  
5 misrepresentation.

6 7. Plaintiff's seventh claim, under the Rosenthal Act, as  
7 to Greenpoint only.

8 8. Plaintiff's eighth claim, for violation of the implied  
9 covenant of good faith and fair dealing, as to  
10 Greenpoint.

11 9. Plaintiff's tenth claim, a freestanding claim for  
12 injunctive relief.

13 The court DENIES the pending motions as to the following:

14 1. Plaintiff's third claim, under TILA, insofar as the  
15 claim is predicated on the violations of 15 U.S.C. §§  
16 1639(a), (b), and (h) discussed in this order.

17 2. Plaintiff's fourth claim, under RESPA, insofar as the  
18 claim is predicated on violations of 12 U.S.C. § 2607(a)  
19 and (b).

20 3. Plaintiff's second claim, for wrongful foreclosure,  
21 insofar as it is predicated on theories regarding  
22 assignment of the actual beneficial interest.

23 3. Plaintiff's ninth claim, under California's Unfair  
24 Competition Law.

25 Plaintiff is granted twenty-one (21) days from the date of  
26 this order in which to file an amended complaint, responding solely

1 to the defects identified above.


2 IT IS SO ORDERED.

3 DATED: May 6, 2010.

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LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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