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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LUZ RIVERA,

NO. CIV. S-09-1639 LKK/JFM

Plaintiff,

v.

O R D E R

GMAC MORTGAGE, JP MORGAN
CHASE, PAUL FINANCIAL, LLC,
ETS SERVICES, LLC, MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS, INC., REPUBLIC 2,
JOE NGUYEN, MINH DUONG and
DOES 1-20, inclusive,

Defendants.

_____/

This case concerns plaintiff's mortgage and foreclosure thereon. Plaintiff's First Amended Complaint ("FAC") names seven defendants and enumerates eleven causes of action. Defendants GMAC Mortgage ("GMAC"), Mortgage Electronic Registration Systems ("MERS"), and Electronic Registration Systems ("ETS") moved to dismiss all claims against them. Defendant Paul Financial, LLC ("Paul Financial") moved to dismiss all but two claims against it, or alternatively moves for a more definite statement. For the reasons stated below, the motions to dismiss are granted in part. Because plaintiff is granted leave to amend, Paul Financial's

1 motion for a more definite statement is denied.

2 **I. BACKGROUND**

3 Defendants GMAC, MERS, and ETS moved to dismiss on August
4 24, 2009; defendant Paul Financial moved to dismiss on August
5 26, 2009. Plaintiff filed oppositions to both motions on
6 September 18, 2009. Paul Financial did not properly attach a
7 declaration upon which it relied in its motion. Accordingly, the
8 court ordered that Paul Financial serve the declaration upon
9 plaintiff and gave plaintiff leave to file an amended
10 opposition. Plaintiff did not amend his opposition to Paul
11 Financial's motion after service of the declaration.

12 **A. Initial Loan**

13 Around November 2006, plaintiff alleges that real estate
14 broker defendant, Minh Duong, an employee of defendant Republic
15 2, solicited plaintiff Luz Rivera to purchase a home loan.
16 Plaintiff's native language is Tagalog, and Duong negotiated her
17 loan primarily in Tagalog. Plaintiff alleges that Duong told her
18 that her mortgage payment would be \$1,922, but did not explain
19 to her that her payment would later increase to \$4,500.
20 Plaintiff also alleges that Duong falsely inflated her income on
21 her loan application: plaintiff's monthly income at the time of
22 the loan was \$4,400, and Duong indicated on her loan application
23 that her income was \$16,400. Duong also allegedly advised
24 plaintiff that if her loan became unaffordable, he would
25 refinance it into an affordable loan.

26 Plaintiff alleges that lender defendant Paul Financial

1 trained brokers and loan officers, including Duong, and paid
2 them commissions based on the volume of loans they sold to
3 consumers. Further, plaintiff alleges that Paul Financial's loan
4 officers received greater commissions or bonuses for placing
5 borrowers in loans with high yield spread premiums.
6 Consequently, plaintiff alleges that borrowers, including
7 plaintiff, were steered by Paul Financial into loans with
8 unfavorable terms for them and for which they were not
9 qualified.

10 At closing, plaintiff alleges she was only given a few
11 minutes to sign the loan documents. Further, plaintiff claims
12 she was not provided with translations of the documents or an
13 interpreter. The court assumes that plaintiff could not read
14 English as a reasonable inference from the alleged facts.
15 Additionally, plaintiff alleges that no one explained to her the
16 contents of the documents. Plaintiff also alleges that lender
17 defendant Paul Financial¹ did not provide her with statutorily
18 required disclosures.²

19
20 ¹ Plaintiff also alleges that defendant Joe Nguyen, an "agent
21 of the Lender," did not provide plaintiff with disclosures.
22 However, the complaint does not indicate what Nguyen's role was
23 with respect to plaintiff's loan.

24 ² Plaintiff also alleges that she was not provided with the
25 statutorily required disclosures under the Truth In Lending Act
26 ("TILA") and the Real Estate Settlement Procedures Act ("RESPA").
Defendant Paul Financial, however, provided TILA and RESPA
disclosures signed by the plaintiff as exhibits to the declaration
in support of its first motion to dismiss. Nonetheless, Paul
Financial has only argued that it provided the required TILA
disclosures in its motion. As such, for the purposes of this order,
the court assumes that plaintiff was provided only with the

1 The deed of trust for plaintiff's mortgage lists defendant
2 Mortgage Electronic Registration Systems ("MERS") as nominee for
3 the lender and the lender's successors and assigns. It also
4 indicates that MERS is the beneficiary under the instrument.
5 Paul Financial is listed as the lender.

6 **B. Foreclosure of Plaintiff's Home Loan**

7 On or about February 25, 2009, defendant trustee ETS
8 Services, LLC ("ETS") filed a notice of default ("NOD") on
9 plaintiff's loan. At some time between the filing of the deed of
10 trust and the filing of the notice, MERS made ETS trustee of
11 plaintiff's mortgage.

12 On or about May 18, 2009, plaintiff mailed a Qualified
13 Written Request ("QWR") to loan servicing defendant GMAC
14 Mortgage ("GMAC") and former defendant JP Morgan Chase.
15 Plaintiff alleges that neither party has properly responded to
16 her request.

17 On or about May 26, 2009, ETS services sent plaintiff a
18 Notice of Trustee Sale. Plaintiff contends that neither MERS nor
19 ETS was in possession of the promissory note for plaintiff's
20 mortgage nor do they have a right to payment under the note.
21 From the face of plaintiff's complaint it is unclear whether
22 plaintiff's mortgage has been foreclosed or whether non-judicial
23 foreclosure proceedings have merely been commenced.

24
25 _____
26 required TILA disclosures, and not with the required RESPA
disclosures.

1 Plaintiff filed her first complaint on June 12, 2009, and
2 filed the amended complaint at issue here on August 12, 2009.

3 II. STANDARD

4 A. Standard for a Fed. R. Civ. P. 12(b)(6) Motion to Dismiss

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

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

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

18 To meet this requirement, the complaint must be supported by
19 factual allegations. Iqbal, 129 S. Ct. at 1950. "While legal
20 conclusions can provide the framework of a complaint," neither
21 legal conclusions nor conclusory statements are themselves
22 sufficient, and such statements are not entitled to a presumption
23 of truth. Id. at 1949-50. Iqbal and Twombly therefore prescribe a
24 two step process for evaluation of motions to dismiss. The court
25 first identifies the non-conclusory factual allegations, and the
26 court then determines whether these allegations, taken as true and

1 construed in the light most favorable to the plaintiff, "plausibly
2 give rise to an entitlement to relief." Id.; Erickson v. Pardus,
3 551 U.S. 89 (2007).³

4 "Plausibility," as it is used in Twombly and Iqbal, does not
5 refer to the likelihood that a pleader will succeed in proving the
6 allegations. Instead, it refers to whether the non-conclusory
7 factual allegations, when assumed to be true, "allow[] the court
8 to draw the reasonable inference that the defendant is liable for
9 the misconduct alleged." Iqbal, 129 S.Ct. at 1949. "The
10 plausibility standard is not akin to a 'probability requirement,'
11 but it asks for more than a sheer possibility that a defendant has
12 acted unlawfully." Id. (quoting Twombly, 550 U.S. at 557). A
13 complaint may fail to show a right to relief either by lacking a
14 cognizable legal theory or by lacking sufficient facts alleged
15 under a cognizable legal theory. Balistreri v. Pacifica Police
16 Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

17 The line between non-conclusory and conclusory allegations is
18 not always clear. Rule 8 "does not require 'detailed factual
19 allegations,' but it demands more than an unadorned, the-defendant-
20 unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at 1949
21 (quoting Twombly, 550 U.S. at 555). While Twombly was not the first

22
23 ³ As discussed below, the court may consider certain limited
24 evidence on a motion to dismiss. As an exception to the general
25 rule that non-conclusory factual allegations must be accepted as
26 true on a motion to dismiss, the court need not accept allegations
as true when they are contradicted by this evidence. See Mullis v.
United States Bankr. Ct., 828 F.2d 1385, 1388 (9th Cir. 1987),
Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

1 case that directed the district courts to disregard "conclusory"
2 allegations, the court turns to Iqbal and Twombly for indications
3 of the Supreme Court's current understanding of the term. In
4 Twombly, the Court found the naked allegation that "defendants
5 'ha[d] entered into a contract, combination or conspiracy to
6 prevent competitive entry . . . and ha[d] agreed not to compete
7 with one another,'" absent any supporting allegation of underlying
8 details, to be a conclusory statement of the elements of an anti-
9 trust claim. Id. at 1950 (quoting Twombly, 550 U.S. at 551). In
10 contrast, the Twombly plaintiffs' allegations of "parallel conduct"
11 were not conclusory, because plaintiffs had alleged specific acts
12 argued to constitute parallel conduct. Twombly, 550 U.S. at 550-51,
13 556.

14 Twombly also illustrated the second, "plausibility" step of
15 the analysis by providing an example of a complaint that failed and
16 a complaint that satisfied this step. The complaint at issue in
17 Twombly failed. While the Twombly plaintiffs' allegations regarding
18 parallel conduct were non-conclusory, they failed to support a
19 plausible claim. Id. at 566. Because parallel conduct was said to
20 be ordinarily expected to arise without a prohibited agreement, an
21 allegation of parallel conduct was insufficient to support the
22 inference that a prohibited agreement existed. Id. Absent such an
23 agreement, plaintiffs were not entitled to relief. Id.⁴

24
25 ⁴ This judge must confess that it does not appear self-evident
26 that parallel conduct is to be expected in all circumstances and
thus would seem to require evidence. Of course, the Supreme Court
has spoken and thus this court's own uncertainty needs only be

1 In contrast, Twombly held that the model pleading for
2 negligence demonstrated the type of pleading that satisfies Rule
3 8. Id. at 565 n.10. This form provides "On June 1, 1936, in a
4 public highway called Boylston Street in Boston, Massachusetts,
5 defendant negligently drove a motor vehicle against plaintiff who
6 was then crossing said highway." Form 9, Complaint for Negligence,
7 Forms App., Fed. Rules Civ. Proc., 28 U.S.C. App., p 829. These
8 allegations adequately "'state[] . . . circumstances, occurrences,
9 and events in support of the claim presented.'" Twombly, 550 U.S.
10 at 556 n.3 (quoting 5 C. Wright & A. Miller, Federal Practice and
11 Procedure § 1216, at 94, 95 (3d ed. 2004)). The factual allegations
12 that defendant drove at a certain time and hit plaintiff render
13 plausible the conclusion that defendant drove negligently.

14 **2. Dismissal of Claims Governed by Fed. R. Civ. P. 9(b)**

15 A Rule 12(b)(6) motion to dismiss may also challenge a
16 complaint's compliance with Fed. R. Civ. P. 9(b). See Vess, 317
17 F.3d at 1107. This rule provides that "In alleging fraud or
18 mistake, a party must state with particularity the circumstances
19 constituting fraud or mistake. Malice, intent, knowledge, and other
20 conditions of a person's mind may be alleged generally." These
21 circumstances include the "time, place, and specific content of the
22 false representations as well as the identities of the parties to
23 the misrepresentations." Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th
24 Cir. 2007) (quoting Edwards v. Marin Park, Inc., 356 F.3d 1058,
25 _____
26 noted, but cannot form the basis of a ruling.

1 1066 (9th Cir. 2004)). "In the context of a fraud suit involving
2 multiple defendants, a plaintiff must, at a minimum, 'identif[y]
3 the role of [each] defendant[] in the alleged fraudulent scheme.'" "
4 Id. at 765 (quoting Moore v. Kayport Package Express, 885 F.2d 531,
5 541 (9th Cir. 1989)). Claims subject to Rule 9(b) must also satisfy
6 the ordinary requirements of Rule 8.

7 **B. Standard for a Fed. R. Civ. P. 12(e) Motion for More**
8 **Definite Statement**

9 "If a pleading to which a responsive pleading is permitted
10 is so vague or ambiguous that a party cannot reasonably be
11 required to frame a responsive pleading, the party may move for
12 a more definite statement before interposing a responsive
13 pleading." Fed. R. Civ. P. 12(e). "The situations in which a
14 Rule 12(e) motion is appropriate are very limited." 5A Wright
15 and Miller, Federal Practice and Procedure § 1377 (1990).
16 Furthermore, absent special circumstances, a Rule 12(e) motion
17 cannot be used to require the pleader to set forth "the
18 statutory or constitutional basis for his claim, only the facts
19 underlying it." McCalden v. California Library Ass'n, 955 F.2d
20 1214, 1223 (9th Cir. 1990). However, "even though a complaint is
21 not defective for failure to designate the statute or other
22 provision of law violated, the judge may in his discretion . . .
23 require such detail as may be appropriate in the particular
24 case." McHenry v. Renne, 84 F.3d 1172, 1179 (9th Cir. 1996).

25 **III. ANALYSIS**

26 The present motions concern all seven claims against GMAC:

1 (1) violation of the Rosenthal Fair Debt Collection Procedures
2 Act ("Rosenthal Act"), (2) negligence, (3) violation of Real
3 Estate Settlement Procedures Act ("RESPA"), (4) fraud, (5)
4 violation of Unfair Competition Law ("UCL"), (6) wrongful
5 foreclosure, and (7) violation of Cal. Civ. Code § 1632; all
6 four claims against MERS: (1) negligence, (2) fraud, (3)
7 violation of UCL, and (4) violation of Cal. Civ. Code § 1632;
8 all six claims against ETS: (1) violation of the Rosenthal Act,
9 (2) negligence, (3) fraud, (4) violation of UCL, (5) wrongful
10 foreclosure, and (6) violation of Cal. Civ. Code § 1632; and
11 eight of ten claims against Paul Financial: (1) violation of
12 Truth In Lending Act ("TILA"), (2) negligence, (3) violation of
13 RESPA, (4) breach of fiduciary duty, (5) fraud, (6) violation of
14 UCL, (7) breach of contract, and (8) breach of implied covenant
15 of good faith and fair dealing.

16 **A. Truth In Lending Act ("TILA")**

17 **1. Damages**

18 Plaintiff's TILA claim arises solely out of the alleged
19 failure of Paul Financial to make required disclosures at the
20 time the loan was entered.⁵ Specifically, plaintiff alleges that
21 Paul Financial failed to disclose (1) all finance charge
22 details; (2) the annual percentage rate; and (3) the amount
23

24
25 ⁵ Paul Financial also challenges plaintiff's TILA claim for
26 damages on statute of limitations grounds. However, because this
claim can be decided on alternate grounds, the court does not
address this argument.

1 financed.⁶ FAC ¶ 61. However, Paul Financial has provided copies
2 of the TILA disclosures in which it provided this information
3 containing plaintiff's signature. Exh. C to Decl. of Melanie
4 Frank in Support of Defendant Paul Financial, LLC's July 9, 2009
5 Motion to Dismiss.⁷ Because plaintiff has neither alleged that
6 the information contained in these disclosures was inaccurate
7 nor has she raised any arguments in support of her TILA claim
8 that can survive after Paul Financial's production of the signed
9 TILA disclosures, Paul Financial's motion to dismiss plaintiff's
10 TILA claim for damages is granted with leave to amend.⁸

11 _____
12 ⁶ Plaintiff also alleges that Paul Financial failed to provide
13 a notice of her right to rescind the loan. FAC ¶ 60. However,
14 Plaintiff admits in her opposition at page 8 that her loan was a
15 "purchase money loan," and consequently "not subject to rescission
16 under TILA." Accordingly, the court does not consider this
17 allegation.

18 ⁷ While Paul Financial frequently cited to this declaration
19 in its August 26, 2009 motion to dismiss plaintiff's amended
20 complaint, it neglected to include it with the motion. As such,
21 plaintiff did not consider the declaration and its exhibits in her
22 opposition. Opposition at 9 n.4 ("[T]he Frank Declaration does not
23 appear to have been filed in support of the instant Motion to
24 Dismiss."). As such, the court granted Plaintiff an opportunity to
25 challenge the authenticity of the exhibits as well as to argue that
26 even if authentic, the documents do not conclusively demonstrate
that she is not entitled to relief. Because plaintiff has not
amended her opposition in light of the declaration and because the
lack of these disclosures is frequently referenced in her
complaint, the court considers the declaration and its exhibits as
if it were properly filed with the August motion. See Branch v.
Tunnell, 14 F.3d 449, 454 (9th Cir. 1994) (On a motion to dismiss,
a court may consider "documents whose contents are alleged in a
complaint and whose authenticity no party questions, but which are
not physically attached to the pleading.").

⁸ There is no question that the disclosures signed by
plaintiff were written in English even though plaintiff alleges
that her loan was negotiated primarily in Tagalog. While the
provision of disclosures in a language lender defendant knew

1 **2. Rescission**

2 Paul Financial also moves to dismiss plaintiff's TILA claim
3 for rescission because "TILA's rescission provision does not
4 apply to 'Residential Mortgage transactions,'" including
5 plaintiff's home loan. Plaintiff admits that the rescission
6 provision does not apply to her, and thereby her mortgage is
7 "not subject to rescission under TILA." As such, Paul
8 Financial's motion to dismiss plaintiff's TILA claim for
9 rescission is granted with prejudice.

10 **B. Rosenthal Fair Debt Collection Practices Act**

11 California's Rosenthal Fair Debt Collection Practices Act
12 ("Rosenthal Act") prohibits creditors and debt collectors from,
13 among other acts, making false, deceptive, or misleading
14 representations in an effort to collect a debt. Cal. Civ. Code §
15 1788, et seq. A "debt collector" is "any person who, in the
16 ordinary course of business, regularly, on behalf of himself or
17 herself or others, engages in debt collection." Cal. Civ. Code §

18 _____
19 plaintiff did not understand may conflict with the purpose of TILA,
20 15 U.S.C. § 1601, it appears that doing so does not offend the
21 statute it self. See 15 U.S.C. § 1604(b) ("A creditor or lessor
22 shall be deemed to be in compliance with the disclosure provisions
23 of this subchapter with respect to other than numerical disclosures
24 if the creditor or lessor [¶] uses any appropriate model form or
25 clause as published by the Board," where all published forms are
26 in English, 12 C.F.R. Pt. 226, App. H.). Nonetheless, failure to
provide translations of the disclosures may contribute to a claim
under state law, as discussed below. See Cal. Civ. Code § 1632(e)
("Provision by a supervised financial organization of a translation
of the disclosures required by . . . Regulation Z, . . . shall
also be deemed in compliance with the requirements of" California's
translation statute.); see also 12 C.F.R. § 226.27 ("Disclosures
required by [Regulation Z] may be made in a language other than
English").

1 1788.2(c); see also Izenberg v. ETS Services, LLC, 589 F. Supp.
2 2d 1193, 1199 (C.D. Cal. 2008). Plaintiff alleges that
3 defendants GMAC, ETS, and Paul Financial as well as other non-
4 moving defendants violated the Rosenthal Act, however, only GMAC
5 and ETS moved to dismiss the claim. Plaintiff's allegations that
6 defendant GMAC and ETS violated the Rosenthal Act are the
7 following:

- 8 1. GMAC and ETS collected a debt not owed to it. FAC ¶
9 71.
- 10 2. GMAC and ETS made false reports to credit reporting
11 agencies. Id.
- 12 3. GMAC and ETS foreclosed upon a void security interest.
13 Id.
- 14 4. GMAC and ETS foreclosed upon a note of which they were
15 not entitled to payment. Id.
- 16 5. GMAC and ETS wrongly increased the amount of
17 plaintiff's debt by including amounts not permitted by
18 law or contract. Id.
- 19 6. GMAC and ETS falsely stated the amount of plaintiff's
20 debt. Id.
- 21 7. GMAC and ETS used unfair and unconscionable means to
22 collect the debt from plaintiff. Id.

23 As an initial matter, allegations numbers one, three, and
24 four are not relevant to a claim under the Rosenthal Act because
25 they do not describe false, deceptive, or misleading
26 representations. Specifically, allegations of illegality in the

1 origination of a loan do not constitute representations relating
2 to collection of the debt. Moreover, foreclosure on a property
3 as a security on a debt is not debt collection activity
4 encompassed by the Rosenthal Act. Cal. Civ. Code § 2924(b),
5 Izenberg, 589 F. Supp. 2d at 1199. Allegation number seven is
6 plainly conclusory in that the plaintiff makes no indication as
7 to what the alleged unfair or unconscionable means were.
8 Accordingly, the court cannot consider this allegation when
9 evaluating whether plaintiff stated a claim. Twombly, 550 U.S.
10 544 (2007).

11 The court will separately address the remaining allegations
12 because each presents a separate theory of liability.
13 Plaintiff's second allegation is that GMAC and ETS threatened to
14 "mak[e] false reports to credit reporting agencies." FAC ¶ 71.
15 Although the Rosenthal Act does not explicitly prohibit
16 reporting false information to a credit agency, the Act
17 explicitly incorporates federal law, Cal. Civ. Code § 1788.17,
18 and the federal Fair Debt Collection Practices Act prohibits
19 "[c]ommunicating or threatening to communicate to any person
20 credit information which is known or which should be known to be
21 false," 15 U.S.C. § 1692e(8). This allegation satisfies the
22 general requirements of Rule 8, in that it identifies the
23 circumstances, occurrences, and events of the challenged
24 conduct. Rule 9(b)'s heightened requirements do not apply to
25 this theory of liability, in that this theory does not "sound[]
26 in fraud." Kearns v. Ford Motor Co., 567 F.3d 1120, 1125-26 (9th

1 Cir. 2009). Plaintiff does not allege that false representations
2 were actually made and relied upon, only that they were
3 threatened. Accordingly, fraud is not the “basis of [the]
4 claim,” and Fed. R. Civ. P. 9(b) does not apply. Vess v. Ciba-
5 Geigy Corp., 317 F.3d 1097, 1103-04 (9th Cir. 2003).

6 Plaintiff further alleges that GMAC and ETS threatened to
7 “increas[e] the amount of a debt by including amounts that are
8 not permitted by law or contract.” FAC ¶ 71. Section 1788.13(e)
9 prohibits adding fees that may not be lawfully added. This claim
10 also provides the minimal particularity required by Rule 8.

11 Finally, plaintiff alleges that GMAC and ETS “threatened to
12 . . . falsely stat[e] the amount of a debt.” FAC ¶ 71. As to
13 this allegation, an alleged “threat” is nearly incoherent;⁹
14 Plaintiff apparently means simply that GMAC and ETS falsely
15 stated the debt to her. Because this allegation concerns
16 particular false representations, it sounds in fraud, and is
17 subject to Rule 9(b)’s heightened requirements. While plaintiff
18 has alleged the content of the false representation (the amount
19 of debt) and the identities of the parties to the representation
20 (GMAC, ETS and Paul Financial), she has not alleged the time or
21 place of the representation. Accordingly, plaintiff has not met
22

23
24 ⁹ As discussed above, threats to falsely state an amount of
25 debt to a credit agency are clearly coherent. Nonetheless, because
26 plaintiff specifically enumerates such threats in paragraph 71, the
court will interpret this allegation so as not to be repetitive.
Accordingly, the court assumes that the false statements were made
to plaintiff, and not threatened to be made to third parties.

1 the pleading requirements for her claim that GMAC and ETS
2 falsely stated the amount of debt.

3 Accordingly, some, but not all, of plaintiff's theories of
4 liability under the Rosenthal Act are sufficiently alleged.
5 Defendants' motion is granted in part and denied in part as to
6 plaintiff's Rosenthal Act claim. With respect to the dismissed
7 arguments, plaintiff is granted leave to amend.

8 **C. Negligence**

9 **1. Standard**

10 Plaintiff's claim for negligence is brought as to all
11 defendants. Under California law, the elements of a claim for
12 negligence are "(a) a legal duty to use due care; (b) a breach
13 of such legal duty; and (c) the breach as the proximate or legal
14 cause of the resulting injury." Ladd v. County of San Mateo, 12
15 Cal. 4th 913, 917 (1996) (internal citations and quotations
16 omitted); see also Cal Civ Code § 1714(a). Moving defendants
17 argue that plaintiff has not adequately alleged facts supporting
18 any of these elements. The court discusses the allegations of
19 negligence as to each defendant separately.

20 **2. Paul Financial**

21 **a. Statute of Limitations**

22 Paul Financial argues that plaintiff's negligence claim
23 should be dismissed because it was not timely filed. Defendant
24 argues that by filing her complaint in June 2009, her negligence
25 claims are barred by the two year statute of limitations under
26 section 339, subdivision 1 of the California Code of Civil

1 Procedure for negligence in origination of her loan in November
2 2006. Defendant's contention is inconsistent with the test for
3 the statute of limitations for negligence under this statute.
4 Specifically, the general rule for statute of limitations begins
5 running not when the allegedly negligent act or omission
6 occurred, but rather "when the cause of action is complete with
7 all of its elements." Williams v. Hilb, Rogal & Hobbs Ins.
8 Servs. of Ca., Inc., 177 Cal. App. 4th 624, 641 (Cal. Ct. App.
9 2009) (quoting Norgart v. Upjohn Co., 21 Cal. 4th 383,
10 397(1999)). Thus, with respect to negligence claims, the statute
11 of limitations does not run until the plaintiff sustains an
12 injury because "the mere breach of a . . . duty does not suffice
13 to create a cause of action for negligence." Sahadi v.
14 Scheaffer, 155 Cal. App. 4th 704, 715 (Cal Ct. App. 2007)
15 (citing (Budd v. Nixen, 6 Cal. 3d 195, 200 (1971).) Accordingly,
16 the two year statute of limitations only starts to run after
17 both (1) all the elements of the negligence claim are complete
18 and (2) plaintiff knew or should have known of the claim.
19 Norgart, 21 Cal. 4th at 397.

20 The standard for a motion to dismiss based on a statute of
21 limitations that has run is that it "may be granted only if the
22 assertions of the complaint, read with the required liberality,
23 would not permit the plaintiff to prove that the statute was
24 tolled." Supermail Cargo, Inc. v. United States, 68 F.3d 1204,
25 1206 (9th Cir. 1995). Here, plaintiff alleges that defendants
26 concealed information about her claim. Plaintiff also alleges

1 that she is not an English speaker, and thereby was unable to
2 read the loan documents. Consequently, plaintiff may require
3 more time to discover any potential negligence claims. Moreover,
4 plaintiff's allegations also support a claim that she did not
5 experience an injury until her loan payments exceeded her
6 ability to pay or even until the initiation of foreclosure
7 proceedings on her home loan. Under the liberal Supermail Cargo
8 standard, plaintiff has stated a claim that either the statute
9 of limitations had not yet run on her negligence claim or that
10 the statute of limitations is tolled.

11 **b. Lenders' Duty of Care to Borrowers**

12 The court rejects defendant's argument that a lender never
13 owes a duty of care to a borrower. California courts have stated
14 that, "as a general rule, a financial institution owes no duty
15 of care to a borrower when the institution's involvement in the
16 loan transaction does not exceed the scope of its conventional
17 role as a mere lender of money." Nymark, 231 Cal. App. 3d at
18 1096. Applying this rule, the court in Nymark granted summary
19 judgment to the defendant on a claim that the defendant lender
20 had acted negligently in appraising the borrower's collateral to
21 determine if it is adequate security for a loan refinancing the
22 borrower's mortgage, as the court concluded as a matter of law
23 that no duty of care existed with respect to the appraisal. Id.
24 at 1096. See also Wagner v. Benson, 101 Cal. App. 3d 27, 35
25 (1980) (a lender has no duty to ensure that borrower will use
26 borrowed money wisely).

1 The court understands Nymark to be limited in two ways.
2 First, a lender may owe a duty of care sounding in negligence to
3 a borrower when the lender's activities exceed those of a
4 conventional lender. The Nymark court noted that the "complaint
5 does not allege, nor does anything in the summary judgment
6 papers indicate, that the appraisal was intended to induce
7 plaintiff to enter into the loan transaction or to assure him
8 that his collateral was sound." Id. at 1096-97. Nymark thereby
9 implied that had such an intent been present, the lender may
10 have had a duty to exercise due care in preparing the appraisal.
11 See also Wagner v. Benson, 101 Cal. App. 3d 27, 35 (1980)
12 ("Liability to a borrower for negligence arises only when the
13 lender actively participates in the financed enterprise beyond
14 the domain of the usual money lender.").

15 Second, even when a lender's acts are confined to their
16 traditional scope, Nymark announced only a "general" rule.
17 Rather than conclude that no duty existed per se, the Nymark
18 court determined whether a duty existed on the facts of that
19 case by applying the six-factor test established by the
20 California Supreme Court in Biakanja v. Irving 49 Cal. 2d 647,
21 320 P.2d 16 (1958). Nymark, 231 Cal. App. 3d at 1098; see also
22 Glenn K. Jackson Inc. v. Roe, 273 F.3d 1192, 1197 (9th Cir.
23 2001). This test balances six non-exhaustive factors:

24 [1] the extent to which the transaction was
25 intended to affect the plaintiff, [2] the
26 foreseeability of harm to him, [3] the
 degree of certainty that the plaintiff
 suffered injury, [4] the closeness of the

1 connection between the defendant's conduct
2 and the injury suffered, [5] the moral blame
3 attached to the defendant's conduct, and [6]
4 the policy of preventing future harm.

4 Roe, 273 F.3d at 1197 (quoting Biakanja, 49 Cal. 2d at 650)
5 (modification in Roe). Although Biakanja reasoned that this test
6 determines "whether in a specific case the defendant will be
7 held liable to a third person not in privity" with the
8 defendant, 49 Cal. 2d. at 650, Nymark held that this test also
9 determines "whether a financial institution owes a duty of care
10 to a borrower-client," 231 Cal. App. 3d at 1098. Applying these
11 factors to the specific facts in that case, the Nymark court
12 assumed that plaintiff suffered injury, but held that the
13 remaining factors all indicated against finding a duty of care.
14 Id. at 1098-1100.

15 In Roe, the Ninth Circuit noted that the California Supreme
16 Court "arguably limited" Biakanja in Bily v. Arthur Young & Co.,
17 3 Cal. 4th 370, (1992), which held a court must consider three
18 additional factors before imposing a duty of care. Roe, 273 F.3d
19 at 1198. Roe summarized these factors as "(1) liability may in
20 particular cases be out of proportion to fault; (2) parties
21 should be encouraged to rely on their own ability to protect
22 themselves through their own prudence, diligence and contracting
23 power; and (3) the potential adverse impact on the class of
24 defendants upon whom the duty is imposed." Id. (citing Bily, 3
25 Cal. 4th at 399-405). Bily was decided before Nymark, but not
26 discussed in the case.

1 **c. Paul Financial's Allegedly Negligent Acts**

2 Both limitations to the Nymark rule require the court to
3 consider the particular conduct underlying the negligence claim.
4 Plaintiff alleges three types of wrongful conduct here.¹⁰

5 First, plaintiff argues that Paul Financial was negligent
6 in failing to provide the disclosures required by TILA and
7 RESPA. FAC ¶ 78. As explained above, plaintiff has not
8 adequately alleged a failure to provide any disclosure required
9 by TILA. Plaintiff has alleged plausible failures to provide
10 disclosures required by RESPA. Paul Financial had a duty of care
11 with regard to these disclosures. Although the disclosures are
12 undoubtedly within the scope of a lender's normal activities,
13 each of the Biakanja factors support finding a duty of care, and
14 the policy concerns identified in Bily are inapplicable here.
15 Plaintiff has adequately alleged a duty to make accurate RESPA
16 disclosures, a breach of that duty, and damages.¹¹

17 Second, plaintiff argues that Paul Financial was negligent
18 in "directing [plaintiff] into a loan transaction that [he] may
19 not have otherwise qualified for by industry standards,
20 resulting in excessive fees paid by the Plaintiff and payments

21
22 ¹⁰ Although the court engages in this fact-specific analysis,
23 the court is mindful of fact that plaintiff has not provided a
24 single example of a case in which a lender was found to owe a duty
of care sounding in negligence to a borrower, nor has the court
discovered any such authority under California law.

25 ¹¹ Paul Financial also included RESPA disclosures as exhibits
26 to the Frank Declaration, but has not argued that these disclosures
conclusively show that it did not violate RESPA by failing to
provide statutorily required disclosures at closing.

1 in excess of Plaintiff's ability to pay." FAC ¶ 77. The
2 California Court of Appeal has directly spoken to this issue,
3 holding that a lender "owes no duty of care to the [borrower] in
4 approving [a] loan." Wagner, 101 Cal. App. 3d at 35. Wagner held
5 that as a matter of law, the lender did not owe a duty in
6 negligence not to place borrowers in a loan even where there was
7 a foreseeable risk borrowers would be unable to repay. Id.
8 Wagner's conclusion is consistent with the principles described
9 above. Approving and providing a loan is within the scope of
10 activities conventionally performed by a lender. Under Bily's
11 second factor, borrowers "should be encouraged to rely on their
12 own ability to protect themselves through their own prudence,
13 diligence and contracting power." Roe, 273 F.3d at 1198 (citing
14 Bily, 3 Cal. 4th at 399-405). While borrowers' ability to
15 protect themselves may depend on access to accurate information,
16 a lender's duty to provide that information is distinct from a
17 duty that would prohibit the lender from offering the loan at
18 all.

19 It follows from the conclusion that a lender does not owe a
20 duty to the borrower in approving the loan that the lender's
21 failure to discover inaccuracies in the loan application
22 regarding borrower's income cannot breach a duty owed to the
23 borrower in negligence, unless these inaccuracies caused a
24 change in the terms of the loan. Plaintiff has alleged no such
25 connection here.

26

1 Third, Plaintiff alleges that Paul Financial was negligent
2 in failing to maintain the original promissory note and in
3 "failing to properly create original documents." FAC ¶ 78. Other
4 than the allegations regarding disclosures, plaintiff has not
5 identified any defect in the promissory note, deed of trust, or
6 attached documents. As to preservation of the original
7 promissory note, plaintiff has not alleged facts supporting the
8 conclusion that any failure to maintain this note caused any
9 harm to plaintiff.

10 Finally, Plaintiff alleges that Paul Financial was
11 negligent when it "took payments to which [it was] not entitled,
12 charged fees [it was] not entitled to charge, and made or
13 otherwise authorized negative reporting of Plaintiff['s]
14 creditworthiness to various credit bureaus." Defendant's duty as
15 to these allegations is limited by the terms of plaintiff's
16 loan.¹² Until the terms of plaintiff's loan are deemed void, Paul
17 Financial's actions to enforce those terms cannot violate any
18 duty. As such, Plaintiff has not alleged a claim for negligence
19 with respect to the collection of payments, charging of fees, or
20 reporting to credit bureaus. For the foregoing reasons, Paul
21 Financial's motion to dismiss plaintiff's negligence claim
22 against it is granted in part and denied in part. With respect

23
24

25 ¹² It is difficult to know exactly what plaintiff is claiming,
26 but it does not appear he is claiming the payments and fees were
not authorized by the loan.

1 to the arguments that the court dismisses, plaintiff is granted
2 leave to amend.

3 **2. As to GMAC**

4 Plaintiff alleges that GMAC negligently "took payments to
5 which [it was] not entitled, charged fees [it was] not entitled
6 to charge, and made or otherwise authorized negative reporting
7 of Plaintiff['s] creditworthiness to various credit bureaus."
8 FAC ¶¶ 78-79. In short, plaintiff apparently alleges that GMAC
9 negligently failed to properly service her loan because the loan
10 was invalid. While GMAC may have a duty to properly service a
11 loan, it could only breach this duty by servicing a loan it
12 knows to be void. Here, plaintiff makes no allegations that her
13 loan was deemed void prior to or while GMAC serviced it. Rather,
14 plaintiff only now seeks to have the loan deemed void by this
15 court. Thus, plaintiff failed to make a claim for negligence
16 against GMAC, and the claim for negligence against GMAC is
17 dismissed with leave to amend.

18 **3. As to MERS**

19 Plaintiff makes two separate claims as to MERS's alleged
20 negligence. The first concerns its failure to maintain the
21 original promissory note. FAC ¶ 78. This court recently
22 considered whether the original promissory note need be
23 maintained by MERS or any other entity seeking non-judicial
24 foreclosure in California. Champlaie v. BAC Home Loans
25 Servicing, LP, 2009 WL 3429622 at *13 (E.D. Cal. October 22,
26 2009). Essentially, "California Civil Code sections 2924-29241

1 establish an exhaustive set of requirements for non-judicial
2 foreclosure, and that production of the note is not one of these
3 requirements." Id. Thus, plaintiff has not alleged that the
4 failure to maintain the promissory note caused her any
5 cognizable harm.

6 The second is that MERS had a duty to only serve an
7 administrative function, as expressed in the terms and
8 conditions of its charter, and that it breached this duty by
9 designating ETS as trustee to execute the foreclosure of her
10 home loan. FAC ¶ 10. The terms and conditions, however,
11 explicitly permit MERS to act as nominee for the beneficial
12 owners of a loan. A nominee is a type of agent of the
13 beneficiary (see "Nominee," Black's Law Dictionary (8th ed.
14 2004)), and the terms and conditions quoted in plaintiff's
15 complaint do not restrict the actions of MERS as nominee on
16 behalf of the beneficiary. Specifically, these terms do not
17 prohibit MERS from substituting another entity as trustee to
18 foreclose the loan. Furthermore, plaintiff has alleged no facts
19 to support the claim that as a nominee, MERS could not properly
20 substitute ETS as a trustee. Accordingly, plaintiff failed to
21 make a claim that MERS was negligent in making ETS the trustee
22 or in commencing foreclosure proceedings. Thus, plaintiff has
23 not alleged a cause of action for negligence against MERS, and
24 this claim is dismissed with leave to amend.

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4. As to ETS

The general thrust of plaintiff's negligence claim against ETS is that ETS violated a duty to plaintiff by instituting foreclosure proceedings on plaintiff's loan while wrongly serving as trustee. As discussed above, plaintiff has not provided facts to support a claim that MERS improperly designated ETS as trustee. Thus, the only remaining theory of liability is that ETS "breached its duties set forth under California's non-judicial foreclosure scheme, when it failed to re-notice the Plaintiff regarding an upcoming trustee's sale." Opposition at 12. This argument, however, is not a viable theory of recovery under California law. A trustee's actions in executing a non-judicial foreclosure are protected by California's litigation privilege, and as such will not support a tort claim other than malicious prosecution. Cal Civ. Code §§ 47, 2924(d), Kachlon v. Markowitz, 168 Cal. App. 4th 316, 333 (2008); see also Bouyer v. Countrywide Bank, FSB, 2009 U.S. Dist. LEXIS 53940 (N.D. Cal. June 25, 2009). ETS's motion to dismiss the negligence claim against it is granted with leave to amend.

D. Real Estate Settlement Procedures Act ("RESPA")

1. As to Paul Financial

Paul Financial argues that plaintiff's claim against it for violation of RESPA should be dismissed for two reasons. First, defendant argues that plaintiff failed to allege facts

1 supporting her claim that it violated RESPA. However, plaintiff
2 did allege facts supporting her claim. Plaintiff alleged that
3 Paul Financial "failed to correctly and accurately comply with
4 disclosure requirements" at the time of closing of the sale of
5 plaintiff's property. FAC ¶ 85. Defendant continues to argue
6 that plaintiff needed to identify what specifically it failed to
7 disclose or inaccurately disclose in order to meet the pleadings
8 requirements under Bell Atlantic Corp. v. Twombly, 550 U.S. 544
9 (2007). While plaintiff's allegation is not detailed, neither is
10 it conclusory. Plaintiff does not merely state that Paul
11 Financial violated RESPA, but rather that Paul Financial failed
12 to comply with RESPA's disclosure requirements. Such an
13 allegation put Paul Financial on notice of what plaintiff's
14 claim is and the grounds upon which it rests, i.e., plaintiff
15 claims that Paul Financial violated RESPA by failing to make
16 disclosures required by the statute at the closing of
17 plaintiff's home loan. Plaintiff has alleged sufficient facts to
18 support her claim against Paul Financial.

19 Defendant's second argument is that a plaintiff alleging a
20 violation of RESPA must allege damages to state a claim under
21 the statute. 12 U.S.C. § 2605(f)(1)(A).¹³ Because plaintiff
22 failed to allege damages, Paul Financial argues, the claim

23 ¹³ RESPA allows for a plaintiff to recover damages of up to
24 \$1000 "in the case of a pattern or practice of noncompliance" with
25 the statute. Plaintiff alleges such a pattern or practice in
26 paragraph 87 of her complaint. The court makes no decision as to
whether plaintiff's allegation should not be considered under
Twombly because defendants have not raised any arguments concerning
the allegation.

1 should be dismissed. Defendant's argument fails because
2 plaintiff has alleged that she has suffered damages because of
3 defendant's violation of RESPA. FAC ¶ 88 ("As a result of
4 Defendants' failure to comply with RESPA, Plaintiff has suffered
5 and continues to suffer damages and costs of suit.").
6 Accordingly, Paul Financial's motion to dismiss plaintiff's
7 RESPA claim is denied.¹⁴

8 **2. As to GMAC**

9 GMAC makes three arguments supporting its motion to dismiss
10 plaintiff's RESPA claim. The court rejects all three arguments.
11 First, GMAC refers to what appears to be a typographical error
12 in plaintiff's complaint. Specifically, in plaintiff's general
13 allegations, Rivera alleges that she sent QWRs to both JP Morgan
14 and GMAC, however Rivera only alleges that JP Morgan has yet to
15 properly respond to the request. FAC ¶ 34. Under her cause of
16 action for violation of RESPA, however, plaintiff clearly
17 alleges that both GMAC and JP Morgan "fail[ed] and refus[ed] to
18 provide a proper written explanation or response to Plaintiff's
19 QWR." While plaintiff's omission of GMAC's failure to respond to
20 the QWR in her general allegations may not be ideal, it does not
21 fail to put GMAC on notice of the grounds on which plaintiff
22 bases her claim. Thus, GMAC's argument does not support
23 dismissal of the RESPA claim against it.

24 _____
25 ¹⁴ This court draws no conclusion as to whether the
26 disclosures contained in Exhibit C to the Frank declaration would
establish that plaintiff has failed to state a claim because
defendant has not raised the argument.

1 Second, GMAC argues that it had no duty to provide
2 disclosures at the closing of plaintiff's loan because it was
3 not the original lender. This argument has no merit because
4 plaintiff does not allege that GMAC failed to make disclosures
5 at closing. Rather, plaintiff alleges that GMAC violated RESPA
6 by failing to timely provide plaintiff with notice that it
7 obtained servicing rights, FAC ¶ 84, and failing to properly
8 respond to plaintiff's QWR, id. at ¶ 87.

9 Lastly, GMAC argues that there is no private right of
10 action under sections 2603 and 2604 of RESPA. However,
11 plaintiff's claim arises under section 2605, and as described
12 above, such a claim provides for individual recovery. See 12
13 U.S.C. 2605(f). GMAC's motion to dismiss is denied.

14 **E. Breach of Fiduciary Duty**

15 Plaintiff brings a claim for breach of fiduciary duty
16 against defendants Minh Duong, Joe Nguyen, Republic 2, and Paul
17 Financial. The former three defendants are not directly at issue
18 in this motion. The court dismisses this claim as to Paul
19 Financial, because plaintiff has not alleged facts supporting
20 the conclusion that Paul Financial owed plaintiff a fiduciary
21 duty, nor has plaintiff provided a legal theory under which Paul
22 Financial may be liable under the brokers' fiduciary duties.

23 In general, a lender does not owe a fiduciary duty to a
24 borrower. "A commercial lender is entitled to pursue its own
25 economic interests in a loan transaction. This right is
26 inconsistent with the obligations of a fiduciary which require

1 that the fiduciary knowingly agree to subordinate its interests
2 to act on behalf of and for the benefit of another." Nymark v.
3 Heart Fed. Savings & Loan Assn., 231 Cal. App. 3d 1089, 1093 n.1
4 (1991). "[A]bsent special circumstances . . . a loan transaction
5 is at arm's length and there is no fiduciary relationship
6 between the borrower and lender." Oaks Management Corporation v.
7 Superior Court, 145 Cal. App. 4th 453, 466 (2006) (collecting
8 cases).

9 Plaintiff argues that because of Paul Financial's influence
10 upon plaintiff's brokers, Republic 2, Joe Nguyen, and Minh
11 Duong, Paul Financial is subject to the fiduciary duty a broker
12 owes to the client. Paul Financial's influence allegedly
13 consisted of commissions paid to the brokers based on the volume
14 and profitability (for Paul Financial) of the loans brokers sold
15 as well as "train[ing], direct[ion], [and] authoriz[ation],"
16 although plaintiff has not explained the sense in which Paul
17 Financial directed or authorized the broker's conduct. FAC ¶¶
18 22, 36, 92. The case relied upon by plaintiff, Wyatt v. Union
19 Mortg. Co., held that "[d]irectors and officers of a corporation
20 . . . may become liable [for a corporation's torts] if they
21 directly ordered, authorized or participated in the tortious
22 conduct." Wyatt v. Union Mortg. Co., 24 Cal. 3d 773, 785 (1979)
23 (emphasis added). Neither Wyatt nor the authorities cited
24 therein suggests that this rule imposes liability outside the
25 relationship between a corporation and its officers.

26 Plaintiff also argues that Paul Financial may be

1 vicariously liable under employer/employee, agency, and
2 conspiracy theories.¹⁵ The factual allegations do not support
3 employee or agency theories. As to master/servant relationships,
4 the "primary factor" in whether the purported employer exercises
5 control over the purported employee. See Metropolitan Water
6 Dist. v. Superior Court, 32 Cal. 4th 491, 512 (2004) (following
7 the Restatement Second of Agency (1958), § 220). Plaintiff has
8 not alleged facts indicating that Paul Financial exercised the
9 requisite control over the brokers' activities. Other factors
10 courts may consider in this analysis are not relevant here. See
11 Tieberg v. Unemployment Ins. Appeals Board, 2 Cal. 3d 943, 950
12 (1970) (quoting Restatement of Agency, Second § 220(2)(b)-(j)).

13 As to agency, an agency relationship exists where a
14 principal authorizes an agent to represent and bind the
15 principal. Cal. Civ. Code § 2295. Here, although plaintiff has
16 alleged that Paul Financial offered the brokers incentives to
17 act in ways that furthered Paul Financial's interests, there is
18 no allegation indicating that Paul Financial gave the brokers
19 authority to represent or bind it, or that Paul Financial took
20 some action that would have given plaintiff the impression that
21 such a relationship existed. Cal. Civ. Code §§ 2299, 2300; J.L.

22 _____
23 ¹⁵ Because the court concludes that each of these theories
24 fails, the court does not address the relationship between these
25 theories and the reasoning in Wyatt. See Doctors' Co. v. Superior
26 Court, 49 Cal. 3d 39, 48 (1989) (citing Wyatt v. Union Mortgage
Co., 24 Cal. 3d at 785).

1 v. Children's Institute, Inc., 177 Cal. App. 4th 388, 403-404
2 (2009). Therefore, plaintiff's allegations do not support a
3 finding of either actual or ostensible agency.

4 Turning finally to conspiracy, Paul Financial may not be
5 liable for conspiracy to breach a fiduciary duty. Under
6 California law, a party may be vicariously liable for another's
7 tort in a civil conspiracy where the plaintiff shows "(1)
8 formation and operation of the conspiracy and (2) damage
9 resulting to plaintiff (3) from a wrongful act done in
10 furtherance of the common design." Rusheen v. Cohen, 37 Cal. 4th
11 1048, 1062 (2006) (citing Doctors' Co. v. Superior Court, 49
12 Cal.3d 39, 44 (1989)), see also Applied Equipment Corp. v.
13 Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 511 (1994).¹⁶ The
14 California Supreme Court has held that even when these elements
15 are shown, however, a conspirator cannot be liable unless he
16 personally owed the duty that was breached. Applied Equipment, 7
17 Cal. 4th at 511, 514. Civil conspiracy "cannot create a duty . .
18 . . [i]t allows tort recovery only against a party who already
19 owes the duty." Id. at 511. Allied Equipment has thus sharply
20 limited the scope of civil conspiracy liability. Numerous
21 California cases have cited Applied Equipment to hold that civil
22 conspiracy liability could not be imposed, and this court is

23 _____
24 ¹⁶ Rusheen stated in passing that these were "[t]he elements
25 of an action for civil conspiracy." 37 Cal. 4th at 1062. In cases
26 more directly considering civil conspiracy liability, however, the
California Supreme Court has explained that "Conspiracy is not a
cause of action." Applied Equipment Corp. v. Litton Saudi Arabia
Ltd., 7 Cal. 4th 503, 510 (1994).

1 aware of only two post-Applied Equipment cases imposing civil
2 conspiracy liability. Kesmodel v. Rand, 119 Cal. App. 4th 1128,
3 1133, 1141 (2004), Shafer v. Berger, Kahn, Shafton, Moss,
4 Figler, Simon & Gladstone, 107 Cal. App. 4th 54, 84 (2003).
5 These cases involved generally-applicable tort duties,
6 respectively, the duty not to falsely arrest, and the duty not
7 to engage in affirmative fraud. In contrast, courts have
8 specifically held that civil conspiracy cannot impose liability
9 for breach of fiduciary duty on a party that does not already
10 owe such a duty. Everest Investors 8 v. Whitehall Real Estate
11 Ltd. Partnership XI, 100 Cal. App. 4th 1102, 1107 (2002) (citing
12 Doctors' Co., 49 Cal. 3d at 41-42, 44 and Allied Equipment, 7
13 Cal. 4th at 510-512). Thus, civil conspiracy allows imposition
14 of vicarious liability on a party who owes a tort duty, but who
15 did not personally breach that duty. Doctors' Co., 49 Cal. 3d at
16 44 (A party may be liable "irrespective of whether or not he was
17 a direct actor and regardless of the degree of his activity.");
18 see also Kesmodel, 119 Cal. App. 4th at 1141 (illustrating
19 application of this rule).

20 The California Supreme Court's holdings appear to compel
21 the conclusion that in this case, however, where Paul Financial
22 is alleged to have induced another, a broker, to engage in a
23 joint scheme that will breach the broker's fiduciary duty, it
24 may not be liable under an independent civil conspiracy claim
25 nor under a claim for civil conspiracy to commit breach of
26 fiduciary duty. Applied Equipment, 7 Cal. 4th at 511, 514.

1 Whatever the wisdom of this rule, the court is bound by the
2 California Supreme Court's holdings on this issue. It may be
3 that Paul Financial is liable, on some other theory, for
4 interfering with the fiduciary duty owed to plaintiff by
5 plaintiff's mortgage brokers. The court declines to speculate on
6 what such a claim would entail, or its likelihood of success.
7 Associated General Contractors of California, 459 U.S. at 526.
8 In the present complaint, the purported interference identified
9 by plaintiff is insufficient to give rise to a fiduciary duty
10 running from the lender to the borrower. Oaks Management, 145
11 Cal. App. 4th at 466. Absent such a duty, plaintiff's claim for
12 breach of fiduciary duty must be dismissed as to Paul Financial.

13 **F. Fraud**

14 Plaintiff brings a claim for fraud as to all defendants.
15 The elements of a claim for intentional misrepresentation under
16 California law are (1) misrepresentation (a false
17 representation, concealment or nondisclosure), (2) knowledge of
18 falsity, (3) intent to defraud (to induce reliance), (4)
19 justifiable reliance, and (5) resulting damage. Agosta v. Astor,
20 120 Cal. App. 4th 596, 603 (2004). Claims for fraud are subject
21 to a heightened pleading requirement under Fed. R. Civ. P. 9(b),
22 as discussed above.

23 The FAC's allegations in support of the claim for fraud are
24 that:

25 Defendants, and each of them, have made
26 several representations to Plaintiff with
regard to material facts. [¶] These material

1 representations made by Defendants were
2 false. [¶] Defendants knew that these
3 material representations were false when
4 made, or these material representations were
5 made with reckless disregard for the truth.
6 [¶] Defendants intended that Plaintiff rely
7 on these material representations. [¶]
8 Plaintiff reasonably relied on said
9 representations. [¶] As a result of
10 Plaintiff[']s reliance, she was harmed and
11 suffered damages.

12 FAC ¶¶ 101-106. These allegations are the paragon of conclusory
13 allegations, and they fail to meet the specificity required by
14 Fed. R. Civ. P. 9(b). They refer to no specific conduct, and
15 give defendants absolutely no indication as to what conduct, if
16 any, underlies the fraud claims.

17 Without attempting to defend the general allegations quoted
18 above, plaintiff contends that the claim nonetheless satisfies
19 Rule 9(b) because it incorporates by reference all other
20 allegations in the complaint. None of these allegations
21 specifically identify any misrepresentation by the parties to
22 this motion. Further, plaintiff argues in her opposition that
23 moving defendants are somehow vicariously liable to the alleged
24 misrepresentations made by real estate broker defendants Nguyen
25 and Duong. Plaintiff, however, fails to provide any legal theory
26 to support such liability based upon the facts alleged in her
complaint. As such, plaintiff has not stated a claim for
vicarious liability of any defendants. Plaintiff's incorporation
of allegations by reference fails to provide the notice required
by Rule 9, and plaintiff's fraud claim is dismissed.
Accordingly, defendants' motion to dismiss the fraud claim is

1 granted as to defendants Paul Financial, GMAC, MERS, and ETS
2 with leave to amend.

3 **G. Breach of Contract**

4 Plaintiff brings a claim for breach of contract against
5 Paul Financial to which defendant moves to dismiss. A cause of
6 action for breach of contract includes four elements: that a
7 contract exists between the parties, that the plaintiff
8 performed his contractual duties or was excused from
9 nonperformance, that the defendant breached those contractual
10 duties, and that plaintiff's damages were a result of the
11 breach. Reichert v. General Ins. Co., 68 Cal. 2d 822, 830
12 (1968); First Commercial Mortgage Co. v. Reece, 89 Cal. App. 4th
13 731, 745 (2001).

14 In her opposition, plaintiff identifies the promissory note
15 as the contract at issue. Plaintiff alleges that Paul Financial
16 violated this contract by failing to comply with language
17 indicating that her payment would be \$1,922. Paul Financial
18 included the note as an exhibit to the Frank declaration. This
19 document clearly indicates that Paul Financial did not breach
20 the contract by charging plaintiff a payment other than \$1,922.
21 For example, plaintiff's adjustable rate note states that, "The
22 interest rate I will pay may change." This documents makes
23 plaintiff's claim for breach of contract untenable.

24 Plaintiff also argues that Paul Financial should be liable
25 to the oral promises made by the broker before they entered the
26 written contracts. It is not clear from plaintiff's opposition

1 or from her complaint whether she is attempting to argue that
2 the oral promises should be integrated into the note or if the
3 oral promises constitute a separate contract under which Paul
4 Financial is vicariously liable. Because the court cannot
5 ascertain the nature or the basis of plaintiff's second argument
6 of liability, the court dismisses plaintiff's claim for breach
7 of contract with leave to amend.

8 **H. Breach of Good Faith and Fair Dealing**

9 Plaintiff brings a claim for breach of the implied covenant
10 of good faith and fair dealing against Paul Financial and other
11 nonmoving defendants. Such a claim is predicated upon the
12 existence of an underlying contract. Plaintiff has alleged two
13 contracts with Paul Financial: the deed of trust and promissory
14 note. Turning to Paul Financial's alleged breach of the implied
15 covenant, as with many of plaintiff's claims, the factual
16 allegations underlying the good faith claim are largely
17 conclusory.¹⁷

18 In her opposition, plaintiff argues that the good faith
19 claim is based on "Paul Fiancial [having] placed Plaintiff into
20 a toxic loan with predatory terms." However, because a claim for
21 breach of the duty good faith is a claim that a defendant
22 deprived plaintiff of benefits reasonably expected by the

23
24 ¹⁷ For example, plaintiff alleges that defendants violated the
25 duty of good faith by "performing the acts and failures to act
26 alleged herein, and by failing to perform the duties specifically
enumerated herein," FAC ¶ 122, and by "failing to comply with all
applicable laws, including notice requirements, before
foreclosure," FAC ¶ 123.

1 parties under the contract, entry into the contract itself
2 cannot constitute a violation of the duty of good faith.

3 Accordingly, plaintiff's claim against Paul Financial for
4 breach of the implied covenant of good faith and fair dealing is
5 dismissed with leave to amend.

6 **I. Wrongful Foreclosure**

7 Finally, plaintiff brings a claim for wrongful foreclosure,
8 as to GMAC and ETS. Plaintiff has failed to allege a violation
9 of any of the requirements for a non-judicial foreclosure.¹⁸

10 Specifically, plaintiff argues that the foreclosure of her home
11 loan violated these requirements because (1) defendants are
12 statutorily required to produce the note to foreclose, or
13 alternatively, (2) defendants are required to proffer proof of
14 ownership of the note to foreclose, and (3) defendants lacked
15 the authority to foreclose. With respect to plaintiff's first
16 argument, California's non-judicial foreclosure process, Cal.
17 Civ. Code §§ 2924-29241, establishes an exhaustive set of
18 requirements for non-judicial foreclosure, and the production of
19 the note is not one of these requirements. Champlaie, 2009 WL
20 3429622 at *13. Similarly, with respect to plaintiff's second
21 argument, under Cal. Civ. Code § 2932.5, the Ninth Circuit has
22 applied California law to hold that promissory notes and deeds

23
24 ¹⁸ Defendants also argue that plaintiff's claim should be
25 dismissed for failure to offer tender. The court does not consider
26 this argument because it dismisses plaintiff's wrongful foreclosure
claim on the grounds that plaintiff has not raised any arguments
to support a claim that the foreclosure of her home loan was
wrongful.

1 of trust arising out of real estate loans could be sold without
2 transfer of possession of the documents themselves. In re Golden
3 Plan of Cal., Inc., 829 F.2d 705, 708 n.2, 710 (9th Cir. 1986).
4 Accordingly, possession of the promissory note is not a
5 prerequisite to non-judicial foreclosure in that a party may
6 validly own a beneficial interest in a promissory note or deed
7 of trust without possession of the promissory note itself.
8 Champlaie, 2009 WL 349622 at *13-14. Consequently, defendants
9 need not offer proof of possession of the note to legally
10 institute non-judicial foreclosure proceedings against
11 plaintiff, although, of course, they must prove that they have
12 the right to foreclose. Lastly, as described above, plaintiffs
13 have not alleged any facts to support a claim that defendants
14 did not possess the right to foreclose plaintiff's loan.
15 Specifically, plaintiff has not alleged that her loan was deemed
16 void or invalid, but rather has raised numerous arguments that
17 her loan is voidable. Thus, this claim is dismissed with leave
18 to amend.

19 **J. Contract Rescission under Cal. Civ. Code § 1632**

20 Plaintiff alleges a claim for violation of Cal. Civ. Code §
21 1632 against all moving defendants, yet only defendants GMAC,
22 MERS, and ETS have moved to dismiss this cause of action. This
23 section requires "any person engaged in a trade or business who
24 negotiates primarily in . . . Tagalog . . . , orally or in
25 writing, in the course of entering [several types of contracts
26 to] deliver to the other party to the contract or agreement and

1 prior to the execution thereof, a translation of the contract or
2 agreement in the language in which the contract or agreement was
3 negotiated." Cal. Civ. Code. § 1632(b). Plaintiff has alleged
4 that "her native language is Tagalog," FAC ¶ 25, and that her
5 "[N]egotiations were translated into Tagalog[,] but no documents
6 were provided to Plaintiff[] translated into Tagalog." GMAC,
7 MERS, and ETS move to dismiss this claim against them for two
8 separate reasons. Defendants argue that no written translation
9 was necessary because the mortgage broker verbally translated
10 the negotiations for plaintiff and was plaintiff's agent.
11 Alternatively, defendants argue that they cannot be liable under
12 the statute because they did not negotiate anything with the
13 plaintiff.¹⁹

14 First, plaintiff correctly argues that the exception to §
15 1632's provisions in subsection (h) does not apply in this case.
16 Specifically, subsection (h) only applies where "the party
17 negotiates the terms of the contract . . . through his or her
18 own interpreter." Defendants argue that the real estate broker
19 was plaintiff's "own interpreter" in that the real estate broker
20 is the agent of the borrower. Such an argument contravenes the
21 purpose of the statute in that it specifically seeks to protect
22 borrowers from being subject to loans negotiated with a real

23
24 ¹⁹ Defendants also argue that the claim should be dismissed
25 because it fails to name any defendants. While the claim could have
26 more clearly identified how each defendant is liable under the
statute, the cause of action sufficiently puts defendants on notice
that plaintiff seeks to hold them liable in that it names
"Defendants' wrongful actions." This is sufficient.

1 estate broker primarily in Tagalog, who nonetheless fails to
2 provide written translations of the loan. See Cal. Civ. Code §
3 1632(b)(4); Cal. Bus. & Prof. Code § 10240. As such, the fact
4 that the real estate broker was plaintiff's agent does not
5 overcome the requirement that he provide translations of
6 plaintiff's loan into Tagalog because the real estate broker
7 could not feasibly be considered plaintiff's own interpreter
8 under the terms of the statute.

9 With respect to defendants' second argument, plaintiff
10 argues that defendants are vicariously liable for the actions of
11 the broker. Vicarious liability, however, is not an issue for
12 liability under § 1632. Rather § 1632 provides for rescission of
13 a contract for failure to comply with its provisions. The
14 statute applies to certain real estate loans secured by real
15 property that are negotiated exclusively by a real estate
16 broker, Cal. Civ. Code § 1632(b)(4); Cal. Bus. & Prof. Code §
17 10240. It also provides a procedure for recovery against a
18 financial institution:

19 When the contract for a consumer credit sale or
20 consumer lease, which has been sold and assigned to a
21 financial institution is rescinded pursuant to this
22 subdivision, the consumer shall make restitution to
23 and have restitution made by the person with whom he
24 or she made the contract, and shall give notice of
25 rescission to the assignee. Notwithstanding that the
26 contract was assigned without recourse, the assignment
shall be deemed rescinded and the assignor shall
promptly repurchase the contract from the assignee.

Cal. Civ. Code § 1632(k).

26 This procedure only applies, however, if plaintiff's home loan

1 is a consumer credit sale. The statute is silent as to the
2 meaning of this term. The California Supreme Court has defined a
3 credit sale secured by real property in contrast to loan secured
4 by real property. Specifically, it defines a credit sale as
5 "when property is sold on credit as an advance over the cash
6 price. In these circumstances, the seller finances the purchase
7 of property by extending payments over time and charging a
8 higher price for carrying the financing." Ghirardo v. Antonioli,
9 8 Cal. 4th 791, 803 (1994) (internal quotations omitted). If
10 plaintiff's loan were a credit sale, defendants would not
11 properly be liable under the statute according to § 1632(k)
12 because the provision would only allow plaintiff to bring a
13 claim against the original seller, who would in turn provide
14 restitution to any assignees of the credit sale. Here, plaintiff
15 does not allege that her mortgage is a credit sale as defined in
16 Ghirardo nor does defendant raise any arguments to suggest that
17 her home loan was actually a credit sale. Consequently, the
18 procedure set forth in § 1632(k) with respect to the assignment
19 of credit sale loans is not applicable, and the court relies
20 upon common law consequences of contract rescission for
21 assignees of plaintiff's home loan.

22 California courts have held that "[a]n assignment carries
23 with it all the rights of the assignor. . . . The assignee
24 'stands in the shoes' of the assignor, taking [its] rights and
25 remedies, subject to any defenses which the obligor has against
26 the assignor prior to notice of the assignment. . . ." Johnson

1 v. County of Fresno, 111 Cal. App. 4th 1087, 1096 (Cal. Ct. App.
2 2003); see also Casa Eva I Homeowners Ass'n v. Ani Const. &
3 Tile, Inc., 134 Cal. App. 4th 771, 783 (Cal. Ct. App. 2005).
4 Section 1632(k) provides that, "Upon a failure to comply with
5 the provisions of this section, the person aggrieved may rescind
6 the contract or agreement." Because plaintiff has alleged that
7 the negotiations of her home loan did not comply with § 1632,
8 and because under California law the assignee of the loan is
9 subject to any defenses which plaintiff had against her real
10 estate broker and original lender at the time of loan
11 origination, plaintiff has stated a claim against assignee
12 defendants GMAC, MERS, and ETS for violation of § 1632. Thus,
13 defendants' motion to dismiss plaintiffs § 1632 claim is denied.

14 **K. Unfair Competition Law**

15 California's Unfair Competition Law ("UCL"), Cal. Bus. &
16 Prof. Code § 17200, proscribes "unlawful, unfair or fraudulent"
17 business acts and practices. Plaintiff's sole allegation
18 specifying the conduct underlying the UCL claim alleges that
19 "Plaintiff is informed and believes that Defendants['] acts as
20 alleged herein constitute unlawful, unfair, and/or fraudulent
21 business practices, as defined in the California Business and
22 Professions Code § 17200 et seq." FAC ¶ 110. Thus, as with the
23 fraud claim, plaintiff's UCL claim merely alleges the barest
24 elements of an UCL claim, and directs defendants to scour the
25 remainder of the complaint to determine which, if any,
26 allegations incorporated by reference plaintiff intend as the

1 basis for this claim.

2 The incorporated allegations fail to state a UCL claim
3 based on fraudulent or unfair business practices. As to fraud,
4 Fed. R. Civ. P. 9(b) applies to UCL claims sounding in fraud,
5 and plaintiff has failed to meet this standard. As to unfair
6 business practices, plaintiff fails to provide defendants with
7 any notice as to which acts, if any, defendants are alleged to
8 have done which constitute such practices.

9 Plaintiff's UCL claim must therefore proceed, if at all, on
10 the theory that defendants acted unlawfully. As discussed above,
11 plaintiff has adequately alleged unlawful acts in that Paul
12 Financial, GMAC, and ETS violated the Rosenthal Act; Paul
13 Financial negligently failed to make RESPA disclosures; Paul
14 Financial and GMAC violated RESPA; and all moving defendants
15 violated Cal. Civ. Code § 1632. These allegations identify
16 predicate acts supporting a UCL claim.

17 Plaintiff also raises in her opposition that MERS acted
18 unlawfully by failing to register as a foreign corporation as
19 required under Cal. Corp. Code § 2105(a). The only fact
20 plaintiff cites to concerning this claim is the description of
21 MERS in the parties section of her complaint: "MERS was not
22 registered to do business in California." Aside from a general
23 statement that "Plaintiff incorporates here each and every
24 allegation set forth above," plaintiff makes no reference to
25 this fact in her cause of action under UCL nor does she anywhere
26 in her complaint indicate that MERS's failure to register in

1 some fashion injured her. Accordingly, the allegation of MERS's
2 not being registered alone does not put MERS on notice to the
3 nature of plaintiff's UCL claim. As such, plaintiff has not
4 stated a claim in her complaint that MERS violated § 2105(a).

5 Defendants' motions to dismiss are therefore granted with
6 leave to amend as to the UCL claim insofar as the claim is
7 predicated upon these acts, and granted otherwise.

8 **L. Motion for a More Definite Statement**

9 In the alternative, Paul Financial has moved for a more
10 definite statement under Fed. R. Civ. P 12(e). This motion is
11 denied in that this court has granted plaintiff leave to amend
12 her complaint.

13 **IV. CONCLUSION**

14 For the reasons stated above, the court GRANTS IN PART
15 Defendants' motion to dismiss the Complaint, Doc. Nos. 20, 22.

16 The court DISMISSES WITHOUT PREJUDICE the following claims:

- 17 1. First Claim, for damages under TILA, as to
18 defendant Paul Financial.
- 19 2. Third Claim, for negligence, as to defendants
20 GMAC, MERS, and ETS.
- 21 3. Fifth Claim, for breach of fiduciary duty, as to
22 defendant Paul Financial.
- 23 4. Sixth Claim, for fraud, as to defendants Paul
24 Financial, GMAC, MERS, and ETS.
- 25 5. Eighth Claim, for breach of contract, as to
26 defendant Paul Financial.

1 6. Ninth Claim, for breach of the implied covenant
2 of good faith and fair dealing, as to defendant
3 Paul Financial.

4 7. Tenth Claim, for wrongful foreclosure, as to
5 defendants GMAC and ETS.

6 The court DISMISSES WITH PREJUDICE the following claim:

7 1. First Claim, for rescission under TILA, as to
8 defendant Paul Financial.

9 The court DENIES defendants' motions to dismiss, Doc. Nos.
10 20, 22, as to the following claims, insofar as they are premised
11 on the theories found adequate in the analysis above:

12 1. Second Claim, under the Rosenthal Act, as to
13 defendants GMAC and ETS.

14 2. Third Claim, for negligence, as to defendant Paul
15 Financial.

16 3. Fourth Claim, under RESPA, as to defendants Paul
17 Financial and GMAC.

18 4. Seventh Claim, under UCL, as to defendants Paul
19 Financial, GMAC, MERS, and ETS.

20 5. Eleventh Claim, under Cal. Civ. Code § 1632, as
21 to defendants GMAC, MERS, and ETS.

22 The court DENIES Paul Financial's motion for a more
23 definite statement.

24 The court further orders that plaintiff is granted twenty
25 days from the date of the issuance of this order in which to
26 file an amended complaint as to all dismissed claims except for

1 rescission under TILA.

2 IT IS SO ORDERED.

3 DATED: January 8, 2010.

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LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

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