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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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DEANNA WALTERS,  
Plaintiff,

Civ. No. 2:09-cv-3317 FCD/KJM

v.

MEMORANDUM AND ORDER

FIDELITY MORTGAGE OF  
CALIFORNIA, INC.; CAL-WESTERN  
RECONVEYANCE CORP.; MORTGAGE  
ELECTRONIC REGISTRATION  
SYSTEMS, INC.; JAMES YORK;  
OCWEN LOAN SERVICING, LLC;  
J.P. MORGAN CHASE & CO.; J.P.  
MORGAN CHASE BANK, N.A.; AND  
DOES 1 THROUGH 50, INCLUSIVE,  
Defendants.

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This matter is before the court on the motion of defendants  
Mortgage Electronic Registration Systems, Inc. ("MERS") and Ocwen  
Loan Servicing, LLC ("Ocwen") (collectively "defendants") to  
dismiss plaintiff Deana Walters's ("plaintiff") first amended  
complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

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1 Plaintiff opposes the motion. For the reasons set forth below,<sup>1</sup>  
2 defendants' motion to dismiss is GRANTED in part and DENIED in  
3 part.

#### 4 BACKGROUND

5 Plaintiff's claims are all based upon activities relating to  
6 a residential mortgage loan transaction. (Pl.'s First Am. Compl.  
7 ("FAC"), filed Oct. 28, 2009, ¶ 10.) On October 22, 2004,  
8 plaintiff obtained a loan in the amount of \$159,000 from Fidelity  
9 Mortgage of California, Inc. ("Fidelity") on property located at  
10 3602 Portage Circle South, Stockton, California ("the property").  
11 (Id. ¶¶ 10, 11.) The loan was evidenced by a written promissory  
12 note and secured by a deed of trust, which named Cal-Western as  
13 trustee and MERS as beneficiary and as nominee for Fidelity.  
14 (Id. ¶ 11.) Around November 3, 2004, the servicing rights to  
15 plaintiff's loan were transferred to Ocwen.<sup>2</sup> (Id. ¶ 12.)

16 Plaintiff alleges that upon acquiring the loan, Ocwen began  
17 to engage in a pattern of unlawful and fraudulent conduct. (Id.  
18 ¶ 14.) Plaintiff claims, *inter alia*, that Ocwen (1) failed to  
19 credit and misapplied timely payments, (2) failed to provide  
20 timely or clear payment information, (3) prematurely referred  
21 plaintiff's loan to collections, (4) increased monthly payment  
22 amounts and added costs, fees, and interest charges in violation  
23 of the terms of the original mortgage note, and (5) inaccurately  
24

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25 <sup>1</sup> Because oral argument will not be of material  
26 assistance, the court orders these matters submitted on the  
briefs. E.D. Cal. L.R. 230(g).

27 <sup>2</sup> Plaintiff also alleges that J.P. Morgan and Chase Bank  
28 acquired some of the ownership and/or servicing rights for the  
loan at some point prior to February 13, 2006. (FAC ¶ 13.)

1 claimed plaintiff was in default and threatened foreclosure when  
2 plaintiff was not in default. (Id.) Plaintiff further alleges  
3 that throughout the life of the loan, she repeatedly contacted  
4 Ocwen to complain about the errors in her loan accounting and  
5 attempted to work with Ocwen to correct the errors. (Id. ¶ 18.)  
6 Ocwen's response to plaintiff's attempts, however, was to  
7 "threaten foreclosure pending investigation into the details of  
8 the accounting errors and mistakes." (Id.)

9 In March 2007, Ocwen demanded that plaintiff enter into a  
10 "forbearance agreement" with Ocwen in order to avoid foreclosure,  
11 pending Ocwen's investigation into the mistakes plaintiff  
12 reported. (Id. ¶ 19.) Plaintiff agreed to the arrangement and  
13 made several payments. (Id.) However, beginning in December  
14 2008, Ocwen claimed that the forbearance agreement had expired,  
15 and Ocwen refused to accept payments until a loan modification  
16 was processed. (Id. ¶ 20.) When plaintiff explained that she  
17 did not want a loan modification, Ocwen insisted that no payments  
18 would be applied to plaintiff's loan balance unless she agreed to  
19 a loan modification. (Id.) As a result, plaintiff provided  
20 Ocwen with information relating to a loan modification. (Id.)

21 Plaintiff repeatedly called Ocwen to try to determine the  
22 status of her loan modification and to process her December 2008  
23 payment, but Ocwen refused to process any payments or provide  
24 plaintiff with information. (Id. ¶ 21.) In January 2009,  
25 plaintiff again contacted Ocwen to obtain a payoff amount in  
26 order to cure Ocwen's claim that plaintiff had defaulted on her  
27 loan. (Id. ¶ 22.) Plaintiff spoke to an Ocwen representative

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1 who agreed to process a request for a "reinstatement quote" in  
2 the amount of \$8,258.60. (Id.)

3       When plaintiff contacted Ocwen to obtain the status of her  
4 modification agreement on January 6, 2009, Ocwen told plaintiff  
5 that her property was scheduled to be sold at foreclosure on  
6 January 15, 2009. (Id. ¶ 23.) Between January 6 and January 14,  
7 2009, plaintiff contacted Ocwen several times to make a payment,  
8 but Ocwen declined her attempts "pending completion of the loan  
9 modification." (Id. ¶ 25.) On January 14, 2009, plaintiff spoke  
10 with an Ocwen representative named Evelyn, who informed plaintiff  
11 that her loan would be cured and the foreclosure sale would not  
12 proceed if plaintiff agreed to transmit the amount on the  
13 "reinstatement quote" to Ocwen. (Id. ¶ 26.) Plaintiff  
14 immediately ordered the wire transfer of \$8,258.60 to J.P.  
15 Morgan, as provided for by the written agreement, and confirmed  
16 placement of the wire transfer with Ocwen by fax on the same day.  
17 (Id. ¶ 27.)

18       On January 16, 2009, Ocwen sent plaintiff a loan payoff  
19 quote that included a breakdown of the payoff funds with an  
20 expiration date of January 26, 2009. (Id. ¶ 29.) Plaintiff  
21 understood this payoff quote to be confirmation that a  
22 foreclosure sale did not take place. (Id.) However, Cal-Western  
23 had conducted a trustee's sale on January 15, and title to the  
24 property was transferred to defendant James York ("York") on  
25 January 17, 2009.

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1           Around January 30, 2009, plaintiff received a three day  
2 notice to quit from York.<sup>3</sup> Thereafter, around January 31, Evelyn  
3 informed plaintiff that Ocwen had received plaintiff's wire  
4 transfer but that the house was sold in foreclosure because the  
5 money had not been received "in time." (Id. ¶ 34.) Evelyn told  
6 plaintiff that she (Evelyn) had contacted York and advised him  
7 that the sale was a mistake, but that York refused Ocwen's  
8 request to rescind the sale. (Id. ¶ 34.) When plaintiff  
9 contacted York directly and asked him to rescind the sale, York  
10 claimed he told Ocwen that he would agree to rescind upon receipt  
11 of proof from Ocwen that plaintiff made the January 14 wire  
12 payment. (Id. ¶ 35.) York claimed, however, that Ocwen never  
13 sent him proof.<sup>4</sup> (Id.)

14           On May 29, 2009, plaintiff filed this action against  
15 defendants MERS, Ocwen, Fidelity, Cal-Western Reconveyance Corp.  
16 ("Cal-Western"), and York, in the California Superior Court, San  
17 Joaquin County. (Docket No. 1.) On October 28, 2009, plaintiff  
18 filed her first amended complaint, adding defendants J.P. Morgan  
19 Chase & Co. ("J.P. Morgan") and J.P. Morgan Chase Bank, N.A.  
20 ("Chase Bank"), and alleging causes of action for (1)

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21  
22           <sup>3</sup> Plaintiff's FAC alleges that she received the notice to  
23 quite from Coral Park Mortgage, which plaintiff claims is a shell  
24 corporation used by defendant York "to avoid tax withholding  
25 obligations in real estate transactions." (FAC ¶ 33.)

26           <sup>4</sup> York subsequently filed an unlawful detainer complaint  
27 against plaintiff on February 9, 2009, claiming title and the  
28 right to possession under the trustee's deed. (Id. ¶ 37.)  
Subsequent to the filing of the action and prior to removal,  
plaintiff and York entered into a stipulation whereby plaintiff  
has deposited \$13,500 into a trust account to cover the fair  
rental value of the property from February 15, 2009, through the  
course of this litigation. (Pl.'s Opp'n, filed Feb. 26, 2010, at  
6 n.16.)

1 cancellation of trustees deed, (2) quiet title, (3) injunctive  
2 relief, (4) breach of contract, (5) civil conspiracy, (6) fraud,  
3 (7) violation of California's Rosenthal Fair Debt Collection  
4 Practices Act ("RFDCPA"), (8) breach of fiduciary duty, (9)  
5 negligence, (10) violation of the federal Racketeer Influenced  
6 and Corrupt Organizations Act ("RICO"), (11) unjust enrichment,  
7 and (12) fraudulent business practices. (Id.) Defendants MERS  
8 and Ocwen removed the FAC to this court on November 27, 2009, on  
9 the basis of federal question jurisdiction, 28 U.S.C. § 1331.<sup>5</sup>  
10 (Id.)

#### 11 STANDARDS

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

23  
24 <sup>5</sup> Defendants also move to strike plaintiff's claims for  
25 punitive damages on the ground that the FAC fails to plead  
26 sufficient facts to warrant the award of such damages. (Motion  
27 to Strike, filed Dec. 10, 2009, at 1:10-25.) Specifically,  
28 defendants contend that plaintiff has not sufficiently alleged  
facts to support plaintiff's civil conspiracy and fraud claims.  
(Id.) Because, as set forth *infra*, the court grants defendants'  
motion to dismiss plaintiff's civil conspiracy and fraud claims,  
defendants' motion to strike is DENIED as moot.

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

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



1 "Even if a document is not attached to a complaint, it may  
2 be incorporated by reference into a complaint if the plaintiff  
3 refers extensively to the document or the document forms the  
4 basis of the plaintiff's claim." United States v. Ritchie, 342  
5 F.3d 903, 908 (9th Cir. 2003). "The defendant may offer such a  
6 document, and the district court may treat such a document as  
7 part of the complaint, and thus may assume that its contents are  
8 true for purposes of a motion to dismiss under Rule 12(b)(6)."  
9 Id. The policy concern underlying the rule is to prevent  
10 plaintiffs "from surviving a Rule 12(b)(6) motion by deliberately  
11 omitting references to documents upon which their claims are  
12 based." Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998).

13 Several of plaintiff's claims for relief are dependent upon,  
14 and plaintiff's complaint repeatedly refers to, information  
15 contained in the deed of trust (RFJN, Ex. 1) and the assignment  
16 of the deed of trust (RFJN, Ex. 5). (See FAC ¶¶ 11-13.) Because  
17 the deed of trust and the assignment of the deed of trust form  
18 the basis of several of plaintiff's causes of action, the court  
19 takes judicial notice of both documents.<sup>6</sup> Accordingly, the court  
20 will treat exhibits 1 and 5 as part of the complaint and assume  
21 that their contents are true for purposes of the motions to  
22 dismiss. Ritchie, 342 F.3d at 908.

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24  
25 <sup>6</sup> Plaintiff objects to defendants' RFJN (Docket No.14),  
26 which seeks judicial notice of various other documents in  
27 addition to the deed of trust and the assignment of the deed of  
28 trust. (Docket No. 8.) Because the court addresses plaintiff's  
causes of action without the additional documents in defendants'  
RFJN, plaintiff's objections to the remaining documents in the  
RFJN are overruled.

1 **B. Cancellation of Trustee's Deed**

2 Plaintiff's first cause of action seeks to cancel the  
3 trustee's deed upon sale on the grounds that plaintiff "satisfied  
4 the written payoff demand of Ocwen in time to avoid the  
5 foreclosure sale." (FAC ¶ 39.) Defendants argue that plaintiff  
6 (1) failed to tender the amount of indebtedness to defendants,  
7 and (2) failed to allege facts entitling her to cancel the  
8 trustee's deed.

9 Under California Civil Code § 3412, "a written instrument in  
10 respect to which there is reasonable apprehension that if left  
11 outstanding it may cause serious injury to a person against whom  
12 it is void or voidable, may, upon his application, be so  
13 adjudged, and ordered to be delivered up or cancelled." Cal.  
14 Civ. Code § 3412. "To 'cancel' a contract means to abrogate so  
15 much of it as remains unperformed. It differs from 'rescission,'  
16 which means to restore the parties to their former position. The  
17 one refers to the state of things at the time of the  
18 cancellation; the other to the state of things existing when the  
19 contract was made." Phleger v. Countrywide Home Loans, Inc., No.  
20 C 07-01686, 2009 WL 537189, at \*15 (N.D. Cal. Mar. 3, 2009)  
21 (quoting Young v. Flickinger, 75 Cal. App. 171, 174 (1925)).  
22 "The court's cancellation powers arise in equity, and are much  
23 broader than those which apply to rescission." Id. (quoting Boyd  
24 v. Lancaster, 56 Cal. App. 2d 103, 110 (1942)).

25 When a trustor and beneficiary enter into an agreement to  
26 cure a trustor's home loan default, and the trustor performs in  
27 accordance with the agreement, the beneficiary may not exercise  
28 the power of sale. Bank of America v. La Jolla Group II, 129

1 Cal. App. 4th 706, 712 (2005). In Bank of America v. La Jolla  
2 Group II, the California Court of Appeal considered whether it  
3 was proper (1) to cancel a nonjudicial foreclosure sale based on  
4 the homeowner's agreement with the mortgagor to cure a default on  
5 the loan secured by a deed of trust, and (2) to reinstate the  
6 loan prior to the sale. Id. After the homeowner missed several  
7 payments on the loan, the homeowner and lender entered into an  
8 agreement to cure the homeowner's default and reinstate the loan.  
9 Id. at 709. Although the homeowner procured the payment in  
10 accordance with the agreement, the lender did not inform the  
11 trustee of the agreement, and the homeowner's property was sold  
12 to a third party. Id. In finding the foreclosure sale invalid,  
13 the court stated that "no contractual basis remain[ed] for  
14 exercising the power of sale" because the "trustor and  
15 beneficiary entered into an agreement to cure the default and  
16 reinstate the loan" after the homeowner's default. Id. at 712.  
17 Therefore, in light of the agreement to cure the default, the  
18 beneficiary "had no right to sell" the property. Id.

19 In the present case, Plaintiff alleges she entered into an  
20 agreement with Ocwen – the reinstatement quote – to cure her  
21 alleged default. Specifically, plaintiff contends that her wire  
22 transfer of \$8,258.60 to defendant J.P. Morgan on January 14,  
23 2009, satisfied the conditions of Ocwen's reinstatement quote.  
24 (FAC ¶¶ 26-28.) Plaintiff alleges that by wiring the money she  
25 "cured any default in accordance with Ocwen's instructions," and  
26 thus, like the beneficiary in La Jolla II, Ocwen had no right to  
27 exercise the power of sale. Construing the allegations in the  
28 light most favorable to plaintiff, it is plausible to infer that

1 plaintiff timely wired the money to Ocwen in accordance with the  
2 reinstatement quote and the directions of Ocwen employees.  
3 Therefore, plaintiff has sufficiently pled that Ocwen had no  
4 contractual basis to exercise the power of sale. See La Jolla  
5 II, 129 Cal. Appl. 4th at 712.

6 Ocwen argues La Jolla II is inapplicable because there the  
7 borrower tendered a reinstatement payment to the beneficiary four  
8 days prior to the sale – and in the present case it is disputed  
9 as to whether plaintiff actually timely provided the payment to  
10 Ocwen in accordance with the reinstatement quote. (Defs.' Reply,  
11 filed Mar. 5, 2010, 2:19-21.) However, under the notice pleading  
12 standard in federal court, plaintiff sufficiently alleges that  
13 her actions satisfied her responsibility under the agreement to  
14 cure the default. See La Jolla II, 129 Cal. App. 4th at 712.

15 Accordingly, defendants' motion to dismiss plaintiff's cause  
16 of action for cancellation of trustee's deed is DENIED.

### 17 **C. Quiet Title**

18 Plaintiff's second cause of action seeks to quiet title  
19 against the claims of all defendants to this action pursuant to  
20 Cal. Code Civ. Proc. §§ 760.010-764.080. (FAC ¶¶ 46-51.)  
21 Plaintiff claims that defendants have "no right to title, estate,  
22 lien, or interest" in the property in question. (FAC ¶ 50.)  
23 Ocwen and MERS argue, *inter alia*, that they are not proper  
24 parties to the claim. (MTD 5:16-19.)

25 The purpose of a quiet title action is to determine "all  
26 conflicting claims to the property in controversy, and to decree  
27 to each such interest or estate therein as he may be entitled  
28 to." Newman v. Cornelius, 3 Cal. App. 3d 279, 284 (1970)

1 (citation omitted); see Garcia v. Wachovia Mortgage Corp., No.  
2 2:09-cv-03925, 2009 WL 3837621, at \*14 (C.D. Cal. Oct. 14, 2009).  
3 A plaintiff may bring a quiet title claim "to establish title  
4 against adverse claims to real or personal property or any  
5 interest therein." Cal. Code Civ. Proc. § 760.010. In order to  
6 state a valid claim under § 761.020, "a complaint must be  
7 verified and include (1) a legal description of the property and  
8 its street address or common designation, (2) the title of the  
9 plaintiff and the basis of the title, (3) the adverse claims to  
10 the title of the plaintiff, (4) the date as of which the  
11 determination is sought, and (5) a prayer for the determination  
12 of the title of the plaintiff against the adverse claims."  
13 Sanchez v. Greenpoint Mortgage Funding, Inc., No. 09 CV 2005,  
14 2010 WL 760613, at \*2 (S.D. Cal. Mar. 4, 2010).

15 In the present case, any responsibility Ocwen has as a loan  
16 servicer does not amount to an adverse claim to title. Bunag v.  
17 Aegis Wholesale Corp., No. C 09-00558, 2009 WL 2245688, at \*5  
18 (N.D. Cal. July 27, 2009); Cleveland v. Deutsche Bank Nat'l Trust  
19 Co., No. 08cv0802, 2009 WL 250017, at \*5 (S.D. Cal. Feb. 2,  
20 2009). Therefore, without an adverse claim to title, Ocwen is  
21 not a proper party to the claim.

22 MERS, similarly, is not a proper party to the quiet title  
23 claim because it was designated merely as a nominee for defendant  
24 Fidelity. (RFJN, Ex. 1.) In this capacity, MERS was essentially  
25 an agent for Fidelity, the nominating party. Moreover, as the  
26 assignment of deed of trust makes clear, MERS assigned all of  
27 Fidelity's interest under the deed of trust and the accompanying  
28 note to HSBC Bank USA, N.A. – the assignee beneficiary – on

1 November 27, 2006. Therefore, MERS never had an independent  
2 claim to the property, and it is no longer involved in the  
3 transaction at issue. Without an interest in the property, MERS  
4 has no adverse claim to title, and is thus an improper party for  
5 this cause of action.

6 In her opposition, plaintiff asks leave to amend her FAC if  
7 defendants' motion to dismiss is granted. While leave to amend  
8 should be freely given pursuant to Federal Rule of Civil  
9 Procedure 15, the court is not required to allow *futile*  
10 amendments. Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv.  
11 Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983). Here, amendment of  
12 the complaint with respect to plaintiff's quiet title claim would  
13 be futile under the governing law described above, and plaintiff  
14 does not provide any other facts which could plausibly give rise  
15 to such a claim against either Ocwen or MERS. See Iqbal, 129 S.  
16 Ct. at 1949.

17 Accordingly, defendants Ocwen and MERS' motion to dismiss  
18 plaintiff's cause of action for quiet title is GRANTED without  
19 leave to amend.

#### 20 **D. Breach of Contract**

21 Plaintiff's third cause of action alleges that Ocwen  
22 breached the terms of the promissory note, which plaintiff  
23 attached to her FAC as Exhibit A. (FAC ¶¶ 56-59.) Ocwen argues  
24 that the claim fails as a matter of law because Ocwen is not a  
25 party to the promissory note. (MTD 7:18-20.)

26 A cause of action for breach of contract must include facts  
27 demonstrating (1) that a contract exists between the parties, (2)  
28 that the plaintiff performed his contractual duties or was

1 excused from nonperformance, (3) that the defendant breached  
2 those contractual duties, and (4) that plaintiff's damages were a  
3 result of the breach. Reichert v. Gen. Ins. Co., 68 Cal. 2d 822,  
4 830 (1968); First Commercial Mortgage Co. v. Reece, 89 Cal. App.  
5 4th 731, 745 (2001).

6 Plaintiff's allegations fail to identify a contract between  
7 plaintiff and Ocwen. Plaintiff's FAC alleges that Ocwen breached  
8 the terms contained in the promissory note. However, the only  
9 parties to the promissory note are plaintiff and defendant  
10 Fidelity, not Ocwen. (FAC, Ex. A.) Plaintiff's opposition  
11 points to "other agreements between Ocwen" and plaintiff that  
12 "establish a contractual relationship" (Opp'n 10:23-24), but  
13 these allegations are outside the scope of the facts pled in  
14 plaintiff's FAC. Because the note demonstrates that a  
15 contractual relationship only existed between plaintiff and  
16 defendant Fidelity, plaintiff is unable to maintain a breach of  
17 contract claim against Ocwen based on the current allegations.

18 Accordingly, defendants' motion to dismiss plaintiff's cause  
19 of action for breach of contract is GRANTED with leave to amend.

#### 20 **E. Civil Conspiracy**

21 Plaintiff's fourth cause of action alleges that Ocwen  
22 engaged in a civil conspiracy with defendants York and J.P.  
23 Morgan to injure plaintiff by misappropriating her property and  
24 engaging in wrongful conduct. (FAC ¶¶ 60-64.) Ocwen argues,  
25 *inter alia*, that plaintiff's FAC fails to state a claim. (MTD  
26 9:11-12.)

27 "A conspiracy is not an independent cause of action, but 'a  
28 legal doctrine that imposes liability on persons who, although

1 not actually committing a tort themselves, share with the  
2 immediate tortfeasors a common plan or design in its  
3 perpetration.'" Brittain v. IndyMac Bank, FSB, No. C-09-2953,  
4 2009 WL 2997394, at \*2 (N.D. Cal. Sep. 16, 2009) (quoting Applied  
5 Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 510-11  
6 (1994)). To state a cause of action for conspiracy under  
7 California law, a plaintiff must plead (1) the formation and  
8 operation of the conspiracy, (2) the wrongful act or acts that  
9 result from the alleged conspiracy, and (3) the damage to  
10 plaintiff resulting from such act or acts. Mertan v. Am. Home  
11 Mortgage Servicing, Inc., No. SACV 09-723, 2009 WL 3296698, at \*5  
12 (C.D. Cal. Oct. 13, 2009) (internal quotation marks omitted)  
13 (citing Schick v. Lerner, 193 Cal. App. 3d 1321, 1327-28 (1987)).

14 In this case, plaintiff's factual allegations are too  
15 conclusory to state a claim for civil conspiracy. For example,  
16 plaintiff alleges that defendants Ocwen, York, and J.P. Morgan  
17 "knowingly and willfully conspired" to injure plaintiff, but  
18 plaintiff's FAC fails to allege specifically how defendants  
19 furthered a conspiracy. Plaintiff suggests a vague connection  
20 between York and Ocwen by alleging that York told plaintiff he  
21 "has many dealings with Ocwen and that he knew from his own  
22 experience that Ocwen has a history and reputation for providing  
23 false, inaccurate and misinformation." (FAC ¶ 35.) However,  
24 this allegation alone is insufficient to state a claim for civil  
25 conspiracy; plaintiff makes no mention whatsoever of how  
26 defendants formed or operated a conspiracy among them. See  
27 Mertan, 2009 WL 3296698, at \*5; Brittain, 2009 WL 2997394, at \*2.

28 /////

1           Accordingly, defendants' motion to dismiss plaintiff's cause  
2 of action for civil conspiracy is GRANTED with leave to amend.

3 **F.    Fraud**

4           Plaintiff's fifth cause of action alleges that Ocwen engaged  
5 in fraud by making false and misleading statements to plaintiff  
6 regarding the status of her loan. (FAC ¶¶ 65-77.) Ocwen claims,  
7 *inter alia*, that plaintiff fails to allege fraud with the  
8 particularity required by Federal Rule of Civil Procedure 9(b).  
9 (MTD 11:7-12:8.)

10           A court may dismiss a claim grounded in fraud when its  
11 allegations fail to satisfy Rule 9(b)'s heightened pleading  
12 requirements. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107  
13 (9th Cir. 2003). As a result, a plaintiff "must state with  
14 particularity the circumstances constituting fraud." Fed. R.  
15 Civ. P. 9(b). In other words, the plaintiff must include "the  
16 who, what, when, where, and how" of the fraud. Id. at 1106  
17 (citations omitted). Further, "[t]he plaintiff must set forth  
18 what is false or misleading about a statement, and why it is  
19 false." Decker v. Glenfed, Inc., 42 F.3d 1541, 1548 (9th Cir.  
20 1994). The purpose of Rule 9(b) is to ensure that defendants  
21 accused of the conduct specified have adequate notice of what  
22 they are alleged to have done, so that they may defend against  
23 the accusations. Concha v. London, 62 F.3d 1493, 1502 (9th Cir.  
24 1995).

25           Furthermore, when asserting a fraud claim against a  
26 corporation, a "plaintiff's burden . . . is even greater . . . .  
27 The plaintiff must 'allege the names of the persons who made the  
28 allegedly fraudulent representations, their authority to speak,

1 to whom they spoke, what they said or wrote, and when it was said  
2 or written.'" Lazar v. Superior Court, 12 Cal. 4th 631, 645  
3 (1996) (quoting Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal.  
4 App. 4th 153, 157 (1991)); see also Mohammad Akhavein v. Argent  
5 Mortgage Co., No. 5:09-cv-00634, 2009 U.S. Dist. LEXIS 61796, at  
6 \*10 (N.D. Cal. July 17, 2009); Edejer v. DHI Mortgage Co., No. C  
7 09-1302, 2009 U.S. Dist. LEXIS 52900, at \*36 (N.D. Cal. June 12,  
8 2009) (dismissing fraud claim where plaintiff did not allege any  
9 misrepresentation or false statements made by defendants and  
10 failed to allege names of individuals who made fraudulent  
11 representations).

12 Here, plaintiff's FAC fails to meet the heightened pleading  
13 requirement of Rule 9(b). Specifically, plaintiff has failed to  
14 allege who actually made the supposedly false representations,  
15 their ability to speak for the corporation, and the timing of the  
16 representation, such that Ocwen has adequate notice of what it is  
17 alleged to have done to plaintiff. See Lazar, 12 Cal. 4th at  
18 645; Tarmann, 2 Cal. App. 4th at 157. Without such information,  
19 plaintiff's fraud claim must fail as a matter of law.

20 Accordingly, defendants' motion to dismiss plaintiff's cause  
21 of action for fraud is GRANTED with leave to amend.<sup>7</sup>

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25 <sup>7</sup> Plaintiff claims in her opposition that she is  
26 "prepared to provide detailed allegations and proof of  
27 Defendants' fraudulent representations and conduct" should the  
28 court dismiss her fraud claim. (Pl.'s Opp'n 1:9-12.) Plaintiff  
also attached as Exhibit A to her opposition a document which  
sets forth additional facts that plaintiff is prepared to plead  
in a second amended complaint. (Id. Ex. A at 1.)

1 **G. California's Rosenthal Act**

2 Plaintiff's sixth cause of action alleges that defendant  
3 Ocwen violated California's Rosenthal Fair Debt Collection  
4 Practices Act ("RFDCPA"), Cal. Civ. Code §§ 1788 et seq., by  
5 falsely representing plaintiff's debt and adding unwarranted  
6 debt. (FAC ¶ 77.) Ocwen argues, *inter alia*, that plaintiff  
7 fails to allege RFDCPA violations. (MTD 15:7-15.)

8 The purpose of the RFDCPA is "to prohibit debt collectors  
9 from engaging in unfair or deceptive acts or practices in the  
10 collection of consumer debts and to require debtors to act fairly  
11 in entering into and honoring such debts." Cal. Civ. Code §  
12 1788.1(b). A debt collector violates the act when it engages in  
13 harassment, threats, the use of profane language, false  
14 simulation of the judicial process, or when it cloaks its true  
15 nature as a licensed collection agency in an effort to collect a  
16 debt. See id. §§ 1788.10-.18; see also Hernandez v. Cal.  
17 Reconveyance Co., 2009 U.S. Dist. LEXIS 13936, at \*13 (E.D. Cal.  
18 Feb. 23, 2009) (holding that RFDCPA claim failed because  
19 complaint lacked allegations of harassment or abuse, false or  
20 misleading representations of debt collector's identity, or  
21 unfair practices during process of collecting debt). However,  
22 the mere allegation that defendants foreclosed on a deed of trust  
23 does not implicate the RFDCPA. See, e.g., Benham v. Aurora Loan  
24 Servs., No. C-09-2059, 2009 U.S. Dist. LEXIS 78384, at \*6 (N.D.  
25 Cal. Sept. 1, 2009); Ricon v. Recontrust Co., No. 09cv937, 2009  
26 U.S. Dist. LEXIS 67807, at \*9 (S.D. Cal. Aug. 4, 2009); Hepler v.  
27 Wash. Mut. Bank, FA, No. CV 07-4804, 2009 U.S. Dist. LEXIS 33883,  
28 at \*11 (C.D. Cal. Apr. 17, 2009).

1 In the present case, plaintiff's RFDCPA claim rests solely  
2 on plaintiff's allegation that Ocwen "engaged in false  
3 representations of [plaintiff's] debt and added unwarranted  
4 debt." (FAC ¶ 77.) However, these bare allegations fail to  
5 adequately put Ocwen on notice of the basis for the alleged  
6 RFDCPA violation. For example, plaintiff's FAC does not  
7 sufficiently allege how Ocwen falsely represented plaintiff's  
8 debt. Plaintiff also does not allege threats, harassment, or  
9 profane language that occurred after the loan was made. In  
10 short, plaintiff's FAC fails to state facts that give rise to a  
11 fair inference that Ocwen violated the RFDCPA. See Larkin v.  
12 Select Portfolio Servicing, 1:09-CV-01280, 2009 U.S. Dist. LEXIS  
13 97656, at \*8 (E.D. Cal. Oct. 21, 2009) (holding that allegations  
14 that defendant used "unfair or unconscionable means to collect a  
15 debt" are merely conclusions of law when the plaintiff did not  
16 allege any facts concerning frequency, timing, or methods of debt  
17 collection practices).

18 Accordingly, defendants' motion to dismiss plaintiff's cause  
19 of action for violations of RFDCPA is GRANTED with leave to  
20 amend.

#### 21 **H. Breach of Fiduciary Duty**

22 Plaintiff's seventh cause of action alleges that Ocwen  
23 breached its fiduciary duty to plaintiff on countless occasions  
24 by, *inter alia*, failing to credit plaintiff's payments, failing  
25 to provide plaintiff with timely information regarding her loan,  
26 and increasing her monthly payment without proper notice. (FAC ¶  
27 83.) Ocwen claims that, as a lending institution, it owes no  
28 duty of care to plaintiff. (MTD 16:19-17:21.)

1 In order to sustain a claim for breach of a fiduciary duty,  
2 "a plaintiff must demonstrate the existence of a fiduciary  
3 relationship, breach of that duty and damages." Serrano v. Sec.  
4 Nat'l Mortgage Co., No. 09-CV-1416, 2009 U.S. Dist. LEXIS 71725,  
5 at \*12-13 (S.D. Cal. Aug. 14, 2009) (citing Shopoff & Cavallo LLP  
6 v. Hyon, 167 Cal. App. 4th 1489 (2008). "Absent special  
7 circumstances, a loan transaction is at arms-length and there is  
8 no fiduciary relationship between the borrower and lender."  
9 Rangel v. DHI Mortgage Co., No. CV F 09-1035, 2009 U.S. Dist.  
10 LEXIS 65674, at \*8 (E.D. Cal. July 20, 2009); see also Tasaranta  
11 v. Homecomings Fin., No. 09-CV-01722, 2009 U.S. Dist. LEXIS  
12 87372, at \*15 (S.D. Cal. Sept. 21, 2009); Brittain v. IndyMac  
13 Bank, FSB, No. C-09-2953, 2009 U.S. Dist. LEXIS 84863, at \*14  
14 (N.D. Cal. Sept. 16, 2009); Dinsmore-Thomas v. Ameriprise Fin.,  
15 Inc., No. SACV 08-587, 2009 U.S. Dist. LEXIS 68882, at \*29 (C.D.  
16 Cal. Aug. 3, 2009); Fox & Carskadon Financial Corp. v. San  
17 Francisco Fed. Sav. & Loan Ass'n, 52 Cal. App. 3d 484, 488, 489  
18 (1975); Bradler v. Craiq, 274 Cal. App. 2d 466, 473, 476 (1969).

19 Plaintiff's claim for breach of fiduciary duty fails because  
20 plaintiff has not alleged any facts creating a special  
21 circumstance where Ocwen, as lender, owed a fiduciary duty to  
22 plaintiff. Plaintiff's allegation that Ocwen "bore a contractual  
23 duty to plaintiff" ostensibly refers to the borrower-lender  
24 relationship between plaintiff and Ocwen. Under California law,  
25 this is not the type of relationship that creates a fiduciary  
26 duty. See, e.g., Rangel, 2009 U.S. Dist. LEXIS 65674, at \*8.  
27 Moreover, because plaintiff did not allege that Ocwen's  
28 relationship with plaintiff exceeded the scope of its

1 conventional role as "a mere lender of money," Nymark v. Hart  
2 Fed. Sav. & Loan Assoc., 231 Cal. App. 3d 1089, 1096 (1991),  
3 plaintiff cannot allege that Ocwen owed her a duty of care.

4 Accordingly, Ocwen's motion to dismiss plaintiff's cause of  
5 action for breach of fiduciary duty is GRANTED with leave to  
6 amend.

#### 7 **I. Negligence**

8 Plaintiff's eighth cause of action alleges that Ocwen  
9 breached various duties owed to plaintiff, including "the  
10 accurate and timely accounting and reporting of her debt  
11 payments, and the accurate and timely communication to  
12 [plaintiff] and various credit reporting agencies of the nature  
13 and amount of her debt." (FAC ¶ 87.) Ocwen argues, *inter alia*,  
14 that it owes no tort duty of care to plaintiff as a matter of  
15 law. (MTD 16:19-17:21.)

16 Under California law, the elements of a claim for negligence  
17 are "(a) a legal duty to use due care; (b) a breach of such legal  
18 duty; and (c) the breach as the proximate or legal cause of the  
19 resulting injury." Ladd v. County of San Mateo, 12 Cal. 4th 913,  
20 917 (1996) (internal citations omitted); see also Cal. Civ. Code  
21 § 1714(a). "[A]s a general rule, a financial institution owes no  
22 duty of care to a borrower when the institution's involvement in  
23 the loan transaction does not exceed the scope of its  
24 conventional role as a mere lender of money . . . ." Nymark, 231  
25 Cal. App. 3d at 1095.

26 As with plaintiff's breach of fiduciary duty claim,  
27 plaintiff has not alleged facts that would suggest Ocwen's  
28 actions exceeded its conventional role as a mere lender of money.

1 As Ocwen points out, plaintiff's allegations "relate solely to  
2 the servicing of Plaintiff's loan" (MTD 18:15-16), and Ocwen did  
3 not actively participate in plaintiff's financed enterprise  
4 "beyond the domain of the usual money lender." Nymark, 231 Cal.  
5 App. 3d at 1093 n.5. Because plaintiff has not alleged that  
6 Ocwen had a duty independent of the lender-borrower relationship,  
7 she has failed to state facts sufficient to support a claim of  
8 negligence.

9 Accordingly, Ocwen's motion to dismiss plaintiff's cause of  
10 action for negligence is GRANTED with leave to amend.

#### 11 **J. RICO Violation**

12 Plaintiff's ninth cause of action alleges that Ocwen  
13 violated the Federal Racketeer Influenced and Corrupt  
14 Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c), (d). (FAC ¶  
15 92.) Plaintiff claims that Ocwen engaged in a pattern of  
16 racketeering activity – specifically mail fraud, wire fraud, and  
17 violations of the Fair Debt Collection Practices Act – for the  
18 purpose of defrauding plaintiff of money. (Id. ¶ 96.) Ocwen  
19 argues, *inter alia*, that plaintiff's FAC fails to state a claim  
20 for RICO. (MTD 20:17-21:16.)

21 18 U.S.C. § 1962(c) states:

22 It shall be unlawful for any person employed by or  
23 associated with any enterprise engaged in, or the  
24 activities of which affect, interstate or foreign  
25 commerce, to conduct or participate, directly or  
indirectly, in the conduct of such enterprise's affairs  
through a pattern of racketeering activity or  
collection of unlawful debt.

26 18 U.S.C. § 1962(c). In order to state a claim for violation of  
27 RICO, a plaintiff must plead "(1) conduct (2) of an enterprise

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1 (3) through a pattern (4) of racketeering activity." Sedima,  
2 S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985).

3 An "enterprise" consists of an independent legal entity such  
4 as a corporation or an "association in fact" of individuals. 18  
5 U.S.C. § 1961(4); Izenberg v. ETS Servs., LLC, 589 F. Supp. 2d  
6 1193, 1201 (C.D. Cal. Dec. 8, 2008). The commission of at least  
7 two acts of "racketeering activity" within a ten year period  
8 constitutes a "pattern." 18 U.S.C. § 1961(5). "Section 1961(5)  
9 concerns only the minimum number of predicates necessary to  
10 establish a pattern; and it assumes that there is something to a  
11 RICO pattern *beyond* simply the number of predicate acts  
12 involved." H.J., Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 237,  
13 238 (1989). In other words, "a plaintiff or prosecutor must show  
14 that the racketeering predicates are related, and that they  
15 amount to or pose a threat of continued criminal activity." Id.  
16 Racketeering activity is any act indictable under the provisions  
17 of 18 U.S.C. § 1961, including mail and wire fraud. 18 U.S.C. §§  
18 1341, 1343; Izenberg, 589 F. Supp. 2d at 1201 (citing Forsyth v.  
19 Humana, Inc., 114 F.3d 1467, 1481 (9th Cir. 1997)). A "plaintiff  
20 only has standing if, and can only recover to the extent that, he  
21 has been injured in his business or property by the conduct  
22 constituting the violation." Sedima, 473 U.S. at 496.

23 Plaintiff fails to state a claim for violation of RICO.  
24 Plaintiff alleges that Ocwen's business practices "were  
25 continuous so as to form a pattern of racketeering activity" (FAC  
26 ¶ 98), but plaintiff's allegations fail to set forth any facts  
27 demonstrating such a pattern. Specifically, plaintiff fails to  
28 allege a sufficient connection between Ocwen's alleged acts of

1 wrongdoing, and does not suggest how or why such behavior is  
2 "Ocwen's regular way of conducting business." See H.J., Inc.,  
3 492 U.S. at 239 (noting that a pattern is not formed by "sporadic  
4 activity" on the part of the defendant).

5 Moreover, the racketeering activity plaintiff complains of –  
6 mail fraud, wire fraud, and FDCPA violations – is not sufficient  
7 to put Ocwen on notice as to the nature of plaintiff's claim and  
8 the grounds upon which it rests. See Twombly, 550 U.S. at 555.  
9 Plaintiff only alleges that Ocwen engaged in a pattern of  
10 racketeering activity, but neither explains how Ocwen engaged in  
11 such fraudulent or illegal activity nor how such conduct injured  
12 plaintiff. These conclusory allegations do not meet the  
13 requisite notice pleading standard. See Iqbal, 129 S. Ct. at  
14 1950.

15 Accordingly, defendants' motion to dismiss plaintiff's cause  
16 of action for violation of RICO is GRANTED with leave to amend.

#### 17 **K. Unjust Enrichment/Restitution**

18 Plaintiff's tenth cause of action alleges that Ocwen  
19 unjustly benefitted from its alleged illegal behavior, and that  
20 Ocwen unjustly retained those benefits at the expense of  
21 plaintiff. (FAC ¶ 80.) Ocwen argues (1) that California law  
22 does not recognize a claim for unjust enrichment, and (2) that  
23 plaintiff "failed to allege any facts demonstrating an unjust  
24 receipt and retention of the benefit by Ocwen." (MTD  
25 15:21-16:10.)

26 Contrary to Ocwen's first argument, California does  
27 recognize a claim for restitution. Nordberg v. Trilegiant Corp.,  
28 445 F. Supp. 2d 1082, 1100 (N.D. Cal. 2006); see Malcolm v.

1 JPMorgan Chase Bank, N.A., No. 09-4496, 2010 WL 934252, at \*7  
2 (N.D. Cal. Mar. 15, 2010). In order to establish a cause of  
3 action for unjust enrichment, a plaintiff must plead "receipt of  
4 a benefit and the unjust retention of the benefit at the expense  
5 of another." Lectrodryer v. Seoulbank, 77 Cal. App. 4th 723, 726  
6 (2000). The plaintiff must demonstrate that the benefit was  
7 conferred on the defendant through mistake, fraud, or coercion.  
8 Nebbi Bros., Inc. v. Home Fed. Sav. & Loan Ass'n, 205 Cal. App.  
9 3d 1415, 1422 (1988).

10 Plaintiff's FAC states a valid claim for unjust enrichment.  
11 As set forth above, plaintiff sufficiently alleges that despite  
12 her compliance with Ocwen's reinstatement quote, Ocwen proceeded  
13 with the trustee's sale. Thus, plaintiff's allegation that Ocwen  
14 retained the benefit of selling the property in question at the  
15 expense of plaintiff is sufficient to put Ocwen on notice as to  
16 the nature of plaintiff's claim and the grounds upon which it  
17 rests. See Twombly, 550 U.S. at 555.

18 Accordingly, defendants' motion to dismiss plaintiff's cause  
19 of action for unjust enrichment is DENIED.

20 **L. Violation Of California Business & Professions Code § 17200**

21 Plaintiff's eleventh cause of action alleges that defendants  
22 Ocwen, York, and J.P. Morgan violated section 17200 of the  
23 California Business & Professions Code by engaging in fraudulent  
24 business practices. (FAC ¶¶ 72-75.) Defendants Ocwen and MERS  
25 argue, *inter alia*, that plaintiffs fail to state a claim as they  
26 merely rely upon conclusory assertions of fraudulent business  
27 practices. (MTD 12:9-13:21.)

28 /////

1           The Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code  
2 §§ 17200 et seq., forbids acts of unfair competition, which  
3 includes "any unlawful, unfair or fraudulent business act or  
4 practice." Id. "The UCL is broad in scope, embracing anything  
5 that can properly be called a business practice and that at the  
6 same time is forbidden by law." People ex rel. Gallegos v. Pac.  
7 Lumber Co., 158 Cal. App. 4th 950, 959 (2008) (internal citations  
8 omitted). Section 17200 "'borrows' violations of other laws and  
9 treats" them as unlawful business practices "independently  
10 actionable under section 17200." Farmers Ins. Exch. v. Superior  
11 Court, 2 Cal. 4th 377, 383 (1992). "Violation of almost any  
12 federal, state, or local law may serve as the basis for a[n]  
13 [unfair competition] claim." Plascencia v. Lending 1st Mortgage,  
14 583 F. Supp. 2d 1090, 1098 (9th Cir. 2008) (citing Suanders v.  
15 Superior Court, 27 Cal. App. 4th 832, 838-39 (1994)); see Hauk v.  
16 JP Morgan Chase Bank U.S., 552 F.3d 1114 (9th Cir. 2009)  
17 ("California's UCL has a broad scope that allows for 'violations  
18 of other laws to be treated as unfair competition that is  
19 independently actionable' while also 'sweep[ing] within its scope  
20 acts and practices not specifically proscribed by any other  
21 law.'").

22           Plaintiff's UCL claim rests solely on allegations that Ocwen  
23 engaged in fraudulent business practices. Because plaintiff's  
24 claim is predicated on facts supporting her fraud claim, which  
25 the court has dismissed, plaintiff is similarly unable to  
26 maintain a separate UCL claim.

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