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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

ANNE JENNINGS,

No. CIV S-10-2126-FCD-CMK

Plaintiff,

vs.

FINDINGS AND RECOMMENDATIONS

WASHINGTON MUTUAL BANK,  
et al.,

Defendants.

\_\_\_\_\_/

Plaintiff, proceeding in this action in propria persona, brings this civil action pursuant to, inter alia, the Real Estate Settlement Procedures Act, 12 U.S.C. § 2603, *et seq.*, and the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* This action was removed to this court from the Plumas County Superior Court on August 9, 2010. Pending before the court is defendants’ unopposed motion to dismiss (Doc. 10). As no opposition was filed, the hearing on the motion was taken off calendar pursuant to Local Rule 230(g).

**I. Background**

This foreclosure action was removed from state court to this court on August 9, 2010, by defendants JP Morgan Chase Bank, N.A., an Acquirer of Certain Assets and Liabilities of Washington Mutual Bank from the FDIC Acting As Receiver (“JP Morgan”), Chase Home

1 Finance LLC (“Chase”), and Mortgage Electronic Registration Systems, Inc. (“MERS”). The  
2 complaint alleges claims for predatory lending practices in violation of Home Ownership and  
3 Equity Protection Act (“HOEPA”) (15 U.S.C. § 1637), Truth in Lending Act (“TILA”) (15  
4 U.S.C. § 1601), Real Estate Settlement Procedures Act (“RESPA”) (26 U.S.C. § 2605),  
5 conspiracy, aiding and abetting, intentional misrepresentation/fraud, violation of California  
6 Corporation Code, accounting, unfair business practices, breach of implied warranty of good  
7 faith and fair dealing, declaratory relief, quiet title and injunctive relief. Defendants move to  
8 dismiss for failure to state a claim in regard to all claims, for failure to specifically plead fraud,  
9 claims are untimely and barred by the applicable statutes of limitations, and that JP Morgan did  
10 not assume any liabilities arising from claims by borrowers of Washington Mutual Bank.

## 11 **II. Motion to Dismiss**

12 Defendants filed a motion to dismiss, or in the alternative for a more definite  
13 statement, pursuant to Federal Rules of Civil Procedure 12(b)(6), (e). Defendants argue that  
14 Plaintiff’s claims are unavailable, she fails to allege facts sufficient to state a claim, and are  
15 vague, ambiguous, and untimely.

### 16 **A. Legal Standards**

17 In considering a motion to dismiss, the court must accept all allegations of  
18 material fact in the complaint as true. See Erickson v. Pardus, 551 U.S. 89, 93-94 (2007). The  
19 court must also construe the alleged facts in the light most favorable to the plaintiff. See Scheuer  
20 v. Rhodes, 416 U.S. 232, 236 (1974); see also Hospital Bldg. Co. v. Rex Hospital Trustees, 425  
21 U.S. 738, 740 (1976); Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam). All  
22 ambiguities or doubts must also be resolved in the plaintiff’s favor. See Jenkins v. McKeithen,  
23 395 U.S. 411, 421 (1969). However, legally conclusory statements, not supported by actual  
24 factual allegations, need not be accepted. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50  
25 (2009). In addition, pro se pleadings are held to a less stringent standard than those drafted by  
26 lawyers. See Haines v. Kerner, 404 U.S. 519, 520 (1972).

1 Rule 8(a)(2) requires only “a short and plain statement of the claim showing that  
2 the pleader is entitled to relief” in order to “give the defendant fair notice of what the . . . claim is  
3 and the grounds upon which it rests.” Bell Atl. Corp v. Twombly, 550 U.S. 544, 555 (2007)  
4 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). However, in order to survive dismissal for  
5 failure to state a claim under Rule 12(b)(6), a complaint must contain more than “a formulaic  
6 recitation of the elements of a cause of action;” it must contain factual allegations sufficient “to  
7 raise a right to relief above the speculative level.” Id. at 555-56. The complaint must contain  
8 “enough facts to state a claim to relief that is plausible on its face.” Id. at 570. “A claim has  
9 facial plausibility when the plaintiff pleads factual content that allows the court to draw the  
10 reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 129 S. Ct. at  
11 1949. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more  
12 than a sheer possibility that a defendant has acted unlawfully.” Id. (quoting Bell Atl. Corp., 550  
13 U.S. at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s  
14 liability, it ‘stops short of the line between possibility and plausibility for entitlement to relief.’”  
15 Id. (quoting Bell Atl. Corp., 550 U.S. at 557).

16 To determine whether a complaint states a claim upon which relief can be granted,  
17 the court generally may not consider materials outside the complaint and pleadings. See Cooper  
18 v. Pickett, 137 F.3d 616, 622 (9th Cir. 1998); Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir.  
19 1994). The court may, however, consider: (1) documents whose contents are alleged in or  
20 attached to the complaint and whose authenticity no party questions, see Branch, 14 F.3d at 454;  
21 (2) documents whose authenticity is not in question, and upon which the complaint necessarily  
22 relies, but which are not attached to the complaint, see Lee v. City of Los Angeles, 250 F.3d 668,  
23 688 (9th Cir. 2001); and (3) documents and materials of which the court may take judicial notice,  
24 see Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994).

25 Finally, leave to amend must be granted “[u]nless it is absolutely clear that no  
26 amendment can cure the defects.” Lucas v. Dep’t of Corr., 66 F.3d 245, 248 (9th Cir. 1995) (per

1 curiam); see also Lopez v. Smith, 203 F.3d 1122, 1126 (9th Cir. 2000) (en banc).

2 **B. Discussion**

3 1. Assumption of Liability by JP Morgan

4 When JP Morgan took over Washington Mutual's assets, it did not assume  
5 liabilities of the kind alleged by plaintiff. Article II of the Purchase and Assumption Agreement  
6 provides in part:

7 2.5 Borrower Claims - Notwithstanding anything to the contrary in  
8 this Agreement, any liability associated with borrower claims for  
9 payment of or liability to any borrower for monetary relief, or that  
provide for any other form of relief to any borrower. . . are  
specifically not assumed by the Assuming Bank.

10 (Defs.' Request for Judicial Notice ("RJN") Ex. 3 at 9.)

11 Based on the aforementioned agreement, any allegation in the complaint which  
12 assumes that JP Morgan took over any alleged liabilities of Washington Mutual cannot be  
13 maintained.

14 2. Truth in Lending Act

15 A lender's violation of TILA allows the borrower to seek damages or to rescind a  
16 consumer loan secured by the borrower's primary dwelling. There is a one-year statute of  
17 limitations applicable to TILA damages claims. See 15 U.S.C. § 1640(e). The limitations period  
18 for damages is subject to equitable tolling. See King v. California, 784 F.2d 910, 915 (9th Cir.  
19 1896). Here, plaintiff's TILA violations stem from the loan application process, wherein  
20 plaintiff argues the defendants failed to verify plaintiff's ability to repay the loan. Thus, the  
21 limitations period in this case accrued at the time Plaintiff signed the loan documents, in March  
22 2007. See Meyer v. Ameriquest Mortg. Co., 342 F.3d 899, 902 (9th Cir.2003). Nothing in  
23 plaintiff's complaint indicates the applicability of equitable tolling, nor does plaintiff argue that it  
24 should apply. See King v. California, 784 F.2d 910, 915 (1986). Accordingly, Plaintiff's  
25 claims for damages under TILA are now time-barred. However, Plaintiff has also requested  
26 rescission.

1 As to plaintiff's claim for rescission based on violations of TILA, "an obligor's  
2 right of rescission shall expire three years after the date of consummation of the transaction or  
3 upon the sale of the property, whichever occurs first . . . ." 15 U.S.C. § 1635(f). Plaintiff's  
4 claims for rescission also appear to be time barred as more than three years passed between the  
5 time plaintiff entered into the loan agreement (March/April 2007) and the filing of the complaint  
6 herein (July 2010). In addition, a claim for recession requires a plaintiff to allege the ability to  
7 tender the loan proceeds or ability to pay back what she has received. See e.g., Yamamoto v.  
8 Bank of N.Y., 329 F.3d 1167, 1170 (9th Cir. 2003), Garza v. Am. Home Mortgage, 2009 WL  
9 188604 at \*5 (E.D. CA 2009). Although the complaint alludes to plaintiff's willingness to  
10 tender, there are no allegations that she is actually able to repay the loan proceeds. Thus,  
11 Plaintiff's claims under TILA are time barred and should be dismissed.

### 12 3. HOEPA

13 Plaintiff's claims under HOEPA are similarly barred by the applicable statute of  
14 limitation. Claims under HOEPA, which is a part of TILA, must be brought within one year of  
15 the occurrence of the violation. See 15 U.S.C. § 1640(e). As discussed above, plaintiff entered  
16 into the loan agreement more than three years prior to filing the complaint. Thus, plaintiff's  
17 claims under HOEPA are time barred and should be dismissed.

### 18 4. Conspiracy

19 Plaintiff claims that the defendants acted in concert with a plan to steal her  
20 property. The conspiracy claim is based on the defendants' alleged participation in the  
21 foreclosure proceedings. However, there are no facts stated to support a conspiracy claim. As  
22 defendants set forth, in order to state a claim for conspiracy, the allegations must allege (1) the  
23 formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and  
24 (3) the damage resulting from such act or acts. See Kidron v. Movie Acquisition Corp., 47 Cal.  
25 Rptr. 2d 752 (Cal. Ct. App. 1995). The California court also set forth that "civil conspiracy is  
26 not an independent tort. Rather civil conspiracy is a 'legal doctrine that imposes liability on

1 persons who, although not actually committing a tort themselves, share with the immediate  
2 tortfeasors a common plan or design in its perpetration.” Id. (citing Applied Equip. Corp. v.  
3 Litton Saudi Arabia Ltd., 28 Cal Rptr. 2d 475, 478 (Cal. 1994)).

4 At best, plaintiff’s complaint alleges the defendants conspired together in their  
5 predatory lending practices, which as discussed herein fails to state a claim. As no underlying  
6 claim can be stated, there is no support for a conspiracy claim, and the motion to dismiss this  
7 claim should be granted.

#### 8 5. Aiding and Abetting

9 Plaintiff also alleges that the defendant Chase aided and abetted Washington  
10 Mutual and MERS in their fraudulent scheme to enable MERS to do business and illegally act as  
11 a lending institution. However, such conclusory allegations cannot sustain an aiding and abetting  
12 claim. It appears to the undersigned that plaintiff’s aiding and abetting claim is related to some  
13 sort of fraud claim. However, as discussed infra, a claim for fraud must be pled with  
14 particularity. Here, plaintiff’s fraud claim is unclear and unsupported. Therefore, no aiding and  
15 abetting claim can be sustained. See Casey v. U.S. Bank National Assn., 26 Cal. Rptr. 3d 401,  
16 405 (2005).

#### 17 6. Intentional Misrepresentation/Deceit (Fraud)

18 Plaintiff claims fraud based on Washington Mutual’s failure to verify that plaintiff  
19 had the ability to repay the loan, and misleading plaintiff as to the terms and conditions of the  
20 loan. She does not, however, explain how she was misled, and what Washington Mutual failed  
21 to disclose.

22 The elements of a California fraud claim are: (1) misrepresentation (false  
23 representation, concealment or nondisclosure); (2) knowledge of the falsity (or “scienter”); (3)  
24 intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. Lazar  
25 v. Superior Court, 49 Cal. Rptr. 2d 377, 380-81 (Cal. 1996). In addition, Federal Rule of Civil  
26 Procedure 9(b) requires that “the circumstances constituting fraud or mistake shall be stated with

1 particularity.” This heightened pleading standard “requires a pleader of fraud to detail with  
2 particularity the time, place, and manner of each act of fraud, plus the role of each defendant in  
3 each scheme.” Lancaster Cmty. Hosp. v. Antelope Valley Dist., 940 F.2d 397, 405 (9th Cir.  
4 1991). Thus, “allegations of fraud must be specific enough to give defendants notice of the  
5 particular misconduct which is alleged to constitute the fraud charged so that they can defend  
6 against the charge and not just deny that they have done anything wrong.” Bly-Magee v.  
7 California, 236 F.3d 1014, 1019 (9th Cir. 2001) (citation and internal quotations omitted).

8 Rule 9(b)’s heightened pleading standard “is not an invitation to disregard Rule  
9 8’s requirement of simplicity, directness, and clarity” and “has among its purposes the avoidance  
10 of unnecessary discovery.” McHenry v. Renne, 84 F.3d 1172, 1178 (9th Cir. 1996). “A pleading  
11 is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the  
12 defendant can prepare an adequate answer from the allegations.” Neubronner v. Milken, 6 F.3d  
13 666, 671-672 (9th Cir. 1993) (internal quotations omitted; citing Gottreich v. San Francisco Inv.  
14 Corp., 552 F.2d 866, 866 (9th Cir. 1997)). The Ninth Circuit Court of Appeals has explained:

15 Rule 9(b) requires particularized allegations of the circumstances  
16 *constituting* fraud. The time, place and content of an alleged  
17 misrepresentation may identify the statement or the omission  
18 complained of, but these circumstances do not “constitute” fraud.  
19 The statement in question must be false to be fraudulent.  
20 Accordingly, our cases have consistently required that  
21 circumstances indicating falseness be set forth. . . . [W]e [have]  
22 observed that plaintiff must include statements regarding the time,  
23 place, and *nature* of the alleged fraudulent activities, and that  
24 “mere conclusory allegations of fraud are insufficient.” . . . The  
25 plaintiff must set forth what is false or misleading about a  
26 statement, and why it is false. In other words, the plaintiff must set  
forth an explanation as to why the statement or omission  
complained of was false or misleading. . . . In certain cases, to be  
sure, the requisite particularity might be supplied with great  
simplicity.

24 In Re Glenfed, Inc. Sec. Litig., 42 F.3d 1541, 1547-1548 (9th Cir. 1994) (en banc) (italics in  
25 original) *superseded by statute on other grounds as stated in* Marksman Partners, L.P. v. Chantal  
26 Pharm. Corp., 927 F. Supp. 1297 (C.D. Cal. 1996); see Cooper v. Pickett, 137 F.3d 616, 627 (9th

1 Cir. 1997) (fraud allegations must be accompanied by “the who, what, when, where, and how” of  
2 the misconduct charged).

3 Here, defendants argue plaintiff’s complaint is insufficient to state a claim for  
4 fraud. Plaintiff’s fraud claim is based on allegations that Washington Mutual failed to verify  
5 plaintiff’s ability to repay the loan, and that it manufactured facts to show plaintiff was capable  
6 of repaying the loan. These vague allegations are insufficient, and fail to put the defendants on  
7 notice as to what actions were fraudulent. Plaintiff fails to explain what the alleged  
8 manufactured facts were, how they misled her, and what terms and conditions were not  
9 disclosed. In addition, as found above, even if Washington Mutual had somehow acted  
10 fraudulently, JP Morgan did not assume any of Washington Mutual’s liabilities. Thus, the  
11 motion to dismiss the fraud claim should be granted.

12 7. California Civil/Corporation Code

13 Plaintiff next claims that the defendants somehow violated the California Civil  
14 and Corporation Code. The complaint states:

15 Defendants, and each of them, entered into an illegal pooling  
16 agreement in express violation of California C.C. §§ 1916.7, 1920,  
17 and 1921, and as a direct and proximate result therefore, failed to  
18 satisfy the requirements of an adjustable mortgage instrument as  
19 set forth in California C.C. § 1920, and the requirements for  
disclosure of information and connections with a mortgage  
instrument, as set forth, required by California C.C. § 1921.  
(Compl. at 14).

20 This claim is based on an undefined “illegal pooling agreement” the defendants  
21 allegedly entered into. This “illegal pooling agreement” is apparently based on plaintiff  
22 allegation that MERS was listed as the beneficiary in the Deed of Trust associated with the  
23 subject loan. However, as defendants set forth, the beneficiary in the Deed of Trust is listed as  
24 Washington Mutual, not MERS. ((Defs.’ RJN, Ex. 2 at 2.) As the factual basis of this claim is  
25 incorrect, the motion to dismiss the claim should be granted.

26 ///



1 Plaintiff further fails to identify what provision of the statutes the defendants have  
2 allegedly violated. The statutes contain several requirements for adjustable rate mortgages, but  
3 the complaint does not state those requirements, nor does it describe the conduct of defendants  
4 that constitutes a violation of any specific requirement. To the extent plaintiff could allege facts  
5 to support violations of the code sections cited, defendants contend those violations would be  
6 preempted by the Home Owners' Loan Act (HOLA), 12 U.S.C. § 1462 *et. seq.*, and 12 C.F.R §  
7 560.2(b). The undersigned agrees that plaintiff's claims under the California Civil Code would  
8 appear to be preempted by HOLA. See Garcia v. Wachovia Mortg Corp., 676 F. Supp. 3d 895,  
9 911-13 (C.D. Cal. 2009). Whether plaintiff would be able to amend her complaint in order to  
10 state a claim for a violation of HOLA, or plea sufficient facts to support a position that the  
11 defendants are not regulated by HOLA is unclear from the minimal facts alleged in the  
12 complaint. Therefore, the undersigned finds dismissal of this claim without prejudice is  
13 appropriate.

#### 14 8. Accounting

15 Plaintiff's "demand for accounting" claim is unclear. It appears she is or has  
16 requested a payoff amount, to which she has received different amounts owed. She states she  
17 had requested copies of her file from the defendants pursuant to RESPA, but her request has been  
18 refused.

19 Defendants argue that plaintiff's claim fails as she has not alleged any facts  
20 showing a fiduciary relationship exists between the parties, nor has she alleged that there is a  
21 balance due to plaintiff from defendants. However, reading the complaint in the light most  
22 favorable to plaintiff, it appears to the undersigned that what plaintiff is actually alleging is a  
23 violation of Section 2605 of RESPA for defendants' failure to respond to a Qualified Written  
24 Request (QWR). If that is plaintiff's claim, such a claim would be time-barred by the three-year  
25 statute of limitations. See 12 U.S.C. § 2614. In addition, plaintiff fails to alleged any pecuniary  
26 loss from defendants' alleged failure to respond to the QWR, which renders her claim

1 insufficient. See Saldate v. Wilshire Credit Corp., 711 F. Supp. 3d 1126, 1134 (E.D. Cal. 2010).

2 Thus, plaintiff's claim for accounting should be dismissed.

3 To the extent defendants' read of plaintiff's complaint is accurate, the undersigned  
4 agrees that she has not alleged that she is due any monies from defendants. Rather, she is  
5 requesting an accounting to ascertain the true amount of money that she may owe them. Absent  
6 a claim that she is due monies from defendants, she has no right to an accounting. See Wond v.  
7 First Magnus Fin. Corp., 2009 WL 2580353 at \* 2 (citing Baxter v. Krieger, 157 Cal. App. 2d  
8 730, 732, 321 P.2d 879 (1958)).

9 9. Unfair Business Practice

10 Plaintiff's claim for unfair business practice, based on the authority plaintiff cites,  
11 is actually an Unfair Competition Law claim. See Cal. Bus & Prof Code §§ 17200 et seq.

12 Plaintiff alleges that defendants

13 have committed acts of unfair business practices . . . by engaging in  
14 acts the Truth in Lending Act, using bait and switch tactics;  
15 making loans without providing borrowers with sufficient, accurate  
16 and understandable information regarding the terms and conditions  
17 of the loan; and making loans without providing borrowers with  
18 sufficient, accurate and understandable information regarding the  
19 nature and extent of the financial risk being assumed by the  
20 borrowers.  
21 (Compl. at 17).

22 As defendants argue, these conclusory allegations fail to set forth what "acts"  
23 have actually been committed by which defendants, and are therefore insufficient to state a claim.  
24 In addition, plaintiff fails to allege any actual pecuniary loss, rather she again states in conclusory  
25 fashion that she has incurred and continues to incur damages "in an amount unascertained."

26 "A plaintiff alleging unfair business practices under these statutes [UCL] must  
state with reasonable particularity the facts supporting the statutory elements of the violation."  
Khoury v. Maly's of California, Inc., 17 Cal. Rptr. 2d 708, 712 (Cal. Ct. Ap. 1993). Therefore,  
the complaint is insufficient, and the motion to dismiss this claim should be granted.

///

1                   10. Breach of Implied Warranty of Good Faith and Fair Dealing

2                   As to plaintiff’s claim for breach of implied warranty of good faith and fair  
3 dealing, the allegations set forth in the complaint are again conclusory at best. Plaintiff states  
4 that the defendants

5                   misled, deceived and willfully and intentionally breached the  
6 implied covenant of . . . good faith and fair dealing due and owing  
to plaintiff under California law.

7                   The aforesaid willful, wrongful deceitful false and illegal  
8 representations and oppressive tactics, acts and conduct by  
9 Defendants, and each of them, constituted a breach of the implied  
warranty of good faith and were done to harm and injure Plaintiff  
(Compl. at 18-19).

10                   “[A]s a general rule, a financial institution owes no duty of care to a borrower  
11 when the institution’s involvement in the loan transaction does not exceed the scope of its  
12 conventional role as a mere lender of money.” Nymark v. Heard Fed. Savings & Loan Ass’n,  
13 283 Cal. Rptr. 53, 56 (Cal. Ct. App. 1991); see also Price v. Wells Fargo Bank, 261 Cal. Rptr.  
14 735, 740 (Cal. Ct. App. 1989). Thus, to the extent plaintiff’s claim relies on a theory that the  
15 defendants owed her a duty of care, her claim must fail.

16                   In addition, plaintiff’s conclusory allegations, without any facts to show how the  
17 defendants actually breached the implied covenant of good faith and fair dealing are insufficient  
18 to survive a motion to dismiss. Plaintiff states that the breach occurred “virtually from the  
19 inception of the agreement.” Thus, it appears plaintiff is stating that Washington Mutual  
20 somehow violated the implied covenant, the party with whom she entered into the contract. As  
21 set forth above, JP Morgan did not assume any of Washington Mutual’s liability. Plaintiff fails  
22 to allege any violations by the actual defendants in this action. Thus, plaintiff’s claim is  
23 insufficient, and the motion to dismiss should be granted.

24                   11. Declaratory Relief

25                   Plaintiff fails to identify the basis for her claim for declaratory relief. The  
26 complaint alleges that the subject loan and security documents “are void ab initio by operation of

1 law based on the facts alleged herein, including, but not limited to, defendant's violation of  
2 disclosure requirements, its violation of its duty to refrain from making misleading statements  
3 and fraudulent misrepresentation, and its engaging in predatory lending practices." (Compl. at  
4 20).

5 Defendants cite the California Code of Civil Procedure section 1060 as a potential  
6 basis for such a claim. Section 1060 states in relevant part:

7 Any person interested under a written instrument, excluding a will  
8 or a trust, or under a contract, or who desires a declaration of his or  
9 her rights or duties with respect to another, . . . , may, in cases of  
10 actual controversy relating to the legal rights and duties of the  
11 respective parties, bring an original action or cross-complaint in the  
12 superior court for a declaration of his or her rights and duties in the  
13 premises. . . .

14 Here, there is no factual basis for plaintiff's claim for declaratory relief, as  
15 discussed above. None of plaintiff's claims are factually sufficient to support this action, thus,  
16 there cannot be a finding of declaratory relief based on the insufficient claims as plead.  
17 Specifically, plaintiff states that she is entitled to declaratory relief based on defendants' fraud  
18 and TILA violations which have been found to be insufficient. Therefore, the claim for  
19 declaratory relief should be dismissed as well.

## 20 12. Quiet Title

21 Plaintiff does not identify any authority for her quiet title claim. However,  
22 defendant identifies the applicable state law provisions. Plaintiff claims the defendants' claim to  
23 the property is invalid due to her right of rescission based on the defendants' TILA violations and  
24 fraudulent acts.

25 "An action may be brought . . . to establish title against adverse claims to real or  
26 personal property or any interest therein." Cal. Code Civ. Proc. § 760.020(a). To state a claim  
for quiet title, a complaint must include: (a) a description of the property that is the subject of the  
action; (b) plaintiff's title and the basis for that title; (c) the adverse claims to plaintiff's title; (d)  
the date as of which the determination is sought; and (e) a prayer for the determination of the title

1 of the Plaintiff against the adverse claims. Cal. Code Civ. Proc. § 761.020. Here, plaintiff's  
2 quiet title claim is premised upon the alleged fraudulent conduct of the defendants. The  
3 complaint alleges that defendants cannot proceed with foreclosure "until the results of their  
4 fraudulent acts are resolved." (Compl. at 21). Because the undersigned finds that the complaint  
5 fails to allege defendants' alleged fraudulent conduct with sufficient particularity, as discussed  
6 above, it is recommended that her quiet title claim also be dismissed.

### 7 13. Injunctive Relief

8 Plaintiff's claim for injunctive relief is again based on her allegations of  
9 defendants' fraudulent conduct.

10 To prevail on a request for injunctive relief, the moving party must show that  
11 irreparable injury is likely in the absence of an injunction. See Stormans, Inc. v. Selecky, 586  
12 F.3d 1109, 1127 (9th Cir. 2009) (citing Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7,  
13 129 S. Ct. 365 (2008)). Under Winter, the test requires a party to demonstrate: (1) he is likely to  
14 succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of an injunction;  
15 (3) the balance of hardships tips in his favor; and (4) an injunction is in the public interest. See  
16 Stormans, 586 F.3d at 1127 (citing Winter, 129 S. Ct. at 374).

17 Here, as discussed above, plaintiff fails to plead sufficient facts to support her  
18 fraud claim. Thus, she cannot demonstrate she is likely to succeed on the merits, and her request  
19 for injunctive relief should be dismissed.

### 20 **III. Conclusion**

21 Plaintiff's complaint fails to allege sufficient facts to state a claim. In addition,  
22 some of plaintiff's claims are barred by the applicable statute of limitations. Thus, defendants'  
23 motion to dismiss should be granted in full. Leave to amend must be granted "[u]nless it is  
24 absolutely clear that no amendment can cure the defects." Lucas v. Dep't of Corr., 66 F.3d 245,  
25 248 (9th Cir. 1995) (per curiam); see also Lopez v. Smith, 203 F.3d 1122, 1126 (9th Cir. 2000)  
26 (en banc). Given plaintiff's lack of opposition to this motion, and lack of factual allegations

1 contained in the original complaint, it is doubtful that plaintiff will be able to amend her claims  
2 sufficiently. However, leave to amend should be granted because, while doubtful, it is not  
3 absolutely clear that the defects discussed above cannot be cured.

4 Based on the foregoing, the undersigned recommends that:

- 5 1. Defendant' unopposed motion to dismiss (Doc. 10) be granted;
- 6 2. Plaintiff's claims for TILA and HOEPA violations, conspiracy and  
7 accounting be dismissed with prejudice; and
- 8 3. Plaintiff be provided 20 days to file an amended complaint to cure the  
9 defects in the remaining claims.

10 These findings and recommendations are submitted to the United States District  
11 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 20 days  
12 after being served with these findings and recommendations, any party may file written  
13 objections with the court. The document should be captioned "Objections to Magistrate Judge's  
14 Findings and Recommendations." Failure to file objections within the specified time may waive  
15 the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

16  
17  
18 DATED: February 25, 2011

19   
20 **CRAIG M. KELLISON**  
21 UNITED STATES MAGISTRATE JUDGE  
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26