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

CONSTANCE SOLANO,	)	
	)	2:10-cv-02426-GEB-GGH
Plaintiff,	)	
	)	
v.	)	<u>ORDER GRANTING MOTIONS TO</u>
	)	<u>DISMISS AND DENYING MOTION TO</u>
AMERICA'S SERVICING COMPANY, a	)	<u>STRIKE AS MOOT</u>
division of WELLS FARGO, NA;	)	
WELLS FARGO, NA; MORTGAGEIT,	)	
INC.; MORTGAGE ELECTRONIC	)	
REGISTRATION SYSTEMS, INC.; NDEX	)	
WEST, LLC; U.S. BANK NA; BANC OF	)	
AMERICA FUNDING 2007-6 TRUST;	)	
MORTGAGE AND INVESTORS	)	
INVESTMENT CONSULTANTS, INC.,	)	
	)	
Defendants.	)	
_____	)	

Defendant MortgageIT, Inc. ("MortgageIT") moves for dismissal of Plaintiff's Complaint under Federal Rule of Civil Procedure ("Rule") 12(b)(6), arguing Plaintiff fails to state a viable claim against it. MortgageIT also moves to strike Plaintiff's punitive damages allegations under Rule 12(f). Defendant NDeX West, LLC ("NdeX") joins MortgageIT's dismissal motion.

Defendants Wells Fargo Bank, N.A. dba America's Servicing Company ("Wells Fargo Bank"); Mortgage Electronic Registration Systems, Inc. ("MERS"); and U.S. Bank N.A. as Trustee for Banc of America Funding 2007-6 Trust ("U.S. Bank") (collectively referred to as "Wells Fargo

1 Defendants") also seek dismissal of Plaintiff's claims under Rule  
2 12(b)(6).

3 Plaintiff filed a late opposition to all three motions.

#### 4 I. LEGAL STANDARD

5 "In reviewing the dismissal of a complaint, we inquire whether  
6 the complaint's factual allegations, together with all reasonable  
7 inferences, state a plausible claim for relief." Cafasso, U.S. ex rel.  
8 v. General Dynamics C4 Systems, --- F.3d ----, 2011 WL 1053366, at \*4  
9 (9th Cir. 2011) (citing Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50  
10 (2009)). The material allegations of the complaint are accepted as true  
11 and all reasonable inferences are drawn in favor of the plaintiff. See  
12 al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009). However, this  
13 tenant "is inapplicable to legal conclusions." Iqbal, 129 S. Ct. at  
14 1949. Further, "[a] pleading that offers 'labels and conclusions' or 'a  
15 formulaic recitation of the elements of a cause of action will not do.'  
16 Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid  
17 of 'further factual enhancement.'" Id. (quoting Bell Atlantic Corp. v.  
18 Twombly, 550 U.S. 544, 555, 557 (2007)). "In sum, for a complaint to  
19 survive a motion to dismiss, the nonconclusory 'factual content,' and  
20 reasonable inferences from that content, must be plausibly suggestive of  
21 a claim entitling the plaintiff to relief." Moss v. United States Secret  
22 Serv., 572 F.3d 962, 969 (9th Cir. 2009).

#### 23 II.

#### 24 REQUEST FOR JUDICIAL NOTICE

25 Defendants' dismissal motions include requests that the Court  
26 take judicial notice of two Deeds of Trust, which are recorded with the  
27 Placer County Recorder. (MortgageIT's Req. for Judicial Notice ("RJN")  
28 Exs. A, C; Wells Fargo Defs.' RJN, Ex. A.)

1 "As a general rule, a district court may not consider any  
2 material beyond the pleadings in ruling on a Rule 12(b)(6) motion." Lee  
3 v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001) (internal  
4 quotation marks and citation omitted). However, a court may consider  
5 matters properly subject to judicial notice. Swartz v. KPMG LLP, 476  
6 F.3d 756, 763 (9th Cir. 2007). A matter may be judicially noticed if it  
7 is either "generally known within the territorial jurisdiction of the  
8 trial court" or "capable of accurate and ready determination by resort  
9 to sources whose accuracy cannot reasonably be questioned." Fed. R.  
10 Evid. 201(b).

11 Since the two Deeds of Trust are publically recorded, they are  
12 capable of accurate determination and may be judicially noticed. See W.  
13 Fed. Sav. & Loan Ass'n v. Heflin Corp., 797 F. Supp. 790, 792 (N.D. Cal.  
14 1992) (taking judicial notice of documents in a county's public record,  
15 including deeds of trust). Therefore, the two Deeds of Trust are  
16 judicially noticed.

17 MortgageIT also requests that the Court consider a "Home  
18 Equity Credit Line Agreement and Disclosure Statement" between Plaintiff  
19 and MortgageIT under the "incorporation by reference doctrine."  
20 (MortgageIT's RJN, Ex. B.) owever, since the document is not referenced  
21 in the complaint, this request is denied. See In re Silicon Graphics  
22 Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999) (stating the  
23 incorporation by reference doctrine "permits a district court to  
24 consider documents whose contents are alleged in a complaint and whose  
25 authenticity no party questions, but which are not physically attached  
26 to the plaintiff's pleading" (quotation omitted)).

1 **III. BACKGROUND**

2 On or about March 23, 2007, Plaintiff obtained two loans,  
3 which were secured by her real property, located at 3161 Big Bear Drive,  
4 Roseville, CA. (MortgageIT's RJN, Exs. A, C.) The primary loan was for  
5 \$592,000.00 (the "Primary Loan"), and the second loan was for \$83,000.00  
6 (the "Secondary Loan"). Id.

7 The Deed of Trust on the Primary Loan identifies Mortgage &  
8 Investment Consultants, Inc. as the lender, Financial Title Company as  
9 trustee, and MERS as beneficiary. Id., Ex. A. The Deed of Trust on the  
10 Secondary Loan identifies MortgageIT as the lender, Financial Title  
11 Company as trustee, and MERS as beneficiary. Id., Ex. C. Plaintiff  
12 alleges Wells Fargo Bank subsequently began servicing the loans. (Compl.  
13 ¶¶ 2, 21-22.)

14 On or about March 4, 2010, NdeX West, LLC filed a Notice of  
15 Trustee Sale in connection with the Primary Loan, in which it indicated  
16 Plaintiff's property was in foreclosure. Id., ¶24, Ex. D.

17 An Assignment of Deed of Trust dated March 29, 2010, assigned  
18 and transferred to U.S. Bank "all beneficial interest under [the] Deed  
19 of Trust" on the Primary Loan. (Compl., Ex. E.) U.S. Bank substituted  
20 NdeX, West L.L.C., as trustee of the Deed of Trust on the Primary Loan  
21 on April 9, 2010. Id., Ex. F.<sup>1</sup>

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22  
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24  
25 <sup>1</sup> The Assignment of Deed of Trust, Substitution of Trustee, and  
26 Notice of Default "may be considered" in ruling on Defendants' Rule  
27 12(b)(6) motions, since they are attached to Plaintiff's Complaint. Hal  
28 Roach Studios, Inc. v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1555  
n.19 (9th Cir. 1989) (stating "material which is properly submitted as  
part of the complaint may be considered" in ruling on a Rule 12(b)(6)  
motion).

1 Plaintiff alleges the foreclosure sale was scheduled for  
2 September 13, 2010. Id., ¶ 24. It is unclear what, if anything, occurred  
3 on this date.

4 Plaintiff's claims stem from her allegations that Defendants  
5 have acted improperly from the loans' origin through foreclosure. Id. ¶¶  
6 25-28.

#### 7 IV. DISCUSSION

8 Plaintiff's Complaint comprises twelve claims. MortgageIT and  
9 the Wells Fargo Defendants (the "Movants") challenge the sufficiency of  
10 every claim in their dismissal motions.

##### 11 A. Breach of Contract

12 Movants seek dismissal of Plaintiff's breach of contract  
13 claim, arguing, *inter alia*, Plaintiff does not allege facts supporting  
14 the elements of this claim. (MortgageIT's Mot. 4:11-12; Wells Fargo  
15 Defs.' Mot. 7:3-6.)

16 In California, "[a] cause of action for breach of contract  
17 requires proof of the following elements: (1) existence of the contract;  
18 (2) plaintiff's performance or excuse for nonperformance; (3)  
19 defendant's breach; and (4) damages to plaintiff as a result of the  
20 breach." CDF Firefighters v. Maldonado, 158 Cal. App. 4th 1226, 1239  
21 (2008).

22 Plaintiff's breach of contract claim is based upon allegations  
23 that Defendants violated the Home Ownership Equity Protection Act  
24 ("HOEPA") by failing to make certain required disclosures prior to when  
25 her loan transactions closed; and, by "engaging in a pattern and  
26 practice of extending credit to Plaintiff without regard to her ability  
27 to pay." (Compl. ¶ 44.) However, a plaintiff "must . . . do  
28 something more . . . than merely point to allegations of a statutory

1 violation" to allege a breach of contract claim. Berger v. Home Depot,  
2 476 F. Supp. 2d 1174, 1177 (C.D. Cal. 2007). Further, although Plaintiff  
3 references the existence of multiple written agreements in the  
4 introductory allegations of her Complaint (a Promissory Note, Deed of  
5 Trust and Modification Agreement), it is unclear which, if any, of the  
6 agreements form the basis of her breach of contract claim, and Plaintiff  
7 does not allege a breach of the terms of any referenced agreement.  
8 (Compl. ¶¶ 19, 21, 29.) Therefore, Plaintiff's breach of contract claim  
9 against the Movants is dismissed.

10 **B. RESPA**

11 Movants also seek dismissal of Plaintiff's 12 U.S.C. § 2607  
12 Real Estate Settlement Procedures Act ("RESPA") claim, arguing, *inter*  
13 *alia*, it is barred by the one-year statute of limitations. (MortgageIT's  
14 Mot. 5:13-16; Wells Fargo Defs.' Mot. 5:16-20.) Plaintiff counters that  
15 the statute of limitations should be equitably tolled. (Pl.'s Opp'n ¶  
16 35.)

17 "The primary ill that § 2607 is designed to remedy is the  
18 potential for unnecessarily high settlement charges, . . . caused by  
19 kickbacks, fee-splitting, and other practices that suppress price  
20 competition for settlement services. This ill occurs, if at all, when  
21 the plaintiff pays for the tainted service, typically at the closing."  
22 Jensen v. Quality Loan Serv. Corp., 702 F. Supp. 2d 1183, 1195 (E.D.  
23 Cal. 2010) (quoting Snow v. First Am. Title Ins. Co., 332 F.3d 356,  
24 359-60 (5th Cir. 2003)). 12 U.S.C. § 2614 provides that a section 2607  
25 claim "may be brought . . . [within] 1 year . . . from the date of the  
26 occurrence of the violation[.]" "Barring extenuating circumstances, the  
27 date of the occurrence of the violation is the date on which the loan  
28 closed." Ayala v. World Savings Bank, FSB, 616 F. Supp. 2d 1007, 1020

1 (C.D. Cal. 2009) (internal quotation marks and citation omitted); see  
2 also Jensen, 702 F. Supp. 2d at 1195 (stating that “courts have  
3 considered the ‘occurrence of the violation’ as the date the loan  
4 closed.”).

5 Here, Plaintiff’s loans “closed” on March 23, 2007.  
6 Therefore, the one-year statute of limitations expired on March 23,  
7 2008. However, Plaintiff did not file her Complaint in this action until  
8 September 10, 2010. Further, neither Plaintiff’s complaint nor her  
9 opposition explains why she could not have discovered Defendants’  
10 alleged section 2607 violation within the one-year statutory period.  
11 Therefore, Plaintiff has not shown that the doctrine of equitable  
12 tolling applies to her section 2607 claim, and this portion of the  
13 Movants’ dismissal motion is granted.

14 **C. TILA Rescission**

15 Movants also seek dismissal of Plaintiff’s Truth in Lending  
16 Act (“TILA”) rescission claim, arguing it is barred by the applicable  
17 three-year statute of limitations. (MortgageIT’s Mot. 5:24-6:6; Wells  
18 Fargo Defs.’ Mot. 5:12-13.)

19 A borrower’s right to rescind a loan transaction under TILA  
20 “expire[s] three years after the date of the consummation of the  
21 transaction[.]” 15 U.S.C. § 1635(f). “Consummation” is defined under the  
22 statute as “the time that a consumer becomes contractually obligated on  
23 a credit transaction.” Grimes v. New Century Mortgage Corp., 340 F.3d  
24 1007, 1009 (9th Cir. 2003) (quoting 12 C.F.R. § 226.2(a)(13)). This  
25 three-year limitations period “represents an absolute limitation on  
26 rescission actions [and] bars any claims filed more than three years  
27 after the consummation of the transaction. Therefore, § 1635(f) is a  
28 statute of repose, depriving the courts of subject matter jurisdiction

1 when a § 1635 claim is brought outside of the three-year limitation  
2 period." Miguel v. Country Funding Corp., 309 F.3d 1161, 1164 (9th Cir.  
3 2002) (internal quotation marks and citation omitted).

4 Since Plaintiff consummated her loans on March 23, 2007, the  
5 three-year statute of limitations expired on March 23, 2010. However,  
6 Plaintiff alleges in the complaint that she did not notify Defendants of  
7 her "elect[ion] to rescind the transaction" until she filed her  
8 Complaint on September 10, 2010. (Compl. ¶ 60.) Therefore, the court  
9 lacks subject matter jurisdiction over Plaintiff's TILA rescission  
10 claim, and this claim is dismissed against all Defendants with  
11 prejudice. See Omar v. Sea-Land Serv., Inc., 813 F.2d 986, 991 (9th Cir.  
12 1987) ("A trial court may dismiss a claim sua sponte under Fed. R. Civ.  
13 P. 12(b)(6) . . . without notice where the claimant cannot possibly win  
14 relief."); see also Silvertown v. Dep't of Treasury, 644 F.2d 1341, 1345  
15 (9th Cir. 1981) (stating court may enter sua sponte dismissal as to  
16 defendants who have not moved to dismiss where such defendants are in a  
17 position similar to that of moving defendants).

#### 18 **D. FCRA Claim**

19 Movants also seek dismissal of Plaintiff's Fair Credit  
20 Reporting Act ("FCRA") claim alleged under 15 U.S.C. § 1681s, arguing  
21 there is no private right of action for reporting inaccurate consumer  
22 credit information under subsection 2(a), and Plaintiff has alleged  
23 insufficient facts to support a claim under subsection 2(b).  
24 (MortgageIT's Mot. 8:14-9:3, Wells Fargo Defs.' Mot. 6:10-22.) Since  
25 Plaintiff's FCRA claim is premised upon subsection 2(b) only, Movants'  
26 argument concerning subsection 2(a) is irrelevant. (Compl. ¶ 63.)

27 The FCRA imposes responsibilities on the sources that provide  
28 credit information to credit reporting agencies ("CRA's"). Gorman v.



1 Wolpoff & Abramson, LLP, 584 F.3d 1147, 1153-54 (9th Cir. 2009)  
2 (quotation omitted). The duties imposed by subsection 2(b) of the FCRA  
3 are "triggered only when a [source of credit information] receives  
4 notice of a dispute from a [CRA] that has itself received notice of a  
5 dispute from a consumer." Pineda v. GMAC Mortgage, LLC, No. CV 08-5341  
6 AHM (PJWx), 2009 WL 1202885, at \*4 (C.D. Cal. Apr. 30, 2009) (citation  
7 omitted); see also Clark v. FLA Card Services, N.A., No. C 09-5240 SBA,  
8 2010 WL 2232161, at \*3 (N.D. Cal. June 3, 2010) (citing Gorman, 584 F.3d  
9 at 1154).

10 Plaintiff's FCRA claim includes the following allegations:

11 Defendants wrongfully, improperly, and illegally  
12 reported negative information as to the Plaintiff  
13 to one or more credit reporting agencies, resulting  
14 in Plaintiff having negative information on her  
15 credit reports and the lowering of her FICO scores.

14 A. The negative information included but  
15 was not limited to an excessive amount  
16 of debt into which Plaintiff was tricked  
17 into seed [sic] into signing;

17 B. Notwithstanding the above, Plaintiff has  
18 paid each and every payment on time from  
19 the time of the closing of the loan and  
20 until Plaintiff's default.

19 Pursuant to 15 USC § 1681 (s) (2) (b), Plaintiff  
20 is entitled to maintain a private cause of action  
21 against Defendants for an award of damages in an  
22 amount to be proven at the time of trial for all  
23 violations of The Fair Credit Reporting Act which  
24 caused actual damages to Plaintiff, including  
25 emotional distress and humiliation.

23 Id. ¶¶ 62-63. These allegations are insufficient to state a FCRA  
24 subsection 2(b) claim since Plaintiff does not allege that she disputed  
25 any negative information with a CRA or that notice of such dispute was  
26 provided to any Defendant. Therefore, Plaintiff's FRCA claim against the  
27 Movants is dismissed. See Clark, 2010 WL 2232161, at \* 3 (dismissing the  
28 plaintiff's FRCA claim where the complaint included "no allegations that

1 Plaintiff disputed any charges with any credit reporting bureau or that  
2 notice of such dispute was provided to [defendant]”).

3 **E. Negligent Misrepresentation**

4 Movants also seek dismissal of Plaintiff’s negligent  
5 misrepresentation claim, arguing, *inter alia*, that this claim fails to  
6 comply with Rule 9(b)’s heightened pleading standard. (MortgageIT’s Mot.  
7 12:2-10; Wells Fargo Defs.’ Mot. 10:21-22.)

8 Plaintiff’s negligent misrepresentation claim includes the  
9 following allegations:

10 Defendants knowingly and intentionally  
11 concealed material information from Plaintiff which  
12 is required by federal and state statutes and  
13 regulations to be disclosed to the Plaintiff both  
14 before and after closing.

15 Defendants also materially misrepresented  
16 material information to the Plaintiff with full  
17 knowledge of Defendants at their affirmative  
18 representations were false, fraudulent, and  
19 misrepresented the truth at the time said  
20 representations were made.

21 (Compl. ¶¶ 66-67.)

22 Rule 9(b)’s heightened pleading standard applies to “averments  
23 of fraud” in all civil cases, regardless of whether or not “fraud” is an  
24 essential element of the claim. Vess v. Ciba-Geigy Corp., 317 F.3d  
25 1097, 1103-05 (9th Cir. 2003). Rule 9(b) provides that “[i]n alleging  
26 fraud or mistake, a party must state with particularity the  
27 circumstances constituting fraud or mistake.” The required specificity  
28 includes the “time, place, and specific content of the false  
representations as well as the identities of the parties to the  
misrepresentations.” Swartz v. KPMG LLP, 476 F.3d at 764 (internal  
quotation marks and citation omitted). Further, in alleging fraud  
against multiple defendants,

1 Rule 9(b) does not allow a complaint to merely lump  
2 multiple defendants together but requires  
3 plaintiff[] to differentiate [her] allegations when  
4 suing more than one defendant . . . and inform each  
5 defendant separately of the allegations surrounding  
6 his alleged participation in the fraud. . . . [A]  
7 plaintiff must, at a minimum, identify the role of  
8 each defendant in the alleged fraudulent scheme.

9 Id. at 764-65 (quotations omitted).

10 Plaintiff's conclusory "averments of fraud" do not provide the  
11 specificity required by Rule 9(b) since they lack sufficient detail  
12 concerning the time, date, and place of the alleged misrepresentations  
13 and non-disclosures, and the identity of the individual(s) who made  
14 them. See Kearns v. Ford Motor Co., 567 F.3d 1120, 1125-27 (9th Cir.  
15 2009) (holding allegations concerning false representations and  
16 non-disclosures "are grounded in fraud" and are subject to Rule 9(b)).  
17 Plaintiff's allegations also fail to distinguish among the defendants.  
18 Therefore, Plaintiff's negligent misrepresentation claim against the  
19 Movants is dismissed.

#### 20 **F. Breach of Fiduciary Duty**

21 Movants also seek dismissal of Plaintiff's breach of fiduciary  
22 duty claim, arguing Plaintiff does not allege the necessary existence of  
23 a fiduciary relationship with any Movant. (MortgageIT's Mot. 11:8-9,  
24 11:17-18; Wells Fargo Defs.' Mot. 8:7-21.)

25 In California, to state a claim for breach of fiduciary duty,  
26 a plaintiff must allege: (1) the existence of a fiduciary relationship;  
27 (2) the breach of that relationship; and (3) damage proximately caused  
28 thereby. Roberts v. Lomanto, 112 Cal. App. 4th 1553, 1562 (2003).

"Breach of fiduciary duty is a tort that by definition may be  
committed by only a limited class of persons." 1-800 Contacts, Inc. v.  
Steinberg, 107 Cal. App. 4th 568, 592 (2003). As a general rule, "a loan

1 transaction is [an] at arms-length [transaction] and there is no  
2 fiduciary relationship between the borrower and lender." Oaks Mgmt.  
3 Corp. v. Superior Court, 145 Cal. App. 4th 453, 466 (2006). Further,  
4 loan servicers typically do not have a fiduciary relationship with  
5 borrowers. See Linder v. Aurora Loan Servicing, LLC, No. 2:09-cv-03490-  
6 JAM-KJM, 2010 WL 1525399, at \*5 (E.D. Cal. Apr. 15, 2010); Moreno v.  
7 Citibank, N.A., No. C-09-5339 CW, 2010 WL 103822, at \*3 (N.D. Cal. Mar.  
8 19, 2010).

9 Plaintiff's fiduciary duty claim contains the following  
10 allegations::

11 Defendants, by . . . contracting to provide  
12 mortgage loan services and a loan program to  
13 Plaintiff which was not only to be best suited to  
14 the Plaintiff given her income and expenses, but by  
15 which Plaintiff would also be able to satisfy her  
16 obligations without risk of losing her home, were  
17 "fiduciaries" in which Plaintiff reposed trust and  
18 confidence . . . .

16 Defendants breached their fiduciary duties to  
17 the Plaintiff by fraudulently inducing Plaintiff to  
18 enter into a mortgage transaction which was  
19 contrary to the Plaintiff stated intentions;  
20 contrary to the Plaintiff's interest; and contrary  
21 to the Plaintiff's preservation of her home.

19 (Compl. ¶¶ 73-74.) These allegations are insufficient to show the  
20 existence of a fiduciary relationship between Plaintiff and any Movant.  
21 See Pajarillo v. Bank of America, No. 10CV937 DMS (JMA), 2010 WL  
22 4392551, at \*5 (S.D. Cal. Oct. 28, 2010) (dismissing breach of fiduciary  
23 claim based upon identical allegations to those plead in this case).  
24 Therefore, Plaintiff's breach of fiduciary duty claim against the  
25 Movants is dismissed.

26 **G. Unjust Enrichment**

27 Movants also seek dismissal of Plaintiff's unjust enrichment  
28 claim, arguing, *inter alia*, an unjust enrichment claim cannot be stated

1 "where there exists between the parties a valid express contract  
2 covering the same subject matter." (MortgageIT's Mot. 12:4-8, 13:5-15;  
3 Wells Fargo Defs.' Mot. 8:23.)

4 Plaintiff's unjust enrichment claim is based upon an alleged  
5 "implied contract" ensuring she "understood all fees which would be paid  
6 to the Defendants to obtain credit on [her] behalf" and that she would  
7 not be "charge[d] any fees which were not related to the settlement of  
8 the loan and without full disclosure" of the same. (Compl. ¶ 76.)  
9 However, under California law, "it is well settled that an action based  
10 upon an implied-in-fact or quasi-contract cannot lie where there exists  
11 between the parties a valid express contract covering the same subject  
12 matter." Lance Camper Manufacturing Corp. v. Republic Indemnity Company  
13 of America, 44 Cal. App. 4th 194, 203 (1996); see also Paracor Finance,  
14 Inc. v. General Electric Capital Corp., 96 F.3d 1151, 1167 (9th Cir.  
15 1996) (stating under California law "unjust enrichment is an action in  
16 quasi-contract, which does not lie when an enforceable, binding  
17 agreement exists defining the rights of the parties"). Here, Plaintiff  
18 entered into two loans, secured by Deeds of Trust, and alleges to have  
19 entered into a written loan modification agreement with Wells Fargo.  
20 (Compl. ¶¶ 18-19, 21; MortgageIT's RJN, Exs. A, C.) Further, none of  
21 Plaintiff's allegations plausibly suggest that valid contracts did not  
22 exist between the parties. Therefore, Plaintiff's unjust enrichment  
23 claim against the Movants is dismissed. See Smith v. Aurora Loan  
24 Services, No. CIV S-10-0198 MCE DAD P, 2010 WL 3504899, at \*4 (E.D. Cal.  
25 Sep. 7, 2010) (stating "[t]he complaint does not allege sufficient facts  
26 to maintain a plausible claim for unjust enrichment" where the plaintiff  
27 "alleges Plaintiff and Defendants entered into the Loan, and no  
28

1 allegations in the complaint support a claim that no contract exists  
2 between the parties”).

3 **H. Civil RICO**

4 Movants also seek dismissal of Plaintiff’s civil Racketeer  
5 Influenced and Corrupt Organizations Act (“RICO”) claim, arguing  
6 Plaintiff did not adequately plead its elements, and the allegations  
7 were not plead with the required specificity. (MortgageIT’s Mot. 15:9-  
8 18; Wells Fargo Defs.’ Mot. 12:2-6, 13:3-6.)

9 18 U.S.C. § 1962 identifies the activities which are  
10 prohibited under RICO. “Subsections (a), (b) and (c) [of § 1962] provide  
11 for stand-alone RICO violations, while subsection (d) makes it a crime  
12 to conspire to commit a violation of subsections (a), (b) or (c).”  
13 Pineda v. Reyes, No. 09-cv-01938-H-WMc, 2009 WL 3388376, at \*8 (S.D.  
14 Cal. Oct. 20, 2009) (citing 15 U.S.C. § 1962). Since subsections (a),  
15 (b) and (c) each criminalize different conduct, “the elements a  
16 plaintiff must plead and prove to prevail under each subsection are  
17 therefore different.” Id.

18 In addition, the Ninth Circuit “applie[s] the particularity  
19 requirements of [R]ule 9(b) to [averments of fraud in] RICO claims.”  
20 Moore v. Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir.  
21 1989). Therefore, Plaintiff’s fraud allegations in her RICO claim must  
22 “identify the time, place and manner of each fraud plus the role of each  
23 defendant in each scheme.” Id. (quotation omitted).

24 Plaintiff’s civil RICO claim contains the following  
25 allegations:

26 Defendants’ actions and use of multiple  
27 corporate entities, multiple parties, and concerted  
28 and predetermined acts and conduct specifically  
designed to defraud Plaintiff constitutes an  
“enterprise”, with the aim and objective at the  
enterprise bean [sic] to perpetuate a fraud upon

1 the Plaintiff through the use of intentional  
2 nondisclosure, material misrepresentation, and  
creation of the fraudulent loan documents.

3 (Compl. ¶ 88.)

4 These conclusory allegations are insufficient to state a civil  
5 RICO claim. Plaintiff does not identify "the subsection of 15 U.S.C. §  
6 1962 which Defendants allegedly violate, and the . . . allegations fail  
7 to 'give defendant[s] fair notice of what the . . . claim is and the  
8 grounds upon which it rests." Pineda v. Reyes, 2009 WL 3388376, at \*8  
9 (quoting Twombly, 550 U.S. at 555.) Further, Plaintiff does not allege  
10 facts concerning the time, date, and place of the alleged  
11 misrepresentations and non-disclosures, the identity of who made them,  
12 or the role of each Defendant in the "enterprise." Therefore,  
13 Plaintiff's civil RICO claim against the Movants is dismissed.

#### 14 I. Quiet Title

15 Movants also seek dismissal of Plaintiff's quiet title claim,  
16 arguing, *inter alia*, Plaintiff has not pled her ability to tender the  
17 amount of her debt. (MortgageIT's Mot. 16:11-124; Wells Fargo Defs.'  
18 Mot. 11:3-11.)

19 Under California law, it is well-settled that "a mortgagor  
20 cannot quiet his title against the mortgagee without paying the debt  
21 secured." Briosos v. Wells Fargo Bank, 737 F. Supp. 2d 1018, 1032 (N.D.  
22 Cal. 2010) (quoting Shimpones v. Stickney, 219 Cal. 637, 649 (1934)  
23 (citations omitted)). Therefore, "to maintain a quiet title claim, a  
24 plaintiff 'is required to allege tender of the proceeds of the loan at  
25 the pleading stage.'" Id. (quoting Velasquez v. Chase Home Finance, LLC,  
26 No. C 10-01641 SI, 2010 WL 3211905, at \*4 (N.D. Cal. Aug. 12, 2010));  
27 see also Hensley v. Bank of New York Mellon, No. 1:10-CV-1316 AWI SMS,  
28 2010 WL 5418862, at \*3 (E.D. Cal. Dec. 23, 2010) (dismissing quiet title

1 claim where the plaintiff did "not allege that she has tendered, or is  
2 able to tender").

3 Plaintiff does not allege tender of the amount of debt owed,  
4 or her ability to tender, under her quiet title claim. She does allege  
5 the following under her breach of contract claim, which is incorporated  
6 by reference into her quiet title claim: "Upon the true 'lenders' full  
7 performance of its obligations under HOEPA, Plaintiff shall tender all  
8 sums to which the true lender is entitled." (Compl. ¶¶ 49, 111.)  
9 However, "[a] tender must be one of full performance and must be  
10 unconditional to be valid." Arnolds Management Corp. v. Eischen, 158  
11 Cal. App. 3d 575, 5780 (1984) (citations omitted). Therefore,  
12 Plaintiff's quiet title claim against the Movants is dismissed.

### 13 **J. Usury and Fraud**

14 Movants also seek dismissal of Plaintiff's "usury and fraud"  
15 claim, arguing Plaintiff failed to allege that the interest rate on  
16 either loan exceeded the statutory minimum. (MortgageIT's Mot. 17:5-7;  
17 Wells Fargo Defs.' Mot. 13:7-9.) The Wells Fargo Defendants also argue  
18 the claim was not plead with the specificity Rule 9(b) requires. (Wells  
19 Fargo Defs.' Mot. 12:2-6.)

20 Plaintiff's "usury and fraud" claim contains the following  
21 allegations:

22 [T]he subject loan, notes, and mortgage were  
23 structured so as to create the appearance of a  
24 higher value of real property than the actual fair  
25 market value.

26 Defendants disguised the transaction to create  
27 the appearance of the lender being a properly  
28 chartered and registered financial institution . .  
. when in fact the real party in interest was not  
disclosed to Plaintiff, and neither were the  
various fees, rebates, refunds, kickbacks, profits  
and gains of the various parties who participated  
in this unlawful scheme.



1 Said real party in interest . . . was neither  
2 a financial institution or an entity . . .  
3 authorized . . . to do business in the state, nor  
to act as banking, lending or other financial  
institution anywhere else.

4 As such, this fraudulent scheme . . . was in  
5 fact a sham to use Plaintiff's interest in the real  
6 property to collect interest in excess of the legal  
rate. . . .

7 The transaction of all the loan of money  
8 pursuant to a written agreement, and as such,  
9 subject to the rate limitation set forth under  
10 state and federal law. The "formula break" a  
reference to end these laws was exceeded by a  
factor in excess of 10 contrary to the applicable  
law and contrary to the requirements for disclosure  
under TILA and HOEPA.

11 (Compl. ¶¶ 105-09.)

12 Although Plaintiff alleged "Usury and Fraud" as a single  
13 claim, they are separate claims under California law. Therefore, the  
14 sufficiency of Plaintiff's allegations are addressed separately under  
15 each claim.

16 Under California law, the elements of a usury claim are: "(1)  
17 The transaction must be a loan or forbearance; (2) the interest to be  
18 paid must exceed the statutory maximum; (3) the loan and interest must  
19 be absolutely repayable by the borrower; and (4) the lender must have a  
20 willful intent to enter into a usurious transaction." Ghirardo v.  
21 Antonioli, 8 Cal. 4th 791, 798 (1994). "A loan that charges an interest  
22 rate greater than 10 percent per annum is usurious." 321 Henderson  
23 Receivables Origination LLC v. Sioteco, 173 Cal. App. 4th 1059, 1076  
24 (2009).

25 Plaintiff does not allege the rate of interest charged on  
26 either of her two loans, or that it exceeded the maximum rate allowable  
27 by law. Therefore, Plaintiff's usury claim against the Movants is  
28 dismissed. See Parjarillo, 2010 WL 4392551, at \*8 (dismissing usury

1 claim when the plaintiff failed to "sufficiently allege how the interest  
2 . . . received by Defendants exceeded the statutory maximum rate").

3 Under California law, the elements of a fraud claim are: (1)  
4 misrepresentation (including, false representation, concealment, or  
5 nondisclosure); (2) knowledge of falsity; (3) intent to induce reliance;  
6 (4) justifiable reliance; and (5) resulting damage. Engalla v.  
7 Permanente Medical Group, Inc., 15 Cal. 4th 951, 974 (1997). A claim  
8 for fraud in federal court must satisfy Rule 9(b)'s heightened pleading  
9 requirements. See Vess, 317 F.3d at 1103.

10 Plaintiff's conclusory allegations concerning Defendants'  
11 "fraudulent scheme" do not provide the specificity required by Rule  
12 9(b). Therefore, Plaintiff's fraud claim against the Movants is  
13 dismissed.

#### 14 **K. Wrongful Foreclosure**

15 Movants also seek dismissal of Plaintiff's wrongful  
16 foreclosure claim, arguing, *inter alia*, that Plaintiff lacks standing to  
17 challenge the foreclosure since "[she] does not make a valid tender  
18 offer." (Wells Fargo Defs.' Mot. 9:9-10:11.)

19 To state a wrongful foreclosure claim, "a plaintiff must  
20 allege a credible tender of the amount of the secured debt . . . ."  
21 Roque v. Suntrust Mortg., Inc., No. C-09-00040 RMW, 2010 WL 546896, at  
22 \*4 (N.D. Cal. Feb. 10, 2010) (citing Abdallah v. United Savings Bank, 43  
23 Cal. App. 4th 1101, 1109 (1996)); see also Guerrero v. Greenpoint  
24 Mortgage Funding, Inc., No. 10-15333, 2010 WL 4117102, at \*1 (9th Cir.  
25 Oct. 20, 2010) (stating the plaintiffs "lacked standing to bring a claim  
26 for 'wrongful foreclosure,' because they failed to allege actual, full  
27 and unambiguous tender of the debt owed on the mortgage").

1           Since Plaintiff does not allege tender of the amount of debt  
2 owed, or her ability to tender, her wrongful foreclosure claim against  
3 the Movants is dismissed.

4           **L.    Civil Conspiracy**

5           Movants also seek dismissal of Plaintiff's civil conspiracy  
6 claim, arguing it is not an independent cause of action, and Plaintiff  
7 has not plead an underlying tort against them. (MortgageIT's Mot. 13:19-  
8 21, 14:1-2; Wells Fargo Defs.' Mot. 12:11-13:2.) The Wells Fargo  
9 Defendants further argue that Plaintiff's civil conspiracy claim was not  
10 plead with the necessary specificity. (Wells Fargo Defs.' Mot. 12:2-6.)

11           "Conspiracy is not a cause of action, but a legal doctrine  
12 that imposes liability on persons who, although not actually committing  
13 a tort themselves, share with the immediate tortfeasors a common plan or  
14 design in its perpetration." Applied Equipment Corp., Litton Saudi  
15 Arabia Ltd., 7 Cal. 4th 503, 510 (1994) (citation omitted). "Standing  
16 alone, a conspiracy does no harm and engenders no tort liability. It  
17 must be activated by the commission of an actual tort." Id. at 511.  
18 Further, to allege a civil "conspiracy to defraud," a complaint must  
19 meet the particularity requirements of [Rule] 9(b). Sandry v. First  
20 Franklin Financial Corp., No. 1:10-cv-01923-OWW-SKO, 2011 WL 202285, at  
21 \*4 (E.D. Cal. Jan. 20, 2011).

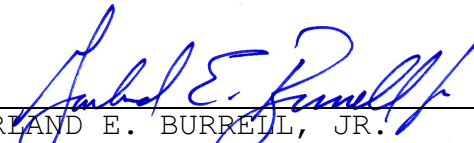
22           Since Plaintiff's tort claims have been dismissed against the  
23 Movants, and Plaintiff's conclusory allegations that Defendants "agreed  
24 . . . to engage in [a] conspiracy to defraud" Plaintiff "for the common  
25 purpose of accruing economic gains for themselves at the expense of and  
26 detriment to Plaintiff" do not provide the specificity required by Rule  
27 9(b), Plaintiff's civil conspiracy claim against the Movants is  
28 dismissed.

1 **V. CONCLUSION**

2 For the stated reasons, each Movant's dismissal motion is  
3 GRANTED. Therefore, MortgageIT's motion to strike is DENIED as moot.  
4 Plaintiff is granted fourteen (14) days from the date on which this  
5 order is filed to file a First Amended Complaint addressing the  
6 deficiencies in any claim dismissed without prejudice.

7 This action may be dismissed with prejudice against the  
8 Movants under Federal Rule of Civil Procedure 41(b) if Plaintiff fails  
9 to file an amended complaint within the prescribed time period.

10 Dated: May 3, 2011

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13 GARLAND E. BURRELL, JR.  
14 United States District Judge  
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