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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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LORNA DELORES THOMPSON,
Plaintiff,

NO. CIV. 2:11-2261 WBS DAD

v.

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS SECOND
AMENDED COMPLAINT

RESIDENTIAL CREDIT SOLUTIONS,
INC., a Delaware Corporation;
AMERICAN BROKERS CONDUIT, A
DIVISION OF AMERICAN HOME
MORTGAGE INVESTMENT
CORPORATION, a Maryland
Corporation; MERSCORP, INC.
dba MORTGAGE ELECTRONIC
REGISTRATION SYSTEM, INC. AS
NOMINEE FOR AMERICAN BROKERS
CONDUIT, AMERICAN HOME
MORTGAGE SERVICING, INC., and
all person unknown, claiming
any legal or equitable right,
title, estate, lien, or
interest in the property,
described in the complaint
adverse to Plaintiff's title,
and any cloud on Plaintiff's
title thereto, and DOES 1-100,
inclusive,

Defendants.

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2 Plaintiff Lorna Delores Thompson brings this action
3 against defendants Residential Credit Solutions, Inc. ("RCS"),
4 American Brokers Conduit ("ABC"), a division of American Home
5 Mortgage Investment Corporation ("AHMIC"), Merscorp, Inc.
6 ("Merscorp"), dba Mortgage Electronic Registration System, Inc.
7 ("MERS") as nominee for American Brokers Conduit, and American
8 Home Mortgage Servicing, Inc. ("AHMSI"), arising from defendants'
9 allegedly wrongful conduct related to a residential loan. RCS
10 and Merscorp now move to dismiss the Second Amended Complaint
11 ("SAC") for failure to state a claim upon which relief can be
12 granted pursuant to Federal Rule of Civil Procedure 12(b)(6).
13 (Docket No. 17.)

14 I. Factual and Procedural Background

15 In July of 2007, plaintiff purchased her residence at
16 2220 Cobblestone Avenue in Fairfield, California ("the
17 property"), with a loan she obtained from American Brokers
18 Conduit. (SAC ¶ 1.) On June 8, 2009, a Notice of Default was
19 filed against the property after plaintiff had accrued a total
20 default of at least \$17,654.25. (Req. for Judicial Notice
21 ("RJN"), Ex. 3 (Docket No. 18).) Beginning in June 2010,
22 plaintiff was placed on a modified monthly trial program by
23 AHMIC. (SAC ¶ 18.) On October 18, 2010, a Notice of Rescission
24 of Notice of Default was recorded. (RJN Ex. 4.) After
25 plaintiff's delinquency increased to \$62,437.88, a second and
26 operative Notice of Default was recorded on April 4, 2011. (Id.
27 Ex. 5.) The Notice of Default included a declaration stating
28 that:

1 The undersigned mortgagee, beneficiary or authorized
2 agent for the mortgagee or beneficiary pursuant to
3 California Civil Code § 2923.5(b) declares that the
4 mortgagee, beneficiary or the mortgagee's or
beneficiary's authorized agent has either contacted the
borrower or tried with due diligence to contact the
borrower as required by California Civil Code 2923.5.

5 (Id.) On July 5, 2011, the National Default Servicing Corp.
6 ("NDSC") was substituted as trustee under the Deed of Trust.

7 (Id. Ex. 7.) The same day, NDSC recorded a Notice of Trustee's
8 Sale setting the foreclosure sale for July 26, 2011. (Id. Ex.
9 8.) The foreclosure sale took place on November 15, 2011, and a
10 Trustee's Deed Upon Sale was recorded on November 28, 2011. (Id.
11 Ex. 9.)

12 On July 18, 2011, plaintiff filed her First Amended
13 Complaint ("FAC") in the Superior Court of California, County of
14 Solano. On August 25, 2011, defendants removed the case to this
15 court based on diversity of citizenship. On November 22, 2011,
16 the court granted RCS and Merscorp's motion to dismiss the FAC.
17 (Docket No. 12.) Plaintiff filed her SAC on November 28, 2011.
18 (Docket No. 13.) The SAC alleges claims against defendants for:
19 (1) wrongful foreclosure under California Civil Code section
20 2923.5; (2) breach of contract; (3) breach of the implied
21 covenant of good faith and fair dealing; (4) anticipatory breach
22 of contract; (5) unfair business practices; (6) wrongful
23 foreclosure under California Civil Code section 2932.6; (7)
24 negligent infliction of emotional distress; (8) quiet title; and
25 (9) violations of the Racketeer Influenced and Corrupt
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1 Organizations ("RICO") Act.¹

2 II. Judicial Notice

3 A court may take judicial notice of facts "not subject
4 to reasonable dispute" because they are either "(1) generally
5 known within the territorial jurisdiction of the trial court or
6 (2) capable of accurate and ready determination by resort to
7 sources whose accuracy cannot reasonably be questioned." Fed. R.
8 Evid. 201. The court may take judicial notice of matters of
9 public record or of documents whose contents are alleged in the
10 complaint and whose authenticity is not questioned. Lee v. City
11 of L.A., 250 F.3d 668, 688-89 (9th Cir. 2001).

12 Residential Credit Solutions and Merscorp have filed a
13 request for judicial notice in support of their motion to dismiss
14 which contains nine exhibits: (1) a copy of the Grant Deed,
15 recorded in Solano County on July 10, 2007; (2) a copy of the
16 Deed of Trust, recorded in Solano County on July 10, 2007; (3) a
17 copy of the Notice of Default and Election to Sell Under Deed of
18 Trust, recorded in Solano County on June 8, 2009; (4) a copy of
19 the Notice of Rescission, recorded in Solano County on October
20 18, 2010; (5) a copy of the Notice of Default and Election to
21 Sell Under Deed of Trust, recorded in Solano County on April 4,
22 2011; (6) a copy of the Corporation Assignment of Deed of Trust,
23 recorded in Solano County on May 3, 2011; (7) a copy of the
24 Substitution of Trustee, recorded in Solano County on July 5,
25 2011; (8) a copy of the Notice of Trustee's Sale, recorded in
26 Solano County on July 5, 2011; and (9) a copy of the Trustee's

27
28 ¹ Plaintiff raises claims four through nine for the first
time in her SAC.

1 Deed Upon Sale, recorded in Solano County on November 28, 2011.

2 The court will take judicial notice of defendants'
3 exhibits as they are matters of public record whose accuracy
4 cannot be questioned. See Lee, 250 F.3d at 689.

5 Plaintiff asks the court to take judicial notice of the
6 judicial opinion in Javaheri v. J.P. Morgan Chase Bank, N.A.,
7 CV10-08185, 2011 WL 97684 (C.D. Cal. Jan. 11, 2011). The court
8 does not need to judicially notice the opinion to consider it.

9 III. Discussion

10 On a motion to dismiss, the court must accept the
11 allegations in the complaint as true and draw all reasonable
12 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
13 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
14 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
15 (1972). "To survive a motion to dismiss, a complaint must
16 contain sufficient factual matter, accepted as true, to 'state a
17 claim to relief that is plausible on its face.'" Ashcroft v.
18 Iqbal, 556 U.S. 662, ---, 129 S. Ct. 1937, 1949 (2009) (quoting
19 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). This
20 "plausibility standard," however, "asks for more than a sheer
21 possibility that a defendant has acted unlawfully," and "[w]here
22 a complaint pleads facts that are 'merely consistent with' a
23 defendant's liability, it 'stops short of the line between
24 possibility and plausibility of entitlement to relief.'" Id.
25 (quoting Twombly, 550 U.S. at 556-57).

26 A. Wrongful Foreclosure Under California Civil Code
27 Section 2923.5

28 Plaintiff contends that defendants failed to comply

1 with the communication requirements set forth in California Civil
2 Code section 2923.5. Section 2923.5(a)(2) requires a "mortgagee,
3 beneficiary or authorized agent" to "contact the borrower in
4 person or by telephone in order to assess the borrower's
5 financial situation and explore options for the borrower to avoid
6 foreclosure." Section 2923.5(b) requires a default notice to
7 include a declaration "from the mortgagee, beneficiary, or
8 authorized agent" of compliance with section 2923.5, including
9 attempt "with due diligence to contact the borrower as required
10 by this section." Cal. Civ. Code § 2923.5.

11 "[T]he remedy for noncompliance [with section 2923.5]
12 is a simple postponement of the foreclosure sale, nothing more."
13 Mabry v. Superior Court, 185 Cal. App. 4th 208, 214 (4th Dist.
14 2010). Since the foreclosure sale has already occurred, the
15 alleged section 2923.5 violation fails to satisfy a claim for
16 wrongful foreclosure. See Geren v. Deutsche Bank Nat'l, No. CV F
17 11-0938 LJO GSA, 2011 WL 3568913, at *9 (E.D. Cal. Aug. 12,
18 2011). Accordingly, the court will dismiss this claim.

19 B. Breach of Contract and Anticipatory Breach of Contract

20 To state a claim for breach of contract under
21 California law, plaintiffs must allege (1) the existence of a
22 contract; (2) plaintiffs' performance or excuse for
23 nonperformance of the contract; (3) defendants' breach of the
24 contract; and (4) resulting damages. Armstrong Petroleum Corp.
25 v. Tri-Valley Oil & Gas Co., 116 Cal. App. 4th 1375, 1390 (2004).
26 Plaintiff alleges that defendants were in breach of contract when
27
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1 they violated the notice requirements in section 2923.5² and the
2 terms of the Modification Agreement.

3 Plaintiff continues to base her breach of contract
4 claim on defendants' alleged violation of section 2923.5. Once
5 again, plaintiff fails to plead how she was damaged by
6 defendants' alleged breach other than being forced to incur
7 "costs and attorney fees." (SAC ¶ 66.) While section 2923.5
8 requires the lender to discuss options to prevent foreclosure, it
9 does not require that any loan modification take place. See Vega
10 v. JPMorgan Chase Bank, N.A., 654 F. Supp. 2d 1104, 1113 (E.D.
11 Cal. 2009). Plaintiff stated that she and defendants discussed
12 her options to prevent foreclosure. (SAC ¶¶ 18-31.) Plaintiff
13 therefore received all the benefits that she was entitled to
14 under section 2923.5 and suffered no damages as a result of
15 defendants' alleged violation of the notice requirements.³

16 In her SAC, plaintiff includes allegations for the
17 first time that defendants' breached the Modification Agreement.
18 "The general rule is that if an 'essential element' of a promise
19 is reserved for the future agreement of both parties, the promise
20 gives rise to no legal obligation until such future agreement is
21 made." City of L.A. v. Super. Ct. of L.A. Cnty., 51 Cal. 2d 423,
22

23 ² The SAC also refers in passing to California Civil Code
24 section 2924. (SAC ¶ 62.) Section 2924 requires that a trustee
25 must notify an owner or borrower before a foreclosure sale may
26 proceeding. Plaintiff has not pled in her SAC that a trustee
27 failed to notify her before the foreclosure sale, thus plaintiff
28 has failed to state a claim for violation of section 2924.

³ Given the obvious deficiencies in plaintiff's claim, it
is unnecessary to reach the question of whether plaintiff
adequately pled that a violation of section 2923.5 had occurred
as a predicate to her breach of contract claim.

1 433 (1959) (quoting Ablett v. Clauson, 43 Cal. 2d 280, 284
2 (1954)). Based on this principle, a number of courts have
3 dismissed claims based on "agreements to agree." See, e.g.,
4 Grant v. Aurora Loan Servs., Inc., 736 F. Supp. 2d 1257, 1266
5 (C.D. Cal. 2010). However, some courts have held that
6 "agreements to negotiate" are enforceable. See, e.g., Copeland
7 v. Baskin Robbins U.S.A., 96 Cal. App. 4th 1251, 1255-60 (2d
8 Dist. 2002).

9 Plaintiff's allegations that defendants breached their
10 obligations under the Modification Agreement are deficient for
11 two primary reasons. First, plaintiff may be alleging an
12 unenforceable "agreement to agree" to a loan modification. See
13 City of L.A., 51 Cal.2d at 433. Second, even if the court
14 construes plaintiff's SAC as alleging an "agreement to negotiate"
15 a loan modification and holds that such agreements are
16 enforceable, plaintiff has only alleged in conclusory fashion
17 that the parties entered into such an agreement. Plaintiff has
18 not provided nonconclusory factual content from which the court
19 can plausibly infer that the parties entered into an agreement to
20 negotiate. See Twombly, 550 U.S. at 570. While plaintiff has
21 detailed a series of interactions with defendants involving
22 plaintiff's loan modification application, (see SAC ¶ 63), "such
23 facts are only consistent with defendants' liability and do not
24 give rise to plausible entitlement to relief." Iqbal, 129 S. Ct.
25 at 149. The court will therefore dismiss plaintiff's breach of
26 contract and anticipatory breach of contract claims.

27 C. Implied Covenant of Good Faith and Fair Dealing

28 "Every contract imposes upon each party a duty of good

1 faith and fair dealing in its performance and its enforcement."
2 Marsu, B.V. v. Walt Disney Co., 185 F.3d 932, 937 (9th Cir. 1999)
3 (quoting Carma Developers, Inc. v. Marathon Dev. Cal., Inc., 2
4 Cal. 4th 342, 371 (1992)). "A typical formulation of the burden
5 imposed by the implied covenant of good faith and fair dealing is
6 'that neither party will do anything which will injure the right
7 of the other to receive the benefits of the agreement.'" Andrews
8 v. Mobile Aire Estates, 125 Cal. App. 4th 578, 589 (2005)
9 (quoting Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 573 (1973)).
10 "The prerequisite for any action for breach of the implied
11 covenant of good faith and fair dealing is the existence of a
12 contractual relationship between the parties" Smith v.
13 City & Cnty. of S.F., 225 Cal. App. 3d 38, 49 (1990). Plaintiff
14 alleges that defendants violated the implied covenant of good
15 faith and fair dealing by failing to offer plaintiff a feasible
16 loan modification, failing to provide plaintiff with a response
17 to the Qualified Written Request ("QWR"), refusing to disclose
18 documents in violation of the Truth in Lending Act ("TILA"), and
19 refusing to provide accounting pursuant to the Fair Debt
20 Collection Practices Act. (SAC ¶72.)

21 Generally, "[a]bsent 'special circumstances' a loan
22 transaction 'is at arms-length'" and no duties arise from the
23 loan transaction outside of those in the agreement. Rangel v.
24 DHI Mortgage Co., Ltd., No. CV F 09-1035 LJO GSA, 2009 WL
25 2190210, at *5 (E.D. Cal. July 21, 2009) (quoting Oaks Mgmt.
26 Corp. v. Superior Court, 145 Cal. App. 4th 453, 466 (2006)).
27 Absent contrary authority or the pleading of special
28 circumstances, plaintiff cannot establish that RCS or Merscorp

1 owed plaintiff a duty of care. See Hardy v. Indymac Federal
2 Bank, 263 F.R.D. 586, 593 (E.D. Cal. 2009). Plaintiff has failed
3 to allege any facts constituting special circumstances that would
4 suggest that the transaction was not at arms length. All that
5 plaintiff has added to her claim is a conclusory sentence stating
6 that defendants owed her a duty that they breached. (SAC ¶ 76.)
7 Pleading a legal conclusion does not satisfy plaintiff's
8 obligation to plead special circumstances. Plaintiff thus fails
9 to plead that RCS and Merscorp owed a duty to not cause plaintiff
10 harm in their capacities as loan servicer and nominal beneficiary
11 of the loan. Additionally, as discussed above, plaintiff has
12 failed to allege nonconclusory factual content from which the
13 court could infer the existence of a modification agreement that
14 could provide the basis for additional duties owed by each party.
15 Accordingly, the court will dismiss this claim.

16 D. Unfair Business Practices

17 California's UCL prohibits "any unlawful, unfair or
18 fraudulent business act or practice" Cal. Bus. & Prof.
19 Code § 17200. This cause of action is generally derivative of
20 some other illegal conduct or fraud committed by a defendant.
21 Khoury v. Maly's of Cal., Inc., 14 Cal. App. 4th 612, 619 (2d
22 Dist. 1993).

23 "Under its 'unlawful' prong, 'the UCL borrows
24 violations of other laws . . . and makes those unlawful practices
25 actionable under the UCL.'" Berryman v. Merit Prop. Mgmt., Inc.,
26 152 Cal. App. 4th 1544, 1554 (4th Dist. 2007) (quoting Lazar v.
27 Hertz Corp., 69 Cal. App. 4th 1494, 1505 (1st Dist. 1999)).

28 "Thus, a violation of another law is a predicate for stating a

1 cause of action under the UCL's unlawful prong." Id. A
2 "fraudulent" business act or practice is one in which members of
3 the public are likely to be deceived. Olsen v. Breeze, Inc., 48
4 Cal. App. 4th 608, 618 (3d Dist. 1996). A business practice is
5 "unfair" when it "violates established public policy or if it is
6 immoral, unethical, oppressive or unscrupulous and causes injury
7 to consumers which outweighs its benefits." McKell v. Wash.
8 Mut., Inc., 142 Cal. App. 4th 1457, 1473 (2d Dist. 2006).
9 Plaintiff's UCL claim is based on defendants' violation of
10 California Civil Code section 2923.5. As discussed above, the
11 court does not reach the question of whether defendants violated
12 section 2923.5 because there is no longer a remedy available to
13 plaintiff.

14 Even if plaintiff has sufficiently alleged a violation
15 of the UCL, standing to bring a UCL claim requires "a person who
16 has suffered injury in fact and has lost money or property as a
17 result of the unfair competition." Cal. Bus. & Prof. Code
18 § 17204 (emphasis added). To have standing, a plaintiff must
19 sufficiently allege that (1) he has "lost 'money or property'
20 sufficient to constitute an 'injury in fact' under Article III of
21 the Constitution," Rubio v. Capital One Bank, 613 F.3d 1195,
22 1203-04 (9th Cir. 2010), and (2) there is a "causal connection"
23 between the defendant's alleged UCL violation and the plaintiff's
24 injury in fact. Id. at 1204 (quoting Hall v. Time Inc., 158 Cal.
25 App. 4th 847, 855 (4th Dist. 2008)).

26 Here, with respect to injury and causation, plaintiff's
27 UCL claims allege: "As a result of breach by Defendants, and each
28 of them, Plaintiff has suffered damages including costs and

1 attorney fees in an amount to be proven at trial." (SAC ¶ 102.)
2 Plaintiff fails to cite any authority establishing that
3 attorney's fees and costs incurred in bringing a UCL claim are
4 sufficient to confer standing. "Under Plaintiff's reasoning, a
5 private plaintiff bringing a UCL claim automatically would have
6 standing merely by filing suit." Cordon v. Wachovia Mortg., 776
7 F. Supp. 2d 1029, 1039 (N.D. Cal. 2011).

8 If the court were to interpret plaintiff's alleged
9 injury as being the loss of her property, plaintiff would still
10 be faced with the possible loss of the property if defendants had
11 fully complied with California Civil Code section 2923.5. See
12 DeLeon v. Wells Fargo Bank, N.A., No. 10-CV-01390, 2011 WL
13 311376, at *7 (N.D. Cal. Jan. 28, 2011) ("Without some factual
14 basis suggesting that Plaintiffs could have cured the default in
15 the fall of 2009, the Court cannot reasonably infer that Wells
16 Fargo's alleged misrepresentations [that it would complete a loan
17 modification agreement and that no foreclosure sale would occur
18 while the loan modification was pending] resulted in the loss of
19 Plaintiffs' home. Rather, the facts alleged suggest that
20 Plaintiffs lost their home because they became unable to keep up
21 with monthly payments and lacked the financial resources to cure
22 the default. Although the Court understands Plaintiffs'
23 frustrations with Wells Fargo's seemingly contradictory
24 statements and actions, it does not appear that this conduct
25 resulted in a loss of money or property."); Justo v. Indymac
26 Bancorp, No. SACV 09-1116, 2010 WL 623715, at *4 (C.D. Cal. Feb.
27 19, 2010) ("[P]laintiffs make no attempt to show a causal
28 connection between the alleged misrepresentation -- the promise

1 to modify loans -- and the alleged injury -- the sale of their
2 homes."). But see Zivanic v. Wash. Mut. Bank, F.A., No. 10-737,
3 2010 WL 2354199, at *5 (N.D. Cal. June 9, 2010) (allowing a
4 violation of section 2923.5 to serve as a basis for plaintiff's
5 UCL claim, but not directly addressing causation). Accordingly,
6 because plaintiff lacks standing under the UCL, the court will
7 grant defendants' motion to dismiss the UCL claims.

8 D. California Civil Code section 2932.5⁴

9 California Civil Code section 2932.5 provides that:

10 Where a power to sell real property is given to a
11 mortgagee, or other encumbrancer, in an instrument
12 intended to secure the payment of money, the power is
13 part of the security and vests in any person who by
14 assignment becomes entitled to payment of the money
secured by the instrument. The power of sale may be
exercised by the assignee if the assignment is duly
acknowledged and recorded.

15 Cal. Civ. Code § 2932.5. Plaintiff alleges that RCS lacked
16 standing to pursue foreclosure because the assignment of the deed
17 of trust from MERS to RCS was not recorded pursuant to section
18 2932.5. (SAC ¶¶ 108-09.)

19 Section 2932.5 "applies only to mortgages that give a
20 power of sale to the creditor, not to deeds of trust which grant
21 a power of sale to the trustee." Roque v. Suntrust Mortg., Inc.,
22 No. C-09-0040, 2010 WL 546896, at *3 (N.D. Cal. Feb. 10, 2010).
23 The distinction between trusts and mortgages has been clearly
24 established under California law since 1908, when the court in

25
26 ⁴ Plaintiff cites a violation of California Civil Code
27 section 2932.6 in her Complaint. This section governs the right
28 of financial institutions to repair property acquired through
foreclosure. See Cal. Civ. Code § 2932.6. It appears that
plaintiff intended to reference section 2932.5, which governs the
power of sale for an assignee, id. § 2932.5.

1 Stockwell v. Barnum, 7 Cal. App. 413 (2d Dist. 1908), held that
2 the precursor to section 2932.5 did not apply to deeds of trust
3 because "a mortgage creates only a lien, with title to the real
4 property remaining in the borrower/mortgagee, whereas a deed of
5 trust passes title to the trustee with the power to transfer
6 marketable title to the purchaser." Calvo v. HSBC Bank USA,
7 N.A., 199 Cal. App. 4th 118, 122 (2d Dist. 2011) (citing
8 Stockwell, 7 Cal. App. at 416). In California, deeds of trust
9 have largely replaced mortgages, "[t]hus, section 2932.5 . . .
10 became practically obsolete and [is] generally ignored by
11 borrowers, creditors, and the California courts." Id. at 125.

12 Here, plaintiff's loan is secured by a Deed of Trust
13 conveying power of sale to the trustee, (RJN Ex. 2), not a
14 mortgage whereby the power of sale rests with the creditor.
15 Accordingly, section 2932.5 is inapplicable and the court will
16 grant defendants' motion to dismiss this claim.

17 F. Negligent Infliction of Emotional Distress

18 Negligent infliction of emotional distress ("NIED") is
19 a form of negligence to which the standard elements of duty,
20 breach, causation, and damages apply. Hillblom v. County of
21 Fresno, 539 F. Supp. 2d 1192, 1209 (E.D. Cal. 2008) (citing
22 Huggins v. Longs Drug Stores Cal., Inc., 6 Cal. 4th 124, 129
23 (1993)). To assert an NIED claim, a plaintiff must suffer
24 "serious" emotional distress. Tuttle v. Chase Ins. Life &
25 Annuity Co., No. 07-3637, 2007 WL 2790359, at *3 (N.D. Cal. Sept.
26 20, 2007) (citing Burgess v. Superior Court, 43 Cal. App. 4th
27 1064, 1073 (5th Dist. 1992)).

28 Under California law, NIED claims may be categorized as

1 "bystander" or "direct victim" claims based on the source of the
2 duty owed by the defendant. "Bystander" claims are typically
3 based on a duty owed to the public in general, while "[d]irect
4 victim" claims "arise[] from the breach of a duty that is assumed
5 by the defendant or imposed on the defendant as a matter of law,
6 or that arises out of the defendant's preexisting relationship
7 with the plaintiff." Huggins, 6 Cal. 4th at 129 (citations
8 omitted); see Fluharty v. Fluharty, 59 Cal. App. 4th 484, 493 (3d
9 Dist. 1997) ("As a direct victim, a party may recover strictly
10 emotional distress damages, i.e., absent physical injury or
11 impact, where a duty arising from a preexisting relationship is
12 negligently breached." (citing Burgess, 43 Cal. App. 4th at
13 1074)). Plaintiff appears to be bringing a direct victim claim.
14 As discussed above, plaintiff fails to plead that defendants
15 negligently breached a duty arising from their preexisting
16 relationship. Accordingly, the court will grant defendants'
17 motion to dismiss plaintiff's claim for negligent infliction of
18 emotional distress.

19 G. Quiet Title

20 The purpose of a quiet title action is to establish
21 one's title against adverse claims to real property. California
22 Code of Civil Procedure section 761.020 states that a claim to
23 quiet title requires: (1) a verified complaint, (2) a description
24 of the property, (3) the title for which a determination is
25 sought, (4) the adverse claims to the title against which a
26 determination is sought, (5) the date as of which the
27 determination is sought, and (6) a prayer for the determination
28 of the title. Cal. Civ. Proc. Code § 761.020.

1 The tender rule applies to a quiet title action.
2 Kozhayev v. America's Wholesale Lender, No. CIV S-09-2841, 2010
3 WL 3036001, at *5 (E.D. Cal. Aug. 2, 2010); see also Shimpones v.
4 Stickney, 219 Cal. 637, 649 (1934). A "quiet title action is
5 doomed in the absence of Plaintiffs' tender of the full amount
6 owed." Gjurovich v. California, No. 1:10-cv-01871, 2010 WL
7 4321604, at *8 (E.D. Cal. Oct. 26, 2010). As with her FAC,
8 plaintiff has not alleged tender or the ability to tender in her
9 SAC.⁵ Accordingly, the court will grant defendants' motion to
10 dismiss the quiet title claim.

11 H. RICO Violations

12 Plaintiff's ninth cause of action asserts that
13 defendants have violated RICO by committing violations of federal
14 law involving mortgage and mail fraud. (SAC ¶¶ 130-39.)
15 Liability under the civil RICO statutes requires the conduct of
16 an enterprise through a pattern of racketeering activity. Miller
17 v. Yokohama Tire Corp., 358 F.3d 616, 620 (9th Cir. 2004).
18 Racketeering activity includes any act which is indictable under
19 certain provisions of Title 18 of the United States Code. See 18
20 U.S.C. § 1961(1)(b).

21 To properly plead a RICO violation for civil damages, a
22 plaintiff must show that the defendants, through two or more acts
23 constituting a pattern, participated in an activity affecting
24 interstate commerce. Sanford v. MemberWorks, Inc., 625 F.3d 550,
25 557 (9th Cir. 2010). The heightened pleading requirements of

26
27 ⁵ Plaintiff argues that it is premature to consider
28 whether she has the ability to tender because tender is not
required to plead a rescission claim under TILA. While plaintiff
has mentioned TILA in passing, she has not pled any claims
arising under TILA, nor has she pled a claim for rescission.

1 Rule 9(b) apply to civil RICO fraud claims. Mostowfi v. i2
2 Telecom Int'l, Inc., 269 F. App'x 621, 623 (9th Cir. 2008)
3 (citing Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th
4 Cir. 2004)). In addition, Rule 9(b) "may apply to claims -- that
5 although lacking fraud as an element -- are 'grounded' or 'sound'
6 in fraud." Id. (quoting Vess v. Ciba-Geigy Corp., 317 F.3d 1097,
7 1103-04 (9th Cir. 2003)). A claim is "grounded in fraud" when it
8 alleges a unified course of fraudulent conduct. Id. at 624.
9 Rule 9(b) requires that when "alleging fraud or mistake, a party
10 must state with particularity the circumstances constituting
11 fraud or mistake." Fed. R. Civ. P. 9(b). The Ninth Circuit has
12 held that "to avoid dismissal for inadequacy under Rule 9(b),
13 [the] complaint would need to 'state the time, place, and
14 specific content of the false representations as well as the
15 identities of the parties to the misrepresentation.'" Edwards,
16 356 F.3d at 1066 (quoting Alan Neuman Prods., Inc. v. Albright,
17 862 F.2d 1388, 1393 (9th Cir. 1989)).

18 Plaintiff's claim is grounded in fraud, as plaintiff
19 alleges that defendants engaged in a pattern of racketeering
20 activity with the objective of perpetrating fraud. (SAC ¶ 133.)
21 In her SAC, plaintiff makes only vague statements referring to
22 laws allegedly broken by defendants without actually explaining
23 how those laws were broken or pleading the "time, place, and
24 specific content of the false representations as well as the
25 identities of the parties to the misrepresentation[s]." Edwards,
26 356 F.3d at 1066. Plaintiff fails to state the circumstances
27 constituting fraud with particularity and has therefore failed to
28 meet the heightened pleading requirements of Rule 9(b).

1 Accordingly, the court will dismiss this claim.

2 III. Sanctions

3 Plaintiff filed her papers in opposition to the
4 defendants' motion to dismiss on January 20, 2012. According to
5 Local Rule 230(c), opposition to the granting of a motion must be
6 filed and served not less than fourteen days preceding the
7 noticed hearing date. As the hearing for this matter was set for
8 January 30, 2012, plaintiff filed her papers three days late.⁶

9 Local Rule 110 authorizes the court to impose sanctions
10 for "[f]ailure of counsel or of a party to comply with these
11 Rules." Therefore, the court will sanction plaintiffs' counsel,
12 Gregory Harper, \$100.00 payable to the Clerk of the Court within
13 ten days from the date of this Order, unless he shows good cause
14 for his failure to comply with the Local Rules.

15 IT IS THEREFORE ORDERED that defendants' motion to
16 dismiss be, and the same hereby is, GRANTED.

17 IT IS FURTHER ORDERED that within ten days of this
18 Order Gregory Harper shall either (1) pay sanctions of \$100.00 to
19 the Clerk of the Court, or (2) submit a statement of good cause
20 explaining his failure to comply with Local Rule 230(c).

21 Plaintiff has twenty days from the date of this Order
22 to file an amended complaint, if she can do so consistent with
23


24 ⁶ This is not the first time that counsel for the
25 plaintiff in this action has filed his opposition late. During
26 the briefing schedule for the previous motion to dismiss, counsel
27 failed to timely file opposition papers. After the clerk emailed
28 counsel to inquire as to whether he intended to oppose the
motion, he emailed the court a copy of the opposition the day
after the filing deadline. The clerk informed counsel that he
would still need to file opposition papers with the court, but
counsel never did so. In that instance, the clerk docketed the
opposition to ensure a complete judicial record.

1 this Order.

2 DATED: January 25, 2012

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WILLIAM B. SHUBB

UNITED STATES DISTRICT JUDGE

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