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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANNABELLA BRITTAIN,)	
)	
Plaintiff,)	No. C-09-2953 SC
)	
v.)	
)	ORDER GRANTING MOTION
INDYMAC BANK, FSB, a business)	<u>TO DISMISS</u>
entity form unknown; AMERICAN)	
RESIDENTIAL MORTGAGE CORPORATION, a)	
business entity; QUALITY LOAN)	
SERVICE CORP., a business entity)	
form unknown; and DOES 1 through)	
25, inclusive,)	
)	
Defendants.)	
)	
_____)	

I. INTRODUCTION

On July 29, 2009, Defendant Onewest Bank, FSB ("Defendant" or "Onewest") filed a Motion to Dismiss.¹ Docket No. 8. Plaintiff Annabella Brittain ("Plaintiff") filed an Opposition and Defendant submitted a Reply. Docket Nos. 12, 13. The other named Defendants, American Residential Mortgage Corporation ("American") and Quality Loan Service Corporation ("Quality"), did not participate in the Motion to Dismiss. Having considered the briefing, the Court GRANTS Defendant's motion.

¹ Defendant is successor in interest to certain assets and liabilities of IndyMac Bank, FSB.

1 **II. BACKGROUND**

2 On September 16, 2005, Plaintiff received a mortgage loan for
3 \$497,000 from IndyMac Bank, F.S.B., secured by property located at
4 340 Vallejo Drive, Unit 78, Millbrae, California. Request for
5 Judicial Notice ("RJN") Ex. A ("Deed of Trust").² In her
6 Complaint, Plaintiff alleges that American Residential Mortgage
7 Corporation ("American") was the original broker of the loan.
8 Notice of Removal, Docket No. 1, Ex. A ("Compl.") ¶ 2. On January
9 12, 2009, Quality Loan Service Corporation ("Quality") became the
10 trustee under the Deed of Trust. RJN Ex. B ("Substitution of
11 Trustee"). Quality sent Plaintiff a notice of default, and the
12 trustee's sale was set to occur on June 17, 2009. RJN Ex. C
13 ("Notice of Default"); RJN Ex. D ("Notice of Trustee's Sale").

14 On June 5, 2009, Plaintiff filed suit in the Superior Court
15 of California, County of San Mateo. See Compl. On June 30, 2009,
16 Defendant removed the case to this Court because of federal
17 questions raised in the Complaint. See Notice of Removal ¶ 3.

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19
20 ² Defendant submitted a request for judicial notice in support
21 of the Motion to Dismiss. Docket No. 16. The request includes
22 copies of the Deed of Trust, Substitution of Trustee, Notice of
23 Default, and Notice of Trustee's Sale. These documents were
24 recorded in the County of San Mateo Recorder's Office. All of
25 these items are public records and properly subject to judicial
26 notice. See Hotel Employees & Rest. Employees Local 2 v. Vista Inn
27 Mgmt. Co., 393 F. Supp. 2d 972, 978 (N.D. Cal. 2005). The Court
28 may take judicial notice of these documents without converting the
 motion to dismiss into a motion for summary judgment because these
 documents are explicitly mentioned in, and therefore incorporated
 by reference into, Plaintiff's Complaint. See Knieval v. ESPN, 393
 F.3d 1068, 1076 (9th Cir. 2005); United States v. Ritchie, 342 F.3d
 903, 907 (9th Cir. 2003). The Court GRANTS Onewest's request for
 judicial notice.

1 **III. LEGAL STANDARD**

2 A motion to dismiss under Federal Rule of Civil Procedure
3 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
4 Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based
5 on the lack of a cognizable legal theory or the absence of
6 sufficient facts alleged under a cognizable legal theory.
7 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
8 1990). Allegations of material fact are taken as true and
9 construed in the light most favorable to the nonmoving party.
10 Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir.
11 1996). However, the court need not accept as true legal
12 conclusions couched as factual allegations. Ashcroft v. Iqbal,
13 129 S.Ct. 1937, 1949-50 (2009). "Threadbare recitals of the
14 elements of a cause of action, supported by mere conclusory
15 statements, do not suffice." Id. at 1949. With regard to well-
16 pleaded factual allegations, the court should assume their truth,
17 but a motion to dismiss should be granted if the plaintiff fails
18 to proffer "enough facts to state a claim for relief that is
19 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544,
20 547 (2007).

21
22 **IV. DISCUSSION**

23 **A. The Tender Rule**

24 Defendant contends that Plaintiff has failed to state any
25 cause of action because she has failed to allege or make actual
26 tender of the full amount owed under the mortgage loan. Mot. at
27 4-5. Here, the Complaint was filed prior to the trustee's sale,
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1 which was scheduled to occur on June 17, 2009. See Notice of
2 Trustee's Sale. In her Opposition, Plaintiff states that after
3 removal of this case, Defendants proceeded with the foreclosure,
4 and that she intends to amend her Complaint to allege causes of
5 action related to the wrongful foreclosure. Opp'n at 3. Neither
6 party has requested the Court to take judicial notice of any
7 documents showing that the foreclosure sale has occurred. If
8 Plaintiff amends her Complaint to allege causes of action related
9 to a wrongful foreclosure, the Court notes that she must allege a
10 credible tender of the amount of the secured debt to maintain any
11 cause of action for wrongful foreclosure. See Abdallah v. United
12 Savings Bank, 43 Cal. App. 4th 1101, 1109 (Ct. App. 1996)
13 (borrower "required to allege tender of the amount of . . .
14 [lender's] secured indebtedness in order to maintain any cause of
15 action for irregularity in the sale procedure"); Arnolds
16 Management Corp. v. Eischen, 158 Cal. App. 3d 575, 578 (Ct. App.
17 1984)("It is settled that an action to set aside a trustee's sale
18 for irregularities in sale notice or procedure should be
19 accompanied by an offer to pay the full amount of the debt for
20 which the property was security.").

21 **B. Civil Conspiracy**

22 Plaintiff alleges that Defendant and American engaged in a
23 conspiracy by making misrepresentations to, and concealing
24 information from, Plaintiff, in violation of the Truth in Lending
25 Act ("TILA"), 15 U.S.C. §§ 1601 et seq., the Real Estate
26 Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601 et seq.,
27 and California Civil Code § 1916.7(c). Compl. ¶ 26.

1 A conspiracy is not an independent cause of action, but "a
2 legal doctrine that imposes liability on persons who, although not
3 actually committing a tort themselves, share with the immediate
4 tortfeasors a common plan or design in its perpetration." Applied
5 Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 510-11
6 (1994). Liability for civil conspiracy generally requires three
7 elements: (1) formation of a conspiracy (an agreement to commit
8 wrongful acts); (2) operation of a conspiracy (commission of the
9 wrongful acts); and (3) damage resulting from operation of a
10 conspiracy. Id. at 511. A civil conspiracy is activated by the
11 commission of an underlying wrongful act. Id.

12 Here, the alleged wrongful acts underlying the conspiracy
13 claim are violations of TILA, RESPA, and California Civil Code
14 section 1916.7(c).³ A TILA claim for monetary damages must be
15 brought within one year from the date of the occurrence of the
16 violation, 15 U.S.C. § 1640(e), and a TILA claim seeking to
17 rescind a transaction expires three years after the date of
18 consummation of the transaction. Id. § 1635(f). Here,
19 Plaintiff's loan transaction was consummated on September 16,
20 2005. See Deed of Trust. Her lawsuit was filed over three years
21 later on June 5, 2009. See Compl. Therefore, the TILA claim is
22 time-barred.

23 Plaintiff's RESPA claim is based on an alleged failure of the
24 lender to disclose certain documents within three business days of

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26 ³ An action can be classified as in tort where the plaintiff
27 seeks damages for violation of a statutory duty. Pintor v. Ong,
28 211 Cal. App. 3d 837, 841-42 (Ct. App. 1989); Young v. Bank of
America, 141 Cal. App. 3d 108, 113 (Ct. App. 1983).

1 the loan application, including the good faith estimate, as
2 required by 24 C.F.R. § 3500.7. Compl. ¶ 18. Plaintiff's
3 allegations seem to be grounded in sections 2603 and 2604 of
4 RESPA, which require lenders to make good faith estimates of
5 charges for services in connection with real estate settlements.
6 12 U.S.C. §§ 2603, 2604(c). However, RESPA provides for a private
7 right of action for claims brought under sections 2605, 2607 and
8 2608 only. See id. § 2614. Section 2605 concerns the servicing
9 of mortgage loans and the administration of escrow accounts. Id.
10 § 2605. Section 2607 prohibits kickbacks and unearned fees, and
11 section 2608 prohibits sellers from requiring that title insurance
12 be purchased from any particular title company. Id. §§ 2607,
13 2608(a).

14 Courts have refused to infer a private right of action under
15 other sections of RESPA. See Bloom v. Martin, 865 F. Supp. 1377,
16 1385 (N.D. Cal. 1994) (section 2603 does not imply a private right
17 of action); Collins v. FMHA-USDA, 105 F.3d 1366, 1368 (11th Cir.
18 1997) ("[T]here is no private civil action for a violation of 12
19 U.S.C. § 2604(c), or any regulations relating to it."); Currey v.
20 Homecomings Fin., LLC, No. 09-0276, 2009 WL 1227010, at *6 (N.D.
21 Cal. May 1, 2009) (no private right of action exists under section
22 2603 or 2604). Therefore, assuming Plaintiff meant to allege a
23 violation of sections 2603 or 2604, Plaintiff fails to state a
24 claim upon which relief may be granted.

25 With regard to California Civil Code section 1916.7,
26 Plaintiff alleges that she was not given the proper notice
27 regarding her adjustable interest rate. Compl. ¶ 21. However,
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1 section 1916.7 applies only to mortgage loans made pursuant to it.
2 Cal. Civ. Code § 1916.7(b). Plaintiff has not alleged facts
3 showing that section 1916.7 applied to her loan. Also, the Deed
4 of Trust includes an "Adjustable Rate Rider" that describes in
5 detail the terms of the adjustable rate loan. See Deed of Trust.

6 Finally, in her Opposition, Plaintiff points out she alleges
7 fraud. However, as explained below, her fraud claim is not
8 alleged with the requisite particularity, see Section IV.H, infra.
9 Because Plaintiff cannot allege a wrongful act based on fraud,
10 TILA, RESPA, or California Civil Code section 1916.7, her first
11 cause of action for civil conspiracy is DISMISSED as to Onewest
12 and American WITH LEAVE TO AMEND.

13 **C. Aiding and Abetting**

14 After citing the legal standard for aiding and abetting
15 liability, Plaintiff alleges that Onewest had actual knowledge of
16 American's fraudulent acts, and that Onewest substantially
17 assisted American's fraudulent practices. Compl. ¶¶ 31-33.
18 Plaintiff also states that Onewest failed to provide proper
19 disclosures, failed to inform Plaintiff that American charged a
20 yield spread premium, and falsified Plaintiff's income. Id. ¶ 33.

21 Aider and abettor liability may be imposed on one who aids
22 and abets the commission of an intentional tort, if the person
23 knows the other's conduct constitutes a breach of a duty, and
24 gives substantial assistance or encouragement to the other. In re
25 First Alliance Mortg. Co., 471 F.3d 977, 992-93 (9th Cir. 2006).
26 Here, Plaintiff's allegations are wholly conclusory, and Plaintiff
27 does not explain how Onewest's conduct shows knowledge of

1 American's allegedly fraudulent conduct, or how Onewest provided
2 substantial assistance or encouragement to American to commit
3 fraud. Vague allegations and mere labels and conclusions are
4 insufficient to withstand a motion to dismiss. See Twombly, 550
5 U.S. at 555. Plaintiff's second cause of action for aiding and
6 abetting is DISMISSED as to Onewest WITH LEAVE TO AMEND.

7 **D. Breach of the Implied Covenant of Good Faith and Fair**
8 **Dealing**

9 Plaintiff's third cause of action alleges that all Defendants
10 breached the implied covenant of good faith and fair dealing.
11 Compl. ¶¶ 35-41. The implied covenant of good faith and fair
12 dealing rests upon the existence of some specific contractual
13 obligation. Foley v. Interactive Data Corp. 47 Cal. 3d 654,
14 683-84 (1988). Here, Plaintiff's Complaint does not allege a
15 contract between herself and Onewest. In her Opposition,
16 Plaintiff seeks leave to amend this cause of action to allege a
17 contractual relationship. Opp'n at 5. Accordingly, the Court
18 DISMISSES Plaintiff's third cause of action as to all Defendants
19 WITH LEAVE TO AMEND.

20 **E. Violation of California Civil Code Sections 1920 and**
21 **1921**

22 Plaintiff alleges that Onewest and American violated
23 California Civil Code section 1920 by "failing to meet the
24 requirements of an adjustable rate mortgage instrument," and she
25 alleges they violated section 1921 by failing to meet "the
26 requirements for disclosure of information and connections with an
27 adjustable rate mortgage instrument." Compl. ¶ 50. These
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1 allegations are far too vague and conclusory to survive a motion
2 to dismiss. Both sections 1920 and 1921 contain multiple
3 requirements, but the Complaint does not state those requirements,
4 and it does not describe the conduct of Defendants that
5 constitutes a violation of any specific requirement. Plaintiff's
6 fifth cause of action is DISMISSED as to Onewest and American WITH
7 LEAVE TO AMEND.

8 **F. Violation of California Civil Code Section 1916.7**

9 As explained in Section IV.B, supra, Plaintiff has failed to
10 state a claim for violation of the requirements of California
11 Civil Code Section 1916.7. Plaintiff's sixth cause of action is
12 DISMISSED as to Onewest and American WITH LEAVE TO AMEND.

13 **G. Unfair Business Practices**

14 Plaintiff's seventh cause of action alleges that American and
15 Onewest violated California Business and Professions Code sections
16 17200 et seq., which prohibits unlawful, unfair or fraudulent
17 business acts or practices. Compl. ¶¶ 57-62. This cause of
18 action is derivative of some other illegal conduct or fraud
19 committed by a defendant, and "[a] plaintiff must state with
20 reasonable particularity the facts supporting the statutory
21 elements of the violation." Khoury v. Maly's of California, Inc.,
22 14 Cal. App. 4th 612, 619 (Ct. App. 1993).

23 Plaintiff alleges that American and Onewest's unfair business
24 practices included:

25 making loans without providing borrowers with
26 sufficient, accurate and understandable
27 information regarding the terms and conditions
28 of the loan; putting Plaintiff in a loan she
could not afford; making loans without providing

1 borrowers with sufficient, accurate and
2 understandable information regarding the nature
3 and extend of the financial risk being assumed
4 by the borrower; failing to follow proper
underwriting standards, and charging Plaintiff
an undisclosed Yield Spread Premium.

5 Compl. ¶ 60. Plaintiff makes no effort to specify which of these
6 allegations apply to Onewest as opposed to American, and Plaintiff
7 does not explain how these allegations are tied to a violation of
8 any specific law or statute. In her Opposition, Plaintiff
9 clarifies that these allegations form the basis for her fraud
10 cause of action. Opp'n at 7. Since the Court dismisses
11 Plaintiff's fraud claim, see Section IV.H, infra, the Court also
12 DISMISSES Plaintiff's Unfair Business Practices cause of action
13 WITH LEAVE TO AMEND.

14 **H. Fraud**

15 Plaintiff alleges that Onewest and American "committed fraud
16 by misrepresenting the true loan amount of the \$800,000 1st
17 mortgage, and \$386,550 2nd mortgage." Compl. ¶ 65. Yet according
18 to the allegations earlier in the Complaint, and the Deed of
19 Trust, Plaintiff entered into one mortgage loan for \$497,000.
20 Compl. ¶ 1; Deed of Trust. Plaintiff also seeks to ground her
21 fraud allegations in TILA and RESPA violations. Compl. ¶ 66.

22 The Court has already explained why Plaintiff has not stated
23 a claim under either TILA or RESPA. See Section IV.B, supra.
24 Plaintiff alleges that Onewest and American further engaged in
25 fraud by falsifying Plaintiff's income and purposely failing to
26 investigate whether Plaintiff could afford the loan. Compl. ¶ 67.
27 The Court finds that these allegations are not stated with enough
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1 particularity to pass muster under Federal Rule of Civil Procedure
2 9(b). Plaintiff fails to differentiate between Onewest and
3 American, making it impossible for the Court to "identify the role
4 of each defendant in the alleged fraudulent scheme." Swartz v.
5 KPMG LLP, 476 F.3d 756, 765 (9th Cir. 2007) (quoting Moore v.
6 Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir. 1989)).
7 The Court DISMISSES Plaintiff's Eighth Cause of Action for Fraud
8 as to Onewest and American WITH LEAVE TO AMEND.

9 **I. Breach of Fiduciary Duty and Negligence**

10 Plaintiff's ninth cause of action is for breach of fiduciary
11 duty and the tenth cause of action is for negligence. Compl. ¶¶
12 74-89. Defendant moves to dismiss both causes of action, Mot. to
13 Dismiss at 12-13, and Plaintiff does not oppose Defendant's
14 efforts, Opp'n at 8. Banks do not owe a fiduciary duty to their
15 borrowers. Kim v. Sumitomo Bank, 17 Cal. App. 4th 974, 979-81
16 (1993); Price v. Wells Fargo Bank, 213 Cal. App. 3d 465, 476
17 (1989). Also, "[a]s a general rule, a financial institution owes
18 no duty of care to a borrower when the institution's involvement
19 in the loan transaction does not exceed the scope of its
20 conventional role as a mere lender of money." Nymark v. Heart
21 Fed. Savings & Loan Ass'n, 231 Cal. App. 3d 1089, 1096 (Ct. App.
22 1991). The Court DISMISSES the ninth and tenth causes of action
23 as to Onewest WITHOUT LEAVE TO AMEND.

24 **J. Declaratory Relief**

25 As her eleventh cause of action, Plaintiff seeks declaratory
26 relief. Compl. ¶¶ 90-95. As this "cause of action" is ultimately
27 a request for relief, in order to weigh it the Court must look to
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1 the underlying claims. See Weiner v. Klais and Co., Inc., 108
2 F.3d 86, 92 (6th Cir. 1997). Here, the Court has dismissed all of
3 the potential underlying claims. Accordingly, the Court DISMISSES
4 the eleventh cause of action as to both Onewest and Quality WITH
5 LEAVE TO AMEND.

6 **K. Unjust Enrichment**

7 To plead a claim for unjust enrichment, a plaintiff must
8 allege that defendant received a benefit that was unjustly
9 retained at the expense of another. Lechtrodryer v. Seoul Bank,
10 77 Cal. App. 4th 723, 726 (Ct. App. 2000). Ordinarily, a
11 plaintiff must show that the benefit was conferred on the
12 defendant through mistake, fraud or coercion. Nebbi Bros., Inc.
13 v. Home Federal Sav. & Loan Ass'n, 205 Cal. App. 3d 1415, 1422
14 (Ct. App. 1988).

15 In this case, Plaintiff relies on a statement made in her
16 fraud claim that Defendants engaged in deceptive practices, and
17 that her consent to the loan was obtained through mistake and
18 fraud. Opp'n at 8; Compl. ¶ 68. Plaintiff further alleges a
19 right to rescind the loan. Compl. ¶ 97. The Court has already
20 determined that Plaintiff's fraud claim is not stated with the
21 requisite particularity, and Plaintiff has failed to adequately
22 allege a single cause of action giving rise to a right of
23 rescission. The Court finds that Plaintiff's unjust enrichment
24 claim must be DISMISSED WITH LEAVE TO AMEND.

25 **L. Quiet Title**

26 Plaintiff's thirteenth cause of action seeks to quiet title
27 against the claims of all Defendants. Comp. ¶¶ 100-102. To state
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1 a claim for quiet title, Plaintiff must include the following in
2 her Complaint:

3 (a) A description of the property that is the
4 subject of the action. . . . (b) The title of
5 the plaintiff as to which a determination under
6 this chapter is sought and the basis of the
7 title. . . . (c) The adverse claims to the title
8 of the plaintiff against which a determination
9 is sought. (d) The date as of which the
10 determination is sought. . . . (e) A prayer for
11 the determination of the title of the plaintiff
12 against the adverse claims.

13 Cal. Civ. Proc. Code § 761.020. Perhaps acknowledging the
14 deficiencies of her Complaint, Plaintiff requests leave to amend
15 her quiet title claim. Opp'n at 8. Accordingly, the Court
16 DISMISSES the quiet title claim WITH LEAVE TO AMEND.

17 **M. Injunctive Relief**

18 Onewest moves to dismiss Plaintiff's fourteenth cause of
19 action for injunctive relief. Motion to Dismiss at 17-18. A
20 request for injunctive relief is not an independent cause of
21 action. Shell Oil Co. v. Richter, 52 Cal. App. 2d 164, 168 (Ct.
22 App. 1942). Plaintiff does not oppose Defendant's motion to
23 dismiss the request for injunctive relief, and Plaintiff states
24 her request for an injunction is moot because the foreclosure sale
25 has already occurred. Opp'n at 9. The Court DISMISSES
26 Plaintiff's request for an injunction WITHOUT LEAVE TO AMEND.

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V. CONCLUSION

For the reasons stated above, the Court DISMISSES the following causes of action:

- 1) The first cause of action for civil conspiracy is DISMISSED as to Onewest and American WITH LEAVE TO AMEND;
- 2) The second cause of action for aiding and abetting is DISMISSED as to Onewest WITH LEAVE TO AMEND;
- 3) The third cause of action for breach of the implied covenant of good faith and fair dealing is DISMISSED as to all Defendants WITH LEAVE TO AMEND;
- 4) The fifth cause of action for violation of California Civil Code sections 1920 and 1921 is DISMISSED as to Onewest and American WITH LEAVE TO AMEND;
- 5) The sixth cause of action for violation of California Civil Code section 1916.7 is DISMISSED as to Onewest and American WITH LEAVE TO AMEND;
- 6) The seventh cause of action for unfair business practices is DISMISSED as to American and Onewest WITH LEAVE TO AMEND;
- 7) The eighth cause of action for fraud is DISMISSED as to Onewest and American WITH LEAVE TO AMEND;
- 8) The ninth and tenth causes of action for breach of fiduciary duty and negligence are DISMISSED as to all Defendants WITHOUT LEAVE TO AMEND;
- 9) The eleventh cause of action for declaratory relief is DISMISSED as to Onewest and Quality WITH LEAVE TO AMEND;

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10) The twelfth cause of action for unjust enrichment is
DISMISSED as to Onewest WITH LEAVE TO AMEND;

11) The thirteenth cause of action seeking to quiet title is
DISMISSED as to all Defendants WITH LEAVE TO AMEND;

12) The fourteenth cause of action seeking injunctive relief
is DISMISSED WITHOUT LEAVE TO AMEND.

If Plaintiff chooses to amend her Complaint, she must do so within
thirty (30) days from the date of this Order.

IT IS SO ORDERED.

September 16, 2009


UNITED STATES DISTRICT JUDGE