

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
San Francisco Division

ANGELIA GREEN,  
Plaintiff,  
v.  
CENTRAL MORTGAGE COMPANY, et  
al.,  
Defendants.

Case No. 3:14-cv-04281-LB  
**ORDER GRANTING IN PART AND  
DENYING IN PART THE  
DEFENDANTS’ MOTION TO DISMISS  
THE SECOND AMENDED  
COMPLAINT**  
[Re: ECF No. 55]

**INTRODUCTION**

The three plaintiffs—Angelia Green in both her individual capacity and her capacity as trustee of the Robert J. Tregre Jr. & Rosia L. Tregre Family Revocable Living Trust (“the Trust”), and the Trust itself—sued three defendants—Central Mortgage Company (“CMC”), PLM Loan Management Services, Inc. (“PLM”), and Deutsche Bank National Trust Company as Trustee for Harborview Mortgage Loan Trust 2007-2 (“Deutsche Bank”)—for violating federal and California law in relation to the denial of her loan modification applications and the foreclosure on her home. (Second Amended Complaint (“SAC”), ECF No. 54.<sup>1</sup>) The court approved the parties’ stipulation that PLM has non-monetary status pursuant to California Civil Code § 2924l and does not have to participate as a party to this action at this time. (Stipulation and Order, ECF No. 45.) CMC and

<sup>1</sup> Record citations are to documents in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the tops of the documents.

1 Deutsche Bank now have moved to dismiss Ms. Green’s Second Amended Complaint (Motion,  
2 ECF No. 55.) Pursuant to Federal Rule of Civil Procedure 78(b) and Civil Local Rule 7-1(b), the  
3 court finds this matter suitable for determination without oral argument. The court grants in part  
4 and denies in part their motion.

5 **STATEMENT**

6 **1. The Plaintiffs’ Allegations**

7 In 1977, Ms. Green’s parents, Robert Tregre and Rosia Tregre (the “Tregres”), purchased  
8 property at 823 Templeton Avenue, Daly City, California 94104 (the “Property”). (SAC, ECF No.  
9 54, ¶¶ 3, 14, 24.) On September 15, 2006, the Tregres created the Robert J. Tregre & Rosia L.  
10 Tregre Family Revocable Living Trust (the “Trust”), and they placed the Property into it. (*Id.* ¶¶ 5,  
11 27-28.) Upon the death of the Tregres, all of the Trust’s assets—including the Property—were to  
12 be distributed to Ms. Green, the Trust’s beneficiary. (*Id.* ¶ 29.)

13 On January 11, 2007, the Trust entered into a refinance loan transaction (the “Loan”) and  
14 secured the Loan with the Property through a deed of trust (the “Deed of Trust”). (*Id.* ¶ 34;  
15 Request for Judicial Notice (“RJN”), ECF No. 36, Ex. 1.) The Trust was listed as the “borrower”  
16 on the Deed of Trust. (RJN, ECF No. 56, Ex. 1.) And Paragraph 13 of the Deed of Trust states in  
17 relevant part: “[A]ny Successor in Interest of Borrower who assumes Borrower’s obligations  
18 under this Security Instrument in writing, and is approved by Lender, shall obtain all of  
19 Borrower’s rights and benefits under this Security Instrument.” (*Id.*)

20 Sometime thereafter, CMC became the servicer of the Loan, and Deutsche Bank became the  
21 beneficiary under the Deed of Trust. (SAC, ECF No. 54, ¶ 34.)

22 Then, in June 2013, the Tregres each died. (*Id.* ¶ 35.) As a result, pursuant to the terms of the  
23 Trust, title to the Property was conveyed to Ms. Green. (*Id.* ¶¶ 29, 36, 40.) Ms. Green then  
24 “automatically became the trustee” of the Trust. (*Id.* ¶¶ , 30-31, 41.) The plaintiffs allege that,  
25 according to the Trust,

26 the trustee’s powers include, but are not limited to: The power to sell [T]rust  
27 property, and to borrow money and to encumber property, specifically including  
28 [T]rust real estate, by mortgage, deed of trust, or other method . . . The power to  
manage [T]rust real estate as if the trustee were the absolute owner of it, including  
the power to lease (even if the lease term may extend beyond the period of any

1 trust) or grant options to lease the property, to make repairs or alterations and to  
2 insure against loss . . . The power to employ and pay reasonable fees to accountants,  
3 lawyers or investment experts for information or advice relating to the [T]rust . . .  
4 The power to continue any business of either grantor . . . The power to execute any  
documents necessary to administer any trust created in this Declaration of Trust . . .  
[and] The power to institute or defend legal actions concerning the [T]rust or the  
grantors' affairs.

5 (*Id.* ¶ 32.) At that point, Ms. Green “was authorized to act on behalf of the [T]rust immediately  
6 upon her parents’ passing,” including by “making payments on the . . . [L]oan and applying for  
7 loss mitigation opportunities on behalf of” the Trust. (*Id.* ¶ 42.)

8 “The [p]laintiffs” thereafter made three payments on the Loan from July 2013 to September  
9 2013, but thereafter the Loan fell into default after Ms. Green’s daycare business closed that  
10 summer and she suffered a loss of income. (*Id.* ¶¶ 37, 43.) CMC and Deutsche Bank accepted all  
11 three of these payments. (*Id.* ¶ 43.)

12 In September 2013, Ms. Green contacted CMC about a loan modification. (*Id.* ¶ 38.) She  
13 informed CMC that both of her parents died and that she had obtained title to the Property. (*Id.* ¶  
14 38-39.) She also told CMC that she wished to inquire about a loan modification. (*Id.* ¶ 38.) She  
15 subsequently sent CMC the Trust documents. (*Id.* ¶ 39.)

16 CMC never questioned Ms. Green’s ability to apply for a loan modification, and it asked “the  
17 [p]laintiffs” to send various documents to be considered for one. (*Id.* ¶¶ 44-45.) No one at CMC,  
18 however, discussed “loss mitigation options” with “the [p]laintiffs,” whether in person or by  
19 telephone, about how to save the home. (*Id.* ¶ 45.)

20 In December 2013 and early January 2014, Ms. Green sent to CMC all of the documents it  
21 requested to be considered for a loan modification. (*Id.* ¶ 47.) CMC acknowledged receiving the  
22 “documents to be considered for a loan modification” and also acknowledged that Ms. Green’s  
23 application was “under review.” (*Id.* ¶ 46.) CMC subsequently denied her application on the basis  
24 that it had not received all of the documents it requested. (*Id.* ¶ 47.) Even though Ms. Green sent  
25 her bank statements, CMC claimed that it had not received them. (*Id.*) CMC denied Ms. Green’s  
26 loan modification application on this basis. (*Id.*)

27 On January 24, 2014, CMC sent “the [p]laintiffs” a letter addressed to the “Mortgagor” and  
28 which thanked the “Mortgagor” “for contacting us about your mortgage.” (*Id.* ¶ 48.) The letter

1 stated that the “Mortgagor” was ineligible to receive a loan modification because the loan  
2 modification application packet was incomplete. (*Id.*) “The [p]laintiffs,” though, “had already sent  
3 in all requested information.” (*Id.*)

4 On March 7, 2014, PLM recorded a Notice of Default stating that the Trust was \$19,910.59 in  
5 arrears on the Loan. (RJN, Ex. 4, ECF No. 56-1 at 28-31.) Exhibit A to the Notice of Default is a  
6 “Declaration Per CA Civil Code Section 2923.5(c).” (RJN, Ex. 4, ECF No. 56-1 at 31.) It states  
7 that the mortgage servicer, CMC, “was unable to make contact with the Borrower” but that “the  
8 following efforts were made”:

9 [x] Sent a First-Class letter to Borrower’s last known mailing address advising  
10 Borrower (a) that Borrower is in default under the Loan, (b) that Borrower should  
11 contact Servicer regarding alternative options to avoid foreclosure, (c) of Servicer’s  
12 toll-free number with access to a live representative during Servicer’s business  
13 hours, (d) of a toll-free number to a HUD certified counseling agency, and € that  
14 Borrower’s failure to contact Servicer may result in commencement of a foreclosure  
15 action;

16 [x] Attempted to contact Borrower by telephone at least 3 times at 3 different hours  
17 on 3 different days at the primary telephone number on file;

18 [x] Two weeks after last telephone contact was completed and no contact having  
19 been made, Servicer sent a letter via Certified Mail Return Receipt Requested to  
20 Borrower’s last known mailing address advising Borrower (a) that Borrower is in  
21 default under the Loan, (b) that Borrower should contact Servicer regarding  
22 alternative options to avoid foreclosure, (c) of Servicer’s toll-free number with  
23 access to a live representative during Servicer’s business hours, (d) of a toll-free  
24 number to a HUC certified counseling agency, and € that Borrower’s failure to  
25 contact Servicer within 30 days of receipt of this letter will result in commencement  
26 of a foreclosure action.

27 (RJN, Ex. 4, ECF No. 56-1 at 31.)

28 Ms. Green received the Notice of Default in the mail at the Property in mid-March 2014.  
(SAC, ECF No. 54, ¶ 49.) She had not previously received written denial of her loan modification  
application “on the merits.” (*Id.*) Before the Notice of Default was recorded, Ms. Green had never  
been able to speak with a CMC representative, whether in person or by telephone, regarding her  
options to avoid foreclosure. (*Id.*)

On June 12, 2014, PLM recorded a Notice of Trustee’s Sale. (RJN, Ex. 5, ECF No. 56-1 at 33-  
34.)

In late June 2014, CMC acknowledged that it received all necessary documents to consider the  
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1 “[p]laintiffs” for a loan modification. (SAC, ECF No. 54, ¶ 50.) And on June 26, 2014, CMC  
2 thanked the “[p]laintiffs” for their “timely submission of your Borrower Response Package.” (*Id.* ¶  
3 51.) On July 1, 2014, CMC sent the “[p]laintiffs” another letter thanking them for submitting a  
4 borrower response package and requesting addition information. (*Id.* ¶ 52.)

5 CMC subsequently denied the “[p]laintiffs” loan modification application “on the basis of  
6 insufficient income.” (*Id.* ¶ 53.) CMC’s “denial letter,” however, made no mention of what her  
7 gross income was. (*Id.*) The plaintiffs allege that this denial was improper because Ms. Green and  
8 her family had sufficient income pursuant to federal guidelines and thus should have been  
9 approved for a loan modification. (*Id.*) Her income was approximately \$3,400 per month, and her  
10 children pledged to contribute \$2,300 toward the payments. (*Id.*)

11 The “[p]laintiffs” apparently appealed CMC’s decision, (*see id.* ¶ 55), because on August 28,  
12 2014, CMC sent Ms. Green a letter denying the appeal. (*Id.*) The denial letter was addressed to  
13 “Borrower.” (*Id.*) Ms. Green was the only natural person who communicated with CMC about a  
14 loan modification. (*Id.*)

15 “Thereafter, Ms. Green filed a consumer complaint.” (*Id.* ¶ 56.)

16 Ms. Green then sent CMC documentation showing that the amount it calculated for her gross  
17 income was “significantly inaccurate.” (*Id.* ¶ 57.) She also spoke with CMC’s representatives  
18 regarding her income. (*Id.*) CMC then sent a letter stating that the “[p]laintiffs” appeal was denied  
19 because they had not provided it with updated income information. (*Id.* ¶ 58.) But the  
20 “[p]laintiffs” had in fact sent CMC documents showing additional income. (*Id.*)

21 On September 12, 2014, Ms. Green, proceeding pro se, filed a voluntary Chapter 13  
22 bankruptcy petition. (*Id.* ¶ 59.) It turns out that the Property was scheduled to be sold at a trustee’s  
23 sale that same day. (*Id.*) Ms. Green was aware that a sale date was coming up, but she did not  
24 know it was scheduled to take place on September 12. (*Id.*)

25 On September 23, 2014, PLM recorded a Trustee’s Deed upon Sale stating that Deutsche Bank  
26 purchased the property for \$685,000 at a trustee’s sale held on September 12, 2014. (RJN, Ex. 7,  
27 ECF No. 56-1 at 38-40.)

28 On October 13, 2014, CMC “sent a letter in response to [Ms. Green’s] consumer complaint.”

1 (SAC, ECF No. 54, ¶ 60.) In the letter, CMC stated that Ms. Green “was now authorized to take  
2 action relative to our borrowers’ account.” (*Id.*) The plaintiffs allege that this letter is “factually  
3 incorrect” because Ms. Green sent CMC information about her parents’ deaths and the Trust the  
4 previous year. (*Id.*) (In other words, the plaintiffs believe that Ms. Green had been authorized to  
5 take action with respect to the Loan and the Property much earlier than CMC stated.)  
6 Notwithstanding this new “authorization,” CMC “obviously had been permitting Ms. Green to  
7 negotiate a loan modification application with [it] the entire time.” (*Id.*) It “treated [her] as an  
8 authorized representative on the account,” “accepted payments from her for the [L]oan,” and  
9 “even communicated to a third party regulator that [she] was authorized to take action on the  
10 account.” (*Id.* ¶ 62.)

11 Several weeks later, Ms. Green received the Trustee’s Deed upon Sale in the mail and learned  
12 that Deutsche Bank purchased her Property. (*Id.* ¶ 61.)

13 As Ms. Green did not have the help of legal counsel, her bankruptcy cases were dismissed. (*Id.*  
14 ¶ 66.) The bankruptcy court’s September 23, 2014 “Order and Notice of Dismissal for Failure to  
15 Comply” states that Ms. Green failed to comply with the bankruptcy court’s September 15, 2014  
16 “Notice of Failure of Debtor(s) to Provide Statement of Social Security Number and/or List of  
17 Creditors.” (RJN, Ex. 8, ECF No. 56-1 at 42-43.)

18 Ms. Green “subsequently learned that Deutsche Bank obtained an [unlawful detainer]  
19 judgment against her.” (SAC, ECF No. 54, ¶ 67.) Deutsche Bank filed the unlawful detainer action  
20 against Ms. Green (in her individual capacity) in San Mateo County Superior Court on January 29,  
21 2015. (RJN, Ex. 9, ECF No. 56-1 at 45-62.) On March 4, 2015, pursuant to California Code of  
22 Civil Procedure § 1169, the San Mateo County Superior Court Clerk issued a default judgment  
23 against Ms. Green for possession of the Property. (RJN, Ex. 10, ECF No. 56-1 at 64-67.) Ms.  
24 Green was evicted from the Property on April 23, 2015, but she was let back into it on May 7,  
25 2015. (SAC, ECF No. 54, ¶¶ 68-69.)

## 26 **2. Procedural History**

27 Ms. Green, in her individual capacity only, filed her original complaint in this action on  
28 September 23, 2014. (Complaint, ECF No. 1.) At that time, she was proceeding pro se. After  
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1 several extensions of time to serve the defendants, Ms. Green retained counsel and filed a First  
2 Amended Complaint on June 24, 2015. (FAC, ECF No. 22.) PLM was declared to have  
3 nonmonetary status, and CMC and Deutsche Bank filed a motion to dismiss. (Motion, ECF No.  
4 35; Stipulation and Order, ECF No. 45.) The court granted the defendants' motion on the ground  
5 that Ms. Green lacked standing in her individual capacity to bring the action and granted her leave  
6 to file an amended complaint. (9/2/2015 Order, ECF No. 53.)

7 Ms. Green filed a Second Amended Complaint on September 23, 2015. (SAC, ECF No. 54.)  
8 She brings the following 12 claims: (1) violation of California's Homeowners Bill of Rights  
9 ("HBOR"), Cal. Civ. Code § 2923.55; (2) violation of HBOR, Cal. Civ. Code § 2923.6; (3)  
10 violation of HBOR, Cal. Civ. Code § 2923.7; (4) violation of HBOR, Cal. Civ. Code § 2924.17;  
11 (5) violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2605(f); (6)  
12 violation of the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691(d)(1); (7) negligent  
13 misrepresentation; (8) fraud; (9) wrongful foreclosure; (10) unfair business practices in violation  
14 of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*; (11)  
15 cancellation of deed; and (12) declaratory relief. (*Id.* ¶¶ 74-140.)

16 CMC and Deutsche Bank again filed a motion to dismiss. (Motion, ECF No. 55.)

## 17 ANALYSIS

### 18 1. The Defendants' Request for Judicial Notice

19 To begin, the court addresses the defendants' request for judicial notice. (*See* RJN, ECF No.  
20 56.) The defendants ask the court to take judicial notice of the following 14 documents: (1) a Deed  
21 of Trust recorded on January 22, 2007, in the San Mateo County Recorder's Office bearing  
22 instrument number 2007-009851; (2) an Assignment of Deed of Trust recorded March 4, 2014, in  
23 the San Mateo County Recorder's Office bearing instrument number 2014-017912; (3) a  
24 Substitution of Trustee recorded March 4, 2014, in the San Mateo County Recorder's Office  
25 bearing instrument number 2014-017913; (4) a Notice of Default recorded March 7, 2014, in the  
26 San Mateo County Recorder's Office bearing instrument number 2014-019210; (5) a Notice of  
27 Trustee's Sale recorded June 12, 2014, in the San Mateo County Recorder's Office bearing  
28 instrument number 2014-051353; (6) an Assignment of Deed of Trust recorded September 23,

1 2014, in the San Mateo County Recorder's Office bearing instrument number 2014-086030; (7) a  
2 Trustee's Deed Upon Sale recorded September 23, 2014, in the San Mateo County Recorder's  
3 Office bearing instrument number 2014-086031; (8) an Order and Notice of Dismissal for Failure  
4 to Comply entered on September 23, 2014 with the United States Bankruptcy Court bearing  
5 bankruptcy case number 14-31336-HLB 13; (9) a Verified Complaint filed on January 29, 2015,  
6 with the San Mateo County Court bearing case number CLJ210694; (10) a Judgment entered by  
7 the San Mateo County Court Clerk on March 4, 2015, bearing case number CLJ210694; (11) an  
8 Order and Notice of Dismissal for Failure to Comply entered on March 23, 2015 by the United  
9 States Bankruptcy Court for the Northern District of California, bearing bankruptcy case number  
10 15-30294; (12) a Voluntary Petition filed on April 13, 2015 in United States Bankruptcy Court for  
11 the Northern District of California, bearing bankruptcy case number 15-30454; (13) a Summary of  
12 Schedules filed on May 8, 2015 in United States Bankruptcy Court for the Northern District of  
13 California, bearing bankruptcy case number 15-30454; and (14) the Declaration of Nelson Goodell  
14 filed on July 29, 2015 in this action. (*Id.*)

15 Under Federal Rule of Evidence 201, "[t]he court may judicially notice a fact that is not  
16 subject to reasonable dispute because it: (1) is generally known within the trial court's territorial  
17 jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot  
18 reasonably be questioned." Fed. R. Evid. 201(b). A "high degree of indisputability is the essential  
19 prerequisite" to taking judicial notice and "the tradition [of taking judicial notice] has been one of  
20 caution in requiring that the matter be beyond reasonable controversy." Fed. R. Evid. 201(a) & (b)  
21 advisory committee's notes (emphasis added). A court, then, may take judicial notice of  
22 undisputed facts contained in public records, but it may not take judicial notice of disputed ones.  
23 *Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001); *see also Muhammad v.*  
24 *California*, C-10-1449-SBA, 2011 WL 873151, at \*4 (N.D. Cal. Mar. 11, 2011) (denying request  
25 for judicial notice of an address contained on a complaint filed in another case because the  
26 "underlying facts relevant to Plaintiff's residence are disputed and otherwise do not meet the  
27 requirements of Rule 201"). Here, Ms. Green objects to the court taking judicial notice "of the  
28 truthfulness" of the documents, (Opposition, ECF No. 59 at 17), but she does not object to the  
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1 court taking judicial notice of the existence of them, all of which are public records. Therefore, the  
2 court takes judicial notice of the existence of the documents but does not take judicial notice of the  
3 disputed facts contained with them.

4 This distinction is important. At several points in their motion the defendants argue that the  
5 plaintiffs' claims fail because the allegations are undermined by statements made in letters from  
6 CMC that are attached to the Declaration of Nelson Goodell. (*See* Motion, ECF No. 55 at 12, 21-  
7 22, 23, 24, 25). These letters are not judicially noticeable because they are not public records; they  
8 are private correspondence attached to a declaration which is a public record. The defendants  
9 provide no authority to support their implied argument that the letters themselves are judicially  
10 noticeable in this context. Moreover, the plaintiffs dispute the factual content of the letters.  
11 Because the letters that are attached as exhibits to the Declaration of Nelson Goodell are not  
12 judicially noticeable, and because the plaintiffs' complaint does not rely upon them, the court does  
13 not consider them at the motion-to-dismiss stage of the litigation. *See United States v. Corinthian*  
14 *Colleges*, 655 F.3d 984, 998-99 (9th Cir. 2011) ("As a general rule, [a district court] 'may not  
15 consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.'") (quoting *Lee v.*  
16 *City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)). This also means that the court does not  
17 consider the defendants' arguments that are based on them. The court therefore has omitted these  
18 arguments when analyzing the defendants' other arguments in the remainder of this order.

19 **2. The Plaintiffs' Standing and the Real Party in Interest**

20 **2.1 The Trust Is Dismissed as a Plaintiff**

21 As an initial matter, the defendants move to dismiss the Trust itself as a plaintiff to this action.  
22 (Motion, ECF No. 55 at 15.) Under Federal Rule of Civil Procedure 17(a), a "[p]laintiff must be  
23 the 'real party in interest,' with respect to the claim sued upon." Schwarzer, Tashima & Wagstafe,  
24 Cal. Prac. Guide: Fed. Civ. P. before Trial, ¶ 7:1 (The Rutter Group 2015); *see Estate of*  
25 *Migliaccio v. Midland Nat'l Life Ins. Co.*, 436 F. Supp. 2d 1095, 1100 (C.D. Cal. 2006).  
26 Generally, for parties other than corporations or individuals not acting in a representative capacity,  
27 capacity to sue or be sued is determined by the law of the state where the court is located. Fed. R.  
28 Civ. P. 17(b). In California, a trust is not a legal entity and has no capacity to sue or be sued.

1 *Jordan v. Paul Fin., LLC*, 644 F. Supp. 2d 115, 1172 (N.D. Cal. 2009) (citing *Galdjie v. Darwish*,  
2 113 Cal. App. 4th 1331, 1343-45 (2003); see *Greenspan v. LADT, LLC*, 191 Cal. App. 4th 486,  
3 522 (2010) (“A trust . . . is simply a collection of assets and liabilities. As such, it has no capacity  
4 to sue or be sued, or to defend an action.”) (internal quotation marks omitted); see also Schwarzer,  
5 Tashima & Wagstafe, Cal. Prac. Guide: Fed. Civ. P. before Trial, ¶ 7:7 (The Rutter Group 2015).

6 Because the Trust does not have capacity to sue, the court dismisses it as a plaintiff from this  
7 action. See *Estate of Migliaccio*, 436 F. Supp. 2d at 1100-01 (granting the defendants’ motion to  
8 dismiss because “as a matter of law, the Estate cannot be a plaintiff in this lawsuit” and “only the  
9 Estate’s trustee, administrator or executor may bring suit on its behalf as the real party in  
10 interest”); see also *Tuttle v. Sky Bell Asset Mgmt., LLC*, No. C 10-03588 WHA, 2012 WL 440393,  
11 at \*4 (N.D. Cal. Feb. 10, 2012) (“To avoid potential standing issues that may be raised as to the  
12 Trust’s capacity to sue as a trust, plaintiffs were granted leave to amend their complaint to reflect  
13 that the Braun Family Trust would be suing by its co-trustee Mr. Braun.”).

14 **2.2 Ms. Green, in Her Individual Capacity, Is Dismissed as a Plaintiff**

15 In its September 2, 2015 order, the court determined that Ms. Green lacked standing to bring  
16 her claims in her individual capacity (which was the only capacity in which she originally sued)  
17 because she was not a party to or “borrower” under the Loan or Deed of Trust and had no existing  
18 obligations under the Loan or Deed of Trust. (9/2/2015 Order, ECF No. 53 at 6-10.) The court  
19 noted that only “borrowers” have standing to assert HBOR or RESPA claims, (*id.* at 6-7), and the  
20 court rejected Ms. Green’s argument that she had standing because she received title to the  
21 Property upon her parents’ deaths and allegedly “assumed” the Loan, (*id.* at 8-9). The court noted  
22 that this argument was “directly at odds with Paragraph 13 of the Deed of Trust, which states that  
23 ‘any Successor in Interest of Borrower who assumes Borrower’s obligations under this Security  
24 Instrument in writing, and is approved by Lender, shall obtain all of Borrower’s rights and benefits  
25 under this Security Instrument.’” (*Id.* at 8 (citing RJN, ECF No. 36, Ex. 1 (emphasis added)).)  
26 The court also noted that “[o]ther courts have found that a successor in interest does not assume a  
27 borrower’s obligations simply upon obtaining title to property when the deed of trust requires an  
28 assumption be made in writing and approved by the lender.” (*Id.* at 8-9 (citing *Layton v. Ocwen*

1 *Loan Serv., LLC*, No. EDCV 15-840-GW(Ex), 2015 WL 4512015, at \*4 (C.D. Cal. July 23, 2015);  
2 *Gonzalez on Behalf of Estate of Perez, v. JP Morgan Chase Bank, N.A.*, No. C-14-2558 EMC,  
3 2014 WL 5462550, at \*3 (N.D. Cal. Oct. 28, 2014); *Robertson v. GMAC Mortg. LLC*, 982 F.  
4 Supp. 2d 1202, 1207 (W.D. Wash. 2013); *Anolik v. Bank of Am. Loans*, No. 2:11-cv-00406-MCE-  
5 JFM, 2011 WL 1549291, at \*1, \*3 (E.D. Cal. Apr. 21, 2011)). In dismissing her claims, the court  
6 allowed Ms. Green leave to file a Second Amended Complaint and invited her to bring claims in  
7 her capacity as representative of the Trust. (*Id.* at 10.)

8 Ms. Green filed a Second Amended Complaint, and she sued the defendants in her capacity as  
9 the trustee of the Trust, but she also sued the defendants in her individual capacity again. (SAC,  
10 ECF No. 54, ¶ 7.) The defendants move to dismiss her in her individual capacity. (Motion, ECF  
11 No. 13-15.) In their motion the defendants raise the same factual and legal points raised previously  
12 and argue that nothing has changed. (*See id.*) They point out that Ms. Green still has not alleged  
13 that she entered into a written loan assumption agreement or that she was approved by the lender,  
14 so she never became the “borrower” under the Deed of Trust. (*Id.* at 15.) The defendants therefore  
15 ask the court to dismiss Ms. Green in her individual capacity for the same reasons the court did  
16 before.

17 In opposition, the plaintiffs argue that Ms. Green has standing in her individual capacity  
18 because she lost title to the Property and thus was harmed. (Opposition, ECF No. 59 at 2-3, 5.) But  
19 this is the same argument that the court rejected the last time, and the court sees no reason to alter  
20 its conclusion. Also, the plaintiffs’ argument that the defendants treated Ms. Green, in her  
21 individual capacity, as the borrower, even if true, does not turn her into the borrower under the  
22 Deed of Trust. As described above, Ms. Green could have assumed the Trust’s obligations under  
23 the Deed of Trust only in writing and after approval by the lender. The plaintiffs have not alleged  
24 this.

25 The plaintiffs also cite Federal Rule of Civil Procedure 17 and argue that Ms. Green, in her  
26 individual capacity, is a real party in interest. (*Id.* at 3-4.) Rule 17 requires that “[a]n action must  
27 be prosecuted in the name of the real party in interest” and provides that “a trustee of an express  
28 trust” “may sue in [his or her] own name[ ] without joining the person for whose benefit the action

1 is brought.” Fed. R. Civ. P. 17(a)(1)(e). Citing *Estate of Migliaccio* and *County of Todd, Minn. v.*  
2 *Loegering*, the plaintiffs say this rule allows Ms. Green to sue in her own name *both* as an  
3 individual *and* as the trustee of the trust. (Opposition, ECF No. 59 at 3.)

4 The court is not persuaded by the plaintiffs’ argument. First, Rule 17 says that a trustee may  
5 sue in his or her own name; it does not say that the trustee may sue in his or her own name both in  
6 an individual and a representative capacity. Rule 17 allows a trustee to sue in his or her own name  
7 without also having to name the trust itself as a plaintiff. Second, the cases the plaintiffs cite do  
8 not support their position. In *Estate of Migliaccio*, the court dismissed the estate itself as a plaintiff  
9 and granted leave to amend to add the estate’s representative as a plaintiff. 436 F. Supp. 2d at  
10 1100-01. And while the court did allow a beneficiary of the estate to sue in her individual capacity  
11 because she was an “interested person” for purposes of Article III standing, the court did not  
12 address any of the barriers to standing at issue here, namely, that Ms. Green was not a party to or  
13 “borrower” under the Loan or Deed of Trust and had no existing obligations under the Loan or  
14 Deed of Trust. *Loegering* featured a plaintiff who sued not in her individual capacity but in her  
15 capacity as trustee to a decedent’s estate. 297 F.2d 470, 471-72 (8th Cir. 1961). This fact alone  
16 makes it inapposite.

17 Accordingly, the court dismisses Ms. Green, in her individual capacity, as a plaintiff to this  
18 action. To the extent that the defendants argue, with respect to any particular claim, that the claim  
19 fails insofar as Ms. Green brings it in her individual capacity (*see* Motion, ECF No. 55 at 19, 22,  
20 24, 26, 28-29, 32), the court finds those arguments encompassed by the defendants’ general  
21 standing argument and this ruling, and the court does not address them later in this order.

22 **2.3 Ms. Green, in Her Capacity as Trustee of the Trust, Is the Real Part in Interest and**  
23 **Is the Proper Plaintiff**

24 The defendants do not argue that Ms. Green, in her capacity as trustee of the Trust, lacks  
25 standing to sue them. The court therefore finds that Ms. Green, in her capacity as trustee of the  
26 Trust, has standing, is the real party in interest, and is the proper plaintiff to this action. As the  
27 only remaining plaintiff is Ms. Green in her capacity as trustee of the Trust, the court addresses the  
28 defendants’ additional arguments with respect to her only in that capacity.

1 **3. Res Judicata**

2 The defendants argue that all of Ms. Green’s claims are barred by California’s res judicata, or  
 3 claim preclusion, doctrine.<sup>2</sup> (Motion, ECF No. 55 at 15-16.) This doctrine “prevents relitigation of  
 4 the same cause of action in a second suit between the same parties or parties in privity with them.”  
 5 *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 896 (2002). “[I]f a plaintiff prevails in an  
 6 action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a  
 7 judgment for the defendant serves as a bar to further litigation of the same cause of action.” *Id.* at  
 8 896-97.

9 The defendants bear the burden of showing that res judicata applies. *Vella v. Hudgins*, 20 Cal.  
 10 3d 251, 257 (1977) (“The burden of proving that the requirements for application of res judicata  
 11 have been met is upon the party seeking to assert it as a bar or estoppel.”). To meet this burden,  
 12 the defendants must show that the following “prerequisite elements” are satisfied: (1) a claim  
 13 raised in the present action is identical to a claim litigated in a prior proceeding; (2) the prior  
 14 proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine  
 15 is being asserted was a party or in privity with a party to the prior proceeding. *Boeken*, 48 Cal. 4th  
 16 at 797. “Even if these threshold requirements are established, res judicata will not be applied ‘if  
 17 injustice would result or if the public interest requires that relitigation not be foreclosed.’” *Citizens*  
 18 *for Open Access to Sand and Tide, Inc. v. Seadrift Ass’n*, 60 Cal. App. 4th 1053, 1065 (1998)  
 19 (quoting *Consumers Lobby Against Monopolies v. Pub. Util. Comm’n*, 25 Cal. 3d 891, 902  
 20 (1979)).

21 The defendants have not met their burden. They say that Deutsche Bank’s unlawful detainer  
 22 action against Ms. Green in her individual capacity bars the claims that Ms. Green brings against  
 23 CMC and Deutsche Bank here in her capacity as trustee of the Trust. (Motion, ECF No. 55 at 16.)  
 24

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25 <sup>2</sup> While the United States Supreme Court uses the term “res judicata” to refer collectively to claim  
 26 preclusion and issue preclusion, *see, e.g., Taylor v. Sturgell*, 553 U.S. 880, 892 (2008), the  
 27 California Supreme Court generally uses the term “res judicata” to refer to claim preclusion, and  
 28 the term “collateral estoppel” to refer to issue preclusion, *see Boeken v. Philip Morris USA, Inc.*,  
 48 Cal. 4th 788, 797 (2010) (distinguishing between the two “aspects” that compose California  
 law’s preclusion doctrine). Here, the defendants raise only claim preclusion. (*See* Motion, ECF  
 No. 55 at 15.)

1 Even if the unlawful detainer action resulted in a final judgment on the merits, the defendants have  
2 not met their burden to show which of Ms. Green’s claims are barred. Although a prior unlawful  
3 detainer action—which is a “summary proceeding ordinarily limited to resolution of the question  
4 of possession”—bars subsequent claims challenging the trustee’s sale and the validity of the title,  
5 *see Malkoskie v. Option One Mortg. Corp.*, 188 Cal. App. 4th 968, 973-76 (2010), it “does not,  
6 however, necessarily bar actions which encompass ‘activities not directly related with the conduct  
7 of the sale,’” *Elstner-Bailey v. N. Pac. Mortg. Corp.*, No. CV 10-07151 DDP (CWx), 2012 WL  
8 2077190, at \*2 n.1 (C.D. Cal. June 8, 2012) (citing *Vella*, 20 Cal. 3d at 256). Thus, when  
9 determining whether res judicata applies, the key question is whether the claim challenges the  
10 trustee’s sale and the validity of title or whether it challenges other conduct. *Compare, e.g., Dancy*  
11 *v. Aurora Loan Servs. LLC*, No. C 10-2602 SBA, 2011 WL 835787, at \*6 (N.D. Cal. Mar. 4,  
12 2011) (“In the instant case, all of Plaintiff’s claims are based on the same primary right at issue in  
13 the unlawful detainer proceeding; namely, the alleged invalidity of the foreclosure sale.”); *Castle*  
14 *v. Mortg. Elec. Registration Sys., Inc.*, No. EDCV 11-00538 VAP, 2011 WL 3626560, at \*7 (C.D.  
15 Cal. Aug. 16, 2011) (“As in *Malkoskie*, Plaintiffs’ claims here are based on the same primary right  
16 at issue in the unlawful detainer proceeding, i.e., the right to the Property. . . . The validity of the  
17 foreclosure process, trustee’s sale, and Fannie Mae’s acquisition of the Property were all  
18 encompassed by the Unlawful Detainer Action.”) *with, e.g., Helmer v. Bank of Am., N.A.*, No. CIV  
19 S-12-0733 KJM-GGH, 2013 WL 1192634, at \*4 (E.D. Cal. Mar. 22, 2013) (“Because plaintiff’s  
20 allegations do not challenge the validity of the foreclosure sale, plaintiff’s claims are not estopped  
21 by the unlawful detainer action.”); *Albizo v. Wachovia Mortg.*, No. 2:11-cv-02991 KJN, 2012 WL  
22 1413996, at \*4 (E.D. Cal. Apr. 20, 2012) (“Here, plaintiffs are not solely challenging the validity  
23 of the foreclosure sale; instead, plaintiffs are also challenging defendants’ conduct (i.e., properly  
24 accounting for plaintiffs’ loan payments, agreeing to a loan modification, etc.) that occurred before  
25 the foreclosure sale.”); *Johannson v. Wachovia Mortg. FSB*, No. C 11-02822 WHA, 2011 WL  
26 3443952, at \*10 (N.D. Cal. Aug. 5, 2011) (“Here, plaintiff is not challenging the validity of the  
27 foreclosure sale; plaintiff is challenging defendant’s conduct that occurred before the foreclosure  
28 sale.”). The defendants never examine this issue in detail and appear to assume that all of Ms.

1 Green’s claims are for “wrongful foreclosure.” (*See* Motion, ECF No. 55 at 16.) The issue,  
2 however, is not as clear-cut as the defendants suggest.

3 The defendants also have not shown privity. The California Court of Appeals has explained  
4 that:

5 The concept of privity for the purposes of res judicata or collateral estoppel refers to  
6 a mutual or successive relationship to the same rights of property, or to such an  
7 identification in interest of one person with another as to represent the same legal  
8 rights and, more recently, to a relationship between the party to be estopped and the  
9 unsuccessful party in the prior litigation which is sufficiently close so as to justify  
10 application of the doctrine of collateral estoppel. This requirement of identity of  
parties or privity is a requirement of due process of law. Due process requires that  
the nonparty have had an identity or community of interest with, and adequate  
representation by, the party in the first action. The circumstances must also have  
been such that the nonparty should reasonably have expected to be bound by the  
prior adjudication.

11 *Citizens*, 60 Cal. App. 4th at 1069-70 (internal citations, quotation marks, and ellipses omitted).

12 “Privity,” moreover, “is not susceptible of a neat definition, and determination of whether it exists  
13 is not a cut-and-dried exercise.” *Aronow v. LaCroix*, 219 Cal. App. 3d 1039, 1048 (1990). Indeed,  
14 “[w]hether someone is in privity with the actual parties requires close examination of the  
15 circumstances of each case.” *Victa v. Merle Norman Cosmetics, Inc.*, 19 Cal. App. 4th 454, 464  
16 (1993) (internal quotation marks and citation omitted).

17 The defendants contend, without citation to any legal authority, that “[p]rivacy is satisfied here  
18 since [Ms.] Green was trustee of the Trust at the time of the [unlawful detainer] action (SAC ¶ 31)  
19 and CMC is the loan servicer for Deutsche Bank.” (Motion, ECF No. 55 at 16.) This is the extent  
20 of their argument on this point. The defendants do not provide any authority for the critical point  
21 that a party, when sued in her individual capacity, is in privity with the Trust for which she is  
22 trustee. It is not obvious to the court that privity would exist in this situation, and without more,  
23 the court cannot conduct the “close examination” to determine if it does.

24 The court also notes the defendants’ incongruous opinions about Ms. Green’s two capacities.  
25 When discussing her standing, the defendants emphasized that her two capacities were entirely  
26 distinct. But when discussing privity, the defendants are quick to argue that her individual and  
27 representative capacities are one and the same. This vacillation suggests that the Trust, through  
28 Ms. Green as its trustee, may not “have had an identity or community of interest with, and

1 adequate representation by, [Ms. Green, in her individual capacity,] in the first action” and may  
2 not “reasonably have expected to be bound by the prior adjudication.” *Citizens*, 60 Cal. App. 4th  
3 at 1070.

4 On this record, then, the court concludes that Deutsche Bank’s unlawful detainer action against  
5 Ms. Green in her individual capacity does not bar the claims brings now in her capacity as trustee  
6 of the Trust.

#### 7 **4. Judicial Estoppel**

8 Next, the defendants argue that all of the claims that Ms. Green brings in her individual  
9 capacity should be precluded under the judicial estoppel doctrine. (Motion, ECF No. 55 at 17.  
10 (“[Ms.] Green, individually, is also barred as a result of her prior bankruptcy filings.”) Because the  
11 court has dismissed Ms. Green in her individual capacity as a plaintiff to this action, the  
12 defendants’ judicial estoppel argument is moot.<sup>3</sup>

#### 13 **5. Tender**

14 The defendants also argue that all of Ms. Green’s claims are barred because she did not allege  
15 that she “tendered the debt owed by the Borrower under the Deed of Trust.” (Motion, ECF No. 55  
16 at 18 (“Absent tender, Plaintiffs’ SAC is barred.”).)

17 The California Court of Appeal, Sixth District, has summarized the so-called “tender rule”:

18 Because the action is in equity, a defaulted borrower who seeks to set aside a  
19 trustee’s sale is required to do equity before the court will exercise its equitable  
20 powers. Consequently, as a condition precedent to an action by the borrower to set  
aside the trustee’s sale on the ground that the sale is voidable because of

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21 <sup>3</sup> Were Ms. Green, in her individual capacity, still a plaintiff to this action, the court would be  
22 reluctant to apply the judicial estoppel doctrine where Ms. Green never obtained a discharge and  
23 the bankruptcy court never confirmed a bankruptcy plan. *See Ah Quin v. Cnty. of Kauai Dep’t of*  
24 *Transp.*, 733 F.3d 267, 271 (9th Cir. 2013) (“In the bankruptcy context, the federal courts have  
25 developed a basic default rule: If a plaintiff-debtor omits a pending (or soon-to-be-filed) lawsuit  
26 from the bankruptcy schedules and obtains a discharge (or plan confirmation), judicial estoppel  
27 bars the action.”); *Nissim v. Wells Fargo Bank, N.A.*, No. C 14-1128 CW, 2014 WL 4421384, at  
28 \*6-7 (N.D. Cal. Sept. 5, 2014); *Chancellor v. OneWest Bank*, No. C 12-01068, at \*5-6 (May 22,  
2012); *Sannah v. Wells Fargo Bank, N.A.*, No. SACV 11-01920 DOC, 2012 WL 10423186, at \*3-  
4 (C.D. Cal. Mar. 19, 2012). And at least two courts in this district have concluded that the entry  
of an automatic stay, without more, does not constitute judicial “acceptance” of a debtor’s prior  
inconsistent position, a requirement for judicial estoppel. *See Boatright v. Aurora Loan Servs.*, No.  
C-12-00009 EDL, 2012 WL 2792415, at \*2-6 (N.D. Cal. July 9, 2012); *Perez v. Wells Fargo*  
*Bank, N.A.*, No. C-11-02279 JCS, 2011 WL 3809808, at \*11-12 (N.D. Cal. Aug. 29, 2011); *see*  
*also Gottlieb v. Kest*, 141 Cal. App. 4th 110, 142-145 (2006).



1 irregularities in the sale notice or procedure, the borrower must offer to pay the full  
2 amount of the debt for which the property was security. The rationale behind the  
3 rule is that if the borrower could not have redeemed the property had the sale  
4 procedures been proper, any irregularities in the sale did not result in damages to  
5 the borrower.

6  
7 There are, however, exceptions to the tender requirement. Our review of the  
8 case law discloses four exceptions.

9  
10 First, if the borrower's action attacks the validity of the underlying debt, a  
11 tender is not required since it would constitute an affirmation of the debt.

12  
13 Second, a tender will not be required when the person who seeks to set aside the  
14 trustee's sale has a counter-claim or set-off against the beneficiary. In such cases, it  
15 is deemed that the tender and the counter claim offset one another, and if the offset  
16 is equal to or greater than the amount due, a tender is not required.

17  
18 Third, a tender may not be required where it would be inequitable to impose  
19 such a condition on the party challenging the sale.

20  
21 Fourth, no tender will be required when the trustor is not required to rely on  
22 equity to attack the deed because the trustee's deed is void on its face.

23  
24 *Lona v. Citibank, N.A.*, 202 Cal. App. 4th 89, 112-13 (2011) (internal quotation marks, citations,  
25 and brackets omitted).

26  
27 The tender rule applies to equitable claims, such as claims to set aside a trustee's sale, to quiet  
28 title, to cancel an instrument, or for wrongful foreclosure, *see Arnolds Mgmt. Corp. v. Eischen*,  
158 Cal. App. 3d 575, 578-79 (1984) (“[The tender] rule is premised upon the equitable maxim  
that a court of equity will not order that a useless act be performed.”), and to claims “implicitly  
integrated” with the foreclosure, *see id.* at 579 (citing *Karlsen v. Am. Sav. & Loan Ass'n*, 15 Cal.  
App. 3d 112, 121 (1971)). *Cf. Ukiru v. Fed. Home Loan Mortg. Corp.*, 602 Fed. App'x 395, 396  
(9th Cir. 2015) (affirming the district court's dismissal of the plaintiff's equitable claims—  
including her claims to set aside the trustee's sale, to cancel the trustee's deed, to quiet title, and  
for wrongful foreclosure—due to her failure to allege credible tender); *Adesokan v. U.S. Bank*,  
N.A., 582 Fed. App'x 672, 673 (9th Cir. July 2, 2014) (“The district court properly dismissed  
Adesokan's wrongful foreclosure, quiet title, cancellation of instruments, and fraud claims because  
Adesokan failed to allege facts showing tender in the amount of his indebtedness or that the  
foreclosure sale was void.”) But the tender rule “has no application . . . where [a] plaintiff[s]  
lawsuit is not based on the premise of a defect in the giving of notice [of foreclosure] but on the  
statutory grounds laid out in HBOR, and seeks monetary damages.” *Valbuena v. Ocwen Loan*

1 *Servicing, LLC*, 237 Cal. App. 4th 1267, 1273-74 (2015); *see id.* at 1273 (“Nothing in the  
2 language of HBOR suggests that a borrower must tender the loan balance before filing suit based  
3 on a violation of the requirements of the law.”).

4 Moreover, “[b]ecause tender is an equitable concept, courts have held that ‘[w]hether Plaintiffs  
5 are required to tender is a matter of discretion left up to the Court,’ and that ‘failure to allege  
6 tender is not decisive at [the pleading] stage.’” *Bingham v. Ocwen Loan Servicing, LLC*, No.: 13-  
7 CV-04040-LHK, 2014 WL 1494005, at \*7-8 (N.D. Cal. Apr. 16, 2014) (quoting *Storm v. Am.’s*  
8 *Servicing Co.*, No. 0911206, 2009 WL 3756629, at \*6 (S.D. Cal. Nov. 6, 2009); *accord Stokes v.*  
9 *CitiMortgage, Inc.*, No. CV 14-00278 BRO (SHx), 2014 WL 4359193, at \*8-9 (C.D. Cal. Sept. 3,  
10 2014) (exercising discretion to decline to apply tender at pleadings stage); *Nguyen v. JP Morgan*  
11 *Chase Bank N.A.*, No. 12-4183, 2013 WL 2146606, at \*6 (N.D. Cal. May 15, 2013) (same).

12 Here, Ms. Green brings a mix of equitable and non-equitable claims (including claims under  
13 HBOR), some of which challenge the foreclosure process and some of which relate to her loan  
14 modification efforts. The defendants, however, never attempt to explain how or why the tender  
15 rule applies to each claim; they just say that the entire Second Amended Complaint is barred. (*See*  
16 *Motion*, ECF No. 55 at 18; *Reply*, ECF No. 60 at 6.) This does not suffice, especially at the  
17 pleading stage, where application of the tender rule depends upon the equitable circumstances of  
18 the case. Accordingly, the court declines to dismiss the Second Amended Complaint because Ms.  
19 Green did not allege tender.

## 20 **6. Claims**

21 With the defendants’ generally-applicable arguments resolved, the court now turns to the  
22 defendants’ arguments about each of Ms. Green’s claims.

### 23 **6.1 HBOR – Cal. Civ. Code § 2329.55**

24 In her first claim, Ms. Green alleges that the defendants violated California Civil Code §  
25 2329.55 “by failing to contact Ms. Green, in person or by telephone, at least 30 days prior to  
26 recording the Notice of Default on March 7, 2014 and the Notice of Trustee’s Sale on June 12,  
27 2014 to explore the ‘traditional’ options for the Plaintiff to avoid foreclosure, such as a repayment  
28 plan, a forbearance agreement or a ‘short sale,’ despite the fact that Ms. Green was fully available

1 to explore such options.” (SAC, ECF No. 54, ¶ 75.); *see also* Cal. Civ. Code § 2923.55(a)(2) (“A  
2 mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent may not record a notice of  
3 default pursuant to Section 2924 until . . . 30 days after initial contact is made as required by  
4 paragraph (2) of subdivision (b) . . .”), (b)(2) (“A mortgage servicer shall contact the borrower in  
5 person or by telephone in order to assess the borrower’s financial situation and explore options for  
6 the borrower to avoid foreclosure.”).

7 The defendants argue that Ms. Green’s allegations undermine her section 2923(b)(2) claim  
8 because she alleges that she and CMC communicated about loan modification applications months  
9 before the Notice of Default was recorded. (*See* Motion, ECF No. 55 at 20-21.) The court agrees  
10 that they do. Several courts have concluded that a section 2923(b)(2) claim fails where the plaintiff  
11 mortgagor and the defendant mortgage servicer had been in communication regarding a loan  
12 modification before a notice of default was recorded. *See Avnieli v. Residential Credit Solutions,*  
13 *Inc.*, No 2:15-cv-02877-ODW, 2015 WL 5923532, at \*4 (C.D. Cal. Oct. 9, 2015) (granting the  
14 defendants’ motion to dismiss the plaintiffs’ section 2923.55(b)(2) claim where the plaintiffs “had  
15 several discussions with [the defendants] regarding loan modification prior to the Notice of  
16 Default”); *Field v. Bank of Am., N.A.*, No. 15-cv-01262 NJV, 2015 WL 4647876, at \*4 (N.D. Cal.  
17 Aug. 5, 2015) (“Plaintiffs’ allegations in support of this [section 2923.55(b)(2)] cause of action are  
18 negated by their concessions that they were in modification discussions with BANA long before  
19 the NOD was recorded.”); *Johnson v. SunTrust Mortg., Inc.*, No. CV 14–2658 DSF (PJWx), 2014  
20 WL 3845205, at \*4 (C.D. Cal. Aug. 4, 2014) (“Because Plaintiffs concede that they had  
21 discussions with SunTrust regarding their financial situation and loan modification options, this  
22 alleged violation of Section 2923.55(b)(2) fails.”). Here, Ms. Green alleges that she had a  
23 “conversation” with CMC about a loan modification as early as September 2013, that CMC asked  
24 Ms. Green to send it document to be considered for a loan modification, that she submitted the  
25 first loan modification application in December 2013, and that the Notice of Default was not  
26 recorded until March 2014. (SAC, ECF No. 54, ¶¶ 38, 45-49.) These allegations undermine her  
27 allegation that no one at CMC ever discussed loss mitigation efforts with her, whether in person or  
28 by telephone. (*See id.* ¶¶ 45, 49.) A loan modification is a loss mitigation effort. Ms. Green’s first

1 claim for violation of section 2923.55(b)(2) therefore fails. Because a conversation took place  
2 more than 30 days before the foreclosure was initiated, and Ms. Green cannot now plead around  
3 this, the court dismisses her first claim with prejudice.

4 **6.2 HBOR – Cal. Civ. Code § 2923.6**

5 In her second claim, Ms. Green alleges that the defendants violated California Civil Code §  
6 2923.6. (SAC, ECF No. 54, ¶¶ 83-89.) Section 2923.6(c) provides:

7 (c) If a borrower submits a complete application for a first lien loan modification  
8 offered by, or through, the borrower’s mortgage servicer, a mortgage servicer,  
9 mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of  
10 default or notice of sale, or conduct a trustee’s sale, while the complete first lien  
11 loan modification application is pending. A mortgage servicer, mortgagee, trustee,  
12 beneficiary, or authorized agent shall not record a notice of default or notice of sale  
13 or conduct a trustee’s sale until any of the following occurs:

- 14 (1) The mortgage servicer makes a written determination that the borrower is not  
15 eligible for a first lien loan modification, and any appeal period pursuant to  
16 subdivision (d) has expired.
- 17 (2) The borrower does not accept an offered first lien loan modification within 14  
18 days of the offer.
- 19 (3) The borrower accepts a written first lien loan modification, but defaults on, or  
20 otherwise breaches the borrower’s obligations under, the first lien loan  
21 modification.

22 Ms. Green alleges that she “never received a written denial letter, prior to the Notice of Default  
23 and Notice of Trustee’s Deed Upon Sale being filed, for the complete loan modification  
24 application that she submitted in January 2014.” (SAC, ECF No. 54, ¶ 84.) Thus, the defendants  
25 “violated Civil Code section 2923.6 by proceeding towards foreclosure, even though they have  
26 never made a determination on [her] complete loan modification applications prior to initiating  
27 foreclosure or scheduling a sale time.” (*Id.* ¶ 85.)

28 As an initial matter, the defendants argue that section 2923.6(c)(1) applies to mortgage  
servicers only and does not apply to beneficiaries such as Deutsche Bank. (Motion, ECF No. 55 at  
22.) To be sure, subsection (c)(1) applies to only mortgage servicers, but subsection (c)(1) does  
not set forth the prohibited conduct. The prohibited conduct is set forth in the paragraph above it.  
It states that if a borrower submits a complete loan modification application, “a mortgage servicer,  
mortgagee, trustee, beneficiary, or authorized agent” cannot record a notice of default or notice of

1 sale, or conduct a trustee’s sale, while the application is pending. The statute applies to  
2 beneficiaries.

3 The defendants next argue that Ms. Green did not allege that a complete loan modification  
4 application was pending at the time a notice of default, notice of trustee’s sale, or trustee’s deed  
5 upon sale was recorded. (Motion, ECF No. 55 at 22-23.) They are right. First, the defendants  
6 highlight that the Notice of Default was recorded on March 7, 2014, but Ms. Green alleges that by  
7 letter CMC denied Ms. Green’s first loan modification application two months earlier in January  
8 2014 because her application was incomplete. (*See* SAC, ECF No. 54, ¶¶ 47-48.) Second, they  
9 point out that the Notice of Trustee’s Sale was recorded on June 12, 2014, before Ms. Green  
10 allegedly submitted more documents to CMC “in late June” 2014. (*See id.* ¶ 50.) Third, they note  
11 that Ms. Green also alleges that CMC “subsequently” (i.e., sometime before August 2014 (*see id.*  
12 ¶ 55)) sent her a “denial letter” denying this second loan modification application, before the  
13 Trustee’s Sale took place in September 2014. (*See id.* ¶ 53.) Even if CMC improperly denied Ms.  
14 Green’s loan modifications (as she alleged), this does not change the fact that CMC denied them  
15 and therefore they was not pending when the foreclosure documents were recorded. Because,  
16 according to Ms. Green’s allegations, her first loan modification application was not pending in  
17 March 2014 when the Notice of Default was recorded, the Notice of Trustee’s Sale was recorded  
18 before she allegedly submitted a second loan modification application, and her second loan  
19 modification application was not pending in September 2014 when the Trustee’s Sale took place,  
20 the defendants did not violate section 2923.6(c). She did not have an application pending when  
21 any those events took place. Accordingly, the court dismisses her second claim for violation of  
22 section 2923.6(c).<sup>4</sup> Because this timeline is clear, and Ms. Green cannot plead around it, the court  
23 dismisses her second claim with prejudice.

24  
25

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26 <sup>4</sup> Because Ms. Green alleges that she received written denials of both of her loan modification  
27 applications, the court need not address the defendants’ argument (which Ms. Green did not  
28 respond to in her opposition) that any lack of denial was not material. (*See* Motion, ECF No. 55 at  
23-24 (citing Cal. Civ. Code § 2924.12 (providing remedies for “material” HBOR violations  
only)).)

1           **6.3 HBOR – Cal. Civ. Code § 2923.7**

2           In her third claim, Ms. Green alleges that the defendants violated California Civil Code §  
3 2923.7. (SAC, ECF No. 54, ¶¶ 90-93.)

4           Section 2923.7 provides that, when a borrower requests a foreclosure-prevention alternative,  
5 such as a loan modification, the servicer must promptly designate a “single point of contact”  
6 (“SPOC”) to communicate directly with the borrower. Cal. Civ. Code § 2923.7(a). The SPOC can  
7 be an individual or a team, but must (among other things<sup>5</sup>) possess sufficient knowledge about  
8 foreclosure alternatives and have access to individuals who have the ability and authority to stop  
9 foreclosure proceedings. *See id.* §§ 2923.7(b)-(d). Moreover, “[t]he mortgage servicer shall ensure  
10 that each member of the [SPOC] team is knowledgeable about the borrower’s situation and current  
11 status in the alternatives to foreclosure process.” *Id.* § 2923.7(e).

12           Ms. Green alleges that the defendants violated section 2923.7 because, despite her numerous  
13 requests to speak to CMC representatives about the status of her loan modification application”  
14 and the trustee’s sale, she was “never able to speak to a designated single point of contact, and no  
15 one at [CMC] could provide her with accurate information regarding the [L]oan] or foreclosure.”  
16 (SAC, ECF No. 54, ¶ 91.) “Instead,” she “received contradictory and confusing information about  
17 which documents were needed to be sent to” CMC. (*Id.*) “As a result of the confusion [this]  
18 created,” CMC sold the Property without Ms. Green’s knowledge. (*Id.*)

19

20           <sup>5</sup> The SPOC is responsible for all the following:

- 21           (1) Communicating the process by which a borrower may apply for an available foreclosure  
22 prevention alternative and the deadline for any required submissions to be considered for  
23 these options.  
24           (2) Coordinating receipt of all documents associated with available foreclosure prevention  
25 alternatives and notifying the borrower of any missing documents necessary to complete  
26 the application.  
27           (3) Having access to current information and personnel sufficient to timely, accurately, and  
28 adequately inform the borrower of the current status of the foreclosure prevention  
alternative.  
              (4) Ensuring that a borrower is considered for all foreclosure prevention alternatives offered  
by, or through, the mortgage servicer, if any.  
              (5) Having access to individuals with the ability and authority to stop foreclosure proceedings  
when necessary.

28           Cal. Civ. Code § 2923.7(b).

1 As an initial matter, the defendants argue that Deutsche Bank cannot be liable for a violation  
2 of section 2923.7 because section 2923.7 applies only to loan servicers. (Motion, ECF No. 55 at  
3 24.) This is true. *See Rockridge Trust v. Wells Fargo, N.A.*, 985 F. Supp. 2d 1110, 1152 (N.D. Cal.  
4 2013) (finding that section 2923.7 “imposes duties only on the loan servicer”). The court  
5 dismisses the claim with prejudice insofar as Ms. Green brings it against Deutsche Bank.

6 The defendants also say that section 2923.7 “only requires the servicer to establish a SPOC  
7 ‘[u]pon request from a borrower.’” (Motion, ECF No. 55 at 24 (quoting Cal. Civ. Code § 2923.7).)  
8 Although they do not explicitly argue it, the defendants imply that Ms. Green’s claim fails because  
9 she does not allege that she requested a SPOC. (*See id.*) Federal courts sitting in California are  
10 split on whether a borrower has to. Some courts have found that the statute is not triggered unless  
11 a borrower specifically requests a SPOC. *See Jerviss v. Select Portfolio Servicing, Inc.*, No. 2:15-  
12 cv-01904-MCE-KJN, 2015 WL 6081994, at \*4 (E.D. Cal. Oct. 13, 2015); *Hatton v. Bank of Am.*,  
13 N.A., No. 1:15-cv-00187-GSA, 2015 WL 4112283, at \*6 (E.D. Cal. July 8, 2015); *Carbajal v.*  
14 *Wells Fargo Bank, N.A.*, No. CV 14-7851 PSG (PLAx), 2015 WL 2454054, at \*7 (C.D. Cal. Apr.  
15 10, 2015); *Garcia v. PNC Mortg.*, No. C 14-3543 PJH, 2015 WL 534395, at \*5 (N.D. Cal. Feb., 9,  
16 2015); *Diamos v. Specialized Loan Servicing LLC*, No. 13-cv-04997 NC, 2014 WL 5810453, at  
17 \*3-4 (Nov. 11, 2014); *Williams v. Wells Fargo Bank, NA*, No. EDCV 13-02075 JVS (DTBx),  
18 2014 WL 1568857, at \*8 (C.D. Cal. Jan. 27, 2014). Other courts have found that the statute  
19 requires a servicer to appoint a SPOC upon the borrower’s request for a foreclosure prevention  
20 alternative. *See Mora v. US Bank*, No. CV 15-02436 DDP (AJWx), 2015 WL 4537218, at \*5  
21 (C.D. Cal. July 27, 2015); *Major v. Wells Fargo Bank, N.A.*, No. 14cv998-LAB (RBB), 2015 WL  
22 2449516, at \*4 (S.D. Cal. May 22, 2015); *Hild v. Bank of Am., N.A.*, No. EDCV 14-2126-JGB  
23 (SPx), 2015 WL 401316, \*7 (C.D. Cal. Jan. 29, 2015); *Penermon v. Wells Fargo Bank, N.A.*, 47 F.  
24 Supp. 3d 982, 1000 (N.D. Cal. 2014); *Mungai v. Wells Fargo Bank*, No. C-14-00289 DMR, 2014  
25 WL 2508090, at \*9-10 (N.D. Cal. June 3, 2014).

26 The court follows the rulings of the latter courts. As one court explained:

27 Under the plain meaning of the statute, a mortgage servicer’s obligation to establish  
28 a single point of contact is triggered “upon request from a borrower who requests a  
foreclosure prevention alternative,” not upon request from a borrower who requests

1 a single point of contact. In the phrase “upon request from a borrower who requests  
2 a foreclosure prevention alternative,” the words “upon request” and “a borrower  
3 who requests” refer to the same request; namely, the borrower’s request for a  
4 foreclosure prevention alternative. The phrase “upon request” simply indicates  
when the SPOC must be assigned (i.e., upon the borrower’s request for a  
foreclosure prevention alternative, as opposed to the borrower’s selection of a  
foreclosure prevention alternative).

5 *Mungai*, 2014 WL 2508090, at \*9. And another court persuasively reasoned that:

6 [T]o the degree that the statute is ambiguous, Defendant’s reading also runs against  
7 the general canon that a statute should not be read to defeat itself. To read the  
8 statute as requiring an explicit request would at best place an unnecessary technical  
9 burden on borrowers and at worst defeat the intent of the statute altogether: most  
borrowers are unlikely to be aware of the language of § 2923.7 and are therefore  
unlikely to demand their right to a single point of contact.

10 *Mora*, 2015 WL 4537218, at \*5 n.1. The court agrees with these courts that section 2923.7  
11 requires a loan servicer to appoint a SPOC upon the borrower’s request for a foreclosure  
12 prevention alternative. Accordingly, the court rejects the defendants’ argument that section 2923.7  
13 was not triggered in this case.

14 Finally, the defendants argue that Ms. Green’s claim fails because she does not allege that she  
15 was harmed by any violation of section 2923.7. (Motion, ECF No. 55 at 24.) They say that  
16 because “she admits that CMC reviewed her [loan modification] application twice, informed her  
17 of its decision, and provided her [with] the time and opportunity to appeal,” she “cannot truthfully  
18 allege that she was unaware of the application process, or the documents required to proceed with  
19 the review.” (*Id.* at 24-25.) The defendants mischaracterize Ms. Green’s allegations. Although she  
20 alleges that she submitted two loan modification applications to CMC and that CMC sent her  
21 letters denying those applications, she also alleges that CMC’s representatives gave her conflicting  
22 information. (*See* SAC, ECF No. 54, ¶ 91.) Ms. Green also clearly alleges that she was harmed:  
23 “As a result of the confusion” created by “never [being] able to speak to a designated single point  
24 of contact” and by not being provided with “accurate information regarding the [L]oan or  
25 foreclosure,” CMC sold the Property without Ms. Green’s knowledge. (*Id.*) The court thus rejects  
26 the defendants’ argument that Ms. Green failed to sufficiently allege a section 2923.7 violation  
27 against CMC.



1           **6.4 HBOR – Cal. Civ. Code § 2924.17**

2           In her fourth claim, Ms. Green alleges that the defendants violated California Civil Code §  
3 2924.17. (SAC, ECF No. 54, ¶¶ 94-96.) Section 2924.17 provides in relevant part:

4           (a) A declaration recorded pursuant to Section 2923.5 or, until January 1, 2018,  
5 pursuant to Section 2923.55, a notice of default, notice of sale, assignment of a deed  
6 of trust, or substitution of trustee recorded by or on behalf of a mortgage servicer in  
7 connection with a foreclosure subject to the requirements of Section 2924, or a  
8 declaration or affidavit filed in any court relative to a foreclosure proceeding shall  
9 be accurate and complete and supported by competent and reliable evidence.

10           (b) Before recording or filing any of the documents described in subdivision (a), a  
11 mortgage servicer shall ensure that it has reviewed competent and reliable evidence  
12 to substantiate the borrower’s default and the right to foreclose, including the  
13 borrower’s loan status and loan information.

14 Cal. Civ. Code § 2924.17(a)-(b).

15           Ms. Green alleges that a CMC representative falsely stated in Exhibit A to the March 7, 2015  
16 Notice of Default that CMC exercised due diligence in an attempt to contact the borrower but was  
17 unable to do so. (SAC, ECF No. 54, ¶ 95.) She alleges that because this statement was false, CMC  
18 had no right to foreclose. (*Id.*)

19           First, the defendants argue that section 2924.17 applies only to mortgage servicers and does  
20 not apply to beneficiaries under deeds of trust, so the claim must be dismissed as to Deutsche  
21 Bank. (Motion, ECF No. 55 at 22.) It is true that the statute appears to apply only to the mortgage  
22 servicer or a party recording a declaration on behalf of the mortgage servicers. In response, Ms.  
23 Green says that the statute “actually applies to everyone,” but she cites no authority to support this  
24 statement. She also says that the statute is “not subject to the limitations of California Civil Code §  
25 2920.5,” but section 2920.5 only provides definitions for the terms “mortgage servicer,”  
26 foreclosure prevention alternatives,” “borrower,” and “first lien”; section 2920.5 says nothing  
27 about whether section 2924.17 applies to beneficiaries such as Deutsche Bank. The court thus  
28 dismisses the claim with prejudice insofar as Ms. Green brings it against Deutsche Bank.

          Second, the defendants argue that “[b]ecause Plaintiffs’ § 2923.55 claim [(Claim One)] fails in  
that Plaintiffs do not state facts that Defendants did not comply with the statute, their § 2924.17  
claim fails for the same reasons.” (Motion, ECF No. 55 at 22.) The court notes, however, that the  
servicer’s requirements under section 2923.55 and different from the mortgage servicer’s

1 requirements under section 2924.17. Section 2923.55(b)(2) requires “[a] mortgage servicer [to]  
2 contact the borrower in person or by telephone in order to assess the borrower’s financial situation  
3 and explore options for the borrower to avoid foreclosure.” Section 2924.17, on the other hand,  
4 requires a declaration filed by or on behalf of a mortgage servicer in connection with a foreclosure  
5 to be “accurate and complete and supported by competent and reliable evidence,” and requires the  
6 mortgage servicer to “ensure that it has reviewed competent and reliable evidence to substantiate  
7 the borrower’s default and the right to foreclose, including the borrower’s loan status and loan  
8 information.”

9 This difference matters because in Exhibit A to the Notice of Default, CMC’s representative  
10 declared that CMC “was unable to make contact with the Borrower” but that CMC sent a first-  
11 class letter and a letter via certified mail to the Trust regarding the default and foreclosure  
12 alternatives and also attempted to contact the Trust by telephone at least 3 times at 3 different  
13 hours on 3 different days at the primary telephone number on file. (RJN, Ex. 4, ECF No. 56-1 at  
14 31.) Ms. Green alleges that CMC did not do all of these things. So even if the communications  
15 between Ms. Green and CMC were sufficient to satisfy section 2923.55’s obligations (as the court  
16 found above), CMC still may not have done what its representative said it did in Exhibit A to the  
17 Notice of Default. If that is the case, then Exhibit A may not have been “accurate and complete  
18 and supported by competent and reliable evidence.” At this stage in the litigation, the discrepancy  
19 between CMC’s declaration (Exhibit A to the Notice of Default) and Ms. Green’s allegations is  
20 enough to state a plausible claim against CMC for violation of section 2924.17.

21 **6.5 RESPA**

22 In her fifth claim, Ms. Green alleges that the defendants violated regulations promulgated  
23 pursuant to RESPA, 12 U.S.C. § 2605, namely 12 C.F.R. § 1024.41(b)(2)(i) and 12 C.F.R. §  
24 1024.41(f)(2). (SAC, ECF No. 54, ¶¶ 97-104.)

25 The first regulation, 12 C.F.R. § 1024.41(b)(2)(i), provides:

26 If a servicer receives a loss mitigation application 45 days or more before a  
27 foreclosure sale, a servicer shall:

- 28 (A) Promptly upon receipt of a loss mitigation application, review the loss  
mitigation application to determine if the loss mitigation application is

complete; and

- 1  
2 (B) Notify the borrower in writing within 5 days (excluding legal public holidays,  
3 Saturdays, and Sundays) after receiving the loss mitigation application that the  
4 servicer acknowledges receipt of the loss mitigation application and that the  
5 servicer has determined that the loss mitigation application is either complete  
6 or incomplete. If a loss mitigation application is incomplete, the notice shall  
7 state the additional documents and information the borrower must submit to  
8 make the loss mitigation application complete and the applicable date pursuant  
9 to paragraph (b)(2)(ii) of this section. The notice to the borrower shall include  
10 a statement that the borrower should consider contacting servicers of any other  
11 mortgage loans secured by the same property to discuss available loss  
12 mitigation options.

13 Ms. Green alleges that the defendants violated this regulation in two ways. First, the  
14 defendants violated it because she submitted a complete loan modification application in  
15 January 2014, but CMC failed to acknowledge her application until June 2014. (SAC, ECF  
16 No. 54, ¶ 99.) Second, the defendants violated it because CMC failed to evaluate her for all  
17 available loss mitigation options and instead simply denied her application “erroneously.”  
18 (*Id.* ¶ 100.)

19 The second regulation, 12 C.F.R. § 1024.41(f)(2), provides:

20 (2) Application received before foreclosure referral. If a borrower submits a  
21 complete loss mitigation application . . . before a servicer has made the first notice  
22 or filing required by applicable law for any judicial or non-judicial foreclosure  
23 process, a servicer shall not make the first notice or filing required by applicable  
24 law for any judicial or non-judicial foreclosure process unless:

- 25 (i) The servicer has sent the borrower a notice pursuant to paragraph (c)(1)(ii)  
26 of this section that the borrower is not eligible for any loss mitigation option  
27 and the appeal process in paragraph (h) of this section is not applicable, the  
28 borrower has not requested an appeal within the applicable time period for  
requesting an appeal, or the borrower’s appeal has been denied;
- (ii) The borrower rejects all loss mitigation options offered by the servicer; or
- (iii) The borrower fails to perform under an agreement on a loss mitigation  
option.

Ms. Green alleges that the defendants violated this regulation because CMC “filed the Notice  
of Default in March 2014 without serving the notice” fulfilling all of the requirements of section  
1024.41(f)(2)(i). (SAC, ECF No. 54, ¶ 102.)

The defendants make several arguments with respect to this claim. First, they point out that the  
regulations Ms. Green cites apply only to loan servicers and do not apply to beneficiaries such as

1 Deutsche Bank. (Motion, ECF No. 55 at 25.) They are correct. *See Bennett v. Nationstar Mortg.*,  
2 No. CA 15-00165-KD-C, 2015 WL 5294321, at \*10 (S.D. Ala. Sept. 8, 2015) (dismissing claim  
3 against a defendant who was not a “servicer”). The regulations circumscribe the conduct of loan  
4 servicers only. Moreover, Ms. Green never alleges that Deutsche Bank acted as a loan servicer or  
5 committed any prohibited conduct; she alleges only that CMC committed prohibited conduct. She  
6 also failed to address this argument in her opposition. The court thus dismisses the claim with  
7 prejudice insofar as Ms. Green brings it against Deutsche Bank.

8 Next, the defendants argue that Ms. Green’s claim for violation of section 1024.41(b)(2)(i)  
9 fails because she cannot credibly allege that CMC never acknowledged her January 2014 loan  
10 modification application (her first one) when she also alleges that (1) CMC acknowledged  
11 receiving the “documents to be considered for a loan modification” and also acknowledged that  
12 Ms. Green’s application was “under review,” and (2) CMC subsequently denied her application on  
13 the basis that it had not received all of the documents it requested. (Motion, ECF No. 55 at 25  
14 (citing SAC, ECF No. 54, ¶ 46-48).) This particular argument is not persuasive. Section  
15 1024.41(b)(2)(i) does not simply require an acknowledgement; it requires that an acknowledgment  
16 containing specific things be sent within a certain time. That said, Ms. Green did allege that CMC  
17 acknowledged receiving her application in January 2014 but she never alleges when CMC sent  
18 that acknowledgement or that CMC’s acknowledgment did not include the required things. She  
19 also never addresses the defendants’ argument in her opposition. (*See Opposition*, ECF No. 59 at  
20 20 (responding to the argument at page 17 of the defendants’ motion, not the argument at page 25  
21 of the defendants’ motion).) Without more specific allegations about CMC’s acknowledgement,  
22 she does not plausibly allege a claim for violation of section 1024.41(b)(2)(i). It is not clear  
23 whether Ms. Green can or cannot sufficiently allege that CMC’s acknowledgment failed to comply  
24 with section 1024.41(b)(2)(i). Accordingly, the court dismisses her section 1024.41(b)(2)(i) claim  
25 without prejudice.

26 With respect to Ms. Green’s claim for violation of section 1024.41(f)(2), the defendants point  
27 out that this section applies only if a borrower submits a “complete” loan modification application  
28 and argue that Ms. Green does not allege that she submitted one. (Motion, ECF No. 55 at 25.) But

1 Ms. Green does allege that she submitted a complete loan modification application in early  
2 January 2014. (*See* SAC, ECF No. 54, ¶¶ 46-48.) That CMC allegedly denied her application on the  
3 ground that it was not complete does not require dismissal of the claim. Whether her application  
4 was complete is a question of fact to be resolved at summary judgment, not at the motion-to-  
5 dismiss stage.

6 The defendants also argue that Ms. Green alleges that CMC sent her a notice on January 24,  
7 2014, which stated that she was ineligible to receive a loan modification because the loan  
8 modification application packet was incomplete. (Motion, ECF No. 55 at 25 (citing SAC, ECF No.  
9 54, ¶¶ 48.) They say this undermines her claim. In Paragraph 48 of her Second Amended  
10 Complaint, Ms. Green alleges that the letter informed her that she was ineligible to receive a loan  
11 modification because her application was incomplete. (*See* SAC, ECF No. 54, ¶¶ 48.) She did not  
12 allege that the letter informed her that she was ineligible for *any* loss mitigation option, which is  
13 what the regulation requires. The court does not find that her allegation at Paragraph 48  
14 undermines this claim. Accordingly, the court concludes that Ms. Green’s claim against CMC for  
15 violation of section 1024.41(f)(2) survives.

16 **6.6 ECOA – 15 U.S.C. § 1691(d)(1)**

17 In her sixth claim, Ms. Green alleges that the defendants violated ECOA. (SAC, ECF No. 54,  
18 ¶¶ 105-09.) 15 U.S.C. § 1691(d)(1), the subsection she alleges the defendants violated, states:

19 “Within thirty days (or such longer reasonable time as specified in regulations of the Bureau for  
20 any class of credit transaction) after receipt of a completed application for credit, a creditor shall  
21 notify the applicant of its action on the application.” Ms. Green alleges that the defendants  
22 violated section 1691(d)(1) because she “submitted a complete application for credit, i.e., a  
23 complete loan modification application,” in January 2014, but CMC did not inform her of its  
24 decision on this application until July 2014, more than 30 days after she submitted it. (SAC, ECF  
25 No. 54, ¶¶ 106-07.)

26 The defendants correctly point out that ECOA applies only to creditors and note that Ms.  
27 Green does not allege that Deutsche Bank was a creditor. (Motion, ECF No. 55 at 27.) They also  
28 point out that Ms. Green does not allege that Deutsche Bank took any action with respect to this

1 claim. (*Id.*) The court thus dismisses the claim with prejudice insofar as Ms. Green brings it  
2 against Deutsche Bank.

3 The defendants next argue that CMC was not obligated to notify Ms. Green of its action on her  
4 loan modification application within 30 days because an “adverse action for purposes of the  
5 ECOA does not include ‘refusal to extend additional credit under an existing credit arrangement  
6 where the applicant is delinquent or otherwise in default,’” and in this case the Trust was in  
7 default. (Motion, ECF No. 55 at 26-27 (quoting 15 U.S.C. 1691(d)(6)).) They cite one case,  
8 *Owens v. Bank of America, N.A.*, No. 11-cv-458-YGR, 2013 WL 1820769 (N.D. Cal. Apr. 30,  
9 2013), where the court dismissed a plaintiff’s ECOA claim because the plaintiffs were in default  
10 on their mortgage. *See id.* at \*5. The court is not persuaded by the defendants’ argument. First,  
11 *Owens* involved a claim under section 1691(d)(2), which requires a creditor to do certain things  
12 when it takes an “adverse action” with respect to an applicant’s application. Section 1691(d)(1),  
13 however, requires a creditor to notify the applicant about its “action” on an application. Ms. Green  
14 brings a claim for violation of section 1691(d)(1), not section 1691(d)(2). At least one court has  
15 recognized this distinction and read section 1691(d) as follows:

16 Under Section 1691, an “adverse action” triggers a creditor’s obligation to  
17 provide a statement of reasons, not its obligation to provide a determination within  
18 thirty days, which is triggered by the completion of the application for credit.  
19 *Compare* 11 U.S.C. § 1691(d)(1) *with* § 1691(d)(2). The phrase “adverse action”  
20 does not appear in Section 1691(d)(1). Accordingly, a plain reading of the statute  
21 confirms that creditors are required to make a determination on a completed  
22 application within thirty days regardless of the status of the applicant, but need not  
send applicants in default a statement of reasons when their application is rejected.  
*See id.* at § 1691(d)(6). Neither a plain reading of the statute nor public policy  
supports a rule requiring a creditor to promptly resolve applications of non-  
defaulting applicants while permitting creditors to leave those applicants in default  
twisting in the wind indefinitely.

23 *MacDonald v. Wells Fargo Bank, N.A.*, No. 14-cv-04970-HSG, 2015 WL 1886000, at \*3 (N.D.  
24 Cal. Apr. 24, 2015). The court finds *MacDonald*’s reading of the statute to be the correct one. The  
25 court rejects the defendants’ statutory interpretation argument.

26 In their reply, the defendants argue for the first time that Ms. Green also has not alleged the  
27 basic elements of an ECOA violation. (*See* Reply, ECF No. 60 at 10.) They cite the four elements  
28 outlined by the district court in *Hafiz v. Greenpoint Mortg. Funding, Inc.*, 652 F. Supp. 2d 1039

1 (N.D. Cal. 2009). The court there stated that “to determine whether a plaintiff properly has  
2 pleaded a claim of discrimination under the ECOA,” a plaintiff “must allege that: (1) she is a  
3 member of a protected class; (2) she applied for credit with defendants; (3) she qualified for credit;  
4 and (4) she was denied credit despite being qualified.” *Id.* at 1045. The defendants’ argument does  
5 not distinguish between violations of ECOA’s discrimination provisions and violations of ECOA’s  
6 procedural requirements. *Compare* 15 U.S.C. §§ 1691(a)-(c) *with* 15 U.S.C. §§ 1691(d)-(e); *see*  
7 *also Vasquez v. Bank of Am., N.A.*, No. 13-cv-02902-JST, 2013 WL 6001924, at \*11 (N.D. Cal.  
8 Nov. 12, 2013) (discussing this distinction). This is important because, as one court in this district  
9 has persuasively noted, “*Hafiz* did not involve the procedural notice requirements of the ECOA,”  
10 and “ECOA’s procedural requirements apply regardless of whether the *Hafiz* prerequisites have  
11 been satisfied.” *Vasquez*, 2013 WL 6001924, at \*12. Ms. Green’s ECOA claim survives.

### 12 **6.7 Negligent Misrepresentation and Fraud**

13 In her seventh and eight claims, Ms. Green alleges claims against the defendants for negligent  
14 misrepresentation and fraud. (Motion, ECF No. 54, ¶¶ 110-19.)

15 To state a claim for negligent misrepresentation, a plaintiff must allege the following: “1) a  
16 representation as to a material fact; 2) that the representation is untrue; 3) that the defendant made  
17 the representation without a reasonable ground for believing it true; 4) an intent to induce reliance;  
18 5) justifiable reliance by the plaintiff who does not know that the representation is false; and, 6)  
19 damage.” *Bear Stearns & Co. v. Daisy Sys. Corp.*, 97 F.3d 1171, 1180 (9th Cir. 1996) (citing  
20 *Masters v. San Bernardino County Employees Retirement Ass’n*, 32 Cal. App. 4th 30, 40 n.6  
21 (1995)). As with intentional misrepresentation, the existence of a duty of care is necessary to  
22 support a negligent misrepresentation claim. *Alfus v. Pyramid Tech. Corp.*, 745 F. Supp. 1511,  
23 1523 (N.D. Cal. 1990) (“Liability for negligent misrepresentation may attach only where plaintiff  
24 establishes that defendants breached a duty owed to him”); *Garcia v. Superior Court*, 50 Cal. 3d  
25 728, 735 (1990).

26 “A cause of action for fraud [under California law] requires the plaintiff to prove (a) a  
27 knowingly false misrepresentation by the defendant, (b) made with the intent to deceive or to  
28 induce reliance by the plaintiff, (c) justifiable reliance by the plaintiff, and (d) resulting damages.”

1 *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192 (9th Cir. 2001) (quoting *Wilkins v. Nat’l*  
2 *Broadcasting Co., Inc.*, 71 Cal. App. 4th 1066, 1082 (1999)); *see also* Cal. Civ. Code § 1572.

3 In addition, the court applies Federal Rule of Civil Procedure 9(b)’s heightened pleading  
4 standard to claims for fraud and negligent misrepresentation. *See Kelley v. Rambus, Inc.*, 384 Fed.  
5 App’x 570, 573 (9th Cir. June 16, 2010) (Kelley’s [California] state law claims for common law  
6 fraud and negligent misrepresentation fail to meet the heightened pleading standards of Rule 9(b)  
7 of the Federal Rules of Civil Procedure.”); *Errico v. Pac. Capital Bank, N.A.*, 753 F. Supp. 2d  
8 1034, 1049 (N.D. Cal. 2010) (“[N]egligent misrepresentation ‘sounds in fraud’ and is subject to  
9 Rule 9(b)’s heightened pleading standard . . . .”); *Neilson v. Union Bank of Cal.*, N.A., 290  
10 F.Supp.2d 1101, 1141 (C.D. Cal. 2003); *but see Petersen v. Allstate Indem. Co.*, 2012 U.S. Dist.  
11 LEXIS 32968, \*8-9, 2012 WL 833034 (C.D. Cal. Mar. 12, 2012) (finding that Rule 9(b) does not  
12 apply to negligent misrepresentation claims; criticizing *Neilson* ). Under Rule 9(b), a party  
13 alleging fraud or intentional or negligent misrepresentation must satisfy a heightened pleading  
14 standard by stating with particularity the circumstances constituting fraud. Specifically,  
15 “[a]llegations of fraud must be accompanied by ‘the who, what, when, where, and how’ of the  
16 misconduct charged.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)  
17 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). Further, “a plaintiff must set forth  
18 more than the neutral facts necessary to identify the transaction. The plaintiff must set forth what  
19 is false or misleading about a statement, and why it is false.” *Id.* (quoting *Decker v. GlenFed, Inc.*,  
20 42 F.3d 1541, 1548 (9th Cir. 1994) (superceded by statute on other grounds)). A plaintiff must  
21 also differentiate his allegations when suing more than one defendant, especially in the context of  
22 fraud claims. *See Destfino v. Reiswig*, 630 F.3d 952, 958 (9th Cir. 2011).

23 The basis of both claims is her allegation that CMC “repeatedly told [her] that [it] had not  
24 received all necessary documents to be considered for a loan modification when [it actually] had.”  
25 (SAC, ECF No. 54, ¶¶ 111, 115.) She also alleges that she relied upon CMC’s representations “by  
26 accruing substantial late charges, failing to take other actions to save her home such as obtaining a  
27 loan with another lender or finding a friend/relative that [could have] provide[d] financial  
28 assistance, and not taking legal action earlier, even though [she had] numerous viable claims



1 against” CMC. (*Id.* ¶¶ 112, 118.) She further alleges that she has been “damaged through damaged  
2 credit, loss of title to her home, unwarranted late fees, and other charges by [CMC] and having to  
3 pay legal costs and expenses.” (*Id.* ¶¶ 112, 118.) She also has “suffered emotional distress for fear  
4 of losing [her] home.” (*Id.* ¶¶ 112, 118.) In addition to these allegations, Ms. Green also alleges  
5 with respect to her negligent misrepresentation claim that CMC “denied [her] for a loan  
6 modification on the basis of insufficient income by grossly miscalculating [her] gross income.”  
7 (*Id.* ¶ 111.)

8 The defendants first argue that Deutsche Bank must be dismissed from these claims because  
9 Ms. Green makes no specific allegations against it. (Motion, ECF No. 55 at 29, 30.) Indeed, Ms.  
10 Green’s only mention of Deutsche Bank in this claim is when she alleges, without elaboration, that  
11 CMC is Deutsche Bank’s agent. (SAC, ECF No. 54, ¶¶ 111, 115.) The rest of the claims simply  
12 describes CMC’s conduct. (*See id.* ¶¶ 111-13, 115-18.) Ms. Green does not respond to this  
13 argument in her opposition. (*See* Opposition, ECF No. 59 at 21-24.) The court thus dismisses the  
14 negligent misrepresentation and fraud claims with prejudice insofar as Ms. Green brings them  
15 against Deutsche Bank.

16 Next, the defendants argue that Ms. Green’s allegations are not particular enough to meet Rule  
17 9(b)’s heightened pleading requirement. (Motion, ECF No. 55 at 27, 30.) The court disagrees. She  
18 identifies who made the misrepresentations: CMC. Her claims are largely based on letters she  
19 received from CMC as an entity, not on conversations she had with particular individuals, so this  
20 is sufficient. She identifies the misrepresentation: CMC telling her that her first loan modification  
21 application was incomplete even though, as she alleges, it was complete, and by falsely using a  
22 miscalculated gross income. She also identifies when the misrepresentation was made: when CMC  
23 denied her loan modification applications. In short, Ms. Green has stated with particularity the  
24 circumstances constituting the alleged negligent misrepresentation and fraud.

25 The defendants also argue that Ms. Green’s negligent misrepresentation claims fails because  
26 she alleges no facts to suggest that they owed a duty to her. (Motion, ECF No. 55 at 28-29.) The  
27 court has faced this issue before and concluded that whether a lender has a duty of care requires  
28 the balancing of the non-exhaustive factors listed in *Nymark v. Heart Fed. Savings & Loan Ass’n*,

1 231 Cal. App. 3d 1089, 1098 (1991). *See Rowland v. JP Morgan Chase Bank*, No. C 14-00036  
2 LB, 2014 WL 992005, at \*8-9 (N.D. Cal. Mar. 12, 2014); *Rijhwani v. Wells Fargo Home*  
3 *Mortgage, Inc.*, No. C 13-05881 LB, 2014 WL 890016, at \*14-17 (N.D. Cal. Mar. 3, 2014). As the  
4 court has explained:

5 Under California law, as Defendants point out, lenders generally do not owe  
6 borrowers a duty of care unless their involvement in the loan transaction exceeds  
7 the scope of their “conventional role as a mere lender of money.” *See Nymark v.*  
8 *Heart Fed. Savings & Loan Ass’n*, 231 Cal. App. 3d 1089, 1095-96 (1991)  
(citations omitted). To determine “whether a financial institution owes a duty of  
care to a borrower-client,” courts must balance the following non-exhaustive  
factors:

9 [1] the extent to which the transaction was intended to affect the  
10 plaintiff, [2] the foreseeability of harm to him, [3] the degree of  
certainty that the plaintiff suffered injury, [4] the closeness of the  
11 connection between the defendant's conduct and the injury suffered,  
[5] the moral blame attached to the defendant's conduct, and [6] the  
12 policy of preventing future harm.

13 *Id.* at 1098 (quotation marks and citations omitted).

14 *Rowland*, 2014 WL 992005, at \*8. In *Rijhwani*, the court found that *Garcia v. Ocwen Loan*  
15 *Servicing, LLC*, No. C 10–0290 PVT, 2010 WL 1881098 (N.D. Cal. May 10, 2010) (finding that a  
16 servicer had a duty of care to a borrower under the *Nymark* factors), is persuasive and instructive.

17 As the court explained, in *Garcia*:

18 the defendant had [at least twice] cancelled the trustee’s sale to allow time for  
19 processing the plaintiff’s application. The defendant asked the plaintiff to submit  
various documents in connection with the loan modification request. The plaintiff  
20 did so, but upon receiving the documents, the defendant routed them to the wrong  
department. Later, the plaintiff’s agent received a recorded message indicating  
21 documents were missing, but the message did not identify which ones were  
missing. For the next several weeks, the plaintiff’s agent repeatedly tried to contact  
22 the defendant to determine which documents were missing, but he was unable to  
speak with any of the defendant's employees. The plaintiff’s agent was finally able  
23 to actually speak with one of the defendant’s employees, but it was too late. The  
employee informed the plaintiff’s agent that the home had been sold at a trustee’s  
24 sale the day before.

25 The court concluded that at least five of the six factors cited above weighed in  
26 favor of finding that the defendant owed the plaintiff a duty of care in processing  
the plaintiff’s loan modification application. [*Garcia*, 2010 WL 1881098,] at \*3-4.

27 *Rijhwani*, 2014 WL 890016, at \*16-17.

28 After weighing the *Nymark* factors, the court finds that Ms. Green’s allegations are sufficient,

1 at least at this stage of the litigation, to support a finding that the defendants owed her a duty of  
2 care. The potential loan modifications were intended to affect her (as trustee of the Trust); it was  
3 foreseeable that improperly denying her loan modification applications would harm her; the  
4 Property was foreclosed upon so she suffered harm; the foreclosure likely would not have  
5 occurred had CMC not improperly denied her applications; if CMC did in fact improperly deny  
6 her applications, it is morally blameworthy; and requiring a duty in this context would help to  
7 prevent future harm. This is sufficient at this time. The defendants may revisit this issue on  
8 summary judgment after discovery is taken.

9 Lastly, the defendants argue that Ms. Green has not alleged justifiable reliance on CMC's  
10 purported misrepresentations. (Motion, ECF No. 55 at 29, 31.) The court disagrees. Ms. Green  
11 alleges that she relied upon CMC's representations "by accruing substantial late charges, failing to  
12 take other actions to save her home such as obtaining a loan with another lender or finding a  
13 friend/relative that [could have] provide[d] financial assistance, and not taking legal action earlier,  
14 even though [she had] numerous viable claims against" CMC. (SAC, ECF No. 54, ¶¶ 112, 118.).  
15 The defendants say that this is not sufficient as a matter of law, but the opinion it cites, which was  
16 dealing with promissory estoppel and not negligent misrepresentation or fraud, says only that  
17 "[m]erely submitting a modification application or making payments to the beneficiary or servicer,  
18 however, is insufficient to establish the required detrimental reliance, because plaintiff was already  
19 legally obligated to make payments under the loan." *Ortiz v. America's Servicing, Co.*, No. EDCV  
20 12-191 CAS (SPx), 2012 WL 2160953, at \*7 (C.D. Cal. June 11, 2012). This court, on the other  
21 hand, has denied motions to dismiss on this ground where a plaintiff has alleged reliance more  
22 specifically, as Ms. Green has, in support of fraud and misrepresentation claims. *See Cruz v.*  
23 *Aurora Loan Servs., LLC*, No. 3:15-cv-00585-LB, 2015 WL 4915452, at \*6 (Aug. 17, 2015);  
24 *Khan v. ReconTrust Co.*, 81 F. Supp. 3d 867, 875 (N.D. Cal. 2015). The court does so again. Ms.  
25 Green's negligent misrepresentation and fraud claims against CMC survive.

26 **6.8 Wrongful Foreclosure and Cancellation of Deed**

27 In her ninth and eleventh claims, Ms. Green brings equitable claims for wrongful foreclosure  
28 and cancellation of the Deed of Trust showing Deutsche Bank's purchase of the Property at the

1 Trustee’s Sale. (SAC, ECF No. 54, ¶¶ 120-24, 131-34.) The defendants make two arguments  
2 regarding these claims. First, they argue that the claims fail because Ms. Green has not alleged that  
3 she made a viable tender of the amount owed. (Motion, ECF No. 31, 32.) The court, however,  
4 already rejected the defendants’ tender argument. Second, the defendants say that these claims are  
5 derivative of Ms. Green’s other claims, and because those claims fail, so do these. (*Id.* at 31, 32.)  
6 But as the court ruled above, not all of Ms. Green’s other claims fail, so neither do these. They  
7 survive.

8 **6.9 Unfair Business Practices – Cal. Bus. & Prof. Code §§ 17200 et seq.**

9 Ms. Green’s tenth claim is for violation of the UCL. (SAC, ECF No. 54 ¶¶ 125-30.) The  
10 defendants argue only that this claim is derivative of Ms. Green’s other claims, and because those  
11 claims fail, so does this one. (Motion, ECF No. 55 at 31.) The court has ruled that not all of Ms.  
12 Green’s other claims fail, so neither does this one. It survives.

13 **6.10 Declaratory Relief**

14 Ms. Green’s twelfth claim is for declaratory relief. (SAC, ECF No. 54, ¶¶ 135-40.) The federal  
15 Declaratory Judgment Act applies in this action. *See Guccione v. JPMorgan Chase Bank, N.A.*,  
16 No. 3:14-cv-04587 LB, 2015 WL 1968114, at \*20-21 (N.D. Cal. May 1, 2015). The defendants  
17 argue only that this claim is derivative of Ms. Green’s other claims, and because those claims fail,  
18 so does this one. (Motion, ECF No. 55 at 32-33.) The court has ruled that not all of Ms. Green’s  
19 other claims fail. This claim survives.

20 **CONCLUSION**

21 The court grants in part and denies in the part the defendants’ motion.

22 The Trust and Ms. Green, in her individual capacity, are dismissed as plaintiffs to this action.  
23 Only Ms. Green, in her capacity as trustee of the Trust, remains as the plaintiff.

24 Ms. Green’s first and second claims are dismissed with prejudice against both CMC and  
25 Deutsche Bank. Her third, fourth, sixth, seventh, and eighth claims are dismissed with prejudice  
26 against Deutsche Bank, but they survive against CMC. Her fifth claim is dismissed with prejudice  
27 against Deutsche Bank, dismissed without prejudice against CMC insofar as it alleges a violation  
28 of 12 C.F.R. § 1024.41(b)(2)(i), and survives against CMC insofar as it is based on a violation of

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12 C.F.R. § 1024.41(f)(2). Her ninth, tenth, eleventh, and twelfth claims survive against both CMC and Deutsche Bank.

If Ms. Green choses to file a Third Amended Complaint to re-allege a claim against CMC for violation of 12 C.F.R. § 1024.41(b)(2)(i), she must do so within 14 days from the date of this order.

**IT IS SO ORDERED.**

Dated: December 1, 2015



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LAUREL BEELER  
United States Magistrate Judge