

United States District Court  
For the Northern District of California

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

VINCENTA MULATO,

Plaintiff,

v.

WMC MORTGAGE CORP.; LITTON LOAN  
SERVICING LP; JP MORGAN CHASE BANK,  
N.A.; CHASE HOME FINANCE LLP;  
CALIFORNIA COMBO MORTGAGE; DMW  
REALTY; ENRIQUE ALVAREZ; RESURGENT  
CAPITAL SERVICES; MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC.,

Defendants.

No. C 09-03443 CW

ORDER GRANTING  
DEFENDANTS JP MORGAN  
CHASE BANK, CHASE  
HOME FINANCE AND  
MORTGAGE ELECTRONIC  
REGISTRATION  
SYSTEMS, INC.'S  
MOTION TO DISMISS

Plaintiff Vincenta Mulato charges Defendants WMC Mortgage Corp., Litton Loan Servicing, JP Morgan Chase Bank, Chase Home Finance, California Combo Mortgage, DMW Realty, Enrique Alvarez, Resurgent Capital Services and Mortgage Electronic Registration Systems, Inc. (MERS) with violating federal and California statutory law and California common law in connection with two loans she obtained to purchase a residential property. JP Morgan Chase Bank and Chase Home Finance (collectively, Chase) and MERS move to dismiss Plaintiff's complaint. No other Defendant joined Chase and MERS' motion. Plaintiff opposes the motion. The motion was decided on the papers. Having considered all of the papers

1 submitted by the parties, the Court grants Chase and MERS' motion.

2 BACKGROUND

3 On or about September 6, 2006, Plaintiff closed escrow on a  
4 home in San Francisco purchased with loans apparently obtained from  
5 Defendant WMC. On September 6, WMC recorded two deeds of trust on  
6 the property with the San Francisco Recorder's Office. Chase and  
7 MERS' Request for Judicial Notice (RJN), Exs. 2-3.<sup>1</sup> The First Deed  
8 of Trust (First DOT), which secured Plaintiff's \$573,000 loan  
9 (First Loan), named WMC as lender, MERS as beneficiary and Westwood  
10 Associates as trustee. RJN Ex. 2. The Second Deed of Trust  
11 (Second DOT), which secured Plaintiff's \$143,000 loan (Second  
12 Loan), also named WMC as lender, MERS as beneficiary and Westwood  
13 Associates as trustee. RJN Ex. 3.

14 In mid-September, 2006, WMC transferred the servicing of  
15 Plaintiff's First Loan to Litton. Compl. Ex. 9. On December 1,  
16 2006, Litton transferred servicing of the loan to Chase. Compl.  
17 Ex. 11. In September, 2007, WMC transferred servicing of  
18 Plaintiff's Second Loan to Resurgent. Compl. Ex. 13.

19 Plaintiff defaulted on both loans. On or about August 18,  
20 2008, she received a letter stating that she was in default on her  
21 Second Loan. Compl. ¶ 63; Compl. Ex. 14. On November 7, 2008,  
22 NDEx West, LLC recorded a Notice of Default and Election to Sell

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24 <sup>1</sup> The Court grants Chase's request for judicial notice of the  
25 grant deed recorded on September 22, 2006; the deeds of trust  
26 recorded on September 22, 2006; the notice of default and election  
27 to sell under deed of trust recorded on November 12, 2008; the  
28 substitution of trustee recorded on December 8, 2008; the  
assignment of deed of trust recorded on December 12, 2008; and the  
notice of trustee's sale recorded on February 18, 2009 because they  
contain facts which are not subject to reasonable dispute. Fed. R.  
Evid. 201.

1 under the First DOT in the recorder's office. RJN Ex. 4.

2 On December 8, 2008, MERS recorded a Notice of an Assignment  
3 of Deed of Trust showing the rights under the First DOT were  
4 transferred to U.S. Bank. RJN Ex. 6. Contemporaneously, NDEx was  
5 substituted as the trustee on the First DOT. RJN Ex. 5. On  
6 February 18, 2009, NDEx recorded a Notice of Trustee's Sale,  
7 setting a non-judicial foreclosure sale for March 5, 2009. RJN  
8 Ex. 7.

9 Plaintiff filed her complaint in San Francisco Superior Court  
10 on March 4, 2009.<sup>2</sup> A substantial portion of the complaint contains  
11 general, vague allegations about "mortgage lending practices." See  
12 Compl. ¶¶ 12-47. Plaintiff's most specific allegations involve her  
13 interactions with WMC, California Combo/DMW Realty<sup>3</sup> and Mr.  
14 Alvarez. She alleges that during the loan origination process,  
15 these Defendants acted improperly by

16 failing to take into account Plaintiff['s] income,  
17 failing to analyze Plaintiff['s] DTI ratio, failing to  
18 provide Plaintiff[] with adequate documentation,  
19 disclosures, notices and other information concerning the  
20 terms of the loans, misleading Plaintiff[] about the  
21 potential for refinancing the loans, misleading  
22 Plaintiff[] about [her] ability to supplement [her]  
income with rental income from a home [she] owned but did  
not occupy, obfuscating the potential for payment shock  
arising from the inevitable interest rate increases on  
the loans, misleading Plaintiff[] about the underwriting

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23 <sup>2</sup> Plaintiff's counsel appears to have asserted similar claims  
24 and arguments in other cases. See, e.g., Coyotzi v. Countrywide  
25 Fin. Corp., 2009 WL 2985497 (E.D. Cal.); Naulty v. GreenPoint  
26 Mortg. Funding, Inc., 2009 WL 2870620 (N.D. Cal.); Onoh v.  
Citigroup, 2009 WL 2246207 (N.D. Cal.). In Coyotzi, the court  
dismissed the plaintiff's claims with prejudice on the basis that  
they were "incognizable or barred as a matter of law." 2009 WL  
2985497, at \*22.

27 <sup>3</sup> Plaintiff asserts that California Combo Mortgage and DMW  
28 Realty "are affiliated entities" and refers to them as California  
Combo/DMW throughout her complaint. Compl. ¶ 5.

1 basis of the loans by suggesting that the primary basis  
2 for approving the loans was the equity in the Trust  
3 Property and that [her] monthly income was irrelevant,  
4 and by failing to advise Plaintiff[] that they intended  
5 to immediately assign and/or re-sell and/or securitize  
6 the loans in the secondary mortgage market.

7 Compl. ¶ 55. Plaintiff further claims that "due, in part, to her  
8 lack of education and the fact that she did not speak English," she  
9 did not understand her loan obligations and relied on Mr. Alvarez's  
10 assurances that she could "promptly refinance her loan at a more  
11 affordable rate and under better terms." Compl. ¶ 61. Plaintiff,  
12 however, does not identify the specific roles played by WMC,  
13 California Combo/DMW and Mr. Alvarez.

14 The complaint alleges the following causes of action:

15 (1) Negligence/Negligence Per Se; (2) Breach of Contract and Breach  
16 of the Implied Covenant of Good Faith and Fair Dealing; (3) Breach  
17 of Fiduciary Duty; (4) Intentional Infliction of Emotional  
18 Distress; (5) Fraud; (6) Violations of Federal/State Lending Laws;  
19 (7) Deceptive Advertising and Other Unfair Business Practices;  
20 (8) Civil RICO; (9) Injunctive Relief; (10) Declaratory Relief;  
21 (11) Rescission; (12) Quiet Title; (13) Accounting; and (14) "For  
22 Punitive Damages."

23 Chase and MERS removed the action to this Court on July 27,  
24 2009 and filed the current motion on August 3. Resurgent filed an  
25 answer to Plaintiff's complaint on September 2, but did not join  
26 Chase and MERS' motion. The Court's records do not contain proofs  
27 of service for WMC, Litton, California Combo/DMW and Mr. Alvarez.  
28 These Defendants did not join Chase and MERS' motion, nor have they  
filed responsive pleadings.

LEGAL STANDARD

1  
2 A complaint must contain a "short and plain statement of the  
3 claim showing that the pleader is entitled to relief." Fed. R.  
4 Civ. P. 8(a). When considering a motion to dismiss under Rule  
5 12(b)(6) for failure to state a claim, dismissal is appropriate  
6 only when the complaint does not give the defendant fair notice of  
7 a legally cognizable claim and the grounds on which it rests.  
8 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In  
9 considering whether the complaint is sufficient to state a claim,  
10 the court will take all material allegations as true and construe  
11 them in the light most favorable to the plaintiff. NL Indus., Inc.  
12 v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this  
13 principle is inapplicable to legal conclusions; "threadbare  
14 recitals of the elements of a cause of action, supported by mere  
15 conclusory statements," are not taken as true. Ashcroft v. Iqbal,  
16 \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550  
17 U.S. at 555).

18 Although the court is generally confined to consideration of  
19 the allegations in the pleadings, when the complaint is accompanied  
20 by attached documents, such documents are deemed part of the  
21 complaint and may be considered in evaluating the merits of a Rule  
22 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d 1265,  
23 1267 (9th Cir. 1987).

DISCUSSION

24  
25 I. First Cause of Action: Negligence/Negligence Per Se

26 A. Negligence

27 Plaintiff alleges that Chase owed her "a general duty of  
28 care . . . , particularly concerning [its] duty to properly perform

1 due diligence as to the loans and related transactional issues"  
2 described in the complaint. Compl. ¶ 79. Chase asserts that it did  
3 not have a relationship with Plaintiff that would impose a duty of  
4 care.

5 A cause of action for negligence must allege (1) the  
6 defendant's legal duty of care to the plaintiff; (2) the  
7 defendant's breach of duty; (3) injury to the plaintiff as a result  
8 of the breach; and (4) damage to the plaintiff. Hoyem v. Manhattan  
9 Beach City Sch. Dist., 22 Cal. 3d 508, 513 (1978). "The legal duty  
10 of care may be of two general types: (a) the duty of a person to  
11 use ordinary care in activities from which harm might reasonably be  
12 anticipated, or (b) an affirmative duty where the person occupies a  
13 particular relationship to others." McGettigan v. Bay Area Rapid  
14 Transit Dist., 57 Cal. App. 4th 1011, 1016-17 (1997).

15 "[A]s a general rule, a financial institution owes no duty of  
16 care to a borrower when the institution's involvement in the loan  
17 transaction does not exceed the scope of its conventional role as a  
18 mere lender of money." Nymark v. Heart of Fed. Savings & Loan  
19 Assn., 231 Cal. App. 3d 1089, 1095 (1991); see also Kinner v. World  
20 Savings & Loan Assn., 57 Cal. App. 3d 724, 732 (1976) (holding no  
21 duty of care owed by lender to borrower to ensure adequacy of  
22 construction loan); Wagner v. Benson, 101 Cal. App. 3d 27, 35  
23 (1980) (finding no duty owed by lender to borrower where lender is  
24 not involved extensively in borrower's business). Courts have  
25 applied this rule to loan servicers. See, e.g., Hendrickson v.  
26 Popular Mortgage Servicing, Inc., 2009 WL 1455491, \*7 (N.D. Cal.);  
27 Marks v. Ocwen Loan Servicing, 2008 WL 344210, \*6 (N.D. Cal.).

28 Plaintiff has not alleged that Chase's involvement in the

1 loan transaction exceeded the scope of its conventional role as a  
2 loan servicer. Accordingly, Plaintiff's claim for negligence is  
3 dismissed with leave to amend because she fails to show that Chase  
4 owed her a duty of care.

5 B. Negligence Per Se

6 Plaintiff also alleges a cause of action for "negligence per  
7 se" against Chase. "Negligence per se," however, is not a cause of  
8 action, but rather an evidentiary presumption that a party failed  
9 to exercise due care if

10 (1) He violated a statute, ordinance, or  
11 regulation of a public entity;

12 (2) The violation proximately caused death or  
13 injury to person or property;

14 (3) The death or injury resulted from an  
15 occurrence of the nature which the statute,  
16 ordinance, or regulation was designed to  
17 prevent; and

18 (4) The person suffering the death or the  
19 injury to his person or property was one of the  
20 class of persons for whose protection the  
21 statute, ordinance, or regulation was adopted.

22 Cal. Evid. Code § 669. Plaintiff alleges that such a presumption  
23 is warranted because Chase violated California Civil Code Section  
24 1916.7, the Truth-in-Lending Act (TILA), the Home Owner Equity  
25 Protection Act (HOEPA) and the Real Estate Settlement Procedures  
26 Act (RESPA) and its related regulations. The complaint, however,  
27 does not plead facts or attach documents showing how Chase's  
28 conduct violated these statutes, nor any particular section of any  
of the statutes. Thus, Plaintiff cannot avail herself of a  
presumption of negligence per se and this claim is dismissed with  
leave to amend.

1 II. Second Cause of Action: Breach of Contract and Breach of the  
2 Implied Covenant of Good Faith and Fair Dealing

3 To assert a cause of action for breach of contract, a  
4 plaintiff must plead: (1) existence of a contract; (2) the  
5 plaintiff's performance or excuse for non-performance; (3) the  
6 defendant's breach; and (4) damages to the plaintiff as a result of  
7 the breach. Armstrong Petrol. Corp. v. Tri-Valley Oil & Gas Co.,  
8 116 Cal. App. 4th 1375, 1391 n.6 (2004).

9 To assert a cause of action for breach of the implied  
10 covenant of good faith and fair dealing, a plaintiff must also  
11 plead the existence of a contractual relationship because "the  
12 covenant is an implied term in the contract." Smith v. City &  
13 County of San Francisco, 225 Cal. App. 3d 38, 49 (1990). "The  
14 implied covenant of good faith and fair dealing is limited to  
15 assuring compliance with the express terms of the contract, and  
16 cannot be extended to create obligations not contemplated by the  
17 contract." Pasadena Live, LLC v. City of Pasadena, 114 Cal. App.  
18 4th 1089, 1094 (2004).

19 Plaintiff fails to allege facts showing that she entered into  
20 a contract with Chase. For this reason, Plaintiff's breach of  
21 contract and breach of the implied covenant of good faith and fair  
22 dealing claims against Chase are dismissed with leave to amend.

23 III. Third Cause of Action: Breach of Fiduciary Duty

24 "A debt is not a trust and there is not a fiduciary relation  
25 between debtor and creditor as such. The same principle should  
26 apply with even greater clarity to the relationship between a bank  
27 and its loan customers." Price v. Wells Fargo Bank, 213 Cal. App.  
28 3d 465, 476 (1989) (internal quotations and citations omitted).



1 Generally, a financial institution does not owe a borrower a duty  
2 of care. Nymark, 213 Cal. App. 3d at 1095.

3 Nothing in the complaint sufficiently describes how the  
4 servicing of her loans by Chase would create a fiduciary  
5 relationship, and Price weighs against finding such relationships.  
6 Plaintiff's citations to Barry v. Raskov, 232 Cal. App 4th 447  
7 (1991), and Roberts v. Lomanto, 112 Cal. App. 4th 1553 (2003),  
8 offer no support. Barry held that "mortgage loan brokers" owe the  
9 lender and borrower a fiduciary duty of the "highest good faith  
10 toward his principal." 232 Cal. App. 4th at 455. Roberts held  
11 that real estate agents owe fiduciary duties. 112 Cal. App. 4th at  
12 1562-63. However, Plaintiff has not alleged facts showing that  
13 Chase employed a mortgage loan broker or a real estate agent who  
14 played a role in her loan transactions. Thus, her breach of  
15 fiduciary duty claim against Chase is dismissed with leave to  
16 amend.

17 IV. Fourth Cause of Action: Intentional Infliction of Emotional  
18 Distress

19 A claim of intentional infliction of emotional distress  
20 requires a plaintiff to plead: "(1) extreme and outrageous conduct  
21 by the defendant with the intention of causing, or reckless  
22 disregard of the probability of causing, emotional distress;  
23 (2) the plaintiff's suffering severe or extreme emotional distress;  
24 and (3) actual and proximate causation of the emotional distress by  
25 the defendant's outrageous conduct." Christensen v. Superior  
26 Court, 54 Cal. 3d 868, 903 (1991).

27 Plaintiff alleges that the actions of Chase, "driven by  
28 profit at the expense of increasingly highly leveraged and

1 vulnerable consumers who placed their faith and trust in the  
2 superior knowledge and position of Defendants," constituted extreme  
3 and outrageous conduct. Compl. ¶ 94. Plaintiff's complaint,  
4 however, fails to allege sufficient facts showing extreme and  
5 outrageous conduct. Thus, her intentional infliction of emotional  
6 distress claim against Chase is dismissed with leave to amend.

7 V. Fifth Cause of Action: Fraud

8 Under California law, "[t]he elements of fraud, which gives  
9 rise to the tort action for deceit, are (a) misrepresentation  
10 (false representation, concealment, or nondisclosure);  
11 (b) knowledge of falsity (or 'scienter'); (c) intent to defraud,  
12 i.e., to induce reliance; (d) justifiable reliance; and  
13 (e) resulting damage." Small v. Fritz Cos., Inc., 30 Cal. 4th 167,  
14 173 (2003) (quoting Lazar v. Superior Court, 12 Cal. 4th 631, 638  
15 (1996)).

16 "In all averments of fraud or mistake, the circumstances  
17 constituting fraud or mistake shall be stated with particularity."  
18 Fed. R. Civ. Proc. 9(b). The allegations must be "specific enough  
19 to give defendants notice of the particular misconduct which is  
20 alleged to constitute the fraud charged so that they can defend  
21 against the charge and not just deny that they have done anything  
22 wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985).  
23 Statements of the time, place and nature of the alleged fraudulent  
24 activities are sufficient, id. at 735, provided the plaintiff sets  
25 forth "what is false or misleading about a statement, and why it is  
26 false." In re GlenFed, Inc., Securities Litigation, 42 F.3d 1541,  
27 1548 (9th Cir. 1994). Scienter may be averred generally, simply by  
28 saying that it existed. Id. at 1547; see Fed. R. Civ. Proc.

1 9(b) ("Malice, intent, knowledge, and other condition of mind of a  
2 person may be averred generally"). Allegations of fraud based on  
3 information and belief usually do not satisfy the particularity  
4 requirements of Rule 9(b); however, as to matters peculiarly within  
5 the opposing party's knowledge, allegations based on information  
6 and belief may satisfy Rule 9(b) if they also state the facts upon  
7 which the belief is founded. Wool v. Tandem Computers, Inc., 818  
8 F.2d 1433, 1439 (9th Cir. 1987).

9 Plaintiff's general allegations do not meet the heightened  
10 pleading standard required by Rule 9(b). Plaintiff fails to plead  
11 sufficient facts describing the "time, place and nature" of any  
12 alleged fraudulent statements. Accordingly, Plaintiff's fraud  
13 claim against Chase must be dismissed with leave to amend because  
14 the claim provides insufficient notice.

15 VI. Sixth Cause of Action: Violations of Federal/State Lending  
16 Laws

17 Plaintiff alleges that Chase "violated Cal. Civ. Code Section  
18 1916.7, TILA, HOEPA, RESPA and the Regulations X and Z promulgated  
19 thereunder." Compl. ¶ 107.

20 A. Violation of California Civil Code § 1916.7

21 California Civil Code § 1916.7 provides, "An applicant for  
22 a[n adjustable-rate loan] . . . must be given, at the time he or  
23 she requests an application, a disclosure notice" explaining the  
24 nature of such loans. Plaintiff does not plead that she did not  
25 receive such a notice at the time she requested an application for  
26 her loans. The Court notes that the Adjustable Rate Rider attached  
27 to the First DOT, which contains information required by § 1916.7,  
28 bears Plaintiff's signature.

1 As Chase notes, it was not the lender on Plaintiff's loans  
2 and thus was not in a position to provide the notice § 1916.7  
3 requires. Because Plaintiff did not respond to Chase's argument,  
4 her § 1916.7 claims against Chase is dismissed with prejudice.

5 B. TILA Claims

6 Plaintiff alleges that Chase violated TILA by failing to make  
7 necessary disclosures and marketing loans without considering her  
8 ability to pay. Chase argues, among other things, that, as a loan  
9 servicer, it cannot be held liable under TILA. Plaintiff did not  
10 respond to Chase's argument.

11 Creditors and their assignees can be held civilly liable for  
12 violations of TILA. 15 U.S.C. § 1640(a). "A servicer of a  
13 consumer obligation arising from a consumer credit transaction  
14 shall not be treated as an assignee of such obligation for purposes  
15 of [liability under TILA] unless the servicer is or was the owner  
16 of the obligation." Id. § 1641.

17 Plaintiff does not allege that Chase currently owns or  
18 previously owned any of her mortgage notes. Indeed, documents  
19 attached to her complaint show that Chase only serviced her loans.  
20 As a loan servicer that has not been alleged to own Plaintiff's  
21 mortgage notes, Chase cannot be held liable for TILA violations.  
22 Because Plaintiff did not address this argument in her opposition,  
23 Plaintiff's TILA claim against Chase is dismissed with prejudice.

24 C. HOEPA Claims

25 Plaintiff alleges that Chase also violated her rights under  
26 HOEPA. HOEPA and TILA are part of the same statutory scheme. See,  
27 e.g., Rendon v. Countrywide Home Loans, 2009 WL 3126400, \*9 (E.D.  
28 Cal.) ("HOEPA is an amendment of TILA, and therefore is governed by

1 the same remedial scheme and statutes of limitations as TILA.")  
2 (citing Kemezis v. Matthew, 2008 WL 2468377, \*3 (E.D. Pa.)). Thus,  
3 for the reasons stated above, Plaintiff's HOEPA claim against Chase  
4 is also dismissed with prejudice.

5 Even if Chase were a proper party, it argues that Plaintiff's  
6 loans do not fall under HOEPA because the statute only applies to  
7 particular high-rate, high-fee loans. See 15 U.S.C. § 1602(aa).  
8 Plaintiff neither plead facts showing that HOEPA applied nor  
9 responded to Chase's argument. Her HOEPA claim against Chase is  
10 dismissed with prejudice for this reason as well.

11 D. RESPA Claims

12 Plaintiff claims that Chase violated RESPA by failing to  
13 provide her with adequate notice regarding the transfer of her  
14 loans' servicing rights<sup>4</sup> and by "paying yield spread premiums and  
15 other unlawful compensation to brokers and loan officers . . . ."  
16 Compl. ¶ 107. Her claims appear to arise under 12 U.S.C. §§ 2605  
17 and 2607. Chase argues that Plaintiff's claim must fail because  
18 she does not identify actual damages arising out of Defendants'  
19 alleged conduct. Plaintiff's opposition did not respond to this  
20 argument.

21 Congress enacted RESPA to insure consumers "are provided with  
22 greater and more timely information . . . and are protected from  
23 unnecessarily high settlement charges caused by certain abusive  
24 practices . . . ." 12 U.S.C. § 2601. To this end, RESPA requires  
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26 <sup>4</sup> Plaintiff vaguely asserts that her RESPA claim arises out of  
27 Defendants' failure to "provide all of the statutorily mandated  
28 disclosures." Because RESPA mandates notice of the transfer of  
loan servicing rights, the Court assumes that this is what she  
meant.

1 disclosures regarding the "assignment, sale, or transfer of loan  
2 servicing," id. § 2605, and prohibits the payment of "kickbacks and  
3 unearned fees," id. § 2607. For failure to receive proper  
4 disclosures, an individual may recover actual damages. Id.  
5 § 2605(f)(1)(A).

6 Chase is correct that Plaintiff failed to claim actual  
7 damages related to Defendants' alleged non-disclosure.  
8 Furthermore, documents attached to Plaintiff's complaint show that  
9 she received notice from WMC and Litton that the servicing of her  
10 loans were assigned to other parties. See Compl. Exs. 9, 11, 13.  
11 Because Plaintiff did not oppose the motion to dismiss her § 2605  
12 claim against Chase, it is dismissed with prejudice.

13 Chase, however, did not address Plaintiff's claim under  
14 § 2607 for improper compensation. This claim may be time-barred by  
15 RESPA's one-year statute of limitations. See 12 U.S.C. § 2614.<sup>5</sup>  
16 In her opposition, Plaintiff generally asserts that all limitations  
17 periods should be equitably tolled. Equitable tolling would  
18 suspend limitations periods "until the borrower discovers or had  
19 reasonable opportunity to discover the fraud or nondisclosures that  
20 form the basis of the [ ] action." King, 784 F.2d at 915. However,  
21 Plaintiff adequately alleges neither fraud nor insufficient  
22 disclosures. Accordingly, Plaintiff's § 2607 claim against Chase  
23 is dismissed with leave to amend to plead facts that would support  
24 equitable tolling.

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27 <sup>5</sup> Section 2614 provides a three-year limitations period for  
28 RESPA claims under § 2605 for failure to disclose the transfer of  
loan servicing rights.

1 VII. Seventh Cause of Action: Deceptive Advertising and Other  
2 Unfair Business Practices

3 A. Claim under California's Unfair Competition Law

4 California's Unfair Competition Law (UCL) prohibits any  
5 "unlawful, unfair or fraudulent business act or practice." Cal.  
6 Bus. & Prof. Code § 17200. The UCL incorporates other laws and  
7 treats violations of those laws as unlawful business practices  
8 independently actionable under state law. Chabner v. United Omaha  
9 Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000). Violation of  
10 almost any federal, state, or local law may serve as the basis for  
11 a UCL claim. Saunders v. Superior Ct., 27 Cal. App. 4th 832, 838-  
12 39 (1994). In addition, a business practice may be "unfair or  
13 fraudulent in violation of the UCL even if the practice does not  
14 violate any law." Olszewski v. Scripps Health, 30 Cal. 4th 798,  
15 827 (2003).

16 Plaintiff has not sufficiently plead facts showing that the  
17 actions of Chase constituted unfair business practices. As  
18 alleged, nothing about how Chase conducted its daily operations  
19 leads to a reasonable inference that it acted unlawfully. The  
20 Court accordingly dismisses this claim against Chase with leave to  
21 amend.

22 B. Claim under California's False Advertising Act

23 Section 17500 of the Business and Professions Code prohibits  
24 "any unlawful, unfair or fraudulent business act or practice and  
25 unfair, deceptive, untrue or misleading advertising." Plaintiff  
26 alleges that Chase "engaged in deceptive advertising." As above,  
27 Plaintiff only provides a legal conclusion to support her claim,  
28 which is insufficient. Thus, this claim against Chase is dismissed

1 with leave to amend.

2 C. Federal Deceptive Practices Act Claim

3 Although Chase moved to dismiss Plaintiff's claim under the  
4 Deceptive Practices Act (DPA), 15 U.S.C. §§ 45, et seq, neither  
5 party provided an argument about it. The Court nonetheless  
6 dismisses this claim with prejudice against Chase because the  
7 statute does not create a private right of action. See Naulty v.  
8 GreenPoint Mortgage Funding, Inc., 2009 WL 2870620, \*6 (N.D. Cal.)  
9 (citing Dreisbach v. Murphy, 658 F.2d 720, 730 (9th Cir. 1981)).

10 VIII. Eighth Cause of Action: Civil RICO

11 Plaintiff also asserts a civil claim for violations of the  
12 Racketeer Influenced and Corrupt Organizations Act (RICO). She  
13 makes a conclusory allegation that Chase, Litton, Resurgent, WMC,  
14 California Combo/DMW and Mr. Alvarez "are and have been engaged in  
15 a[n] unlawful Racketeering Enterprise." Compl. ¶ 113. Chase  
16 argues that Plaintiff fails to allege a RICO enterprise.

17 A civil RICO claim "requires (1) conduct (2) of an enterprise  
18 (3) through a pattern (4) of racketeering activity." Sedima,  
19 S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985). The alleged  
20 enterprise must be an independent legal entity or a "group of  
21 individuals associated in fact." 18 U.S.C. § 1961(4). The entity  
22 must be "associated together for a common purpose of engaging in a  
23 common course of conduct." United States v. Turkette, 452 U.S.  
24 576, 583 (1981).

25 Plaintiff's complaint fails to plead that Chase was engaged  
26 in an unlawful enterprise with the other Defendants. The complaint  
27 contains no allegations that Chase belonged to a separate legal  
28 entity or other association. Plaintiff alleges that there was a



1 "shifting association of persons and entities," but this vague,  
2 conclusory assertion is insufficient to state a RICO claim.  
3 Plaintiff repeats a similar argument in her opposition. The  
4 complaint also fails to allege a pattern of racketeering activity.  
5 Accordingly, Plaintiff's civil RICO claim is dismissed with leave  
6 to amend.

7 IX. Ninth Cause of Action: Injunctive Relief

8 Plaintiff's claim for injunctive relief against Chase is  
9 dismissed with prejudice because injunctive relief is a remedy, not  
10 a cause of action, and she fails to plead a claim upon which  
11 injunctive relief could be based.

12 X. Tenth Cause of Action: Declaratory Relief

13 Plaintiff states that she seeks "a judicial declaration  
14 of . . . who has true title to the Trust Property, and whether the  
15 Promissory Note Secured by the Deed of Trust on which the Trustee's  
16 Sale is based is void or voidable due to fraud or mistake." Compl.  
17 ¶ 126. She seeks declaratory relief against Chase and MERS.

18 When a claim for declaratory relief is removed to federal  
19 court, the court must conduct its analysis under the Declaratory  
20 Judgment Act (DJA). See Golden Eagle Ins. Co. v. Travelers Cos.,  
21 103 F.3d 750, 753 (9th Cir. 1996), overruled on other grounds by  
22 Gov't Employees Ins. v. Dizol, 133 F.3d 1220 (9th Cir. 1998); see  
23 also Gamble v. GMAC Mortgage Corp., 2009 WL 400359, \*2 (N.D. Cal.);  
24 Coyotzi, 2009 WL 400359 at \*18. The DJA permits a federal court to  
25 "declare the rights and other legal relations" of parties to "a  
26 case of actual controversy." 28 U.S.C. § 2201; see Wickland Oil  
27 Terminals v. Asarco, Inc., 792 F.2d 887, 893 (9th Cir. 1986). The  
28 "actual controversy" requirement of the Declaratory Judgment Act is

1 the same as the "case or controversy" requirement of Article III of  
2 the United States Constitution. American States Ins. Co. v.  
3 Kearns, 15 F.3d 142, 143 (9th Cir. 1993).

4 Like her other claims, Plaintiff's declaratory judgment claim  
5 fails because her complaint does not allege facts showing that  
6 there is an actual case or controversy between her and Defendants.  
7 The complaint merely contends that the "Trustee's Sale is invalid,  
8 and that the Promissory Note secured by the Deed of Trust on which  
9 it is based was procured by fraud and other unlawful means."  
10 Plaintiff, however, does not allege that the trustee sale initiated  
11 by NDEX is improper, and she does not allege her fraud claim with  
12 sufficient particularity. Accordingly, her declaratory judgment  
13 claim must be dismissed with leave to amend.

14 XI. Eleventh Cause of Action: Rescission

15 Plaintiff claims she is entitled to rescission pursuant to  
16 California Civil Code §§ 1689, 1691 and 1692. However, as those  
17 sections make clear, rescission is a remedy, not a cause of action.  
18 Moreover, as stated above, the complaint does not sufficiently  
19 allege grounds to support rescission, nor does it identify a  
20 contract to be rescinded. Because rescission is not a cause of  
21 action, the Court dismisses this claim with prejudice.

22 XII. Twelfth Cause of Action: Quiet Title

23 Plaintiff brings a quiet title action because she alleges  
24 that Chase and MERS, along with other Defendants, are "currently  
25 seeking to foreclose on said Property with a Trustee's Sale pending  
26 for March 5, 2009." Compl. ¶ 132. She further alleges that they  
27 "have no estate, lien or interest in the Trust Property . . . ."  
28 Id. ¶ 133. To file a claim for quiet title, a plaintiff's

1 complaint must contain: (1) a description of the property; (2) the  
2 title of the plaintiff and its basis; (3) the adverse claims to  
3 that title; (4) the date as of which the determination is sought;  
4 and (5) a prayer for relief of quiet title. Cal. Civ. Proc. Code  
5 § 761.020. As Chase and MERS point out, Plaintiff has not alleged  
6 facts showing that they currently have an interest being asserted  
7 in the Trustee's Sale. The Trustee's Sale is pursuant to the First  
8 DOT, which currently names U.S. Bank as beneficiary and NDEx West,  
9 LLC as trustee. RJN Exs. 6-7. Because Plaintiff's claim does not  
10 show that Chase and MERS have an adverse claim based on the First  
11 DOT, the quiet title action against them must be dismissed with  
12 leave to amend.

13 XIII. Thirteenth Cause of Action: Accounting

14 Plaintiff claims she is entitled to an accounting by Chase  
15 because "the true amount of money Plaintiff owes . . . is  
16 unknown . . . at this time." Compl. ¶ 136. An action for  
17 accounting, which is equitable in nature, "may be brought to  
18 require a defendant to account to a plaintiff for money or  
19 property, (1) where a fiduciary relationship exists between the  
20 parties, or (2) where, though no fiduciary relationship exists, the  
21 accounts are so complicated that an ordinary legal action demanding  
22 a fixed sum is impracticable." Witkin, California Procedure,  
23 Pleading § 775 (4th ed.); Civic Western Corp. v. Zila Industries,  
24 66 Cal. App. 3d 1, 14 (1977).

25 Plaintiff's use of an accounting action is unconventional  
26 because she seeks a determination of how much she owes Chase.  
27 Generally, an accounting claim determines the opposite: the amount  
28 owed to a plaintiff by a defendant. Even if an accounting cause of

1 action can be used for this purpose, Plaintiff's complaint fails to  
2 allege that a fiduciary relationship existed between her and Chase  
3 or that there are sufficiently complicated accounts that make a  
4 legal action impracticable. Thus, Plaintiff's accounting action  
5 against Chase must be dismissed with leave to amend.

6 XIV. Fourteenth Cause of Action: "For Punitive Damages"

7 Plaintiff's purported claim "For Punitive Damages" is  
8 dismissed with prejudice because the award of punitive damages is a  
9 remedy, not a freestanding claim. Even if Plaintiff intended to  
10 seek punitive damages based upon the claims discussed above,  
11 Plaintiff's request would also fail because her complaint does not  
12 support those claims.

13 CONCLUSION

14 For the foregoing reasons, Chase and MERS' motion to dismiss  
15 Plaintiff's claims is GRANTED. Below is a summary of the Court's  
16 holdings.

- 17 1. Plaintiff's negligence/negligence per se claim  
18 against Chase is dismissed with leave to amend  
19 because Plaintiff fails to plead facts showing that  
20 Chase owed her a duty of care or that it violated  
21 California Civil Code § 1916.7, TILA, HOEPA or  
22 RESPA and its related regulations.
- 23 2. Plaintiff's breach of contract and breach of the  
24 implied covenant of good faith and fair dealing  
25 claims against Chase are dismissed with leave to  
26 amend because she fails to plead facts showing that  
27 she entered into a contract with Chase.
- 28 3. Plaintiff's breach of fiduciary duty claim against

1 Chase is dismissed with leave to amend because she  
2 does not plead facts that establish a fiduciary  
3 relationship.

4 4. Plaintiff's intentional infliction of emotional  
5 distress claim against Chase is dismissed with  
6 leave to amend because she does not allege conduct  
7 to support this claim.

8 5. Plaintiff's fraud claim against Chase is dismissed  
9 with leave to amend because she does not meet the  
10 heightened pleading standards of Rule 9(b).

11 6. Plaintiff's claim under California Civil Code  
12 § 1916.7 against Chase is dismissed with prejudice  
13 because it was not the original lender on her  
14 loans. Plaintiff did not oppose Chase's argument.  
15 Plaintiff's TILA and HOEPA claims against Chase are  
16 dismissed because, as a loan servicer, it cannot be  
17 held liable under these statutes. Her HOEPA claim  
18 is also dismissed for the additional reason that  
19 she did not allege that HOEPA applies to her loans.  
20 Because Plaintiff did not oppose Chase's argument,  
21 the dismissals of her TILA and HOEPA claims are  
22 with prejudice. Plaintiff's RESPA claim under 12  
23 U.S.C. § 2605 against Chase is dismissed with  
24 prejudice because Plaintiff failed to respond to  
25 Chase's argument that she failed to plead actual  
26 damages. Her claim under 12 U.S.C. § 2607 is  
27 dismissed with leave to amend to plead facts  
28 showing that equitable tolling applies.

1 7. Plaintiff's claims against Chase under California's  
2 unfair competition and false advertising laws are  
3 dismissed with leave to amend because she fails to  
4 plead sufficient facts to state such claims. Her  
5 claim against Chase under the federal Deceptive  
6 Practices Act is dismissed with prejudice because  
7 the statute does not provide a private right of  
8 action.

9 8. Plaintiff's Civil RICO claim against Chase is  
10 dismissed with leave to amend because she does not  
11 allege an unlawful enterprise or a pattern of  
12 racketeering activity.

13 9. Plaintiff's claim for injunctive relief against  
14 Chase is dismissed with prejudice because  
15 injunctive relief is a remedy, not a cause of  
16 action, and she does not state a claim upon which  
17 it could be based.

18 10. Plaintiff's claims for declaratory relief against  
19 Chase and MERS are dismissed with leave to amend  
20 because she does not state a case or controversy  
21 upon which they could be based.

22 11. Plaintiff's claim against Chase for rescission is  
23 dismissed with prejudice because rescission is not  
24 a cause of action.

25 12. Plaintiff's quiet title action against Chase and  
26 MERS is dismissed with leave to amend because she  
27 does not allege that they have an adverse claim  
28 against her title based on the First DOT.

1 13. Plaintiff's accounting claim against Chase is  
2 dismissed with leave to amend because she does not  
3 plead the existence of a fiduciary duty.

4 14. Plaintiff's claim "For Punitive Damages" against  
5 Chase is dismissed with prejudice because it is  
6 not a freestanding cause of action.

7 Plaintiff may file an amended complaint curing these  
8 deficiencies within twenty days of the date of this order. As  
9 mentioned above, the Court's records do not show that Plaintiff  
10 served WMC, California Combo/DMW, Litton and Mr. Alvarez within 120  
11 days of filing her original complaint. See Fed. R. Civ. P. 4(m).  
12 She must therefore serve her amended complaint on all Defendants  
13 within ten days of filing it. Defendants may file a motion to  
14 dismiss noticed for hearing on Thursday, January 7, 2010 at 2:00  
15 p.m.

16 **Plaintiff's failure to comply with this Order will result in**  
17 **the dismissal of her case with prejudice.**

18 IT IS SO ORDERED.

19  
20 Dated: October 27, 2009



21 CLAUDIA WILKEN  
22 United States District Judge  
23  
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