

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

3  
 4 STEPHANI JACKSON,

No. C 13-05755 CW

5                                    Plaintiff,

ORDER GRANTING  
 MOTIONS TO DISMISS  
 (Docket Nos. 13  
 and 23) AND  
 GRANTING LEAVE TO  
 AMEND

6                                    v.

7 ATLANTIC SAVINGS OF AMERICA;  
 8 DEUTSCHE ALT-A SECURITIES  
 9 MORTGAGE LOAN TRUST SERIES 2007-  
 10 1; AMERICA'S SERVICING COMPANY;  
 11 MORTGAGE ELECTRONIC REGISTRATION  
 SYSTEM; CHICAGO TITLE COMPANY; DB  
 STRUCTURED PRODUCTS, INC.; ACE  
 SECURITIES CORP.; HSBC BANK USA;  
 WELLS FARGO BANK N.A.; and Does  
 1-10 Inclusive,

12                                    Defendants.

13  
 14 \_\_\_\_\_/  
 15                                    Plaintiff Stephani Jackson<sup>1</sup> asserts various mortgage-related  
 16 claims against Defendants Atlantic Savings of America, Deutsche  
 17 Alt-A Securities Mortgage Loan Trust Series 2007-1, America's  
 18 Servicing Company, Mortgage Electronic Registration Systems, Inc.

19 \_\_\_\_\_  
 20                                    <sup>1</sup> There is some confusion in Plaintiff's documents as to  
 21 whether Plaintiff should be referred to as "she" or "he." For  
 22 example, the complaint reads, "Plaintiff is entitled to an order  
 23 compelling defendants . . . to remove the cloud they have placed  
 24 upon his title." Compl. ¶ 66. However, Plaintiff's opposition  
 25 reads, "The present motion before the Court is not a motion for  
 26 Summary Judgment . . . and this Plaintiff is not held to proving  
 27 her claims to a prima facie burden." Pl.'s Opp. 6. On the same  
 28 page, the opposition reverts to "him": "Plaintiff's complaint is  
 only to be held to the requirement of pleading his claim in a  
 short and generalized manner[.]" In the 2007 Deed of Trust, of  
 which the Court takes judicial notice, Plaintiff is referred to as  
 an "unmarried woman." Defs.' Request For Judicial Notice (RFJN),  
 Ex. A. For consistency's sake, "she" and "her" will be used when  
 referring to Plaintiff.

1 (MERS), Chicago Title Company, DB Structured Products, Inc. (DB),  
2 ACE Securities Corp., HSBC Bank USA and Wells Fargo Bank, N.A.<sup>2</sup>

3 Defendants Wells Fargo (also sued as America's Servicing  
4 Company), HSBC (as trustee for Deutsche Alt-A Securities Mortgage  
5 Loan Trust Series 2007-1, Mortgage Pass-Through Certificates) and  
6 MERS (Wells Defendants) move to dismiss Plaintiff's complaint.  
7 Defendant DB filed a separate motion to dismiss.<sup>3</sup> Plaintiff has  
8 filed an opposition.<sup>4</sup> Each set of Defendants filed a reply. The  
9 Court took the motions under submission on the papers. Having  
10 considered the arguments presented by the parties, the Court  
11 GRANTS the motions and GRANTS Plaintiff leave to amend.

12  
13  
14  
15 <sup>2</sup> There is no indication that Plaintiff has served Defendants  
16 Atlantic Savings of America, Chicago Title Company, or ACE  
17 Securities Corp. Rule 4(m) requires service on a defendant within  
18 120 days after the complaint is filed. The claims against  
19 Atlantic Savings of America, Chicago Title Company, Deutsche Alt-A  
20 Securities Mortgage Loan Trust Series 2007-1, and ACE Securities  
21 Corp. are dismissed for the same reasons they are dismissed  
22 against the other Defendants. See Silverton v. U.S. Dep't of  
23 Treasury, 644 F.2d 1341, 1345 (9th Cir. 1981) ("A District Court  
24 may properly on its own motion dismiss an action as to defendants  
25 who have not moved to dismiss where such defendants are in a  
26 position similar to that of moving defendants or where claims  
27 against such defendants are integrally related."). If Plaintiff  
28 wants to include these Defendants in any amended complaint, she  
must move for an extension of time to serve them, stating good  
cause for not having done so timely.

<sup>3</sup> Deutsche Bank Securities, which is not named in the  
caption, joined DB in its motion to dismiss "out of caution"  
because Plaintiff served a summons directed at Deutsche Bank  
Securities Inc. All Deutsche entities will be referred to as DB.

<sup>4</sup> In her opposition, Plaintiff does not respond directly to  
any of Defendants' arguments. Instead, the opposition recites a  
summary of the complaint and boilerplate regarding the legal  
standard under Rule 12(b)(6).

1 BACKGROUND

2 I. Facts

3 The following summary is taken from the complaint and  
4 documents of which the Court takes judicial notice.<sup>5</sup>

5 In March 2007, Plaintiff obtained two loans funded by  
6 Atlantic Savings of America in the principal amount of \$556,000.  
7 This lawsuit concerns one of the loans, in the principal amount of  
8 \$444,800. Defs.' Request for Judicial Notice (RFJN), Ex. A. The  
9 loan was secured by a deed of trust encumbering the real property  
10 located at 462-464 38th Street, Oakland, California. RFJN, Ex. B.  
11 The beneficiary of the deed of trust was MERS and Chicago Title  
12 Company was appointed as the trustee. Id.

13 In December 2008, NDEx West, LLC, as agent for MERS, recorded  
14 a notice of default on Plaintiff's loan. RFJN, Ex. C.

15 In January 2009, MERS recorded an assignment of the deed of  
16 trust transferring its beneficial interests to HSBC, trustee for  
17 the holders of certificates issued by Deutsche Alt-A Securities  
18 Mortgage Loan Trust, Series 2007-1 (Deutsche Certificates). RFJN,  
19 Ex. D. Also in January 2009, NDEx West was recorded as replacing  
20 Chicago Title Company as the trustee. RFJN, Ex. E. A notice of  
21 trustee sale was recorded in March 2009, signed by "Randy  
22 Middleton."

23  
24 \_\_\_\_\_  
25 <sup>5</sup> Defendants ask, and there is no record of Plaintiff  
26 opposing, that the Court take judicial notice of various recorded  
27 documents associated with Plaintiff's purchase of the property,  
28 the loan secured by a deed of trust, and subsequent appointment of  
trustees and beneficiaries. RFJN, Exs. A-M. "[A] court may take  
judicial notice of 'matters of public record.'" Sami v. Wells  
Fargo Bank, 2012 WL 967051, at \*4 (N.D. Cal.) (citation omitted).  
The Court GRANTS this request.

1 In June 2009, Plaintiff entered into a loan modification  
2 agreement with Wells Fargo Bank. RFJN, Ex. G. In July 2009, the  
3 notice of default was rescinded by NDEX West. RFJN, Ex. F. The  
4 notice of rescission was signed by "Randy Middleton." RFJN, Ex.  
5 H. Plaintiff alleges "Randy Middleton" is a robo-signer. Compl.  
6 ¶ 8-9.

7 In July 2011, another assignment of the deed of trust was  
8 recorded, again documenting that MERS assigned its beneficial  
9 interests to HSBC. RFJN, Ex. H. Plaintiff alleges that the  
10 assignment of deed of trust either does not exist or was  
11 fabricated. Compl. ¶¶ 14, 46.<sup>6</sup>

12 In April 2012, NDEX West, as agent for Wells Fargo Bank,  
13 recorded a notice of default on Plaintiff's modified loan. RFJN,  
14 Ex. I. Also in April 2012, HSBC substituted NDEX West as trustee  
15 under the deed of trust. RFJN, Ex. J. Between July 2012 and  
16 November 2013, NDEX West recorded three notices of trustee's sale.  
17 RFJN, Exs. K, L & M. There is no record of an actual foreclosure  
18 sale.

19 Plaintiff does not allege any facts regarding DB or Deutsche  
20 Bank Securities, nor does she bring any claims against them.

21 Plaintiff's complaint asserts six causes of action against  
22 all Defendants: (1) declaratory relief to determine the status of  
23 Defendants' claims; (2) a request to set aside the deed of trust;

24 \_\_\_\_\_  
25 <sup>6</sup> Plaintiff is not clear as to which assignment of the deed  
26 of trust is invalid. Both the 2009 and 2011 assignments were from  
27 MERS to HSBC as trustee for the Deutsche Bank certificate holders.  
28 RFJN, Exs. D & H. It is not clear from any of the documents why  
two assignments were recorded conveying the same information two  
years apart.

1 (3) violation of California Business and Professions Codes section  
2 17200; (4) a request to void or cancel the trustee's deed upon  
3 sale; (5) an accounting; and (6) quiet title.<sup>7</sup>

4 In addition to the relief she requests for each of her  
5 claims, Plaintiff asks for "compensatory, special and general  
6 damages in excess of \$5,000,000, against each of the Defendants"  
7 as well as "punitive and exemplary damages in an amount to be  
8 determined by the Courts [sic] against all Defendants," costs of  
9 suit and attorney's fees. Compl. 14.

10 LEGAL STANDARD

11 A complaint must contain a "short and plain statement of the  
12 claim showing that the pleader is entitled to relief." Fed. R.  
13 Civ. P. 8(a). The plaintiff must proffer "enough facts to state a  
14 claim to relief that is plausible on its face." Ashcroft v.  
15 Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v.  
16 Twombly, 550 U.S. 544, 570 (2007)). A claim is facially plausible  
17 "when the plaintiff pleads factual content that allows the court

18 \_\_\_\_\_  
19 <sup>7</sup> It is worth noting that Plaintiff fails to allege any  
20 claims related to the Homeowners Bill of Rights (HBOR) in her  
21 complaint. She does, however, invoke the HBOR in her opposition  
22 to Defendants' motion to dismiss. The HBOR, codified at  
23 California Civil Code section 2924 et seq., provides protections  
24 to California homeowners faced with foreclosure. In particular,  
25 its two main provisions restrict "dual-track" foreclosures, where  
26 a lender pursues a loan modification with a borrower while also  
27 pursuing foreclosure, and it guarantees homeowners a single point  
28 of contact with their lender. Plaintiff has not alleged that her  
loan was subject to a dual-track process, nor does she allege that  
she has been denied a single point of contact with her lender.  
Plaintiff does allege that her loan documents were signed by a  
"robo-signer." Compl. ¶ 8-9. However, "the prevailing view [is]  
that plaintiff homeowners lack standing to challenge the validity  
of robo-signatures." Mendoza v. JPMorgan Chase Bank, N.A., 228  
Cal. App. 4th 1020, 1036 (2014).

1 to draw the reasonable inference that the defendant is liable for  
2 the misconduct alleged." Id.

3 In considering whether the complaint is sufficient to state a  
4 claim, the court will take all material allegations as true and  
5 construe them in the light most favorable to the plaintiff.  
6 Metzler Inv. GMBH v. Corinthian Colls., Inc., 540 F.3d 1049, 1061  
7 (9th Cir. 2008). The court's review is limited to the face of the  
8 complaint, materials incorporated into the complaint by reference,  
9 and facts of which the court may take judicial notice. Id. at  
10 1061. However, the court need not accept legal conclusions,  
11 including "threadbare recitals of the elements of a cause of  
12 action, supported by mere conclusory statements." Iqbal, 556 U.S.  
13 at 678 (citing Twombly, 550 U.S. at 555).

14 When granting a motion to dismiss, the court is generally  
15 required to grant the plaintiff leave to amend, even if no request  
16 to amend the pleading was made, unless amendment would be futile.  
17 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
18 F.2d 242, 246-47 (9th Cir. 1990). In determining whether  
19 amendment would be futile, the court examines whether the  
20 complaint could be amended to cure the defect requiring dismissal  
21 "without contradicting any of the allegations of [the] original  
22 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th  
23 Cir. 1990).

24 DISCUSSION

25 Defendants seek to dismiss Plaintiff's complaint in its  
26 entirety.

27

28

1 I. First Cause of Action: Declaratory Judgment

2 Plaintiff's first cause of action requests that the Court  
3 "declare the actual rights and obligations of the Parties and make  
4 a determination as to whether Defendant [sic] was the lawful  
5 successor in interest to fraudulent lien claim against Plaintiff  
6 is enforceable [sic] and whether it is secured by an [sic] right,  
7 title, or interest in Plaintiff's Property." Compl. ¶ 40. The  
8 Wells Defendants argue that "declaratory relief is not an  
9 independent cause of action, but only a remedy." Docket No. 13  
10 at 6. They also argue that there is "no actual controversy to  
11 support declaratory relief." Id. DB argues that Plaintiff  
12 alleges no facts "to show either entity [DB or Deutsche Bank  
13 Securities] claims a current lien interest in the property adverse  
14 to Plaintiff." Docket No. 23 at 6. The Court GRANTS both  
15 Defendants' motions to dismiss this claim.

16 Under the Declaratory Judgment Act (DJA), "in a case of  
17 actual controversy within its jurisdiction, upon the filing of an  
18 appropriate pleading, [any federal court] may declare the rights  
19 and other legal relations of any interested party seeking such  
20 declaration, whether or not further relief is or could be sought."  
21 28 U.S.C. § 2201; see also DeFeo v. Procter & Gamble Co., 831 F.  
22 Supp. 776, 777-78 (N.D. Cal. 1993). The "actual controversy"  
23 requirement of the DJA is the same as the "case or controversy"  
24 requirement of Article III of the United States Constitution. Am.  
25 States Ins. Co. v. Kearns, 15 F.3d 142, 143 (9th Cir. 1993). The  
26 declaratory judgment plaintiff must establish that the "facts  
27 alleged under all the circumstances show that there is a  
28 substantial controversy between parties having adverse legal

1 interests of sufficient immediacy and reality to warrant the  
2 issuance of declaratory judgment." Micron Tech., Inc. v. Mosaid  
3 Techs., Inc., 518 F.3d 897, 901 (Fed. Cir. 2008) (citation  
4 omitted).

5 Plaintiff's declaratory relief claim is based on the same  
6 facts alleged to support her other causes of action. This claim  
7 fails for the same reasons the other claims fail, as will be  
8 discussed below. Accordingly, the Court GRANTS Defendants'  
9 motions to dismiss this claim. Plaintiff is granted leave to  
10 amend to remedy the deficiencies noted in this as well as her  
11 other causes of action if she can do so truthfully and without  
12 contradicting the allegations in her prior pleadings.

13 II. Second Cause of Action: Set Aside Deed of Trust

14 Plaintiff requests that the Court set aside the deed of trust  
15 that secures the property. Plaintiff appears to be referring not  
16 to the original deed of trust that secures the loan on her home,  
17 but to both the 2009 and 2011 assignments of the deed of trust  
18 which transfer the beneficial interests in the deed from MERS to  
19 HSBC. See e.g., Compl. ¶ 36 ("The Plaintiff alleges that  
20 defendants were willingly and knowingly the successor in interest  
21 of a [sic] invalid lien assignment . . . and lack the legal rights  
22 to foreclose on the plaintiff's home.") Plaintiff further alleges  
23 that "neither defendants had or have a secured, unsecured legal,  
24 equitable or pecuniary interest in the lien evidenced by the Deed  
25 of Trust and that its purported assignment has no value since the  
26 Deed of Trust was fraudulent and wholly unsecured." Compl. ¶ 34.  
27 Plaintiff alleges that, if the deed of trust is not set aside, she  
28 will be subject to "a cloud on [her] title to the Property in that

1 it restricts [her] right to the use and enjoyment of the Property  
2 [and] hinders [her] right to unrestricted alienation of the  
3 Property." Compl. ¶ 51.

4 For the reasons discussed below, the Court GRANTS Defendants'  
5 motions to dismiss this cause of action.

6 A. Tender

7 The Wells Defendants argue that Plaintiff lacks standing to  
8 assert this claim because she has failed to tender the undisputed  
9 obligation in full. Docket No. 13 at 3. Plaintiff alleges that  
10 she "has offered to and is ready, willing and able to  
11 unconditionally tender [her] obligation to whomever it is  
12 determined [she] lawfully owes [her] debt to." Compl. ¶ 33. As  
13 an alternative, Plaintiff argues that she is exempt from the  
14 tender requirement.

15 "As a general rule, a homeowner in default must first tender  
16 payment of the obligation in full to achieve standing to challenge  
17 nonjudicial foreclosure proceedings." Mendoza, 228 Cal. App. 4th  
18 at 1028. "Because the action is in equity, a defaulted borrower  
19 who seeks to set aside a trustee's sale is required to do equity  
20 before the court will exercise its equitable powers.  
21 Consequently, as a condition precedent to an action by the  
22 borrower to set aside the trustee's sale on the ground that the  
23 sale is voidable because of irregularities in the sale notice or  
24 procedure, the borrower must offer to pay the full amount of the  
25 debt for which the property was security. The rationale behind  
26 the rule is that if [the borrower] could not have redeemed the  
27 property had the sale procedures been proper, any irregularities  
28 in the sale did not result in damages to the [borrower]." Lona v.

1 Citibank, N.A., 202 Cal. App. 4th 89, 112 (2011)(internal  
2 quotations and citations omitted).

3       However, "[r]ecent opinions in this court . . . reflect a  
4 split in authority as to whether the tender rule should apply in  
5 situations where a sale is pending." Ford v. Lehman Bros. Bank,  
6 FSB, 2012 WL 2343898, at \*4 (N.D. Cal.)(compare Hague v. Wells  
7 Fargo Bank, N.A., 2011 WL 6055759, at \*5 (N.D. Cal.) ("[T]ender is  
8 not required in this [lending fraud] case, as the foreclosure at  
9 issue has not yet occurred . . ."), with Alicea v. GE Money Bank,  
10 2009 WL 2136969, at \*3 (N.D. Cal.) (applying the tender rule to  
11 deny all claims premised on wrongful foreclosure aimed at  
12 preventing the foreclosure sale).

13       This Court finds that the tender rule is applicable when a  
14 plaintiff seeks to set aside a deed of trust or requests a quiet  
15 title. Plaintiff cannot claim exclusive rights to the property  
16 without first paying her obligation in full. Further, the Court  
17 finds that Plaintiff's offer must be a "valid and viable tender of  
18 payment of the indebtedness owing" in order to support her action  
19 to cancel a voidable sale under a deed of trust. FPCI RE-HAB 01  
20 v. E&G Investments, Ltd., 207 Cal. App. 3d 1018, 1021 (1989); see  
21 also Karlsen v. Am. Sav. & Loan Assn., 15 Cal. App. 3d 112, 118  
22 (1971)("Simply put, if the offeror is without the money necessary  
23 to make the offer good and knows it the tender is without legal  
24 force or effect.") Plaintiff does not allege any facts to support  
25 that she "has the money necessary to make the offer good."  
26 Therefore, her offer to tender is neither valid nor viable.

27       There are exceptions, however, to the tender requirement.  
28 Lona, 202 Cal. App. 4th at 112-113. "First, if the borrower's

1 action attacks the validity of the underlying debt, tender is not  
2 required since it would constitute an affirmation of the debt."  
3 Id. at 113. "Second, a tender will not be required when the  
4 person who seeks to set aside the trustee's sale has a counter-  
5 claim or set-off against the beneficiary. In such cases, it is  
6 deemed that the tender and the counter claim offset one another,  
7 and if the offset is equal to or greater than the amount due, a  
8 tender is not required." Id. "Third, a tender may not be  
9 required where it would be inequitable to impose such a condition  
10 on the party challenging the sale." Id. "Fourth, no tender will  
11 be required when the trustor is not required to rely on equity to  
12 attack the deed because the trustee's deed is void on its face."  
13 Id. "Courts have found exceptions to the tender rule if 'a sale  
14 is void, rather than simply voidable,' as when an incorrect  
15 trustee forecloses on a property." Subramani v. Wells Fargo Bank  
16 N.A., 2013 WL 5913789, at \*4 (N.D. Cal.) (citation omitted).

17 As an alternative to tendering her full obligation, Plaintiff  
18 seeks exemption from the tender rule under the fourth exception.  
19 In Subramani, the plaintiff argued that the defendant failed to  
20 assign the deed of trust or endorse the note so that "after  
21 Defendant sold the Loan, neither Defendant nor anyone else had any  
22 right to or interest in the Loan, so all legal notices associated  
23 with the note and [deed of trust] -- including the [substitutions  
24 of trustee], [notices of default], and the foreclosure sale itself  
25 -- are illegal and void." Id. at \*2. Plaintiff's allegations  
26 are different from those in Subramani. Plaintiff does not allege  
27 that Defendants failed to assign the deed of trust. Rather,  
28 Plaintiff alleges that the document recording the assignment of

1 the deed of trust is fraudulent. To qualify for this exemption,  
2 Plaintiff must allege sufficient facts to support her claim that  
3 the assignment of the deed of trust was fraudulent.

4 "In all averments of fraud or mistake, the circumstances  
5 constituting fraud or mistake shall be stated with particularity."  
6 Fed. R. Civ. P. 9(b). "Therefore, in an action based on state  
7 law, while a district court will rely on state law to ascertain  
8 the elements of fraud that a party must plead, it will also follow  
9 Rule 9(b) in requiring that the circumstances of the fraud be  
10 pleaded with particularity." Marolda v. Symantec Corp., 672 F.  
11 Supp. 2d 992, 996 (N.D. Cal. 2009); see also Kearns v. Ford Motor  
12 Co., 567 F.3d 1120, 1125 (9th Cir. 2009). "[W]hen the claim is  
13 'grounded in fraud,' the pleading of that claim as a whole is  
14 subject to Rule 9(b)'s particularity requirement." Marolda, 672  
15 F. Supp. 2d at 997 (citing Vess v. Ciba-Geigy Corp. USA, 317 F.3d  
16 1097, 1104). Rule 9(b) requires the plaintiff to allege "the who,  
17 what, when, where, and how" of the alleged fraudulent conduct.  
18 Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997). A plaintiff  
19 must describe the alleged fraud in specific enough terms "to give  
20 defendants notice of the particular misconduct so that they can  
21 defend against the charge." Kearns, 567 F.3d at 1124.

22 Plaintiff does not plead with the required particularity that  
23 the document recording the assignment of the deed of trust is  
24 fraudulent. She does not allege any facts stating which Defendant  
25 did what to support her claim. Thus Plaintiff does not satisfy  
26 any of the requirements to be exempted from tender, nor does she  
27 allege a valid and viable tender of her obligation, in full, to  
28 support her claim to set aside the deed of trust.

1           Accordingly, the Court GRANTS the Wells Defendants' motion to  
2 dismiss this claim. Plaintiff is granted leave to amend to remedy  
3 the deficiencies noted above if she can do so truthfully and  
4 without contradicting the allegations in her prior pleadings.

5           B. Pre-Suit Notice and Opportunity to Cure

6           Even if Plaintiff's claim to set aside the deed of trust did  
7 not fail for lack of tender, the Wells Defendants further argue  
8 that Plaintiff is prohibited from bringing this claim because "she  
9 failed to comply with the presuit notice and opportunity to cure  
10 provision in the deed of trust." Docket No. 13 at 14-15. In  
11 Hollowell v. Alliance Bancorp, Inc., 2011 WL 2884801, at \*1 (N.D.  
12 Cal.), the court dismissed a plaintiff's claim alleging breach of  
13 the terms of a mortgage contract until she showed that she "either  
14 complied with the contractual provision requiring her to afford  
15 defendants the opportunity to cure any asserted breach of the  
16 terms of the Deed of Trust prior to filing suit . . . or that she  
17 is excused from having to so comply."

18           Section 20 of the deed of trust provides:

19           Neither Borrower nor Lender may commence, join, or be joined  
20 to any judicial action . . . that arises from the other  
21 party's action pursuant to this Security Instrument . . .  
22 until such Borrower or Lender has notified the other party  
23 . . . and afforded the other party hereto a reasonable period  
24 after the giving of such notice to take corrective action.  
25 RFJN, Ex. A.

26           Plaintiff does not allege that she has complied with the  
27 provision as it pertains to her cause of action to set aside the  
28 deed of trust. This claim depends specifically on Plaintiff's  
allegations of irregularities and fabrication of mortgage  
documents. Nor has Plaintiff alleged that she is excused from  
complying with the provision. Accordingly, for this reason as

1 well, the Court GRANTS the Wells Defendants' motion to dismiss  
2 Plaintiff's request to set aside the deed of trust. Plaintiff is  
3 granted leave to amend to remedy this deficiency. If Plaintiff  
4 wishes to pursue this claim in any amended complaint, she must  
5 first give Defendants notice of her claims within seven days of  
6 the date of this order. Defendants will then have twenty-one days  
7 to cure before these claims can be re-filed.

8 C. Failure to State a Claim

9 Plaintiff's request to set aside the deed of trust also fails  
10 to state a "legally cognizable claim and the grounds on which it  
11 rests." Twombly, 550 U.S. at 555. Defendants argue that  
12 Plaintiff has not alleged facts sufficient to support this cause  
13 of action.

14 In general, "California courts have refused to delay the non-  
15 judicial foreclosure process by allowing trustor-debtors to pursue  
16 preemptive judicial actions to challenge the right, power, and  
17 authority of a foreclosing 'beneficiary' or beneficiary's 'agent'  
18 to initiate and pursue foreclosure." Jenkins v. JPMorgan Chase  
19 Bank, N.A., 216 Cal. App. 4th 497, 511-12 (2013). A plaintiff can  
20 pursue such an action only if there is a "specific factual basis  
21 for alleging that the foreclosure was not initiated by the correct  
22 party." Id. at 512.

23 Plaintiff suggests three theories to support her claim that  
24 the foreclosure was not initiated by the correct party, rendering  
25 the initiation of foreclosure void. First, Plaintiff alleges that  
26 "there is no evidence in the Record to indicate that the Deed of  
27 Trust was ever transferred concurrently with the purported legal  
28 transfer of the Note, such that the Deed of Trust and Note has

1 been irrevocably separated, thus making a nullity out of the  
2 purported security in a property." Compl. ¶ 23.

3 This theory is unpersuasive. "It is well established that  
4 when a note secured by a mortgage is transferred, 'transfer of the  
5 note carries with it the security, without any formal assignment  
6 or delivery, or even mention of the latter.' Thus, transfer of  
7 the note without the mortgage does not cause the mortgage to  
8 become null, nor the note to become unsecured; the mortgage  
9 automatically follows the note." Davidson v. Countrywide Home  
10 Loans, Inc., 2010 WL 962712, at \*5 (S.D. Cal.)(citing Carpenter v.  
11 Longan, 83 U.S. 271, 275 (1872); see also Cal. Civ. Code § 2936  
12 ("The assignment of a debt secured by mortgage carries with it the  
13 security."). Accordingly, the Court rejects Plaintiff's claim  
14 that the note and the deed of trust have been split and therefore  
15 are unenforceable.

16 According to Plaintiff's second theory, the securitization of  
17 the note renders the note "no longer a Note." Compl. ¶ 21.  
18 Plaintiff claims that "once a loan has been securitized . . . it  
19 forever loses its security component (i.e. the Deed of Trust) and  
20 the right to foreclose through the Deed of Trust is lost forever."  
21 Compl. ¶ 22.

22 Defendants respond that the assertion that securitization  
23 renders a note unenforceable is incorrect. "The argument that  
24 parties lose interest in a loan when it is assigned to a trust  
25 pool . . . [has] been rejected by numerous district courts." Lane  
26 v. Vitek Real Estate Indus. Grp., 713 F. Supp. 2d 1092, 1099 (E.D.  
27 Cal. 2010). "Other courts in this district have summarily  
28 rejected the argument that companies like MERS lose their power of

1 sale pursuant to the deed of trust when the original promissory  
2 note is assigned to a trust pool." Benham v. Aurora Loan Serv.,  
3 2009 WL 2880232, at \*3 (N.D. Cal.).

4 Like Plaintiff here, the plaintiff in Benham "argue[d], in  
5 broad terms, that Defendants sold Plaintiff's loan to financial  
6 entities who pooled the loans, put them into trusts, and sold  
7 securities based on them. As a result, according to Plaintiff,  
8 Defendants and MERS are no longer entitled to enforce the security  
9 interest under the note and the deed of trust." Id. The Benham  
10 court rejected this claim, explaining that "the Deed of Trust  
11 states that the Note or a partial interest in the Note (together  
12 with this Security Instrument) can be sold one or more times  
13 without prior notice to Borrower." Id. (citation omitted). In  
14 this case, an identical statement appears in the deed of trust  
15 between Plaintiff and Wells Fargo. RFJN, Ex. A. The Court  
16 therefore rejects Plaintiff's contention that securitization of  
17 her loan makes it unenforceable.

18 Plaintiff's third theory is that the 2011 assignment of the  
19 deed of trust in favor of HSBC as trustee for the Deutsche  
20 Certificates is fabricated. Compl. ¶ 10-14, Ex. A. Plaintiff  
21 alleges that if that assignment is fabricated, HSBC lacks the  
22 legal authority to foreclose on Plaintiff's property. Defendants  
23 respond that Plaintiff fails to provide any factual allegations as  
24 to the particulars of the alleged fabrication of this assignment.

25 As stated above, a plaintiff can pursue an action to delay  
26 the non-judicial foreclosure process if there is a "specific  
27 factual basis for alleging that the foreclosure was not initiated  
28 by the correct party." Jenkins, 216 Cal. App. 4th at 512

1 (citation omitted). Plaintiff does not allege with specificity  
2 who fabricated the document, nor does she allege any reason to  
3 believe that the document was fabricated. Therefore, this theory  
4 fails as well.

5 Accordingly, the Court GRANTS Defendants' motions to dismiss  
6 this cause of action for the additional reason that it fails to  
7 state a claim. Plaintiff is granted leave to amend to remedy the  
8 deficiencies noted above if she can do so truthfully and without  
9 contradicting the allegations in her prior pleadings.

10 III. Third Cause of Action: Violation of California  
11 Business and Professions Code section 17200 et seq.

12 Plaintiff alleges that Defendants engaged in "unfair,  
13 unlawful, and fraudulent business practices with respect to  
14 mortgage loan servicing." Compl. ¶ 58.

15 The California Unfair Competition Law (UCL), California  
16 Business and Professions Code section 17200 et seq., prohibits  
17 "any unlawful, unfair or fraudulent business act or practice."  
18 Because section 17200 is written in the disjunctive, it  
19 establishes three types of unfair competition. Davis v. Ford  
20 Motor Credit Co., 179 Cal. App. 4th 581, 593 (2009). Therefore, a  
21 practice may be prohibited as unfair or deceptive even if it is  
22 not unlawful and vice versa. Podolsky v. First Healthcare Corp.,  
23 50 Cal. App. 4th 632, 647 (1996).

24 A. Unlawful Business Practice

25 An unlawful business practice includes anything that can be  
26 called a business practice and that is forbidden by law. Ticconi  
27 v. Blue Shield of Cal. Life & Health Ins., 160 Cal. App. 4th 528,  
28 539 (2008). Any federal, state or local law can serve as a

1 predicate for an unlawful business practice action. Smith v.  
2 State Farm Mut. Auto. Ins. Co., 93 Cal. App. 4th 700, 718 (2001).  
3 Thus, the UCL incorporates violations of other laws and treats  
4 them as unlawful practices independently actionable under the UCL.  
5 Id.; Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1048  
6 (9th Cir. 2000); Cel-Tech Communs., Inc. v. L.A. Cellular Tel.  
7 Co., 20 Cal. 4th 163, 180 (1999).

8 Plaintiff claims Defendants' actions were unlawful and  
9 fraudulent according to California Penal Code section 532(f)(a)(4)  
10 ("A person commits mortgage fraud if, with the intent to defraud,  
11 the person does any of the following . . . Files or causes to be  
12 filed with the recorder of any county in connection with a  
13 mortgage loan transaction any document the person knows to contain  
14 a deliberate misstatement, misrepresentation, or omission") and  
15 California Civil Code section 1095 ("When an attorney in fact  
16 executes an instrument transferring an estate in real property, he  
17 must subscribe the name of his principal to it, and his own name  
18 as attorney in fact.").

19 As discussed above, Plaintiff has failed to allege, against  
20 any Defendant, facts sufficient to support any claim of a  
21 violation of a predicate law. Furthermore, as discussed above,  
22 Plaintiff has failed to plead, with particularity, her fraud  
23 allegations as required by Rule 9(b). Plaintiff, therefore, fails  
24 to allege sufficient facts to support an unlawful business  
25 practices claim.

26 B. Unfair Business Practice

27 Plaintiff alleges that Defendants' misconduct "gave  
28 Defendants an unfair competitive advantage over their

1 competitors." Compl. ¶ 62. She also alleges that "as a direct  
2 and proximate result of the actions of Defendants . . . [she] has  
3 been injured in that a cloud has been placed upon title to [her]  
4 Property and Defendants, [sic] have failed to remove this cloud  
5 from [her] title." Id. at ¶ 65. Defendants respond that  
6 Plaintiff fails to plead any facts in particular as required by  
7 Rule 9(b), and also does not plead any facts that support the  
8 claim that Defendants' unfair actions caused her injuries.

9 The California Supreme Court has not established a definitive  
10 test to determine whether a business practice is unfair under the  
11 UCL. See Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20  
12 Cal. 4th 163, 187 n.12 (1999) (stating that the test for  
13 unfairness in cases involving business competitors is "limited to  
14 that context" and does not "relate[ ] to actions by consumers.");  
15 Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1170 (9th Cir.  
16 2012)("The California courts have not yet determined how to define  
17 'unfair' in the consumer action context after Cel-Tech.").  
18 California courts of appeal have applied three different tests to  
19 evaluate claims by consumers under the UCL's unfair business  
20 practices prong. Drum v. San Fernando Valley Bar Ass'n, 182 Cal.  
21 App. 4th 247, 256 (2010).

22 Under one test, a consumer must allege a "violation or  
23 incipient violation of any statutory or regulatory provision, or  
24 any significant harm to competition." Id. at 256. The "public  
25 policy which is a predicate to a consumer unfair competition  
26 action under the 'unfair prong' of the UCL must be tethered to  
27 specific constitutional, statutory, or regulatory provisions."  
28 Id.

1 Under the second test, the "unfair prong" requires a consumer  
2 to plead that (1) a defendant's conduct "is immoral, unethical,  
3 oppressive, unscrupulous or substantially injurious to consumers"  
4 and (2) "the utility of the defendant's conduct" is outweighed by  
5 "the gravity of the harm to the alleged victim." Id. at 257  
6 (citing Smith v. State Farm Mut. Auto. Ins. Co., 93 Cal. App. 4th  
7 700, 718-719 (2001)) ("The test of whether a business practice is  
8 unfair involves an examination of [that practice's] impact on its  
9 alleged victim, balanced against the reasons, justifications and  
10 motives of the alleged wrongdoer. In brief, the court must weigh  
11 the utility of the defendant's conduct against the gravity of the  
12 harm to the alleged victim.") (citation omitted).

13 The third test, which is based on the Federal Trade  
14 Commission's definition of unfair business practices, requires  
15 that, as a result of unfair conduct, "(1) the consumer injury must  
16 be substantial; (2) the injury must not be outweighed by any  
17 countervailing benefits to consumers or competition; and (3) it  
18 must be an injury that consumers themselves could not reasonably  
19 have avoided." Id. (citing Camacho v. Auto. Club of S. Cal., 142  
20 Cal. App. 4th 1394, 1402-1405 (2006)).

21 In Lozano v. AT&T Wireless Serv., Inc., 504 F.3d 718, 736  
22 (9th Cir. 2007), the Ninth Circuit endorsed the tethering test or  
23 the balancing test and declined "to apply the FTC standard in the  
24 absence of a clear holding from the California Supreme Court."  
25 See Ferrington v. McAfee, Inc., 2010 WL 3910169, at \*12 (N.D.  
26 Cal.) ("Pending resolution of this issue by the California Supreme  
27 Court, the Ninth Circuit has approved the use of either the  
28 balancing or the tethering tests in consumer actions, but has

1 rejected the FTC test.") (citation omitted); I.B. ex rel. Fife v.  
2 Facebook, Inc., 905 F. Supp. 2d 989, 1010-11 (N.D. Cal. 2012).

3 Plaintiff's claim of an unfair business practice fails because she  
4 does not allege that Defendants' conduct violates an existing  
5 statute, nor does she allege facts sufficient to support her claim  
6 that Defendants' actions were "immoral, unethical, oppressive,  
7 unscrupulous or substantially injurious to consumers."

8 Plaintiff, therefore, fails to allege facts sufficient to support  
9 an unfair business practices claim.

10 C. Fraudulent Business Practice

11 "A fraudulent business practice is one in which members of  
12 the public are likely to be deceived." Morgan v. AT&T Wireless  
13 Servs., Inc., 177 Cal. App. 4th 1235, 1254 (2009).

14 Plaintiff's claims based on fraudulent business practices  
15 lack the particularity required by Rule 9(b). As discussed above,  
16 Plaintiff makes broad assertions unsupported by factual  
17 allegations. She does not allege any facts to support her claim  
18 that the assignment of the deed of trust was fabricated and she  
19 does not specify what role, if any, each Defendant played in the  
20 alleged fabrication and fraud. Therefore, Plaintiff fails to  
21 satisfy the requirements of Rule 9(b).

22 Because Plaintiff's claims under all three prongs fail, the  
23 Court GRANTS Defendants' motions to dismiss the UCL causes of  
24 action. Plaintiff is granted leave to amend to remedy the  
25 deficiencies noted above if she can do so truthfully and without  
26 contradicting the allegations in her prior pleadings.

27  
28

1 IV. Fourth Cause of Action: Void or Cancel Trustee's Deed  
Upon Sale

2 Plaintiff's fourth cause of action asks the Court to void or  
3 cancel the trustee's deed upon sale. The Court GRANTS Defendants'  
4 motions to dismiss this claim.

5 In order for the Court to void or cancel a trustee's deed  
6 upon sale, there must have been a foreclosure sale. See Moeller  
7 v. Lien, 25 Cal. App. 4th 822, 831 (1994). Despite Plaintiff's  
8 apparent belief to the contrary, there is no trustee's deed upon  
9 sale to void given that there is no indication that a foreclosure  
10 sale has occurred. Furthermore, as discussed above with regard to  
11 the claim to set aside the deed of trust, if there had been a  
12 foreclosure sale, Plaintiff would have to allege a valid and  
13 viable tender in full to void the deed upon sale. Also, as  
14 discussed above, she would have to provide notice and opportunity  
15 to cure.

16 Accordingly, the Court GRANTS Defendants' motions to dismiss  
17 this cause of action. Plaintiff is granted leave to amend to  
18 remedy this deficiency if she can do so truthfully and without  
19 contradicting the allegations in her prior pleadings.

20 V. Fifth Cause of Action: Accounting

21 Plaintiff requests an accounting for the payments she made to  
22 Defendants, alleging that, due to fraud, none of the money she  
23 paid was actually owed to Defendants. The Wells Defendants argue  
24 that "accounting is only a valid claim where the defendant owes  
25 the plaintiff money -- not the other way around." Docket No. 13  
26 at 13. DB argues that Plaintiff does not allege any facts to show  
27 that she paid DB any money.

28

1 "A cause of action seeking an accounting may be maintained  
2 when (1) a relationship exists between a plaintiff and defendant  
3 that requires an accounting, and (2) some balance is due to the  
4 plaintiff that can only be ascertained by an accounting."  
5 Shkolnikov v. JPMorgan Chase Bank, 2012 WL 6553988, at \*23 (N.D.  
6 Cal.). The relationship need not be fiduciary. Id. "But '[a]n  
7 action for accounting is not available where the plaintiff alleges  
8 the right to recover a sum certain or a sum that can be made  
9 certain by calculation.'" Id. (citing Penney v. Wells Fargo Bank,  
10 2012 WL 2071705, at \*13 (C.D. Cal.)).

11 Plaintiff has not alleged any facts that would warrant an  
12 accounting because there is no indication that there is a balance  
13 due to Plaintiff. Instead, Plaintiff "has offered to and is  
14 ready, willing, and able to unconditionally tender his [sic]  
15 obligation to whomever it is determined he [sic] lawfully owes his  
16 [sic] debt to." Compl. ¶ 32. Plaintiff does not dispute what she  
17 owes under the deed of trust; rather she purports to question to  
18 whom it is owed.

19 Accordingly, the Court GRANTS Defendants' motions to dismiss  
20 this cause of action. Plaintiff is granted leave to amend to  
21 remedy these deficiencies if she can do so truthfully and without  
22 contradicting the allegations in her prior pleadings.

23 VI. Sixth Cause of Action: Quiet Title

24 Plaintiff requests that the Court make a "judicial  
25 declaration that title to the . . . Property is vested solely in  
26 Plaintiff[.]" Compl. ¶ 83. Defendants argue that Plaintiff's  
27 cause of action to quiet title fails for the same reasons her  
28

1 causes of action to set aside the deed of trust and void or cancel  
2 the deed of trust fail.

3 "The purpose of a quiet title action is to finally settle  
4 and determine, as between the parties, all conflicting claims to  
5 the property in controversy, and to decree to each such interest  
6 or estate therein as he may be entitled to." Rosenfeld v.  
7 JPMorgan Chase Bank, N.A., 732 F. Supp. 2d 952, 974 (N.D. Cal.  
8 2010) (internal quotation marks and citations omitted). A quiet  
9 title action must include: "(1) a description of the property in  
10 question; (2) the basis for plaintiff's title; and (3) the adverse  
11 claims to plaintiff's title." Ananiev v. Aurora Loan Servs., LLC,  
12 2012 U.S. Dist. LEXIS 132489, at \*9-10 (N.D. Cal.); Cal. Civ.  
13 Proc. Code § 760.020. "In order to satisfy the second  
14 requirement, plaintiff must allege that he has discharged his  
15 debt, regardless to whom it is owed." Id. (citing Kelley v.  
16 Mortg. Elec. Registration Sys., Inc., 642 F. Supp. 2d 1048, 1057  
17 (N.D. Cal. 2009)); see also Miller v. Provost, 26 Cal. App. 4th  
18 1703, 1707 (1994) ("This rule was based on the equitable principle  
19 that a mortgagor of real property cannot, without paying his debt,  
20 quiet his title against the mortgagee.").

21 Plaintiff seeks to remove all clouds from her title and  
22 requests a determination that she holds title to the property,  
23 free from all claims of Defendants, apparently including the  
24 original promissory note and deed of trust. Compl. ¶ 66. As  
25 discussed above with respect to the claim to set aside and the  
26 claim to void the sale, Plaintiff must tender her obligation in  
27 full to show that she has satisfied her debt, and she must provide  
28

1 pre-suit notice and opportunity to cure. Without tender and  
2 providing notice, Plaintiff has not stated a claim to quiet title.

3 Accordingly, the Court GRANTS Defendants' motions to dismiss  
4 this cause of action. Plaintiff is granted leave to amend to  
5 remedy this deficiency if she can do so truthfully and without  
6 contradicting the allegations in her prior pleadings.

7 CONCLUSION

8 For the reasons set forth above, the Court GRANTS Defendants'  
9 motions to dismiss (Dockets No. 13 and 23) and GRANTS Plaintiff  
10 leave to amend. In her amended complaint Plaintiff must state,  
11 within each cause of action, which Defendant she accuses and the  
12 alleged actions of that Defendant. Plaintiff may not, absent a  
13 foreclosure sale, renew her claim to void or cancel the trustee's  
14 deed upon sale. She must also satisfy the requirement of pre-suit  
15 notice and opportunity to cure. Likewise, Plaintiff may not  
16 include in an amended complaint her claims to set aside the deed  
17 of trust and quiet title without satisfying the requirements of  
18 pre-suit notice and opportunity to cure. If Plaintiff wishes to  
19 pursue these claims in any amended complaint, she must first give  
20 Defendants notice of her claims within seven days of the date of  
21 this order. Defendants will then have twenty-one days to cure  
22 before these claims can be re-filed. If Defendants do not cure,  
23 Plaintiff may, within seven days thereafter, file an amended  
24 complaint alleging notice and failure to cure and remedying the  
25 other deficiencies identified above. She may not add further  
26 claims or allegations not authorized by this order. In any event,  
27 Plaintiff must file any amended complaint within five weeks of the  
28 date of this order.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

If Plaintiff files an amended complaint, Defendants shall respond to it within fourteen days after it is filed. If Defendants file a motion to dismiss, Plaintiff shall respond to the motion within fourteen days after it is filed. Plaintiff must file a brief that responds only to the arguments raised in Defendants' motion. If Plaintiff files an opposition that is inapplicable to this case or does not respond to Defendants' arguments, the Court will consider the motion to be unopposed and will grant it. Defendants' reply, if necessary, shall be due seven days thereafter. Any motion to dismiss will be decided on the papers.

IT IS SO ORDERED.

Dated: September 26, 2014

  
\_\_\_\_\_  
CLAUDIA WILKEN  
United States District Judge