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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

PATRICIA C. MORAN,	)	Case No.: 5:13-CV-04981-LHK
	)	
Plaintiff,	)	
v.	)	ORDER GRANTING DEFENDANTS'
	)	MOTION TO DISMISS
GMAC MORTGAGE, LLC, et al.,	)	
	)	
Defendants.	)	

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Plaintiff Patricia Moran (“Moran”) brings this mortgage action against GMAC Mortgage, LLC, Executive Trustee Services, LLC, Mortgage Electronic Registration Systems, Inc., US Bank National Association as Trustee for the Greenpoint Mortgage Funding Trust, and OCWEN Loan Servicing, LLC (collectively, “Defendants”). Defendants now move to dismiss the First Amended Complaint. Having considered the briefing, the record in this case, and applicable law, the Court GRANTS Defendants’ Motion to Dismiss.

**I. BACKGROUND**

**A. Factual Background**

Except where otherwise noted, the Court draws the following facts, taken as true for purposes of a motion to dismiss, from Plaintiff’s First Amended Complaint. ECF No. 29 (“FAC”).

On September 13, 2006, Plaintiff entered into a residential mortgage loan with Greenpoint Mortgage Funding, Inc. (“Greenpoint Mortgage”), a subsidiary of Capital One Financial Group, to

1 finance the purchase of property at 10920 Ridgeview Avenue, San Jose, CA 95127. FAC at 2, 13.  
2 The Note and Deed of Trust secured the property, and the deed was recorded in the Santa Clara  
3 County Recorder’s office on November 9, 2005. FAC at 13. Defendant Mortgage Electronic  
4 Registration Systems, Inc. (“MERS”), which holds title to mortgages and tracks ownership  
5 interests and servicing rights in mortgages, acted as the nominal beneficiary of Greenpoint  
6 Mortgage as stated in the deed of trust signed by the Plaintiff. FAC at 3.

7 According to the FAC, sometime on or before November 1, 2006, Greenpoint Mortgage  
8 sold Plaintiff’s loan to Lehman Brothers Holdings, Inc. FAC at 13-14. Lehman Brothers then sold  
9 the loan to a securitization depositor, Defendant Structured Asset Securities Corporation  
10 (“SASC”). *Id.* SASC then sold and securitized the Plaintiff’s mortgage loan into a mortgage-  
11 backed security (“MBS”) trust organized under New York law called Greenpoint Mortgage  
12 Funding Trust 2006-AR7. FAC at 5, 16. Defendant US Bank National Association (US Bank) was  
13 named as the trustee. FAC at 5. Plaintiff alleges Defendant GMAC Mortgage LLC (GMAC)  
14 represented itself as the “purported servicer, successor lender, mortgagee and secured creditor” in  
15 Plaintiff’s loan. FAC at 3. Plaintiff claims however that GMAC was actually a “complete  
16 stranger,” as it was never a party to the original loan transaction and was never a successor lender.  
17 *Id.* Executive Trustee Services, LLC (ETS Services) was an affiliate company of GMAC and the  
18 substitute trustee in Plaintiff’s deed of trust. FAC at 4. ETS was later sold to Defendant Ocwen  
19 Loan Services, LLC. *Id.*

20 Allegedly, none of these transactions were initially recorded in the Santa Clara County  
21 Clerk-Recorder’s office at the time of the transaction. FAC at 14-16. Plaintiff also alleges that the  
22 transfer of Plaintiff’s mortgage into a MBS fund violated procedural rules in the trust agreement  
23 because it did not take place before the closing date specified in the trust. FAC at 11. Plaintiff  
24 alleges this violated the Pooling and Serving Agreement (“PSA”) as well as the Mortgage Loan  
25 Purchase Agreement. FAC at 10.

26 Plaintiff entered into a loan modification agreement with Defendant GMAC on February  
27 10, 2010. FAC at 14. Plaintiff alleges GMAC represented itself as the lender in her loan and  
28 “deceived” her based on her lack of knowledge between a servicer and a lender of a loan. *Id.*

1 However, Greenpoint Mortgage, not GMAC, remained the stated lender on Plaintiff's deed of trust  
2 throughout this transaction. *Id.* Plaintiff argues that due to the failure to transfer the full and  
3 unencumbered interest in the mortgage loan from Greenpoint Mortgage to GMAC, Plaintiff's loan  
4 modification with GMAC is void. FAC at 14-15.

5 Furthermore, during April of 2011, MERS assigned the beneficial interest in the original  
6 deed to GMAC. FAC at 17. MERS' assignment of the deed of trust was notarized in Pennsylvania  
7 on April 15, 2011, which was three days before Plaintiff alleges it was signed by MERS' secretary.  
8 FAC at 17-18. Plaintiff contends that because Greenpoint Mortgage initially failed to properly  
9 assign and transfer the mortgage to the purchaser, MERS had no beneficial interest in the deed of  
10 trust. FAC at 17. Moreover, Plaintiff alleges that the discrepancy in signing dates was due to  
11 automatic computerized signing, or "robo-signing" by the company. FAC at 18. On April 18, 2011,  
12 MERS issued an assignment of deed of trust which was later recorded on April 26, 2011. FAC at  
13 24-25. According to Plaintiff, this transfer occurred without ownership of the underlying note, and  
14 this transfer was an attempted "cover-up" of previous improper transactions by the Defendants.  
15 FAC at 18.

16 **B. Procedural Background**

17 Moran filed her complaint in state court on September 4, 2013, which Defendants removed  
18 to federal court on October 25, 2013. ECF No. 1. On November 1, 2013, Defendants filed a Motion  
19 to Dismiss. ECF No. 7. Moran did not file a timely opposition to Defendants' Motion to Dismiss.  
20 Nearly four months after the opposition was due, the Court ordered Moran to show cause why the  
21 case should not be dismissed for failure to prosecute under Federal Rule of Civil Procedure 41(b).  
22 ECF No. 18. At the hearing on the order to show cause, the Court "noted that this is at least the  
23 fifth Northern District of California home foreclosure case [in the last two years] in which  
24 Plaintiff's counsel has failed to oppose a first motion to dismiss. Thus, the Court gave Plaintiff's  
25 counsel notice that should Plaintiff's counsel fail to miss another deadline in this case, the Court  
26 would refer Plaintiff's counsel to the Northern District of California's Standing Committee on  
27 Professional Conduct and levy \$1,000 in sanctions." ECF No. 27, Order Vacating Order to Show  
28 Cause and Granting Motion to Dismiss. The Court also granted Defendants' Motion to Dismiss for

1 failure to oppose, and gave Moran leave to file an amended complaint. *Id.* However, the Court  
2 cautioned Moran that failure to cure the deficiencies identified in Defendants’ Motion to Dismiss  
3 would result in a dismissal with prejudice. *Id.*

4 Moran timely filed the FAC on April 9, 2014, ECF No. 29, which the Defendants moved to  
5 dismiss on April 28, 2014, ECF No. 30 (“Mot.”). Moran filed an opposition (“Opp.”), ECF No. 32,  
6 and Defendants filed a reply (“Rep.”), ECF No. 33. Defendants also filed a Statement of Recent  
7 Decision pursuant to Civ. L. R. 7-3(d)(2). ECF No. 35. Plaintiff’s counsel responded with a new  
8 six page opposition, which is not authorized under the Civil Local Rules. *See* Civ. L. R. 7-3(d). The  
9 Court therefore STRIKES Moran’s Opposition to Notice of New Authority.

## 10 II. LEGAL STANDARD

### 11 A. Motion to Dismiss

12 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal  
13 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In considering  
14 whether the complaint is sufficient to state a claim, the Court must accept as true all of the factual  
15 allegations contained in the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). However, the Court  
16 need not accept as true “allegations that contradict matters properly subject to judicial notice or by  
17 exhibit” or “allegations that are merely conclusory, unwarranted deductions of fact, or  
18 unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). While  
19 a complaint need not allege detailed factual allegations, it “must contain sufficient factual matter,  
20 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678  
21 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when  
22 it “allows the court to draw the reasonable inference that the defendant is liable for the misconduct  
23 alleged.” *Id.* at 678. “Determining whether a complaint states a plausible claim for relief . . . [is] a  
24 context-specific task that requires the reviewing court to draw on its judicial experience and  
25 common sense.” *Id.* at 679.

26 Claims sounding in fraud are subject to the heightened pleading requirements of Federal  
27 Rule of Civil Procedure 9(b). A plaintiff alleging fraud “must state with particularity the  
28 circumstances constituting fraud.” Fed. R. Civ. P. 9(b). To satisfy this standard, the allegations

1 must be “specific enough to give defendants notice of the particular misconduct which is alleged to  
2 constitute the fraud charged so that they can defend against the charge and not just deny that they  
3 have done anything wrong.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Accordingly,  
4 claims sounding in fraud must allege “an account of the time, place, and specific content of the  
5 false representations as well as the identities of the parties to the misrepresentations.” *Swartz v.*  
6 *KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007).

7 **B. Leave to Amend**

8 If the Court determines that the complaint should be dismissed, it must then decide whether  
9 to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend  
10 “should be freely granted when justice so requires,” bearing in mind that “the underlying purpose  
11 of Rule 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or  
12 technicalities.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation  
13 marks omitted). Nonetheless, a court “may exercise its discretion to deny leave to amend due to  
14 ‘undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure  
15 deficiencies by amendments previously allowed, undue prejudice to the opposing party . . . , [and]  
16 futility of amendment.’” *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892-93 (9th Cir.  
17 2010) (alterations in original) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

18 **III. DISCUSSION**

19 The Court first analyzes a preliminary standing issue that affects eight of Plaintiff’s nine  
20 causes of action. In addition to standing, the Court identifies further deficiencies as alternative  
21 bases to dismiss Plaintiff’s causes of action for slander of title, fraud, fraud-based unfair  
22 competition,<sup>1</sup> cancellation of instruments, and negligence. The Court will then address Plaintiff’s  
23 remaining cause of action for violation of California Civil Code Section 2924.17.

24 **A. Standing**

25 To establish Article III standing, Plaintiff must demonstrate that she satisfies three  
26 irreducible requirements: (1) she has suffered an “injury in fact,” i.e., “an invasion of a legally  
27

28 <sup>1</sup> Throughout this order, the Court refers to the California Business and Professions Code section 17200 by its common names, including “unfair competition,” “unfair competition law,” or “UCL.”

1 protected interest which is (a) concrete and particularized, and (b) actual or imminent, not  
2 conjectural or hypothetical”; (2) the injury is “fairly traceable to the challenged action of the  
3 defendant”; and (3) it is “likely, as opposed to merely speculative, that the injury will be redressed  
4 by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992) (internal  
5 citations, quotation marks, and alterations omitted); accord *Friends of the Earth, Inc. v. Laidlaw*  
6 *Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

7 A suit brought by a plaintiff without Article III standing is not a “case or controversy,” and  
8 an Article III federal court therefore lacks subject matter jurisdiction over the suit. *Steel Co. v.*  
9 *Citizens for a Better Env’t*, 523 U.S. 83 (1998). In that event, the suit should be dismissed under  
10 Federal Rule of Civil Procedure 12(b)(1). *See id.* at 109-10.

11 Eight of Plaintiff’s causes of action are premised on the theory that Defendants failed to  
12 actually transfer ownership of her loan. Specifically, such causes of action are: (1) wrongful  
13 foreclosure, (2) quiet title, (3) slander of title, (4) fraud, (5) cancellation of instruments, (6)  
14 negligence, (7) unjust enrichment, and (8) unfair competition. For all of these claims, Plaintiff  
15 brings an action as a borrower asserting loss of her property, emotional distress, wrongfully paid  
16 mortgage payments, and damage to her credit from irregularities in the subsequent assignment of  
17 her loan. *See* FAC at 43. Defendants move to dismiss these causes of action on the basis that  
18 Plaintiff does not have standing. *See* Mot. at 4-5. As these arguments stem from the same theory,  
19 the Court consolidates the issues here. Note, however, that the Court addresses Plaintiff’s  
20 “unlawful business act” unfair competition law (“UCL”) claim separately at the end of this section  
21 because analysis of this UCL claim is somewhat more complex.

22 “Third-party borrowers lack standing to assert problems in the assignment of the loan”  
23 because the borrowers have not suffered an injury in fact. *Flores v. GMAC Mortg., LLC*, 2013 WL  
24 2049388, at \*3 (N.D. Cal. May 14, 2013); *see also Jenkins v. JP Morgan Bank, N.A.*, 216 Cal.  
25 App. 4th 497, 513-14 (2013); *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256 (2011).  
26 Assignment defects do not injure borrowers because “even if there were some defect in the  
27 [subsequent] assignment of the deed of trust, that assignment would not have changed plaintiff’s  
28 payment obligations.” *Simmons v. Aurora Bank, FSB*, 2013 WL 5508136, at \*2 (N.D. Cal. Sept.

1 30, 2013); *see Siliga v. Mortg. Elec. Registration Sys., Inc.*, 219 Cal. App. 4th 75, 85 (2013) (“The  
2 assignment of the deed of trust and the note did not change [Plaintiffs’] obligations under the note,  
3 and there is no reason to believe that . . . the original lender would have refrained from foreclosure  
4 in these circumstances.”); *Apostol v. CitiMortgage, Inc.*, 2013 WL 6328256, at \*7-8 (N.D. Cal.  
5 Nov. 21, 2013).

6 Here, Plaintiff has failed to specify an injury “fairly traceable to the challenged action of the  
7 defendant.” *Lujan*, 504 U.S. at 590 (internal citations, quotation marks, and alterations omitted).  
8 Plaintiff does not contend that the *initial* securitization of her loan to Greenpoint Mortgage was  
9 improper. Because Plaintiff’s obligation to repay her mortgage is unaffected by any assignment  
10 defects, the foreclosure—which is the injury alleged by Plaintiff—also remains unchanged by the  
11 alleged assignments defects. Therefore, even if a loss in property occurred, “the true victim was not  
12 plaintiff but the original lender, which would have suffered the unauthorized loss.” *Fontenot*, 198  
13 Cal. App. 4th at 272 (2011).

14 Plaintiff alleges that Defendant MERS robo-signed documents when assigning the deed of  
15 trust. FAC at 18. However, “robo-signing” of documents in the securitization and transfer process  
16 does not itself constitute harm to the borrower because it does not affect the foreclosure, which is  
17 the only injury suffered by the homeowner. *See Javaheri v. JP Morgan Chase Bank, N.A.*, 2012  
18 WL 3426278, at \*7 (C.D. Cal. Aug. 13, 2012) (“While the allegation of robo-signing may be true,  
19 the Court ultimately concludes that [Plaintiff] lacks standing to seek relief under such an allegation  
20 . . . the only injury [Plaintiff] alleges is the pending foreclosure on his home, which is the result of  
21 his default on his mortgage. The foreclosure would occur regardless of what entity was named as  
22 trustee, and so Javaheri suffered no injury as a result of this substitution.”). Plaintiff thus cannot  
23 claim to be the “true victim” of the alleged mistakes in the assignment process. *See Fontenot*, 198  
24 Cal. App. 4th at 272 (2011) (“If [defendant] indeed lacked authority to make the assignment, the  
25 true victim was not plaintiff but the original lender, which would have suffered the unauthorized  
26 loss . . . .”). Consequently, Plaintiff lacks standing to challenge the alleged irregularities in the  
27 assignment of her loan.  
28

1 Moran relies entirely on a single case from the Court of Appeal for the Fifth District, *Glaski*  
2 *v. Bank of Am. Nat'l Ass'n*, 218 Cal. App. 4th 1079, 1099 (2013). *Glaski* held that a borrower,  
3 whose loan had been organized into a trust formed under New York law, had standing to challenge  
4 an assignment of his note because the defendants failed to assign the trust before the trust's closing  
5 date, creating a defect in the chain of transfer. *See id.* at 1096. The court in *Glaski* acknowledged  
6 "that some federal district courts sitting in California have rejected the post-closing date theory of  
7 invalidity on the grounds that the borrower does not have standing to challenge an assignment  
8 between two other parties." *Id.* at 1098 (citing *Aniel v. GMAC Mortgage, LLC*, 2012 WL 5389706  
9 (N.D. Cal. Nov. 2, 2012); *Almutarreb v. Bank of New York Trust Co., N.A.*, 2012 WL 4371410  
10 (N.D. Cal. Sept. 24, 2012)). However, the *Glaski* court concluded that "[t]hese cases are not  
11 persuasive because they do not address the principle that a borrower may challenge an assignment  
12 that is void and they do not apply New York trust law to the operation of the securitized trusts in  
13 question." *Glaski*, 218 Cal. App. 4th at 1098. The court in *Glaski* explained that if the assignment  
14 of a trust was void, the defendant could not initiate a lawful foreclosure proceeding against the  
15 Plaintiff because it did not have a legal right to the property. *Id.* at 1095-97. The court then went on  
16 to find that the trust in *Glaski* was void under New York trust law. *Id.* at 1097. Because the  
17 assignment of the note was void, the defendant in *Glaski* was not the lawful holder of the plaintiff's  
18 deed of trust and could not initiate a foreclosure proceeding against the plaintiff. *Id.* at 1097-98.  
19 This gave the plaintiff standing to challenge the assignment despite being a third-party borrower.  
20 *See id.*

21 However, *Glaski* conflicts with several other California Courts of Appeal cases that have  
22 held that a mortgage borrower, as a third party, does not have a cause of action due to irregularities  
23 in the chain of transfer. *See, e.g., Fontenot*, 198 Cal. App. 4th at 272-73 (stating Plaintiff had no  
24 cause of action for merely alleging irregularities in the assignment process); *Jenkins*, 216 Cal. App.  
25 4th at 515 ("As an unrelated third party to the alleged securitization, and any other subsequent  
26 transfers of the beneficial interest under the promissory note, [Plaintiff] lacks standing to enforce  
27 any agreements, including the investment trust's pooling and servicing agreement, relating to such  
28 transactions."). The viewpoint expressed in *Glaski* is in the minority, and numerous other

1 California appellate courts have declined to follow it, even where the trust at issue was organized  
2 under New York law. *See Sporn v. JP Morgan Chase Bank N.A.*, 2014 WL 280627, at \*5 (Cal. Ct.  
3 App. 4th Jan. 27, 2014) (categorizing the holding in *Glaski* as a minority view and declining to  
4 follow it); *Yvanova v. New Century Mortg. Co.*, 2014 WL 2149797, at \*5 (Cal. Ct. App. 2d Apr.  
5 25, 2014) (declining to follow *Glaski*). “Moreover, courts in this District have expressly rejected  
6 *Glaski* and adhered to the majority view that individuals who are not parties to a PSA [Pooling and  
7 Serving Agreement] cannot base wrongful foreclosure claims on alleged deficiencies in the  
8 PSA/securitization process.” *Apostol*, 2013 WL 6328256, at \*7 (citation omitted); *see also Giseke*  
9 *v. Bank of Am., N.A.*, 2014 WL 718463, at \*4-5 (N.D. Cal. Feb. 23, 2014) (“To the best of the  
10 Court’s knowledge, no court has yet followed *Glaski* on this point, and many have pointedly  
11 declined to.”); *Mottale v. Kimball Tirey & St. John, LLP*, 2014 WL 109354, at \*4-5 (S.D. Cal. Jan.  
12 10, 2014) (“[T]he weight of authority rejects *Glaski* as a minority view on the issue of a borrower’s  
13 standing to challenge an assignment as a third party to that assignment”); *Flores*, 2013 WL  
14 2049388, at \*3 (“Even assuming, however, that there was some deficiency in MERS’ assignment  
15 or substitution with respect to the deed of trust, plaintiffs do not have standing to assert . . . causes  
16 of action that they claim arise out of that deficiency.”).

17 *Glaski*’s reasoning is also unpersuasive. First, it is already well established that a third  
18 party should not be permitted to enforce covenants made for the benefit of others. *See, e.g.,*  
19 *Murphy v. Allstate Ins. Co.*, 17 Cal. 3d 937, 944 (1976) (“A third party should not be permitted to  
20 enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his  
21 right to performance is predicated on the contracting parties’ intent to benefit him.”). In the context  
22 of home mortgages, neither the case law nor any statute creates a cause of action for individuals  
23 who have not suffered a distinct injury due to failures in the transfer of title. The obligations of a  
24 third party borrower to pay the original loan have not changed. *See Jenkins*, 216 Cal. App. 4th at  
25 \*514-515 (“Because a promissory note is a negotiable instrument, a borrower must anticipate it can  
26 and might be transferred to another creditor . . . an assignment merely substituted one creditor for  
27 another, without changing [Plaintiff]’s obligations under the note.”) (quoting *Herrera v. Federal*  
28 *Nat. Mortg. Assn.*, 205 Cal. App. 4th 1495, 1507 (2012)); *Siliga v. Mortg. Elec. Registration Sys.*,

1 *Inc.*, 219 Cal. App. 4th 75, 85 (2013) (“The assignment of the deed of trust and the note did not  
2 change the Plaintiff’s obligations under the note, and there is no reason to believe that . . . the  
3 original lender would have refrained from foreclosure in these circumstances.”). Second, there is  
4 persuasive authority that the reasoning in *Glaski* is based on a flawed reading of New York trust  
5 law. New York state appellate courts have consistently found that an act in violation of a trust  
6 agreement is voidable, not void as *Glaski* held. *See, e.g., In re Levy*, 69 A.D. 3d 630, 632 (2010)  
7 (holding that a violation of a trust’s procedural obligations to formally inform a beneficiary of a  
8 trustee did not void a trust); *Mooney v. Madden*, 193 A.D. 2d 933 (1993) (holding that a trustee  
9 excluding beneficiaries in a trust from voting in a matter violated the trust agreement but did not  
10 make the trust void); *Anh Nguyet Tran v. Bank of New York*, 2014 WL 1225575 (S.D.N.Y. Mar.  
11 24, 2014) (“though some courts have held that non-compliance with the terms of a PSA renders an  
12 assignment *void* under [the New York trust statute], the weight of the case law holds that such an  
13 assignment is merely *voidable*, and therefore outside the scope of that section.”); *see also Banares*  
14 *v. Wells Fargo Bank, N.A.*, 2014 WL 985532, at \*4-5 (N.D. Cal. Mar. 7, 2014) (criticizing *Glaski*  
15 for its flawed reading of New York trust law). Whether the assignment of a trust is void or only  
16 voidable is significant because a foreclosure proceeding involving a void trust assignment can be  
17 challenged on the basis that the foreclosing entity does not have a legal right to the property,  
18 whereas a voidable assignment can only be challenged by a directly injured party. *Glaski*, 218 Cal.  
19 App. 4th at 1095-97. Because the trust assignment in the instant case is merely voidable and not  
20 void, Plaintiff cannot challenge defects in the assignment because Plaintiff is not a directly injured  
21 party. In sum, Plaintiff’s reliance on *Glaski* is misplaced because *Glaski* does not state the majority  
22 rule and its reasoning is unpersuasive. Thus, the Court follows the weight of the authority and finds  
23 that Plaintiff lacks standing to challenge the alleged assignment defects.

24 **1. Plaintiff’s claims for wrongful foreclosure, quiet title, slander of title, fraud,**  
25 **fraud-based unfair competition, cancellation of instruments, negligence,**  
26 **and unjust enrichment**

27 Eight of Plaintiff’s nine causes of action—Plaintiff’s claims for wrongful foreclosure, quiet  
28 title, slander of title, fraud, fraud-based unfair competition, cancellation of instruments, negligence,  
and unjust enrichment—arise directly out of alleged assignment defects. The Court therefore

1 follows numerous courts in this District and the California Courts of Appeal and dismisses these  
2 claims for lack of standing. *See Apostol*, 2013 WL 6328256, at \*6-8 (holding that Plaintiff lacks  
3 standing to bring an action for wrongful foreclosure, quiet title, and negligence based purely on  
4 allegations of irregularities in subsequent transfer); *Giseke*, 2014 WL 718463, at \*5 (holding that  
5 wrongful foreclosure, quiet title, slander of title, and cancellation of instruments actions can be  
6 dismissed for lack of standing due to the Plaintiff being a third-party borrower); *Reyes-Aguilar v.*  
7 *Bank of Am., N.A.*, 2014 WL 2153792, at\*8-9 (N.D. Cal. Mar. 20, 2014) (dismissing a slander of  
8 title action because errors in the securitization of a loan did not constitute by itself malice or injury  
9 to the Plaintiff); *Dahnken v. Wells Fargo Bank, N.A.*, 2013 WL 5979356, at \*2 (N.D. Cal. Nov. 8,  
10 2013) (dismissing Plaintiff’s action for wrongful foreclosure, quiet title, slander of title, fraud,  
11 cancellation of instruments, negligence, and unjust enrichment due to lack of standing); *Jenkins*,  
12 216 Cal. App. 4th at 523 (dismissing fraud-based UCL claims for lack of standing).

13 **2. “Unlawful business act” unfair competition**

14 The UCL prohibits “any unlawful, unfair or fraudulent business act or practice and unfair,  
15 deceptive, untrue or misleading advertising.” Cal. Bus. & Prof. Code § 17200. In addition to  
16 Plaintiff’s allegations—dismissed for lack of standing above—that Defendants violated this section  
17 by engaging in the filing of fraudulent foreclosure documents and deceptive practices, Plaintiff also  
18 alleges that Defendants violated the UCL’s “unlawful business act” prong based on predicate  
19 violations of six statutes.

20 Plaintiff lists, without pleading any specific legal elements or supporting facts, violation of  
21 California Penal Code sections 115 and 532f(a) and California Civil Code sections 1095, 1708,  
22 1709, and 2923.5 as predicate violations for a UCL claim based on unlawful business conduct.  
23 FAC at 56. Despite Plaintiff’s failure to recite even a bare legal element of any of these claims, the  
24 Court nonetheless substantively analyzes these allegations and dismisses them for lack of standing.  
25 The Court first considers Plaintiff’s allegations based upon California Civil Code sections 1708,  
26 2923.5, and 1095, and then addresses Plaintiff’s allegations based upon California Civil Code  
27 section 1709 and California Penal Code sections 115 and 532f(a).

1 Plaintiff's allegations based upon California Civil Code sections 1708, 2923.5, and 1095 all  
2 relate to Plaintiff's wrongful foreclosure claim and Plaintiff's general allegations that there were  
3 defects in the assignment of her loan. California Civil Code section 1708 provides that "[e]very  
4 person is bound, without contract, to abstain from injuring the person or property of another, or  
5 infringing upon any of his rights." Cal. Civ. Code § 1708. California Civil Code section 2923.5  
6 states that a "mortgagee . . . may not record a notice of default pursuant to [s]ection 2924 until . . .  
7 30 days after initial contact is made as required by paragraph (2) or 30 days after satisfying the due  
8 diligence requirements . . . ." Cal. Civ. Code § 2923.5(a)(1). It also specifies the types of initial  
9 contact required, including options to avoid foreclosure. *See* Cal. Civ. Code § 2923.5(a)(2).  
10 California Civil Code Section 1095 states that "[w]hen an attorney in fact executes an instrument  
11 transferring an estate in real property, he must subscribe the name of his principal to it, and his own  
12 name as attorney in fact." Cal. Civ. Code § 1095. However, as a third party borrower, Plaintiff has  
13 not suffered any injury from irregularities in the assignment process because her payment  
14 obligations under the loan have not changed. *See Simmons*, 2013 WL 5508136, at \*2; *Siliga v.*  
15 *Mortg. Elec. Registration Sys., Inc.*, 219 Cal. App. 4th 75, 85 (2013) ("The assignment of the deed  
16 of trust and the note did not change [Plaintiffs'] obligations under the note, and there is no reason  
17 to believe that . . . the original lender would have refrained from foreclosure in these  
18 circumstances."). Accordingly, Plaintiff does not have standing to bring a UCL claim based on  
19 predicate violations of these three statutes. *See Jenkins*, 216 Cal. App. 4th at 523.

20 Plaintiff's remaining three UCL claims, which allege violations of California Civil Code  
21 section 1709 and California Penal Code sections 115 and 532f(a) as predicate "unlawful business  
22 acts," all relate to Plaintiff's fraud claim. The Court has already dismissed Plaintiff's fraud claim  
23 and Plaintiff's fraud-based UCL claim for lack of standing. Thus, "even if we assume [Plaintiff]  
24 . . . alleges facts indicating Defendants' actions violated at least one of the UCL's three unfair  
25 competition prongs (unlawful, unfair, or fraudulent), [she] cannot show any of the alleged  
26 violations have a causal link to her economic injury." *Jenkins*, 216 Cal. App. 4th at 523; *see also*  
27 *Baldoza v. Bank of Am., N.A.*, 2013 WL 978268, at \*2, 14 (N.D. Cal. Mar. 12, 2013) (dismissing  
28 Plaintiffs' section 1708 action together with their wrongful foreclosure action for lack of standing).

1 Therefore, the court dismisses all of Plaintiff’s “unlawful business act” UCL claims for lack of  
2 standing.<sup>2</sup>

3 **3. Summary**

4 In sum, the Court dismisses eight of Plaintiff’s nine claims—all but Plaintiff’s claim for  
5 violation of California Civil Code 2924.17—for lack of standing. Apart from standing, the Court  
6 now identifies additional and independent reasons to dismiss Plaintiff’s causes of actions for  
7 slander of title, fraud, fraud-based unfair competition, cancellation of instruments, and negligence.  
8 The Court now turns to these alternative reasons for dismissal, and then addresses Plaintiff’s claim  
9 under California Civil Code Section 2924.17.

10 **B. Slander of title**

11 “The recordation of an instrument facially valid but without underlying merit will give rise  
12 to an action for slander of title.” *Stamas v. Madera*, 2011 WL 2433633, at \*14 (E.D. Cal. June 14,  
13 2011). The elements of the slander of title tort are: “(1) a publication, (2) which is without privilege  
14 or justification, (3) which is false, and (4) which causes direct and immediate pecuniary loss.”  
15 *Manhattan Loft, LLC v. Mercury Liquors, Inc.*, 173 Cal. App. 4th 1040, 1051 (2009).

16 Plaintiff alleges that Defendants falsely and fraudulently made statements of ownership in  
17 assigning mortgages and substituting trustees. FAC at 45. She additionally asserts that “[t]he  
18 recording of the foregoing assignment of DOT, SOT, NOD and NOTS have cast a cloud on the  
19 title to her Property.” FAC at 46.

20 Plaintiff cannot establish the second element of her claim, i.e. that the publication is  
21 “without privilege.” All of the documents that Plaintiff identifies are foreclosure documents that  
22 are privileged pursuant to California Civil Code section 2924(d). *See Madlaing v. JP Morgan*  
23 *Chase Bank, N.A.*, 2013 WL 243379, at \*13-14 (E.D. Cal. May 31, 2013) (stating that Plaintiff’s  
24 slander of title claim fails since foreclosure documents are privileged communications). Section  
25

26 <sup>2</sup> Because Plaintiff’s UCL claims based on sections 115 and 532f(a) of the California Penal Code  
27 are dismissed for lack of standing, the Court need not reach the question of whether a plaintiff may  
28 allege a UCL “unlawful business act” violation based on predicate violations of the California  
Penal Code. *See Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 573 (1998)  
(applying a preemption analysis and finding that the criminal statute at issue did not foreclose  
related civil actions).

1 2924(d) identifies, pursuant to Civil Code section 47, privileged communications, among other  
2 things, as the “mailing, publication, and delivery” of foreclosure notices and “performance” of  
3 foreclosure procedures. Cal. Civ. Code § 2924. Thus, in addition to Plaintiff’s lack of standing, the  
4 Court also grants Defendants’ motion to dismiss Plaintiff’s slander of title claim on the grounds  
5 that section 2924(d) bars Plaintiff’s claim for slander of title as the publications upon which  
6 Plaintiff relies are privileged.

7 **C. Fraud**

8 To state a claim for fraud, a plaintiff must plead “(a) misrepresentation (false  
9 representation, concealment, or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent to  
10 defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.” *Kearns v. Ford*  
11 *Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009) (quoting *Engalla v. Permanente Med. Group, Inc.*,  
12 15 Cal. 4th 951, 974 (Cal. 1997)). Under the federal rules, a plaintiff alleging fraud “must state  
13 with particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). In other words, to  
14 state a claim for fraud, a plaintiff must plead “the who, what, when, where, and how” of the  
15 conduct charged. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting  
16 *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)).

17 Plaintiff asserts several times, both as an independent cause of action and as a basis for  
18 every other claim, that the Defendants “conspired” in fraudulently producing mortgage documents  
19 and in initiating foreclosure proceedings. FAC at 46-47. However, Plaintiff alleges no supporting  
20 facts that give rise to a plausible claim that Defendants had the intent to defraud her or how the  
21 Defendants defrauded her. Plaintiff repeats the factual allegations supporting her claims for  
22 wrongful foreclosure (among others), but Plaintiff’s specific allegations of fraud and conspiracy  
23 are entirely conclusory. *See* FAC at 47. Specifically, Plaintiff fails to plead *how* or *why*  
24 Defendants’ actions were fraudulent. First, Plaintiff alleges multiple times that the Defendants took  
25 out foreclosure insurance to “ensure” that the Plaintiff would default. FAC at 47 (“Defendants  
26 failed to advise Plaintiff that they would be taking out insurance to ensure that Plaintiff would  
27 default on their loan resulting in foreclosure.”). Plaintiff further alleges that Defendants “knew at the  
28 time Plaintiff made the mortgage that the Bank planned to securitize the loan and the majority of

1 loans in these default swaps result [sic] foreclosure, leaving homeowner homeless.” *Id.* at 47. Yet,  
2 Plaintiff fails to plead any facts showing how or why the act of buying an insurance policy to  
3 protect the bank in the event of foreclosure is evidence of a scheme to “ensure” Plaintiff would  
4 default on her mortgage. *See id.* at 47; *see, e.g., Ward v. Wells Fargo Home Mortg.*, 2014 WL  
5 1922082 (N.D. Cal. May 6, 2014) (holding that allegations a Defendant knew a loan would be  
6 likely to fail did not meet the Rule 9(b) requirements for fraud).

7 Later, Plaintiff attempts to plead fraudulent intent by stating: “Defendants’ intention was to  
8 defraud Plaintiff from the onset of the mortgage. Taking out insurance to ensure default, charging  
9 late fees to increase debt. [sic]” FAC at 47. However, Plaintiff pleads no facts to support her  
10 allegations that the charging of late fees was fraudulent. Finally, Plaintiff relies on the assertion  
11 that irregularities in the chain of transfer are evidence of fraudulent action. *See* FAC at 48-50  
12 (allegations that Defendants filed false and fraudulent statements in the Santa Clara County  
13 Recorder’s Office after their mistake in assigning Plaintiff’s loan). Again, irregularities in the loan  
14 process are not fraudulent in themselves. *See Fontenot*, 198 Cal. App. 4th at 272 (“[A]ssignments  
15 of debt, as opposed to assignments of the security interest incident to the debt, are commonly not  
16 recorded. The lender could readily have assigned the promissory note to HSBC in an unrecorded  
17 document that was not disclosed to [P]laintiff.”); *Karimi v. GMAC*, 2011 WL 5914006, at \*4 (N.D.  
18 Cal. Nov. 28, 2011) (“Plaintiff does not allege *who* at GMAC or ETS concealed *what* information  
19 and *when*. Nor does Plaintiff allege *how* the substitution of trustee or notice of default are  
20 “fraudulent” documents besides stating so in conclusory fashion.”); *see also Vess*, 317 F.3d at 1106  
21 (9th Cir. 2003). Accordingly, the FAC wholly lacks facts to support a plausible claim for fraud,  
22 much less the detailed factual pleading required by Federal Rule of Civil Procedure 9(b).  
23 Therefore, in addition to Plaintiff’s lack of standing, the Court dismisses Plaintiff’s fraud claim for  
24 failure to plead sufficient facts under Federal Rule of Civil Procedure 9(b)

25 Furthermore, Plaintiff alleges a violation of the UCL based on Defendants’ “fraudulent  
26 business acts.” Plaintiff’s UCL claim is materially identical to her action for fraud; therefore,  
27 Plaintiff’s fraud-based UCL claim is also dismissed for failure to state a claim. Section 17200 does  
28 not have the same pleading requirements as common law fraud. *See In re Mattel, Inc.*, 588 F. Supp.

1 2d 1111, 1118 (C.D. Cal. 2008). However, if a UCL claim is grounded in fraud, “the pleading of  
2 that claim as a whole must satisfy the particularity requirement of Rule 9(b).” *Kearns v. Ford*  
3 *Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009); *see Makreas v. First Nat. Bank*, 856 F. Supp. 2d  
4 1097, 1102 (N.D. Cal. 2012). Because Plaintiff’s “fraudulent business act” UCL claim is grounded  
5 in fraud, her UCL claim must also meet the heightened Rule 9(b) pleading standard for fraud. *See*  
6 *Lomboy v. SCME Mortg. Bankers*, 2009 WL 1457738, at \*4 (N.D. Cal. May 26, 2009) (applying  
7 Rule 9(b) requirements to section 17200); *Ngoc Nguyen v. Wells Fargo Bank, N.A.*, 749 F. Supp.  
8 2d 1022, 1037 (N.D. Cal. 2010). Consequently, as Plaintiff has failed to state a claim for fraud, she  
9 also fails to state a claim for violation of the UCL based on her fraud claim. *See Lomboy*, 2009 WL  
10 1457738, at \*6; *Nguyen*, 749 F. Supp. 2d, at 1037. In addition to lack of standing, Plaintiff’s fraud-  
11 related UCL claim is also dismissed for failure to state a claim.

12 **D. Cancellation of Instruments**

13 Plaintiff seeks to cancel the Note, Deed of Trust, Notice of Default and Sale, and various  
14 loan modification agreements and trustee deeds under California Civil Code section 3412. FAC at  
15 53. Section 3412 provides a cause of action for the cancellation of instruments, stating: “[a] written  
16 instrument, in respect to which there is a reasonable apprehension that if left outstanding it may  
17 cause serious injury to a person against whom it is void or voidable, may, upon his application, be  
18 so adjudged, and ordered to be delivered up or canceled.” Cal. Civ. Code § 3412.

19 Plaintiff argues that Defendants, despite possessing the deed of trust, did not have recorded  
20 documents “showing legally effective assignment” of the deed. FAC at 54. However, there is no  
21 “requirement under California law that the original note be produced to render the foreclosure  
22 proceedings valid.” *Farner v. Countrywide Home Loans, Inc.*, 2009 WL 189025, at \*2 (S.D. Cal.  
23 Jan. 29, 2009); *Neal v. Juarez*, 2007 WL 2140640, at \*3 (E.D. Cal. July 23, 2007) (“[An] allegation  
24 that the trustee did not have the original note or had not received it is insufficient to render the  
25 foreclosure proceeding invalid.”) (citing *R.G. Hamilton Corp. v. Corum*, 218 Cal. 92, 94, 97  
26 (1933)). Therefore, because under California law, the trustee of a deed of trust has the power to  
27 initiate foreclosure proceedings, the fact that Defendants lacked a properly-assigned note is not a  
28 sufficient basis to cancel the agreements into which Plaintiff entered. *See Hafiz v. Greenpoint*

1 *Mortg. Funding*, 652 F. Supp. 2d 1039, 1043 (N.D. Cal. 2009) (“California law does not require  
2 possession of the note as a precondition to non-judicial foreclosure under a deed of trust . . .  
3 Pursuant to section 2924(a)(1) of the California Civil Code the trustee of a Deed of Trust has the  
4 right to initiate the foreclosure process.”). In addition to Plaintiff’s lack of standing, the Court thus  
5 dismisses Plaintiff’s claim for cancellation of instruments because there is no requirement to  
6 produce the original note to initiate foreclosure proceedings in California.

7 **E. Negligence**

8 To state a claim for negligence, a plaintiff must allege: (1) the defendant’s legal duty of  
9 care to the plaintiff; (2) the defendant’s breach of duty; (3) injury to the plaintiff as a result of the  
10 breach; and (4) damage to the plaintiff. *See Hoyem v. Manhattan Beach City Sch. Dist.*, 22 Cal. 3d  
11 508, 513 (1978). If no duty exists, there cannot be a cause of action for negligence. *See J’Aire Corp*  
12 *v. Gregory* 24 Cal. 3d 799, 803 (1979). Plaintiff alleges that Defendant GMAC exceeded its role as  
13 a lender in offering the possibility of a loan modification and “falsely represented” itself as a valid  
14 lender. FAC at 58.

15 A financial institution owes no duty of care to a borrower when engaged in activity that  
16 falls within its traditional role as a lender of money. *See Nymark v. Heart Fed. Savings & Loan*  
17 *Assn.*, 231 Cal. App. 3d 1089, 1095-97 (1991). Plaintiff states she entered into a standard loan  
18 modification agreement with Defendant GMAC. FAC at 14. Courts are clear that the mere  
19 agreement to modify a loan does not go beyond the traditional actions of a financial institution. *See*  
20 *Meyer v. Wells Fargo Bank, N.A.*, 2013 WL 6407516, at \*5-6 (N.D. Cal. Dec. 6, 2013) (“The vast  
21 majority of courts in this district have found that merely *engaging* in the loan modification process  
22 is a traditional money lending activity”); *Morgan v. U.S. Bank Nat. Ass’n*, 2013 WL 684932, at \*3-  
23 4 (N.D. Cal. Feb. 25, 2013) (“[A] lender undertakes no new duty by offering a loan  
24 modification.”). Because Plaintiff has failed to allege that any of the Defendants have acted beyond  
25 their traditional role as a lender of money, Defendants owe no duty of care to Plaintiff. Because  
26 Plaintiff cannot establish the first element of a claim for negligence, i.e., that the Defendants had a  
27 duty of care to the Plaintiff, Plaintiff cannot state a claim for negligence. Therefore, in addition to  
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1 Plaintiff's lack of standing, the Court also dismisses Plaintiff's claim for negligence because  
2 Defendants do not owe Plaintiff a duty of care.

3 **F. Violation of California Civil Code Section 2924.17**

4 California Civil Code sections 2924.17(a) and 2924.17(b) (part of the Homeowner Bill of  
5 Rights or "HBOR") provide a private cause of action for multiple and uncorrected recoding and  
6 filing violations. *See* Cal. Civ. Code § 2924.17; *Rockridge Trust v. Wells Fargo*, 2013 WL  
7 5428722, at \*24 (N.D. Cal. Sept 25, 2013) (noting that section 2924.17 is part of the Homeowner  
8 Bill of Rights). Plaintiff alleges that the Defendants failed to comply with these provisions by using  
9 inaccurate and fraudulent documents. FAC at 55.

10 Plaintiff's claim fails because the HBOR cannot be applied retroactively. *See Mcgough v.*  
11 *Wells Fargo Bank, N.A.*, 2012 WL 5199411, at \*5 n.4 (N.D. Cal. 2012) ("there is no indication that  
12 the law is intended to be, or will be, applied retroactively."); *Rose v. J.P. Morgan Chase, N.A.*,  
13 2014 WL 546584, at \*8 (E.D. Cal. Feb 11, 2014). *See generally Myers v. Philip Morris Cos.*, 28  
14 Cal. 4th 828, 841 (2002). ("unless there is an express retroactivity provision, a statute will not be  
15 applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have  
16 intended a retroactive application"). Section 2924 is part of the Homeowner Bill of Rights  
17 (HBOR), which took effect on January 1, 2013. *Rockridge Trust v. Wells Fargo*, 2013 WL  
18 5428722, at \*28 (N.D. Cal. Sept 25, 2013). All of the actions Plaintiff alleges violated section  
19 2924.17 took place before 2013. FAC at 2-5. Consequently, Plaintiff has no cause of action for a  
20 violation of section 2724.17. *See McFarland v. JP Morgan Chase Bank*, 2014 WL 1705968, at \*6-  
21 7 (C.D. Cal. Apr. 28, 2014).

22 **G. Leave to Amend**

23 "[A] proposed amendment is futile only if no set of facts can be proved under the  
24 amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v.*  
25 *Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). Eight of Plaintiff's nine causes of action—  
26 Plaintiff's claims for wrongful foreclosure, quiet title, slander of title, fraud, cancellation of  
27 instruments, negligence, unjust enrichment, and unfair competition—are premised on a  
28 fundamental legal defect, i.e., Plaintiff lacks standing to assert her claims arising out of assignment

1 defects in the transfer of her loan. Any additional facts Plaintiff may allege cannot overcome this  
2 flaw. Moreover, the Court has also identified additional legal defects in several of these causes of  
3 action. Thus, amendment of these claims would be futile, and the Court will not grant leave to  
4 amend these claims.

5 Plaintiff's claim under Section 2924.17, her California Homeowner Bill of Rights claim,  
6 cannot survive as a matter of law either. The HBOR cannot be applied retroactively, and the entire  
7 timeline of events Plaintiff cites in her First Amended Complaint occurred before the statute took  
8 effect. Granting Plaintiff leave to amend her HBOR claim would therefore also be futile, and the  
9 Court will not grant leave to amend this claim.

10 Moreover, in addition to the fundamental legal defects in all of Plaintiff's claims, Plaintiff  
11 is not entitled to leave to amend because of her "repeated failure to cure deficiencies by  
12 amendments previously allowed." *Carvalho*, 629 F.3d at 892 (quoting *Foman*, 371 U.S. at 182).  
13 The Court previously cautioned Moran that failure to cure the deficiencies identified in  
14 Defendants' Original Motion to Dismiss would result in a dismissal with prejudice. ECF No. 27.  
15 Yet, Plaintiff's allegations in her FAC are virtually unchanged from her Original Complaint, save  
16 for the addition of two defendants. *See* ECF No. 1; FAC at 47. Similarly, Defendants' Motion to  
17 Dismiss the FAC and their Original Motion to Dismiss are nearly verbatim identical. *See* ECF No.  
18 7; Mot. at 17. Therefore, because Plaintiff has made no attempt to address the deficiencies  
19 identified in Defendants' Original Motion to Dismiss, the Court denies Plaintiff leave to amend.

20 In sum, all of Plaintiff's claims are dismissed with prejudice, both because leave to amend  
21 would be futile, and because Plaintiff has failed to cure the deficiencies identified in the Original  
22 Complaint. *See Foman*, 371 U.S. at 182; *Carvalho*, 629 F.3d at 892-93.

### 23 **III. CONCLUSION**

24 The Court finds that Plaintiff's FAC fails to state a claim that entitles her to relief.  
25 Accordingly, the Court GRANTS Defendants' Motion to Dismiss. All causes of action in the FAC  
26 are dismissed with prejudice.

27 **IT IS SO ORDERED.**

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Dated: June 18, 2014

  
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LUCY H. KOH  
United States District Judge