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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JULINDA RUNAJ,

Plaintiff,

vs.

WELLS FARGO BANK and TD SERVICE
COMPANY,

Defendants.

CASE NO. 09-CV-1320-IEG(BLM)

ORDER:

**(1) DENYING PLAINTIFF’S
MOTION TO REMAND (Doc. No.
11);**

**(2) GRANTING DEFENDANT
WELLS FARGO’S MOTION TO
DISMISS THE COMPLAINT (Doc.
No. 5); and**

**(3) DENYING AS MOOT
DEFENDANT WELLS FARGO’S
MOTION FOR MORE DEFINITE
STATEMENT (Doc. No. 6.)**

Presently before the Court are Plaintiff’s motion to remand the case to state court, and defendant Wells Fargo Bank’s (“Wells Fargo”) motions to dismiss the complaint for failure to state a claim, or alternatively for a more definite statement. For the reasons stated herein, the Court denies Plaintiff’s motion to remand, grants Wells Fargo’s motion to dismiss, and denies Wells Fargo’s motion for more definite statement as moot.

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1 **FACTUAL AND PROCEDURAL BACKGROUND**

2 On April 28, 2006, Plaintiff allegedly received a loan from Wells Fargo in the amount of
3 \$496,000.00. Plaintiff applied the loan proceeds to the purchase of a 6,000 square foot lot containing
4 one home, and with the intention to rebuild a second home on the property, which had previously
5 burned down. As of the date Plaintiff filed her complaint, she had not yet completed construction of
6 the second home. Plaintiff alleges that because of recent declines in the real estate market, the value
7 of the completed home would be \$325,000 less than the current amount she owes on the loan.
8 (Compl. at 3.)

9 Plaintiff, proceeding *pro se*, filed the instant complaint in San Diego Superior Court on May
10 22, 2009. The action allegedly arises, *inter alia*, from Defendants’ refusal to agree to modify or
11 negotiate the terms of Plaintiff’s loan. The complaint alleges violations of California Civil Code
12 Section 2923.6; the federal Truth in Lending Act (“TILA”), 15 U.S.C. § 1601 *et seq.*; TILA’s
13 regulations, 12 C.F.R. §§ 226.1- .29 (“Reg. Z”); and the federal Home Ownership Equity Protection
14 Act, 15 U.S.C. § 1639 (“HOEPA”). Wells Fargo removed the case to this Court on June 19, 2009.
15 (Doc. No. 1.) On June 26, 2009 Wells Fargo filed a motion to dismiss the complaint pursuant to
16 Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 5.) On June 29, 2009 Wells Fargo filed a motion
17 alternatively moving for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e).
18 (Doc. No. 6.) On July 23, 2009 Plaintiff filed an untimely opposition to Wells Fargo’s motion to
19 dismiss the complaint. (Doc. No. 8.) That same day, Plaintiff filed a “Response to Motion to
20 Remove.” (Doc. No. 9.) On July 27, 2009, Wells Fargo filed an additional brief in support of its
21 motion to dismiss the complaint and for a more definite statement. (Doc. No. 7.)

22 In an order dated July 30, 2009 the Court construed Plaintiff’s “Response to Motion to
23 Remove” as a motion to remand the case to state court. (Doc. No. 10.) The Court also found Wells
24 Fargo’s motions to dismiss the complaint and for a more definite statement and Plaintiff’s motion to
25 remand to be appropriate for disposition without oral argument pursuant to Local Civil Rule 7.1(d)(1).
26 (Id.) The Court’s order also gave Wells Fargo leave to file a reply to Plaintiff’s untimely opposition
27 to the motion to dismiss, and set a briefing schedule on the motion to remand. (Id.) Wells Fargo
28 accordingly filed a “response” brief in support of its motions on August 13, 2009, and also filed an

1 opposition to Plaintiff’s motion to remand. (Doc. Nos. 13 and 14.) Instead of filing a reply in support
2 of her motion to remand, as directed by the Court’s order, Plaintiff filed a second opposition brief to
3 Wells Fargo’s motion to dismiss on August 20, 2009.¹ (Doc. No. 18.)

4 **DISCUSSION**

5 **I. Plaintiff’s Motion to Remand**

6 **A. Legal Standard**

7 An action is removable to federal court if it might have been brought there originally. 28
8 U.S.C. § 1441(a) (2009). The propriety of the removal may be tested in federal court by a motion to
9 remand. 28 U.S.C. § 1447(c). Remand of a case to state court after removal is appropriate when
10 removal is procedurally improper or when there are no grounds for federal jurisdiction, whether
11 federal-question (i.e. subject matter) or diversity. Id.; Baker v. BDO Seidman, L.L.P., 390 F. Supp.
12 2d 919, 920 (N.D. Cal. 2005) (noting that federal jurisdiction is “traditionally predicated upon
13 diversity jurisdiction or federal question jurisdiction”). The removal statute is strictly construed
14 against removal jurisdiction, and the court must reject federal jurisdiction if there is any doubt as to
15 whether removal was proper. Matheson v. Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th
16 Cir.2003) (“Where doubt regarding the right to removal exists, a case should be remanded to state
17 court.”). The party seeking removal bears the burden of proving the propriety of removal. Duncan v.
18 Stuetzle, 76 F.3d 1480, 1485 (9th Cir. 1996).

19 **B. Analysis**

20 Plaintiff presents several arguments in support of her motion to remand the case to state court.
21 First she appears to argue the removal was procedurally defective because she was improperly served
22 with Defendant’s notice of removal. (Motion to Remand at 2.) Plaintiff also appears to argue the
23 Court has neither diversity nor federal question jurisdiction over the action. (Id. at 2-3.) Defendant
24 argues Plaintiff’s motion is untimely and that she has otherwise failed to properly challenge the
25 removal of this case to federal court. The Court addresses each argument below.

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27 ¹ Plaintiff has attached documents to her second opposition that appear to be related to her
28 loan transaction and also includes a “historical printout” of adjustable-rate mortgage indexes. Plaintiff
has not requested that the Court judicially notice the documents, and the Court finds they are
otherwise immaterial to its ruling on Wells Fargo’s motion to dismiss.

1 1. “Procedural Defect” Objections

2 Plaintiff contends the removal of this case was procedurally improper because she was not
3 “formally” served as required by Federal Rules of Civil Procedure 41 and 45, and did not receive
4 “personal service” as required by Federal Rule of Civil Procedure 4. She further argues Wells Fargo’s
5 notice of removal failed to comply with Federal Rule of Civil Procedure 11.

6 28 U.S.C. § 1446(d), which governs the procedure for removal of a case from state court,
7 provides that “[p]romptly after the filing of [a] notice of removal of a civil action the defendant[s]
8 shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk
9 of such State court, which shall effect removal and the State court shall proceed no further unless and
10 until the case is remanded.” Section 1446(d) does not require “formal” or “personal” service of a
11 notice of removal upon a plaintiff; it merely requires “written notice.” Here, Wells Fargo filed a
12 certificate of service with this Court on June 19, 2009 stating it had served the notice of removal upon
13 Plaintiff by mail on June 18, 2009, along with the civil cover sheet, certification of interested parties,
14 and defendant TD Service Company’s consent to removal. (Doc. No. 4.)

15 Plaintiff has failed to identify any procedural defects in the removal of this case. Plaintiff does
16 not contest the veracity of the proof of service described above, or contend that she did not receive
17 written notice of the removal of the action as § 1446(d) requires. Moreover, Federal Rules of Civil
18 Procedure 4, 41, and 45 do not apply to notices of removal. Rule 4 governs the service of a summons,
19 Rule 41 governs the dismissal of actions, and Rule 45 governs the issuance of subpoenas. See Fed.
20 R. Civ. Proc. 4, 41, and 45. Turning to Plaintiff’s Rule 11 objection, 28 U.S.C. § 1446(a) provides,
21 “defendant[s] desiring to remove any civil action or criminal prosecution from a State court shall file
22 in the district court of the United States for the district and division within which such action is
23 pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure[.]”
24 On June 19, 2009, Wells Fargo filed a notice of removal with this Court, which Wells Fargo’s counsel
25 signed, as required by Rule 11. Plaintiff has not explained how the notice of removal failed to
26 otherwise comply with that rule.

27 Finally, as Wells Fargo correctly argues, Plaintiff’s procedural objections are time-barred. “A
28 motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must

1 be made within 30 days after the filing of the notice of removal under section 1446(a).” 28 U.S.C. §
2 1447(c) (2009); see also N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co., 69 F.3d
3 1034, 1038 (9th Cir. 1995) (holding § 1447(c) “requires that a defect in removal procedure be raised
4 in the district court within 30 days after the filing of the notice of removal.”) Here, Wells Fargo filed
5 its notice of removal on June 19, 2009. Plaintiff filed her motion to remand the case on June 23, 2009,
6 34 days after Wells Fargo filed the notice of removal. Accord In re Edward Jones Holders Litig., 453
7 F. Supp. 2d 1210, 1212 (C.D. Cal. 2006) (finding untimely a motion for remand for procedural defects
8 filed 32 days after the notice of removal.) Plaintiff’s motion to remand based on procedural defects
9 in the case’s removal is therefore denied.

10 2. Jurisdictional Objections

11 Plaintiff also appears to argue removal of the case is improper because the Court lacks both
12 diversity and federal question jurisdiction over the action.² This is a curious argument, because the
13 complaint alleges violations of several federal laws, including: the federal Truth in Lending Act
14 (“TILA”), 15 U.S.C. § 1601 *et seq.*; TILA’s regulations, which are issued by the Federal Reserve
15 System, 12 C.F.R. §§ 226.1- .29 (“Reg. Z”); and the federal Home Ownership Equity Protection Act,
16 15 U.S.C. § 1639 (“HOEPA”). These claims clearly arise under the “laws. . . of the United States,”
17 and therefore the court has original jurisdiction over them. See 28 U.S.C. § 1331 (2009).

18 Although the complaint does allege a violation of state law, Cal. Civ. Code § 2923.6,³ and
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22 ² Wells Fargo removed this case to federal court on the basis of federal question jurisdiction
23 pursuant to 28 U.S.C. § 1331, and *not* based on diversity jurisdiction. Because the Court’s exercise
of federal question and supplemental jurisdiction is dispositive, it does not reach the issue of whether
it may exercise diversity jurisdiction over this case.

24 ³ Section 2923.6 provides, *inter alia*: “(a) The Legislature finds and declares that any duty
25 servicers may have to maximize net present value under their pooling and servicing agreements is
26 owed to all parties in a loan pool, not to any particular parties, and that a servicer acts in the best
27 interests of all parties if it agrees to or implements a loan modification or workout plan for which both
28 of the following apply: (1) The loan is in payment default, or payment default is reasonably
foreseeable. (2) Anticipated recovery under the loan modification or workout plan exceeds the
anticipated recovery through foreclosure on a net present value basis. [¶] (b) It is the intent of the
Legislature that the mortgagee, beneficiary, or authorized agent offer the borrower a loan modification
or workout plan if such a modification or plan is consistent with its contractual or other authority.”

1 references injunctive relief under Cal. Civ. Proc. Code § 526,⁴ the federal statute governing
2 supplemental jurisdiction provides, “in any civil action of which the district courts have original
3 jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so
4 related to claims in the action within such original jurisdiction that they form part of the same case or
5 controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(a) (2009). This
6 provision “applies with equal force to cases removed to federal court as to cases initially filed there.”
7 City of Chi. v. Int’l Coll. of Surgeons, 522 U.S. 156, 165 (1997). Here, the Court may properly
8 exercise supplemental jurisdiction over Plaintiff’s state law claims because Plaintiff’s state and
9 federal claims derive from a common nucleus of operative fact: Wells Fargo’s loan to Plaintiff, and
10 its alleged refusal to subsequently modify that loan. See, e.g. Carpenters Health & Welfare Trust Fund
11 v. Tri Capital Corp., 25 F.3d 849, 852-853 (9th Cir. 1994) (holding that because a state claim and
12 federal claim arose from a “common nucleus of operative fact[.]” the district court could have properly
13 asserted jurisdiction over the state claim), overruled on other grounds by S. Cal. IBEW-NECA Trust
14 Funds v. Std. Indus. Elec. Co., 247 F.3d 920, 929 (9th Cir. 2001). Accordingly, Plaintiff’s motion to
15 remand the case to state court is denied.

16 II. Wells Fargo’s Motion to Dismiss the Complaint

17 Wells Fargo has filed a motion to dismiss the complaint for failure to state a claim pursuant
18 to Federal Rule of Civil Procedure 12(b)(6). The motion is based on the grounds that: (1) Plaintiff has
19 no private right of action under Cal. Civ. Code § 2923.6; (2) Defendant has no duty to modify
20 Plaintiff’s loan under § 2923.6; and (3) Plaintiff’s claims for relief under TILA and HOEPA are time-
21 barred and inadequately-alleged. Moreover, in Wells Fargo’s reply brief in support of its motion
22 (Doc. No. 7), it raises the issue of Plaintiff’s filing for Chapter 7 bankruptcy on June 29, 2009,
23 subsequent to the filing of Wells Fargo’s motion to dismiss.⁵ In light of this development, Wells

25 ⁴ Plaintiff’s motion to remand also contends she has made a claim under Cal. Civ. Code §§
26 1798.45(b)-(c), but the complaint itself contains no such allegations.

27 ⁵ Ordinarily the Court would not consider an argument raised for the first time in a reply brief,
28 because Plaintiff would not have an opportunity to respond. However, Plaintiff had not yet filed for
bankruptcy when Wells Fargo filed its motion, so Wells Fargo could not have raised the issue in its
initial brief. Moreover, Plaintiff has taken the liberty of submitting a second opposition brief, which
provided the opportunity for her to respond to Wells Fargo’s contentions regarding her bankruptcy.

1 Fargo contends Plaintiff's lawsuit is the property of her bankruptcy estate and the case must be
2 dismissed because Plaintiff is no longer a real party in interest, as required by Fed. R. Civ. P. 17(a).
3 Although the Rule 17 issue is dispositive, the Court addresses the sufficiency of Plaintiff's substantive
4 allegations, in the event that she attempts to amend the complaint.

5 A. Legal Standard

6 A complaint must contain "a short and plain statement of the claim showing that the pleader
7 is entitled to relief." Fed. R. Civ. P. 8(a) (2009). A motion to dismiss pursuant to Rule 12(b)(6) of
8 the Federal Rules of Civil Procedure tests the legal sufficiency of the claims asserted in the complaint.
9 Fed. R. Civ. P. 12(b)(6); Navarro v. Block, 250 F.3d 729, 731 (9th Cir. 2001). A complaint survives
10 a motion to dismiss under Fed. R. Civ. P. 12(b)(6) if it contains "enough facts to state a claim to relief
11 that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S.544, 570 (2007). The court only
12 reviews the contents of the complaint, accepting all factual allegations as true, and drawing all
13 reasonable inferences in favor of the nonmoving party. Knieval v. ESPN, 393 F.3d 1068, 1072 (9th
14 Cir. 2005). Notwithstanding this deference, the court need not accept "legal conclusions" as true.
15 Ashcroft v. Iqbal, --- U.S. ---, 129 S.Ct. 1937, 1949 (2009). Moreover, it is improper for a court to
16 assume "the [plaintiff] can prove facts that [he or she] has not alleged." Assoc. Gen. Contractors of
17 Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983). Accordingly, a reviewing
18 court may begin "by identifying pleadings that, because they are no more than conclusions, are not
19 entitled to the assumption of truth." Iqbal, 129 S. Ct. at 1950.

20 However, "[w]hen there are well-pleaded factual allegations, a court should assume their
21 veracity and then determine whether they plausibly give rise to an entitlement to relief." Id. A claim
22 has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the
23 reasonable inference that the defendant is liable for the misconduct alleged." Id. at 1949 (citing
24 Twombly, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but
25 it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. "Where a
26 complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line
27 between possibility and plausibility of entitlement to relief.'" Id. (citing Twombly, 550 U.S. at 557).
28 The Court recognizes the mandate to construe a pro se plaintiff's pleadings liberally in determining

1 whether a claim has been stated. Ortez v. Washington County, 88 F.3d 804, 807 (9th Cir. 1996).

2 **B. Plaintiff's Status As the Real Party In Interest**

3 Under Fed. R. Civ. P. 17(a) (2009), "[a]n action must be prosecuted in the name of the real
4 party in interest." Wells Fargo has raised an objection under Rule 17,⁶ and has directed the Court to
5 the fact that on June 29, 2009 Plaintiff filed for Chapter 7 bankruptcy but did not list the instant
6 lawsuit on her bankruptcy schedules. Accordingly Wells Fargo argues that the bankruptcy trustee,
7 and not Plaintiff, is the real party in interest with respect to this action. In support of this contention,
8 Wells Fargo has provided the docket printout for Plaintiff's bankruptcy case and a copy of Plaintiff's
9 bankruptcy schedules.⁷ The Court's review of the schedules confirms that they make no mention of
10 the instant lawsuit. Plaintiff's second opposition to the motion to dismiss fails to address these
11 contentions at all, and does not contest the veracity of the bankruptcy documents.

12 **1. Applicable Law**

13 The act of filing a petition for relief under the Bankruptcy Code begins a bankruptcy case and
14 creates an estate in bankruptcy. See 11 U.S.C. §§ 301(b) ("The commencement of a voluntary case
15 under a chapter of this title constitutes an order for relief under such chapter.") and 541 (governing
16 the property of a bankruptcy estate). The property of a bankruptcy estate includes "all legal or
17 equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §

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19 ⁶ Although the Ninth Circuit has not reached the issue, district courts have permitted parties
20 to raise Rule 17 objections in the context of a motion to dismiss under Rule 12(b)(6). See Soto v.
21 Diakon Logistics (Delaware), Inc., 2009 U.S. Dist. LEXIS 20541, at *5-6 (S.D. Cal. Mar. 13, 2009)
22 (considering a Rule 17 objection as the basis for motion to dismiss under Rule 12(b)(6)); Cleveland
23 v. Deutsche Bank Nat'l Trust Co., 2009 U.S. Dist. LEXIS 7165, at *4-5 (S.D. Cal. Feb. 2, 2009)
(dismissing a plaintiff as a party under Rule 12(b)(6) because he was not a real party in interest as
required by Rule 17); see generally Schwarzer et al., California Practice Guide: Federal Civil
Procedure Before Trial ("Rule 17 refers to the making of an 'objection' to the action being prosecuted
in the name of someone other than the real party in interest The objection may be raised either
by a Rule 12(b)(6) motion to dismiss the complaint or as an affirmative defense in the answer.")

24 ⁷ Wells Fargo requested that the Court judicially notice these documents. In ruling on a
25 motion to dismiss for failure to state a claim, "a court may generally consider only allegations
26 contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial
27 notice." Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). Accordingly, a court may consider
28 matters of public record on a motion to dismiss, and in doing so "does not convert a Rule 12(b)(6)
motion to one for summary judgment." Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1282
(9th Cir. Cal. 1986), abrogated on other grounds by Astoria Federal Savings and Loan Ass'n v.
Solimino, 501 U.S. 104, 111 (1991). The documents Wells Fargo has produced are public records
subject to judicial notice under Fed. R. Evid. 201. The Court grants Wells Fargo's request for judicial
notice and will consider the documents in ruling on this motion.

1 541(a)(1) (2009). It is well settled that prepetition causes of action, including TILA claims, are assets
2 included within the meaning of property of the estate. See In re Smith, 640 F.2d 888, 890 (7th Cir.
3 1981) (“there is no question . . .that the [bankruptcy] estate includes causes of action such as []
4 truth-in-lending claims. . . .”); Rowland v. Novus Fin. Corp., 949 F. Supp. 1447, 1453 (D. Haw.
5 1996).⁸ Accord Cusano v. Klein, 264 F.3d 936, 945 (9th Cir. 2001) (assets of the plaintiff’s
6 bankruptcy estate included prepetition causes of action for unpaid royalties).

7 Here, plaintiff brought suit on May 22, 2009. She filed for Chapter 7 bankruptcy on July 27,
8 2009. Her prepetition claims, including those set forth in this lawsuit, are therefore the property of
9 her bankruptcy estate. A trustee in bankruptcy is the representative of the estate, and has the capacity
10 to sue and be sued. 11 U.S.C. § 323 (2009). “Because the bankruptcy trustee controls the bankruptcy
11 estate, it is the real party in interest in the suits that belong to the estate.” Griffin v. Allstate Ins. Co.,
12 920 F. Supp. 127, 130 (C.D. Cal. 1996). A Chapter 7 debtor may not prosecute a cause of action
13 belonging to the bankruptcy estate absent a showing her claims were exempt from the bankruptcy
14 estate or abandoned by the bankruptcy trustee. Rowland, 949 F. Supp. at 1453. As discussed below,
15 plaintiff has not made either showing.

16 2. No Showing of Exemption from Bankruptcy Estate

17 Section 522 of the Bankruptcy Code specifies the federal property exemptions available to
18 debtors. However, to qualify for these exemptions, the Code requires that the debtor “shall file a list
19 of property that the debtor claims as exempt.” 11 U.S.C. § 522 (2009). If a Chapter 7 debtor claims
20 her prepetition causes of action under the bankruptcy exemption, she has standing to bring those
21 claims. Id. at 1454 (citing Wissman v. Pittsburg Nat’l Bank, 942 F.2d 867, 870 (4th Cir. 1991)). If
22 the debtor does not file such a list, the property it is not exempt and the bankruptcy trustee may
23 dispose of it as he sees fit. Smith, 640 F.2d at 891. Here, Plaintiff has not alleged or otherwise shown
24 that her claims fall under any Bankruptcy Code exemptions. She has also not shown that she has made
25

26 ⁸ In Rowland, the plaintiff refinanced his home with a loan secured by his property. A year
27 later he attempted to rescind the transaction. Two days after that attempt he sued the mortgagee for
28 rescission under TILA. A year later, he filed for Chapter 7 bankruptcy. The court found that his cause
of action was included in the bankruptcy estate. It further found that he did not have standing to bring
the claim because he did not allege the claim was exempt from the estate or abandoned by the
bankruptcy trustee. Rowland, 949 F. Supp. at 1453-54.

1 the required claims for such exemptions. Therefore, her causes of action remain with the bankruptcy
2 estate unless the bankruptcy trustee has abandoned them. See 11 U.S.C. § 554 (2009) (providing the
3 means for abandonment of property of bankruptcy estate); Rowland, 949 F. Supp. at 1454.

4 3. No Showing of Abandonment by Bankruptcy Trustee

5 Abandonment of bankruptcy estate property may occur: by the trustee after notice to creditors
6 and a hearing (Fed. Bankr. R. 6007 (2009); 11 U.S.C. § 554 (a) (2009)); on request of a party in
7 interest after notice and a hearing (11 U.S.C. § 554 (b) (2009)); or when the case is closed and the
8 trustee has not otherwise administered the property. (Id., § 554 (c)). Here, plaintiff has not shown
9 or even alleged that her causes of action have been abandoned by the bankruptcy trustee in any of the
10 aforementioned ways.

11 4. Conclusion

12 For the reasons set forth in this Section, the Court finds Plaintiff is not a real party in interest
13 to this case, as required by Rule 17. Therefore, Plaintiff is ordered to substitute or join the bankruptcy
14 trustee, or show the trustee's ratification of this action, pursuant to the requirements of Fed. R. Civ.
15 P 17(a)(3).⁹ Alternatively, Plaintiff may amend her complaint to allege her lawsuit is exempt from
16 the bankruptcy estate or has been abandoned by the bankruptcy trustee, if she is able to do so
17 consistent with Fed. R. Civ. P. 11. Plaintiff must take these actions **on or before October 23, 2009**.
18 If Plaintiff believes it is not necessary to take any of these actions, she must show cause in writing to
19 that effect on or before **October 23, 2009**. If Plaintiff fails to comply with this order within the
20 allotted time, the Court will automatically dismiss this case with prejudice.

21 C. Violation of Cal. Civ. Code § 2923.6

22 Plaintiff's first cause of action is for violation of Cal. Civ. Code § 2923.6.¹⁰ Plaintiff alleges
23 Defendant has a duty to "maximize the value of a loan when payments are in default and the
24 anticipated recovery of a loan modification exceeds that [of a] foreclosure sale." (Compl. at 4.)

25
26 ⁹ "Joinder of the Real Party in Interest. The court may not dismiss an action for failure to
27 prosecute in the name of the real party in interest until, after an objection, a reasonable time has been
28 allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification,
joinder, or substitution, the action proceeds as if it had been originally commenced by the real party
in interest." Fed. R. Civ. P. 17(a)(3) (2009).

¹⁰ The Court has reproduced the relevant portions of § 2923.6 in footnote 3, *supra*.

1 Section 2923.6 is recently-enacted, and there is scarce authority interpreting the statute. However,
2 similar to other district courts that have faced the issue, the Court finds § 2923.6 does not provide a
3 cause of action for Plaintiff. Section (a) applies to loan servicers and parties in a loan pool, and
4 Plaintiff has not alleged he is either type of entity. Moreover, the permissive language in Section (b)
5 does not impose any duty on Defendants. See Nool v. Homeq Servicing, 2009 U.S. Dist. LEXIS
6 80640, at * 8 (E.D. Cal. Sept. 3, 2009) (“[T]he language of section (b) belies the imposition of any
7 duty to engage in loan modification discussions, as the provision merely expresses legislative “intent”
8 that the mortgagee, beneficiary, or authorized agent offer the borrower a loan modification if doing
9 so is consistent with its authority.”). Accord Pantoja v. Countrywide Home Loans, Inc., 2009 U.S.
10 Dist. LEXIS 70856, at *22 (N.D. Cal. July 9, 2009) (“The Court finds that the wording in Section (b)
11 does not impose any duty on Defendants. Since Defendants do not owe Plaintiff a statutory duty
12 under this section, Plaintiff has no cause of action.”); Farner v. Countrywide Home Loans, 2009 U.S.
13 Dist. LEXIS 5303, at *4-5 (S.D. Cal. Jan. 26, 2009) (“[N]othing in Cal. Civ. Code § 2923.6 imposes
14 a duty on servicers of loans to modify the terms of loans or creates a private right of action for
15 borrowers.”). Accordingly, Plaintiff’s § 2923.6 claim against Wells Fargo is dismissed.

16 D. HOEPA Claim

17 Plaintiff’s second cause of action against Wells Fargo is for violation of HOEPA, 15 U.S.C.
18 § 1639. Plaintiff alleges various TILA violations under this cause of action as well. Congress added
19 HOEPA to the Truth in Lending Act (“TILA”) to “combat predatory lending.” In re First Alliance
20 Mortgage Co., 471 F.3d 977, 984, n. 1 (9th Cir. 2006). HOEPA applies to certain high risk loans
21 involving higher interest rates and costs. HOEPA's disclosure requirements include those otherwise
22 included under TILA, in addition to the special requirements set out in 15 U.S.C. § 1639. These
23 disclosure requirements only apply to loans in which “the annual percentage rate at consummation of
24 the transaction will exceed by more than 10 percentage points the yield on Treasury securities” or
25 those in which “the total points and fees payable by the consumer at or before closing will exceed the
26 greater of–(i) 8 percent of the total loan amount; or (ii) \$ 400.” 15 U.S.C. § 1602(aa)(1)(2009).

27 As currently alleged, Plaintiff’s HOEPA claim against Wells Fargo fails. First, the claim avers
28 only generally to “Defendants[’]” violation of HOEPA, making it difficult, if not impossible to tell

1 which conduct is being alleged against Wells Fargo as opposed to defendant TD Service Company.
2 The claim therefore fails to meet the minimal notice pleading standards of Fed. R. Civ. P. 8. Second,
3 Plaintiff's claim is time-barred. Plaintiff seeks damages and rescission under HOEPA; claims which
4 are governed by the same limitations periods applicable to TILA claims. Claims for damages under
5 these statutes are subject to a one-year statute of limitations,¹¹ which generally "starts at the
6 consummation of the [loan] transaction." King v. California, 784 F.2d 910, 915 (9th Cir. 1986). With
7 respect to rescission, TILA's "buyer's remorse" provision allows borrowers three business days to
8 rescind, without penalty, a consumer loan that uses their principal dwelling as security. Semar v.
9 Platte Valley Federal Sav. & Loan Ass'n, 791 F.2d 699, 701 (9th Cir. 1986); 15 U.S.C. § 1635(a)
10 (2009). TILA rescission may be extended up to three years if the lender fails to comply with TILA
11 disclosure requirements. Semar, 791 F.2d at 701-702; 15 U.S.C. § 1635(f) (2009). Here, the alleged
12 date of the loan transaction was April 26, 2009 (Compl. at 5), but Plaintiff brought the instant lawsuit
13 on May 22, 2009, over three years after receiving the loan, which time-bars Plaintiff's claim under
14 either limitations period.

15 Plaintiff appears to argue the limitations period on her damages claim¹² is subject to equitable
16 tolling, because the alleged HOEPA and TILA violations were concealed by misrepresentations that
17 were not apparent on the face of the loan's disclosure statement. The Ninth Circuit has held equitable
18 tolling of civil damages claims brought under TILA may be appropriate "in certain circumstances,"
19 such as when a borrower might not have had a reasonable opportunity to discover the nondisclosures
20 at the time of loan consummation. King, 784 F.2d at 914-15. In such circumstances, Courts have
21 discretion to "adjust the limitations period accordingly." Id. Although the applicability of equitable
22 tolling often depends on matters outside the pleadings, and "is not generally amenable to resolution

25 ¹¹ "Any action under this section may be brought in any United States district court, or in any
26 other court of competent jurisdiction, within one year from the date of the occurrence of the violation."
15 U.S.C. § 1640(e) (2009).

27 ¹² Plaintiff does not specifically argue that her rescission claim is subject to equitable tolling.
28 Moreover, the only authority she cites, Ellis v. GMAC, 160 F.3d 703, 710 (11th Cir. 1998) concerns
equitable tolling in the context of a TILA damages claim. The Court therefore finds Plaintiff has
raised her equitable tolling "argument" only with respect to her damages claim.

1 on a Rule 12(b)(6) motion,”¹³ the complaint has not alleged any facts that would trigger the doctrine
2 of equitable tolling. Accordingly, the Court grants Wells Fargo’s motion to dismiss Plaintiff’s second
3 cause of action.

4 E. Plaintiff’s Miscellaneous Allegations

5 Plaintiff’s complaint contains only two causes of action: one for relief under Cal. Civ. Code
6 § 2923.6 and one for relief under HOEPA. Nevertheless, the complaint’s “factual allegations” briefly
7 contend that “[t]his action arises for lack of willingness of Defendants to modify or negotiate current
8 construction loan in violation of [12 U.S.C. § 1715u(a) requires lenders to engage in loss mitigation.
9 [12 U.S.C. 1735f-14(b)(1)(I)] [m]akes a failure to do so a violation subjecting the lender to penalties.”
10 (Compl. at 2.) The complaint does not elaborate further on these allegations, and it is unclear whether
11 Plaintiff is seeking relief under statutes she mentions. Accordingly, to the extent Plaintiff has invoked
12 these statutes as independent causes of action against the defendants, the Court finds Plaintiff’s scant
13 allegations do not amount to a short and plain statement of the claim showing Plaintiff is entitled to
14 relief, as required by Fed. R. Civ. P. 8.

15 F. Injunctive Relief

16 Without specifically requesting an injunction, Plaintiff briefly claims “[Cal. Civ. Proc. Code
17 § 526(a)(2) indicates that an injunction is appropriate where irreparable harm may be suffered by the
18 applicant if relief is not granted. All real property under the eye of the law is considered unique.
19 Money cannot compensate for the loss of a family residence and home.” (Compl. at 7.) To the extent
20 Plaintiff requests injunctive relief, the Court finds such relief is not presently warranted, because the
21 Complaint does not set forth the appropriate legal standard for injunctive relief or present any
22 argument that Plaintiff’s situation meets that standard. See Stuhlberg Intern. Sales Co. v. John D.
23 Brush and Co., 240 F.3d 832, 839-840 (9th Cir. 2001) (holding a preliminary injunction is appropriate
24 if the moving party establishes either (1) a combination of probable success on the merits and the
25 possibility of irreparable injury; or (2) serious questions going to the merits of the case and the balance
26 of hardships tips sharply in favor of the moving party).

27 ///

28 _____
¹³ Supermail Cargo v. United States, 68 F.3d 1204, 1206 (9th Cir. 1995) (citation omitted).

1 III. Wells Fargo's Motion for More Definite Statement

2 As the Court's dismissal of the entire complaint is dispositive, WMC's motion for definite
3 statement is denied as moot.

4 CONCLUSION


5 For the reasons stated herein, Plaintiff's motion to remand the case to state court is DENIED.
6 The Court GRANTS Wells Fargo's motion to dismiss the complaint, DENIES AS MOOT Wells
7 Fargo's motion for more definite statement, and DISMISSES the complaint in its entirety, WITHOUT
8 PREJUDICE. Plaintiff may file a first amended complaint on or before October 23, 2009, but the
9 Court reiterates that Plaintiff, in any amended complaint:

- 10 (1) must cure the substantive deficiencies described herein; and
11 (2) must substitute or join the bankruptcy trustee, or show the trustee's
12 ratification of this action, pursuant to the requirements of Fed. R. Civ.
13 P 17(a)(3); *or alternatively*, must allege the lawsuit is exempt from the
14 bankruptcy estate or has been abandoned by the bankruptcy trustee, *if*
15 *she is able to do so consistent with Fed. R. Civ. P. 11.*¹⁴

16 If Plaintiff believes it is not necessary to take any the actions required by Rule 17, she must show
17 cause in writing to that effect on or before October 23, 2009. If Plaintiff fails to comply with the Rule
18 17 requirements within the allotted time, the Court will automatically dismiss this case with prejudice.

19 **IT IS SO ORDERED.**

20 **DATED: September 30, 2009**

21 
22 IRMA E. GONZALEZ, Chief Judge
23 United States District Court

24 ¹⁴ Federal Rule of Civil Procedure 11 provides, "By presenting to the court a pleading, written
25 motion, or other paper--whether by signing, filing, submitting, or later advocating it--an . . .
26 unrepresented party certifies that to the best of the person's knowledge, information, and belief,
27 formed after an inquiry reasonable under the circumstances: . . . (2) the claims, defenses, and other
28 legal contentions are warranted by existing law or by a nonfrivolous argument for extending,
modifying, or reversing existing law or for establishing new law; (3) the factual contentions have
evidentiary support or, if specifically so identified, will likely have evidentiary support after a
reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions
are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack
of information." Fed. R. Civ. P. 11(b) (2009).