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

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FRIDA VISSUET,

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Plaintiff,

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vs.

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INDYMAC MORTGAGE SERVICES;  
QUALITY LOAN SERVICE CORP.; and  
DOES 1-100,

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Defendants.

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Currently before the Court is a Motion to Dismiss the First Amended Complaint brought by Defendant OneWest Bank, FSB as Successor in Interest to Certain Assets and Liabilities of IndyMac Bank, FSB (“OneWest”). Having considered the parties’ arguments, and for the reasons set forth below, the Court **GRANTS IN PART and DENIES IN PART** the motion.

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**BACKGROUND**

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**I. Parties**

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Frida Vissuet (“Vissuet”) is the owner of certain real property commonly known as 2234 MOROSE STREET, LEMON GROVE, CALIFORNIA 91945 (“Property”).

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OneWest is the current owner of all beneficial interest under the Deed of Trust executed by Vissuet. The original lender under the Deed of Trust was PacificBanc Mortgage. (Def. MTD, Ex. A.) OneWest became the beneficial owner on July 13, 2009, through an assignment by Mortgage

CASE NO. 09-CV-2321 - IEG (CAB)

ORDER GRANTING IN PART AND  
DENYING IN PART ONEWEST’S  
MOTION TO DISMISS

[Doc. No. 16]

1 Electronic Registration Systems, Inc., acting as a nominee for PacificBanc Mortgage. (Id., Ex. C.) The  
2 Assignment of Deed of Trust was recorded on July 23, 2009. (Id.)

3 Quality Loan Services is the current trustee. The original trustee under the Deed of Trust was  
4 LandAmerica Southland Title. (Id., Ex. A.) Quality Loan Services was substituted as a trustee on June  
5 20, 2009. (Id., Ex. D.) The Substitution of Trustee was recorded on August 4, 2009. (Id.)

## 6 **II. Factual background**

7 On July 24, 2007, Vissuet executed a Deed of Trust securing a loan in the amount of \$360,000  
8 from PacificBanc Mortgage. According to Vissuet, this was an Alternative-A loan,<sup>1</sup> and it consisted  
9 of a “refinance” of the first deed on the Property. (FAC ¶ 4.) On June 20, 2009, after Vissuet defaulted  
10 on her loan, Quality Loan Services recorded and served a Notice of Default on the Property. (See Def.  
11 MTD, Ex. B.) On September 25, 2009, Quality Loan Services recorded a Notice of Trustee’s Sale of  
12 the Property in the amount of \$379,660.17, setting October 15, 2009 as the date of sale. (Id., Ex. E.)

13 Upon receipt of the Notice of Trustee’s Sale, Vissuet contacted IndyMac and requested loan  
14 modification. She was allegedly told that if she completed and submitted the loan modification  
15 application, IndyMac would postpone the trustee’s sale. (FAC ¶ 9.) Vissuet alleges that based upon  
16 that promise, she completed and submitted her loan modification application. (Id. ¶ 10.) However,  
17 after Vissuet submitted the application, she was informed by IndyMac that there was nothing that  
18 could be done to stop the trustee’s sale of the Property. (Id.) As a result, Vissuet filed the present suit.  
19 After the action was commenced, Vissuet received in the mail two additional letters from IndyMac,  
20 dated November 2 and November 5, indicating that IndyMac was willing to work with Vissuet on a  
21 loan modification. (See, e.g., id., Ex. B.)

## 22 **III. Procedural background**

23 Vissuet filed the present complaint on October 13, 2009, in the Superior Court for the County  
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25 <sup>1</sup> An “Alternative-A” loan (“Alt-A loan”) refers to a type of a subprime loan. “The prime rate  
26 is the ‘base rate that banks use in pricing commercial loans to their best and most creditworthy  
27 customers.’” In re MoneyGram Int’l, Inc. Sec. Litig., 626 F. Supp. 2d 947, 958 n.6 (D. Minn. 2009)  
28 (citation omitted). “Prime borrowers as a group generally receive the same terms from most lenders,  
while subprime borrowers are sorted into a number of different risk classes. . . . Borrowers who have  
prime credit scores but cannot provide full income documentation, or otherwise pose a higher risk,  
are considered ‘Alt-A’ borrowers.” Todd J. Zywicki & Joseph D. Adamson, *The Law and Economics  
of Subprime Lending*, 80 U. COLO. L. REV. 1, 7 (2009) (citations omitted).

1 of San Diego, alleging four causes of action. OneWest subsequently removed the case to this Court  
2 on October 19, 2009. On November 10, 2009, Vissuet moved for a Temporary Restraining Order  
3 (“TRO”) to avoid an impending trustee’s sale. The Court granted the motion for TRO and scheduled  
4 a hearing on the preliminary injunction for November 23, 2009. After the hearing, the Court denied  
5 the request for preliminary injunction and dissolved the TRO. [Doc. No. 12]. On December 4, 2009,  
6 Vissuet filed her First Amended Complaint (“FAC”), alleging five causes of action: (1) for predatory  
7 lending against IndyMac; (2) for breach of contract against all Defendants; (3) for fraud against all  
8 Defendants; (4) for violation of Section 2923.52 et seq. of the California Civil Code against all  
9 Defendants; and (5) for declaratory and injunctive relief against all Defendants. [Doc. No. 14].

10 Subsequently, on January 13, 2010, OneWest filed the present Motion to Dismiss the FAC  
11 pursuant to Fed. R. Civ. P. 12(b)(6). Vissuet filed a late opposition, and OneWest filed a reply.<sup>2</sup>

#### 12 LEGAL STANDARD

13 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the pleadings. A  
14 complaint survives a motion to dismiss if it contains “enough facts to state a claim to relief that is  
15 plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S.544, 570 (2007). The court may dismiss  
16 a complaint as a matter of law for: (1) “lack of cognizable legal theory,” or (2) “insufficient facts  
17 under a cognizable legal claim.” SmileCare Dental Group v. Delta Dental Plan of Cal., 88 F.3d 780,  
18 783 (9th Cir. 1996) (citation omitted). The court only reviews the contents of the complaint, accepting  
19 all factual allegations as true, and drawing all reasonable inferences in favor of the nonmoving party.  
20 al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009) (citation omitted).

21 Despite the deference, the court need not accept “legal conclusions” as true. Ashcroft v. Iqbal,  
22 --- U.S. ---, 129 S.Ct. 1937, 1949-50 (2009). It is also improper for the court to assume “the [plaintiff]  
23 can prove facts that [he or she] has not alleged.” Assoc. Gen. Contractors of Cal., Inc. v. Cal. State  
24 Council of Carpenters, 459 U.S. 519, 526 (1983). On the other hand, “[w]hen there are well-pleaded  
25 factual allegations, a court should assume their veracity and then determine whether they plausibly  
26 give rise to an entitlement to relief.” Iqbal, 129 S.Ct. at 1950.

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28 <sup>2</sup> Although Plaintiff’s opposition was untimely, the Court will exercise its discretion to accept  
it. See CIV. L.R. 7.1(e)(7). Plaintiff’s counsel, however, is cautioned that another such missed deadline  
could result in the opposing party’s motion being granted. See CIV. L.R. 7.1(f)(3)(c).

1 DISCUSSION

2 I. Failure to tender

3 OneWest first asserts that the entire FAC should be dismissed due to Plaintiff’s failure to  
4 allege or make an actual tender. OneWest relies on an apparent maxim in the context of foreclosures  
5 known as the “tender rule,” pursuant to which a borrower who has defaulted must first do equity  
6 himself before requesting the Court to stop or set aside the foreclosure proceedings. However, a  
7 review of the cases cited by OneWest indicates that the California “tender rule” applies only where  
8 the plaintiff is trying to *set aside* a foreclosure sale due to some irregularity. See, e.g., Nguyen v.  
9 Calhoun, 105 Cal. App. 4th 428, 439 (2003) (plaintiff’s purchase of the subject property before the  
10 sale took place); Abdallah v. United Sav. Bank, 43 Cal. App. 4th 1101, 1109 (1996) (irregularity in  
11 the sale procedure); U.S. Cold Storage v. Great Western Sav. & Loan Ass’n, 165 Cal. App. 3d 1214,  
12 1225 (1985) (irregularity in the sale notice); Arnolds Mgmt. Corp. v. Eischen, 158 Cal. App. 3d 575,  
13 578 (1984) (irregularity in the sale notice); Karlsen v. Am. Sav. & Loan Ass’n, 15 Cal. App. 3d 112,  
14 118 (1971) (voidable sale under a deed of trust)

15 In the present case, however, the trustee’s sale has not occurred yet, and OneWest has failed  
16 to cite to any case that would establish a similar bright-line rule requiring tender where the plaintiff  
17 is merely attempting to *prevent* a trustee sale from proceeding.<sup>3</sup> Moreover, it is well-established that  
18 “an offer to pay debt may not be required where doing so would be inequitable.” See Pantoja v.  
19 Countrywide Home Loans, Inc., 640 F. Supp. 2d 1177, 1184 (N.D. Cal. 2009) (citations omitted). As  
20 the California Supreme Court has stated:

21 [T]here are not a few cases holding that, where a party has the right to avoid a sale, he  
22 is not bound to tender any payment in redemption. Whatever may be the correct rule,  
23 viewing the question generally, it is certainly not the law that an offer to pay the debt  
24 must be made, where it would be inequitable to exact such offer of the party  
complaining of the sale. Under the circumstances disclosed by this record, the  
defendant would be subjected to very evident injustice and hardship if her right to  
attack the sale were made dependent upon an offer by her to pay the whole debt.

25 Humboldt Sav. Bank v. McCleverty, 161 Cal. 285, 291 (1911) (internal citations omitted).

26  
27 <sup>3</sup> The only case that is somewhat relevant is Meetz v. Mohr, 141 Cal. 667, 673 (1904), where  
28 the California Supreme Court concluded that tender was required before a sale under a trust deed  
could be enjoined. In the present case, however, the Court has already determined that Plaintiff is not  
entitled to an order enjoining the trustee’s sale. [See Doc. No. 12].

1 Accordingly, because Plaintiff alleges improprieties with the origination and servicing of her loan, and  
2 because the trustee sale has not taken place yet, the Court declines to require Plaintiff to make or  
3 allege an actual tender at this time.

4 **II. First cause of action for predatory lending (against IndyMac)**

5 In her first cause of action, Plaintiff alleges that the subject loan was accomplished by the use  
6 of predatory lending because Defendants knew or should have known that the loan was one that  
7 Plaintiff should not have qualified for. (FAC ¶¶ 17-19.) In moving to dismiss this cause of action,  
8 OneWest argues that the term “predatory lending” is very expansive and that Plaintiff’s FAC does not  
9 really provide notice to OneWest of the allegations against it. The Court agrees.

10 First, Plaintiff fails to indicate any legal basis for her “predatory lending” cause of action. As  
11 a result, both the Court and OneWest are left to guess whether this cause of action is based on an  
12 alleged violation of federal law, state law, common law, or some combination of the above.<sup>4</sup> Second,  
13 Plaintiff fails to plead sufficient facts to support her claim of “predatory lending.” Notably, Plaintiff  
14 does not allege that she signed the documents based on duress or fraud, that there were terms in the  
15 loan documents she did not understand, or that some mandated disclosures were not provided to her.  
16 Rather, Plaintiff alleges IndyMac did not factor her ability to pay the loan, her creditworthiness, or  
17 her ability to pay the adjusted monthly payments in the future when providing Plaintiff with the loan;  
18 but she does not allege whether any of that information was available to IndyMac at the relevant time  
19 or how that amounted to “predatory lending.” (See FAC ¶¶ 17-19.) Accordingly, because Plaintiff has  
20 failed to provide the “grounds”—both factual and legal—of her “entitlement to relief,” the Court  
21 **GRANTS** OneWest’s Motion to Dismiss and **DISMISSES WITH LEAVE TO AMEND** the first  
22 cause of action for “predatory lending.” See Twombly, 550 U.S. at 555.

23 **III. Second cause of action for breach of contract (against all Defendants)**

24 In her second cause of action, Plaintiff alleges that in exchange for her promise to complete  
25 and submit to IndyMac a loan modification application, IndyMac promised to postpone the trustee’s  
26 sale on the subject property. (FAC ¶ 23.) According to Plaintiff, she performed her portion of this oral

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28 <sup>4</sup> The fact that there might not be an established, objective definition of the term “predatory  
lending,” as Plaintiff argues in her reply, does not change the fact that Plaintiff must specify some  
legal basis for her cause of action.

1 contract, and IndyMac breached its obligation when it failed to postpone the trustee's sale. (Id. ¶ 24.)  
2 In its motion to dismiss, OneWest denies that any oral contract was formed between the parties, and  
3 in the alternative argues that any such contract would be unenforceable due to lack of certainty  
4 regarding the material terms and because it violates the Statute of Frauds.

5 The Court is not persuaded by the argument that the alleged agreement *by itself* violates the  
6 Statute of Frauds. Section 1624(a)(6), on which OneWest relies, provides only that “[a]n agreement  
7 by a purchaser of real property *to pay an indebtedness secured* by mortgage or deed of trust upon the  
8 property purchased” is invalid unless made in writing and subscribed by the party to be charged. CAL.  
9 CIV. CODE § 1624(a)(6) (emphasis added). Plaintiff's second cause of action, however, alleges an oral  
10 contract where IndyMac promised to postpone the trustee's sale in exchange for Plaintiff's promise  
11 to complete and submit a loan modification application. (FAC ¶ 23.) This agreement is not for any  
12 obligation “to pay an indebtedness secured” and therefore is not covered by Section 1624(a)(6).

13 Rather, the proper challenge to the validity of an oral modification of a deed of trust is through  
14 Section 1698. See Secret v. Sec. Nat'l Mortgage Loan Trust 2002-2, 167 Cal. App. 4th 544, 553  
15 (2008) (concluding that an agreement that “altered the lender's ability to exercise a right to foreclose  
16 under the note and deed of trust due to the borrower's default” amounted to a modification, which  
17 must comply with the requirements of Section 1698). Section 1698 provides that a contract in writing  
18 may only be modified (1) in writing, (2) by an executed oral agreement, or (3) by an oral agreement  
19 supported by new consideration. CAL. CIV. CODE § 1698(a)-(c). The California Supreme Court has  
20 held that “if there exists sufficient consideration for an oral modification agreement, then full  
21 performance by the promisee alone would suffice to render the agreement ‘executed’ within the  
22 meaning of section 1698.” Raedeke v. Gibraltar Sav. & Loan Ass'n, 10 Cal. 3d 665, 673 (1974)  
23 (concluding that the borrowers had a cognizable cause of action at law because they relied on the  
24 lender's promise to postpone the foreclosure sale if they obtained a solvent buyer).

25 In the present case, adequate consideration can be found in the form of Plaintiff's completion  
26 and submission of the loan modification application. The application was not something Plaintiff was  
27 required to do under the original contract, and if not for the application, Plaintiff alleges she would  
28 have spent the time pursuing alternate measures to avoid the foreclosure. See Pope v. Sav. Bank of

1 Puget Sound, 850 F.2d 1345, 1356 (9th Cir. 1988) (“We recall the first lesson in contracts, the  
2 peppercorn theory—that courts will not inquire into the adequacy of consideration, so long as it was  
3 true and valuable.”). Accordingly, because Plaintiff has alleged sufficient facts that there was  
4 “sufficient consideration” for an oral modification and that she has fully performed her part of the  
5 contract, Plaintiff’s second cause of action is not barred by Section 1698. See Raedeke, 10 Cal. 3d  
6 at 673.

7         Moreover, Plaintiff can state a cause of action even in the absence of actual consideration.  
8 Thus, “the doctrine of promissory estoppel is used to provide a substitute for the consideration which  
9 ordinarily is required to create an enforceable promise. . . . ‘The purpose of this doctrine is to make  
10 a promise binding, under certain circumstances, without consideration in the usual sense of something  
11 bargained for and given in exchange.’” Id. at 672. “‘Under this doctrine a promisor is bound when he  
12 should reasonably expect a substantial change of position, either by act or forbearance, in reliance on  
13 his promise, if injustice can be avoided only by its enforcement.’”<sup>5</sup> Id. at 672 n.1. In the present case,  
14 Plaintiff has sufficiently alleged that: (1) IndyMac made a promise that it would postpone the sale if  
15 Plaintiff completed and submitted the loan modification application; (2) IndyMac should have  
16 reasonably expected that Plaintiff would rely on that promise; (3) Plaintiff in fact did rely on that  
17 promise by spending time to complete the application rather than pursuing alternate measures to avoid  
18 the foreclosure; and (4) if the promise is not enforced, injustice will occur in the form of a foreclosure  
19 on Plaintiff’s property.<sup>6</sup> (See FAC ¶¶ 10, 22-25.) Accordingly, even in the absence of actual  
20 consideration, Plaintiff has pled sufficient facts for her second cause of action to withstand a motion  
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23 <sup>5</sup> The doctrine of promissory estoppel is not precluded by Section 1698. See CAL. CIV. CODE  
24 § 1698(d) (“Nothing in this section precludes in an appropriate case the application of rules of law  
concerning estoppel . . .”).

25 <sup>6</sup> OneWest also argues that the oral contract is unenforceable due to lack of certainty regarding  
26 the material terms. Section 3390 provides that an agreement, “the terms of which are not sufficiently  
27 certain to make the precise act which is to be done clearly ascertainable,” cannot be specifically  
28 enforced. CAL. CIV. CODE § 3390(5). “However, the law does not favor but leans against the  
destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to  
carry into effect the reasonable intentions of the parties if they can be ascertained.” Patel v.  
Liebermensch, 45 Cal. 4th 344, 349 (2008) (internal quotation marks and citations omitted). As the  
above recitation of the promissory estoppel factors demonstrates, the material terms of the alleged oral  
contract are sufficiently ascertainable in this case to be specifically enforced by the Court.

1 to dismiss.<sup>7</sup> See Sutherland v. Barclays Am. / Mortgage Corp., 53 Cal. App. 4th 299, 312 (1997)  
2 (concluding that Plaintiff could proceed with her cause of action for breach of contract where she  
3 detrimentally relied on the defendant’s statement that she could postpone three mortgage payments).

4 **III. Third cause of action for fraud (against all Defendants)**

5 In her third cause of action, Plaintiff alleges she was defrauded by Defendants when they  
6 promised to postpone the trustee’s sale if she filed her application, and then failed to do so. (FAC ¶¶  
7 27-29.) Plaintiff argues that this conduct constituted a fraudulent business practice because IndyMac  
8 failed to act in good faith and deal fairly with Plaintiff. (Id. ¶ 30.) Finally, Plaintiff alleges that this  
9 is a wide-spread practice by IndyMac, whereby it promises to postpone the trustee’s sales upon the  
10 borrowers’ submission of their loan modification applications and subsequently either falsely claims  
11 that it did not receive the applications or all of the documentation, or proceeds with the trustee’s sales  
12 regardless of what the borrowers do. (Id. ¶ 33.) OneWest moves to dismiss this cause of action,  
13 arguing there is no obligation to modify the loan, and that in any event Plaintiff has failed to plead the  
14 necessary elements to support a claim for fraud with required particularity.

15 As an initial matter, OneWest misunderstands Plaintiff’s third cause of action. Specifically,  
16 this cause of action appears to be based on OneWest’s obligation to modify the loan *as agreed* in the  
17 oral contract, and *not* on any duty under the California Civil Code. (See FAC ¶¶ 26-29.)

18 Nonetheless, the Court agrees that Plaintiff has failed to plead her cause of action for fraud  
19 with the required particularity. To recover for common law fraud under California law, Plaintiff must  
20 demonstrate: (1) misrepresentation, (2) knowledge of its falsity, (3) intent to defraud, (4) justifiable  
21 reliance, and (5) resulting damage. Gil v. Bank of Am., N.A., 138 Cal. App. 4th 1371 (2006) (citation  
22 omitted). Moreover, Federal Rule of Civil Procedure 9(b) requires allegations of fraud or mistake to

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24 <sup>7</sup> OneWest’s reliance on Secrest to defeat this argument is unavailing. In Secrest, the Court of  
25 Appeals expressly found that the plaintiffs “do not assert they changed their position in reliance on  
26 the January 2002 Forbearance Agreement in any way other than by making the downpayment.” 167  
27 Cal. App. 4th at 556. According to the court, this was insufficient for purposes of promissory estoppel.  
28 Id. at 555-56. In contrast, Vissuet asserts that she changed her position in reliance on OneWest’s  
promise by completing and submitting the application, as well as by foregoing an opportunity to  
pursue alternate measures for avoiding the foreclosure. (See FAC ¶¶ 10, 22-25.) This alleged reliance  
is based on more than a mere payment of money and is sufficient to take the contract out of the  
Statute of Frauds. See Sutherland v. Barclays Am. / Mortgage Corp., 53 Cal. App. 4th 299, 312 (1997)  
(concluding that Plaintiff could proceed with her cause of action for breach of contract where she  
detrimentally relied on the defendant’s statement that she could postpone three mortgage payments).



1 be stated “with particularity.” In the Ninth Circuit, this rule “has been interpreted to mean the pleader  
2 must state the time, place and specific content of the false representations as well as the identities of  
3 the parties to the misrepresentation.” Misc. Serv. Workers, Drivers & Helpers v. Philco-Ford Corp.,  
4 661 F.2d 776, 782 (9th Cir.1981) (citations omitted); see also Vess v. Ciba-Geigy Corp. USA, 317  
5 F.3d 1097, 1106 (9th Cir. 2003) (“Averments of fraud must be accompanied by ‘the who, what, when,  
6 where, and how’ of the misconduct charged.” (citation omitted)). Thus, where multiple defendants are  
7 involved, “a plaintiff must, at a minimum, ‘identify the role of each defendant in the alleged fraudulent  
8 scheme.”” Swartz v. KPMG LLP, 476 F.3d 756, 765 (9th Cir.2007) (quotation omitted).

9 In the present case, as OneWest points out, Plaintiff has failed to identify who she talked to,  
10 what specifically was promised, and why there was any knowledge of falsity. As such, the third cause  
11 of action fails to comply with Rule 9(b) because it is not “specific enough to give defendants notice  
12 of the particular misconduct ... so that they can defend against the charge and not just deny that they  
13 have done anything wrong.” See Vess, 317 F.3d at 1106 (internal quotation marks and citation  
14 omitted). Accordingly, the Court **GRANTS** the Motion to Dismiss in this regard and **DISMISSES**  
15 **WITH LEAVE TO AMEND** Plaintiff’s third cause of action.

16 **IV. Fourth cause of action for violation of California Civil Code Section 2923.52 et seq.**  
17 **(against all Defendants)**

18 In her fourth cause of action, Plaintiff alleges Defendants are in violation of Section 2923.52  
19 et seq. of the California Civil Code because they have not implemented a viable loan modification  
20 program. (FAC ¶¶ 34-36.) Specifically, with respect to her, Plaintiff alleges Defendants failed to offer  
21 her a viable loan modification program. (Id. ¶ 37.) Accordingly, because they failed to implement a  
22 viable loan modification program, Plaintiff alleges Defendants were “required to extend the notice of  
23 default period an additional 90 days,” including with respect to Plaintiff’s loan. (Id. ¶¶ 38-39.)

24 Plaintiff’s fourth claim essentially boils down to two arguments. First, it appears Plaintiff  
25 argues Defendants had an obligation to provide her with a loan modification program. However,  
26 “nothing in Cal. Civ. Code § 2923.6 imposes a duty on servicers of loans to modify the terms of loans  
27 or creates a private right of action for borrowers.” Farmer v. Countrywide Home Loans, No. 08cv2193  
28 BTM (AJB), 2009 WL 189025, at \*2 (S.D. Cal. Jan. 26, 2009); accord Pantoja v. Countrywide Home  
Loans, 640 F. Supp. 2d 1177, 1188 (N.D. Cal. 2009).

1           Second, and in the alternative, Plaintiff appears to argue that Defendants had to provide her  
2 with additional 90 days after the notice of default. Normally, notice of sale cannot be given less than  
3 three months from the filing of the notice of default.<sup>8</sup> CAL. CIV. CODE § 2924(2), (3). However, under  
4 the California Foreclosure Prevention Act, Cal. Civ. Code §§ 2923.52 et seq., with regard to certain  
5 residential loans, lenders are required to provide the borrower with *additional* 90 days. The longer  
6 period applies only if all of the following criteria are met: (1) the loan was recorded during the period  
7 of January 1, 2003 to January 1, 2008; (2) the loan at issue is “the first mortgage or deed of trust that  
8 the property secures;” (3) the borrower “occupied the property as the borrower’s principal residence  
9 at the time the loan was delinquent;” and (4) the notice of default has been recorded on the property.  
10 Id. § 2923.52(a). If Section 2923.52 does not apply to the particular sale at hand, that fact must be  
11 expressly stated in the Notice of Sale. Id. § 2923.54.

12           In the present case, Plaintiff has failed to allege sufficient facts to show that she was entitled  
13 to the additional 90 days. Notably, the FAC expressly provides that Plaintiff’s loan “consisted of a  
14 *refinance* of a first trust deed on [the Property].” (FAC ¶ 4 (emphasis added).) However, to qualify  
15 for the longer period, the loan must have been “the *first mortgage* or deed of trust that the property  
16 secures.”<sup>9</sup> See CAL. CIV. CODE § 2923.52(a)(2) (emphasis added). Moreover, Section 2923.52 does  
17 not apply in this case because OneWest obtained a permanent exemption from the Department of  
18 Financial Institutions pursuant to Section 2923.53.<sup>10</sup> See Dep’t of Fin. Inst., California Foreclosure  
19 Prevention Act, <http://www.dfi.ca.gov/cfpa/default.asp> (last visited March 11, 2010). As required by

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22           <sup>8</sup> In the present case, it is clear that Defendants complied with the regular waiting period of  
23 three months under Section 2924 because the Notice of Sale was recorded on September 25, 2009,  
while the Notice of Default was recorded on June 20, 2009. (See Def. MTD, Exs. B, E.)

24           <sup>9</sup> A “first mortgage” is a mortgage “that is senior to all other mortgages on the same property.”  
25 BLACK’S LAW DICTIONARY 1102 (9th ed. 2009). On the other hand, “refinancing” refers to “[a]n  
26 exchange of an old debt for a new debt, as by negotiating a different interest rate or term or by  
repaying the existing loan with money acquired from a new loan.” Id. at 1394. Accordingly, if  
Plaintiff’s loan was obtained to *refinance* her property, (FAC ¶ 4), the FAC on its face forecloses the  
argument that it was a “first mortgage” on the Property.

27           <sup>10</sup> Section 2923.53 provides in pertinent part: “A mortgage loan servicer that has implemented  
28 a comprehensive loan modification program that meets the requirements of this section shall have the  
loans that it services exempted from the provisions of Section 2923.52, upon order of the  
commissioner.” Cal. Civ. Code § 2923.53(a).

1 Section 2923.54, this fact was expressly stated in the Notice of Sale sent to Plaintiff.<sup>11</sup> (See Def. MTD,  
2 Ex. E.) For the foregoing reasons, the Court **GRANTS** OneWest’s Motion to Dismiss and  
3 **DISMISSES WITH PREJUDICE** Plaintiff’s fourth cause of action.

4 **V. Fifth cause of action for declaratory and injunctive relief (against all Defendants)**

5 Finally, OneWest moves to dismiss Plaintiff’s fifth cause of action seeking declaratory and  
6 injunctive relief. According to OneWest, Plaintiff’s declaratory relief action fails because she seeks  
7 to redress past wrongs, rather than declaration of her future rights. Moreover, OneWest argues the  
8 request for declaratory relief is entirely commensurate with relief sought through the other causes of  
9 action. Finally, OneWest argues Plaintiff is not entitled to injunctive relief because: (1) it is a remedy,  
10 and not a cause of action; (2) it is unavailable because Plaintiff has failed to do equity herself; and (3)  
11 it is unavailable to Plaintiff because she has slept on her rights.

12 Under 28 U.S.C. § 2201, “any court of the United States, upon the filing of an appropriate  
13 pleading, may declare the rights and other legal relations of any interested party seeking such  
14 declaration, whether or not further relief is or could be sought.” Declaratory relief, however, may be  
15 unnecessary where an adequate remedy exists under some other cause of action. See Mangindin v.  
16 Wash. Mut. Bank, 637 F. Supp. 2d 700, 707 (N.D. Cal. 2009). Likewise, “[d]eclaratory relief should  
17 be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in  
18 issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by  
19 the parties.” United States v. Washington, 759 F.2d 1353, 1356-57 (9th Cir. 1985) (en banc) (per  
20 curiam) (citations omitted). In the present case, Plaintiff’s request for declaratory relief is not  
21 redundant in the face of the other causes of action, and it may be useful in clarifying the legal relations

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22 <sup>11</sup> The Notice of Sale in this case expressly provided that:

23 Pursuant to California Civil Code § 2923.54 the undersigned, on behalf of the  
24 beneficiary, loan servicer or authorized agent, declares as follows:

25 [ 1 ] The mortgage loan servicer has obtained from the commissioner a final or  
26 temporary order of exemption pursuant to Section 2923.53 that is current and valid on  
the date the notice of sale is filed;

27 [ 2 ] The timeframe for giving notice of sale specified in subdivision (a) of Section  
28 2923.52 does not apply pursuant to Section 2923.52.

(Def. MTD, Ex. E.)

1 between the parties. Specifically, Plaintiff wants the Court to adjudge whether she is entitled to a good  
2 faith evaluation of her loan modification application, and if so, whether Defendants are then required  
3 to make a good faith offer to modify her loan and cancel the currently pending trustee's sale. (FAC  
4 ¶¶ 43-44.) Because the relief sought is different from what is sought in the remaining four causes of  
5 action, the Court **DENIES** OneWest's Motion to Dismiss in this regard. See StreamCast Networks,  
6 Inc. v. IBIS LLC, No. CV 05-04239 MMM (Ex), 2006 WL 5720345, at \*\*3-5 (C.D. Cal. May 2,  
7 2006) (denying defendant's motion to dismiss the declaratory relief claim where the claim sought a  
8 declaration that plaintiff could terminate the agreement in the future and retain the advance payment  
9 without liability, which was different than the relief sought in plaintiff's breach of contract claim).

10 On the other hand, the Court agrees with OneWest that injunctive relief "is a remedy and not,  
11 in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted."  
12 See Shell Oil Co. v. Richter, 52 Cal. App. 2d 164, 168 (1942) (citation omitted). Accordingly, the  
13 Court **GRANTS** the Motion to Dismiss in this regard and **DISMISSES WITH PREJUDICE** the  
14 *cause of action* for injunctive relief. Plaintiff's request for injunctive relief as a *remedy*, however,  
15 remains viable—provided Plaintiff is successful on the merits of one of her remaining causes of action.

#### 16 CONCLUSION

17 For the foregoing reasons, the Court **ORDERS** as follows:

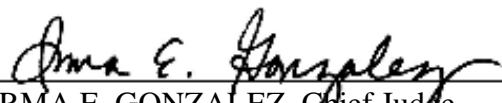
18 (1) OneWest's Motion to Dismiss Plaintiff's first and third causes of action is **GRANTED**,  
19 and those causes of action are **DISMISSED WITH LEAVE TO AMEND**. Plaintiff shall have  
20 **twenty (20) days** from the date of the filing of this Order to file a Second Amended Complaint.

21 (2) OneWest's Motion to Dismiss Plaintiff's fourth cause of action and fifth cause of action  
22 seeking injunctive relief is **GRANTED**, and those causes of action are **DISMISSED WITH**  
23 **PREJUDICE**.

24 (3) OneWest's Motion to Dismiss is **DENIED** in all other respects.

25 **IT IS SO ORDERED.**

26  
27 DATED: March 19, 2010

28   
IRMA E. GONZALEZ, Chief Judge  
United States District Court