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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 Plaintiff's Second 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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Plaintiff 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. RJN, 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. 22]

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,¹ and it consisted
9 of a “refinance” of the first deed on the Property. (SAC ¶ 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 RJN, 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. (SAC ¶ 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 there was nothing that could
18 be done to stop the trustee’s sale of the Property. (Id.) As a result, Vissuet filed the present suit. After
19 the action was commenced, Vissuet received in the mail two additional letters from IndyMac, dated
20 November 2, 2009 and November 5, 2009, indicating that IndyMac was willing to work with Vissuet
21 on a 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 ¹ 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. Defendant
7 OneWest subsequently filed a Motion to Dismiss the FAC, which the Court granted in part and denied
8 in part on March 19, 2010. [Doc. No. 20]. Finally, on April 8, 2010, Plaintiff filed her Second
9 Amended Complaint (“SAC”) alleging three causes of action: (1) predatory lending; (2) breach of
10 contract; and (3) fraud. [Doc. No. 21].

11 On April 23, 2010, OneWest filed the present Motion to Dismiss. [Doc. No. 22]. Vissuet filed
12 an opposition, and OneWest replied. [Doc. Nos. 23, 25]. The Court subsequently took the motion
13 under submission pursuant to Civil Local Rule 7.1(d)(1).

14 LEGAL STANDARD

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

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

1 **DISCUSSION**

2 **I. Failure to tender**

3 OneWest first asserts the entire SAC should be dismissed due to Plaintiff’s failure to allege
4 or make an actual tender. The Court, however, previously rejected this argument and does so again
5 here. Specifically, as the Court previously stated, the cases cited by OneWest stand only for the
6 proposition that without tendering an obligation in full, the plaintiff lacks standing to challenge a
7 foreclosure sale that has *already occurred* or to set it aside. (See MTD Order, at 4 [Doc. No. 20].) In
8 the present case, the trustee’s sale has not occurred yet, and OneWest has failed to cite to any case that
9 would establish a similar bright-line rule requiring tender where the plaintiff is merely attempting to
10 *prevent* a trustee sale from proceeding. (Id.) Accordingly, the Court once again declines to require
11 Plaintiff to make or allege an actual tender at this time.

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

13 In her first cause of action, Plaintiff alleges the subject loan was accomplished by the use of
14 predatory lending in violation of California Financial Code § 4970 et seq. because Defendants knew
15 or should have known the loan was one for which Plaintiff should not have qualified.

16 Plaintiff, however, failed to allege sufficient facts to demonstrate her loan falls within the
17 ambit of California’s predatory lending law, which is only applicable to specific covered loans. See
18 Wolski v. Fremont Inv. & Loan, 127 Cal. App. 4th 347, 351 (2005). To qualify as a “covered loan,”
19 the loan must be a consumer loan in which:

20 the original principal balance of the loan does not exceed the most current conforming
21 loan limit for a single-family first mortgage loan established by the Federal National
22 Mortgage Association in the case of a mortgage or deed of trust, and where one of the
following conditions are met:

- 23 (1) For a mortgage or deed of trust, the annual percentage rate at
24 consummation of the transaction will exceed by more than eight percentage
25 points the yield on Treasury securities having comparable periods of maturity
on the 15th day of the month immediately preceding the month in which the
application for the extension of credit is received by the creditor.
- 26 (2) The total points and fees payable by the consumer at or before closing for
a mortgage or deed of trust will exceed 6 percent of the total loan amount.

27 CAL. FIN. CODE § 4970(b). In this case, Plaintiff has failed to allege any facts from which the Court
28 might be able to determine whether “the original principal balance of the loan does not exceed the

1 most current conforming loan limit for a single-family first mortgage loan established by the Federal
2 National Mortgage Association.” See id.

3 Moreover, Plaintiff’s claim fails because OneWest was not involved in the origination of
4 Plaintiff’s loan. As applicable here, California’s predatory lending law provides that “[a] person who
5 *originates* covered loans shall not make or arrange a covered loan unless at the time the loan is
6 consummated, the person reasonably believes the consumer, or consumers, . . . will be able to make
7 the scheduled payments to repay the obligation based upon a consideration of their current and
8 expected income, current obligations, employment status, and other financial resources, other than the
9 consumer’s equity in the dwelling that secures repayment of the loan.” Id. § 4973(f)(1) (emphasis
10 added). “Originates” means “to arrange, negotiate, or make a consumer loan.” Id. § 4970(h). In this
11 case, as the Deed of Trust indicates, the original lender for Plaintiff’s loan was PacificBanc Mortgage.
12 (Def. RJN, Ex. A.) OneWest only received an interest in the loan via Assignment of the Deed of Trust
13 that was notarized on July 13, 2009, and recorded on July 23, 2009.² (Id., Ex. C.) Accordingly,
14 because OneWest did not originate Plaintiff’s loan, it cannot be liable for any predatory lending during
15 the origination process. Thus, this cause of action is **DISMISSED WITH PREJUDICE.**

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

17 In her second cause of action, Plaintiff alleges that in exchange for her promise to complete
18 and submit to IndyMac a loan modification application, IndyMac promised to postpone the trustee’s
19 sale on the subject property. (SAC ¶ 28.) According to Plaintiff, she performed her portion of this oral
20 contract, and IndyMac breached its obligation when it failed to postpone the trustee’s sale. (SAC ¶
21 29.) In its motion to dismiss, OneWest denies that any oral contract was formed between the parties,
22 and in the alternative argues that any such contract would be unenforceable due to lack of certainty
23 regarding the material terms and because it violates the Statute of Frauds. OneWest also argues
24 Plaintiff has failed to adequately allege facts establishing the elements for breach of contract.

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26 ² Both the Deed of Trust and the Assignment of the Deed of Trust are document of which the
27 Court can take judicial notice because they are matters of public record “whose accuracy cannot
28 reasonably be questioned.” See FED. R. EVID. 201; Castaneda v. Saxon Mortgage Servs., Inc., 687 F.
Supp. 2d 1191, 1196 (E.D. Cal. 2009). Moreover, “judicial notice may be taken of a fact to show that
a complaint does not state a cause of action.” Sears, Roebuck & Co. v. Metro. Engravers, Ltd., 245
F.2d 67, 70 (9th Cir. 1957). In this case, the Notice of Default and the Assignment of the Deed of
Trust confirm that IndyMac was not the originator of Plaintiff’s loan.

1 The Court has previously rejected OneWest’s argument that the alleged oral contract is
2 unenforceable because it violates the Statute of Frauds. As the Court previously explained, Section
3 1698 of the California Civil Code provides that a contract in writing may only be modified (1) in
4 writing, (2) by an executed oral agreement, or (3) by an oral agreement supported by new
5 consideration. CAL. CIV. CODE § 1698(a)-(c). The California Supreme Court has held that “if there
6 exists sufficient consideration for an oral modification agreement, then full performance by the
7 promisee alone would suffice to render the agreement ‘executed’ within the meaning of section 1698.”
8 Raedeke v. Gibraltar Sav. & Loan Ass’n, 10 Cal. 3d 665, 673 (1974) (concluding that the borrowers
9 had a cognizable cause of action at law because they relied on the lender’s promise to postpone the
10 foreclosure sale if they obtained a solvent buyer). In this case, adequate consideration can be found
11 in the form of Plaintiff’s completion and submission of the loan modification application.³

12 Similarly, Plaintiff has adequately alleged an existence of a valid oral contract. A cause of
13 action for breach of contract requires proof of the following elements: “(1) existence of the contract;
14 (2) plaintiff’s performance or excuse for nonperformance; (3) defendant’s breach; and (4) damages to
15 plaintiff as a result of the breach.” CDF Firefighters v. Maldonado, 158 Cal. App. 4th 1226, 1239
16 (2008) (citation omitted). Here, Plaintiff has alleged that in exchange for her promise to complete and
17 submit to IndyMac a loan modification application, IndyMac promised to postpone the trustee’s sale
18 on the subject property. (SAC ¶¶ 9, 28.) According to Plaintiff, she performed her portion of this oral
19 contract by completing and submitting the loan modification application. (SAC ¶¶ 10, 29.) Plaintiff
20 also adequately alleges IndyMac breached its obligation when it failed to postpone the trustee’s sale.⁴
21 (SAC ¶ 29.) Finally, Plaintiff alleges she was injured because she was required to initiate litigation

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23 ³ Even in the absence of actual consideration, Plaintiff can state a cause of action under the
24 doctrine of promissory estoppel. See Raedeke, 10 Cal. 3d at 672 (“Under [the doctrine of promissory
25 estoppel] a promisor is bound when he should reasonably expect a substantial change of position,
26 either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its
enforcement.”); 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 defendant’s statement that she could postpone three mortgage payments).

27 ⁴ The Court is not persuaded by OneWest’s argument that it has not breached the alleged oral
28 agreement because the trustee’s sale was ultimately postponed. As Plaintiff’s SAC indicates, the
postponement did not take place until *after* Plaintiff commenced this suit and obtained a temporary
restraining order, first in the state court and then in this Court. (See SAC ¶¶ 11-15.)

1 to compel postponement of the trustee's sale, thereby incurring damages in the form of attorney fees
2 and costs. (SAC ¶ 30.) For the foregoing reasons, because Plaintiff's SAC alleges sufficient facts to
3 state a claim for breach of contract, the Court **DENIES** the motion to dismiss in this regard.

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. (SAC ¶¶
7 34-36.) According to Plaintiff, this is a wide-spread practice by IndyMac, whereby it promises to
8 postpone the trustee's sales upon the borrowers' submission of their loan modification applications
9 and subsequently either falsely claims that it did not receive the applications or all of the
10 documentation, or proceeds with the trustee's sales regardless of what the borrowers do. (SAC ¶¶ 37-
11 39.) OneWest moves to dismiss this cause of action, arguing Plaintiff has failed to plead the necessary
12 elements to support a claim for fraud with required particularity.

13 To recover for common law fraud under California law, Plaintiff must demonstrate: (1)
14 misrepresentation, (2) knowledge of its falsity, (3) intent to defraud, (4) justifiable reliance, and (5)
15 resulting damage. Lazar v. Super. Ct., 12 Cal. 4th 631, 638 (1996). Moreover, Rule 9(b) of Federal
16 Rules of Civil Procedure requires allegations of fraud or mistake to be stated "with particularity." In
17 the Ninth Circuit, this rule "has been interpreted to mean the pleader must state the time, place and
18 specific content of the false representations as well as the identities of the parties to the
19 misrepresentation." Misc. Serv. Workers, Drivers & Helpers v. Philco-Ford Corp., 661 F.2d 776, 782
20 (9th Cir.1981) (citations omitted); see also Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th
21 Cir. 2003) ("Averments of fraud must be accompanied by 'the who, what, when, where, and how' of
22 the misconduct charged." (citation omitted)). Thus, where multiple defendants are involved, "a
23 plaintiff must, at a minimum, 'identify the role of each defendant in the alleged fraudulent scheme.'" Swartz v. KPMG LLP, 476 F.3d 756, 765 (9th Cir.2007) (quotation omitted).

25 In this case, Plaintiff has sufficiently alleged the "'the who, what, when, where, and how' of
26 the misconduct charged." See Vess, 317 F.3d at 1106. According to Plaintiff, on or about October 7,
27 2009, she spoke with Ms. Lori Melton, a qualified agent of IndyMac, who represented to her that the
28 then-impending trustee's sale would be postponed if Plaintiff would file her application for a loan

1 modification. (SAC ¶¶ 9, 34.) This representation turned out to be false, and IndyMac failed to
2 postpone the trustee’s sale. (SAC ¶¶ 10, 34.) Plaintiff adequately alleges that IndyMac knew the
3 representation was false when made and that IndyMac never intended to comply with its promise.
4 (SAC ¶¶ 35-36.) In support of IndyMac’s intent and knowledge, Plaintiff points to IndyMac’s alleged
5 fraudulent business practice pursuant to which IndyMac promises to postpone the trustee’s sales upon
6 the borrowers’ submission of their loan modification applications and subsequently either falsely
7 claims that it did not receive the applications or all of the documentation, or proceeds with the
8 trustee’s sales regardless of what the borrowers do. (SAC ¶¶ 37-39.) According to Plaintiff, this is
9 further confirmed by the numerous suits currently pending against IndyMac that arise from similar
10 fraudulent practices. (SAC ¶ 35.) Next, Plaintiff adequately alleges she relied on IndyMac’s
11 misrepresentation by completing and submitting the loan modification application. (SAC ¶ 10.)
12 Finally, Plaintiff adequately alleges she incurred damages in the form of attorney fees and costs when
13 she was required to initiate litigation to compel postponement of the trustee’s sale.⁵ (SAC ¶¶ 30, 38.)

14 The Court finds the foregoing allegations in the SAC to be “specific enough” to state a cause
15 of action for fraud and “to give [OneWest] notice of the particular misconduct so that [it] can defend
16 against the charge and not just deny that [it has] done anything wrong.” See Kearns v. Ford Motor Co.,
17 567 F.3d 1120, 1124 (9th Cir. 2009) (citation and internal quotation marks omitted); see also Peterson
18 v. Bank of Am., N.A., No. 09cv2570-WQH-CAB, 2010 WL 1881070, at **8-9 (S.D. Cal. May 10,
19 2010). Accordingly, the Court **DENIES** the motion to dismiss in this regard.

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28 ⁵ In her opposition to the Motion to Dismiss, Plaintiff also alleges IndyMac’s misrepresentations precluded her from taking alternative forms of recourse to prevent the trustee’s sale. (Pl. Opp., at 20.)


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CONCLUSION

For the foregoing reasons, the Court **GRANTS** the motion to dismiss as it relates to Plaintiff's first cause of action for predatory lending and **DISMISSES WITH PREJUDICE** this cause of action with respect to OneWest. In all other respects, the Court **DENIES** the motion to dismiss.

IT IS SO ORDERED.

DATED: June 29, 2010


IRMA E. GONZALEZ, Chief Judge
United States District Court