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

JESSICA LOPEZ,	
Plaintiff,	
v.	
U.S. BANK NATIONAL ASSOCIATION,	
et al.,	
Defendants.	

Case No. 10cv978 BTM (BGS)  
**ORDER RE MOTION TO DISMISS**

Defendant U.S. Bank National Association has filed a motion to dismiss the Complaint [Doc. 5]. For the following reasons, the Court **GRANTS** the motion.

**I. BACKGROUND<sup>1</sup>**

Plaintiff alleges several causes of action related to a \$1.275 million purchase-money mortgage she received on June 24, 2008. After signing for the loan, she eventually was unable to make her payments and in August 2009 a notice of default and election to sell was issued, saying she owed \$136,998.72 in past due payments.<sup>2</sup> A notice of trustee’s sale was recorded in November 2009.

Plaintiff wants to keep her home and cancel the foreclosure. She also wants to have her credit restored, have the loan forgiven in its entirety, and get compensatory, statutory, and punitive damages. She believes she is entitled to this relief because Defendants misrepresented the interest rate on her loan and failed to make several disclosures required

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<sup>1</sup> The following are allegations in the Complaint and not the Court’s factual findings.

<sup>2</sup> Although these allegations are not in the Complaint, the Court has taken judicial notice of the notice of default and election to sell attached to U.S. Bank’s motion to dismiss.

1 by federal law, including notice of her right to rescind the mortgage. She alleges six causes  
2 of action, and the Court addresses each of them below.

## 3 4 **II. LEGAL STANDARD**

5 Under Federal Rule of Civil Procedure 8(a)(2), the plaintiff is required only to set forth  
6 a “short and plain statement of the claim showing that the pleader is entitled to relief,” and  
7 “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”  
8 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When reviewing a motion to  
9 dismiss, the allegations of material fact in plaintiff’s complaint are taken as true and  
10 construed in the light most favorable to the plaintiff. See *Parks Sch. of Bus., Inc. v.*  
11 *Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). But only factual allegations must be  
12 accepted as true—not legal conclusions. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).  
13 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
14 statements, do not suffice.” *Id.* Although detailed factual allegations are not required, the  
15 factual allegations “must be enough to raise a right to relief above the speculative level.”  
16 *Twombly*, 550 U.S. at 555. Furthermore, “only a complaint that states a plausible claim for  
17 relief survives a motion to dismiss.” *Iqbal*, 129 S. Ct. at 1949.

18 In ruling on a motion to dismiss, a court may take judicial notice of matters of public  
19 record that are not subject to reasonable dispute. *Lee v. City of Los Angeles*, 250 F.3d 668,  
20 689 (9th Cir. 2001).

## 21 22 **III. DISCUSSION**

23 U.S. Bank moves to dismiss each of Plaintiff’s causes of action, starting with her first  
24 claim under the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2601 *et seq.*

### 25 26 **1. RESPA Claim**

27 RESPA requires loan servicers to respond to qualified written requests (“QWR”),  
28 which are requests for information related to loan servicing, like the outstanding amount due

1 or the interest rate. See 12 U.S.C. § 2605(e). A borrower can also use a QWR to challenge  
2 the amount due or try to correct an error by the loan servicer. See *id.* A QWR must be in  
3 writing and have enough information so that the servicer can identify the borrower. *Id.* at §  
4 2605(e)(1)(B). If the servicer fails to respond to a QWR, the borrower can seek payment for  
5 “any actual damages to the borrower as a result of the failure.” See 12 U.S.C. § 2605(f). A  
6 plaintiff must have suffered actual damages in order to recover under this provision. *Eronini*  
7 *v. JP Morgan Chase Bank NA*, No. 08-55929, 2010 WL 737841, at \*1 (9th Cir. Mar. 3, 2010)  
8 (affirming dismissal of RESPA claim because plaintiff “suffered no damages”).

9 Here, not only has Plaintiff failed to allege she suffered damages, but she nearly fails  
10 to allege that she sent a QWR at all. All she alleges is that “Defendants failed to adequately  
11 respond to Plaintiff’s requests for information regarding the loan.” (Compl. ¶ 24.) She does  
12 not allege when she sent the QWR, to whom, or what she asked for, and for these reasons  
13 fails to state a claim under RESPA.

14 Plaintiff also alleges a violation of 12 U.S.C. § 2605(c) and (d). Section 2605(c) deals  
15 with the transfer of loan servicing duties to a new servicer, and requires the new servicer to  
16 give notice to the borrower when the servicing duties have been transferred. And § 2605(d)  
17 addresses what happens when the servicer has changed but the borrower continues to send  
18 payments to the old servicer. If the payments are made on time to the old servicer, then for  
19 the sixty days after the servicing duties were transferred to the new servicer, the new servicer  
20 cannot charge any late fees. See 12 U.S.C. § 2605(d).<sup>3</sup>

21 Plaintiff fails to allege a violation of §§ 2605(c), (d). She does not allege when the  
22 servicing was transferred, when the new servicer imposed a late fee, how much the late fee  
23 was, or any other details regarding the alleged violation. She does not even allege that the  
24 servicing was ever transferred at all. And she has not tried to allege that she suffered

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26 <sup>3</sup> Section 2605(d) states that “[d]uring the 60-day period beginning on the effective  
27 date of transfer of the servicing of any federally related mortgage loan, a late fee may not be  
28 imposed on the borrower with respect to any payment on such loan and no such payment  
may be treated as late for any other purposes, if the payment is received by the transferor  
servicer (rather than the transferee servicer who should properly receive payment) before  
the due date applicable to such payment.”

1 damages as a result of the alleged failure. See *Eronini*, 2010 WL 737841, at \*1 (requiring  
2 actual damages for RESPA violation). Conclusory allegations of wrongdoing are insufficient  
3 to state a claim, *Iqbal*, 129 S. Ct. at 1949, and Plaintiff’s allegations are exactly the type of  
4 threadbare claims that the Court is obligated to dismiss.

5 Plaintiff has not stated a RESPA claim against any Defendant and the Court  
6 **DISMISSES** the RESPA cause of action in its entirety.

7  
8 **2. TILA Claim**

9 Plaintiff’s second cause of action is for a violation of the Truth in Lending Act (“TILA”),  
10 15 U.S.C. § 1601 *et seq.* A plaintiff can seek two types of remedies under TILA: damages  
11 and rescission of the loan. 15 U.S.C. § 1640(a) (damages), § 1635 (rescission). For  
12 damages, a plaintiff must file the action within a year of making the loan. 15 U.S.C. §  
13 1640(e). Here, Plaintiff filed her action on May 6, 2010, over a year after she obtained the  
14 loan in June 24, 2008, so her claim for damages must be dismissed.<sup>4</sup>

15 Plaintiff also seeks rescission of her purchase-money mortgage. But purchase-money  
16 mortgages, which are mortgages used to finance the initial purchase of property, cannot be  
17 rescinded under TILA. See 15 U.S.C. § 1635(e)(1) (excluding “residential mortgage  
18 transaction” from rescission rights); 15 U.S.C. § 1602(w) (defining residential mortgage  
19 transaction as a transaction “in which a mortgage . . . is created . . . against the consumer’s  
20 dwelling to finance the acquisition or initial construction of such dwelling”). So her rescission  
21 claim must also be dismissed.

22 Plaintiff has failed to state a claim under TILA, and the Court **DISMISSES** the TILA  
23 claim in its entirety.

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25 **3. Negligent Misrepresentation**

26 Plaintiff also asserts a claim for negligent misrepresentation. “The elements of  
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28 <sup>4</sup> Although equitable tolling is available for TILA claims, *King v. California*, 784 F.2d  
910, 915 (9th Cir. 1986), Plaintiff has not alleged any facts supporting it.

1 negligent misrepresentation are '(1) the misrepresentation of a past or existing material fact,  
2 (2) without reasonable ground for believing it to be true, (3) with intent to induce another's  
3 reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5)  
4 resulting damage.'" *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated*  
5 *Servs. Group, Inc.*, 171 Cal. App. 4th 35, 50 (2009) (quoting *Apollo Capital Fund LLC v. Roth*  
6 *Capital Partners, LLC*, 158 Cal. App. 4th 226, 243 (2007)).

7 In addition to stating facts for each element, a claim for negligent misrepresentation  
8 must be alleged with particularity under Rule 9(b). *Neilson v. Union Bank of California*, 290  
9 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) (citing *Glen Holly Entertainment, Inc. v. Tektronix,*  
10 *Inc.*, 100 F. Supp. 2d 1086, 1093 (C.D. Cal. 1999). That means a complaint "must  
11 adequately specify the statements it claims were false or misleading, give particulars as to  
12 the respect in which plaintiff contends the statements were fraudulent, state when and where  
13 the statements were made, and identify those responsible for the statements." *In re*  
14 *GlenFed, Inc. Securities Litigation*, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc). And a  
15 complaint cannot lump defendants together; plaintiffs must "differentiate their allegations  
16 when suing more than one defendant . . . and inform each defendant separately of the  
17 allegations surrounding his alleged participation in the fraud." *Swartz v. KPMG LLP*, 476  
18 F.3d 756, 764–65 (9th Cir. 2007).

19 Plaintiff has not done any of this. All of her allegations lump Defendants together and  
20 do not say who made the misrepresentations or why the representations were false. For  
21 example, she claims that "[a]lthough U.S. BANK, WINNER FINANCIAL, FIRST NATIONAL,  
22 and other Defendants made certain representations regarding the LOAN, in actuality, the  
23 LOAN was not as represented because . . . it was at a higher interest rate than what was  
24 represented," the payments were higher, there was less equity in the home, and there was  
25 less money available to Plaintiff than represented. (Compl. ¶ 13.) This allegation, along with  
26 the many similar allegations in her Complaint, are too vague and conclusory, and fail to  
27 satisfy the requirements of Rule 9(b).

28 There is another reason to dismiss Plaintiff's negligent misrepresentation claim. One

1 of the elements of her claim is justifiable reliance: She must have justifiably relied on the  
2 alleged misrepresentation. See *Nat'l Union Fire Ins. Co.*, 171 Cal. App. 4th at 50. But she  
3 has not shown justifiable reliance because she presumably had access to and signed the  
4 loan documents. *Brookwood v. Bank of America*, 45 Cal. App. 4th 1667, 1674 (1996)  
5 (“Reliance on an alleged misrepresentation ... is not reasonable when plaintiff could have  
6 ascertained the truth through the exercise of reasonable diligence. Reasonable diligence  
7 requires the reading of a contract before signing it.”) Any misrepresentation about what the  
8 actual interest rate was would have been dispelled simply by reading the documents she  
9 signed.

10 The Court **DISMISSES** Plaintiff’s claim for negligent misrepresentation because she  
11 has failed to plead it with particularity and has failed to plead justifiable reliance.

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#### 13 **4. Rescission**

14 Plaintiff’s fourth cause of action is for rescission. The Court has already dismissed  
15 Plaintiff’s rescission claim under TILA, a federal law. But rescission is also available under  
16 California state law. In order to make a state-law rescission claim, a plaintiff must restore,  
17 or offer to restore, to the non-rescinding party all consideration received under the contract.  
18 See Cal. Civ. Code § 1691(b). Plaintiff has not done so, nor has she demonstrated that she  
19 is capable of doing so. This is fatal to her rescission claim, and the Court **DISMISSES** it in  
20 its entirety. See *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1173 (9th Cir. 2003)  
21 (Courts have the power to confirm that a borrower “could repay the loan proceeds before  
22 going through the empty (and expensive) exercise of a trial on the merits.”).

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#### 24 **5. Unjust Enrichment**

25 Although Plaintiff also states a claim for unjust enrichment, “there is no cause of action  
26 in California for unjust enrichment.” *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779,  
27 781 (2003). It is a “general principle, synonymous with restitution, rather than a remedy” in  
28 itself. The Court therefore **DISMISSES** Plaintiff’s claim for unjust enrichment in its entirety.

1 See, e.g., *Walker v. Equity 1 Lenders Grp.*, No. 09cv325, 2009 WL 1364430, at \*9 (S.D. Cal.  
2 May 14, 2009) (dismissing unjust enrichment claim because the claim “is not cognizable  
3 under California law”).

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5 **6. Quiet Title**

6 Plaintiff’s last claim is one for quiet title. To state a quiet-title claim, California law  
7 requires that the complaint be verified and include (1) a legal description and common  
8 designation of the property, (2) the title of the plaintiff and its basis, (3) the adverse claims  
9 to the plaintiff’s title, (4) the date as of which the determination is sought, and (5) a prayer  
10 that title is quieted in the plaintiff. See Cal. Civ. Proc. Code § 761.020. There is another  
11 requirement: if the plaintiff has mortgaged the property, he must discharge the debt before  
12 a court will quiet title. *Miller v. Provost*, 26 Cal. App. 4th 1703, 1706 (1994).

13 Yet again, Plaintiff utterly fails to state her claim. The Complaint is not verified. She  
14 does not allege the date as of which the determination of title is sought. And, most  
15 importantly, she has not alleged that she discharged her debt. Until she complies with these  
16 requirements, her claim fails.

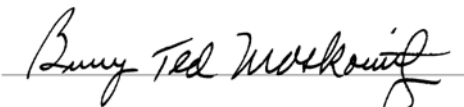
17 The Court **DISMISSES** Plaintiff’s quiet-title claim in its entirety.

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19 **IV. CONCLUSION**

20 For the foregoing reasons, the Court **GRANTS** U.S. Bank’s motion to dismiss [Doc.  
21 5]. Plaintiff has not stated a single claim against any Defendant, and the Court **DISMISSES**  
22 the Complaint in its entirety. Plaintiff may file an Amended Complaint within fourteen days  
23 of the filing of this order. If she fails to do so, the Court will enter a final judgment of  
24 dismissal.

25 **IT IS SO ORDERED.**

26 DATED: August 31, 2010

27   
28 Honorable Barry Ted Moskowitz  
United States District Judge