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

JANICE MUELLER, an individual,

Plaintiff,

vs.

BANK OF AMERICA, N.A.; WELLS
FARGO BANK, N.A., as trustee for the
Certificate holders of Banc of America
Mortgage Securities, Inc., Mortgage Pass-
Through Certificates, Series 2004-C; and
Does 1–10, inclusive,

Defendants.

CASE NO. 12cv0074 WQH-BLM

ORDER

HAYES, Judge:

The matter before the Court is the Motion to Dismiss filed by Defendants Bank of America, N.A. and Wells Fargo Bank, N.A. (ECF No. 14).

BACKGROUND

On January 10, 2012, Plaintiff initiated this action by filing a complaint. (ECF No. 1). On March 9, 2012, Plaintiff filed a First Amended Complaint (“Complaint”). (ECF No. 12). In the Complaint, Plaintiff asserts the following nine causes of action against Defendants: (1) declaratory relief to determine the status of Defendants’ claims to Plaintiff’s property, (2) negligence against Bank of America, (3) negligent infliction of emotional distress against Bank of America, (4) violation of 15 U.S.C. § 1641(g) of the Truth in Lending Act (“TILA”) against Wells Fargo, (5) violation of 12 U.S.C. § 2605 of the Real Estate Settlement Practices Act (“RESPA”) against Bank of America, (6) violation of California Business and Professional

1 Code § 17200, et seq. against Bank of America and Wells Fargo, (7) breach of contract against
2 Bank of America and Wells Fargo, (8) breach of the implied covenant of good faith and fair
3 dealing against Bank of America and Wells Fargo, and (9) violation of California Civil Code
4 §§ 2923.5 and 2924 against Bank of America and Wells Fargo.

5 On March 26, 2012, Defendants Bank of America and Wells Fargo filed a Motion to
6 Dismiss. (ECF No. 14). On April 19, 2012, Plaintiff filed an Opposition. (ECF No. 16-1).

7 **I. Allegations of the Complaint**

8 On February 5, 2004, Janice and Gary Mueller executed a Note and Deed of Trust in
9 favor of Bank of America in the amount of \$770,000 secured by a deed of trust for real
10 property located at 1544 Rancho Encinitas Drive, Encinitas, California 92024. Until July
11 2010, Plaintiff made timely mortgage payments on the property.

12 In March 2010, Plaintiff and her husband commenced contentious divorce proceedings.
13 In June 2010, Plaintiff anticipated that she would not be able to make her mortgage payments.
14 Plaintiff contacted Bank of America Servicing to discuss options for a loan modification.
15 Plaintiff was told by Bank of America representatives that she could apply for a “special
16 forbearance program for victims of domestic abuse.” (ECF No. 12 at 8). In July 2010, as
17 anticipated, Plaintiff was unable to make payments on the mortgage and stopped.

18 On September 29, 2011, Bank of America executed an Assignment of the Deed of Trust
19 to Wells Fargo Bank, N.A. and a Substitution of the Trustee of the Deed of Trust to
20 ReconTrust Company, N.A. (Complaint Exh. C, D; ECF No. 12-3, 12-4). On September 29,
21 2011, ReconTrust recorded a Notice of Default on the property on behalf of the beneficiary.
22 (Complaint Exh. E; ECF No. 12-5). The Assignment, Substitution, and Notice of Default are
23 invalid. No legal transfer ever occurred because the documents were all signed by “a ‘robo-
24 signer’ - an individual who simply signs thousands of foreclosure documents on behalf of
25 several entities without any personal knowledge or corporate authority.” *Id.* at 14.

26 Between June 2010 and November 2011, Plaintiff engaged in exhaustive efforts with
27 Bank of America in an attempt to apply for the special forbearance program and to obtain
28 information relating to the Wells Fargo transfer. Plaintiff submitted numerous loan

1 modification applications, financial documents, and banks statements to Bank of America.
2 Bank of America representatives provided contradictory information to Plaintiff, transferred
3 her among numerous representatives, and claimed to have lost or to have never received her
4 application materials.

5 On December 15, 2011, Plaintiff sent Bank of America a Qualified Written Request
6 (“QWR”) to verify and validate her debt. Bank of America failed to acknowledge receipt of
7 Plaintiff’s QWR and has yet to substantively respond to the QWR. Plaintiff does not dispute
8 that she owes money on the mortgage, but disputes the amount owed and seeks the Court’s
9 assistance in determining the true creditor.

10 II. Standard of Review

11 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state a claim
12 upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Federal Rule of Civil Procedure
13 8(a) provides: “A pleading that states a claim for relief must contain ... a short and plain
14 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).
15 Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal
16 theory or sufficient facts to support a cognizable legal theory. *See Balistreri v. Pacifica Police*
17 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

18 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief”
19 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause
20 of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting Fed. R.
21 Civ. P. 8(a)(2)). When considering a motion to dismiss, a court must accept as true all
22 “well-pleaded factual allegations.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). However, a
23 court is not “required to accept as true allegations that are merely conclusory, unwarranted
24 deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d
25 979, 988 (9th Cir. 2001). “In sum, for a complaint to survive a motion to dismiss, the
26 non-conclusory factual content, and reasonable inferences from that content, must be plausibly
27 suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Service*, 572 F.3d
28 962, 969 (9th Cir. 2009) (quotations omitted).

1 **DISCUSSION**

2 **I. Negligence and Negligent Infliction of Emotional Distress**

3 Plaintiff alleges that “BOA Servicing, as the purported mortgage servicer, has a duty
4 to exercise reasonable care and skill with regard to engaging Plaintiff in loan modification and
5 special forbearance negotiations and handling Plaintiff’s forbearance and loan modification
6 applications with reasonable care....” (ECF No. 12 at 20). Plaintiff alleges that “BOA
7 Servicing breached their duty when it repeatedly mismanaged Plaintiff’s loan assistance
8 applications, repeatedly requested Plaintiff resubmit identical documents, failed to handle and
9 maintain each of her documents with reasonable care, and expressed to Plaintiff that she would
10 qualify for forbearance and other foreclosure assistance programs.” *Id.* at 21. Plaintiff alleges
11 that “BOA Servicing went beyond its conventional role as Plaintiff’s purported mortgage
12 servicer to offer Plaintiff an opportunity for a special forbearance and to modify her Loan....
13 BOA Servicing actively participated in special forbearance and loan modification negotiations
14 and efforts giving rise to a duty owed to Plaintiff.” *Id.* Plaintiff alleges that, “[a]s a result of
15 the acts of BOA Servicing, Plaintiff suffered, and continues to suffer from extreme anxiety,
16 loss of sleep, loss of appetite, and other psychological and emotional issues.” *Id.* at 22.

17 Defendants contend that lenders and loan servicers owe no duty in processing loans or
18 making representations regarding loan modifications. Defendants contend that Plaintiff fails
19 to allege a tort duty of care owed by Defendants, as required for a negligence claim.
20 Defendants contend that California law does not recognize a negligent infliction of emotional
21 distress claim without the successful pleading of a negligence claim.

22 Plaintiff contends that Bank of America stepped out of its role of a silent lender when
23 it offered to review Plaintiff for a loan modification and that Bank of America had a duty to
24 process Plaintiff’s loan modification application.

25 “Under California law, the elements of a claim for negligence are ‘(a) a legal duty to
26 use due care; (b) a breach of such legal duty; and (c) the breach as the proximate or legal cause
27 of the resulting injury.’” *Walters v. Fidelity Mortg. of CA*, 730 F.Supp.2d 1185, 1205 -1206
28 (E.D. Cal. 2010) quoting *Ladd v. County of San Mateo*, 12 Cal.4th 913, 917 (1996). “The

1 existence of a duty of care owed by a defendant to a plaintiff is a prerequisite to establishing
2 a claim for negligence.” *Nymark v. Heart Fed. Savings & Loan Assn.*, 231 Cal. App. 3d 1089,
3 1095 (1991) (citation omitted). In California, “[t]he ‘negligent causing of emotional distress
4 is not an independent tort but the tort of *negligence*, involving the usual duty and causation
5 issues.” *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129
6 Cal.App.4th 1228, 1264 (2005) (quotations omitted) (emphasis in original).

7 “[A]s a general rule, a financial institution owes no duty of care to a borrower when the
8 institution’s involvement in the loan transaction does not exceed the scope of its conventional
9 role as a mere lender of money.” *Nymark*, 231 Cal. App. 3d at 1096 (citation omitted).
10 “Liability to a borrower for negligence arises only when the lender actively participates in the
11 financed enterprise beyond the domain of the usual money lender.” *Id.* (quotations omitted).
12 There is no statutory duty in California for lenders to agree to a mortgage loan modification.
13 *Hamilton v. Greenwich Investors XXVI, LLC*, 195 Cal.App.4th 1602, 1617 (2011) *citing*
14 *Mabry v. Superior Court*, 185 Cal.App.4th 208, 222-23 (2010) (the relevant California statute
15 “merely expresses the hope that lenders will offer loan modifications on certain terms”; the
16 statute “conspicuously does not require lenders to take any action.”); *see also Sullivan v. JP*
17 *Morgan Chase Bank, NA*, 725 F.Supp.2d 1087, 1094 (E.D. Cal. 2010) (allegations that a lender
18 has misrepresented that loan modifications would be made are insufficient to form the basis
19 of a negligence claim).

20 In this case, Plaintiff alleges that Bank of America mishandled and misinformed her
21 about loan modification opportunities with Bank of America. The Court finds that these
22 allegations are insufficient to form the basis of a negligence claim because Bank of America
23 had no duty to provide any loan modification to Plaintiff and Bank of America did “not exceed
24 the scope of its conventional role as a mere lender of money” by discussing loan modification
25 opportunities with Plaintiff. *Nymark*, 231 Cal. App. 3d at 1096. Plaintiff fails to allege
26 sufficient facts to show that a tort duty of care existed between Plaintiff and Bank of America,
27 and fails to plead sufficient facts to show that Plaintiff is entitled to relief on a claim for
28 negligence or negligent infliction of emotional distress. Plaintiff’s second cause of action for

1 negligence and third cause of action for negligent infliction of emotional distress are dismissed.

2 **II. Violation of TILA 15 U.S.C. § 1641(g)**

3 Plaintiff alleges that Wells Fargo violated 15 U.S.C. § 1641(g) because Wells Fargo
4 “did not provide Plaintiff with written notice within 30 days after the date on which they were
5 allegedly assigned the Mortgage.” (ECF No. 12 at 24). Plaintiff alleges that she “never
6 received any notice indicating the exact date of the purported Assignment of the interest in her
7 Note.... how to reach an agent or party having authority to act on Wells Fargo Trustee’s
8 behalf.... the location of the place where transfer of ownership of the debt is recorded.... [or]
9 any other relevant information regarding the new creditor....” *Id.* at 24-25.

10 Defendants contend that Plaintiff received the necessary information relating to the
11 assignment to Wells Fargo on the Assignment and Notice of Default dated September 29,
12 2011. Plaintiff contends that the information necessary under TILA was not conveyed in the
13 Assignment and Notice of Default.

14 15 U.S.C. § 1641(g) provides that, “not later than 30 days after the date on which a
15 mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is
16 the new owner or assignee of the debt shall notify the borrower in writing of such transfer,
17 including (A) the identity, address, telephone number of the new creditor; (B) the date of
18 transfer; (C) how to reach an agent or party having authority to act on behalf of the new
19 creditor; (D) the location of the place where transfer of ownership of the debt is recorded; and
20 (E) any other relevant information regarding the new creditor.” 15 U.S.C. § 1641(g). A
21 creditor that fails to comply with any requirement imposed under § 1641(g)(1) faces liability
22 for “any actual damage sustained by such a person as a result of the failure.” 15 U.S.C. §
23 1640(a)(1).

24 The September 29, 2011 Assignment, attached to the Complaint, provides notice of the
25 date of the transfer and the location where the transfer is recorded. The September 29, 2011
26 Notice of Default, attached to the Complaint, provides the identity, address, and telephone
27 number of the new creditor and information regarding how to reach an agent or party with
28 authority to act on behalf of the new creditor. Plaintiff fails to allege facts sufficient to show

1 that the Assignment or Notice of Default was insufficient or that Defendant Wells Fargo
2 violated 15 U.S.C. § 1641(g). Plaintiff's fourth cause of action for a violation of 15 U.S.C. §
3 1641(g) is dismissed.

4 **III. Violation of RESPA 12 U.S.C. § 2605**

5 Plaintiff alleges that she sent Bank of America Servicing a Qualified Written Request
6 ("QWR") on December 15, 2011. "The QWR... contained requests for information of the
7 Loan, specifically the identity and contact information of the creditor of Plaintiff's Note, a
8 complete loan history, accumulated late fees and charges, and requested information to verify
9 the validity of the purported debt owed to Wells Fargo Trustee." (ECF No. 12 at 26).
10 Plaintiff alleges that "BOA Servicing did not acknowledge the receipt of Plaintiff's QWR...
11 and has yet to substantively respond." (ECF No. 12 at 26). Plaintiff alleges that her "actual
12 pecuniary damages include, but are not limited to, the over calculation and overpayment of
13 interest on Plaintiff's Loan, the costs of repairing Plaintiff's credit, the reduction and/or
14 elimination of Plaintiff's credit limits, costs associated with removing the cloud on her
15 Property title and setting aside the trustee's sale, and attorneys' fees and costs...." *Id.* at 27.

16 Defendants contend that the QWR does not request information relating to the servicing
17 of Plaintiff's loan. Defendants contend that Plaintiff fails to allege sufficient pecuniary
18 damages as a result of Bank of America's alleged failure to respond to the QWR.

19 Plaintiff contends that the December 15, 2011 letter was a proper QWR because it
20 contained a statement of the reasons Plaintiff thought the account was in error and sought the
21 identity of the creditor, accumulated fees and charges, and a complete loan transaction history.

22 Section 2605 of RESPA requires that "[i]f any servicer of a federally related mortgage
23 loan receives a qualified written request from the borrower (or an agent of the borrower) for
24 information relating to the servicing of such loan, the servicer shall provide a written response
25 acknowledging receipt of the correspondence within 20 days ... unless the action requested is
26 taken within such period." 12 U.S.C. § 2605(e)(1)(A). A qualified written request is "a
27 written correspondence, ... that- (i) includes, or otherwise enables the servicer to identify, the
28 name and account of the borrower; and (ii) includes a statement of the reasons for the belief

1 of the borrower, to the extent applicable, that the account is in error or provides sufficient
2 detail to the servicer regarding other information sought by the borrower.” 12 U.S.C. §
3 2605(e)(1)(B). When a loan servicer receives a qualified written request, it must either correct
4 the borrower’s account or, after conducting an investigation, provide the borrower with a
5 written explanation of: (1) why the servicer believes the account is correct; or (2) why the
6 requested information is unavailable. *See* 12 U.S.C. § 2605(e)(2).

7 “Not all requests that relate to the loan are related to the *servicing* of the loan.”
8 *Williams v. Wells Fargo, N.A.*, No. C 10-00399, 2010 WL 1463521, at *3 (N.D. Cal. April 13,
9 2010) (citations omitted). A loan servicer only has a duty to respond if the information request
10 is related to loan servicing. *See, e.g., id.; Champlaine v. BAC Home Loans Servicing, LP*, 706
11 F.Supp.2d 1029, 1043 (E.D.Cal. 2009). If a loan servicer fails to comply with the provisions
12 of § 2605, a borrower shall be entitled to “any actual damages to the borrower as a result of
13 the failure” and “any additional damages, as the court may allow, in the case of a pattern or
14 practice of noncompliance with the requirements of [§ 2605].” 12 U.S.C. § 2605(f)(1).

15 “Numerous courts have read Section 2605 as requiring a showing of pecuniary damages
16 to state a claim.” *Molina v. Washington Mutual Bank*, No. 09-CV-00894-IEG (AJB), 2010
17 WL 431439 at *7 (S.D. Cal. Jan. 29, 2010) (collecting cases). “This pleading requirement has
18 the effect of limiting the cause of action to circumstances in which plaintiff can show that a
19 failure to respond or give notice has caused them actual harm.” *Shepherd v. Am. Home Mortg.*
20 *Services, Inc.*, Case No. Civ. 2:09-1916 WBS GGH, 2009 WL 4505925 at * 3 (E.D. Cal. Nov.
21 20, 2009) (citation omitted). A plaintiff is entitled to recover for the loss that relates to the
22 RESPA violation, not for all losses related to foreclosure activity. *See Lal v. American Home*
23 *Servicing, Inc.*, 680 F. Supp. 2d 1218, 1223 (E.D. Cal. 2010) (“[T]he loss alleged must be
24 related to the RESPA violation itself.”); *Torres v. Wells Fargo Home Mortg., Inc.*, No. C
25 10-04761 CW, 2011 WL 11506 at *8 (N.D. Cal. Jan. 4, 2011) (“The plaintiff must also allege
26 a causal relationship between the alleged damages and the RESPA violation.”).

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28 Plaintiff’s December 15, 2011 letter requests general information regarding the status

1 and validity of the loan, such as “a true and present copy of the promissory note and deed of
2 trust... a complete life of loan transaction history... copies of all collection notes and
3 communication files... [and all] screen shots of all system accounts... associated with the loan.”
4 (ECF No. 12-7 at 2-3). Plaintiff fails to allege facts to show that the letter she sent to Bank of
5 America on December 15, 2011 “related to the servicing of the loan.” *Williams*, 2010 WL
6 1463521, at *3. Plaintiff further fails to plead non-conclusory factual allegations indicating
7 how she was damaged by the alleged failure of Bank of America to respond to the QWR. *Cf.*
8 *Allen v. United Fin. Mortg. Corp.*, 660 F. Supp. 2d 1089, 1097 (N.D. Cal. 2009) (“Allen only
9 offers the conclusory statement that ‘damages consist of the loss of plaintiff’s home together
10 with his attorney fees.’ He has not actually attempted to show that the alleged RESPA
11 violations caused any kind of pecuniary loss (indeed, his loss of property appears to have been
12 caused by his default).”).

13 Plaintiff fails to allege facts to show that the failure of Bank of America to comply with
14 RESPA, as opposed to Plaintiff’s default, plausibly caused the damages alleged in the
15 Complaint. *Cf. Lawther v. OneWest Bank*, No. C-10-54, 2010 WL 4936797, at *7 (N.D. Cal.
16 Nov. 30, 2010) (granting motion to dismiss RESPA claim for failure to adequately allege
17 actual damages because “[w]hat remains unexplained ... is how the QWR failure itself is
18 causally connected to the claimed distress of Lawther or his family”). Plaintiff has failed to
19 allege sufficient facts to support a claim for damages under RESPA. Plaintiff’s fifth cause of
20 action for a violation of RESPA is dismissed.

21 **IV. Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair** 22 **Dealing**

23 Plaintiff alleges: “If the Court finds that Wells Fargo Trustee is a successor in interest
24 to the Deed of Trust pursuant to the terms of the Deed of Trust, Plaintiff alleges that Wells
25 Fargo Trustee breached the Deed of Trust by improperly crediting and debiting their account.”
26 (ECF No. 12 at 33). Plaintiff alleges that “Plaintiff substantially performed all of her
27 conditions in the Deed of Trust.... Defendant Wells Fargo Trustee breached the Deed of Trust
28 by failing to apply the payments made by Plaintiff in the order of priority set forth in [the

1 Deed], and this resulted in improper fees and taxes being added to the balance of the Loan.”
2 *Id.* “Plaintiff alleges that Defendants Wells Fargo Trustee breached the implied promise of
3 good faith and fair dealing by making it impossible for Plaintiff to carry out her obligations
4 under the contract because of the improperly applied payments and addition of interest and
5 improper fees to her account.” *Id.* at 34.

6 Defendants contend that Plaintiff fails to allege sufficient facts to show that Defendants
7 improperly charged and taxed Plaintiff’s account. Defendants contend that Plaintiff fails to
8 allege a breach of contract claim because Plaintiff herself failed to perform under the deed of
9 trust when she defaulted on her mortgage payments. Defendants contend that Plaintiff alleged
10 no special relationship that would permit a claim for tortious breach of the implied covenant
11 of good faith and fair dealing under California law.

12 Plaintiff contends that Defendant Wells Fargo misapplied payments before Plaintiff
13 defaulted on the loan and before Plaintiff breached her performance on that contract.

14 “The essential elements of a breach of contract claim are: (1) the contract, (2) plaintiff’s
15 performance or excuse for nonperformance, (3) defendant’s breach, and (4) the resulting
16 damages to plaintiff.” *Hamilton v. Greenwich Investors XXVI, LLC*, 195 Cal.App.4th 1602,
17 1614 (2011) (quotations omitted). “It is elementary that one party to a contract cannot compel
18 another to perform while he himself is in default.” *Durell v. Sharp Healthcare*, 183
19 Cal.App.4th 1350, 1367 (2010) (quotations omitted).

20 Under California law, “[t]he covenant of good faith and fair dealing, implied by law in
21 every contract, exists merely to prevent one contracting party from unfairly frustrating the
22 other party’s right to receive the benefits of the agreement actually made. The covenant thus
23 cannot be endowed with an existence independent of its contractual underpinnings. It cannot
24 impose substantive duties or limits on the contracting parties beyond those incorporated in the
25 specific terms of their agreement.” *Guz v. Bechtel Nat’l, Inc.*, 24 Cal. 4th 317, 349-50 (2000)
26 (quotation omitted). “[T]he implied covenant is limited to assuring compliance with the
27 express terms of the contract, and cannot be extended to create obligations not contemplated
28 in the contract.” *Racine & Laramie, Ltd. v. Dep’t of Parks & Recreation*, 11 Cal. App. 4th

1 1026, 1032 (1992). Moreover, “tort recovery for breach of the covenant is available only in
2 limited circumstances, generally involving a special relationship between the contracting
3 parties, such as the relationship between an insured and its insurer.” *Bionghi v. Metro. Water*
4 *Dist.*, 70 Cal. App. 4th 1358, 1370 (1999).

5 Plaintiff’s allegations that Wells Fargo improperly credited and debited her account are
6 conclusory and lack any factual support. Plaintiff fails to identify the manner in which Wells
7 Fargo misapplied payments or how that misapplication “resulted in improper fees and taxes
8 being added to the balance of the Loan.” (ECF No. 12 at 33). There are no facts in the
9 Complaint to support that there is “a special relationship between the contracting parties” in
10 this case. *Bionghi*, 70 Cal. App. 4th at 1370; *see also Price v. Wells Fargo Bank*, 213 Cal.
11 App. 3d 465, 476 (1989) (“A debt is not a trust and there is not a fiduciary relation between
12 debtor and creditor as such.”); *Mitsui Mfrs. Bank v. Super. Ct.*, 212 Cal. App. 3d 726, 729
13 (1989) (“reject[ing] [the] argument that [the covenant] ... should encompass normal
14 commercial banking transactions”). Plaintiff has failed to allege sufficient facts to support a
15 claim for breach of contract and breach of the covenant of good faith and fair dealing.
16 Plaintiff’s seventh cause of action for breach of contract and eighth cause of action for breach
17 of the covenant of good faith and fair dealing are dismissed.

18 **V. Violation of California Civil Code §§ 2923.5 and 2924**

19 Plaintiff alleges that “Defendants had a duty to comply with the foreclosure avoidance
20 and workout plan requirements of Civil Code section 2923.5.” (ECF No. 12 at 36). Plaintiff
21 alleges that Defendants “failed and refused to: (1) evaluate Plaintiff’s financial condition
22 regarding foreclosure avoidance; (2) advise Plaintiff of her statutory right to meet with
23 Defendant regarding such foreclosure avoidance; and (3) advise Plaintiff of the toll-free federal
24 Department of Housing and Urban Development (“HDD”) telephone number regarding
25 counseling opportunities to avoid the subject foreclosure.” *Id.* at 38. Plaintiff alleges that
26 Defendants “failed to give proper notice of the Notice of Default, which was apparently
27 recorded on or about October 3, 2011.... Said failures are in direct violation of the notice and
28 recording requirements set forth in California Civil Code section 2923.5.” *Id.* at 37. Plaintiff

1 alleges that she “spent hundreds of hours with BOA Servicing to explore options to avoid
2 foreclosure” and that “ BOA Servicing actively participated in special forbearance and loan
3 modification negotiations....” *Id.* at 21, 37.

4 Defendants contend that the Notice of Default was proper and that alternatives to
5 foreclosure were provided to Plaintiff. Plaintiff contends that proper notice was never given.

6 California Civil Code § 2924(a)(1) provides that “[t]he trustee, mortgagee, or
7 beneficiary, or any of their authorized agents” may commence the non-judicial foreclosure
8 process by recording and serving a notice of default. In this case, the September 29, 2010
9 Notice of Default, attached to the Complaint, plainly states that ReconTrust commenced the
10 foreclosure process by recording the Notice of Default acting as an agent for the beneficiary,
11 in compliance with § 2924(a)(1).

12 California Civil Code § 2923.5 provides that “[a] mortgagee, trustee, beneficiary, or
13 authorized agent may not file a notice of default ... until 30 days after” the “mortgagee,
14 beneficiary, or authorized agent ... contact[s] the borrower in person or by telephone in order
15 to assess the borrower’s financial situation and explore options for the borrower to avoid
16 foreclosure.” Cal. Civ. Code § 2923.5(a)(1), (2). In this case, Plaintiff alleges in the
17 Complaint that she spent “hundreds of hours” engaged in foreclosure negotiations with Bank
18 of America starting as early as June 2010. Plaintiff alleges that she actively participated with
19 Bank of America in “special forbearance and loan modification negotiations.” (ECF No. 12
20 at 21, 37). Plaintiff’s allegations in the Complaint reflect extensive negotiations with
21 Defendants regarding Plaintiff’s financial situations and foreclosure options. *See Davenport*
22 *v. Litton Loan Servicing, LP*, 725 F.Supp.2d 862, 877 (N.D.Cal. 2010) (dismissing § 2923.5
23 claim because plaintiffs’ allegation of loan modification talks negated a claim that § 2923.5
24 was violated).

25 Plaintiff fails to allege sufficient facts to show that Defendants violated Cal. Civil Code
26 §§ 2923.5 and 2924. Plaintiff’s ninth cause of action for violation of Cal. Civil Code §§
27 2923.5 and 2924 is dismissed.

28 **VI. Declaratory Relief**

1 Plaintiff alleges that the “purported Assignment has no value” because it was signed by
2 an employee without proper authority who did not review Plaintiff’s loan file before executing
3 the Assignment. (ECF No. 12 at 18). Plaintiff alleges that she does not know the proper
4 creditor on her loan and Wells Fargo lacks authority to enact foreclosure proceedings on the
5 property. Plaintiff’s cause of action for declaratory relief “requests that the Court make a
6 finding and issue appropriate orders stating that none of the named Defendants or Doe
7 Defendants, have any right or interest in Plaintiff s Note, Deed of Trust, or the Property which
8 authorizes them, in fact or as a matter of law, to collect Plaintiffs mortgage payments or
9 enforce the terms of the Note or Deed of Trust in any manner...” (ECF No. 12 at 19).

10 Defendants contend that they are not required to show authorization to foreclose upon
11 the property and that Plaintiff lacks standing to challenge the transfer to Wells Fargo. Plaintiff
12 contends that she has alleged a substantial controversy between the parties regarding the
13 property that warrants declaratory relief from the Court.

14 “A complaint for declaratory relief is legally sufficient if it sets forth facts showing the
15 existence of an actual controversy relating to the legal rights and duties of the respective
16 parties under a contract and requests that these rights and duties be adjudged by the court.”
17 *Browning v. Aymard*, 224 Cal. App. 2d 277, 280 (1964). “It is not essential, to entitle a
18 plaintiff to seek declaratory relief, that he should establish his right to a favorable declaration.”
19 *Id.*; *see also Shepherd v. Paul A. Hauser, Inc.*, 138 Cal. App. 384, 387-88 (1934).

20 Under California law, a plaintiff has no right to bring suit to determine whether an entity
21 initiating foreclosure is authorized to do so. *Gomes v. Countrywide Home Loans, Inc.*, 192
22 Cal.App.4th 1149, 1154–55 (2011) (explaining that California’s “comprehensive” statutory
23 scheme governing nonjudicial foreclosure provides “no grounds for implying such an action”).
24 A plaintiff may be able to bring suit when the complaint alleges a “specific factual basis for
25 alleging” that foreclosure is unlawful but this basis must be supported by more than a bare
26 assertion. *See id.* at 1155.

27 ///

28 In this case, Plaintiff alleges that an actual controversy exists as to the legal rights and

1 duties of the parties regarding the loans on certain real property. Plaintiff has not identified
2 the factual basis of the controversy. Plaintiff makes conclusory allegations that she does not
3 believe that Defendants have any rights to the property. However, Plaintiff fails to allege
4 “more than labels and conclusions.” *Bell Atl. Corp.*, 550 U.S. at 555. Plaintiff’s first cause
5 of action for declaratory relief is dismissed.

6 **VII. Sixth Cause of Action: Violation of Cal. Bus. and Prof. Code § 17200, et seq.**

7 Plaintiff alleges that “Defendants have engaged in unfair, unlawful, and fraudulent
8 business practices in the State of California” in violation of California Business and
9 Professions Code § 17200, et seq. (ECF No. 12 at 28).

10 Defendants contend that Plaintiff fails to state a claim for violation under any other
11 claim as required by the statute. Plaintiff contends that Defendants wrongfully collected
12 payments from Plaintiff, violated RESPA and TILA, and attempted to collect on the mortgage
13 under false pretenses. Plaintiff contends that such conduct forms the basis for a claim under
14 California Business and Professions Code § 17200.

15 California law prohibits unfair competition, defined as “any unlawful, unfair or
16 fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. “By proscribing ‘any
17 unlawful’ business practice, section 17200 borrows violations of other laws and treats them
18 as unlawful practices that the unfair competition law makes independently actionable.”
19 *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999)
20 (quoting Cal. Bus. & Prof. Code § 17200). “Virtually any law—federal, state or local—can
21 serve as a predicate for an action under Business and Professions Code section 17200.”
22 *Durell*, 183 Cal.App.4th at 1361 (quotations omitted).

23 Plaintiff has failed to allege any “unlawful practices that the unfair competition law
24 makes independently actionable.” *Cel-Tech Commc’ns, Inc.*, 20 Cal. 4th at 180. Plaintiff fails
25 to allege sufficient facts to support a claim for violation of California’s Business and
26 Professions Code section 17200. Plaintiff’s sixth cause of action for violation of California’s
27 Business and Professions Code section 17200 is dismissed.

28 **CONCLUSION**

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The Motion to Dismiss filed by Defendants (ECF No. 14) is GRANTED. Plaintiff may file a motion for leave to file an amended complaint, accompanied by the proposed amended complaint, no later than twenty (20) days from the date of this Order.

DATED: August 1, 2012


WILLIAM Q. HAYES
United States District Judge