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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

VINCENT SIPE,	)	No. CV-F-09-798 OWW/DLB
)	
	)	MEMORANDUM DECISION GRANTING
	)	DEFENDANT SIERRA PACIFIC
Plaintiff,	)	MORTGAGE COMPANY'S MOTION TO
	)	DISMISS SECOND AMENDED
vs.	)	COMPLAINT (Doc. 42) AND
	)	GRANTING DEFENDANTS
	)	COUNTRYWIDE BANK AND
COUNTRYWIDE BANK, et al.,	)	MORTGAGE ELECTRONIC
	)	REGISTRATION SYSTEM, INC.'S
	)	MOTION TO DISMISS SECOND
Defendants.	)	AMENDED COMPLAINT (Doc. 43)
)	
)	

Pursuant to the Memorandum Decision filed on February 16, 2010, (Doc. 37, "February 16 Memorandum Decision"), and the Order filed on February 18, 2010, (Doc. 39), Plaintiff timely filed a Second Amended Complaint ("SAC"). The caption of the SAC names as Defendants Countrywide Bank ("CWB" or "Countrywide"), Sierra Pacific Mortgage Company, Inc. ("SPM" or "Sierra Pacific"), Financial Advantage, Inc., John Daniel Norberg, Carol DeSilva,

¹The status of Financial Advantage, Inc., John Norberg, and Carol DeSilva is unclear. Although summons were issued on May 5, 2009 (Doc. 4), the only return of service is as to John Norberg, who was personally served on September 28, 2009 (Doc. 18). Norberg has not appeared in this action. There are no returns of service filed for Financial or DeSilva.

1 and Does 1-20.¹

2 In the section of the SAC captioned "Parties," Mortgage
3 Electronic Registration System, Inc. ("MERS") is also named as a
4 defendant. However, MERS is not specifically named in any of the
5 causes of action in the SAC, although causes of action for
6 negligence, fraud and unfair competition were alleged against
7 MERS in the First Amended Complaint. The SAC alleges that MERS
8 is engaged in the business of holding title to mortgages, that
9 MERS was not licensed to do business in California at the time of
10 the residential mortgage loan, that it has no beneficial interest
11 or right to enforce the terms of the promissory note, and because
12 it is not in possession of the promissory note, it has no
13 authority to conduct a non-judicial foreclosure sale. Plaintiff
14 must clarify whether or not MERS is still a party to this action
15 and, if not, whether these allegations should be stricken as
16 irrelevant.

17 The SAC alleges that CWB is a diversified services
18 corporation engaged primarily in residential mortgage loan
19 servicing which has represented to Plaintiff that it has the
20 right to service Plaintiff's residential mortgage and demand
21 payments from Plaintiff, which right Plaintiff denies; that SPM
22 is a diversified financial marketing and/or services corporation

23
24 ¹The status of Defendants Financial, Norberg and DeSilva is
25 unclear. Summons were issued as to these defendants on May 5, 2009
26 (Doc. 4). The only return of service filed is as to Norberg, who
was personally served on September 28, 2009 (Doc. 18). Norberg has
not appeared in this action. There are no returns of service filed
as to Financial and DeSilva.

1 and is believed to be a residential mortgage lender and was the
2 original lender for Plaintiff's residential mortgage loan; that
3 Financial, Norberg and DeSilva sold Plaintiff the mortgage
4 involved in this action; that DeSilva, a licensed real estate
5 salesperson, was employed by Financial and sold the mortgage to
6 Plaintiff; that Norberg, a licensed real estate broker, was the
7 broker of record for Financial; and that Financial is a
8 diversified financial marketing company engaged in mortgage
9 brokering and was the mortgage broker for Plaintiff's residential
10 mortgage loan.

11 For "General Allegations," the SAC alleges:

12 17. This action arises out of a loan related
13 activity to the Property of which the
14 Plaintiff is the rightful owner.

15 18. Beginning in 1998 and continuing through
16 2009, lenders, including Defendant SPM, their
17 agents, employees, and related servicers,
18 including Defendant CWB, developed a scheme
19 to rapidly infuse capital into the home
20 mortgage lending system by selling mortgages
21 on the secondary market, normally three to
22 five times, to create a bankruptcy remote
23 transaction. For there to be a bankruptcy
24 remote transaction, there must be a true sale
25 of the note and no interest can remain in the
26 seller of the note.

21 19. In a typical transaction, the original
22 lender, called "Originator", in this case
23 Defendant SPM would immediately upon closing,
24 enter the loan into MERS system, then sell
25 the loan to their "Warehouse Lender". The
26 "Warehouse Lender" in this case is not known
to Plaintiff. Since these transactions are
hidden and not recorded, Plaintiff will only
be able to discover the name of the
"Warehouse Lender" through Discovery.

20. The loan would then be sold by the

1 "Warehouse Lender" to a "Special Investment
2 Vehicle" ("SIV"). The SIV would then sell the
3 loan to a "Depositor". Depositor would in
4 turn pool these mortgages into large trusts,
5 securitizing the pool and selling these
6 securities on Wall Street as mortgage backed
7 securities, bonds, derivatives, and
8 insurances, often for twenty or thirty times
9 the original mortgage and sometimes
10 fraudulently selling the same mortgage to
11 multiple investors.

12 21. This securitized trust is governed by
13 the common law trust rules of Delaware or New
14 York, depending on its origin, the prospectus
15 filed with the Securities and Exchange
16 Commission and distributed to investors, and
17 Internal Revenue Code § 860A through 860G,
18 better known as the Real Estate Mortgage
19 Investment Conduit ("REMIC") rules.

20 22. The servicing of the pool is governed by
21 a document titled "Pooling and Servicing
22 Agreement" ("PSA"). Plaintiff is informed and
23 believes, and thereon alleges that the REMIC
24 rules, the PSA and the prospectus require the
25 notes and deeds of trust to be received by
26 the trustee on or before the closing date of
the trust.

27 23. Plaintiff's mortgage note is a
28 negotiable instrument under the Uniform
29 Commercial Code Article 3 and California
30 Commercial Code § 3301 et seq. To transfer
31 ownership of a mortgage note, it must be
32 properly endorsed by a person with authority
33 to endorse the note, physical delivery of the
34 note and acceptance of the note.

35 24. Plaintiff is informed and believes, and
36 there on alleges that the mortgage note which
37 is the subject of this action was not
38 received by the trustee of the securitized
39 trust at all, and certainly not within a
40 specified number of days of the trust's
41 formation.

42 25. Plaintiff is informed and believes and
43 thereon alleges that the mortgage note and
44 deed of trust, immediately after closing and
45 recording, was entered into MERS and the

1 original note was destroyed or warehoused,
2 but not transferred, assigned or negotiated.
3 This resulted in the stripping and voiding of
4 the security interest in the note and no
5 interest was ever transferred to the trust.

6 26. In "selling" these mortgage notes on the
7 secondary market, Defendant SPM, along with
8 the Warehouse Lender, Sponsor and Depositor
9 failed to follow the basic legal requirements
10 for the transfer of a negotiable instrument
11 and an interest in real property, including,
12 but not limited to, written assignments of
13 Plaintiff's Deed of Trust, delivery of the
14 Deed of Trust, endorsements of Plaintiff's
15 Note by the owner of Plaintiff's Note,
16 delivery of Plaintiff's Note and acceptance
17 of Plaintiff's Note.

18 27. In fact, no interest in Plaintiff's
19 Mortgage Note, Deed of Trust or Property was
20 ever legally transferred to any of the
21 parties in the chain and that the Defendants
22 are in effect strawmen, and parties without
23 any standing before this Court to assert
24 legal rights with respect to this contractual
25 transaction.

26 28. Defendant CWB thus could not have
27 legally been given the right to service
28 Plaintiff's Loan. Accordingly, Plaintiff
29 alleges Defendant CWB representations to
30 Plaintiff that it has the right to service
31 Plaintiff's Loan was, and is, fraudulent and,
32 Defendant CWB, knowingly and fraudulently
33 entered this information into the MERS
34 system.

35 29. Further, as this process became more and
36 more profitable, the underwriting
37 requirements were repeatedly reduced to
38 ensure [sic] more and more unsuspecting
39 borrowers. As Defendant SPM reduced the
40 underwriting requirements, it introduced the
41 concept of "churning" loans involving a
42 calculated plan to repeatedly refinance
43 borrowers' loans taking as much equity as
44 possible, and artificially driving up housing
45 prices.

46 30. In this case, Defendants FINANCIAL and

1 NORBERG, in concert with Defendant SPM,
2 placed Plaintiff into a predatory loan with
3 toxic terms, as detailed below, with the
4 ultimate objective of forcing Plaintiff to
refinance his loan in the near future for
each of these named Defendants' financial
gain.

5 31. Unlike the former traditional lending
6 practices prior to the loan securitization
7 process, Defendant SPM profited from the sale
8 of the loans, not from the loan investment
9 itself. The intent of these "Lenders", such
10 as Defendant SPM, under the securitization
11 process, was to trap as many unsuspecting
borrowers as possible, Plaintiff included,
regardless of the borrower's credit history
or ability to pay, take as much of the
borrower's equity as possible through high
fees and sell the loans for a profit on the
secondary market.

12 32. Servicers, such as Defendant CWB, would
13 then obtain the servicing rights to the
14 borrowers' loans, Plaintiff's loan included,
15 profiting by taking a percentage of the
16 amounts collected from the borrowers,
17 collecting additional fees or initiating
18 foreclosure proceedings. Plaintiff is
informed and believes, and thereon alleges
that Defendant CWB is not paid to modify the
terms of Plaintiff's Mortgage Note, giving
them a disincentive to work with borrowers,
Plaintiff included, to negotiate a fair
resolution.

19 33. Defendant SPM regularly trained,
20 directed, authorized and/or participated with
21 mortgage brokers, in this case, Defendants
22 FINANCIAL and NORBERG, to implement this
scheme, giving them monetary incentives to
violate the borrowers' trust, Plaintiff
included.

23 34. On or about March 01, 2006, Defendant
24 DESILVA approached Plaintiff telling him that
25 she was the loan officer for Defendant
26 FINANCIAL, and solicited him to refinance his
residence.

35. Defendant DESILVA advised Plaintiff that

1 she could get him the "best deal" and the
2 "best interest rates" available on the
3 market. Defendant DESILVA knew or should have
4 known that these assurances were false and
5 misleading.

6 36. When Plaintiff applied for this loan, he
7 accurately described his income and provided
8 Defendant DESILVA with documentation of his
9 income including tax returns, bank
10 statements, W-2s and 1099s. Plaintiff is now
11 informed and believes, and thereon alleges
12 that his income was overstated on the loan
13 application by Defendant DESILVA, without his
14 knowledge or permission. Plaintiff is
15 informed and believes, and thereon alleges
16 that Defendant SPM's underwriters knew or
17 should have known of the fraudulent
18 information on the loan application but
19 approved the loan anyway. Plaintiff's income
20 was overstated on the loan application by the
21 Defendant DESILVA, Plaintiff had an income of
22 \$4,800.00 per month and the loan application
23 stated Plaintiff had an income of \$7,800.00
24 at the time the loan was made.

25 37. Defendant DESILVA overstated the
26 borrower's income in order to qualify him for
27 this refinance transaction. The standard
28 housing and debt to income ratios are 33% for
29 housing and 38% for debt to income. Based on
30 the Plaintiff's monthly income of \$4,800.00
31 and using the minimum mortgage payments of
32 \$1,398.61, the housing ratio was 29.14% and
33 the debt to income ratio was 46.05%. Using
34 the fully amortized and/or fully indexed
35 mortgage payments of \$2,082.43, the housing
36 ratio was 43.38% and the debt to income ratio
37 was 60.30%. Based on the overstated monthly
38 income of \$7,800.00 and using the minimum
39 mortgage payments of \$1,398.61, the housing
40 ratio was 17.93% and the debt to income ratio
41 was 28.34%.

42 38. Defendant DESILVA advised Plaintiff that
43 he [sic] could get him 100% financing for his
44 loan. However, Defendant DESILVA actually
45 sold Plaintiff a predatory loan. The loan, in
46 the amount of \$286,000.00 carried a teaser
47 rate of 2.0% for one month, that adjusted to
48 9.95% interest rate, based on 12 month MTA

1 index plus 2.90%, negatively amortized
2 115.00%. Plaintiff's initial monthly
3 payments for the loan was \$1,057.11.
4 Plaintiff's fully amortized payment was
5 \$2,082.43.

6 39. Plaintiff is informed and believes, and
7 thereon alleges that Defendant DESILVA
8 received \$4,290.00 in yield spread premiums
9 and \$1,840.00 in origination fee for
10 Plaintiff's loan. The combined yield spread
11 premiums of the loan was \$6,130.00.

12 40. Defendant DESILVA further advised
13 Plaintiff that if the loan ever became
14 unaffordable, she would simply refinance it
15 into an affordable loan, something Defendant
16 DESILVA knew or should have known was false
17 and misleading. Defendant DESILVA knew or
18 should have known that these
19 misrepresentations were designed to induce
20 Plaintiff to accept this loan to his
21 detriment.

22 41. Plaintiff was not given a copy of any of
23 the loan documents prior to closing as
24 required. At closing, Plaintiff was only
25 given a few minutes to sign the documents.
26 The notary did not explain any of the loan
documents nor was Plaintiff allowed to review
them. Plaintiff was simply told to sign and
initial the documents provided by the notary.
Further, Plaintiff did not receive the
required copies of a proper notice of
cancellation.

42. The facts surrounding this loan
transaction were purposefully hidden to
prevent Plaintiff from discovering the true
nature of the transaction and the documents
involved therein. Facts surrounding this
transaction continue to be hidden from the
Plaintiff to this day.

43. On or about June 1, 2006, Plaintiff
completed the loan on the Property. The terms
of the loan were memorialized in a Promissory
Note, which was secured by a Deed of Trust on
the Property. The Deed of Trust identified
Greenhead Investments, Inc. as Trustee, and
Defendant Spm [sic] as Lender.

1 44. The Deed of Trust also identified MERS
2 as nominee for the Lender and Lender's
3 successors and assigns, and the beneficiary.
4 However, MERS has no standing in this forum.
5 It is not licensed to be and/or act as a
6 nominee or a beneficiary of any of the
7 Defendants, nor does its Terms and
8 Conditions, enumerated above, permit MERS to
9 act in such capacity. MERS was developed to
10 be a document storage company, not a nominee
11 or a beneficiary of any of the Defendants.
12 Therefore, the Deed of Trust must fail.
13 Further, MERS was not licensed to do business
14 in the State of California, and was not
15 registered with the State of California at
16 the inception of the loan involved herein.

17 45. On or about April 7, 2009, a Qualified
18 Written Request ("QWR" or "Request") was
19 mailed to Defendant CWB. The QWR properly
20 identified the Plaintiff, the Plaintiff's
21 residential mortgage loan, the objections to
22 the loan servicing and requested specific
23 documents. The QWR also included a demand to
24 rescind the loan. Defendant CWB has yet to
25 properly respond to this Request.

26 46. On information and belief, Plaintiff
alleges that each of the Defendants is not a
"person entitled to enforce" the security
interest under the Note and the Deed of
Trust, as defined in California Commercial
Code § 3301. Plaintiff alleges that
Defendants sold home loans, Plaintiff home
loan included, to other financial entities,
which "pooled" large numbers of loans, put
them into trusts, and sold securities based
on such loans. Defendants do not own the
loan subject to this action, and are not
entitled to enforce the security interest.

47. Defendants regularly approved loans to
unqualified borrowers and implemented
unlawful lending practices. Further,
Defendant SPM employed brokers and loan
officers who were paid commissions based on
the volume of loans they sold to consumers,
Plaintiff included. Defendant SPM loan
officers received a greater commission or
bonus for placing borrowers in loans with
relatively high yield spread premiums. As

1 such, borrowers, Plaintiff included, were
2 steered and encouraged into loans with terms
3 unfavorable to them, or loans which the
4 borrowers were not qualified to obtain.

48. Defendants are attempting to obtain
5 putative legal title to Plaintiff's Property
6 without having established that either of
7 them was ever a "person entitled to enforce"
8 the security interest under the Note and the
9 Deed of Trust.

49. Each Defendant, in fact, is not a
10 "person entitled to enforce" said interest.
11 No legal transfer of the Mortgage Note, Deed
12 of Trust or any other interest in Plaintiff's
13 Property was effected that gave any of the
14 Defendants the right to be named a trustee,
15 mortgagee, beneficiary or an authorized agent
16 of trustee, mortgagee or beneficiary of
17 Plaintiff's Mortgage Note, Deed of Trust or
18 any other interest in Plaintiff's Property.

50. Plaintiff entered into a loan
19 transaction with Defendant SPM, which was
20 subject to finance charges, and which was
21 initially payable to Defendant SPM under the
22 Deed of Trust.

51. Defendants SPM and NORBERG, as agents of
23 the Lender, were required to provide
24 Plaintiff with said disclosures, but failed
25 to do so.

52. In all of the wrongful acts alleged
26 herein, Defendants, and each of them, have
utilized the United States mail, telephones,
and internet in furtherance of their pattern
of unlawful and illegal conduct to collect on
negotiable instruments when they were not
entitled to do so.

53. Further, Defendants fraudulently added
costs and charges to the payoff amount of the
Note that were not justified or proper under
the terms of the Note or the law.

54. Defendants represented that they have
the right to payment under the Mortgage Note,
payment of which was secured by the Deed of
Trust. Whereas in fact, Defendants, and each

1 of them, are not the real parties in interest
2 because they are not the legal trustee,
3 mortgagee or beneficiary, nor are they
4 authorized agents of the trustee, mortgagee
5 or beneficiary, nor are they in possession of
6 the Note, or holders of the Note, or non-
7 holders of the Note entitled to payment, as
8 required by the California Commercial Code §§
9 3301 and 3309, and California Civil Code §
10 2924 et seq.

11 55. Defendants engaged in a civil conspiracy
12 where by they secreted the nature of the
13 misdeeds alleged herein, the roles and
14 identities of the various entities that were
15 purportedly handling his Loan at any given
16 time, and the transfers of the loan documents
17 and negotiable instruments that are the
18 subject of this action.

19 56. Defendants misrepresented material facts
20 with the intent of forcing Plaintiff to pay
21 large sums of money to the Defendants, to
22 which they were not entitled, resulting in
23 profit for the Defendants.

24 57. The misrepresentations and allegations
25 stated herein were all discovered within the
26 past year, such that any applicable statute
of limitations are extended or should be
extended pursuant to the equitable tolling
doctrine or other equitable principles. Even
through the exercise of reasonable diligence,
Plaintiff would still not have been able to
learn of or file his claim on time.

19 The SAC alleges the following causes of action: (1) First
20 Cause of Action for fraud against all Defendants; (2) Second
21 Cause of Action for breach of contract against DeSilva and
22 Norberg; (3) Third Cause of Action for breach of the implied
23 covenant of good faith and fair dealing against DeSilva, Norberg
24 and Financial; (4) Fourth Cause of Action for violation of
25 California Rosenthal Act, Civil Code §§ 1788 et seq. against CWB;
26 (5) Fifth Cause of Action for negligence against DeSilva, Norberg

1 and Financial; (6) Sixth Cause of Action for breach of fiduciary
2 duty against DeSilva, Norberg and Financial; and (7) Seventh
3 Cause of Action for violations of California Business &
4 Professions Code §§ 17200 et seq. against all Defendants.

5 Before the Court are the motions to dismiss the SAC by SPM
6 and by CWB and MERS.

7 A. GOVERNING STANDARDS.

8 1. Motion To Dismiss.

9 Dismissal under Rule 12(b)(6) is appropriate where the
10 complaint lacks sufficient facts to support a cognizable legal
11 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699
12 (9th Cir. 1990). To sufficiently state a claim for relief and
13 survive a 12(b)(6) motion, the pleading "does not need detailed
14 factual allegations" but the "[f]actual allegations must be enough
15 to raise a right to relief above the speculative level." *Bell Atl.*
16 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Mere "labels and
17 conclusions" or a "formulaic recitation of the elements of a cause
18 of action will not do." *Id.* Rather, there must be "enough facts to
19 state a claim to relief that is plausible on its face." *Id.* at 570.
20 In other words, the "complaint must contain sufficient factual
21 matter, accepted as true, to state a claim to relief that is
22 plausible on its face." *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct.
23 1937, 1949 (2009) (internal quotation marks omitted). The Ninth
24 Circuit has summarized the governing standard, in light of *Twombly*
25 and *Iqbal*, as follows: "In sum, for a complaint to survive a motion
26 to dismiss, the non-conclusory factual content, and reasonable

1 inferences from that content, must be plausibly suggestive of a
2 claim entitling the plaintiff to relief." *Moss v. U.S. Secret*
3 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks
4 omitted). Apart from factual insufficiency, a complaint is also
5 subject to dismissal under Rule 12(b)(6) where it lacks a
6 cognizable legal theory, *Balistreri*, 901 F.2d at 699, or where the
7 allegations on their face "show that relief is barred" for some
8 legal reason, *Jones v. Bock*, 549 U.S. 199, 215 (2007).

9 In deciding whether to grant a motion to dismiss, the court
10 must accept as true all "well-pleaded factual allegations" in the
11 pleading under attack. *Iqbal*, 129 S. Ct. at 1950. A court is
12 not, however, "required to accept as true allegations that are
13 merely conclusory, unwarranted deductions of fact, or
14 unreasonable inferences." *Sprewell v. Golden State Warriors*, 266
15 F.3d 979, 988 (9th Cir. 2001); see, e.g., *Doe I v. Wal-Mart*
16 *Stores, Inc.*, 572 F.3d 677, 683 (9th Cir. 2009). "When ruling on
17 a Rule 12(b)(6) motion to dismiss, if a district court considers
18 evidence outside the pleadings, it must normally convert the
19 12(b)(6) motion into a Rule 56 motion for summary judgment, and
20 it must give the nonmoving party an opportunity to respond."
21 *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003). "A
22 court may, however, consider certain materials-documents attached
23 to the complaint, documents incorporated by reference in the
24 complaint, or matters of judicial notice-without converting the
25 motion to dismiss into a motion for summary judgment." *Id.* at
26 908.

1 2. Rule 9(b).

2 Rule 9(b) imposes an elevated pleading standard for fraud
3 claims. Rule 9(b) states:

4 In alleging fraud or mistake, a party must
5 state with particularity the circumstances
6 constituting fraud or mistake. Malice,
intent, knowledge, and other conditions of a
person's mind may be alleged generally.

7 "To comply with Rule 9(b), allegations of fraud must be specific
8 enough to give defendants notice of the particular misconduct
9 which is alleged to constitute the fraud" *Swartz v. KPMG*
10 *LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (internal quotation marks
11 omitted). Allegations of fraud must include the "time, place,
12 and specific content of the false representations as well as the
13 identities of the parties to the misrepresentations." *Id.*
14 (internal quotation marks omitted). The "[a]verments of fraud
15 must be accompanied by the who, what, when, where, and how of the
16 misconduct charged." *Kearns v. Ford Motor Co.*, 567 F.3d 1120,
17 1124 (9th Cir. 2009) (internal quotation marks omitted). A
18 plaintiff alleging fraud "must set forth more than the neutral
19 facts necessary to identify the transaction. The plaintiff must
20 set forth what is false or misleading about a statement, and why
21 it is false." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106
22 (9th Cir. 2003) (emphasis and internal quotation marks omitted).

23 B. FIRST CAUSE OF ACTION FOR FRAUD.

24 CWB and SPM move to dismiss the First Cause of Action for
25 fraud.

26 The February 16 Memorandum Decision dismissed this claim

1 with leave to amend, ruling:

2 With respect to Sierra Pacific, the complaint
3 alleges that it directed, authorized, or
4 participated in a "scheme" to "fraudulently
5 induce Plaintiff" to enter into his loan
6 transaction. (Doc. 14 at 17.) Elsewhere in
7 the complaint, Plaintiff asserts that his
8 loan was part of a larger "scheme"
9 perpetrated by "Defendants" pursuant to which
10 they sold home loans on the "secondary
11 market," then "pooled" these loans into
12 trusts, and issued new securities backed by
13 the pool. (*Id.* at 5, 7) Under this scheme,
14 Sierra Pacific's borrowers, including
15 Plaintiff, "were steered and encouraged into
16 loans with terms unfavorable to them, or
17 loans which the borrowers . . . were not
18 qualified to obtain." (*Id.* at 8.)

19 With respect to Countrywide, the complaint
20 alleges that Countrywide "misrepresented to
21 Plaintiff that Countrywide has the right to
22 collect monies from Plaintiff on its behalf
23 or on behalf of others when Defendant
24 Countrywide had no legal right to collect
25 such monies." (*Id.* at 17.) As to MERS, the
26 complaint alleges that "MERS misrepresented
to Plaintiff on the Deed of Trust that it is
a qualified beneficiary with the ability to
assign or transfer the Deed of Trust and/or
the Note and/or substitute trustees under the
Deed of Trust." (*Id.* at 17-18.)

1 In California, "[t]he elements of fraud,
2 which give[] rise to the tort action for
3 deceit, are (a) misrepresentation (false
4 representation, concealment, or
5 nondisclosure); (b) knowledge of falsity (or
6 scienter); (c) intent to defraud, i.e., to
7 induce reliance; (d) justifiable reliance;
8 and (e) resulting damage." *Small v. Fritz*
9 *Companies, Inc.*, 30 Cal. 4th 167, 173 (2003)
10 (internal quotation marks omitted).
11 Plaintiff's fraud claim is subject to Rule
12 9(b)'s elevated pleading standard, which
13 Plaintiff has failed to meet with respect to
14 each moving defendant.

15 As to Sierra Pacific, the allegations in the
16 complaint fail to specify the "who, what,

1 when, where, and how of the misconduct
2 charged," *Kearns*, 567 F.3d at 1124 (internal
3 quotation marks omitted). The complaint
4 provides no particular details on *what*
5 specific role Sierra Pacific played in the
6 "scheme" to "fraudulently induce Plaintiff"
7 to enter into his loan transaction, or *when*
8 and *where* the scheme occurred. See *Swartz*,
9 476 F.3d at 764-65 (concluding that, in a
10 fraud suit involving multiple defendants, a
11 plaintiff must "identif[y] the role" each
12 defendant played "in the alleged fraudulent
13 scheme," informing "each defendant separately
14 of the allegations surrounding his alleged
15 participation in the fraud") (alteration in
16 original) (internal quotation marks omitted);
17 *Vess*, 317 F.3d at 1106 (concluding that a
18 fraudulent conspiracy claim failed to satisfy
19 Rule 9(b) because, among other things, the
20 pleading failed to "provide the particulars
21 of when, where, or how the alleged conspiracy
22 occurred"). In addition, the complaint fails
23 to specify what particular misrepresentation
24 was involved in the fraudulent scheme. The
25 complaint alleges that certain agents "made
26 false statements to Plaintiff regarding
material facts, including, but not limited
to, interest rates, financing options,
availability of financing, and Plaintiff's
qualification for this loan . . . [which
were] designed to fraudulently induce
Plaintiff to enter into his transaction."
(Doc. 14 at 17.) The complaint, however,
fails to specify what these "false
statements" were, when they were made, and
how they were false. Sierra Pacific, or any
defendant, is not required to guess what
particular misrepresentation(s) are at issue
in the fraud claim. Under Rule 9(b), the
obligation is on Plaintiff to spell it out.

The complaint's allegation of a larger
"scheme" in which "defendants" sold home
loans on the "secondary market," "pooled"
these loans into trusts, and issued new
securities backed by the pool, is similarly
deficient under Rule 9(b). Plaintiff has not
identified the role each defendant played in
this fraudulent scheme, when and where the
scheme occurred, or details on the specific
misrepresentation involved in the fraudulent

1 scheme.

2 As to Countrywide, the allegation that
3 Countrywide "misrepresented to Plaintiff that
4 Countrywide has the right to collect monies
5 from Plaintiff on its behalf or on behalf of
6 others when Defendant Countrywide had no
7 legal right to collect such monies," fails to
8 satisfy Rule 9(b). No details are provided
9 on the specific content of the false
10 representation, when the statement was made,
11 where it was made, and how it was false.

12 Finally, as to MERS, the complaint is also
13 deficient with respect to the allegation that
14 (i) "MERS misrepresented to Plaintiff on the
15 Deed of Trust that it is a qualified
16 beneficiary with the ability to assign or
17 transfer the Deed of Trust and/or the Note
18 and/or substitute trustees under the Deed of
19 Trust" and (ii) "MERS misrepresented that it
20 followed the applicable legal requirements to
21 transfer the Note and Deed of Trust to
22 subsequent beneficiaries." Missing from the
23 complaint are facts specifying the particular
24 verbal or written misrepresentations at
25 issue, when they were made, where they were
26 made, and how or why they are false. See
Morgera v. Countrywide Home Loans, Inc., No.
2:09-cv-1476-MCE-GGH, 2010 WL 160348, at *6
(E.D. Cal. Jan. 11, 2010) (dismissing same
fraud claim as to MERS for failure to satisfy
Rule 9(b) requirements); *Webb v. Indymac Bank
Home Loan Servicing*, No. CIV 2:09-2380 WBS
DAD, 2010 WL 121084, at *4 (E.D. Cal. Jan. 7,
2010) (same).¹

27 In addition, and apart from Rule 9(b), under
28 California law, resulting damage is a
29 necessary element of fraud. At the pleading
30 stage, "the pleading must show a cause and
31 effect relationship between the fraud and
32 damages sought; otherwise no cause of action
33 is stated." *Commonwealth Mortgage Assurance
34 Co. v. Superior Court*, 211 Cal. App. 3d 508,
35 518 (1989). The complaint, as MERS correctly
36 argues, does not indicate how Plaintiff was
37 damaged by MERS's alleged misrepresentations.
38 Instead, the complaint states, in conclusory
39 fashion, that Plaintiff was "harmed and
40 suffered damages" (Doc. 14 at 18) as a result

1 of the fraud. Absent facts to plausibly
2 suggest a causal connection between the
3 alleged fraud and some damage to Plaintiff,
4 the fraud claim is insufficiently pled.

5 ...

6 ¹ To the extent any fraud claim against
7 Countrywide, MERS or any defendant is tied to
8 or involves the theory that possession of the
9 original promissory note is a prerequisite to
10 the initiation of non-judicial foreclosure,
11 this theory lacks merit. See *Castaneda*, 2009
12 WL 4640673 at *7 ("Under California law,
13 there is no requirement for the production of
14 the original note to initiate a non-judicial
15 foreclosure."); see also *Nool v. HomeQ*
16 *Servicing*, 653 F. Supp. 2d 1047, 1053 (E.D.
17 Cal. 2009).

18 As to SPM and CWB, the First Cause of Action of the SAC
19 alleges:

20 Defendants SPM, NORBERG, DESILVA, and
21 FINANCIAL

22 66. Defendant SPM was the original lender of
23 the subject mortgage loan for Plaintiff's
24 Property.

25 67. Defendant SPM's conduct herein was not
26 that of a traditional lender, in that it
actively participated in the enforcement of
the predatory lending scheme against
Plaintiff's interest.

68. Defendant SPM regularly trained,
directed, authorized, and participated with
mortgage brokers and loan officers to
implement this fraud, giving them monetary
incentives to violate the borrowers' trust.

69. Defendant SPM exercised extensive
control over the actions of Defendants
NORBERG, DESILVA, and FINANCIAL by directly
ordering, authorizing and participating with
Defendants NORBERG, DESILVA, and FINANCIAL in
order to conceal the misrepresentations on
Plaintiff's loan application.

1 70. Defendant SPM shared in the profits made
2 from the sale of the subject mortgage loans
3 to Plaintiff by ensuring that the mortgage
4 contained terms that made them profitable on
5 the secondary market.

6 71. Defendant SPM, through its underwriters,
7 knew that the income stated on Plaintiff's
8 loan application did not match the monthly
9 income represented from the income
10 verification documents provided by Plaintiff
11 to Defendants NORBERG, DESILVA, and
12 FINANCIAL.

13 72. Defendant SPM conspired with Defendants
14 NORBERG, DESILVA, and FINANCIAL to hide the
15 true terms of this loan from Plaintiff by not
16 providing Plaintiff with the required loan
17 disclosure documents prior to or after the
18 signing of the loan documents.

19 73. At closing, Plaintiff were presented
20 with a stack of documents by a notary,
21 approximately 1 inch thick, with tabs that
22 indicated where Plaintiff should sign and/or
23 initial. There was no representative of SPM,
24 NORBERG, DESILVA, or FINANCIAL present at
25 closing.

26 74. In fact, Defendants NORBERG, DESILVA, or
FINANCIAL have been advised by Defendant SPM
not to be present at closing.

75. At closing, the notary did not explain
any of the loan documents to Plaintiff and
had been advised not to explain any of the
loan documents to Plaintiff by Defendants
NORBERG, DESILVA, or FINANCIAL. The notary
simply told Plaintiff to sign and initial the
documents provided.

76. Plaintiff were [sic] only given a few
minutes to sign the documents and Plaintiff
were [sic] not allowed to review the
documents.

77. When Plaintiff applied for this loan, he
accurately described his income and provided
Defendant DESILVA with documentation of his
income including tax returns, bank
statements, W-2s and 1099s. Plaintiff is now

1 informed and believes, and thereon alleges
2 that his income was overstated on the loan
3 application by Defendant DESILVA, without his
4 knowledge or permission. Plaintiff is
5 informed and believes, and thereon alleges
6 that Defendant SPM's underwriters knew or
7 should have known of the fraudulent
8 information on the loan application but
9 approved the loan anyway. Plaintiff's income
10 was overstated on the loan application by the
11 Defendant DESILVA, Plaintiff had an income of
12 \$4,800.00 per month and the loan application
13 stated Plaintiff had an income of \$7,800.00
14 at the time the loan was made.

8 Defendant CWB

9
10 78. As alleged herein, Defendant CWB
11 misrepresented to Plaintiff that Defendant
12 CWB has the right to collect monies from
13 Plaintiff on its behalf or on behalf of
14 others when Defendant CWB had no legal right
15 to collect such monies.

13 79. Defendant CWB has known, at all relevant
14 times, that it, in fact, is not entitled to
15 collect monies from Plaintiff.

15 80. Plaintiff's mortgage note is a
16 negotiable instrument under the Uniform
17 Commercial Code Article 3 and California
18 Commercial Code § 3301 et seq.

18 81. To transfer ownership of a mortgage note
19 in a "True Sale" transaction, it requires
20 proper endorsement by a person with authority
21 to endorse the note, physical delivery of the
22 note and acceptance of the note.

21 82. In "selling" this mortgage note
22 Defendant SPM failed to follow the basic
23 legal requirements for the transfer of a
24 negotiable instrument and an interest in real
25 property, in that (1) there was not a proper
26 and timely written assignment of the deed of
trust, (2) there was not a proper endorsement
of the note a person with authority to
endorse the note, and (3) there was not
proper and timely delivery of the Note and
acceptance of the Note and Deed of Trust.

1 83. As a result of Defendant SPM's failure
2 to follow the guidelines under Uniform
3 Commercial Code Article 3 and California
4 Commercial Code § 3301 et seq., no interest
5 in Plaintiff's Mortgage Note, Deed of Trust
6 or Property was ever legally transferred to
7 any of the named Defendants or Doe
8 Defendants.

9 84. Defendant CWB, as part of its duties and
10 responsibilities "servicing" the Subject
11 Mortgage, entered information related to the
12 subject mortgage loan into MERS and therefore
13 has direct knowledge related to inadequate
14 and illegal transfers of title, inadequate
15 and illegal assignments of rights, inadequate
16 and illegal substitutions of parties and all
17 other inadequate and illegal activity related
18 to the chain of title for the Subject
19 Property.

20 85. Accordingly, Defendant CWB could not
21 have legally been given the right to service
22 Plaintiff's Loan.

23 86. Defendant CWB knew or should have known
24 the law namely, Uniform Commercial Code
25 Article 3 and California Commercial Code §
26 3301 - and its application to its business
services.

87. Defendant CWB's representations to
Plaintiff that it has the right to service
Plaintiff's Loans was, and is, fraudulent.

General Allegations as to all Defendants and
Damages

88. These material representations made by
each Defendant were false.

89. Each Defendant knew that these material
representations were false when made, or
these material representations were made with
reckless disregard for the truth.

90. Defendants intended that Plaintiff rely
on these material representations.

91. Plaintiff reasonably relied on said
representations.

1 92. As a result of Plaintiff's reliance, he
2 was harmed and suffered damages including,
3 but not limited to, loss of property,
4 incurred attorneys' fees and costs to recover
5 the Property, a loss of reputation and
6 goodwill, destruction of credit, severe
7 emotional distress, loss of appetite,
8 frustration, fear, anger, helplessness,
9 nervousness, anxiety, sleeplessness, sadness,
10 and depression. Plaintiff's reliance on
11 Defendants' false material representations
12 was a substantial factor in causing Plaintiff
13 harm.

14 93. Additional evidentiary facts
15 constituting fraud in this matter are
16 secreted within Defendants' knowledge and
17 possession.

18 94. Defendants, and each of them, conspired
19 together to perpetrated the fraud alleged
20 herein over the course of several years.

21 95. Defendants are guilty of malice, fraud
22 and/or oppression, as defined in California
23 Civil Code § 3294. Defendants' actions were
24 malicious and willful, in conscious disregard
25 of the rights and safety of Plaintiff in that
26 the actions were calculated to injure
Plaintiff. As such, Plaintiff is entitled to
recover, in addition to actual damages,
punitive damages to punish Defendants and to
deter them from engaging in future
misconduct.

96. Defendants SPM, CWB, and FINANCIAL's
officers, directors and/or managing agents
failed to adequately supervise, train and
direct its employees, and employing them with
conscious disregard for the safety of
Plaintiff and thereafter ratified the conduct
of its employees.

97. Defendants SPM, CWB, and FINANCIAL
implemented policies and procedures which
permitted and encouraged the conduct of its
employees and agents in this case and as such
said Defendant consented, acquiesced,
approved and ratified the behavior and
conduct of its employees, including Does 1
through 20, and each of them in causing harm

1 to Plaintiff.

2 98. Accordingly, Plaintiff is entitled to
3 recover punitive damages from Defendants
4 pursuant to California Civil Code § 3294, in
5 an amount according to proof.

6 SPM argues that the allegations against it in the First
7 Cause of Action fail to comply with Rule 9(b):

8 [N]ot only does Plaintiff continue to fall
9 short of meeting the specificity requirements
10 imposed by Rule 9(b), Plaintiff still fails
11 ... to identify any representation whatsoever
12 that Sierra Pacific allegedly made ... [¶]
13 Far from pleading a viable fraud cause of
14 action, Plaintiff cannot even describe one,
15 single statement by Sierra Pacific on which
16 such a claim might even *theoretically* stand.

17 Plaintiff responds that the allegations in Paragraphs 57 to
18 65 and 73-84 are very specific about the actions of SPM,
19 including that SPM told people not to attend the closing.
20 Plaintiff asserts that "[t]hese individuals would have explained
21 the true terms of the loan to Plaintiff and Plaintiff would not
22 have gone through with the transaction."

23 Paragraphs 57-65 of the SAC allege fraud against Defendants
24 Financial, DeSilva and Norberg, not against SPM. As to
25 Paragraphs 73-84, SPM asserts: "where they mention Sierra Pacific
26 at all - contain only a few lines about (a) no representative of
Sierra Pacific being present at closing and (b) a purported
instruction by Sierra Pacific that others need not be present,
either, followed by an allegation that Sierra Pacific's
underwriters should have known about allegedly fraudulent
information placed on Plaintiff's loan application by another

1 Defendant."

2 SPM's motion to dismiss the First Cause of Action for fraud
3 is GRANTED WITH PREJUDICE. The SAC alleges no fraudulent actions
4 against SPM and certainly without the specificity required by
5 Rule 9(b). A mortgage is not a negotiable instrument unless and
6 until the requirements for negotiability have been satisfied.
7 The theory is contrived and based on a misapprehension of the law
8 of commercial paper. Because Plaintiff has had multiple
9 opportunities to allege a claim for fraud against SPM upon which
10 relief can be granted, no further leave to amend is granted.

11 CWB moves to dismiss this cause of action. With regard to
12 the allegations in Paragraphs 78 and 82 that "CWB misrepresented
13 to Plaintiff that Defendant CWB has the right to collect monies
14 from Plaintiff on its behalf or on behalf of others when
15 Defendant CWB had no legal right to collect such monies," and
16 that in "selling" this mortgage note Defendant SPM failed to
17 follow the basic legal requirements for the transfer of a
18 negotiable instrument and an interest in real property, in that
19 (1) there was not a proper and timely written assignment of the
20 deed of trust, (2) there was not a proper endorsement of the note
21 a person with authority to endorse the note, and (3) there was
22 not proper and timely delivery of the Note and acceptance of the
23 Note and Deed of Trust," CWB argues that these allegations are
24 "nothing more than the latest manifestation of the 'produce the
25 note" theory."2008 Because case law holds that California law
26 does not require production of the promissory note to initiate

1 foreclosure, see, e.g., *Putkkuri v. Recontrust Co.*, 2009 WL 32567
2 at *2 (S.D.Cal., Jan. 5, 2009); *Candelo v. Ndex West LLC*, 2008 WL
3 5382259 at *4 (E.D.Cal., Dec. 23, 2008), CWB asserts that it did
4 not defraud Plaintiff by collecting loan payments without
5 demonstrating that it is in possession of the original note. The
6 holder of a note secured by deed of trust may appoint any
7 collection agent and need not transfer possession of the note to
8 enable collection. CWB further argues that the allegations of
9 fraud are not pleaded with the required specificity: "Plaintiff
10 has recited nothing but legal theories about why the sale of a
11 promissory note might be flawed, without any facts that are
12 relevant to this case." Finally, CWB asserts that the
13 allegations do not demonstrate that Plaintiff was damaged:

14 Plaintiff does not contend that some other
15 entity tried to collect loan payments as well
16 as Countrywide. Plaintiff signed a note and
17 deed of trust in which he promised to make
18 specified monthly payments, under the threat
19 of foreclosure. Countrywide, and nobody
20 else, has sought to collect those payments.
21 If, hypothetically, someone else was entitled
22 to those payments, that other person may have
23 a claim against Countrywide. But plaintiff
24 has not shown how he has been damaged by
25 making the loan payments that he promised he
26 would make when he executed the note and deed
 of trust.

21 Plaintiff responds that Paragraphs 57-65 and 85-94 are very
22 specific about the actions of CWB and believes the requirements
23 of Rule 9(b) have been met. Again, Paragraphs 57-65 of the SAC
24 allege fraud against Defendants Financial, DeSilva and Norberg,
25 not against CWB. Paragraphs 85-94 pertain to CWB's alleged legal
26

1 inability to service the loan under U.C.C. Art. 3 and to
2 Plaintiff's contention that CWB's representation that it was the
3 loan servicer is fraudulent.

4 CWB's motion to dismiss the First Cause of Action is
5 GRANTED. Plaintiff's reliance on California Commercial Code §
6 3301 is misplaced in this context. See *Blanco v. American Home*
7 *Mortgage Servicing, Inc.*, 2010 WL 716311 at *2 (E.D.Cal., Feb.
8 26, 2010):

9 Plaintiff also bases her theory of fraud
10 against AHSMI on an erroneous theory.
11 Specifically, plaintiff claims that AHSMI
12 made misrepresentations to plaintiff when it
13 'represented ... that AHSMI has the right to
14 collect monies' from her because AHSMI is not
15 a 'person entitled to enforce' the mortgage
16 note pursuant to California Commercial Code
17 Section 3301. ... In that regard, plaintiff
18 contends that defendants failed to properly
19 endorse the note and physically deliver it,
20 rendering the transfer of the note invalid.
21 However, '[w]hen a mortgage is sold, physical
22 transfer of the note is not required.' *Wood*
23 *v. Aegis Wholesale Corp.*, 2009 U.S. Dist.
24 LEXIS 57151, *14 (E.D.Cal. July 2, 2009)
25 (citing *In re Golden Plan of Cal., Inc.* 829
26 F.2d 705, 708-11 (9th Cir.1986). Accordingly,
plaintiff has failed to identify any
misrepresentations made by AHSMI or why AHSMI
would know a statement that it had the right
to service her loan was false.

Further, Plaintiff has not alleged facts from which it may be
inferred that he was damaged by CWB's alleged misrepresentation.
As CWB notes, Plaintiff agreed to make monthly payments pursuant
to the terms of the promissory note and deed of trust when he
obtained the loan from SPM. Whether or not CWB is legally
entitled to service Plaintiff's does not harm Plaintiff in the

1 absence of allegations that Plaintiff was also making loan
2 payments to a third party.

3 The First Cause of Action as to CWB is DISMISSED WITH
4 PREJUDICE.

5 C. FOURTH CAUSE OF ACTION FOR VIOLATION OF CALIFORNIA
6 ROSENTHAL ACT.

7 CWB moves to dismiss the Fourth Cause of Action for
8 violation of the Rosenthal Fair Debt Collection Practices Act
9 ("RFDCPA") for failure to state a claim upon which relief can be
10 granted.

11 The February 16 Memorandum Decision dismissed this claim
12 with leave to amend, ruling:

13 The RFDCPA was enacted "to prohibit debt
14 collectors from engaging in unfair or
15 deceptive acts or practices in the collection
16 of consumer debts, and to require debtors to
17 act fairly in entering into and honoring such
18 debts." Cal. Civ. Code § 1788.1. Under the
19 RFDCPA, a "debt collector" is defined as "any
20 person who, in the ordinary course of
21 business, regularly, on behalf of himself or
22 herself or others, engages in debt
23 collection." Cal. Civ. Code § 1788.2(c). The
24 term "debt collection" means "any act or
25 practice in connection with the collection of
26 consumer debts," § 1788.2(b), and "consumer
debt" means "money, property or their
equivalent, due or owing or alleged to be due
or owing from a natural person by reason of a
consumer credit transaction," § 1788.2(f).
In turn, "consumer credit transaction" means
"a transaction between a natural person and
another person in which property, services or
money is acquired on credit by that natural
person from such other person primarily for
personal, family, or household purposes." §
1788.2(e). A debt collector violates the act
when it engages in harassment, threats, the
use of profane language, false simulation of

1 the judicial process, or when it cloaks its
2 true nature as a licensed collection agency
3 in an effort to collect a consumer debt. See
4 Cal. Civ. Code. §§ 1788.10-1788.16.

5 Plaintiff alleges that Countrywide and Sierra
6 Pacific violated the RFDCPA by "collecting on
7 a debt not owed to the Defendants, making
8 false reports to credit reporting agencies,
9 falsely stating the amount of a debt,
10 increasing the amount of debt by including
11 amounts that are not permitted by law or
12 contract, and using unfair and unconscionable
13 means to collect a debt." (Doc. 14 at 13.)
14 Plaintiff's RFDCPA claim is deficient in at
15 least two respects.

16 First, "[t]he law is clear that foreclosing
17 on a deed of trust does not invoke the
18 statutory protections of the RFDCPA." *Collins*
19 *v. Power Default Servs., Inc.*, No. 09-4838
20 SC, 2010 WL 234902, at *3 (N.D. Cal. Jan. 14,
21 2010) (collecting numerous cases).
22 "[F]oreclosure pursuant to a deed of trust
23 does not constitute debt collection under the
24 RFDCPA." *Castenda v. Saxon Mortgage Servs.,*
25 *Inc.*, ___ F. Supp. 2d ___, 2009 WL 4640673, at
26 *3 (E.D. Cal. 2009); see also *Gonzalez v.*
27 *First Franklin Loan Servs.*, No. 1:09-CV-00941
28 AWI-GSA, 2010 WL 144862, at *7 (E.D. Cal.
29 Jan. 11, 2010) ("[F]oreclosure related
30 actions . . . do not implicate the RFDCPA.").
31 The conduct Plaintiff complains of concerns
32 foreclosure related actions in connection
33 with his residential mortgage. This conduct
34 is not covered by the RFDCPA. For this
35 reason, Plaintiff's RFDCPA claim is subject
36 to dismissal.

37 Second, the RFDCPA claim lacks any supporting
38 facts. The complaint has no non-conclusory
39 factual content to plausibly suggest that
40 Countrywide and Sierra Pacific violated the
41 RFDCPA by engaging in acts (such as
42 harassment) prohibited by the statute. See
43 *Keen v. Am. Home Mortgage Servicing, Inc.*, ___
44 F. Supp. 2d ___, 2009 WL 3380454, at *5 (E.D.
45 Cal. 2009); *Gonzalez*, 2010 WL 144862 at *7.

46 After incorporating all preceding allegations, the Fourth

1 Cause of Action in the SAC alleges:

2 130. Plaintiff alleges that Defendant CWB is
3 a debt collector within the meaning of the
4 Rosenthal Act in that they [sic] regularly,
5 in the course of their business, on behalf or
6 themselves or others, engage in the
7 collection of debt.

8 131. Defendant CWB used unfair and
9 unconscionable means to collect a debt not
10 owed to Defendant CWB or its principal by
11 sending deceptive letters and making phone
12 calls to Plaintiff demanding payment.

13 132. Defendant CWB made false reports to
14 credit reporting agencies about Plaintiff's
15 credit standing, falsely stating the amount
16 of Plaintiff's mortgage debt, falsely stating
17 that a debt was owed to Defendant CWB, and
18 falsely stating Plaintiff's payment history.

19 133. Further, Defendant CWB increased the
20 amount of Plaintiff's mortgage debt by
21 stating amounts not permitted by law or
22 contract, including, but not limited to,
23 excessive service fees, attorneys' fees, and
24 late charges.

25 Defendant CWB's actions have caused Plaintiff
26 actual damages, including, but not limited
to, loss of property, incurred attorneys'
fees and costs to recover the Property, a
loss of reputation and goodwill, destruction
of credit, severe emotional distress, loss of
appetite, frustration, fear, anger,
helplessness, nervousness, anxiety,
sleeplessness, sadness, and depression,
according to proof at trial but within the
jurisdiction of this Court.

134. As a result of Defendant CWB's
violations, Plaintiff is entitled to
statutory damages in an amount to be
determined at trial, actual damages according
to proof, and costs and reasonable attorneys'
fees.

CWB argues that these allegations do nothing more than
recite the language of the statutes and fail to set forth any

1 facts showing how CWB violated the RFDCPA. See *Keen v. American*
2 *Home Mortg. Servicing, Inc.*, 644 F.Supp.2d 1086, 1095
3 (E.D.Cal.2009) (dismissing complaint where it failed to allege the
4 specific provisions of the RFDCPA were violated or any facts that
5 defendant used threats, harassment, or profane language to
6 collect a debt); accord *Rosal v. First Federal Bank of*
7 *California*, 671 F.Supp.2d 1111 (N.D.Cal.2009).

8 Plaintiff responds that the Fourth Cause of Action alleges
9 that CWB violated the RFDCPA in attempting to collect money from
10 Plaintiff and not just to enforce a security interest. Plaintiff
11 cites *Ohlendorf v. American Home Mortgage Servicing*, 2010 U.S.
12 Dist. LEXIS 31098 at *18-20 (E.D.Cal., March 13, 2010):

13 California's Rosenthal Fair Debt Collection
14 Practices Act ... prohibits creditors and
15 debt collectors from, among other things,
16 making false, deceptive, or misleading
17 misrepresentations in an effort to collect a
18 debt ... Pursuant to *Cal. Civ. Code Section*
19 *1788.17*, the Rosenthal Act incorporates the
20 provisions of the federal Fair Debt
21 Collection Practices Act prohibiting
22 '[c]ommunicating or threatening to
23 communicate to any person credit information
24 which is known or which should be known to be
25 false.' 15 U.S.C. § 1692e(8).

26 Plaintiff alleges that AHMSI violated the
Rosenthal Act by making false reports to
credit reporting agencies, falsely stating
the amount of debt, falsely stating a debt
was owed, attempting to collect said debt
through deceptive letters and phone calls
demanding payment, and increasing plaintiff's
debt by stating amounts not permitted,
including excessive service fees, attorneys'
fees, and late charges ... AHMSI argues that
foreclosing on a property is not a collection
of a debt, and so is not regulated by the
Rosenthal Act, that the alleged activities

1 resulted from plaintiff's default, and
2 plaintiff has not alleged when the violations
3 occurred. AHMSI correctly points out that
4 foreclosure on a property securing a debt is
5 not debt collection activity encompassed by
6 [the] Rosenthal Act ... However, plaintiff's
7 allegations with respect to this cause of
8 action do not mention foreclosure, instead
9 alleging violations related to payment
10 collection efforts ... Further, the actions
11 of debt collectors under the act are not
12 immunized if plaintiff actually owed money.
13 Rather, the Rosenthal Act prohibits conduct
14 in collecting a debt, whether valid or not.
15 Accordingly, AHMSI's second argument is
16 without merit. Lastly, as to AHMSI's third
17 argument, plaintiff has sufficiently alleged
18 the general time of the conduct he claims
19 violates the Rosenthal Act. Specifically,
20 the court infers from the complaint, that the
21 alleged conduct occurred after plaintiff
22 stopped making his loan payments. Thus,
23 AHMSI's motion to dismiss this claim is
24 denied.

25 See also *Azzini v. Countrywide Home Loans*, 2010 WL 962856 at *
26 (S.D.Cal., March 15, 2010) (denying motion to dismiss Rosenthal
27 Act claim based on allegations that Countrywide is a loan
28 servicer, it has collected mortgage payments from Plaintiffs, it
29 is a debt collector under the Rosenthal Act, and has engaged in
30 acts such as 'threatening and deceptive phone calls); *Gumbs v.*
31 *Litton Loan Servicing*, 2010 WL 1992199 at * 5 (E.D.Cal., May 13,
32 2010) (denying motion to dismiss Rosenthal Act claim based on
33 allegations that Litton made deceptive phone calls, sent letters,
34 and engaged in unlawful acts in an attempt to collect a debt it
35 was not lawfully owed). Plaintiff also cites *Castrillo v.*
36 *American Home Mortg. Servicing, Inc.*, 2010 WL 1424398 (E.D.La.,
37 April 5, 2010), discussing the federal Fair Debt Collection

1 Practices Act, and noting that the Fifth Circuit in *Perry v.*
2 *Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir.1985), held that a
3 "debt collector 'does not include ... a mortgage servicing
4 company, or an assignee of a debt, as long as the debt was not in
5 default at the time it was assigned."²

6 The only "debt" CWB is allegedly attempting to collect is a
7 residential mortgage loan, which is not a debt under the
8 Rosenthal Act. Cases hold that a residential mortgage loan is
9 not a consumer debt within the meaning of the RFDCPA. See
10 *Pontiflet-Moore v. GMAC Mortg.*, 2010 WL 432076 at *6 (E.D.Cal.,
11 Jan. 15, 2010); *Fuentes v. Duetsche Bank*, 2009 WL 1971610 at * 3
12 (S.D.Cal., July 8, 2009). *Pittman v. Barclays Capital Real*
13 *Estate, Inc.*, 2009 WL 1108889 at 3 (S.D.Cal., April 24, 2009);
14 *Ines v. Countrywide Home Loans, Inc.*, 2008 WL 4791863 at * 3
15 (S.D.Cal., Nov. 3, 2008). The cases cited by Plaintiff do not
16 address the definition of "consumer debt" within the meaning of
17 the Rosenthal Act. A District Court judge is not bound by
18 decisions of other District Court judges, even in the same
19 district. *Hernandez v. Balakian*, 2007 WL 1649911 at *6 n.2
20 (E.D.Cal., June 1, 2007). If a residential mortgage loan is not
21 a debt under the RFDCPA for purposes of foreclosure, it makes no

22
23 ²Plaintiff also cites *Wilson v. Draper & Goldberg, P.L.L.C.*,
24 443 F.3d 373 (4th Cir.2006), where the Fourth Circuit held that
25 "Defendants could still be 'debt collectors' even if they were
26 enforcing a security interest." However, in *Odinma v. Aurora Loan*
Services, 2010 WL 2232169 at * 12 (N.D.Cal., June 3, 2010), the
District Court rejected the plaintiff's reliance on *Wilson* as being
against the weight of authority.

1 sense to categorize it as a "consumer debt" when a loan servicing
2 company allegedly attempts to collect the debt by means other
3 than foreclosure.

4 CWB's motion to dismiss the Fourth Cause of Action is
5 GRANTED WITHE PREJUDICE.

6 D. SEVENTH CAUSE OF ACTION FOR VIOLATION OF CALIFORNIA
7 BUSINESS & PROFESSIONS CODE.

8 SPM and CWB move to dismiss the Seventh Cause of Action.

9 The February 16 Memorandum Decision dismissed this claim
10 with leave to amend:

11 The complaint alleges that Countrywide, MERS,
12 and Sierra Pacific engaged in "unlawful,
13 unfair, and/or unfair business practices" in
14 violation of California's Unfair Competition
15 Law ("UCL"), Business & Professions Code §
16 17200 et seq. (Doc. 14 at 18.) The complaint
17 does not assert any particular facts in
18 support of this claim; rather, the pleading
19 indiscriminately incorporates by reference
20 all prior allegations in the complaint. (*Id.*)

21 The UCL prohibits unfair competition
22 including "any unlawful, unfair or fraudulent
23 business act or practice." Cal. Bus. & Prof.
24 Code § 17200. Because the statute is written
25 in the disjunctive, it applies separately to
26 business acts or practices that are (1)
unlawful, (2) unfair, or (3) fraudulent. See
Pastoria v. Nationwide Ins., 112 Cal. App.
4th 1490, 1496 (2003). "Each prong of the
UCL is a separate and distinct theory of
liability; thus, the 'unfair' practices prong
offers an independent basis for relief."
Kearns, 567 F.3d at 1127.

As to the unlawful prong, the UCL
incorporates other laws and treats violations
of those laws as unlawful business practices
independently actionable under state law.
Chabner v. United Omaha Life Ins. Co., 225
F.3d 1042, 1048 (9th Cir. 2000). As to the

1 "unfair" prong, "[a]n unfair business
2 practice is one that either 'offends an
3 established public policy' or is 'immoral,
4 unethical, oppressive, unscrupulous or
5 substantially injurious to consumers.'" *McDonald v. Coldwell Banker*, 543 F.3d 498,
6 506 (9th Cir. 2008) (quoting *People v. Casa*
7 *Blanca Convalescent Homes, Inc.*, 159 Cal.
8 App. 3d 509, 530 (1984)). As to the
9 fraudulent prong, "fraudulent acts are ones
10 where members of the public are likely to be
11 deceived." *Sybersound Records, Inc. v. UAV*
12 *Corp.*, 517 F.3d 1137, 1151-52 (9th Cir.
13 2008).

14 Plaintiff's UCL claim has several
15 deficiencies. First, to the extent Plaintiff
16 asserts a UCL claim based on a violation of
17 other law, his complaint fails to state a
18 claim for a violation of TILA, RESPA, or any
19 other law. Accordingly, to the extent the
20 UCL claim is predicated on the violation of
21 other law, it is insufficiently pled. Second,
22 to the extent Plaintiff seeks to
23 impose liability on Countrywide, MERS, or
24 Sierra Pacific for "unfair" business
25 practices, the complaint fails to indicate
26 which particular acts or practices Plaintiff
is relying upon to advance this claim, or
what acts or practices each defendant did
which constitute "unfair" acts or practices.
Third, to the extent Plaintiff asserts a UCL
claim that is based on or grounded in fraud,
it must meet the requirements of Rule 9(b),
Kearns, 567 F.3d at 1124-27, *Vess*, 317 F.3d
at 1103-04, which it does not. The complaint
fails to specify what particular role each
defendant played in the fraudulent conduct or
scheme, when and where the scheme occurred,
or details on the specific misrepresentation
involved in the fraudulent scheme.

27 The Seventh Cause of Action of the SAC, after incorporating
28 all preceding allegations, alleges:

29 Defendant CWB

30 159. Defendant CWB's violation of the
31 Rosenthal Act, their fraud, and illegal
32 foreclosure activities, as alleged herein,

1 constitute unlawful, unfair, and/or
2 fraudulent business practices, as defined in
3 the California Business and Professions Code
4 § 17200 et seq.

5 160. Defendant CWB violated the Rosenthal
6 Act when it used unfair and unconscionable
7 means to collect a debt not owed to Defendant
8 CWB or its principal by repeatedly, over the
9 past year, sending threatening and deceptive
10 letters and making threatening and deceptive
11 phone calls to Plaintiff demanding payment in
12 violation of California Civil Code §1788.13,
13 when it repeatedly made false reports to
14 credit reporting agencies about Plaintiff's
15 credit standing, falsely stating the amount
16 of Plaintiff's mortgage debt, falsely stating
17 that a debt was owed to Defendant SPM and
18 falsely stating Plaintiff's payment history,
19 violating California Civil Code § 1788.13(f),
20 and when it increased the amount of
21 Plaintiff's mortgage debt by stating amounts
22 not permitted by law or contract, including,
23 but not limited to, excessive service fees,
24 attorneys' fees, and late charges, in
25 violation of California Civil Code
26 1788.10(f).

Defendant SPM

161. Defendant SPM's fraud, breach of
contract, and breach of the implied covenant
of good faith and fair dealing, as alleged
herein, constitute unlawful, unfair, and/or
fraudulent business practices, as defined in
the California Business and Professions Code
§ 17200 et seq.

162. Defendant SPM, committed negligence
when it breached its fiduciary duty when it
directly ordered, authorized and participated
in Defendant DESILVA's conduct, approved
an application with false information, and
placed Plaintiff into a loan which he could
not ultimately afford. In addition, Defendant
SPM, breached its duty of care to the
Plaintiff provide proper disclosures on or
before closing, properly maintain the
original Note, and properly assign or
transfer the Note.

1 163. Defendant SPM, committed fraud when it,
2 while acting in concert with Defendant
3 DESILVA's tortious conduct, approved the loan
4 to Plaintiff which he was unqualified for,
5 implemented unlawful lending practices, and
6 engaged in fraudulent assignments for the
7 purposes of foreclosure.

8 164. Defendant SPM breached its contract,
9 implied covenant of good faith and fair
10 dealing, and fiduciary duty when it ordered,
11 authorized, and participated in Defendant
12 DESILVA's conduct, approved an application
13 with false information, failed to provide
14 proper disclosures at closing, failed to
15 allow Plaintiff to review the final loan
16 documents, and failed to explain any of the
17 final loan documents to Plaintiff at closing.
18 Defendant SPM, also breached by failing to
19 exercise reasonable efforts and due diligence
20 as promised, engaged in the above mentioned
21 wrongful acts, and thus failed to provide
22 Plaintiff with an affordable loan.

23 The Seventh Cause of Action prays for, among other things,
24 reasonable attorney's fees. SPM, citing *America Online, Inc. v.*
25 *Superior Court*, 90 Cal.App.4th 1, 16 n.10 (2001), asserts that
26 attorney's fees are not recoverable by a plaintiff in an UCL
action. In *Walker v. Countrywide Home Loans, Inc.*, 98
Cal.App.4th 1158, 1179 (2002), the Court ruled that, although the
unfair competition law does not provide for attorney's fees, if a
plaintiff prevails on an unfair competition law claim, it may
seek attorney's fees as a private attorney general pursuant to
Code of Civil Procedure § 1021.5. At the hearing, Plaintiff
conceded that attorney's fees pursuant to the Seventh Cause of
Action are not recoverable. SPM's request to strike the request
for attorney's fees is GRANTED.

CWB argues that the Seventh Cause of Action must be

1 dismissed against it because the allegations of violation of the
2 RFDCPA which CWB asserts are conclusorily alleged. See
3 *discussion supra*. Because Plaintiff's claim for relief against
4 CWB for violation of RFDCPA is granted without leave to amend,
5 the Seventh Cause of Action as against CWB is DISMISSED WITH
6 PREJUDICE.

7 SPM moves to dismiss the Seventh Cause of Action to the
8 extent it is based on breach of contract, breach of the implied
9 covenant of good faith and fair dealing, negligence, and breach
10 of fiduciary duty. None of these claims are alleged against SPM
11 in the SAC.

12 Plaintiff cites *Baldain v. American Home Mortg. Servicing,*
13 *Inc.*, 2010 WL 56143 (E.D.Cal., Jan. 5, 2010) as holding that
14 "allegations of negligence, breach of TILA and unfair debt
15 collection are sufficient to support a cause of action for unfair
16 competition."

17 However, the SAC does not allege these claims against SPM
18 and the breach of contract, breach of the implied covenant of
19 good faith and fair dealing, negligence, and breach of fiduciary
20 duty upon which the Seventh Cause of Action rests are not
21 asserted against SPM.

22 To the extent the Seventh Cause of Action is based on SPM's
23 alleged fraud, because the First Cause of Action is not
24 adequately pleaded and is dismissed without leave to amend, see
25 *discussion supra*, the Seventh Cause of Action as against SPM is
26 DISMISSED WITH PREJUDICE.

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CONCLUSION

For the reasons stated:

1. Defendants Countrywide Bank and Sierra Pacific Mortgage Company, Inc.'s motions to dismiss the First, Fourth and Seventh Causes of Action is GRANTED WITHOUT LEAVE TO AMEND;

2. Counsel for Defendants shall prepare and lodge a form of order consistent with this Memorandum Decision within five (5) court days following service of this Memorandum Decision.

IT IS SO ORDERED.

Dated: July 13, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE