

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

VANG CHANTHAVONG,)	
)	2:10-cv-2269-GEB-JFM
Plaintiff,)	
)	
v.)	<u>ORDER GRANTING IN PART AND</u>
)	<u>DENYING IN PART DEFENDANTS'</u>
AURORA LOAN SERVICES, INC., a)	<u>MOTION TO DISMISS AND DENYING</u>
Delaware Corporation; MORTGAGE)	<u>MOTION TO STRIKE</u>
ELECTRONIC REGISTRATION SYSTEMS,)	
INC.,)	
)	
Defendants.)	
_____)	

Defendants Aurora Loan Services, LLC ("Aurora") and Mortgage Electronic Registration Systems, Inc. ("MERS"; collectively, "Defendants") seek dismissal of Plaintiff Van Chanthavong's Second Amended Complaint ("SAC"). Dismissal is sought under Federal Rule of Civil Procedure ("Rule") 12(b)(6), based on the argument that the SAC fails to state a viable claim. (ECF No. 28.) Defendants also seek to have stricken Plaintiff's request for punitive damages under Rule 12(f). Id. Plaintiff filed an opposition brief. (ECF No. 29.) For the reasons stated below, Defendants' dismissal motion will be granted in part and denied in part and the motion to strike will be denied.

1 **I. PLAINTIFF'S ALLEGATIONS IN SAC**

2 The following factual allegations are from the SAC. On August
3 24, 2007 Plaintiff and Lehman Brothers "entered into a loan agreement
4 for the refinancing of" Plaintiff's real property located at 1900 H
5 Street, Sacramento, California (the "Property"). (SAC ¶¶ 1, 24.)
6 Plaintiff executed an adjustable rate note (the "Note") and a deed of
7 trust (the "Deed") for the Property. Id. ¶¶ 24-25, Exs. A-B. The Deed
8 lists Lehman Brothers as the lender and MERS "as a nominee for Lender
9 and Lender's successors and assigns." Id. ¶¶ 25, 29, Ex. B. "MERS is
10 . . . the beneficiary under this Security Instrument." Id. ¶ 25.
11 Plaintiff "default[ed] under the terms of the Note." Id. ¶ 35. On August
12 15, 2008, a Notice of Default was recorded that listed MERS as the
13 contact to "find out the amount [Plaintiff had to] pay, or to arrange
14 for payment to stop the foreclosure[.]" Id. ¶ 36, Ex. C. On October 16,
15 2008, MERS recorded a substitution of trustee in which MERS is the
16 "'nominee for LEHMAN BROTHERS BANK, FSB,' . . . the original
17 beneficiary." Id. ¶ 37. Plaintiff alleges "[u]pon information and
18 belief, MERS is not, and never has been in possession of the Note." Id.
19 ¶ 38.

20 Plaintiff filed for bankruptcy protection in the Eastern
21 District of California on April 21, 2009. Id. ¶ 43. Plaintiff alleges
22 Defendants violated the automatic bankruptcy stay on April 24, 2009 by
23 causing "to be published a Notice of Trustee's Sale, and post[ing] it"
24 at the Property. Id. ¶ 44. MERS, as nominee for Lehman Brothers,
25 transferred all beneficial interest under the Deed to Aurora on June 8,
26 2009. Id. ¶ 45, Ex. E. Plaintiff alleges "[t]his [transfer] action was
27 void because it violated the automatic stay" and "[t]here is no
28 endorsement or allonge evidencing that LEHMAN BROTHERS, MERS, or AURORA

1 LOAN SERVICES is or was the holder of the note." Id. ¶¶ 45-46.

2 The Bankruptcy Court filed an Order Discharging the Debtors on
3 August 3, 2009, and Plaintiff's bankruptcy case was closed August 14,
4 2009. Id. ¶ 48. "Plaintiff alleges that since there is no evidence that
5 LEHMAN BROTHERS, MERS, nor AURORA ever took actual possession of the
6 note, its security interest was never perfected, [and was] not perfected
7 at the time of filing the debtor's bankruptcy, and thus the underlying
8 debt was discharged." Id. ¶ 49.

9 Plaintiff alleges that both before and after his bankruptcy
10 filing, "Plaintiff's agent, Boomie Cotton, and AURORA Loan Services
11 . . . engaged in discussions of loan modification." Id. ¶ 50. Plaintiff
12 further alleges: "On September 7, 2009, plaintiff's agent contacted
13 AURORA and was advised that the payment could not be made and was told
14 that they would give a 10 day grace period. Payment was . . . credited
15 to plaintiff's account on or about September 24, 2009." Id. ¶ 53. "On
16 . . . September 11, 2009, Defendants caused to be published a Notice of
17 Trustee's Sale set for September 30, 2009." Id. ¶ 54, Ex. G. Plaintiff
18 alleges he was unaware that a Notice of Trustee's Sale was filed and
19 never received notice. Id. ¶ 55.

20 Plaintiff received a Special Forbearance Agreement from
21 Aurora, which he signed and returned on September 21, 2009. Id. ¶ 56,
22 Ex. H. Plaintiff attaches to his SAC a copy of the Special Forbearance
23 Agreement that he signed; however, it is not signed by Aurora. Id. Ex.
24 H. Plaintiff alleges his agent contacted Aurora on September 24, 2009,
25 to clarify the agreement "and was told that the agreement was a six
26 month trial period[.]" Id. ¶ 57. "[P]laintiff's agent was told by
27 representatives of AURORA that there was no sale date and that the
28 property was not in foreclosure, but that the property was in an 'active

1 loan mod.'" Id. ¶ 58. "Plaintiff's Agent contacted AURORA on a monthly
2 basis and was repeatedly told that there was no foreclosure date set[.]"
3 Id. ¶ 59.

4 Plaintiff alleges his agent mailed Plaintiff's October payment
5 to Aurora on October 19, 2009, and again asked "if there was a sale
6 date[; the agent] was told the loan was not in foreclosure and there was
7 no sale date." Id. ¶ 64. Plaintiff alleges: "On or about October 30,
8 2009, defendants conducted a private foreclosure sale without notice to
9 plaintiff or his agent of any default in the loan modification
10 agreement." Id. ¶ 65. Plaintiff alleges the Notice of Trustee's Sale was
11 never posted on the premises, mailed by certified mail, or received by
12 the Plaintiff. Id. ¶¶ 66-67.

13 Plaintiff alleges he was advised that the Property was for
14 sale on November 2, 2009, when a real estate agent came to the Property.
15 Id. ¶ 70. Plaintiff alleges that same day "plaintiff's agent spoke with
16 defendant AURORA and asked when the loan modification/forbearance
17 agreement was canceled, and was told that it was canceled on October 20,
18 2009. Plaintiff [alleges he] never received a notice of cancellation."
19 Id. 9:24-26.¹ Plaintiff alleges on November 3, 2009, his

20 agent contacted the foreclosure trustee and
21 discovered for the first time that the trustee's
22 sale had been continued from month to month and
23 also learned for the first time that a new notice
of trustee's sale had been published and a new sale
date set for October 30, 2009. AURORA advised that
. . . the property was sold on October 30, 2009.

24 Id. 10:20-24. "[P]laintiff's agent . . . discovered that sales dates had
25

26 ¹ Beginning on page 9 line 21 in the SAC, Plaintiff re-uses the
27 numbers 53 through 70 in numbering his paragraphs; then beginning on
28 page 24 line 2, Plaintiff re-uses the numbers 126 through 154.
Therefore, these paragraphs are referred to by the page and line number,
rather than the paragraph numbers.

1 been set on 2/2/09, 3/4/09, 5/12/09, 9/12/09, 7/15/09, 8/18/09, 9/30/09,
2 and 10/30/09." Id. 10:7-9. Plaintiff alleges that he, "and his agent or
3 representative had . . . numerous conversations with the loan servicing
4 agent and was told there was no sale date set." Id. 10:27-28.

5 Plaintiff also alleges in the SAC that "[f]ollowing the filing
6 of this case," the bankruptcy trustee "was advised of the possible claim
7 of the estate and . . . the Trustee [was given] an opportunity to review
8 the complaint [Plaintiff filed in this district court,] and [to] advise
9 the [bankruptcy] court whether he wished to pursue the claim on behalf
10 of the estate." Id. 11:12-16. Plaintiff further alleges in the SAC that
11 the Bankruptcy Court did not reopen his bankruptcy case and "[a]s a
12 result, the 'asset' was effectively abandoned back to the debtor by
13 operation of law[.]" Id. 11: 17-19.

14 II. DISCUSSION

15 Defendants seek dismissal of Plaintiff's claims arguing, *inter*
16 *alia*: "Plaintiff lacks standing to assert several of his . . . [claims]
17 because he failed to include those claims as assets of his estate in his
18 Chapter 7 Petition" and "each of Plaintiff's . . . claims fails because
19 they do not meet the pleading requirements." (Defs.' Mem. of P. & A.
20 ("Mot.") 1:19-21, 2:1-2.) Plaintiff's SAC is comprised of what is
21 labeled as the following ten claims, three of which comprise more than
22 a single claim: 1) injunctive relief, 2) declaratory relief, 3) breach
23 of contract, 4) negligence/negligent misrepresentation, 5) demand to
24 produce the note, 6) demand to set aside the trustee's sale, 7) demand
25 to cancel the trustee's deed, 8) request to quiet title, 9) violation of
26 statute, and 10) fraud and deceit. (SAC ¶¶ 71-159.)

27 Defendants argue Plaintiff's demand to cancel the trustee's
28 deed and request to quiet title should be dismissed because Plaintiff

1 included those claims in his SAC without receiving leave of court to
2 allege these claims. (Mot. 4:23-5:4.) These claims were not alleged in
3 Plaintiff's First Amended Complaint ("FAC") and were included in the SAC
4 without leave of court to include the claims in a SAC. An Order filed
5 March 18, 2011, decided Defendants' motion to dismiss Plaintiff's FAC
6 and granted Plaintiff leave to "file a Second Amended Complaint in which
7 he could "address the deficiencies discussed" in the Order. (Order
8 20:28-21:1, ECF No. 22.) Since the two challenged claims were not
9 alleged in the FAC, this portion of Defendants' motion to dismiss is
10 granted.

11 **A. STANDING**

12 Defendants also argue Plaintiff lacks standing to prosecute
13 the following claims because they "remain part of the bankruptcy
14 estate": demand to produce the note, demand to set aside the trustee's
15 sale, violation of statute, and fraud and deceit. (Mot. 7:1-24, 7:27-
16 8:1.) Plaintiff only responds to the Defendants' standing challenge to
17 his claim to set aside the trustee's sale, arguing since this claim
18 "accrue[d] when the foreclosure occur[red]" he has standing to pursue
19 this claim because it is not part of the bankruptcy estate. (Opp'n
20 9:24.)

21 Only the trustee has standing to prosecute the claims that are
22 part of a bankruptcy estate, since "the bankruptcy trustee controls the
23 bankruptcy estate, [and] is the real party in interest in the suits that
24 belong to the estate." Griffin v. Allstate Ins. Co., 920 F. Supp. 127,
25 130 (C.D. Cal. 1996). The filing of a bankruptcy petition "creates an
26 estate [which] is comprised of . . . all legal or equitable interests of
27 the debtor in property as of the commencement of the case." 11 U.S.C. §
28 541(a)(1). "11 U.S.C. § 541(a)(1) . . . defines property of the

1 bankruptcy estate to include 'all legal or equitable interests of the
2 debtor in property as of the commencement of the case.' The scope of
3 section 541 is broad, and includes causes of action." Sierra Switchboard
4 Co. v. Westinghouse Elec. Corp., 789 F.2d 705, 707 (9th Cir. 1986). "11
5 U.S.C. § 521(1) [of the bankruptcy code] provides that, '[t]he debtor
6 shall file a list of creditors, and unless the court orders otherwise,
7 a schedule of assets and liabilities, a schedule of current income and
8 current expenditures, and a statement of the debtor's financial
9 affairs.'" Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 784
10 (9th Cir. 2001).

11 " [A] debtor who fail[s] to disclose a pending claim as an
12 asset in a bankruptcy proceeding where debts were permanently discharged
13 [is] estopped from pursuing such claim in a subsequent proceeding." Id.
14 Further "[t]he debtor's duty to disclose potential claims as assets does
15 not end when the debtor files schedules, but instead continues for the
16 duration of the bankruptcy proceeding." Id. at 784-85. "If [the debtor]
17 fail[s] to properly schedule an asset, including a cause of action, that
18 asset continues to belong to the bankruptcy estate and does not revert
19 to [the debtor]." Cusano v. Klein, 264 F.3d 936, 945-46 (9th Cir. 2001)
20 (citing Vreugdenhill v. Navistar Int'l Transp. Corp., 950 F.2d 524, 526
21 (8th Cir. 1991) (property is not abandoned by operation of law unless
22 the debtor "formally schedule[s] the property before the close of the
23 case"))).

24 "Plaintiff did not list any claim sub judice in his bankruptcy
25 filing." (Order 10:4-5, ECF No. 22.) "[G]enerally, a debtor has no duty
26 to schedule a cause of action that did not accrue prior to bankruptcy."
27 Cusano, 264 F.3d at 947. A claim accrues when an "action could have been
28 brought[.]" Id.

1 Defendants argue "[b]ecause Plaintiff never scheduled the
2 [subject SAC claims] . . . in his bankruptcy petition, . . . Plaintiff
3 lacks standing to bring . . . [the subject claims because they] arose
4 before August 14, 2009[,] " the date on which Plaintiff's bankruptcy case
5 was closed. (Mot. 6:15-20.) Plaintiff alleges in his SAC that his
6 unsuccessful attempt to reopen his bankruptcy case after filing this
7 action, resulted in the "'asset[s]' [being] effectively abandoned back
8 to the [Plaintiff] by operation of law." (SAC 11:19.)

9 A bankruptcy trustee may abandon assets; however, property
10 that is not abandoned or administered by the trustee remains property of
11 the estate. 11 U.S.C. §§ 554 (a), (d). "'Abandonment' is a term of art
12 with special meaning in the bankruptcy context. It is the formal
13 relinquishment of the property at issue from the bankruptcy estate."
14 Catalano v. C.I.R., 279 F.3d 682, 685 (9th Cir. 2002). "In short,
15 abandonment requires formal notice and a hearing." Id. at 686 (citation
16 and internal quotation marks omitted). "The Bankruptcy Court's Order
17 denying Plaintiff's motion to reopen his bankruptcy case did not state
18 any property was abandoned by the trustee." (Order 10:26-28, ECF No.
19 22.) Therefore, any claim that accrued prior to the close of Plaintiff's
20 bankruptcy case remains in the bankruptcy estate.

21 **1. Demand to Produce the Note**

22 Defendants argue Plaintiff's demand to produce the Note claim,
23 in which he alleges "Defendants lacked possession of the Note and thus
24 could not foreclose[,] accrued when the Notice of Default was recorded."
25 (Mot. 7:1-3.) Plaintiff alleges in the SAC that the Notice of Default
26 was recorded on August 15, 2008. (SAC ¶ 36, Ex. C.)

27 Plaintiff's demand to produce the Note claim accrued when MERS
28 recorded the Notice of Default on August 15, 2008, since an "action

1 could have been brought" to challenge the foreclosure proceedings and
2 Defendants' right to foreclose once the Notice of Default was recorded.
3 Cusano, 264 F.3d at 947. Therefore, Plaintiff's "demand to produce the
4 Note" claim accrued prior to the close of Plaintiff's bankruptcy and
5 should have been listed in Plaintiff's bankruptcy estate. Accordingly,
6 this claim remains in the bankruptcy estate and Plaintiff does not have
7 standing to pursue this claim. Therefore, Defendants' motion to dismiss
8 this claim is granted.

9 Further, "Defendants request that the Court grant the Motion
10 to Dismiss . . . without leave to amend." (Mot. 2:3.) This claim was
11 previously dismissed for the same reasons when the Court granted
12 Defendants' previous dismissal motion challenging the FAC. (Order 15:23-
13 28, ECF No. 22.) Since Plaintiff failed to address the issues identified
14 in the previous Order, it is clear "any amendment would be futile, [and]
15 there [is] no need to prolong the litigation by permitting further
16 amendment." Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1039 (9th Cir.
17 2002). Therefore, this claim is dismissed with prejudice.

18 **2. Demand to Set Aside the Trustee's Sale**

19 Defendants argue Plaintiff lacks standing to bring his set
20 aside of the trustee's sale claim. (Mot. 7:6-13.) Plaintiff alleges in
21 his SAC "that at the time the Notice of Default was recorded, neither
22 LEHMAN BROTHERS, MERS, AURORA, nor CAL WESTERN RECONVEYANCE had
23 possession of the note and thus had no standing or authority to initiate
24 foreclosure proceedings on the deed of trust, rendering the Notice of
25 Default Void"; and, that "defendants failed to comply with Civil Code
26 2924f and failed to provide written notice of the trustee's sale or post
27 said notice on the property." (SAC ¶¶ 130-131.)

28 ///

1 Defendants argue "Plaintiff bases this claim on Defendants'
2 lack of possession of the Note and thus their lack of authority to
3 initiate foreclosure proceedings." (Mot. 7:6-8.) Defendants further
4 argue that since "the Notice of Default was recorded on August 15, 2008,
5 and the Notice of Trustee's Sale was recorded on April 24, 2009[,]"
6 which is prior to the close of Plaintiff's bankruptcy estate on August
7 14, 2009, "Plaintiff lacks standing to bring this claim here." (Mot.
8 7:10-13.) Plaintiff counters that "[t]he fraudulent activities of
9 defendants occurred both before and after the bankruptcy, and since
10 . . . the foreclosure[] occurred post discharge, the claim is not
11 property of the bankruptcy estate" since this claim "accrues when the
12 foreclosure occurs." (Opp'n 10:4-6, 9:24.) However, Defendants have not
13 shown that Plaintiff could have brought this claim before the
14 foreclosure sale occurred; therefore, this portion of the motion is
15 denied.

16 **3. Violation of Statute**

17 Defendants also argue Plaintiff lacks standing to pursue his
18 violation of statute claim, alleged under California Civil Code section
19 2924. (Mot. 7:14-19.) Plaintiff alleges in this claim that "CALIFORNIA
20 WESTERN AND AURORA violated the California Foreclosure laws by . . .
21 [f]ailing to post notice of the trustee's sale as required[and] . . .
22 [f]ailing to send notice of the trustee's sale by certified mail as
23 required[.]" (SAC 25:2-5.) Defendants argue "this claim accrued on April
24 24, 2009," when the Notice of Trustee's Sale was recorded and posted.
25 (Mot. 7:16-17.) However, Defendants have not shown that Plaintiff could
26 have brought this claim before the foreclosure sale occurred; therefore,
27 this portion of the motion is denied.

28 ///

1 **4. Fraud and Deceit**

2 Defendants also argue that Plaintiff lacks standing to pursue
3 his fraud and deceit claim, which is based on Plaintiff's allegation
4 that Defendants fraudulently initiated foreclosure proceedings when they
5 filed the Notice of Default, since "the Notice of Default was recorded
6 prior to the close of Plaintiff's bankruptcy[.]" (Mot. 7:20-24.)
7 Plaintiff alleges two fraud and deceit claims; one of them is addressed
8 in this section of the Order and the other fraud and deceit claim is
9 addressed *infra*. (SAC 25:15-27:21.)

10 Plaintiff alleges in this claim that MERS and Aurora were
11 never holders of the Note and consequently, "[t]he representation that
12 [P]laintiff was in default on an obligation is false and fraudulent,
13 since there is no evidence that AURORA or MERS is or was the actual
14 beneficiary of the note." Id. 25:27-28. Plaintiff alleges, therefore,
15 "Defendants lacked standing to commence . . . foreclosure" proceedings.
16 Id. 25:17. This claim accrued when the Notice of Default was recorded,
17 which occurred prior to the close of Plaintiff's bankruptcy proceeding.
18 Therefore, Plaintiff lacks standing to pursue this claim, and this claim
19 is dismissed. Further, this claim was previously dismissed in a prior
20 order on these grounds; therefore, this claim is dismissed with
21 prejudice.

22 **B. FAILURE TO STATE A CLAIM**

23 Defendants argue Plaintiff's remaining claims for breach of
24 contract, negligence, negligent misrepresentation, demand to set aside
25 the trustee's sale, violation of statute, fraud and deceit, injunctive
26 relief, and declaratory relief should be dismissed since they fail to
27 state a claim under Rule 12(b)(6).

28 ///

1 Dismissal under Rule 12(b)(6) is appropriate only where a
2 claim either 1) lacks a cognizable legal theory, or 2) lacks factual
3 allegations sufficient to support a cognizable legal theory. Balistreri
4 v. Pacific Police Dept., 901 F.2d 696, 699 (9th Cir. 1988). To avoid
5 dismissal, a plaintiff must allege "enough facts to state a [plausible]
6 claim to relief[.]" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547
7 (2007).

8 In deciding a Rule 12(b)(6) motion, the material allegations
9 of the complaint are accepted as true and all reasonable inferences are
10 drawn in favor of the plaintiff. See al-Kidd v. Ashcroft, 580 F.3d 949,
11 956 (9th Cir. 2009). However, "the tenet that a court must accept as
12 true all of the allegations contained in a complaint is inapplicable to
13 legal conclusions." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). "A
14 pleading that offers 'labels and conclusions' or 'a formulaic recitation
15 of the elements of a cause of action will not do.' Nor does a complaint
16 suffice if it tenders 'naked assertion[s]' devoid of 'further factual
17 enhancement.'" Id. (quoting Twombly, 550 U.S. at 555, 557). "In sum, for
18 a complaint to survive a motion to dismiss, the nonconclusory 'factual
19 content,' and reasonable inferences from that content, must be plausibly
20 suggestive of a claim entitling the plaintiff to relief." Moss v. United
21 States Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009).

22 **1. Breach of Contract**

23 Defendants argue, *inter alia*, that Plaintiff's breach of
24 contract claim should be dismissed since the Special Forbearance
25 Agreement is only signed by Plaintiff, and therefore the statute of
26 frauds precludes it from being enforceable against Defendants. (Mot.
27 10:16-24.)

28 ///

1 Plaintiff counters he "has ple[d] breaches of two written
2 agreement[s:] 1) the written agreement with LEHMAN BROTHERS, alleging
3 wrongful and fraudulent origination, assignment and servicing; [and] 2)
4 the written agreement with AURORA re the Special Forbearance Agreement."
5 (Opp'n 5:23-25.) However, Plaintiff's pled breach of contract claim is
6 based solely on his allegations that Defendants breached the Special
7 Forbearance Agreement. (SAC ¶¶ 94-106.) Plaintiff also argues that since
8 Aurora "accepted payments under the agreement, and agreed to postpone
9 the sale at least initially[,] . . . Aurora is estopped [from] deny[ing]
10 the existence of any agreement[.]" (Opp'n 6:24-27.)

11 "[A]n agreement by which a lender agreed to forbear from
12 exercising the right of foreclosure under a deed of trust securing an
13 interest in real property comes within the statute of frauds." Secrest
14 v. Sec. Nat'l Mortg. Loan Trust 2002-2, 167 Cal. App. 4th 544, 547
15 (2008) (holding an unsigned forbearance agreement violated the statute
16 of frauds since it attempted to modify a promissory note and deed of
17 trust, which are subject to the statute of frauds). Therefore, since the
18 Special Forbearance Agreement modifies Plaintiff's obligations under the
19 Note and the Deed, it comes within the statute of frauds. Further,
20 Plaintiff's argument that payments under the agreement, and the
21 agreement to postpone the foreclosure sale, estops Defendants from
22 denying the existence of an agreement "fails under well-established
23 law." Id. at 555.

24 Part performance allows enforcement of a contract
25 lacking a requisite writing in situations in which
26 invoking the statute of frauds would cause
27 unconscionable injury. To constitute part
28 performance, the relevant acts either must
unequivocally refer to the contract, or clearly
relate to its terms. Such conduct satisfies the
evidentiary function of the statute of frauds by
confirming that a bargain was in fact reached. In
addition to having partially performed, the party

1 seeking to enforce the contract must have changed
2 position in reliance on the oral contract to such
3 an extent that application of the statute of frauds
would result in an unjust or unconscionable loss,
amounting in effect to a fraud.

4 Id. (internal citations and quotation marks omitted). However, “[t]he
5 payment of money is not sufficient part performance to take an oral
6 agreement out of the statute of frauds[.]” Id. Further, since Plaintiff
7 “do[es] not assert [he] changed [his] position in reliance on the
8 [Special] Forbearance Agreement in any way other than by making
9 [payments,]” the statute of frauds applies to the Special Forbearance
10 Agreement and Plaintiff has not pled an enforceable contract claim. Id.
11 Since this claim was previously dismissed on these grounds, Plaintiff’s
12 breach of contract claim is dismissed with prejudice because it is
13 evident that “any amendment would be futile[.]” Lipton, 284 F.3d at
14 1039.

15 **2. Negligence/Negligent Misrepresentation**

16 **a. Negligence**

17 Defendants argue Plaintiff’s negligence claim should be
18 dismissed since “Plaintiff has not alleged Defendants had a duty or
19 facts showing Defendants breached any duty.” (Mot. 12:24-25.) Defendants
20 argue “Plaintiff’s SAC does not allege Defendants['] actions extended
21 beyond its routine involvement as a lender.” Id. 13:23-24. Plaintiff
22 counters that “Aurora went beyond the scope of the role of a loan
23 originator and was actively involved in negotiating and implement[ing]
24 a Special Forbearance Agreement/Loan Modification Agreement.” (Opp’n
25 8:7-9.) Plaintiff further argues that when “Aurora undertook the duty of
26 negotiating the terms of the ‘Special Forbearance Agreement’ and
27 updating the borrower regarding status and terms[,] . . . it acted as
28 more than just an institution that funded the loan.” Id. 8:14-16.

1 "[A] financial institution owes no duty of care to a borrower
2 when the institution's involvement in the loan transaction does not
3 exceed the scope of its conventional role as a mere lender of money."
4 Nymark v. Heart Fed. Sav. & Loan Assn., 231 Cal. App. 3d 1089, 1096
5 (1991). Plaintiff's allegations do not plausibly suggest that the
6 Defendants "actively participate[d] in the financed enterprise beyond
7 the domain of the usual money lender." Id. Therefore, this portion of
8 Defendants' dismissal motion is granted. Further, since this claim was
9 previously dismissed for this reason, Plaintiff's negligence claim is
10 dismissed with prejudice.

11 **b. Negligent Misrepresentation**

12 Defendants also argue Plaintiff's negligent misrepresentation
13 claim should be dismissed since "Plaintiff has not differentiated
14 between the different defendants nor alleged the time, place, and other
15 specifics of any misrepresentations." (Mot. 14:17-18.) Plaintiff
16 counters that his SAC "sets forth that the person(s) answering the phone
17 purported to render advice regarding the status of the loan; that the
18 persons had knowledge of the transaction and apparent authority to speak
19 for the corporation; [and] the nature of the factual
20 misrepresentations." (Opp'n 8:22-24.)

21 The elements of a fraud claim under California law are: "(a)
22 misrepresentation (false representation, concealment, or nondisclosure);
23 (b) knowledge of falsity (or scienter); (c) intent to defraud, i.e., to
24 induce reliance; (d) justifiable reliance; and (e) resulting damage."
25 Engall v. Permanente Medical Group, Inc., 15 Cal. 4th 951, 974 (1997)
26 (internal quotation marks omitted). "The same elements comprise a cause
27 of action for negligent misrepresentation, except there is no
28 requirement of intent to induce reliance." Caldo v. Owens-Illinois,

1 Inc., 125 Cal. App. 4th 513, 519 (2004).

2 "It is established law . . . that Rule 9(b)'s particularity
3 requirement applies to state-law causes of action." Vess v. Ciba-Geigy
4 Corp., 317 F.3d 1097, 1103 (9th Cir. 2003). Rule 9(b)'s heightened
5 pleading requirements apply to Plaintiff's negligent misrepresentation
6 claim since this claim is "grounded in fraud [and is alleged] to sound
7 in fraud." Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)
8 (internal quotation marks omitted). Rule 9(b) prescribes that "[i]n
9 alleging fraud or mistake, a party must state with particularity the
10 circumstances constituting fraud or mistake." Fed.R.Civ.P. 9(b).
11 Accordingly, a fraud averment must include "an account of the 'time,
12 place, and specific content of the false representations as well as the
13 identities of the parties to the misrepresentations.'" Swartz v. KPMG
14 LLP, 476 F.3d 756, 764 (9th Cir. 2007) (quoting Edwards v. Marin Park,
15 Inc., 356 F.3d 1058, 1066 (9th Cir. 2004)).

16 Plaintiff alleges in his negligent misrepresentation claim:

17 Plaintiff[']s agent was in continual contact with
18 Aurora through the 800 number, and each time she
19 was told that there was no sale date, that the loan
20 was in bankruptcy or loan modification.

21 [When calling the 800 number, a] caller is prompted
22 to enter in the loan number and the agent comes on
23 the phone The representative of Aurora had
24 apparent authority to discuss details of the loan,
25 status of the loan, status of the loan
26 modification, payments due, and status of trustee's
27 sale, if any, and foreclosure status. The names of
28 the agent or agents plaintiff talked to are in the
possession of AURORA and peculiarly within the
knowledge of defendant.

On 10/19/09 plaintiff[']s agent called the
800-669-0102 number and asked . . . , "Is this loan
in foreclosure?" The answer was "NO." She then said
. . . "there is NO . . . scheduled foreclosure sale
date right?" Again, the answer was "no, because
your loan is on a modification plan[.]"

(SAC ¶¶ 112-114.)

1 These allegations against Aurora in Plaintiff's negligent
2 misrepresentation claim provide the required specificity since Plaintiff
3 sufficiently alleges the "time, place, and specific content of the false
4 representations[.]" Swartz, 476 F.3d at 764. "The only arguable
5 deficiency in plaintiff's allegations of fraud is that the [S]AC does
6 not state the names of all the individual representatives of the
7 defendant[]." Susilo v. Wells Fargo Bank, N.A., No. CV 11-1814 CAS, 2011
8 WL 2471167, at *10 (C.D. Cal. June 21, 2011). However, 9(b)'s
9 "requirement is relaxed where the defendant must necessarily possess
10 full information concerning the facts of the controversy, or when the
11 facts lie more in the knowledge of the opposite party." Id. (internal
12 citations and quotation marks omitted). Therefore, Plaintiff has
13 sufficiently alleged this claim against Aurora.

14 However, "Rule 9(b) does not allow a complaint to merely lump
15 multiple defendants together but 'require[s] plaintiffs to differentiate
16 their allegations when suing more than one defendant . . . and inform
17 each defendant separately of the allegations surrounding his alleged
18 participation in the fraud.'" Swartz, 476 F.3d at 764-765 (internal
19 citations omitted). Since Plaintiff's factual allegations in this claim
20 are solely related to Aurora and Plaintiff does not allege any conduct
21 by MERS, Plaintiff's negligent misrepresentation claim against MERS is
22 dismissed.

23 **3. Demand To Set Aside the Trustee's Sale**

24 Defendants argue that "[b]ecause Plaintiff has not tendered
25 the amount due, he cannot challenge the foreclosure sale and the Court
26 should dismiss this claim." (Mot. 16:12-13.) Plaintiff does not respond
27 to this argument.

28 "Wrongful foreclosure is an action in equity, where a

1 plaintiff seeks to set aside a foreclosure sale that has already
2 occurred." Foster v. SCME Mortgage Bankers, Inc., No. CIV 2:10-518-WBS
3 GGH, 2010 WL 1408108, at *4 (E.D. Cal. April 7, 2010). Therefore,
4 Plaintiff's claim to set aside the Trustee's Sale is a wrongful
5 foreclosure claim. "Under a claim for wrongful foreclosure, a plaintiff
6 must allege a credible tender of the amount of the secured debt"
7 Rogue v. Suntrust Mortg., Inc., No. C-09-00040 RMW, 2010 WL 546896, at
8 *4 (N.D. Cal. Feb. 10, 2010) (citing Abdallah v. United Savings Bank, 43
9 Cal. App. 4th 1101, 1109 (1996)); see Guerrero v. Greenpoint Mortgage
10 Funding, Inc., 403 Fed. Appx. 154, 157 (9th Cir. 2010) (stating the
11 plaintiffs "lacked standing to bring a claim for 'wrongful foreclosure,'
12 because they failed to allege actual, full and unambiguous tender of the
13 debt owed on the mortgage") (citing Karlsen v. Am. Sav. & Loan Ass'n, 15
14 Cal. App. 3d 112, 117 (1971)). Plaintiff does not allege tender of the
15 amount of debt owed, or his ability to tender. Plaintiff was previously
16 informed of this pleading deficiency in a ruling deciding a challenge to
17 Plaintiff's FAC. (Order 17:2-5, ECF No. 22.) Therefore, Plaintiff's
18 claim to set aside the trustee's sale is dismissed with prejudice since
19 it is clear "any amendment would be futile[.]" Lipton, 284 F.3d at 1039.

20 **4. Violation of Statute**

21 Defendants seek dismissal of Plaintiff's violation of statute
22 claim. (Mot. 20:7-27.) Plaintiff alleges in this claim that each
23 Defendant violated: 1) California Civil Code sections 2923.52 and
24 2923.53; and 2) California Civil Code section 2924 *et seq.* (SAC 22:26-
25 25:9.)

26 Plaintiff's claims under California Civil Code sections
27 2923.52 and 2923.53 were previously "dismissed with prejudice since
28 neither section 2923.52 or section 2923.53 provides any private right of

1 action." (Order 17:16-18, ECF No. 22 (citation and internal quotation
2 marks omitted).) Therefore, these claims are stricken.

3 Further, while Plaintiff does not cite to California Civil
4 Code section 2923.5, it is clear he is alleging a claim under this
5 statute since he cites to Mabry v. Superior Court, 1185 Cal. App. 4th
6 208, 214 (2010), which held that "section 2923.5 [may] be enforced by a
7 private right of action[.]" (SAC 24:20-21.) However, this claim was not
8 alleged in Plaintiff's FAC and was included in the SAC without leave of
9 court to include this claim in the SAC. Therefore, Plaintiff's section
10 2923.5 claim is dismissed.

11 Defendants argue Plaintiff has not stated a claim under
12 California Civil Code section 2924. (Mot. 20:17.) Plaintiff alleges in
13 this claim that "Defendant CALIFORNIA WESTERN AND AURORA violated the
14 California Foreclosure laws by . . . [f]ailing to post notice of the
15 trustee's sale as required [and] . . . [f]ailing to send notice of the
16 trustee's sale by certified mail as required[.]" (SAC 25:2-5.)

17 Defendants argue, *inter alia*, that "Plaintiff must allege he
18 can tender the amount of the loan to state a wrongful foreclosure
19 claim." (Mot. 21:17-18.) Plaintiff alleges the foreclosure sale was not
20 conducted in accordance with California Civil Code section 2924 et seq.
21 and "[a]s a proximate result of defendant's violation of statute,
22 plaintiff's property has wrongfully been foreclosed upon." (SAC 25:5-7.)
23 Plaintiff seeks "a declaration . . . that the Trustee's sale . . . is
24 void[.]" Id. 30:18-19. Since Plaintiff is alleging a wrongful foreclose
25 claim, he must plead tender or ability to tender. See Roque, 2010 WL
26 546896, at *4. Plaintiff fails to do so. Therefore, Defendants' motion
27 to dismiss this claim is granted.

28 ///

1 **5. Fraud and Deceit**

2 Defendants also seek dismissal of Plaintiff's remaining fraud
3 and deceit claim, arguing Plaintiff fails to "state the contents of
4 alleged misrepresentative statements, as well as the role of each
5 defendant in the alleged fraud, what is false or misleading about the
6 statement, who made it, when it was made, where it was made and why it
7 is false." (Mot. 21:23-26.)

8 Plaintiff's fraud and deceit claim is based on the following
9 allegations: "[t]hroughout the course of the loan modification
10 discussions with AURORA, plaintiff's agent had numerous discussions with
11 the representatives of AURORA" and "[t]he representations to plaintiff
12 and plaintiff's agent were in fact false." (SAC 26:12-13, 17.)
13 "[D]efendant AURORA never intended to provide plaintiff with a loan
14 modification agreement, and falsely misled [Plaintiff] into believing
15 that is what he had received." Id. 26:22-25. "AURORA, through their
16 representatives falsely misled plaintiff and his agent to believe that
17 . . . there was no sale date set; [and] that the account was in 'loan
18 modification' status." Id. 26:28-27:2. Plaintiff also incorporates by
19 reference his allegations in the preceding paragraphs of his SAC. Id.
20 25:15-16. In Plaintiff's negligent misrepresentation claim, he sets
21 forth allegations against Aurora which satisfy Rule 9(b)'s requirements.
22 Id. ¶¶ 112-114.

23 Since Plaintiff's fraud and deceit claim is based on the same
24 allegations against Aurora which Plaintiff alleges in his negligent
25 misrepresentation claim, and those allegations satisfy Rule
26 9(b), Plaintiff's fraud and deceit claim against Aurora is sufficiently
27 alleged. However, Plaintiff fails to sufficiently allege his fraud and
28 deceit claim against MERS since Plaintiff does not include any factual

1 allegations against MERS in this claim; therefore, Plaintiff's fraud and
2 deceit claim against MERS is dismissed.

3 **6. Injunctive Relief and Declaratory Relief**

4 Defendants also argue Plaintiff's injunctive relief and
5 declaratory relief claims should be dismissed since there is "no
6 recognized claim for 'injunctive relief'" and Plaintiff's "declaratory
7 relief claim . . . is duplicative of other claims [and therefore, it]
8 should be dismissed." (Mot. 8:5-6, 10:9:12-13.) Plaintiff responds that
9 "[w]hether fashioned as a cause of action or a remedy adjunct to the
10 causes of action is a matter of formality, not of substance." (Opp'n
11 5:20-21.)

12 An injunction is a remedy, not a claim in and of itself. See
13 Curtis v. Option One Mortg. Corp., No. 109-cv-1608 AWI SMS, 2010 WL
14 599816, at *13 (E.D. Cal. Feb 18, 2010) (citing Washington Toxics
15 Coalition v. Environmental Protection Agency, 413 F. 3d 1024, 1034 (9th
16 Cir. 2005). Therefore, Defendants' motion to dismiss Plaintiff's
17 injunctive relief claim is granted.

18 Further, a "federal court may decline to address a claim for
19 declaratory relief" where the substantive claims "would resolve the
20 issues raised by the declaratory action[.]" Fimbres v. Chapel Mortg.
21 Cop., No. 09-cv-0886-IED, 2009 WL 416332, at *5 (S.D. Cal. Nov. 20,
22 2009) (citations and internal quotation marks omitted). Since
23 Plaintiff's declaratory relief claim is duplicative of the relief sought
24 in Plaintiff's remaining claims, Defendants' motion to dismiss this
25 claim is granted.

26 **C. MOTION TO STRIKE**

27 Defendants also move under Rule 12(f) for an order striking
28 Plaintiff's request for punitive damages, arguing these damages "are not

1 recoverable as a matter of law.” (Mot. 22:23-24.)

2 Rule 12(f) states that a district court “may strike from a
3 pleading an insufficient defense or any redundant, immaterial,
4 impertinent, or scandalous matter.” However, “Rule 12(f) does not
5 authorize district courts to strike claims for damages on the ground
6 that such claims are precluded as a matter of law.” Whittlestone, Inc.
7 v. Handi-Craft Co., 618 F.3d 970, 971 (9th Cir. 2010).

8 The proper medium for challenging the sufficiency
9 of factual allegations in a complaint is through
10 Rule 12(b)(6), not Rule 12(f). However, where a
11 motion is in substance a Rule 12(b)(6) motion, but
12 is incorrectly denominated as a Rule 12(f) motion
to strike, the Court may convert the improperly
designated Rule 12(f) motion into a Rule 12(b)(6)
motion.

13 Parker v. Fidelity Security Life Ins. Co., No. CIV F 06-654 AWI DLB,
14 2006 WL 2190956, at *5 (E.D. Cal. Aug. 1, 2006).

15 Defendants argue “Plaintiff fails to allege sufficient facts
16 to support a request for punitive damages” since “he does not allege any
17 specific reasons for the request.” (Mot. 23:8-9, 19-20.) California
18 Civil Code section 3294(a) prescribes:

19 In an action for the breach of an obligation not
20 arising from contract, where it is proven by clear
21 and convincing evidence that the defendant has been
22 guilty of oppression, fraud, or malice, the
plaintiff, in addition to the actual damages, may
recover damages for the sake of example and by way
of punishing the defendant.

23 Since two of Plaintiff’s remaining claims are grounded in fraud,
24 Defendants’ motion to strike is denied.

25 **III. CONCLUSION**

26 For the stated reasons, Defendants’ motion to dismiss is
27 granted in part and denied in part. Plaintiff is granted ten (10) days
28 from the date on which this order is filed to file a Third Amended

1 Complaint in which he addresses the deficiencies in any claim Plaintiff
2 was previously granted leave to include in the SAC, and which has not
3 dismissed with prejudice. Further, Plaintiff is notified that if he
4 fails to amend the dismissed claims within the prescribed time period,
5 the referenced claims could be dismissed with prejudice under Federal
6 Rule of Civil Procedure 41(b).

7 Dated: November 30, 2011

8
9 
10 GARLAND E. BURRELL, JR.
11 United States District Judge
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28