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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

TSVETAL TORBOV,  
  
Plaintiff,  
  
v.  
  
CENLAR AGENCY, INC., MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS,  
INC., TAYLOR, BAN & WHITAKER CORP,  
AND DOES 1-25,  
  
Defendants.

Case No. 5:14-cv-00130-BLF

**ORDER GRANTING MOTION TO  
DISMISS WITH LEAVE TO AMEND**

[Re: ECF 37]

Plaintiff Tsvetan Torbov, proceeding *pro se*, filed this action to stop a trustee’s sale of his home following his default on a mortgage loan. Defendants move to dismiss Plaintiff’s second amended complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. The Court has considered the briefing submitted by the parties and the oral argument presented at the hearing on July 3, 2014. For the reasons discussed below, the motion is GRANTED with leave to amend.

**I. BACKGROUND**

The following facts are taken from Plaintiff’s operative second amended complaint (“SAC”) and from documents that are judicially noticeable.<sup>1</sup> In September 2005, Plaintiff obtained a home mortgage loan from Taylor, Bean & Whitaker Mortgage Corporation in the amount of \$359,650, secured by a Deed of Trust on his home. (RJN Exh. 1, ECF 38) The Deed of Trust identified

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<sup>1</sup> Defendant requests judicial notice of three documents recorded in the Santa Clara County Recorder’s Office with respect to Plaintiff’s property: a Deed of Trust, a Notice of Default and Election to Sell Under Deed of Trust, and a Notice of Trustee’s Sale. The request is GRANTED. *See Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988) (court may take judicial notice of matters of public record).

1 Mortgage Electronic Registration Systems, Inc. (“MERS”) as the beneficiary under the Deed of  
2 Trust. (*Id.*)

3 On October 15, 2013, Sage Point Lender Services, LLC, the trustee under the Deed of Trust,  
4 recorded a Notice of Default and Election to Sell under Deed of Trust. (RJN Exh. 2) The Notice of  
5 Default stated that Plaintiff’s property was in foreclosure because he was behind on his payments;  
6 that the amount of the deficiency was \$30,157.55 as of October 11, 2013; and that the property  
7 would be sold unless Plaintiff paid the entire amount due. (*Id.*) The Notice of Default advised  
8 Plaintiff that he could obtain a written itemization of the amount due by writing to “Nationstar  
9 Mortgage LLC c/o Cenlar FSB” at an address provided, and that he might be able to arrange for  
10 additional time to cure the default or establish a schedule of payments to cure the default. (*Id.*)

11 On January 9, 2014, Plaintiff filed this action, alleging that Defendants had refused to accept  
12 his monthly mortgage payments since February 2013. (Compl., ECF 1) On January 28, 2014, Sage  
13 Point Lender Services, LLC recorded a Notice of Trustee’s Sale, scheduling a trustee’s sale of  
14 Plaintiff’s home for February 20, 2014. (RJN Exh. 3) The Notice of Trustee’s Sale indicated that  
15 the total unpaid balance on the mortgage was \$359,723.82.<sup>2</sup> (*Id.*)

16 On February 14, 2014, the Court issued a temporary restraining order enjoining Defendants  
17 from proceeding with the February 20, 2014 trustee’s sale. (TRO, ECF 13) On March 10, 2014, the  
18 Court issued an order lifting the temporary restraining order and denying Plaintiff’s motion for a  
19 preliminary injunction. (Order, ECF 30) The Court noted that “Defendant” had “submitted  
20 evidence showing that Torbov failed to make his loan payments as required, and that it acted within  
21 its contractual rights when it returned certain payments tendered by him, because those payments  
22 were insufficient to cure the default.” (*Id.* at 1-2)

23 On March 26, 2014, Plaintiff filed the operative SAC, alleging that he paid his mortgage by  
24 check for fifteen years; that in October 2012 Defendants advised him by telephone that under a new  
25 policy payments had to be made by telephone; that Plaintiff complied with the new policy; and that  
26 starting in February 2013 Defendants stopped accepting Plaintiff’s payment by telephone without

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28 <sup>2</sup> The Court notes that this amount is greater than the original loan amount.

1 explanation. (SAC, ECF 35) Plaintiff then began submitting his mortgage payments by check, but  
2 Defendants returned those checks to Plaintiff. (*Id.*) Plaintiff alleges that he made several requests  
3 for an explanation, but “Defendant CENLAR” did not respond. (*Id.*) Plaintiff believes that  
4 Defendants conspired to create a situation that would put Plaintiff into default and deprive him of  
5 his home. (*Id.*) He asserts claims for: (1) quiet title, (2) violation of RESPA, (3) violation of  
6 California Business and Professions Code § 17200, and (4) conspiracy to defraud. It is not clear  
7 from the record whether the trustee’s sale has been rescheduled and/or whether Plaintiff’s home has  
8 been sold.

9 **II. LEGAL STANDARDS**

10 “A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a  
11 claim upon which relief can be granted ‘tests the legal sufficiency of a claim.’” *Conservation Force*  
12 *v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d 729, 732  
13 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts as true all  
14 well-pled factual allegations and construes them in the light most favorable to the plaintiff. *Reese v.*  
15 *BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). However, the Court need not  
16 “accept as true allegations that contradict matters properly subject to judicial notice” or “allegations  
17 that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re*  
18 *Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (internal quotation marks and citations  
19 omitted). While a complaint need not contain detailed factual allegations, it “must contain sufficient  
20 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v.*  
21 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A  
22 claim is facially plausible when it “allows the court to draw the reasonable inference that the  
23 defendant is liable for the misconduct alleged.” *Id.*

24 **III. DISCUSSION**

25 Before turning to Plaintiff’s claims, the Court makes two observations. First, the SAC does  
26 not allege many facts. Without more information regarding communications that Plaintiff had with  
27 each of the defendants, dates of those communications, and what was said or written, Plaintiff  
28 cannot satisfy the basic pleading requirements set out by the Supreme Court in *Twombly* and *Iqbal*.

1 Second, Plaintiff’s opposition contains a number of assertions and theories that are not contained in  
2 the SAC. On a motion to dismiss, the Court considers only whether the operative *pleading* states a  
3 claim upon which relief may be granted; the Court cannot consider new assertions and theories  
4 presented in Plaintiff’s briefing. *See New Mexico State Investment Council v. Ernst & Young LLP*,  
5 641 F.3d 1089, 1094 (9th Cir. 2011) (when resolving a Rule 12(b)(6) motion “review is generally  
6 limited to the face of the complaint, materials incorporated into the complaint by reference, and  
7 matters of judicial notice”). As discussed herein, Plaintiff is granted an opportunity to amend. As  
8 the Court explained at the hearing, Plaintiff may amend *only the existing claims* that are the subject  
9 of the present motion. If Plaintiff wishes to assert *new claims*, he must file a motion for leave to  
10 amend his pleading pursuant to Federal Rule of Civil Procedure 15(a)(2) and Civil Local Rule 7-2.  
11 Plaintiff is encouraged to include in any amended pleading as many facts as possible regarding the  
12 mortgage transaction, the events that led to his default on the loan, and exactly what each defendant  
13 said or did.

14 **A. Claim 1 – Quiet Title**

15 Claim 1 seeks to quiet title to the property. “An action may be brought . . . to establish title  
16 against adverse claims to real or personal property or any interest therein.” Cal. Civ. P. Code §  
17 760.020(a). “A borrower may not, however, quiet title against a secured lender without first paying  
18 the outstanding debt on which the mortgage or deed of trust is based.” *Lueras v. BAC Home Loans*  
19 *Servicing, LP*, 221 Cal. App. 4th 49, 86 (2013).

20 Plaintiff does not allege that he has paid the outstanding debt or that he has the ability to do  
21 so. (SAC ¶¶ 1-11) Accordingly, he has failed to state a claim for quiet title. Plaintiff requests a  
22 declaration that “the title to the subject property is vested in plaintiffs alone and that the defendant  
23 [sic] herein, and each of them, be declared to have no estate, right, title or interest in the subject  
24 property.” (*Id.* ¶ 8) The allegation that Defendants have no rights in the property is directly  
25 contradicted by the Deed of Trust. *See In re Gilead*, 536 F.3d at 1055 (holding that the Court need  
26 not “accept as true allegations that contradict matters properly subject to judicial notice” or  
27 “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable  
28 inferences”) (internal quotation marks and citations omitted).

1 Accordingly, the motion to dismiss is GRANTED as to Claim 1 with leave to amend.

2 **B. Claim 2 – RESPA**

3 Claim 2 asserts that Defendants violated the Real Estate Settlement Procedures Act  
4 (“RESPA”) by failing to respond to a “qualified written request” made under 12 U.S.C. § 2605.  
5 “RESPA requires the servicer of a federally related mortgage loan to provide a timely written  
6 response to inquiries from borrowers regarding the servicing of their loans.” *Medrano v. Flagstar*  
7 *Bank, FSB*, 704 F.3d 661, 665 (9th Cir. 2012) (citing 12 U.S.C. § 2605(e)(1)(A), (e)(2)). “If the  
8 servicer fails to respond properly to such a request, the statute entitles the borrower to recover actual  
9 damages and, if there is a ‘pattern or practice of noncompliance,’ statutory damages of up to  
10 \$1,000.” *Id.* (citing 12 U.S.C. § 2605(f)). While a borrower’s written inquiry does not need to  
11 contain any “magic” words, it constitutes a qualified written request only if it “(1) reasonably  
12 identifies the borrower’s name and account, (2) either states the borrower’s ‘reasons for the belief . .  
13 . that the account is in error’ or ‘provides sufficient detail to the servicer regarding other information  
14 sought by the borrower,’ and (3) seeks ‘information relating to the servicing of [the] loan.’” *Id.* at  
15 666 (quoting 12 U.S.C. § 2605(e)(1)(A)-(B)). Plaintiff does not allege facts demonstrating that he  
16 sent written requests containing this information to Defendants.

17 Accordingly, the motion to dismiss is GRANTED as to Claim 2 with leave to amend.

18 **C. Claim 3 – Section 17200**

19 Claim 3 asserts a violation of California Business & Professions Code § 17200. In order to  
20 state a claim for relief under that provision, Plaintiff must allege facts showing that Defendants  
21 engaged in an “unlawful, unfair or fraudulent business act or practice.” Cal. Bus. & Prof. Code §  
22 17200. “Because the statute is written in the disjunctive, it is violated where a defendant’s act or  
23 practice violates any of the foregoing prongs.” *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152,  
24 1168 (9th Cir. 2012). The Court addresses each of the prongs in turn.

25 **1. Unlawful**

26 “By proscribing any unlawful business practice, section 17200 borrows violations of other  
27 laws and treats them as unlawful practices that the unfair competition law makes independently  
28 actionable.” *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000)

1 (internal quotation marks and citation omitted). “It does not matter whether the underlying statute  
2 also provides for a private cause of action; section 17200 can form the basis for a private cause of  
3 action even if the predicate statute does not.” *Id.* Claim 3 does not identify any law upon which to  
4 piggyback a Section 17200 claim; in fact the only statute mentioned in Claim 3 is Section 17200  
5 itself. (SAC ¶¶ 14-15, ECF 35). To the extent that Plaintiff’s Section 17200 claim is based on  
6 violation of RESPA, Plaintiff has failed to allege facts showing a violation, as discussed above.

7 **2. Unfair**

8 In consumer cases such as this one, “the UCL does not define the term ‘unfair’ as used in  
9 Business and Professions Code section 17200.” *Durell v. Sharp Healthcare*, 183 Cal. App. 4th  
10 1350, 1364 (2010). The California Supreme Court has not established a definitive test to determine  
11 whether a business practice is unfair either. *Phipps v. Wells Fargo Bank, N.A.*, No. CV F 10-2025  
12 LJO SKO, 2011 WL 302803, at \*16 (E.D. Cal. Jan. 27, 2011). Three lines of authority have  
13 developed among the California Courts of Appeal. In the first line, the test requires “that the public  
14 policy which is a predicate to a consumer unfair competition action under the unfair prong of the  
15 UCL must be tethered to specific constitutional, statutory, or regulatory provisions.” *Drum v. San*  
16 *Fernando Valley Bar Ass’n* 182 Cal. App. 4th 247, 257 (2010) (internal quotation marks and  
17 citation omitted). A second line of cases applies a test to determine whether the identified business  
18 practice is “immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers  
19 and requires the court to weigh the utility of the defendant’s conduct against the gravity of the harm  
20 to the alleged victim.” *Id.* (internal quotation marks and citation omitted). The third test draws on  
21 the definition of “unfair” from antitrust law and requires that “(1) the consumer injury must be  
22 substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or  
23 competition; and (3) it must be an injury that consumers themselves could not reasonably have  
24 avoided.” *Id.* (internal quotation marks and citation omitted).

25 Claim 3 asserts that Defendants have fraudulently represented that Plaintiff is in default on  
26 his mortgage. Plaintiff’s default is apparent from the Notice of Default and Election to Sell Under  
27 Deed of Trust, and the Notice of Trustee’s Sale. Thus Plaintiff has not alleged facts showing that  
28 the representation of default was “unfair.” Claim 3 also asserts that Defendants have refused to

1 provide a payment history to Plaintiff and have conspired to deprive Plaintiff of his home. Such  
2 conduct might be sufficient to allege a claim under the “unfair” prong of Section 17200. However,  
3 Plaintiff has not alleged any facts to support such a claim, for example, the dates and times that he  
4 requested a payment history or the manner in which Defendants conspired against him.

5 **3. Fraudulent**

6 “A business practice is fraudulent under the UCL if members of the public are likely to be  
7 deceived.” *Davis*, 691 F.3d at 1169. Allegations of fraud under Section 17200 must satisfy the  
8 heightened pleading standard of Federal Rule of Civil Procedure 9(b). *Kearns v. Ford Motor Co.*,  
9 567 F.3d 1120, 1125 (9th Cir. 2009). Rule 9(b) requires that “a party must state with particularity  
10 the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). “Averments of fraud must be  
11 accompanied by the who, what, when, where, and how of the misconduct charged.” *Kearns*, 567  
12 F.3d at 1124 (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)). While  
13 Claim 3 alleges in conclusory fashion that Defendants “fraudulently” represented that Plaintiff was  
14 in default, it contains no factual allegations describing Defendants’ misconduct. As noted above,  
15 Plaintiff’s default is apparent from the Notice of Default and Election to Sell Under Deed of Trust,  
16 and the Notice of Trustee’s Sale. Plaintiff must allege specific facts and circumstances  
17 demonstrating that these Notices were obtained fraudulently.

18 Based upon the foregoing, the motion to dismiss is GRANTED as to Claim 3 with leave to  
19 amend.

20 **D. Claim 4 – Conspiracy to Defraud**

21 Claim 4 alleges that Defendants “conspired to participate in a fraudulent scheme to foreclose  
22 on Plaintiff [sic] residence.” (SAC ¶ 17) Once again, Plaintiff fails to allege “the who, what, when,  
23 where, and how of the misconduct charged.” *Kearns*, 567 F.3d at 1124 (quoting *Vess*, 317 F.3d at  
24 1106). The claim contains no factual allegations whatsoever regarding Defendants’ alleged  
25 fraudulent scheme.

26 Accordingly, the motion to dismiss is GRANTED as to Claim 4 with leave to amend.

27 **E. Leave to Amend**

28 The Court notes that Plaintiff has attempted to state a claim in three separate pleadings: his

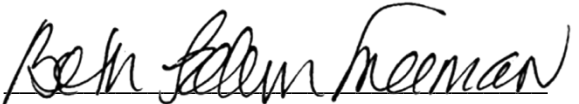
1 original complaint (ECF 1), a first amended complaint filed as of right (ECF 6), and the operative  
2 SAC (ECF 35), which was filed with leave of the Court (ECF 34). Because he has not yet had the  
3 benefit of an order explaining the deficiencies of his claims, and in light of his *pro se* status,  
4 Plaintiff is granted an opportunity to amend. However, if Plaintiff once again fails to allege a viable  
5 claim – or at least facts showing that he *could* allege a viable claim if given further leave – his  
6 claims will be dismissed without leave to amend and the action will be dismissed with prejudice.

7 **IV. ORDER**

8 For the foregoing reasons, Defendants’ motion to dismiss is GRANTED with leave to amend  
9 *only the existing claims* that are the subject of the present motion. Any amended complaint shall be  
10 filed on or before July 29, 2014.

11 IT IS SO ORDERED.

12  
13 Dated: July 8, 2014

  
BETH LABSON FREEMAN  
United States District Judge