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**UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

**BEHROOZ DERA KHSHAN,** )  
 )  
 **Plaintiff,** )  
 )  
 **v.** )  
 )  
 **MORTGAGE ELECTRONIC** )  
 **REGISTRATION SYSTEMS, INC.;** )  
 **FIRST AMERICAN LOANSTAR** )  
 **TRUSTEE SERVICES; FIRST** )  
 **FRANKLIN FINANCIAL;** )  
 **DEUTSCHE BANK NATIONAL** )  
 **TRUST CO.; AMERICAS** )  
 **SERVICING CO; and DOES 1** )  
 **through 50, inclusive,** )  
 )  
 **Defendants.** )  
 )

**CASE NO. SACV08-1185 AG (RNBx)**

**ORDER GRANTING MOTION TO  
DISMISS SECOND AMENDED  
COMPLAINT & DENYING AS MOOT  
DEFENDANTS' MOTION TO STRIKE**

This case, like many others before this Court, involves the sale of an option adjustable-rate mortgage loan. Pro se Plaintiff Behroooz Derakhshan ("Plaintiff") filed a Second Amended Complaint ("SAC"). Defendants Wells Fargo Bank, N.A., d/b/a America's Servicing Co. ("ASC"), Deutsche Bank National Trust ("Deustche Bank"), and Mortgage Electronic Registration Systems, Inc. ("MERS") (collectively, "Defendants") have filed a Motion to Dismiss the SAC ("Motion") and a Motion to Strike the SAC. After considering all papers and

arguments submitted, the Court GRANTS Defendants' Motion to Dismiss, and DENIES as moot Defendants' Motion to Strike.

#### **BACKGROUND**

The following facts are taken from Plaintiff's Second Amended Complaint ("SAC"), and for the purposes of this Motion are accepted as true.

On June 12, 2006, Plaintiff Behrooz Derakhshan ("Plaintiff") executed an "Adjustable Rate Note" promising to pay Defendant First Franklin Financial Corporation ("Defendant First Franklin") \$783,200 by monthly payment commencing August 1, 2006. (SAC ¶ 12.) The loan was a variable interest loan. (SAC ¶ 26.) To get a loan to purchase property, Plaintiff went to Defendant Andrew Cano ("Defendant Cano") at Defendant Service First Group ("Defendant Service First"), who acted as a dual agent for Plaintiff. (SAC ¶ 13.) Plaintiff "perceived his relationship with Defendant Cano as being very close," and Plaintiff "relied on Defendant Cano's financial advice." (SAC ¶ 14.) Plaintiff "relied on Defendant Cano's advice concerning" Plaintiff's use of the property as a "commercial/residential property for the care of the elderly as a basis for entering into the loan agreement" with Defendant First Franklin. (SAC ¶ 15.)

Defendant Cano "represented to Plaintiff that Plaintiff would only be able to finance the [property] as a commercial property, which had an interest rate approximately two percent higher than a standard residential loan." (SAC ¶ 16.) "Defendant Cano was aware that Plaintiff's income would not support the loan," and told Plaintiff that "the lender would not approve the loan unless there was a twenty percent down payment." (SAC ¶ 16-17.) To get the loan, Defendant Cano "convinced Plaintiff to enter into a high interest rate loan agreement with the sellers, [Defendants Teofil Oros and Mariana Oros (collectively "Oros Defendants")], for an interest only Second Trust Deed for half of the down payment." (SAC ¶ 17.)

The Oros Defendants gave \$30,000 to Plaintiff "to induce Plaintiff to enter into the purchase transaction with the full knowledge and approval of all of the other defendants."

1 (SAC ¶ 18.)

2 Defendant Cano “misrepresented that the property would support payment of the loan  
3 through rents charged to elderly residents.” (SAC ¶ 19.) Defendant Cano also “misrepresented  
4 to Plaintiff that the value of the [property] would continue to increase and that he could secure  
5 for Plaintiff refinancing of the [property] within six months at a lower interest rate.” (SAC ¶  
6 19.) “Defendant Cano, the lender’s appraiser, and the sellers misrepresented that the [property]  
7 was worth several hundred thousand dollars more than it actually was.” (SAC ¶ 19.) Defendant  
8 Cano’s alleged misrepresentations were made “on behalf of, and with the support, approval and  
9 at the request of each of the other Defendants, and such misrepresentations were subsequently  
10 ratified by the other Defendants, and each of them.” (SAC ¶ 20.) Plaintiff relied on the alleged  
11 misrepresentations in entering into the loan. (SAC ¶ 20.)

12 “When Plaintiff sat down with the escrow agent to sign the loan documents and  
13 disclosures, the escrow agent did not explain the documents, and simply presented Plaintiff with  
14 a several inches thick stack of documents to sign.” (SAC ¶ 28.) The escrow agent “never  
15 informed Plaintiff when the right to cancel expired, how to cancel, or where to cancel.” (SAC ¶  
16 28.) “Plaintiff alleges that the Defendants . . . never explained the workings of the rate, how it  
17 was computed, or its inherent volatility.” (SAC ¶ 30.)

18 Plaintiff executed a Deed of Trust securing the loan on June 12, 2006. (SAC ¶ 33.) The  
19 deed named First Franklin as the lender and MERS as the beneficiary. (SAC ¶ 33.) The deed  
20 was recorded and named Stewart Title Company as trustee. (SAC ¶ 40.) Later, a substitution of  
21 trustee was filed with the Orange County Recorder, and First American Loanstar Trustee  
22 Services (“First American”) was named as trustee. (SAC ¶ 41.) On December 1, 2006, Plaintiff  
23 received a “Mortgage Loan Statement” from ASC that included a coupon for payment with a  
24 mailing address for ASC. (SAC ¶¶ 42-43.)

25 On July 9, 2007, “an unknown employee of First American” executed “on behalf of  
26 Defendant MERS as Beneficiary” a Notice of Breach and Default and of Election to Cause Sale  
27 of Real Property Under Deed of Trust (“Notice of Default”). (SAC ¶ 47.) Plaintiff alleges that  
28 Defendants MERS, First American, First Franklin, Deutsche Bank, and ASC “each claimed an

1 interest in Plaintiff's Note and Mortgage, and have claimed that they were entitled to the  
2 payments" at "all times relevant" to this action. (SAC ¶ 50.)

3 On January 22, 2009, this Court granted Defendants' motion to dismiss Plaintiff's  
4 original Complaint ("January 22 Order"). This Court then granted Defendants' motions to  
5 dismiss Plaintiff's First Amended Complaint on June 29, 2009 ("June 29 Order"). Plaintiff has  
6 now filed a Second Amended Complaint, bringing nine claims against Defendants, numbered as  
7 follows: (1) deceit; (2) unfair business practices under Cal. Bus. & Prof. Code § 17000, *et seq.*  
8 ("UCL"); (3) violations of the federal Racketeer Influenced and Corrupt Organizations Act  
9 ("RICO"), 18 U.S.C. §§ 1961-68; (4) violations of the Truth in Lending Act ("TILA"), 15  
10 U.S.C. § 1611, *et seq.*; (5) violations of the Real Estate Settlement Procedures Act ("RESPA"),  
11 26 U.S.C. § 2605, *et seq.*; (6) violations of the Fair Debt Collection Practices Act ("FDCPA"),  
12 15 U.S.C. § 1692, *et seq.*; (7) breach of fiduciary duty; (8) injunctive relief; and (9) declaratory  
13 relief.

## 14 15 **LEGAL STANDARD**

16  
17 A court should dismiss a complaint when its allegations fail to state a claim upon which  
18 relief can be granted. FED. R. CIV. P. 12(b)(6). A complaint need only include "a short and plain  
19 statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2).  
20 "[D]etailed factual allegations' are not required." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949  
21 (May 18, 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007)). The Court  
22 must accept as true all factual allegations in the complaint and must draw all reasonable  
23 inferences from those allegations, construing the complaint in the light most favorable to the  
24 plaintiff. *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir. 1993).

25 But the complaint must allege "sufficient factual matter, accepted as true, to 'state a claim  
26 that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). "A  
27 claim has facial plausibility when the pleaded factual content allows the court to draw the  
28 reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at

1 1940 (citing *Twombly*, 550 U.S. at 556). A court should not accept “threadbare recitals of a  
2 cause of action’s elements, supported by mere conclusory statements,” *Iqbal*, 129 S. Ct. at 1940,  
3 or “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable  
4 inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Dismissal  
5 without leave to amend is appropriate only when the Court is satisfied that the deficiencies of the  
6 complaint could not possibly be cured by amendment. *Jackson v. Carey*, 353 F.3d 750, 758 (9th  
7 Cir. 2003).

8 “A *pro se* litigant must be given leave to amend his or her complaint unless it is  
9 absolutely clear that the deficiencies of the complaint could not be cured by amendment.” *Noll*  
10 *v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (internal quotation omitted).

## 11 12 **PRELIMINARY MATTERS**

13  
14 To support their motion, Defendants request that the Court take judicial notice of several  
15 documents. Under Federal Rule of Evidence 201, “[a] judicially noticed fact must be one not  
16 subject to reasonable dispute in that it is either (1) generally known within the territorial  
17 jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to  
18 sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201. Facts subject to  
19 judicial notice may be considered on a motion to dismiss. *Mullis v. United States Bankruptcy*  
20 *Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987).

21 Defendants request that the Court take judicial notice of five documents recorded in the  
22 official records of the Orange County Recorder’s Office: (1) an April 26, 2006 Grant Deed; (2) a  
23 June 6, 2006 Deed of Trust; (3) a July 9, 2007 Notice of Default and Election to Sell Under  
24 Deed of Trust; (4) a September 20, 2007 Assignment of Deed of Trust; and (5) an October 11,  
25 2007 Notice of Trustee’s Sale. The Court finds that these documents meet the requirements of  
26 Rule 201, and Defendants’ request for judicial notice is GRANTED as to those five documents.

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2  
3 **ANALYSIS**  
4

5 **1. PLAINTIFF’S FIRST CLAIM FOR DECEIT**  
6

7 Plaintiff’s first claim is brought against all defendants for “deceit,” which Plaintiff also  
8 calls “fraud.” The elements of a fraud claim are: (1) a misrepresentation; (2) knowledge of the  
9 falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damage. *Engalla v.*  
10 *Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 974 (1996). Plaintiff’s fraud claim fails.

11 Plaintiff admits that Defendants moving here did not commit the alleged  
12 misrepresentations. (Opposition to Defendants’ Motion (“Opposition”) 4:14-15.) Instead,  
13 Plaintiff relies on the theory that Defendants “subsequently ratified the earlier  
14 misrepresentations.” (Opp’n 4:16-17.) But the allegations in the SAC and Opposition do not  
15 support this theory. Plaintiff alleges the misrepresentations, but does not allege sufficient facts  
16 to allow the Court “to draw a reasonable inference” that Defendant later ratified those  
17 misrepresentations. *Iqbal*, 129 S. Ct. at 1940. Defendants’ Motion to Dismiss is GRANTED as  
18 to Plaintiff’s first claim for deceit.  
19

20 **2. PLAINTIFF’S SECOND CLAIM FOR UNFAIR BUSINESS PRACTICES**  
21

22 Plaintiff’s second claim is brought against all defendants for unfair business practices.  
23 California Unfair Competition Law (“UCL”) makes unlawful business practices actionable. Cal.  
24 Bus. & Prof. Code § 17200, *et seq.* “The UCL defines unfair competition as any unlawful,  
25 unfair or fraudulent business practice. . . . In effect, the UCL borrows violations of other laws .  
26 . . and makes those unlawful practices actionable under the UCL.” *Lazar v. Hertz Corp.*, 69 Cal.  
27 App. 4th 1494, 1505 (1999). Plaintiff’s UCL claim is based on Defendants’ alleged “false  
28 representations, unlawful transfers of the [property], failure to record real property transfers and

1 predatory lending practices.” (Compl. ¶ 59.) These allegations are “mere conclusory statements”  
2 that cannot withstand a motion to dismiss. *Iqbal*, 129 S. Ct. at 1940. The Court is dismissing  
3 Plaintiff’s eight other claims, so Plaintiff cannot point to an underlying unlawful practice. (See  
4 Section 1, *supra*, and Sections 3-9, *infra*.) Further, Plaintiff’s claim that Defendants failed to  
5 “record real property transfers” is contradicted by the assignment that was, in fact, recorded.  
6 (Defendants’ Request for Judicial Notice (“RJN”), Exh. D.)

7 Defendants’ Motion to Dismiss is GRANTED as to Plaintiff’s second claim for unfair  
8 business practices.

### 9 10 **3. PLAINTIFF’S THIRD CLAIM FOR RICO VIOLATIONS**

11  
12 Plaintiff’s third claim is brought against all defendants for violations of RICO. Plaintiff  
13 did not bring a RICO claim in his Complaint or FAC.

14 Plaintiff alleges that all Defendants “are involved in the conduct of an enterprise through  
15 a pattern of racketeering activity” and “are ongoing business entities which were and continue to  
16 be engaged in acts of predatory lending with the intent to wrongfully and fraudulently deprive  
17 victims of their money and property.” (SAC ¶ 63.) Plaintiff further alleges that in engaging in  
18 those “acts and omissions, Defendants, and each of them, engaged in wire fraud and mail  
19 fraud, used the Internet, and the Mortgage Electronic Registration System in order to commit  
20 such frauds, deceits, and acts of predatory lending.” (SAC ¶ 63.)

21 To state a civil claim under RICO, a plaintiff must plead that the defendant violated the  
22 Act, and that the plaintiff was injured as a result of the violation. “The elements of a civil RICO  
23 claim are simple enough: (1) conduct (2) of an enterprise (3) through a pattern (4) of  
24 racketeering activity (known as “predicate acts”) (5) causing injury to the plaintiff’s “business or  
25 property.” *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996) (citing 18 U.S.C. §§ 1964(c),  
26 1962(c); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985))

27 “Leaving aside the other elements of a civil RICO claim, RICO imposes civil and  
28 criminal liability on organizations engaged in ‘racketeering activity.’” *Sosa v. DIRECTV, Inc.*,

1 437 F.3d 923, 939 (9th Cir. 2006) (citing 18 U.S.C. §§ 1962-1964). “Racketeering activity, in  
2 turn, is defined to include a number of generically specified criminal acts as well as the  
3 commission of one of a number of listed predicate offenses.” *Id.* (citing U.S.C. § 1961(1)).  
4 Plaintiff asserts that “predatory lending with the intent to fraudulently deprive the victims,  
5 including Plaintiff, of their money and real property” is the predicate offense in this case.  
6 (Opp’n 10:13-15.) “Predatory lending” by a mortgage company is not a listed predicate offense  
7 under U.S.C. Section 1961(1), and Plaintiff cites no authority for using “predatory lending” as a  
8 predicate offense. Plaintiff has not alleged sufficient facts that could allow the Court to draw an  
9 inference that a predicate act has occurred. Plaintiff’s third claim for violations of RICO fails.  
10

#### 11 **4. PLAINTIFF’S FOURTH CLAIM FOR TILA VIOLATIONS**

12

13 Plaintiff’s fourth claim is brought against all defendants for TILA violations. Plaintiff  
14 alleges that Defendants violated TILA by: (1) refusing and continuing to refuse “to validate or  
15 otherwise make a full accounting and the required disclosures as to the true finance charges and  
16 fees;” (2) improperly retaining funds belonging to Plaintiff “in amounts to be determined;” (3)  
17 failing to disclose the status of the ownership of the loans; and (4) failing to provide the required  
18 notice of right to rescind in the loan documents. (SAC ¶ 68.) Plaintiff requests compensatory  
19 damages, attorney fees, punitive damages, and statutory damages. (SAC ¶ 69-71.) Plaintiff’s  
20 TILA claim fails.

21 An action for damages under TILA must be brought within one year of the alleged  
22 violation. 15 U.S.C. § 1640(e). The violation occurs upon consummation of the loan.  
23 *Betancourt v. Countrywide Home Loans, Inc.*, 344 F. Supp. 2d 1253, 1258 (D. Colo. 2004). A  
24 loan is deemed consummated at “the time that a consumer becomes contractually obligated on a  
25 credit transaction.” 12 C.F.R. § 226.2(a)(13). In its January 22 Order, the Court dismissed  
26 Plaintiff’s claim for damages under TILA as time-barred, finding that under the facts alleged by  
27 Plaintiff, the loan in this case was consummated on June 12, 2006, more than one year before  
28 this action was filed on August 4, 2008. (Jan. 22 Order 5:6-9.) Plaintiff’s TILA claim for



1 damages in the FAC was also dismissed because it was time-barred. (June 29 Order 5:20-21.)  
2 Plaintiff's SAC admits that the loan transaction was consummated on June 12, 2006. (SAC ¶  
3 66.) The limitations period for any damage claim under TILA expired on June 12, 2007, and  
4 Plaintiff did not file this lawsuit until August 4, 2008. Plaintiff's claim for damages under TILA  
5 is time-barred.

6 Plaintiff asks the court to apply the "equitable tolling" doctrine. (Opp'n 5:14-6:9.)  
7 Before the Court can apply equitable tolling, Plaintiff has the burden of showing the following  
8 elements: "fraudulent conduct by the defendant resulting in concealment of the operative facts,  
9 failure of the plaintiff to discover the operative facts that are the basis of its cause of action  
10 within the limitations period, and due diligence by the plaintiff until discovery of those facts."  
11 *Sagehorn v. Engle*, 141 Cal. App.4th 452, 460-61 (2006) (citing *Federal Election Com'n v.*  
12 *Williams* 104 F.3d 237, 240-41(9th Cir.1996)). Plaintiff alleges that he "did not discover the  
13 facts underlying his TILA, RESPA and Fair Debt Collection Causes of action until the summer  
14 of 2008." (SAC ¶ 29.) Plaintiff also alleges that Defendant First Franklin's "trickery,  
15 concealment and silence caused a delay in discovering" the alleged violations, (SAC ¶ 28), and  
16 that Defendants Cano and Service assured him that they would help him refinance the original  
17 loan six months after the close of escrow. (SAC ¶ 29). But Plaintiff does not allege sufficient  
18 facts to show that he exercised due diligence until discovery of those facts. The equitable tolling  
19 doctrine does not apply here.

20 Defendants' Motion to Dismiss is GRANTED as to Plaintiff's fourth claim for TILA  
21 violations.

## 22 23 **5. PLAINTIFF'S FIFTH CLAIM FOR RESPA VIOLATIONS**

24  
25 Plaintiff's fifth claim is brought against all defendants for RESPA violations. Plaintiff  
26 alleges that Defendants violated RESPA by placing loans "for the purpose of unlawfully  
27 increasing or otherwise obtaining yield spread fees and sums in excess of what would have been  
28 lawfully earned" and by transferring the service contract and its attending duties without the

1 required notice. (SAC ¶¶ 75-76.) Plaintiff requests compensatory damages and attorney fees.  
2 The Court finds that Plaintiff fails to state a claim under RESPA.

3 Plaintiff's first allegation that Defendants unlawfully increased or otherwise obtained  
4 yield spread fees and sums "in excess of what would have been lawfully earned" appears to  
5 invoke RESPA's anti-kickback provision. *See* 12 U.S.C. § 2607. That provision prohibits the  
6 payment and acceptance of a kickback or referral for unearned services on real estate loans. *Id.*;  
7 *see also Perkins v. Johnson*, 551 F. Supp. 2d 1246, 1252 (D. Colo. 2008). Plaintiff's apparent  
8 Section 2607 claim is time-barred. A claim brought under 12 U.S.C. § 2607 must be brought  
9 within one year of the alleged violation. 12 U.S.C. § 2614; *see also Edwards v. First Am. Corp.*,  
10 517 F. Supp. 2d 1199, 1204 (C.D. Cal. 2007); *Blaylock v. First Am. Title Ins. Co.*, 504 F. Supp.  
11 2d 1091, 1106 (W.D. Wash. 2007). Under the facts alleged by Plaintiff, the loan in this case was  
12 consummated on June 12, 2006, more than one year before this action was filed on August 4,  
13 2008. (*See* SAC ¶66.) Again, the Court cannot apply the "equitable tolling" doctrine because  
14 Plaintiff has failed to allege sufficient factual matter that could lead to an inference that Plaintiff  
15 exercised due diligence in discovering the underlying facts.

16 Plaintiff's second allegation that Defendants violated RESPA by transferring the  
17 servicing contract and its attending duties without the required notice also fails. When the  
18 servicing of a mortgage loan is transferred, RESPA requires the transferee servicer to notify the  
19 borrower of the transfer within a statutorily mandated period of time and forbids imposition of  
20 late fees on payments made within 60 days of the transfer. *See* 12 U.S.C. §§ 2605(a)-(d). Under  
21 RESPA, a plaintiff may recover any "actual damages to the borrower" resulting from the failure  
22 to give notice, plus any additional damages the Court may allow "in the case of a pattern or  
23 practice of non-compliance" with the statute. 12 U.S.C. § 2605(f)(1). Here, Plaintiff alleges that  
24 he was subject to "improper late fees for payments made within 60 days of the transfer of the  
25 note in a sum subject to proof at trial." (SAC ¶ 32.) But Plaintiff has failed to allege facts  
26 sufficient to show that a transfer of servicing rights has happened. The beneficiaries of the loan  
27 have changed, (RJN Ehxs. B, D), but Defendant ASC has been the only servicer for the life of  
28 the loan. (RJN, Exh. C.) There has been no transfer of the servicing rights, and therefore no

1 violation of 12 U.S.C. Section 2605, so Plaintiff's RESPA claim fails.

2 Defendants' Motion to Dismiss is GRANTED as to Plaintiff's fifth claim for violations of  
3 RESPA.

4  
5 **6. PLAINTIFF'S SIXTH CLAIM FOR FDCPA VIOLATIONS**

6  
7 Plaintiff's sixth claim is brought against all defendants for FDCPA violations. Plaintiff  
8 alleges that Defendants failed to respond to Plaintiffs' requests for "validation" of the debt as  
9 required by the FDCPA and requests statutory damages. Plaintiff's FDCPA claim fails.

10 Plaintiff alleges that he "requested that Defendants verify the alleged debt by producing  
11 the original Note, but they have failed to do so." (SAC ¶ 82.) Plaintiff alleges that this request  
12 took place in bankruptcy court, and that he made the request to the attorney for Defendants First  
13 Franklin, ASC, and Deutsche Bank, and that the original note was never produced. (SAC ¶ 82.)

14 Although Plaintiff brings this claim against all defendants, the request for the validation  
15 was made only to the attorney for First Franklin, ASC, and Deutsche Bank. (SAC ¶ 82.) The  
16 FDCPA regulates the conduct of debt collectors. A "debt collector" is "any person who uses any  
17 instrumentality of interstate commerce or the mails in any business the principal purpose of  
18 which is the collection of any debts, or who regularly collects or attempts to collect, directly or  
19 indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6).  
20 The FDCPA specifically excludes creditors collecting their own consumer debts. *Id.* Mortgage  
21 loan beneficiaries and servicing companies are not "debt collectors" under the FDCPA. *See*  
22 *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1209 (5th Cir. 1985) ("The legislative history of  
23 section 1692a(6) indicates conclusively that a debt collector does not include the consumer's  
24 creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in  
25 default at the time it was assigned.") (*citing* S.Rep. No. 95-382, 95th Cong., 1st Sess. 3,  
26 reprinted in 1977 U.S.Code Cong. & Ad.News 1695, 1698). Defendants do not fall in the "debt  
27 collector" definition, so this claim fails.

28 Defendants' Motion to Dismiss is GRANTED as to Plaintiff's sixth claim for violations

1 of the FDCPA.

2  
3  
4 **7. PLAINTIFF’S SEVENTH CLAIM FOR BREACH OF FIDUCIARY DUTY**

5  
6 Plaintiff’s seventh claim, for breach of fiduciary duty, is brought against Defendants First  
7 Franklin, MERS, Cano, Service, and the Oros and their Trust. Plaintiff alleges that Defendants  
8 breached their fiduciary duties to Plaintiff by placing and negotiating loans “without due care to  
9 the best interests of Plaintiff or for the protection of his rights” and by “represent[ing] the home  
10 to Plaintiff as commercial property even though the house is in a residential area.” (SAC ¶ 52.)  
11 This claim fails.

12 Under well-settled California law, lenders do not owe fiduciary duties to borrowers. “The  
13 relationship between a lending institution and its borrower-client is not fiduciary in nature.”  
14 *Nymark v. Heart Fed. Savings & Loan Ass’n*, 231 Cal. App. 3d 1089, 1093 n.1 (1991); *see also*  
15 *Price v. Wells Fargo Bank*, 213 Cal. App. 3d 465, 476 (1989) (no fiduciary relationship  
16 “between a bank and its loan customers”); *Downey v. Humphreys*, 102 Cal. App. 2d 323, 332  
17 (1951) (“A debt is not a trust and there is not a fiduciary duty relation between debtor and  
18 creditor as such.”). Here, Defendants were creditors who did not, as a matter of law, owe  
19 Plaintiff any fiduciary duties. Plaintiff’s fiduciary duty claim must fail.

20 Defendants’ Motion to Dismiss is GRANTED as to Plaintiff’s seventh claim for breach of  
21 fiduciary duty.

22  
23 **8. PLAINTIFF’S EIGHTH CLAIM FOR INJUNCTIVE RELIEF**

24  
25 Plaintiffs’ eighth claim seeks an order enjoining Defendants from transferring or selling  
26 the Note and Deed of Trust, or from foreclosing on the property. (SAC ¶ 96.) Plaintiff also  
27 seeks a determination as to the “legal rights and obligations of the parties under the Adjustable  
28 Rate Note and Deed of Trust.” (SAC ¶ 95.) Plaintiff’s claim fails.

1 Plaintiff fails to adequately allege that an actual controversy exists regarding each party's  
2 legal status under the note. In fact, the documents provided by Defendants make clear each  
3 party's role and legal rights under the note. (RJN Exhs. B-D.) Plaintiff fails to allege any facts  
4 showing that the parties have actually made competing claims for money owed under the note.

5 Defendants' Motion to Dismiss is GRANTED as to Plaintiffs' eighth claim for injunctive  
6 relief.

### 7 8 **9. PLAINTIFF'S NINTH CLAIM FOR DECLARATORY RELIEF**

9  
10 Finally, Plaintiff's ninth claim is for declaratory relief against all Defendants. Plaintiff  
11 requests a court order declaring that: (1) MERS is conducting an unlawful scheme to avoid  
12 payment of taxes to the State of California and to hide the status of ownership of real property;  
13 (2) MERS has no rights to exercise a legal interest in Plaintiff's loan; (3) MERS is associated  
14 with Deutsche Bank and is still claiming an interest in Plaintiff's loan; (4) Plaintiff is the owner  
15 in fee simple absolute of the property based on fraud, deceit, and unlawful conduct of all of the  
16 Defendants; (5) the proposed Trustee's sale is unlawful; and (6) Defendants have wrongfully  
17 interfered with Plaintiff's use and enjoyment of his property. (SAC ¶¶ 100-05.)

18 The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its  
19 jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations  
20 of any interested party seeking such declaration." 28 U.S.C. § 2201(a). For declaratory relief to  
21 be appropriate, there must be an actual controversy relating to the legal rights and duties of the  
22 parties. *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 669 (9th Cir. 2005) (citing *American*  
23 *States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994)).

24 Plaintiff fails to allege specific facts that could lead the Court to make reasonable  
25 inferences supporting the requested declarations. These allegations "are merely conclusory,  
26 unwarranted deductions of fact" and "unreasonable inferences" that the Court cannot accept.  
27 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Iqbal*, 129 S. Ct. at 1940.  
28 Plaintiff has not adequately demonstrated an actual controversy relating to the legal rights and

1 duties of the parties in this case.


2 Defendants' Motion to Dismiss is GRANTED as to Plaintiff's ninth claim for declaratory  
3 relief.

4  
5 **DISPOSITION**

6  
7 Defendants' Motion to Dismiss is GRANTED without leave to amend. The Court  
8 DENIES as moot Defendant's Motion to Strike.

9  
10 IT IS SO ORDERED.

11 DATED: October 13, 2009

12   
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14 Andrew J. Guilford  
15 United States District Judge  
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