

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF CALIFORNIA

3 VINCENT SIPE,

4 Plaintiff,

5 v.

6 COUNTRYWIDE BANK; SIERRA PACIFIC
7 MORTGAGE COMPANY, INC.; MORTGAGE
8 ELECTRONIC REGISTRATION SYSTEMS,
9 INC.; FINANCIAL ADVANTAGE, INC. DBA
10 : SILVERSTON REALTY; JOHN DANIEL
11 NORBERG; CAROL DESILVA and DOES 1-
12 20 inclusive,

13 Defendants.

09-CV-00798-OWW-DLB

MEMORANDUM DECISION AND
ORDER RE: (1) DEFENDANT
SIERRA PACIFIC MORTGAGE
COMPANY INC.'S MOTION TO
DISMISS; and (2) DEFENDANTS
COUNTRYWIDE BANK AND
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS,
INC.'S MOTION TO DISMISS

14 I. INTRODUCTION

15 Before the court are two motions to dismiss. One motion is
16 brought by Defendant Sierra Pacific Mortgage Company Inc. ("Sierra
17 Pacific") and another is brought collectively by Defendants
18 Countrywide Bank ("Countrywide") and Mortgage Electronic
19 Registration Systems, Inc. ("MERS"). The motions are directed at
20 the claims asserted by Plaintiff Vincent Sipe ("Plaintiff") in his
21 First Amended Complaint ("FAC" or "complaint"). The following
22 background facts are taken from the FAC and other documents on file
23 in this case.

24 II. BACKGROUND

25 A. General Background

26 This is a mortgage fraud case concerning Plaintiff's
27 residential property located in Coarsegold, California. On or
28 about May 2006, Defendant Carol Desilva, a loan officer for
Defendant Financial Advantage Inc., approached Plaintiff about a

1 refinance loan on his residence. Desilva "advised" Plaintiff that
2 she could get the "best deal" and the "best interest rates" on the
3 market. Plaintiff applied for the loan, and he accurately
4 described his income and provided Desilva with income-related
5 documentation, including income bank statements, W-2s, and 1099s.
6 On Desilva's loan application, however, Plaintiff's monthly income
7 was "fraudulently overstated." Desilva advised Plaintiff that
8 Desilva could get him 100% financing for his residence and that his
9 loan would be fixed for thirty (30) years at a 2.15% interest rate.
10 Desilva, however, actually sold Plaintiff a five-year fixed loan
11 with an adjustable rate rider. Defendant Sierra Pacific served as
12 the lender.

13 On or about May 11, 2006, Plaintiff completed the loan on his
14 property. The terms of the loan were memorialized in a Promissory
15 Note, which was secured by a Deed of Trust on the property. The
16 Deed of Trust identified Sierra Pacific as the lender and MERS as
17 the lender's nominee and beneficiary.

18 Plaintiff, allegedly, was not given a copy of "any of the loan
19 documents prior to closing." At the closing, Plaintiff was only
20 given a few minutes to sign the documents and was not "allowed to
21 review them." Plaintiff also did not receive "the required copies
22 of a proper notice of cancellation." Plaintiff now wants to
23 rescind the loan.

24 Plaintiff asserts that his loan was part of a larger "scheme"
25 perpetrated by "Defendants" pursuant to which they sold home loans
26 on the "secondary market." Once on the secondary market,
27 "Defendants" allegedly "pooled" these loans into trusts and issued
28 new securities backed by the pool. As part of this scheme, Sierra

1 Pacific's borrowers, including Plaintiff, "were steered and
2 encouraged into loans with terms unfavorable to them, or loans
3 which the borrowers . . . were not qualified to obtain."

4 B. Procedural History And Plaintiff's Claims

5 Plaintiff filed an initial complaint on May 5, 2009. (Doc. 1.)
6 The initial complaint included claims for a violation of the Truth
7 In Lending Act ("TILA"), 15 U.S.C. § 1601 et seq., and a violation
8 of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C.
9 § 2605 et seq. In August 2009, Defendant Sierra Pacific filed a
10 motion to dismiss Plaintiff's initial complaint. In response,
11 Plaintiff filed a FAC.

12 In the FAC, Plaintiff asserts causes of action for: (1) a
13 violation of TILA; (2) a violation of the Rosenthal Fair Debt
14 Collection Practices Act ("RFDCPA"), California Civil Code § 1788
15 et seq.; (3) negligence; (4) a violation of RESPA; (5) breach of
16 fiduciary duty; (6) fraud; (7) a violation of California Business
17 and Professions Code § 17200 et seq.; (8) breach of contract; and
18 (9) breach of the implied covenant of good faith and fair dealing.

19 After Plaintiff filed his FAC, Sierra Pacific filed a motion
20 to dismiss, and Countrywide and MERS also filed a separate motion
21 to dismiss. In the FAC, federal question jurisdiction is invoked
22 by the TILA and RESPA claims, and supplemental jurisdiction is
23 asserted for the state law claims.

24 C. Defendants' Motions

25 Sierra Pacific moves to dismiss all claims against it, raising
26 various arguments as to why each claim is insufficiently pled or
27 legally barred. Countrywide and MERS move to dismiss the claims
28 against them, raising numerous arguments as to why each claim is

1 insufficiently pled. With respect to the fraud claim, Sierra
2 Pacific, Countrywide, and MERS argue, among other things, that it
3 fails to meet the pleading requirements of Rule 9(b).

4 Plaintiff filed untimely opposition briefs to both motions.
5 The hearing date on the motions was continued to permit adequate
6 time for reply briefing.¹

7
8 III. STANDARDS OF DECISION

9 A. Motion To Dismiss

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

27 _____
28 ¹ Future compliance with the filing deadlines is expected.

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

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

27 B. Rule 9(b)

28 Rule 9(b) imposes an elevated pleading standard for fraud

1 claims. Rule 9(b) states:

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

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

21 22 IV. DISCUSSION AND ANALYSIS

23 A. TILA Claim

24 Plaintiff asserts a TILA claim against Sierra Pacific for
25 damages and rescission. Sierra Pacific allegedly violated TILA by:
26 "(a) failing to provide required disclosures prior to consummation
27 of the transaction; (b) failing to make required disclosures
28 clearly and conspicuously in writing; (c) failing to timely deliver

1 to Plaintiff notices required by TILA; (d) placing terms prohibited
2 by TILA into the transaction; and (e) failing to disclose all
3 finance charge details and the annual percentage rate based upon
4 properly calculated and disclosed finance charges and amounts
5 financed." (Doc. 14 at 11.)

6 Sierra Pacific argues that Plaintiff's TILA claim for damages
7 and rescission are both time-barred, and that the complaint fails
8 to allege facts sufficient to demonstrate a right to rescission.

9 1. Damages Claim

10 TILA "requires creditors to provide borrowers with clear and
11 accurate disclosures of terms dealing with things like finance
12 charges, annual percentage rates of interest, and the borrower's
13 rights." *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998).
14 Failure to satisfy TILA's requirements exposes a lender to
15 "statutory and actual damages [that are] traceable to a lender's
16 failure to make the requisite disclosures." *Id.*

17 A TILA claim for damages must be brought "within one year from
18 the date of the occurrence of the violation." 15 U.S.C. § 1640(e);
19 see also *Beach*, 523 U.S. at 412. For statute of limitations
20 purposes, the "occurrence of the violation" takes place on the
21 "consummation of the transaction." *King v. California*, 784 F.2d
22 910, 915 (9th Cir. 1986). Here, according to the complaint, the
23 transaction was consummated "on or about May 11, 2006." (Doc. 14 at
24 7.) Plaintiff had until May 2007 to file his TILA claim for
25 damages. Plaintiff, however, filed his TILA claim for damages on
26 May 4, 2009, well past the deadline. (See Doc. 1.) Accordingly,
27 Plaintiff's TILA claim for damages is time-barred absent equitable
28 tolling.

1 As explained in *King*, TILA's one-year limitations period may
2 be extended through equitable tolling:

3 [T]he limitations period in Section 1640(e) runs from the
4 date of consummation of the transaction but ... the
5 doctrine of equitable tolling may, in the appropriate
6 circumstances, suspend the limitations period until the
7 borrower discovers or had reasonable opportunity to
8 discover the fraud or nondisclosures that form the basis
9 of the TILA action. Therefore, as a general rule the
limitations period starts at the consummation of the
transaction. The district courts, however, can evaluate
specific claims of fraudulent concealment and equitable
tolling to determine if the general rule would be unjust
or frustrate the purpose of the Act and adjust the
limitations period accordingly.

10 784 F.2d at 915. "Equitable tolling may be applied if, despite all
11 due diligence, a plaintiff is unable to obtain vital information
12 bearing on the existence of his claim." *Santa Maria v. Pac. Bell*,
13 202 F.3d 1170, 1178 (9th Cir. 2000); see also *Garcia v. Brockway*,
14 526 F.3d 456, 465 (9th Cir. 2008). "Fairness, without more, is not
15 sufficient justification to invoke equitable tolling"
16 *Garcia*, 526 F.3d at 466.

17 Here, Sierra Pacific's failure to make TILA disclosures and
18 alleged misconduct - including its failure to "make required
19 disclosures clearly and conspicuously in writing," and its
20 placement of "terms prohibited by TILA into the transaction" -
21 occurred, if at all, by the time of the loan transaction in May
22 2006. With the transaction completed and the loan documents in
23 hand, Plaintiff could have reviewed them and discovered whether
24 illegal terms were included in the loan transaction, or whether the
25 disclosures to be included in the transaction were unclear, omitted
26 or otherwise problematic, and then filed suit within the one-year
27 limitations period.

28 In *Meyer v. Ameriquest Mortgage Co.*, 342 F.3d 899, 902 (9th

1 Cir. 2003), the court rejected the application of equitable tolling
2 to a TILA damages claim asserted against a lender. The court
3 reasoned:

4 The failure to make the required disclosures occurred, if
5 at all, at the time the loan documents were signed. The
6 Meyers were in full possession of all information
7 relevant to the discovery of a TILA violation and a §
8 1640(a) damages claim on the day the loan papers were
signed. The Meyers have produced no evidence of
undisclosed credit terms, or of fraudulent concealment or
other action on the part of Ameriquest that prevented the
Meyers from discovering their claim.

9 Plaintiff argues equitable tolling should apply because, as
10 alleged, he was not "allowed to review" the loan documents "at
11 closing," they were not explained to him at closing, and he was not
12 given a copy of them prior to closing. (Doc. 14 at 6.) Even
13 assuming this is true, Plaintiff does not explain why immediately
14 after the closing, when he had the loan documents, he could not
15 have reviewed them that same day (or at any point thereafter) and,
16 with or without the assistance of others, discovered the alleged
17 TILA violations.

18 Plaintiff also argues that equitable tolling should apply
19 because, as alleged, "[t]he facts surrounding this loan transaction
20 were purposely hidden to prevent Plaintiff from discovering the
21 true nature of the transaction and the documents involved therein.
22 Facts surrounding the transaction continue to be hidden from
23 Plaintiff to this day." (Doc. 14 at 7.) This conclusory allegation
24 may relate to the averment in the TILA claim that Sierra Pacific
25 failed to "disclose all finance charge details" and "the annual
26 percentage rate based upon a properly calculated and disclosed
27 finance charges and amounts financed." Plaintiff does not,
28

1 however, allege what facts were "purposely hidden" from Plaintiff
2 to prevent discovery of his TILA claim.

3 Plaintiff's allegation that the "facts surrounding this loan
4 transaction were purposely hidden to prevent Plaintiff from
5 discovering the true nature of the transaction and the documents"
6 and "continue to be hidden from Plaintiff to this day" is a legal
7 conclusion, and the complaint does not assert how the "hidden
8 facts" prevented him from discovering the alleged TILA violations
9 or how they relate to the alleged TILA violations committed by
10 Sierra Pacific. Facts sufficient to invoke equitable tolling have
11 not been alleged.

12 Plaintiff's TILA claim for damages is time-barred absent
13 equitable tolling. Defendant Sierra Pacific's motion to dismiss,
14 on the grounds that this claim is barred by the statute of
15 limitations, is GRANTED WITH LEAVE TO AMEND. Plaintiff shall have
16 one opportunity to allege what facts were hidden that prevented him
17 from discovering his claim, and how those hidden facts relate to
18 the TILA violations Sierra Pacific allegedly committed.

19 2. Rescission Claim

20 Generally, TILA provides that a borrower has until midnight of
21 the third business day following the consummation of the loan
22 transaction to rescind the transaction. 15 U.S.C. § 1635(a). A
23 borrower's right of rescission is extended from three days to three
24 years if the lender (1) fails to provide notice of the borrower's
25 right of rescission or (2) fails to make a material disclosure. See
26 *Reagen v. Aurora Loan Servs.*, No. 1:09-CV-00839-OWW-DLB, 2009 WL
27 3789997, at *6 (E.D. Cal. Nov. 10, 2009) (citing 12 C.F.R. §
28

1 226.23(a)(3)).² Section 1635(f) of TILA provides:

2 An obligor's right of rescission shall expire three years
3 after the date of consummation of the transaction or upon
4 the sale of the property, whichever occurs first,
5 notwithstanding the fact that the information and forms
6 required under this section or any other disclosures
7 required under this part have not been delivered to the
8 obligor.

9 15 U.S.C. § 1635(f).

10 Here, the date of loan consummation is on or about May 11,
11 2006. Plaintiff filed his TILA rescission claim on May 4, 2009.
12 Accordingly, Plaintiff's rescission claim is well outside the
13 three-day window but *within* the three-year period if the three-year
14 period applies in this case.

15 Sierra Pacific argues that Plaintiff cannot avail himself of
16 the three-year period because (i) he, in fact, received his notice
17 of his right of rescission and (ii) there are no facts pled in the
18 complaint as to what material disclosures Sierra Pacific failed to
19 make. As to the rescission notice, Sierra Pacific requests that
20 judicial notice be taken of a document entitled "NOTICE OF RIGHT OF
21 CANCEL." This document identifies Sierra Pacific as the lender and
22 Plaintiff as the borrower, explains to the reader how to cancel the
23 loan transaction, and bears the purported signature of Plaintiff at
24 the bottom.³ Sierra Pacific argues that this document proves that

25 ² Regulation Z provides that "[t]he term 'material
26 disclosures' means the required disclosures of the annual
27 percentage rate, the finance charge, the amount financed, the total
28 payments, the payment schedule, and the disclosures and limitations
referred to in §§ 226.32(c) and (d) and 226.35(b)(2)." 12 C.F.R. §
226.23(a)(3) n.48.

³ Even assuming it were proper to take judicial notice of this
document, and further assuming that doing so would eviscerate any
claim that Plaintiff did not receive notice of his rescission

1 Plaintiff received the requisite notice regarding his rescission
2 rights.

3 The issue of whether this document is judicially noticeable,
4 whether Sierra Pacific provided Plaintiff with the requisite notice
5 regarding his right of rescission, and whether Plaintiff has failed
6 to sufficiently plead the failure to make material disclosures,
7 need not be determined. Plaintiff's TILA claim for rescission
8 fails for another reason.

9 "Plaintiff must allege (subject to Rule 11) an ability to
10 tender in order to state a claim for rescission under TILA and
11 Regulation Z." *Garcia v. Wachovia Mortgage Corp.*, ___ F. Supp. 2d
12 ___, 2009 WL 3837621, at *5 (C.D. Cal. 2009); see also *Gonzalez v.*
13 *HomeQ Servicing*, No. 1:09-CV-00951-OWW-SMS, 2010 WL 289303, at *3
14 (E.D. Cal. Jan. 15, 2010); *Yamamoto v. Bank of N.Y.*, 329 F.3d 1167,
15 1171 (9th Cir. 2003) ("[R]escission should be conditioned on
16 repayment of the amounts advanced by the lender.") (emphasis
17 omitted).⁴ "The equitable goal of rescission under TILA is to
18 restore the parties to the status quo ante." *Am. Mortgage Network,*
19 *Inc. v. Shelton*, 486 F.3d 815, 820 (4th Cir. 2007) (internal
20 quotation marks omitted).

21 The complaint does not allege that Plaintiff has tendered or
22

23 rights, this would still not resolve whether Sierra Pacific
24 otherwise failed to provide material disclosures to Plaintiff which
25 would extend the limitations period to three years.

26 ⁴ As recognized in *Garcia*, "[b]y far, the majority of Courts
27 to address the issue recently have required that borrowers allege
28 an ability to tender the principal balance of the subject loan in
order to state a claim for rescission under TILA." 2009 WL 3837621
at *3.

1 has the ability to tender the principal balance of the loan. This
2 is required. Absent such allegations, Plaintiff's TILA claim for
3 rescission is subject to dismissal.

4 Sierra Pacific's motion to dismiss the TILA rescission claim
5 is GRANTED, and this claim is DISMISSED WITH LEAVE TO AMEND.

6 B. RFDCPA Claim

7 Plaintiff asserts a claim for violation of the RFDCPA,
8 California Civil Code § 1788 et seq., against Countrywide and
9 Sierra Pacific who raise two arguments for dismissal. First, that
10 the RFDCPA, which applies to debt collection activities, does not
11 cover foreclosure-related activities and is not implicated here.
12 Second, that Plaintiff has only generically alleged RFDCPA
13 violations with no facts to support them.

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

1 person primarily for personal, family, or household purposes." §
2 1788.2(e). A debt collector violates the act when it engages in
3 harassment, threats, the use of profane language, false simulation
4 of the judicial process, or when it cloaks its true nature as a
5 licensed collection agency in an effort to collect a consumer debt.
6 See Cal. Civ. Code. §§ 1788.10-1788.16.

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

14 First, "[t]he law is clear that foreclosing on a deed of trust
15 does not invoke the statutory protections of the RFDCPA." *Collins*
16 *v. Power Default Servs., Inc.*, No. 09-4838 SC, 2010 WL 234902, at
17 *3 (N.D. Cal. Jan. 14, 2010) (collecting numerous cases).
18 "[F]oreclosure pursuant to a deed of trust does not constitute debt
19 collection under the RFDCPA." *Castenda v. Saxon Mortgage Servs.,*
20 *Inc.*, __ F. Supp. 2d __, 2009 WL 4640673, at *3 (E.D. Cal. 2009);
21 *see also Gonzalez v. First Franklin Loan Servs.*, No. 1:09-CV-00941
22 AWI-GSA, 2010 WL 144862, at *7 (E.D. Cal. Jan. 11, 2010)
23 ("[F]oreclosure related actions . . . do not implicate the
24 RFDCPA."). The conduct Plaintiff complains of concerns foreclosure

25
26 ⁵ This conclusory allegation is a verbatim repetition of a
27 RFDCPA claim in *Sorenson v. Countrywide Home Loans, Inc.*, No.
28 2:09-cv-01943-MCE-KJM, 2010 WL 308794, at *4 (E.D. Cal. Jan. 12,
2010).

1 related actions in connection with his residential mortgage. This
2 conduct is not covered by the RFDCPA. For this reason, Plaintiff's
3 RFDCPA claim is subject to dismissal.

4 Second, the RFDCPA claim lacks any supporting facts. The
5 complaint has no non-conclusory factual content to plausibly
6 suggest that Countrywide and Sierra Pacific violated the RFDCPA by
7 engaging in acts (such as harassment) prohibited by the statute.
8 *See Keen v. Am. Home Mortgage Servicing, Inc.*, __ F. Supp. 2d __,
9 2009 WL 3380454, at *5 (E.D. Cal. 2009); *Gonzalez*, 2010 WL 144862
10 at *7.

11 Defendant Countrywide's motion to dismiss the RFDCPA claim is
12 GRANTED WITH LEAVE TO AMEND.

13 C. Negligence Claim

14 To establish a negligence claim, "it must be shown that (1)
15 the defendant owed the plaintiff a legal duty, (2) the defendant
16 breached that duty, and (3) the breach was a proximate or legal
17 cause of the plaintiff's injuries. The absence of any one of these
18 three elements is fatal to a negligence claim." *Gilmer v.*
19 *Ellington*, 159 Cal. App. 4th 190, 195 (2008) (internal citation
20 omitted). "The existence of a legal duty to use reasonable care in
21 a particular factual situation is a question of law for the court
22 to decide." *Vasquez v. Residential Invs., Inc.*, 118 Cal. App. 4th
23 269, 278 (2004). Defendants principally attack Plaintiff's
24 negligence claim on the ground that nothing is alleged in the
25 complaint which would suggest that they owed a duty to Plaintiff
26 upon which to predicate a negligence claim.

27 Plaintiff's negligence claim is asserted against Countrywide,
28 MERS, and Sierra Pacific. Plaintiff alleges that Countrywide,

1 MERS, and Sierra Pacific "owed a duty to the Plaintiff to perform
2 acts in such a manner as to not cause Plaintiff harm." (Doc. 14 at
3 17.) Defendants allegedly breached this duty "when they failed to
4 maintain the original Mortgage Note, failed to properly create
5 original documents, [and] failed to make required disclosures to
6 the Plaintiff." (*Id.*) Plaintiff further alleges that Countrywide,
7 MERS and Sierra Pacific breached this "duty of care when they took
8 payments to which they were not entitled, charged fees they were
9 not entitled to charge, and made or otherwise authorized negative
10 reporting of Plaintiff's creditworthiness to various credit bureaus
11 wrongfully." (*Id.*) These negligence allegations are identical to
12 those in *Castenda*, 2009 WL 4640673 at *4, there found insufficient
13 to state a claim.

14 Consistent with his complaint, Plaintiff argues that
15 Defendants had a "general duty not to harm" Plaintiff. In support
16 of this theory, Plaintiff cites *McGarry v. Sax*, 158 Cal. App. 4th
17 983 (2008), *Giraldo v. Department of Corrections & Rehabilitation*,
18 168 Cal. App. 4th 231 (2008), and *Peart v. Ferro*, 119 Cal. App. 4th
19 60 (2004). In *McGarry*, the court noted:

20 Under general negligence principles and Civil Code
21 section 1714, a person ordinarily is obligated to
22 exercise due care in his or her own actions so as not to
23 create an unreasonable risk of injury to others. This
24 legal duty generally is owed to the class of persons who
25 it is reasonably foreseeable may be injured as the result
26 of the actor's conduct.

27 158 Cal. App. 4th at 995. Similarly, the *Giraldo* court recognized
28 that "[a]s a general principle, a defendant owes a duty of care to
all persons who are foreseeably endangered by his conduct, with
respect to all risks which make the conduct unreasonably
dangerous." 168 Cal. App. 4th at 245 (internal quotation marks

1 omitted). Finally, in *Peart*, the court noted that “[u]nder general
2 principles of negligence law, persons have a duty to use due care
3 to avoid injury to others, and may be held liable if their careless
4 conduct injures another person.” 119 Cal. App. 4th at 70-71
5 (internal quotation marks omitted).

6 No issue is taken with these statements on the general duty of
7 care owed to others. Plaintiff, however, takes these statements
8 out of context. *McGarry*, *Giraldo* and *Peart* were personal injury
9 cases. In *McGarry* the plaintiff was injured at a skateboard park,
10 158 Cal. App. 4th at 987, in *Giraldo* the plaintiff was raped and
11 physically beaten, 168 Cal. App. 4th at 237, and in *Peart* the
12 plaintiff was injured in a watercraft collision, 119 Cal. App. 4th
13 at 65-67 & n.2. In each of these personal injury cases, the court
14 articulated the general duty of care owed by persons to avoid
15 engaging in conduct that poses an unreasonable risk of personal
16 injury to foreseeable plaintiffs. This case, by contrast, is *not*
17 a personal injury case. At most, Plaintiff alleges some sort of
18 generalized “harm” caused by various lending-related activities.
19 Plaintiff has cited no authority to support the application of the
20 general duty of care in personal injury cases - to avoid engaging
21 in conduct that poses an unreasonable risk of personal injury to
22 foreseeable plaintiffs - to the lending field of commercial law.
23 As far as the case law reveals, the concept of duty in the lending
24 context is more nuanced than the general duty of care owed in
25 personal injury cases.

26 “Under California law, a lender does not owe a borrower or
27 third party any duties beyond those expressed in the loan
28 agreement, except those imposed due to special circumstance.”

1 *Resolution Trust Corp. v. BVS Dev.*, 42 F.3d 1206, 1214 (9th Cir.
2 1994) (citing *Nymark v. Heart Fed. Sav. & Loan Ass'n*, 231 Cal. App.
3 3d 1089, 1096 (1991)); see also *Castaneda*, 2009 WL 4640673 at *4
4 (concluding that a loan servicer owed no duty of care to the
5 plaintiff). Special circumstances arise when the lender "actively
6 participates in the financed enterprise beyond the domain of the
7 usual money lender." *Wagner v. Benson*, 101 Cal. App. 3d 27, 35
8 (1980) (internal quotation marks omitted). Further, a trustee
9 under a deed of trust "is not a true trustee, and owes no fiduciary
10 obligations; [it] merely acts as a common agent for the trustor and
11 beneficiary of the deed of trust. [The trustee's] only duties are:
12 (1) upon default to undertake the steps necessary to foreclose the
13 deed of trust; or (2) upon satisfaction of the secured debt to
14 reconvey the deed of trust." *Wong v. Am. Servicing Co., Inc.*, 2:09-
15 CV-01506 FCD/DAD, 2009 WL 5113516, at *6 (E.D. Cal. Dec. 18, 2009)
16 (alterations in original) (internal quotation marks omitted).

17 The complaint fails to allege any facts that show special
18 circumstances, such as, that as a lender, Sierra Pacific actively
19 participated in the financed enterprise beyond the realm of the
20 usual money lender, or that Countrywide and MERS, in their
21 respective capacities as servicer and nominee of the trust,
22 actively participated in the financed enterprise "beyond the usual
23 practices associated with the lending business," *Wong*, 2009 WL
24 5113516 at *6. There are no special circumstances alleged. Under
25 the facts pled, Defendants owed Plaintiff no duty of care. There
26 is no basis for the negligence claim. The moving Defendants'
27 motions to dismiss are GRANTED, and the negligence claim is
28

1 DISMISSED WITH LEAVE TO AMEND.⁶

2 D. RESPA Claim

3 1. Countrywide

4 Plaintiff asserts a RESPA claim against Countrywide, alleging
5 that "Defendant Countrywide violated RESPA, 12 U.S.C. § 2605(e) (2),
6 by failing and refusing to provide a proper written explanation or
7 response to Plaintiff's QWR." (Doc. 14 at 15.) Countrywide argues
8 that this RESPA claim is subject to dismissal because the complaint
9 does not allege facts showing that what Plaintiff sent to
10 Countrywide constitutes a "qualified written request" under RESPA.
11 Countrywide contends that Plaintiff alleges, in conclusory fashion,
12 that he sent a "Qualified Written Request" to Countrywide without
13 alleging any facts to support this legal characterization of the
14 document. Countrywide is correct.

15 Section 2605 imposes certain disclosure obligations on loan
16 servicers who transfer or assume the servicing of a federally
17 related mortgage loan. 12 U.S.C. § 2605(b). A loan servicer also
18 has a statutory duty to respond to a borrower's inquiry or
19 "qualified written request." 12 U.S.C. § 2605(e). More
20 specifically, § 2605(e) (1) (A) requires a loan servicer "who
21 receives a *qualified written request* from the borrower (or an agent
22 of the borrower) *for information relating to the servicing of such*
23 *loan*" to provide the borrower with a written acknowledgment of
24 receipt within twenty days.

25 A "qualified written request" is a "written correspondence"

26
27 ⁶ At oral argument Plaintiff expressed some doubt about
28 whether he could amend the complaint to state a viable negligence
claim, but he still requested leave to amend. Rule 11 governs.

1 that (i) includes, or otherwise enables the servicer to identify,
2 the name and account of the borrower; and (ii) includes a statement
3 of the reasons for borrower's belief that the account is in error
4 or provides sufficient detail to the servicer regarding other
5 information sought by the borrower. § 2605(e)(1)(B)(i)-(ii). The
6 term "servicing" means "receiving any scheduled periodic payments
7 from a borrower pursuant to the terms of any loan . . . and making
8 the payments of principal and interest and such other payments with
9 respect to the amounts received from the borrower as may be
10 required pursuant to the terms of the loan." § 2605(i)(3).

11 After receiving a qualified written request under §
12 2605(e)(1)(A), no later than sixty days afterwards, the loan
13 servicer is required to respond by making appropriate corrections
14 to the borrower's account, if necessary, and, after conducting an
15 investigation, providing the borrower with a written clarification
16 or explanation. § 2605(e)(2).

17 Plaintiff alleges that on or about April 7, 2009, "a Qualified
18 Written Request was mailed to Defendant Countrywide" and it
19 "included a demand to rescind the loan under the TILA provisions."
20 (Doc. 14 at 7.) A demand to rescind the loan is a communication
21 about the validity of the loan and not its servicing. *Wong*, 2009 WL
22 5113516 at *7. Nothing in the complaint indicates that the written
23 correspondence to Countrywide concerned the servicing of
24 Plaintiff's loan, which is required to qualify the correspondence
25 as a "qualified written request" under RESPA. A conclusory
26 allegation that the correspondence was a "Qualified Written
27 Request" is insufficient. See *Twombly*, 550 U.S. at 555 (mere
28 "labels and conclusions" are insufficient to state a claim); see

1 also *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 683 (9th Cir.
2 2009).

3 Similarly insufficient is the complaint's conclusory
4 allegation that, apart from failing to respond to Plaintiff's
5 correspondence, "Defendants," including Countrywide, "engaged in a
6 pattern or practice of non-compliance with . . . § 2605." (Doc. 14
7 at 15.) There are no facts alleged to support this boilerplate
8 assertion. See *Wong*, 2009 WL 5113516 at *7 (dismissing a similar
9 claim).

10 The motion to dismiss the RESPA claim against Countrywide is
11 GRANTED and this claim is DISMISSED WITH LEAVE TO AMEND.

12 2. Sierra Pacific

13 Plaintiff also asserts a RESPA claim against Sierra Pacific.
14 The complaint alleges that Sierra Pacific "violated RESPA at the
15 time of closing of the Loan . . . by failing to correctly and
16 accurately comply with the disclosure requirements." (Doc. 14 at
17 15.) For several reasons, this claim fails.

18 First, it is entirely conclusory - there are no facts alleged
19 that explain what information, if any, Sierra Pacific failed to
20 provide at closing. *Blanco v. Am. Home Mortgage Servicing, Inc.*,
21 No. CIV. 2:09-CV-578 WBS DAD, 2009 WL 4674904, at *6 (E.D. Cal.
22 Dec. 4, 2009) (dismissing identical RESPA claim due to conclusory
23 allegation of illegality). Second, to the extent this claim really
24 asserts a violation of § 2603, which requires a standard disclosure
25 at or before "settlement," this section does not create a private
26 right of action. *Lingad v. Indymac Fed. Bank*, No. 2:09-cv-2347, ___
27 F. Supp. 2d ___, 2010 WL 347994, at *6 (E.D. Cal. Jan. 29, 2010);
28 *Olivier v. NDEX West, LLC*, No. 1:09-CV-00099 OWW GSA, 2009 WL

1 2486314, at *3 (E.D. Cal. Aug. 12, 2009). Third, the RESPA
2 disclosure provisions that do confer a private right of action do
3 not pertain to disclosures at a loan's closing. *Lingad*, 2010 WL
4 347994 at *7.

5 Plaintiff also alleges that "Defendants," including Sierra
6 Pacific, engaged in a pattern and practice of non-compliance with
7 the requirements of § 2605. This conclusory allegation is not
8 supported by any other factual allegations and is insufficient to
9 state a claim.

10 Sierra Pacific's motion to dismiss the RESPA claim against it
11 is GRANTED. At oral argument, Plaintiff indicated that he did not
12 believe he could amend the complaint to state a RESPA claim against
13 Sierra Pacific. The RESPA claim against Sierra Pacific is
14 DISMISSED WITHOUT LEAVE TO AMEND.

15 E. Fiduciary Duty Claim

16 Plaintiff asserts a claim against Sierra Pacific for breach of
17 fiduciary duty. Sierra Pacific argues that the complaint lacks any
18 facts to support the assertion that Sierra Pacific owed Plaintiff
19 a fiduciary duty.

20 "In order to plead a cause of action for breach of fiduciary
21 duty, there must be shown the existence of a fiduciary
22 relationship, its breach, and damage proximately caused by that
23 breach. The absence of any one of these elements is fatal to the
24 cause of action." *Brown v. Cal. Pension Adm'rs & Consultants, Inc.*,
25 45 Cal. App. 4th 333, 347-48 (1996) (internal quotation marks
26 omitted). "Absent special circumstances, a loan transaction is at
27 arms-length and there is no fiduciary relationship between the
28 borrower and lender." *Keen*, 2009 WL 3380454 at *7 (internal

1 quotation marks omitted). "The relationship between a lending
2 institution and its borrower-client is not fiduciary in nature. A
3 commercial lender is entitled to pursue its own economic interests
4 in a loan transaction." *Nymark*, 231 Cal. App. 3d at 1093 n.1
5 (internal citation omitted). "This right is inconsistent with the
6 obligations of a fiduciary . . . to subordinate its interests to
7 act on behalf of and for the benefit of another." *Id.*

8 Here, no special circumstances are pled. Nothing in the
9 complaint suggests that Sierra Pacific acted as anything other than
10 a typical lender. Plaintiff has failed to allege any facts that
11 give rise to a fiduciary relationship between Sierra Pacific and
12 Plaintiff. To the extent the complaint alleges that Sierra Pacific
13 breached a fiduciary duty owed to Plaintiff, this claim is
14 insufficiently pled and subject to dismissal.

15 Alternatively, Plaintiff appears to assert that Sierra
16 Pacific's liability is derived from an "agency" relationship
17 between certain individuals, including Norberg and Desilva, and
18 Plaintiff who acted as the principal. In turn, Norberg and Desilva
19 acted as agents for Sierra Pacific, these agents (not Sierra
20 Pacific) breached a fiduciary duty they owed to Plaintiff, and
21 Sierra Pacific is secondarily responsible for their conduct.

22 "A lender may . . . be secondarily liable through the actions
23 of a mortgage broker, who has a fiduciary duty to its
24 borrower-client, but only if there is an agency relationship
25 between the lender and the broker." *Gonzalez*, 2010 WL 144862 at
26 *13. The problem with this theory is that there are no facts pled
27 to plausibly suggest an agency relationship existed between Sierra
28

1 Pacific (the lender) and Norberb or Desilva. Absent such facts,
2 Sierra Pacific cannot be pursued on a secondary liability theory.
3 *Id.*

4 Sierra Pacific's motion to dismiss the fiduciary duty claim is
5 GRANTED, and this claim is DISMISSED WITHOUT LEAVE TO AMEND.⁷

6 F. Fraud Claim

7 Plaintiff asserts a fraud claim against Countrywide, MERS, and
8 Sierra Pacific. The moving defendants argue that Plaintiff's fraud
9 claim is insufficiently pled under Rule 9(b).

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

22 With respect to Countrywide, the complaint alleges that
23 Countrywide "misrepresented to Plaintiff that Countrywide has the
24 right to collect monies from Plaintiff on its behalf or on behalf
25

26 ⁷ At oral argument, when asked about leave to amend, Plaintiff
27 conceded that dismissal of this claim should be without leave to
28 amend.

1 of others when Defendant Countrywide had no legal right to collect
2 such monies." (*Id.* at 17.) As to MERS, the complaint alleges that
3 "MERS misrepresented to Plaintiff on the Deed of Trust that it is
4 a qualified beneficiary with the ability to assign or transfer the
5 Deed of Trust and/or the Note and/or substitute trustees under the
6 Deed of Trust." (*Id.* at 17-18.)

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

16 As to Sierra Pacific, the allegations in the complaint fail to
17 specify the "who, what, when, where, and how of the misconduct
18 charged," *Kearns*, 567 F.3d at 1124 (internal quotation marks
19 omitted). The complaint provides no particular details on *what*
20 specific role Sierra Pacific played in the "scheme" to
21 "fraudulently induce Plaintiff" to enter into his loan transaction,
22 or *when* and *where* the scheme occurred. See *Swartz*, 476 F.3d at 764-
23 65 (concluding that, in a fraud suit involving multiple defendants,
24 a plaintiff must "identif[y] the role" each defendant played "in
25 the alleged fraudulent scheme," informing "each defendant
26 separately of the allegations surrounding his alleged participation
27 in the fraud") (alteration in original) (internal quotation marks
28

1 omitted); *Vess*, 317 F.3d at 1106 (concluding that a fraudulent
2 conspiracy claim failed to satisfy Rule 9(b) because, among other
3 things, the pleading failed to "provide the particulars of when,
4 where, or how the alleged conspiracy occurred"). In addition, the
5 complaint fails to specify what particular misrepresentation was
6 involved in the fraudulent scheme. The complaint alleges that
7 certain agents "made false statements to Plaintiff regarding
8 material facts, including, but not limited to, interest rates,
9 financing options, availability of financing, and Plaintiff's
10 qualification for this loan . . . [which were] designed to
11 fraudulently induce Plaintiff to enter into his transaction." (Doc.
12 14 at 17.) The complaint, however, fails to specify what these
13 "false statements" were, when they were made, and how they were
14 false. Sierra Pacific, or any defendant, is not required to guess
15 what particular misrepresentation(s) are at issue in the fraud
16 claim. Under Rule 9(b), the obligation is on Plaintiff to spell it
17 out.

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

25 As to Countrywide, the allegation that Countrywide
26 "misrepresented to Plaintiff that Countrywide has the right to
27 collect monies from Plaintiff on its behalf or on behalf of others
28

1 when Defendant Countrywide had no legal right to collect such
2 monies," fails to satisfy Rule 9(b). No details are provided on
3 the specific content of the false representation, when the
4 statement was made, where it was made, and how it was false.

5 Finally, as to MERS, the complaint is also deficient with
6 respect to the allegation that (i) "MERS misrepresented to
7 Plaintiff on the Deed of Trust that it is a qualified beneficiary
8 with the ability to assign or transfer the Deed of Trust and/or the
9 Note and/or substitute trustees under the Deed of Trust" and (ii)
10 "MERS misrepresented that it followed the applicable legal
11 requirements to transfer the Note and Deed of Trust to subsequent
12 beneficiaries." Missing from the complaint are facts specifying
13 the particular verbal or written misrepresentations at issue, when
14 they were made, where they were made, and how or why they are
15 false. See *Morgera v. Countrywide Home Loans, Inc.*, No. 2:09-cv-
16 1476-MCE-GGH, 2010 WL 160348, at *6 (E.D. Cal. Jan. 11, 2010)
17 (dismissing same fraud claim as to MERS for failure to satisfy Rule
18 9(b) requirements); *Webb v. Indymac Bank Home Loan Servicing*, No.
19 CIV 2:09-2380 WBS DAD, 2010 WL 121084, at *4 (E.D. Cal. Jan. 7,
20 2010) (same).⁸

21 In addition, and apart from Rule 9(b), under California law,
22

23 ⁸ To the extent any fraud claim against Countrywide, MERS or
24 any defendant is tied to or involves the theory that possession of
25 the original promissory note is a prerequisite to the initiation of
26 non-judicial foreclosure, this theory lacks merit. See *Castaneda*,
27 2009 WL 4640673 at *7 ("Under California law, there is no
28 requirement for the production of the original note to initiate a
non-judicial foreclosure."); see also *Nool v. HomeQ Servicing*, 653
F. Supp. 2d 1047, 1053 (E.D. Cal. 2009).

1 resulting damage is a necessary element of fraud. At the pleading
2 stage, "the pleading must show a cause and effect relationship
3 between the fraud and damages sought; otherwise no cause of action
4 is stated." *Commonwealth Mortgage Assurance Co. v. Superior Court*,
5 211 Cal. App. 3d 508, 518 (1989). The complaint, as MERS correctly
6 argues, does not indicate how Plaintiff was damaged by MERS's
7 alleged misrepresentations. Instead, the complaint states, in
8 conclusory fashion, that Plaintiff was "harmed and suffered
9 damages" (Doc. 14 at 18) as a result of the fraud. Absent facts to
10 plausibly suggest a causal connection between the alleged fraud and
11 some damage to Plaintiff, the fraud claim is insufficiently pled.

12 The motions to dismiss the fraud claim are GRANTED, and this
13 claim is DISMISSED WITH LEAVE TO AMEND.

14 G. UCL Claim

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

22 The UCL prohibits unfair competition including "any unlawful,
23 unfair or fraudulent business act or practice." Cal. Bus. & Prof.
24 Code § 17200. Because the statute is written in the disjunctive,
25 it applies separately to business acts or practices that are (1)
26 unlawful, (2) unfair, or (3) fraudulent. See *Pastoria v. Nationwide*
27 *Ins.*, 112 Cal. App. 4th 1490, 1496 (2003). "Each prong of the UCL
28

1 is a separate and distinct theory of liability; thus, the 'unfair'
2 practices prong offers an independent basis for relief." *Kearns*,
3 567 F.3d at 1127.

4 As to the unlawful prong, the UCL incorporates other laws and
5 treats violations of those laws as unlawful business practices
6 independently actionable under state law. *Chabner v. United Omaha*
7 *Life Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000). As to the
8 "unfair" prong, "[a]n unfair business practice is one that either
9 'offends an established public policy' or is 'immoral, unethical,
10 oppressive, unscrupulous or substantially injurious to consumers.'" *McDonald v. Coldwell Banker*, 543 F.3d 498, 506 (9th Cir. 2008)
11 (quoting *People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal.
12 App. 3d 509, 530 (1984)). As to the fraudulent prong, "fraudulent
13 acts are ones where members of the public are likely to be
14 deceived." *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137,
15 1151-52 (9th Cir. 2008).

17 Plaintiff's UCL claim has several deficiencies. First, to the
18 extent Plaintiff asserts a UCL claim based on a violation of other
19 law, his complaint fails to state a claim for a violation of TILA,
20 RESPA, or any other law. Accordingly, to the extent the UCL claim
21 is predicated on the violation of other law, it is insufficiently
22 pled. Second, to the extent Plaintiff seeks to impose liability on
23 Countrywide, MERS, or Sierra Pacific for "unfair" business
24 practices, the complaint fails to indicate which particular acts or
25 practices Plaintiff is relying upon to advance this claim, or what
26 acts or practices each defendant did which constitute "unfair" acts
27 or practices. Third, to the extent Plaintiff asserts a UCL claim

1 that is based on or grounded in fraud, it must meet the
2 requirements of Rule 9(b), *Kearns*, 567 F.3d at 1124-27, *Vess*, 317
3 F.3d at 1103-04, which it does not. The complaint fails to specify
4 what particular role each defendant played in the fraudulent
5 conduct or scheme, when and where the scheme occurred, or details
6 on the specific misrepresentation involved in the fraudulent
7 scheme.

8 The motions to dismiss the UCL are GRANTED, and this claim is
9 DISMISSED WITH LEAVE TO AMEND.

10 H. Breach of Contract Claim

11 The complaint asserts a claim for breach of contract against
12 Sierra Pacific. As alleged, "Plaintiff entered into an agreement
13 with Defendant[] Sierra Pacific . . . whereby [it] promised to
14 provide Plaintiff with an affordable loan." (Doc. 14 at 19.)
15 Sierra Pacific allegedly breached this agreement in a number of
16 respects.

17 To state a claim for breach of contract under California law,
18 Plaintiff must allege: (1) the existence of a contract; (2) his
19 performance or excuse for non-performance of the contract; (3)
20 Sierra Pacific's breach of the contract; and (4) resulting damage.
21 *Harris v. Rudin, Richman & Appel*, 74 Cal. App. 4th 299, 307 (1999).

22 Plaintiff's breach of contract claim against Sierra Pacific is
23 deficient in at least two respects. First, the complaint lacks any
24 facts to plausibly suggest that a contract existed between *Sierra*
25 *Pacific* and Plaintiff to provide Plaintiff with an "affordable
26 loan."

27 Plaintiff alleges that Sierra Pacific entered into a loan
28

1 agreement with Plaintiff and the "terms of the loan were
2 memorialized in a Promissory Note, which was secured by a Deed of
3 Trust." (Doc. 14 at 7.) The complaint, however, does not allege
4 that among the terms memorialized in the Promissory Note was a
5 written provision to provide Plaintiff with an "affordable" loan.
6 In addition, Plaintiff alleges that before the loan was
7 memorialized, he spoke with Defendant Desilva who was a "loan
8 officer for Defendant Financial [Advantage Inc.]." (Doc. 14 at 6.)
9 Desilva "advised" Plaintiff that Desilva could get Plaintiff "the
10 'best deal' and the 'best interest rates' available on the market."
11 (Doc. 14 at 6.) Even assuming that Desilva made these statements,
12 and that these statements support the inference that Desilva
13 offered to provide Plaintiff with an "affordable loan," there are
14 no facts pled in the complaint to suggest that Desilva was an
15 employee or agent of *Sierra Pacific* or that Sierra Pacific was even
16 aware of Desilva's statements and agreed to them. The complaint
17 lacks any facts to suggest that Sierra Pacific, whether in writing
18 or orally, ever entered into a contract with Plaintiff to provide
19 him an "affordable loan." See *Lingad*, 2010 WL 347994 at *9
20 (dismissing breach of contract claim with same allegations).

21 Second, Plaintiff's breach of contract claim against Sierra
22 Pacific also fails because the alleged agreement to provide
23 Plaintiff with "affordable loan" is too vague and indefinite to
24 form a contract. "To form a contract, an offer must be
25 sufficiently definite ... that the performance promised is
26 reasonably certain." *Alexander v. Codemasters Group Ltd.*, 104 Cal.
27 App. 4th 129, 141 (2002) (internal quotation marks omitted). In
28

1 the lending context, "[a] loan commitment is not binding on the
2 lender unless it contains all of the material terms of the loan,"
3 which "include the identity of the lender and borrower, the amount
4 of the loan, and the terms for repayment." *Peterson Dev. Co. v.*
5 *Torrey Pines Bank*, 233 Cal. App. 3d 103, 115 (1991) (alteration in
6 original) (internal quotation marks omitted).

7 A purported agreement to provide an "affordable loan" is not
8 sufficiently definite that the performance promised is reasonably
9 certain. Even if it were tantamount to a loan commitment, it lacks
10 the material terms necessary to form an enforceable contract. The
11 alleged commitment to provide an "affordable loan" is too vague and
12 uncertain to form a contract between Plaintiff and Sierra Pacific.
13 See *Blanco*, 2009 WL 4674904 at *7 (analyzing the same alleged
14 promise to provide an "affordable loan" and concluding "[s]uch a
15 vague promise is not sufficient to show the existence of a
16 contract"); see also *See Hardy v. Indymac Federal Bank*, __ F.R.D __,
17 2009 WL 2985446, at *5 (E.D. Cal. Sept. 15, 2009).

18 Sierra Pacific's motion to dismiss the breach of contract
19 claim against it is GRANTED WITH LEAVE TO AMEND.

20 I. Implied Covenant Claim

21 Plaintiff asserts a claim against Sierra Pacific for breach of
22 the implied covenant of good faith and fair dealing. The implied
23 covenant of good faith and fair dealing exists in every contract.
24 The implied covenant "is aimed at making effective the agreement's
25 promises." *Kransco v. Am. Empire Surplus Lines Ins. Co.*, 23 Cal.4th
26 390, 400 (2000) (internal quotation marks omitted). "Broadly
27 stated, that covenant requires that neither party do anything which
28

1 will deprive the other of the benefits of the agreement." *Freeman*
2 *& Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85, 91 (1995)
3 (internal quotation marks omitted). The implied covenant
4 "prevent[s] a contracting party from engaging in conduct which
5 (while not technically transgressing the express covenants)
6 frustrates the other party's rights to the benefits of the
7 contract." *Racine & Laramie, Ltd. v. Dep't of Parks & Recreation*,
8 11 Cal. App. 4th 1026, 1031-32 (1992) (internal quotation marks
9 omitted).

10 The implied covenant "does not extend beyond the terms of the
11 contract at issue." *Poway Royal Mobilehome Owners Ass'n v. City of*
12 *Poway*, 149 Cal. App. 4th 1460, 1477 (2007). Instead, the "implied
13 covenant of good faith and fair dealing is limited to assuring
14 compliance with the express terms of the contract." *Pasadena Live,*
15 *LLC v. City of Pasadena*, 114 Cal. App. 4th 1089, 1094 (2004)
16 (internal quotation marks omitted). "The prerequisite for any
17 action for breach of the implied covenant of good faith and fair
18 dealing is the existence of a contractual relationship between the
19 parties" *Smith v. City & County of San Francisco*, 225 Cal.
20 App. 3d 38, 49 (1990). "The implied covenant of good faith and
21 fair dealing rests upon the existence of some specific contractual
22 obligation" and there "is no obligation to deal fairly or in good
23 faith absent an existing contract." *Racine & Laramie, Ltd.*, 11 Cal.
24 App. 4th at 1031-32.

25 Here, as Sierra Pacific correctly argues, Plaintiff's implied
26 covenant claim is insufficiently pled for two reasons. First, the
27 complaint does not allege or identify what underlying contract
28

1 between Sierra Pacific and Plaintiff forms the basis for this
2 claim. Instead, the complaint merely alleges that a duty of good
3 faith and fair dealing was "implied by law into the contract at
4 issue" (Doc. 14 at 20) without ever identifying that contract. To
5 the extent the contract at issue is the alleged promise to provide
6 an "affordable loan," this vague and indefinite commitment cannot
7 supply the predicate contract between Sierra Pacific and Plaintiff.

8 Second, the implied covenant claim is also deficient in that
9 it fails to identify any acts that *Sierra Pacific* committed which
10 allegedly constitute a breach of the implied covenant. To the
11 extent the contract at issue is the loan agreement memorialized in
12 the Promissory Note, Plaintiff has not alleged any conduct by
13 Sierra Pacific that frustrated Plaintiff's rights to the benefits
14 of any express provision in that contract. See *Lingad*, 2010 WL
15 347994 at *10 (concluding same implied covenant claim failed
16 because Plaintiff had not "alleged what contract form[ed] the basis
17 of [the] claim; nor . . . identified any express provision which
18 ha[d] been frustrated by [defendant's] conduct").

19 Sierra Pacific's motion to dismiss the implied covenant claim
20 against it is GRANTED WITHOUT LEAVE TO AMEND.⁹

21
22 V. CONCLUSION

23 For the reasons stated:

24 1. As to the TILA claim for damages, Sierra Pacific's motion
25 to dismiss is GRANTED, and this claim is DISMISSED WITH LEAVE TO

26 _____
27 ⁹ At oral argument, Plaintiff agreed that dismissal of this
28 claim should be without leave to amend.

1 AMEND. Plaintiff shall have one opportunity to allege what facts
2 were hidden that prevented him from discovering his claim, and how
3 those hidden facts relate to the TILA violations Sierra Pacific
4 allegedly committed.

5 2. As to the TILA claim for rescission, Sierra Pacific's
6 motion to dismiss is GRANTED, and this claim is DISMISSED WITH
7 LEAVE TO AMEND.

8 3. As to the RFDCPA claims against Countrywide and Sierra
9 Pacific, the motions to dismiss are GRANTED, and these claims are
10 DISMISSED WITH LEAVE TO AMEND.

11 4. As to the negligence claims against Countrywide, MERS,
12 and Sierra Pacific, the motions to dismiss are GRANTED, and these
13 claims are DISMISSED WITH LEAVE TO AMEND.

14 5. As to the RESPA claim against Countrywide, its motion to
15 dismiss is GRANTED, and this claim is DISMISSED WITH LEAVE TO
16 AMEND.

17 6. As to the RESPA claim against Sierra Pacific, its motion
18 to dismiss is GRANTED, and this claim is DISMISSED WITHOUT LEAVE TO
19 AMEND.

20 7. As to the fiduciary duty claim against Sierra Pacific,
21 the motion to dismiss is GRANTED, and this claim is DISMISSED
22 WITHOUT LEAVE TO AMEND.

23 8. As to the fraud claims against Countrywide, MERS, and
24 Sierra Pacific, the motions to DISMISS are GRANTED, and these
25 claims are DISMISSED WITH LEAVE TO AMEND.

26 9. As to the UCL claims against Countrywide, MERS, and
27 Sierra Pacific, the motions to DISMISS are GRANTED, and these
28

1 claims are DISMISSED WITH LEAVE TO AMEND.

2 10. As to the breach of contract claim against Sierra
3 Pacific, the motion to dismiss is GRANTED, and this claim is
4 DISMISSED WITH LEAVE TO AMEND.

5 11. As to the implied covenant claim against Sierra Pacific,
6 the motion to dismiss is GRANTED, and this claim is DISMISSED
7 WITHOUT LEAVE TO AMEND.

8 Any amended complaint is due within thirty (30) days from the
9 date of electronic service of this Memorandum Decision. Any
10 responsive pleading is due within thirty (30) days from the date of
11 electronic service of any such amended complaint.

12 Defendants shall submit a form of order consistent with, and
13 within five (5) days following electronic service of, this
14 Memorandum Decision.

15 IT IS SO ORDERED.

16 Dated: February 16, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE