

1 **BACKGROUND**¹

2 Mr. Hardy’s claims arise from his refinance of a loan secured by real property commonly known
3 as 3304 Cardinal Flower Way in Modesto, California (“property”). In April 2006, Mr. Gardella, a loan
4 officer employed by ABHL, approached Mr. Hardy and “solicited him to finance” the property. Mr.
5 Gardella advised Mr. Hardy that he could get him the “best deal” and the “best interest rates” available
6 on the market. Although Mr. Hardy wanted a 30-year fixed rate loan, Mr. Gardella advised Mr. Hardy
7 that the only loan available to him was an adjustable rate loan. Mr. Gardella advised Mr. Hardy that
8 interest rate on this adjustable rate loan “would be low and affordable.”

9 Mr. Gardella sold Mr. Hardy a “Pick-a-Pay” loan that carried a 6.875% initial interest rate that
10 adjusted to an almost 10% interest rate, “in a time that interest rates were falling to the lowest point in
11 history.” While there was an option to pay a 1% rate on a negative amortizing loan, Mr. Hardy was not
12 told of the option. To qualify for the loan, Mr. Hardy provided Mr. Gardella with documentation of his
13 current income. At the time of the loan, Mr. Hardy was a branch manager for the Plus Group, Inc., and
14 made approximately \$3200 per month.

15 Mr. Gardella told Mr. Hardy that “if the loan ever became unaffordable, [Mr. Hardy] would
16 simply refinance it into an affordable loan.” Mr. Gardella and ABHL failed to provide Mr. Hardy with
17 a copy of the loan application. Mr. Hardy now believes that the loan application Mr. Gardella submitted
18 contained false information to inflate Mr. Hardy’s income and assets to qualify for the loan.

19 In June 2006, Mr. Hardy completed the loan on the property. Defendant Stearns Lending Inc.
20 was the lender for the loan. The deed of trust identified MERS as “nominee for lender and lenders
21 successors and assigns, and the beneficiary.” The current payments for this loan exceed \$3700 per
22 month.

23 On July 24, 2009, Mr. Hardy filed his FAC to allege ten causes of action against defendants
24 MERS, ABHL, Mr. Gardella, ,INDYMAC Federal Bank, Sterns Lending, Inc., and Quality Loan Service
25 Corp. Specific to the instant motions to dismiss, Mr. Hardy alleges the following causes of action
26 against MERS and Americas Best:

27 ¹The facts from the complaint are taken as true. *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.
28 1990).

- 1 3. Negligence (against all defendants)
- 2 4. Violation of Real Estate Settlement Procedures Act, 12 U.S.C. §2605 (“RESPA”) (against Americas Best);
- 3 6. Fraud (against all defendants)
- 4 7. Violation of California Business and Professions Code §17200 (against all defendants);
- 5 8. Breach of Contract (against Mr. Gardella)
- 6 9. Breach of Implied Covenant of Good Faith and Fair Dealing (against all defendants)

7 Americas Best moved to dismiss Mr. Hardy’s fourth and sixth through ninth causes of action and
8 to strike language in the complaint that refers to Mr. Hardy’s prayer for recovery of attorneys’ fees and
9 punitive damages. MERS moved to dismiss Mr. Hardy’s third, sixth, seventh, and ninth causes of
10 action. Mr. Hardy opposed MERS’ motion to dismiss on August 24, 2009. Mr. Hardy opposed
11 Americas Best’s motion to dismiss and motion to strike on August 28, 2009. MERS replied on
12 September 3, 2009. Americas Best replied on September 8, 2009. This Court found these motions
13 suitable for a decision without oral argument, vacated the September 10 and September 15, 2009
14 hearings pursuant to Local Rule 78-230(h), and issues the following ruling.

15 DISCUSSION

16 **I. Pleading And Fed. R. Civ. P. 12(b)(6) Motion Standards**

17 MERS and Americas Best attack Mr. Hardy’s claims as incognizable and lacking necessary
18 elements and factual allegations, pursuant to Fed. R. Civ. P. 12(b)(6). A motion to dismiss pursuant to
19 Fed R. Civ. P. 12(b)(6) is a challenge to the sufficiency of the pleadings set forth in the complaint. A
20 Fed. R. Civ. P. 12(b)(6) dismissal is proper where there is either a “lack of a cognizable legal theory”
21 or “the absence of sufficient facts alleged under a cognizable legal theory.” *Balisteri v. Pacifica Police*
22 *Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). In considering a motion to dismiss for failure to state a claim,
23 the court generally accepts as true the allegations of the complaint in question, construes the pleading
24 in the light most favorable to the party opposing the motion, and resolves all doubts in the pleader's
25 favor. *Lazy Y. Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

26 To survive a motion to dismiss, the plaintiff must allege “enough facts to state a claim to relief
27 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1974 (2007).
28 “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw
the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129
S. Ct. 1937, 1949 (2009). “The plausibility standard is not akin to a ‘probability requirement,’ but it

1 asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550
2 U.S. at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability,
3 it ‘stops short of the line between possibility and plausibility for entitlement to relief.’” *Id.* (quoting
4 *Twombly*, 550 U.S. at 557).

5 “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
6 allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more
7 than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
8 *Twombly*, 550 U.S. 554,127 S. Ct. 1955, 1964-65 (internal citations omitted). Thus, “bare
9 assertions...amounting to nothing more than a ‘formulaic recitation of the elements’ ...are not entitled to
10 an assumption of truth.” *Iqbal*, 129 S. Ct. at 1951 (quoted in *Moss v. United States Secret Serv.*, 2009
11 U.S. App. LEXIS 15694, *14 (9th Cir. 2009)). A court is “free to ignore legal conclusions, unsupported
12 conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual
13 allegations.” *Farm Credit Services v. American State Bank*, 339 F.3d 765, 767 (8th Cir. 2003) (citation
14 omitted).

15 Moreover, a court “will dismiss any claim that, even when construed in the light most favorable
16 to plaintiff, fails to plead sufficiently all required elements of a cause of action.” *Student Loan*
17 *Marketing Ass’n v. Hanes*, 181 F.R.D. 629, 634 (S.D. Cal. 1998). In practice, “a complaint . . . must
18 contain either direct or inferential allegations respecting all the material elements necessary to sustain
19 recovery under some viable legal theory.” *Twombly*, 550 U.S. at 562, 127 S.Ct. at 1969 (quoting *Car*
20 *Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

21 With these standards in mind, this Court turns to the defendants challenges to Mr. Hardy’s
22 claims.

23 **II. Americas Best’s Motion to Dismiss**

24 **A. RESPA**

25 Americas Best moved to dismiss Mr. Hardy’s (fourth) RESPA cause of action, arguing that Mr.
26 Hardy failed to state a claim pursuant to 12 U.S.C. §2605 and Mr. Hardy’s RESPA claim is barred by
27 the statute of limitations. In opposition, Mr. Hardy points out that his RESPA allegations against
28 Americas Best fall within 12 U.S.C. §2607, pertaining to RESPA disclosure requirements at the time

1 of closing. Mr. Hardy further points out that this action was filed timely. Americas Best apparently
2 concedes these points, as it fail to address Mr. Hardy’s arguments in reply. Accordingly, Americas
3 Best’s motion to dismiss Mr. Hardy’s (fourth) RESPA cause of action is denied.

4 **B. Fraud**

5 Americas Best moves to dismiss Mr. Hardy’s (sixth) fraud cause of action. The elements of a
6 California fraud claim are: (1) misrepresentation (false representation, concealment or nondisclosure);
7 (2) knowledge of the falsity (or “scienter”); (3) intent to defraud, i.e., to induce reliance; (4) justifiable
8 reliance; and (5) resulting damage. *Lazar v. Superior Court*, 12 Cal.4th 631, 638, 49 Cal.Rptr.2d 377
9 (1996).

10 Mr. Hardy must plead allegations of fraud with particularity. Fed. R. Civ. P. 9(b) requires that
11 “the circumstances constituting fraud or mistake shall be stated with particularity.” This heightened
12 pleading standard “requires a pleader of fraud to detail with particularity the time, place, and manner of
13 each act of fraud, plus the role of each defendant in each scheme.” *Lancaster Cmty. Hosp. v. Antelope*
14 *Valley Dist.*, 940 F.2d 397, 405 (9th Cir. 1991). Thus, “allegations of fraud must be specific enough to
15 give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so
16 that they can defend against the charge and not just deny that they have done anything wrong.” *Bly-*
17 *Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (citation and internal quotations omitted).

18 Fed. R. Civ. P. 9(b)’s heightened pleading standard “is not an invitation to disregard Rule 8’s
19 requirement of simplicity, directness, and clarity” and “has among its purposes the avoidance of
20 unnecessary discovery.” *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996). “A pleading is
21 sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can
22 prepare an adequate answer from the allegations.” *Neubronner v. Milken*, 6 F.3d 666, 671-672 (9th Cir.
23 1993) (internal quotations omitted; citing *Gottreich v. San Francisco Investment Corp.*, 552 F.2d 866,
24 866 (9th Cir. 1997)). The Ninth Circuit Court of Appeals has explained:

25 Rule 9(b) requires particularized allegations of the circumstances *constituting* fraud. The
26 time, place and content of an alleged misrepresentation may identify the statement or the
27 omission complained of, but these circumstances do not “constitute” fraud. The
28 statement in question must be false to be fraudulent. Accordingly, our cases have
consistently required that circumstances indicating falseness be set forth. . . . [W]e [have]
observed that plaintiff must include statements regarding the time, place, and *nature* of
the alleged fraudulent activities, and that “mere conclusory allegations of fraud are

1 insufficient.” . . . The plaintiff must set forth what is false or misleading about a
2 statement, and why it is false. In other words, the plaintiff must set forth an explanation
as to why the statement or omission complained of was false or misleading. . . .

3 In certain cases, to be sure, the requisite particularity might be supplied with great
4 simplicity.

5 *In Re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541, 1547-1548 (9th Cir. 1994) (en banc) (italics in
6 original) *superseded by statute on other grounds as stated in Marksman Partners, L.P. v. Chantal*
7 *Pharm. Corp.*, 927 F.Supp. 1297 (C.D. Cal. 1996); *see Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir.
8 1997) (“fraud allegations must be accompanied by “the who, what, when, where, and how” of the
9 misconduct charged).

10 As to multiple fraud defendants, a plaintiff “must provide each and every defendant with enough
11 information to enable them ‘to know what misrepresentations are attributable to them and what
12 fraudulent conduct they are charged with.’” *Pegasus Holdings v. Veterinary Centers of America, Inc.*,
13 38 F.Supp.2d 1158, 1163 (C.D. Ca. 1998) (quoting *In re Worlds of Wonder Sec. Litig.*, 694 F.Supp.
14 1427, 1433 (N.D. Ca. 1988)).

15 Americas Best contends that Mr. Hardy fails to set forth specific allegations of fraud. Mr. Hardy
16 counters that the FAC is full of specific allegations that Americas Best committed fraud, including the
17 following: Mr. Hardy was induced by Mr. Gardella and Americas Best into accepting a predatory
18 mortgage loan with unfair and deceptive terms on June 8, 2006 (FAC ¶¶25-36); Mr. Gardella represented
19 that he could get Mr. Hardy the “best deal” and the “best interest rates” available on the market, and that
20 he would get Mr. Hardy a fixed rate loan. (FAC ¶25); Mr. Gardella’s representations were untrue
21 because he and Americas Best sold Mr. Hardy a “Pick-a-Pay” loan that carried an interest rate of 6.875%
22 and would adjust to almost 10% (FAC ¶26); Americas Best sold Mr. Hardy a loan that carried payments
23 that to date have adjusted to over \$3,700 per month, well exceeding underwriting guidelines and Mr.
24 Hardy’s income (FAC ¶31); Americas Best obtained Mr. Hardy’s loan based on loan information that
25 contained, without Mr. Hardy’s knowledge or consent, false information and inflated income and asset
26 figured (FAC ¶30); Americas Best provided false information on Mr. Hardy’s loan application despite
27 Mr. Hardy having provided Americas Best with full and accurate accounting and documentation of his
28 income (FAC ¶29); America’s Best failed to inform Mr. Hard about the negative amortization of his loan

1 and failed to provide Mr. Hardy with requisite RESPA disclosures and copies of the loan
2 documents prior to signing (FAC ¶¶27, 32, 34, 87, 89); These facts were hidden from Mr. Hardy (FAC
3 ¶35). Based on these allegations, this Court finds that Mr. Hardy has pled his (fourth) fraud cause of
4 action against Americas Best with specificity. Accordingly, Americas Best's motion to dismiss this
5 cause of action is denied.

6 **C. California's UCL**

7 Mr. Hardy's (seventh) cause of action is based on California's Unfair Competition Law ("UCL"),
8 California Business and Professions Code section 17200, et seq. This statutory scheme prohibits
9 "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code section 17200. A cause
10 of action under this section must be based on some predicate act involving a violation of some other
11 statute or law. *Cel-Tech Communications v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163 (1999). Mr. Hardy
12 alleges that Americas Best has engaged in unfair and fraudulent business practices by, inter alia,
13 falsifying loan applications to qualify him as a borrower and deceptively induced Mr. Hardy into a loan
14 with exceedingly unfavorable terms. Americas Best appears to concede in reply that Mr. Hardy states
15 a UCL claim. Accordingly, Americas Best's motion to dismiss this claim is denied.

16 **D. Breach of Contract**

17 To state a claim for breach of contract under California law, Mr. Hardy must allege: (1) the
18 existence of a contract; (2) Mr. Hardy's performance or excuse for non-performance of the contract; (3)
19 defendants' breach of the contract; and (4) resulting damage. *Armstrong Petroleum Corp. v. Tri-Valley*
20 *Oil and Gas Company*, 116 Cal. App. 4th 1375, 1390 (2004).

21 Mr. Hardy's (eighth) breach of contract cause of action alleges that Mr. Gardella entered into an
22 agreement with Mr. Hardy whereby Mr. Hardy promised to provide Mr. Hardy with an affordable loan.
23 Mr. Hardy further alleges that he wanted a fixed-rate loan. However, Americas Best failed to provide
24 Mr. Hardy with a loan that he desired.

25 Mr. Hardy fails to allege the existence of a contract. Although Mr. Hardy asserts that providing
26 a fixed-rate loan was part of the contract, Mr. Hardy's FAC includes an allegation that Mr. Gardella
27 advised Mr. Hardy that the only loan program available for him was an adjustable loan (FAC ¶26). In
28 addition, Mr. Gardella's "promise" to provide an "affordable loan" is vague, and provides no

1 consideration in exchange for such promise. Thus, Mr. Hardy’s allegations amount to an unenforceable
2 promise, not an enforceable contract. Accordingly, Mr. Hardy’s breach of contract claim is dismissed
3 against Americas Best.

4 **E. Breach of Implied Covenant of Good Faith and Fair Dealing**

5 Mr. Hardy’s ninth claim alleges that defendants breached the covenant of good faith and fair
6 dealing. “The prerequisite for any action for breach of the implied covenant of good faith and fair
7 dealing is the existence of a contractual relationship between the parties, since the covenant is an implied
8 term in the contract.” *Smith v. City and County of San Francisco*, 225 Cal.App.3d 38, 49, 275 Cal.Rptr.
9 17 (1990). The “implied covenant of good faith and fair dealing is limited to assuring compliance with
10 the express terms of the contract, and cannot be extended to create obligations not contemplated by the
11 contract.” *Pasadena Live, LLC v. City of Pasadena*, 114 Cal.App.4th 1089, 1093-1094, 8 Cal.Rptr.3d
12 233 (2004) (citation omitted.) “Without a contractual relationship, [a plaintiff] cannot state a cause of
13 action for breach of the implied covenant.” *Smith*, 225 Cal.App.3d at 49, 275 Cal.Rptr. 17.

14 As discussed above, Mr. Hardy failed to establish the existence of a contract between Mr. Hardy
15 and Americas Best. Because Mr. Hardy cannot state a cause of action for a breach of the implied
16 covenant without a contractual relationship, this claim is dismissed against Americas Best.

17 **III. MERS’ Motion to Dismiss**

18 **A. Specific Allegations as to MERS**

19 Mr. Hardy asserts that the “current financial crisis in the United States can be directly traced to
20 the creation and operation of Defendant MERS.” To understand the basis of Mr. Hardy’s claim, and how
21 its relevant to the instant action, a brief explanation of MERS is in order. “MERS is a national electronic
22 registration and tracking system that tracks the beneficial ownership interest and servicing rights in
23 mortgage loans.” *In re Hawkins*, 2009 Bankr. LEXIS 877, 5 (D. Nev. 2009). “Created by the real estate
24 finance industry, MERS eliminates the need to prepare and record assignments when trading residential
25 and commercial mortgage loans.” *Id.* MERS operates in the following manner:

26 [L]oans are registered to a “MERS Member” who has entered into the MERS
27 Membership Agreement. MERS Members enter into a contract with MERSCORP to
28 electronically register and track beneficial ownership interests and servicing rights in
MERS registered mortgage loans. MERS Members agree to appoint MERS, which
MERSCORP wholly owns, to act as their common agent, or nominee, and to name

1 MERS as the lienholder of record in a nominee capacity on all recorded security
2 instruments relating to the loans registered on the MERS System. When a promissory
note is sold by the original lender to others, the various sales of the notes are tracked on
the MERS System.

3 *Id.*

4 Mr. Hardy contends that MERS “served nothing more than a shell or front corporation for its
5 ‘Members’” and MERS’ “primary function was to hide these toxic and fraudulent loans from borrowers,
6 the government, and the investors in the mortgage-backed securities.” “After MERS was created, it was
7 impossible for a borrower, their attorney, the courts, the government, or anyone else to identify the actual
8 beneficial owner of any particular loans or the property which was the collateral securing the loan.” Mr.
9 Hardy asserts that after the creation of MERS, “from the moment the deed of trust was executed by the
10 borrower, there was no true ‘beneficiary’ under the deed of trust.” As a result, “all subsequent
11 assignments of any interest in the loan and deed of trust were known by the MERS Members...to be
12 fraudulent and unlawful.” In addition, “the servicing rights to these predatory loans” were “transferred
13 to other predatory entities...for the specific purpose of forcing the borrower to refinance the loan, taking
14 much of the equity through high fees and prepayment penalties, or ultimately foreclose on the residence
15 and take the borrowers home, without any right to do so.”

16 In this action, MERS was included on Mr. Hardy’s deed of trust as both nominee and beneficiary.
17 Mr. Hardy asserts that the “nominee” status is a “legal fiction” and it is “unclear exactly what
18 interest...MERS acquired in its capacity as ‘nominee.’” Mr. Hardy similarly attacks MERS’ status as
19 beneficiary. Mr. Hardy contends that MERS’ active management of his loan caused his property to be
20 noticed for a Trustee’s Sale. Mr. Hardy maintains that none of the defendants, including MERS, had
21 the right to assign the deed of trust to Indymac and, as a result, Indymac had no right to file a notice of
22 sale.

23 **B. Negligence**

24 The FAC’s (second) negligence claim is asserted against all defendants. “The elements of a
25 cause of action for negligence are (1) a legal duty to use reasonable care, (2) breach of that duty, and (3)
26 proximate [or legal] cause between the breach and (4) the plaintiff’s injury.” *Mendoza v. City of Los*
27 *Angeles*, 66 Cal.App.4th 1333, 1339, 78 Cal.Rptr.2d 525 (1998) (citation omitted). “The existence of
28 a legal duty to use reasonable care in a particular factual situation is a question of law for the court to

1 decide.” *Vasquez v. Residential Investments, Inc.*, 118 Cal.App.4th 269, 278, 12 Cal.Rptr.3d 846 (2004)
2 (citation omitted).

3 Mr. Hardy argues that MERS owed a duty to Mr. Hardy to perform its administrative duties of
4 recording Mr. Hardy’s note and deed in such a manner as to not cause him harm. Mr. Hardy contends
5 that MERS breached this duty when, without proper authority, it assigned Mr. Hardy’s note and deed
6 of trust to Indymac, without any right to do so. Mr. Hardy charges that this negligence caused him harm,
7 in that it may lead to the loss of his property through foreclosure.

8 This Court is not persuaded that MERS owed a duty to Mr. Hardy. Mr. Hardy has pointed to no
9 authority to establish that MERS owes a duty of care to the mortgagors for the deeds of trust held in its
10 institution. Moreover, though MERS was not the lending institution or trustee, the Court finds guidance
11 in California state law in those areas. Generally, barring an assumption of duty or a special relationship,
12 "financial institutions owe no duty of care to a borrower when the institution's involvement in the loan
13 transaction does not exceed the scope of its conventional role as a mere lender of money." *Nymark v.*
14 *Heart Fed. Sav. & Loan Ass'n*, 231 Cal. App. 3d 1089, 1096, 283 Cal. Rptr. 53 (1991). Although
15 California law imposes a fiduciary duty on a mortgage broker for the benefit of the borrower, no such
16 duty is imposed on a lender. *UMET Trust v. Santa Monica Med. Inv. Co.*, 140 Cal.App.3d 864, 872-73,
17 189 Cal. Rptr. 922 (1983). Similarly, the trustee under a deed of trust "is not a true trustee, and owes
18 no fiduciary obligations; [it] merely acts as a common agent for the trustor and beneficiary of the deed
19 of trust...[T]here is no authority for the proposition that a trustee under a deed of trust owes any duties
20 with respect to exercise of the power of sale beyond those specified in the deed and the statutes."
21 *Heritage Oaks Partners v. First American Title Ins. Co.*, 155 Cal.App.4th 339, 345, 66 Cal.Rptr.3d 510
22 (2007). MERS, as nominee beneficiary, is more similar to the lending institution or trustee than
23 mortgage broker. Accordingly, absent an assumption of duty or special relationship, MERS owed no
24 duty of care to Mr. Hardy. Accordingly, Mr. Hardy’s negligence claim against MERS is dismissed.

25 **B. Fraud**

26 As set forth above, the elements of fraud are: (1) misrepresentation (false representation,
27 concealment or nondisclosure); (2) knowledge of the falsity (or “scienter”); (3) intent to defraud, i.e.,
28 to induce reliance; (4) justifiable reliance; and (5) resulting damage. *Lazar*, 12 Cal.4th 631, 638. Mr.

1 Hardy contends that MERS committed fraud by falsely representing its interest (or lack thereof) in Mr.
2 Hardy's property. In addition, according to Mr. Hardy, MERS' assignment of Mr. Hardy's note was part
3 of a pattern of unlawful activity to conspire with others to utilize the non-judicial foreclosure structure
4 of California law to take Mr. Hardy's property unlawfully.

5 MERS argues that Mr. Hardy has failed to set forth allegations in sufficient detail to satisfy Fed.
6 R. Civ. P. 9(b) pleading standards. MERS points out that the details of Mr. Hardy's fraudulent
7 conspiracy, while explained in his opposition, are not contained in the FAC. In the FAC, Mr. Hardy
8 alleges that MERS is a nominee for the Lender, is not licenced to be and/or act as a nominee or
9 beneficiary, and is not permitted to act in such a capacity. These allegations alone do not constitute
10 allegations of fraud, and do not amount to the fraudulent scheme as set forth in Mr. Hardy's opposition.
11 Based on the insufficiency of pleading, Mr. Hardy's (sixth) claim of fraud against MERS fails.

12 **C. UCL**

13 As set forth above, a cause of action under this section must be based on some predicate act
14 involving a violation of some other statute or law. *Cel-Tech Communications v. L.A. Cellular Tel. Co.*,
15 20 Cal. 4th 163 (1999). As discussed infra, however, Mr. Hardy's negligence and fraud causes of action
16 fail as to MERS. In addition, Mr. Hardy fails to allege sufficiently details of unfair business practices
17 as it relates to MERS. Accordingly, this Court dismisses Mr. Hardy's (seventh) UCL cause of action
18 against MERS.

19 **D. Breach of Implied Covenant of Good Faith and Fair Dealing**

20 Mr. Hardy's ninth claim alleges that defendants breached the covenant of good faith and fair
21 dealing. As set forth above, a "prerequisite for any action for breach of the implied covenant of good
22 faith and fair dealing is the existence of a contractual relationship between the parties, since the covenant
23 is an implied term in the contract." *Smith*, 225 Cal.App.3d 38, 49. Here, Mr. Hardy argues that as the
24 nominee beneficiary on the deed of trust, the parties have a contractual relationship. Mr. Hardy further
25 contends that MERS breached the covenant of good faith and fair dealing by self-dealing to the
26 detriment of Mr. Hardy. In response, MERS contends that MERS' actions were expressly authorized
27 under the Deed of Trust and did not breach the implied covenant of good faith and fair dealing.

28 Having read the allegations of the FAC, this Court finds that Mr. Hardy fails to allege how

1 MERS breached the covenant of good faith and fair dealing. Mr. Hardy's arguments in opposition to
2 the instant motion are not rooted in the allegations of this cause of action, which allege that unspecified
3 defendants initiated foreclosure proceedings against him, sent deceptive letters, and failed to give
4 requisite notice before commencing foreclosure. No allegations of the complaint link MERS to the
5 described activity. Accordingly, this Court dismisses this cause of action against MERS.

6 **IV. Motion to Strike**

7 **A. Standard of Review**

8 Fed. R. Civ. P. 12(f) provides that a court "may order stricken from any pleading any redundant,
9 immaterial, impertinent, or scandalous matter." "[T]he function of a 12(f) motion to strike is to avoid
10 the expenditure of time and money that must arise from litigating spurious issues by dispensing with
11 those issues prior to trial..." *Sidney-Vinstein v. A.H. Robbins Co.*, 697 F.2d 880, 885 (9th Cir. 1983).
12 A motion to strike under Fed. R. Civ. P. 12(f) is therefore the proper vehicle for a plaintiff to challenge
13 a legally insufficient affirmative defense. 5C Wright & Miller, Federal Practice and Procedure 1380 (3d
14 ed. 2004) ("A motion to strike under Federal Rule 12(f) is the appropriate remedy for the elimination
15 of redundant, immaterial, impertinent, or scandalous matter in any pleading, and is the primary
16 procedure for objecting to an insufficient defense."). "[A] motion to strike may be used to strike any part
17 of the prayer for relief when the damages sought are not recoverable as a matter of law." *Bureerong v.*
18 *Uvawas*, 922 F.Supp. 1450, 1479, n. 34 (C.D. Cal. 1996).

19 **B. Attorneys' Fees**

20 Americas Best moves to strike Mr. Hardy's claim for attorneys' fees, arguing that Mr. Hardy fails
21 to state a basis for the recovery of an attorneys' fees award. In opposition, Mr. Hardy points out that
22 RESPA and California's UCL include provisions that allow recovery of attorneys' fees. In reply,
23 Americas Best concedes that attorneys' fees are available under those statutes only. Because Mr. Hardy
24 proceeds on his RESPA and UCL claims against Americas Best, Americas Best's motion to strike Mr.
25 Hardy's attorneys' fees prayer is denied.

26 **C. Punitive Damages**

27 Americas Best moves to strike references in the FAC demanding punitive damages. California
28 Civil Code §3294 permits recovery of punitive damages where a defendant has engaged in "oppression,

1 fraud, and malice.” Here, Mr. Hardy claims that Americas Best committed a fraudulent scheme, as
2 detailed in the fraud cause of action above. The allegations in the complaint are sufficient to sustain the
3 punitive damages language at the pleading stage. Accordingly, the motion to strike is denied.

4 **CONCLUSION AND ORDER**

5 For the reasons discussed above, this Court:

- 6 1. DENIES in part Americas Best’s motion to dismiss as to the fourth, sixth, and seventh
7 causes of action;
- 8 2. GRANTS in part Americas Best’s motion to dismiss and DISMISSES Mr. Hardy’s
9 eighth and ninth causes of action as to Americas Best and Mr. Gardella without
10 prejudice;
- 11 3. DENIES in full Americas Best’s motion to strike;
- 12 4. GRANTS in full MERS’ motion to dismiss and DISMISSES Mr. Hardy’s third, sixth,
13 seventh, and ninth causes of action as to MERS; and
- 14 5. ORDERS Mr. Hardy, no later than October 5, 2009, to file a second amended complaint.

15 IT IS SO ORDERED.

16 **Dated: September 15, 2009**

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE

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