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2 UNITED STATES DISTRICT COURT  
3 EASTERN DISTRICT OF CALIFORNIA

4 PATRICK MBABA,

5 Plaintiff,

6 v.

7 INDYMAC FEDERAL BANK F.S.B.; MTC  
8 FINANCIAL, INC. dba TRUSTEE CORPS,

9 Defendants.

1:09-CV-01452-OWW-GSA

MEMORANDUM DECISION ON  
DEFENDANT MTC FINANCIAL,  
INC., dba TRUSTEE CORPS'  
MOTION TO DISMISS (Doc. 7)

10 I. INTRODUCTION

11 Defendant MTC Financial, Inc. dba Trustee Corps moves to  
12 dismiss Plaintiff Patrick Mbaba's Complaint on grounds, among  
13 others, that Trustee Corps is not subject to Plaintiff's claims in  
14 its limited role as foreclosure trustee. Plaintiff, proceeding *pro*  
15 *se*, has filed opposition, to which Defendant has replied.

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17 II. BACKGROUND

18 This case involves a dispute between Plaintiff Patrick Mbaba  
19 ("Mbaba") and Defendants IndyMac Federal Bank ("IndyMac") and MTC  
20 Financial, Inc. dba Trustee Corps ("Trustee Corps"), the latter a  
21 foreclosure trustee headquartered in Orange, California. The  
22 dispute concerns two mortgage loans obtained by Plaintiff on real  
23 property located at 5201 Gorman Way and 5203 Gorman Way,  
24 Bakersfield, California.

25 On June 29, 2007, Plaintiff obtained two loans from First  
26 Capital Group, both in the amount of \$142,000, which were secured  
27 by Deeds of Trust ("DOT") on the Gorman Way properties. (Request  
28

1 for Judicial Notice ("RJN"), Doc. 7-2, Exhs. A-B.<sup>1</sup>) The Deeds of  
2 Trust identify First Capital Group as the lender, Orange Coast  
3 Title Co. as the trustee, and Mortgage Electronic Registration  
4 Systems, Inc. ("MERS") as the beneficiary.<sup>2</sup> (Id. Exhs. A-D.)

5 By Assignments of Deed of Trust dated April 13th and 15th,  
6 2009, MERS assigned to Defendant Indymac all its beneficial  
7 interest under the Deeds of Trust encumbering the 5201 and 5203  
8 Gorman Way properties. On April 15, 2009, IndyMac substituted  
9 Trustee Corps as trustee under the Deed of Trust for the 5201  
10 Gorman Way property. IndyMac substituted Trustee Corps as trustee  
11 under the Deed of Trust for the 5203 Gorman Way property on June 5,  
12 2009.<sup>3</sup> (Id. Exhs. G-H.)

13 On April 17, 2009, Trustee Corps recorded notices of default  
14 on the Gorman Way properties.<sup>4</sup> After Mr. Mbaba failed to cure his  
15 defaults, Trustee Corps filed a Notice of Trustee's Sale for August  
16 12, 2009 sale for 5201 Gorman Way and an August 13, 2009 sale for  
17 5203 Gorman Way. (Id. Exhs. K-L.)

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20 <sup>1</sup> Trustee Corps' request for judicial notice of this document  
was GRANTED. See § III(B), *infra*.

21 <sup>2</sup> Specifically, the DOT on the 5201 Gorman Way property was  
22 assigned by MERS to IndyMac on April 13, 2009 and the DOT on the  
23 5203 Gorman Way was assigned on April 15, 2009. (Id. Exhs. 3-4.)  
The assignments were recorded with the Kern County Recorder on  
24 August 18, 2009 and September 1, 2009. (Id. Exhs. E-F.)

25 <sup>3</sup> The Substitutions of Trustee were recorded in Kern County on  
26 July 23, 2009 (5201 Gorman Way) and July 28, 2009 (5203 Gorman  
Way).

27 <sup>4</sup> On April 17, 2009, the amount to cure default on the 5201  
28 Gorman Way property was \$6,760.65 and \$4,866.44 on the 5203 Gorman  
Way property.

1 On August 11, 2009, Plaintiff filed this case in the Superior  
2 Court of California, County of Kern, alleging seven causes of  
3 action: (1) Injunction of Defendants Notice of Trustee Sales; (2)  
4 Housing Discrimination; (3) Fraud; (4) Unjust Enrichment; (5)  
5 Breach of Contract; (6) Compensatory Damages; and (7) Punitive  
6 Damages. (Doc. 1., Exh. A (the "Complaint").)

7 The substance of the complaint is that IndyMac placed  
8 Plaintiff in an unaffordable "interest only" loan "which precluded  
9 Plaintiff from the benefit of equity growth or protection of  
10 Plaintiff's asset." (Compl. ¶ 8.) As a result of the housing  
11 collapse, Plaintiff alleges he was left with little or no equity in  
12 his home and could not sustain his loan payments. (Id. ¶ 9.)  
13 According to Plaintiff, he requested a loan modification from  
14 IndyMac in August 2008, but his request was denied. (Id. ¶ 10.)  
15 Following IndyMac's refusal, Plaintiff alleges that IndyMac "hired  
16 [Trustee Corps] to substitute and illegally file notice of Trustee  
17 sale of Plaintiffs [sic] without consideration to Plaintiff's  
18 repeated application and request for loan modification." (Id. ¶  
19 13.) Plaintiff also alleges:

20 14. Defendants MTC Financial Inc. DbA Trustee Corps  
21 and IndyMac conspired among themselves to  
22 secretly acquire said assets for themselves with  
23 intent to unjustly enrich themselves and deprive  
24 Plaintiff of peaceful and fair opportunity to  
25 benefit from Plaintiff's own asset.

26 15. Plaintiff is informed and believes that the  
27 Defendants IndyMac and MTC Financial Inc. DbA  
28 Trustee Corps jointly and individually by failure  
to consider Plaintiff's application for loan  
modification violated Plaintiff's Civil Rights  
and the Equal Opportunity Act (EOA) and Fair  
Lending Sec. 801[42 U.S.C. 3601].

(Id. ¶¶ 14-15.)

1 Plaintiff requests general, special, as well as "punitive  
2 damages in the sum of \$500 million." Plaintiff also requests an  
3 injunction "to prevent Defendants proposed sale of Plaintiff's real  
4 properties identified as follows: (a) 5201 Gorman Way,  
5 Bakersfield, California, 93309; (b) 5203 Gorman Way Bakersfield,  
6 California, 93309." (Id. at 7:16-7:20.)

7 On August 18, 2009, this case was removed on the basis of  
8 federal question jurisdiction. (Doc. 1.) The notice of removal  
9 asserts that Plaintiff's action is founded on claims arising under  
10 federal laws, including the Federal Housing Act ("FHA"), 42 U.S.C.  
11 § 3601, *et seq.*, and Truth in Lending Act ("TILA"), 15 U.S.C. §  
12 1601, *et seq.* (Id.)

13 Defendant Trustee Corps filed this motion on September 10,  
14 2009. (Doc. 7.) Defendant Trustee Corps asserts that Plaintiff's  
15 suit should be dismissed with prejudice because the type of claims  
16 alleged are targeted at the original lender - which was not Trustee  
17 Corps.<sup>5</sup> In any event, Defendant claims that Plaintiff has no basis  
18 to pursue claims under federal or state law.

19 The parties appeared before the court on October 26, 2009, for  
20 argument on Defendant's motion to dismiss and motion to strike.  
21 During the hearing, Plaintiff, who did not file an opposition,  
22 requested an extension of time to obtain counsel and file an  
23 opposition. The court granted the request and continued the  
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25  
26 <sup>5</sup> Specifically, Trustee Corps argues that it was "merely the  
27 substitute trustee under the Deeds of Trust for purposes of  
28 foreclosure" and not "involved in the making of the subject loans  
to Plaintiff or the decisions not to renegotiate those loans."  
(Doc. 7, 3:15-3:18.)

1 hearing to January 25, 2010.<sup>6</sup>

2 On December 16, 2009, Plaintiff filed a single document  
3 entitled: "1. Plaintiff's Opposition To: Motion to Dismiss  
4 Complaint Against Trustee Corps and Motion to Strike; 2.  
5 Plaintiff's Notice and Motion For Summary Judgement Against  
6 Defendants." (Doc. 13.) Plaintiff's filing does not comply with  
7 the Rule 56-260, Local Rules of Practice, governing motions for  
8 summary judgment.<sup>7</sup> It is considered solely as an opposition to  
9 Defendant's motion to dismiss pursuant to Local Rule 78-230(c).

10 In his opposition, Plaintiff maintains that the actions of  
11 "Defendant IndyMac [] and Defendant [Trustee Corps] were jointly  
12 and individually collusive, fraudulent and with malice, oppression  
13 and extreme indifference [sic] to Plaintiff's rights." (Doc. 13,  
14 2:2-2:5.) Plaintiff also contends that he was not properly served  
15 with notice of the foreclosure sale. (Id. at 2:6-2:7.)

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17 **III. LEGAL STANDARD**

18 **A. Motion to Dismiss**

19 Under Federal Rule of Civil Procedure 12(b)(6), a motion to  
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21 <sup>6</sup> The court also set a supplemental briefing schedule:  
22 Plaintiff's opposition was due on or before December 22, 2009 and  
23 any reply was due on or before January 4, 2010. (Doc. 12.)

24 <sup>7</sup> Specifically, Plaintiff's "motion" did not comply with  
25 Eastern District Local Rule 56-260(a). Pursuant to Local Rule 56-  
26 260(a), "[e]ach motion for summary judgment or summary adjudication  
27 shall be accompanied by a 'Statement of Undisputed Facts' that  
28 shall enumerate discretely each of the specific material facts  
relied upon in support of the motion and cite the particular  
provisions of any pleading, affidavit, deposition, interrogatory  
answer, admission, or other document relied upon to establish that  
fact."

1 dismiss can be made and granted when the complaint fails "to state  
2 a claim upon which relief can be granted." Dismissal under Rule  
3 12(b)(6) is appropriate where the complaint lacks a cognizable  
4 legal theory or sufficient facts to support a cognizable legal  
5 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699  
6 (9th Cir. 1990).

7 To sufficiently state a claim for relief and survive a  
8 12(b)(6) motion, a complaint "does not need detailed factual  
9 allegations" but the "[f]actual allegations must be enough to raise  
10 a right to relief above the speculative level." *Bell Atl. Corp. v.*  
11 *Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).  
12 Mere "labels and conclusions" or a "formulaic recitation of the  
13 elements of a cause of action will not do." *Id.* Rather, there  
14 must be "enough facts to state a claim to relief that is plausible  
15 on its face." *Id.* at 570. In other words, "[t]o survive a motion to  
16 dismiss, a complaint must contain sufficient factual matter,  
17 accepted as true, to state a claim to relief that is plausible on  
18 its face." *Ashcroft v. Iqbal*, --- U.S. ----, 129 S.Ct. 1937, 1949,  
19 173 L.Ed.2d 868 (2009) (internal quotation marks omitted). "The  
20 plausibility standard is not akin to a probability requirement, but  
21 it asks for more than a sheer possibility that a defendant has  
22 acted unlawfully. Where a complaint pleads facts that are merely  
23 consistent with a defendant's liability, it stops short of the line  
24 between possibility and plausibility of entitlement to relief."  
25 *Id.* (internal citation and quotation marks omitted).

26 In deciding whether to grant a motion to dismiss, the court  
27 must accept as true all "well-pleaded factual allegations." *Iqbal*,  
28 129 S.Ct. at 1950. A court is not, however, "required to accept as

1 true allegations that are merely conclusory, unwarranted deductions  
2 of fact, or unreasonable inferences." *Sprewell v. Golden State*  
3 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); see, e.g., *Doe I v.*  
4 *Wal-Mart Stores, Inc.*, --- F.3d ----, 2009 WL 1978730, at \*3 (9th  
5 Cir. July 10, 2009) ("Plaintiffs' general statement that Wal-Mart  
6 exercised control over their day-to-day employment is a conclusion,  
7 not a factual allegation stated with any specificity. We need not  
8 accept Plaintiffs' unwarranted conclusion in reviewing a motion to  
9 dismiss.").

10 The Ninth Circuit has summarized the governing standard, in  
11 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint  
12 to survive a motion to dismiss, the non-conclusory factual content,  
13 and reasonable inferences from that content, must be plausibly  
14 suggestive of a claim entitling the plaintiff to relief." *Moss v.*  
15 *U.S. Secret Service*, 572 F.3d 962, 2009 WL 2052985, at \*6 (9th Cir.  
16 July 16, 2009) (internal quotation marks omitted).

17  
18 **B. Requests for Judicial Notice**

19 In connection with its motion to dismiss, Defendant Trustee  
20 Corps submitted a request for judicial notice pursuant to Fed. R.  
21 Evid. § 201: (1) a Deed of Trust, recorded on July 10, 2007, in the  
22 Official Records of Kern County, California as Doc No. 0207143995;  
23 (2) a Deed of Trust, recorded on July 10, 2007, in the Official  
24 Records of Kern County, California as Doc No. 0207143993; (3) an  
25 Assignment of Deed of Trust, recorded on July 10, 2007, in the  
26 Official Records of Kern County, California as Doc No. 0207143996;  
27 (4) an Assignment of Deed of Trust, recorded on July 10, 2007, in  
28 the Official Records of Kern County, California as Doc. No.

1 0207143994; (5) an Assignment of Deed of Trust, recorded on  
2 September 1, 2009, in the Official Records of Kern County,  
3 California as Doc. No. 0209128874; (6) an Assignment of Deed of  
4 Trust, recorded on August 18, 2009, in the Official Records of Kern  
5 County, California as Doc. No. 0209120607; (7) a Substitution of  
6 Trustee, recorded on July 23, 2009, in the Official Records of Kern  
7 County, California as Doc. No. 0209106882; (8) a Substitution of  
8 Trustee, recorded on July 28, 2009, in the Official Records of Kern  
9 County, California as Doc. No. 0209109205; (9) a Notice of Default  
10 and Election to Sell Under Deed of Trust, recorded on April 17,  
11 2009, as Doc. No. 0209054670; (10) a Notice of Default and Election  
12 to Sell Under Deed of Trust, recorded on April 17, 2009, as Doc.  
13 No. 0209054674; (11) a Notice of Trustee's Sale Under Trust Deed,  
14 recorded on July 23, 2009, as Doc. No. 0209054670; and (12) a  
15 Notice of Trustee's Sale Under Trust Deed, recorded on July 28,  
16 2009, as Doc. No. 0209109206.

17 Federal Rule of Evidence 201(b) provides the criteria for  
18 judicially noticed facts: "A judicially noticed fact must be one  
19 not subject to reasonable dispute in that it is either (1)  
20 generally known within the territorial jurisdiction of the trial  
21 court or (2) capable of accurate and ready determination by resort  
22 to sources whose accuracy cannot reasonably be questioned."

23 As the above documents are all matters of public record,  
24 Trustee Corps' request for judicial notice is GRANTED. See *MGIC*  
25 *Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (a court  
26 may take judicial notice of matters of public record outside the  
27 pleadings on a motion to dismiss.); *W. Fed. Sav. v. Heflin*, 797  
28 F.Supp. 790, 792 (N.D. Cal. 1992) (taking judicial notice of



1 documents in a county public record, including deeds of trust).

2  
3 IV. DISCUSSION

4 As a preliminary matter, Trustee Corps argues that, due to its  
5 status as a foreclosure trustee, Plaintiff's complaint against it  
6 is barred by the litigation privilege of Cal. Civil Code § 47(b).  
7 Trustee Corps contends that the privilege, which is made applicable  
8 in trustee sale proceedings, bars any tort action based on a  
9 protected communication.

10 Non-judicial foreclosure sales "are governed by a  
11 'comprehensive' statutory scheme. This scheme, which is found in  
12 Civil Code §§ 2924 through 2924k, evidences a legislative intent  
13 that a sale which is properly conducted constitutes a final  
14 adjudication of the rights of the borrower and lender." *Royal*  
15 *Thrift and Loan Co. v. County Escrow, Inc.*, 123 Cal. App. 4th 24,  
16 32 (2004) (quotation and citation omitted).

17 Section 2924(d) qualifies as California Civil Code § 47  
18 "privileged communications" the "mailing, publication, and  
19 delivery" of foreclosure notices and "performance" of foreclosure  
20 procedures. The § 2924(d) privilege extended through California  
21 Civil Code § 47 applies to tort claims other than malicious  
22 prosecution. *Hagberg v. California Federal Bank FSB*, 7 Cal.Rptr.3d  
23 803 (2004) ("As noted, the only tort claim we have identified as  
24 falling outside the privilege established by section 47(b) is  
25 malicious prosecution.").

26 Here, to the extent Trustee Corps' acts as trustee involved  
27 statutorily required mailing, publication, and delivery of notices  
28 for nonjudicial foreclosures, and the performance of statutory

1 nonjudicial foreclosure procedures, Trustee Corps correctly asserts  
2 that these are privileged communications under the qualified  
3 privilege for a communication. See, e.g., *Garretson v. Post*, 156  
4 Cal. App. 4th 1508 (2007). Trustee Corps' foreclosure proceedings  
5 are subject to § 2924(d) immunity from tort claims.

6  
7 **A. Injunctive Relief (Claim I)**

8 Plaintiff's first cause of action seeks injunctive relief  
9 against Defendants. (Compl. ¶¶ 16-17.) However, a request for  
10 injunctive relief by itself does not state a cause of action and is  
11 properly raised as a separate motion. *Shamsian v. Atl. Richfield*  
12 *Co.*, 107 Cal. App. 4th 967, 984-85 (2003). Even if this requests  
13 is construed as derivative of all other alleged causes of action,  
14 Plaintiff still bears the burden of showing that he is likely to  
15 succeed on the merits, that he is likely to suffer irreparable harm  
16 in the absence of preliminary relief, that the balance of equities  
17 tip in his favor, and that an injunction is in the public interest.  
18 *Winter v. Natural Resources Defense Council, Inc.*, --- U.S. ----,  
19 ----, 129 S.Ct. 365, 374 (2008); see also *Munaf v. Green*, --- U.S.  
20 ----, ---- - ----, 128 S.Ct. 2207, 2218-19 (2008).

21 Because a request for injunctive relief by itself does not  
22 state a cause of action, this claim is dismissed for failure to  
23 state a claim upon which relief may be granted as no underlying  
24 basis for injunctive relief has been stated.<sup>8</sup> Plaintiff also does

25  
26 <sup>8</sup> "[T]he law is long-established that a trustor or his  
27 successor must tender the obligation in full as a prerequisite to  
28 challenge of the foreclosure sale." *Vargas v. Reconstrust Co.*, No.  
CV-F-08-1683 LJO-TAG, 2008 WL 5101557 at \*6 (E.D. Cal. Dec. 02,  
2008) (citing *U.S. Cold Storage v. Great Western Savings & Loan*

1 not satisfy the *Winters* factors.<sup>9</sup> Plaintiff's cause of action for  
2 injunctive relief is DISMISSED for failure to state a claim upon  
3 which relief may be granted.<sup>10</sup>

4  
5 B. Housing Discrimination (Claim II)

6 The complaint's second claim is comprised of one paragraph,  
7 however, the allegations relate only to IndyMac, not Trustee Corps:

8 Defendants IndyMac set a usurious high interest rates  
9 for Plaintiff higher than the fair market rate because  
10 of Plaintiff's ethnic origin as African American and  
11 refused to modify Plaintiff's loan, causing undue  
12 financial hardship to Plaintiff.

13 (Compl. ¶ 19.)

14 Trustee Corps correctly observes that "this claim fails to  
15 allege any conduct by Trustee Corps in which it, in any way,  
16 discriminated against Plaintiff on the basis of race." The  
17 complaint has not appropriately identified with particularity the  
18 conduct undertaken by Trustee Corps that he claims was unlawful.  
19 For example, to support a violation of housing discrimination the  
20 complaint alleges only that Defendant IndyMac "set a usurious high

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21 *Assn.*, 165 Cal. App. 3d 1214, 1222 (1985)). Here, the complaint  
22 does not contain allegations that Plaintiff attempted to tender, or  
23 is capable of tendering, the value of the property. As Plaintiff  
24 has not alleged that he has made such an offer or contemplates  
25 making such an offer, he cannot challenge the foreclosure sale.

26 <sup>9</sup> As explained in §§ IV(B)-(F), *infra*, Plaintiff's claim for  
27 injunctive relief does not satisfy the first *Winters* factor -  
28 likelihood of success on the merits. This ends the inquiry under  
*Winters*. See *Doe v. Reed*, 586 F.3d 671, 681 n.14 (9th Cir. 2009)  
("Because we conclude that Plaintiffs have failed to satisfy the  
first *Winter* factor - likelihood of success on the merits - we need  
not examine the three remaining *Winter* factors.").

<sup>10</sup>

1 interest rate" because of his "ethnic origin as African American."  
2 No other facts are alleged. The complaint does not allege that  
3 Trustee Corps discriminated against him based on his race; that  
4 Trustee Corps participated in setting interest rates; or that  
5 Trustee Corps resisted Plaintiff's attempts to obtain a loan  
6 modification. No factual allegations describe how Trustee Corps,  
7 as substitute trustee, was involved in Plaintiff's initial loan  
8 transaction or his subsequent attempts to obtain a loan  
9 modification, other than to pursue a trustee sale following  
10 Plaintiff's default. Under *Iqbal*, because the complaint does not,  
11 and likely cannot, include a single fact that Defendant Trustee  
12 Corps discriminated - or was involved in any aspect of his loan  
13 transaction - against Plaintiff based on race, the claim is  
14 insufficient to state a claim for housing discrimination.

15 The same reasoning applies to the arguments contained in  
16 Plaintiff's opposition. In his opposition, Plaintiff argues that  
17 Trustee Corps has a "historical practice of discrimination against  
18 African American and the Latinos [sic], according to proof during  
19 discoveries and trial." (Doc. 13, 4:12-4:13.) This allegation is  
20 not included in the complaint and, assuming it was, such an  
21 allegation - without more - is insufficient to support a claim for  
22 housing discrimination. A claim is plausible only "when the  
23 plaintiff pleads factual content that allows the court to draw the  
24 reasonable inference that the defendant is liable for the  
25 misconduct alleged." *Iqbal*, 129 S.Ct. 1937, 1949 (quoting *Bell*  
26 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570.). The complaint's  
27 second cause of action for housing discrimination does not meet  
28 this standard. The motion to dismiss is GRANTED WITH PREJUDICE.

1           C.    Fraud (Claim III)

2           The fraud claim alleges that Defendants Trustee Corps and  
3 IndyMac "systematically refuse[d] to consider plaintiff's request  
4 and application for loan modification with intent to defraud  
5 Plaintiff." (Compl. ¶ 21.) The fraud claim also alleges that  
6 "Defendants deprive[d] Plaintiff of his rightful asset and peaceful  
7 enjoyment by providing misleading statements and applying delaying  
8 tactics." (Id.)

9           Trustee Corps faults the claim's failure to satisfy Rule  
10 9(b)'s particularity requirement and to distinguish and/or identify  
11 the "role of each defendant in the alleged fraudulent scheme."  
12 Trustee Corps notes the absence of "charging allegations" against  
13 it given that it was not involved in Plaintiff's loan.<sup>11</sup>

14           Rule 9(b) requires a party to "state with particularity the  
15 circumstances constituting fraud." In the Ninth Circuit, "claims  
16 for fraud and negligent misrepresentation must meet Rule 9(b)'s  
17 particularity requirements." *Neilson v. Union Bank of California,*  
18 *N.A.*, 290 F.Supp.2d 1101, 1141 (C.D. Cal. 2003). A fraud claim is  
19 subject to dismissal when its allegations fail to satisfy Rule  
20 9(b)'s heightened pleading requirements. *Vess v. Ciba-Geigy Corp.*  
21 *USA*, 317 F.3d 1097, 1107 (9th Cir. 2003). A motion to dismiss a  
22 claim "grounded in fraud" under Rule 9(b) for failure to plead with  
23 particularity is the "functional equivalent" of a Rule 12(b)(6)

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24  
25           <sup>11</sup> Rule 9(b)'s particularity requirement applies to state law  
26 causes of action: "[W]hile a federal court will examine state law  
27 to determine whether the elements of fraud have been pled  
28 sufficiently to state a cause of action, the Rule 9(b) requirement  
that the circumstances of the fraud must be stated with  
particularity is a federally imposed rule." *Vess v. Ciba-Geigy*  
*Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003) (citations omitted).

1 motion to dismiss for failure to state a claim. *Vess*, 317 F.3d at  
2 1107. As a counter-balance, Rule 8(a)(2) requires from a pleading  
3 "a short and plain statement of the claim showing that the pleader  
4 is entitled to relief."

5 Rule 9(b)'s heightened pleading standard "is not an invitation  
6 to disregard Rule 8's requirement of simplicity, directness, and  
7 clarity" and "has among its purposes the avoidance of unnecessary  
8 discovery." *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996).  
9 "A pleading is sufficient under Rule 9(b) if it identifies the  
10 circumstances constituting fraud so that the defendant can prepare  
11 an adequate answer from the allegations." *Neubronner v. Milken*, 6  
12 F.3d 666, 671-672 (9th Cir. 1993) (internal quotations omitted;  
13 citing *Gottreich v. San Francisco Investment Corp.*, 552 F.2d 866,  
14 866 (9th Cir.1997)). The Ninth Circuit Court of Appeals has  
15 explained:

16 Rule 9(b) requires particularized allegations of the  
17 circumstances constituting fraud. The time, place and  
18 content of an alleged misrepresentation may identify  
19 the statement or the omission complained of, but these  
20 circumstances do not "constitute" fraud. The  
21 statement in question must be false to be fraudulent.  
22 Accordingly, our cases have consistently required that  
23 circumstances indicating falseness be set forth....  
24 [W]e [have] observed that plaintiff must include  
25 statements regarding the time, place, and nature of  
26 the alleged fraudulent activities, and that "mere  
27 conclusory allegations of fraud are insufficient." ...  
28 The plaintiff must set forth what is false or  
misleading about a 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....

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

27 *In Re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541,  
28 1547-1548 (9th Cir. 1994) (en banc) (italics in original)

1 superseded by statute on other grounds as stated in *Marksman*  
2 *Partners, L.P. v. Chantal Pharm. Corp.*, 927 F.Supp. 1297 (C.D. Cal.  
3 1996); see *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)  
4 ("fraud allegations must be accompanied by "the who, what, when,  
5 where, and how" of the misconduct charged).

6 As to multiple fraud defendants, a plaintiff "must provide  
7 each and every defendant with enough information to enable them 'to  
8 know what misrepresentations are attributable to them and what  
9 fraudulent conduct they are charged with.'" *Pegasus Holdings v.*  
10 *Veterinary Centers of America, Inc.*, 38 F.Supp.2d 1158, 1163 (C.D.  
11 Cal. 1998) (quoting *In re Worlds of Wonder Sec. Litig.*, 694 F.Supp.  
12 1427, 1433 (N.D. Cal. 1988)). "Rule 9(b) does not allow a  
13 complaint to merely lump multiple defendants together but  
14 'require[s] plaintiffs to differentiate their allegations when  
15 suing more than one defendant ... and inform each defendant  
16 separately of the allegations surrounding his alleged participation  
17 in the fraud.'" *Swartz v. KPMG LLP*, 476 F.3d 756, 764-765 (9th  
18 Cir. 2007) (quoting *Haskin v. R.J. Reynolds Tobacco Co.*, 995  
19 F.Supp. 1437, 1439 (M.D. Fla. 1998)). "In the context of a fraud  
20 suit involving multiple defendants, a plaintiff must, at a minimum,  
21 'identif[y] the role of [each] defendant[ ] in the alleged  
22 fraudulent scheme.'" *Swartz*, 476 F.3d at 765 (quoting *Moore v.*  
23 *Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir.1989)).

24 In a fraud action against a corporation, a plaintiff must  
25 "allege the names of the persons who made the allegedly fraudulent  
26 representations, their authority to speak, to whom they spoke, what  
27 they said or wrote, and when it was said or written." *Tarmann v.*  
28 *State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991).

1           The elements of a California fraud claim are: (1)  
2 misrepresentation (false representation, concealment or  
3 nondisclosure); (2) knowledge of the falsity (or "scienter"); (3)  
4 intent to defraud, i.e., to induce reliance; (4) justifiable  
5 reliance; and (5) resulting damage. *Lazar v. Superior Court*, 12  
6 Cal.4th 631, 638 (1996). The same elements comprise a cause of  
7 action for negligent misrepresentation, except there is no  
8 requirement of intent to induce reliance. *Caldo v. Owens-Illinois,*  
9 *Inc.*, 125 Cal. App. 4th 513, 519 (2004).

10           "[T]o establish a cause of action for fraud a plaintiff must  
11 plead and prove in full, factually and specifically, all of the  
12 elements of the cause of action. *Conrad v. Bank of America*, 45  
13 Cal. App. 4th 133, 156 (1996). There must be a showing "that the  
14 defendant thereby intended to induce the plaintiff to act to his  
15 detriment in reliance upon the false representation" and "that the  
16 plaintiff actually and justifiably relied upon the defendant's  
17 misrepresentation in acting to his detriment." *Conrad*, 45 Cal.  
18 App. 4th at 157.

19           The complaint is severely lacking and fails to satisfy Rule  
20 9(b) "who, what, when, where and how" requirements as to Trustee  
21 Corps, as well the other defendants. See *Tarmann v. State Farm*  
22 *Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991) (a plaintiff  
23 asserting fraud against a corporate employer must "allege the names  
24 of the persons who made the allegedly fraudulent representations,  
25 their authority to speak, to whom they spoke, what they said or  
26 wrote, and when it was said or written.") The complaint fails to  
27 establish fraud elements. The fraud allegations do not target  
28 particular defendants, and the complaint's global approach is



1 unsatisfactory.<sup>12</sup> The fraud claims' deficiencies are so severe to  
2 suggest no potential improvement from an attempt to amend. The  
3 third cause of action is DISMISSED WITH PREJUDICE against Defendant  
4 Trustee Corps.

5  
6 D. Unjust Enrichment (Claim IV)

7 The complaint's fourth cause of action alleges that  
8 "defendants actions amount to unjust enrichment based on the  
9 usurious interest rates and conspiracy to unjustly take possession  
10 of plaintiff's assets." (Compl. ¶ 23.)

11 Trustee Corps moves to dismiss the claim on grounds that it  
12 "did not issue any loan to Plaintiff and, therefore, was not  
13 enriched on that basis." As to any alleged "conspiracy," Trustee  
14 Corps states that it was "only the foreclosure trustee" and did  
15 "not tak[e] possession of Plaintiff's assets."

16 The elements of an unjust enrichment claim are the receipt of  
17

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18  
19 <sup>12</sup> The arguments included in Plaintiff's opposition are  
20 unpersuasive for the same reasons. Plaintiff contends that  
21 "Trustee Corps told the Plaintiff that the loan for the Plaintiff  
22 was going to be modified [...] the Defendants never informed that  
23 Plaintiff that the property was going to be sold under  
24 foreclosure." (Doc. 13, 2:14-2:16.) Plaintiff also contends that  
25 Trustee Corps "misled" him and engaged in a "secret" plan to sell  
26 the Gorman Way properties to "Real Estate Agents that have prior  
27 and ongoing business relationships with Defendant Trustee Corps."  
28 (Id. 2:21-2:22.) First, Trustee Corps role was limited - it was  
retained as substitute trustee in April 2009 and was not involved  
in the loan origination or modification. Second, neither Trustee  
Corps involvement nor its initiation of foreclosure proceedings  
were "secret," as Plaintiff argues. Documents designating Trustee  
Corps as successor trustee were filed with Kern County Recorder on  
April 15, and June 5, 2009. Notices of Default and Notices of  
Trustee's Sales were filed in the Kern County Recorder's office on  
April 17, July 23, and July 28, 2009.

1 a benefit and unjust retention of the benefit at the expense of  
2 another. *Lectrodryer v. SeoulBank*, 77 Cal. App. 4th 723, 726  
3 (2000). The complaint does not plead the elements of a cause of  
4 action for unjust enrichment against Trustee Corps. Instead, the  
5 complaint vaguely states that Defendants - presumably IndyMac -  
6 refused to consider Plaintiff's request for a loan modification and  
7 disrupted his "peaceful enjoyment." This is insufficient under  
8 *Iqbal*. No enforceable duty to modify Plaintiff's loan has been  
9 identified. For instance, the complaint fails to specifically  
10 allege how Defendant Trustee Corps could have been unjustly  
11 enriched when Plaintiff is in default on the loan; the complaint  
12 also fails to allege how Trustee Corps was unjustly enriched when  
13 its only involvement was as substitute trustee, a position which  
14 does not require receiving payment or possessing the Gorman Way  
15 properties. As Plaintiff does not allege any facts showing that  
16 Trustee Corps received anything of value by which it could be  
17 unjustly enriched, no claim is stated. The unjust enrichment claim  
18 is meritless as alleged and is DISMISSED.

19  
20 E. Breach of Contract (Claim V)

21 The complaint's fifth cause of action alleges breach of  
22 contract in that "Defendant IndyMac initially agreed to modify the  
23 loan and offer a fair interest rate and then refused to consider  
24 Plaintiff's application as agreed."

25 In California, "[a] cause of action for breach of contract  
26 requires proof of the following elements: (1) existence of the  
27 contract; (2) plaintiff's performance or excuse for nonperformance;  
28 (3) defendant's breach; and (4) damages to plaintiff as a result of

1 the breach." *CDF Firefighters v. Maldonado*, 158 Cal. App. 4th  
2 1226, 1239 (2008). Plaintiff alleges that he entered into a "home  
3 loan mortgage" with IndyMac, and, to the extent it can be  
4 understood, alleges that IndyMac breached the mortgage contract  
5 when it refused to modify the existing terms of his mortgage loan.  
6 These allegations, which purport to describe the contract  
7 underlying Plaintiff's breach of contract claim, do not allege any  
8 actions or conduct with respect to Trustee Corps, instead  
9 describing an alleged refusal to modify a written note and deed of  
10 trust on the part of IndyMac. The complaint's inadequacy is best  
11 demonstrated by its failure to allege the most basic fact of a  
12 breach of contract claim: the existence of a contract.<sup>13</sup>

13 The complaint fails to allege a viable breach of a contract  
14 claim against Trustee Corps. The motion is GRANTED WITH PREJUDICE.

15  
16 **F. Compensatory and Punitive Damages (Claims VI-VII)**

17 The complaint's sixth and seventh causes of action for  
18 "compensatory damages" and "punitive damages" request appropriate  
19 relief because "Plaintiff lost money on the properties and overpaid  
20 interest to Defendant IndyMac" and "the conduct of ... Trustee  
21

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22 <sup>13</sup> Specifically, Plaintiff fails to allege a contract existed  
23 between himself and Defendant Trustee Corps. In his opposition,  
24 Plaintiff's argues that Trustee Corps breached its contract with  
25 Plaintiff when it "substituted for IndyMac [...] such contractual  
26 obligations were expressly transferred to Defendant Trustee Corps."  
27 (Doc. 13, 4:18-4:20.) This is factually incorrect. Trustee Corps  
28 substituted in as trustee to conduct the foreclosure, nothing more.  
It did not "purchase" the loan or otherwise take ownership of the  
mortgage loan or its payments. Trustee Corps was not a party to  
the loan agreement. Without a contract between the parties, there  
is no breach. See, e.g., *CDF Firefighters*, 158 Cal. App. 4th at  
1239.

1 Corps was with malice intended to injure Plaintiff and with  
2 conscious disregard to Plaintiff's rights and with oppression  
3 subjecting Plaintiff to cruel and unjust hardship." (Compl. ¶¶ 27,  
4 29.)

5 Trustee Corps correctly observes that these claims only seek  
6 a remedy, and do not state an underlying claim. They otherwise  
7 fail because Plaintiff's other claims are inadequate. The sixth  
8 and seventh claims are DISMISSED WITH PREJUDICE.

9  
10 G. Punitive Damages

11 The complaint, in its seventh claim and its concluding prayer  
12 for relief, seeks "punitive damages in the sum of \$500 million."  
13 Trustee Corps moves to strike the punitive damages claims in the  
14 absence of viable claim to support a punitive damage award.

15 Rule 12(f) empowers a court to strike from a pleading "any  
16 redundant, immaterial, impertinent, or scandalous matter." Motions  
17 to strike may be granted if "it is clear that the matter to be  
18 stricken could have no possible bearing on the subject matter of  
19 the litigation." *LeDuc v. Kentucky Central Life Ins. Co.*, 814  
20 F.Supp. 820, 830 (N.D. Cal. 1992); *Colaprico v. Sun Microsystems,*  
21 *Inc.*, 758 F.Supp. 1335, 1339 (N.D. Cal. 1991). "[T]he function of  
22 a [F.R.Civ.P.] 12(f) motion to strike is to avoid the expenditure  
23 of time and money that must arise from litigating spurious issues  
24 by dispensing with those issues prior to trial." *Sidney-Vinstein*  
25 *v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). "[A] motion  
26 to strike may be used to strike any part of the prayer for relief  
27 when the damages sought are not recoverable as a matter of law."  
28 *Bureerong v. Uvawas*, 922 F.Supp. 1450, 1479, n. 34 (C.D. Cal.

1 1996).

2 Absent viable claims, Plaintiff cannot state a claim for  
3 punitive damages. The motion to strike the punitive damages claim  
4 is GRANTED.

5  
6 H. Attempt At Amendment

7 Plaintiff's claims are insufficiently pled and barred as a  
8 matter of law. Plaintiff is unable to cure his claims by  
9 allegation of other facts and in view of futility is not granted  
10 leave to amend. Defendant Trustee Corps' motion is GRANTED WITH  
11 PREJUDICE.

12  
13 V. CONCLUSION.

14 For the reasons stated:

15 (1) All claims against Trustee Corps are DISMISSED WITH  
16 PREJUDICE; and

17 (2) Defendant's motion to strike the punitive damages claim  
18 is GRANTED.

19  
20 Defendant Trustee Corps shall submit a form of order  
21 consistent with, and within five (5) days following electronic  
22 service of, this memorandum decision.

23  
24 IT IS SO ORDERED.

25 Dated: January 27, 2010

\_\_\_\_\_  
/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE