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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

BERNARD F. CLARK,  
  
Plaintiff,  
  
v.  
  
COUNTRYWIDE HOME LOANS, INC.,  
*et al.*,  
  
Defendants.

1:09-CV-01998-OWW-GSA  
  
MEMORANDUM DECISION AND ORDER RE  
COUNTRYWIDE HOME LOANS, INC.,  
RECONTRUST COMPANY, BANK OF  
AMERICA, N.A., MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS,  
INC., (erroneously sued as MERS,  
INC., Chase Home Finance

I. INTRODUCTION

On or about August 2, 2007, Plaintiff Bernard F. Clark obtained a mortgage loan in the amount of \$360,000 secured by a deed of trust encumbering real property in Groveland, California. Plaintiff defaulted on the loan, and Defendants proceeded to foreclose on the real property. Defendant's Request for Judicial Notice ("RJN"), Exs. B-D.

On August 24, 2009, Plaintiff filed a complaint in the Superior Court of the State of California, County of Tuolumne, alleging ten causes of action. Doc. 1. On November 12, 2009,

1 Defendants removed the action to federal court pursuant to 28  
2 U.S.C. §§ 1331, 1441, based on federal question jurisdiction.  
3 *Id.* Plaintiff's amended complaint, filed March 17, 2010, alleges  
4 17 causes of action: (1) Fraud; (2) Breach of Loan Commitment;  
5 (3) Negligence; (4) Breach of Good Faith; (5) Breach of Fiduciary  
6 Duty; (6) Economic Duress; (7) Civil RICO; (8) Cal. Civ. Code §  
7 2923.5; (9) Cal. Civ. Code § 2923.6; (10) California's Rosenthal  
8 Fair Debt Collection Practices Act ("RFDCPA"), Cal. Civ. Code. §§  
9 1788.17; (11) Cal. Civ. Code § 1572; (12) Real Estate Settlement  
10 Procedures Act ("RESPA"), (12) U.S.C. § 2607(b); (13) Quiet  
11 Title; (14) Unfair business practices, Cal. Bus. Prof. Code §§  
12 17200, et seq.; (15) Produce the Original Note; (16) Cal. Civ.  
13 Code § 1572; (17) Injunctive Relief. Doc. 16.

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15  
16 On April 5, 2010, Defendants Countrywide Home Loans, Inc.  
17 ("Countrywide"), ReconTrust Company ("ReconTrust"), Bank of  
18 America, N.A. ("BANA"), and Mortgage Electronic Registration  
19 Systems, Inc.'s ("MERS"), (collectively "Countrywide Defendants")  
20 moved to dismiss all of the claims in the case pursuant to  
21 Federal Rule of Civil Procedure 12(b)(6). Doc. 24. Plaintiff  
22 opposed the motion to dismiss. Doc. 31, filed June 1, 2010.  
23 Countrywide Defendants replied. Doc. 33, filed June 7, 2010.  
24 Defendant Chase Home Finance, LLC.<sup>1</sup> ("Chase") filed a separate  
25 motion to dismiss on June 22, 2010. Doc. 36. Plaintiff filed  
26

27  
28 <sup>1</sup> Although Chase was named as a Defendant to this action, no claim specifically refers to Chase.

1 an opposition to Countrywide Defendants' reply<sup>2</sup> and an opposition  
2 to Chase's motion to dismiss.<sup>3</sup> Doc. 38, filed July 21, 2010.  
3 Chase replied.<sup>4</sup> Doc. 39.

## 4 II. LEGAL STANDARD

5 A motion to dismiss brought under Federal Rule of Civil  
6 Procedure 12(b)(6) "tests the legal sufficiency of a claim."  
7 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In deciding  
8 whether to grant a motion to dismiss, the court "accept [s] all  
9 factual allegations of the complaint as true and draw[s] all  
10 reasonable inferences" in the light most favorable to the  
11 nonmoving party. *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir.  
12 1999). To survive a motion to dismiss, a complaint must "contain  
13 sufficient factual matter, accepted as true, to 'state a claim to  
14 relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129  
15 S. Ct. 1937, 1949 (May 18, 2009) (quoting *Bell Atl. Corp v.*  
16 *Twombly*, 550 U.S. 544, 570 (2007)).  
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21 <sup>2</sup> The local rules do not permit Plaintiff to file an opposition to  
Countrywide Defendants' reply. See Local Rule 230 (Fed. R. Civ. P 78).

22 <sup>3</sup> Plaintiff's opposition to Chase's motion to dismiss largely restates  
previous arguments and nowhere refers specifically to Chase or Chase's motion  
23 to dismiss. It also contains various incorrect statements, including that  
"the motion to dismiss intentionally skips any answer to the concerted fraud  
24 committed to the plaintiff...." Doc. 38 2:12-13. This is inaccurate, as  
Chase addressed the fraud claim in detail in its motion to dismiss. Doc. 36  
at 3-5.

25 <sup>4</sup> Chase claims that it did not receive an opposition or statement of  
non-opposition to the motion to dismiss and that neither are present on the  
26 docket. Chase is mistaken, as Doc. 38, which is titled an "opposition" to  
Countrywide Defendants' reply, contains Plaintiff's opposition to Chase's  
27 motion to dismiss. However, Document 38 was filed on July 21, 2010, two days  
after the July 19, 2010 deadline for the filing of his opposition to Chase's  
28 motion. Plaintiff dated the document July 19, 2010, but gives no explanation  
as to why it was not filed with the Clerk of court on that date.

1 A claim has facial plausibility when the plaintiff  
2 pleads factual content that allows the court to  
3 draw the reasonable inference that the defendant  
4 is liable for the misconduct alleged. The  
5 plausibility standard is not akin to a  
6 "probability requirement," but it asks for more  
7 than a sheer possibility that defendant has acted  
8 unlawfully. Where a complaint pleads facts that  
9 are "merely consistent with" a defendant's  
10 liability, it "stops short of the line between  
11 possibility and plausibility of 'entitlement to  
12 relief.'"

13 *Id.* (citing *Twombly*, 550 U.S. 556-57). Dismissal also can be  
14 based on the lack of a cognizable legal theory. *Balistreri v.*  
15 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

### 16 III. BACKGROUND

17 On or about July 26, 2007, Plaintiff financed the purchase  
18 of a residential property located at 12689 Mt. Jefferson Street,  
19 Groveland, California ("Subject Property") through a promissory  
20 note with First Magnus Financial Corp. ("First Magnus") in the  
21 amount of \$360,000 ("Subject Loan") secured by a deed of trust.  
22 Doc. 16 at ¶ 9. Plaintiff later defaulted on the Subject Loan.  
23 On January 27, 2009, a Notice of Default and Election to Sell  
24 Under Deed of Trust, Instrument No. 2007013088, was recorded in  
25 the Office of the County Recorder of Tuolumne County. Doc. 16 at  
26 ¶ 21. The default was not cured, and on May 1, 2009, a notice of  
27 trustee's sale, Instrument No. 2009005160, was also recorded.

28 *Id.*

Plaintiff alleges that (1) no Defendant has the original  
note to prove that it is a party authorized to conduct the

1 foreclosure (Doc. 16 at ¶ 24); (2) Defendants breached an oral  
2 promise to modify the existing loan terms (Doc. 16 at ¶ 31); and  
3 (3) Plaintiff was not contacted to explore his financial  
4 situation prior to notice of default (Doc. 16 at ¶ 156-160).  
5 These allegations form the basis of most of Plaintiff's causes of  
6 action.  
7

#### 8 IV. ANALYSIS

##### 9 A. Constructive or Actual Fraud

10 Plaintiff's first cause of action alleges fraud by each  
11 Defendant. This claim is based largely on the allegation that  
12 "each Defendant has represented to Plaintiff and to third parties  
13 that they were the owner of the Trust Deed and Note as either the  
14 Trustee or the beneficiary regarding ... Possession of the Note  
15 is not incidental to the right to foreclose, it is absolutely  
16 necessary." Doc. 16 at ¶ 34. This is a wholly discredited legal  
17 theory serially advanced in mortgage fraud cases.  
18

19 It is well established that there is no requirement under  
20 California law that the party initiating foreclosure be in  
21 possession of the original note. *Nool v. HomeQ Servicing*, 653 F.  
22 Supp. 2d 1047, 1053 (E.D. Cal. 2009); *Candelo v. NDEX West, LLC*,  
23 2008 WL 5382259, at \*4 (E.D. Cal. Dec. 23, 2008) ("No requirement  
24 exists under statutory framework to produce the original note to  
25 initiate non-judicial foreclosure."); *Putkkuri v. ReconTrust Co.*,  
26 2009 WL 32567, \*2 (S.D. Cal. Jan 5, 2009) ("Production of the  
27 original note is not required to proceed with a non-judicial  
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1 foreclosure." ). Therefore, Plaintiff's assertion that  
2 Countrywide Defendants and Chase did not possess the note is not  
3 grounds for a wrongful foreclosure or a fraud claim.

4 Plaintiff also alleges that the "broker" committed fraud by  
5 placing him in a sub-prime mortgage "on the promise that things  
6 would get better and the borrower could refinance when the value  
7 of their home increases." Doc. 1 ¶ 39. All claims for fraud  
8 must comply with Federal Rule of Civil Procedure 9(b), which  
9 requires that Plaintiff clearly set forth the "who, what, when,  
10 where, and how" concerning their fraud allegations. *Vess v. Ciba*  
11 *Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). Plaintiff  
12 entirely fails to describe which of the many defendants was the  
13 "broker," what the broker told him, and when and how any such  
14 statements were made.  
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16

17 Plaintiff has been previously afforded leave to amend the  
18 fraud claim. The fraud cause of action against the Countrywide  
19 Defendants and Chase is DISMISSED WITH PREJUDICE.  
20

#### 21 B. Breach of Loan Commitment

22 Plaintiff's second cause of action alleges a breach of loan  
23 commitment against MERS and First Magnus. This allegation is  
24 based on supposed oral promises made by First Magnus to modify  
25 the loan and a breach of those promises. Doc. 16 at ¶ 127.  
26 Plaintiff further alleges that MERS is liable as a nominee of the  
27 lender who breached a contract. Doc. 16 at ¶ 128. As "breach of  
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1 loan commitment" is not a cognizable legal claim, Plaintiff's  
2 claim is analyzed as a breach of contract claim. The elements  
3 for a breach of contract are: (1) the existence of a valid  
4 contract, (2) plaintiff's performance or excuse for  
5 nonperformance, (3) defendants' breach, and (4) resulting damage.  
6 *McKell v. Washington Mutual, Inc.* 142 Cal. App. 4th 1457, 1489  
7 (2006).  
8

9 Certain types of contracts are invalid unless memorialized  
10 by a written document signed by the party against whom the  
11 contract is being enforced. Cal. Civ. Code § 1624. Mortgages  
12 and deeds of trust are subject to the statute of frauds. *Secrest*  
13 *v. Sec. Nat'l Mortg. Loan Trust 2002-2*, 167 Cal. App. 4th 544,  
14 552 (2008). "An agreement to modify a contract that is subject  
15 to the statute of frauds is also subject to the statute of  
16 frauds" and must be in writing. *Id.* at 553; *see also Basham v.*  
17 *Pac. Funding Group*, 2010 WL 2902368 (E.D. Cal. July 22,  
18 2010) (dismissing a claim that defendant breached an oral contract  
19 to provide plaintiffs with a loan modification because, under the  
20 statute of frauds, "absent a writing, there can be no contract,  
21 much less a breach of contract."); *Justo v. Indymac Bancorp, et*  
22 *al.*, 2010 WL 623715 (E.D. Cal. Feb. 19, 2010) (plaintiff's claim  
23 that defendants breached an oral contract to modify his loan and  
24 cancel the foreclosure sale was barred by the statute of frauds).  
25 A written contract may not be modified by an oral agreement,  
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1 unless that oral agreement is memorialized in writing and signed  
2 by the parties. Cal. Civ. Code § 1698.

3 Here, the alleged promise for a loan modification is subject  
4 to the statute of frauds. Absent a written agreement to modify  
5 the loan, any claim based upon an oral contract to modify the  
6 loan is barred by the statute of frauds. See *Secrest*, 167 Cal.  
7 App. 4<sup>th</sup> at 552.

9 At oral argument, Plaintiff claimed that Countrywide  
10 promised him that if he brought the loan current, they would  
11 modify his loan. Plaintiff further claims that, in reliance on  
12 this promise, he obtained money (approximately \$8,000) to bring  
13 the loan current, but Countrywide refused the loan modification.  
14 Although Plaintiff cannot state a breach of contract claim based  
15 upon this conduct, he may be able to state a claim for fraud. In  
16 California, the elements for a claim of fraud are: (1)  
17 misrepresentation; (2) knowledge of falsity; (3) intent to  
18 defraud; (4) justifiable reliance; and (5) resulting damage.  
19 *Small v. Fritz Companies, Inc.*, 30 Cal. 4th 167, 173 (2003).

20 Upon removal to federal court, all claims for fraud must be pled  
21 with sufficient particularity to satisfy Federal Rule of Civil  
22 Procedure Rule 9(b). "[W]hile a federal court will examine state  
23 law to determine whether the elements of fraud have been pled  
24 sufficiently to state a cause of action, the Rule 9(b)  
25 requirement ... is a federally imposed rule." *Vess*, 317 F.3d at  
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1 1103) .

2 The Countrywide Defendants' motion to dismiss the second  
3 cause of action is GRANTED WITH LEAVE TO AMEND. Plaintiff shall  
4 have one final opportunity to amend his complaint to state a  
5 fraud claim based upon the conduct discussed at oral argument.  
6

7 C. Negligence

8 Plaintiff alleges negligence against First Magnus and BANA.  
9 The claim against BANA is based solely upon BANA's violation of  
10 RESPA. Doc. 16 at ¶¶ 129-132. Plaintiff further alleges that he  
11 sent a Qualified Written Request ("QWR") to BANA and the reply  
12 was untimely.  
13

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  
18 these three elements is fatal to a negligence claim." *Gilmer v.*  
19 *Ellington*, 159 Cal. App. 4th 190, 195 (2008) (internal citation  
20 omitted). "Financial institutions owe no duty of care to a  
21 borrower when the institution's involvement in the loan  
22 transaction does not exceed the scope of its conventional role as  
23 a mere lender of money." *Nymark v. Heart Fed. Sav. & Loan Ass'n*,  
24 231 Cal. App. 3d 1089, 1096 (1991). As BANA owes no duty to the  
25 Plaintiff, Plaintiff cannot assert a claim of negligence against  
26 BANA.  
27  
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1 To the extent Plaintiff's negligence claim can be  
2 interpreted as a stand-alone claim under RESPA against BANA,  
3 Plaintiff has not alleged how BANA failed to respond to the QWR.

4 RESPA requires:

5 if any servicer of a federally related mortgage loan  
6 receives a qualified written request from the borrower (or  
7 agent of the borrower) for information relating to the  
8 servicing of such loan, the servicer shall provide a written  
9 response acknowledging receipt of the correspondent within  
20 days ... unless the action requested is taken within such  
period.

10 12 U.S.C. § 2605(e)(1)(A). Here, Plaintiff admits that BANA did  
11 respond to the QWR, but contends that the response was untimely.  
12 However, Plaintiff fails to provide any other details regarding  
13 the QWR and the "untimely" response. Plaintiff did not request  
14 leave to amend the negligence claim. Countrywide Defendants'  
15 motion to dismiss is GRANTED WITHOUT LEAVE TO AMEND.  
16

17 D. Breach of Fiduciary Duty

18 As a general rule, a financial institution owes no duty of  
19 care to a borrower where the institution's involvement in the  
20 loan transaction does not exceed the scope of its conventional  
21 role as a lender of money. *Nymark v. Hart Fed. Savings & Loan*  
22 *Assn.*, 231 Cal. App. 3d 1089, 1096 (1991). There is no fiduciary  
23 relationship between Plaintiffs and any defendant. Accordingly,  
24 the Countrywide Defendants' motion to dismiss the fiduciary duty  
25 claim is GRANTED WITHOUT LEAVE TO AMEND.  
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1 E. Breach of Implied Covenant of Good Faith and Fair Dealing

2 The implied covenant of good faith and fair dealing exists  
3 in every contract. The implied covenant "is aimed at making  
4 effective the agreement's promises." *Kransco v. Am. Empire*  
5 *Surplus Lines Ins. Co.*, 23 Cal. 4th 390 (2000). "Broadly stated,  
6 that covenant requires that neither party do anything which will  
7 deprive the other of the benefits of the agreement." *Freeman &*  
8 *Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85 (1995).  
9

10 A tortuous breach of the covenant of good faith and fair  
11 dealing claim is limited to situations in which a fiduciary or  
12 special relationship exists. *Mitsui Manuf. Bank v. Superior*  
13 *Court*, 212 Cal. App. 3d 726, 730 (1989). As no fiduciary  
14 relationship exists here, the Countrywide Defendants' motion to  
15 dismiss this cause of action is GRANTED WITHOUT LEAVE TO AMEND to  
16 the extent it alleges tortuous breach of contract. If it is  
17 meant to allege a breach of contract claim, a sufficient  
18 independent breach of contract claim must be stated.  
19

20  
21 F. Economic Duress

22 Plaintiff's sixth claim against all Defendants is for  
23 "economic duress." Plaintiff asserts this claim on the grounds  
24 that Countrywide made an oral promise to the Plaintiff to modify  
25 the loan. Doc. 16 at ¶¶ 143-148.

26 A party's consent to a contract must be freely given. Cal.  
27 Civ. Code § 1565. Apparent consent is not free when obtained  
28

1 through duress, menace, fraud, undue influence, or mistake. §  
2 1567. "Duress generally exists whenever one is induced by the  
3 unlawful act of another to make a contract or perform some act  
4 under circumstances that deprive him of the exercise of free  
5 will. *Tarpy v. County of San Diego*, 110 Cal. App. 4th 267, 276  
6 (2003). Economic duress does not necessarily involve an unlawful  
7 act, but may arise from "the doing of a wrongful act which is  
8 sufficiently coercive to cause a reasonably prudent person faced  
9 with no reasonable alternative to succumb to the perpetrator's  
10 pressure." *Rich & Whillock, Inc. v. Ashton Development, Inc.*,  
11 157 Cal. App. 3d 1154, 1158 (1984). Examples of such "wrongful  
12 acts" include "[t]he assertion of a claim known to be false or a  
13 bad faith threat to breach a contract or to withhold a  
14 payment...." *Id.* at 1159.

17 Here, Plaintiff's claim of economic duress is that  
18 defendants proceeded with the foreclosure sale in violation of an  
19 oral promise that they would not do so if Plaintiff "brought the  
20 loan current." Doc. 1 ¶¶ 146-147. This is an allegation of  
21 breach of oral contract, not of economic duress. He also  
22 complains that the parties never assigned the deed to one  
23 another, an invocation of the "failure to hold the original  
24 promissory note" theory, which is meritless. Plaintiff has  
25 failed to plead a claim for economic duress.

27 Plaintiff did not request leave to amend the claim for  
28

1 economic duress. Countrywide Defendants' motion to dismiss the  
2 Economic Duress claim is GRANTED WITHOUT LEAVE TO AMEND.

3  
4 G. Civil RICO

5 The seventh cause of action is a Civil RICO claim against  
6 all Defendants. 18 U.S.C. § 1962 provides in pertinent part:

7 (c) It shall be unlawful for any person employed by or  
8 associated with any enterprise engaged in or the  
9 activities of which effect, interstate or foreign  
10 commerce, to conduct or participate, directly or  
11 indirectly, in the conduct of such enterprise's affairs  
12 through a pattern of racketeering activity or  
13 collection of unlawful debt.

14 "A civil RICO complaint must at least allege: '(1) conduct  
15 (2) of an enterprise (3) through a pattern (4) of racketeering  
16 activity (known as "predicate acts") (5) causing injury to  
17 plaintiff's "business or property." ' " *Flores v. Emerich & Fike*,  
18 416 F. Supp. 2d 885, 911 (E.D. Cal. 2006). A civil RICO claim  
19 must also comply with Rule 9(b)'s particularity requirement. *Id.*  
20 at 912.

21 Plaintiff essentially alleges that every defendant was aware  
22 that the notice of default was invalid and that every defendant  
23 either participated in or rendered substantial assistance in the  
24 issuance of the invalid notice. These allegations are not  
25 remotely sufficient to support of a Civil RICO violation.  
26 Plaintiff did not request leave to amend the Civil RICO claim.  
27 Countrywide Defendants' and Chase's motions to dismiss the Civil  
28 RICO claim are GRANTED WITHOUT LEAVE TO AMEND.

1 H. Cal. Civ. Code §§ 2923.5 & 2923.6.

2 Plaintiff alleges that Countrywide and ReconTrust failed to  
3 comply with California Civil Code §§ 2923.5 (requiring lenders to  
4 contact borrower prior to filing notice of default), Doc. 16 at ¶  
5 156-160, and that all Defendants failed to comply with 2923.6  
6 (requiring certain waiting periods prior to giving notice of  
7 sale). There is no private right of action under either  
8 provision. *Gaitan*, 2009 WL 3244729, \*7, succinctly summarized  
9 the state of the law and the relevant analysis:  
10

11 Under California law, a statute will only be deemed to  
12 contain a private right of action if the Legislature  
13 has manifested an intent to create such a right.  
14 *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46  
15 Cal.3d 287, 305 (1988).

16 The Perata Mortgage Relief Act was enacted relatively  
17 recently, and thus California courts have had little  
18 chance to examine its provisions. Nevertheless,  
19 section 2923.6, passed along with section 2923.5,  
20 clearly does not create a private right of action.  
21 That section solely "creat[es] a duty between a loan  
22 servicer and a loan pool member. The statute in no way  
23 confers standing on a borrower to contest a breach of  
24 that duty." *Farner v. Countrywide Home Loans*, No.  
25 08cv2193 BTM (AJB), 2009 WL 189025, at \*2 (S.D.Cal.  
26 Jan. 26, 2009). Other courts to consider this question  
27 have agreed unanimously with the Farner court. See  
28 *Tapia v. Aurora Loan Servs., LLC*, No. 1:09-cv-01143 AWI  
(GSA), 2009 WL 2705853, at \*1 (E.D.Cal. Aug. 25, 2009);  
*Anaya v. Advisors Lending Group*, No. CV F 09-1191 LJO  
DLB, 2009 WL 2424037, at \*8 (E.D.Cal. Aug. 5, 2009);  
*Pantoja v. Countrywide Home Loans, Inc.*, 640 F. Supp.  
2d 1147, 1188, No. C 09-01615 JW, 2009 WL 2423703, at  
\*7 (N.D.Cal. July 9, 2009); *Connors v. Home Loan Corp.*,  
No. 08cv1134-L (LSP), 2009 WL 1615989, at \*7 (S.D. Cal.  
June 9, 2009).

Whether or not section 2923.5 creates a private right  
of action, however, has not been the subject of  
unanimity among the courts. Only two courts have  
considered this question, and they have reached  
inconsistent results. See *Yulaeva v. Greenpoint*  
*Mortgage Funding, Inc.*, No. CIV. S-09-1504 LKK/KJM,  
2009 WL 2880393, at \*11 (E.D. Cal. Sept. 03, 2009)

1 (assuming without deciding that section 2923.5 does not  
2 provide a private right of action); *Ortiz v. Accredited*  
3 *Home Lenders, Inc.*, 69 F. Supp. 2d 1159, 1166, No. 09  
4 CV 0461 JM (CAB), 2009 WL 2058784, at \*5 (S.D. Cal.  
5 Jul. 13, 2009) (finding section 2923.5 does contain a  
6 private right of action, as "the California legislature  
7 would not have enacted this 'urgency' legislation,  
8 intended to curb high foreclosure rates in the state,  
9 without any accompanying enforcement mechanism.").

6 Under California law, "courts are not at liberty to  
7 impute a particular intention to the Legislature when  
8 nothing in the language of the statute implies such an  
9 intention." *Dunn-Edwards Corp. v. Bay Area Air Quality*  
10 *Management Dist.*, 9 Cal. App. 4th 644, 658 (1992).  
11 Thus, "if the Legislature intends to create a private  
12 cause of action, we generally assume it will do so  
13 directly, in clear, understandable, unmistakable  
14 terms." *Vicko Ins. Servs., Inc. v. Ohio Indemnity Co.*,  
15 70 Cal. App. 4th 55, 62-63 (1999), quoting *Moradi-*  
16 *Shalal*, 46 Cal. 3d at 294-295 (internal marks omitted).

12 Section 2923.5 contains no language that indicates any  
13 intent whatsoever to create a private right of action.

14 Neither section 2923.5 or 2923.6 creates a private right of  
15 action. Plaintiff offers no contrary authority or argument.

16 Plaintiff did not request leave to amend the Section 2923.5  
17 claim. The Countrywide Defendants' motion to dismiss the claim  
18 brought under California Civil Code Section 2923.5 is GRANTED  
19 WITHOUT LEAVE TO AMEND. Plaintiff has been previously afforded  
20 leave to amend the Section 2923.6 claim. Countrywide Defendants'  
21 and Chase's motion to dismiss the Section 2923.6 claim is GRANTED  
22 WITHOUT LEAVE TO AMEND.

#### 24 I. Rosenthal Fair Debt Collection Practices Act

25 The complaint next alleges a violation of the Rosenthal Fair  
26 Debt Collection Practices Act ("RFDCPA"), Section 1788.17 against  
27 all Defendants. The RFCDPA was enacted to "prohibit debt  
28

1 collectors from engaging in unfair and deceptive acts or  
2 practices in the collection of consumer debts, and to require  
3 debtors to act fairly in entering into and honoring such debts."  
4 Cal. Civ. Code § 1788.1. Plaintiff's allegations simply list  
5 statutory language then conclude that Defendants violated each  
6 section.  
7

8 "The law is clear that foreclosing on a deed of trust does  
9 not invoke the statutory protections of the RFDCPA." *Collins v.*  
10 *Power Default Servs., Inc.*, No. 09-4838 SC, 2010 WL 234902, at \*3  
11 (N.D. Cal. Jan. 14, 2010) (collecting numerous cases).

12 "Foreclosure pursuant to a deed of trust does not constitute debt  
13 collection under the RFDCPA." *Casteneda v. Saxon Mortgage*  
14 *Serve., Inc.*, 687 F. Supp. 2d 1191, 1197 (E.D. Cal 2009); *see*  
15 *also Gonzalez v. First Franklin Loan Servs.*, No. 1:09-CV-00941  
16 AWI-GSA, 2010 WL 144862, at \*7 (E.D. Cal. Jan. 11, 2010)  
17 ("Foreclosure related actions...do not implicate the RFDCPA.") The  
18 conduct Plaintiff complains of concerns foreclosure related  
19 actions in connection with his residential mortgage. This  
20 conduct is not covered by the RFDCPA. For this reason,  
21 Plaintiff's RFDCPA claim is subject to dismissal.  
22

23  
24 Plaintiff has been previously afforded leave to amend the  
25 RFDCPA claim. Countrywide Defendants' and Chase's motions to  
26 dismiss the RFDCPA claim are GRANTED WITHOUT LEAVE TO AMEND.  
27  
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1 J. Cal. Civ. Code § 1572

2 Plaintiff's eleventh cause of action is against First Magnus  
3 and MERS for violation of California Civil Code § 1572 (Actual  
4 Fraud). The complaint alleges:

5 The misrepresentations by Defendants and/or  
6 Defendants' predecessors, failures to disclose,  
7 and failure to investigate as described above were  
8 made with the intent to induce Plaintiff to  
9 obligate themselves on the Loan in reliance on the  
integrity of Defendants and/or Defendants'  
predecessors.

10 (Compl. at ¶ 180).

11 In California, "[t]he elements of fraud, which give[] rise  
12 to the tort action for deceit, are (a) misrepresentation (false  
13 representation, concealment, or nondisclosure); (b) knowledge of  
14 falsity (or scienter); (c) intent to defraud, i.e., to induce  
15 reliance; (d) justifiable reliance; and (e) resulting damage."  
16 *Small v. Fritz Companies, Inc.*, 30 Cal. 4th 167, 173 (2003)  
17 (internal quotation marks omitted). Plaintiff's fraud claim is  
18 subject to Rule 9(b)'s elevated pleading standard. *Vess v. Ciba-*  
19 *Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).

21 The allegations in the complaint fail to specify the "who,  
22 what, when, where, and how of the misconduct charged." *Kearns v.*  
23 *Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 1120) (internal  
24 quotation marks omitted). The complaint provides no particular  
25 details on *what* specific role First Magnus or MERS played in the  
26 "scheme" to "fraudulently induce Plaintiff" to enter into his  
27 loan transaction, or *when* and *where* the scheme occurred. See

1 *Swartz*, 476 F.3d at 764-65 (concluding that, in a fraud suit  
2 involving multiple defendants, a plaintiff must "identif[y] the  
3 role" each defendant played "in the alleged fraudulent scheme,"  
4 informing "each defendant separately of the allegations  
5 surrounding his alleged participation in the fraud") (alteration  
6 in original) (internal quotation marks omitted); *Vess v. Ciba-*  
7 *Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (concluding  
8 that a fraudulent conspiracy claim failed to satisfy Rule 9(b)  
9 because, among other things, the pleading failed to "provide the  
10 particulars of when, where, or how the alleged conspiracy  
11 occurred"). In addition, the complaint fails to specify what  
12 particular misrepresentation was involved in the fraudulent  
13 scheme. First Magnus, MERS, or any defendant, is not required to  
14 guess what particular misrepresentation(s) are at issue in the  
15 fraud claim.  
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18 Plaintiff's sixteenth cause of action restates the  
19 allegations from the eleventh cause of action against all  
20 Defendants and fails for the same reasons.

21 Plaintiff has been previously afforded leave to amend the  
22 Section 1572 claim. He has not done so. Countrywide Defendants'  
23 motion to dismiss the eleventh cause of action is GRANTED WITHOUT  
24 LEAVE TO AMEND. Countrywide Defendants' and Chase's motions to  
25 dismiss the sixteenth cause of action are GRANTED WITHOUT LEAVE  
26 TO AMEND.  
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K. Real Estate Settlement Procedures Act

Plaintiff reasserts a RESPA claim against each Defendant, alleging: (1) "That the failure to respond to Plaintiff's RESPA constitutes a violation of 12 U.S.C. § 2607(b); and (2) Plaintiff has suffered damages actually and proximately caused by Defendants' violation of the within statute." (Doc. 16 at ¶¶ 196, 198). Plaintiff's claim against each Defendant is unfounded, as he only addressed a RESPA letter to BANA.

Just as Plaintiff's prior alleged RESPA claim failed to state a claim, this RESPA claim fails. The new claim does not allege who or how each Defendant violated RESPA. Instead the allegation simply affords the conclusion of law that the Defendants violated RESPA resulting in damages to the Plaintiff. Plaintiff did not request leave to amend the RESPA claim. Countrywide Defendants' and Chase's motions to dismiss this RESPA cause of action are GRANTED WITHOUT LEAVE TO AMEND.

L. Quiet Title

"[A] mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee." *Miller v. Provost*, 26 Cal. App. 4th 1703, 1707 (1994) (citations omitted). Here, Plaintiff defaulted on the Subject Loan, and does not allege that he has since paid the outstanding balance.

Plaintiff has been previously afforded leave to amend the

1 claim for Quiet Title. Countrywide Defendants' and Chase's  
2 motions to dismiss the fourth cause of action are GRANTED WITHOUT  
3 LEAVE TO AMEND.

4 N. Cal. Bus. & Prof. Code §17200

5 Plaintiff asserts a claim under California's Unfair  
6 Competition Law ("UCL"). Cal. Bus. & Prof. Code § 17200.  
7 Section 17200 prohibits "any unlawful, unfair or fraudulent  
8 business act or practice and unfair, deceptive, untrue or  
9 misleading advertising." "[A] plaintiff must have suffered an  
10 'injury in fact' and 'lost money or property as a result of the  
11 unfair competition' to have standing to pursue either an  
12 individual or a representative claim under the California Unfair  
13 Competition Law." *Hall v. Time, Inc.*, 158 Cal. App. 4th 847, 849  
14 (2008); *see also* Cal. Bus. & Prof. Code § 17204.  
15

16 Defendants argue that Plaintiff did not state a claim under  
17 the UCL because: (1) "Plaintiff has not alleged sufficient facts  
18 under Fed. R. Civ. P. 8"; (2) Plaintiff did not allege statutory  
19 violations or allege that any conduct was unlawful, unfair, or  
20 fraudulent; (3) Plaintiff did not plead claims of fraud and  
21 misrepresentation with specificity; (4) Plaintiff did not state  
22 what money and property was lost.  
23

24 The UCL prohibits unfair competition including "any  
25 unlawful, unfair or fraudulent business act or practice." Cal.  
26 Bus. & Prof. Code § 17200. Because the statute is written in the  
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1 disjunctive, it applies separately to business acts or practices  
2 that are (1) unlawful, (2) unfair, or (3) fraudulent. See  
3 *Pastoria v. Nationwide Ins.*, 112 Cal. App. 4th 1490, 1496 (2003).  
4 "Each prong of the UCL is a separate and distinct theory of  
5 liability; thus, the 'unfair' practices prong offers an  
6 independent basis for relief." *Kearns*, 567 F.3d at 1127.  
7

8 As to the unlawful prong, the UCL incorporates other laws  
9 and treats violations of those laws as unlawful business  
10 practices independently actionable under state law. *Chabner v.*  
11 *United Omaha Life Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000).  
12 As to the "unfair" prong, "[a]n unfair business practice is one  
13 that either 'offends an established public policy' or is  
14 'immoral, unethical, oppressive, unscrupulous or substantially  
15 injurious to consumers.'" *McDonald v. Coldwell Banker*, 543 F.3d  
16 498, 506 (9th Cir. 2008) (quoting *People v. Casa Blanca*  
17 *Convalescent Homes, Inc.*, 159 Cal. App. 3d 509, 530 (1984)). As  
18 to the fraudulent prong, "fraudulent acts are ones where members  
19 of the public are likely to be deceived." *Sybersound Records,*  
20 *Inc. v. UAV Corp.*, 517 F.3d 1137, 1151-52 (9th Cir. 2008). For  
21 UCL claims, "[a] plaintiff must state with reasonable  
22 particularity the facts supporting the statutory elements of the  
23 violation." *Khoury v. Maly's of Cal., Inc.*, 14 Cal. App. 4th  
24 612, 619 (1993).  
25  
26

27 Plaintiff's UCL claim has several deficiencies. First,  
28

1 Plaintiff's UCL allegations do not specify the basis for his  
2 claim, i.e., whether it is based on an unlawful, unfair, or  
3 fraudulent practice, let alone state, with reasonable  
4 particularity, the facts supporting the statutory elements of the  
5 violation. Second, to the extent Plaintiff asserts an UCL claim  
6 based on a violation of other law, his complaint fails to state a  
7 claim for a violation of law. Accordingly, to the extent the UCL  
8 claim is predicated on the violation of other law, it is  
9 insufficiently pled. Third, to the extent Plaintiff asserts a  
10 UCL claim that is based on or grounded in fraud, it must meet the  
11 requirements of Rule 9(b), *Kearns*, 567 F.3d at 1124-27, *Vess*, 317  
12 F.3d at 1103-04, which it does not. The complaint fails to  
13 specify what particular role Defendants played in the fraudulent  
14 scheme, when and where the scheme occurred, or details on the  
15 specific misrepresentation(s) involved in the fraudulent scheme.

16  
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18 Plaintiff has been previously afforded leave to amend the  
19 Section 17200 claim. Defendants' motion to dismiss the Section  
20 17200 cause of action is GRANTED WITHOUT LEAVE TO AMEND.

21 O. Production of Original Note

22  
23 The complaint's 15th cause of action against ReconTrust and  
24 MERS alleges that no Defendant owns the note and therefore has no  
25 right to foreclose. Doc. 16 ¶ 214. As discussed above, this is  
26 not the law in California. Plaintiff's demand to produce the  
27 note fails as matter of law for the reasons stated above.

1 Plaintiff did not request leave to amend this claim.  
2 Defendants' motion to dismiss the 15th cause of action is GRANTED  
3 WITHOUT LEAVE TO AMEND.

4 Q. Injunctive Relief

5 Countrywide Defendants and Chase move to dismiss the last  
6 cause of action for injunctive relief on the grounds that: (1)  
7 injunctive relief is not a cause of action; and (2) it must be  
8 tethered to some independent legal duty owed by the defendant to  
9 the plaintiff.  
10

11 Plaintiff alleges "Defendants threaten to, and unless  
12 restrained, will foreclose upon Plaintiff's home by conducting a  
13 trustee's sale or causing a trustee's sale to be conducted, or  
14 otherwise." Doc. 16 at ¶ 229. Plaintiff further alleges that  
15 "[i]njunctive relief is necessary to enjoin Defendants from  
16 foreclosing upon Plaintiff's home." Doc. 16 at ¶ 231.  
17

18 "Injunctive relief is a remedy and not, in itself, a cause  
19 of action, and a cause of action must exist before injunctive  
20 relief may be granted." *Camp v. Board of Supervisors*, 123 Cal.  
21 App. 3d 334, 356 (1981) (quoting *Shell Oil Co. v. Richter*, 52  
22 Cal. App. 2d 164, 168 (1942)). Here, as all of the substantive  
23 allegations have been dismissed, Plaintiff cannot obtain  
24 injunctive relief.  
25

26 Plaintiff has been previously afforded leave to amend the  
27 claim for injunctive relief. Countrywide Defendants' and Chase's  
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1 motions to dismiss the final cause of action are GRANTED WITHOUT  
2 PREJUDICE, but only if Plaintiff states a sufficient fraud claim.

3  
4 V. CONCLUSION

5 For the reasons set forth above, Defendants' motions to  
6 dismiss are GRANTED in their entirety.

7 Plaintiff requests leave to amend to state a fraud claim  
8 against the Countrywide Defendants in connection with the alleged  
9 oral promise to modify the loan agreement. Any amended complaint  
10 shall be filed within thirty (30) days of electronic service. No  
11 claims may be reasserted against Chase.

12  
13 SO ORDERED  
14 Dated: August 9, 2010

15 /s/ Oliver W. Wanger  
16 Oliver W. Wanger  
17 United States District Judge  
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