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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ANER OSBALDO HERNANDEZ,)	1:10cv01484 OWW DLB
)	
)	
Plaintiff,)	FINDINGS AND RECOMMENDATIONS
)	REGARDING DISMISSAL OF ACTION
v.)	
)	
HOMEQ SERVICING; WELLS FARGO)	
BANK,)	
)	
)	
Defendants.)	

Plaintiff Anner Osbaldo Hernandez (“Plaintiff”), appearing pro se and proceeding in forma pauperis, filed the instant action on August 17, 2010. He names Homeq Servicing and Wells Fargo Bank as Defendants.

On September 19, 2010, the Court dismissed the complaint with leave to amend. In granting leave to amend, the Court cautioned Plaintiff that he must provide facts to support his claims. The Court also took notice of Plaintiff’s prior unsuccessful effort to pursue identical claims against these defendants in Hernandez v. Homeq Servicing, 1:10-cv-00528 OWW DLB.

On October 12, 2010, Plaintiff filed a first amended complaint (“FAC”).

DISCUSSION

A. Screening Standard

1 Pursuant to [28 U.S.C. § 1915\(e\)\(2\)](#), the court must conduct an initial review of the
2 complaint for sufficiency to state a claim. The court must dismiss a complaint or portion thereof
3 if the court determines that the action is legally “frivolous or malicious,” fails to state a claim
4 upon which relief may be granted, or seeks monetary relief from a defendant who is immune
5 from such relief. [28 U.S.C. § 1915\(e\)\(2\)](#). If the court determines that the complaint fails to state
6 a claim, leave to amend may be granted to the extent that the deficiencies of the complaint can be
7 cured by amendment.

8 [Fed. R. Civ. P. 8\(a\)](#) provides:

9 A pleading that states a claim for relief must contain: (1) a short and plain
10 statement of the grounds for the court’s jurisdiction, unless the court already has
11 jurisdiction and the claim needs no new jurisdictional support; (2) a short and
12 plain statement of the claim showing that the pleader is entitled to relief; and (3) a
13 demand for the relief sought, which may include relief in the alternative or
14 different types of relief.

15 A complaint must contain a short and plain statement as required by [Fed. R. Civ. P.](#)
16 [8\(a\)\(2\)](#). Although the Federal Rules adopt a flexible pleading policy, a complaint must give fair
17 notice and state the elements of the claim plainly and succinctly. [Jones v. Community Redev.](#)
18 [Agency, 733 F.2d 646, 649 \(9th Cir. 1984\)](#). Plaintiff must allege with at least some degree of
19 particularity overt acts which the defendants engaged in that support Plaintiff’s claim. [Id.](#)
20 Indeed, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
21 relief that is plausible on its face.’” [Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 \(2009\)](#) (quoting [Bell](#)
22 [Atlantic Corp. v. Twombly, 550 U.S. 544, 570 \(2007\)](#)). “A claim has facial plausibility when the
23 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
24 defendant is liable for the misconduct alleged.” [Iqbal](#), 129 S.Ct. at 1949. “Threadbare recitals of
25 the elements of a cause of action, supported by mere conclusory statements, do not suffice.” [Id.](#)

26 In reviewing a complaint under this standard, the Court must accept as true the allegations
27 of the complaint in question, [Hospital Bldg. Co. v. Trustees of Rex Hospital, 425 U.S. 738, 740](#)
28 [\(1976\)](#), construe the pro se pleadings liberally in the light most favorable to the Plaintiff, [Resnick](#)
[v. Hayes, 213 F.3d 443, 447 \(9th Cir. 2000\)](#), and resolve all doubts in the Plaintiff’s favor,
[Jenkins v. McKeithen, 395 U.S. 411, 421 \(1969\)](#).

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B. Plaintiff's Allegations

In the FAC, Plaintiff contends that the “lender” prevented “borrower” from refinancing the loan (Loan Number 325186427). Plaintiff asserts that the “lender” is not willing to modify loan documents entered in “02/2006” and it is his understanding that the lender must give the borrower an opportunity to modify the loan documents or reduce the interest rate before foreclosing on the property. FAC, p.1.

Plaintiff also alleges that “defendant” failed to make certain disclosures in connection with a consumer credit transaction in violation of the Truth in Lending Act (“TILA”), [15 U.S.C. § 1601 et seq.](#), its implementing regulations and the Home Ownership Protection Act (“HOEPA”), an amendment to TILA, [15 U.S.C. § 1639](#). He seeks damages, title to the property and litigation costs.

As an “ADDED COMPLAINT,” Plaintiff alleges wrongful foreclosure, asserting that the “lender” has sent a letter of intent to foreclose. Plaintiff questions whether the lender possesses the original debt instrument. He requests that the court intervene and prevent foreclosure.

C. Analysis

1. Loan Modification

Plaintiff attempts to bring a cause of action based on the lender’s refusal to modify loan documents. In relevant part, Plaintiff states:

This is a ongoing process which started on or about January 2008 after lender prevented borrower from refinancing the loan.,
Up to now lender is still not willing to cooperate in modifying the loan documents that were entered on 02/2006.

It is my understanding that under California law the lender must give an opportunity to the borrower to modified the loan documents or at least should reduced the interest rate before they foreclose on the property.
The Obama Administration Making Home Affordable Program includes opportunities to modify or refinance mortgages to make monthly payments more affordable I am only asking for the same opportunity given to the rest of lenders nation wide

FAC, p. 1.

a. “Making Home Affordable Program”

1 Plaintiff appears to assert that one or both defendants violated the Home Affordable
2 Modification Program (“HAMP”) by failing to offer a modification of the loan. Generally
3 described, the HAMP program involves an agreement between a participating loan servicer and
4 the U.S.Department of Treasury. See [Marks v. Bank of America, N.A., 2010 WL 2572988, *3-5](#)
5 [\(D. Ariz. June 22, 2010\)](#) (discussing HAMP program). HAMP provides financial incentives to
6 participating mortgage servicers to modify the terms of eligible loans, but does not require loan
7 modification. *Id.* at *3 and 5-6; see also [Escobedo v. Countrywide Home Loans, Inc., 2009 WL](#)
8 [4981618, *3 \(S.D. Cal. 2009\)](#) (HAMP agreement does not require modification of eligible loans).
9 Although it generally has a goal of assisting homeowners, a borrower does not have a right to
10 enforce the HAMP contract between the government and the loan servicer. [Benito v. Indymac](#)
11 [Mortgage Serv., 2010 WL 2130648, *7 \(D. Nev. 2010\)](#); [Wright v. Bank of America, N.A., 2010](#)
12 [WL 2889117, *5 \(N.D. Cal. Jul. 22, 2010\)](#) (plaintiff could not assert a third-party beneficiary
13 claim for breach of HAMP contract).cf. [Reyes v. Saxon Mortgage Serv. 2009 WL 3738177 \(S.D.](#)
14 [Cal. 2009\)](#) (finding plaintiff had plead sufficient facts to support third-party beneficiary theory
15 under HAMP by identifying the contract and attaching a copy to his complaint). Indeed, HAMP
16 does not grant a plaintiff the right of enforcement. [Marks, 2010 WL 2572988 at *6](#); see also
17 [Inman v. Suntrust Mortgage, Inc., 2010 WL 3516309, *2 \(E.D. Cal. Sept. 3, 2010\)](#) (“no private
18 right of action provided under HAMP”).

19 Here, it is unclear how defendants owe any duties under HAMP when Plaintiff has not
20 alleged that either defendant is a participating servicer. Furthermore, there is no private right of
21 action available to Plaintiff under HAMP. Thus, the Court recommends that Plaintiff’s claims
22 under HAMP be dismissed without leave to amend.

23 b. State Law

24 Plaintiff appears to assert that defendants failed to modify his loan under state law.
25 Plaintiff has not cited any authority, but the Court construes his claim as one for violation of [Cal.](#)
26 [Civ. Code § 2923.6](#). [Section 2923.6](#) provides:

27 (a) The Legislature finds and declares that any duty servicers may have to
28 maximize net present value under their pooling and servicing agreements is owed
to all parties in a loan pool, not to any particular parties, and that a servicer acts in

1 the best interests of all parties if it agrees to or implements a loan modification or
2 workout plan for which both of the following apply:

3 (1) The loan is in payment default, or payment default is reasonably
4 foreseeable.

5 (2) Anticipated recovery under the loan modification or workout plan
6 exceeds the anticipated recovery through foreclosure on a net present value
7 basis.

8 (b) It is the intent of the Legislature that the mortgagee, beneficiary, or authorized agent
9 offer the borrower a loan modification or workout plan if such a modification or plan is
10 consistent with its contractual or other authority.

11 However, section 2923.6 does not create a cause of action for Plaintiff. See Quinteros v.
12 Aurora Loan Services, --- F.Supp.2d.---, 2010 WL 3817541, *9 (E.D. Cal. Sept. 30, 2010)
13 (“[T]here is no private cause of action under Section 2923.6.”); Nool v. Homeq Servicing, 653
14 F.Supp.2d 1047, 1052 and n.2 (E.D. Cal. 2009) (finding language of section 2923.6(b) belies the
15 imposition of any duty to engage in loan modification discussions; noting absence of authority
16 supporting a private right of action under the statute); Pantoja v. Countrywide Home Loans, Inc.,
17 640 F.Supp.2d 1177, 1187-88 (N.D. Cal. 2009) (section 2923.6 does not create a cause of action
18 for borrower); Farner v. Countrywide Home Loans, 2009 WL 189025, *2 (S.D. Cal. Jan. 26,
19 2009) (“[N]othing in Cal. Civ. Code § 2923.6 imposes a duty on servicers of loans to modify the
20 terms of loans or creates a private right of action borrowers.”). Accordingly, the Court
21 recommends that the California Civil Code § 2923.6 claim be dismissed without leave to amend.

22 2. TILA

23 The FAC’s next apparent claim refers to the Truth in Lending Act (“TILA”), 15 U.S.C.
24 §§ 1601 et seq., its implementing Regulation Z, 12 C.F.R. § 226, et seq., and the Home
25 Ownership Protection Act (“HOEPA”), an amendment to TILA, 15 U.S.C. § 1639.

26 As with Plaintiff’s original complaint, the FAC is devoid of facts demonstrating that he
27 has standing to bring a TILA claim as a borrower under any loan. TILA confers a statutory “right
28 of action only on a borrower in a suit against the borrower's creditor.” Talley v. Deutsche Bank
Trust Co., 2008 WL 4606302, *2 (D.N.J. Oct.15, 2008). Although Plaintiff cites a loan number
and a property description in the caption, his complaint does not provide any factual information
regarding the loan transaction. For example, Plaintiff does not identify whether he is the

1 borrower on the loan, whether there is more than one borrower, the type of loan at issue, which
2 defendant is the “lender” or any other factual information. Indeed, Plaintiff refers generally to
3 “defendant” throughout the complaint, but appears to have named two separate defendants in the
4 caption.

5 The Court previously identified these deficiencies and instructed Plaintiff to provide
6 sufficient factual information in his amended complaint. Plaintiff has failed to do so.
7 Notwithstanding this failure, the Court presumes that Plaintiff is the borrower and therefore
8 reviews Plaintiff’s additional TILA allegations to determine if he states a claim.

9 In the FAC, Plaintiff alleges that Defendants failed to make certain disclosures to him in
10 violation of TILA, Regulation Z, and HOEPA. However, Plaintiff’s allegations are not
11 sufficiently precise to put Defendants on notice as to which of them was responsible for the
12 alleged violations.

13 Moreover, Plaintiff’s claims appear to be time-barred.¹ There are two types of remedies
14 available under TILA, Regulation Z and HOEPA: statutory damages and rescission. [15 U.S.C. §§](#)
15 [1635\(f\), 1640\(a\)](#). The statute of limitations for bringing a claim for statutory damages is one year
16 from the date of the occurrence of the violation. [§ 1640\(e\)](#). When the alleged violations are
17 based on a failure to disclose information during the loan origination, the limitations period
18 begins running the date the loan issues. See [15 U.S.C. § 1640\(e\)](#).

19 Here, Plaintiff reportedly entered into the challenged loan transaction in February 2006.
20 Plaintiff provides no other dates on which any alleged violations occurred. Therefore, the statute
21 of limitations for any statutory damages claim expired in February 2007. Plaintiff did not file
22 this lawsuit until August 17, 2010, more than three years later.² Further, there is no apparent
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24 ¹Claims brought under Regulation Z and HOEPA are subject to TILA's statute of limitations. See, e.g.,
25 [Diessner v. Mortgage Elec. Registration Sys.](#), 618 F.Supp.2d 1184, 1190-91 (D. Ariz. 2009); [Kanady v. GMAC](#)
26 [Mortg., LLC](#), 2010 WL 4010289, *9 (E.D. Cal. Oct. 13, 2010) (finding that HOEPA is an amendment of TILA and
27 is governed by the same remedial scheme and statutes of limitations as TILA); [Tanuvasa v. F.D.I.C.](#), 2009 WL
3108568, *3 (C.D. Cal. Sept. 29, 2009) (“[T]he Court notes that HOEPA is simply a component of TILA, and thus,
it is governed by the same statute of limitations”) (citing [In re Cmty. Bank of N. Va.](#), 418 F.3d 277, 304-05 (3d Cir.
2005)).

28 ²Plaintiff filed his original lawsuit (1:10-cv-00528 OWW DLB) on March 25, 2010, which also is beyond
the statutory limitations period.

1 equitable tolling of the TILA damages claim. The FAC is vague and Plaintiff has provided no
2 facts to establish that equitable tolling is warranted despite being given multiple opportunities to
3 amend his complaint. Thus, any damages claims under TILA are barred.

4 In addition to damages, rescission is available under TILA in some circumstances. [15](#)
5 [U.S.C. § 1635](#); [12 C.F.R. § 226.23](#). The consumer's right to rescission is absolute for a period of
6 three days after the loan is consummated, [15 U.S.C. § 1635\(a\)](#); [12 C.F.R. § 226.23\(a\)\(3\)](#).
7 However, if the lender fails to provide “material disclosures” at the closing, then the period is
8 extended to three years, [15 U.S.C. § 1635\(f\)](#); [12 C.F.R. § 226.23\(a\)\(3\)](#).

9 Here, Plaintiff did not initiate this lawsuit within the three year time period. Any
10 rescission claims under TILA are barred.

11 Accordingly, the Court recommends that Plaintiff’s TILA claims, including those
12 originating from Regulation Z and HOEPA, be dismissed without leave to amend.

13 3. Original Note Possession

14 As in his original complaint, Plaintiff again challenges a proposed home foreclosure
15 based on the premise that the home owner is “unsure as to whether the lender still posses [sic]
16 the original debt instrument” and he wants proof of such authority. FAC, p. 3. In the written
17 narrative of his complaint, Plaintiff has not identified the home owner, the lender or any other
18 relevant factual allegations.³ As with his TILA claim, Plaintiff was given an opportunity to
19 provide facts in compliance with [Rule 8](#), but failed to do so in his amended complaint.

20 Regardless, Plaintiff’s assertions concerning the original debt instrument are unavailing.
21 “It is well established that there is no requirement under California law that the party initiating
22 foreclosure be in possession of the original note.” [Clark. v. Countrywide Home Loans, Inc., ---](#)
23 [F.Supp.2d ---, 2010 WL 3154119, * 2 \(E.D. Cal. Aug. 9, 2010\)](#) (plaintiff’s assertion that
24 defendants did not possess the note was not grounds for a wrongful foreclosure claim); [Nool v.](#)
25 [HomeQ Servicing, 653 F.Supp.2d 1047, 1053 \(E.D. Cal.2009\)](#); [Putkkuri v. Recontrust Co., 2009](#)
26 [WL 32567, *2 \(S.D. Cal. Jan. 5, 2009\)](#) (“Production of the original note is not required to

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28 ³The Court acknowledge that there is a property description in the caption, but Plaintiff provides no facts or
information regarding the subject property in his FAC.

1 proceed with a non-judicial foreclosure.”); [Candelo v. NDex West, LLC, 2008 WL 5382259, at](#)
2 [*4 \(E.D. Cal. Dec. 23, 2008\)](#) (“No requirement exists under statutory framework to produce the
3 original note to initiate non-judicial foreclosure.”). Therefore, Plaintiff’s allegations that
4 defendant lender must produce the original debt instrument is not grounds for a wrongful
5 foreclosure claim. The Court recommends that any wrongful foreclosure claim be dismissed
6 without leave to amend.

7 **CONCLUSION AND RECOMMENDATIONS**

8 Based on the foregoing, Plaintiff cannot prevail on his claims against the Defendants in
9 this action. Dismissal of a pro se complaint for failure to state a claim is proper where it is
10 obvious that the plaintiff cannot prevail on the facts alleged and that an opportunity to amend
11 would be futile. See [Lopez v. Smith, 203 F.3d 1122 \(9th Cir. 2000\)](#) (en banc). As noted
12 throughout, Plaintiff has been notified of deficiencies in his complaint and has been given
13 multiple opportunities to provide facts to support his claims.⁴ He has not done so. The Court
14 concludes that further opportunities to amend would be futile.

15 Therefore, the Court HEREBY RECOMMENDS that this action be DISMISSED
16 WITHOUT LEAVE TO AMEND.

17 These findings and recommendations will be submitted to the Honorable Oliver W.
18 Wanger, pursuant to the provisions of [Title 28 U.S.C. § 636\(b\)\(1\)](#). Within thirty (30) days after
19 being served with these Findings and Recommendations, Plaintiff may file written objections
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26 ⁴ In [Hernandez v. HomeEq Servicing, 1:10-cv-00528 OWW DLB](#), Plaintiff attempted to pursue identical
27 claims against these same defendants. There, the Court twice dismissed Plaintiff’s complaint with leave to amend to
28 comply with [Rule 8](#). When the Court dismissed his complaint for the second time with leave to amend, Plaintiff
failed to file a timely amended complaint and the action was dismissed on August 4, 2010. Subsequently, Plaintiff
filed the instant action with nearly identical allegations. The Court again dismissed his claims with leave to amend to
comply with [Rule 8](#) and to state a claim. Thereafter, Plaintiff filed the operative complaint.

1 with the Court. The document should be captioned “Objections to Magistrate Judge's Findings
2 and Recommendations.” Plaintiff is advised that failure to file objections within the specified
3 time may waive the right to appeal the District Court’s order. [Martinez v. Ylst, 951 F.2d 1153](#)
4 [\(9th Cir. 1991\)](#).

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6 IT IS SO ORDERED.

7 **Dated: December 3, 2010**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

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