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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAVID LEROY NEWMAN,

 Plaintiffs,

 v.

BANK OF NEW YORK MELLON,
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,
AND BANK OF AMERICA,

 Defendants.

Case No. 1:12-cv-01629-AWI-MJS

FINDINGS AND RECOMMENDATION TO
DENY PLAINTIFF’S MOTION TO AMEND

(ECF NO. 67)

FOURTEEN (14) DAY OBJECTION
DEADLINE

This matter is before the Court on Plaintiff’s October 6, 2016, Motion for Leave to Amend and Supplement Plaintiff’s First Amended Complaint after Remand. (ECF No. 67.) The motion was fully briefed (ECF Nos. 67, 68, 69, and 71) and, on November 3, 2016, argued and submitted. It is ready for resolution.

I. Relevant History

Plaintiff initiated this action October 1, 2012. (ECF Nos. 1 and 2.) Named Defendants were Bank of New York Mellon (“BONY”), Mortgage Electronic Recording Systems (“MERS”), and Bank of America (“BOA”). His Complaint sought damages and injunctive and declaratory relief based on causes of action arising out of quasi contract;

1 negligence; the Fair Debt Collection Practices Act (“FDCPA”), 15 USC section 1692, et
2 seq.; and California’s Unfair Competition Law (“UCL”), California Business and
3 Professions Code Section 17200, et seq. Broadly stated, Plaintiff’s claims derived from
4 his securing a home loan with a deed of trust on the home; subsequent transfers of the
5 loan, the security in it, and the right to payment on it; attempts by successor creditors to
6 foreclose on the security; and Plaintiff’s attempts to pay off or refinance the loan. Plaintiff
7 sought, among other relief, to enjoin foreclosure on the home.

8 On December 3, 2012, Defendants moved to dismiss the Complaint. (ECF No. 8.)
9 Their motion was granted, but with leave to amend. (ECF No. 18.) Plaintiff filed a First
10 Amended Complaint on April 30, 2013. (ECF Nos. 19 & 20.) Defendants again moved to
11 dismiss. (ECF No. 25.) On October 11, 2013, the District Court granted the motion to
12 dismiss, entered judgment for Defendants, and closed the case. (ECF Nos. 42 & 43.)

13 Plaintiff appealed. On May 13, 2016, the 9th Circuit Court of Appeals, in an
14 unpublished decision, affirmed in part, reversed in part, and remanded. (ECF No. 52). As
15 to the reversal, it explained:

16 1. The district court dismissed Newman’s claims for
17 declaratory relief, quasi contract, violations of the Fair Debt
18 Collection Practices Act, violations of California Business &
19 Professions Code section 17200, and accounting because
20 the court determined that a borrower like Newman has no
21 standing to challenge a foreclosing entity’s legal authority to
22 foreclose. But while this appeal was pending, the California
23 Supreme Court decided Yvanova v. New Century Mortgage
24 Corp., 365 P.3d 845 (Cal. 2016), which clarified that
25 borrowers do have standing to challenge a foreclosing
26 entity’s authority to foreclose once the foreclosure has
27 occurred. Id. at 860–61. And it appears that Newman’s home
28 was recently foreclosed on, bringing him within the class of
people who have standing to bring these kind of claims. We
therefore reverse the district court’s dismissal of these claims
for the district court to apply intervening California case law in
the first instance.

2. As to Newman’s negligence claim, the district court
correctly held that a lender generally owes no duty to
consider a loan modification. But while this appeal was

1 pending, the California Court of Appeal decided another
2 case, Alvarez v. BAC Home Loans Servicing, L.P., 176 Cal.
3 Rptr. 3d 304 (Cal. Ct. App. 2014), which clarified that a lender
4 may have a duty to act reasonably once it affirmatively
5 agrees to consider a loan modification application. Id. at 310.
6 Because Newman alleges that defendants agreed to consider
7 his loan modification request, we also remand this claim to
8 the district court for consideration of intervening California
9 case law in the first instance.

10 Newman v. Bank of N.Y. Mellon Corp., 649 F. App'x 630, 631 (9th Cir. 2016); (ECF No.
11 52).

12 The Appeals Court's mandate issued June 7, 2016. (ECF No. 54.) On October 6,
13 2016, Plaintiff filed the motion to amend which is now before the Court. (ECF No. 67.)
14 Defendants filed their opposition on October 17, 2016 (ECF No. 69), and Plaintiff replied
15 to the opposition on October 27, 2016 (ECF No. 71). The parties appeared and argued
16 their positions before the undersigned on November 3, 2016. (ECF No. 72.)

17 **II. Plaintiff's Motion to Amend**

18 As reflected above, the Appeals Court reversed as to Plaintiff's claims for
19 declaratory relief, quasi contract, violations of the FDCPA and California's UCL,
20 accounting and negligence. It remanded those claims "to the district court for
21 consideration of intervening California case law in the first instance." Newman, 649 F.
22 App'x at 631.

23 **A. Plaintiff's Motion**

24 Shortly after remand and before any other substantive case events took place,
25 Plaintiff filed the motion now before the Court. It is entitled "MOTION FOR LEAVE TO
26 AMEND AND SUPPLEMENT PLAINTIFF'S FIRST AMENDED COMPLAINT AFTER
27 REMAND." (ECF No. 67.) The word "SUPPLEMENT" is telling. In the motion, Plaintiff
28 states the objective of amendment is "to raise the appropriate allegations in concert with
the Ninth Circuit's ruling. In addition, the Plaintiff has added defendants who were
complicit in the foreclosure of his residence . . ." and allegations against the original
defendants for "their alleged continuing course of conduct which resulted in Plaintiff's

1 loss of his residence and a claim for a wrongful foreclosure.” (ECF No. 67, p.3, lines 3-
2 9.)

3 The proposed Amended Complaint purports to name as additional Defendants:
4 Recon Trust, Inc. (also referred to at times therein as Recon Trust, N.A. or
5 RECONTRUST), a subsidiary of Bank of America, located in Simi Valley, California
6 (“Recon”); Old Republic Title Insurance Company, located in Chicago, Illinois (“Old
7 Republic”); New Penn Financial LLC dba Shellpoint Mortgages Services (also referred to
8 at times as Shellpoint Servicing), located in Greenville, South Carolina (“Penn”); Peak
9 Foreclosure Services, in Woodland Hills, California (“Peak”), and Does 1-10. Though
10 perhaps a gross oversimplification, but sufficient for present purposes, the allegations
11 against the new proposed defendants are that they were involved at various points in the
12 chain of securitization transactions which began with the deed of trust on Plaintiff’s
13 house and ultimately resulted in foreclosure upon it.

14 **B. Opposition**

15 Defendants BONY, MERS, and BOA oppose the motion to amend on the grounds
16 that: 1) the proposed amendments raise claims beyond those the Ninth Circuit directed
17 be addressed on remand and Defendants would be prejudiced if the claims were
18 allowed to proceed; and, 2) amendment would be futile because a) Plaintiff lacks
19 standing to challenge the foreclosure on his home; and, b) Plaintiff has failed to allege
20 facts essential to a cause of action for negligence.

21 As to the first ground, Defendants argue that the Ninth Circuit’s remand order did
22 not invite Plaintiff to amend, add new parties, or enlarge his negligence claims. It simply
23 directed that his claims be reviewed in light of intervening, more Plaintiff-favorable, case
24 law. To force Defendants to meet these new claims and allow Plaintiff to proceed against
25 additional parties in this same suit would be prejudicial to the defense.

26 As to the second ground for objecting to amendment, Defendants cite to the
27 principal that amendment should be denied where futile, where no set of facts in the
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1 amendment would give rise to a valid claim. (Citing Dumas v Kipp, 90 F.3d 386, 393 (9th
2 Cir. 1996)). In this regard, Defendants argue that Plaintiff's proposed pleading
3 demonstrates that Plaintiff does not have standing to challenge the foreclosure based on
4 securitization because the alleged defects are merely voidable, and a borrower-victim of
5 a nonjudicial foreclosure may challenge an assignment in the chain of securitization (as
6 Plaintiff seeks to do here) only if the assignment was void. (Citing, inter alia, Yvanova,
7 365 P.3d at 848, 856-57; Morgan v Aurora Loan Servs. LLC, 646 Fed. Appx. 546, 550
8 (9th Cir. 2016); and Saterbak v. JPMorgan Chase Bank, N.A., 199 Cal. Rptr. 3rd 790
9 (Cal. Ct. App. 2016)).

10 Further, as to negligence, Defendants argue that Plaintiff has not alleged that he
11 was qualified to receive, and would have received, a loan modification if Defendants had
12 not negligently handled his modification applications or delayed his seeking financial
13 relief elsewhere, as was alleged in Alvarez, the new case which prompted the Ninth's
14 remand.

15 C. Reply

16 Plaintiff responds that he proposes adding nothing new beyond the wrongful
17 foreclosure, which Yvanova recognized as a valid cause of action. He argues that the
18 new defendants were "part and parcel" of the scheme to foreclose, and Plaintiff has the
19 right to proceed against them under California Civil Code Sections 2923.55, 2924.12 and
20 2914.17. He feels those sections support claims relating back to Defendants' alleged
21 acts, and that all should be joined in this one action. Additionally, Plaintiff states that,
22 while the first amended complaint "relie[d] in part on securitization issues," the proposed
23 amended and supplemental complaint no longer contains allegations that "rely on a
24 securitization argument, late-entry to the trust or otherwise." Indeed, Plaintiff appears, at
25 least at one point, to disclaim his previous arguments regarding improper securitization.
26 Instead, he now argues that the original deed of trust is void for various reasons, and
27 thus that all subsequent assignments also are void.

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III. Principles Applicable to Motions to Amend

The Court looks first at Defendant’s first objection to amendment: that Plaintiff’s proposal goes far beyond anything the Ninth Circuit directed be considered on remand.

The facts giving rise to that objection are indisputable. There is no reason whatsoever to believe that the Ninth Circuit anticipated Plaintiff would seek to broaden his suit on remand. But, correspondingly, there is nothing to reflect a Ninth Circuit intent to foreclose such an expansion. The Appeals Court did not say, “This case is remanded only for the purpose of” There appears to be nothing in the proposed amendment that is inconsistent with the District Court’s dismissal of Plaintiff’s California Civil Code section 2923.5 claim, which dismissal the Ninth Circuit upheld. Defendant did not cite to, and Court was unable to find, any authority suggesting that a remand on two of three grounds foreclosed expansion of the case in ways not inconsistent with other final rulings.

Accordingly, the Court concludes that, now that this case is back before the District Court pursuant to the Ninth Circuit remand Order, it procedurally is like any other case in a similar stage of litigation and the motion for amendment should be evaluated in accordance with the standard rules for same.

Except in circumstances not present here, leave of Court is required to amend a pleading. Fed. R. Civ. P. 15(a)(2). Leave to amend should be given freely, and with extreme liberality, unless the opposing party makes a showing of undue prejudice, bad faith, dilatory motive on the part of the moving party, or futility of the amendment. Forman v. Davis, 371 U.S. 178, 182 (1962); Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001) (citations omitted); Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 772 (9th Cir. 1991) (quoting Forman, 371 U.S. at 182). “Absent prejudice, or a strong showing of any of the remaining Forman factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend.” Eminence

1 Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (citation omitted).

2 Here, the Defendants raise two grounds for denial, prejudice and futility.

3 The Court envisions no prejudice to Defendants if the requested amendment is
4 allowed. Though the case is chronologically old, delay alone, particularly in the
5 circumstances of this case, would not support denial of the motion to amend. Bowles v.
6 Reade 198 F.3d 752, 758 (9th Cir. 1999). Despite its age, this case remains in a very
7 early stage. Most of the time since its filing has been devoted to Defendants' motions to
8 dismiss and appeal of the order granting dismissal and judgment for Defendants. No
9 Answer has been filed. No Scheduling Order has issued. Plaintiff reports that no
10 discovery has taken place. (ECF No. 71 at 3, line 23.) In short, it does not appear that
11 allowing the proposed amendment at this point would put Defendant in any procedurally
12 or substantively different position than if the new parties and new claims had been in the
13 original pleading.

14 Leave to amend also may be denied if the proposed amendment is futile. Carrico
15 v. City and County of San Francisco, 656 F.3d 1002, 1008 (9th Cir. 2011) (citation
16 omitted). The test for futility is the same as for a Federal Rule of Civil Procedure 12(b)(6)
17 motion to dismiss, i.e., that the proposed amendment does not make out a plausible
18 claim for relief. See Nordyke v. King, 644 F.3d 776, 788 n.12 (9th Cir. 2011), aff'd on
19 reh'g en banc on other grounds, 681 F.3d 1041 (9th Cir. 2012).

20 The 9th Circuit remanded the case to determine whether new California case law
21 opened the door for Plaintiff to proceed on his securitization-based claims and
22 negligence claims. Defendants argue that Plaintiff's proposed amendment would be
23 futile because these claims are not cognizable as pled. As set forth below, Defendants
24 arguments do not precisely track the facts and arguments presented in the proposed
25 amended complaint. The parties' arguments are addressed in turn below.

1 **IV. Foreclosure-Related Claims**

2 **A. Remand Order**

3 Plaintiff's first amended complaint contained several causes of action that
4 challenged BONY's authority to enforce the mortgage on various grounds. The first of
5 these grounds was based on alleged defects relating to the Pooling and Service
6 Agreement ("PSA") applicable in this case. However, these claims were dismissed on
7 the ground that Plaintiff lacked standing to bring any cause of action based on violations
8 of the PSA. Additional claims relating to alleged improper assignment in violation of the
9 bankruptcy stay were dismissed on the basis of collateral estoppel. Finally, claims
10 relating to fraudulent assignment based on the actions of allegedly unauthorized "robo-
11 signers" were dismissed as conclusory and implausible. (ECF No. 42.)

12 As noted, the Court of Appeals found that, because Plaintiff's home had been
13 foreclosed upon during the pendency of the appeal of this case, Plaintiff fell within the
14 class of people Yvanova held had standing to challenge the foreclosing entity's authority
15 to foreclose. The Court notes that this holding addresses only the first ground for
16 dismissal of Plaintiff's foreclosure-related claims, i.e., Plaintiff's standing. Nothing in the
17 Ninth Circuit's remand order purports to disturb the Court's prior conclusions dismissing
18 without leave to amend the claims based on violations of the bankruptcy stay or
19 unauthorized actions of "robo-signers." To the extent Plaintiff intends to raise such
20 claims in his proposed amended and supplemental complaint, these claims are barred
21 by the Court's prior dismissal order (ECF No. 42) and are not addressed herein.

22 Furthermore, there appears to be some question whether Plaintiff's proposed
23 amended complaint implicates the standing issue articulated by Yvanova and by the
24 Ninth Circuit's remand order. Defendants' primary argument against allowing the
25 amendment is that Plaintiff's claims regarding improper securitization allege voidable,
26 rather than void assignments of the security of his loan, and thus he has no standing
27 under Yvanova. Defendants' arguments go to the heart of the matter that was remanded
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1 to this Court.

2 Plaintiff contends, however, that the proposed amended and supplemental
3 complaint “does not contain allegations that rely on a securitization argument, late-entry
4 to the trust or otherwise.” (ECF No. 71 at 5.) A review of the proposed amended and
5 supplemental complaint reflects that Plaintiff is no longer relying on violations of the PSA
6 or late entry into the trust. That is to say, Plaintiff appears to have abandoned the
7 securitization arguments that formed the basis for his claim in the first amended
8 complaint and the Ninth Circuit’s remand order. As best the Court can tell, Plaintiff now
9 argues that the event which rendered the foreclosure invalid occurred at the first stage in
10 the chain of title, not from the assignments which took place after the closing on the
11 original loan transaction. (ECF No. 71 at 6-8.) According to Plaintiff, this initial defect left
12 none of the defendants with any valid interest in Plaintiff’s home. (Id.)

13 At oral argument on the motion, the parties disputed whether Plaintiff’s proposed
14 claims were premised on securitization, and even whether they were subject to the
15 principles set out in Yvanova. Because Plaintiff’s claims are far from clear, and because
16 the Ninth Circuit remanded expressly for consideration of whether Plaintiff’s claims are
17 cognizable under Yvanova, the Court begins its analysis with Yvanova.

18 **B. Yvanova**

19 Prior to the California Supreme Court’s decision in Yvanova, California courts
20 were split on the issue of whether a borrower had standing to challenge alleged
21 improprieties in the assignment of a deed of trust. Compare Jenkins v. JP Morgan Chase
22 Bank, N.A., 216 Cal. App. 4th 497, 514-15 (2013) (borrower is an unrelated third party to
23 the assignment and has no standing to enforce or challenge it) with Glaski v. Bank of
24 America, 218 Cal. App. 4th 1079, 1094-95 (2013) (borrower had standing to challenge
25 foreclosure on the basis that assignments were void).

26 In Yvanova, the Court went to some length to draw, and explain, the distinction
27 between void and voidable assignments in such cases, and ultimately authorized claims
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1 based on void, but not voidable, assignments. 62 Cal. 4th at 929-40. The court
2 recognized a borrower's standing to challenge a foreclosure sale conducted by one who
3 had no authority to conduct it, even where the borrower was not party to the assignment
4 that allegedly deprived the assignee of authority to foreclose: "A homeowner who has
5 been foreclosed on by one with no right to do so has suffered an injurious invasion of his
6 or her legal rights at the foreclosing entity's hands. No more is required for standing to
7 sue." Id. at 939 (citing Angelucci v. Century Supper Club, 41 Cal. 4th 160, 175 (2007)).

8 Since only the original lender, its assignee or someone acting on behalf of one of
9 them may direct the trustee to foreclose, "[i]f a purported assignment necessary to the
10 chain by which the foreclosing entity claims that power is absolutely void, meaning of no
11 legal force or effect whatsoever, the foreclosing entity has acted without legal authority
12 by pursuing a trustee's sale, and such an unauthorized sale constitutes a wrongful
13 foreclosure." Id. at 935 (citations omitted).

14 The California Supreme Court relied on Glaski and the reasoning of "several
15 federal court decisions" to support the proposition that a borrower has standing to
16 challenge such an assignment as void, though not as voidable.¹ Id. 930-31 (citing
17 Culhane v Aurora Loan Servs. of Nebraska, 708 F.3d. 282 (1st Cir. 2013) and Reinagel
18 v. Deutsche Bank Nat. Trust Co. 735 F.3d 220 (5th Cir. 2013)). The Court reasoned that
19 where the alleged defect in assignment rendered it merely voidable at the election of one
20 of the parties to it, but otherwise effective to pass legal title, the borrower had no
21 standing to challenge the assignment. Id. at 932. In such circumstances,

22 the power to ratify or avoid the transaction lies solely with the
23 parties to the assignment; the transaction is not void unless
24 and until one of the parties takes steps to make it so. A
25 borrower who challenges a foreclosure on the ground that an
assignment to the foreclosing party bore defects rendering it

26 _____
27 ¹ Although some federal decisions held to the contrary, the Yvanova court found those decisions
28 unpersuasive. Id. at 940 (citing Khan v. ReconTrust Co., 81 F. Supp. 3d 867 (N.D. Cal. 2015) and Flores
v. EMC Mort. Co., 997 F. Supp. 2d 1088 (E.D. Cal. 2014)). There is no dispute that California law controls
and that Yvanova has settled this issue.

1 voidable could thus be said to assert an interest belonging
2 solely to the parties to the assignment rather than to herself.

3 Id. at 936.

4 The holding in Yvanova can be distilled quite simply as follows: a borrower who
5 has suffered a nonjudicial foreclosure has standing to sue for wrongful foreclosure based
6 on an allegedly void assignment. However, the court stopped well short of determining
7 whether particular conduct or defects actually rendered an assignment void or merely
8 voidable. Indeed, the court “express[ed] no opinion” on what facts might show a void
9 assignment. Id. at 931, 943. Thus, this Court must look to other law to determine
10 whether the claims at issue here point to a void or voidable assignment.

11 **C. Plaintiff’s Allegations**

12 As best the Court can tell, Plaintiff proposes to support his foreclosure-related
13 claims with the following factual allegations.

14 First, Plaintiff alleges that the deed of trust was recorded on November 22, 2006,
15 but the loan was not funded until November 28, 2006. (ECF No. 67 at 14.) Thus, he
16 contends that he did not receive his consideration at the time he became liable on the
17 Note and Deed of Trust. (ECF No. 71 at 6-7.) He contends that this delayed funding
18 resulted in a deed of trust that “secured nothing” and is therefore void. In support, he
19 cites California Insurance Code § 12413.1(j) and 12 C.F.R. § 229. (Id.)

20 Second, Plaintiff alleges that, because the funding checklist listed an investor, an
21 un-named investor was the actual funder of the loan, and table-funded the loan after the
22 deed of trust was recorded. (ECF No. 67 at 23; No. 71 at 7.) According to Plaintiff,
23 because the actual lender was unknown to Plaintiff at the time Plaintiff signed the
24 promissory note and deed of trust, the loan contract was not “consummated.” In support,
25 he cites Jackson v. Grant, 876 F.2d 764 (9th Cir. 1989). (ECF No. 71 at 7.)

26 Third, Plaintiff alleges that his initial loan payment to Decision One Mortgage LLC
27 is not reflected on his payment history. Plaintiff contends that Decision One Mortgage
28 LLC thus did not collect his loan payment, but rather collected that amount as a fee for

1 loan origination. He contends that such conduct was predatory under the Truth in
2 Lending Act. He also seems to argue that Decision One was merely a conduit for an
3 unnamed investor and thus could not transfer any equitable interest in the note to any
4 other party, so the indorsement by Decision One and all subsequent indorsements are
5 void. (ECF No. 67 at 14-15; No. 71 at 7.) Also as a result, Plaintiff had a right to rescind
6 under the Truth in Lending Act, and did in fact serve a notice of rescission on BONY on
7 March 7, 2015. (ECF No. 67 at 23.)

8 Plaintiff surmises that all of these defects resulted in there being no sale or
9 transaction at all; thus all subsequent assignments also are void because they merely
10 ratified an event that never happened. In short, the Defendant holders of the security
11 had nothing to foreclose on or assign. What they assigned had no legal existence.

12 As stated, Defendants have not addressed these arguments, choosing to instead
13 attack the allegations contained in the operative complaint regarding securitization
14 defects as being voidable, rather than void. Nonetheless, as discussed below, even the
15 most cursory review of the materials cited by Plaintiff demonstrates that the transaction
16 at issue here is not void. Thus, Plaintiff fails to state a basis for challenging Defendants'
17 authority to foreclose on the loan.

18 **D. Discussion**

19 The Court begins with general principles of contract law by noting that void
20 contracts typical involve circumstances where “one party was an infant, or where the
21 contract was induced by fraud, mistake, or duress, or where breach of a warranty or
22 other promise justifies the aggrieved party in putting an end to the contract.”
23 Restatement (Second) of Contracts § 7 (1981). For example, deeds of trust have been
24 declared void where they are procured through a “document switch fraud” amounting to
25 fraud in the execution, LaChapelle v. Hansen McCoy Investments, LLC, No. E060825,
26 2015 WL 8060750, at *7-8 (Cal. Ct. App. Dec. 7, 2015), as modified on denial of reh'g
27 (Jan. 5, 2016), or where the deed of trust was a forgery, La Jolla Grp. II v. Bruce, 211
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1 Cal. App. 4th 461, 478 (Cal. Ct. App. 2012).

2 **1. Delayed Funding**

3 Plaintiff first suggests that the delayed funding of his loan rendered the loan void
4 under California Insurance Code § 12413.1(j) and 12 C.F.R. part 229. California
5 Insurance Code § 12413.1 is California's good funds law, and it governs the
6 disbursement of funds from an escrow account. Subsection (j) provides, "Nothing in this
7 section shall be deemed to prohibit the recordation of documents prior to the time funds
8 are available for disbursement with respect to a transaction provided the parties to the
9 transaction consent in writing prior thereto." This provision does not suggest that delayed
10 funding voids the transaction, whether or not it is authorized in writing. To the contrary,
11 the law expressly addresses the effect of violations: title insurance companies, controlled
12 escrow companies, and underwritten title companies may be held liable for intentional
13 violations that do not result from bona fide errors. California Insurance Code
14 § 12413.1(i). This express remedial structure suggests that delayed funding does not
15 render a deed of trust void. Furthermore, Plaintiff does not cite, not does the Court find,
16 case law to support such a proposition. Nor does Plaintiff set forth any argument to
17 suggest how or why delayed funding voids the transaction.

18 Plaintiff cites generally to 12 C.F.R. part 229, but does not point to which specific
19 provision of the code was violated. Regardless, however, violations of this part are
20 subject to administrative enforcement mechanisms, 12 C.F.R. § 229.3, or civil liability, 12
21 C.F.R. § 229,21. Neither provision suggests that violations of the part render a
22 transaction void.

23 **2. Unknown Investor**

24 Plaintiff next alleges that the deed of trust was void because an unnamed investor
25 is listed on the funding checklist. At least one California court has rejected a similar
26 argument. Torres v. U.S. Bank Nat'l Ass'n, No. G051406, 2016 WL 3571014, at *7-8
27 (Cal. Ct. App. June 23, 2016), review denied (Sept. 21, 2016) (rejecting argument that
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1 inability to precisely identify the lender rendered a deed of trust void, particularly where
2 the borrowers “did not allege they were subjected to competing claims for payment on
3 the loan or that they did not know who to pay”). Furthermore, regardless of what was
4 presented on the funding checklist², both the Note and the Deed of Trust list the lender
5 as Decision One, (ECF No. 67 at 57, 64), it was to Decision One that Plaintiff made his
6 first payment, and it was Decision One that first assigned the deed of trust (ECF No. 67
7 at 82).

8 As another variation on the argument that Decision One is not the true lender,
9 Plaintiff claims that he was not credited for his initial payment to Decision One and thus
10 Decision One must have collected this money as a fee, rather than a payment on the
11 loan. However, all of the documents attached to the complaint state that Plaintiff’s initial
12 payment was due January 1, 2007, the date he allegedly paid Decision One. Decision
13 One’s failure to credit the payment, to the extent it did so, does not render the deed of
14 trust void.

15 **C. Truth in Lending Act**

16 Plaintiff appears to argue that the note and deed of trust are void because of
17 violations of the Truth in Lending Act (“TILA”) and Regulation Z. As an initial matter, the
18 Court notes that Plaintiff has not brought a claim for rescission or damages under TILA
19 or Regulation Z. To the extent Plaintiff argues that TILA violations rendered the note and
20 deed of trust void for purposes of the Yvanova analysis, he is incorrect. Under TILA, if
21 required disclosures are not made, the consumer may rescind. 15 U.S.C. § 1635(a).
22 However, the borrower must return the money or property when he exercises the right to
23 rescind. 15 U.S.C. § 1635(b). Regulation Z, 12 C.F.R. § 226.23, implements these
24 provisions. Under these provisions, a security interest “becomes void” only when certain
25 conditions are met; it is not voided simply by serving a notice of rescission. Yamamoto
26 v. Bank of N.Y., 329 F.3d 1167, 1172 (9th Cir. 2003). The structure of the statute and

27 _____
28 ² It is far from clear that the funding checklist identifies an undisclosed investor as the true lender. (See ECF No. 67 at 105.)

1 regulations squarely create a system under which a security interest is voidable, rather
2 than void.

3 Furthermore, Plaintiff's reliance on Jackson v. Grant, 876 F.2d 764 (9th Cir.
4 1989), amended and superseded by 890 F.2d 118 (9th Cir. 1989), is misplaced. That
5 case involved a question of when a loan is "consummated" under TILA for purposes of
6 triggering various notification requirements. Furthermore, the note and deed of trust at
7 issue in Jackson did not identify any lender. Indeed, the lender was not known at that
8 time and the loan was not yet guaranteed. The borrower subsequently executed a note
9 and deed of trust (both of which listed the lender) that triggered the TILA notification
10 requirements. Here, Plaintiff has not brought a TILA claim and the question of when a
11 loan is consummated under TILA is not at issue. Furthermore, unlike in Jackson, the
12 note and deed of trust clearly identified the lender on Plaintiff's loan. His contention that
13 Decision One was not the true lender appears to be based solely on speculation and is
14 not supported by the documents attached as Exhibits to the complaint for the reasons
15 set forth above.

16 **4. Conclusion**

17 Plaintiff has not presented facts to suggest that the deed of trust or subsequent
18 assignments are void. He thus does not have standing under Yvanova to pursue claims
19 challenging securitization or Defendants' right to foreclose. Leave to amend to add such
20 claims would be futile and should be denied. See Destfino v. Reiswig, 630 F.3d 952,
21 958-59 (9th Cir. 2011) (holding that further leave to amend need not be granted when
22 plaintiffs have had multiple opportunities to amend).

23 **V. Negligence Claim**

24 The Ninth Circuit remanded Plaintiff's negligence claim "for consideration of intervening
25 California case law in the first instance." In particular, the Ninth Circuit noted that, while
26 the appeal was pending, the California Court of Appeal decided Alvarez v. BAC Home
27 Loans Servicing, L.P., 176 Cal. Rptr. 3d 304 (Cal. Ct. App. 2014), which the Ninth Circuit
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1 described as “clarif[y]ing] that a lender may have a duty to act reasonably once it
2 affirmatively agrees to consider a loan modification application.” Newman, 649 F. App’x
3 at 631.

4 On the instant motion, Defendants argue that Plaintiff’s negligence claim does not
5 meet the standard articulated by Alvarez and, in any event, Plaintiff cannot adequately
6 plead damages in relation to this claim. Plaintiff responds only that arguments as to this
7 claim are “better reserved for litigation involving factual determinations” and should not
8 be resolved at the pleading stage.

9 **A. California Negligence Law**

10 Under California law, a negligence claim has three primary elements: (1) the
11 defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, and
12 (3) the breach proximately caused the plaintiff's damages or injuries. Lueras v. BAC
13 Home Loans Servicing, L.P., 221 Cal. App. 4th 49, 62 (2013) (citation omitted). “Whether
14 a duty of care exists is a question of law to be determined on a case-by-case basis.” Id.
15 In determining whether a duty of care exists, the following six factors are considered:
16 “the extent to which the transaction was intended to affect the plaintiff, the foreseeability
17 of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of
18 the connection between the defendant's conduct and the injury suffered, the moral
19 blame attached to the defendant's conduct, and the policy of preventing future harm.”
20 Biakanja v. Irving, 49 Cal. 2d 647, 650 (1958). “[A]s a general rule, a financial institution
21 owes no duty of care to a borrower when the institution's involvement in the loan
22 transaction does not exceed the scope of its conventional role as a mere lender of
23 money.” Lueras, 221 Cal. App. 4th at 63 (quoting Nymark v. Heart Fed. Savings & Loan
24 Assn., 231 Cal. App.3d 1089, 1096 (Cal. Ct. App. 1991)).

25 Although the Alvarez court concluded that a lender owed a duty of care to
26 particular borrowers in the loan modification process, the Court notes that Alvarez is by
27 no means considered a definitive statement on California law. Indeed, California courts,
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1 and federal courts interpreting California law, are “divided as to whether a lender owes a
2 duty of care during a loan modification application process.” Cornejo v. Ocwen Loan
3 Servicing, LLC, 151 F. Supp. 3d 1102, 1116 (E.D. Cal. 2015) (comparing Lueras, 221
4 Cal. App. 4th at 67 (finding no duty) with Alvarez, 228 Cal. App. 4th at 948 (finding duty
5 of care where lender agrees to consider loan modification application)).

6 In Lueras, the plaintiff alleged that the defendant financial institutions negligently
7 failed to offer him a loan modification. The Court of Appeal for the Fourth District
8 concluded that a residential lender owes no “common law duty of care to offer, consider,
9 or approve a loan modification, or to explore and offer foreclosure alternatives.” 221 Cal.
10 App. 4th at 67. The court determined that “a loan modification is the renegotiation of loan
11 terms, which falls squarely within the scope of a lending institution's conventional role as
12 a lender of money.” Id. Furthermore, the court concluded that the Biakanja factors did
13 not support the imposition of a duty of care in the loan modification context: “If the
14 modification was necessary due to the borrower's inability to repay the loan, the
15 borrower's harm, suffered from denial of a loan modification, would not be closely
16 connected to the lender's conduct. If the lender did not place the borrower in a position
17 creating a need for a loan modification, then no moral blame would be attached to the
18 lender's conduct.” Id. The court thus concluded that the complaint could not, as a matter
19 of law, state a negligence claim based on the failure to offer a loan modification.

20 Approximately nine months after Lueras was decided, the Court of Appeal for the
21 First District decided Alvarez. Therein, the plaintiffs alleged that the defendant financial
22 institutions negligently reviewed their loan modification applications after having agreed
23 to consider them. 228 Cal. App. 4th at 944-45. Specifically, the defendants allegedly did
24 not review the applications in a timely manner, foreclosed on the property while the
25 applications were pending, and mishandled the applications by relying on incorrect
26 information. Id. at 945.

27 The Alvarez court concluded that the Biakanja factors weighed in favor of
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1 imposing a duty of care on a lender that undertakes to review a loan for potential
2 modification:

3 The transaction was intended to affect the plaintiffs and it was
4 entirely foreseeable that failing to timely and carefully process
5 the loan modification applications could result in significant
6 harm to the applicants. Plaintiffs allege that the mishandling
7 of their applications “caus[ed] them to lose title to their home,
8 deterrence from seeking other remedies to address their
9 default and/or unaffordable mortgage payments, damage to
10 their credit, additional income tax liability, costs and expenses
11 incurred to prevent or fight foreclosure, and other damages.”
12 As stated in Garcia, “Although there was no guarantee the
13 modification would be granted had the loan been properly
14 processed, the mishandling of the documents deprived
15 Plaintiff of the possibility of obtaining the requested relief.”
16 Should plaintiffs fail to prove that they would have obtained a
17 loan modification absent defendants' negligence, damages
18 will be affected accordingly, but not necessarily eliminated.

19 Id. at 948-49 (citing Garcia v. Ocwen Loan Servicing, LLC, No. C 10-0290 PVT, 2010
20 WL 1881098, at *2-4 (N.D. Cal. May 10, 2010)).

21 Additionally, the court noted that the defendants' conduct was particularly
22 blameworthy in light of the plaintiffs' relative lack of bargaining power in the loan
23 modification process. Id. at 949. Of particular concern to the court was the process of
24 “dual tracking,” in which financial institutions simultaneously pursue foreclosure while
25 evaluating a borrower's loan modification application. Id. at 950-951. This process of
26 dual tracking has been significantly limited through the California Homeowner Bill of
27 Rights (“HBOR”). See Cal. Civ. Code §§ 2923.6, 2924.18. Although the HBOR was not
28 in effect at the time of the conduct at issue in Alvarez, the Alvarez court nonetheless
concluded that the duties imposed thereunder “fall well within the duty to use reasonable
care in the processing of a loan modification.” Id. at 951.

Based on this reasoning, the court determined that the plaintiffs had sufficiently
alleged a breach of the duty of care. Additionally, the court concluded that they had
“alleged that the improper handling of their applications deprived them of the opportunity
to obtain loan modifications, which they allege they were qualified to receive and would

1 have received had their applications been properly reviewed, and alternatively, that the
2 delay in processing deprived them of the opportunity to seek relief elsewhere.” Id.
3 Accordingly, they were permitted to proceed on their negligence claim.

4 It is notable that an increasing number of courts that have considered the split in
5 authority reflected in Lueras and Alvarez have declined to follow Alvarez, holding instead
6 that there is no duty of care in the loan modification process. E.g., Marques v. Wells
7 Fargo Bank, N.A., No. 16-cv-03973-YGR, 2016 WL 5942329, at *7-8 (N.D. Cal. Oct. 13,
8 2016) (discussing split and following Lueras); Griffin v. Green Tree Servicing, LLC, CV-
9 14-09408-MMM, 2015 WL 10059081, at *14 (C.D. Cal. Oct. 1, 2015) (discussing the split
10 in authority, finding no duty of care, and stating that “there is no principled way to
11 distinguish the process of applying for an original loan from the process of applying for a
12 loan modification; both involve activities clearly within the conventional role of mere
13 lenders of money”); Garcia v. PNC Mortg., No. 14-cv-3543-PJH, 2015 WL 5461563, at
14 *3 (N.D. Cal. Sept. 16, 2015) (agreeing with Lueras in finding that loan modifications fall
15 under the “provision of ordinary financial services”); Cohen v. Capital One, N.A., No. CV
16 14-6319 PSG (EX), 2015 WL 12746217, at *10 (C.D. Cal. June 1, 2015) (concluding that
17 loan modification falls within the lenders “conventional role as a lender of money”);
18 Carbajal v. Wells Fargo Bank, N.A., No. CV 14-7851-PSG, 2015 WL 2454054, at *6
19 (C.D. Cal. Apr. 10, 2015) (noting that cases following Alvarez have “side-stepped . . .
20 financial lending negligence jurisprudence” and concluding that lenders owe no duty of
21 care when considering loan modification applications).

22 The Ninth Circuit has, in an unpublished opinion, acknowledged the lack of clarity
23 on this issue. Anderson v. Deutsche Bank Nat. Trust Co. Americas, 649 F. App'x 550,
24 552 & n.1 (9th Cir. 2016), cert. denied sub nom. Anderson v. Aurora Loan Servs., LLC,
25 137 S. Ct. 496, 196 L. Ed. 2d 404 (2016). Moreover, since Alvarez, the Ninth Circuit has
26 repeatedly relied on Lueras to find there is no duty of care in the loan modification
27 process. Id. at 552 (“[A]pplication of the Biakanja factors does not support imposition of
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1 such a duty where, as here, the borrowers' negligence claims are based on allegations
2 of delays in the processing of their loan modification applications.”); Badame v. J.P.
3 Morgan Chase Bank, N.A., 641 F. App'x 707, 709-10 (9th Cir. 2016) (following Lueras
4 and finding no duty of care); Deschaine v. IndyMac Mortg. Servs., 617 F. App'x 690, 692
5 (9th Cir. 2015) (“The district court did not err in dismissing Deschaine's negligence claim,
6 because IndyMac did not have ‘a common law duty of care to offer, consider, or approve
7 a loan modification, or to explore and to offer [Deschaine] foreclosure alternatives[.]”).

8 Cases that have followed Alvarez have focused primarily on the pitfalls of dual
9 tracking and lenders' misrepresentations regarding the status of a loan modification
10 application. In Martinez v. Flagstar Bank, FSB, No. 2:15-cv-01934-KJM-CKD, 2016 WL
11 3906810, at *8 (E.D. Cal. July 19, 2016), the Court held, in essence, that a bank always
12 owes a duty of care “‘to a borrower not to make material misrepresentations about the
13 status of an application for a loan modification’ and that a borrower would foreseeably be
14 harmed ‘by an inaccurate or untimely communication . . . about the status of a loan
15 modification application.’”³ Of significance to the court were the following facts: the bank
16 “induced [the borrowers] to default, told them they qualified, repeatedly lost or purposely
17 misplaced their application materials, and all the while assured them no foreclosure sale
18 would go forward while it considered their application. Then it completed a foreclosure
19 sale despite their pending application.” Id.

20 **B. Discussion**

21 The Court acknowledges the pitfalls inherent in the process of dual tracking.
22 Nonetheless, the Court finds the Lueras line of cases more persuasive, particularly in
23 light of the several Ninth Circuit unpublished cases declining to find a duty of care in
24 these circumstances. The Court simply cannot distinguish the loan modification process
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26 ³ The Lueras court similarly concluded that a lender owes a borrower a duty to not make negligent
27 misrepresentations of fact, such as material misrepresentations about the status of an application for a
28 loan modification. 221 Cal. App. 4th at 68. Such allegations could support a claim for negligent
misrepresentation. This is distinct, however, from a claim that a modification application was negligently
handled or considered. The Martinez line of cases appears to conflate the two claims.

1 from a lender's conventional role as a lender of money. See, e.g., Lueras, 221 Cal. App.
2 4th at 67.

3 Moreover, even assuming that Alvarez controls, the Court finds that the following
4 facts alleged in the complaint weigh heavily against finding a duty of care. First, although
5 Plaintiff implies that he was induced to forego loan payments in order to pursue a loan
6 modification, he also alleges that he ceased payments on his mortgage in December
7 2009 because "he could no longer make his full payment." (ECF No. 67 at 34.) Thus, the
8 bank did not induce Plaintiff to default, and nothing in the proposed complaint suggests
9 that Plaintiff could have, or would have, continued to make payments had his
10 modification not been under consideration. See Martinez, 2016 WL 3906810, at *8.
11 Defendants' conduct therefore is only minimally connected, if at all, to any injury suffered
12 by Plaintiff with regard to deficient loan modification procedures. See Biakanja, 49 Cal.
13 2d at 650 (considering "the closeness of the connection between the defendant's
14 conduct and the injury suffered").

15 Second, according to the proposed complaint, Plaintiff was informed early in
16 2010, mere months after first submitting his application, that his modification request had
17 not been received. He subsequently was informed on multiple occasions – twice in 2010
18 and once in early 2011, that his modification request was denied. The Court finds it
19 difficult to conclude that any moral blame should be attached to such conduct. See
20 Biakanja, 49 Cal. 2d at 650 (considering "the moral blame attached to the defendant's
21 conduct"). Moreover, Plaintiff does not allege that these representations encouraged him
22 to forego other alternatives for curing his mortgage default or altering his mortgage
23 obligations – indeed such allegations would be implausible based on the facts
24 presented. See Alvarez, 228 Cal. App. 4th at 948-49.

25 Similarly, while Plaintiff claims that he was verbally informed in early 2011 that his
26 modification had been approved and that the prior denial letter may have been a
27 mistake, he was informed in subsequent calls that the application was in process. At the
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1 same time, Plaintiff continued to receive collection calls up to ten times per day. These
2 collection calls did not stop until Plaintiff filed for bankruptcy. While these
3 communications certainly reflect mixed messages, and potentially attach a degree of
4 moral blame to Defendants' conduct, Plaintiff once again fails to allege that this conduct
5 led him to forego other alternatives.

6 Thus, even if the Court could conclude that these factors weighed in favor of
7 finding a duty of care, Plaintiff cannot proceed on this claim because he fails to allege
8 any damages caused by Defendants' conduct. Plaintiff does not allege that he was
9 qualified to receive a loan modification or that he was induced through the modification
10 process to forego other alternatives for curing his mortgage deficiencies, avoiding
11 bankruptcy, maintaining title to his home, etc. Absent such allegations, his damages
12 would appear to be comprised merely of the time and energy spent pursuing a
13 modification. However, such damages are not cognizable. Lueras, 221 Cal. App. 4th at
14 79 ("Time and effort spent assembling materials for an application to modify a loan is the
15 sort of nominal damage subject to the maxim de minimis non curat lex – i.e., the law
16 does not concern itself with trifles." (Citation omitted)). Plaintiff does not identify any
17 other potential damages and the Court will not speculate in this regard.

18 In sum, the Court concludes that leave to amend would be futile because
19 Plaintiff's negligence claim is not cognizable as pled.

20 **VI. Conclusion and Recommendation**

21 Based on the foregoing, it is HEREBY RECOMMENDED that Plaintiff's motion to
22 amend and supplement the complaint be DENIED as futile. See Carrico v. City and
23 County of San Francisco, 656 F.3d 1002, 1008 (9th Cir. 2011) (citation omitted).

24 The findings and recommendation will be submitted to the United States District
25 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1).
26 Within fourteen (14) days after being served with the findings and recommendation, the
27 parties may file written objections with the Court. The document should be captioned
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1 “Objections to Magistrate Judge’s Findings and Recommendation.” A party may respond
2 to another party’s objections by filing a response within fourteen (14) days after being
3 served with a copy of that party’s objections. The parties are advised that failure to file
4 objections within the specified time may result in the waiver of rights on appeal.
5 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923
6 F.2d 1391, 1394 (9th Cir. 1991)).

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IT IS SO ORDERED.

Dated: May 5, 2017

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE