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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

10 ERNIE ALTMANN,

11 Plaintiff,

12 v.

13 WELLS FARGO BANK, N.A.;  
14 RUSHMORE LOAN MANAGEMENT  
SERVICES, LLC.; and DOES 1-50,  
15 INCLUSIVE,

16 Defendants.

Case No. 1:16-cv-01121-LJO-SKO

MEMORANDUM DECISION AND ORDER  
GRANTING DEFENDANTS' MOTION TO  
DISMISS

(ECF No. 7)

17  
18 This is the fifth<sup>1</sup> case that Plaintiff Ernie Altmann ("Plaintiff") has filed pertaining to the  
19 foreclosure of real property located at 15923 Sonora Road, Knights Ferry, California ("the  
20 Sonora Road property"). See ECF No. 1, Ex. A ("Compl."); ECF No. 6 (Notice of Related  
21 Cases). Significantly, on December 10, 2015, this Court dismissed a wrongful foreclosure action  
22 filed by Plaintiff against Wells Fargo Bank, N.A. ("Wells Fargo") and Rushmore Loan  
23 Management Services, LLC ("Rushmore"), who are both named as Defendants in this case, on  
24 the grounds that Plaintiff's claims against Rushmore and Wells Fargo were either barred by res  
25 judicata (having been ruled on by this Court in *Altmann v. PNC Mortg.*, 850 F. Supp. 2d 1057  
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27 <sup>1</sup> See, e.g., *In Re Altmann*, No. 16-90363-E-11, 2016 WL 3598286 (Bankr. E.D. Cal. June 27, 2016); *In Re Altmann*,  
28 No. 15-91221 (Bankr. E.D. Cal.); *Altmann v. Rushmore Loan Mgmt. Svcs., Inc.*, No. 1:15-cv-880-LJO-MJS, 2015  
WL 8483111 (E.D. Cal. Dec. 10, 2015); *Altmann v. PNC Mortg.*, 850 F. Supp. 2d 1057 (E.D. Cal. 2012).

1 (E.D. Cal. 2012) (“Altman I”) or failed to state a claim. *Altmann v. Rushmore Loan Mgmt. Svcs.,*  
2 *Inc.*, No. 1:15-cv-880-LJO-MJS, 2015 WL 8483111 (E.D. Cal. Dec. 10, 2015) (“Altmann II”).

3 On July 22, 2016, Plaintiff commenced this action against Defendants in Stanislaus  
4 County Superior Court, asserting four causes of action: (1) wrongful foreclosure; (2) fraud; (3)  
5 “to set aside trustee’s sale”; (4) and “to cancel or void trustee’s deed upon sale.” See Compl.  
6 Invoking diversity jurisdiction, Defendants removed the action to this Court on July 26, 2016,  
7 pursuant to 28 U.S.C. § 1141(b). ECF No. 1 at 2.

8 Now before the Court is Defendants’ motion to dismiss (ECF No. 7), arguing that  
9 Plaintiff’s claims are barred under *res judicata*, or in the alternative, that the claims are  
10 insufficiently pled and lacking in factual support. Plaintiff has failed to file an opposition. See  
11 ECF No. 10. This matter is suitable for decision on the papers. E.D. Cal. L.R. 230(g). For the  
12 reasons that follow, the Court GRANTS Defendants’ unopposed motion to dismiss.

### 13 **FACTUAL ALLEGATIONS<sup>2</sup>**

14 Before any of the transactions at issue in this case, Plaintiff had purchased the Sonora  
15 Road property. Compl. ¶ 8. On or around April 18, 2007, Plaintiff borrowed \$1,170,000 from  
16 National City Bank, which was later acquired and merged into PNC Financial Services, N.A. to  
17 improve the Sonora Road property. *Id.* ¶ 9. The loan was secured by a deed of trust on the  
18 Sonora Road property. *Id.*

19 Sometime after March 2010, Rushmore informed Plaintiff that it was the new loan  
20 servicer, and that all communications relating to the matter should be sent to Rushmore. *Id.* ¶ 11.

21 On or around June 15, 2011, after Plaintiff threatened to file suit, Plaintiff and Rushmore  
22 entered into a settlement agreement wherein Plaintiff “agreed to make a ‘short pay’ in exchange  
23 for postponement of a trustee’s sale.” *Id.* ¶ 12.

24 On June 30, 2011, Plaintiff entered into Chapter 7 bankruptcy. *Id.* ¶ 13. On October 17,  
25 2011, the Bankruptcy Court “granted discharge” to Plaintiff, and notified Defendants. *Id.*

26 On October 12, 2012, Plaintiff entered into a loan agreement with Rushmore for the

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28 <sup>2</sup> These allegations are drawn from Plaintiff’s complaint, the truth of which the Court must assume for purposes of a  
Rule 12(b)(6) motion to dismiss.

1 amount of \$710,000. Id. ¶ 14. Part of this loan agreement was a “balloon payment” in the amount  
2 of \$674,501.65, which was separate from the principal amount and not subject to interest  
3 payments, and was due to be paid on October 1, 2052. Id. ¶ 14. “The \$710,000 document  
4 originally referred to real property with ‘Legal Description as Set Forth in the Mortgage.’” Id.  
5 The original document for this loan was not secured by any property. Id. ¶ 15. Rushmore “never  
6 funded \$710,000 to Plaintiff, nor any entity controlled by Plaintiff.” Id. Plaintiff subsequently  
7 received another document, which pertained to two parcels of real property in Stanislaus County,  
8 bearing his signature, that he had not agreed to or signed. Id.

9 On March 18, 2015, in response to a letter sent by Rushmore to Plaintiff stating that  
10 Rushmore sought to collect on a debt, Rushmore sent a letter to Plaintiff “confirming that the  
11 debt for the loan was discharged.” Id. ¶ 16.

12 Before July 5, 2016, Rushmore scheduled a trustee’s sale to be held on July 5, 2016. Id.  
13 ¶ 17. At this trustee’s sale, Rushmore purchased the Sonora Road property. Id. On July 5, 2016,  
14 the Bankruptcy Court lifted the automatic stay it had previously imposed on this case. Id. ¶ 18.

15 Plaintiff alleges that after the funding of the loan, the loan was sold to investors as a  
16 “mortgage backed security,” that Rushmore “never owned the loan or corresponding note,” and  
17 as a result, Defendants “never had the right to declare default, cause notices of default to be  
18 issued or recorded, or foreclose on Plaintiff’s interest in the Property.” Id. ¶ 20, 23. Plaintiff  
19 alleges that Defendants did not comply with California Civil Code §§ 2923.5(a)-(b), which  
20 require a mortgage servicer, mortgagee, trustee, or authorized agent “to assess the borrower’s  
21 financial situation and explore options for the borrower to avoid foreclosure,” and that  
22 Defendants “therefore engaged in a fraudulent foreclosure of the Property since Defendants did  
23 not have the legal authority to foreclose.” Id. ¶ 22-23. Plaintiff further alleges that Defendants  
24 “engaged in a pattern of deception by altering documents and placing Plaintiff’s forged signature  
25 on said documents,” id. ¶ 26, that Defendants impermissibly continued with the foreclosure and  
26 trustee’s sale while the automatic stay issued by the Bankruptcy court was in effect,” id. ¶ 35,  
27 and that the trustee’s sale is therefore invalid, id. ¶ 38.

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1 **LEGAL STANDARD**

2 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is a challenge  
3 to the sufficiency of the allegations set forth in the complaint. A 12(b)(6) dismissal is proper  
4 where there is either a “lack of a cognizable legal theory” or “the absence of sufficient facts  
5 alleged under a cognizable legal theory.” *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699  
6 (9th Cir. 1990). In considering a motion to dismiss for failure to state a claim, the court generally  
7 accepts as true the allegations in the complaint, construes the pleading in the light most favorable  
8 to the party opposing the motion, and resolves all doubts in the pleader’s favor. *Lazy Y. Ranch*  
9 *LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

10 To survive a 12(b)(6) motion to dismiss, the plaintiff must, in accordance with Rule 8,  
11 allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v.*  
12 *Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the Plaintiff pleads  
13 factual content that allows the court to draw the reasonable inference that the defendant is liable  
14 for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility  
15 standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility  
16 that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556). “While a  
17 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual  
18 allegations, a Plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires  
19 more than labels and conclusions.” *Twombly*, 550 U.S. at 555 (internal citations omitted). Thus,  
20 “bare assertions . . . amount[ing] to nothing more than a ‘formulaic recitation of the elements’ . .  
21 . are not entitled to be assumed true.” *Iqbal*, 556 U.S. at 681. “[T]o be entitled to the presumption  
22 of truth, allegations in a complaint . . . must contain sufficient allegations of underlying facts to  
23 give fair notice and to enable the opposing party to defend itself effectively.” *Starr v. Baca*, 652  
24 F.3d 1202, 1216 (9th Cir. 2011). In practice, “a complaint . . . must contain either direct or  
25 inferential allegations respecting all the material elements necessary to sustain recovery under  
26 some viable legal theory.” *Twombly*, 550 U.S. at 562.

27 Under Rule 9(b), a plaintiff alleging fraud or mistake “must state with particularity the  
28 circumstances constituting fraud.” Fed. R. Civ. P. 9(b). “This means the plaintiff must allege ‘the

1 who, what, when, where, and how of the misconduct charged.” United States v. United  
2 Healthcare Insurance Company, \_\_\_ F.3d\_\_\_, 2016 WL 4205941 at \*12 (9th Cir. Aug. 10,  
3 2016) (internal citations omitted). “Rule 9(b) serves not only to give notice to defendants of the  
4 specific fraudulent conduct against which they must defend, but also ‘...to protect [defendants]  
5 from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from  
6 unilaterally imposing upon the court, the parties and society enormous social and economic costs  
7 absent some factual basis.” Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001).

8 To the extent that the pleadings can be cured by the allegation of additional facts, a  
9 plaintiff should be afforded leave to amend. Cook, Perkiss and Liehe, Inc. v. Northern California  
10 Collection Serv., Inc., 911 F.2d 242, 247 (9th Cir. 1990) (citations omitted). Leave to amend will  
11 be denied where amendment would be futile. *Id.*

## 12 DISCUSSION

13 Defendants argue that Plaintiff’s claims are barred by res judicata, or in the alternative,  
14 that they are insufficiently supported by the factual allegations set forth above. ECF No. 7. Upon  
15 examination of the complaint in this case, the Court now finds that all four causes of action fail  
16 to state a claim in accordance with the requirements of Rules 8 and 9(b). The Court therefore  
17 need not address Defendants’ res judicata argument.

### 18 A. Wrongful Foreclosure

19 Plaintiff’s first cause of action alleges wrongful foreclosure. Compl. ¶¶ 19-24. More  
20 specifically, Plaintiff alleges that the loan over the Sonora Road property was sold to investors as  
21 a “mortgage backed security,” and that Rushmore did not have a legal right to effect the  
22 foreclosure of the Sonora Road property. See *id.*

23 “Under California law, the ‘tender rule’ requires that as a precondition to challenging a  
24 foreclosure sale, or any cause of action implicitly integrated to the sale, the borrower must make  
25 a valid and viable tender of payment of the secured debt.” *Montoya v. Countrywide Bank*, No.  
26 C09-00641 JW, 2009 WL 1813973, at \*11 (N.D. Cal. June 25, 2009); see also *Karlsen v.*  
27 *American Sav. & Loan Assn.*, 15 Cal. App. 3d 112, 117 (1971) (“A valid and viable tender of  
28 payment of the indebtedness owing is essential to an action to cancel a voidable sale under a

1 deed of trust.”) “The application of the ‘tender rule’ prevents ‘a court from uselessly setting aside  
2 a foreclosure sale on a technical ground when the party making the challenge has not established  
3 his ability to purchase the property.” *Magdaleno v. Indymac Bancorp, Inc.*, 853 F. Supp. 2d 983,  
4 991 (E.D. Cal. 2011) (quoting *Williams v. Countrywide Home Loans*, No. C 99-0242 SC, 1999  
5 WL 740375, at \*2 (N.D. Cal. Sept. 15, 1999)).

6 Here, Plaintiff “offers nothing to indicate that [he] is able to tender [his] debt to warrant  
7 disruption of non-judicial foreclosure.” *Anaya v. Advisors Lending Grp.*, No. CV F 09-1191 LJO  
8 DLB, 2009 WL 2424037, at \*10 (E.D. Cal. Aug 5, 2009). Therefore, Plaintiff has failed to meet  
9 the threshold requirement to allege a plausible claim for wrongful foreclosure. See *Magdaleno*,  
10 853 F. Supp. 2d at 991.

11 Relatedly, Plaintiff alleges that Defendants failed to comply with their statutory  
12 obligations under California Civil Code §§ 2923.5-2923.6, which require mortgage servicers to  
13 satisfy certain notice requirements before proceeding with a foreclosure. Compl. ¶ 22. However,  
14 because the foreclosure sale of the Sonora Road property has already occurred, as noted in  
15 paragraph 17 of the complaint, Plaintiff’s claims that Defendants violated §§ 2923.5 and 2923.6  
16 also fail, because there is no remedy available to Plaintiff for these violations, even if true. See  
17 *Newman v. Bank of New York Mellon*, No. 1-12-CV-1629 AWI, 2013 WL 56033616, at \*11  
18 (E.D. Cal. Oct. 11, 2013) (“There is no remedy for a violation of § 2923.5 if the foreclosure sale  
19 has already occurred.”); *Quinteros v. Aurora Loan Svcs.*, 740 F. Supp. 2d 1163, 1174 (E.D. Cal.  
20 2010) (“[T]here is no private cause of action under [§] 2923.6”).

21 For these reasons, Plaintiff has failed to state a claim for wrongful foreclosure, and the  
22 Court GRANTS Defendants’ motion to dismiss this claim, without leave to amend.

### 23 **B. Fraud**

24 Plaintiff next attempts to state a claim for fraud, alleging that Defendants (1) “engaged in  
25 a pattern of deception by altering documents and placing Plaintiff’s forged signature on said  
26 documents”; (2) “had knowledge that Plaintiff’s amounts owed were inaccurate, but  
27 nevertheless caused notices of delinquent payments to be sent to Plaintiff’s residence”; (3)  
28 “concealed material facts known to them, but not to Plaintiff, from Plaintiff with the intent to

1 defraud Plaintiff”; (4) “made these representations, including that Plaintiff owed them monies,  
2 with knowledge of these misrepresentations to induce Plaintiff’s reliance, which Plaintiff  
3 justifiably relied on, resulting in excessive overpayments of a debt Plaintiff did not owe and  
4 leading to an improper foreclosure”; and (5) that Plaintiff “was unaware of the true facts of the  
5 situation” and suffered damages as a result of Defendants’ misrepresentations. Compl. ¶¶ 26-31.

6 Under California law, the elements of fraud are: “(a) misrepresentation (false  
7 representation, concealment, or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent  
8 to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damages.” *Lazar v.*  
9 *Superior Court*, 909 P.2d 981, 985 (1996). State-law fraud claims are subject to the heightened  
10 pleading standard of Rule 9(b). *Altmann I*, 850 F. Supp. 2d at 1069 n.3 (quoting *Vess v. Ciba-*  
11 *Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003)).

12 At most, Plaintiff’s allegations amount to a rote recitation of the elements of California  
13 fraud. Just as this Court found in *Altmann I*, the allegations here “lack[] facts to support fraud  
14 elements, let alone the who, what, when, and how of alleged misconduct.” See *id.* at 1070-71.  
15 Moreover, as Defendants point out (ECF No. 7 at 10), Plaintiff’s vague and conclusory  
16 allegations fail to satisfy the requirements of Rule 9(b). Accordingly, the Court GRANTS  
17 Defendants’ motion to dismiss this claim, without leave to amend.

### 18 **C. Remaining Claims**

19 Plaintiff’s third and fourth causes of action request that the Court set aside or cancel the  
20 trustee’s sale of the Sonora Road property. Compl. ¶¶ 32-39. In support of these claims, Plaintiff  
21 reiterates the allegations that Defendants did not have the legal power to effect the foreclosure  
22 while the Bankruptcy Court’s stay was in effect, that the deed of trust was either improperly  
23 assigned or never transferred to Defendants from the original lender, and that the deed of trust  
24 could not provide a valid basis for foreclosure. See *id.* Plaintiff additionally alleges that  
25 Defendants’ interest in the Sonora Road property was “never acknowledged and recorded under  
26 [Cal. Civ. Code § 2932.5].” *Id.* ¶ 33.

27 Section 2923.5 provides,  
28

1 Where a power to sell real property is given to a mortgagee, or other encumbrancer, in an  
2 instrument intended to secure the payment of money, the power is part of the security and  
3 vests in any person who by assignment becomes entitled to payment of the money  
4 secured by the instrument. The power of sale may be exercised by the assignee if the  
5 assignment is duly acknowledged and recorded.

6 However, California’s non-judicial foreclosure statutes “do not require a recording of  
7 assignments of interests in deeds of trust prior to foreclosure.” *Lazo v. Summit Mgmt. Co., LLC*,  
8 No. 1-13-cv-02015-AWI, JLT, 2014 WL 3362289, at \*10 (E.D. Cal. July 9, 2014).

9 As this Court previously found in *Altmann II*, Plaintiff’s allegations are vague,  
10 nonsensical, and “borderline unintelligible.” See 2015 WL 8483111, at \*2 n.2. The Court agrees  
11 with Defendants that Plaintiff “provides absolutely no facts to support that the assignments are  
12 somehow void.” See ECF No. 7 at 11. Furthermore, Plaintiff misapprehends § 2932.5, which  
13 does not actually require that the assignment of an interest for a deed of trust be recorded. See  
14 *Calvo v. HSBC Bank USA, N.A.*, 199 Cal. App. 4th 118, 122 (2011) (“It has been established  
15 since 1908 that this statutory requirement in [§ 2932.5] that an assignment of the beneficial  
16 interest in a debt secured by real property must be recorded in order for the assignee to exercise  
17 the power of sale applies only to a mortgage and not to a deed of trust.”). Because Plaintiff’s  
18 allegations fail to demonstrate any basis upon which relief may be granted, the Court GRANTS  
19 Defendants’ motion to dismiss Plaintiff’s third and fourth causes of action, without leave to  
20 amend.

### 21 CONCLUSION AND ORDERS

22 For these reasons, Defendants’ unopposed motion to dismiss (ECF No. 7) is GRANTED  
23 in its entirety, and the Court hereby DISMISSES Plaintiff’s complaint (ECF No. 1). Because it  
24 does not appear that the pleadings may be cured by further factual allegations, and because of the  
25 Court’s familiarity with the underlying facts of this case, dismissal shall be without leave to  
26 amend.

27 IT IS SO ORDERED.

28 Dated: September 15, 2016

/s/ Lawrence J. O’Neill  
UNITED STATES CHIEF DISTRICT JUDGE