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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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RONALD RUIZ,

Plaintiff,

v.

NO. CIV. S-09-0780 FCD DAD

MEMORANDUM AND ORDER

MORTGAGE ELECTRONIC  
REGISTRATION SYSTEM, INC.;  
GREENPOINT MORTGAGE FUNDING  
INC.; TRIPLE E LENDING, LLC;  
GMAC MORTGAGE, LLC; EXECUTIVE  
TRUSTEE SERVICES, LLC; DOES I-  
X, Inclusive,

Defendants.

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This matter is before the court on defendants Greenpoint  
Mortgage Funding, Inc.'s ("Greenpoint") and GMAC Mortgage's  
("GMAC") (collectively, "defendants") motions to dismiss pursuant  
to Federal Rule of Civil Procedure 12(b)(6),<sup>1</sup> or in the  
alternative, motions for a more definite statement pursuant to  
Rule 12(e) (Docket #s 7, 10), and GMAC's motion to strike

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<sup>1</sup> Unless otherwise indicated, all future references to a  
"Rule" are to the Federal Rules of Civil Procedure.

1 pursuant to Rule 12(f) (Docket # 12).<sup>2</sup> Plaintiff opposes the  
2 motions.<sup>3</sup>

3 For the reasons set forth below, defendants' motions to  
4 dismiss pursuant to Rule 12(b)(6) are GRANTED with prejudice;  
5 plaintiff is not permitted leave to amend. Because the court  
6 grants defendants' motions to dismiss, it is unnecessary to  
7 consider defendants' alternative motions for a more definite  
8 statement and to strike.

#### 9 BACKGROUND<sup>4</sup>

10 On or about February 24, 2006, plaintiff financed and  
11 obtained a loan through Triple E, a mortgage broker, who obtained  
12 concurrent funding through Greenpoint. The first deed of trust  
13 was for \$504,000. (Pl.'s Compl., filed March 19, 2009 [Docket  
14 # 2], ¶ 9.) Plaintiff used the loan proceeds to purchase a  
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16 <sup>2</sup> Defendants Executive Trustee Services, LLC and Mortgage  
17 Electronic Registration System, Inc. join GMAC's motion to  
18 dismiss, or in the alternative, motion for a more definite  
19 statement. (See Joinder of Def. Executive Trustee Services, LLC  
20 [Docket # 40]; Joinder of Def. Mortgage Electronic Registration  
21 System, Inc., [Docket # 42].) The court notes that defendant  
22 Triple E Lending, LLC ("Triple E") is not a moving party on these  
23 motions; however, it appears the company has not been served;  
24 Triple E has not answered the complaint or otherwise made an  
25 appearance in the case. As such, the court's dismissal of the  
26 case applies to Triple E as well.

27 <sup>3</sup> Because oral argument will not be of material  
28 assistance, the court orders this matter submitted on the briefs.  
E.D. Cal. L.R. 78-230(h).

29 <sup>4</sup> At the outset, the court notes that while the parties  
30 and the court have gone to great lengths to discern the facts and  
31 claims that plaintiff asserts, neither plaintiff's complaint nor  
32 his opposition papers clearly articulate plaintiff's legal  
33 theories. Indeed, plaintiff's oppositions are, in large part,  
34 barely intelligible. At best, plaintiff's oppositions merely  
35 quote extensively a variety of cases. However, plaintiff wholly  
36 fails to indicate the cases' significance to plaintiff's various  
37 causes of action or defendants' arguments.

1 parcel of real property known as "9471 McKenna Drive, Elk Grove,  
2 California, 95757" (the "Property"). (Id. at ¶ 1.) Executive  
3 Trustee Services, LLC obtained compensation through points, and  
4 when the loan was sold, plaintiff alleges it failed to disclose  
5 the range of points on the Truth In Lending Disclosure Statement  
6 Form, as mandated by the Real Estate Settlement Procedures Act  
7 ("RESPA"). (Id. at ¶ 10.)

8 Plaintiff alleges generally that defendants entered into a  
9 fraudulent scheme, for the purpose of making loans to plaintiff  
10 that plaintiff could not afford, at a cost "far exceeding" the  
11 market rate, and falsely represented to plaintiff that he could  
12 not qualify for any other financing. (Id. at ¶ 11.) Plaintiff  
13 further alleges that this scheme was devised to extract illegal  
14 and undisclosed compensation from plaintiff through an  
15 undisclosed yield spread premium of which defendants shared in  
16 some unknown percentage. (Id.)

17 Plaintiff acknowledges that defendants allege he "defaulted"  
18 on his loan, but claims that this was due to the high payments  
19 and structure of the loan and interest rate. (Id. at ¶ 13.)  
20 Plaintiff claims that he did not "default"; rather, because of  
21 the alleged prior breach of the terms of the notes by defendants,  
22 plaintiff claims his own performance was excused. (Id.)  
23 Plaintiff also alleges that after his loans were originated and  
24 funded, they were sold on multiple occasions, bundled into a  
25 group of trust deeds and subsequently sold to investors, so that  
26 none of the defendants owned the loan, and therefore, none had  
27 the right to declare a default, to cause notices of default to  
28 issue or be recorded, or to foreclose on plaintiff's interest in

1 the Property. (Id. at ¶ 14.)

2  
3 Plaintiff further alleges that the foreclosure sale of the  
4 Property was not executed in accordance with the requirements of  
5 California Civil Code sections 1624 and 2932.5 and Commercial  
6 Code section 3302 *et seq.* (Id. at ¶ 17.) Plaintiff states that  
7 although California Civil Code section 1624 requires an agency  
8 relationship to be in written form, the trustee here, acting as  
9 the agent of the principal, did not have written authorization to  
10 act for the principal. (Id. at ¶ 18.) Plaintiff contends that  
11 California Civil Code section 2924 *et seq.* are being unlawfully  
12 applied against plaintiff because the party acting as the trustee  
13 proceeded with the foreclosure of the Property without possession  
14 of the original Note. (Id. at ¶ 20.) Because of this alleged  
15 violation of Section 2924, plaintiff contends that the  
16 foreclosure of the Property is void as a matter of law. (Id. at  
17 ¶ 22.)

18 Plaintiff's first cause of action against all defendants is  
19 for a judicial determination of defendants' rights, obligations  
20 and duties, and a declaration of the current owner of the  
21 Property. (Id. at ¶ 28.) Plaintiff claims that a controversy  
22 exists concerning plaintiff and defendants' rights, obligations  
23 and duties as they relate to the Property, specifically because  
24 plaintiff contends that defendants were not holders in due course  
25 of the Note and Deed of Trust executed by plaintiff, that  
26 defendants had no right to foreclose on plaintiff's Deed of Trust  
27 and Note, that their application of Civil Code section 2924 is  
28 unlawful, and that defendants utilized an electronic recording

1 system, the Mortgage Electronic Registration System, to further  
2 their alleged scheme to defraud plaintiff. (Id. at ¶ 27.)

3 Plaintiff's second cause of action is for fraud against  
4 defendants Triple E and Greenpoint. (Id. at ¶ 30.) Plaintiff  
5 alleges that on or about February 24, 2006, defendants were  
6 engaged in an illegal scheme to execute loans secured by real  
7 property in order to make commissions, kickbacks, illegal  
8 undisclosed yield spread premiums, and undisclosed profits.  
9 (Id.) Plaintiff claims that defendants represented to plaintiff  
10 and others that they were the owners of the Deed of Trust and  
11 Note for plaintiff's Property, caused a Notice of Default to be  
12 issued and recorded, and subsequently executed a foreclosure that  
13 permanently affected plaintiff's right, title and interest in the  
14 Property. (Id.)

15 Plaintiff alleges the promissory notes were assigned in  
16 violation of Civil Code section 2932.5 *et seq.*, as the assignment  
17 was not recorded, and thus, the promissory note was rendered non-  
18 negotiable and no power of sale was conveyed with the note at the  
19 time of assignment. (Id.) Plaintiff alleges that defendants  
20 falsely told plaintiff they were experts in obtaining affordable  
21 loans and would only offer plaintiff loans in his best interest,  
22 given his credit history, financial needs and limitations. (Id.  
23 at ¶ 31.) Plaintiff further alleges: (1) the loans provided by  
24 defendants contained excessive financing; (2) defendants failed  
25 to utilize due diligence regarding plaintiff's ability to repay  
26 the loan; (3) defendants intentionally gave plaintiff a "sub-  
27 prime loan" in order to benefit themselves with high interest  
28 rates; (4) defendants failed to provide federally mandated

1 disclosures; and (5) defendants employed coercive tactics to  
2 force plaintiff to sign the loan documents. (Id. at ¶ 32.)

3 Plaintiff further asserts that defendants were secretly  
4 compensated for the loan in violation of RESPA, 12 U.S.C. section  
5 2607, which requires that fees be paid in accordance with the  
6 value of the work performed. (Id. at ¶ 36.) Plaintiff claims  
7 that defendant Greenpoint paid the other defendants fees  
8 exceeding the value of the services performed, constituting an  
9 illegal kickback. (Id. at ¶ 37.) Plaintiff also claims that  
10 Executive Trustee Services, LLC had an undisclosed agency  
11 relationship with Greenpoint, which was contrary to plaintiff's  
12 interests. (Id. at ¶ 39.) Plaintiff alleges that (unnamed)  
13 defendants paid other (unnamed) defendants a yield spread premium  
14 to make the loan more favorable to defendants by providing  
15 plaintiff with higher interest rates, for the overall purpose of  
16 increasing the value of the loan for Greenpoint and subsequent  
17 purchasers. (Id.) Plaintiff further alleges that at the time  
18 the Note and Deed of Trust were assigned to Greenpoint, the Note  
19 was no longer negotiable, and thus, the power of sale was not  
20 conveyed through the assignment. (Id. at ¶ 48.) Plaintiff  
21 contends that defendants were not the legal owners of the Note  
22 and Deed of Trust when they issued notices of foreclosure and  
23 commenced the foreclosure process, and that defendants  
24 intentionally and fraudulently converted plaintiff's right, title  
25 and interest in his property. (Id. at ¶ 49.)

26 Plaintiff contends that due to his reliance on defendants'  
27 representations, he was damaged in an amount exceeding  
28 \$1,000,000, with additional costs relating to his relocation.

1 (Id. at ¶ 52.) Plaintiff also claims that he suffered severe  
2 emotional distress, mortification, anxiety and humiliation in an  
3 amount that has not yet been ascertained, but which exceeds the  
4 jurisdictional limitations of this court. (Id. at ¶ 53.)  
5 Plaintiff also contends that defendants' conduct was intentional,  
6 oppressive, fraudulent, and malicious, thereby justifying an  
7 award of punitive damages. (Id. at ¶ 54.)

8 Plaintiff's third cause of action is for violation of RESPA,  
9 12 U.S.C. section 2607(b), by Greenpoint. (Id. at ¶ 64.)  
10 Plaintiff claims that Greenpoint paid Triple E compensation  
11 outside of escrow to place plaintiff in a less desirable loan,  
12 and also paid Triple E an undisclosed point spread outside of  
13 escrow. (Id. at ¶ 60.) Plaintiff also claims that defendants  
14 "structured" an undisclosed, unknown percentage of the loan for  
15 servicing the loan and failed to disclose this information on the  
16 HUD1 statement. (Id.) Plaintiff alleges that these fees and  
17 kickbacks were illegal under Section 2607(b), and that plaintiff  
18 is accordingly entitled to treble damages in a sum subject to  
19 proof at trial. (Id. at ¶ 64.) Plaintiff also claims that GMAC  
20 purchased the note from Greenpoint and paid defendants' fees  
21 after closing based on the interest rate of the loan, without  
22 disclosing the fees nor the effect on the loan, and seeks damages  
23 accordingly. (Id. at ¶ 65.)

24 Plaintiff's fourth cause of action is against defendants  
25 Executive Trustee Services, LLC, Greenpoint and GMAC and asks the  
26 court to set aside the foreclosure. (Id. at ¶ 69.) Plaintiff  
27 claims that defendants created a "special relationship" with him  
28 in which defendants voluntarily assumed a "special duty" to

1 plaintiff not to offer, expose or execute a loan which was not  
2 within plaintiff's financial needs and limitations. (Id. at  
3 ¶ 70.) Plaintiff alleges that defendants breached this "special  
4 duty" through the following: (1) by offering plaintiff a loan he  
5 could not afford; (2) by executing a loan which defendants knew  
6 plaintiff could not afford; (3) by failing to disclose the true  
7 cost of originating the loan; (4) by negligently failing to  
8 comply with the disclosure requirements of the Truth In Lending  
9 Act; (5) by negligently failing to comply with RESPA by charging  
10 and failing to disclose an excessive yield spread premium; (6) by  
11 negligently executing a foreclosure based upon a void promissory  
12 note; (7) by negligently executing a foreclosure without  
13 possession of the original promissory note; and (8) by  
14 negligently making the loan in an unsafe and unsound manner that  
15 increased plaintiff's risk of defaulting on the loan. (Id. at ¶  
16 71.) Plaintiff thus alleges that he actually and proximately  
17 suffered damages in an amount which has not yet been fully  
18 ascertained, but which exceeds the jurisdictional limitations of  
19 the court. (Id. at ¶ 74.)

#### 20 STANDARD

21 On a motion to dismiss, the allegations of the complaint  
22 must be accepted as true. Cruz v. Beto, 405 U.S. 319, 322  
23 (1972). The court is bound to give the plaintiff the benefit of  
24 every reasonable inference to be drawn from the "well-pleaded"  
25 allegations of the complaint. Retail Clerks Int'l Ass'n v.  
26 Schermerhorn, 373 U.S. 746, 753 n.6 (1963). Thus, the plaintiff  
27 need not necessarily plead a particular fact if that fact is a  
28 reasonable inference from facts properly alleged. See id.



1           Nevertheless, it is inappropriate to assume that the  
2 plaintiff "can prove facts which it has not alleged or that the  
3 defendants have violated the . . . laws in ways that have not  
4 been alleged." Associated Gen. Contractors of Calif., Inc. v.  
5 Calif. State Council of Carpenters, 459 U.S. 519, 526 (1983).  
6 Moreover, the court "need not assume the truth of legal  
7 conclusions cast in the form of factual allegations." United  
8 States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th  
9 Cir. 1986). Indeed, "[t]hreadbare recitals of the elements of a  
10 cause of action, supported by mere conclusory statements, do not  
11 suffice." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)(citing  
12 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

13           In ruling upon a motion to dismiss, the court may consider  
14 only the complaint, any exhibits thereto, and matters which may  
15 be judicially noticed pursuant to Federal Rule of Evidence 201.  
16 See Mir v. Little Co. of Mary Hospital, 844 F.2d 646, 649 (9th  
17 Cir. 1988); Isuzu Motors Ltd. v. Consumers Union of United  
18 States, Inc., 12 F. Supp.2d 1035, 1042 (C.D. Cal. 1998).

19           Ultimately, the court may not dismiss a complaint in which  
20 the plaintiff alleged enough facts to "state a claim to relief  
21 that is plausible on its face." Iqbal, 129 S. Ct. at 1949  
22 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570  
23 (2007)). Only where a plaintiff has failed to "nudge [his or  
24 her] claims across the line from conceivable to plausible," is  
25 the complaint properly dismissed. Id. at 1952. When there are  
26 well-pleaded factual allegations, "a court should assume their  
27 veracity and then determine whether they plausibly give rise to  
28 an entitlement to relief." Id. at 1950.



1 declaratory relief is inappropriate. See Canova v. Trs. of  
2 Imperial Irrigation Dist. Employee Pension Plan, 150 Cal. App.  
3 4th 1487, 1497 (2007) (stating "declaratory relief operates  
4 prospectively to declare future rights, rather than to redress  
5 past wrongs"). The purpose of a declaratory judgment is to set  
6 controversies at rest before they cause harm to the plaintiff,  
7 not to remedy harms that have already occurred. County of San  
8 Diego v. State, 164 Cal. App. 4th 580, 607-08 (2008); see also  
9 Societe de Conditionnement v. Hunter Eng. Co., Inc., 655 F.2d  
10 938, 943 (9th Cir. 1981) (stating a declaratory relief action  
11 "brings to the present a litigable controversy, which otherwise  
12 might only be tried in the future"). If a party has a "fully  
13 matured cause of action for money," the party must seek damages  
14 rather than declaratory relief. Canova, 150 Cal. App. 4th at  
15 1497.

16 In Edejer v. DHI Mortgage Co., the court held that the  
17 plaintiff's declaratory relief claim, relating to a foreclosure  
18 of her real property, failed because she sought to redress past  
19 wrongs rather than a declaration as to future rights. Edejer v.  
20 DHI Mortgage Co., No. C 09-1302 PJH, 2009 U.S. Dist. LEXIS 52900,  
21 \*31 (N.D. Cal. June 12, 2009); see also Metcalf v. Drexel Lending  
22 Group, No. 08-CV-00731 W POR, 2008 U.S. Dist. LEXIS 87420, \*15-16  
23 (S.D. Cal. Oct. 29, 2008) (holding that because the foreclosure  
24 had already taken place, the claimed invasion of rights had  
25 already occurred, and accordingly the proper avenue for the  
26 plaintiff to seek redress was through a claim for money damages,  
27 not declaratory relief). In Edejer, the plaintiff alleged that a  
28 dispute existed between herself and the defendants as to their

1 respective duties and obligations with regard to the loan  
2 foreclosure, including the ownership rights in the property and  
3 validity of the foreclosure proceedings. Edejer, 2009 U.S. Dist.  
4 LEXIS 52900, at \*31. In dismissing the claim, the court held  
5 that the foreclosure sale had already taken place, and therefore  
6 the claimed invasion of rights had already occurred. Id. at \*32.  
7 The court further held that “[t]o the extent this cause of action  
8 can be construed to seek to challenge the validity of the  
9 foreclosure sale on the basis that the loan documents or Deed of  
10 Trust are void or voidable, ‘it is settled that an action to set  
11 aside a trustee’s sale for irregularities in sale notice or  
12 procedure should be accompanied by an offer to pay the full  
13 amount of the debt for which the property was security.’” Id.  
14 (citing Arnolds Mgmt. Corp. v. Eischen 158 Cal. App. 3d 575, 578  
15 (1984)). Thus, because the foreclosure sale had already taken  
16 place, and because the plaintiff did not allege that she was  
17 prepared to tender the loan proceeds, the court dismissed her  
18 claim for declaratory relief. Id. at \*33.

19 Similarly here, plaintiff alleges that an “actual  
20 controversy” exists between plaintiff and defendants concerning  
21 their respective rights, obligations and duties as to the  
22 Property, and asks the court to make a judicial determination of  
23 the parties’ respective rights, including the ownership rights in  
24 the Property and validity of the foreclosure proceedings. (See  
25 Compl. at ¶¶ 25-28.) Plaintiff alleges that the trustee “could  
26 not have lawfully proceeded with the foreclosure sale,” and  
27 accordingly seeks a declaration as to “who owns plaintiff’s  
28 subject property.” Id. Plaintiff attempts to clarify the

1 alleged controversy in his opposition, arguing this claim seeks  
2 to determine "who has the superior right to possession of the  
3 subject property." (See Pl.'s Resp. to Def. Greenpoint's Motion  
4 to Dismiss at 6.) This query, however, does not change the  
5 nature of the alleged controversy. Furthermore, nowhere in the  
6 complaint does plaintiff allege he is prepared to tender the loan  
7 proceeds, which is "essential to an action to cancel a voidable  
8 sale under a deed of trust." See Karlsen v. American Sav. & Loan  
9 Assn., 15 Cal. App. 3d 112, 117 (1971). Because plaintiff seeks  
10 to redress past wrongs--the foreclosure sale having already taken  
11 place--and fails to allege he is prepared to tender the loan  
12 proceeds, plaintiff's first cause of action must be dismissed for  
13 failure to state a claim upon which relief can be granted.

14 For the foregoing reasons, defendants' motions to dismiss  
15 plaintiff's claim for declaratory relief are GRANTED.

16 **B. Fraud**

17 Greenpoint moves to dismiss plaintiff's cause of action for  
18 fraud for failure to satisfy Rule 9(b)'s heightened pleading  
19 requirements. Plaintiff's second cause of action alleges the  
20 following: (1) on or about February 24, 2006, defendants  
21 intentionally and fraudulently made false representations to  
22 plaintiff and others that they were the owners of the Note and  
23 Deed of Trust as either the trustee or beneficiary for  
24 plaintiff's real property; (2) based on this representation,  
25 defendants caused a Notice of Default to be issued and recorded;  
26 (3) thereafter, defendants executed a foreclosure, which  
27 permanently affected plaintiff's right, title and interest in the  
28 Property; (4) the promissory note forming the basis of a security

1 interest in the Property was assigned in violation of Civil Code  
2 section 2932.5 *et seq.* because the assignment was not recorded;  
3 (5) accordingly, the promissory note was rendered non-negotiable  
4 and no power of sale was conveyed at the time of assignment; (6)  
5 as a result thereof, defendants had no lawful security interest  
6 in the Property; (7) defendants were secretly compensated for the  
7 loan; (8) in violation of RESPA, the value of the work performed  
8 was less than the cost of the yield spread premium or other  
9 undisclosed compensation; (9) plaintiff suffered damages in an  
10 amount exceeding \$1,000,000, including severe emotional distress;  
11 and (10) defendants' conduct was intentional, oppressive,  
12 fraudulent and malicious, thereby justifying an award of punitive  
13 damages.

14 Under California law, the elements of common law fraud are  
15 "misrepresentation, knowledge of its falsity, intent to defraud,  
16 justifiable reliance, and resulting damages." Gil v. Bank of  
17 Am., Nat'l Ass'n, 138 Cal. App. 4th 1371, 1381 (2006). A court  
18 may dismiss a claim grounded in fraud when its allegations fail  
19 to satisfy Rule 9(b)'s heightened pleading requirements. Vess v.  
20 Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107 (9th Cir. 2003). This  
21 means that plaintiff "must state with particularity the  
22 circumstances constituting fraud." Fed. R. Civ. P. 9(b). In  
23 other words, the plaintiff must include "the who, what, when,  
24 where, and how" of the fraud. Id. at 1106 (citations omitted).  
25 "The plaintiff must set forth what is false or misleading about a  
26 statement, and why it is false." Decker v. Glenfed, Inc., 42  
27 F.3d 1541, 1548 (9th Cir. 1994). Furthermore, "Rule 9(b) does  
28 not allow a complaint to merely lump multiple defendants together

1 but require[s] plaintiffs to differentiate their allegations when  
2 suing more than one defendant . . . and inform each defendant  
3 separately of the allegations surrounding his alleged  
4 participation in the fraud." Swartz v. KPMG LLP, 476 F.3d 756,  
5 765-66 (9th Cir. 2007). The purpose of Rule 9(b) is to ensure  
6 that defendants accused of the conduct specified have adequate  
7 notice of what they are alleged to have done, so that they may  
8 defend against the accusations. Concha v. London, 62 F.3d 1493,  
9 1502 (9th Cir. 1995). "Without such specificity, defendants in  
10 these cases would be put to an unfair advantage, since at the  
11 early stages of the proceedings they could do no more than  
12 generally deny any wrongdoing." Id. (citing Semegen v. Weidner,  
13 780 F.2d 727, 731 (9th Cir. 1985).

14 In Edejer, the court found that the plaintiff's fraud claim  
15 failed because it did not satisfy the heightened pleading  
16 requirements of Rule 9(b). Edejer, 2009 U.S. Dist. LEXIS 52900  
17 at \*36; see also Spencer v. DHI Mortg. Co., No. CV F 09-0925 LJO  
18 DLB, 2009 U.S. Dist. LEXIS 55191, \*17-18 (E.D. Cal. June 30,  
19 2009) (dismissing the plaintiff's fraud claim without leave to  
20 amend because it failed to satisfy Rule 9(b)'s "'who, what, when,  
21 where and how' requirements" and was so deficient as to "suggest  
22 no potential improvement from an attempt to amend"). In so  
23 holding, the court in Edejer noted that the plaintiff did not  
24 allege any misrepresentation or false statements made by the  
25 defendants; did not allege the names of the persons who made the  
26 allegedly fraudulent representations and their authority to  
27 speak; and did not allege with sufficient particularity or  
28 clarity what was false or misleading about the statements. Id.

1 As such, the court found that the plaintiff's allegations were  
2 insufficient to satisfy the purpose of Rule 9(b), which is to  
3 ensure that defendants accused of the conduct specified have  
4 adequate notice of what they are alleged to have done, so that  
5 they may defend against the accusations. Id. at \*37.

6 In this case, plaintiff likewise fails to satisfy the  
7 heightened pleading requirements of Rule 9(b). Plaintiff fails  
8 to allege the names of the persons from defendants Triple E or  
9 Greenpoint who made the allegedly fraudulent representations and  
10 their authority to speak on behalf of the respective defendants.  
11 Indeed, plaintiff utterly fails to differentiate between  
12 defendants, which is essential to give each defendant adequate  
13 notice of the allegations surrounding their alleged participation  
14 in the fraud. Nor does plaintiff allege with any particularity,  
15 much less clarity, what is false or misleading about the claimed  
16 statements. Accordingly, plaintiff's second cause of action must  
17 be dismissed for failure to state a claim upon which relief may  
18 be granted. See Edejer, 2009 U.S. Dist. LEXIS 52900, at \*36;  
19 Spencer, 2009 U.S. Dist. LEXIS 55191, at \*17-18.

20 For the foregoing reasons, defendant's motion to dismiss  
21 plaintiff's second cause of action is GRANTED.

22 **C. Violation of RESPA**

23 Plaintiff's third cause of action alleges a statutory  
24 violation of RESPA. Specifically, plaintiff alleges that  
25 Greenpoint violated 12 U.S.C. section 2607(b) by receiving  
26  
27  
28



1 illegal kickbacks and failing to disclose them.<sup>5</sup>

2 Greenpoint and GMAC move to dismiss this cause of action as  
3 time barred by the one year statute of limitations for Section  
4 2607 claims.

5 RESPA provides a one year statute of limitations for Section  
6 2607 claims. 12 U.S.C. § 2614; see also Valasquez v. Mortgage  
7 Elec. Registration Sys., No. C 08-3818 PJH, 2008 U.S. Dist. LEXIS  
8 93502, \*8 (N.D. Cal. Nov. 17, 2008). Here, plaintiff alleges he  
9 obtained the subject loan on February 24, 2006. (Compl. at 6.)  
10 Plaintiff did not file his complaint until December 15, 2008,  
11 more than one year after the consummation of the loan. (See  
12 Notice of Removal filed by Def. Greenpoint at 1 [Docket # 2].)  
13 Accordingly, plaintiff's RESPA claim is time barred.

14 For the foregoing reasons, defendants' motions to dismiss  
15 plaintiff's RESPA claim as time barred are GRANTED.

16 **D. Cause of Action to Set Aside Foreclosure**

17 Plaintiff alleges that defendants Executive Trustee  
18 Services, LLC, Greenpoint and GMAC breached their "special duty  
19 to plaintiff not to offer, expose or execute a loan which was not  
20 within plaintiff's financial needs and limitations," and  
21 accordingly moves to set aside the foreclosure.

22 Greenpoint moves to dismiss this claim because (1) plaintiff  
23 has not satisfied the pre-foreclosure tender requirement, (2) to  
24 the extent plaintiff raises a fraud claim with respect to this

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25  
26 <sup>5</sup> Though plaintiff does not list GMAC as one of the  
27 relevant defendants for his RESPA claim, he nevertheless mentions  
28 GMAC in this section of the complaint. GMAC accordingly moved to  
dismiss plaintiff's claim, to the extent plaintiff intended to  
assert the claim against it.

1 claim, plaintiff fails to satisfy the strict pleading  
2 requirements of Rule 9(b), and (3) to the extent plaintiff  
3 intends to state a claim for breach of fiduciary duty, defendant  
4 Greenpoint does not owe a fiduciary duty to plaintiff. GMAC also  
5 moves to dismiss this claim on the ground that plaintiff fails to  
6 allege sufficient facts to state such a claim against GMAC.

7 As an initial matter, the court notes that plaintiff's claim  
8 to set aside the foreclosure does not satisfy the minimal notice  
9 pleading requirements of Rule 8. See Fed. R. Civ. P. 8. Even  
10 construing the complaint liberally, plaintiff has failed to  
11 allege any authority giving rise to any duty that defendants owed  
12 to plaintiff. Such pleading does not give defendants fair notice  
13 of the claim against them and the grounds upon which the claims  
14 rest. Vague allegations and mere labels and conclusions are  
15 insufficient to withstand a motion to dismiss. See Twombly, 127  
16 S.Ct. at 1964-65.

17 However, to the extent that this claim can be construed as  
18 attempting to plead a breach of fiduciary duty, plaintiff's claim  
19 must also fail. "[T]o plead a cause of action for breach of  
20 fiduciary duty, there must be shown the existence of a fiduciary  
21 relationship, its breach, and damage proximately caused by that  
22 breach. The absence of any one of these elements is fatal to the  
23 cause of action." Pierce v. Lyman, 1 Cal. App. 4th 1093, 1101  
24 (1991). "The relationship between a lending institution and its  
25 borrower-client is not fiduciary in nature." Nymark v. Heart  
26 Fed. Sav. & Loan Ass'n, 231 Cal. App. 3d 1089, 1093 (1991)  
27 (citing Price v. Wells Fargo Bank, 213 Cal. App. 3d 465, 476-78  
28 (1989)). "A commercial lender is entitled to pursue its own

1 economic interests in a loan transaction." Spencer v. DHI  
2 Mortgage Co., No. CV F 09-0925 LJO DLB, 2009 U.S. Dist. LEXIS  
3 55191, \*12 (E.D. Cal. June 30, 2009) (citing Nymark, 231 Cal.  
4 App. 3d at 1093). "Absent 'special circumstances' a loan  
5 transaction is 'at arms-length and there is no fiduciary  
6 relationship between the borrower and lender.'" Id. In the  
7 absence of alleged special circumstances and a legal duty owed by  
8 defendants, the breach of fiduciary duty claim must fail.  
9 Plaintiff has not alleged any facts suggesting the existence of  
10 special circumstances such that a fiduciary relationship between  
11 himself and defendants was created.

12 Accordingly, defendants' motions to dismiss plaintiff's  
13 fourth cause of action to set aside the foreclosure are GRANTED.

14 **E. Leave to Amend**

15 Plaintiff asks that should the court grant defendants'  
16 motions to dismiss, the court give plaintiff the opportunity to  
17 amend his complaint. "Valid reasons for denying leave to amend  
18 include undue delay, bad faith, prejudice, and futility." Cal.  
19 Architectural Building Prods. v. Franciscan Ceramics, 818 F.2d  
20 1466, 1472 (9th Cir. 1988). While leave to amend must be freely  
21 given, the court is not required to allow futile amendments.  
22 Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau, 701 F.2d  
23 1276, 1293 (9th Cir. 1983); see also Reddy v. Litton Indus.,  
24 Inc., 912 F.2d 291, 296-97 (9th Cir. 1990); Rutman Wine Co. v. E.  
25 & J. Gallo Winery, 829 F.2d 729, 738 (9th Cir. 1987).

26 For the following reasons, plaintiff's first, third, and  
27 fourth causes of action are dismissed with prejudice.  
28 Plaintiff's first cause of action for declaratory relief is

1 dismissed without leave to amend because where there is an  
2 accrued cause of action for a past wrong, declaratory relief is  
3 inappropriate as a matter of law. See Canova, 150 Cal. App. 4th  
4 at 1797. Plaintiff's third cause of action for a statutory  
5 violation of RESPA is dismissed without leave to amend because it  
6 is time barred by the one year statute of limitations for Section  
7 2607 claims. 12 U.S.C. § 2614. Plaintiff's fourth cause of  
8 action, insofar as it alleges a breach of a fiduciary duty, is  
9 dismissed without leave to amend because there is no fiduciary  
10 relationship between a lending institution and a borrower as a  
11 matter of law. See Nymark, 231 Cal. App. 3d at 1093.

12 Plaintiff's second cause of action for fraud is dismissed  
13 without leave to amend because the claims' deficiencies are so  
14 severe as to suggest no potential improvement from an attempt to  
15 amend. See Spencer, 2009 U.S. Dist. LEXIS 55191, at \*17-18; see  
16 also Aspenlind v. America's Servicing Co., No. CIV S-07-0768 GEB  
17 EFB PS, 2008 U.S. Dist. LEXIS 11530, \*12-13 (E.D. Cal. Feb. 15,  
18 2008) (dismissing plaintiff's fraud claim without leave to amend  
19 because in light of the complaint and opposition papers, which  
20 were "vague, confusing, and largely unintelligible," amendment  
21 would be futile). Indeed, while a fraud claim must allege the  
22 "who, what, when, where and how" of the alleged fraud under Rule  
23 9(b), plaintiff's complaint completely fails to target particular  
24 defendants or plead specific facts relating to defendants'  
25 alleged fraudulent conduct. Instead, plaintiff broadly alleges  
26 that defendants "fraudulently" portrayed themselves to plaintiff  
27 and concealed facts relevant to the Property, but fails to state  
28 any factual basis for how he knew defendants "intentionally and

1 fraudulently converted" plaintiff's interests in the Property.  
2 Further, though plaintiff alleges defendants were not the owners  
3 of the Trust Deed and Note, plaintiff fails to allege how any of  
4 the defendants were not the actual owners. In short, the  
5 allegations are so vague and confusing that it is impossible to  
6 discern the basic facts surrounding the purported fraud.  
7 Moreover, plaintiff has also failed to clarify his allegations in  
8 his opposition papers, which as indicated above are largely  
9 inapposite and are barely intelligible. In light of plaintiff's  
10 conclusory allegations and failure to allege the requisite  
11 elements of fraud, plaintiff's claim must be dismissed with  
12 prejudice.

13 Therefore, all of plaintiff's claims are dismissed without  
14 leave to amend.

15 **CONCLUSION**

16 For the foregoing reasons, defendants' motions to dismiss  
17 pursuant to Rule 12(b)(6) are GRANTED. Plaintiff is denied leave  
18 to amend. The Clerk of the Court is directed to close this file.

19 IT IS SO ORDERED.

20 DATED: August 3, 2009.

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22 \_\_\_\_\_  
23 FRANK C. DAMRELL, JR.  
24 UNITED STATES DISTRICT JUDGE  
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26  
27  
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