UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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TONY RAYA, JR.,

Plaintiff,

v.

WACHOVIA MORTGAGE,FSB, individually and as successor in interest to WORLD SAVINGS BANK; ETS Services, LLC; EMILIO LANDEROS; JANINE THRASH; and DOES 1 to 10, inclusive,

Defendants.

NO. CIV. 2:09-cv-01325-FCD-GGH

MEMORANDUM AND ORDER

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This matter is before the court on the motion of defendant Wachovia Mortgage, FSB ("Wachovia") to dismiss plaintiff's First Amended Complaint pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6) and motion to strike portions of the First Amendment Complaint pursuant to FRCP 12(f). Plaintiff Tony Raya,

Jr. ("plaintiff" or "Raya") opposes the motion. For the reasons set forth below,[1] defendants' motion is GRANTED.

BACKGROUND

Plaintiff brought this action against Wachovia, ETS Services, LLC ("ETS"), Emilio Landeros, and Janine Thrash (collectively, "defendants") for conduct arising out of a loan and subsequent foreclosure activity. (Pl.'s First Amended Complaint ("Compl."), filed June 25, 2009, ¶ 14.) Plaintiff alleges that in January and February of 2006, Landeros and Thrash told him that they were loan officers for World Savings Bank, now renamed as Wachovia Mortgage, FSB, and solicited him to refinance his residence. (Id. ¶ 20; Wachovia's Ex. A.) Plaintiff alleges that Landeros and Thrash told him that they could get him the "best deal" and the "best interest rates" available on the market. (Id. ¶ 21.) Plaintiff claims that he could have qualified for a better loan program but defendants told him that the mortgage loan at issue was the only mortgage loan program that plaintiff could qualify for. (Id. ¶ 23.)

Prior to the closing of the loan, plaintiff alleges that defendants did not provide him with any loan documentation. (Id. ¶ 25.) Plaintiff claims that he discovered that his loan rate would be adjustable only after the closing. (Id.) When plaintiff questioned Landeros and Thrash about it, they allegedly asked plaintiff to sign the documents because the loan at issue was the only loan available to him and defendants would "fix it"

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[1] Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. L.R. 78-230(h).

later. (Id.) Landeros and Thrash also told plaintiff that they would refinance the loan if the loan ever became unaffordable. (Id.)

During the closing, plaintiff alleges that he was given only a few minutes to sign the loan. (Id. ¶ 26.) Plaintiff alleges that the notary did not explain any of the documents and that plaintiff was not allowed to review them. (Id.) Plaintiff also alleges that, at the time of closing, he did not receive the disclosures and the number of copies of the Notice of Right to Cancel that were required under the Truth In Lending Act ("TILA").[2] (Id. ¶ 39.)

On or about May 15, 2006, plaintiff claims that he completed the loan on the property.[3] (Id. ¶ 28.) The terms of the loan were memorialized in a promissory note secured by a Deed of Trust on the property. (Id.) The Deed of Trust identified World Savings Bank, FSB as the lender. (Id.)

Plaintiff alleges that, on February 10, 2009, a Qualified Written Request ("QWR") pursuant to the Real Estate Settlement

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[2] The court notes that the Federal TILA Disclosure Required By Regulation Z is dated June 2, 2006 and bears plaintiff's signature, dated June 5, 2006, acknowledging receipt of the document. (Federal Truth In Lending Disclosure Required By Regulation Z, attached as Def.'s Ex. E.)

The court also considers that the Notice Of Right To Cancel is dated June 2, 2006, and bears plaintiff's signature, dated June 5, 2006, acknowledging the receipt of two copies of the notice. (Notice Of Right To Cancel - Refinancing, attached as Def.'s Ex. F.) The document states that plaintiff has until June 8, 2006 to cancel the transaction without cost. (Id.)

[3] The court considers that the Deed of Trust bears plaintiff's signature and is dated June 2, 2006. (Deed of Trust, attached as Def.'s Ex. C.) The attached notary acknowledgment also bears plaintiff's signature and is dated June 5, 2006. (Id.)

Procedures Act ("RESPA") was mailed to Wachovia. (Id. ¶ 29.) Plaintiff alleges that the QWR also included a demand to cancel the pending trustee sale and to rescind the loan pursuant to TILA. (Id.)

Plaintiff claims, upon "information and belief," that defendants sold their home loans to other financial entities and, accordingly, do not own the loan that is the subject of this action. (Id. ¶ 30.) Plaintiff also makes other general allegations regarding the practices of the lending industry; specifically, he claims that borrowers were steered into loans with less favorable terms because lenders gave higher commissions for placing borrowers in these types of loans. (Id.)

On November 24, 2008, a Notice of Default was filed in Sacramento County. (Id. ¶ 40.) Plaintiff claims that defendants do not possess the note and are not entitled to payment. (Id. ¶ 42.)

In his First Amended Complaint, plaintiff asserts claims for 1) violation of TILA, 15 U.S.C. §§ 1601 *et seq.*; 2) violation of the Rosenthal Fair Debt Collection Practices Act ("RFDCPA"), California Civil Code §§ 1788 *et seq.*, 3) negligence, 4) violation of RESPA, 12 U.S.C. §§ 2601 *et seq.*, 5) breach of fiduciary duty, 6) fraud, 7) violation of California Business and Professions Code § 17200; 8) breach of contract, 9) breach of implied covenant of good faith and fair dealing, and 10) wrongful foreclosure. (Compl.) Wachovia now moves to dismiss plaintiff's claims on grounds of HOLA preemption and plaintiff's failure to state cognizable claims. (Wachovia's Mem. Mot. Dismiss ("Wachovia's Mem."), filed Sept. 18, 2009.) Wachovia also moves

to strike portions of plaintiff's First Amended Complaint, specifically plaintiff's pleas for punitive damages in the Third and Sixth claims, and for attorney's fees in the Eighth and Ninth claims.[4]

STANDARD

Under Federal Rule of Civil Procedure 8(a), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Under notice pleading in federal court, the complaint must "give the defendant fair notice of what the claim is and the grounds upon which it rests." Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations omitted). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).

On a motion to dismiss, the factual allegations of the complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319, 322 (1972). The court is bound to give plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not allege "'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief. Twombley, 550 U.S. at 570. "A claim has facial plausibility when the

[4] Because, as set forth *infra*, the court grants defendant's motion to dismiss in its entirety, the court does not reach the merits of the motion to strike. Accordingly, the motion is DENIED as MOOT.

plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949.

Nevertheless, the court "need not assume the truth of legal conclusions cast in the form of factual allegations." United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th Cir. 1986). While Rule 8(a) does not require detailed factual allegations, "it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at 1949. A pleading is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Twombly, 550 U.S. at 555; Iqbal, 129 S. Ct. at 1950 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Moreover, it is inappropriate to assume that the plaintiff "can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983).

Ultimately, the court may not dismiss a complaint in which the plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." Iqbal, 129 S. Ct. at 1949 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 570 (2007)). Only where a plaintiff has failed to "nudge [his or her] claims across the line from conceivable to plausible," is the complaint properly dismissed. Id. at 1952. While the plausibility requirement is not akin to a probability requirement, it demands more than "a sheer possibility that a

defendant has acted unlawfully." Id. at 1949. This plausibility inquiry is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 1950.

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

ANALYSIS

A. Wachovia's Exhibits

In ruling upon a motion to dismiss, the court may also consider matters which may be judicially noticed pursuant to Federal Rule of Evidence 201. See Mir v. Little Co. of Mary Hospital, 844 F.2d 646, 649 (9th Cir. 1988); Isuzu Motors Ltd. v. Consumers Union of United States, Inc., 12 F. Supp.2d 1035, 1042 (C.D. Cal. 1998). "Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003). "The defendant may offer such a document, and the district court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." Id. The policy concern underlying the rule is to prevent plaintiffs "from surviving a Rule 12(b)(6) motion by deliberately omitting references to documents upon

which their claims are based." Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998).

Plaintiff's complaint alleges several causes of action that are premised on defendants' failure to provide the disclosures and number of copies of the Notice of Right to Cancel as required by TILA. (Compl. ¶ 39.) Accordingly, as these documents form the basis of the relevant causes of action, the court considers them and assumes that the contents are true for the purpose of a motion to dismiss.

B. TILA Violation

The First claim asserts that Wachovia violated TILA by failing to provide the required disclosures to plaintiff at the time of closing and failing to give clear and conspicuous disclosures. (Compl. ¶ 49.) Through the complaint, plaintiff also gives notice and demands rescission of the loan transaction. (Id. ¶ 54.) Wachovia moves to dismiss the count on grounds that: (1) the claim for damages is time-barred by the one-year statute of limitation; (2) plaintiff fails to plead sufficient facts to state a cognizable claim of relief; and (3) plaintiff's claim for rescission fails because he has not alleged ability to tender the indebtedness. (Wachovia's Mem. at 2.)

1. Claim For Damages

Wachovia argues that the claim for damages arising under TILA is time-barred because plaintiff's one-year statute of limitation ran on June 2, 2007 and plaintiff did not file this suit until May 14, 2009. (Id. at 6.) Plaintiff, however, relies on equitable tolling to suspend the statute of limitations.

(Pl.'s Opp'n Mot. Dismiss ("Pl.'s Opp'n"), filed Sept. 18, 2009, at 12.)

TILA violations include the failure to provide the required disclosures pursuant to 15 U.S.C. § 1631 and the failure to clearly and conspicuously disclose information relating to the "annual percentage rate" and the "finance charge" pursuant to 15 U.S.C. § 1632. To recover damages arising from alleged TILA violations, a plaintiff must file an action to recover damages "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). However, in certain circumstances, equitable tolling of civil damages claims brought under TILA might be appropriate. See King v. State of California, 784 F.2d 910, 915 (9th Cir. 1986). The doctrine of equitable tolling may be appropriate when the imposition of the statute of limitations would be unjust or would frustrate TILA's purpose "to assure a meaningful disclosure of credit terms so that the consumer will be able to ... avoid the uninformed use of credit." Id. (quoting 15 U.S.C. § 1601(a)). District courts, therefore, have the discretion to evaluate specific claims of equitable tolling and adjust the limitations period accordingly when the borrower may not have reasonable opportunity to discover the fraud or nondisclosures that give rise to a TILA action. Id.

In this case, plaintiff alleges that he consummated the loan on or about May 15, 2006. (Compl. ¶ 28.) The loan documents are dated either June 2, 2006 or June 5, 2006. (Wachovia's Ex.s B, C, E, F.) Accordingly, as plaintiff did not bring the claim until May 14, 2006, more than one year has passed since the alleged TILA violations.

To support the claim, plaintiff alleges that he did not receive any loan documentation, including the disclosures required by TILA, prior to the closing. (Id. ¶¶ 25, 39.) Plaintiff also alleges that, during the closing, plaintiff did not receive the required copies of a proper notice of cancellation. (Id. ¶ 26.) However, the loan documents specifically referred by plaintiff in his complaint show that plaintiff acknowledged on June 5, 2006 that he received the TILA disclosure and the Notice Of Right To Cancel. (Wachovia's Ex.s E, F.) Accordingly, plaintiff cannot allege that Wachovia violated TILA by failing to provide these required disclosures or that he was not aware of these disclosures in June 2006.

Plaintiff also alleges that defendants failed to provide clear and conspicuous disclosures regarding the loan terms in writing. (Compl. ¶ 34.) The allegation is refuted by the Federal TILA Required By Regulation Z form, which "clearly and conspicuously" states the annual percentage rate and finance charge. (Wachovia's Ex. E.) Plaintiff therefore cannot allege a TILA violation premised on the failure to disclose these loan terms in writing or that he was not on notice of these terms in June 2006. Therefore, plaintiff's claim of TILA violations predicated on these facts cannot survive a motion to dismiss and the court need not reach the issue of equitable tolling.

To the extent that plaintiff seeks equitable tolling on the basis of Wachovia's misrepresentations of the loan rate, plaintiff's claim also fails. Plaintiff pleads no other facts to explain how Wachovia concealed the true facts or why plaintiff could not otherwise have discovered the TILA violations at the

consummation of his loan. "Such factual underpinnings are all the more important ... since the vast majority of [p]laintiff's] alleged violations under TILA are violations that are self-apparent at the consummation of the transaction." Cervantes v. Countrywide Home Loans, Inc., 2009 U.S. Dist. LEXIS 87997, at ** 13-14 (D. Ariz. 2009) (holding that equitable tolling was not appropriate when plaintiffs simply alleged that defendants "fraudulently misrepresented and concealed the true facts related to the items subject to disclosure"). Indeed, plaintiff alleges that he discovered that his loan rate would be adjustable after the closing, which is well within the one-year statute of limitation. (Compl. ¶ 25.)

Accordingly, Wachovia motion to dismiss plaintiff's claim for damages is GRANTED without leave to amend.

2. Claim For Rescission

Wachovia argues that plaintiff's rescission claim fails because plaintiff's right to rescind expired on June 8, 2008. (Wachovia's Mem. at 7.) Plaintiff argues that Wachovia has forfeited the right to restitution in allegedly failing to make the required disclosures and refusing to honor plaintiff's election to cancel made through the QWR. (Pl.'s Opp'n at 14.)

"TILA provides two private remedies: damages and rescission." Shelley v. Quality Loan Serv. Corp., 2009 U.S. Dist. LEXIS 58156, at *5 (C.D. Cal. June 17, 2009). A borrower has the right to rescind the loan transaction "until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms ... together with a statement containing the material

disclosures." 15 U.S.C. § 1635(a). However, where the required forms and disclosures have not been delivered to the obligor, 15 U.S.C. § 1635(f) provides that "[a]n obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first."

As plaintiff has a right to rescind the loan within three years only if Wachovia has not provided the documents required by TILA, plaintiff cannot state a claim for relief. Plaintiff acknowledged receipt of the TILA disclosure and Notice Of Right To Cancel on June 5, 2006. (Wachovia's Exs. E, F.) Therefore, plaintiff's right to rescind expired on June 8, 2006.

Furthermore, the Ninth Circuit has held that rescission under TILA "*should* be conditioned on repayment of the amounts advanced by the lender." Yamamoto v. Bank of N.Y., 329 F. 3d 1167, 1170 (9th Cir. 2003) (emphasis in original). District courts in this circuit have dismissed rescission claims under TILA at the pleading stage based upon the plaintiff's failure to allege an ability to tender loan proceeds. See, e.g., Garza v. Am. Home Mortgage, 2009 U.S. Dist. LEXIS 7448, at *15 (E.D. Cal. Jan. 27, 2009) (stating that "rescission is an empty remedy without [the borrower's] ability to pay back what she has received"); Ibarra v. Plaza Home Mortgage, 2009 U.S. Dist. LEXIS 80581, at *22 (S.D. Cal. Sept. 4, 1009); Carnero v. Weaver, 2009 U.S. Dist. LEXIS 62665, at *8 (N.D. Cal. July 20, 2009); Pesayco v. World Sav., Inc., 2009 U.S. Dist. LEXIS 73299, at *4 (C.D. Cal. July 29, 2009); Ing Bank v. Korn, 2009 U.S. Dist. LEXIS 73329, at *7 (W.D. Wash. May 22, 2009). In this case, plaintiff

has failed to allege any facts relating to his ability to tender the loan principal.

Accordingly, Wachovia's motion to dismiss plaintiff's rescission claims is also GRANTED.

C. RESPA Violation

The Fourth claim alleges that Wachovia violated 12 U.S.C. § 2605 by failing to provide a written explanation in response to plaintiff's QWR. (Compl. ¶ 71.) Plaintiff also generally alleges that Wachovia failed to comply with RESPA's disclosure requirements at the time of closing and that defendants engaged in a pattern or practice of non-compliance with 12 U.S.C. § 2605. (Id. ¶¶ 70, 72.) Wachovia moves to dismiss this claim on grounds that the claim is time-barred and that plaintiff fails to plead a cognizable claim. (Defs.' Mem. at 10-11.)

1. Section 2605

Section 2605 requires a loan servicer to provide disclosures relating to the assignment, sale, or transfer of loan servicing to a potential or actual borrower: (1) at the time of the loan application, and (2) at the time of transfer. 12 U.S.C. § 2605. The loan servicer also has a duty to respond to a borrower's inquiry or "qualified written request." 12 U.S.C. § 2605(e). A qualified written request is a written correspondence that enables the servicer to identify the name and account of the borrower. 12 U.S.C. § 2605(e)(1). It also either includes a statement describing why the borrower believes that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower. Id. The loan servicer is required to respond by making appropriate

corrections to the borrower's account, if necessary and, after conducting an investigation, providing the borrower with a written clarification or explanation. 12 U.S.C. § 2605(e)(2). The statute of limitation to bring an action for a Section 2605 violation is three years. 12 U.S.C. § 2614.

Plaintiff alleges that he sent a QWR to Wachovia Mortgage, FSB on February 10, 2009 and has yet to receive a response. (Compl. ¶ 29.) As plaintiff's complaint is filed well within the statute of limitation, plaintiff's claim is not time-barred.

Wachovia argues that plaintiff's purported QWR does not meet the description in Section 2605(e)(1) because the allegations reflect that the "QWR" did not challenge the accuracy of the account or information regarding servicing of the loan. (Wachovia's Mem. at 11.) Pursuant to § 2605(i), "'servicing' means receiving any scheduled periodic payments from a borrower . . . and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower." According to the allegations in the complaint, the February 10, 2009 letter "simply disputed the validity of the loan and not its servicing." Consumer Solutions REO, LLC v. Hillery, -- F. Supp. 2d --, 2009 WL 2711264 (Aug. 26, 2009 N.D. Cal. 2009); see MorEquity, Inc. v. Naeem, 118 F. Supp. 2d 885, 900-01 (N.D. Ill. 2000) (noting that the "[t]he counterclaim alleges [that the request alleged] a forged deed, and irregularities with respect to the recoding of the two loans, but [made] no claim with respect to improper servicing" and therefore dismissing claim pursuant to § 2605(e)). As such, plaintiff has

failed to set forth facts alleging that he sent a valid and actionable QWR to defendant.

Wachovia also argues that plaintiff's failure to allege actual damages is fatal to the claim. (Id. at 11.) A claim of a RESPA violation cannot survive a motion to dismiss when the plaintiff does not plead facts showing how the plaintiff suffered actual harm due to defendant's failure to respond to a qualified written response. See Benham v. Aurora Loan Servs., 2009 U.S. Dist. LEXIS 91287, at **10-11 (N.D. Cal. Oct. 1, 2009); Singh v. Wash. Mut. Bank, 2009 U.S. Dist. LEXIS 73315, at *16 (N.D. Cal. Aug. 19, 2009). While courts interpret this requirement liberally, the plaintiff must at least allege what or how the plaintiff suffered the pecuniary loss. See Yulaeva v. Greenpoint Mortgage Funding, Inc., 2009 U.S. Dist. LEXIS 79094, at *44 (E.D. Cal. Sept. 3, 2009) (holding that the plaintiff's claim was sufficient to survive a motion to dismiss because the plaintiff alleged that she was made to pay a referral fee that was prohibited by RESPA); Hutchinson v. Del. Sav. Bank FSB, 410 F. Supp. 2d 374, 383 (D.N.J. 2006) (holding that the plaintiffs adequately pled actual damages when they alleged that they suffered "negative credit ratings on their credit reports [and] the inability to obtain and borrow another mortgage loan and other financing"). Here, plaintiff does not allege how plaintiff suffered actual damages as a result of Wachovia's failure to respond to the QWR. Therefore, plaintiff has not sufficiently pled facts showing a cognizable RESPA violation.

Plaintiff also claims that defendants engaged in a pattern or practice of non-compliance of 12 U.S.C. § 2605 but alleges no

facts relating to Wachovia's conduct that suggest such an inference.[5] As it is inappropriate to assume that plaintiff "can prove facts which it has not alleged," this assertion also cannot survive a 12(b)(6) motion.

Accordingly, Wachovia's motion to dismiss the Fourth claim as predicated on a Section 2605 violations is GRANTED.

2. Section 2607

RESPA also requires a lender to provide disclosures when it pays fees, salaries, or other forms of compensation to its agents or pursuant to referral agreements between real estate agents and brokers or affiliated business arrangements. 12 U.S.C. § 2607(c). This disclosure may occur during closing. Id. The statute of limitation to bring an action for a Section 2607 violation is three years. 12 U.S.C. § 2614. Plaintiff alleges that Wachovia violated RESPA at the time of closing because Wachovia did not comply with disclosure requirements. (Compl. ¶ 70.) However, plaintiff fails to identify what the disclosures are. As such, plaintiff's general allegation is insufficient to give Wachovia notice of the purported violation. Accordingly, Wachovia's motion to dismiss the Fourth claim as predicated on a Section 2605 violations is GRANTED.[6]

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[5] Plaintiff later alleges a possible violation of 12 U.S.C. § 2607(a) but gives no facts supporting this allegation. (Pl.'s Opp'n at 20 n.16.)

[6] In its opposition, plaintiff also vaguely references § 2601. Contrary to plaintiff's assertion, 12 U.S.C. § 2601 is a declaration of the legislative purpose underlying RESPA and does not create a violation for failing to disclose escrow costs.

D. Violation Of The RFDCPA

The Second claim asserts that Wachovia violated the RFDCPA and provides a litany of general allegations "including but not limited to: foreclosing upon a void security interest; foreclosing upon a note of which [defendants] were not in possession nor otherwise entitled to payment; falsely stating the amount of a debt; increasing the amount of a debt by including amounts that are not permitted by law or contract; and using unfair and unconscionable means in an attempt to collect a debt." (Id. ¶ 57.) Plaintiff argues that HOLA does not preempt the RFDCPA because the Act is not a lending regulation; rather, it only regulates the practice of collecting a debt once a loan is made. (Pl.'s Opp'n at 10.)

The purpose of the RFDCPA is "to prohibit debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts and to require debtors to act fairly in entering into and honoring such debts." Cal. Civ. Code § 1788.1(b). A debt collector violates the act when it engages in harassment, threats, the use of profane language, false simulation of the judicial process, or when it cloaks its true nature as a licensed collection agency in an effort to collect a debt. See Cal. Civ. Code §§ 1788.10-88.18; see also Hernandez v. Cal. Reconveyance Co., 2009 U.S. Dist. LEXIS 13936, at * 13 (E.D. Cal. Feb. 23, 2009) (holding that a RFDCPA claim failed because the complaint lacked allegations of harassment or abuse, false or misleading representations of the debt collector's identity, or unfair practices during the process of collecting debt). The RFDCPA is not applicable until after a loan is made and does not

constitute a lending regulation. See Alkan v. Citimortgage, Inc., 336 F. Supp. 2d 1061, 1064 (N.D. Cal. 2004). Moreover, foreclosing on a deed of trust does not implicate the RFDCPA. See e.g. Benham v. Aurora Loan Servs., 2009 U.S. Dist. LEXIS 78384, at *6 (N.D. Cal. Sept. 1, 2009); Ricon v. Recontrust Co., 2009 U.S. Dist. LEXIS 67807, at *9 (S.D. Cal. Aug. 4, 2009); Hepler v. Wash. Mut. Bank, F.A., 2009 U.S. Dist. LEXIS 33883, at *11 (C.D. Cal. April 17, 2009).

Plaintiff's complaint fails to allege any facts supporting how Wachovia violated the RFDCPA. Plaintiff neither alleges threats, harassment, or profane language that occurred after the loan was made nor does plaintiff identify who among the defendants acted as a debt collector. Plaintiff also does not point to any provision of the RFDCPA that Wachovia purportedly violated. Plaintiff alleges only that Wachovia does not possess the promissory note and thus is not entitled to enforce the security interest. (Compl. ¶ 116.) This does not constitute an actionable conduct under the RFDCPA. See Hafiz v. Greenpoint Mortgage Funding, Inc., 2009 U.S. Dist. LEXIS 60818 (N.D. Cal. July 15, 2009) (finding that the plaintiff "entirely misstate[d] the law in alleging that defendants must present a note in order to foreclose under the deed of trust" and holding that alleging that the note was assigned to a trust pool did not give rise to a cognizable legal claim). Without any facts that give rise to an

inference that Wachovia violated the RFDCPA, plaintiff has not stated a plausible claim.[7]

Accordingly, Wachovia's motion to dismiss the Second claim is GRANTED.[8]

E. Breach Of Contract and Breach Of Covenant Of Good Faith And Fair Dealing

The Eighth claim asserts that Wachovia, together with Landeros and Thrash, breached agreements made during the loan application process and also breached an agreement to provide plaintiff with an affordable loan. (Id. ¶¶ 98-101.) The Ninth claim asserts that Wachovia, together with Landeros, Thrash, and ETS, breached duties of good faith and fair dealing that are implied by law into the "contract that is at issue in this action."

In California, "[a] cause of action for breach of contract requires proof of the following elements: (1) existence of the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff as a result of the breach." CDF Firefighters v.

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[7] Plaintiff attempts to rescue his RFDCPA claim by later alleging in his opposition that defendants made "numerous phone calls, sent letters, and otherwise misrepresented material facts." (Pl.'s Opp'n at 17.) Making numerous phone calls and sending letters does not constitute actionable offenses under the RFDCPA. See Cal. Civ. Code §§ 1788.10-88.18. Alleging that defendants misrepresented material facts, without more, is a legal conclusion that does not give Wachovia sufficient notice of the nature of the claim because not every misrepresentation is actionable under the RFDCPA.

[8] As the court grants Wachovia's motion to dismiss plaintiff's RFDCPA claim on the ground that plaintiff has pled insufficient facts to state a claim, the court does not address whether HOLA preempts the RFDCPA.

Maldonado, 158 Cal. App. 4th 1226, 1239 (2008). Further, "[t]he prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties." Smith v. City & County of San Francisco, 225 Cal. App. 3d 38, 49 (1990). "To establish a breach of an implied covenant of good faith and fair dealing, a plaintiff must establish the existence of a contractual obligation, along with conduct that frustrates the other party's rights to benefit from the contract." Fortaleza v. PNC Fin. Servs. Group, Inc., 2009 U.S. Dist. LEXIS 64624, at **15-16 (N.D. Cal. July 27, 2009). The "implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract." Pasadena Live, LLC v. City of Pasadena, 114 Cal. App. 4th 1089, 1093-1094 (2004). "[T]he implied covenant will only be recognized to further the contract's purpose; it will not be read into a contract to prohibit a party from doing that which is expressly permitted by the agreement itself." Wolf v. Walt Disney Pictures and Television, 162 Cal. App. 4th 1107, 1120 (2008).

Plaintiff generally alleges in the complaint that all named defendants breached a number of agreements but fails to identify which defendant made which contract with plaintiff. The allegations on the face of the complaint are insufficient to give notice to Wachovia of the contract that it allegedly entered into with plaintiff or how Wachovia breached that particular

contract.[9] Therefore, plaintiff has insufficiently pled facts to survive a motion to dismiss.

Accordingly, Wachovia's motion to dismiss the Eighth and Ninth claims is GRANTED.[10]

F. Wrongful Foreclosure

The Tenth claim asserts a wrongful foreclosure claim against Wachovia, together with ETS, that is predicated on violations of Section 2923.5 of the California Civil Code and Section 3301 of the California Commercial Code. (Compl. ¶¶ 115, 118.)

1. California Civil Code § 2923.5

Section 2923.5 of the California Civil Code provides that a declaration shall be included in a notice of default stating that "the mortgagee, beneficiary, or authorized agent . . . has contacted the borrower . . . or tried with due diligence to contact the borrower." In support of this claim, plaintiff only alleges that Wachovia failed to properly record and give notice of the Notice of Default. (Compl. ¶ 118.) This allegation is insufficient to state a cognizable violation of Section 2923.5. Accordingly, to the extent that plaintiff's claim is predicated on a violation of Section 2923.5, plaintiff's claim fails.

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[9] In the Opposition to Wachovia's Motion To Dismiss, plaintiff refers to the promissory note as the contract at issue in this claim. While the court grants plaintiff leave to amend, the court also notes that plaintiff's factual allegations regarding the provisions in the promissory note do not comport with the actual statements in the document. (Wachovia's Ex. B.)

[10] As the court grants Wachovia's motion for plaintiff's failure to plead sufficient facts, the court does not reach the issue of whether HOLA preempts these claim.

2. California Commercial Code § 3301

Section 3301 of the California Commercial Code defines a "[p]erson entitled to enforce" as "(a) the holder of the instrument, (b) a nonholder in possession of the instrument who has the rights of a holder, or (c) a person not in possession of the instrument who is entitled to enforce the instrument . . . ." However, possession of the original promissory note is not required to permit foreclosure. See e.g. Rangel v. DHI Mortg. Co., Ltd., 2009 U.S. Dist. LEXIS 65674, at *24 (E.D. Cal. July 20, 2009); Pantoja v. Countrywide Home Loans, Inc., 2009 U.S. Dist. LEXIS 70856, at *14 (N.D. Cal. July 9, 2009); Calderon v. Endres, 2009 U.S. Dist. LEXIS 57936, at *8 (S.D. Cal. July 7, 2009). A mere allegation that a trustee or a lender does not have the original note or has not received it is insufficient to render the foreclosure proceeding invalid. See Neal v. Juarez, 2007 U.S. Dist. LEXIS 98068, 2007 WL 2140640, *8 (S.D. Cal. 2007).

In his complaint, plaintiff merely alleges that neither defendants nor their beneficiaries or assignees are in possession of the promissory note. (Compl. ¶ 116.) The allegation fails to support plaintiff's claim as a matter of law. Moreover, even construing plaintiff's complaint liberally, plaintiff's allegation is predicated on "information and belief" that defendants sold home loans to other unnamed financial entities. (Compl. ¶ 30.) Plaintiff sets forth no facts to support this allegation. Therefore, plaintiff has not stated sufficient facts to show a violation of Section 3301.

Accordingly, Wachovia's motion to dismiss the Tenth claim is GRANTED.[11]

G. Negligence

The Third claim asserts that Wachovia, together with Landeros, Thrash, and ETS, breached a duty of care by directing plaintiff to a loan that he would not otherwise have qualified for by industry standards. (Compl. ¶ 61.) Plaintiff argues that HOLA does not preempt the claim because plaintiff does not seek to impose a lending requirement on defendants but to enforce defendants' duty not to harm the plaintiff. (Pl.'s Opp'n at 11.)

In the field of lending regulation of federal savings associations, the presumption against preemption of state law is inapplicable. See Silvas v. E*Trade Mortgage Corp., 514 F.3d 1001, 1004 (9th Cir. 2008). Through HOLA, OTS issued a preemption regulation that "occupies the entire field of lending regulation for federal savings associations." See 12 U.S.C. § 1464; 12 C.F.R. § 560.2. The regulations promulgated by OTS have "no less preemptive effect than federal statutes." See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982).

Section 560.2(b) of Title 12 of the Code of Federal Regulations preempts state laws that purport to impose requirements regarding:

> "(4) The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

[11] As the court grants Wachovia's motion to dismiss on the ground that plaintiff fails to plead a cognizable claim, the court does not address the issue of HOLA preemption.

> (5) Loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees;
> ...
>
> (9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants;
>
> (10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages ..."

12 C.F.R. § 560.2(b).

However, Section 560.2 does not preempt state laws such as contract and commercial law and tort law, but only to the extent that they either only have an incidental effect on lending operations or are not otherwise contrary to the purpose of "allowing federal savings associations to conduct their operations ... free from undue regulatory duplication and burden". 12 C.F.R. § 560.2(a), (c).

To analyze whether a specific state law is preempted under § 560.2, the first inquiry is whether the type of law is listed in subsection (b) of Section 560.2. See Silvas, 514 F.3d at 1005. If the type of law in question is listed in paragraph (b), the analysis ends; the law is preempted. Id. If the law is not described in subsection (b), the second question is whether the law affects lending. Id. If the law affects lending, the law is presumed preempted. Id. The presumption is reversed only when it can be shown that the law only incidentally effects lending operations or does not impose undue regulatory duplication and burden. Id.; 12 C.F.R. § 560.2(a), (c). Any doubts are resolved in favor of preemption. Silvas, 514 F.3d at 1005.

Though not artfully pled, the complaint alleges that Wachovia's employees, namely Trash and Landeros, should have informed plaintiff of other loan options instead of directing plaintiff to a loan that he could not afford. (Compl. ¶¶ 5, 61-62.) Whether plaintiff could have qualified for another loan involves a discussion of the credit terms and the requirements to qualify for a loan. This falls within the descriptions set forth in 22 C.F.R. §§ 560.2(b)(4) and (9). See Rivera v. Wachovia Bank, 2009 U.S. Dist. LEXIS 68391, at **2-3, *7 (S.D. Cal. Aug. 4, 2009) (finding that plaintiff's allegations that the lender induced him to sign the loan documents although knowing that the plaintiff could not afford the mortgage payments involved a discussion of credit terms; thus, HOLA preempted the state law claims including the tort claim). Additionally, whether Wachovia should have told plaintiff about other loan options is related to the advertising of loans, fitting the description set forth in 22 C.F.R. § 560.2(b)(9). As a determination in plaintiff's favor will more than incidentally affect loan qualification and advertising standards, plaintiff's negligence claim is preempted by HOLA.

Furthermore, even if HOLA preemption does not apply, plaintiff's negligence claim is fatally flawed because Wachovia, as a lender, does not owe plaintiff a duty. "The question of the existence of a legal duty of care . . . presents a question of law which is to be determined by the courts alone." First Interstate Bank of Ariz., N.A. v. Murphy, Weir & Butler, 210 F.3d 983, 987 (9th Cir. 2000). "Absent the existence of duty ... , there can be no breach and no negligence." Nichols v. Keller, 15

Cal. App. 4th 1672, 1683 (1993). "Under California law, a lender does not owe a borrower or third party any duties beyond those expressed in the loan agreement, except[] those imposed due to special circumstance." Resolution Trust Corp. v. BVS Dev., 42 F.3d 1206, 1214 (9th Cir. 1994) (citing Nymark v. Heart Fed. Sav. & Loan Ass'n., 231 Cal. App. 3d 1089, 1096 (1991)); see also Cataulin v. Wash. Mut. Bank, 2009 U.S. Dist. LEXIS 59708, at *6 (S.D. Cal. July 13, 2009); Spencer v. DHI Mortgage Co., 2009 U.S. Dist. LEXIS 55191, at *8 (E.D. Cal. June 30, 2009); Mangindin v. Wash. Mut. Bank, 2009 U.S. Dist. LEXIS 51231, at *21 (N.D. Cal. June 17, 2009). Special circumstances arise when a lender actively participates in the financed enterprise. See Nymark, 231 Cal. App. 3d at 1096; Wagner v. Benson, 101 Cal. App. 3d 27, 35 (1980). A lender may also be secondarily liable through the actions of a mortgage broker, who has a fiduciary duty to its borrower-client, if there is an agency relationship between the lender and the broker. See Plata v. Long Beach Mortg. Co., 2005 U.S. Dist. LEXIS 38807, at *23 (N.D. Cal. Dec. 13, 2005).

In his complaint, plaintiff describes nothing more than an arms-length loan transaction between Wachovia and himself. Plaintiff also does not allege that Wachovia actively participated in the financed enterprise beyond the usual practices associated with the lending business. As such, Wachovia owes plaintiff no duty of care and the negligence claim must fail also for this reason.

Accordingly, Wachovia's motion to dismiss the Third claim is GRANTED without leave to amend.

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H. Breach Of Fiduciary Duty

The Fifth claim asserts that Wachovia, together with Landeros and Thrash, breached their fiduciary duties to act primarily for plaintiff's benefit by allegedly obtaining a loan with unfavorable terms, failing to disclose the negative consequences of the loan, and securing a secret profit by failing to comply with TILA, RESPA and engaging in unfair business practices. (Compl. ¶¶ 79-81.)

Plaintiff's claim fails for the same reason the negligence claim fails. "Absent special circumstances, a loan transaction is at arms-length and there is no fiduciary relationship between the borrower and lender." Rangel v. DHI Mortgage Co., Ltd., 2009 U.S. Dist. LEXIS 65674, at *8 (E.D. Cal. July 20, 2009); see also e.g. Tasaranta v. Homecomings Fin., 2009 U.S. Dist. LEXIS 87372, at *15 (S.D. Cal. Sept. 21, 2009); Brittain v. IndyMac Bank, FSB, 2009 U.S. Dist. LEXIS 84863, at * 14 (N.D. Cal. Sept. 16, 2009); Dinsmore-Thomas v. Ameriprise Fin., Inc., 2009 U.S. Dist. LEXIS 68882, at *29 (C.D. Cal. Aug. 3, 2009). In the absence of any fiduciary duty, there can be no breach.

Because, as set forth above, plaintiff has failed to allege any facts that would give rise to a fiduciary relationship, defendants' motion to dismiss the Fifth claim is GRANTED.

I. Fraud

The Sixth claim asserts that the conduct of Wachovia, together with Thrash, Landeros, and ETS, constitutes fraud. (Compl. ¶¶ 85-91.) Specifically, plaintiff's complaint alleges that Wachovia's employees, Landeros and Thrash, made the following false allegations in January and February 2006: (a)

that they could get him the "best deal" and the "best interest rates" available on the market; (b) that Plaintiff could qualify for only the loan program at issue; and (c) that Plaintiff qualified for a fixed rate loan with an interest rate of 5%. (Compl. ¶¶ 20-24.) Plaintiff also alleges that on or about May 15, 2006, when he closed on the loan, defendants Landeros and Thrash falsely assured plaintiff that: (a) they would "fix" the loan after plaintiff discovered that it had an adjustable rate; and (b) that they would refinance the loan into an affordable loan if the loan ever became unaffordable. (Id. ¶ 25.) In addition to HOLA preemption, Wachovia moves to dismiss this count also on the ground that plaintiff fails to plead with the required specificity. (Wachovia's Mem. at 12-13.)

The court first addresses whether HOLA preempts this claim. "Under California law, 'the indispensable elements of a fraud claim include a false representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages.'" Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1105 (quoting Hackethal v. Nat'l Cas. Co., 189 Cal. App. 3d 1102, 1111 (1987)). While this is a state law claim that is not specifically listed in 12 C.F.R. 560.2(b), "it is arguable that [p]laintiff's claim is preempted by HOLA pursuant to [§] 560.2(b)(4) because the gravamen of th[is] fraud ... claim[] is the 'terms of credit.'" Bassett v. Ruggles, 2009 U.S. Dist. LEXIS 83349, at *58 (E.D. Cal. Sept. 14, 2009); see also Naulty v. Greenpoint Mortgage Funding, Inc., 2009 U.S. Dist. LEXIS 79250, at *14 (N.D. Cal. Sept. 2, 2009); Wilkerson v. World S&L Ass'n, 2009 U.S. Dist. LEXIS 76539, at *10 (E.D. Cal. Aug. 26, 2009); Kelley v. Mortgage Elec. Registration

Sys., Inc., 2009 U.S. Dist. LEXIS 70796, at *11 (N.D. Cal. Aug. 12 2009). However, HOLA does not preempt a common law fraud claim that incidentally effects lending operations. See 12 C.F.R. § 560.2(c).

In this case, HOLA preempts this claim to the extent that plaintiff alleges that Wachovia, through its employees, misled him about credit terms to induce him to enter into a loan with an interest rate higher than an alternative one for which he may have been qualified. See Bassett, 2009 U.S. Dist. LEXIS 83349, at *60. Plaintiff's allegations that Landeros and Thrash induced him to enter into a loan by promising to "fix" or refinance the loan, however, are fraudulent representations of their commitment to a future action. A determination of a fraud claim based on these facts turns on defendants' conduct and plaintiff's reliance, not credit terms. Cf. In re Ocwen Loan Servicing, LLC, 491 F.3d 638, 644 (7th Cir. 2007) ("[If] the mortgagee fraudulently represents to the mortgagor that it will forgive a default, and then forecloses, it would be surprising for a federal regulation to bar a suit for fraud."). Accordingly, to the extent that the fraud claim is predicated on the promises of future action made by Wachovia's employees, HOLA does not necessarily preempt this claim.

However, plaintiff's fraud claim must satisfy FRCP 9(b)'s heightened pleading requirement. This means that plaintiff "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). In other words, the plaintiff must include "the who, what, when, where, and how" of the fraud. Id. at 1106 (citations omitted). "The plaintiff must set forth what is false

or misleading about a statement, and why it is false." Decker v. Glenfed, Inc., 42 F.3d 1541, 1548 (9th Cir. 1994). Furthermore, "Rule 9(b) does not allow a complaint to merely lump multiple defendants together but require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." Swartz v. KPMG LLP, 476 F.3d 756, 765-66 (9th Cir. 2007). The purpose of Rule 9(b) is to ensure that defendants accused of the conduct specified have adequate notice of what they are alleged to have done, so that they may defend against the accusations. Concha v. London, 62 F.3d 1493, 1502 (9th Cir. 1995).

When asserting a fraud claim against a corporation, "the plaintiff's burden . . . is even greater. . . . The plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.'" Lazar v. Superior Court, 12 Cal. 4th 631, 645 (1996) (quoting Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal. App. 4th 153, 157 (1991)); see also Mohammad Akhavein v. Argent Mortgage Co., 2009 U.S. Dist. LEXIS 61796, at *10 (N.D. Cal. July 17, 2009); Spencer v. DHI Mortgage Co., 2009 U.S. Dist. LEXIS 55191, at *18 (E.D. Cal. June 30, 2009).

Plaintiff alleges that Landeros and Thrash are Wachovia's employees. (Compl. ¶ 20.) Plaintiff alleges that, at the loan closing, Landeros and Thrash made misrepresentations that they would fix the loan and refinance it when it became unaffordable. (Id. ¶ 25.) Plaintiff also specifies that the allegedly false

statements, which are the alleged assurances of future conduct, induced him into signing the loan documents. (Id.) However, plaintiff has not set forth any specific facts explaining why the assurances were false and misleading. Therefore, plaintiff's allegations are insufficient to meet FRCP 9(b)'s heightened pleading standard.

Accordingly, Wachovia's motion to dismiss the Sixth claim is GRANTED.

J. Violation of California Business & Professions Code § 17200.

The Seventh claim asserts that Wachovia, together with Landeros, Thrash, and ETS, violated Section 17200 of the California Business & Professions Code by engaging in unlawful, unfair, and fraudulent business practices. (Compl. ¶ 94.) Plaintiff predicates this claim on all the other purported statutory and common law violations alleged in the complaint. (Pl.'s Opp'n at 25.)

The Unfair Competition Law ("UCL"), California Business and Professions Code §§ 17200, *et seq.*, forbids acts of unfair competition, which includes "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. "The UCL is broad in scope, embracing anything that can properly be called a business practice and that at the same time is forbidden by law." People ex rel. Gallegos v. Pacific Lumber Co., 158 Cal. App. 4th 950, 959 (2008) (internal citations omitted).

To the extent that this claim is premised on negligence and breach of fiduciary duty, HOLA preempts this claim for the reasons mentioned *supra*. To the extent that this claim is

predicated on TILA,[12] RESPA, the RFDCPA, fraud, breach of contract, breach of implied covenant of good faith and fair dealing, and wrongful foreclosure, this claim fails for the same reasons set forth above.

Accordingly, Wachovia's motion to dismiss the Seventh claim is GRANTED.

CONCLUSION

For the foregoing reasons, Wachovia's motion to dismiss is GRANTED. Plaintiff is granted fifteen (15) days from the date of this order to file a second amended complaint in accordance with this order. Defendants are granted thirty (30) days from the date of service of plaintiff's second amended complaint to file a response thereto.

IT IS SO ORDERED.

DATED: October 22, 2009

FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE

[12] HOLA also preempts this claim based on a TILA violation for another reason; TILA concerns lending requirements and fits squarely within the description in 12 C.F.R. § 560.2(b).