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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DMITRIY LANIN,

Plaintiff,

v.

Civ. No. S-09-2461 FCD/DAD

MEMORANDUM AND ORDER

WELLS FARGO BANK NA; MARIN
CONVEYANCING CORPORATION;
GREENPOINT MORTGAGE FUNDING,
INC.; CAPITAL ONE, N.A.; and
DOES 1-50,

Defendants.

_____ /

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This matter is before the court on the motions of defendants Wells Fargo, N.A. ("Wells Fargo"), Greenpoint Mortgage Funding, Inc. ("Greenpoint"), Marin Conveyancing Corporation ("Marin"), and Capitol One, N.A. to dismiss plaintiff Dmitriy Lanin's ("plaintiff") first amended complaint pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6). (Docket #s 6, 19).

1 Plaintiff opposes the motions. For the reasons set forth below,¹
2 defendants' motions are GRANTED.

3 **BACKGROUND**

4 Plaintiff brings this action against defendants Wells Fargo,
5 Greenpoint, Marin, and Capitol One, N.A.² (Pl.'s First Am.
6 Compl. ("Compl."), filed Sept. 1, 2009, ¶¶ 1-5.) Plaintiff's
7 claims are based upon a residential home loan transaction and the
8 subsequent foreclosure of plaintiff's home. (Id. ¶¶ 16, 8.)
9 Plaintiff, who is not fluent in English, bases several claims on
10 defendants' failure to provide plaintiff with copies of documents
11 in his native Slavic language. (Id. ¶ 10, 37.) Additionally,
12 plaintiff alleges that defendant Greenpoint acted as a "predatory
13 lender" by misrepresenting the terms of plaintiff's loan and by
14 failing to provide plaintiff with accurate disclosures. (Id.
15 ¶ 16.) All defendants have moved to dismiss the action for
16 failing to state any claims upon which relief could be granted.
17 Fed. R. Civ. P. 12(b)(6).

18 **STANDARDS**

19 Under Federal Rule of Civil Procedure 8(a), a pleading must
20 contain "a short and plain statement of the claim showing that
21 the pleader is entitled to relief." See Ashcroft v. Iqbal, 129
22 S. Ct. 1937, 1949 (2009). Under notice pleading in federal
23 court, the complaint must "give the defendant fair notice of what
24 the claim is and the grounds upon which it rests." Bell Atlantic

25 ¹ Because oral argument will not be of material
26 assistance, the court orders these matters submitted on the
27 briefs. E.D. Cal. L.R. 230(g).

28 ² At times, defendants Greenpoint, Marin, and Capitol
One, N.A. are referred to collectively as the "GPM defendants."

1 v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations
2 omitted). "This simplified notice pleading standard relies on
3 liberal discovery rules and summary judgment motions to define
4 disputed facts and issues and to dispose of unmeritorious
5 claims." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).

6 On a motion to dismiss, the factual allegations of the
7 complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319,
8 322 (1972). The court is bound to give plaintiff the benefit of
9 every reasonable inference to be drawn from the "well-pleaded"
10 allegations of the complaint. Retail Clerks Int'l Ass'n v.
11 Schermerhorn, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not
12 allege "'specific facts' beyond those necessary to state his
13 claim and the grounds showing entitlement to relief." Twombly,
14 550 U.S. at 570. "A claim has facial plausibility when the
15 plaintiff pleads factual content that allows the court to draw
16 the reasonable inference that the defendant is liable for the
17 misconduct alleged." Iqbal, 129 S. Ct. at 1949.

18 Nevertheless, the court "need not assume the truth of legal
19 conclusions cast in the form of factual allegations." United
20 States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th
21 Cir. 1986). While Rule 8(a) does not require detailed factual
22 allegations, "it demands more than an unadorned, the defendant-
23 unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at 1949. A
24 pleading is insufficient if it offers mere "labels and
25 conclusions" or "a formulaic recitation of the elements of a
26 cause of action." Twombly, 550 U.S. at 555; Iqbal, 129 S. Ct. at
27 1950 ("Threadbare recitals of the elements of a cause of action,
28 supported by mere conclusory statements, do not suffice.").

1 Moreover, it is inappropriate to assume that the plaintiff "can
2 prove facts which it has not alleged or that the defendants have
3 violated the . . . laws in ways that have not been alleged."
4 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council
5 of Carpenters, 459 U.S. 519, 526 (1983).

6 Ultimately, the court may not dismiss a complaint in which
7 the plaintiff has alleged "enough facts to state a claim to
8 relief that is plausible on its face." Iqbal, 129 S. Ct. at 1949
9 (citing Twombly, 550 U.S. at 570). Only where a plaintiff has
10 failed to "nudge [his or her] claims across the line from
11 conceivable to plausible," is the complaint properly dismissed.
12 Id. at 1952. While the plausibility requirement is not akin to a
13 probability requirement, it demands more than "a sheer
14 possibility that a defendant has acted unlawfully." Id. at 1949.
15 This plausibility inquiry is "a context-specific task that
16 requires the reviewing court to draw on its judicial experience
17 and common sense." Id. at 1950.

18 ANALYSIS

19 A. Defendants' Exhibits

20 In ruling upon a motion to dismiss, the court may consider
21 matters which may be judicially noticed pursuant to Federal Rule
22 of Evidence 201. See Mir v. Little Co. of Mary Hospital, 844
23 F.2d 646, 649 (9th Cir. 1988); Isuzu Motors Ltd. v. Consumers
24 Union of United States, Inc., 12 F. Supp. 2d 1035, 1042 (C.D.
25 Cal. 1998). Rule 201 permits a court to take judicial notice of
26 an adjudicative fact "not subject to reasonable dispute" because
27 the fact is either "(1) generally known within the territorial
28 jurisdiction of the trial court or (2) capable of accurate and

1 ready determination by resort to sources whose accuracy cannot
2 reasonably be questioned." Fed. R. Evid. 201(b). The court can
3 take judicial notice of matters of public record, such as
4 pleadings in another action and records and reports of
5 administrative bodies. See Emrich v. Touche Ross & Co., 846 F.2d
6 1190, 1198 (9th Cir. 1988).

7 "Even if a document is not attached to a complaint, it may
8 be incorporated by reference into a complaint if the plaintiff
9 refers extensively to the document or the document forms the
10 basis of the plaintiff's claim." United States v. Ritchie, 342
11 F.3d 903, 908 (9th Cir. 2003). "The defendant may offer such a
12 document, and the district court may treat such a document as
13 part of the complaint, and thus may assume that its contents are
14 true for purposes of a motion to dismiss under Rule 12(b)(6)."

15 Id. The policy concern underlying the rule is to prevent
16 plaintiffs "from surviving a Rule 12(b)(6) motion by deliberately
17 omitting references to documents upon which their claims are
18 based." Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998).

19 Plaintiff's first claim for relief, an action to quiet
20 title, is dependent upon plaintiff having a current interest in
21 the property. Greenpoint's Exhibit 3 and Wells Fargo's Exhibit G
22 show the current title to the property in question. Accordingly,
23 the court will treat the exhibits as part of the complaint and
24 assume that their contents are true for purposes of the motions
25 to dismiss. Ritchie, 342 F.3d at 908.

26 **B. Violation of 15 U.S.C. § 1639(H), TILA and HOEPA**

27 Plaintiff's ninth, twelfth, and thirteenth causes of action
28 are based on violations of 15 U.S.C. § 1639(h), the Truth in

1 Lending Act ("TILA"), and the Home Ownership and Equity
2 Protection Act ("HOEPA"), respectively. (Compl. ¶¶ 86, 109-11,
3 123.) In plaintiff's opposition to the motion to dismiss, he
4 concedes he no longer wishes to pursue actions based on HOEPA.
5 (Pl.'s Opp. at 11:18-22.) Presumably, this concession also
6 applies to plaintiff's claims under TILA and 15 U.S.C. § 1639(h),
7 as plaintiff has failed to address these claims in his opposition
8 and both would be barred for the same reason as the HOEPA
9 claim--the residential mortgage loan in question does not fall
10 under the purview of TILA. See 15 U.S.C. § 1602(aa).

11 Accordingly, defendants' motions to dismiss plaintiff's
12 ninth, twelfth, and thirteenth claims for relief are GRANTED
13 without leave to amend.

14 **C. RESPA**

15 Plaintiff's sixteenth claim is for violation of the Real
16 Estate Settlement Procedures Act ("RESPA") against defendant
17 Greenpoint. 12 U.S.C. 2601 *et. seq.* Greenpoint has moved to
18 dismiss this claim on the basis that plaintiff has failed to
19 plead any facts which could constitute a RESPA violation.
20 (Greenpoint's MTD, 14:5-9.) Plaintiff did not address the RESPA
21 claim in his opposition to the motion.

22 Plaintiff has failed to state a cause of action under RESPA.
23 Plaintiff's sixteenth cause of action lists a litany of charges
24 including several violations of California law. (Compl. ¶¶ 147-
25 54.) Plaintiff's only allegations that could constitute a
26 possible violation of RESPA are in paragraph 140 of the
27 complaint:

28 ///

1 Defendant Green[point] violated RESPA with respect to
2 Plaintiff's loan transaction by: (a) giving or
3 accepting kickbacks or other things of value in
4 violation of 12 U.S.C. § 2607(a) and 24 C.F.R. §
5 3500.14(b); and (b) giving a portion, split, or
6 percentage of charges made or received for the
7 rendering of a real estate settlement service in
8 connection with a transaction involving a federally
9 related mortgage loan other than for services actually
10 performed, in violation of 12 U.S.C. § 2607(b) and 24
11 C.F.R. § 3500.14(c).

12 (Compl. ¶ 140.) Plaintiff's allegations are barren of factual
13 support. Plaintiff fails to state how Greenpoint has given or
14 accepted kickbacks or split fees, and thus, the court GRANTS
15 Greenpoint's motion to dismiss plaintiff's RESPA claim.

16 **D. Quiet Title**

17 Plaintiff's first claim for relief is an action to quiet
18 title against all defendants. (Compl. ¶ 30.) Plaintiff seeks a
19 judicial declaration that the property is vested in him alone,
20 and that none of the defendants have any estate or interest in
21 the property. (Id. at ¶ 35.) Both Wells Fargo and the GPM
22 Defendants contend that plaintiff lacks standing to bring the
23 claim because plaintiff no longer has an interest in the property
24 due to the foreclosure. (Wells Fargo's MTD, 7:14-16; GPM
25 Defendant's MTD, 4:14-17.)

26 In order to proceed on a claim to quiet title, the plaintiff
27 must have a legal interest in the property. See Lechuza Villas
28 West v. California Coastal Com., 60 Cal. App. 4th 218, 242
(1997)(citing Peterson v. Gibbs, 147 Cal. 1, 5 (1905)); see also
Melvin v. Melvin, 8 Cal. App. 684, 687-88 (1908) (where the
plaintiff no longer had any title to the property she failed to
state a cause of action for quiet title and the demurrer was
properly sustained).

1 Plaintiff's complaint alleges that "[p]laintiff is the
2 owner" of the property. (Compl. ¶ 31.) However, plaintiff also
3 admits that Wells Fargo purchased the house at a foreclosure
4 sale. (Compl. ¶ 8). Based on the exhibits which the court has
5 taken judicial notice of, namely, a Trustee's Deed Upon Sale
6 conveying the property from plaintiff to Wells Fargo, it is clear
7 that plaintiff no longer has an interest in the property as his
8 interest was lost when the property was sold at foreclosure to
9 defendant Wells Fargo. (Wells Fargo's Ex. G; Greenpoint's Ex.
10 3.) Because plaintiff cannot allege that he has any present
11 interest in the property, plaintiff's first cause of action to
12 quiet title must be dismissed without leave to amend.

13 Accordingly, defendants' motions to dismiss plaintiff's
14 quiet title claim are GRANTED.

15 **E. California Civil Code § 1632**

16 Plaintiff's second claim for relief is based on a violation
17 of California Civil Code § 1632. (Compl. ¶¶ 36-37.) Section
18 1632 provides that when certain types of contracts are negotiated
19 in certain languages other than English, the offeree must be
20 provided with a translated copy of the contract before the
21 contract is executed. Cal. Civ. Code § 1632(b) (West 2009).
22 Defendants move to dismiss this claim on several grounds. Wells
23 Fargo argues that they have never entered into a contract with
24 plaintiff. (Wells Fargo's MTD, 8:9-10.) All defendants contend
25 that plaintiff cannot state a cause of action under Section 1632
26 because plaintiff does not speak one of the languages covered by
27 the statute. (Id. at 19-20; Greenpoint's MTD, 5:13-21.)

28

1 Section 1632(b) provides that "[a]ny person engaged in a
2 trade or business who negotiates primarily in Spanish, Chinese,
3 Tagalog, Vietnamese, or Korean . . . shall deliver to the other
4 party to the contract or agreement and prior to the execution
5 thereof, a translation of the contract or agreement in the
6 language in which the contract or agreement was negotiated. . .
7 ." Cal. Civ. Code § 1632(b) (West 2009). Section 1632 was
8 originally enacted in 1976 and applied only to the Spanish
9 language. 1974 Cal. Stat. ch. 1446. In 2003, the California
10 Legislature passed Assembly Bill 309, which added the Chinese,
11 Tagalog, Vietnamese, and Korean languages to the statute. 2003
12 Cal. Stat. ch. 330. The statute has been amended as recently as
13 2008. 2008 Cal. Stat. ch. 278.

14 Against defendant Wells Fargo, plaintiff has failed to plead
15 any facts which suggest that plaintiff and Wells Fargo have ever
16 entered into a contractual relationship. Plaintiff's claims
17 against Wells Fargo are based on the fact that Wells Fargo
18 purchased plaintiff's home at a foreclosure sale. (Compl. ¶ 8.)
19 Because plaintiff has not pled any allegations that Wells Fargo
20 negotiated any contract with plaintiff, plaintiff's claim under
21 Civil Code § 1632 against Wells Fargo must fail.

22 Furthermore, plaintiff admits that the Slavic language which
23 he speaks is not included as a covered language under § 1632.
24 (Compl. ¶ 38.) However, plaintiff argues that this court should
25 extend the statute to the Slavic language based on the overall
26 purpose of Section 1632. (Id. at ¶¶ 38-40; Pl.'s Opp, 5:1-7).
27 Plaintiff has not provided any authority for this proposition,
28 but contends that the Slavic language should be covered based on

1 the large increase in Slavic speakers in California since the
2 statute was originally enacted in 1976. (Compl. ¶ 40.)

3 Plaintiff's argument fails. When the statute was originally
4 enacted in 1976, it only protected Spanish speakers. 1974 Cal.
5 Stat. ch. 1446. It was not until 2003, and based upon
6 information in the most recent census, that the legislature chose
7 to amend the statute to include additional languages. 2003 Cal.
8 Stat. ch. 330. The legislature has amended the statute as
9 recently as 2008, but chose not to include the Slavic language as
10 a protected language under the statute. 2008 Cal. Stat. ch. 278.
11 The question of which languages are to be covered is a question
12 for the legislature, not this court. Because plaintiff has
13 failed to allege that he negotiated any contract in a language
14 which is protected by the statute, plaintiff's claim under
15 Section 1632 must be dismissed.

16 Accordingly, defendants' motions to dismiss plaintiff's
17 claim under California Civil Code § 1632 are GRANTED without
18 leave to amend.

19 **F. Rescission Based on Fraud and Fraud**

20 Plaintiff's third and fourteenth claims for relief are based
21 on the alleged fraud of defendant Greenpoint. Plaintiff alleges
22 that "[d]efendant Green[point] fraudulently, intentionally, and
23 knowingly induced the Plaintiffs [sic] to enter into the subject
24 mortgage transaction by misrepresenting and/or failing to provide
25 material information." (Compl. ¶ 128.)

26 Under California law, the elements of common law fraud are
27 "misrepresentation, knowledge of its falsity, intent to defraud,
28 justifiable reliance, and resulting damages." Gil v. Bank of

1 Am., Nat'l Ass'n, 138 Cal. App. 4th 1371, 1381 (2006). A court
2 may dismiss a claim grounded in fraud when its allegations fail
3 to satisfy Rule 9(b)'s heightened pleading requirements. Vess v.
4 Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107 (9th Cir. 2003).
5 Therefore, plaintiff "must state with particularity the
6 circumstances constituting fraud." Fed. R. Civ. P. 9(b). In
7 other words, the plaintiff must include "the who, what, when,
8 where, and how" of the fraud. Id. at 1106 (citations omitted).
9 "The plaintiff must set forth what is false or misleading about a
10 statement, and why it is false." Decker v. Glenfed, Inc., 42
11 F.3d 1541, 1548 (9th Cir. 1994). The purpose of Rule 9(b) is to
12 ensure that defendants accused of the conduct specified have
13 adequate notice of what they are alleged to have done, so that
14 they may defend against the accusations. Concha v. London, 62
15 F.3d 1493, 1502 (9th Cir. 1995). "Without such specificity,
16 defendants in these cases would be put to an unfair advantage,
17 since at the early stages of the proceedings they could do no
18 more than generally deny any wrongdoing." Id. (citing Semegen v.
19 Weidner, 780 F.2d 727, 731 (9th Cir. 1985)).

20 Furthermore, "Rule 9(b) does not allow a complaint to merely
21 lump multiple defendants together but require[s] plaintiffs to
22 differentiate their allegations when suing more than one
23 defendant . . . and inform each defendant separately of the
24 allegations surrounding his alleged participation in the fraud."
25 Swartz v. KPMG LLP, 476 F.3d 756, 765-66 (9th Cir. 2007). When
26 asserting a fraud claim against a corporation, "the plaintiff's
27 burden . . . is even greater. . . . The plaintiff must 'allege
28 the names of the persons who made the allegedly fraudulent

1 representations, their authority to speak, to whom they spoke,
2 what they said or wrote, and when it was said or written.'"
3 Lazar v. Superior Court, 12 Cal. 4th 631, 645 (1996) (quoting
4 Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal. App. 4th 153,
5 157 (1991)); see also Edejer, 2009 U.S. Dist. LEXIS 52900 at *36
6 (dismissing the fraud claim where the plaintiff did not allege
7 any misrepresentation or false statements made by the defendants;
8 did not allege the names of the persons who made the allegedly
9 fraudulent representations and their authority to speak; and did
10 not allege with sufficient particularity or clarity what was
11 false or misleading about the statements); Mohammad Akhavein v.
12 Argent Mortgage Co., 2009 U.S. Dist. LEXIS 61796, at *10 (N.D.
13 Cal. July 17, 2009); Spencer v. DHI Mortgage Co., 2009 U.S. Dist.
14 LEXIS 55191, at *18 (E.D. Cal. June 30, 2009) (dismissing the
15 plaintiff's fraud claim without leave to amend because it failed
16 to satisfy Rule 9(b)'s "'who, what, when, where and how'
17 requirements" and was so deficient as to "suggest no potential
18 improvement from an attempt to amend").

19 In the present case, plaintiff has failed to meet the
20 heightened pleading requirement of Rule 9(b). Specifically,
21 plaintiff has alleged fraud against Greenpoint, which is a
22 corporation, but has failed to allege who actually made the
23 supposedly false representations or their ability to speak for
24 the corporation. See Lazar v. Superior Court, 12 Cal. 4th 631,
25 645 (1996); Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal.
26 App. 4th 153, 157 (1991). For instance, plaintiff alleges that
27 Greenpoint "intentionally failed to disclose [facts] as of
28 February 28, 2005, and thereafter continued to keep this material

1 information from Plaintiff" and that Greenpoint "fraudulently,
2 intentionally, and knowingly induced the Plaintiffs [sic] to
3 enter into the subject mortgage transaction." (Compl. ¶¶ 53,
4 128.) These allegations fail to allege which individuals
5 purportedly failed to make such disclosures.

6 Accordingly, defendant Greenpoint's motion to dismiss
7 plaintiff's claims for rescission based on fraud and fraud are
8 GRANTED.

9 **G. RFDCPA and FDCPA Violations**

10 Plaintiff's fourth claim for relief alleges violations of
11 California's Rosenthal Fair Debt Collection Practices Act
12 ("RFDCPA"), the Federal Fair Debt Collection Practices Act
13 ("FDCPA"), and RESPA against all defendants. (Compl. ¶ 58.)
14 Defendants move to dismiss this claim because plaintiff has
15 failed to allege any facts which could constitute a violation of
16 these statutes.

17 Plaintiff has failed to allege any facts which could
18 constitute unfair debt collection. In plaintiff's opposition to
19 the motions he contends that "[t]here is factual evidence that
20 the GPM Defendants were involved in debt collection." (Pl.'s
21 Opp., 5:11-12.) However, plaintiff has not cited to where in his
22 complaint that he alleges these defendants were involved in debt
23 collection. And, after close review, this court has found no
24 such factual allegations. Plaintiff merely alleges that the
25 defendants have violated the RDFCPA, FDCPA, and RESPA. (Compl.
26 ¶ 58.) These allegations are conclusions of law which need not
27 be accepted as true by this court. See United States ex. rel.
28 Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th Cir. 1986). The

1 only allegation which plaintiff makes which could be construed as
2 a debt practice is the defendants' foreclosure of plaintiff's
3 home. (Compl. ¶ 59.) However, "foreclosing on [a] property
4 pursuant to a deed of trust is not the collection of a debt
5 within the meaning of the FDCPA." Izenberg v. ETS Services, LLC,
6 589 F. Supp. 1193, 1199 (C.D. Cal. 2008) (quoting Ines v.
7 Countrywide Home Loans, 2008 WL 4791863, at *2 (S.D. Cal. Nov. 3,
8 2008)). Nor does foreclosure meet the requirements of a debt
9 collection within the meaning of the RFDCPA. Id.

10 Accordingly, defendants' motions to dismiss plaintiff's
11 claims for unfair debt collection are GRANTED.

12 **H. Unfair Business Practices**

13 Plaintiff's fifth claim asserts that all defendants violated
14 Section 17200 of the California Business & Professions Code by
15 engaging in unlawful, unfair, and fraudulent business practices.
16 (Compl. ¶ 62.) Plaintiff predicates this claim on defendants'
17 alleged violations of California Civil Code § 1632, RFDCPA,
18 FDCPA, and RESPA. (Compl. ¶ 107.)

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

27 Because plaintiff's UCL claim is predicated upon defendants'
28 alleged violations of § 1632, RESPA, FDCPA, and RFDCPA, for the

1 reasons set forth above, plaintiff's allegations regarding their
2 UCL claim similarly fail to state a basis for relief.

3 Accordingly, defendants' motions to dismiss plaintiff's UCL
4 claim are GRANTED.

5 **I. Breach of Fiduciary Duty**

6 Plaintiff's sixth claim for relief, against all defendants,
7 alleges that defendants breached their fiduciary duties by
8 allegedly failing to provide him with all disclosures required by
9 law. (Compl. ¶¶ 69-70.) Defendants move to dismiss the claim on
10 the basis that a lending institution does not owe a fiduciary
11 duty to a borrower. Additionally, Wells Fargo moves to dismiss
12 on the ground that they never entered into any direct contractual
13 relationship with plaintiff.

14 In order to sustain a claim for breach of a fiduciary duty,
15 "a plaintiff must demonstrate the existence of a fiduciary
16 relationship, breach of that duty and damages." Serrano v. Sec.
17 Nat'l Mortg. Co., 2009 U.S. Dist. LEXIS 71725 (S.D. Cal. Aug. 14,
18 2009) (citing Shopoff & Cavallo LLP v. Hyon, 167 Cal. App. 4th
19 1489, 85 Cal. Rptr.3d 268, 285 (Cal. Ct. App. 2008). "Absent
20 special circumstances, a loan transaction is at arms-length and
21 there is no fiduciary relationship between the borrower and
22 lender." Rangel v. DHI Mortgage Co., Ltd., 2009 U.S. Dist. LEXIS
23 65674, at *8 (E.D. Cal. July 20, 2009); see also e.g. Tasaranta
24 v. Homecomings Fin., 2009 U.S. Dist. LEXIS 87372, at *15 (S.D.
25 Cal. Sept. 21, 2009); Brittain v. IndyMac Bank, FSB, 2009 U.S.
26 Dist. LEXIS 84863, at * 14 (N.D. Cal. Sept. 16, 2009);
27 Dinsmore-Thomas v. Ameriprise Fin., Inc., 2009 U.S. Dist. LEXIS
28 68882, at *29 (C.D. Cal. Aug. 3, 2009); Fox & Carskadon Financial

1 Corp. v. San Francisco Fed. Sav. & Loan Assn. 52 Cal. App. 3d
2 484, 488, 489 (1st Dist. 1975); Bradler v. Craig, 274 Cal. App.
3 2d 466, 473, 476 (2d Dist. 1969).

4 Plaintiff's claim for breach of fiduciary duty must fail
5 because plaintiff has not alleged any facts which could create a
6 special circumstance in which the GPM Defendants, as lenders,
7 owed a fiduciary duty to plaintiff. Plaintiff only alleges that
8 "defendants, and each of them as the lender, trustee, mortgage
9 broker, had[] a fiduciary duty to Plaintiff to advise him. . . ."
10 (Compl. ¶ 69.) Under California law, this is not the type of
11 transaction which creates a fiduciary duty. See, e.g., Rangel,
12 2009 U.S. Dist. LEXIS 65674, at *8.

13 Additionally, plaintiff has failed to allege any
14 relationship with Wells Fargo aside from the purchase of
15 plaintiff's home at the foreclosure sale. (Compl. ¶ 8.)
16 Therefore, plaintiff has failed to allege any facts which could
17 possibly support a claim for breach of fiduciary duty as to Wells
18 Fargo, and accordingly, the court GRANTS defendants' motions to
19 dismiss this claim for relief.

20 **J. Breach of Contract**

21 Plaintiff's seventh claim for relief is for breach of
22 contract against defendant Greenpoint. (Compl. ¶ 75.) Plaintiff
23 alleges that defendant had a duty to provide a copy of the
24 contract in the Slavic language and that "[t]his failure to
25 disclose, was and is a breach of contract by defendant." Id. To
26 the extent that plaintiff's breach of contract claim is based on
27 a violation of California Civil Code § 1632 for failure to
28 provide a Slavic language translation of the contract, his claim

1 for breach of contract must fail. The court, as noted above,
2 finds that Greenpoint had no such duty to provide a copy of the
3 contract in the Slavic language. Therefore, a failure to do so
4 cannot be the basis of a claim for breach of contract.

5 Greenpoint's motion to dismiss this claim is GRANTED.

6 **K. Breach of Implied Covenant of Good Faith and Fair Dealing**

7 Plaintiff's eighth claim for relief asserts that Greenpoint
8 breached the implied covenant of good faith and fair dealing.

9 Plaintiff specifically alleges that defendants collectively
10 breached the implied covenant of good faith when they: (1) failed
11 to comply with California Civil Code § 1632, requiring defendant
12 to provide a copy of the contract in plaintiff's Slavic language;
13 and (2) failed to comply with 15 U.S.C. § 1639(h). (Compl. ¶¶
14 80-81.) To the extent that this court has concluded that
15 Greenpoint owed plaintiff no duty under Section 1632 and
16 plaintiff has conceded that no claim exists under 15 U.S.C.
17 § 1639(h), plaintiff's claim for breach of the implied covenant
18 of good faith and fair dealing must be dismissed.

19 **L. Wrongful Foreclosure**

20 Plaintiff's eleventh claim for relief is a claim for
21 wrongful foreclosure against all defendants.³ The basis of
22 plaintiff's allegation is that Greenpoint has never provided the
23 actual promissory note but only a copy. (Compl. ¶ 94(2)).
24 Defendants move to dismiss this claim on the ground that it is
25 not necessary to produce the original promissory note before

26
27 ³ Plaintiff's complaint couches the claim as one for
28 "unlawful" foreclosure. (Compl. ¶ 94.) Plaintiff's opposition
papers clarify that the claim is for "wrongful" foreclosure and
the court proceeds as such.

1 proceeding with a non-judicial foreclosure.

2 California Civil Code §§ 2924 through 29241 govern non-
3 judicial foreclosures pursuant to a deed of trust. Non-judicial
4 foreclosure may be initiated by a "trustee, mortgagee, or
5 beneficiary, or any of their authorized agents." Cal. Civ. Code
6 § 2924(a)(1). Plaintiff contends that even when the deed of
7 trust designates a party as a trustee or beneficiary and the
8 party complies with the remaining requirements of Sections 2924
9 through 29241, this is not sufficient to demonstrate that a party
10 has the power to foreclose, because the party must also provide
11 the original promissory note. Plaintiff bases his argument, in
12 part, on the requirements of the California Commercial Code.
13 (Compl. ¶ 100-01.)

14 As noted above, California's non-judicial foreclosure
15 process is governed by a statutory framework that is distinct
16 from the commercial code, California Civil Code §§ 2924-29241.
17 The California Civil Code has no requirement that a party
18 demonstrate actual possession of the promissory note. See
19 Champlaie v. BAC Home Loans Servicing, LP, 2009 WL 3429622, at
20 *12 (E.D. Cal. Oct. 22, 2009) (Karlton, J.) (reviewing several
21 district court opinions and concluding that "so far as this court
22 is aware, the district courts have unanimously concluded that in
23 a non-judicial foreclosure, a party need not demonstrate actual
24 possession of the underlying note"). Because plaintiff's sole
25 allegation supporting the claim for wrongful foreclosure is that
26 the defendants failed to produce the promissory note, plaintiff's
27 claim fails as a matter of law. Defendants' motions to dismiss
28 plaintiff's eleventh claim for wrongful foreclosure are GRANTED.

1 **M. Civil Conspiracy to Commit Fraud**

2 Plaintiff's fifteenth cause of action is for civil
3 conspiracy to commit fraud against defendant Greenpoint.
4 Greenpoint moves to dismiss on the grounds that plaintiff has
5 failed to allege any facts which could constitute a conspiracy.
6 The court agrees. One of the hallmarks of any conspiracy claim
7 is an agreement between two or more people. Plaintiff's
8 conspiracy claim is directed solely at a single defendant, namely
9 Greenpoint. Additionally, plaintiff's accusations are conclusory
10 and totally lacking of factual support. Plaintiff alleges that
11 "[t]hrough their unlawful conduct constituting a civil conspiracy
12 to defraud a vulnerable and immigrant homeowner, defendant
13 Green[point] acted in a malicious, willful, wanton, and
14 oppressive fashion, in reckless disregard of plaintiffs rights."
15 (Compl. ¶ 134.) This allegation fails to state a single fact
16 from which this court could conclude that the defendants' actions
17 could possibly constitute a conspiracy to commit fraud.
18 Accordingly, Greenpoint's motion to dismiss plaintiff's claim for
19 civil conspiracy to commit fraud is GRANTED.

20 **N. Declaratory and Injunctive Relief**

21 Plaintiff's tenth cause of action for declaratory and
22 injunctive relief is based upon plaintiff's first nine causes of
23 action which this court has dismissed. As such, plaintiff's
24 claim for declaratory and injunctive relief must also be
25 dismissed. Accordingly, defendants' motions to dismiss
26 plaintiff's tenth claim for relief are GRANTED.

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1 **O. Leave to Amend**

2 Plaintiff has requested leave to amend his complaint.
3 "Valid reasons for denying leave to amend include undue delay,
4 bad faith, prejudice, and futility." Cal. Architectural Building
5 Prods. v. Franciscan Ceramics, 818 F.2d 1466, 1472 (9th Cir.
6 1988). While leave to amend should be freely given pursuant to
7 Federal Rule of Civil Procedure 15, the court is not required to
8 allow *futile* amendments. Klamath-Lake Pharm. Ass'n v. Klamath
9 Med. Serv. Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983). Here,
10 amendment of the complaint with respect to plaintiff's first,
11 ninth, twelfth, and thirteenth claims for relief would be futile
12 under the governing law described above, and plaintiff does not
13 describe any other facts which could plausibly give rise to such
14 claims against defendants. Iqbal, 129 S. Ct. at 1949.
15 Therefore, the court denies plaintiff leave to amend with respect
16 to these claims for relief.

17 **CONCLUSION**

18 For the foregoing reasons, defendants' motions to dismiss
19 are GRANTED. Plaintiff's first, ninth, twelfth, and thirteenth
20 claims are dismissed without leave to amend. As to all other
21 claims, plaintiff is granted fifteen (15) days from the date of
22 this order to file a second amended complaint in accordance with
23 this order. Defendants are granted thirty (30) days from the
24 date of service of plaintiff's second amended complaint to file a

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1 response thereto.

2 IT IS SO ORDERED.

3 DATED: February 19, 2010



FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE

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