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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FREDERIC MILLER

Plaintiff,

No. CIV S-10-0284 GEB DAD PS

v.

WELLS FARGO HOME MORTGAGE,
FIRST AMERICAN LOANSTAR
TRUST SERVICES,

FINDINGS AND RECOMMENDATIONS

Defendants.

_____/

This case came before the court on March 26, 2010, for hearing on the motion to dismiss or strike plaintiff's complaint pursuant to Federal Rules of Civil Procedure 8, 12(b)(6) and 12(f) brought on behalf of defendants Wells Fargo Home Mortgage and First American Loanstar Trustee Services. (Doc. Nos. 10 and 15.) Nathaniel Peters appeared on behalf of defendant Wells Fargo Home Mortgage and Lawrence Harris appeared telephonically on behalf of defendant First American Loanstar Trustee Services. Plaintiff did not file written opposition to the defendants' motions to dismiss nor did he appear at the hearing.¹ Upon consideration of all written materials

¹ Counsel for defendants advised the court at the hearing that following the removal of this action to federal court, plaintiff sued the Clerk of the Sacramento County Superior Court for refusing to accept documents plaintiff attempted to file in the removed state court action.

1 filed in connection with the motion, counsels' arguments at the hearing, and the entire file, the
2 undersigned recommends that defendants' motion be granted without leave to amend and that this
3 case proceed only with respect to defendant HBA Mortgage, Inc. who filed an answer to
4 plaintiff's complaint on February 16, 2010.

5 BACKGROUND

6 Plaintiff originally filed his complaint in the Sacramento County Superior Court on
7 December 31, 2009. On February 3, 2010, defendant Wells Fargo Home Mortgage removed the
8 action pursuant to 28 U.S.C. §§ 1441(b) and 1446 on the grounds that over plaintiff's claims for
9 foreclosure by way of "fraudulent inducement" and "illegal usury practices" which are completely
10 preempted under the National Bank Act (12 U.S.C. §§ 85, 86) and that this court had jurisdiction
11 over the action pursuant to 28 U.S.C. § 1331. See Notice of Removal (Doc. No. 1).

12 PLAINTIFF'S CLAIMS

13 In his verified complaint, plaintiffs alleges as follows. Defendants did "obligate
14 him" into a fraudulent transaction with respect to his home mortgage and, along with their
15 attorney, engaged in a foreclosure on that property "by way of fraud by way of inducement and
16 illegal usury practices, policies and procedures." (Notice of Removal (Doc. No. 1), Compl. at 9 of
17 68.²) Specifically, on November 10, 2006 defendants purported to lend plaintiff \$440,000 on his
18 home located at 2221 Portola Way in Sacramento, California. (Id. at. 15.) Defendants acted in
19 bad faith by fraudulently inducing plaintiff to enter into this loan transaction knowing that he
20 would default on the loan. (Id.) On or about August 28, 2008 and thereafter, plaintiff wrote to the
21 defendants making reasonable counter-offers seeking a loan modification but his offers were
22 rejected. (Id. at 16.) Plaintiff eventually defaulted on his loan on June 7, 2009. (Id.) Defendants
23 have failed to produce "the original blue ink certified promissory note" thereby "precluding any
24 lawful resolution of this matter." (Id. at 19.) Plaintiff alleges that as a result of the defendants

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26 ² The page numbers cited to herein are those that appear in the court's CM/ECF system.

1 wrongful acts he has suffered damages (including those related to the loss of his home, his job,
2 pain and suffering, etc.) in the total amount of almost \$6.5 million.

3 At the outset, defendants have requested that the court take judicial notice of the
4 official documents related to the matters at issue. (Doc. Nos. 11 and 16.) Specifically, defendants
5 request that the court take judicial notice of the following official documents related to plaintiff's
6 mortgage loan transaction: the Promissory Note signed and initialed by plaintiff on October 12,
7 2006; the Deed of Trust dated October 12, 2006, executed by plaintiff and recorded in the
8 Sacramento County Recorder's Office on October 24, 2006³; the Notice of Default and Election to
9 Sell Under Deed of Trust dated May 7, 2009 and recorded with the Sacramento County
10 Recorder's Office on May 11, 2009; the Substitution of Trustee recorded in the Sacramento
11 County Recorder's Office on June 12, 2009; the Assignment of Deed of Trust recorded in the
12 Sacramento County Recorder's Office on June 19, 2009; the Notice of Trustee's Sale recorded in
13 the Sacramento County Recorder's Office on August 12, 2009 and the Trustee's Deed Upon Sale
14 dated December 17, 2009 and recorded in the Sacramento County Recorder's Office on December
15 22, 2009. (Doc. No. 11, Exs. A-F; Doc. No. 16, Exs. A-D.)⁴

16 Defendants' requests for judicial notice will be granted pursuant to Federal Rule of
17 Evidence 201. See Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001) (on a motion
18 to dismiss, court may consider matters of public record); MGIC Indem. Corp. v. Weisman, 803
19 F.2d 500, 504 (9th Cir. 1986) (on a motion to dismiss, the court may take judicial notice of
20 matters of public record outside the pleadings).

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23 ³ This exhibit reflects that plaintiff's mortgage was what is typically referred to as a 5-
24 year adjustable rate mortgage with an initial interest rate of 6.375%. Plaintiff defaulted on the
loan in 2009, well before the rate adjustment was scheduled to take place in November of 2011.

25 ⁴ Defendant Wells Fargo Home Mortgage also request that judicial notice be taken of the
26 list of active National Banks as of December 31, 2009 in support of the removal of this action.
(Doc. No. 16, Ex. E.)

1 DEFENDANTS' ARGUMENTS

2 Defendants seek dismissal of plaintiff's complaint pursuant to Federal Rule of
3 Civil Procedure 9(b) and 12(b)(6) on the grounds that he has failed to state any cognizable claim.⁵
4 Specifically, defendants argues that plaintiff's claim for usury under the National Bank Act is both
5 time-barred pursuant to the applicable two-year statute of limitations and fails to state a
6 cognizable claim because the interest rate charged to plaintiff on the loan was not in excess of that
7 permitted by the State of South Dakota, the home state of defendant Wells Fargo Bank.
8 Defendants also argue that plaintiff's fraud claims fail because they are not alleged with the
9 specificity required by Rule 9(b) of the Federal Rules of Civil Procedure. Finally, defendants
10 contend that the allegations of plaintiff's complaint fail to state cognizable claims for rescission,
11 unfair debt collection practices, violation of the Real Estate Settlement Procedures Act (RESPA),
12 negligence, unjust enrichment, conspiracy or wrongful foreclosure based on the alleged failure to
13 produce the original promissory note.

14 As noted above, plaintiff has filed no written opposition to the motion and did not
15 appear at the hearing on defendants' motions to dismiss.

16 LEGAL STANDARDS APPLICABLE TO DEFENDANTS' MOTION

17 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal
18 sufficiency of the complaint. N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 581 (9th Cir.
19 1983). "Dismissal can be based on the lack of a cognizable legal theory or the absence of
20 sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901
21 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege "enough facts to state a claim to
22 relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Thus,
23 a defendant's Rule 12(b)(6) motion challenges the court's ability to grant any relief on the

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25 ⁵ In addition, defendant First American Loanstar Trustee Services moves to dismiss
26 pursuant to Federal Rule of Civil Procedure 8 on the grounds that plaintiff's complaint does not
include a short and plain statement of the claimed basis for relief and to strike plaintiff's prayer
for relief pursuant to Federal Rule of Civil Procedure 12(f).

1 plaintiff's claims, even if the plaintiff's allegations are true.

2 In determining whether a complaint states a claim on which relief may be granted,
3 the court accepts as true the allegations in the complaint and construes the allegations in the light
4 most favorable to the plaintiff. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Love v.
5 United States, 915 F.2d 1242, 1245 (9th Cir. 1989). In general, pro se complaints are held to less
6 stringent standards than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519,
7 520-21 (1972). However, the court need not assume the truth of legal conclusions cast in the form
8 of factual allegations. W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

9 With regard to claims of fraud, “the circumstances constituting fraud . . . shall be
10 stated with particularity.” Fed. R. Civ. P. 9(b). “Rule 9(b) serves not only to give notice to
11 defendants of the specific fraudulent conduct against which they must defend, but also ‘to deter
12 the filing of complaints as a pretext for the discovery of unknown wrongs, to protect [defendants]
13 from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from
14 unilaterally imposing upon the court, the parties and society enormous social and economic costs
15 absent some factual basis.” Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001)
16 (quoting In re Stac Elec. Sec. Litig., 89 F.3d 1399, 1405 (9th Cir. 1996)). Thus, pursuant to Rule
17 9(b), a plaintiff alleging fraud at a minimum must plead evidentiary facts such as the time, place,
18 persons, statements and explanations of why allegedly misleading statements are misleading. In
19 re GlenFed, Inc. Sec. Litig., 42 F. 3d 1541, 1547 n.7 (9th Cir. 1994); see also Vess v. Ciba-Geigy
20 Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003); Fecht v. Price Co., 70 F.3d 1078, 1082 (9th Cir.
21 1995).⁶

22 For the reasons set forth below, the undersigned will recommend that defendants’
23 motions to dismiss be granted.

24 _____

25 ⁶ “Under California law, the ‘indispensable elements of a fraud claim include a false
26 representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages.”
Vess, 317 F.3d at 1105 (quoting Moore v. Brewster, 96 F.3d 1240, 1245 (9th Cir. 1996)).

1 ANALYSIS

2 The undersigned finds plaintiff's failure to file written opposition and to appear at
3 the hearings on defendants' motions to dismiss, considered together with his failure to participate
4 in this action since its removal to this court, should be deemed a statement of no opposition to the
5 granting of defendants' motions. Nonetheless, in light of plaintiff's pro se status, the undersigned
6 has reviewed defendants' arguments and addresses each of them briefly below.

7 I. Usury

8 _____ In his complaint plaintiff refers to the "illegal usury practices" of defendants. Any
9 usury cause of action fails for several reasons.

10 Defendant Wells Fargo is a National Bank. (Doc. No. 16, Ex. E.) Title 12 U.S.C.
11 § 85 limits the rate of interest charged by National Banks to that allowed by the laws of the State
12 where the bank is located. Title 12 U.S.C. § 86 provides that any action brought under § 85 must
13 be commenced within two years from the time the allegedly usurious transaction occurred. Here,
14 the mortgage loan in question was originated in November of 2006. Plaintiff's complaint was not
15 filed in the Sacramento County Superior Court until December 31, 2009, more than three years
16 after the loan was originated. Any cause of action for usury is therefore time-barred.

17 Moreover, defendant Wells Fargo Bank appears to be a citizen of South Dakota.
18 South Dakota law does not set a maximum interest rate so long as that rate is set by written
19 agreement, as is the case here. See South Dakota Codified Laws § 54-3-1.1.

20 _____ Finally, even under California law plaintiff has failed to state a cognizable claim
21 for usury. The essential elements of such a claim under California law are: the transaction must
22 be a loan or forbearance; the interest to be paid must exceed the statutory maximum; the loan and
23 interest must be absolutely repayable by the borrower; and the lender must have the willful intent
24 to enter into a usurious transaction. Ghirardo v. Antonioli, 8 Cal.4th 791, 798 (1994); WRI
25 Opportunity Loans II LLC v. Cooper, 154 Cal. App.4th 525, 533 (2007). There is a rebuttable
26 presumption that a transaction is not usurious. Ghirardo, 8 Cal.4th at 798-99. A loan that charges

1 an interest rate greater than 10 percent per annum is usurious under California law. Henderson
2 Receivables Origination LLC v. Sioteco, 173 Cal. App.4th 1059, 1076 (2009) (citing Regents of
3 University of California v. Superior Court of Alameda County, 17 Cal.3d 533, 536 (1976)).
4 Any cause of action for usury under California law fails here because plaintiff has failed to set
5 forth specific factual allegations in support thereof, including whether defendant Wells Fargo had
6 a willful intent to enter into a usurious transaction. Plaintiff has cited no California or federal
7 authority in support of this claim. Furthermore, the Deed of Trust indicates that although the
8 interest rate under the loan could have been adjusted in November 2011, from the time the loan
9 was originated through the date plaintiff stopped paying on that loan the interest rate remained at
10 6.375%, far below the maximum interest rate allowed by law in California.

11 Any cause of action for usury presented by plaintiff's complaint should therefore
12 be dismissed as to the two moving defendants without leave to amend. See Jiramoree v. Homeq
13 Servicing, et al., No. CV 08-07511 SJO (Ex), 2009 WL 605817, *1-2 (C.D. Cal. Mar.9, 2009)
14 (dismissing plaintiff's usury cause action for failure to state a claim stemming from a foreclosure
15 following his default on his mortgage loan); Bouyer v. GMAC Mortgage, Civ. No. S-08-3022
16 GEB GGH PS, 2009 WL 2877603, *4 (E.D. Cal. Sept. 3,2009).

17 II. Wrongful Foreclosure/Rescission

18 Defendants correctly observe that to the extent plaintiff seeks a declaration that the
19 foreclosure proceedings in his case were unlawful and/or for the rescission of his mortgage loan
20 agreement, his claims fail because he has not alleged the ability to tender the entire amount due on
21 the mortgage loan to the lender.

22 "A valid and viable tender of payment of the indebtedness owing is
23 essential to an action to cancel a voidable sale under a deed of
24 trust." Karlsen v. American Sav. & Loan Assn., 15 Cal. App.3d
25 112,117 (Cal. App.2d Dist.1971). The overwhelming majority of
26 California district courts utilize the Karlsen rationale in examining
wrongful foreclosure claims. Anaya v. Advisors Lending Group,
2009 U.S. Dist. LEXIS 68373, 2009 WL 2424037 (E.D. Cal.
August 3, 2009) ("Plaintiff offers nothing to indicate that she is able
to tender her debt to warrant disruption of non-judicial

1 foreclosure”); Alicea v. GE Money Bank, 2009 U.S. Dist. LEXIS
2 60813, 2009 WL 2136969 (N.D. Cal. July 16, 2009) (“When a
3 debtor is in default of a home mortgage loan, and a foreclosure is
4 either pending or has taken place, the debtor must allege a credible
5 tender of the amount of the secured debt to maintain any cause of
6 action for foreclosure.”); Montoya v. Countrywide Bank, 2009 U.S.
7 Dist. LEXIS 53920, 2009 WL 1813973 (N.D. Cal. June 25, 2009)
8 (“Under California law, the “tender rule” requires that as a
9 precondition to challenging a foreclosure sale, or any cause of
10 action implicitly integrated to the sale, the borrower must make a
11 valid and viable tender of payment of the secured debt”). The
12 application of the “tender rule” prevents “a court from uselessly
13 setting aside a foreclosure sale on a technical ground when the party
14 making the challenge has not established his ability to purchase the
15 property.” Williams v. Countrywide Home Loans, 1999 U.S. Dist.
16 LEXIS 14550, 1999 WL 740375 (N.D. Cal. Sept. 15, 1999).

17 Somera v. Indymac Federal Bank, FSB, No. 2:09-cv-1947-FCD-DAD, 2010 WL 761221, at *8
18 (E.D. Cal. Mar. 3, 2010). See also Yamamoto v. Bank of New York, 329 F.3d 1167, 1171 (9th
19 Cir. 2003) (holding that rescission “*should* be conditioned on repayment of the amounts advanced
20 by the lender” and explaining that, because rescission is a remedy that restores the status quo ante,
21 a borrower seeking rescission is required to allege ability to tender the loan proceeds).⁷

22 Because plaintiff has not alleged any facts supporting his ability to tender payment,
23 defendants’ motions to dismiss those causes of action seeking to enjoin foreclosure proceedings or
24 order rescission of the loan agreement should be granted.⁸

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26 ⁷ Likewise, “a mortgagor cannot quiet his title against the mortgagee without paying the
debt secured.” Shimpones v. Stickney, 219 Cal. 637, 649 (1934). See also Aguilar v. Bocci, 39
Cal. App. 3d 475, 477 (1974); Kelley v. Mortgage Electronic Registration, 642 F. Supp. 2d 1048,
1057 (N.D. Cal. 2009) (“Plaintiffs have not alleged . . . that they have satisfied their obligation
under the Deed of Trust. As such, they have not stated a claim to quiet title.”) Plaintiff does not
allege that he has tendered, or is able to tender, the debt secured by the subject property.

⁸ The court also notes that to the extent plaintiffs complaint suggest that the foreclosure
was wrongful because defendants have not produced the original promissory note, such a claim is
also not cognizable. California law “does not require possession of the note as a precondition to
non-judicial foreclosure under a Deed of Trust.” Alicea v. GE Money Bank, No. C 09-00091
SBA, 2009 WL 2136969 at *2 (N.D. Cal., July 16, 2009). See also De Valle v. Mortgage Bank
of California, No. CV-F-09-1316 OWW/DLB, 2010 WL 1813505, *1-2 (E. D. Cal. May 5,
2010); Nool v. HomeQ Servicing, 653 F. Supp.2d 1047, 1053 (E.D. Cal. 2009).

1 III. Any Fraud Claim by Plaintiff is Insufficient and Not Cognizable

2 Plaintiff's complaint suggests a claim that he was fraudulently induced by
3 defendants to enter into the mortgage loan in question despite their knowledge that he would
4 eventually default on the loan. Any such claim fails as a matter of law.

5 First, it is impossible to ascertain with any degree of particularity the precise
6 conduct being alleged by plaintiff as to each of the named defendants. As such, plaintiff has
7 failed to place the defendants on notice of the claim or claims being asserted against it.

8 Furthermore, however, plaintiffs' claim invokes no applicable statutory or common law authority
9 pursuant to which relief could be granted by the court.

10 Nonetheless, construing the complaint liberally, the court notes that under
11 California Civil Code § 1689(b)(1), a party to a contract may rescind the agreement if his consent
12 to the contract was obtained through fraud. However, "[i]n all averments of fraud or mistake, the
13 circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent,
14 knowledge and other condition of mind of a person may be averred generally." Fed. R. Civ. Proc.
15 9(b). A claim of fraud under California law must allege the following elements: "(a) a
16 misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity
17 (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e)
18 resulting damage." In re Estate of Young, 160 Cal. App.4th 62, 79 (2008) (quoting Lazar v.
19 Superior Court, 12 Cal.4th 631, 638 (1996) (internal quotation marks omitted).

20 The Ninth Circuit has "interpreted Rule 9(b) to mean that the pleader must state the
21 time, place and specific content of the false representations as well as the identities of the parties
22 to the misrepresentation." Alan Neuman Productions, Inc. v. Albright, 862 F.2d 1388, 1393 (9th
23 Cir.1988). When asserting a fraud claim against a corporation, "the plaintiff's burden . . . is even
24 greater. . . . The plaintiff must 'allege the names of the persons who made the allegedly fraudulent
25 representations, their authority to speak, to whom they spoke, what they said or wrote, and when it
26 was said or written.'" Lazar, 12 Cal.4th at 645 (quoting Tarmann v. State Farm Mutual Auto. Ins.

1 Co., 2 Cal. App. 4th 153, 157 (1991)). See also e.g. Spencer v. DHI Mortgage Co., Case No. CV
2 F 09-0925 LJO DLB, 2009 WL 1930161, at *6 (E.D. Cal. June 30, 2009). Moreover, dismissal of
3 a fraud claim is appropriate when its allegations fail to meet the required pleading standard. Vess,
4 317 F.3d at 1107; see also Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997) (“fraud allegations
5 must be accompanied by ‘the who, what, when, where, and how’ of the misconduct alleged”);
6 Decker v. Glenfed, Inc., 42 F.3d 1541, 1548 (9th Cir. 1994); 1991); Tarmann, 2 Cal. App.4th at
7 157.

8 Here, plaintiff merely alleges in conclusory fashion that the foreclosure on his
9 home was “by way of fraud” and that he was “fraudulently induced” by defendants to enter this
10 allegedly “fraudulent transaction.” (Notice of Removal (Doc. No. 1), Compl. at 9 & 15 of 68.)
11 Such general and vague allegations are clearly insufficient to state a cognizable fraud claim under
12 the legal standards set forth above. Because plaintiff has not alleged fraud with the required
13 particularity to state a plausible claim for relief, any fraud claim should be dismissed.

14 IV. Unfair Debt Collection Practices

15 Plaintiff’s complaint also perhaps suggests a claim that defendants engaged in
16 unfair debt collection practices in violation of either the Rosenthal Fair Debt Collection Practices
17 Act (RFDCPA), the Federal Fair Debt Collections Act (FDCPA), or the Real Estate Settlement
18 Procedures Act (RESPA). However, his complaint provides no factual allegations of any kind in
19 support of such a claim and it is subject to dismissal on that basis alone.

20 The RFDCPA prohibits a host of unfair and oppressive methods of collecting
21 debt, but to be liable under the RFDCPA a defendant must fall under its definition of “debt
22 collector.” Izenberg v. ETS Svcs., LLC, 589 F. Supp.2d 1193, 1199 (C.D. Cal.2008). A “debt
23 collector” under the RFDCPA is “any person who, in the ordinary course of business, regularly,
24 on behalf of himself or herself or others, engages in debt collection.” California Civil Code §
25 1788.2(c). As noted, plaintiff does not identify in their complaint the sections of the RFDCPA
26 that defendants allegedly violated and fail to allege facts that would support the inference that

1 defendants are “debt collectors” under the RFDCPA. Plaintiff’s complaint fails to allege
2 essential elements necessary to establish liability as a “debt collector,” namely that the deed of
3 trust memorializes a “consumer credit transaction” and that the amount owed under the deed of
4 trust is a “consumer debt” according to the RFDCPA. See California Civil Code § 1788.2(b) and
5 (f). Plaintiffs’ bare allegations, without even identifying what part of the RFDCPA defendants
6 violated, are insufficient to survive a motion to dismiss. See Rosal v. First Fed. Bank of Cal., No.
7 09-1276, 2009 WL 2136777, at * 18 (N.D. Cal. July 15, 2009).

8 Additionally, foreclosure pursuant to a deed of trust does not constitute debt
9 collection under the RFDCPA. See Izenberg, 589 F. Supp.2d at 1199; see also Rosal, 2009 WL
10 2136777, at *18 (dismissing RFDCPA claim as to all defendants in foreclosure case); Ricon v.
11 Recontrust Co., No. 09-937, 2009 WL 2407396, at *4 (S.D. Cal. Aug. 4, 2009) (dismissing with
12 prejudice plaintiff’s unfair debt collection claims in foreclosure case); Pittman v. Barclays Capital
13 Real Estate, Inc., No. 09-0241, 2009 WL 1108889, at *3 (S.D. Cal. Apr. 24, 2009) (dismissing
14 with prejudice plaintiff’s Rosenthal Act claim in foreclosure case because a “residential mortgage
15 loan does not qualify as a ‘debt’ under the statute”); Gallegos v. Recontrust Co., No. 08-2245,
16 2009 WL 215406, at *3 (S.D. Cal. Jan. 28, 2009) (dismissing RFDCPA claim in foreclosure
17 case). Since residential mortgage loans do not fall within the RFDCPA, the court should grant
18 defendants’ motion to dismiss any cause of action possibly brought by plaintiff under the
19 RFDCPA.

20 To the extent plaintiff is attempting to allege that a non-judicial foreclosure on the
21 subject property violates the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, et
22 seq., he once again cannot state a cognizable claim. The FDCPA does not apply to non-judicial
23 foreclosure since a debt collector for purposes of the Act does not include the consumer’s
24 creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in
25 default at the time it was assigned. Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir.
26 1985), modified on other grounds, 761 F.2d 237 (5th Cir. 1985). Moreover, foreclosing on the

1 subject property pursuant to a deed of trust is not the collection of a debt within the meaning of
2 the FDCPA. Hulse v. Ocwen Federal Bank, FSB, 195 F. Supp.2d 1188, 1204 (D. Or. 2002); Ines
3 v. Countrywide Home Loans, No. 08cv1267 WQH (NLS), 2008 WL 4791863, at *2 (S.D. Cal.
4 Nov. 3, 2008).

5 Finally, while RESPA's purpose is to "curb abusive settlement practices in the real
6 estate industry, "[s]uch amorphous goals, however, do not translate into a legislative intent to
7 create a private right of action." Bloom v. Martin, 865 F. Supp. 1377, 1385 (N.D. Cal.1994),
8 aff'd, 77 F.3d 318 (9th Cir. 1996). See also Bojorquez v. Gutierrez, No. C 09-03684 SI, 2010 WL
9 1223144, at *8 (N.D. Cal. Mar. 25, 2010) (no private right of action for disclosure violations
10 under RESPA). "The structure of RESPA's various statutory provisions indicates that Congress
11 did not intend to create a private right of action for disclosure violations under 12 U.S.C. § 2603
12 . . . Congress did not intend to provide a private remedy . . ." Bloom, 865 F. Supp. at 1384. The
13 absence of a private right of action for RESPA disclosure violations is fatal to any unfair debt
14 collection practices claim plaintiff may be attempting to bring based on such alleged violations.

15 V. Negligence Claim

16 In his complaint plaintiff suggests that he is pursuing a negligence claim against
17 the defendants based upon their fiduciary position "toward" him. However, "[t]he relationship
18 between a lending institution and its borrower-client is not fiduciary in nature." Nymark v. Heart
19 Fed. Savings & Loan Assn., 231 Cal. App.3d 1089, 1093 n. 1, 1096 (1991) ("[A]s a general rule,
20 a financial institution owes no duty of care to a borrower when the institution's involvement in the
21 loan transaction does not exceed the scope of its conventional role as a mere lender of money.");
22 see also Oaks Management Corp. v. Superior Court, 145 Cal. App.4th 453, 466 (2006) (absent
23 special circumstances, a loan transaction is at arms-length and there is no fiduciary relationship
24 between the borrower and lender). Rather, a commercial lender is entitled to pursue its own
25 economic interests in a loan transaction. Nymark, 231 Cal. App.3d at 1093 n. 1 (citing Kruse v.
26 Bank of America, 202 Cal. App.3d 38, 67 (1988)). Plaintiff's complaint contains only bare

1 conclusory allegations of negligence, which are insufficient to withstand a motion to dismiss. See
2 Twombly, 550 U.S. at 555-56.

3 VI. Unjust Enrichment/Conspiracy

4 Plaintiff's complaint may be read as suggesting a claim that defendants unlawfully
5 conspired to enrich themselves to his detriment by offering him a loan based on an inflated
6 property value that they knew he would default upon and then foreclosing on the property
7 securing that loan. Such allegations do not state independent causes of action. However, they
8 may suggest that plaintiff is attempting to claim a breach of the implied covenant of good faith
9 and fair dealing. Any such claim would also fail.

10 "To establish a breach of an implied covenant of good faith and fair dealing, a
11 plaintiff must establish the existence of a contractual obligation, along with conduct that frustrates
12 the other party's rights to benefit from the contract." Fortaleza v. PNC Fin. Servs. Group, Inc.,
13 642 F. Supp. 2d 1012, 1021-22 (N.D. Cal. 2009) (citing Racine & Laramie v. Dep't of Parks &
14 Rec., 11 Cal. App. 4th 1026, 1031 (1992)). The "implied covenant of good faith and fair dealing
15 is limited to assuring compliance with the express terms of the contract, and cannot be extended to
16 create obligations not contemplated by the contract." Pasadena Live, LLC v. City of Pasadena,
17 114 Cal. App.4th 1089, 1093-1094 (2004). See also Guz v. Bechtel Nat. Inc., 24 Cal 4th 317,
18 349-50 (2000) "[T]he implied covenant will only be recognized to further the contract's purpose;
19 it will not be read into a contract to prohibit a party from doing that which is expressly permitted
20 by the agreement itself ." Wolf v. Walt Disney Pictures and Television, 162 Cal. App.4th 1107,
21 1120 (2008).

22 Defendants had no duty to disclose to plaintiff that he did not have the ability to
23 repay his loan. See Cross v. Downey Savings & Loan Ass'n, No. CV 09-317 CAS (Ssx), 2009
24 WL 481482, at *5 (C.D. Cal. Feb 23, 2009) (citing Nymark, 231 Cal. App. 3d at 1096). See also
25 Davidson v. Countrywide Home Loans, Inc, No. 09-CV-2694-IEG (JMA), 2010 WL 2925440, at
26 *9 (S.D. Cal. July 23, 2010) ("[T]o the extent Plaintiffs bases this claim on the contention that

1 Countrywide gave Davidson a loan she could not afford, this claim would fail.”); Camillo v.
2 Washington Mutual Bank, F.A., No. 1:09-CV-1548 AWI SMS, 2009 WL 3614793, * 7 (E.D. Cal.
3 Oct. 27, 2009) (“Thus, Defendants had not duty to disclose to [Plaintiffs] that [they] did not have
4 the ability to repay the loan.”)

5 Accordingly, defendants’ motion to dismiss any unjust enrichment or conspiracy
6 cause of action should be granted.

7 VII. Motion to Strike Damages Claim

8 Because the undersigned is recommending that all of plaintiff’s claims against the
9 moving defendants be dismissed, it is not necessary to address the motion of defendant First
10 American Loanstar Trustee Services to strike plaintiff’s prayer for relief with respect to damages.
11 But see Whittlestone, Inc. v. Handi-Craft Company, ___ F.3d ___, ___, No. 09-16353, 2010 WL
12 3222417, at *3-4 (9th Cir. Aug. 17, 2010) (in a case of first impression holding that Federal Rule
13 of Civil Procedure 12(f) does not authorize a district court to strike or dismiss a claim for damages
14 on the basis that it is precluded as a matter of law).

15 VIII. Granting Leave to Amend Would Be Futile

16 The undersigned has carefully considered whether plaintiff may amend his
17 complaint to state any cognizable claim against the two moving defendants. “Valid reasons for
18 denying leave to amend include undue delay, bad faith, prejudice, and futility.” California
19 Architectural Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1472 (9th Cir. 1988). See also
20 Klamath-Lake Pharm. Ass’n v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983)
21 (holding that while leave to amend shall be freely given, the court does not have to allow futile
22 amendments). Leave to amend would clearly be futile in this case given the obvious deficiencies
23 in and frivolous nature of plaintiff’s complaint. Accordingly, the undersigned will recommend
24 that the this action be dismissed as to defendants First American Loanstar Trustee Services and
25 Wells Fargo Home Mortgage with prejudice.

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CONCLUSION

For the reasons set forth above, IT IS RECOMMENDED that:

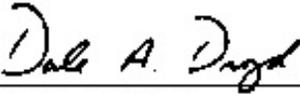
1. Defendant First American Loanstar Trustee Services' motion to dismiss (Doc. No. 10) be granted pursuant to Federal Rule of Civil Procedure 12(b)(6);

2. Defendant Wells Fargo Home Mortgage's motion to dismiss (Doc. No. 15) be granted pursuant to Federal Rule of Civil Procedure 12(b)(6); and

3. This action be dismissed as to the two moving defendants with prejudice.

These findings and recommendations will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, any party may file and serve written objections with the court. A document containing objections should be titled "Objections to Magistrate Judge's Findings and Recommendations." Any reply to objections shall be filed and served within seven days after the objections are served. The parties are advised that failure to file objections within the specified time may, under certain circumstances, waive the right to appeal the District Court's order. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: August 30, 2010.



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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