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

DENNL Y R. BECKER; THE
BECKER TRUST DATED
MARCH 25, 1991,

No. 2:10-cv-02799 LKK KJN PS

Plaintiffs,

v.

WELLS FARGO BANK, N.A.,
INC.; WACHOVIA MORTGAGE
CORPORATION; DOES 1-20,

ORDER and FINDINGS AND
RECOMMENDATIONS

Defendants.

_____ /
Dennly Becker (“Becker”) and the Becker Trust Dated March 25, 1991 (“Becker Trust”) (collectively, “plaintiff”¹), proceeding without counsel in this action, filed a verified First Amended Complaint (the “FAC”) on November 29, 2010. (FAC, Dkt. No. 19.)

Currently pending before the undersigned are several motions filed by Defendants Wells Fargo Bank, N.A. (“Wells Fargo”), and Wachovia Mortgage Corporation (“Wachovia”)

_____ /
¹ The undersigned treats Becker and the Becker Trust as a singular plaintiff because, as discussed in the court’s order dated December 13, 2010 (Dkt. No. 21), Becker is the sole beneficiary of the Becker Trust.

1 (collectively, the “defendants”) attacking that pleading. The pending motions are defendants’
2 jointly-filed Motion to Dismiss (the “MTD”) the FAC pursuant to Federal Rule of Civil
3 Procedure 12(b)(6) (Dkt. No. 26), defendants’ jointly-filed Motion to Strike plaintiff’s pleading
4 (the “MTS”) (Dkt. No. 27), and defendants’ jointly-filed Request for Judicial Notice (defendants’
5 “RJN”) (Dft’s RJN, Dkt. No. 28). Plaintiff filed oppositions to the MTD and the MTS. (Dkt.
6 Nos. 41-42.) Plaintiff also filed his own Request for Judicial Notice (plaintiff’s “RJN”). (Pltf’s
7 RJN, Dkt. No. 43.)²

8 The court heard oral arguments regarding these motions on its law and motion
9 calendar on March 3, 2011. During that hearing, the undersigned also heard oral arguments on
10 another motion pending in this case.³ Plaintiff, who is proceeding without counsel, appeared on
11 his own behalf. Attorney Gene Wu appeared on behalf of defendants.

12 The undersigned has considered the briefs, oral arguments, and the record in this
13 case and, for the reasons that follow, orders that defendants’ MTD is granted. Several of
14 plaintiff’s claims are dismissed without prejudice. Plaintiff shall have the opportunity to file an
15 amended pleading to remedy those deficient claims in accordance with the terms of this order.
16 The undersigned also recommends that several of plaintiff’s claims be dismissed with prejudice.

17 The undersigned also orders that defendants’ MTS is denied and that defendant’s
18 RJN is denied in part and granted in part. The undersigned orders that plaintiff’s RJN is denied.

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22 ² This matter was referred to the undersigned pursuant to Eastern District Local Rule
23 302(c)(21). (Dkt. No. 34.)

24 ³ Several motions are currently before the court, including Plaintiff’s “Ex Parte Motion
25 For: 1) Order To Show Cause Why Defendants Should Not Be Held In Contempt And
26 Sanctioned, 2) Order For Rescission of NOS, 3) Order For Written Instructions Stopping
Foreclosure, and 4) Court Approval Of Lis Pendens” (plaintiff’s “Lis Pendens Motion”). (Dkt.
No. 24.) That motion is addressed in a separate order.

1 I. BACKGROUND

2 A. Procedural History

3 On September 15, 2010, plaintiff filed a complaint against the named defendants
4 and twenty Doe defendants in state court. (Dkt. No. 1-1.) This complaint concerned plaintiff's
5 loans on nine residential properties. On October 15, 2010, Wells Fargo and Wachovia removed
6 this action to federal court. (Dkt. No. 1.) On October 27, 2010, defendants moved to dismiss
7 plaintiff's complaint. (Dkt. No. 11.)

8 Defendants' prior motion to dismiss was dismissed as moot, because on
9 November 4, 2010, plaintiff requested leave to file a first supplemental complaint pursuant to
10 Fed. R. Civ. P. 15(d) and attached his proposed supplemental complaint to the motion. (Dkt. No.
11 13.) On November 12, 2010, the undersigned denied plaintiff's motion on the ground that Fed.
12 R. Civ. P. 15(d) is not the proper section of the rule from which plaintiff may amend his
13 complaint and instructed plaintiff to file and serve a first amended complaint on or
14 before December 10, 2010, pursuant to Fed. R. Civ. P. 15(a). (Dkt. No. 15.) The undersigned
15 therefore denied defendants' motion to dismiss without prejudice as moot. (Id.)

16 On November 29, 2010, plaintiff filed his verified FAC. (FAC, Dkt. No. 19.) In
17 the interim, plaintiff filed a motion for a preliminary injunction and the motion was granted.⁴
18 Plaintiff and defendants entered into a stipulation to extend time for defendants to respond to the
19 FAC. (Dkt. No. 22.)

20 On January 13, 2011, defendants filed their MTD, MTS, and RJN and set those
21 motions to be heard on February 17, 2011. (Dkt. Nos. 26-28.) On January 28, plaintiff filed an
22

23 ⁴ On November 12, 2010, plaintiff filed a motion for a preliminary injunction. (Dkt. No.
24 14.) Plaintiff sought to enjoin foreclosure sales of three properties, which plaintiff represented
25 were scheduled to occur on December 23, 2010. The three properties were located at 865
26 Shelborne Drive, Tracy, CA ("Shelborne property"), 2416 Third Street, Lincoln, CA ("Third
Street property"), and 1896 Larkflower Way, Lincoln, CA ("Larkflower property"). On
December 13, 2010, Senior Judge Lawrence K. Karlton granted plaintiff's motion for a
preliminary injunction (the "December 13th Order"). (December 13th Order, Dkt. No. 21.)

1 ex parte application for an order continuing that hearing to permit him more time to prepare
2 oppositions to defendants' motions. (Dkt. No. 38.) The undersigned continued the hearing for
3 14 days and reset the hearing date as March 3, 2011 and required plaintiff to file his oppositions
4 by February 17, 2011. (Dkt. No. 39.)

5 On February 16, 2011, plaintiff filed an opposition to the MTD ("Oppo.").
6 (Oppo., Dkt. No. 41.) That same day, plaintiff filed an opposition to the MTS. (Dkt. No. 42.)
7 Plaintiff also filed his own RJN. (Pltf's RJN, Dkt. No. 43.) Defendants filed a reply in support
8 of their MTD (the "Reply"). (Reply, Dkt. No. 44.) Defendants also filed a reply in support of
9 their MTS. (Dkt. No. 45.) As described above, the undersigned heard oral arguments on the
10 motions on March 3, 2011. (Dkt. No. 47.)

11 B. Plaintiff's allegations

12 The FAC is one hundred and thirteen pages long, contains numerous allegations
13 and enumerates causes of action for: (1) fraud; (2) violation of the Consumer Legal Remedies
14 Act, California Civil Code §§ 1750 et seq.; (3) violation of the Unfair Competition Law,
15 California Business and Professions Code §§ 17200 et seq.; (4) False Advertising; California
16 Business and Professions Code §§ 17500 et seq.; (5) violation of California Civil Code § 2943;
17 (6) wrongful foreclosure proceedings; (7) quiet title; (8) unfair debt collection practices (state and
18 federal law); (9) Racketeer Influenced and Corrupt Organizations ("RICO") violations; (10)
19 negligent misrepresentation and negligence. (FAC at pp. 56-103.)

20 The following recitation of "facts" are all based upon allegations in plaintiff's
21 FAC. Plaintiff's claims arise from his nine residential investment properties and loans secured
22 by those properties. Plaintiff alleges that he obtained mortgages on these properties with
23 Wachovia's predecessor and that Wachovia and Wells Fargo now service and "claim[] to own"
24 his mortgages. (Id. ¶¶ 21-22.)

25 After he lost his job, plaintiff became unable to afford mortgage payments and
26 decided to stop making mortgage payments on his investment Shelborne property. (Id. ¶¶ 24,

1 28.) On October 1, 2009, plaintiff stopped making his mortgage payments on the Shelborne
2 property. (Id. ¶ 28.) Later that month, plaintiff was contacted by one of defendants’ employees,
3 who, he alleges, referred him to the loan counseling department to discuss loan modification.
4 (Id. ¶ 29.) In early November 2009, defendants’ employee Carl Saris (“Saris”) asked plaintiff
5 whether he could afford his payments on this loan and the Third Street and Larkflower property
6 loans if they were reduced by \$500. (Id. ¶ 31.) Plaintiff told Saris that he could make those
7 reduced payments effective immediately. (Id.) Saris allegedly told plaintiff that his loans “could
8 all be modified to lower the monthly payments for each by \$500 per month. Mr. Saris then
9 verbally gave the plaintiff a list of documents that plaintiff would have to provide to
10 WACHOVIA to receive the loan modifications. Mr. Saris stated that once the documentation
11 was received, the modification could be processed quickly.” (Id. ¶ 31.)

12 Plaintiff gathered and sent his financial documents in reliance on Saris’s
13 representation that the loans “could all be modified” and “processed quickly.” (Id. ¶ 32.) But
14 later that month, defendants informed plaintiff that his loans would not be modified. (Id. ¶ 35.)
15 Thereafter, plaintiff continued to participate in the modification application process and
16 continued to send requested documents, but no modification ever occurred.

17 While plaintiff participated in the drawn-out application process, he failed to
18 make payments on his Shelborne property and defendants took steps to foreclose upon it. (Id. ¶
19 39.) These foreclosure actions allegedly damaged plaintiff’s credit score, and caused plaintiff to
20 “lose credit worth \$76,000.” (Id. ¶ 213.) Plaintiff also alleges that he “intended to request loan
21 modifications from” other financial institutions for seven of his other investment properties after
22 obtaining the modifications that defendants represented “would occur quickly,” but as the
23 modifications never came, he never requested modifications from other financial institutions.
24 (Id. ¶ 214.)

25 In December 2009, defendants notified plaintiff that foreclosure proceedings
26 would commence upon the Shelborne property. (Id. ¶ 39.) In January 2010, defendants

1 requested that plaintiff provide information required for a potential modification of the loan on
2 the Shelborne property. (Id. ¶ 54.) Plaintiff, at the time already engaged in frequent
3 communications with defendants' agents concerning the status of the loan modification request
4 on the Shelborne property, again provided documents to support the request. (Id. ¶¶ 57-86.)

5 In April 2010, plaintiff decided to cease making payments on the Third Street and
6 Larkflower properties. (Id. ¶ 87.) He then requested loan modifications on all of his loans,
7 including the six for which he was still making payments. (Id. ¶ 88.) Later that month, plaintiff
8 was informed that his request for the loan modification on the Shelborne property was denied
9 because he was not an owner-resident. (Id. ¶ 92.) The next day, plaintiff received a written
10 Forbearance Agreement (the "Forbearance Agreement"), which stated: "The purpose of this
11 Agreement is to determine Borrower's capacity and willingness to make monthly mortgage
12 payments. Upon completion of the payments referenced in this Agreement, Borrower will be
13 required to (1) move forward with any necessary actions to result in payoff of the loan, (2) fully
14 reinstate the loan and/or cure the default, or (3) you may choose to apply for a permanent
15 modification." (Id. ¶ 93.) The Forbearance Agreement required plaintiff to make three monthly
16 payments, starting in June 2010, that were \$360 more than the amount to which Saris had
17 represented that plaintiff's loan would be modified. (Id.) Plaintiff then engaged in numerous
18 communications with defendants' agents in which he tried to determine whether it was necessary
19 for him to enter the Forbearance Agreement and the status of his requests for loan modification.
20 (Id. ¶¶ 94-101.) He received some conflicting and otherwise confusing information, and
21 defendants' agents failed to respond to some of his communications. (Id.)

22 In May 2010, plaintiff received a letter from defendants indicating that his loan
23 modification file had been closed due to non-receipt of documentation and information. (Id. ¶
24 102.) The letter indicated that defendants intended to move forward with collection efforts. (Id.)
25 Plaintiff alleges that after reading the letter and learning that defendants were indeed
26 "proceeding with foreclosure," plaintiff signed the Forbearance Agreement. (Id. ¶¶ 103, 216.)

1 He alleges, “since WACHOVIA was continually threatening to foreclose on the Shelborne
2 property, plaintiff decided to make the [forbearance] payments believing that after the final
3 payment WACHOVIA would honor its initial commitment to lower the Shelborne payment by
4 \$500 per month.” (Id. ¶¶ 104, 217.)

5 When plaintiff returned the signed Forbearance Agreement to defendants, he also
6 included a letter to defendants in which he expressed his belief that defendants were engaging in
7 unfair business practices because they denied his request for a loan modification even though he
8 adjusted his income to the levels Wachovia’s agents indicated would be necessary to qualify for
9 the modification. (Id.) The Forbearance Agreement was subsequently approved by defendants.
10 (Id. ¶ 106.) Around the same time, plaintiff received a letter from defendants’ “Executive
11 Mortgage Specialist,” Kevin Kreis (“Kreis”) informing plaintiff that he was not entitled to any
12 in-house loan modification programs on the Shelborne property because he was not an owner-
13 resident. (Id. ¶¶ 107, 219.) Plaintiff was surprised by this letter because defendants had advised
14 him to apply for loan modifications and because through all of his communications with
15 defendants about loan modification he was never informed that he could not qualify, but rather
16 that he should provide proper documentation and adjust his income to qualify. (Id.)

17 Later in May 2010, plaintiff received notices of intent to foreclose on the Third
18 Street and Larkflower properties. (Id. ¶ 112.) The notices included information on loan
19 modification. (Id.) He subsequently received three more letters from defendants encouraging
20 him to seek loan modification on those properties. (Id. ¶¶ 113-15.) In June 2010, plaintiff sent
21 defendants a request for loan modification on the Third Street and Larkflower properties along
22 with documentary support of his current income. (Id. ¶ 116.) Several weeks later, plaintiff was
23 informed by defendants that the mortgages on the Third Street and Larkflower properties would
24 not be modified. (Id. ¶¶ 124-25.) Defendants indicated that they intended to commence
25 foreclosure upon these properties as well. (Id. ¶ 125.)

26 Plaintiff made payments under the Forbearance Agreement (Id. ¶¶ 109, 119, 132

1 (final payment made July 15, 2010.) According to the terms of the Forbearance Agreement, the
2 payments were due on June 1, 2010, July 1, 2010, and August 1, 2010, but plaintiff made these
3 payments early. (Id. ¶ 93.) He sent the final payment on July 15, 2010. (Id. ¶ 132.)

4 Following plaintiff’s third and final payment made under the Forbearance
5 Agreement, plaintiff received a letter thanking him for his participation and informing him that
6 he “could now apply for a permanent loan modification.” (Id. ¶¶ 134, 226.) Thereafter, plaintiff
7 received a Notice of Intent to Foreclose upon the Shelborne property. (Id. ¶ 142.) That Notice
8 was dated July 22, 2010, and it demanded payment of \$18,045.79 by August 21, 2010, to prevent
9 foreclosure. (Id. ¶¶ 141-42.)

10 Plaintiff appears to suggest that the July 22, 2010 Notice was a violation of the
11 Forbearance Agreement, but plaintiff does not formally plead a breach of contract. He alleges
12 that he found the July 22, 2010 Notice of Intent to Foreclose confusing because “plaintiff had
13 paid the amounts required under the April 26, 2010 Forbearance Agreement. The amounts paid
14 under the agreement were for June, July, and August . . . Plaintiff had made all payments through
15 August, it was not yet August and WACHOVIA was threatening to foreclose before the end of
16 August.” (Id. ¶ 142.)

17 Plaintiff also alleges that during multiple conversations during the modification
18 application process, he was told he did not qualify for modification because his income was too
19 low. For instance, defendants’ representative “Teo” allegedly told plaintiff that the loan
20 modification for Shelborne “was not approved because plaintiff’s income was too low” and that,
21 in response to plaintiff’s statement that “he could take money out of his Individual Retirement
22 Account (IRA)” to raise his income, Teo “told Plaintiff to reapply for the loan modification when
23 he had proof of his IRA income.” (Id. ¶ 42.) Plaintiff alleges that, to try to correct for this
24 shortcoming in his modification package, plaintiff made an early withdrawal on his IRA
25 retirement funds (such that he was taxed) to raise his income. Plaintiff alleges that “based on
26 Teo’s representation” (id. ¶ 191) and “because of Teo’s statement [that plaintiff’s income was

1 “too low”], plaintiff began withdrawing \$2000 per month from his IRA.” (Id. ¶ 101.) On
2 reapplying for modification, however, he was told his income was too high. (Id. ¶¶ 190-91.)

3 II. LEGAL STANDARDS

4 A. Motion to Dismiss

5 A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6)
6 challenges the sufficiency of the pleadings set forth in the complaint. Vega v. JP Morgan Chase
7 Bank, N.A., 654 F. Supp. 2d 1104, 1109 (E.D. Cal. 2009). Under the “notice pleading” standard
8 of the Federal Rules of Civil Procedure, a plaintiff’s complaint must provide, in part, a “short and
9 plain statement” of plaintiff’s claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); see
10 also Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). “A complaint may survive a
11 motion to dismiss if, taking all well-pleaded factual allegations as true, it contains ‘enough facts
12 to state a claim to relief that is plausible on its face.’” Coto Settlement v. Eisenberg, 593 F.3d
13 1031, 1034 (9th Cir. 2010) (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)). “A claim
14 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the
15 reasonable inference that the defendant is liable for the misconduct alleged.” Caviness v.
16 Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010) (quoting Iqbal, 129 S. Ct. at
17 1949). The court accepts all of the facts alleged in the complaint as true and construes them in
18 the light most favorable to the plaintiff. Corrie v. Caterpillar, 503 F.3d 974, 977 (9th Cir. 2007).
19 The court is “not, however, required to accept as true conclusory allegations that are contradicted
20 by documents referred to in the complaint, and [the court does] not necessarily assume the truth
21 of legal conclusions merely because they are cast in the form of factual allegations.” Paulsen,
22 559 F.3d at 1071 (citations and quotation marks omitted).

23 The court must construe a pro se pleading liberally to determine if it states a claim
24 and, prior to dismissal, tell a plaintiff of deficiencies in his complaint and give plaintiff an
25 opportunity to cure them if it appears at all possible that the plaintiff can correct the defect. See
26 Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000) (en banc); see also Balistreri v. Pacifica

1 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990) (stating that “pro se pleadings are liberally
2 construed, particularly where civil rights claims are involved”). In ruling on a motion to dismiss
3 pursuant to Rule 12(b), the court “may generally consider only allegations contained in the
4 pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.”
5 Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 899 (9th Cir. 2007) (citation and
6 quotation marks omitted).

7 B. Motion to Strike

8 Rule 12(f) of the Federal Rules of Civil Procedure states that a court “may strike
9 from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous
10 matter.” “Motions to strike are disfavored, and the remedy of striking a pleading should
11 generally be used only when necessary to discourage parties from raising allegations that are
12 completely unrelated to the relevant claims and when the interests of justice so require.” Serpa v.
13 SBC Telecomms., Inc., No. C 03-4223 MHP, 2004 WL 2002444, at *3 (N.D. Cal. Sept. 7, 2004)
14 (unpublished) (citing Augustus v. Board of Pub. Instruction, 306 F.2d 862, 868 (5th Cir. 1962));
15 see also Fogerty v. Fantasy, Inc., 984 F.3d 1524, 1527 (9th Cir. 1993), rev’d on other grounds by
16 Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994) (“The function of a 12(f) motion to strike is to
17 avoid the expenditure of time and money that must arise from litigating spurious issues by
18 dispensing with those issues prior to trial”)

19 “Rule 12(f) does not authorize a district court to strike a claim for damages on the
20 ground that such damages are precluded as a matter of law.” Whittlestone, Inc. v. Handi-Craft
21 Co., 618 F.3d 970, 971 (9th Cir. 2010). The court noted that courts may not resolve disputed and
22 substantial factual or legal issues in deciding a motion to strike. Id. at 973. “Motions to strike
23 are generally not granted unless it is clear that the matter to be stricken could have no possible
24 bearing on the subject matter of the litigation.” LeDuc v. Kentucky Cent. Life Ins. Co., 814 F.
25 Supp. 820, 830 (N.D. Cal. 1992). Granting a motion to strike may be proper if it will make trial
26 less complicated or eliminate serious risks of prejudice to the moving party, delay, or confusion

1 of the issues. Fantasy, 984 F.2d at 1527-28; Travelers Cas. and Sur. Co. of America v.
2 Dunmore, No. CIV. S-07-2493 LKK-DAD, 2010 WL 5200940, at *3 (E.D. Cal. Dec. 15, 2010)
3 (unpublished) (same). As the moving party, defendant bears the burden on its motion to strike
4 and the standard for granting such a motion is high. Willis v. Mullins, No. CIV-F-04-6542 AWI
5 LJO, 2006 WL 2792857, at *1 (E.D. Cal. Sept. 28, 2006) (unpublished).

6 C. Request for Judicial Notice

7 In ruling on a motion to dismiss, the court may consider matters which may be
8 judicially noticed pursuant to Federal Rule of Evidence 201. E.g., Isuzu Motors Ltd. v.
9 Consumers Union of U.S., Inc., 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998). Rule 201 permits a
10 court to take judicial notice of an adjudicative fact “not subject to reasonable dispute” because
11 the fact is either: “(1) generally known within the territorial jurisdiction of the trial court or (2)
12 capable of accurate and ready determination by resort to sources whose accuracy cannot
13 reasonably be questioned.” Fed. R. Evid. 201(b). The court can also take judicial notice of
14 matters of public record, such as pleadings in another action and records and reports of
15 administrative bodies. Emrich v. Touche Ross & Co., 846 F.2d 1190 (9th Cir. 1988).

16 III. DISCUSSION

17 A. Defendants’ Motion to Dismiss

18 1. Fraud Claim

19 Defendants argue that plaintiff’s first claim for fraud should be dismissed for
20 several reasons: (1) as pleaded, the fraud claim is preempted by Home Owners Loan Act
21 (“HOLA”) (12 U.S.C. § 1463(a), § 1464(a); 12 C.F.R. § 560.2) (MTD at 5-6), (2) the alleged
22 promise did not create a duty to modify plaintiff’s loan (MTD at 9-10), (3) the alleged promise
23 depends on an oral agreement barred by the statute of frauds and lacks new consideration (MTD
24 at 10-11), (4) a breach of an alleged agreement to modify a loan does not amount to fraud (MTD
25 at 12), (5) plaintiff fails to identify individuals who made promises without the intent to perform
26 and therefore fails to plead the elements of fraud with specificity (MTD at 12-13), and (6) the

1 alleged promise was a statement of future events and is an opinion rather than actionable fraud
2 (MTD at 13-14.) Some of defendants' arguments are well-taken, and accordingly, for the reasons
3 stated below, plaintiff's fraud claim is dismissed. Plaintiff shall have the opportunity to amend
4 his pleading to plead facts supporting each element of fraud, with particularity.

5 i) HOLA and Plaintiff's Fraud Claim

6 Defendants argue that the various statutory and common law claims plaintiff
7 alleges are preempted by HOLA. Plaintiff has not disputed that defendants are lenders embraced
8 by HOLA. Some of defendants' arguments are well-taken. While defendants are correct that
9 HOLA preempts some of plaintiff's claims, however, the undersigned cannot conclude at this
10 time that HOLA preempts all aspects of plaintiff's fraud claim.

11 Pursuant to HOLA, the Office of Thrift Supervision ("OTS") was granted the
12 power, "under such regulations as [it] may prescribe – to provide for the organization,
13 incorporation, examination, operation, and regulation of . . . Federal savings associations. . . ." 12
14 U.S.C. § 1464(a). The OTS is thus authorized "to prescribe a nationwide system of operation,
15 supervision, and regulation which would apply to all federal associations." Glendale Fed. Sav. &
16 Loan Ass'n v. Fox, 459 F. Supp. 903, 909 (C.D. Cal. 1978). The OTS regulations are
17 "preemptive of any state law purporting to address the subject of the operations of a federal
18 savings association." 12 C.F.R. § 545.2. The "OTS hereby occupies the entire field of lending
19 regulation for federal savings associations..." and a federal savings bank, "may extend credit as
20 authorized under federal law, including this part, without regard to state laws purporting to
21 regulate or otherwise affect their credit activities." 12 C.F.R. § 560.2(a).

22 The Ninth Circuit Court of Appeals has "described HOLA and its following
23 agency regulations as ... so pervasive as to leave no room for state regulatory control. [B]ecause
24 there has been a history of significant federal presence in national banking, the presumption
25 against preemption of state law is inapplicable." Silvas v. E*Trade Mortgage Corp., 514 F.3d
26 1001, 1004-05 (9th Cir. 2008).

1 The applicable regulations provide for HOLA preemption of state laws that
2 purport to impose upon a federal savings bank any requirements regarding the “terms of credit,
3 including . . . balance, payments do, or term to maturity of the loan;” “disclosure and
4 advertising,” and “processing, origination, servicing, sale or purchase of, or investment or
5 participation in, mortgages.” 12 C.F.R. § 560.2(b)(4), (b)(9), and (b)(10).

6 However, HOLA’s preemption of state laws affecting federal savings associations
7 is not absolute. Section 560.2(c) carves out state laws that “only *incidentally* affect the lending
8 operations of Federal savings associations or are otherwise consistent with the purposes of
9 paragraph (a) of this section.” 12 C.F.R. § 560.2(c) (emphasis added). The Ninth Circuit Court
10 of Appeals has given further guidance with respect to whether a state law of general applicability
11 is preempted by HOLA “as applied”:

12 [T]he first step will be to determine whether the type of law in
13 question is listed in paragraph (b) [of 12 C.F.R. § 560.2]. If so, the
14 analysis will end there; the law is preempted. If the law is not
15 covered by paragraph (b), the next question is whether the law
16 affects lending. If it does, then, in accordance with paragraph (a),
17 the presumption arises that the law is preempted. This presumption
can be reversed only if the law can clearly be shown to fit within
the confines of paragraph (c). For these purposes, paragraph (c) is
intended to be interpreted narrowly. Any doubt should be resolved
in favor of preemption.

18 Silvas, 514 F.3d at 1004-06 (“Section 560.2(c) provides that state laws of general applicability
19 only incidentally affecting federal savings associations are not preempted.”); accord DeLeon v.
20 Wells Fargo Bank, N.A., 729 F.Supp.2d 1119, 1125 (N.D. Cal. 2010).

21 Here, plaintiff’s fraud claim does not arise from a “state law purporting to address
22 the subject of the operations of a federal savings association” and is therefore not preempted at
23 the “first step” of the analysis described in Silvas. Silvas, 514 F.3d at 1004-06.

24 Proceeding to the “next question,” of whether the type of law in question “affects
25 lending,” at this stage the fraud claim does not appear to be preempted “as applied” in this
26 particular case. See id. This determination is because Saris’s alleged fraudulent representations

1 do not necessarily bear on “servicing” or “processing” of mortgages as a matter of law, and may
2 have only an “incidental” effect upon those practices. Based on the FAC and plaintiff’s
3 statements during the hearing, the primary factual basis for plaintiff’s fraud claim appears to be
4 Saris’s alleged representation that if plaintiff provided certain documents, his loans would
5 definitely be modified. Plaintiff allegedly provided the documents, but never received any
6 modification. Plaintiff alleges that his application for a modification repeatedly “fell out” of the
7 system such that he had to start over again, and alleges that he was repeatedly asked to provide
8 the same documents. (FAC ¶ 63.) Plaintiff also alleges he was fraudulently “induced” to sign
9 the Forbearance Agreement, as he “believed” that if he signed it, at the end of the forbearance
10 period he would receive a permanent modification. (FAC ¶¶ 104, 217, 219, 245-46.) Based on
11 the foregoing, it appears that plaintiff attempts to allege that he was promised a modification
12 even though defendants never intended to modify his loan or seriously consider his application.

13 In sum, the alleged fraud in this particular case is not a misrepresentation of loan
14 “disclosures,” interest rates, or some other loan parameter that directly “affects lending.” Silvas,
15 514 F.3d at 1004-06. Instead, plaintiff’s fraud claim appears to arise from a more “general duty
16 not to misrepresent material facts,” and therefore it does not necessarily regulate lending activity.
17 See DeLeon v. Wells Fargo Bank, N.A., No. 10-CV-01390-LHK, 2011 WL 311376, at *1-11
18 (N.D. Cal. Jan. 28, 2011) (where plaintiff alleged that defendant “falsely represented” that a loan
19 modification would be given and that foreclosure would not occur while the modification process
20 was ongoing, fraud and unfair competition claims arising therefrom were not preempted by
21 HOLA); Biggins v. Wells Fargo & Co., 266 F.R.D. 399, 417 (N.D. Cal. 2009) (distinguishing
22 between allegations of inadequate disclosures of loan terms and affirmative, material
23 misrepresentations); Taguinod v. World Sav. Bank, FSB, No. CV 10-7864-SVW, 2010 WL
24 5185845, at * 4 (C.D. Cal. Dec. 2, 2010) (claims arising from defendant’s allegedly deliberate
25 change to loan document after signing were not preempted by HOLA); Ibarra v. Loan City, No.
26 09-CV-02228-IEG, 2010 WL 415284, at *5 (S.D. Cal. Jan. 27, 2010) (holding that a

1 misrepresentation of material facts is not preempted by HOLA).

2 Although the court in DeLeon ultimately dismissed the misrepresentation claim,
3 the court explained that, on the pleaded facts, that claim was not preempted by HOLA. DeLeon,
4 2011 WL 311376, at *7-8. The court held that the claim was grounded in allegations that the
5 bank “represented (1) that the loan modification would be completed, and (2) that no foreclosure
6 sale would take place while the loan modification was pending.” Id. The court held that
7 “because this claim is based on allegations of material misrepresentations and does not attempt to
8 impose substantive requirements regarding loan terms, disclosures, or servicing or processing
9 procedures, it is not preempted by HOLA.” Id.

10 On the other hand, defendants cite the Guerrero case to suggest that HOLA
11 preempts fraud claims arising from the modification process. (MTD at 6, 10 (citing Guerrero v.
12 Wells Fargo Bank, N.A., 2010 U.S. Dist. LEXIS 96261 at *4, *9-10 (C.D. Cal. Sept. 14, 2010).)
13 In Guerrero, plaintiffs alleged fraud because a trustee’s sale occurred despite ongoing loan
14 modification discussions, but the court dismissed the claim with prejudice on preemption
15 grounds. Guerrero, 2010 U.S. Dist. LEXIS 96261 at *4, *9-10. However, unlike the analysis in
16 DeLeon, the court in Guerrero engaged in relatively little discussion of the issue of preemption in
17 the loan modification context. See id.; DeLeon, 2011 WL 311376, at *1-11.

18 Accordingly, and particularly based upon the reasoning in the recent DeLeon case,
19 the undersigned cannot conclude at this time that plaintiff’s fraud claim is preempted as a matter
20 of law. See DeLeon, 2011 WL 311376, at *1-11. Such a conclusion would also be premature at
21 this time, because as described below plaintiff will receive leave to amend his fraud claim. An
22 analysis of whether a claim is preempted “as applied” logically depends upon the nature of the
23 alleged facts supporting the claim. Therefore, until plaintiff clarifies the allegations surrounding
24 defendants’ alleged misrepresentations, the undersigned cannot conclude that any particular
25 misrepresentations necessarily amounted to “processing” or “servicing” mortgages as opposed to
26 affirmative or material misrepresentations with only an incidental connection to lending

1 operations.

2 ii) Defendants' Additional Challenges to the Fraud Claim

3 Defendants argue that their employees' alleged representations did not create a
4 "duty to modify" plaintiff's loan, that the "breach of an agreement to modify a loan does not
5 amount to fraud," that the "alleged promise depends on an oral agreement barred by the statute of
6 frauds," and that any such agreement "lacks new consideration," but these arguments are not
7 well-taken with respect to the fraud claim. (MTD at 9-11.) Defendants argue that plaintiff
8 alleges "nothing more than a purported oral agreement to modify a written loan agreement," and
9 that because no valid oral agreement could have been created as a matter of law, then no fraud
10 could have occurred. (MTD at 10-11). Defendants support these arguments by citing to cases
11 where promises to modify a loan were held to not amount to enforceable contracts to complete a
12 modification. E.g., DeLeon, 729 F. Supp. 2d at 1127 (holding that expressions of "confidence"
13 that a loan would be modified did not "create a duty or contract to modify a loan"); Huerta v.
14 Ocwen Loan Servicing, Inc., No. C 09-05822 (HRL), 2010 U.S. Dist. LEXIS 17970, at *11-12
15 (N.D. Cal. Mar. 1, 2010) (same). While expressions of "confidence" may be insufficient to
16 create a "duty" or "contract" to modify a loan, however, nothing indicates that those expressions
17 cannot form the basis of a fraud claim. Defendants did not cite any authorities holding that a
18 fraud claim must be dismissed as a matter of law if the allegedly fraudulent statement could not
19 have created a contract or contractual duty. In short, defendants' arguments blur the distinctions
20 between the breach, creation, and/or modification of a contract and the intentional tort of fraud,
21 and defendants have not demonstrated that a fraud claim cannot be maintained as a matter of law
22 here. Absent authority to the contrary, plaintiff's fraud claim may lie even if his contract
23 claims(s) ultimately do not.

24 Defendants' contract-based challenges to the fraud claim are also premature.
25 From the current pleading, which does not include a formal "contract" claim, it is unclear
26 whether plaintiff intends to allege a breach of the Forbearance Agreement and/or a breach of an

1 actual oral “contract” regarding loan modification. As described herein, plaintiff will be given
2 leave to plead facts supporting contract claims pertaining to the Forbearance Agreement and/or
3 any agreement to modify his loan(s). After plaintiff amends his pleading to more clearly allege
4 his contract claim or claims, defendants will have the opportunity to advance these arguments.
5 Further, despite defendants’ arguments that plaintiff’s loan agreement prohibits oral
6 modifications, such prohibition would only bear on plaintiff’s claims for breach of oral contracts,
7 not necessarily a claim for fraud (or for breach of the Forbearance Agreement).

8 Defendants also argue that plaintiff fails to identify individuals who made
9 promises without intent to perform and therefore fails to plead the elements of fraud with
10 specificity (MTD at 12-13), and argue that the alleged promise was a statement of future events
11 and is an opinion rather than actionable fraud (MTD at 13-14.) These arguments are well-taken.
12 As pleaded, the nature of the alleged fraud is unclear.

13 To determine if the elements of fraud have been sufficiently pleaded, the court
14 looks to state law. Kearns v. Ford Motor Co., 567 F.3d 1120, 1126 (9th Cir. 2009). In
15 California, the elements of fraud are: (1) misrepresentation; (2) knowledge of falsity (scienter);
16 (3) intent to defraud (i.e., intent to induce reliance); (4) justifiable reliance; and (5) resulting
17 damage. Id. Further, fraud must be pleaded with particularity. Fed. R. Civ. P. 9(b). Vague or
18 conclusory allegations are insufficient to satisfy Rule 9(b)’s “particularity” requirement. E.g.,
19 Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989). To comply with
20 Rule 9(b), allegations of fraud must be specific enough to give defendants notice of the particular
21 misconduct that is alleged to constitute the fraud claim so that they can defend against the claim
22 and not just deny that they have done anything wrong. Bly-Magee v. California, 236 F.3d 1014,
23 1019 (9th Cir. 2001). Rule 9(b) requires plaintiffs to differentiate between the conduct of each
24 defendant and “inform each defendant separately of the allegations surrounding his alleged
25 participation in the fraud.” Swartz v. KPMG LLP, 476 F.3d 756, 764-65 (9th. Cir. 2007). In a
26 fraud action against a corporation, a plaintiff must “allege the names of the persons who made

1 the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they
2 said or wrote, and when it was said or written.” Tarmann v. State Farm Mut. Auto Ins. Co., 2
3 Cal. App. 4th 153, 157 (1991).

4 Plaintiff’s allegations of fraud appear largely premised on Saris’s alleged
5 representations to him on November 4, 2009. (FAC ¶ 31.) Fraud must be pleaded with
6 particularity, and although the FAC spans over one hundred pages, plaintiff’s fraud claim lacks
7 particularity. For instance, the FAC is internally contradictory regarding Saris’s alleged
8 representations to plaintiff. For instance, in some paragraphs, the FAC indicates that Saris told
9 plaintiff his loans “*could be*” modified after plaintiff provided certain documents. (See FAC ¶ 31
10 (“loans could all be modified” and “modification could be processed quickly”); ¶ 94 (“loans
11 could be quickly modified”); ¶ 187.) In other paragraphs, the FAC indicates that Saris told
12 plaintiff his loans “*would be*” modified. (FAC ¶ 101 (“ . . . told by Mr. Saris that plaintiff’s
13 financial hardship would allow WACHOVIA to modify”); ¶ 104 (“ . . . the original \$500 per
14 month reduction that plaintiff was told he would receive”); ¶ 213 (“Plaintiff relied on
15 WACHOVIA representations that his loans would be modified”.) Plaintiff also
16 conclusorily alleges that “WACHOVIA made plaintiff a promise it never intended to keep.”
17 (FAC ¶ 246.)

18 In alleging fraud, there is an obvious difference between a statement that loan
19 modification “could” happen, and, on the other hand, representing that loan modification
20 “would” happen. The first is a statement of opinion, the second is a statement of fact that is
21 capable of being fraudulently misrepresented. (E.g., Neu-Visions Sports v. Soren/McAdam/
22 Bartells, 86 Cal. App. 4th 303, 307 (2000) (alleged misrepresentations about value of property to
23 be used to obtain loan and whether lessor would have clear title at time of financing were
24 opinions about future events). Presently, plaintiff’s fraud allegations are inconsistently pleaded
25 with respect to whether his loan merely “could be” modified versus whether it definitely “would
26 be” modified. Therefore, the FAC fails to particularly plead facts supporting the

1 “misrepresentation” element of fraud. See e.g., Garcia v. Ocwen Loan Servicing, LLC, No. C
2 10-0290 PVT, 2010 WL 1881098, at *2 (N.D. Cal. May 10, 2010) (dismissing negligent
3 misrepresentation claim with leave to amend, because “[t]he only allegations of ‘untrue’ facts
4 appear to be those in Paragraphs 36 through 42 that ‘Defendant and or its agents agreed to
5 continue working for a loan modification that would be approved, which would allow Plaintiff to
6 keep and save his home,’ and various other representations regarding approval of his loan
7 modification, lower interest rate, monthly payments and repayment plan . . . [A]ll of the alleged
8 misrepresentations involve promises regarding future events rather than representations of past or
9 existing facts.”) As pleaded, then, Saris’s alleged representation regarding plaintiff’s potential
10 modification is contradictory and the claim is deficient.

11 Plaintiff’s allegations of fraud with respect to representations made regarding the
12 Forbearance Agreement and his early IRA withdrawals are also deficient as pleaded. Plaintiff
13 fails to allege a specific representation by defendants that he would definitely receive a
14 modification if he signed the Forbearance Agreement, or a specific representation that plaintiff
15 would definitely receive a modification if he were able to raise his income by withdrawing from
16 his IRA. Equally deficient are plaintiff’s allegations that, because he was given directly-
17 conflicting information (i.e. that his modification was denied because his income was “too low”
18 and then, after he made IRA withdrawals, denied because his income was “too high”), someone
19 must have committed fraud. (FAC ¶¶ 190-91 (“Both agents should know the criteria for loan
20 modifications. Thus, one agent made a fraudulent statement.”).) This allegation is conclusory
21 and does not support a claim for fraud. The same is true with respect to the allegation that
22 “either Mr. Kreis or the WACHOVIA person who originated the Forbearance Agreement acted
23 fraudulently.” (FAC ¶ 219.)

24 The FAC also lacks specific facts supporting either an “intent to induce reliance”
25 or a “knowledge of falsity,” and both are elements required to properly plead a fraud claim. See
26 Kearns, 567 F.3d at 1126. Nowhere does the FAC allege that Saris (or anyone else employed by

1 defendants) both knew that a false statement was being made to plaintiff *and* intended plaintiff to
2 rely on that false statement.

3 Similarly, as to alleged “reasonable reliance” on the allegedly false representation
4 and “resulting damages,” neither element is supported with non-conclusory, factual allegations.
5 See Kearns, 567 F.3d at 1126. Plaintiff’s alleged damages appear to have been lost opportunities
6 to seek separate modifications for other loans (from other lenders and relating to other properties)
7 while awaiting defendants’ approval of his modification request, and plaintiff’s premature
8 withdrawal of IRA income. (FAC ¶¶ 101, 213-14.) However, as pleaded, these alleged damages
9 are not the alleged result of reliance upon specific alleged fraudulent statement(s) by defendants.
10 This conclusion is primarily because the contents of the alleged statements are not pleaded with
11 particularity, making it impossible to tell which particular statement(s) plaintiff allegedly relied
12 upon. For instance, there are no allegations that defendants instructed plaintiff to refrain from
13 seeking separate modifications for other loans while his modification application was pending,
14 and thus no allegation that plaintiff relied on that statement. Likewise, there are no allegations
15 that anyone affiliated with defendants told plaintiff to make early withdrawals from this IRA
16 funds, and thus no allegation that plaintiff relied on that statement.

17 Accordingly, the MTD is granted with respect to plaintiff’s fraud claim arising
18 from the loan modification application process, and the claim is dismissed with leave to amend.
19 During the hearing on this matter plaintiff stated that he could amend his fraud claim to more
20 particularly state the contents of Saris’s representations, which allegedly included statements that
21 plaintiff’s loan definitely “would be” modified. Therefore, plaintiff shall have one more
22 opportunity to amend his fraud claim to attempt to correct that deficiency, as well as the
23 additional deficiencies noted above.

24 2. Consumer’s Legal Remedies Act (“CLRA”) Claim

25 “The CLRA makes unlawful certain “unfair methods of competition and unfair or
26 deceptive acts or practices undertaken by any person in a transaction intended to result or which

1 results in the sale or lease of goods or services to any consumer.” Cal. Civ. Code § 1770(a).
2 “Goods” are defined as “tangible chattels bought or leased for use primarily for personal, family,
3 or household purposes.” Cal. Civ. Code § 1761(a). “Services” are defined as “work, labor, and
4 services for other than a commercial or business use, including services furnished in connection
5 with the sale or repair of goods.” Cal. Civ. Code § 1761(b).” Consumer Solutions REO, LLC v.
6 Hillery, 658 F. Supp. 2d 1002, 1015-16 (N.D. Cal. 2009).

7 Historically, courts in this circuit held that CLRA claims can properly arise from
8 mortgage loans. See Jefferson v. Chase Home Finance LLC, No. C06-6510, 2007 WL 1302984,
9 at *3 (N.D. Cal. May 3, 2007) (not reported) (concluding that the loan transactions between a
10 mortgage finance company and the plaintiff involved “more than the provision of a loan; they
11 also include [the] financial services [of managing the loan.]”); Knox v. Ameriquest Mortgage
12 Co., No. C05-00240, 2005 WL 1910927, at *4 (N.D. Cal. Aug. 10, 2005) (not reported) (finding
13 that, in the context of predatory lending allegations and after a review of the case law, “California
14 courts generally find financial transactions to be subject to the CLRA.”). In these cases, the
15 defendant provided additional services over and above the extension of credit, although the
16 services alleged may have been minimal. See Hernandez v. Hilltop Financial Mortg., Inc., 622
17 F.Supp.2d 842, 851 (N.D. Cal. Oct. 22, 2007) (“ . . .the situation in the present case involves
18 more than the mere extension of a credit line. Instead, the circumstances here deal not just with
19 the mortgage loan itself, but also with the services involved in developing, securing, and
20 maintaining plaintiffs’ loan.”).

21 However, in 2009 the California Supreme Court clarified that ancillary loan
22 “servicing” does not bring a loan within the scope of the CLRA and that statute’s definition of
23 “services.” In Fairbanks v. Superior Court, the court held that life insurance is neither a “good”
24 nor a “service” covered by the CLRA. Fairbanks v. Superior Court 46 Cal. 4th 56 (2009).
25 District courts have since applied Fairbanks to claims challenging mortgage loan servicing under
26 the CLRA and dismissed the claims, concluding that under Fairbanks “loans are intangible goods

1 and that ancillary services provided in the sale of intangible goods do not bring these goods
2 within the coverage of the CLRA.” Consumer Solutions, 658 F. Supp. 2d at1016; accord Justo v.
3 Indymac Bancorp, No. SACV 09-1116 JVS (AGRx), 2010 WL 623715, at *3 (C.D. Cal. Feb. 19,
4 2010).

5 Here, particularly analogous is the case of Justo, which involved claims arising
6 from a mortgage loan “modification” application process similar to the one plaintiff has alleged
7 here. Justo, 2010 WL 623715, at *3-4. The Justo plaintiffs claimed a CLRA violation arising
8 from the allegation that the “defendants falsely pledged to help mortgagors modify their loans,
9 but failed to negotiate a modification or to offer a reduction of the principal balance.” Id. The
10 court concluded, “under the reasoning of Fairbanks, a loan modification is not a service. . . .
11 Thus, the CLRA does not apply to loan modifications. The first cause of action is dismissed with
12 prejudice.” Id.; accord Reynoso v. Paul Financial, LLC, No. 09-3225 SC, 2009 WL 3833298, at
13 * 9 (N.D. Cal. Nov. 16, 2009).

14 Accordingly, pursuant to these post-Fairbanks authorities, the CLRA does not
15 encompass plaintiff’s claims arising from his attempted loan modification. See Justo, 2010 WL
16 623715, at *3-4. Defendants’ motion to dismiss is granted with respect to the CLRA claim, and
17 the undersigned recommends that plaintiff’s CLRA claim be dismissed without leave to amend.
18 Leave to amend would be futile in this instance, as “the CLRA does not apply to loan
19 modifications.” Justo, 2010 WL 623715, at *3; accord Reynoso, 2009 WL 3833298, at * 9.⁵

20 3. Unfair Competition Law (“UCL”) Claim

21 Defendants argue that the sufficiency of plaintiff’s UCL claim depends in part
22 upon his other claims, because a UCL violation must be premised on some other wrong. (MTD
23

24 ⁵ Where amendment would be futile, no opportunity to amend need be provided. A
25 claim is considered futile and leave to amend shall not be given if there is no set of facts that can
26 be proved under the amendment that would constitute a valid claim. Miller v. Rykoff-Sexton,
Inc., 845 F.2d 209, 214 (9th Cir. 1988); accord Amaral v. Wachovia Mortgage Corp., No. CV-F-
09-937 OWW/GSA, 2010 WL 2673766, at *4 (E.D. Cal. July 2, 2010) (not reported).

1 at 14 (the UCL claim “fails because it relies on defective claims”).) In this case, the “wrong”
2 upon which plaintiff’s UCL claim is premised appears to be defendants’ alleged fraud in
3 connection with the loan modification process. Thus, the allegations supporting the UCL claim
4 are deficient for the same reasons described above with respect to the fraud claim. However, for
5 the same reasons the undersigned cannot conclude that plaintiff’s fraud claim is preempted by
6 HOLA at this time, the undersigned cannot conclude that plaintiff’s UCL claim is preempted at
7 this time. See DeLeon, 2011 WL 311376, at *1-11 (where plaintiff alleged that defendant
8 “falsely represented” that a loan modification would be given and that foreclosure would not
9 occur while the modification process was ongoing, fraud and UCL claims arising therefrom were
10 not preempted by HOLA); Reyes v. Downey Savings & Loan Assn., F.A., 541 F. Supp. 2d
11 1108,1112-15 (C.D. Cal. 2008) (where defendants allegedly misrepresented the loan terms and
12 interest rate that would actually bind the plaintiffs, the court held that the principles of breach of
13 contract and fraud in the inducement “are not specific to lending activities” and concluding that
14 “HOLA does not preempt this application of the UCL”).

15 The DeLeon decision offers particular guidance here. In DeLeon, the court held
16 that, with respect to representations made during the loan modification application process, a
17 UCL claim arising therefrom is not necessarily preempted by HOLA as a matter of law. DeLeon,
18 2011 WL 311376, at *1-11. The court explained,

19 Plaintiffs do not seek to impose a substantive requirement that a
20 federal savings bank must always complete a loan modification
21 agreement once the modification process has started or that a
22 federal savings bank can never execute a sale while a loan
23 modification is pending. Rather, Plaintiffs seek only to require
24 Wells Fargo to refrain from making untrue statements about
25 material facts when doing business with mortgagors or any other
26 persons. Plaintiffs thus invoke the general duty not to engage in
fraud or express deception in a manner that only incidentally
affects lending activities. For this reason, HOLA does not preempt
Plaintiff’s UCL claim based on misrepresentation.

25 Id. at *6. Here, plaintiff’s UCL claim arises from representations allegedly made to plaintiff
26 during and regarding the loan modification process, so DeLeon’s reasoning is persuasive. The

1 undersigned cannot find that plaintiff's UCL claim is preempted at this time.

2 However, putting aside preemption, the UCL claim is deficient for other reasons.
3 As pleaded, plaintiff's UCL claim is entwined with his fraud claim and both appear to arise from
4 the same facts; namely, that plaintiff was promised a modification that he never received. Where
5 a complaint sounds in fraud, all of its allegations are subject to Rule 9(b)'s pleading
6 requirements, and consequently, plaintiff's UCL claims must be dismissed if they are based on
7 allegations of fraud but not pleaded with particularity. Kearns, 567 F.3d at 1124-25; Vess v.
8 Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-04 (9th Cir. 2003). For the same reasons described
9 above in the discussion of plaintiff's fraud claim, plaintiff's UCL claim is not pleaded with the
10 requisite particularity. Accordingly, the undersigned grants defendants' motion to dismiss with
11 respect to the UCL claim, but plaintiff shall have leave to amend the claim to correct the
12 deficiencies described above.⁶

13 In amending his UCL claim, plaintiff is cautioned that the claim must be pleaded
14 with particularity. E.g., Kearns, 567 F.3d at 1125 ("we have specifically ruled that Rule 9(b)'s
15 heightened pleading standards apply to claims for violations of the . . . UCL."); Periguerra v.
16 Meridas Capital, Inc., No. C 09-4748 SBA, 2010 WL 395932, at * 8 (N.D. Cal. Feb. 1, 2010)
17 (not reported) ("To the extent Plaintiffs are relying on the "fraudulent" prong of the section
18 17200, Plaintiffs must allege reliance"); In re Tobacco II Cases, 46 Cal. 4th 298, 328 (2009);
19 Cattie v. Wal-Mart Stores, Inc., 504 F. Supp. 2d 939, 947-49 (S.D. Cal. 2007).

20 ////

21 _____
22 ⁶ Defendants argue that none of plaintiff's claims can support his UCL claim. (MTS at
23 14-15.) However, because plaintiff's UCL claim appears to arise from his allegations of fraud in
24 the loan modification process, and because this order gives plaintiff leave to amend his UCL
25 claim, the undersigned need not determine whether plaintiff's other claims might possibly serve
26 as predicates for his UCL claim at this time. However, the undersigned clarifies that neither the
claim for violation of California Civil Code section 2943 nor the CLRA claim can serve as
predicates for plaintiff's UCL claim, as the undersigned has recommended that those claims be
dismissed without leave to amend. The same is true with respect to plaintiff's "wrongful
foreclosure" and "quiet title" claims, as described herein.

1 should be excepted from the HOLA preemption analysis); accord Lopez v. World Savings &
2 Loan Assn., 105 Cal. App. 4th 729 (2003) (holding that Section 2943 governs mortgage
3 beneficiary and payoff demand statements and is thus within the scope of provisions that OTS’s
4 federal regulation intended HOLA to preempt.)

5 Accordingly, defendants’ motion to dismiss is granted with respect to the Section
6 2943 claim. The undersigned will recommend that the claim be dismissed without leave to
7 amend. Leave to amend would be futile here, as additional allegations would not change the
8 preemption analysis.

9 Plaintiff suggests that his pleaded facts also support a potential claim under
10 federal law, specifically, the Real Estate Settlement Procedures Act (“RESPA”). (Oppo. at 16
11 (“Plaintiff’s claim for violation of Civil Code § 2943 can be amended to state a valid claim
12 pursuant to 12 U.S.C. § 2605” [the Real Estate Settlement Procedures Act].) Defendants do not
13 argue otherwise, except for requesting clarification regarding which specific properties are
14 implicated by plaintiff’s demand letters to defendants. (Reply at 6.)

15 The sufficiency of a pleading should be analyzed based upon the factual
16 allegations within it—not upon the proffered legal theories arising from those alleged facts.⁷
17 Therefore, while the undersigned will recommend that plaintiff’s preempted Section 2943 claim
18 be dismissed, the undersigned will permit plaintiff to amend his pleading to allege a RESPA
19 claim based upon the already-pleaded facts. (E.g., FAC ¶¶ 169, 171-83.) Plaintiff’s RESPA
20 allegations should clearly list the specific properties plaintiff made written demands about, and
21 the date(s) of each request, etc., as defendants accurately note (Reply at 6) that such information
22 is unclear from the currently-pleaded facts.

23
24 ⁷ Where, as here, defendants have fair notice of the nature of the *claim*, the complaint
25 need not even allege the legal theory on which recovery is being sought. Crull v. GEM Ins. Co.,
26 58 F.3d 1386, 1391 (9th Cir. 1995). A plaintiff, whether represented by counsel or not, need not
plead the statute or other provision upon which he bases his claims. Rather, all that is necessary
is that he pleads facts sufficient to support such claims. Bell Atlantic Corp. v. Twombly, 550
U.S. 544, 555 (2007).

1 (where plaintiff's claims "attack[ed] Defendant's disclosure and initiation of the foreclosure
2 process" through alleging in part that foreclosure was improper in light of ongoing loan
3 modification discussion, court dismissed the claim with prejudice on preemption grounds.)

4 On the pleaded facts, plaintiff's wrongful foreclosure claim is preempted by
5 HOLA. The claim arises from alleged violation of California statutes affecting the servicing of
6 mortgages, implicating HOLA's express preemption of state laws regulating the "processing"
7 and "servicing" mortgages. See DeLeon, 729 F. Supp. 2d at 1127. In other words, as pleaded,
8 plaintiff's wrongful foreclosure claim is based on violations of state laws requiring certain
9 mortgage documents to be recorded. Because plaintiff's "wrongful foreclosure" claim is based
10 on defendants' alleged violations of state laws regulating mortgages, the wrongful foreclosure
11 claim is preempted.

12 In his opposition, plaintiff clarifies that he did not intend to allege actual violation
13 of Cal. Civ. Code § 2923.5 and suggests that he can plead other factual bases for a wrongful
14 foreclosure claim that are not grounded in defendants' failures to record certain documents.
15 (Pltf's Oppo. at 14-15 (" . . . plaintiff did not claim that Civil Code § 2923.5 applies. Plaintiff
16 only makes reference to Civil Code § 2923.5 to show that three Wells Fargo vice presidents
17 committed perjury and the veracity of defendants is suspect.")⁹ Plaintiff clarifies that his "claim
18 is based on the contention that the defendants are not holders of the plaintiff's notes and have no
19 beneficial interest in plaintiff's properties. If the defendants are not the holders of the notes, they
20 cannot foreclosure by either a judicial or non-judicial process." (Oppo. at 6.) However, when
21 the preempted "failure to record documents" allegations are put aside, there are no factual
22 allegations left to support plaintiff's "true holders of the notes" theory.

23 With respect to plaintiff's clarified allegation (Oppo. at 6) that defendants are not
24

25 ⁹ There is no perjury action pending before this court, and this court is unable to
26 adjudicate the "veracity" of defendants. Therefore, plaintiff's reference to these issues will not
be considered in analyzing the sufficiency of claims within the FAC.

1 the true holders of his notes and thus any foreclosure activities they took were necessarily
2 wrongful, the pleaded facts simply do not support the claim. Plaintiff has not pleaded any non-
3 conclusory facts supporting this “true holders of notes” argument, as the only *factual* allegations
4 pertaining to defendants’ right to foreclose are that certain documents were not *recorded*. (See
5 FAC ¶¶ 293, 300-03.)

6 Perhaps in efforts to plead a theory that is not preempted by virtue of its
7 dependance upon recordation of mortgage documents under state law, plaintiff has requested the
8 opportunity to amend his pleading to introduce new factual allegations utterly absent from his
9 FAC: that “Mexican drug cartels” are the true holders of his notes. (E.g., Oppo. at 13.)

10 While plaintiff believes he can allege additional facts (i.e., facts unrelated to a
11 failure to record certain documents) to support a theory that defendants are not the true owners of
12 his notes, plaintiff has not suggested any non-conclusory, factual bases for such amendment.
13 During the hearing on the motion, plaintiff reiterated his new theory that his loans may have been
14 among a group of loans he believes were sold to “Mexican drug cartels.” Plaintiff’s RJN also
15 includes documents plaintiff believes support this theory. However, when asked whether he had
16 any actual facts to support his “cartel” allegations, plaintiff responded that he believed it was
17 “plausible” that his loan was among a group of loans defendants sought to rid themselves of. But
18 plaintiff did not provide any facts showing *his* particular loan was part of that alleged group.

19 Plaintiff’s beliefs coupled with conclusory allegations are not sufficient to support
20 his claims. Therefore, plaintiff does not have leave to amend his “wrongful foreclosure” claim,
21 and does not have leave to amend his pleading to add the new “cartel” allegations. The
22 undersigned cautions plaintiff that, while this order gives him leave to amend certain claims (i.e.,
23 fraud), plaintiff does not have leave to add his “cartel” allegations to support such claims.

24 Therefore, to the extent plaintiff bases his “wrongful foreclosure” claim on
25 violation of state laws requiring certain documents to be recorded, those state laws are preempted
26 and do not support plaintiff’s wrongful foreclosure claim. To the extent plaintiff wishes to base

1 his wrongful foreclosure claim on the theory that defendants are not the “true holders” of his
2 notes for reasons *other than* failing to record certain documents, he has not pleaded any
3 supporting factual allegations. Accordingly, defendants’ motion to dismiss is granted with
4 respect to the “wrongful foreclosure” claim, and the undersigned recommends that the claim be
5 dismissed without leave to amend.

6 7. Quiet Title Claim

7 Defendants allege that plaintiff has not pleaded the six requirements of a quiet
8 title claim. (Reply at 21.) California Code of Civil Procedure § 761.020 states that a claim to
9 quiet title requires: (1) a verified complaint, (2) a description of the property, (3) the title to
10 which a determination is sought, (4) the adverse claims to the title against which a determination
11 is sought, (5) the date as of which the determination is sought, and (6) a prayer for the
12 determination of the title. District courts have adhered to the pleading requirements of section
13 761.020. E.g., Hensley v. Bank of N.Y. Mellon, 2010 U.S. Dist. LEXIS 135812 *9 (E.D. Cal.
14 Dec. 23, 2010).

15 Plaintiff’s FAC contains allegations to meet each of these requirements: the FAC
16 is verified (FAC at 114); it describes plaintiff’s properties (FAC at 5-7); it defines those
17 properties as those to which a determination of title is sought (FAC ¶ 307(d)); it states that the
18 “adverse claim” is “by the defendants since the right of sale provided by the deed of trust is an
19 interest in the property” (FAC ¶ 307(c)); it states that the date of the FAC is the date as of which
20 the determination is sought (FAC ¶ 307(d)); and it includes a prayer for the determination of title.
21 (FAC ¶ 307(e).)

22 However, plaintiff’s “quiet title” claim is based upon the allegation that
23 defendants “do not presently have the right to initiate foreclosure”, and the FAC does not
24 contain any factual support for this conclusion. (FAC ¶ 306.) Further, plaintiff has not indicated
25 that he could provide such factual support if leave to amend the claim were granted. As
26 described in the above discussion of plaintiff’s “wrongful foreclosure” claim, the only factual

1 allegations that appear to support plaintiff's quiet title claim are that defendants failed to properly
2 record certain documents in accordance with California laws (preempted by HOLA), and
3 conclusory allegations that defendants are not the "true holders" of his notes. Plaintiff's "quiet
4 title" claim is thus premised on the same deficient grounds as his wrongful foreclosure claim.

5 Courts have dismissed "quiet title" claims on preemption grounds in cases where
6 the quiet title claim is based upon a preempted "wrongful foreclosure" claim, and also in cases
7 where defendants allegedly have "refused to modify" loans despite plaintiff's willingness to
8 participate in the modification process. DeLeon, 729 F. Supp. 2d at 1127 (granting motion to
9 dismiss "wrongful foreclosure" claim on preemption grounds, then granting motion to dismiss
10 "quiet title" claim because that claim was "premised on . . . [plaintiffs'] claims of wrongful
11 foreclosure and defective notice, which are preempted by HOLA."); Guerrero, 2010 U.S. Dist.
12 LEXIS 96261 at *4, *9-10 (where plaintiff's claims "attack[ing] Defendant's disclosure and
13 initiation of the foreclosure process" through alleging in part that foreclosure was improper in
14 light of ongoing loan modification discussion, court dismissed quiet title claim on preemption
15 grounds); Curcio v. Wachovia Mortgage Corporation, 2009 U.S. Dist. LEXIS 96155, at *16-18
16 (S.D. Cal. Oct. 14, 2009) (where plaintiff alleged in part that defendants "refused to modify
17 Plaintiff's loan payments" despite plaintiff's willingness to "participate in loan modification"
18 plaintiff alleged a "quiet title" claim (among others), the court found that HOLA preempted quiet
19 title claim and others); Andrade v. Wachovia Mortg., FSB, 2009 U.S. Dist. LEXIS 34872 *6-9
20 (S.D. Cal. April 21, 2009) (holding that plaintiff's claims for quiet title were expressly preempted
21 by 12 C.F.R. § 560.2(b)(4), (9), (10)).

22 Accordingly, defendants' motion to dismiss is granted with respect to the quiet
23 title claim for the same reasons described in the above discussion of the wrongful foreclosure
24 claim. The undersigned also recommends that the claim be dismissed without leave to amend for
25 the reasons described above. Further, plaintiff cannot add new "cartel" allegations in efforts to
26 plead a quiet title theory that is not preempted by HOLA. Again, the undersigned cautions

1 plaintiff that, while this order gives him leave to amend certain claims (i.e., fraud), plaintiff does
2 not have leave to add his “cartel” allegations to support such claims.

3 8. Unfair Debt Collection Claims

4 Plaintiff claims defendants violated California’s Rosenthal Fair Debt Collection
5 Practices Act (Cal. Civ. Code §§ 1788 et seq.) (“Rosenthal Act” or “RFDCPA”) and the Federal
6 Fair Debt Collection Practices Act (the “FDCPA”) (15 U.S.C. § 1692). (FAC ¶ 309.)

7 The RFDCPA defines a “debt collector” as “any person who, in the ordinary
8 course of business, regularly, on behalf of himself or herself or others, engages in debt
9 collection.” Id. § 1788.2. Similarly, the FDCPA defines “debt collector,” in pertinent part, as

10 “any person who uses any instrumentality of interstate commerce
11 or the mails in any business the principal purpose of which is the
12 collection of any debts, or who regularly collects or attempts to
collect, directly or indirectly, debts owed or due or asserted to be
owed or due another.”

13 Id. (citing 15 U.S.C. § 1692a(6)). To be held liable for violation of the FDCPA, a defendant
14 must—as a threshold requirement—fall within the Act’s definition of “debt collector.” Izenberg
15 v. ETS Services, LLC, 589 F. Supp. 2d 1193, 1198-99 (C.D. Cal. 2008) (finding defendant was
16 not “collecting a debt” when it sought to foreclose on property). A “debt collector” under the
17 FDCPA is therefore either (1) “a person” the “principal purpose” of whose business is the
18 collection of debts (whether on behalf of himself or others); or (2) “a person” who “regularly”
19 collects debts on behalf of others (whether or not it is the principal purpose of his business).
20 Izenberg, 589 F.Supp.2d at 1198-99. Plaintiff has not alleged that defendants are “debt
21 collectors” under the RFDCPA or the FDCPA, so his debt collection claims are deficient.

22 Further, a “debt collector” violates the RFDCPA when it engages in harassment,
23 threats, the use of profane language, false simulation of the judicial process, or when it cloaks its
24 true nature as a licensed collection agency in an effort to collect a debt— and plaintiff has not
25 alleged any of these actions. See Cal. Civ. Code §§ 1788.10-88.18; see also Hernandez v. Cal.
26 Reconveyance Co., 2009 U.S. Dist. LEXIS 13936, at * 13 (E.D. Cal. Feb. 23, 2009) (holding that

1 a RFDCPA claim failed because the complaint lacked allegations of harassment or abuse, false or
2 misleading representations of the debt collector’s identity, or unfair practices during the process
3 of collecting debt); Hepler v. Wash. Mut. Bank, F.A., Case No. CV 07-4804 CAS (Ex), 2009
4 U.S. Dist. LEXIS 33883, at *11-12 (C.D. Cal. April 17, 2009) (“[T]he law is well-settled . . . that
5 creditors, mortgagors, and mortgage servicing companies are not debt collectors and are
6 statutorily exempt from liability under the FDCPA.”). A mortgage servicing company is not a
7 debt collector within the meaning of the FDCPA. Walker v. Equity 1 Lenders Group, No.
8 09cv325, 2009 WL 1364430, at *7 (S.D. Cal. May 14, 2009).

9 Similarly, as to the FDCPA, where a pleading “lacks allegations of harassment or
10 abuse to violate 15 U.S.C. § 1692d, false or misleading representations to violate 15 U.S.C.
11 §1692e, or unfair practices to violate 15 U.S.C. § 1692f,” it fails to state a FDCPA claim. See
12 Hernandez, 2009 U.S. Dist. LEXIS 13936, at * 13; Jelsing, 2010 WL 2731470, at *5 (holding
13 that sending a Notice of Trustee’s Sale is not actionable under the FDCPA where a plaintiff does
14 not allege that the sender was a “debt collector” and also because “foreclosing on [a] property
15 pursuant to a deed of trust is not the collection of a “debt” within the meaning of the FDCPA.”
16 (citing cases).

17 The undersigned notes that the alleged “debt collection” activities plaintiff
18 ascribes to defendants appear to include telling credit reporting agencies of his past due payments
19 (FAC ¶ 309), and by continuing to attempt to collect on his debts in violation of the Forbearance
20 Agreement. (E.g., Oppo. at 24.) Defendants have not cited cases stating that either of these
21 allegations cannot sufficiently support a debt collection claim as a matter of law.¹⁰

23 ¹⁰ The RFDCPA does not typically apply to lenders foreclosing on a deed of trust. E.g.,
24 Izenberg v. ETS Services, LLC, 589 F.Supp.2d 1193, 1199 (C.D. Cal. 2008) (stating that
25 “foreclosure does not constitute debt collection under the RFDCPA”). However, courts have
26 held that non-foreclosure efforts to collect upon a residential mortgage debts may come within
the scope of the Rosenthal Act. E.g., Yulaeva v. Greenpoint Mortgage Funding, No. 09-1504,
24-25, 2009 WL 2880393, at *10 (E.D. Cal. Sept. 3, 2009) (denying motion to dismiss debt
collection claims because, plaintiff’s “claim is based on reporting of default to credit reporting

1 However, as pleaded, plaintiff has not alleged non-conclusory facts suggesting
2 harassment, abuse, or false representations¹¹ in the collection of a debt. Because plaintiff will
3 have the opportunity to amend his debt collection claims, it would be premature for the
4 undersigned to determine as a matter of law that plaintiff’s allegations do not come within the
5 scope of “debt collection” under either statute. The precise nature of those allegations will
6 determine the sort of “debt collection” activities upon which plaintiff bases his claim. If and
7 when plaintiff amends the facts supporting the claim, defendants remain able to challenge the
8 factual sufficiency of the amendment, including whether the activities plaintiff construes as “debt
9 collection” actually come within the scope of either statute. Accordingly, defendants’ motion to
10 dismiss is granted with respect to plaintiff’s FDCPA claim, but plaintiff shall have leave to
11 amend the claim to correct the above-described deficiencies.

12 In his opposition, plaintiff says he will amend his pleading to state that defendants
13 are “debt collectors” and otherwise allege the elements of his debt-collection claims. (Oppo. at
14 23-24.) Plaintiff also suggests that none of the named defendants presently “own plaintiff’s
15 debt,” intimates that “foreign” entities (i.e. “Mexican drug cartels”) likely own his debt such that
16 defendants do not “own” his loan and thus that their actions are those of “debt collectors”
17 seeking to collect his money to give to some other entity (i.e. the “Mexican drug cartels”).
18 (Oppo. at 24-25.) As described above, however, in his papers and during the hearing plaintiff did
19 not provide any factual support for this theory aside from his beliefs and tangential documents in
20 his RJN (addressed below). Therefore, while plaintiff will receive leave to amend his debt
21 collection claims to allege that defendants are “debt collectors” and to state which alleged
22 activities amounted to harassing, abusive conduct under the law, plaintiff shall *not* receive leave
23 _____
24 agencies, an activity that might have some incidental connection to foreclosure, but that is also
25 squarely connected to debt collection.”)

26 ¹¹ As described in the foregoing discussion of the fraud claim, the alleged
“representations” in the FAC are contradictory and unclear.

1 to amend to add allegations relating to “Mexican drug cartels” or allegations of defendants’
2 efforts to collect debts on behalf of those cartels.

3 9. RICO Claim

4 The FAC alleges defendants violated RICO (18 U.S.C. § 1962) in connection with
5 representations made within the modification application process. (FAC ¶¶ 312-13.) To state a
6 RICO claim, a plaintiff must allege that defendant (a) received income derived from a pattern of
7 racketeering activity, and used the income to acquire or invest in an enterprise in interstate
8 commerce; (b) acquired or maintained an interest in, or control of, an enterprise engaged in
9 interstate commerce through a pattern of racketeering activity; (c) caused an enterprise engaged
10 in interstate commerce, while employed by the enterprise, to conduct or participate in a pattern of
11 racketeering activity; or (d) conspired to engage in any of these activities. 18 U.S.C. § 1962;
12 Forsyth v. Humana, Inc., 114 F.3d 1467, 1481 (9th Cir. 1997). “Racketeering activity” is any act
13 indictable under the provisions of 18 U.S.C. § 1961. Forsyth, 114 F.3d at 1481.

14 A RICO claim must be pleaded with particularity. Izenberg, 589 F. Supp. 2d at
15 1202. Further, in a case involving a foreclosure of a mortgage on real property, in order to
16 establish a concrete financial injury under RICO a plaintiff must allege he will pay a greater
17 amount than is in fact owed on his mortgage. Id. at 1204. A plaintiff must also plead that
18 defendants’ violation was both the “but for” and proximate cause of a concrete financial injury.
19 Id. at 1201 (“Prospective injuries . . . do not satisfy RICO’s concrete financial injury
20 requirement.”)

21 Plaintiff concedes that his FAC does not state a RICO claim as pleaded, and under
22 the authorities described above, he is correct. Therefore, the undersigned grants defendants’
23 motion to dismiss the RICO claim. However, plaintiff requests leave to amend the claim.
24 (Oppo. at 19-20.) Plaintiff’s proffered amendment again arises from his new “Mexican drug
25 cartel” theory: that “his nine loans were in the group securitized, sold, and serviced illegal and
26 fraudulently as part of the defendants’ criminal activities with the drug cartels. Given the

1 magnitude and complexity of the transactions, the crimes would have to be committed via wire
2 and mail.” (*Id.*) Again, plaintiff’s papers and statements during the hearing confirm that
3 plaintiff’s proffered “cartel” theory is premised on conclusory allegations rather than actual facts
4 supporting a RICO claim. Therefore, plaintiff will *not* receive leave to amend to add those
5 “cartel” allegations.

6 However, while he may not add “cartel” allegations, plaintiff shall receive leave to
7 amend to plead a RICO claim with specificity based upon his allegations of fraudulent statements
8 made in connection with the loan modification process. *See Izenberg*, 589 F.Supp.2d at 1205 (“a
9 district court should grant leave to amend ... unless it determines that the pleading could not
10 possibly be cured by the allegation of other facts”). Defendants’ motion to dismiss is granted
11 with respect to the RICO claim, but plaintiff shall have leave to amend the claim. While plaintiff
12 receives leave to amend his claim, plaintiff does *not* receive leave to add allegations relating to
13 “Mexican drug cartels.”

14 10. Negligence and Negligent Misrepresentation Claims

15 Defendants suggest that plaintiff’s negligence claims are preempted by HOLA,
16 but their papers do not discuss cases analyzing preemption of negligence claims. (MTD at 6.)
17 Therefore, without passing upon the issue HOLA preemption, the undersigned’s analysis
18 proceeds to the sufficiency of plaintiff’s allegations of negligence. Defendants challenge the
19 “duty” element of plaintiff’s negligence claim. (MTD at 24.)

20 Plaintiff’s negligence claim is deficient because the defendants, as conventional
21 lenders, do not typically owe plaintiff a duty of care. “The question of the existence of a legal
22 duty of care . . . presents a question of law which is to be determined by the courts alone.” *First*
23 *Interstate Bank of Ariz., N.A. v. Murphy, Weir & Butler*, 210 F.3d 983, 987 (9th Cir. 2000).
24 “Absent the existence of duty . . . there can be no breach and no negligence.” *Nichols v. Keller*,
25 15 Cal. App. 4th 1672, 1683 (1993). “Under California law, a lender does not owe a borrower or
26 third party any duties beyond those expressed in the loan agreement, except[] those imposed due

1 to special circumstance.” Resolution Trust Corp. v. BVS Dev., 42 F.3d 1206, 1214 (9th Cir.
2 1994) (citing Nymark v. Heart Fed. Sav. & Loan Ass’n., 231 Cal. App. 3d 1089, 1096 (1991)).

3 Special circumstances triggering a duty may arise when a lender actively
4 participates in the financed enterprise. See Nymark, 231 Cal. App. 3d at 1096; Wagner v.
5 Benson, 101 Cal. App. 3d 27, 35 (1980). A lender may also be secondarily liable through the
6 actions of a mortgage broker, who has a fiduciary duty to its borrower-client, if there is an agency
7 relationship between the lender and the broker. See Plata v. Long Beach Mortg. Co., 2005 U.S.
8 Dist. LEXIS 38807, at *23 (N.D. Cal. Dec. 13, 2005).

9 In the FAC, plaintiff describes arms-length loan modification discussions between
10 defendants and himself. He does not describe any “special circumstances” akin to those
11 described in Nymark (lender participation in financed enterprise) or Plata (lender liable through
12 broker’s fiduciary duty to borrower-client) that would trigger a duty. See Nymark, 231 Cal. App.
13 3d at 1096; Plata, 2005 U.S. Dist. LEXIS 38807, at *23. Therefore, plaintiff’s negligence claim
14 is insufficiently pleaded with respect to the existence of a duty of care. See e.g., Walters v.
15 Fidelity Mortgage of California, Inc., 730 F. Supp. 2d 1185, 1206 (E.D. Cal. 2010) (dismissing
16 plaintiff’s negligence claim without leave to amend in mortgage loan case, because amendment
17 would be “futile under governing law, and plaintiff fails to allege any other facts that could
18 plausibly give rise to a duty on the part of defendants”).

19 Plaintiff explains that he intends his negligence claims to arise from the
20 Forbearance Agreement, and argues that such Agreement was for his benefit. (Oppo. at 34-35.)
21 He also argues that a duty of care was created based upon his particular dealings with defendants
22 by virtue of the six factors originating from the Biakanja case¹² (the “Biakanja factors”).

24 ¹² Plaintiff argues that the test for determining whether a financial institution owes a duty
25 of care to a borrower-client “involves the balancing of various factors, among which are [1] the
26 extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm
to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the
connection between the defendant’s conduct and the injury suffered, [5] the moral blame attached

1 Defendants correctly note that the court in Nymark analyzed the Biakanja factors
2 and concluded that, in the bank’s conventional role as lender, it did not owe a duty of care to its
3 borrower in the preparation of an appraisal report. Nymark v. Heart Federal Savings & Loan
4 Ass’n, 231 Cal. App. 3d 1089 (1991). However, even the court in Nymark cautioned that the
5 “general rule” that a lender does not owe a duty of care to a borrower is not absolute. See e.g.,
6 Garcia, 2010 WL 1881098, at *2 (“ . . . Nymark does not stand for the proposition that a lender
7 never owes a duty of care to a borrower.”) Further, at least one court has found that a Biakanja-
8 type duty of care arose in connection with “processing [a] loan modification application.” See id.
9 at *3 (N.D. Cal. May 10, 2010) (finding that a lender owed a duty of care to a borrower-client in
10 processing the borrower’s loan modification application).

11 Because plaintiff has not pleaded a “special circumstance” that would give rise to
12 a lender’s duty of care, the MTD is granted as to plaintiff’s negligence claims and those claims
13 will be dismissed. Moreover, insofar as those claims arise from the Forbearance Agreement, the
14 undersigned will recommend that plaintiff’s negligence claims be dismissed without leave to
15 amend. See Watkinson, 2010 WL 2196083, at *9. Insofar as those claims arise from a duty that
16 may have been triggered based upon defendants’ other actions or representations during the loan
17 modification application process, plaintiff shall have the opportunity to amend the claim to state
18 facts supporting the Biakanja factors. The “negligent misrepresentation” claim must be pleaded
19 with particularity. E.g., U.S. Concord, Inc. v. Harris Graphics Corp., 757 F. Supp. 1053, 1058
20 (N.D. Cal. 1991) (dismissing negligent misrepresentation claim for lack of particularity and
21 because it rested upon the “same flawed allegations of misrepresentation as the fraud claim”).

22 ////

23 ////

24 _____
25 to the defendant’s conduct, and [6] the policy of preventing future harm.” (Oppo. at 34 (citing
26 Connor v. Great Western Sav. & Loan Assn. 69 Cal.2d 850, 865 (1968); Biakanja v. Irving, 49
Cal.2d 647, 650 (1958).)

1 alleging damages (if any) that resulted directly from that breach. As pleaded, there do not appear
2 to be any such damages, especially as plaintiff has not pleaded that his properties were *actually*
3 foreclosed upon during the forbearance period. Regardless, plaintiff may amend his pleading to
4 formally include a “Breach of Contract” claim with respect to the Forbearance Agreement.

5 Putting aside the potential for a claim for breach of the written Forbearance
6 Agreement, it is unclear whether plaintiff hopes to allege the creation of an actual oral or implied
7 contract guaranteeing him a loan modification. Because it is possible plaintiff can plead
8 additional facts supporting such a claim, plaintiff shall receive leave to formally set out such a
9 claim if he wishes. While plaintiff may be able to plead an oral or implied contract for a loan
10 modification, he has not yet done so: for instance, plaintiff’s allegations regarding the
11 conversation with Saris are internally inconsistent (described *infra*) and as currently pleaded do
12 not amount to an oral contract. Regardless, plaintiff shall have leave to amend his pleading to
13 formally allege an oral or implied contract if he believes he can do so in good faith. However, as
14 noted repeatedly herein, while plaintiff receives leave to amend he does *not* receive leave to add
15 allegations relating to “Mexican drug cartels.”

16 While defendants raise potentially valid legal challenges¹³ to plaintiff’s
17 intimations regarding an oral contract for a modification, the undersigned cannot at this time state
18 that plaintiff should not be permitted to at least attempt to formally plead his potential claims. Of
19 course, defendants shall have the opportunity to challenge the sufficiency plaintiff’s contract
20 claim(s) once the claim(s) are formally pleaded and the supporting facts clarified.

21 ////

23 ¹³ Defendants do not address the potential claim for breach of the written Forbearance
24 Agreement and construe plaintiff’s potential contract claim as a breach of an oral agreement for a
25 loan modification. (MTD pp. 10-12 (citing cases holding that an expression of confidence that a
26 modification could occur were not sufficient to create a contract to modify a loan.)) Defendants’
arguments may indeed preclude a claim that defendants allegedly breached an oral contract to
modify plaintiff’s loan, but the undersigned cannot make this determination unless and until
plaintiff clarifies the nature and content of any alleged oral contract for a loan modification.

1 B. Defendants’ Motion to Strike

2 Defendants’ MTS seeks to have plaintiff’s damages claims stricken on grounds
3 that the FAC lacks allegations to support the claims from which those damages might arise. For
4 instance, defendants claim that plaintiff is not entitled to injunctive relief stopping foreclosure
5 proceedings (FAC ¶ 304), a judicial declaration that title is vested in plaintiff alone (FAC ¶
6 307(e)), or any punitive damages (FAC at pp. 105, ln. 13, ¶¶ 1- 19) because plaintiff has not
7 adequately pleaded claims from which these damages would flow. For example, defendants
8 argue that “[a]ll of plaintiff’s damages claims are defective because plaintiff is not entitled to the
9 recovery of damages under California’s UCL, nor is plaintiff entitled to damages under the
10 Consumers Legal Remedies Act because a loan modification is not “goods” or “services” within
11 the meaning of the Act, nor is plaintiff a “consumer” within the meaning of the Act because this
12 clearly involved his investment business. . . . [and] plaintiff fails to establish the basis of
13 actionable fraud, oppression or malice to support a punitive damages claim against defendants.”
14 (MTS at 1.) Thus, the MTS seeks to strike claims based on the insufficiency of the facts alleged
15 within the FAC. (E.g., id. at 2 (“plaintiff fails to adequately plead the basis for an award of
16 punitive damages . . .”) (emphasis added); MTS at 7; see also Reply at 4.) Defendants
17 essentially seek to dismiss all of plaintiff’s requests for recovery, whether the recovery requested
18 is restitution, (see id. at 4); injunctive relief, (see id. at 5); statutory damages (see id. at 7-8); or
19 compensatory damages (see FAC, Prayer for Relief ¶¶ 3, 5.)

20 As a preliminary matter, this order recommends the dismissal of certain claims
21 without leave to amend: the CLRA claim, the False Advertising claim, the claim for violation of
22 California Civil Code § 2943, the wrongful foreclosure claim, and the quiet title claim as
23 described *infra*. Therefore, defendants’ requests to strike prayers for damages arising from these
24 dismissed claims are denied as moot.

25 As to defendants’ requests to strike demands for punitive and other damages
26 arising from the remaining claims, the MTS is denied. That certain requested damages are

1 unavailable as a matter of law is not a legal basis for granting a motion to strike. Whittlestone,
2 618 F.3d at 972-74 (“Rule 12(f) does not authorize a district court to strike a claim for damages
3 on the ground that such damages are precluded as a matter of law.”) Further, because plaintiff
4 shall receive leave to amend the facts supporting his fraud claim, a conclusion that punitive
5 damages arising therefrom are unavailable would be premature. Moreover, trial courts are not
6 permitted to determine disputed and substantial factual or legal issues in deciding a motion to
7 strike. Id. The court’s inquiry is limited to whether the statement constitutes either an
8 insufficient defense, or redundant, immaterial, impertinent, or scandalous matter under Rule
9 12(f), and except for a cursorily describing the damages claims as “immaterial”, defendants have
10 not explained how the requested damages fit into any of these categories. (See id.; Notice of
11 MTS at 3.) Defendants have not shown that the requested damages have “no possible bearing
12 on the subject matter of the litigation.” LeDuc, 814 F. Supp. at 830.

13 Accordingly, the remaining requests within the MTS are “really an attempt to
14 have certain portions of [plaintiff’s] complaint dismissed. . . .” Whittlestone, 618 F.3d at 974.
15 Therefore, the MTS is denied without prejudice. Going forward, defendants may have valid
16 arguments regarding the availability of certain damages, especially given that this order
17 recommends dismissal of several claims with prejudice. However, defendants will have the
18 opportunity to properly move to dismiss those damages claims if they remain in the amended
19 pleading plaintiff files in accordance with this order. Further, plaintiff has requested leave to
20 amend his pleading “to seek restitution and not damages under Cal. Bus. & Prof. C. § 17200”; to
21 “seek injunctive relief for himself.” (Pltf’s Oppo. to MTS, Dkt. No. 42 at 4-5.) Because plaintiff
22 will have leave to amend certain claims as described above, he will have the opportunity to
23 amend his damages requests and will perhaps obviate the need for future briefing on those issues.

24 C. Requests for Judicial Notice

25 In their RJN, defendants ask the undersigned to take judicial notice of plaintiff’s
26 Deed of Trust dated February 4, 2005, and recorded in the official records of the San Joaquin

1 County Recorder on February 17, 2005 (Exh. F to RJN), and the Forbearance Agreement, dated
2 April 26, 2010 (Exh. G to RJN). Pursuant to Federal Rule of Evidence 201, these materials are
3 judicially noticeable and therefore this request is granted. E.g., United States v. Ritchie, 342
4 F.3d 903, 908 (9th Cir. 2003); Gamboa v. Tr. Corps & Cent. Mortg. Loan Servicing Co., 2009
5 U.S. Dist. LEXIS 19613 *4-*10 (N.D. Cal. Mar. 12, 2009) (court took judicial notice of recorded
6 documents related to the foreclosure sale, including grant deed and deed of trust: “[t]hese
7 documents are also part of the public record and are easily verifiable.”) Plaintiff did not file any
8 objection to defendants’ RJN, and during the hearing on the matter he stated that he had no
9 objection to the copy of the Forbearance Agreement attached to defendants’ RJN.

10 Defendants also ask that the undersigned take judicial notice of other documents
11 such as defendants’ corporate certificates, charters and profiles. The undersigned did not find it
12 necessary to rely on any of these remaining exhibits to defendants’ RJN. Therefore, the
13 remainder of defendants’ RJN is denied as moot.

14 The undersigned denies plaintiff’s RJN. (Pltf’s RJN, Dkt. No. 43.) Plaintiff
15 requests judicial notice of defendants’ annual reports, a deferred prosecution agreement reflecting
16 Wachovia’s agreement to the filing of a one (1) count information charging Wachovia with
17 failing to maintain an anti-money laundering program, and OTS “Schedule-SC (Consolidated
18 Statement of Condition)” documents from 2006 to 2009. (Pltf’s RJN, 1-3.) However, in his
19 papers and during the hearing, plaintiff confirmed that while these documents broadly relate to
20 his theory that “Mexican drug cartels” are the true holders of his notes, nothing in the documents
21 references plaintiff’s loans in particular. Accordingly, the undersigned did not find it necessary
22 to rely upon any of these documents, and plaintiff’s RJN is denied as moot.

23 In light of the foregoing, IT IS HEREBY ORDERED that:

- 24 1. Defendants’ Motion to Dismiss is granted.
- 25 2. Plaintiff’s claims for fraud, violation of the California Unfair Competition
26 law (Cal. Bus. & Prof. §§ 17200 et seq.); unfair debt collection under state and federal law, and

1 violation of RICO, are hereby dismissed without prejudice. Plaintiff shall have leave to amend
2 these claims.

3 3. Plaintiff's claims for negligent misrepresentation and negligence, insofar as
4 they arise from defendants' alleged representations during the loan modification application
5 process, are hereby dismissed without prejudice. Plaintiff shall have leave to amend these claims
6 in order to state facts supporting the Biakanja factors.

7 4. Plaintiff shall also have leave to formally plead a claims for breach of contract
8 insofar as such claim may arise from defendants' alleged foreclosure activities during the
9 forbearance period stated within the Forbearance Agreement, and/or insofar as such claim may
10 arise from an oral contract for a loan modification resulting from representations made to
11 plaintiff during the loan modification process.

12 5. Accordingly, plaintiff shall file an amended pleading entitled "Second
13 Amended Complaint" within 30 days of being served with this order.

14 6. Plaintiff's "Second Amended Complaint" should omit headings and references
15 to the claims dismissed without leave to amend herein. Plaintiff does *not* have leave to add
16 allegations that his loans are owned by "Mexican drug cartels" or other foreign entities, or to add
17 related allegations within the Second Amended Complaint.

18 7. Defendants' Motion to Strike is denied.

19 8. Defendants' Request for Judicial Notice is granted with respect to Exhibits F
20 and G thereto, but denied as to the remaining exhibits.

21 9. Plaintiff's Request for Judicial Notice is denied.

22 Also in light of the foregoing, IT IS HEREBY RECOMMENDED that:

23 1. Plaintiff's claims for violation of the Consumers Legal Remedies Act
24 ("CLRA"), false advertising, violation of California Civil Code § 2943, wrongful foreclosure,
25 and quiet title, be dismissed with prejudice;

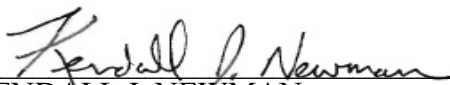
26 2. Plaintiff's claims for negligent misrepresentation and negligence, insofar as

1 they arise implicitly or explicitly from the Forbearance Agreement, be dismissed with prejudice.

2 These findings and recommendations are submitted to the United States District
3 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
4 days after being served with these findings and recommendations, any party may file written
5 objections with the court and serve a copy on all parties. Id.; see also E. Dist. Local Rule 304(b).
6 Such a document should be captioned “Objections to Magistrate Judge’s Findings and
7 Recommendations.” Any response to the objections shall be filed with the court and served on
8 all parties within fourteen days after service of the objections. E. Dist. Local Rule 304(d).
9 Failure to file objections within the specified time may waive the right to appeal the District
10 Court’s order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d
11 1153, 1156-57 (9th Cir. 1991).

12 **IT IS SO ORDERED AND RECOMMENDED.**

13 DATED: March 21, 2011

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE