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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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STEVEN GRILL,

CIV NO. 10-CV-03057-FCD/GGH

Plaintiff,

v.

MEMORANDUM AND ORDER

BAC HOME LOANS SERVICING LP;
Bank of America N.A.,;
RECONTRUST COMPANY N.A.; and
DOES 1-10, inclusive

Defendants.

_____ /

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This matter is before the court on the motions of defendant BAC Home Loans Servicing LP ("BAC") to dismiss and to strike plaintiff Steven Grill's ("plaintiff") Complaint pursuant to Federal Rules of Procedure 12(b)(6) and 12(f). Plaintiff opposes BAC's motions. For the reasons set forth below,¹ BAC's motion to

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

1 dismiss is GRANTED.²

2 **BACKGROUND**

3 Plaintiff brought this action against BAC for conduct
4 arising out of a Home Affordable Modification Trial Period Plan
5 (the "Plan") that BAC sent plaintiff on or about October 22,
6 2009. (Compl., filed Oct. 12, 2010 [Docket # 1], ¶ 65.)

7 Plaintiff alleges that BAC failed "to honor its agreement with
8 [p]laintiff to modify his mortgage and prevent foreclosure."

9 (Id. ¶ 1)

10 Plaintiff claims the terms of the Plan state that if he met
11 all the requirements listed, BAC was obligated to provide him
12 with a modification of his current mortgage loan. (Id. ¶ 3.) He
13 alleges that he met the terms of the Plan "by submitting the
14 required documentation and making payments." (Id.) Plaintiff
15 alleges that "[d]espite his efforts, [BAC] has ignored its
16 contractual obligation to permanently modify his loan." (Id.)
17 Plaintiff alleges that "[BAC's] actions thwart the purpose of the
18 [United States Treasury's Home Affordable Modification Program
19 ("HAMP")] and are illegal under California law. (Id. at 4.)

20 Plaintiff's Complaint sets forth six causes of action: (1)
21 breach of contract based on the Plan; (2) breach of the implied
22 covenant of good faith and fair dealing; (3) breach of contract
23 based on plaintiff's status as an intended third-party
24 beneficiary to the Servicer Participation Agreement ("SPA"); (4)
25 promissory estoppel; (5) violation of the Rosenthal Fair Debt

26
27 ² Because the court grants BAC's motion to dismiss, it
28 does not reach the motion to strike. Defendant's motion to
strike is DENIED as MOOT.

1 Collection Practices Act; and (6) unfair and fraudulent business
2 practices in violation of the California Unfair Competition Law,
3 California Business & Professions Code Sections 17200 *et seq.*.

4 **STANDARDS**

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

16 On a motion to dismiss, the factual allegations of the
17 complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319,
18 322 (1972). The court is bound to give plaintiff the benefit of
19 every reasonable inference to be drawn from the "well-pleaded"
20 allegations of the complaint. Retail Clerks Int'l Ass'n v.
21 Schermerhorn, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not
22 allege "'specific facts' beyond those necessary to state his
23 claim and the grounds showing entitlement to relief." Twombly,
24 550 U.S. at 570. "A claim has facial plausibility when the
25 plaintiff pleads factual content that allows the court to draw
26 the reasonable inference that the defendant is liable for the
27 misconduct alleged." Iqbal, 129 S. Ct. at 1949.

28 /////

1 Nevertheless, the court "need not assume the truth of legal
2 conclusions cast in the form of factual allegations." United
3 States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th
4 Cir. 1986). While Rule 8(a) does not require detailed factual
5 allegations, "it demands more than an unadorned, the defendant-
6 unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at 1949. A
7 pleading is insufficient if it offers mere "labels and
8 conclusions" or "a formulaic recitation of the elements of a
9 cause of action." Twombly, 550 U.S. at 555; Iqbal, 129 S. Ct. at
10 1950 ("Threadbare recitals of the elements of a cause of action,
11 supported by mere conclusory statements, do not suffice.").
12 Moreover, it is inappropriate to assume that the plaintiff "can
13 prove facts which it has not alleged or that the defendants have
14 violated the . . . laws in ways that have not been alleged."
15 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council
16 of Carpenters, 459 U.S. 519, 526 (1983).

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

1 In ruling upon a motion to dismiss, the court may consider
2 only the complaint, any exhibits thereto, and matters which may
3 be judicially noticed pursuant to Federal Rule of Evidence 201.
4 See Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir.
5 1988); Isuzu Motors Ltd. v. Consumers Union of U.S., Inc., 12 F.
6 Supp. 2d 1035, 1042 (C.D. Cal. 1998).

7 ANALYSIS

8 A. Defendant's Exhibits

9 Rule 201 permits a court to take judicial notice of an
10 adjudicative fact "not subject to reasonable dispute" because the
11 fact is either "(1) generally known within the territorial
12 jurisdiction of the trial court or (2) capable of accurate and
13 ready determination by resort to sources whose accuracy cannot
14 reasonably be question." Fed. R. Evid. 201(b). The court can
15 take judicial notice of matters of public record, such as
16 pleadings in another action and records and reports of
17 administrative bodies. See Emrich v. Touche Ross & Co., 846 F.2d
18 1190, 1198 (9th Cir. 1988).

19 "Even if a document is not attached to a complaint, it may
20 be incorporated by reference into a complaint if the plaintiff
21 refers extensively to the document or the document forms the
22 basis of the plaintiff's claim." United States v. Ritchie, 342
23 F.3d 903, 908 (9th Cir. 2003). "The defendant may offer such a
24 document, and the district court may treat such a document as
25 part of the complaint, and thus may assume that its contents are
26 true for purposes of a motion to dismiss under Rule 12(b)(6)."
27 Id. The policy concern underlying the rule is to prevent
28 plaintiffs "from surviving a Rule 12(b)(6) motion by deliberately

1 omitting references to documents upon which their claims are
2 based." Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998).

3 BAC requests the court to take judicial notice of various
4 documents, including (1) the Note signed by plaintiff (Ex. A),
5 (2) the original deed of trust signed by plaintiff (Ex. B), and
6 (3) the Home Affordable Modification Trial Period Plan (Ex. C).
7 Plaintiff's claims for relief depend upon, and/or repeatedly
8 refer to, information contained in Exhibit C. (See, e.g., Compl.
9 ¶¶ 3, 65, 66, 75, 76, 77, 79, 80, 82, 83, 97, 98, 99, 110, 114,
10 Prayer ¶ 5). In addition, Exhibit A and Exhibit B are matters of
11 public record. Because these exhibits form the basis of several
12 of plaintiff's claims for relief, the court takes judicial notice
13 of these documents. Accordingly, the court will treat exhibits
14 A, B, and C as part of the complaint and will assume that their
15 contents are true for purposes of the motion to dismiss. See
16 Ritchie, 342 F.3d at 908.

17 **B. Breach of Contract Based on Trial Period Plan**

18 Plaintiff's first claim for relief alleges that defendant
19 BAC breached the terms of the Plan. Specifically, plaintiff
20 alleges that he performed the terms and conditions of the Plan by
21 providing the requested documents and making trial period
22 payments for three successive months and seven months after the
23 final trial period payment. (Compl. ¶ 67.) Plaintiff alleges
24 that BAC "breached the [Plan] by failing to offer [p]laintiff a
25 permanent HAMP modification after payment of the trial period
26 payments." (Compl. ¶ 77.) BAC moves to dismiss the claim
27 arguing that no binding contract existed. (Def.'s Mot. to
28 Dismiss ("MTD"), filed Nov. 19, 2010 [Docket # 5], at 6.)

1 "[T]o state a claim for breach of contract, the plaintiff
2 must plead: 1) *the existence of the contract*; 2) plaintiff's
3 performance or excuse for nonperformance of the contract; 3)
4 defendant's breach of the contract; and 4) resulting damages."
5 Armstrong Petrol. Corp. v. Tri Valley Oil & Gas Co., 116 Cal.
6 App. 4th 1375, 1391 n. 6 (2004) (emphasis added). It is well
7 settled under California law "that there is no contract until
8 there has been a meeting of the minds on all material points."
9 Banner Entm't, Inc. v. Superior Court of Los Angeles County, 62
10 Cal. App. 4th 348, 357, 357-58 (1998) (emphasis removed).
11 Further, when it is clear that the proposed written contract
12 would become operative only when signed by the parties, the
13 failure to sign the agreement means no binding contract was
14 created. Id. at 358 (citing Beck v. Am. Health Group Int'l,
15 Inc., 211 Cal. App. 3d 1555, 1562 (1989)).

16 On a motion to dismiss, the court need not accept
17 allegations as true if they are contradicted by documents before
18 the court. Sprewell v. Golden State Warriors, 266 F.3d 979, 988
19 (9th Cir. 2001). "[W]hen a written instrument is attached to the
20 pleading and properly incorporated therein by reference, the
21 court may examine the exhibit and treat the pleader's allegations
22 of its legal effect as surplusage." Burnett v. Chimney Sweep,
23 123 Cal. App. 4th 1057, 1064 (2004) (quoting Lumbermens Mut. Cas.
24 Co. v. Vaughn, 199 Cal. App. 3d 171, 178 (1988)).

25 Plaintiff's allegations fail to sufficiently allege a
26 binding contract between plaintiff and BAC regarding a loan
27 modification. Indeed, plaintiff's claim that a binding contract
28 existed between BAC and himself is contradicted by BAC's

1 exhibits. In the first sentence of BAC's Exhibit C, the document
2 provides: "*If I am in compliance with this Trial Period Plan. . .*
3 *then the Servicer will provide me a . . . Modification Agreement*
4 *that would amend. . . the Loan Documents.*" (Request for Judicial
5 Notice ("RJN"), filed Nov. 19, 2010 [Docket #6], Exh. C, § 1)
6 (emphasis added).) Section 2, titled "The Trial Period Plan,"
7 further provides in pertinent part: "I understand that *the Plan*
8 *is not a modification of the Loan Documents* and that the Loan
9 Documents *will not be modified unless and until* (i) I meet all of
10 the conditions required for modification, (ii) I receive a fully
11 executed copy of a Modification Agreement. . . . I further
12 understand and agree that *the Servicer will not be obligated or*
13 *bound to make any modification* of the Loan Documents if I fail to
14 meet any one of the requirements under this Plan." (Id. at Ex.
15 C, § 2(G) (emphasis added).) Finally, Section 3, titled "The
16 Modification," provides in pertinent part: "*If I comply with the*
17 *requirements in Section 2 and . . . Section 1, the Servicer will*
18 *[determine the new payment amount and] send me a Modification*
19 *Agreement for my signature which will modify my Loan Documents. .*
20 *. . Upon execution of a Modification Agreement by the Servicer*
21 *and me, this Plan shall terminate and the Loan Documents, as*
22 *modified by the Modification Agreement, shall govern the terms*
23 *between the Servicer and me.*" (Id. at Ex. C, § 3) (emphasis
24 added).

25 Accordingly, Exhibit C makes clear that providing the
26 requested documents was simply a part of the application process,
27 which plaintiff was willing to complete in the hope that BAC
28 would modify his loan. Under the language of Exhibit C, a

1 binding modification would not result unless and until BAC
2 determined that plaintiff complied with the requirements. If BAC
3 so determined, then it would send plaintiff a modification
4 agreement, including a new monthly payment amount, which both
5 plaintiff and defendant would execute.

6 Plaintiff has not alleged or provided exhibits (1) that BAC
7 determined plaintiff had met the requirements or (2) that BAC
8 sent plaintiff a loan modification with a new monthly payment
9 that was then executed by both plaintiff and BAC. As such, no
10 binding contract has been alleged and BAC's motion to dismiss
11 plaintiff's breach of contract claim is GRANTED with leave to
12 amend.³

13 **C. Breach of Implied Covenant of Good Faith and Fair Dealing**

14 Plaintiff's second claim for relief asserts that BAC
15 breached the implied covenant of good faith and fair dealing.
16 Plaintiff's claim is based on the same assertions set forth under
17 his breach of contract claim; namely, that BAC breached the
18 implied covenant of good faith and fair dealing by "[f]ailing to
19 perform loan servicing functions consistent with its
20 responsibilities to plaintiff . . . , [f]ailing to properly
21 supervise its agents and employees . . . , [f]ailing to
22 permanently modify loans and/or provide alternatives to
23 foreclosure . . . , and [m]aking inaccurate calculations and

24
25 ³ Plaintiff also alleges breach of oral contract.
26 However, plaintiff's Complaint fails to set forth any facts
27 relating to when such an oral contract was made, with whom, and
28 under what terms. Plaintiff further fails to address the
viability of any oral agreement in his opposition. Accordingly,
defendant's motion to dismiss plaintiff's breach of contract
claim arising out of any alleged oral agreement is GRANTED with
leave to amend.

1 determinations of plaintiff's eligibility for trial or permanent
2 modification." (Compl. ¶ 83.)

3 "To establish a breach of an implied covenant of good faith
4 and fair dealing, a plaintiff must *establish the existence of a*
5 *contractual obligation*, along with conduct that frustrates the
6 other party's rights to benefit from the contract." Fortaleza v.
7 PNC Fin. Servs. Group, Inc., 642 F. Supp. 2d 1012, 1021-22 (N.D.
8 Cal. 2009) (emphasis added). Further, "a breach of the implied
9 covenant of good faith and fair dealing involves something beyond
10 breach of the contractual duty itself." Careau & Co. v. Sec.
11 Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1394 (1990). The
12 "implied covenant of good faith and fair dealing is limited to
13 assuring compliance with the express terms of the contract, and
14 cannot be extended to create obligations not contemplated by the
15 contract." Pasadena Live, LLC v. City of Pasadena, 114 Cal. App.
16 4th 1089, 1093-1094 (2004).

17 Because the court has concluded that plaintiff has not
18 sufficiently alleged the existence of a binding modification
19 agreement, BAC's motion to dismiss plaintiff's claim for breach
20 of the implied covenant of good faith and fair dealing is GRANTED
21 with leave to amend.

22 **D. Breach of Contract Based on Intended Third-Party Beneficiary**
23 **Status to the SPA**

24 Plaintiff's third claim for relief alleges that he is an
25 intended third-party beneficiary of the SPA between BAC and
26 Fannie Mae and that BAC breached the terms of the SPA. (Compl.
27 ¶¶ 89, 93). Plaintiff asserts that "[BAC] failed to perform
28 under its SPA contracts in a manner which directly impacts

1 [p]laintiff." (Compl. ¶ 92). Specifically, plaintiff argues
2 that he "is an intended third-party beneficiary sufficient to
3 expect that his loan would be 'considered' for modification under
4 HAMP rules." (Opp.'n at 12.) BAC moves to dismiss this claim
5 arguing that plaintiff "does not have standing to enforce the
6 SPA, and the SPA does not require that [BAC] modify [plaintiff's]
7 loan." (MTD at 13).

8 The SPA is "governed by and construed under Federal law."
9 (Compl. Exh. entitled "Commitment to Purchase Financial
10 Instrument and Servicer Participation Agreement" [hereinafter
11 "SPA"] § 11(A)). With regard to third-party beneficiaries, the
12 Restatement of Contracts guides the Ninth Circuit. See Klamath
13 Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1210-11
14 (9th Cir. 2000). To recover under a contract, a third party
15 "must show that the contract was made for its direct benefit -
16 that it is an intended beneficiary of the contract." Id. at 1210
17 (citing Williams v. Fenix & Scisson, Inc., 608 F.2d 1204,1208
18 (9th Cir. 1979)). The Restatement of Contracts distinguishes
19 between intended and incidental beneficiaries and explains:

20 (1) Unless otherwise agreed between promisor and
21 promisee, a beneficiary of a promise is an intended
22 beneficiary if recognition of a right to performance in
23 the beneficiary is appropriate to effectuate the
24 intention of the parties and . . . (b) the
25 circumstances indicate that the promisee intends to
26 give the beneficiary the benefit of the promised
27 performance.

28 (2) An incidental beneficiary is a beneficiary who is
not an intended beneficiary.

Restatement (Second) of Contracts § 302 (1979) ("Restatement").

"To sue as a third-party beneficiary of a contract, the
third party must show that the contract reflects the express or

1 implied intention of the parties to the contract to benefit the
2 third party." Klamath, 204 F.3d at 1211. More specifically, the
3 questions turns on "whether the beneficiary would be reasonable
4 in relying on the promise as manifesting an intention to confer a
5 right on him or her." Id. (citing Restatement § 302(1)(b) cmt.
6 d.).

7 "Parties that benefit from a government contract are
8 generally assumed to be incidental beneficiaries, and may not
9 enforce the contract absent a clear intent to the contrary.
10 Government contracts often benefit the public, but individual
11 members of the public are treated as incidental beneficiaries
12 unless a different intention is manifested." Id. at 1211
13 (internal citations and quotations omitted). The Ninth Circuit
14 has noted that "this 'clear intent' hurdle is not satisfied by a
15 contract's recitation of interested constituencies, vague
16 hortatory pronouncements, statements of purpose, explicit
17 reference to a third party, or even a showing that the contract
18 operates to the third parties' benefit and was entered into with
19 them in mind." County of Santa Clara v. Astra U.S.A., Inc., 588
20 F.3d 1237, 1244 (9th Cir. 2009) (internal citations and
21 quotations omitted). Instead, the precise language of the
22 contract must demonstrate a clear intent to rebut the presumption
23 that the third parties are merely incidental beneficiaries. Id.

24 In the present case, the documents attached to plaintiff's
25 Complaint demonstrate that plaintiff is an incidental third-party
26 beneficiary. Although the SPA between BAC and Fannie Mae was
27 entered into in part for the benefit of qualified borrowers, the
28 language of the SPA does not support the conclusion that BAC and

1 Fannie Mae intended to grant qualified borrowers the right to
2 enforce agreement. Section 11E of the SPA states that "[t]he
3 Agreement shall inure to the benefit of and be binding upon the
4 parties to the Agreement and their permitted successor-in-
5 interest." (SPA, §11E.)

6 The Ninth Circuit has held that similar language did not
7 manifest the parties' intent to grant third parties the right to
8 enforce the contract. Klamath 204 F.3d at 1212. In Klamath, a
9 group of irrigators attempted to assert third-party beneficiary
10 status to a contract between the United States and a dam
11 operator. Id. at 1210. Article 15 of the contract provided:

12 This contract binds and inures to the benefit of the
13 parties hereto, their successors and assigns, including
14 without limitation any water users' organization or
15 similar group which may succeed either by assignment or
by operation of law to the rights of the United States
hereunder.

16 Id. The Ninth Circuit concluded that the language of the
17 contract did not "give the [i]rrigators any rights besides those
18 of incidental beneficiaries, because they have not succeeded,
19 either by assignment or operation of law, to the rights of the
20 United States. Id. While acknowledging that the contract was
21 entered into with the irrigators in mind, the court reasoned that
22 allowing the irrigators intended third-party status would extend
23 to all persons receiving a benefit from the dam, a result not
24 intended by the parties to the contract. Id. Similarly, in this
25 case, as in Klamath, the SPA was entered into with qualified
26 borrowers in mind but the language of the contract does not
27 manifest a clear intent by the parties to grant qualified
28 borrowers the right to enforce the Agreement.

1 The majority of district courts in the Ninth Circuit have
2 likewise concluded that qualified borrowers cannot reasonably
3 rely on an alleged manifested intent to confer rights upon them
4 since the SPA does not require that BAC modify all eligible
5 loans. See Hammonds v. Aurora Loan Services, LLC, No. EDCV 10-
6 1025 AG (Opx), 2010 WL 3859069 (C.D. Cal. Sept. 27, 2010); Wright
7 v. Bank of America, N.A., No. CV 10-01723 JF (HRL), 2010 WL
8 2889117 (N.D. Cal. July 22, 2010); Hoffman v. Bank of America,
9 N.A., No. C 10-2171 SI, 2010 WL 2635773 (N.D. Cal. June 30,
10 2010); Simmons v. Countrywide Home Loans, Inc., No. 09cv1245
11 JAH(JMA), 2010 WL 2635220 (S.D. Cal. June 29, 2010); Zendejas v.
12 GMAC Wholesale Mortgage Corp., No. 1:10-CV-00184 OWW GSA, 2010 WL
13 2629899 (E.D. Cal. June 29, 2010); Marks v. Bank of America,
14 N.A., No. 03:10-cv-08039-PHX-JAT, 2010 WL 2572988 (D. Ariz. June
15 22, 2010); Lucero v. Countrywide Bank, N.A., No. 09cv1742 BTM
16 (BLM), 2010 WL 1880649 (S.D. Cal. May 10, 2010); Escobedo v.
17 Countrywide Home Loans, Inc., No. 09cv1557 BTM (BLM), 2009 WL
18 4981618, at *3 (S.D. Cal. Dec. 19, 2009); but see Marques v.
19 Wells Fargo Home Mortgage, Inc., No. 09-cv-1985-L(RBB), 2010 WL
20 3212131 (S.D. Cal. Aug. 12, 2010); Reyes v. Saxon Mortgage
21 Services, Inc., No. 09cv1366 DMS (WMC), 2009 WL 3738177 (S.D.
22 Cal. Nov. 5, 2009). Rather, these courts have concluded that the
23 SPA only requires that BAC consider plaintiff's loan for
24 modification. See Escobedo, 2009 WL 4981618, at *6.

25 Accordingly, BAC's motion to dismiss plaintiff's claim for
26 breach of contract based on the SPA is GRANTED without leave to
27 amend.

28 /////

1 **E. Promissory Estoppel**

2 Plaintiff's fourth claim for relief asserts that BAC "made a
3 representation to [p]laintiff that if he agreed to the terms of
4 [the Plan], . . . he would receive a permanent HAMP
5 modification." (Compl. ¶ 97.) Plaintiff further asserts that he
6 relied on BAC's alleged modification promise "to his detriment .
7 . . and has lost the opportunity to fund other strategies to deal
8 with his default and to avoid foreclosure." (Id. ¶ 99.) BAC
9 moves to dismiss plaintiff's promissory estoppel claim asserting
10 that "[p]laintiff would not be offered a modification unless and
11 until [p]laintiff met all conditions required for modification."
12 (MTD at 18.) BAC further asserts that plaintiff fails to allege
13 detrimental reliance because "[h]ad plaintiff not made any trial
14 payments, he would not have been able to fund other options, as
15 he was still obligated to make his normal monthly payments, which
16 exceeded the reduced payments he made under the Trial Period
17 Plan." (Id.) (emphasis removed).

18 Under California law, a cause of action for promissory
19 estoppel requires that plaintiff show "(1) a clear promise, (2)
20 reliance, (3) substantial detriment, and (4) damages measured by
21 the extent of the obligation assumed and not performed." Poway
22 Royal Mobilehome Owners Assn. v. City of Poway, 149 Cal. App. 4th
23 1460, 1471 (2007) (citations omitted). Under this doctrine, "a
24 promise which the promisor should reasonably expect to induce
25 action or forbearance on the part of the promisee or a third
26 person and which does induce such action or forbearance is
27 binding if injustice can be avoided only by enforcement of the
28 promise." Kajima/Ray Wilson v. Los Angeles County Metro. Transp.

1 Auth., 23 Cal. 4th 305, 310 (2000) (quoting Restatement (Second)
2 of Contracts, § 90(1) (1981)).

3 Plaintiff fails to sufficiently allege a claim for
4 promissory estoppel. First, as set forth in the analysis of
5 plaintiff's breach of contract claim, BAC made no promise to
6 provide plaintiff a permanent modification evidenced by BAC's
7 exhibits. Rather, the plain terms of Exhibit C expressly placed
8 plaintiff on notice that issuance of a loan modification was not
9 guaranteed by simply sending in the requested documentation and
10 making trial period payments. Indeed, the language of Exhibit C
11 provides that the modification was conditioned on BAC's
12 determination that plaintiff's information complied with the
13 Plan's requirements. If BAC found that it did, only then would
14 it send plaintiff a modification agreement which both plaintiff
15 and BAC must have executed. (RJN Exh. C.) As such, BAC made no
16 express promise to modify plaintiff's loan.

17 Second, plaintiff's complaint does not sufficiently allege
18 substantial detriment. Plaintiff alleges that his reliance on
19 BAC's alleged promise to modify his loan was to his detriment
20 because he lost the opportunity to pursue other strategies and
21 fund those strategies to deal with his default and avoid
22 foreclosure. (Compl. ¶ 99.) However, plaintiff fails to
23 substantiate this conclusory allegation with sufficient facts.
24 Even if plaintiff had not paid the reduced payments, he would
25 have been obligated to pay the full amount of the mortgage
26 because the Plan states that "all terms and provisions [of the
27 Note and Mortgage]. . . remain in full force." (RJN Exh. C at
28 Section 4 ¶ D.) In addition, plaintiff admits that as of January

1 2009, he "could no longer pay the full mortgage payment due to
2 his reduced earnings." (Compl. ¶ 58.) Thus, it is unclear how
3 plaintiff's other alleged opportunities were sacrificed in order
4 to comply with BAC's requests. As such, the court cannot find
5 plaintiff has alleged substantial detriment on the purported
6 promise.

7 Accordingly, BAC's motion to dismiss plaintiff's claim for
8 promissory estoppel is GRANTED with leave to amend.

9 **F. Rosenthal Fair Debt Collection Practices Act**

10 Plaintiff's fifth claim for relief alleges that BAC violated
11 California's Rosenthal Fair Debt Collection Practices Act
12 ("RFDCPA"). (Compl. ¶¶ 102-104.) Plaintiff argues that because
13 California's nonjudicial foreclosure statute specifically exempts
14 from the RFDCPA trustees conducting a trustee sale and because no
15 similar exemption is made for lenders and servicers, "such actors
16 may be held liable for any unlawful debt collection activities
17 during foreclosure." (Opp'n at 13.) BAC moves to dismiss
18 plaintiff's RFDCPA claim asserting that plaintiff "does not
19 allege any debt under the meaning of the RFDCPA[,] . . . and the
20 claim does not specifically allege any false, deceptive, or
21 unfair means." (MTD at 19.)

22 The RFDCPA precludes a debt collector from collecting or
23 attempting to collect from a debtor on a consumer debt in a
24 threatening or harassing manner. See Cal. Civ. Code § 1788 *et*
25 *seq.* (West 2010). Specifically, the RFDCPA prohibits threats,
26 obscenity, misleading or false communications, and overreaching
27 by debt collectors. Id. §§ 1788.10-.12, 1788.14-.16. The RFDCPA
28 defines a debt collector as "any person who in the ordinary

1 course of business, regularly, on behalf of himself or herself or
2 others, engages in debt collection." Id. § 1788.2(c).

3 Numerous courts within the Ninth Circuit have concluded that
4 foreclosure pursuant to a deed of trust is not the collection of
5 a debt within the meaning of the RFDCPA. Lal v. American Home
6 Servicing, Inc., 680 F. Supp. 2d 1218, 1224 (E.D. Cal. 2010);
7 Izenberg v. ETS Servs., LLC, 589 F. Supp. 2d 1193, 1199 (C.D.
8 Cal. 2008); see Wilson v. JPMorgan Chase Bank, NA., No. CIV.
9 2:09-863 WBS GGH, 2010 WL 2574032, *10 (E.D. Cal. June 25, 2010);
10 Chernik v. Bank of America Home Loans, No. 2:09-cv-02746 JAM-DAD,
11 2010 WL 3269797, *3 (E.D. Cal. Aug. 18, 2010); Ricon v.
12 Recontrust Co., No. 09-937, 2009 WL 2407396, at *4 (S.D.Cal. Aug.
13 4, 2009) (dismissing with prejudice plaintiff's unfair debt
14 collection claims in foreclosure case); Pittman v. Barclays
15 Capital Real Estate, Inc., No. 09-0241, 2009 WL 1108889, at *3
16 (S.D. Cal. Apr. 24, 2009) (dismissing with prejudice plaintiff's
17 Rosenthal Act claim in foreclosure case because a "residential
18 mortgage loan does not qualify as a 'debt' under the statute");
19 Gallegos v. Recontrust Co., No. 08-2245, 2009 WL 215406, at *3
20 (S.D. Cal. Jan. 28, 2009) (dismissing RFDCPA claim in foreclosure
21 case). Further, several courts within this Circuit have also
22 concluded that in mirroring certain provisions of the Federal
23 Debt Collection Practices Act ("FDCPA"), a mortgage servicing
24 company or any assignee of the debt is not considered a "debt
25 collector" under the RFDCPA. Lal, 680 F. Supp. 2d at 1224
26 (citing Nool v. HomeQ Servicing, 653 F. Supp. 2d 1047, 1053 (E.D.
27 Cal. 2009); Olivier v. NDEX West, LLC, No. 1:09-CV-00099 OWW GSA,
28 2009 WL 2486314, at *3 (E.D. Cal. Aug. 10, 2009); Cordova v.

1 America's Servicing Co., No. C 08-05728 SI, 2009 WL 1814592, at
2 *2 (N.D. Cal. June 24, 2009).

3 Plaintiff's complaint alleges that "[BAC] is a 'debt
4 collector' within the meaning of [the RFDCPA]." (Compl. ¶ 102.)
5 Under prevailing law among California district courts, defendant
6 BAC cannot be liable for such conduct under the RFDCPA because
7 the foreclosure is not a debt and BAC is not a debt collector
8 within the meaning of the statute. Accordingly, the defendant's
9 motion to dismiss plaintiff's fifth claim for relief for
10 violations of the RFDCPA is GRANTED with leave to amend.

11 **G. California Business & Professions Code § 17200**

12 In his sixth claim for relief, plaintiff alleges that BAC
13 violated § 17200 of the California Business and Professions Code
14 ("UCL") by using unfair and fraudulent business practices.
15 (Compl. ¶ 108.) BAC moves to dismiss plaintiff's UCL claim
16 contending that plaintiff does not sufficiently "allege[] any
17 predicate unlawful, unfair, or fraudulent acts."⁴ (MTD at 20.)

18 UCL forbids acts of unfair competition, which includes "any
19 unlawful, unfair or fraudulent business act or practice." Cal.
20 Bus. & Prof. Code § 17200. UCL "incorporates other laws and
21 treats violations of those laws as unlawful business practices
22 independently actionable under state law." Plascencia v. Lending
23 1st Mortg., 583 F. Supp. 2d 1090, 1098 (N.D. Cal. 2008); see also

24
25 ⁴ Defendant also moves to dismiss on the basis that
26 plaintiff has not sufficiently alleged loss of money or property,
27 and thus, does not have standing to sue. (MTD at 20.) Because
28 the court concludes that plaintiff has not stated a viable claim
based on the factual allegations regarding defendant's conduct,
the court does not reach the merits of whether plaintiff has
sufficiently alleged loss of money or property.

1 Farmers Ins. Exch. v. Superior Court, 2 Cal. 4th 377, 383 (1992).
2 "California's UCL has a broad scope that allows for 'violations
3 of other laws to be treated as unfair competition that is
4 independently actionable' while also 'sweep[ing] within its scope
5 acts and practices not specifically proscribed by any other
6 law.'" Hauk v. JP Morgan Chase Bank U.S.A., 552 F.3d 1114 (9th
7 Cir. 2009) (internal citations omitted). "Violation of almost
8 any federal, state, or local law may serve as the basis for a UCL
9 claim." Plascencia, 583 F. Supp. 2d at 1098 (citing Saunders v.
10 Superior Court, 27 Cal. App. 4th 832, 838-839 (1994)).

11 Because plaintiff's UCL claim against BAC is predicated on
12 facts supporting his breach of contract, breach of the implied
13 covenant of good faith and fair dealing, promissory estoppel, and
14 violation of the RFDCPA claims, all of which the court has
15 dismissed, the defendant's motion to dismiss plaintiff's sixth
16 claim for relief for violations of California Business &
17 Professions Code § 17200 is GRANTED with leave to amend.

18 **CONCLUSION**

19 For the foregoing reasons, BAC's motion to dismiss is
20 GRANTED. Plaintiff's claims are dismissed with leave to amend.
21 Plaintiff is granted fifteen (15) days from the date of this
22 order to file a first amended complaint in accordance with this
23 order. Defendant is granted thirty (30) days from the date of
24 service of plaintiff's first amended complaint to file a response
25 thereto.

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IT IS SO ORDERED.

DATED: January 13, 2011



FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE

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