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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GENNADY SHAPIRO,)	Case No. 2:11-CV-00576-JAM-CMK
)	
Plaintiff,)	
)	
v.)	
)	
BANK OF AMERICA, N.A.; PRLAP,)	ORDER GRANTING DEFENDANTS'
INC.; RECONSTRUCT COMPANY, N.A.;)	MOTION TO DISMISS
BAC HOME LOANS SERVICING, LP;)	
VERDUGO TRUSTEE SERVICE)	
CORPORATION; CITIBANK, N.A.;)	
MORTGAGE ELECTRONIC REGISTRATION)	
SYSTEMS, INC.; and DOES 1)	
through 20, inclusive,)	
)	
)	
Defendants.)	

This matter comes before the Court on Defendants Bank of America, N.A. ("BANA"), PRLAP, Inc. ("PRLAP"), BAC Home Loans Servicing, LP ("BAC"), and Recontrust Company, N.A.'s ("Recontrust") (collectively "Defendants") Motion to Dismiss ("MTD") (Doc. #16) Plaintiff Gennady Shapiro's ("Plaintiff") Amended Complaint (Doc. #12), pursuant to Federal Rule of Civil Procedure 12(b)(6).¹ Plaintiff opposes the motion (Doc. #32).

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was originally scheduled for September 7, 2011.

1 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

2 This action arises out of a nonjudicial foreclosure of real
3 property located at 8120 Lone Pine Place, Granite Bay, California
4 ("the Property"). See Am. Compl. ¶ 1. In July, 2005 Plaintiff
5 executed a written Deed of Trust with BANA as beneficiary. Am.
6 Compl. ¶ 17. The original trustee was PRLAP. Am. Compl. Ex. C.
7 In October 2010, Recontrust recorded a Notice of Default and
8 Election to Sell Under Deed of Trust ("Notice of Default") on the
9 Property. Am. Compl. Ex. I. Two days later, Recontrust recorded a
10 Substitution of Trustee executed by BANA on October 25, 2010 naming
11 Recontrust as the replacement trustee. Am. Compl. Ex. J.
12 Subsequently, Recontrust recorded a Notice of Trustee's Sale, and
13 the Property was foreclosed upon. Am. Compl. Ex. K. Plaintiff's
14 Amended Complaint alleges, generally, that the foreclosure was
15 improper.

16 The Complaint and supporting exhibits also indicate that the
17 Property was subject to other liabilities involving other
18 Defendants who recorded numerous encumbrances and other documents
19 related to the Property. Am. Compl. ¶ 20 ("Chain of Title
20 Problems"). The motion currently before the Court is only relevant
21 to claims against Defendants BANA, PRLAP, BAC and Recontrust, which
22 all arise out of the July, 2005 Deed of Trust executed by Plaintiff
23 in BANA's favor and the foreclosure proceedings resulting from that
24 instrument.

25 For the reasons set forth below, Defendants' Motion to Dismiss
26 is GRANTED in its entirety.

1 II. OPINION

2 A. Legal Standard

3 A party may move to dismiss an action for failure to state a
4 claim upon which relief can be granted pursuant to Federal Rule of
5 Civil Procedure 12(b)(6). In considering a motion to dismiss, the
6 court must accept the allegations in the complaint as true and draw
7 all reasonable inferences in favor of the plaintiff. Scheuer v.
8 Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by
9 Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319,
10 322 (1972). Assertions that are mere "legal conclusions," however,
11 are not entitled to the assumption of truth. Ashcroft v. Iqbal,
12 129 S. Ct. 1937, 1950 (2009) (citing Bell Atl. Corp. v. Twombly,
13 550 U.S. 544, 555 (2007)). To survive a motion to dismiss, a
14 plaintiff needs to plead "enough facts to state a claim to relief
15 that is plausible on its face." Twombly, 550 U.S. at 570.
16 Dismissal is appropriate where the plaintiff fails to state a claim
17 supportable by a cognizable legal theory. Balistreri v. Pacifica
18 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

19 Upon granting a motion to dismiss for failure to state a
20 claim, the court has discretion to allow leave to amend the
21 complaint pursuant to Federal Rule of Civil Procedure 15(a).
22 "Dismissal with prejudice and without leave to amend is not
23 appropriate unless it is clear . . . that the complaint could not
24 be saved by amendment." Eminence Capital, L.L.C. v. Aspeon, Inc.,
25 316 F.3d 1048, 1052 (9th Cir. 2003).

26 B. Judicial Notice

27 In this case, both parties submit requests for judicial
28 notice. Generally, the Court may not consider material beyond the

1 pleadings in ruling on a motion to dismiss for failure to state a
2 claim. The exceptions are material attached to, or relied on by,
3 the complaint so long as authenticity is not disputed, or matters
4 of public record, provided that they are not subject to reasonable
5 dispute. E.g., Sherman v. Stryker Corp., 2009 WL 2241664 at *2
6 (C.D. Cal. Mar. 30, 2009) (citing Lee v. City of Los Angeles, 250
7 F.3d 668, 688 (9th Cir. 2001) and Fed. R. Evid. 201).

8 Plaintiff filed an "Exhibit Index and Exhibits A-L to
9 Plaintiff's First Amended Complaint," attaching the Legal
10 Description of Property, Grant Deed, Deed of Trust, Full
11 Reconveyance (August 16, 2005), Full Reconveyance (August 22,
12 2005), Substitution of Trustee (October 20, 2005), Full
13 Reconveyance (October 20, 2005), Deed of Realty in Trust (April 17,
14 2008), Notice of Default, Substitution of Trustee (October 28,
15 2010), Notice of Trustee's Sale, and Deed of Trust [Second
16 Mortgage] (Doc. #12-2, Exs. A-L). Defendants also request that
17 this Court take judicial notice of the Deed of Trust, Notice of
18 Default, Substitution of Trustee (October 28, 2005), and Notice of
19 Trustee's Sale. See Defs' Request for Judicial Notice ("RJN"),
20 Doc. #16-2, Exs. A-D. As Plaintiff did not object to Defendants'
21 request, and because he relies on these documents in his Complaint,
22 this Court will GRANT Defendants' request and take judicial notice
23 of the Deed of Trust, Substitution of Trustee (October 28, 2005),
24 Notice of Default, and Notice of Trustee's Sale (Defs.' RJN,
25 Exhibits A-D) in accordance with Federal Rule of Evidence 201.

26 Plaintiff also included a request for judicial notice in his
27 Opposition to Defendants' Motion to Dismiss, asking this Court to
28 consider two consent orders entered by federal agencies and signed

1 by personnel associated with various defendants in this litigation
2 (Doc. #32-1, Exs. A-B). These documents are irrelevant to the
3 pending motion to dismiss, and this case, and Plaintiff's request
4 as to Exhibits A and B to his Opposition is accordingly DENIED.
5 See Fed. R. Evid. 201.

6 C. Motion to Dismiss

7 1. Defendant Recontrust's Standing to Foreclose

8 As a threshold matter, Plaintiff argues that Recontrust did
9 not have standing to initiate proceedings pursuant to California's
10 non-judicial foreclosure statutes. Whether or not Recontrust was
11 the correct entity to proceed with the foreclosure bears on
12 multiple causes of action in Plaintiff's Amended Complaint. The
13 Court addresses this preliminary issue first.

14 Plaintiff specifically alleges that Recontrust was not
15 properly made trustee prior to the October 26, 2010 filing of the
16 Notice of Default because the Substitution of Trustee was not
17 recorded until two days later on October 28, 2010. Defendant
18 responds that the Substitution of Trustee does not need to be
19 recorded to be valid.

20 Cal. Civ. Code § 2934(a)(1) clearly states that a trustee "may
21 be substituted by the recording in the county in which the property
22 is located of a substitution executed. . . ." Cal. Civ. Code
23 § 2934(a)(1). The executed substitution must be acknowledged by
24 either all of the beneficiaries to the deed of trust or at least
25 50% of the beneficiaries of a series of notes secured by the
26 property. Cal. Civ. Code §§ 2934(a)(1)(A)-(B). In order to
27 proceed with a non-judicial foreclosure, a notice of default must
28 be recorded by the trustee, mortgagee, or beneficiary of the deed

1 of trust. Cal. Civ. Code § 2924(a)(1). "The statutory
2 requirements must be strictly complied with, and a trustee's sale
3 based on a statutorily deficient notice of default is invalid."
4 Anderson v. Heart Fed. Sav. & Loan Ass'n, 256 Cal. Rptr. 180, 185
5 (Ct. App. 1989) (internal citations omitted).

6 In this case, the Court relies on the facts as stated in
7 Plaintiff's Amended Complaint and the documents attached to his
8 complaint, which were also included in Defendants' request for
9 judicial notice. Plaintiff alleges that Recontrust was substituted
10 as trustee when Recontrust recorded the Notice of Substitution on
11 October 28, 2010, two days after the Notice of Default was filed on
12 October 26, 2010. Defendants' response that recording the notice
13 of substituted trustee was not necessary fails in light of the
14 statutory requirement to record the notice. Cal. Civ. Code
15 § 2934a(a)(1). Further, Plaintiff's argument that a Substitution
16 of Trustee must be recorded is supported by California case law.
17 Pro Value Props., Inc. v. Quality Loan Serv. Corp., 88 Cal.Rptr.3d
18 381, 383 (Ct. App. 2009) ("[The purported trustee] was not the
19 trustee named in the deed of trust, and so was required to record a
20 Substitution of Trustee pursuant to Civil Code section 2934a.");
21 Anderson, 256 Cal. Rptr. at 185 (the statutory notice requirements
22 must be strictly complied with).

23 While the Substitution of Trustee appointing Reconstruct as
24 trustee on the Deed of Trust was recorded two days after the Notice
25 of Default, this deficiency does not necessarily entitle Plaintiff
26 to relief. In Ferguson v. Avelo Mortg., LLC, as modified on June
27 1, 2011, the purported trustee filed a notice of default before it
28 was actually substituted as trustee. 126 Cal.Rptr.3d 586, 595 (Ct.

1 App. 2011). The problem was cured three months later by the time
2 the notice of sale was recorded, and the Court of Appeals upheld
3 the resulting sale. Id. Further, another California court held
4 that a one minute lag between recording a substitution of trustee
5 and a notice of default was not a sufficient basis to void an
6 otherwise proper notice of default. U. S. Hertz, Inc. v. Niobrara
7 Farms, 116 Cal. Rptr. 44, 55 (Ct. App. 1974). In order for a
8 plaintiff to state a claim based on a tardily recorded substitution
9 of trustee, the plaintiff's complaint must allege some prejudice
10 resulting from the deficiency. Id.; Pedersen v. Greenpoint
11 Mortgage Funding, Inc., No. S-11-0642 KJM EFB, 2011 WL 3818560, at
12 *21 (E.D. Cal. Aug. 29, 2011). In the present matter, Plaintiff's
13 complaint does not allege that his rights were prejudiced by the
14 two day delay in recording the Substitution of Trustee. Without
15 such an allegation, Plaintiff has not pleaded that the Notice of
16 Default was statutorily deficient. U. S. Hertz, 116 Cal. Rptr. at
17 55.

18 For these reasons, the Court finds that Plaintiff has failed
19 to allege that Defendant Reconstruct lacked standing to initiate
20 foreclosure proceedings against the Property.

21 2. Federal Claims for Relief

22 a. Violations of Truth in Lending Act

23 Plaintiff alleges that Defendants violated the Truth in
24 Lending Act ("TILA"), 15 U.S.C. § 1605, and Regulation Z, 12 C.F.R.
25 §§ 226.4, 226.18, by failing to make required disclosures. Am.
26 Compl. ¶¶ 55-56. Defendants argue that Plaintiff failed to file
27 his claim within the time period required by TILA, and that the
28 claim was not properly pleaded.

1 Plaintiff lists a number of disclosures that Defendants
2 allegedly failed to make, as required by TILA, when the loan was
3 created. He re-lists the alleged faulty disclosures essentially
4 without argument in his Opposition. Am. Compl. ¶ 56; Opp., at 16.
5 Defendants' argument rests on a conclusory statement that
6 "Plaintiff generically refers to the fact that 'certain charges'
7 were [sic] failed to be disclosed," but Defendants do not address
8 the specific deficiencies identified in the Amended Complaint.
9 MTD, at 5. While the deficiencies identified by Plaintiff might be
10 sufficient to defeat this motion to dismiss, Defendants also raise
11 the statute of limitations and Plaintiff's failure to plead tender
12 to support dismissal, which makes it unnecessary for the Court to
13 determine if the alleged nondisclosures state a claim upon which
14 relief can be granted.

15 The statute of limitations for a TILA damages claim is one
16 year from the occurrence of a violation. 15 U.S.C. § 1640(e).
17 Under 15 U.S.C. § 1635(f), TILA rescission claims expire three
18 years after the date of consummation of the transaction, or upon
19 sale of the property, whichever occurs first. The limitations
20 periods for both damages and rescissions actions run from the date
21 of consummation of the transaction. Wadhwa v. Aurora Loan
22 Services, LLC, 2011 WL 1601593, *2 (E.D. Cal. April 27, 2011)
23 (citing King v. California, 784 F.2d 910, 915 (9th Cir.1986)).

24 In this case, Plaintiff filed his original Complaint on March
25 1, 2011 more than five years after the loan was executed in July
26 2005. Thus, the Court finds that the filing of the present action
27 was outside of both TILA limitations periods.

1 Plaintiff does not disagree that the action was filed outside
2 of the applicable limitations period, but argues that the
3 limitations period should be tolled by the Court. Plaintiff's
4 argument is that the statute of limitations should be tolled
5 because he is a lay person unfamiliar with federal and state law.
6 He also argues that as an alleged victim of fraud, he did not have
7 a reasonable opportunity to discover Defendant's fraudulent
8 activities with respect to the loan. Opp., at 11-12.

9 In the Ninth Circuit, "[e]quitable tolling may be applied if,
10 despite all due diligence, a plaintiff is unable to obtain vital
11 information bearing on the existence of his claim." Santa Maria v.
12 Pacific Bell, 202 F.3d 1170, 1178 (9th Cir. 2000) (citing Holmberg
13 v. Armbrecht, 327 U.S. 392, 397 (1946)). Importantly:

14 [E]quitable tolling does not depend on any wrongful
15 conduct by the defendant to prevent plaintiff from
16 suing. Instead it focuses on whether there was
17 excusable delay by the plaintiff. If a reasonable
18 plaintiff would not have known the existence of a
19 possible claim within the limitations period, then
equitable tolling will serve to extend the statute of
limitations for filing suit until plaintiff can gather
what information he needs.

20 Id. (citing Thelen v. Marc's Big Boy Corp., 64 F.3d 264, 268 (7th
21 Cir. 1995)) (other citations omitted).

22 Plaintiff failed to plead facts in his Amended Complaint
23 sufficient to meet the due diligence requirement for equitable
24 tolling. On the one hand, Plaintiff pleaded that he first learned
25 of Defendants' actions in November 2010 because the alleged non-
26 disclosures and fraudulent actions of Defendants were not apparent
27 from the face of the loan documents. Am. Compl. ¶ 63. On the
28 other, Plaintiff pleaded that "upon inspection of the [Deed of

1 Trust] and Note [received in 2005], Plaintiff began to question
2 whether those documents had been properly drafted." Am. Compl.
3 ¶ 58. Plaintiff does not explain his lack of diligence in
4 investigating the improperly drafted documents in 2005, when he
5 received them. Further, Plaintiff alleges no facts that show that
6 he was diligent through other means in trying to discover
7 Defendants' alleged fraud. Compare Von Brincken v.
8 Mortgageclose.Com, Inc., No. 2:10-CV-2153-JAM-KJN, 2011 WL 2621010,
9 at *3 (E.D. Cal. June 30, 2011) (finding a very similar TILA claim,
10 filed by Plaintiff's counsel, was barred by the statute of
11 limitations and that plaintiff failed to plead facts supporting the
12 application of equitable tolling in his second amended complaint).
13 Since Plaintiff did not plead facts sufficient to justify equitable
14 tolling, the Court declines to toll the statute of limitations.

15 Finally, Defendants argue that Plaintiff's TILA claim should
16 be dismissed because he failed to plead that he tendered or offered
17 to tender the full amount of the loan to the lender, which is a
18 condition for rescission under TILA. Plaintiff responds that no
19 tender requirement is necessary.

20 When a plaintiff seeks to rescind a loan under TILA, he must
21 first make an offer of complete tender. See e.g. Little v. Accent
22 Conservatory & Sunroom Designs, 2011 WL 2215816, at *3 (S.D. Cal.
23 June 7, 2011).² Here, Plaintiff did not plead tender, but only
24 argues that pleading tender is unnecessary. Plaintiff's position
25 is incorrect.

26
27 ² Plaintiff's counsel should be well aware of this rule, as a claim
28 she filed on behalf of a different plaintiff was recently dismissed
on the same grounds by this Court. Von Brincken v.
Mortgageclose.Com, Inc., No. 2:10-CV-2153-JAM-KJN, 2011 WL 2621010,
at *3 (E.D. Cal. June 30, 2011).

1 Accordingly, Plaintiff's TILA claim is dismissed without
2 prejudice.

3 b. Violations of RESPA

4 Plaintiff alleges that Defendants violated the Real Estate
5 Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607, by
6 "except[ing] [*sic*] charges for the rendering of real estate
7 services which were in fact charges for other than services [*sic*]
8 actually performed. . . ." Am. Compl. ¶ 65.

9 RESPA proscribes referral fees or fee splitting "in
10 connection with a transaction involving a federally related
11 mortgage loan. . . ." 12 U.S.C. § 2607(a), (b). Plaintiff
12 alleges that fees were collected to "purchase securities and the
13 attendant fees [*sic*] provided for in the MBST Master Sales and
14 Servicing Agreement." Am. Compl. ¶ 65. Plaintiff does not explain
15 anywhere in the Amended Complaint or his Opposition what the MBST
16 is, or why the fees assessed were improper. Defendants argue that
17 there is no indication in Plaintiff's pleading as to what the
18 charges were or how they were collected. MTD, at 6. Without some
19 indication in the complaint as to what fees Plaintiff is referring
20 to, his claim cannot survive Defendants' motion.

21 Plaintiff also alleges violations of 12 U.S.C. § 2605. As
22 Defendants argue and Plaintiff's Amended Complaint points out,
23 § 2605 requires a servicer to take certain actions when a Qualified
24 Written Request ("QWR") is received. 12 U.S.C. § 2605; Amd. Compl.
25 ¶ 66. Plaintiff does not plead, however, that he sent a QWR to
26 anyone at all. The Court is unable to determine how § 2605 applies
27 in this situation, and Plaintiff offers no explanation in his
28 Opposition to Defendants' motion. Opp., at 17-18.

1 Defendants also seek dismissal on the grounds that both of
2 these claims fall outside of the applicable statute of limitations.
3 MTD, at 6 (citing 12 U.S.C. § 2614). Plaintiff argues that the
4 limitations period should be tolled, but that argument fails for
5 the same reasons stated above.

6 Accordingly, Plaintiff's RESPA claims are dismissed without
7 prejudice.

8 c. Violations of FCRA

9 Plaintiff alleges that Defendants violated the Fair Credit
10 Reporting Act ("FCRA"), 15 U.S.C. § 1681, by "wrongfully,
11 improperly, and illegally report[ing] negative information as to
12 Plaintiff . . . resulting in Plaintiffs [sic] negative information
13 on their credit reports and lowering of their [sic] FICO scores."
14 Am. Compl. ¶ 70. Defendants argue that they are not "credit
15 reporting agencies" for purposes of FCRA, and that FCRA only
16 applies to credit reporting agencies. MTD, at 7. Defendants'
17 argument is inapplicable because Plaintiff brings a claim under
18 § 1681s-2(b), which deals with entities that furnish information to
19 the credit reporting agencies. 15 U.S.C. §§ 1681n-1681o, 1681s-
20 2(b).

21 There is a private right of action for violations of section
22 1681s-2(b) of FRCA. Matracia v. JP Morgan Chase Bank, 2011 WL
23 1833092 at *3 (E.D. Cal. May 12, 2011). However, to succeed on
24 such a claim, a plaintiff must allege that he had a dispute with a
25 credit reporting agency regarding the accuracy of an account, that
26 the credit reporting agency notified the furnisher of the
27 information, and that the furnisher failed to take the remedial
28 measures outlined in the statute. Id. Plaintiff has not pleaded

1 the requisite elements of this cause of action in his complaint,
2 namely that he first disputed the allegedly incorrect information
3 with the credit bureaus. Accordingly, his FCRA claim is dismissed
4 without prejudice.

5 d. Civil Rico Violations

6 Plaintiff alleges that Defendants participated in a conspiracy
7 through a pattern of racketeering activities, with multiple
8 entities and parties constituting a civil and criminal enterprise
9 designed to defraud Plaintiff in violation of the Civil Racketeer
10 Influenced and Corrupt Organizations Act ("RICO"). Comp. at ¶¶ 93-
11 96.

12 To properly plead a civil RICO claim for damages, a plaintiff
13 must show that defendants, through two or more acts constituting a
14 pattern, participated in an activity affecting interstate commerce.
15 E.g., McAnelly v. PNC Mortgage, 2011 WL 318575 at *3 (E.D. Cal.
16 Feb. 1, 2011). Moreover, Rule 9(b)'s heightened pleading
17 requirement "applies to civil RICO fraud claims." Edwards v. Marin
18 Park, Inc., 356 F.3d 1058, 1065-66 (9th Cir. 2004) (citing Alan
19 Neuman Prods., Inc. v. Albright, 862 F.2d 1388, 1392 (9th Cir.
20 1989)).

21 Defendants correctly assert that Plaintiff's conclusory
22 allegations regarding the alleged RICO violations fall well short
23 of the Rule 9(b) particularity requirements. MTD, at 12-13; accord
24 Edwards, 356 F.3d at 1066. Defendants correctly point out that
25 while Plaintiff alleges the participation of multiple entities in
26 the RICO enterprise, he fails to establish what those entities are
27 and how they actually participated. Id. Plaintiff's allegations
28 lack any substantiating facts, and this Court cannot discern from

1 Plaintiff's conclusory allegations whether or not there was a
2 pattern of racketeering.

3 Accordingly, Defendants' Motion to Dismiss is granted, and
4 Plaintiff's RICO claim is dismissed without prejudice.

5 3. Plaintiff's State Law Claims

6 a. Fraud

7 Plaintiff alleges that BANA concealed material information
8 from him, in violation of state and federal regulations. Am.
9 Compl. ¶ 76. Specifically, Plaintiff alleges that he was not
10 informed that his loan would be conveyed to a third party, or that
11 his loan payments were going to be used by Bank of America to pay
12 fees, buy insurance, and buy other credit enhancements on behalf of
13 a third party. Id. Defendants respond that Plaintiff has not met
14 his pleading burden because he failed to allege the necessary
15 elements to support his fraud claim. MTD, at 8-9.

16 Federal Rule of Civil Procedure 9(b) provides a heightened
17 pleading standard, which applies to all "averments of fraud,"
18 regardless of whether or not "fraud" is an essential element of the
19 claim. Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1103-1105 (9th
20 Cir. 2003). Rule 9(b) provides that "[i]n alleging fraud or
21 mistake, a party must state with particularity the circumstances
22 constituting fraud or mistake," meaning a plaintiff must plead the
23 "time, place, and specific content of the false representations, as
24 well as the identities of the parties to the misrepresentations."
25 Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (internal
26 quotations and citations omitted).

1 Importantly, when a plaintiff pleads a claim for fraud against
2 multiple defendants:

3 Rule 9(b) does not allow a complaint to merely lump
4 multiple defendants together but requires plaintiff[]
5 to differentiate [his] allegations when suing more
6 than one defendant . . . and inform each defendant
7 separately of the allegations surrounding his alleged
8 participation in the fraud. . . . [A] plaintiff must,
9 at a minimum, identify the role of each defendant in
10 the alleged fraudulent scheme.

11 Id. at 764-65 (quotations omitted).

12 Defendants correctly assert that Plaintiff's allegations of
13 fraud are conclusory and lack the specificity required by Rule
14 9(b). MTD, at 8-9. Indeed, Plaintiff does not present any factual
15 detail regarding the time, place, or specific content of the
16 alleged misrepresentations by Defendants. Am. Compl. ¶¶ 76-77.
17 While Plaintiff does allege specific misrepresentations made by
18 BANA, he does not detail the time or place of those alleged
19 misrepresentations. Id. ¶ 76. In the next paragraph, Plaintiff
20 reverts to allegations of fraud against "BANK OF AMERICA and/or
21 RECONTRUST," which fails to specify with the particularity required
22 by Rule 9(b) which Defendant committed the alleged fraud, but
23 instead lumps them together under general allegations. Id. ¶ 77-
24 80.

25 Defendants also point out that Plaintiff's claim is barred by
26 the applicable three-year statute of limitations. MTD, at 8; Cal.
27 Civ. Proc. Code § 338. Plaintiff's Complaint includes the same
28 conclusory statement regarding the equitable tolling under his
fraud claim as he does under his federal claims, discussed above,
which lacks the factual specificity required to toll the
limitations period. Compl. at ¶ 85.

1 Because Plaintiff's fraud claim as currently pled is time-
2 barred and his Complaint fails to meet the pleading standard set by
3 Rule 9(b), Plaintiff's fraud claim is dismissed without prejudice.

4 b. Unjust Enrichment

5 Plaintiff alleges that Defendants retained "benefits from
6 their actions of charging a higher interest rate, fees, rebates,
7 kickbacks, profits . . . and gains and yield spread premium fees,
8 fees paid to Server, unrelated to the settlement services provided
9 at closing [sic]," unjustly, and to Plaintiff's detriment. Comp.
10 at ¶¶ 86-87.

11 Many California courts have made clear that unjust enrichment
12 is not a cause of action. See, e.g., Jogani v. Superior Court, 165
13 Cal.App.4th 901, 911 (2008) (citing Melchior v. New Line Products,
14 106 Cal.App.4th 779, 793 (2003)). Additionally, under California
15 law, it is well settled that an action based upon an implied-in-
16 fact contract or quasi-contract cannot lie where there exists a
17 valid express contract covering the same subject matter between the
18 parties. Solano v. America's Servicing Company, 2011 WL 1669735 at
19 *7 (E.D. Cal. May 3, 2011). Notably, Plaintiff does not present
20 law that supports the viability of such a claim. See Opp. at pgs.
21 21-22.

22 Because Plaintiff has pled an uncognizable claim, Defendants'
23 Motion to Dismiss is granted and Plaintiff's claim for unjust
24 enrichment is dismissed. It is clear that allowing amendment would
25 be futile as to this claim, as it is not recognized under
26 California law, and Plaintiff is not entitled to implied-in-fact or
27 quasi-contract relief due to the relationship between the parties.
28 See Jogani, 165 Cal.App.4th at 911 (citing Melchior v. New Line

1 Products, 106 Cal.App.4th 779, 793 (2003)). Accordingly,
2 Plaintiff's claim for unjust enrichment is dismissed with
3 prejudice.

4 c. Breach of Security Instrument

5 Plaintiff alleges that Defendants improperly foreclosed on his
6 property for a number of reasons: 1) only the Lender can initiate
7 foreclosure according to the Deed of Trust, 2) the Substitution of
8 Trustee is void due to fraud and because it was not executed by the
9 Lender, 3) the Notice of Default was recorded prior to the
10 assignment of the loan, and 4) Defendants failed to meet their
11 obligations under the Deed of Trust prior to initiating foreclosure
12 proceedings. Am. Compl. ¶¶ 117-118.

13 Preliminarily, the Court notes with great concern that
14 Plaintiff's Amended Complaint refers to several entities that are
15 not parties to the present action. Am. Compl. ¶ 117 (referencing
16 Quality Loan and Financial Title Company). This section also
17 refers to documents and dates that contradict allegations made in
18 other parts of Plaintiff's Amended Complaint. Id. (Referring to
19 Substitution of Trustee involving Quality Loan on November 25,
20 2009). It appears that Plaintiff's counsel cut and paste portions
21 of the Amended Complaint from pleadings prepared for other cases,
22 causing significant inconsistencies with the pleading. These
23 errors make it difficult to ascertain the nature of Plaintiff's
24 allegations. For this reason, among others, boilerplate or "cut
25 and paste" pleadings are strongly discouraged by this Court.

26 The Court now addresses each of the allegations listed under
27 this cause of action. Plaintiff's allegation that only the Lender,
28 according to the Deed of Trust, may initiate foreclosure

1 proceedings is contradicted by the plain language of the Deed of
2 Trust. The Deed of Trust states, "If Lender invokes the power of
3 sale, Lender shall execute or cause Trustee to execute a written
4 notice of an event of default and of Lender's election to cause the
5 Property to be sold." Am. Compl. Ex. C, at 9 (emphasis added).
6 The Deed of Trust permits the Trustee to, upon the Lender's
7 authorization, initiate foreclosure proceedings.

8 The Substitution of Trustee is not void, as discussed above.
9 See supra Part II.C.1. Plaintiff's conclusory reassertion that the
10 Substitution of Trustee was fraudulent does not meet the pleading
11 standard contained in Rule 9(b), as discussed above.

12 Plaintiff alleges that the Notice of Default was not recorded
13 prior to the assignment of the loan. Plaintiff has not alleged
14 that the loan was ever assigned, and the documents attached to the
15 Amended Complaint indicate that the loan was never assigned making
16 these allegations irrelevant.

17 Finally, Plaintiff alleges that Defendants failed to comply
18 with "any of the expressed provisions of the Deed of Trust." Am.
19 Compl., at 33. Defendants argue that the necessary notices were
20 properly recorded and were valid. MTD, at 19. The Court agrees
21 that Plaintiff has failed to sufficiently allege that the Notice of
22 Default and Substitution of Trustee are invalid. See supra Part
23 II.C.1. Further, the allegation that Defendants failed to comply
24 with "any expressed provisions of the Deed of Trust" does not meet
25 the applicable pleading standard. Nearly identical allegations
26 were dismissed as conclusory and vague in Von Brincken v.
27 Mortgageclose.Com, Inc., No. 2:10-CV-2153-JAM-KJN, 2011 WL 2621010,
28 at *7 (E.D. Cal. June 30, 2011), and Matraccia v. JP Morgan Chase

1 Bank, NA, No. CIV. 2:11-190 WBS JFM, 2011 WL 1833092, at *5-6 (E.D.
2 Cal. May 12, 2011). This Court likewise finds that Plaintiff has
3 failed to state a claim for breach of the security instrument, and
4 the claim is dismissed without prejudice.

5 d. Wrongful Foreclosure

6 Plaintiff alleges that Defendants did not have standing to
7 foreclose, and if they did have standing, that they failed to
8 comply with California Corporations Code § 313 and California Civil
9 Code § 2923.5. Defendants respond that they did have standing to
10 foreclose, and that they complied with the statutory requirements.

11 As discussed in Part II.C.1, supra, Plaintiff's claim that
12 Defendants did not have standing to foreclose is not adequately
13 pleaded.

14 Plaintiff claims that the Substitution of Trustee is not valid
15 because the individual did not list his corporate capacity along
16 with his signature, as required by California Corporations Code
17 § 313. Am. Compl. ¶ 120. Section 313, however, does not require
18 that the signatory list his corporate capacity. It merely states
19 that certain officers may bind a corporation, even if they lack
20 actual authority, so long as the other party to the agreement or
21 instrument signed is unaware that they lack authority. Cal. Corps.
22 Code § 313.

23 Plaintiff also alleges that he was not contacted as required
24 by California Civil Code § 2923.5. The purpose of the contact is
25 for the entity that wishes to foreclose to discuss the borrower's
26 financial position and potential alternatives to foreclosure. Cal.
27 Civ. Code § 2923.5(a)(2). Defendant argues that pursuant to
28 California Civil Code § 2923.5(g), due diligence to contact the

1 borrower is sufficient.

2 California Civil Code § 2923.5(g) permits a foreclosure to
3 proceed without actual contact with the borrower if the foreclosing
4 entity exercised due diligence in attempting to contact the
5 borrower. Cal. Civ. Code § 2923.5(g). In this case, Plaintiff
6 only alleges that he was not contacted. The declaration in the
7 Notice of Default, attached to the Amended Complaint, indicates
8 that Defendants relied on the due diligence exception contained in
9 § 2923.5(g). Since Plaintiff only alleged that he was not
10 contacted, but did not also allege a lack of due diligence on the
11 part of Defendants, this claim is also insufficiently pleaded.

12 Accordingly, Plaintiff's Wrongful Foreclosure claim is
13 dismissed without prejudice.

14 e. California Business and Professions Code
15 § 17200

16 Plaintiff alleges that "Defendants [*sic*] conduct overall
17 supports a cause of action under B&P Code § 17200." *Opp.*, at 24.
18 His argument is that he experienced a wrongful foreclosure, which
19 was just another example of Defendants' unlawful pattern and
20 practice of wrongfully foreclosing on property within California.
21 Id. Defendants point out that Plaintiff's cause of action
22 necessarily relies on the validity of his other claims. The Court
23 agrees.

24 Since Plaintiff has not successfully pleaded a cause of action
25 for wrongful foreclosure, and Plaintiff's Business & Professions
26 Code claim rests solely on Defendants' alleged wrongful foreclosure
27 on Plaintiff's home, this cause of action is dismissed without
28 prejudice.

1 f. Quiet Title

2 Plaintiff alleges that the "real party in interest on the
3 lender's side may be the owner of the asset-backed security issued
4 by the servicing and pooling vendor, the insurer . . . , or the
5 Federal Government. . . ." Compl. ¶ 130. On this basis,
6 Plaintiff seeks to quiet title.

7 In order to plead a claim to quiet title, the complaint must
8 state: (1) a legal description of the property; (2) the title of
9 the plaintiff and the basis of the title; (3) the adverse claims to
10 the title of the plaintiff; (4) the date as of which the
11 determination is sought; and (5) a prayer for the determination of
12 the title of the plaintiff against adverse claims. Cal. Civ. Proc.
13 Code § 761.020. Importantly, "[a] mortgagor cannot quiet his title
14 against the mortgagee without paying the debt secured." Dyachishin
15 v. America's Wholesale Lenders, 2010 WL 1525703 at *2 (E.D. Cal.
16 April 15, 2010) (quoting Santos v. Countrywide Home Loans, 2009 WL
17 3756337 at *4 (E.D. Cal. Nov. 6, 2009)).

18 Defendants correctly assert that Plaintiff's complaint
19 completely fails to present facts substantiating the requisite
20 elements for a claim to quiet title, and Plaintiff has not alleged
21 his ability to tender. MTD, at 19-20; accord Dyachishin, 2010 WL
22 1525703 at *2-3 (E.D. Cal. April 15, 2010). Plaintiff's
23 allegations within this claim indicate that he believes that none
24 of the present Defendants actually lent him money, or at least they
25 do not currently have a beneficial interest in the mortgage. Am.
26 Compl. ¶¶ 20, 25, 130. As explained in Part II.C.1, supra,
27 Plaintiff has not adequately pleaded that Recontrust lacks standing
28 to foreclose. Further, the documents attached to the Amended

1 Complaint by Plaintiff indicate that he executed a Deed of Trust
2 with Defendant BANA to secure a loan taken on the Property. Am.
3 Compl. Ex. C. Plaintiff's conclusory claims pleaded without any
4 factual support do not satisfy the pleading standard of Rule 8.
5 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (plaintiff
6 needs to plead "enough facts to state a claim to relief that is
7 plausible on its face.").

8 Accordingly, Defendants' Motion to Dismiss is GRANTED, and
9 Plaintiff's cause of action to quiet title is dismissed without
10 prejudice.

11 12 III. ORDER

13 After carefully considering the papers submitted in this
14 matter, it is hereby ordered that Defendant's Motion to Dismiss is
15 GRANTED, as follows:

16 1. Plaintiff's claim for violations of Truth in Lending Act
17 is dismissed without prejudice;

18 2. Plaintiff's claim for violations of the Real Estate
19 Settlement Procedures Act is dismissed without prejudice;

20 3. Plaintiff's claim for violations of the Fair Credit
21 Reporting Act is dismissed without prejudice;

22 4. Plaintiff's claim for fraud is dismissed without
23 prejudice;

24 5. Plaintiff's claim for unjust enrichment is dismissed with
25 prejudice;

26 6. Plaintiff's claim for civil RICO violations is dismissed
27 without prejudice;

28 7. Plaintiff's claim for violations of California Business &

1 Professions Code § 17200 is dismissed without prejudice;

2 8. Plaintiff's claim for breach of security instrument is
3 dismissed without prejudice;

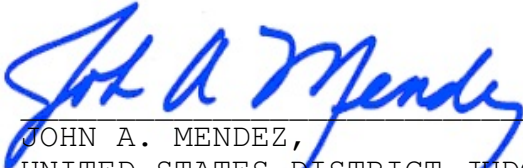
4 9. Plaintiff's claim for wrongful foreclosure is dismissed
5 without prejudice;

6 10. Plaintiff's claim to quiet title is dismissed without
7 prejudice.

8 If Plaintiff wishes to file an Amended Complaint that is in
9 accordance with this Order, it must be filed within twenty (20)
10 days. Otherwise, Plaintiff should file a notice of dismissal.

11 IT IS SO ORDERED.

12 Dated: October 12, 2011



13 JOHN A. MENDEZ,
14 UNITED STATES DISTRICT JUDGE

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