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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER D. SCHNEIDER,

Plaintiff,

v.

BANK OF AMERICA N.A., BANK OF
AMERICA MORTGAGE, BANK OF
AMERICA HOME LOANS SERVICING
LP, BALBOA INSURANCE CO.,
HOME RETENTION GROUP, QUALITY
LOAN SERVICE CORP., CLIFF
COLER, DOES 1-40,

Defendants.

No. CIV. S-11-2953 LKK/DAD PS

ORDER

This is a mortgage foreclosure case. Plaintiff, proceeding pro se, alleges fifteen (15) federal and state causes of action relating to the foreclosure of his home. Defendants' motions to dismiss were heard by a United States Magistrate Judge pursuant to E.D. Cal. R. ("Local Rule") 302(c)(21).

On March 26, 2013, the Magistrate Judge filed extensive Findings and Recommendations herein which were served on all parties and which contained notice to all parties that any objections to the Findings and Recommendations were to be filed

1 within fourteen days. Plaintiff timely has filed objections to
2 the Findings and Recommendations, and defendants have timely
3 filed a response to plaintiff's objections.

4 In accordance with the provisions of 28 U.S.C. 636(b)(1)(c)
5 and Local Rule 304, this court has conducted a de novo review of
6 this case. Having carefully reviewed the entire file, this court
7 finds the Findings and Recommendations to be supported by the
8 record and by the Magistrate Judge's analysis, except as set
9 forth below.

10 Defendants Bank of American, NA ("BANA"), BAC Home Loans
11 Servicing LP ("BAC Home Loans") and Balboa Insurance Co.
12 ("Balboa"), assert that the 45-page complaint "should be
13 dismissed in its entirety, with prejudice," because it is not a
14 "short and plain" statement of the claims, and is confusing as to
15 which claims are asserted against which defendants.¹ ECF No. 96
16 at 14-15. It is within this court's discretion to dismiss an
17 incomprehensible or over-long complaint which no reasonable
18 defendant could comprehend or know how to respond to. See, e.g.,
19 McHenry v. Renne, 84 F.3d 1172, 1179 (9th Cir. 1996).

20 It is true that plaintiff's pro se Complaint is a bit of a
21 mess.² However, the Complaint does not deserve a Rule 8

22 ¹ The motions to dismiss were filed by defendants BANA, BAC Home
23 Loans and Balboa, in one motion, and by Quality Loan Service
24 Corp. ("QLS"), in another. No dismissal motions were filed by
25 defendants Bank of America Mortgage ("BAC Mortgage"), Home
Retention Group ("HRG") or "FHLMC LBAC 173 a.k.a. Federal Home
Loan Mortgage Corp." ("FLHMC").

26 ² For example, the Complaint has an unfortunate tendency to lump
27 all defendants together. However, it is possible to disentangle
28 even these allegations, in most cases. For example, plaintiff
typically alleges that Defendant A engaged in unlawful conduct,

1 dismissal, as the court is able to disentangle much of what
2 plaintiff is alleging. The court also notes that pro se
3 plaintiff here is essentially caught in the legal vise created by
4 the defendants' complaining that the Complaint is at once too
5 specific for Rule 8, while also being not specific enough for
6 Rules 9(b) and 12(b)(6).

7 **I. CLAIM ONE - RESPA**

8 **A. 12 U.S.C. § 2605(e) and 24 C.F.R. § 3500.21.**

9 Plaintiff alleges that defendants BANA and BAC Home Loans
10 violated the Real Estate Settlement Procedures Act ("RESPA"), 12
11 U.S.C. § 2605(e), and 24 C.F.R. § 3500.21, by failing to respond
12 to his Qualified Written Requests ("QWR"), that is, letters he
13 wrote to defendant loan servicers regarding the servicing of his
14 loan.³

15 Specifically, (1) plaintiff alleges that on August 17, 2010,
16 he sent a QWR to defendant BAC Home Loans Servicing LP ("BAC Home
17 Loans"), the loan servicer at the time. The QWR is attached as
18 Exhibit C to the Complaint. See Second Amended Complaint (ECF
19 No. 91) ("Complaint") ¶ 27; Exhibit C to the Complaint (ECF
20 No. 91-1) at 31.⁴ BAC Home Loans "willfully ignored" the QWR and
21

22 and then alleges that Defendants A, B, C and D are liable without
23 any allegation that would make Defendants B, C and D liable for
24 A's violation. In that case, the court considers plaintiff to be
alleging a claim only against Defendant A.

25 ³ Defendants BANA and BAC Home Loans assert that on July 1, 2011,
26 BAC Home Loans merged into and became a part of BANA. ECF No. 96
at 1 n.1.

27 ⁴ The document is attached to the Complaint as Exhibit C, and
28 therefore is a part of the Complaint for all purposes. See Fed.
R. Civ. P. 10(c).

1 "did not respond."⁵ Complaint ¶ 28. (2) Plaintiff alleges that
2 on April 15, 2011, he sent another QWR to BAC Home Loans. The
3 QWR is attached as Exhibit D to the Complaint. Defendant did not
4 respond to this QWR in a timely manner.⁶ See Complaint ¶ 46.
5 (3) Plaintiff alleges that on July 24, 2011, he sent a third QWR,
6 this time to Bank of America, N.A. ("BANA"), who had become the
7 servicer on the loan. This QWR is attached as Exhibit Q to the
8 Complaint. Complaint ¶¶ 43 & 46; Exhibit Q to the Complaint (ECF
9 No. 91-1) at 33. BANA did not timely respond to this QWR.
10 Complaint ¶ 43.⁷

11 The Complaint goes on to allege that defendants' conduct
12 "caused plaintiff actual damages and injuries ... including in part
13 a detriment to plaintiff's ability to sell or refinance his
14 home." Complaint ¶ 46 (emphasis in text).⁸

17 ⁵ Plaintiff alleges that several other defendants also did not
18 respond. However, plaintiff does not allege that he sent a QWR
19 to them, nor does he allege any basis that would impose an obligation for
20 those defendants to respond to a QWR that was not sent to them.

21 ⁶ The Complaint alleges that defendants failed to respond timely
22 to any of the QWR's plaintiff sent between August 2010 and
23 October 2011. Complaint ¶ 46.

24 ⁷ Plaintiff further alleges that between August 2010 and October
25 2011, he sent BAC Home Loans and BANA "over 10 specific QWR's,"
26 none of which were responded to in a timely manner. Complaint
27 ¶ 46. Plaintiff did not attach any of these other QWRs to the
28 Complaint, nor does he allege when he sent them, nor to which
defendants, nor anything about the substance of the
communications, other than that they were QWRs.

⁸ Plaintiff also alleged that defendants' conduct caused him to
suffer "extreme emotional and physical stress and anxiety."
Complaint ¶ 44.

1 Defendants BANA and BAC Home Loans move to dismiss.⁹ They
2 assert that, "save for one letter," plaintiff "has not alleged
3 the dates on which he sent each of his alleged QWR's." BANA
4 Motion To Dismiss ("BANA Motion") (ECF No. 96) at 17. There are
5 two problems with this assertion.

6 First, defendant does not address even that "one letter" -
7 the July 24, 2011 letter. See BANA Motion at 17 ("Plaintiff now
8 alleges the date of only one such alleged letter, July 24, 2011,
9 that he claims constitutes a QWR to the bank"). RESPA does not
10 require that a loan servicer fail to respond to a slew of QWRs
11 before it will be found to have violated the law. It states that
12 if one is sent, the loan servicer must respond to that one. See
13 12 U.S.C. §§ 2605(e)(1)(A) (if a loan servicer "receives a
14 qualified written request from the borrower ... the servicer shall"
15 acknowledge the letter within 5 days) (emphasis added),
16 2605(e)(2) (servicer must substantively respond to "any qualified
17 written request" within 30 days) (emphasis added). Defendant
18 seems to argue that because plaintiff failed to allege the date
19 of each one of the QWR's (even assuming this is a fatal pleading
20 error), the claim must be dismissed even as to those QWR's where
21 the dates are alleged. This court knows of no legal basis for
22 such an argument, nor has defendant provided any.

23 Second, plaintiff has specifically identified three

24 _____
25 ⁹ The Magistrate Judge indicates that FHLMC also moved to
26 dismiss. ECF No. 123 at 10. However, as best this court can
27 tell, FHLMC, which is apparently represented by counsel, has not
28 answered, moved to dismiss, or otherwise responded to the
Complaint, although it has responded to plaintiff's Objections to
the Findings and Recommendations.

1 communications he says are QWRs. He specifies the dates they
2 were sent and to whom they were sent. They are, as described
3 above, the August 17, 2010 letter, the April 15, 2011 letter, and
4 the July 24, 2011 letter, and all three are attached as exhibits
5 to the Complaint. See Exhibits C, D & Q to the Complaint.¹⁰

6 Defendants also move to dismiss on the ground that plaintiff
7 "has failed to plead facts that establish actual damages as
8 required by the statute," citing 12 U.S.C. § 2605(f)(1)(A).
9 Specifically, defendants argue for dismissal because plaintiff
10 "fails to provide any detail as to how the alleged QWR violation
11 has damaged him." BANA Motion at 17. Defendants assert that:

12 Plaintiff only makes the general allegation
13 that that "[BANA'S] conduct has caused
14 plaintiff countless unnecessary and
15 substantial actual costs, damages, fees and
16 injuries in fact ... Plaintiff has been and
17 continues to be subject to extreme and
18 physical stress and anxiety over all of the
19 events that occurred after the July 24, 2011
20 QWR."

21 BANA Motion at 17 (citing Complaint ¶ 45).

22 This supposedly complete recitation of plaintiff's alleged
23 damages ignores the very next paragraph of the complaint, which
24 alleges that plaintiff's damages include "a detriment to
25 plaintiff's ability to sell or refinance his home." See
26 Complaint ¶ 46. Defendant nowhere asserts that this damage
27 allegation is not specific enough, or lacks causality, and the
28 court will not make those arguments on defendants' behalf.¹¹

¹⁰ As for the remaining, unidentified letters, defendant can simply ask for them, or ask about them, in discovery.

¹¹ The court is aware of the district court cases which seem to

1 In addition, plaintiff has specifically alleged three
2 clearly identified instances where he sent a QWR to the loan
3 servicer, and got no timely response to any of them.
4 Accordingly, the Complaint alleges a "pattern or practice of
5 noncompliance" sufficient to state a claim for statutory damages
6 under RESPA. See 12 U.S.C. § 2605(f)(1)(B) ("additional damages"
7 are available "in the case of a pattern or practice of
8 noncompliance with the requirements of this section").

9 In short, plaintiff alleges a violation of the Real Estate
10 Settlement Procedures Act ("RESPA"):

11 RESPA requires the servicer of a federally
12 related mortgage loan to provide a timely
13 written response to inquiries from borrowers
14 regarding the servicing of their loans. 12
15 U.S.C. § 2605(e)(1)(A), (e)(2). If the
16 servicer fails to respond properly to such a
17 request, the statute entitles the borrower to
recover actual damages and, if there is a
"pattern or practice of noncompliance,"
statutory damages of up to \$1,000. *Id.*
§ 2605(f).

18 Medrano v. Flagstar Bank, FSB, 704 F.3d 661, 665 (9th Cir. 2012),
19 cert. denied, 133 S. Ct. 2880 (2013).

20 Defendant also asserts that the Complaint's allegation of
21 damages resulting from stress and anxiety are "conclusory," and
22 lacking in detail. The court does not find the allegations to be

23
24 hold that the complaint must demonstrate a causal relationship
25 between the alleged damages and the RESPA violation (at least one
26 of which relies upon the Magistrate Judge's decision in this
27 case). See, e.g., Guidi v. Paul Financial LLC, 2014 WL 60253 at
28 *4 (N.D. Cal. 2014). It is not necessary to address the issue
here, since plaintiff here does allege a causal relationship to a
specific harm. Moreover, plaintiff adequately alleges statutory
damages, as discussed below.

1 conclusory. To the contrary, plaintiff paints quite a clear
2 picture. Plaintiff found himself in a dispute with the Bank of
3 America, and BAC Home Loans, the originator and servicers of his
4 home mortgage, a dispute which he must have known could lead to
5 him losing his home. He wrote to the bank requesting
6 information, and received no response, even though the bank was
7 legally required to give him an acknowledgement and then a
8 substantive response. This failure to respond caused him
9 "extreme emotional and physical stress and anxiety." There is
10 nothing "conclusory" about those allegations. They set forth an
11 entirely plausible, factual sequence of events - with clear
12 causality between the violation and the damages - to which
13 defendant must now respond.¹²

14 **B. 12 U.S.C. § 2609 and 24 C.F.R. § 3500.17.**

15 The court adopts the findings and recommendation of the
16 Magistrate Judge that this portion of the first claim be
17 dismissed as to BANA, BAC Home Loans and Balboa, for lack of a
18 private right of action. See ECF No. 123 at 18.

19 ////

20 ////

21
22 ¹² Plaintiff also alleges that defendants' conduct violates 12
23 U.S.C. § 2605(k), which requires, among things, that a servicer
24 timely "respond to a borrower's requests to correct errors
25 relating to allocation of payments, final balances for purposes
26 of paying off the loan, or avoiding foreclosure, or other
27 standard servicer's duties." 12 U.S.C. § 2605(k)(1)(C).
28 Defendants, all of whom are represented by counsel, have not
briefed or moved to dismiss this claim. Accordingly, the court
will not adopt the Magistrate Judge's recommendation that it be
dismissed.

1 **II. CLAIM TWO - TRUTH IN LENDING ACT ("TILA")¹³**

2 Plaintiff alleges that on November 9, 2011, he called BANA,
3 BAC Home Loans and Quality Loan Service Corp. ("QLS"), requesting
4 the exact amount his mortgage was in arrears, and the payoff
5 balance. Complaint ¶ 60. Plaintiff alleges that these
6 defendants never responded, in violation of banking regulations
7 providing that "no servicer shall ... [f]ail to provide, within a
8 reasonable time after receiving a request from the consumer ... an
9 accurate statement of the total outstanding balance that would be
10 required to satisfy the consumer's obligation in full as of a
11 specified date."¹⁴ 12 C.F.R. § 226.36(c)(1)(iii).¹⁵

12 Plaintiff also alleges that BAC Home Loans delayed posting
13 plaintiff's December 13, 2010 mortgage payment for eight days.
14 Complaint ¶ 61. See 12 C.F.R. § 226.36(c)(1)(i) ("no servicer
15 shall ... [f]ail to credit a payment to the consumer's loan account

16 ¹³ See 15 U.S.C. § 1601, et seq., and 12 C.F.R. § 226.36(c)(1).

17 ¹⁴ The court notes that 15 U.S.C. § 1639g provides that "A
18 creditor or servicer of a home loan shall send an accurate payoff
19 balance within a reasonable time, but in no case more than 7
20 business days, after the receipt of a written request for such
balance from or on behalf of the borrower").

21 ¹⁵ The cited regulation is a part of "Regulation Z," Subpart E,
22 originally promulgated by the Board of Governors of the Federal
Reserve System "to implement the federal Truth in Lending Act."
23 See 12 C.F.R. § 226.1 (Regulation Z: authority, purpose and
coverage); Home Funds Direct v. Monroy (In re Monroy), 650 F.3d
24 1300, 1301 (9th Cir. 2011) ("As authorized by TILA, on October 1,
2009, new 12 C.F.R. § 226.36(c)(1)(iii) went into effect (also
25 known as part of 'Regulation Z')," and "The Federal Reserve Board
of Governors was authorized to promulgate Regulation Z under 15
26 U.S.C. § 1604(a)"). It appears that responsibility for enforcing
Regulation Z now lies with the U.S. Consumer Financial Protection
27 Bureau ("CFPB"). See 76 Fed. Reg. 79,768 (December 22, 2011)
28 (effective December 31, 2011).

1 as of the date of receipt").¹⁶ Plaintiff alleges that this
2 posting delay caused him to be liable for a late fee of \$48.43.
3 Complaint ¶ 61.

4 **A. "Vague," "Incomplete" and "Generic" Allegations.**

5 Defendants BANA and BAC Home Loans move to dismiss both
6 parts of this claim because the allegations "are vague and
7 incomplete," ECF No. 96 at 20, and because the Complaint contains
8 only "generic allegations of a statutory violation, unsupported
9 by facts," ECF No. 96 at 19. In fact, plaintiff's allegations of
10 defendants' Regulation Z violations are clear and very specific.

11 Plaintiff alleges that on a specified date, November 9,
12 2011, he called specified defendants, "both QLS and [BANA]," and
13 requested a specified piece of information, namely "the payoff
14 amount necessary to redeem his home, i.e. 'an accurate statement
15 of the total outstanding balance.'" Complaint ¶ 60. This
16 failure to respond is alleged to violate Regulation Z, which
17 makes it unlawful for those defendants to fail to provide the
18 above-specified information in a timely manner, once requested.
19 See 12 C.F.R. § 226.36(c)(1)(iii).

20 Plaintiff further alleges that on a specified date, December
21 13, 2010, "defendant [BAC Home Loans] received plaintiff's
22 payment" of a specified amount, namely \$968.57. Complaint ¶ 61.
23 Plaintiff further alleges that the payment "was for the full
24 monthly amount due on the loan." Id. Plaintiff goes on to

25
26 ¹⁶ The court notes that 15 U.S.C. § 1639f provides that "no
27 servicer shall fail to credit a payment to the consumer's loan
28 account as of the date of receipt."

1 allege that BAC Home Loans delayed posting that payment until a
2 specified date, namely, December 21, 2010, eight days later.¹⁷
3 Id. The Complaint specifies the legal provision that this
4 conduct violates, namely, 12 C.F.R. § 226.36(c)(i), which makes
5 it unlawful for a servicer to “[f]ail to credit a payment to the
6 consumer’s loan account as of the date of receipt.”

7 Defendants do not explain what is “vague,” “incomplete” or
8 “generic” about these allegations, or what additional information
9 they would need in order to understand and respond to the claim.
10 This court finds that there is nothing vague, incomplete or
11 generic about these allegations.

12 **B. Failure To Provide Pay-Off Balance.**

13 **1. Defendant QLS.**

14 The court adopts the recommendation of the Magistrate Judge
15 that the TILA/Regulation Z claim against QLS be dismissed, but
16 will do so without leave to amend. This court writes separately
17 to set out its reasoning.

18 Defendant QLS asserts that it cannot be liable for the
19 failure to provide a payoff balance because it is not a “lender,”
20 citing Chow v. Aegis Mortg. Corp., 286 F. Supp. 2d 956 (N.D.
21 Ill. 2003) (“The only parties who can be liable for Truth in
22 Lending Act (“TILA”) violations are the original creditor, 15
23 U.S.C. § 1640, and assignees of that creditor, 15 U.S.C. §
24 1641”). QLS does not mention 12 C.F.R. § 226.36(c)(1), upon

25
26 ¹⁷ The Complaint contains an error that has the delay extending to
27 “December 21, 2012.” Defendants’ brief makes clear that they
28 understand that this was just an error, and that the payment was
allegedly delayed 8 days.

1 which plaintiff's claim rests, which specifically addresses
2 "[s]ervicing practices," and which specifically prohibits the
3 "servicer" from failing to provide the payoff balance to the
4 borrower within a reasonable time after being asked for it. See
5 12 C.F.R. § 226.36(c)(1)(iii).

6 QLS does not explain why it is exempted from liability for
7 violations of Regulation Z that are specifically addressed to it
8 as a servicer.¹⁸ Rather, it has simply ignored the plain language
9 of the Complaint's allegations, leaving it to the Magistrate
10 Judge and this court to figure out, without any input from the
11 parties, whether plaintiff may have a claim against a servicer
12 under the plain language of Regulation Z.

13 Nevertheless, as QLS does argue, the governing statute here,
14 TILA, provides for civil liability only against the creditor and
15 its assignee. See 15 U.S.C. §§ 1640(a) ("any creditor who fails
16 to comply with any requirement imposed under this part ... is
17 liable") (emphasis added) & 1641 (liability of assignees of
18 creditors).¹⁹ This court knows of no principle that would permit

19
20 ¹⁸ The court notes that the district courts are divided over
21 whether there is an independent private right of action under
22 Regulation Z. See New Mexico ex rel. King v. Capital One Bank
23 (USA) N.A., ___ F. Supp. 2d ___, 2013 WL 5944087 at *7
24 (D.N.M. 2013) (finds private right of action); Purcell v.
25 Universal Bank, N.A., 2003 WL 1962376 at *3 n.2 (E.D. Pa. 2003)
26 (same); Runkle v. Federal Nat. Mortg. Ass'n, 905 F. Supp. 2d
27 1326, 1332 (S.D. Fla. 2012) (same). Contra, Kievman v. Federal
28 Nat. Mortg. Ass'n., 901 F. Supp. 2d 1348, 1353 (S.D. Fla. 2012)
(no private right of action).

26 ¹⁹ At least one court has resolved the apparent dilemma created by
27 a regulation that imposes an obligation on the servicer, under a
28 statute that imposes a liability only against the creditor, by
saying that the creditor is liable for the servicer's violation.
See Runkle, 905 F. Supp. 2d at 1332-33 (creditor's assignee may

1 an implementing regulation to create a liability that is broader
2 than, or not even contemplated by, the governing statute. To the
3 contrary,

4 The rulemaking power granted to an
5 administrative agency charged with the
6 administration of a federal statute is not
7 the power to make law. Rather, it is "the
8 power to adopt regulations to carry into
9 effect the will of Congress as expressed by
10 the statute."

11 Ernst & Ernst v. Hochfelder, 425 U.S. 185, 212-214 (1976)

12 (quoting Dixon v. United States, 381 U.S. 68, 74 (1965)).

13 Therefore, even if the regulation creates a private right of
14 action, "its scope cannot exceed the power" granted to the Board
15 of Governors (or the CFPB), by the governing statute. Ernst, 525
16 U.S. at 214.

17 Accordingly, this claim will not lie against QLS, which is
18 alleged to be a loan servicer, not a creditor or lender.²⁰ See
19 Complaint ¶ 10 (QLS "is in the business of acting as a debt
20 collector, loan servicer, and foreclosure trustee").

2. Defendants BANA and BAC Home Loans.

21 Defendants BANA and BAC Home Loans argues that the claim is
22 vague, incomplete and generic. See ECF No. 96 at 19-20. As
23 discussed above, the allegations are sufficiently specific. They
24 also argue that the claim is barred by the statute of limitations

25 be held liable for the loan servicer's RESPA violation, otherwise
26 the loan servicer could violate Regulation Z with impunity,
27 leaving both it and the creditor immune from liability).

28 ²⁰ Since the claim must be dismissed, there is no need for the
court to address QLS's statute of limitations argument.

1 since the loan documents were signed in 2001. However, the claim
2 is based upon conduct alleged to have occurred in 2010 and 2011.
3 The limitations argument fails.

4 **C. Failure To Credit Payment - BAC Home Loans.**

5 Defendant BAC Home Loans asserts that it is not liable for
6 the alleged failure to post plaintiff's December 13, 2010
7 mortgage payment in a timely manner, because the claim is "time
8 barred after December 2011." Defendant makes two limitations
9 arguments. First, it asserts that the TILA and Regulation Z
10 claim is time-barred because the claim is based upon loan
11 documents that were signed in 2001. The court adopts the
12 Magistrate Judge's findings and recommendation that the Complaint
13 not be dismissed on this basis. See ECF No. 123 at 23-24.

14 Second, defendant asserts that the Second Amended Complaint,
15 which first explicitly asserted a claim under TILA and
16 Regulation Z, was filed in 2012, more than one year after the
17 delayed posting.²¹ Plaintiff's original complaint, however, was
18 filed on November 7, 2011, within the one-year limitations
19 period. See ECF No. 1. That complaint alleges that "the payment
20 he [plaintiff] made on December 10, 2010, was received" by BAC
21 Home Loans, but that defendants "specifically held the December
22

23 ²¹ BANA and BAC Home Loans also assert that the claim is
24 conclusory and internally inconsistent. There is no real
25 explanation of this argument and frankly, the court does not
26 understand it. Plaintiff clearly alleges that defendants did not
27 post his December 2010 payment for eight days, rather than
28 posting it immediately as required by Regulation Z. As a result
of their own delay, defendants charged plaintiff a late fee. The
court does not view these allegations as being conclusory,
unclear or internally consistent.

1 10 payment and did not credit it until December 21, 2010." ECF
2 No. 1 ¶ 67 (emphasis in text). It goes on to allege that "this
3 was intentionally done ... to produce a knowingly false and
4 inflated picture of Plaintiff's timely payment under the
5 contract." Id. (emphases in text). It concludes this allegation
6 by stating that Defendants' actions "violated Federal and State
7 debt collection laws" Id. Thus, the original complaint of
8 November 2011 expressly sets out the transactions and conduct
9 that give rise to plaintiff's TILA and Regulation Z claim.

10 Under these circumstances, the "relation back" doctrine
11 applies. Fed. R. Civ. P. 15(c)(1)(B) ("An amendment to a
12 pleading relates back to the date of the original pleading when ...
13 the amendment asserts a claim or defense that arose out of the
14 conduct, transaction, or occurrence set out - or attempted to be
15 set out - in the original pleading").²² The pro se plaintiff's
16 failure to explicitly mention the statute or regulation does not
17 prevent him from taking advantage of the relation back doctrine.

18 The claim is not time-barred.²³

19 **III. CLAIM THREE - FDCPA & ROSENTHAL ACT**

20 **A. Fair Debt Collection Practices Act ("FDCPA")**

21 Plaintiff alleges that BANA, BAC Home Loans and QLS violated
22

23 ²² Accordingly, the court does not adopt the Magistrate Judge's
24 findings or recommendation on this point.

25 ²³ Defendants also assert that the claim based upon their alleged
26 failure to provide a payoff statement pursuant to plaintiff's
27 November 9, 2011 request, is barred by plaintiff's "failure to
28 allege tender." The "tender" defense is frivolous, as it has
nothing to do with this case, inasmuch as the TILA claim does not
seek rescission.

1 the federal Fair Debt Collection Practices Act ("FDCPA"), 15
2 U.S.C. §§ 1692e and 1692g.

3 Section 1692e prohibits "debt collectors" from using any
4 "false, deceptive, or misleading representation or means in
5 connection with the collection of any debt." 15 U.S.C. §
6 1692e(1). Among other things, debt collectors may not falsely
7 represent or imply "that any individual is an attorney or that
8 any communication is from an attorney." 15 U.S.C. § 1692e(3).
9 They also may not falsely represent "the character, amount, or
10 legal status of any debt." Id., § 1692e(2)(A).

11 Section 1692g requires a debt collector to provide, upon
12 request, "the name and address of the original creditor, if
13 different from the current creditor." 15 U.S.C. § 1692g.

14 **1. BANA and BAC Home Loans.**

15 Defendants BANA and BAC Home Loans assert that they are
16 categorically exempt from the FDCPA because they are not "debt
17 collectors." The FDCPA exempts from its provisions the
18 "originator" of a debt the person is trying to collect. 15
19 U.S.C. § 1692a(6)(F)(ii); De Dios v. International Realty &
20 Investments, 641 F.3d 1071, 1074 (9th Cir. 2011) ("the person who
21 originated the debt, such as a creditor to whom the debt was
22 originally owed, is not considered a debt collector"). The
23 Complaint alleges that BANA is the originator of the mortgage at
24 issue here. See Complaint ¶ 16. Accordingly, the court adopts
25 the Magistrate Judge's finding and recommendation that BANA be
26 dismissed from the FDCPA claims because it is categorically
27 exempt as a "creditor."
28

1 The court adopts the Magistrate Judge's recommendation that
2 BAC Home Loans also be dismissed from the FDCPA claim, but not
3 because BAC Home Loans is categorically exempt from the FDCPA
4 based upon its status as a mortgage loan servicer. According to
5 the Ninth Circuit, the legislative history shows that "mortgage
6 service companies" are only exempt "'so long as the debts were
7 not in default when taken for servicing.'" De Dios, 641 F.3d at
8 1075 n.3.

9 In fact, the FDCPA specifically exempts a person collecting
10 a debt "which was not in default at the time it was obtained by
11 such person." 15 U.S.C. § 1692a(6)(F)(iii); De Dios, 641 F.3d at
12 1076 ("International Realty is exempt from the definition of a
13 'debt collector' under § 1692a(6)(F)(iii) because it obtained the
14 right to collect De Dios's rent before the debt was contractually
15 overdue"). The Complaint alleges that BAC Home Loans became the
16 servicer of the mortgage "in November 2009," before any alleged
17 arrearage occurred. Complaint ¶ 21. Accordingly, BAC Home
18 Loans, whether or not it is a "debt collector," is exempt from
19 plaintiff's FDCPA claims.²⁴

20 2. **QLS.**

21 QLS asserts that "Plaintiff fails to support his conclusory
22 statement that Quality is a debt collector within the meaning of
23 the FDCPA." QLS Motion at 13. The FDCPA defines a "debt
24 collector to be:

25 ²⁴ The court notes, however, that BAC Home Loans' correspondence,
26 attached as exhibits to the Complaint, states that "BAC Home
27 Loans Service, LP is required by law to inform you that this
28 communication is from a debt collector." See Exh. H (ECF
No. 91-1) at 41.

1 any person who uses any instrumentality of
2 interstate commerce or the mails in any
3 business the principal purpose of which is
4 the collection of any debts, or who regularly
5 collects or attempts to collect, directly or
6 indirectly, debts owed or due or asserted to
7 be owed or due another.

8 15 U.S.C. § 1692a(6). The Complaint alleges that QLS "is in the
9 business of acting as a debt collector." Complaint ¶ 10. The
10 Complaint also alleges that QLS is a "'debt collector'" as
11 defined by 15 U.S.C. § 1692A(6), and that it is "not exempt from
12 the requirements of the FDCPA." Complaint ¶ 64. In addition,
13 the Complaint alleges that QLS was "trying to collect a debt,"
14 namely, the mortgage at issue here, and that some of the
15 communications with QLS took place over the telephone, an
16 instrument of interstate commerce. Complaint ¶¶ 60 (phone call
17 to QLS), 67 (QLS is trying to collect a debt).

18 These allegations, standing alone, are sufficient to allege
19 that QLS is a debt collector within the meaning of the FDCPA, for
20 purposes of this dismissal motion.²⁵ The Complaint goes further,
21 however, by attaching a communication from QLS to plaintiff. See

22 ²⁵ There are 9 separate exceptions to the definition of "debt
23 collector" set forth at 15 U.S.C. § 1692a(6)(A)-(E) and
24 F(i)-(iv). Plaintiff need not set forth facts showing that QLS
25 is not exempt pursuant to each and every one of these exceptions,
26 as they are in the nature of affirmative defenses. Accord, Scott
27 v. Jones, 964 F.2d 314, 316 (4th Cir. 1992) ("Jones asserted the
28 affirmative defense that he was not a "debt collector" as defined
in the FDCPA, and therefore was not in violation of that
statute"); Murphy v. Stephens & Michaels Associates, Inc. 2011
WL 1465761 at *1 (S.D. Cal. 2011) ("whether Defendant falls
within an exception to the 'debt collector' definition under 15
U.S.C. Section 1692a is an affirmative defense").

1 Exhibit P ("Notice of Trustee's Sale"). The communication
2 states, in bold, capital letters:

3 **THIS NOTICE IS SENT FOR THE PURPOSE OF**
4 **COLLECTING A DEBT. THIS FIRM IS ATTEMPTING**
5 **TO COLLECT A DEBT ON BEHALF OF THE HOLDER AND**
6 **OWNER OF THE NOTE. ANY INFORMATION OBTAINED**
7 **BY OR PROVIDED TO THIS FIRM OR THE CREDITOR**
8 **WILL BE USED FOR THAT PURPOSE.**

9 Exhibit P (ECF No. 91-1) at 66.²⁶

10 QLS goes on to argue that the Complaint fails to allege that
11 it engaged in any "unfair practices." QLS Motion at 13. The
12 Complaint, in fact, alleges that QLS made a false, deceptive, or
13 misleading representation in connection with its efforts to
14 collect a debt, in violation of 15 U.S.C. § 1692e. Specifically,
15 the Complaint alleges that QLS falsely denied that it could give
16 plaintiff information about the debt, and also, that "'only the
17 lender could postpone the sale.'" Complaint ¶ 36 (emphasis in
18 text). Yet, when plaintiff called the lender that same day, the
19 lender's employee told plaintiff that he had to get the
20 information from QLS, and that "'only the trustee [QLS] could
21 postpone the sale.'" Complaint ¶ 37 (emphasis in text). There
22 is nothing conclusory or vague about these allegations, which
23 plainly point to an unfair credit collection practice.²⁷

24 ²⁶ The court is not ruling on whether this admission is
25 conclusive. However, the admission is certainly sufficient to
26 put the burden on QLS to establish why it is not a debt
27 collector.

28 ²⁷ The court does not adopt the Magistrate Judge's findings and
recommendation that FHLMC be dismissed from the FDCPA claim,
because FHLMC, which is represented by counsel, has not moved to
dismiss the claim.

1 Accordingly, the claim alleging that QLS violated 15 U.S.C.
2 § 1692e(2)(A) & (3) will not be dismissed.

3 **B. Rosenthal Fair Debt Collection Practices Act.**

4 Plaintiff alleges that BANA violated the Rosenthal Fair Debt
5 Collection Practices Act ("Rosenthal Act"), Cal. Civ. Code
6 §§ 1788, et seq., by falsely referring to QLS, the entity it was
7 referring plaintiff to in order to resolve the foreclosure, as
8 "the attorneys." Complaint ¶ 68.

9 BANA moves to dismiss solely on the grounds that it is
10 exempt from the Rosenthal Act because it is a mortgage "lender[]
11 and/or servicer[]." As the Magistrate Judge points out, BANA
12 incorrectly relies on the federal statute to argue that it is
13 exempt under the state law. BANA cites no provision of the
14 Rosenthal Act where this asserted exemption can be found, and
15 cites no cases decided under the Act that stand for this
16 proposition.²⁸ BANA has failed to show that it is exempt under
17 the Rosenthal Act.

18 Plaintiff alleges that BANA is a "debt collector" pursuant
19 to Cal. Civ. Code 1788.2 of the Rosenthal Act. That provision
20 defines "debt collector" broader than the FDCPA does, by
21 including persons collecting their own debts, whereas such
22 persons are expressly exempted under the FDCPA. Compare Cal.

23
24 _____
25 ²⁸ BANA cites Caballero v. Ocwen Loan Serv., 2009 WL 1528128 at *1
26 (N.D. Cal. 2009) and Scott v. Wells Fargo Home Mortg. Inc., 326
27 F. Supp. 2d 709, 718 (E.D. Va.), aff'd mem., 67 Fed. Appx. 238
28 (4th Cir. 2003), both of which are about the FDCPA, not the
Rosenthal Act. It also cites Ines v. Countrywide Home Loans,
Inc., 2008 WL 2795875 *3 (S.D. Cal. 2008) which defines "debt
collectors" in the context of the FDCPA, not the Rosenthal Act.

1 Civ. Code § 1788.2(c) ("The term "debt collector" means any
2 person who, in the ordinary course of business, regularly, on
3 behalf of himself or herself or others, engages in debt
4 collection") (emphasis added), with 15 U.S.C. § 1692a(6) ("The
5 term 'debt collector' means any person who ... regularly collects
6 or attempts to collect ... debts owed or due or asserted to be owed
7 or due another") (emphasis added).

8 Accordingly, the court adopts the Magistrate Judge's finding
9 that BANA is not exempt under the Rosenthal Act. See ECF No. 123
10 at 31. However, the court does not adopt the recommendation that
11 the claim be dismissed for lack of specificity. As noted above,
12 the Complaint specifically alleges that BANA falsely referred to
13 QLS as "the attorneys," conduct that is expressly made unlawful
14 by the Rosenthal Act. See Cal. Civ. Code § 1788.13(b)
15 (prohibiting a debt collector from making "[a]ny false
16 representation that any person is an attorney or counselor at
17 law").

18 **IV. CLAIM 4 - CAL. CIV. CODE § 2954(a)(1)**

19 Plaintiff alleges that BAC Home set up an illegal escrow
20 account against his mortgage.²⁹ California law provides that:

21 [n]o ... account for payment of ... insurance
22 premiums or other purposes relating to the
23 property shall be required as a condition of
24 a ... loan secured by a deed of trust or
mortgage on real property [except in
specified situations].

25
26 ²⁹ The Complaint is clear that BAC Home is responsible for this
27 alleged conduct, but it is unclear whether any of the other
28 defendants mentioned there are responsible. The court interprets
the claim to be against BAC Home only.

1 Cal. Civ. Code § 2954(a)(1). It further provides that any such
2 account "established in violation" of Section 2954(a)(1) "is
3 voidable, at the option of the purchaser or borrower."

4 Id.

5 The court adopts the Magistrate Judge's findings and
6 recommendation that Claim 4 not be dismissed, and it will proceed
7 against BAC Home only. See ECF No. 123 at 32-34.

8 **V. CLAIM 5 - FRAUD, NEGLIGENT MISREPRESENTATION & CONSPIRACY**

9 **A. Fraud at the closing.**

10 "The elements of fraud, which give rise to
11 the tort action for deceit, are
12 (a) misrepresentation (false representation,
13 concealment, or nondisclosure); (b) knowledge
14 of falsity (or 'scienter'); (c) intent to
15 defraud, i.e., to induce reliance;
16 (d) justifiable reliance; and (e) resulting
17 damage." (5 Witkin, Summary of Cal. Law (9th
18 ed. 1988) Torts.

19 Lazar v. Superior Court, 12 Cal. 4th 631, 638 (1996).

20 Plaintiff alleges that BANA and BAC Mortgage committed fraud
21 in connection with the creation of his mortgage, at the end of
22 January 2001.³⁰ Plaintiff alleges that he refused to go forward
23 with the closing unless BANA agreed that no "escrow account"
24 would ever be placed against the property (other than the initial
25 escrow required by law since his down-payment was under 20% of
26 the purchase price).³¹ Complaint ¶¶ 73 & 81 ("Plaintiff stopped

27 ³⁰ This claim is alleged only against BANA and BAC Mortgage, as
28 they are the only defendants alleged to have "tricked" plaintiff
into signing the modified documents "knowing full well that they
were not going to honor the modified terms regarding any future
escrow account." Complaint ¶ 86.

³¹ The initial escrow account was closed after the home was re-

1 the entire purchase of the property at his final closing
2 paperwork signing on January 30, 2001 and was ready and willing
3 to cancel it had [BANA], BAC Mortgage authorized employees, not
4 agreed to his demand of 'absolutely no escrow accounts ever for
5 hazard insurance or property taxes'"). The Complaint alleges
6 that this was an oral agreement that was reduced to a "written
7 mutual agreement" at the closing. Complaint ¶ 73.

8 The Complaint further alleges that BANA (through its agent,
9 Susan Birge), had plaintiff make changes to the "closing
10 paperwork" before signing, specifically, "forms BA 174 and
11 BA084," assuring him that the changes to those documents would
12 have the effect that he wanted, namely, it would prevent any
13 future escrow account from being placed against the mortgage.
14 Complaint ¶¶ 82-83. Plaintiff alleges that in reliance upon
15 BANA's representations, he went forward with the closing, even
16 though he "could easily have gone to another lender" if BANA had
17 not agreed to the modifications prohibiting future escrow
18 accounts. Complaint ¶ 83.

19 The Complaint further alleges that BANA's statements were
20 misrepresentations, because it "had no intention" of abiding by
21 the representations it had made regarding the promise of "no
22 escrow account ever for the remainder of the loan." Complaint
23 ¶ 82. Plaintiff alleges that he did not discover the
24 misrepresentation until July 2010, when he discovered that BANA
25 and others had "created an escrow account on Plaintiff's loan"
26 the month before. Complaint ¶¶ 84 & 86. Finally, plaintiff

27
28 appraised. See Complaint ¶¶ 20 & 21.

1 alleges that the creation of this escrow account was the start of
2 all the harm that he complains of now.

3 BANA moves to dismiss this claim because (1) it is barred by
4 the three-year statute of limitations, and (2) it is not specific
5 enough.

6 **1. Limitations.**

7 Fraud claims under California law are subject to a three-
8 year statute of limitations. Cal. Code Civ. P. § 338(d).
9 However, the fraud claim "is not deemed to have accrued until the
10 discovery, by the aggrieved party, of the facts constituting the
11 fraud or mistake." Id. Plaintiff specifically alleges that he
12 did not discover BANA's deceit until July 2010, when the escrow
13 account - which BANA promised in 2001 would never be created -
14 was created. Complaint ¶ 84. Defendant offers no reason the
15 court should reject plaintiff's assertion that the limitations
16 period is tolled until he discovers the fraud, and the court
17 knows of none.

18 **2. Specificity.**

19 As recounted above, the complaint sets forth with
20 particularity exactly what misrepresentations plaintiff is
21 challenging, namely, that no escrow account (other than the
22 initial PMI escrow account) would ever be placed against
23 plaintiff's mortgage account. Moreover, those allegations set
24 forth all of the elements of a fraud claim.

25 The fraud claim is not subject to dismissal, and will
26 proceed against BANA and BANA Mortgage.³²

27 _____
28 ³² Accordingly, the court does not adopt the Magistrate Judge's
findings or recommendations on this issue. See ECF No. 123

1 **B. Fraud, Negligent Representation and Deceit in Loan**
2 **Modification Activities.**

3 Plaintiff alleges that in 2010 and 2011, defendant BANA and
4 BAC Home Loans, and others, acting through their agent, defendant
5 Home Retention Group ("HRG"), created a false paper trail
6 relating to his supposed request for a loan modification through
7 the federal Home Affordable Mortgage Program ("HAMP") program.
8 Plaintiff denies that he ever applied for loan modification.

9 Specifically, in April or May 2011, HRG sent plaintiff a
10 letter falsely stating that plaintiff "had sent in their loan
11 modification package for the 'HAMP,' that he was seeking a home
12 loan modification and was asking for assistance." Complaint
13 ¶ 91. On June 28, 2011, BAC Home Loans sent plaintiff a letter
14 falsely stating that it had reviewed plaintiff's "request for a
15 loan modification" under HAMP, even though plaintiff had never
16 sent in such a request. Complaint ¶ 94. That letter also stated
17 that plaintiff's supposed request "was denied because he had not
18 sent in the requested documents." Id. On July 1, 2011, BANA
19 sent plaintiff a letter falsely stating that it had received
20 plaintiff's "request for workout assistance," even though
21 plaintiff had never requested assistance. Complaint ¶ 97.
22 Plaintiff alleges that defendants sent similar false letters to
23 the HAMP administrator.³³ Complaint ¶ 95.

24 According to plaintiff, defendants did all this to collect
25 money from plaintiff that he did not owe, and to create a false

26 _____
at 36-37.

27 ³³ This would serve as the predicate offenses for plaintiff's RICO
28 claims, since if true, this conduct violates 18 U.S.C. § 1001
(false statements).

1 impression that they had complied with all guidelines permitting
2 them to foreclose. Complaint ¶ 89-97. As a result, plaintiff
3 alleges, plaintiff is now disqualified from applying for a loan
4 modification through HAMP. Complaint ¶ 96.

5 Defendants move to dismiss based on the statute of
6 limitations, since the loan was issued in 2001. This is no basis
7 for dismissal, as the basis of the alleged fraud claim is conduct
8 that took place in 2010 and 2011.

9 Defendants also move to dismiss asserting that the Complaint
10 is not "specific enough" under Fed. R. Civ. P. 9(b), governing
11 fraud allegations. This court finds that the allegations are
12 sufficiently specific to allow defendants to defend themselves.

13 However, the Complaint on its fact does not state a claim
14 for fraud or misrepresentation. An essential element of this
15 claim is "deceit," that is, the victim of the fraud must be
16 deceived, and take action (justifiable reliance) based upon that
17 deceit. Here, plaintiff alleges that he knew that these letters
18 were false, thus he was never deceived. Moreover, he does not
19 allege that he justifiably relied upon the supposed truth of the
20 communications. The claim for negligent misrepresentation also
21 requires allegations that the victim was deceived and justifiably
22 relied on the deception.

23 This portion of the fraud claim will be dismissed for
24 failure to state a claim.

25 **C. Conspiracy - The HAMP Program.**

26 Plaintiff alleges that BANA, BAC Home Loans and FHLMC
27 conspired in the creation of the false paper trail relating to
28

1 the HAMP program, discussed above. This court has already found
2 that there was no viable claim for fraud or misrepresentation
3 against BANA, the only defendant charged with fraud. Therefore,
4 there can be no claim for civil conspiracy against anyone who
5 allegedly conspired with BANA to inflict a tort that never
6 occurred.

7 There is no separate tort of civil
8 conspiracy. The significance of the
9 allegation is to hold each member of the
10 conspiracy liable as a joint tortfeasor.
11 This joint liability does not accrue unless a
12 wrongful act is carried out and damage
13 results.

12 Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc., 159 Cal.
13 App. 3d 637, 645 (2nd Dist. 1984) (emphasis added).

14 The claim for conspiracy will therefore be dismissed in its
15 entirety, for failure to state a claim.

16 VI. CLAIM 6 - BREACH OF CONTRACT

17 [T]he elements of a cause of action for
18 breach of contract are (1) the existence of
19 the contract, (2) plaintiff's performance or
20 excuse for nonperformance, (3) defendant's
21 breach, and (4) the resulting damages to the
22 plaintiff.

21 Oasis West Realty, LLC v. Goldman, 51 Cal. 4th 811, 821
22 (2011). Plaintiff alleges that BANA breached the contract (the
23 Deed of Trust) by (1) creating an "unlawful escrow account on
24 Plaintiff's Mortgage loan," and (2) failing to credit his
25 payments in a timely manner.

26 ////

27 ////

28 ////

1 **A. BANA and BAC Home Loans.**

2 Defendants seek dismissal, asserting that plaintiff failed
3 to allege his own performance (and indeed, that he alleged his
4 own non-performance), and failed to allege defendant's breach.

5 As for plaintiff's own performance, it appears that
6 plaintiff's obligation to have a homeowner's insurance policy
7 arose in May 2001, when plaintiff took out a second mortgage on
8 his home. See Complaint ¶ 23. It further appears that for nine
9 (9) years, May 2001 until May 2010, BANA acquiesced in
10 plaintiff's failure to obtain insurance - or at least, his
11 failure to produce it - finally demanding it in May 2010. Id.
12 Plaintiff accordingly alleges that defendant has waived this
13 provision of the Deed of Trust. Thus, while plaintiff has not
14 alleged complete performance, he has alleged an excuse for non-
15 performance or waiver of performance. Defendant does not address
16 the allegation of waiver, and the court will not reject it on its
17 own initiative.

18 Defendants assert that plaintiff failed to allege breach.
19 That is not so. Plaintiff alleges that a written modification to
20 the Deed of Trust - which he has not attached to the complaint -
21 contains an agreement that BANA would never create an escrow
22 account against his mortgage, other than the initial PMI escrow
23 account. He further alleges that in breach of that written
24 agreement, defendant created an escrow account against his
25 mortgage.³⁴

26 ³⁴ The court therefore does not adopt the Magistrate's finding
27 that plaintiff is alleging the breach of an oral contract. The
28 modified contract is allegedly written, although apparently, it
has yet to be produced.

1 It does seem that plaintiff's allegation brushes right up
2 against the "plausibility" standard of Iqbal. It is hard to
3 believe that a lender would ever agree to such a thing, and it is
4 suspicious that plaintiff has never produced this written
5 modification.³⁵ However, it seems to the court that plaintiff's
6 allegations are merely improbable, rather than implausible, and
7 therefore they will survive dismissal.

8 [s]ome improbable allegations might properly
9 be disposed of on summary judgment, but to
10 dismiss them as frivolous without any factual
11 development is to disregard the age-old
12 insight that many allegations might be
13 "strange, but true; for truth is always
14 strange, Stranger than fiction." Lord Byron,
15 Don Juan, canto XIV, stanza 101 (T. Steffan,
16 E. Steffan & W. Pratt eds. 1977)).

17 Denton v. Hernandez, 504 U.S. 25, 33 (1992).

18
19 **B. QLS and Balboa.**

20 QLS and Balboa move to dismiss because plaintiff has not
21 alleged that they were party to any contract with plaintiff.
22
23

24 ³⁵ Defendant notes that plaintiff has not attached the modified
25 documents to the complaint. If this matter were being litigated
26 in a California state court, the failure to set forth the exact
27 language of the breached contract, or otherwise attached the
28 contract, might be fatal. See Harris v. Rudin, Richman & Appel,
74 Cal. App. 4th 299, 307 (2nd Dist. 1999) ("If the action is
based on alleged breach of a written contract, the terms must be
set out verbatim in the body of the complaint or a copy of the
written agreement must be attached and incorporated by
reference"). However, this matter is in federal court, where
notice pleading rules govern. See Boland, Inc. v. Rolf C. Hagen
(USA) Corp., 685 F. Supp. 2d 1094, 1102 (E.D. Cal. 2010)
(Karlton, J.) (addressing pleading requirements for breach of
contract claim: "California pleading requirements do not apply in
federal court").

1 That is correct, and the court accordingly adopts the Magistrate
2 Judge's findings and recommendations that the claim be dismissed
3 against QLS and Balboa. See ECF No. 123 at 39.

4 **VII. DECLARATORY RELIEF**

5 "To qualify for declaratory relief, [a party]
6 would have to demonstrate its action
7 presented two essential elements: '(1) a
8 proper subject of declaratory relief, and
9 (2) an actual controversy involving
justiciable questions relating to [the
party's] rights or obligations.'"

10 Jolley v. Chase Home Finance, LLC, 213 Cal. App. 4th 872, 909
11 (1st Dist. 2013) (quoting Wilson & Wilson v. City Council of
12 Redwood City, 191 Cal. App. 4th 1559, 1582 (2011)).

13 Plaintiff seeks a declaration determining the respective
14 rights of the parties. Defendant seeks to dismiss solely on the
15 grounds that it is duplicative of the relief he seeks from the
16 lawsuit as a whole. It does appear that "this cause of action is
17 redundant of [plaintiff's] other claims," and will be dismissed
18 for that reason. Jolley, 213 Cal. App. 4th at 909. However, the
19 request for declaratory relief remains in the Complaint as one of
20 the requested elements of relief. See Complaint page 47.

21 **VIII. ACCOUNTING**

22 Plaintiff seeks an accounting of moneys paid and due on the
23 mortgage transaction.

24 A cause of action for an accounting requires
25 a showing that a relationship exists between
26 the plaintiff and defendant that requires an
27 accounting, and that some balance is due the
28 plaintiff that can only be ascertained by an
accounting.

1 Teselle v. McLoughlin, 173 Cal. App. 4th 156, 179 (3rd
2 Dist. 2009).

3 Defendants seek dismissal solely on the grounds that
4 plaintiff has not alleged that any sums are due to him that would
5 be the subject of an accounting. ECF No. 69 at 28-29. That is
6 not so. Plaintiff alleges that "he has actually overpaid
7 [defendants] and is entitled to a refund on his mortgage
8 account." Complaint ¶ 134. Plaintiff seeks an accounting to
9 determine the amount of his overpayment.

10 **IX. CONVERSION**

11 Plaintiff alleges that defendants collected from him "escrow
12 funds" which were to be credited to his mortgage payments
13 (interest and principal) and, to the degree they were surplus,
14 were to be returned to plaintiff. Complaint ¶¶ 136-37. Instead
15 of doing either, plaintiff alleges, defendants wrongfully kept
16 the funds. Id.

17 "Conversion is the wrongful exercise of
18 dominion over the property of another."
19 The elements of a claim for conversion are
20 (1) "the plaintiff's ownership or right to
21 possession of the property at the time of the
22 conversion," (2) "the defendant's conversion
23 by a wrongful act or disposition of property
24 rights," and (3) damages. "It is not
25 necessary that there be a manual taking of
26 the property," only "an assumption of control
27 or ownership over the property, or that the
28 alleged converter has applied the property to
his [or her] own use."

25 Prakashpalan v. Engstrom, Lipscomb and Lack, 223 Cal. App. 4th
26 1105, 1135 (2nd Dist. 2014) (citations omitted).

27 A cause of action for conversion of money can
28 be stated only where defendant interferes

1 with plaintiff's possessory interest in a
2 specific, identifiable sum, such as when a
3 trustee or agent misappropriates the money
4 entrusted to him. "Money cannot be the
5 subject of a cause of action for conversion
6 unless there is a specific, identifiable sum
involved, such as where an agent accepts a
sum of money to be paid to another and fails
to make the payment.

7 Kim v. Westmoore Partners, Inc., 201 Cal. App. 4th 267, 284 (4th
8 Dist. 2011) (citations omitted).

9 Defendant moves to dismiss on the grounds that plaintiff's
10 right to payment is a "mere contractual one." ECF No. 96 at 29.
11 This misconceives the claim plaintiff is making. Plaintiff does
12 not simply assert that defendants owe him money under the
13 contract. Rather, he asserts that pursuant to the contract, he
14 entrusted specific sums of money to defendants, which defendants
15 were to use for a specific purpose - to credit plaintiff's
16 mortgage account, and return the surplus. Plaintiff further
17 asserts that defendants instead took the money entrusted to them,
18 used it to pay fees plaintiff did not owe, and are refusing to
19 return it, or even any surplus after the fees are paid. This
20 states a claim for conversion.

21 **X. WRONGFUL FORECLOSURE**

22 Plaintiff asserts a claim for wrongful foreclosure, alleging
23 numerous errors and points of unfairness, and also alleging that
24 he has made "full and timely tender of all amounts owed to
25 defendants." See Complaint ¶ 147. Defendant

26 To obtain the equitable set aside of a
27 trustee's sale or maintain a wrongful
28 foreclosure claim, a plaintiff must allege
that (1) defendants caused an illegal,

1 fraudulent, or willfully oppressive sale of
2 the property pursuant to a power of sale in a
3 mortgage or deed of trust; (2) plaintiff
4 suffered prejudice or harm; and (3) plaintiff
5 tendered the amount of the secured
6 indebtedness or were excused from tendering.
7 Recognized exceptions to the tender rule
8 include when: (1) the underlying debt is
9 void, (2) the foreclosure sale or trustee's
10 deed is void on its face, (3) a counterclaim
11 offsets the amount due, (4) specific
12 circumstances make it inequitable to enforce
13 the debt against the party challenging the
14 sale, or (5) the foreclosure sale has not yet
15 occurred.

16 Chavez v. Indymac Mortgage Services, 219 Cal. App. 4th 1052, 1062
17 (4th Dist. 2013) (emphasis added) (citations omitted).

18 Defendant BANA moves to dismiss on the ground that plaintiff
19 has not alleged "tender." This has two problems. First,
20 plaintiff has alleged "tender." See Complaint ¶ 147. Second,
21 tender is not required where the claim is for "wrongful
22 foreclosure" where, as here, "the foreclosure sale has not yet
23 occurred." Chavez, 219 Cal. App. 4th at 1062.³⁶ BANA also
24 asserts that plaintiff has not performed under the Deed of Trust
25 by failing to obtain insurance on the property. As discussed

26 ³⁶ As QLS points out, and as the Magistrate Judge found, a
27 wrongful foreclosure claim seeking to set aside a foreclosure
28 sale would be premature where no foreclosure sale had yet
occurred. To the degree federal magistrate judges and district
courts have held that all wrongful foreclosure claims are
premature unless a sale has occurred, this court respectfully
disagrees. The California courts acknowledge the validity of
claims for wrongful foreclosure prior to the foreclosure sale
where, as here, defendants are alleged to have violated laws
intended to avoid foreclosure. See Pfeifer v. Countrywide Home
Loans, Inc., 211 Cal. App. 4th 1250, 1280 (1st Dist. 2012)
("[c]ourts, however, have not required tender when the lender has
not yet foreclosed and has allegedly violated laws related to
avoiding the necessity for a foreclosure").

1 above, plaintiff has credibly alleged that BANA has waived
2 plaintiff's performance.

3 Defendant QLS moves to dismiss because plaintiff has not
4 alleged it did anything unlawful, and because it acted in good
5 faith. However, plaintiff has set out in excruciating detail all
6 the things he says went wrong with the Notice of Trustee's Sale,
7 and why he thinks they violate specified sections of California
8 law. If QLS wishes to get this claim dismissed, it must set
9 forth which allegations are not legally sufficient, and why.
10 This court will not, on its own initiative, try to identify the
11 allegations QLS thinks are insufficient and why.³⁷

12 **XI. BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING**

13 Plaintiff asserts that all defendants breached the covenant
14 of good faith and fair dealing in relation to the Deed of Trust.
15 Broadly stated, that covenant requires that neither party do
16 anything that will deprive the other of the benefits of the
17 agreement. Freeman & Mills, Inc. v. Belcher Oil Co., 11 Cal. 4th
18 85, 91 (1995).

19 **A. Defendants QLS and Balboa.**

20 The court adopts the Magistrate's findings and
21 recommendation that QLS and Balboa be dismissed from this claim
22

23
24 ³⁷ This court is aware of its obligation to treat the Complaint
25 with some liberality, since it is authored by a pro se plaintiff.
26 However, the motion to dismiss is authored by a party represented
27 by counsel. Defendant must, accordingly, do the work of getting
28 the complaint dismissed, if it is to be dismissed, rather than
simply pointing out that it does not like the Complaint, and
demand that this court or the Magistrate Judge do all the
research needed to establish whether the claim is valid or not.

1 because they are not alleged to be parties to the mortgage
2 agreement. See ECF No. 123 at 46-47.

3 **B. BANA and BAC Home Loans.**

4 Defendants BANA and BAC Home Loans move to dismiss this
5 claim because this claim "is limited to situations in which a
6 fiduciary relationship exists." ECF No. 96 at 30. However, as
7 the Magistrate Judge found, in California, every contract carries
8 with it an implied covenant of good faith and fair dealing.³⁸
9 See, e.g., Wilson v. 21st Century Ins. Co., 42 Cal. 4th 713, 720
10 (2007) ("The law implies in every contract ... a covenant of good
11 faith and fair dealing"); Freeman & Mills, Inc. v. Belcher Oil
12 Co., 11 Cal. 4th 85, 91 (1995) ("It is well settled that, in
13 California, the law implies in every contract a covenant of good
14 faith and fair dealing.") (emphasis in text); Carma Developers
15 (Cal.), Inc. v. Marathon Development California, Inc., 2 Cal. 4th
16 342, 371-72 (1992) (same).

17 BANA also asserts that the Complaint does not allege that
18 defendants have frustrated plaintiff's ability to obtain the
19 benefits of the original loan. This is also not so. Plaintiff
20 alleges that by placing the escrow account against his mortgage,
21 BANA has prevented plaintiff from paying off his mortgage in the
22 manner he anticipated and agreed to, at the time he signed the
23

24 ³⁸ The Magistrate Judge recommended that the claim be found to be
25 barred by the statute of limitations. The court will not adopt
26 that recommendation however, as it is an affirmative defense
27 which neither defendant raised in their motion. In any event,
28 the claim arose not upon the signing of the Deed of Trust in
2001, but upon the alleged breach of the covenant in 2010 or
2011.

1 modified mortgage agreement.

2 This claim will not be dismissed against BANA.³⁹

3 **XII. NEGLIGENCE**

4 The court adopts the Magistrate Judge's findings and
5 recommendation that the negligence claim be dismissed as to BANA,
6 BAC Home Loans and Balboa, except that the claim will be
7 dismissed with prejudice.⁴⁰ See ECF No. 123 at 48-49.

8 **XIII. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

9 The court adopts the Magistrate Judge's findings and
10 recommendation that the claim for intentional infliction of
11 emotional distress be dismissed as to BANA, BAC Home Loans,
12 Balboa and QLS, except that the claim will be dismissed with
13 prejudice. See ECF No. 123 at 49-50.

14 **XIV. CALIFORNIA'S FAIR BUSINESS LAW**

15 Defendants move to dismiss the claim under Cal. Bus. & Prof.
16 Code § 17200 on the ground that the court should dismiss all the
17 underlying claims of unfair or unlawful practices. Since some of
18 those claims have survived dismissal, this claim will not be
19 dismissed, to the degree it is predicated on a surviving claim.

20 **XV. CIVIL RICO**

21 The court adopts the Magistrate Judge's findings and
22 recommendation that the civil claim under the Racketeer
23 Influenced and Corrupt Organizations Act ("RICO"), be dismissed
24 as to BANA, BAC Home Loans, Balboa and QLS, except that the claim

25 _____
26 ³⁹ BAC Home Loans is not alleged to have been a party to the
27 contract, so it will also be dismissed.

28 ⁴⁰ Defendant QLS did not move to dismiss this claim.

1 will be dismissed with prejudice.⁴¹ See ECF No. 123 at 28-29.

2 **CONCLUSION**

3 For the reasons set forth above:

4 1. The motion of BANA, BAC Home Loans, Balboa and QLS to
5 dismiss the complaint in its entirety for failure to comply with
6 Rule 8 is **DENIED**;

7 2. The motion of BANA and BAC Home Loans, to dismiss the
8 RESPA claim (Claim One), under 12 U.S.C. § 2605(e) and 24 C.F.R.
9 § 3500.21, is **DENIED**, as plaintiff has properly alleged that
10 defendants failed to respond to three QWRs in a timely manner;

11 3. The motion of BANA and BAC Home Loans, to dismiss the
12 RESPA claim (also Claim One), under 12 U.S.C. § 2609 AND 24
13 C.F.R. § 3500.17, is **GRANTED** without leave to amend, as there is
14 no private right of action.

15 Accordingly, this portion of Claim One is **DISMISSED** in its
16 entirety, with prejudice;

17 4. The motion of QLS, to dismiss the TILA and Regulation Z
18 claim (Claim Two), is **GRANTED** without leave to amend, as the
19 claim only lies against a creditor or lender.

20 Accordingly, this portion of Claim Two (against QLS) is
21 **DISMISSED**, with prejudice;

22 5. The motion of BANA and BAC Home Loans to dismiss the
23 TILA and Regulation Z claim (also Claim Two), is **DENIED**, as the
24 allegations that defendants failed to provide a pay-off balance,
25 and failed to credit plaintiff's payment in a timely manner, are
26

27 _____
28 ⁴¹ Defendant HRG did not move to dismiss this claim.

1 sufficiently pled, and the claim is not barred by the statute of
2 limitations;

3 7. The motion of BANA and BAC Home Loans to dismiss the
4 FDCPA claim (Claim Three), is **GRANTED** without leave to amend, as
5 BANA is categorically exempt as a "creditor," and BAC Home Loans
6 is exempt because under the facts alleged in the Complaint, it is
7 not a "debt collector."

8 Accordingly, this portion of Claim Three (against BANA and
9 BAC Home Loans) is **DISMISSED**, with prejudice;

10 8. The motion of QLS to dismiss the FDCPA claim (also
11 Claim Three), is **DENIED**, as the Complaint sufficiently alleges
12 that QLS is a "debt collector," and sufficiently alleges conduct
13 that violates the FDCPA;

14 9. The motion of BANA to dismiss the Rosenthal Act claim
15 (also Claim Three) is **DENIED**, because BANA is not exempt and the
16 Complaint sufficiently alleges that BANA falsely referred to QLS
17 as "the attorneys;"

18 10. The motion of BANA to dismiss the claim under Cal. Civ.
19 Code § 2954(a)(1) (Claim Four), is **DENIED** for reasons set forth
20 by the Magistrate Judge;

21 11. The motion of BANA to dismiss the fraud claim
22 (Claim Five), is **DENIED**, as it is not barred by the statute of
23 limitations and sufficiently pleads a claim for fraud;

24 12. The motion of BANA, BAC Home Loans and QLS to dismiss
25 the Negligent Misrepresentation claim regarding loan modification
26
27
28

1 activities (also Claim Five) is **GRANTED** without leave to amend,⁴²
2 as the allegations fail to state a claim.

3 Accordingly, this portion of Claim Five is **DISMISSED** in its
4 entirety, with prejudice;

5 13. The motion of BANA and BAC Home Loans to dismiss the
6 conspiracy claim (also Claim Five), is **GRANTED** without leave to
7 amend, as the allegations fail to state a claim.

8 Accordingly, the conspiracy portion of Claim Five is
9 **DISMISSED** in its entirety, with prejudice;

10 14. The motion of BANA to dismiss the breach of contract
11 claim (Claim Six), is **DENIED**, as the Complaint sufficiently
12 alleges the elements of the claim;

13 15. The motions of and BAC Home Loans, Balboa and QLS to
14 dismiss the breach of contract claim (also Claim Six), are
15 **GRANTED** without leave to amend, as plaintiff does not allege any
16 contract with BAC Home Loans, Balboa or QLS.

17 Accordingly, this portion of Claim Six (against BAC Home
18 Loans, Balboa and QLS) is **DISMISSED**, with prejudice;

19 16. The motions of BANA, BAC Home Loans, Balboa and QLS to
20 dismiss the claim for declaratory relief (Claim Seven), are
21 **GRANTED** without leave to amend, as the claim is redundant of the
22 request for relief.

23 Accordingly, Claim Seven is **DISMISSED** in its entirety, with
24 prejudice;

25 _____
26 ⁴² It is theoretically possible that plaintiff could amend his
27 complaint to state a claim. However, this is plaintiff's third
28 complaint in this case, and it does not appear that the pro se
plaintiff is capable of, or willing to, correct his pleadings.

1 17. The motion of BANA and BAC Home Loans to dismiss the
2 claim for an accounting (Claim Eight), is **DENIED**, as the
3 Complaint sufficiently pleads the claim;

4 18. The motion of BANA and BAC Home Loans to dismiss the
5 conversion claim (Claim Nine), is **DENIED**, as the Complaint
6 sufficiently pleads the claim;

7 19. The motions of BANA, BAC Home Loans, Balboa and QLS to
8 dismiss the claim for wrongful foreclosure (Claim Ten), is
9 **DENIED**, as the Complaint sufficiently pleads the claim;

10 20. The motion of BANA and BAC Home Loans to dismiss the
11 claim for breach of the covenant of good faith and fair dealing
12 (Claim Eleven), is **DENIED**, as the Complaint sufficiently pleads
13 the claim;

14 21. The motions of Balboa and QLS to dismiss the claim for
15 breach of the covenant of good faith and fair dealing (also
16 Claim Eleven), is **GRANTED** without leave to amend, as the
17 Complaint does not allege they are parties to the contract.

18 Accordingly, this portion of Claim Eleven (against Balboa
19 and QLS) is **DISMISSED**, with prejudice;

20 22. The motion of BANA and BAC Home Loans to dismiss the
21 claim for negligence (Claim Twelve), is **GRANTED** without leave to
22 amend, as the Complaint fails to state a claim;

23 Accordingly, Claim Twelve is **DISMISSED** in its entirety, with
24 prejudice;

25 23. The motions of BANA, BAC Home Loans, Balboa and QLS to
26 dismiss the claim for intentional infliction of emotional
27 distress (Claim Thirteen), is **GRANTED** without leave to amend, as
28 the Complaint fails to state a claim;

1 Accordingly, Claim Thirteen is **DISMISSED** in its entirety,
2 with prejudice;

3 24. The motions of BANA, BAC Home Loans, Balboa and QLS to
4 dismiss the claim for violation of Cal. Bus. & Prof. Code § 17200
5 (Claim Fourteen), is **DENIED** to the degree the claim is predicated
6 upon any of the surviving claims discussed above;

7 25. The motions of BANA, BAC Home Loans, Balboa and QLS to
8 dismiss the claim for civil RICO (Claim Fourteen), is **GRANTED**
9 without leave to amend, for failure to state a claim;

10 Accordingly, Claim Fifteen is **DISMISSED** in its entirety,
11 with prejudice.

12 This matter is remanded to the Magistrate Judge for further
13 proceedings.

14 IT IS SO ORDERED.

15 DATED: May 21, 2014.

16

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LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

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