IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER D. SCHNEIDER,

Plaintiff, Case No. 2:11-cv-2953 LKK DAD PS

vs.

BANK OF AMERICA N.A., et al., ORDER

Defendants.

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This matter came before the court on March 2, 2012, for hearing of defendants' motions to dismiss plaintiff's amended complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and plaintiff's motions for a preliminary injunction and imposition of sanctions. Plaintiff Christopher Schneider, who is proceeding pro se in this action, appeared on his own behalf. Attorney Ashley Hennessee appeared on behalf of defendant Quality Loan Service Corporation. Attorney Tracy Moyer appeared telephonically on behalf of defendants Bank of America, N.A., BAC Home Loan Servicing, LP, and Balboa Insurance Company. Oral argument was heard, and the parties' motions were taken under submission.

Upon consideration of the briefing on file, the parties' arguments at the hearing, and the entire file, defendants' motions to dismiss will be granted, as to plaintiff's federal causes of action. In this regard, the court finds that plaintiff's amended complaint fails to allege a

cognizable claim giving rise to federal jurisdiction. Without a cognizable federal claim for relief, the court would recommend that the assigned District Judge decline to exercise jurisdiction over plaintiff's remaining state law claims. Accordingly, the instant order addresses plaintiff's federal causes of action and identifies the deficiencies as those causes of action are alleged in the amended complaint. However, plaintiff will be given the opportunity to file a second amended complaint in an effort to state a cognizable claim giving rise to federal jurisdiction.[1]

PROCEDURAL BACKGROUND

Plaintiff commenced this action on November 7, 2011, by paying the required filing fee and filing his original complaint. (Doc. No. 1.) On November 14, 2011, plaintiff filed a motion for a temporary restraining order. (Doc. No. 9.) On November 17, 2011, the assigned District Judge granted plaintiff's motion for a temporary restraining order and enjoined defendants from foreclosing on plaintiff's property. (Doc. No. 12.)

On November 28, 2011, before a responsive pleading had been filed, plaintiff filed an amended complaint. (Am. Compl. (Doc. No. 15.)) On November 29, 2011, plaintiff filed a request for an extension of the temporary restraining order and an order to show cause as to why a preliminary injunction should not issue. (Doc. No. 16.) On December 1, 2011, the assigned District Judge set a hearing on plaintiff's request for a preliminary injunction for January 17, 2012, and extended the temporary restraining order through the date of that hearing. (Doc. No. 17.) On December 19, 2011, plaintiff filed a motion for a preliminary injunction, (Doc. No. 24), and on December 22, 2011, defendants Bank of America, N.A., BAC Home Loan Servicing, LP, and Balboa Insurance Company (collectively "BOA, N.A.") filed a motion to dismiss. (Doc. No. 26.) On January 3, 2012, defendant BOA, N.A., filed an opposition to plaintiff's motion for a preliminary injunction, (Doc. No. 30), and that same day plaintiff filed an opposition to defendant BOA, N.A.'s, motion to dismiss. (Doc. No. 32.) However, on January

[1] In light of the granting of leave to amend, and without a properly pled federal claim, the court will defer consideration of plaintiff's state law claims at this juncture.

12, 2012, the assigned District Judge vacated the January 17, 2012 hearing, and ordered the parties to re-notice their motions before the undersigned. (Doc. No. 42.) The assigned District Judge also ordered that the temporary restraining order remain in effect until the hearing before the undersigned on plaintiff's motion for a preliminary injunction.

On January 18, 2012, defendant Quality Loan Service Corporation ("Quality Loan") filed a motion to dismiss noticed for hearing before the assigned District Judge, (Doc. No. 46), and then filed an amended motion to dismiss, noticed for hearing before the undersigned. (Doc. No. 47.) On January 19, 2012, defendant BOA, N.A., re-noticed their December 22, 2011 motion to dismiss for hearing before the undersigned, (Doc. No. 48), and on January 20, 2012, plaintiff re-noticed his December 19, 2011 motion for a preliminary injunction also for hearing before the undersigned. (Doc. No. 49.) That same day, plaintiff filed a motion seeking imposition of sanctions against defendant Quality Loan. (Doc. No. 51.) On February 7, 2012, defendant Quality Loan filed an opposition to plaintiff's motion for sanctions. (Doc. No. 54.) On March 2, 2012, the parties came before the undersigned for hearing of their motions.

PLAINTIFF'S FACTUAL ALLEGATIONS

In his amended complaint plaintiff alleges that in 2001, he purchased his home with a mortgage obtained from defendant BOA, N.A. Because plaintiff did not make an initial down payment of 20% or greater, he was required to pay a monthly mortgage insurance premium into an escrow account opened by BOA, N.A., in addition to his regular mortgage payment. However, in November of 2004, plaintiff had his home re-appraised and, as a result, was able to eliminate the mortgage insurance requirement so that he was obligated only for his monthly mortgage payment of $968.57. Defendant BOA, N.A., closed the escrow account associated with plaintiff's mortgage insurance premium. (Am. Compl. (Doc. No. 15) at 8.)[2]

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[2] Page number citations such as this one are to the page number reflected on the court's CM/ECF system and not to page numbers assigned by the parties.

In May of 2010, plaintiff, for the first time received a notice from defendant BOA, N.A., notifying him that he had failed to provide defendant with a copy of his required homeowner's insurance policy. (Id. at 9.) Defendant BOA, N.A., purchased homeowner's insurance on plaintiff's behalf.[3] On August 17, 2010, plaintiff sent defendant BOA, N.A., a letter requesting a copy of the insurance policy "he was being asked to pay for, so that he could see exactly what was covered and other significant details of it." (Id. at 10.) Plaintiff "wished to verify" that the policy purchased by defendant provided the same coverage as the policy plaintiff was being required to purchase, so that there was "no double standards of terms and conditions." (Id.) Defendant BOA, N.A., did not respond to plaintiff's letter.

After receiving defendant's May 2010 letter plaintiff contacted several insurers in an attempt to purchase his own homeowners policy but, for various reasons, was denied coverage. Finally in December of 2010, plaintiff was able to purchase coverage through the CA Fair Plan, California's insurer of last resort. Though plaintiff obtained coverage in December of 2010, and the insurance purchased by the defendant lender was supposedly canceled that same month, plaintiff received a statement indicating that he continued to be billed for the lender purchased policy until March of 2011. As a result of these circumstances, plaintiff alleges there is a large credit balance in an escrow account that has not been returned to him. (Id. at 9-10.)

On April 14, 2011, after defendant BOA, N.A., refused to accept plaintiff's mortgage payment, plaintiff opened a disputed escrow account purportedly pursuant to California Civil Code §1500, and deposited his monthly mortgage payment of $968.57 into that account. Plaintiff has since deposited each monthly mortgage payment into this account and has notified defendant BOA of each deposit and the account balance. (Id. at 11.)

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[3] Plaintiff alleges that an escrow account was opened in connection with the homeowner's insurance policy purchased by BOA, N.A. (Am. Compl. (Doc. No. 15) at 17.) According to plaintiff, at the time he purchased his home he negotiated an agreement with BOA, N.A., employees Cliff Coler and Susan Birge, so that "absolutely no escrow accounts *ever* for hazard insurance or property taxes" could be opened, and that this agreement is reflected in his loan documents. (Id. at 16-17.)

Defendants did not contact plaintiff regarding the disputed escrow account, but instead alleged that plaintiff had defaulted on his mortgage and sought to foreclose on his home. On November 9, 2011, plaintiff contacted defendant Quality Loan and BOA, N.A., to obtain the amount he allegedly owed, so that he could stop the foreclosure sale scheduled for November 18, 2011. Both defendants told plaintiff that he would have to contact the other defendant to obtain the total amount owed and to stop the foreclosure sale. (Id. at 12-13.)

Based on this conduct, plaintiff alleges federal causes of actions against defendants for violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607 et seq., Interpleader, 28 U.S.C. § 1335, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., Bank Fraud, 18 U.S.C. § 1344(2), Wire and Mail Fraud, 18 U.S.C. §§ 1341, 1343, and violation of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq., as well as several state law causes of action. (Id. at 3.)

LEGAL STANDARDS APPLICABLE TO DEFENDANT'S MOTION

A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the complaint. North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983). Dismissal of the complaint, or any claim within it, "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). See also Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984). Thus, the court may dismiss a complaint or any claim within it as frivolous where the claim is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke v. Williams, 490 U.S. 319, 327 (1989). The critical inquiry is whether a claim, even if inartfully pleaded, has an arguable legal and factual basis. Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989); Franklin v. Murphy, 745 F.2d 1221, 1227 (9th Cir. 1984). As the Supreme Court has explained, in order to state a claim on which relief may be granted, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

In determining whether a complaint states a claim, the court accepts as true the material allegations in the complaint and construes those allegations, as well as the reasonable inferences that may be drawn from them, in the light most favorable to the plaintiff. Erickson v. Pardus, 551 U.S. 89, 94 (2007); Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Hosp. Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 740 (1976); Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989). For purposes of a motion to dismiss, the court also resolves doubts in the plaintiff's favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

Pro se pleadings are held to a less stringent standard than those drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972). However, the court may disregard allegations in the complaint that are contradicted by facts established by exhibits attached to the complaint. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). In addition, the court need not accept as true conclusory allegations, unreasonable inferences, or unwarranted deductions of fact. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

ANALYSIS

I. Rule 8

The minimum requirements for a civil complaint in federal court are as follows:

> A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . , (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

Fed. R. Civ. P. 8(a).

Although the Federal Rules of Civil Procedure adopt a flexible pleading policy, a complaint must give the defendant fair notice of the plaintiff's claims and must allege facts that state the elements of each claim plainly and succinctly. Fed. R. Civ. P. 8(a)(2); Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual

enhancements.'" Ashcroft v. Iqbal, 556 U.S. 662, ---, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 555, 557). A plaintiff must allege with at least some degree of particularity overt acts which the defendants engaged in that support the plaintiff's claims. Jones, 733 F.2d at 649. A complaint must also contain "a short and plain statement of the grounds for the court's jurisdiction" and "a demand for the relief sought." Fed. R. Civ. P. 8(a)(1) & 8(a)(3).

Here, the amended complaint does not give the defendants fair notice of plaintiff's claims. In this regard, in his amended complaint plaintiff frequently fails to identify individual defendants when referring to actions allegedly undertaken. Instead, the amended complaint frequently uses the non-specific identifier "defendants." For example, plaintiff merely alleges that the "defendants" violated provisions of RESPA, that the "defendants" violated RICO, and that the "[d]efendants collectively" were "'aiding and abetting' each other's unlawful acts . . ." (See Am. Compl. (Doc. No. 15) at 31, 40 and 42.)

Nor does plaintiff's amended complaint allege facts that state the elements of his claims plainly or succinctly. In this regard, while plaintiff's amended complaint provides detailed factual allegations and asserts numerous causes of action, the factual allegations are alleged almost entirely separate from the causes of action, so that it is difficult to determine what factual allegations are intended to support which causes of action. For example, although plaintiff sets forth a claim for the violation of the FCRA, there are almost no factual allegations stated in connection with that claim. (Id. at 43.)

Below the court will address each of plaintiff's federal causes of action.

II. RESPA

"RESPA creates a private right of action for only three types of wrongful acts: (1) payment of a kickback and unearned fees for real estate settlement services, 12 U.S.C. § 2607(a), (b); (2) requiring a buyer to use a title insurer selected by the seller, 12 U.S.C. § 2608(b); and (3) the failure by a loan servicer to give proper notice of a transfer of servicing rights or to respond to

a qualified written request ("QWR") for information about a loan, 12 U.S.C. § 2605(f)." Choudhuri v. Wells Fargo Bank, N.A., No. C 11-00518 SBA, 2011 WL 5079480, at *8 (N.D. Cal. Oct. 25, 2011). In his amended complaint plaintiff alleges that between "August 2010 and October 2011," he sent "roughly 10-15 specific QWR's that have not been responded to . . ."[4] (Am. Compl. (Doc. No. 15) at 31.)

Under RESPA, a QWR is a "written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan." 12 U.S.C. § 2605(e)(1)(A). Among other things, a QWR must include a "statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower." 12 U.S.C. § 2605(e)(1)(B)(ii). A loan servicer must respond to a QWR only if the information is related to a loan servicing. Cuaresma v. Deustche Bank Nat. Co., No. C-11-03829 RMW, 2011 WL 4727805, at *5 (N.D. Cal. Oct. 7, 2011); Lawther v. Onewest Bank, No. C 10-0054 RS, 2010 WL 4936797, at *6 (N.D. Cal. Nov. 30, 2010). If a loan servicer fails to comply with the provisions of § 2605, a borrower is entitled to any actual damages as a result of the failure. Id.

Although the amended complaint refers to 10-15 QWR's plaintiff allegedly sent, the only alleged QWR's referred to with specificity in the amended complaint are those sent on August 17, 2010 and April 14, 2011.[5] (Am. Compl. (Doc. No. 15) at 10-11.) These are also the only alleged QWR's that have been provided by plaintiff as exhibits to his amended complaint. (Ex. Index (Doc. No. 15-1) at 31, 33.)

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[4] Although plaintiff has alleged this claim against "all defendants" the allegations underlying this claim do not refer to defendant Quality Loan.

[5] The amended complaint does not even refer to these two QWR's in plaintiff's RESPA claim, but instead discusses them in a lengthy section of the amended complaint designated "BACKGROUND FACTS COMMON TO ALL CAUSES OF ACTION." (Am. Compl. (Doc. No. 15) at 7.)

Morever, plaintiff's amended complaint does not allege what actual damages he suffered as a result of the alleged failure to respond. Instead the amended complaint merely asserts in a conclusory manner that defendants' conduct "caused Plaintiff actual damages." (Am. Compl. (Doc. No. 15-1) at 31.) "At the pleading stage, the plaintiff must include a demonstration of some actual pecuniary loss and a causal relationship between the alleged damages and the RESPA violation." Cuaresma v. Deustche Bank Nat. Co., No. C-11-03829 RMW, 2011 WL 4727805, at *5 (N.D. Cal. Oct. 7, 2011). See also Hussein v. Wells Fargo Bank, No. CIV S-11-1023 KJM DAD (TEMP) PS, 2011 WL 2215815, at *3 (E.D. Cal. June 6, 2011) (recommending dismissal of RESPA claim, in part, because plaintiff failed "to allege what actual damages he suffered as a result of the alleged failure to respond to the QWR."); Padilla v. One West Bank, No. 10-04080 CW, 2010 WL 5300900, at *6 (N.D. Cal. Dec. 20, 2010) ("The plaintiff must include, at the pleading state, a demonstration of some actual pecuniary loss."); Farias v. FCM Corp., Civil No. 10cv260 L(CAB), 2010 WL 4806894, at *3 (S.D. Cal. Nov. 18, 2010) ("Under section 2605(f)(1), plaintiff must, at a minimum, allege the 'actual damages' he suffered as a result of Litton's failure to respond to his QWR.").

Finally, the amended complaint also alleges that "defendants" have violated various subsections of 12 U.S.C. § 2609. (Am. Compl. (Doc. No. 15) at 32.) While a lender who violates 12 U.S.C. § 2609 is subject to imposition of penalties by the Secretary of Housing and Urban Development, there is no private right of action under 12 U.S.C. § 2609. See Hardy v. Regions Mortg. Inc., 449 F.3d 1357, 1360 (11th Cir. 2006); Choudhuri v. Wells Fargo Bank, N.A., No. C 11-00518 SBA, 2011 WL 5079480, at *8 (N.D. Cal. Oct. 25, 2011); Benas v. Shea Mortg. Inc., No. 11cv1461-IEG (BGS), 2011 WL 4635645, at *4 (S.D. Cal. Oct. 4, 2011); Birkholm v. Washington Mut. Bank, F.A., 447 F. Supp.2d 1158, 1163 (W.D. Wash. 2006).

For these reasons, the court concludes that plaintiff has yet to state a cognizable claim under RESPA.

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III. Interpleader

Plaintiff's amended complaint also alleges a cause of action for "Interpleader" pursuant to 28 U.S.C. § 2361. (Am. Compl. (Doc. No. 15) at 34.) 28 U.S.C. § 2361, however, does not provide a cause of action, but instead provides that:

> In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.
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> Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

28 U.S.C. § 2361.

In turn, § 1335 provides that:

> The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if
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> > (1) Two or more adverse claimants, of diverse citizenship as defined in subsection (a) or (d) of section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and

> with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.
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> (b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

28 U.S.C.A. § 1335.

Here, the import of these statutes is not apparent from plaintiff's amended complaint.

IV. RICO

Plaintiff's amended complaint also attempts to allege a civil RICO claim. (Am. Compl. (Doc. No. 15) at 40.) To state a civil RICO claim, a plaintiff must allege: (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity (known as "predicate acts"), (5) causing injury to plaintiff's business or property. Sanford v. Memberworks, Inc., 625 F.3d 550, 557 (9th Cir. 2010); Walter v. Drayson, 538 F.3d 1244, 1247 (9th Cir. 2008); Grimmett v. Brown, 75 F.3d 506, 510 (9th Cir. 1996). The alleged enterprise must exist "separate and apart from that inherent in the perpetration of the alleged [activity]." Chang v. Chen, 80 F.3d 1293, 1300-01 (9th Cir. 1996). A "pattern of racketeering activity" means at least two criminal acts enumerated by statute. 18 U.S.C. § 1961(1), (5) (including, among many others, mail fraud, wire fraud, and financial institution fraud). These so-called "predicate acts" under RICO must be alleged with specificity in compliance with Rule 9(b). Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1400-01 (9th Cir. 2004); see also Lancaster Community Hospital v. Antelope Valley Hospital Dist., 940 F.2d 397, 405 (9th Cir. 1991) (holding with respect to the predicate act of mail fraud that a plaintiff must allege with "particularity the time, place, and manner of each act of fraud, plus the role of each defendant in each scheme"); Alan Neuman Productions, Inc. v. Albright, 862 F.2d 1388, 1392-93 (9th Cir. 1988); Pineda v. Saxon Mortgage

Services, No. SACV 08-1187 JVS (ANx), 2008 WL 5187813, at *4 (C.D. Cal. Dec. 10, 2008) ("It is not enough for [plaintiff] to rely on mere labels and conclusions" to establish a RICO claim but rather, plaintiff must give each defendant notice of the particular predicate act it participated in and must allege each predicate act with specificity).[6]

Here, the allegations of the amended complaint with respect to a civil RICO claim are inadequate. Plaintiff offers no factual allegations in support of his civil RICO claim, let alone specific facts sufficient to meet the heightened pleading requirements applicable to fraud claims under Rule 9(b). Instead, the amended complaint offers mere conclusory allegations, such as that "on, around, or after January 2001," defendants participated in "fraud(s), consipracy(s), extorion, and interstate scheme which has proximately caused injuries and damages to Plaintiff." (Am. Compl. (Doc. No. 15) at 40.) Also deficient are plaintiff's allegations that each defendant is "an

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[6] Plaintiff is advised that his various fraud claims are also subject to the specificity requirements of Rule 9. In this regard, when claims of fraud are raised, "the circumstances constituting fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b). "Rule 9(b) serves not only to give notice to defendants of the specific fraudulent conduct against which they must defend, but also 'to deter the filing of complaints as a pretext for the discovery of unknown wrongs, to protect [defendants] from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis.'" Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001) (quoting In re Stac Elec. Sec. Litig., 89 F.3d 1399, 1405 (9th Cir. 1996)). Pursuant to Rule 9(b), a plaintiff alleging fraud at a minimum must plead evidentiary facts such as the time, place, persons, statements and explanations of why allegedly misleading statements are misleading. In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1547 n.7 (9th Cir. 1994); see also Fecht v. Price Co., 70 F.3d 1078, 1082 (9th Cir. 1995). Likewise, "[u]nder California law, the 'indispensable elements of a fraud claim include a false representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages.'" Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1105 (9th Cir. 2003) (quoting Moore v. Brewster, 96 F.3d 1240, 1245 (9th Cir. 1996)). Circumstances that must be stated with particularity pursuant to Rule 9(b) include the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." Sanford v. Memberworks, Inc., 625 F.3d 550, 558 (9th Cir. 2010) (quoting Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004)). See also Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007); Miscellaneous Serv. Workers, Drivers & Helpers v. Philco-Ford Corp., 661 F.2d 776, 782 (9th Cir. 1981) (affirming district court's dismissal of the plaintiffs' deceit and misrepresentation claims where plaintiffs failed to allege with sufficient particularity the content of the false representations and identities of the parties to the misrepresentations). "In the context of a fraud suit involving multiple defendants, a plaintiff must, at a minimum, 'identif[y] the role of [each] defendant[ ] in the alleged fraudulent scheme.'" Swartz, 476 F.3d at 765 (quoting Moore v. Kayport Package Express, 885 F.2d 531, 541 (9th Cir. 1989)).

'enterprise defendant,'" and that any reference to "any act of any Defendants . . . shall mean that each Defendant acted individually and jointly with other Defendants." (Id.) As noted above, predicate acts must be alleged specifically and in relation to each defendant's particular, alleged illegal conduct. Plaintiff's amended complaint fails to set forth these specifics.

V. Bank, Wire and Mail Fraud

Plaintiff's amended complaint also alleges causes of action for bank fraud (18 U.S.C. § 1344(2)), wire fraud (18 U.S.C. § 1343), and mail fraud (18 U.S.C. § 1341).[7] (Am. Compl. (Doc. No. 15) at 41-42.) These provisions, however, are criminal statutes that do not provide a private cause of action or a basis for civil liability.[8] See Ellis v. City of San Diego, 176 F.3d 1183, 1189 (9th Cir. 1999) (affirming district court's dismissal of sixteen claims based on California Penal Code sections because "these code sections do not create enforceable individual rights"); Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980) (holding that criminal statutes 18 U.S.C. §§ 241 and 242 "provide no basis for civil liability"); see also Aguirre v. Cal-Western Reconveyance Corp., No. CV 11-6911 CAS (AGRx), 2012 WL 273753, at *10 (C.D. Cal. Jan. 30, 2012) ("The mail fraud statute, 18 U.S.C. § 1341, is a criminal statute and does not provide for a private right of action."); Cobb v. Brede, No. C 10-03907 MEJ, 2012 WL 33242, at *2 (N.D. Cal. Jan. 6, 2012) ("The Court assumes that Plaintiffs are referring to 18 U.S.C. §§ 1341 and 1343, which are the federal criminal statutes for mail and wire fraud. These criminal statutes, however, do not provide litigants with a private right of action."); Milgrom v. Burstein, 374 F. Supp.2d 523, 528-29 (E.D. Ky. 2005) (finding "no cognizable civil action flowing from

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[7] Though the amended complaint sets forth the bank fraud cause of action separately from the causes of action for wire and mail fraud, all of these causes of action suffer from the same defects and will therefore be addressed together.

[8] Plaintiff concedes in his opposition to BOA, N.A.'s motion to dismiss that "there is no independent private right of action when alleged as separate causes of action" and that "[d]ismissal is thus proper as separate causes" of action. (Pl's. Opp.'n to BOA, N.A. MTD (Doc. No. 32) at 13.) In the event plaintiff chooses to file a second amended complaint, he should not re-allege these causes of action.

the bank fraud statutes . . . 18 U.S.C. §§ 1344 and 1014.").[9]

VI. FCRA

Finally, the amended complaint alleges a cause of action based upon a violation of the "FCRA." (Am. Compl. (Doc. No. 15) at 43.) Specifically, plaintiff alleges that the "[d]efendants wrongfully, improperly and illegally reported negative information" about plaintiff to one of more credit reporting agencies. (Id.) Accordingly, plaintiff alleges that he is entitled to maintain a private cause of action against defendants pursuant to 15 U.S.C. §1681(s)-2(b). (Id.)

> Subsection 1681s-2(b) provides that, after receiving a notice of dispute, the furnisher [of credit information to a consumer reporting agency ("CRA")] shall:
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> > (A) conduct an investigation with respect to the disputed information;
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> > (B) review all relevant information provided by the [CRA] pursuant to section 1681i(a)(2) ...;
> >
> > (C) report the results of the investigation to the [CRA];
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> > (D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other [CRAs] to which the person furnished the information ...; and
> >
> > (E) if an item of information disputed by a consumer is found to be inaccurate or incomplete or cannot be verified after any reinvestigation under paragraph (1) ... (i) modify ... (ii) delete[or] (iii) permanently block the reporting of that item of information [to the CRAs].

Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1154 (9th Cir. 2009). However, "[t]hese obligations are triggered 'upon notice of dispute'–that is, when a person who furnished

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[9] Moreover, even if a private right of action was created by these statues, plaintiff's claims would be subject to dismissal for failing to meet the particularity requirements of Rule 9(b) as noted above. See Vess, 317 F.3d at 1106 ("Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged.") (quoting Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)).

information to a [credit reporting agency] receives notice from the [credit reporting agency] that the consumer disputes the information." Id.

Here, while the amended complaint does allege that "[d]efendants qualified as a provider of information to the credit reporting agencies," it is not alleged that plaintiff submitted to either defendant a notice of dispute.[10] (Am. Compl. (Doc. No. 15) at 43.) Accordingly, plaintiff has failed to state a cognizable FCRA claim. See Cross v. Wells Fargo Bank, N.A., No. CV11-00447 AHM (OPx), 2011 WL 6136734, at *8-9 (C.D. Cal. Dec. 9, 2011) ("Plaintiffs fail to state a claim under these sections because they do not allege that they disputed their credit ratings with any credit reporting agencies and do not allege that any agency subsequently notified Defendant of any such dispute."); Zirelli v. BAC Home Loan Servicing, L.P., No. 2:11-cv-00305-GEB-DAD, 2011 WL 6100442, at *4 (E.D. Cal. Dec. 7, 2011) (dismissing FCRA claim where plaintiff failed to "allege that he disputed any negative information with a CRA or that notice of such dispute was provided to any Defendant."); Von Brincken v. Mortgageclose.Com, Inc., No. 2:10-CV-2153-JAM-KJN, 2011 WL 2621010, at *5 (E.D. Cal. June 30, 2011) ("to succeed on such a claim, a plaintiff must allege that she had a dispute with a credit reporting agency regarding the accuracy of an account, that the credit reporting agency notified the furnisher of the information, and that the furnisher failed to take the remedial measures outlined in the statute.").

LEAVE TO AMEND

For the reasons explained above, defendants' motions to dismiss plaintiff's claims giving rise to federal jurisdiction will be granted.

The court has carefully considered whether plaintiff may further amend his complaint to state a federal claim upon which relief can be granted. "Valid reasons for denying

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[10] Plaintiff concedes in his opposition to BOA, N.A.'s motion to dismiss that he "may not have properly pled this cause" of action. (Pl's. Opp.'n to BOA, N.A.'s MTD (Doc. No. 32) at 14.)

leave to amend include undue delay, bad faith, prejudice, and futility." California Architectural Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1472 (9th Cir. 1988). See also Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983) (holding that while leave to amend shall be freely given, the court does not have to allow futile amendments). However, when evaluating the failure to state a claim, the complaint of a pro se plaintiff may be dismissed "only where 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984) (quoting Haines v. Kerner, 404 U.S. 519, 521 (1972). See also Weilburg v. Shapiro, 488 F.3d 1202, 1205 (9th Cir. 2007) ("Dismissal of a pro se complaint without leave to amend is proper only if it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.") (quoting Schucker v. Rockwood, 846 F.2d 1202, 1203-04 (9th Cir. 1988)).

Here, the court cannot say that it is now beyond doubt that leave to amend would be futile. Plaintiff's amended complaint will therefore be dismissed, and he will be granted leave to file a second amended complaint. Plaintiff is cautioned however that, if he elects to file a second amended complaint, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S.662, ---, 129 S. Ct. 1937, 1949 (2009). "While legal conclusions can provide the complaint's framework, they must be supported by factual allegations." Id. at 1950. Those facts must be sufficient to push the claims "across the line from conceivable to plausible[.]" Id. at 1951 (quoting Twombly, 550 U.S. at 557).

Plaintiff is also instructed that the court cannot refer to a prior pleading in order to make an amended complaint complete. Local Rule 220 requires that any amended complaint be complete in itself without reference to prior pleadings. Any second amended complaint will supersede the both the original and the amended complaint. See Loux v. Rhay, 375 F.2d 55, 57

(9th Cir. 1967). Thus, in a second amended complaint, just as if it were the initial complaint filed in the case, each defendant must be listed in the caption and identified in the body of the complaint, and each claim and the involvement of each defendant must be sufficiently alleged. Plaintiff's second amended complaint must include concise but complete factual allegations describing the conduct and events which underlie his claims. Finally, if plaintiff elects to file a second amended complaint in an attempt to cure the deficiencies noted above, he should take heed of the court's analysis set forth in this order and neither include causes of action nor name defendants in a manner inconsistent with that analysis.

PRELIMINARY INJUNCTION

With respect to plaintiff's motion for a preliminary injunction, "injunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008). "The proper legal standard for preliminary injunctive relief requires a party to demonstrate 'that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting Winter, 555 U.S. at 20); see also Center for Food Safety v. Vilsack, 636 F.3d 1166, 1172 (9th Cir. 2011) ("After Winter, 'plaintiffs must establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction."); Am. Trucking Ass'n, Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009). The Ninth Circuit has also held that "[a] preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." Alliance for Wild Rockies v. Cottrell, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (quoting Lands

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Council v. McNair, 537 F.3d 981, 97 (9th Cir. 2008) (en banc)).[11]

As discussed above, plaintiff's amended complaint will be dismissed for failure to state a claim upon which relief can be granted. For this reason, there is at this time no likelihood that plaintiff will succeed on the merits of the claims alleged in his amended complaint. However, he will be granted leave to file a second amended complaint. Accordingly, plaintiff's motion for a preliminary injunction will be denied at this time without prejudice to refilling. In addition, as noted above, plaintiff was previously granted a temporary restraining order. "The purpose in issuing a temporary restraining order is to preserve the status quo pending a fuller hearing." Wilson v. Tilton, No. 2:07-cv-1192 GEB DAD (PC), 2012 WL 43615, at *1 (E.D. Cal. Jan. 9, 2012). "In many cases the emphasis of the court is directed to irreparable harm and the balance of hardships because the merits of a controversy are often difficult to ascertain and adjudicate on short notice." (Id.)

Here, while the merits of this controversy are difficult to ascertain at this early stage of the proceedings, it appears that plaintiff would suffer irreparable harm if the temporary restraining order expired before it was determined whether he could state a cognizable federal claim. Because under these circumstances the balance of hardships tips in plaintiff's favor, the temporary restraining order previously granted by the assigned District Judge will remain in place until plaintiff has filed an amended complaint that states cognizable claims or this matter is dismissed.

MOTION TO RECORD LIS PENDENS

Plaintiff has also filed an ex parte motion for approval of filing a notice of lis pendens. (Doc. No. 6.)

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[11] The Ninth Circuit has found that this "serious question" version of the circuit's sliding scale approach survives "when applied as part of the four-element Winter test." Alliance for Wild Rockies v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011). "That is, 'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." Id. at 1135.

"A lis pendens is a recorded document giving constructive notice that an action has been filed affecting right or title to possession of the real property described in the notice." Pedersen v. Greenpoint Mortgage Funding, Inc., No. S-11-0642 KJM EFB, 2011 WL 3818560, at * 22 (E.D. Cal. Aug. 29, 2011). California Code of Civil Procedure § 405.20 provides that a party to an action who asserts a real property claim may record a notice of pendency of action in the office of the recorder of each county in which all or part of the real property is situated. However, under California Code of Civil Procedure § 405.21, "[t]he only way an individual in pro per can record a notice of pendency of action is with the approval of a judge." Wolf v. Wells Fargo Bank, N.A., No. C11-01337 WHA, 2011 WL 4595012, at *2 (N.D. Cal. Oct. 4, 2011). See also Orcilla v. Bank of America, N.A., No. C10-03931 HRL, 2011 WL 1113549, at *1 (N.D. Cal. Mar. 25, 2011) ("On February 25, 2011, this Court approved Plaintiffs' notice of lis pendens pursuant to Cal. Code Civ. Proc. § 405.21"); Costner v. MRA Funding Corp., No. CV 09-649 PSG (EX), 2009 WL 1106815, at *1 (C.D. Cal. Apr. 23, 2009) ("For instance, although not raised by Empire Mortgage X, because Costner is proceeding pro se, she was required to obtain the Court's approval before recording the Notice of Lis Pendens. Cal. Civ. Proc. Code § 405.21. This she failed to do, thus making the recording improper."); Helppi v. Bowman, No. C 07-0853, 2007 WL 1521570, at *1 (N.D. Cal. May 23, 2007) ("Without regard to the conclusion expressed above that there presently is no right to record notice of this action, there is no dispute that California Civil Code section 405.21 prohibits the recording of a notice of pending action by a party appearing in pro se unless it has been 'approved by a judge.'").

Pursuant to California Code of Civil Procedure § 405.4, a "'[r]eal property claim' means the cause or causes of action in a pleading which would, if meritorious, affect (a) title to, or the right to possession of, specific real property or (b) the use of an easement identified in the pleading . . . " As noted above, plaintiff's amended complaint will be dismissed with leave to amend. Accordingly, there is currently no pending cause of action which would, if meritorious, affect title to or the right to possession of specific real property. Moreover, the court has ordered

that the previously issued temporary restraining order preventing a foreclosure sale remain in place. For all of these reasons, plaintiff's ex parte motion for approval of filing a notice of lis pendens will be denied without prejudice. See Austero v. Aurora Loan Services, Inc., No. C-11-00490 JCS, 2011 WL 1585530, at *13 (N.D. Cal. Apr. 27, 2011) ("Because the Court has dismissed Plaintiffs' case, the Court cannot determine whether Plaintiffs will be able to satisfy the requirements for lis pendens, i.e., the probable validity of the claims. The Plaintiffs' lis pendens application is DENIED WITHOUT PREJUDICE.").

MOTION FOR SANCTIONS

Plaintiff has filed a motion seeking the imposition of sanctions pursuant to Rule 11 of Federal Rules of Civil Procedure against defendant Quality Loan, its corporate counsel, Renee De Golier, and its foreclosure legal liaison, Bounlet Louvan. (Mot. for Sanctions (Doc. No. 51) at 1.) Therein, plaintiff argues that the identified parties filed a knowingly false declaration of nonmonetary status on December 12, 2011. (Id. at 4.) In this regard, plaintiff argues that because the temporary restraining order he filed alleged that it arose "out of acts or omission" on the part of defendant Quality Loan "in the performance of its duties as trustee," defendant Quality Loan's declaration of nonmonetary status filed with the court was knowingly false. (Id. at 6.)

In relevant part, Federal Rule of Civil Procedure 11 provides:

> (b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper–whether by signing, filing, submitting, or later advocating it–an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> > (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
> >
> > (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.
>
> (c) Sanctions.
>
> (1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

Fed. R. Civ. P. 11(b)-(c)(1). "[T]he central purpose of Rule 11 is to deter baseless filings in district court and . . . streamline the administration and procedure of the federal courts." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990).

Here, the filing at issue is defendant Quality Loan's December 12, 2011, declaration of nonmonetary status. (Doc. No. 23.) Therein, defendant Quality Loan asserted that it believed that it had been named in this action solely in its capacity as Trustee under the Deed of Trust. (Id. at 2.) Under California law, a trustee under a deed of trust that "maintains a reasonable belief that it has been named in the action or proceeding solely in its capacity as trustee, and not arising out of any wrongful acts or omissions on its part in the performance of its duties as trustee, . . . may file a declaration of nonmonetary status." Cal. Civ. Code § 2924l(a). If a plaintiff does not object timely to a trustee's filing of such a declaration, "the trustee shall not be required to participate any further in the action or proceeding." Id. § 2924l(d). However, in "the event of a timely objection to the declaration of nonmonetary status, the trustee shall thereafter be required to participate in the action or proceeding." Id. § 2924l(e).

In this regard, it appears clear that defendant's filing was authorized and not submitted for any purpose inconsistent with Rule 11. See generally Smith v. Quality Loan

Service Corp., No. Civ S-11-2108 KJM-EFB, 2012 WL 202055, at *2-*3 (E.D. Cal. Jan. 23, 2012) (discussing defendant's filing of declaration of nonmonetary status). Moreover, on January 3, 2012, plaintiff filed his objection to defendant's declaration of nonmonetary status, (Doc. No. 29), and defendant Quality Loan has since participated in these proceedings by filing a motion to dismiss. (Doc. No. 47.)[12]

For these reasons, plaintiff's motion for the imposition of sanctions will be denied.

CONCLUSION

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's November 8, 2011 ex parte motion for approval of filing lis pendens (Doc. No. 6) is denied without prejudice;

2. Plaintiff's December 19, 2011 motion for a preliminary injunction (Doc. No. 24), re-noticed before the undersigned on January 20, 2012, (Doc. No. 49) is denied without prejudice;

3. The temporary restraining order previously granted by the assigned District Judge will remain in effect, absent further order of the court, until plaintiff has filed an amended complaint found to state a cognizable claim or this matter is dismissed;

4. Defendant BOA, N.A.'s December 22, 2011 motion to dismiss (Doc. No. 26), re-noticed before the undersigned on January 19, 2012, (Doc. No. 48) is granted;

5. Defendant Quality Loan's January 18, 2012, amended motion to dismiss (Doc. No. 46) is granted;

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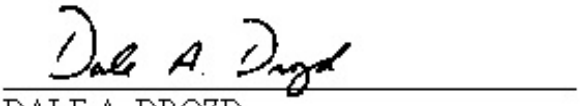
[12] The court notes that Rule 11 has a safe harbor provision which requires that a party be given twenty-one days before the filing of a motion for sanctions to "withdraw or otherwise correct" the allegedly offending paper. Holgate v. Baldwin, 425 F.3d 671, 678 (9th Cir. 2005). That safe harbor provision is to be strictly enforced. See Radcliffe v. Rainbow Const. Co., 254 F.3d 772, 788-89 (9th Cir. 2001) (citing Barber v. Miller, 146 F.3d 707, 710-11 (9th Cir. 1998)). It does not appear that plaintiff complied with that safe harbor provision. See Spain v. Eagleburger Group, No. CV-08-1089-PHX-DGC, 2009 WL 307280, at *4 (D. Ariz. 2009) (denying Rule 11 motion for failure to comply with safe harbor provision).

6. Plaintiff's January 20, 2012 motion for the imposition of sanctions (Doc. No. 51) is denied;

7. Plaintiff is granted forty-five days from the date of service of this order to file a second amended complaint that complies with the requirements of the Federal Rules of Civil Procedure, and the Local Rules of Practice; the second amended complaint must bear the docket number assigned to this case and must be labeled "Second Amended Complaint"; failure to file a second amended complaint in accordance with this order will result in a recommendation that this action be dismissed; and

8. Any defendant named in plaintiff's amended complaint filed November 28, 2011, named as a defendant in any second amended complaint plaintiff elects to file, shall respond to the second amended complaint within thirty days after it is filed and served.

DATED: March 5, 2012.



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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