

1 I. Factual & Procedural History

2 In 2005, plaintiff entered into a mortgage loan for
3 \$310,000, which was secured by a Deed of Trust to his home in
4 Rough and Ready, California. (IndyMac Req. for Judicial Notice
5 ("IndyMac RJN") Ex. A (Docket No. 10).) On January 26, 2009,
6 Trustee Corps, a foreclosure trustee, recorded a Notice of
7 Default against plaintiff's home stating that plaintiff was
8 \$17,901.804 in arrears on his mortgage payments. (Id. Ex. B.)
9 Later that year, plaintiff contacted IndyMac, the servicer of
10 plaintiff's mortgage loan, about the possibility of applying for
11 a loan modification. (First Am. Compl. ("FAC") ¶ 15 (Docket No.
12 22).) Plaintiff initiated an application for a HAMP loan
13 modification¹ in September 2009 and entered into a trial loan
14 modification plan ("TPP") in February 2010. (Id. ¶¶ 16-18.)

15 Plaintiff began making payments under the TPP, but
16 received notice from IndyMac in July 2010 that he was ineligible
17 for a permanent HAMP loan modification because his mortgage
18 payments were less than thirty-one percent of his monthly income.
19 (Id. ¶¶ 19-20.) IndyMac invited plaintiff to apply for a Freddie
20 Mac Backup Modification, under which plaintiff could continue to
21 make payments on the mortgage. (Id. ¶ 20, Ex. B.) Plaintiff
22 attempted to make payments under the Backup Modification for
23 approximately a year and a half, but fell behind on his payments
24 again. (Id. ¶ 23.) On June 13, 2012, Trustee Corps recorded

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26 ¹ HAMP is a program initiated by the Treasury Department
27 in 2009 "to incentivize banks to refinance mortgages of
28 distressed homeowners so they could stay in their homes."
Corvello v. Wells Fargo Bank, N.A., 728 F.3d 878, 880 (9th Cir.
2013).

1 another NOD, reflecting an arrearage of \$11,990.13. (IndyMac RJN
2 Ex. D.)

3 On several occasions between April 2012 and June 2013,
4 plaintiff attempted to obtain an additional loan modification
5 from IndyMac. (FAC ¶ 24.) Plaintiff alleges that IndyMac
6 repeatedly declined to offer him a loan modification, either
7 because IndyMac claimed that plaintiff's application was
8 incomplete or because plaintiff was ineligible for a loan
9 modification. (Id. ¶¶ 25-30.)

10 Plaintiff then filed for bankruptcy on February 25,
11 2013. (Id. ¶ 31; IndyMac RJN Ex. E.) Plaintiff obtained a
12 discharge in bankruptcy on June 3, 2013. (IndyMac RJN Ex. F.)²
13 Although plaintiff did not disclose any of the claims he asserts
14 in this lawsuit as assets in his bankruptcy filings, (see FAC ¶¶
15 49, 50; IndyMac RJN Ex. D), he alleges that he re-opened his
16 bankruptcy petition on October 29, 2013, to list these claims as
17 assets. (Pl.'s Opp'n to Mot. to Dismiss ("Pl.'s Opp'n") 9:16-18
18 (Docket No. 27).)

19 During the time his bankruptcy petition was pending,
20 IndyMac allegedly informed plaintiff that he could re-apply for a
21 loan modification. (FAC ¶ 32.) Plaintiff submitted a complete
22 loan application to IndyMac on March 20, 2013, as well as an
23

24 ² It is not explained in the pleadings, and it is unclear to
25 this court why plaintiff's debt on his home loan was not
26 discharged in the bankruptcy proceeding. But obviously it was
27 not. Apparently, the bankruptcy petition was filed in order to
28 avert the sale of plaintiff's home, which was scheduled for the
next day. It clearly accomplished that purpose, but not much
else, and after the discharge the parties simply returned to
business as usual.

1 updated application on April 4, 2013. (Id. ¶¶ 32-33.) Between
2 April and June 2013, plaintiff alleges he "remained in constant
3 contact" with IndyMac and continued to send updated financial
4 documents when requested to do so. (Id. ¶ 34.)

5 On June 11, 2013, an IndyMac employee named "Alex W19"
6 allegedly informed plaintiff that there was no foreclosure sale
7 scheduled, but that IndyMac required additional documentation in
8 order to process his application. (Id. ¶ 35.) Plaintiff then
9 alleges that on June 24, 2013, an IndyMac employee named "Albert
10 938" informed plaintiff that his home would be sold at a
11 foreclosure sale the next day. (Id. ¶ 36.) On June 25, 2013,
12 Freddie Mac purchased plaintiff's home at a trustee's sale. (Id.
13 ¶ 38.)

14 Plaintiff filed this action in Nevada County Superior
15 Court on August 8, 2013, bringing ten claims against IndyMac,
16 Trustee Corps, and Freddie Mac. (Not. of Removal Ex. A (Docket
17 No. 1).) Defendants removed the action to this court pursuant to
18 12 U.S.C. § 1452(f), which entitles Freddie Mac to remove to
19 federal court any action to which it is a party. (Id.) On
20 October 21, 2013, plaintiff filed a First Amended Complaint
21 ("FAC"), which alleged, as is typical in this kind of case,
22 twelve separate claims for relief: (1) intentional
23 misrepresentation; (2) negligent misrepresentation; (3) breach of
24 contract; (4) promissory estoppel; (5) negligence; (6) violation
25 of the Unfair Competition Law ("UCL"), Cal. Bus. & Profs. Code §
26 17200 et seq.; (7) equitable accounting; (8) "dual tracking" of
27 plaintiff's loan modification application in violation of
28 California Civil Code section 2923.6(c); (9) failure to issue

1 plaintiff an opportunity to appeal the denial of a loan
2 modification in violation of California Civil Code section
3 2923.6(d); (10) failure to appoint a single point of contact in
4 violation of California Civil Code section 2923.7; (11) violation
5 of California Civil Code section 2924; and (12) wrongful
6 foreclosure.³ On November 12, 2013, plaintiff stipulated to
7 dismiss Trustee Corps from the action with prejudice. (Docket
8 No. 30.) Defendants now move to dismiss the FAC pursuant to
9 Federal Rule of Civil Procedure 12(b)(6) for failure to state a
10 claim upon which relief can be granted.⁴ (Docket No. 9.)

11 II. Request for Judicial Notice

12 In general, a court may not consider items outside the
13 pleadings when deciding a motion to dismiss, but it may consider
14 items of which it can take judicial notice. Barron v. Reich, 13
15 F.3d 1370, 1377 (9th Cir. 1994). A court may take judicial
16 notice of facts "not subject to reasonable dispute" because they
17 are either "(1) generally known within the territorial
18 jurisdiction of the trial court or (2) capable of accurate and
19 ready determination by resort to sources whose accuracy cannot
20 reasonably be questioned." Fed. R. Evid. 201. Judicial notice
21 may properly be taken of matters of public record outside the

22 ³ Plaintiff styles this claim as an "equitable action to
23 set aside sale," which is equivalent to a wrongful foreclosure
24 claim. See, e.g., Castaneda v. Saxon Mortg. Servs, Inc., 687 F.
25 Supp. 2d 1191, 1201 (E.D. Cal. 2009) ("Wrongful foreclosure is an
26 action in equity, where a plaintiff seeks to set aside a
foreclosure sale."). In the interest of brevity, the court will
refer to this claim as "wrongful foreclosure."

27 ⁴ Although only IndyMac initially moved to dismiss,
28 IndyMac and Freddie Mac later filed an amended notice clarifying
that they jointly moved to dismiss. (Docket No. 23.)

1 pleadings. See MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504
2 (9th Cir. 1986).

3 Defendants request that the court judicially notice
4 several recorded documents pertaining to plaintiff's property,
5 including the Deed of Trust, (IndyMac RJN Ex. A), and three
6 Notices of Default, (id. Exs. B-D). The court will take judicial
7 notice of these documents, since they are matters of public
8 record whose accuracy cannot be questioned. See Lee v. City of
9 Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001). The court will
10 also take judicial notice of plaintiff's bankruptcy court
11 filings, (see IndyMac RJN Exs. E-F), as they are likewise matters
12 of public record whose accuracy cannot be questioned. See Rosal
13 v. First Fed. Bank of Cal., 671 F. Supp. 2d 1111, 1121 (N.D. Cal.
14 2009) (taking judicial notice of bankruptcy filings).

15 III. Discussion

16 On a motion to dismiss, the court must accept the
17 allegations in the complaint as true and draw all reasonable
18 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
19 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
20 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
21 (1972). To survive a motion to dismiss, a plaintiff needs to
22 plead "only enough facts to state a claim to relief that is
23 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S.
24 544, 570 (2007). This "plausibility standard," however, "asks
25 for more than a sheer possibility that a defendant has acted
26 unlawfully," and where a complaint pleads facts that are "merely
27 consistent with" a defendant's liability, it "stops short of the
28 line between possibility and plausibility." Ashcroft v. Iqbal,

1 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 556-57).

2 A. Negligent & Intentional Misrepresentation

3 To state a claim for intentional misrepresentation, a
4 plaintiff must allege: (1) a misrepresentation, (2) knowledge of
5 falsity, (3) intent to defraud, i.e., to induce reliance; (4)
6 justifiable reliance on the misrepresentation; and (5) resulting
7 damage. Engalia v. Permanente Med. Grp., Inc., 15 Cal. 4th 951,
8 974 (1997); Kearns v. Ford Motor Co., 567 F.3d 1120, 1126 (9th
9 Cir. 2009). To state a claim for negligent misrepresentation, a
10 plaintiff must allege: (1) a misrepresentation of a past or
11 existing material fact; (2) without reasonable ground for
12 believing it to be true; (3) intent to induce reliance; (4)
13 justifiable reliance; and (5) resulting damage. Apollo Capital
14 Fund, LLC v. Roth Capital Partners, LLC, 158 Cal. App. 4th 226,
15 243 (2d Dist. 2007); Glenn K. Jackson, Inc. v. Roe, 273 F.3d
16 1192, 1200 (9th Cir. 2000).

17 Plaintiff alleges that at various points in 2012 and
18 2013, IndyMac falsely represented that plaintiff's loan
19 application was incomplete, (FAC ¶ 64), that plaintiff was
20 ineligible for a successive HAMP modification, (id. ¶ 70), and
21 that there was no foreclosure sale scheduled. (Id. ¶ 76.)
22 Plaintiff then alleges that, as a result of these three
23 misrepresentations, he "continued [his] attempts to obtain a loan
24 modification" from IndyMac rather than "exploring other options"
25 that would have enabled him to continue making monthly mortgage
26 payments and postpone the trustee's sale. (Id. ¶¶ 68, 74, 80.)

27 Even if plaintiff could satisfy the first three
28 elements of each claim, he has not shown that he acted in

1 reliance on any of IndyMac's alleged misrepresentations. In the
2 mortgage context, a plaintiff's allegations that he declined to
3 "explore other options" as a result of a lender's false
4 representations are generally not sufficient to withstand a
5 motion to dismiss because they simply "re-state the element of
6 the claim." Valtierra v. Wells Fargo Bank, N.A., No. CIV-F-10-
7 0849 AWI GSA, 2011 WL 2078024, at *3 (E.D. Cal. May 25, 2011)
8 (holding that an allegation that "Plaintiff could have explored
9 other options had the [Defendant] not acted in such a deceptive
10 manner" was not sufficient to demonstrate reliance).

11 Plaintiff does not identify what "other options" he
12 declined to pursue, or how they would have enabled him to make
13 his mortgage payments or postpone the foreclosure sale. For
14 instance, one panel of the California Court of Appeal held that a
15 plaintiff could survive demurrer based on allegations that "she
16 would have pursued other options, including possibly selling her
17 home, retaining counsel earlier, and/or finding a cosigner to
18 save her home" but for the defendant's statement that she would
19 receive a permanent loan modification. West v. JPMorgan Chase
20 Bank, N.A., 214 Cal. App. 4th 780, 805 (4th Dist. 2013). By
21 contrast, this court has held that bare allegations that the
22 plaintiff would have explored other options or pursued legal
23 action to stop a foreclosure sale were insufficient to survive a
24 motion to dismiss. See, e.g., Sholiay v. Fed. Nat'l Mortg.
25 Assoc., No. CIV 2:13-00958, 2013 WL 5569988, at *7 n. 6 (E.D.
26 Cal. Oct. 9, 2013) (holding that plaintiff's allegation that he
27 would have been able to enjoin a trustee's sale if he was not
28 falsely promised a loan modification was implausible because his

1 "underlying claim lacks merit").

2 "Even assuming justifiable reliance . . . no liability
3 attaches if the damages sustained were otherwise inevitable or
4 due to unrelated causes." Gardner v. RSM & A Foreclosure Servs.,
5 LLC, No. CIV. 2:12-2666 JAM AC, 2013 WL 3242211, at *4 (E.D. Cal.
6 June 25, 2013) (quoting Kruse v. Bank of Am., 202 Cal. App. 3d
7 38, 60-61 (1st Dist. 1988) (internal quotation marks omitted)).
8 Here, plaintiff's allegations do not show that any damages he
9 suffered were the result of IndyMac's conduct, rather than his
10 own failure to make his mortgage payments. Trustee Corps
11 recorded multiple notices of default against plaintiff's home
12 prior to any of the alleged misrepresentations, and each of these
13 notices states an arrearage of over \$10,000. (See IndyMac RJN
14 Exs. B-D.) See Manzano v. Metlife Bank, N.A., No. CIV 2:11-651
15 WBS DAD, 2011 WL 2080249, at *5 (E.D. Cal. May 25, 2011)
16 (dismissing fraud and negligent misrepresentation claims when
17 "plaintiff stopped making payments under the loan before these
18 alleged misrepresentations were made"); DeLeon v. Wells Fargo
19 Bank, N.A., 10-CV-10390-LHK, 2011 WL 311376, at *7 (N.D. Cal.
20 Jan. 28, 2011) ("Without some factual basis suggesting that
21 Plaintiffs could have cured the default . . . the Court cannot
22 reasonably infer that Wells Fargo's alleged misrepresentations
23 resulted in the loss of plaintiff's home. The facts alleged
24 suggest that Plaintiffs lost their home because they became
25 unable to keep up with monthly payments and lacked the financial
26 resources to cure the default.").

27 In short, plaintiff has not sufficiently alleged that
28 he relied on any of IndyMac's representations; even if he had, he

1 has not alleged any facts showing that the damages he suffered
2 were a result of IndyMac's alleged misrepresentations, as opposed
3 to his own inability to pay back his loan. See Gardner, 2013 WL
4 3242211, at *4. Accordingly, the court must grant IndyMac's
5 motion to dismiss plaintiff's intentional and negligent
6 misrepresentation claims.

7 B. Promissory Estoppel

8 "The elements of a promissory estoppel claim are: (1) a
9 promise that is clear and unambiguous in its terms; (2) reliance
10 on the promise by the party to whom the promise is made; (3) that
11 is reasonable and foreseeable; and (4) injury to the party
12 asserting estoppel due to his or her reliance." Alimena v.
13 Vericrest Fin., Inc., --- F. Supp. 2d ----, No. CIV 2:12-901 LKK
14 JFM, 2013 WL 4049663, at *12 (E.D. Cal. Aug. 29, 2013) (citing
15 Laks v. Coast Fed. Sav. & Loan Ass'n, 60 Cal. App. 3d 885, 890-91
16 (2d Dist 1976)).

17 Plaintiff alleges that IndyMac "promised [p]laintiff a
18 HAMP loan modification in or about 2010 and further promised not
19 to foreclose on [p]laintiff while he was being reviewed for a
20 loan modification." (FAC ¶ 95.) As explained above, even if
21 IndyMac had made these promises, plaintiff has not sufficiently
22 alleged that he suffered any injury in reliance on these
23 promises. Accordingly, the court must grant IndyMac's motion to
24 dismiss plaintiff's promissory estoppel claim.

25 C. Breach of Contract

26 "[T]he elements of a cause of action for breach of
27 contract are (1) the existence of the contract, (2) plaintiff's
28 performance or excuse for nonperformance, (3) defendant's breach,

1 and (4) the resulting damages to the plaintiff.” Oasis W.
2 Realty, Inc. v. Goldman, 51 Cal. 4th 811, 821 (2011).

3 Plaintiff alleges that IndyMac promised to extend him a
4 permanent loan modification and that it breached this promise by
5 providing him with a “backup modification” with terms that were
6 inconsistent with HAMP guidelines. (FAC ¶ 90.) The court need
7 not decide whether this alleged promise constituted an
8 enforceable contract because, even if it did, plaintiff admits
9 that he did not make all of the payments that were required under
10 the loan modification agreement. (Id. ¶ 91.) Because plaintiff
11 has not performed his obligation under any alleged contract, he
12 cannot bring a breach of contract claim unless his failure to
13 perform is excused.

14 Plaintiff alleges that his failure to make payments was
15 excused because he could no longer afford to make the payments,
16 which were “based on inaccurate income and outside of HAMP
17 guidelines.” (Id.) However, it is black-letter law that “mere
18 unforeseen difficulty or expense . . . ordinarily will not excuse
19 performance.” 1 Witkin, Summary of California Law (Contracts) §
20 830 (10th ed. 2005); Metzler v. Thye, 163 Cal. 95, 98 (1912).
21 In order to show that his performance was excused, plaintiff must
22 show that it was “objectively impossible” for any person to make
23 the required payments. Rosales v. Downey Sav. & Loan Ass’n, No.
24 09cv39 WQH (AJB), 2009 WL 514229, at *8 (S.D. Cal. Mar. 2, 2009)
25 (citing Hensler v. City of Los Angeles, 124 Cal. App. 2d 71, 83
26 (2d Dist. 1954)).

27 The fact that the required mortgage payments were
28 onerous is not enough to excuse plaintiff’s failure to pay them.

1 See, e.g., Archiunda v. Chase Home Fin. LLC, No. 09-CV-00960-H
2 (AJB), 2009 WL 1796295, at *5 (S.D. Cal. June 23, 2009) (holding
3 that plaintiff's performance was not excused even though he
4 alleged that "based upon the actual income information provided .
5 . . . Plaintiff could never perform according to the terms of the
6 loan"). Because it is not "impossible for anyone to perform,"
7 id., plaintiff's failure to make payments does not excuse his
8 nonperformance, and plaintiff cannot state a breach of contract
9 claim. Accordingly, the court must grant IndyMac's motion to
10 dismiss plaintiff's breach of contract claim.

11 D. Negligence

12 "To prove a cause of action for negligence, plaintiff
13 must show (1) a legal duty to use reasonable care, (2) breach of
14 that duty, and (3) proximate [or legal] cause between the breach
15 and (4) the [plaintiff's] injury." Castaneda, 687 F. Supp. 2d at
16 1197 (citing Mendoza v. City of Los Angeles, 66 Cal. App. 4th
17 1333, 1339 (2d Dist. 1998)) (internal quotation marks omitted).
18 "The existence of a legal duty to use reasonable care in a
19 particular factual situation is a question of law for the court
20 to decide." Vasquez v. Residential Invs., Inc., 118 Cal. App.
21 4th 269, 278 (4th Dist. 2004).

22 "[A]s a general rule, a financial institution owes no
23 duty of care to a borrower when the institution's involvement in
24 the loan transaction does not exceed the scope of its
25 conventional role as a lender of money." Nymark v. Heart Fed.
26 Sav. & Loan Ass'n, 231 Cal. App. 3d 1089, 1096 (3d Dist. 1991).
27 Plaintiff argues, however, that IndyMac owed him a duty of care
28 because it "actively engaged him in the modification process" and

1 exceeded the scope of its traditional role as a lender. (Pl.'s
2 Opp'n at 20:13-14.) Some courts in California have held that a
3 loan servicer who offers a loan modification goes "beyond its
4 role as a silent lender and loan servicer" and that its
5 activities "constitute sufficient active participation to create
6 a duty of care." Ansanelli v. JP Morgan Chase Bank, N.A., No. C-
7 10-03892 WHA, 2011 WL 1134451, at *7 (N.D. Cal. Mar. 28, 2011);
8 see also, e.g., Jolley v. Chase Home Fin., LLC, 213 Cal. App. 4th
9 872, 905 (1st Dist. 2013); Becker v. Wells Fargo Bank, N.A., No.
10 CIV. 2:10-02799 LKK KJN, 2012 WL 6005759, at *11-*12 (E.D. Cal.
11 Nov. 30, 2012) (Newman, M.J.); Garcia v. Ocwen Loan Servicing,
12 LLC, No. C-10-0290 PVT, 2010 WL 1881098, at *2-*3 (N.D. Cal. May
13 10, 2010).

14 Despite plaintiff's reliance on this "long line" of
15 authorities, (Pl.'s Opp'n at 20:27), Ansanelli and its progeny
16 represent a minority position. Armstrong v. Chevy Chase Bank,
17 FSB, No. 5:11-cv-05664 EJD, 2012 WL 4747165, at *4 (N.D. Cal.
18 Oct. 3, 2012); see also Settle v. World Sav. Bank, F.S.B., No. ED
19 CV 11-00800 MMM (DTBx), 2012 WL 1026103, at *8 (C.D. Cal. Jan.
20 11, 2012) (noting that "numerous cases have characterized a loan
21 modification as a traditional money lending activity" and listing
22 cases). In Armstrong, the court explained that "a loan
23 modification, which at its core is an attempt by a money lender
24 to salvage a troubled loan, is nothing more than a renegotiation
25 of loan terms." Armstrong, 2012 WL 4747165, at *4. "Outside of
26 actually lending money, it is undebatable that negotiating the
27 terms of the lending relationship is one of the key functions of
28 a money lender." Id. For this reason, the court has stated

1 before that it, "like the court in Armstrong, finds Ansanelli
2 unpersuasive." Bunce v. Ocwen Loan Servicing, LLC, No. CIV.
3 2:13-00976 WBS EFB, 2013 WL 3773950, at *6 (E.D. Cal. July 17,
4 2013).

5 Because the majority of California courts hold that
6 loan modification activities are part and parcel of a loan
7 servicer's "conventional role as a lender of money," Nymark, 231
8 Cal. App. 3d at 1096, and because plaintiff has not alleged any
9 facts that show a special relationship with IndyMac, plaintiff
10 cannot allege that IndyMac owed him a duty of care. Accordingly,
11 the court must grant IndyMac's motion to dismiss plaintiff's
12 negligence claim.

13 E. Equitable Accounting

14 "Under California law, an accounting is generally a
15 remedy under equity," rather than a freestanding cause of action.
16 Pantoja v. Countrywide Home Loans, Inc., 640 F. Supp. 2d 1177,
17 1191 (N.D. Cal. 2009) (citing Batt v. City & County of San
18 Francisco, 155 Cal. App. 4th 65, 82 (1st Dist. 2007)). To the
19 extent that California law does permit a separate cause of action
20 for accounting, a plaintiff must show that there is "some balance
21 due the plaintiff that can only be ascertained by an accounting."
22 Teselle v. McLoughlin, 173 Cal. App. 4th 156, 179 (3d Dist.
23 2009). Plaintiff does not seek an accounting of the money that
24 defendants owe him; rather, he seeks an accounting of the "true
25 amount of his indebtedness" to defendants. (Pl.'s Opp'n at
26 23:15.) Accordingly, plaintiff cannot bring a claim for
27 accounting, and the court must grant defendants' motion to
28 dismiss this claim.

1 F. HOLA Preemption

2 The Home Owners Loan Act of 1933 ("HOLA") authorizes
3 the Office of Thrift Supervision ("OTS") to promulgate
4 regulations governing federal savings associations. 12 U.S.C. §
5 1464; Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1005 (9th
6 Cir. 2008). Pursuant to that authority, OTS has issued a
7 regulation that authorizes federal savings associations to
8 "extend credit as authorized under federal law . . . without
9 regard to state laws purporting to regulate or otherwise affect
10 their credit activities." 12 C.F.R. § 560.2(a). By its own
11 terms, this regulation "occupies the entire field of lending
12 regulation for federal savings associations," id., and therefore
13 "le[aves] no room for the States to supplement it." Rice v.
14 Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

15 The regulation lists thirteen "illustrative examples"
16 of state laws that are preempted. 12 C.F.R. § 560.2(b). In
17 particular, the regulation preempts any state law that purports
18 to regulate the "processing, origination, servicing, sale or
19 purchase of, or investment or participation in, mortgages." 12
20 C.F.R. § 560.2(b)(10). The list in paragraph (b) is not limited
21 to statutes that specifically regulate lending activities, but
22 also encompasses statutes of general applicability, such as the
23 UCL. See, e.g., Munoz v. Fin. Freedom Senior Funding Corp., 567
24 F. Supp. 2d 1156, 1163 (C.D. Cal. 2008) (holding that UCL claims
25 were preempted by HOLA). The regulation also includes a savings
26 clause stating that several types of state law, including
27 contract and commercial law, real property law, and tort law,
28 "are not preempted to the extent that they only incidentally

1 affect the lending operations of Federal savings associations or
2 are otherwise consistent with the purposes of paragraph (a) of
3 this section." 12 C.F.R. § 560.2(c).

4 OTS has also promulgated a framework for courts to
5 determine "the status of state laws under § 560.2":

6 [T]he first step will be to determine whether the type
7 of law in question is listed in paragraph (b). If so,
8 the analysis will end there; the law is preempted. If
9 the law is not covered by paragraph (b), the next
10 question is whether the law affects lending. If it
11 does, then, in accordance with paragraph (a), the
12 presumption arises that the law is preempted. This
13 presumption can be reversed only if the law can be
14 shown to fit within the confines of paragraph (c).

15 OTS, Final Rule, 61 Fed. Reg. 50951, 50966-67 (Sept. 30, 1996).⁵

16 The Final Rule emphasizes that "paragraph (c)," the savings
17 clause in the regulation, "is intended to be interpreted
18 narrowly," and that "[a]ny doubt should be resolved in favor of
19 preemption." Id.; see also Bank of Am. v. City & County of San
20 Francisco, 309 F.3d 551, 558 (9th Cir. 2002) ("[B]ecause there
21 has been a history of significant federal presence in national
22 banking, the presumption against preemption of state law is
23 inapplicable."). In applying this framework, the relevant issue
24 is whether the state law, "as applied, is a type of state law
25 contemplated in the list under paragraph (b)." Silvas, 514 F.3d
26 at 1006 (emphasis added).

27 ⁵ To the extent that the Final Rule evinces OTS's
28 interpretation of the preemptive scope of § 560.2, it "must be
given controlling weight." Silvas, 514 F.3d at 1005 n.5 (citing
Auer v. Robbins, 519 U.S. 452 (1997)); see also Bassiri v. Xerox
Corp., 463 F.3d 927, 930 (9th Cir. 2006) (explaining that an
agency's interpretation of its own regulation is "controlling"
under Auer).

1 IndyMac is a division of OneWest Bank, FSB, which is a
2 federally chartered savings bank. The Deed of Trust noted that
3 the "Lender" was "IndyMac Bank, F.S.B., a federally chartered
4 savings bank." (IndyMac RJN Ex. A.) IndyMac is therefore a
5 federal savings association subject to OTS regulations, see 12
6 U.S.C. § 1462 (defining a "federal savings association"), and the
7 court must determine whether plaintiff's five statutory claims
8 are preempted.⁶

9 1. California Civil Code Section 2923

10 Plaintiff brings claims under sections 2923.6(c),
11 2923.6(d), and 2923.7 of the California Civil Code, which
12 regulate loan modification activities. Plaintiff alleges that
13 IndyMac's conduct in the loan modification process violated
14 California Civil Code section 2923 because IndyMac "dual tracked"
15 his application, (FAC ¶ 120), did not permit him to appeal the
16 denial of his application, (id. ¶ 117), and failed to assign him
17 a single point of contact with regard to his application (id. ¶
18 121). Plaintiff alleges that these violations resulted in the
19 unlawful sale of his home at a foreclosure sale. (Id. ¶¶ 118,
20 120, 122.)

21 As applied to plaintiff's claims, section 2923 is
22 preempted because it imposes requirements on the "processing,
23 origination, [and] servicing" of plaintiff's mortgage loan and
24 application for a loan modification in addition to those imposed
25 by federal law. 12 C.F.R. § 560.2(b)(10); see, e.g., Biggins v.

27 ⁶ Because the court grants IndyMac's motion to dismiss
28 plaintiff's non-statutory claims on alternative grounds, it need
 not determine whether those claims are also preempted by HOLA.

1 Wells Fargo & Co., 266 F.R.D. 399, 417 (N.D. Cal. 2009) (holding
2 that a section 2923.6 claim premised on failure to extend a loan
3 modification was preempted by HOLA); Marquez v. Wells Fargo Bank,
4 N.A., No. C 13-2819 PJH, 2013 WL 5141689, at *5 (N.D. Cal. Sept.
5 13, 2013) (holding that a section 2923.7 claim based on
6 allegations that the plaintiffs were denied a single point of
7 contact and were never “given a meaningful opportunity to apply
8 for, and receive, a loan modification . . . is preempted by
9 HOLA”).

10 Even if section 2923 were not covered by §
11 560.2(b)(10), it would still be preempted to the extent that it
12 affected IndyMac’s lending activities by imposing liability on
13 IndyMac for its conduct in the loan modification process. See
14 Final Rule, 61 Fed. Reg. at 50966-67. To the extent that
15 plaintiff alleges that IndyMac’s “fail[ure] to communicate” with
16 him during the loan modification process can give rise to
17 liability, section 2923 is preempted because it would impose
18 duties on IndyMac that it would “not be subject to . . . in other
19 states.” Parcray v. Shea Mortg., Inc., No. CIV. 2:09-1942 OWW
20 GSA, 2010 WL 1659369, at *8 (E.D. Cal. Apr. 23, 2010) (citing
21 Odinma v. Aurora Loan Svcs., No. C-09-4674 EDL, 2010 WL 1199886,
22 at *8 (N.D. Cal. Mar. 23, 2010)). Accordingly, the court must
23 grant IndyMac’s motion to dismiss plaintiff’s section 2923
24 claims.

25 2. California Civil Code Section 2924

26 Plaintiff also brings a claim under section 2924 of the
27 California Civil Code, which regulates foreclosure proceedings.
28 Plaintiff alleges that the assignment of his mortgage loan to a

1 securitized trust was unlawful, that the Notice of Default was
2 therefore void, and that, as a result, the foreclosure sale
3 violated Civil Code section 2924.

4 Like plaintiff's section 2923 claims, section 2924
5 "[c]laims based on misconduct related to the foreclosure
6 proceedings" are preempted by HOLA. Ismail v. Wells Fargo Bank,
7 N.A., No. CIV. 2:12-1653 MCE CKD, 2013 WL 930611, at *9 (E.D.
8 Cal. Mar. 8, 2013) (citations omitted); see also, e.g., DeLeon v.
9 Wells Fargo Bank, N.A., 729 F. Supp. 2d 1119, 1126 (N.D. Cal.
10 2010) (holding that claims under sections 2923.5 and 2924 are
11 preempted by HOLA); Ngoc Nguyen v. Wells Fargo Bank, N.A., 749 F.
12 Supp. 2d 1022, 1032 (N.D. Cal. 2010) (same). Plaintiff's claim,
13 which is premised on the alleged assignment of his loan to a
14 securitized trust, is squarely preempted because it seeks to
15 apply section 2924 to regulate IndyMac's "sale or purchase" of
16 mortgages. 12 C.F.R. § 560.2(b)(10); Sami v. Wells Fargo Bank,
17 No. C. 12-00108 DMR, 2012 WL 967051, at *6-7 (holding that a
18 section 2924 claim premised on allegations of unlawful assignment
19 was preempted by HOLA). Because plaintiff's section 2924 claim
20 is premised on the allegation that IndyMac lacked authority to
21 initiate the foreclosure sale, it is preempted for the same
22 reason. Id. at *8 ("Initiation of the foreclosure process is the
23 type of lending activity expressly contemplated by § 560.2(b)(10)
24 because it constitutes the 'processing' and 'servicing' of a
25 mortgage."). Accordingly, the court must grant defendants'
26 motion to dismiss plaintiff's section 2924 claim.

27 3. The UCL

28 California's UCL prohibits "any unlawful, unfair, or

1 fraudulent business act or practice" Cal Bus. & Profs.
2 Code § 17200. The UCL "establishes three varieties of unfair
3 competition In other words, a practice is prohibited as
4 unfair or deceptive even if not unlawful and vice versa." Cel-
5 Tech Comm'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163,
6 180 (1999) (internal quotation marks and citations omitted).

7 Plaintiff brings a claim under the UCL for "unlawful
8 business practices,"⁷ in which he alleges that IndyMac "violated
9 Cal. Civ. Code §§ 2923.6, 2923.7, and 2924."⁸ (FAC ¶ 108.)
10 Because "those statutes would impose additional requirements on
11 [IndyMac] in the mortgage process, the UCL claim is . . .
12 preempted to the extent that it depends on those statutes."

13
14 ⁷ Although plaintiff labels his UCL claim "unlawful
15 business practices," some allegations suggest that he also seeks
16 to assert a claim under the UCL's "unfair" prong. (See, e.g.,
17 FAC ¶ 107 ("[T]he unlawful acts and practices of Defendants
18 alleged herein constitute unlawful or unfair business practices .
19 . . .").) The court need not determine whether plaintiff has
20 stated a claim under the UCL's "unfair" prong because any such
21 claim would also be preempted. See, e.g., Vega, 654 F. Supp. 2d
22 at 1118 (noting that a UCL claim brought under the "unfair" prong
23 was preempted by HOLA to the extent that it relied on allegations
24 of inadequate loan disclosures).

25 ⁸ Plaintiff's UCL claim also reiterates his allegations
26 that IndyMac committed "material misrepresentations affecting
27 plaintiff's interest in [his home] and committed numerous acts of
28 negligence in the handling of and processing of [p]laintiff's
loan modification applications." (FAC ¶ 108.) These allegations
cannot give rise to an "unlawful business practices" claim, which
must be premised on the violation of a statute or constitutional
provision. Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1168
(9th Cir. 2012) (citing People ex rel. Lockyer v. Fremont Life
Ins. Co., 104 Cal. App. 4th 508, 515 (2d Dist. 2002)). Because
plaintiff's section 2923 and 2924 claims are preempted by HOLA,
plaintiff has no constitutional or statutory predicate for his
UCL claim. See id.

1 Plastino v. Wells Fargo Bank, 873 F. Supp. 2d 1179, 1186 n.4
2 (N.D. Cal. 2012); see also Vega v. JPMorgan Chase Bank, N.A., 654
3 F. Supp. 2d 1104, 1118 (E.D. Cal. 2009) (O'Neill, J.) (holding
4 that plaintiffs in a foreclosure-related action "are unable to
5 avoid [HOLA] preemption in the guise of a UCL claim").
6 Accordingly, the court must grant defendants' motion to dismiss
7 plaintiff's UCL claim.⁹

8 G. Wrongful Foreclosure

9 "Wrongful foreclosure is an action in equity, where a
10 plaintiff seeks to set aside a foreclosure sale." Castaneda, 687
11 F. Supp. 2d at 1201. "A nonjudicial foreclosure sale is
12 accompanied by a presumption that it was conducted regularly and
13 fairly." Melendrez v. D & I Inv., Inc., 127 Cal. App. 4th 1238,
14 1258 (6th Dist. 2005) (internal quotation marks omitted). "This
15 presumption may only be rebutted by substantial evidence of
16 prejudicial procedural irregularity." Id.; see also Quinteros v.
17 Aurora Loan Servs., 740 F. Supp. 2d 1163, 1169 (E.D. Cal. 2010)
18 (Ishii, J.) ("[S]ome form of actual prejudice is necessary").
19 On a motion to dismiss, therefore, a plaintiff must allege "facts
20 showing that [he was] prejudiced by the alleged procedural
21 defects." Hadley v. BNC Mortg., Inc., 466 Fed. App'x 612, 613
22 (9th Cir. 2012) (citing Arnolds Mgmt. Corp. v. Eischen, 158 Cal.

23
24 _____
25 ⁹ Because all of plaintiff's statutory claims are
26 preempted by HOLA, the court need not reach IndyMac's argument
27 that these statutes violate the Contracts Clause of the
28 Constitution. See Douglas v. Seacoast Prods., Inc., 431 U.S. 265
(1977) (holding that addressing preemption questions before
constitutional questions is consistent with the "practice of
deciding statutory claims first to avoid unnecessary
constitutional adjudications").

1 App. 3d 575 (2d Dist. 1984)).

2 Plaintiff alleges that he "suffered harm and prejudice
3 as the sale occurred and he has now lost title to the Subject
4 Property." (FAC ¶ 132.) The fact that plaintiff lost title to
5 his home in a foreclosure sale does not constitute prejudice; if
6 it did, the prejudice inquiry would be meaningless because every
7 plaintiff in a wrongful foreclosure action has lost title to his
8 or her home in a foreclosure sale. Rather, plaintiff must
9 demonstrate that the "violation of the statute[s] [themselves],
10 and not the foreclosure proceedings, caused [his] injury."
11 Aguiar v. Wells Fargo Bank, N.A., No. 12-CV-03653 YGR, 2012 WL
12 5915124, at *5 (N.D. Cal. Nov. 26, 2012).

13 Plaintiff cannot do so for two reasons. First, because
14 plaintiff's statutory claims cannot withstand dismissal, he
15 cannot bring a wrongful foreclosure claim predicated on
16 violations of those statutes. See, e.g., Falcocchia v. Saxon
17 Mortg., Inc., 709 F. Supp. 2d 873, 887 (E.D. Cal. 2010) (Karlton,
18 J.) (holding that because plaintiff's statutory claims under the
19 Real Estate Settlement Procedures Act (RESPA) failed, plaintiff
20 could not bring a wrongful foreclosure claim predicated on RESPA
21 violations). Plaintiff cannot do an end-run around HOLA
22 preemption by recasting his statutory claims as a wrongful
23 foreclosure claim. See DeLeon, 729 F. Supp. 2d at 1126 (holding
24 that plaintiff's wrongful foreclosure claim was preempted because
25 it relied upon violations of statutory claims that were
26 preempted).

27 Second, even if plaintiff could bring this wrongful
28 foreclosure claim, plaintiff has not sufficiently alleged that he

1 was prejudiced by any alleged violation of these statutes. At
2 various points throughout the FAC, plaintiff alleges that he was
3 not assigned a single point of contact about his loan
4 modification application, (FAC ¶ 121), was "dual tracked," (id. ¶
5 120), and was denied an opportunity to appeal the decision not to
6 offer him a loan modification, (id. ¶ 117). Plaintiff does not
7 allege any facts showing that these alleged irregularities
8 resulted in the denial of his application for a loan modification
9 or that he could have successfully appealed the denial of his
10 application for a loan modification. Plaintiff has therefore not
11 alleged that these "violations of the statute[s] [themselves],
12 and not the foreclosure proceedings, caused [his] injury."
13 Aguiar, 2012 WL 5915124, at *5. Accordingly, the court must
14 grant IndyMac's motion to dismiss this claim.

15 H. Claims Against Freddie Mac

16 Plaintiff also asserts that Freddie Mac is liable for
17 IndyMac's conduct because IndyMac acted as the agent of Freddie
18 Mac, the owner of plaintiff's loan. (FAC ¶¶ 51-58.) The court
19 need not determine whether plaintiff has alleged sufficient
20 "facts that would suggest a plausible agency relationship"
21 between IndyMac and Freddie Mac, Castaneda v. Saxon Mortg.
22 Servs., Inc., No. CIV. 2:09-1124 WBS DAD, 2010 WL 726903, at *6
23 (E.D. Cal. Feb. 26, 2010), because plaintiff has not stated a
24 claim for relief against IndyMac and does not allege any separate
25 wrongdoing by Freddie Mac. Accordingly, the court must grant
26 defendants' motion to dismiss all claims against Freddie Mac.¹⁰

27 ¹⁰ Because the court grants defendants' motion to dismiss
28 in its entirety, it need not reach defendants' argument that

1 IT IS THEREFORE ORDERED that defendants' motion to
2 dismiss be, and the same hereby is, GRANTED. Plaintiff has
3 twenty days to file an amended complaint, if he can do so
4 consistent with this Order.

5 Dated: November 15, 2013

6 

7 **WILLIAM B. SHUBB**
8 **UNITED STATES DISTRICT JUDGE**

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plaintiff is estopped from bringing any claims that he did not include in his bankruptcy petition.