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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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JASON DESCHAINED,

 Plaintiff,

 v.

INDYMAC MORTGAGE SERVICES, A
DIVISION OF ONEWEST BANK,
FSB; FEDERAL HOME LOAN
MORTGAGE CORPORATION; and
DOES 1 through 50, inclusive,

 Defendants.

NO. CIV. 2:13-1991 WBS CKD

MEMORANDUM AND ORDER RE: MOTION
TO DISMISS SECOND AMENDED
COMPLAINT

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Plaintiff Jason Deschaine brought this action against
defendants IndyMac Mortgage Services, a division of OneWest Bank,
FSB ("IndyMac") and the Federal Home Loan Mortgage Corporation
("Freddie Mac") arising out of the foreclosure of his home.
Defendants now move to dismiss plaintiff's Second Amended
Complaint for failure to state a claim upon which relief can be
granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

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. (Defs.' Req. for Judicial Notice
5 ("RJN") Ex. A (Docket No. 36).) On January 26, 2009, Trustee
6 Corps, a foreclosure trustee, recorded a Notice of Default
7 ("NOD") 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, and sought a loan modification.
11 (Second Amended Complaint ("SAC") ¶ 15 (Docket No. 34).)
12 Plaintiff applied for a HAMP loan modification in September 2009
13 and entered into a trial loan modification plan ("TPP") in
14 February 2010. (Id. ¶¶ 16-18.)

15 Plaintiff began making payments under the TPP until
16 IndyMac notified him in July 2010 that he was ineligible for a
17 permanent HAMP¹ loan modification because his mortgage payments
18 were less than thirty-one percent of his monthly income. (Id. ¶¶
19 19-20.) IndyMac invited plaintiff to apply for a Freddie Mac
20 Backup Modification, under which plaintiff could continue to make
21 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 15, 2012, Trustee Corps recorded

25
26 ¹ The Home Affordable Modification Program ("HAMP") is a
27 program initiated by the Treasury Department in 2009 designed "to
28 incentivize banks to refinance mortgages of 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, which reflected an arrearage of \$11,990.13. (RJN
2 Ex. D.)

3 Between April 2012 and June 2013, plaintiff attempted
4 to obtain an additional loan modification from IndyMac. (SAC ¶
5 24.) On several occasions, IndyMac responded either that
6 plaintiff's application was incomplete or that he was ineligible
7 for a loan modification. (Id. ¶¶ 25-30.) IndyMac then scheduled
8 a foreclosure sale on February 26, 2013. (See id. ¶ 31.) On
9 February 25, 2013, a day before the foreclosure sale, plaintiff
10 filed for bankruptcy. (Id.) Plaintiff obtained a discharge in
11 bankruptcy on June 3, 2013. (RJN Ex. F.)

12 At some point between February 26, 2013, and March 20,
13 2013, IndyMac allegedly informed plaintiff that he could re-apply
14 for a loan modification. (SAC ¶ 32.) Plaintiff submitted that
15 application to IndyMac on March 20, 2013, as well as an updated
16 application on April 4, 2013. (Id. ¶¶ 32, 33.) Between April
17 and June 2013, plaintiff alleges that he "remained in constant
18 contact" with IndyMac and continued to send updated financial
19 documents when IndyMac requested him to do so. (Id. ¶ 34.)

20 On June 11, 2013, an IndyMac employee named "Alex W19"
21 allegedly informed plaintiff that there was no foreclosure sale
22 scheduled, but that IndyMac required additional documentation in
23 order to process his application. (Id. ¶ 35.) Plaintiff then
24 alleges that on June 24, 2013, an IndyMac employee named "Albert
25 938" informed plaintiff that his home would be sold at a
26 foreclosure sale the next day. (Id. ¶¶ 36-37.) On June 25,
27 2013, Freddie Mac purchased plaintiff's home at a trustee's sale.
28 (Id. ¶ 38.)

1 Plaintiff filed this action in Nevada County Superior
2 Court on August 8, 2013.² (Docket No. 1.) Defendants removed
3 the action to this court pursuant to 12 U.S.C. § 1452(f), which
4 entitles Freddie Mac to remove to federal court any action to
5 which it is a party. (Id.) On October 21, 2013, plaintiff filed
6 a First Amended Complaint, which alleged twelve claims: (1)
7 intentional misrepresentation; (2) negligent misrepresentation;
8 (3) breach of contract; (4) promissory estoppel; (5) negligence;
9 (6) violation of the Unfair Competition Law ("UCL"), Cal. Bus. &
10 Profs. Code § 17200 et seq.; (7) equitable accounting; (8) "dual
11 tracking" of plaintiff's loan modification application in
12 violation of California Civil Code section 2923.6(c); (9) failure
13 to issue plaintiff an opportunity to appeal the denial of a loan
14 modification in violation of California Civil Code section
15 2923.6(d); (10) failure to appoint a single point of contact in
16 violation of California Civil Code section 2923.7; (11) violation
17 of California Civil Code section 2924; and (12) wrongful
18 foreclosure.³ (Docket No. 22.)

19 On November 15, 2013, the court granted defendants'
20 motion to dismiss plaintiff's First Amended Complaint, and
21 granted plaintiff leave to file an amended complaint within

22 ² In addition to Freddie Mac and IndyMac, plaintiff named
23 Trustee Corps as a defendant in this action. Plaintiff
24 subsequently stipulated to dismiss Trustee Corps from this action
with prejudice. (Docket No. 46.)

25 ³ Plaintiff refers to this claim as an "equitable action
26 to set aside sale," which is equivalent to a wrongful foreclosure
27 claim. See, e.g., Castaneda v. Saxon Mortg. Servs, Inc., 687 F.
28 Supp. 2d 1191, 1201 (E.D. Cal. 2009) (Shubb, J.) ("Wrongful
foreclosure is an 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."

1 twenty days "if he can do so consistent with this Order."

2 (Docket No. 33.) Plaintiff timely filed the SAC, which did not
3 assert a claim for equitable accounting but did re-assert each of
4 the eleven other claims that plaintiff had brought in the First
5 Amended Complaint. Defendants now move to dismiss the SAC
6 pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure
7 to state a claim upon which relief can be granted. (Docket No.
8 35.)

9 II. Request for Judicial Notice

10 In general, a court may not consider items outside the
11 pleadings when deciding a motion to dismiss, but it may consider
12 items of which it can take judicial notice. Barron v. Reich, 13
13 F.3d 1370, 1377 (9th Cir. 1994). A court may take judicial
14 notice of facts "not subject to reasonable dispute" because they
15 are either "(1) generally known within the territorial
16 jurisdiction of the trial court or (2) capable of accurate and
17 ready determination by resort to sources whose accuracy cannot
18 reasonably be questioned." Fed. R. Evid. 201. Judicial notice
19 may properly be taken of matters of public record outside the
20 pleadings. See MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504
21 (9th Cir. 1986).

22 Defendants request that the court judicially notice
23 several recorded documents pertaining to plaintiff's property,
24 including the Deed of Trust, (RJN Ex. A), and three Notices of
25 Default, (id. Exs. B-D). The court will take judicial notice of
26 these documents, since they are matters of public record whose
27 accuracy cannot be questioned. See Lee v. City of Los Angeles,
28 250 F.3d 668, 689 (9th Cir. 2001). The court will also take

1 judicial notice of plaintiff's bankruptcy court filings, (see RJN
2 Exs. E-F), as they are likewise matters of public record whose
3 accuracy cannot be questioned. See Rosal v. First Fed. Bank of
4 Cal., 671 F. Supp. 2d 1111, 1121 (N.D. Cal. 2009) (taking
5 judicial notice of bankruptcy filings).

6 III. Discussion

7 On a motion to dismiss, the court must accept the
8 allegations in the complaint as true and draw all reasonable
9 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
10 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
11 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
12 (1972). To survive a motion to dismiss, a plaintiff needs to
13 plead "only enough facts to state a claim to relief that is
14 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S.
15 544, 570 (2007). This "plausibility standard," however, "asks
16 for more than a sheer possibility that a defendant has acted
17 unlawfully," and where a complaint pleads facts that are "merely
18 consistent with" a defendant's liability, it "stops short of the
19 line between possibility and plausibility." Ashcroft v. Iqbal,
20 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 556-57).

21 A. Negligent & Intentional Misrepresentation

22 To state a claim for intentional misrepresentation, a
23 plaintiff must allege: (1) a misrepresentation; (2) knowledge of
24 falsity; (3) intent to defraud; (4) justifiable reliance on the
25 misrepresentation; and (5) resulting damage. Engalia v.
26 Permanente Med. Grp., Inc., 15 Cal. 4th 951, 974 (1997); Kearns
27 v. Ford Motor Co., 567 F.3d 1120, 1126 (9th Cir. 2009). To state
28 a claim for negligent misrepresentation, a plaintiff must allege:

1 (1) a misrepresentation of a past or existing material fact; (2)
2 without reasonable ground for believing it to be true; (3) intent
3 to induce reliance; (4) justifiable reliance; and (5) resulting
4 damage. Apollo Capital Fund, LLC v. Roth Capital Partners, LLC,
5 158 Cal. App. 4th 226, 243 (2d Dist. 2007); Glenn K. Jackson,
6 Inc. v. Roe, 273 F.3d 1192, 1200 (9th Cir. 2000).

7 Plaintiff alleges, as he did in the First Amended
8 Complaint, that IndyMac falsely represented that plaintiff's
9 application for a loan modification was incomplete, (SAC ¶ 71),
10 that plaintiff was ineligible for a successive HAMP modification,
11 (id. ¶ 78), and that there was no foreclosure sale scheduled,
12 (id. ¶ 85). Plaintiff alleges that, as a result of these
13 misrepresentations, he "continued [his] attempts to obtain a loan
14 modification" from IndyMac in lieu of pursuing other options to
15 avert foreclosure. (Id. ¶¶ 76, 83, 90.)

16 Even if plaintiff could satisfy the first three
17 elements of each claim, he has not sufficiently alleged that he
18 acted in reliance on IndyMac's alleged misrepresentation.
19 Plaintiff has alleged no facts demonstrating that he changed his
20 position in reliance on IndyMac's alleged misrepresentations; on
21 the contrary, plaintiff repeatedly alleges that he "continued
22 [his] attempts to obtain a loan modification," which he had
23 initiated prior to any alleged misrepresentations. (SAC ¶¶ 76,
24 83, 90 (emphasis added).) Because the alleged misrepresentations
25 took place during the course of ongoing efforts to obtain a loan
26 modification, and because plaintiff's allegations indicate that
27 he continued to seek a modification both before and after IndyMac
28 made these alleged misrepresentations, plaintiff's allegations do

1 not show that he changed his position in reliance on these
2 misrepresentations. See, e.g., Rossberg v. Bank of Am., N.A.,
3 219 Cal. App. 4th 1481, 1500 (4th Dist. 2013) (holding that
4 plaintiff's continued efforts to seek a loan modification from
5 Bank of America in lieu of obtaining alternative financing based
6 on alleged representations that plaintiff would receive a
7 modification did not constitute reliance).

8 Plaintiff alleges that had IndyMac had not made these
9 misrepresentations, he would have "explore[d] other options"
10 to postpone the foreclosure sale, including a short sale of the
11 property, filing for bankruptcy, and borrowing money to cure the
12 default. (SAC ¶¶ 76, 83, 90.) Although these allegations are
13 more specific than those in the First Amended Complaint, they are
14 nonetheless insufficient to survive dismissal because plaintiff
15 has not "allege[d] any facts suggesting how pursuing these
16 hypothetical avenues would have prevented the foreclosure of
17 [his] home." Dick v. Am. Home. Mortg. Serv. Co., Civ. No. 2:13-
18 201 WBS CKD, 2014 WL 172537, at *4 (E.D. Cal. Jan. 15, 2014); see
19 also, e.g., Newgent v. Wells Fargo Bank, N.A., Civ. No. 9-1525
20 WQH, 2010 WL 761236, at *5 (S.D. Cal. Mar. 2, 2010) (dismissing
21 fraud claim because plaintiff did "not allege facts that support
22 a cognizable theory upon which she could have prevented the
23 trustee's sale").

24 For instance, in Sholiay v. Federal National Mortgage
25 Association, the plaintiff claimed that, but for defendant's
26 representation that he would receive a loan modification, he
27 would have retained an attorney to prevent the foreclosure of his
28 home. Civ. No. 2:13-958 WBS, 2013 WL 3773896, at *6 (E.D. Cal.

1 July 17, 2013). This court nonetheless dismissed the claim
2 because the plaintiff "fail[ed] to allege facts suggesting how
3 hiring a lawyer could have prevented the sale." Id.

4 Like the plaintiff in Sholiay, plaintiff has failed to
5 allege any facts demonstrating that he would have been able to
6 avert the sale of his home through a short sale, a loan,
7 bankruptcy, or any other method. Plaintiff's allegation that
8 IndyMac's promise of a loan modification deterred him from
9 declaring bankruptcy is particularly implausible, as plaintiff
10 allegedly continued to seek a loan modification even after he
11 filed his bankruptcy petition. (See SAC ¶¶ 31-35.) Plaintiff
12 has therefore not alleged sufficient facts to show that he relied
13 on IndyMac's alleged representations about his application for a
14 loan modification.

15 "Even assuming justifiable reliance . . . no liability
16 attaches if the damages sustained were otherwise inevitable or
17 due to unrelated causes." Gardner v. RSM & A Foreclosure Servs.,
18 LLC, Civ. No. 2:12-2666 JAM AC, 2013 WL 3242211, at *4 (E.D. Cal.
19 June 25, 2013) (quoting Kruse v. Bank of Am., 202 Cal. App. 3d
20 38, 60-61 (1st Dist. 1988) (internal quotation marks omitted)).
21 Like his allegations in the First Amended Complaint, plaintiff's
22 allegations here do not show that any damages he suffered were a
23 result of IndyMac's conduct, rather than his own failure to make
24 his mortgage payments. Trustee Corps recorded multiple notices
25 of default against plaintiff's home prior to any alleged
26 misrepresentations, and each of these notices states an arrearage
27 of over \$10,000. (See RJN Exs. B-D.) Because plaintiff
28 repeatedly defaulted prior to any alleged misrepresentations, his

1 allegation that those misrepresentations resulted in the
2 foreclosure of his home is implausible. See Manzano v. Metlife
3 Bank, N.A., Civ. No. 2:11-651 WBS DAD, 2011 WL 2080249, at *5
4 (E.D. Cal. May 25, 2011) (dismissing fraud and negligent
5 misrepresentation claims when "plaintiff stopped making payments
6 under the loan before these alleged misrepresentations were
7 made").

8 While plaintiff has amended his complaint to allege
9 that "[t]he above damages were not inevitable" and that his home
10 would not have been foreclosed upon "had the representations not
11 been false," (SAC ¶¶ 77, 84, 91), this allegation is also
12 implausible because plaintiff has not alleged any facts to
13 suggest that he could have avoided default. "Without some
14 factual basis suggesting that [plaintiff] could have cured the
15 default . . . the [c]ourt cannot reasonably infer that
16 [IndyMac's] alleged misrepresentations resulted in the loss of
17 [plaintiff's] home. Rather, the facts alleged suggest that
18 [plaintiff] lost [his] home because [he] became unable to keep up
19 with monthly payments and lacked the financial resources to cure
20 the default." DeLeon v. Wells Fargo Bank, N.A., Civ. No. 10-
21 10390 LHK, 2011 WL 311376, at *7 (N.D. Cal. Jan. 28, 2011).
22 Accordingly, because plaintiff has not alleged sufficient facts
23 to demonstrate reliance or resulting damage, the court must grant
24 defendants' motion to dismiss his intentional and negligent
25 misrepresentation claims.

26 B. Promissory Estoppel

27 "The elements of a promissory estoppel claim are: (1) a
28 promise that is clear and unambiguous in its terms; (2) reliance

1 on the promise by the party to whom the promise is made; (3) that
2 is reasonable and foreseeable; and (4) injury to the party
3 asserting estoppel due to his or her reliance." Alimena v.
4 Vericrest Fin., Inc., --- F. Supp. 2d ----, Civ. No. 2:12-901 LKK
5 JFM, 2013 WL 4049663, at *12 (E.D. Cal. Aug. 29, 2013) (citing
6 Laks v. Coast Fed. Sav. & Loan Ass'n, 60 Cal. App. 3d 885, 890-91
7 (2d Dist. 1976)).

8 Plaintiff again alleges that IndyMac "promised
9 [p]laintiff a HAMP loan modification in or about 2010 and further
10 promised not to foreclose on [p]laintiff while he was being
11 reviewed for a loan modification." (SAC ¶ 106.) As explained
12 above, even if IndyMac had made these promises, plaintiff has not
13 sufficiently alleged that he suffered any injury in reliance on
14 those promises. Accordingly, the court must grant defendants'
15 motion to dismiss plaintiff's promissory estoppel claim.

16 C. Breach of Contract

17 "[T]he elements of a cause of action for breach of
18 contract are (1) the existence of the contract, (2) plaintiff's
19 performance or excuse for nonperformance, (3) defendant's breach,
20 and (4) the resulting damages to the plaintiff." Oasis W.
21 Realty, Inc. v. Goldman, 51 Cal. 4th 811, 821 (2011).

22 Plaintiff alleges that IndyMac promised to extend him a
23 permanent loan modification and that it breached this promise by
24 providing him with a "backup modification" with terms that were
25 inconsistent with HAMP guidelines. (SAC ¶ 101). Plaintiff
26 concedes, as he did in the First Amended Complaint, that he did
27 not make all the payments that were required under the loan
28 modification agreement. (Id. ¶ 102.) Because plaintiff has not

1 performed his obligation under any alleged contract, he cannot
2 bring a breach of contract claim unless his failure to perform is
3 excused. See Goldman, 51 Cal. 4th at 821.

4 Plaintiff re-asserts that his failure to make payments
5 was excused because he could no longer afford to make the
6 payments, which were "based on inaccurate income and outside of
7 HAMP guidelines." (Id.) As the court emphasized in its previous
8 Order, this allegation is insufficient because "mere unforeseen
9 difficulty or performance . . . ordinarily will not excuse
10 performance." 1 Witkin, Summary of California Law (Contracts) §
11 830 (10th ed. 2005); accord Metzler v. Thye, 163 Cal. 95, 98
12 (1912). Rather, plaintiff must allege that performance under the
13 terms of the Backup Modification was "objectively impossible" for
14 any person. Rosales v. Downey Sav. & Loan Ass'n, Civ. No. 9-39
15 WQH AJB, 2009 WL 514229, at *8 (S.D. Cal. Mar. 2, 2009) (citation
16 omitted). Because plaintiff has not done so, he cannot allege
17 that his performance was excused. See, e.g., id.; Archiunda v.
18 Chase Home Fin. LLC, Civ. No. 9-960 H AJB, 2009 WL 1796295, at *5
19 (S.D. Cal. June 23, 2009) (holding that the plaintiff's
20 performance was not excused even though he alleged that "based
21 upon the actual income information provided . . . Plaintiff could
22 never perform according to the terms of the loan").

23 Insofar as it is not "impossible for anyone to perform"
24 under the terms of the Backup Modification, id., plaintiff's
25 alleged inability to make payments does not excuse his
26 performance. Accordingly, the court must grant defendants'
27 motion to dismiss plaintiff's breach of contract claim.

28

1 D. Negligence

2 "To prove a cause of action for negligence, plaintiff
3 must show (1) a legal duty to use reasonable care, (2) breach of
4 that duty, (3) proximate [or legal] cause between the breach and
5 (4) the [plaintiff's] injury." Castaneda, 687 F. Supp. 2d at
6 1197 (citing Mendoza v. City of Los Angeles, 66 Cal. App. 4th
7 1333, 1339 (2d Dist. 1998)) (internal quotation marks omitted).
8 "The existence of a legal duty to use reasonable care in a
9 particular factual situation is a question of law for the court
10 to decide." Vasquez v. Residential Invs., Inc., 118 Cal. App.
11 4th 269, 278 (4th Dist. 2004).

12 As the court noted in its previous Order, the majority
13 of California courts hold that a loan servicer who offers to
14 modify a borrower's loan does not owe that borrower a duty of
15 care because "its involvement in the loan transaction does not
16 exceed the scope of its conventional role as a lender of money."
17 Nymark v. Heart Fed. Sav. & Loan Ass'n, 231 Cal. App. 3d 1089,
18 1096 (3d Dist. 1991); see also Settle v. World Sav. Bank.,
19 F.S.B., Civ. No. 11-800 MMM (DTBx), 2012 WL 1026103, at *8 (C.D.
20 Cal. Jan. 11, 2012) (noting that "numerous cases have
21 characterized a loan modification as a traditional money lending
22 activity" and listing cases). Indeed, plaintiff now concedes
23 that there is "[g]enerally . . . no duty" to grant a loan
24 modification. (SAC ¶ 133.) To the extent that plaintiff's
25 negligence claim is premised on the allegation that IndyMac
26 failed to modify his mortgage loan, plaintiff therefore cannot
27 state a claim for negligence.

28 Relying on Lueras v. BAC Home Loans Servicing, 221 Cal.

1 App. 4th 49 (4th Dist. 2013), plaintiff contends that IndyMac
2 nonetheless had a duty "not to make a misrepresentation . . .
3 regarding the status of the application or the time [] and status
4 of the foreclosure sale." (SAC ¶ 113.) In Lueras, the plaintiff
5 brought a negligence claim arising out of the defendant's
6 handling of his application for a loan modification. 221 Cal.
7 App. 4th at 63. Although the court held that plaintiff could not
8 state a negligence claim because the defendant had no "common law
9 duty to offer or approve a loan modification," it nonetheless
10 concluded that "a lender does owe a duty to a borrower to not
11 make material misrepresentations about the status of an
12 application for a loan modification or about the date, time, or
13 status of a foreclosure sale." Id. at 67-68. As a result, the
14 court granted plaintiff leave to amend "to plead a cause of
15 action for negligent misrepresentation." Id. at 69 (emphasis
16 added).

17 As in Lueras, plaintiff has not alleged the existence
18 of a duty of care that could support a negligence claim. To the
19 extent that plaintiff has alleged that IndyMac violated a duty
20 not to misrepresent facts about the modification and foreclosure
21 process, those allegations sound in negligent misrepresentation,
22 rather than negligence.⁴ See 5 Witkin, Summary of Cal. Law

23
24 ⁴ Unlike the plaintiff in Lueras, plaintiff has already
25 alleged a negligent misrepresentation claim. In fact,
26 plaintiff's allegation that IndyMac was negligent because it
27 "misrepresented the sale date," (SAC ¶ 115), closely parallels
28 his allegation that IndyMac committed a "[m]isrepresentation" by
"stat[ing] that there was no foreclosure sale date" (id. ¶ 85).
As explained above, these allegations are insufficient to state a
negligent misrepresentation claim because plaintiff has not
sufficiently alleged that he relied on these representations or

1 (Torts) § 819 (10th Ed. 2005) (noting that California law treats
2 negligent misrepresentation as a form of deceit, rather than as a
3 form of negligence); Bily v. Arthur Young & Co., 3 Cal. 4th 370,
4 413 (1992) (holding that plaintiffs can recover for negligent
5 misrepresentation, but not negligence, when they are able to
6 allege reliance on a defendant's misrepresentation but cannot
7 allege the existence of a duty of care). Accordingly, because
8 plaintiff has not sufficiently alleged that IndyMac owed him a
9 duty of care, the court must grant defendants' motion to dismiss
10 plaintiff's negligence claim.

11 E. HOLA Preemption⁵

12 Prior to the enactment of the Dodd-Frank Wall Street
13 Reform Act and Consumer Protection Act of 2010 ("Dodd-Frank
14 Act"), 12 U.S.C. § 5301 et seq., the Home Owners Loan Act of 1933
15 ("HOLA") authorized the Office of Thrift Supervision ("OTS") to
16 promulgate regulations governing federal savings associations.
17 Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1005 (9th Cir.
18 2008) (citing then-current version of 12 U.S.C. § 1464).
19 Pursuant to that authority, OTS issued a regulation that
20 authorized federal savings associations to "extend credit as
21 authorized under federal law . . . without regard to state laws
22 purporting to regulate or otherwise affect their credit

23
24 suffered harm as a result of that reliance.

25 ⁵ Defendants move to dismiss a total of five claims
26 brought pursuant to California Business & Professions Code
27 section 17200 and California Civil Code sections 2923 and 2924 on
28 the basis that these claims are preempted by HOLA. Because the
court dismisses plaintiff's other claims on alternate grounds, it
need not reach the issue of whether any of those claims are also
preempted by HOLA.

1 activities." 12 C.F.R. § 560.2(a). By its own terms, that
2 regulation "occupie[d] the entire field of lending regulation for
3 federal savings associations," id., and therefore "left no room
4 for the States to supplement it." Rice v. Santa Fe Elevator
5 Corp., 331 U.S. 218, 230 (1947).

6 Although the Dodd-Frank Act has since transferred that
7 authority to the Office of the Comptroller of the Currency, see
8 12 U.S.C. § 1464, and now provides that HOLA's implementing
9 regulations no longer occupy the field of lending regulation, see
10 12 U.S.C. § 1465, it explicitly provided that those amendments
11 "shall not be construed to alter or affect the applicability of
12 any regulation, order, guidance, or interpretation prescribed,
13 issued, and established by . . . the Office of Thrift
14 Supervision regarding the applicability of State law under
15 Federal banking law to any contract entered into on or before the
16 date of enactment of this Act" 12 U.S.C. § 5553. As a
17 result, "claims involving contracts formed before July 21, 2010
18 are subject to the preemption regime in place before Dodd-Frank,"
19 rather than the more lenient conflict preemption standard
20 established by the Dodd-Frank Act. Settle, 2012 WL 1026103, at
21 *14; accord Henning v. Wachovia Mortg., FSB, --- F. Supp. 2d ----
22 , Civ. No. 11-11428 WGY, 2013 WL 5229837, at *5 (D. Mass. Sep.
23 17, 2013) ("Courts have uniformly held, however, that the
24 provisions of Dodd-Frank are not retroactive, and that HOLA
25 preemption applies to mortgages originated before either July 21,
26 2010 or July 21, 2011 Because the loans at issue originated
27 before either date, the appropriate preemption standard to apply
28 . . . is that extant prior to the effective date of Dodd-Frank."

1 (citations omitted)).

2 At the time plaintiff entered into his mortgage loan,
3 OTS's implementing regulations explicitly stated that HOLA
4 preempted several enumerated types of state law, including any
5 state law that purports to regulate the "processing, origination,
6 servicing, sale, or purchase of, or investment or participation
7 in, mortgages." 12 C.F.R. § 560.2(b)(10). That list encompasses
8 not only statutes that specifically regulate lending activities,
9 but also statutes of general applicability, such as the UCL.
10 See, e.g., *Munoz v. Fin. Freedom Senior Funding Corp.*, 567 F.
11 Supp. 2d 1156, 1163 (C.D. Cal. 2008) (holding that UCL claims
12 were preempted by HOLA). The regulation also includes a savings
13 clause stating that several types of state law, including
14 contract and commercial law, real property law, and tort law "are
15 not preempted to the extent that they only affect the lending
16 operations of Federal savings associations or are otherwise
17 consistent with the purposes of paragraph (a) of this section."
18 12 C.F.R. § 560.2(c).

19 OTS also promulgated a framework for courts to
20 determine "the status of state laws under § 560.2":

21 [T]he first step will be to determine whether the type
22 of law in question is listed in paragraph (b). If so,
23 the analysis will end there; the law is preempted. If
24 the law is not covered by paragraph (b), the next
25 question is whether the law affects lending. If it
26 does, then, in accordance with paragraph (a), the
27 presumption arises that the law is preempted. This
28 presumption can be reversed only if the law can be
shown to fit within the confines of paragraph (c).

OTS, Final Rule, 61 Fed. Reg. 50951, 50966-67 (Sept. 30, 1996).⁶

⁶ Insofar as the Final Rule evinces OTS's interpretation of the preemptive scope of § 560.2, it "must be given controlling

1 The Final Rule emphasized that “paragraph (c),” the
2 savings clause in the regulation, “is intended to be interpreted
3 narrowly” and that “[a]ny doubt should be resolved in favor of
4 preemption.” Id.⁷ In applying this framework, the relevant
5 issue is whether the state law, “as applied, is a type of law
6 contemplated in the list under paragraph (b).” Silvas, 514 F.3d
7 at 1006 (emphasis added).

8 IndyMac is a division of OneWest Bank, FSB, which is a
9 federally chartered savings bank. The Deed of Trust noted that
10 the “Lender” was “IndyMac Bank, F.S.B., a federally chartered
11 savings bank.” (RJN Ex. A.) Plaintiff initially entered into a
12 mortgage loan with IndyMac on December 7, 2005, (see id.), and
13 subsequently modified that loan on February 1, 2010 and July 14,
14 2010 (see SAC ¶¶ 18, 20). Plaintiff’s claims relating to his
15 mortgage loan are therefore subject to the preemption standard
16 set forth by 12 C.F.R. § 560.2, and the court must determine
17 whether plaintiff’s five statutory claims are preempted.

19 weight.” Silvas, 514 F.3d at 1005 n.5 (citing Auer v. Robbins,
20 519 U.S. 452 (1997)); see also Basiri v. Xerox Corp., 463 F.3d
21 927, 930 (9th Cir. 2006) (explaining that an agency’s
22 interpretation of its own regulation is “controlling” under
23 Auer.)

24 ⁷ While plaintiff invokes the “strong presumption”
25 against federal preemption, (Pl.’s Opp’n at 16:20-21 (Docket No.
26 48)), the Ninth Circuit has repeatedly held that this presumption
27 does not apply to HOLA or its implementing regulations. See Bank
28 of Am. v. City & County of San Francisco, 309 F.3d 551, 559 (9th
Cir. 2002) (“[B]ecause there has been a history of significant
federal presence in national banking, the presumption against
preemption of state law is inapplicable.” (internal quotation
marks and citations omitted)); Silvas, 514 F.3d at 1004
(asserting that “HOLA and its following agency regulations [are]
so pervasive as to leave no room for state regulatory control”)
(citations and internal quotation marks omitted).

1 1. California Civil Code Section 2923

2 Like plaintiff's first amended complaint, the SAC
3 brings claims under sections 2923.6(c), 2923.6(d), and 2923.7 of
4 the California Civil Code, which regulate loan modification
5 activities. Plaintiff alleges that IndyMac violated these
6 provisions because it "dual-tracked" his application, (SAC ¶
7 126), did not permit him to appeal the denial of his application,
8 (id. ¶ 132), and failed to assign him a single point of contact
9 with regard to his application (id. ¶ 136). Plaintiff alleges
10 that these violations resulted in the unlawful sale of his home
11 at a foreclosure sale. (Id. ¶¶ 127, 133, 137.)

12 As the court held in its earlier Order, plaintiff's
13 section 2923 claims are preempted because they impose
14 requirements on the "processing, origination, [and] servicing" of
15 plaintiff's mortgage loan and application for a loan modification
16 in addition to those imposed by federal law. 12 C.F.R. §
17 560.2(b)(10); see, e.g., Biggins v. Wells Fargo & Co., 266 F.R.D.
18 399, 417 (N.D. Cal. 2009) (holding that a section 2923.6 claim
19 premised on failure to extend a loan modification was preempted
20 by HOLA); Marquez v. Wells Fargo Bank, N.A., Civ. No. 13-2819
21 PJH, 2013 WL 5141689, at *5 (N.D. Cal. Sept. 13, 2013) (holding
22 that a section 2923.7 claim based on allegations that the
23 plaintiffs were denied a single point of contact and were never
24 "given a meaningful opportunity to apply for, and receive, a loan
25 modification is preempted by HOLA").

26 Even if plaintiff were correct that section 2923 does
27 not fall into the enumerated categories of state law preempted by
28 section 560.2(b), plaintiff's section 2923 claim would

1 nonetheless be preempted because it would impose liability on
2 IndyMac for its conduct in the loan modification process and
3 thereby "affect[] lending." Final Rule, 61 Fed. Reg. at 50966-
4 67; see, e.g., Parcray v. Shea Mortg., Inc., Civ. No. 2:09-1942
5 OWW GSA, 2010 WL 1659369, at *8 (E.D. Cal. Apr. 23, 2010)
6 (holding that claims alleging that a lender "failed to
7 communicate" with a borrower during the loan modification process
8 are preempted insofar as they impose duties on lenders that they
9 "would not be subject to . . . in other states") (citation and
10 internal quotation marks omitted).⁸ Accordingly, the court must
11 grant defendants' motion to dismiss plaintiff's section 2923
12 claims.

13 2. California Civil Code Section 2924

14 Plaintiff also alleges, as he did in the First Amended
15 Complaint, that IndyMac assigned his mortgage loan to a
16 securitized trust. As a result, plaintiff alleges, the Notice of
17 Default was void and the foreclosure sale violated section 2924
18 of the California Civil Code.

19 Section 2924 claims "based on misconduct related to the
20 foreclosure proceedings" are preempted by HOLA. Ismail v. Wells

21 ⁸ While plaintiff relies on Mabry v. Superior Court, 185
22 Cal. App. 4th 208 (4th Dist. 2010), in support of the proposition
23 that section 2923 or other statutes governing the foreclosure
24 process are not preempted, that case represents a minority
25 position. See, e.g., Taguinod v. World Sav. Bank, 755 F. Supp.
26 2d 1064, 1074 (C.D. Cal. 2010) (characterizing Mabry as
27 inconsistent with "the overwhelming weight of authority").
28 Plaintiff's reliance on Mabry and other decisions from the
California Courts of Appeal is also misplaced because federal
courts, including this court, "are not bound by state court
decisions on the preemptive effect of federal law." In re
Holiday Airlines Corp., 647 F.2d 977, 980 (9th Cir. 1981)
(citations omitted).

1 Fargo Bank, N.A., Civ. No. 2:12-1653 MCE CKD, 2013 WL 930611, at
2 *9 (E.D. Cal. Mar. 8, 2013) (citations omitted); see also, e.g.,
3 DeLeon v. Wells Fargo Bank, N.A., 729 F. Supp. 2d 1119, 1126
4 (N.D. Cal. 2010) (holding that claims under sections 2923.5 and
5 2924 are preempted by HOLA). Because plaintiff's section 2924
6 claim alleges that the assignment of his loan to a securitized
7 trust was invalid, it is preempted because it would effectively
8 regulate IndyMac's "sale or purchase" of mortgages. 12 C.F.R. §
9 560.2(b)(1)); Sami v. Wells Fargo Bank, Civ. No. 12-108 DMR, 2012
10 WL 967051, at *6-7 (N.D. Cal. Mar. 21, 2012) (holding that a
11 section 2924 claim premised on allegations of an unlawful pooling
12 and servicing agreement was preempted by HOLA). Further,
13 plaintiff's section 2924 claim is preempted by HOLA because it
14 alleges that IndyMac lacked authority to initiate the foreclosure
15 process. Id. at *8; Kenery v. Wells Fargo, N.A., Civ. No. 5:13-
16 2411 EJD, 2014 WL 129262, at *4 (N.D. Cal. Jan. 14, 2014)
17 ("Plaintiff's claim is preempted by HOLA because it seeks to
18 apply [section 2924] to impose requirements on the initiation of
19 the foreclosure process." (citations omitted)). Accordingly, the
20 court must grant defendants' motion to dismiss plaintiff's
21 section 2924 claim.

22 3. The UCL

23 California's UCL prohibits "any unlawful, unfair, or
24 fraudulent business act or practice . . ." Cal. Bus. & Profs.
25 Code § 17200. The UCL "establishes three varieties of unfair
26 competition . . . In other words, a practice is prohibited as
27 unfair or deceptive even if not unlawful and vice versa." Cel-
28 Tech Comm'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163,

1 180 (1999) (internal quotation marks and citations omitted).

2 Plaintiff brings a claim under the UCL for "unlawful
3 business practices"⁹ in which he alleges that defendants
4 "violated Cal. Civ. Code §§ 2923.6, 2923.7, and 2924."¹⁰ (SAC ¶
5 119.) Because "those statutes would impose additional
6 requirements on [IndyMac] in the mortgage process, the UCL claim
7 is . . . preempted to the extent that it depends on those
8 statutes." Plastino v. Wells Fargo Bank, 873 F. Supp. 2d 1179,
9 1186 n.4 (N.D. Cal. 2012); see also Vega, 654 F. Supp. 2d at 1118
10 (holding that plaintiffs in a foreclosure-related action were
11 "unable to avoid [HOLA] preemption in the guise of a UCL claim").
12 Accordingly, the court must grant defendants' motion to dismiss
13 plaintiff's UCL claim.

14 _____
15 ⁹ Although plaintiff labels his UCL claim "unlawful
16 business practices," some allegations suggest that he also seeks
17 to assert a claim under the UCL's "unfair" prong. (See, e.g.,
18 SAC ¶ 118 ("[T]he unlawful acts and practices of Defendants
19 alleged herein constitute unlawful or unfair business practices .
20 . . .").) The court need not determine whether plaintiff has
21 stated a claim under the UCL's "unfair" prong because any such
22 claim would also be preempted. See, e.g., Vega v. JPMorgan Chase
23 Bank, N.A., 654 F. Supp. 2d 1104, 1118 (E.D. Cal. 2009) (O'Neill,
24 J.) (noting that a UCL claim brought under the "unfair" prong was
25 preempted by HOLA to the extent that it relied on allegations of
26 inadequate loan disclosures).

27 ¹⁰ Plaintiff's UCL claim also reiterates his allegations
28 that IndyMac committed "material misrepresentations affecting
plaintiff's interest in [his home] and committed numerous acts of
negligence in the handling of and processing of [p]laintiff's
loan modification applications." (SAC ¶ 119.) 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 F. Wrongful Foreclosure

2 "Wrongful foreclosure is an action in equity, where a
3 plaintiff seeks to set aside a foreclosure sale." Castaneda, 687
4 F. Supp. 2d at 1201. "A nonjudicial foreclosure sale is
5 accompanied by a presumption that it was conducted regularly and
6 fairly." Melendrez v. D & I Inv., Inc., 127 Cal. App. 4th 1238,
7 1258 (6th Dist. 2005) (internal quotation marks omitted). "This
8 presumption may only be rebutted by substantial evidence of
9 prejudicial procedural irregularity." Id.; see also Quinteros v.
10 Aurora Loan Servs., 740 F. Supp. 2d 1163, 1169 (E.D. Cal. 2010)
11 (Ishii, J.) ("[S]ome form of actual prejudice is necessary.").
12 On a motion to dismiss, therefore, a plaintiff must allege "facts
13 showing that [he was] prejudiced by the alleged procedural
14 defects." Hadley v. BNC Mortg., Inc., 466 Fed. App'x 612, 613
15 (9th Cir. 2012) (citing Arnolds Mgmt. Corp. v. Eischen, 158 Cal.
16 App. 3d 575 (2d Dist. 1984)).

17 In order to demonstrate prejudice, plaintiff must show
18 not only that he lost his home in a foreclosure sale, but that
19 the alleged "violation of the statute[s] [themselves], and not
20 the foreclosure proceedings, caused [his] injury." Aguiar v.
21 Wells Fargo Bank, N.A., Civ. No. 12-3653 YGR, 2012 WL 5915124, at
22 *5 (N.D. Cal. Nov. 26, 2012). Although plaintiff has amended
23 his complaint to allege that he would have qualified for a loan
24 modification and avoided foreclosure "[h]ad . . . [d]efendants
25 complied with the code," (SAC ¶ 147), this allegation suffers
26 from the same two defects as his earlier complaint.

27 First, because plaintiff's statutory claims cannot
28 withstand dismissal, plaintiff cannot bring a wrongful

1 foreclosure claim predicated on violations of those statutes.
2 See, e.g., Falcocchia v. Saxon Mortg., Inc., 709 F. Supp. 2d 873,
3 887 (E.D. Cal. 2010) (Karlton, J.) (holding that because
4 plaintiff's statutory claims under the Real Estate Settlement
5 Procedures Act (RESPA) failed, plaintiff could not bring a
6 wrongful foreclosure claim based on RESPA violations). Nor can
7 plaintiff avoid pre-emption by re-characterizing his statutory
8 claims as a wrongful foreclosure claim. See DeLeon, 729 F. Supp.
9 2d at 1126 (holding that plaintiff's wrongful foreclosure claim
10 was preempted because it relied upon violations of statutory
11 claims that were preempted).

12 Second, even if plaintiff could bring this wrongful
13 foreclosure claim, plaintiff has not alleged any facts suggesting
14 that he was prejudiced by any statutory violations. Throughout
15 the SAC, plaintiff alleges that he was not assigned a single
16 point of contact about his loan modification application, (SAC ¶
17 136), was "dual-tracked," (id. ¶ 126), and was denied an
18 opportunity to appeal the denial of his application for a loan
19 modification (id. ¶132). Plaintiff has not alleged any facts
20 showing that these alleged irregularities resulted in the denial
21 of his application for a loan modification or that he could have
22 successfully applied the denial of his application for a loan
23 modification. Plaintiff has therefore not shown that these
24 alleged "violations of the statute[s] [themselves], and not the
25 foreclosure proceedings, caused [his] injury." Aguiar, 2012 WL
26 5915124, at *5. Accordingly, the court must grant defendants'
27 motion to dismiss this claim.

28

1 G. Claims Against Freddie Mac

2 Plaintiff alleges that Freddie Mac is liable for
3 IndyMac's conduct because IndyMac acted as the agent of Freddie
4 Mac, the owner of plaintiff's loan. (SAC ¶¶ 52-59.) Because
5 plaintiff has not stated a claim for relief against IndyMac and
6 alleges no separate wrongdoing by Freddie Mac, the court need not
7 determine whether plaintiff has alleged sufficient "facts that
8 would create a plausible agency relationship" between IndyMac and
9 Freddie Mac. Castaneda v. Saxon Mortg. Servs., Inc., Civ. No.
10 2:09-1124 WBS DAD, 2010 WL 726903, at *6 (E.D. Cal. Feb 26,
11 2010). Accordingly, the court must grant defendants' motion to
12 dismiss all claims against Freddie Mac.

13 H. Leave to Amend

14 Although leave to amend must be freely granted, the
15 court need not permit futile amendments. See DeSoto v. Yellow
16 Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992). Because
17 the court has already permitted plaintiffs to amend their
18 pleadings and it appears that plaintiffs are unable to state a
19 viable claim against defendants, all claims will be dismissed
20 with prejudice and without leave to amend.

21 IT IS THEREFORE ORDERED that defendants' motion to
22 dismiss be, and the same hereby is, GRANTED.

23 The Clerk of the Court is directed to enter a judgment
24 of dismissal in accordance with this Order and close the file.

25 Dated: January 22, 2014

26 

27 WILLIAM B. SHUBB
28 UNITED STATES DISTRICT JUDGE