UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DAVID WEINER, individually, and on behalf of other members of the public similarly situated,

Plaintiff,

v.

OCWEN FINANCIAL CORPORATION, a Florida corporation, and OCWEN LOAN SERVICING, LLC, a Delaware limited liability company,

Defendants.

No. 2:14-cv-02597-MCE-DAD

MEMORANDUM AND ORDER

Through the present action, Plaintiff David Weiner ("Plaintiff") alleges that his mortgage servicer, Ocwen Loan Servicing LLC ("OLS") and OLS' parent company, Ocwen Financial Corporation (collectively referred to as "Ocwen" unless otherwise indicated), improperly assessed default-related service fees that contained substantial, undisclosed mark-ups which violated the terms of his mortgage contract. Plaintiff further alleges that Defendants misapplied his payments in violation of the terms of the applicable deed of trust.

Plaintiff also purports to represent a class of borrowers who have been similarly damaged by Defendants' allegedly improper actions in this regard. Ocwen now moves

to dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted in accordance with Federal Rule of Civil Procedure 12(b)(6).[1] Additionally, with respect to Plaintiff's claims premised on fraud, Ocwen further assert those claims fail because they are not pled with the particularity required by Rule 9(b). As set forth below, Ocwen's Motion is DENIED.[2]

BACKGROUND[3]

Ocwen assumed the servicing of Plaintiff's home mortgage in late 2012 or 2013. According to the Complaint, the previous servicer on the loan, GMAC, had paid Plaintiff's property taxes in 2010 and accordingly had established an escrow account for Plaintiff's pre-payment of those expenses in the future. Plaintiff nonetheless claims that after fully reimbursing GMAC for the taxes it paid in early 2011, and paying a $400.00 escrow fee, Plaintiff arranged with GMAC that he would pay his own property taxes going forward and would provide timely proof of his payments. Despite meeting his commitment in that regard, Plaintiff asserts that after Ocwen became his loan servicer it began charging a $600.00 annual escrow account fee and further began diverting funds to that escrow account such that the account carried a positive balance of more than $10,000.00. Plaintiff was denied any access to those funds. Plaintiff maintains that this diversion resulted in Ocwen failing to properly apply his interest and principal payments, which he alleges are supposed to be credited before any escrow amounts are withheld.[4] This

[1] All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure unless otherwise noted.

[2] Having determined that oral argument would not be of material assistance, the Court ordered this matter submitted on the briefs in accordance with E.D. Local Rule 230(g).

[3] This factual background is drawn directly from the allegations contained in Plaintiff's Class Action Complaint (ECF No. 1).

[4] According to the applicable Deed of Trust, the "Application of Payments or Proceeds establishes a hierarchy in which funds from customer payments are to be applied. Those funds are to be allocated in the following order: 1) interest due under the promissory note; 2) principal due under the promissory note; 3) amounts due for any "escrow item (such as property taxes or homeowners' insurance premiums); 4)

misallocation resulted ultimately in Ocwen's refusal to accept Plaintiff's interest and principal payments altogether on grounds that they are insufficient to satisfy the defaulted amount on the loan. Plaintiff states that Ocwen's improper diversion of escrow funds has made him unable to claim interest deduction on his federal and state tax returns, has subjected him to harassing phone calls, has precluded him from refinancing his loan, and has placed Plaintiff in constant fear of imminent foreclosure on his home.

In addition to misallocation of loan payments and being denied access to surplus funds diverted to his escrow account, Plaintiff also claims that once Ocwen succeeded in forcing him into default by misapplying his loan payments, it proceeded to improperly assess marked-up fees for default related services on his mortgage accounts, including so-called Broker Price Option ("BPO") fees, title report, and title search fees. By way of example, Plaintiff asserts that Ocwen assessed BPO fees of $109.00 and $110.00 on September 4, 2013, and February 24, 2014, respectively, despite knowing that the actual cost of a BPO is only approximately $50.00. Additionally, with respect to fees for services related to the examination of title, Plaintiff claims he was assessed a title search fee on June 9, 2014 in the amount of $829.00, despite the fact that such a fee typically ranges between $150.00 and $450.00. In both instances, according to Plaintiff, the markup on fees by Ocwen was double the appropriate amount.

According to Plaintiff, Ocwen profited from this arrangement, and was able to avoid detection, because computer management programs designed to assess fees were spun off by Ocwen, on August 10, 2009, to Altisource. The Chairman of the Board for both Altisource and Ocwen was the same individual, William C. Erbey, and according to the Complaint Erbey owns some 27 percent of the common source of Altisource. Because of the interconnection between the two companies, Plaintiff alleges that both entities benefit from inflated fees. More specifically, the Complaint states:

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late charges; and 5) fees for default related services and other amounts. Compl., ¶¶ 76, 77; see also Deed of Trust, Ex. 1 to Ocwen's Request for Judicial Notice, ¶ 2. Ocwen's request that the Court judicially notice a redacted copy of Plaintiff's Deed of Trust, pursuant to Federal Rule of Evidence 201, is unopposed and is hereby GRANTED.

> Ocwen directs Altisource to order and coordinate default-related services, and, in turn, Altisource places orders for such services with third-party vendors. The third-party vendors charge Altisource for the performance of the default-related services, [and] Altisource then marks up the price of the vendors' services, in numerous instances by 100% or more, before "charging the services to Ocwen, In turn, Ocwen bills the marked-up fees to homeowners."

Compl., ¶ 52.

Plaintiff points out that the applicable Deed of Trust[5] provided that, in the event of default, the loan servicer is authorized to:

> pay for whatever is reasonable or appropriate to protect the note holder's interest in the property and rights under the security instrument, including protecting and/or assessing the value of the property, and securing and/or repairing the property.

Id. at ¶ 55; see also Deed of Trust, ¶ 9.

The Deed of Trust further discloses that any such "amounts disbursed by the servicer to a third party shall become additional debt of the homeowner secured by the deed of trust and shall bear interest at the Note rate from the date of "disbursement." Compl., ¶ 56. Moreover, according to Plaintiff, the Promissory Note discloses that with respect to "Payment of the Note Holder's Costs and Expenses," if there is a default, the homeowner will have to "pay back" costs and expenses incurred in enforcing the Note to the extent not prohibited by applicable law. Plaintiff therefore asserts that the mortgage instruments provide that the servicer will "pay for default-related services when reasonably necessary, and will be reimbursed of "paid back" by the homeowner for amounts "disbursed." Compl., ¶ 58. Plaintiff maintains that nowhere is it disclosed to borrowers that Ocwen may engage, as it purportedly does, in self-dealing to mark up the actual cost of those services to make a profit. Id.

Plaintiff's Class Action Complaint alleges violations of: 1) California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, et seq. ("UCL"); 2) The Racketeer

[5] Plaintiff's mortgage contract consists of two documents, the Promissory Note and the Deed of Trust, which authorizes the loan servicer to take certain steps to protect the note holder's interest in the property.

Influenced and Corrupt Organizations Act, 182 U.S.C. §§ 1962(c) and (d) ("RICO"); and 3) the Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code § 1788, et seq. ("RFDCPA"). Plaintiff also includes state law claims for unjust enrichment, fraud and breach of contract, and he further seeks to bring his claims on behalf of both himself and others similarly situated by way of a class action under Rule 23.

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STANDARD

A. Rule 12(b)(6)

On a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Rule 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require detailed factual allegations. However, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. (internal citations and quotations omitted). A court is not required to accept as true a "legal conclusion couched as a factual allegation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 555). "Factual allegations must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555 (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004) (stating that the pleading must contain something more than "a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

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Furthermore, "Rule 8(a)(2) . . . requires a showing, rather than a blanket assertion, of entitlement to relief." Twombly, 550 U.S. at 555 n.3 (internal citations and quotations omitted). Thus, "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirements of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." Id. (citing Wright & Miller, supra, at 94, 95). A pleading must contain "only enough facts to state a claim to relief that is plausible on its face." Id. at 570. If the "plaintiffs . . . have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." Id. However, "[a] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

A court granting a motion to dismiss a complaint must then decide whether to grant leave to amend. Leave to amend should be "freely given" where there is no "undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment . . . ." Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to be considered when deciding whether to grant leave to amend). Not all of these factors merit equal weight. Rather, "the consideration of prejudice to the opposing party . . . carries the greatest weight." Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that "the complaint could not be saved by any amendment." Intri-Plex Techs. v. Crest Group, Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006, 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989) ("Leave need not be granted where the amendment of the complaint . . . constitutes an exercise in futility . . . .")).

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B. Rule 9(b)

A plaintiff must plead allegations of fraud and those that "sound in fraud" with particularity. Fed. R. Civ. P. 9(b); Vess v. Ciba-Geigy Corp. U.S.A., 317 F.3d 1097, 1103-05 (9th Cir. 2003). Conclusory allegations of fraud are insufficient. Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989).

A pleading satisfies Rule 9(b) when it is "specific enough to give defendants notice of the particular misconduct. . . . so that they can defend against the charge and not just deny that they have done anything wrong." Vess, 317 F.3d at 1106 (internal quotation marks and citation omitted); *accord* Moore, 885 F.2d at 540 ("A pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations."). As a result, the plaintiff must plead the "who, what, when, where, and how" of the alleged fraud. Vess, 317 F.3d at 1106 (internal quotation marks and citations omitted). Further, if the plaintiff claims that a statement is false or misleading, "[t]he plaintiff must set forth what is false or misleading about a statement, and why it is false." In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994).

Despite this heightened standard, the Ninth Circuit has opined that courts "cannot make Rule (b) carry more weight than it was meant to bear." Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997); see also Schlagal v. Learning Tree Int'l., 1998 WL 1144581 at *8 (C.D. Cal. Dec 23, 1998) ("The Court must strike a careful balance between insistence on compliance with demanding pleading standards and ensuring that valid grievances survive.") Instead, Rule 9(b) "must be read in harmony with Fed. R. Civ. P. 8's requirement of a 'short and plain' statement of the claim." Baas v. Dollar Tree Stores, 2007 WL 2462150 at *2 (N.D. Cal. August 29, 2007).

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ANALYSIS

A. Breach of Contract Claim

In his opposition, Plaintiff makes it clear that his breach of contract claim is "straightforward" and does not involve the fraud based allegations he makes elsewhere in his complaint. Instead, Plaintiff limits his contractual challenge to the manner in which Ocwen applies mortgage payments. Pl.'s Opp'n, 19:19-20:2. Plaintiff avers that Ocwen diverted funds from Plaintiff's monthly mortgage payments to an escrow account without first applying funds to the interest and principal balance of the loan, as required by the Deed of Trust. Compl., ¶¶ 76, 77. According to Plaintiff, Ocwen diverted funds to an escrow account for taxes and insurance despite the fact that Plaintiff was paying those fees himself, and despite the fact that Ocwen had agreed he could do so long as Plaintiff provided timely proof of such payments, which he claims he in fact submitted. Id. at ¶ 93. As a result, Ocwen's escrow account has grown to more than $10,000.00, despite the fact that it has never once been used to pay property taxes and insurance. Id. at ¶ 95. Plaintiff contends that Ocwen's failure to properly credit his interest and principal payments "has burdened his accounts with unscrupulous fees and forced his loan into default." Id. at ¶ 97. In addition to default, Plaintiff also claims that Ocwen's conduct has made him unable to claim interest deductions on his federal and state tax returns, or to refinance his loan." Id. at ¶ 98.

"A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendants' breach, and (4) the resulting damages to plaintiff. Careau & Co., v. Sec. Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1388 (1990). Here, there appears no question that the mortgage contract constitutes the requisite agreement, and that Plaintiff "performed" by paying the amounts due for principal and interest as specified by the contract. The salient issue is whether Ocwen breached the agreement by, as Plaintiff alleges, improperly diverting money into an escrow account

when Ocwen had agreed otherwise.

According to Ocwen, to state a breach of contract claim under Plaintiff's payment misapplication theory, Plaintiff must allege which payments he contends were improperly applied and how the application that was applied differed from the payment hierarch established by the Deed of Trust. Ocwen instead characterizes Plaintiff's contentions as only "generalized allegations" without any factual specificity. To the contrary, however, Plaintiff's Complaint recites the payment application hierarchy specifically set forth in the Deed of Trust, which requires that payments be credited to interest and then principal before credit can be taken for any other purpose, including escrow items (like property taxes and liability insurance) and default-related charges. Compl., ¶ 76. Plaintiff then contends that Ocwen misapplies payments to divert interest and principal payments to "escrow" accounts, even when homeowners pay their own property taxes and maintain proper insurance. Id. at ¶ 77. Those allegations meet the requirement that a breach be alleged, and for purposes of testing the pleading the Court must accept their veracity.

While Ocwen claims that Plaintiff's failure to pay taxes in 2010 caused the previous loan servicer, GMAC, to properly open an escrow account as withholding funds is authorized by the Deed of Trust in those circumstances, Plaintiff asserts that GMAC agreed in early 2011 that Plaintiff could in fact pay his own property taxes going forward so long as timely proof of such payments was provided. Id. at ¶ 93. The Court's reading of Plaintiff's Complaint indicates this arrangement continued for as much as two years, until Ocwen took over the servicing of Plaintiff's loan from GMAC in late 2012 or 2013. While Ocwen appears to argue that it was entitled to resume an escrow arrangement despite GMAC's alleged agreement to the contrary, that contention is, at best, problematic. Nor does Ocwen's claim that any waiver of escrow be in writing negate Plaintiff's purported agreement and course of conduct with GMAC, arrangements that were in place for a significant amount of time before Ocwen's involvement with Plaintiff's loan even began.

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Ocwen further claims that Plaintiff has not identified, as he must, the payments he contends were improperly applied. That contention also does not carry the day for Ocwen's attack on Plaintiff's breach of contract claim. Plaintiff claims not only that Ocwen began charging a fee of $600.00 per year after it assumed the servicing of Plaintiff's mortgage loan in late 2012 or early 2013, but also that its subsequent diversion of funds to the escrow account resulted in a positive balance in that account of more than $10,000.00. Id. at ¶¶ 91, 95. Those allegations are specific enough to apprise Ocwen of just how Plaintiff claims the diversion occurred, the time frame involved and the amount of monies involved. Finally, between the amount of the allegedly diverted funds and Plaintiff's claim that the diversion forced him into foreclosure, the contract claim's damage component is also satisfied.

The Court concludes that Ocwen's request for dismissal of Plaintiff's Seventh Cause of Action, for breach of contract, is misplaced. Ocwen's motion is therefore denied as to that claim.

B. Factual Specificity Required for Fraud-Based Claims

In addition to the contractual breach identified above, Plaintiff also asserts, for his Sixth Cause of Action, a state law claim for fraud. Plaintiff also pleads a number of other claims premised on the same fraudulent conduct. Those claims include the First Cause of Action, premised on violations of California's UCL, the Second and Third Causes of Action, both of which allege RICO violations, and the Fourth Cause of Action asserting a RFDCPA violation.

Plaintiff's fraud claim s are factually grounded on allegations that Ocwen marked up BPO and title search fees by as much as 100 percent without disclosing the vendor's markup. According to the Complaint, Ocwen is able to conceal its fee markup given its spin-off of servicing programs previously done in house (by the Ocwen Solutions line of businesses) to an ostensibly independent company, Altisource. Id. at ¶¶ 36-37. According to Plaintiff, however, Altisource and Ocwen share the same Chairman of the Board, William C. Erby, and Erbey owns not only 13 percent of Ocwen's common stock

but 27 percent of the common stock of Altisource as well. Id. at ¶¶ 37-38. Plaintiff goes on to claim that Ocwen is contractually obligated to purchase mortgage and technology services from Altisource under service agreements that extend through 2020. That has resulted, according to Plaintiff, in Ocwen being Altisource's largest customer, accounting for some 60 percent of its total annual revenue. Id. at ¶ 44.

After citing evidence suggesting that Ocwen's use of related companies has raised serious concerns about whether the transactions between the two companies are priced fairly (as opposed to inflated fees through conflicted business relationships), Plaintiff claims that Ocwen in fact directs Altisource to order and coordinate default related services with Altisource marking the arrangements for the provision of such services by third-party property preservation vendors. After the vendors charge Altisource for their services, Plaintiff alleges that Altisource, in turn, marks up their price before "charging" the cost to Ocwen who then bills the marked up fees to homeowners. Id. at ¶ 52. As indicated above, Plaintiff personally claims that he has been charged BPO fees of $109.00 and $100.00, and title search fees of $829.00 when those services should have run just over $100.00 for BPOs and between $150.00 and $450.00 for a title search. Id. at ¶¶ 62, 69, 101, 103. Plaintiff further provides the dates that both the BPO fees (September 4, 2013 and February 27, 2014, respectively) and the title search fees (June 9, 2014) were assessed on his mortgage account. Id. at ¶¶ 101, 103.

Ocwen correctly points out that allegations sounding in fraud must be pled with particularity. Fed. R. Civ. P. 9(b); Vess v. Ciba-Geigy Corp. U.S.A., 317 F.3d at 1103-05). Conclusory allegations of fraud are insufficient. Moore v. Kayport Package Express, Inc., 885 F.2d at 540. The same heightened pleading standard also applies to UCL claims (Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009) and to claims alleging RICO violations. See Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc., 806 F.2d 1393, 1400-01 (9th Cir. 1986). Additionally, with respect to Plaintiff's RFDCPA claim, factual particularity is also required. Lopez v. Professional Collection Consultants, 2011 WL 4964886 at *2 (C.D. Cal. Oct. 19, 2011).

Given the above-summarized description of Plaintiff's accusations of fraudulent behavior against Ocwen, which describe the structure of Ocwen's scheme to charge marked-up default services through use of a spin-off company with shared management and ownership, as well as the specifics of how those marked up fees were charged against Plaintiff (with both dates and the alleged mark-up figures described in detail), the Court squarely rejects Ocwen's claim that Plaintiff's complaint utterly fails to state any specific evidence to supports its claims of misrepresentation and/or omission. Plaintiff further cites language from the Deed of Trust which, fairly read, permits Ocwen to be reimbursed for reasonable and appropriate fees but not marked up fees designed to make a profit.

In Kirkeby v. JP Morgan Chase Bank, N.A., 2014 WL 4364836 (S.D. Cal. Sept 3, 2014), a case cited by Ocwen as supporting its position, the complaint only generally alleged the defendants' default-related fee practice but alleged "no specifics as to the fraud allegedly committed on Plaintiff individually" and no allegations regarding dates or how the fees in question were categorized. Id. at *4. Plaintiff's complaint, on the other hand, provides specific allegations as described above. Those allegations, taken as a whole, are more than enough to satisfy even the heightened pleading standard applicable to fraud-related claims.

C. Economic-Loss Doctrine

In addition to arguing that Plaintiff's fraud-based claims have not been pled with the requisite specificity, Ocwen also takes specific aim at Plaintiff's Sixth Cause of Action, for common law fraud, on grounds that it is barred by the so-called economic-loss doctrine. Under California law, the economic-loss doctrine prevents those bound by contract from suing in tort, unless they allege harm distinct from that that stemming from the breached contract. See FoodSafety Net Servs. v. Eco Safe Sys. USA, Inc., 209 Cal. App. 4th 1118, 1130 (2010) ([A] party alleging fraud or deceit in connection with a contract must establish tortious conduct independent of a breach of the contract itself, that is, violation of 'some independent duty arising from tort law.'" (quoting Robinson

Helicopter Co. v. Dana Corp., 34 Cal. 4th 979, 990 (2004)); Giles v. GMAC, 494 F.3d 865, 874-75 (9th Cir. 2007). Asserting that Plaintiff's fraud allegations hinge completely on the assumption that the challenged fees constitute a breach of the Deed of Trust, Ocwen argues that Plaintiff's fraud claim is precluded.

In Bias v. Wells Fargo & Co., 942 F.Supp. 2d 915 (N.D. Cal. 2013, under circumstances nearly identical to those of this case, the plaintiff challenged Wells Fargo's practice of assessing unlawfully marked-up BPO fees on the accounts of borrowers in default. The Northern District was unpersuaded by Wells Fargo's argument that its conduct amounted, at most, to breach of contract. Id. at 938 n.18. See also Young v. Wells Fargo, 671 F. Supp. 2d 1006, 1034-35 (S.D. Iowa 2009) (allegations that Wells Fargo assessed unnecessary default-related service fees went beyond a mere breach of contract and instead amounted to "a systematic course of conduct to defraud mortgage borrowers"). Here, while Ocwen was clearly entitled under the terms of the Deed of Trust to be reimbursed for fees it paid to protect its security interest in defaulted property, according to Plaintiff's Complaint it went well beyond any contractual right in that regard by failing to disclose that the fees for which it sought reimbursement had been significantly marked-up. Those allegations are sufficient to save Plaintiff's fraud claim from being barred under the economic-loss doctrine.

D. Statute of Limitation as to RFDCPA Claim

In his Fourth Cause of Action, Plaintiff claims that Ocwen violated the RFDCPA which prohibits a debt collector from using "any false deceptive, or misleading representation or means in connection with the collection of any debt." Compl., ¶ 171, citing 15 U.S.C. § 1692e. By knowingly and actively concealing Ocwen's mark-up for default related services, Plaintiff contends that those provisions have been abrogated.

In addition to arguing that Plaintiff's RFDCPA claim is subject to the heightened pleading requirement of a fraud based claim, an assertion the Court has already rejected above, Ocwen also argues that the claim is barred by one year statute of limitations contained in California Civil Code § 1788.3(f). Although Ocwen concedes that tolling

may result in an extension of that limitations period, it claims that Plaintiff "has not alleged the required facts to suggest he was 'induced or tricked by [his]adversary's misconduct into allowing the filing deadline to pass."" Ocwen's Mot., 10:1-3, citing Wilson v. Gordon & Wong Law Grp., P.C., 2013 WL 5230387 at *3 (E.D. Cal. Sept. 16, 2013 (dismissing RFDCPA claims as time-barred where plaintiff's tolling allegations were conclusory).

Plaintiff claims that tolling has occurred due to Ocwen's "knowing and active concealment, denial, and misleading actions" designed to "conceal the true character, quality, and nature of its assessment of marked-up fees on homeowners' loan accounts." See Compl., ¶¶ 105, 106. As set forth above, Plaintiff has alleged specific instances where he was assessed default-related fees whose mark-up was not disclosed. Moreover, and in any event, as Plaintiff points out, he claims to have been assessed marked-up fees occurred on February 27, 2014 and June 9, 2014, respectively, both of which would fall within the one year preceding the filing of the instant complaint on November 5, 2014. Either way, Ocwen's contention that Plaintiff's RFDCPA claim is time barred lacks merit.

E. RICO Claims

To state a RICO claim under either 18 U.S.C. § 1962(c) or (d), as Plaintiff purports to do in his Second and Third Causes of Action, he must first plead the existence of an enterprise as that term is defined by RICO. The requisite enterprise can be "any individual partnership corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4); see also Eclectic Props. East, LLC v. Marcus & Millichap Co., 751 F.3d 990, 997 (9th Cir. 2014); Sanford v. MemberWorks, Inc., 625 F.3d 550, 559 (9th Cir. 2010). In order to allege an association-in-fact enterprise, a plaintiff must allege: 1) "a group of persons associated together for a common purpose of engaging in a course of conduct," 2) "an ongoing organization, either formal or informal," and 3) that "the various associates function as a continuing unit." Odom v. Microsoft Corp., 486 F.3d 541, 552-

53 (9th Cir. 2007). The enterprise must consist of at least two entities, and must be more than the RICO defendant "referred to by a different name." See Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001).

A viable RICO claim under § 1962(c) must allege conduct by a qualifying enterprise through a pattern of racketeering activity. Walter v. Drayson, 538 F.3d 1244, 1237 (9th Cir. 2008). Consequently, in addition to demonstrating the existence of the requisite enterprise, predicate racketeering acts must also be identified. Ocwen contends that Plaintiff's § 1962(c) RICO claim fails on both those counts. In addition, with regard to Plaintiff's § 1962(d) claim for conspiracy to violate RICO, Ocwen also argues that because Plaintiff has demonstrated no substantive RICO violation, any related conspiracy claim also necessarily fails. Turner v. Cook, 362 F.3d 1219, 1231 n.17 (9th Cir. 2004) (affirming dismissal of § 1962(d) claim where plaintiff had failed to allege the predicate § 1962(c) claim). Therefore, in assessing the viability of Plaintiff's RICO claim the Court will begin by considering first whether a qualifying enterprise has been identified and, if it has, will then proceed to the question of whether the Complaint adequately alleges a predicate racketeering act sufficient for purposes of RICO.

1. Enterprise

Plaintiff alleges Ocwen, along with Altisource and Ocwen's property preservation vendors, qualify as an associated-in-fact enterprise for RICO purposes under 28 U.S.C. § 1961(4). Compl., ¶ 141. As Ocwen recognizes, however, Plaintiff's RICO claim is based primarily on the contention the Ocwen and Altisource comprise such an enterprise. Ocwen's Mot., 13:16-17, citing Compl, ¶¶ 2, 35-50. As stated above, Plaintiff alleges that "Ocwen directs Altisource to order and coordinate default-related services," with Altisource then placing orders for such services and charging Ocwen "marked up" fees, which in turn are passed on to borrowers. Compl., ¶ 52. While Ocwen contends there is nothing wrong with it charging to borrowers the fee it paid to Altisource, whether marked-up or not, the fact remains that Plaintiff specifically alleges that Altisource and Ocwen are related companies with at least partially shared ownership

and management such that they do not operate on an "arm's length" basis. The two companies acting together to collude in passing on "marked-up" default-related fees to unwitting borrowers is, according to Plaintiff, the RICO enterprise. The fact that the arrangement may have benefitted both companies does not preclude it being effectuated by way of the enterprise. Additionally, while related, the two companies appear to possess a distinct legal status which satisfied RICO's requirement that more than one entity be involved.

As Plaintiff points out, the definition of an associated-in-fact enterprise is "not very demanding." Odom, 486 F.3d at 548. Significantly, too, under controlling Ninth Circuit precedent, RICO must in any event "be liberally construed to effectuate its remedial purposes." Id. at 547. In addition to identifying the contours of the two companies as stated above, Plaintiff makes specific allegations pertaining to the "policies and procedures developed by Ocwen's executives, including:

> funneling default-related services through [Ocwen's] affiliated company, Altisource, to disguise unlawful mark-ups of services provided by third parties; providing statements that conceal the true nature of the marked-up default-related service fees; using mortgage loan management software designed to assess undisclosed marked-up fees on borrowers accounts; and failing to provide borrowers with accurate documentation to support assessment of fees for BPOs.

Compl., ¶ 145.

In Bias, like the present case, the plaintiff alleged that defendants formed an enterprise to unlawfully mark-up default-related fees, with borrowers ultimately being charged a fee significantly in excess of what third-party vendors actually charged for those services. Similar too are allegations that an inter-company division of defendant Wells Fargo called Premiere Asset Services participated as a member of the enterprise by creating the impression that it was an independent company providing BPOs. Although Bias differs from this case in the sense that Wells Fargo is claimed never to have actually paid the marked-up invoices, given the interrelationship between Ocwen and Altisource, and that fact that payments benefitted both companies, that factor is not

dispositive in distinguishing Bias from the present case, despite Ocwen's argument to the contrary.

The Bias court found that plaintiffs met both the distinct entity and the "common purpose" requirements for alleging an associated-in-fact enterprise under RICO. Bias, 942 F. Supp. 2d at 940-41. By identifying both Wells Fargo and at least one other entity, Premiere Asset Services, as participating as a member of the enterprise, plaintiffs satisfied the requirement that two different members be "associated together for a common purpose to maximize profits through concealment of marked-up fees." Id. This analysis applies squarely to the present case and causes the Court to conclude that Plaintiff's RICO claim adequately pleads the existence of a RICO enterprise.

2. Predicate Act

As the requisite "predicate act" for establishing RICO liability, Plaintiff alleges that Ocwen engaged in mail or wire fraud in violation of RICO by concealing, in statements transmitted to borrowers, its mark-up of default related fees. Compl., ¶¶ 152-57. Additionally, according to Plaintiff, '[b]y disguising the true nature of amounts purportedly owed in communications to borrowers," the enterprise in which Ocwen participated "made false statements using the Internet, telephone, facsimile, United States mail, and other interstate commercial carriers" (id. at ¶ 152), and "fraudulently communicat[ed] false information about these fees to borrower in order "to pursue their fraudulent scheme." Id. at ¶ 155. Ocwen argues that these allegations are insufficient for RIO purposes because Plaintiff has not identified the date or contents of a single misstatement in support of his RICO claims. While Ocwen correctly points out that predicate acts under RICO must be alleged with specificity under Rule 9(b) (Schreiber Dist. Co., v. Serv-Well Furniture Co., Inc.,. 806 F.2d 1393, 1400-01 (9th Cir. 1986)), this Court concludes, as it did with respect to Plaintiff's fraud allegations as discussed above, that the requisite specificity has been met for pleadings purposes. Unlike cases where no individualized injury is identified, Plaintiff here contends he received monthly statements demanding that he pay allegedly marked-up fees for BPO assessed on

September 4, 2013 and February 27, 2014, and a marked-up "Title Search" fee assessed to his account on June 9, 2014. Id. at ¶ 101, 103. These allegations square with assertions deemed sufficient by the Court in Bias, where the plaintiff alleged that, "[t]hrough the mail and wire, [Wells Fargo] provided mortgage invoices, payoff demands, or proofs of claims to borrowers, demanding that borrowers pay fraudulently concealed marked-up fees for default-related services." Bias, 942 F. Supp. 2d at 938-39.

3. Conspiracy

As indicated above, Plaintiff's Third Cause of Action alleges, under 18 U.S.C. § 1962(d), a conspiracy to violate the general RICO violations already set forth in the Second Cause of Action. Ocwen's claim that the conspiracy claim fails depends primarily on the success of its assertion that Plaintiff has failed to allege a substantive RICO violation under § 1962(c). The Court's rejection of Ocwen's argument in that regard disposes of the very foundation of Ocwen's same argument with respect to conspiracy. Ocwen's secondary argument that Plaintiff has failed to sufficiently allege the nature and scope of the unlawful scheme for purposes of § 1962(d) is equally unavailing. Plaintiff's allegations, as discussed at length above, are more than sufficient to withstand pleadings scrutiny at this juncture of the case.

F. UCL Claims

Under Calfiornia's UCL, any person or entity that has engaged "in unfair competition may be enjoined in any court of competent jurisdiction." Cal. Bus. & Prof. Code §§ 17201, 17203. "Unfair competition" includes "any unlawful, unfair or fraudulent business act or practice ." Id. at § 17200.

Plaintiff here premises her UCL violations under the "fraudulent" and "unfair" components of the statute. Compl., ¶ 126. To state a claim under the "fraudulent" prong of the UCL, "it is necessary only to show that members of the public are likely to be deceived" by the business practice. In re Tobacco II Cases, 46 Cal. 4th 298, 312 (2009). While no definitive test has been established to determine whether a business practice is "unfair" in consumer cases, three tests for unfairness have been developed in the

consumer context. First, a business practice is unfair where the practice implicates a public policy that is "tethered to specific constitutional, statutory or regulatory provisions." Harmon v. Hilton Group, 2011 WL 5914004 at *8 (N.D. Cal. Nov. 28, 2011). The second test "determine[s] whether the alleged business practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers and requires the court to weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." Id. Finally, under the third test, "unfair" conduct requires that "(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." Davis v. Ford Motor Credit Co., 179 Cal. App. 4th 581, 597-98 (2009).

Under the "fraudulent" prong of the statute, Plaintiff alleges that Ocwen "affirmatively misled delinquent borrowers into paying marked-up fees which Defendants are not authorized to collect." Pl.'s Opp'n, 16:16-18. Plaintiff goes on to contend that in furtherance of this fraudulent scheme, Defendants send delinquent borrowers monthly statements which

> disguise[] the fact that the amounts [Ocwen] represent[s] as being owed have been marked-up beyond the actual cost of the services, violating the disclosures in the mortgage contract.

Compl., ¶ 128.

According to Plaintiff, with the "true character, quality, and nature of their assessment of marked-up default-related service fees" concealed from unsuspecting borrowers, Defendants use the full force of their position as a major financial institution to sell the fraud and collect the prohibited fees. Id. at ¶¶ 127, 133-35. Based on these allegations, Plaintiff asserts that there can be no real dispute that Ocwen's conduct could mislead and/or deceive the public so as to state a claim under the UCL's "fraudulent" prong.

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Significantly, under very similar circumstances, the Bias court found that plaintiffs' claim there sufficed to satisfy this requirement for pleadings purposes. Bias, 942 F. Supp. 2d at 935. In Bias, like the present case, plaintiffs provided specific dates on which they were charged marked-up fees as well as Wells Fargo's failure to inform them that the fees were in face inflated. Taken together, Bias found those allegations to "adequately allege a fraudulent business practice likely to deceive the public" for UCL purposes, despite the fact that as a claim grounded in fraud, the particularity requirement of Rule 9(b) applies. Id. at 935, 932. The Court views this reasoning as persuasive and, like Bias, denies the request for dismissal as to Plaintiff's UCL claim based on the fraudulent prong.

Ocwen fares no better in its challenge to the "unfairness" component of Plaintiff's UCL claim. Citing Walker v. Countrywide Home Loans, Inc., 98 Cal. App. 4th 1158 (2002), Ocwen contends that Plaintiff's claim cannot be "unfair" for UCL purposes because the Deed of Trust authorizes default-related services to protect the holder's security interest in the subject property. Walker's recognition that a loan servicer can charge a delinquent borrower a property inspection fee for this purpose, however, does not mean that Defendants can charge marked-up default-related service fees, an issue not addressed in Walker. Under either the second or third test for determining the viability of a claim of "unfairness" under UCL, Plaintiff's claim suffices.

G. Unjust Enrichment

Under California law, the elements of unjust enrichment are: (1) receipt of a benefit; and (2) the unjust retention of the benefit at the expense of another. Peterson v. Cellco Partnership, 164 Cal. App. 4th 1583, 1593 (2008). Restitution resulting from unjust enrichment can "be awarded in lieu of breach of contract damages when the parties had an express contract" but the contract "was procured by fraud or is unenforceable or ineffective for some reason." McBride v. Boughton, 123 Cal. App. 4th 379, 387 (2004). Nonetheless, "where express binding agreements exist and define the parties' rights," an action for unjust enrichment does not lie. Cal. Med. Ass'n, Inc. v.

Aetna U.S. Healthcare of Cal., 94 Cal. App. 4th 151, 172 (2001).

Plaintiff's unjust enrichment claim is premised on the same facts underlying Ocwen's alleged fraudulent concealment of its marked-up default related fees. While default service fees themselves may be authorized by the Deed of Trust, the propriety of a mark-up is not governed by the mortgage contract, despite Ocwen's argument to the contrary. Given the fact that Ocwen's challenge to the unjust enrichment claim is based solely on the contention that the fees at issue are authorized by contract, the Court's conclusion that they are not authorized by contract disposes of Ocwen's challenge, and mandates that its motion to dismiss as to the Fifth Cause of Action for unjust enrichment be denied.

CONCLUSION

For all the reasons set forth above, Ocwen's Motion to Dismiss (ECF No. 6) is DENIED.

IT IS SO ORDERED.

Dated: July 28, 2015

MORRISON C. ENGLAND, JR, CHIEF JUDGE
UNITED STATES DISTRICT COURT