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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DENNLy R. BECKER,  
  
Plaintiff,  
  
v.  
  
BANK OF NEW YORK MELLON AS  
TRUSTEE FOR THE BELLAVISTA  
MORTGAGE TRUST 2004-2 &  
NATIONSTAR MORTGAGE LLC,  
  
Defendants.

No. 2:15-cv-2240-MCE-KJN PS

ORDER AND  
FINDINGS AND RECOMMENDATIONS

Presently pending before the court is defendants Bank of New York Mellon as Trustee for the Bellavista Mortgage Trust 2004-2 (“BNY”) and Nationstar Mortgage, LLC’s (“Nationstar”) motion to dismiss plaintiff Denny R. Becker’s first amended complaint. (ECF No. 19.)<sup>1</sup> Plaintiff opposed the motion, and defendants filed a reply brief. (ECF Nos. 21, 23.)<sup>2</sup> For the reasons discussed below, the court recommends that the motion be GRANTED IN PART and DENIED IN PART.

<sup>1</sup> This action proceeds before the undersigned pursuant to Local Rule 302(c)(21).

<sup>2</sup> The motion was submitted for decision without oral argument on the record and written briefing pursuant to Local Rule 230(g). (ECF No. 22.)

1 BACKGROUND

2 The background facts, unless otherwise noted, are taken from the allegations of the first  
3 amended complaint, which are taken as true for purposes of the present motion to dismiss.

4 Plaintiff, a California resident, owned a property at 145 Yosemite Drive, Tracy, California  
5 95376 (the “Property”) as part of his real estate business. (First Amended Complaint, ECF No. 17  
6 [“FAC”] ¶¶ 1, 7.) According to plaintiff, he refinanced the Property in 2004, signing both a Note  
7 and a Deed of Trust, and the current defendants were either servicers, beneficiaries, or trustees of  
8 the Note and/or Deed of Trust, or their agents. (FAC ¶¶ 8-14; see also ECF 17-3 at 4-34.)<sup>3</sup>

9 On September 16, 2013, plaintiff sent a request for a payoff demand statement to  
10 Nationstar. (FAC ¶ 15.) Plaintiff’s letter identified the Property by loan number and address;  
11 requested a “Payoff Demand Statement” pursuant to California Civil Code section 2943; and  
12 quoted subsection (a)(5) of that statute, which contains the definition of a payoff demand  
13 statement. (Id. ¶¶ 15, 17.) The letter also contained a check for \$30, which Nationstar cashed.  
14 (Id. ¶ 18.) The letter was sent by first class mail with the U.S. Postal service and contained an  
15 acknowledgement as asserted proof of plaintiff’s identity. (Id. ¶¶ 19, 21.)

16 Plaintiff alleges that he stopped making loan payments on October 1, 2013. (FAC ¶ 24.)  
17 Plaintiff contends that defendants had a duty under California Civil Code § 2943 to respond with  
18 a payoff demand statement by October 11, 2013, but that defendants did not provide any response  
19 by that date. (Id. ¶ 62.) Plaintiff further alleges that he had the ability to pay off the loan in its  
20 entirety, and that he intended to do so as soon as he received the payoff demand statement. (Id.  
21 ¶¶ 53, 61-62.) According to plaintiff, the next communication he received from Nationstar was  
22 on November 14, 2013, but that letter merely informed plaintiff that he had fallen behind in his  
23 payments and did not include a payoff demand statement. (Id. ¶ 25.) Around November 20,  
24 2013, plaintiff evicted his tenants at the Property for their failure to pay rent. (Id. ¶ 26.)

25 Subsequently, on December 3, 2013, Nationstar sent plaintiff a letter informing him that  
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27 <sup>3</sup> The court grants both plaintiff’s and defendants’ requests for judicial notice of the deed of trust  
28 and other public records related to the Property recorded at the San Joaquin County Recorder.  
(See ECF Nos. 17-3, 20.)

1 his single point of contact (“SPOC”) regarding the loan at Nationstar would be Ilea Wolford.  
2 (FAC ¶ 27.) In return, plaintiff sent a letter to Ms. Wolford on December 13, 2013, explaining  
3 that he had evicted his tenants who had done about \$35,000 in damages to the Property; that  
4 plaintiff had changed the locks and started renovations, but that the locks had since been changed  
5 twice by someone who purportedly represented the investor; and that plaintiff had thus stopped  
6 work on the Property. (Id. ¶ 28.) Plaintiff also requested information as to his options. (Id.)

7 In a letter dated December 20, 2013, Nationstar stated that it had received notice that the  
8 Property was vacant, but did not otherwise respond to plaintiff’s prior communication. (FAC ¶  
9 29.) Consequently, on January 2, 2014, plaintiff sent another letter to Ms. Wolford, explaining  
10 that the Property was vacant because Nationstar had changed the locks; that plaintiff was unable  
11 to make repairs to the Property to make it habitable; and that it did not make sense for plaintiff to  
12 bring the Property out of default if he could not generate income on the Property. (Id.) After  
13 plaintiff received no response to that letter, he sent another letter to Ms. Wolford on February 4,  
14 2014, reiterating that plaintiff could not make any repairs to the Property, because he was locked  
15 out of the Property. (Id. ¶¶ 30-31.) Ms. Wolford again failed to respond. (Id. ¶ 31.)

16 Thereafter, on March 27, 2014, Nationstar sent plaintiff a letter notifying him of the  
17 NewStart Solutions program and a “Mortgage Release” option, which would allow plaintiff to  
18 potentially eliminate responsibility to repay debt on a first mortgage by transferring title to the  
19 Property to Nationstar. (FAC ¶ 32.) On April 18, 2014, plaintiff sent a letter requesting more  
20 information about the Mortgage Release option, to which Nationstar did not respond. (Id. ¶¶ 33,  
21 34.)

22 On September 3, 2014, Nationstar, in its capacity as the mortgage loan servicer for  
23 defendant Bank of New York Mellon as Trustee for the Bellavista Mortgage Trust 2004-2, sent  
24 plaintiff a letter notifying him that defendants intended to initiate foreclosure proceedings. (FAC  
25 ¶ 35.) On October 14, 2014, a Notice of Default and Election to Sell Under Deed of Trust was  
26 recorded against the Property. (Id. ¶ 36; ECF No. 17-3 at 35.) Subsequently, on November 25,  
27 2014, plaintiff sent another letter to Ms. Wolford, restating his objections to being locked out of  
28 the Property and complaining that he had not received responses to his previous letters. (Id. ¶

1 38.) On December 2, 2014, Nationstar acknowledged receipt of plaintiff's November 25, 2014  
2 letter, and on January 7, 2015, Nationstar sent plaintiff another letter with information allowing  
3 plaintiff to get the keys to the Property. (Id. ¶¶ 39-40.)

4 Subsequently, on January 13, 2015, plaintiff sent Ms. Wolford a letter, indicating that  
5 plaintiff would need to make repairs to the Property and requesting assurance that defendants  
6 would not foreclose on the property while the repairs were being made. (FAC ¶ 41.) According  
7 to plaintiff, Ms. Wolford did not respond to that letter. (Id.) Instead, on February 26, 2015, a  
8 Notice of Trustee's sale was recorded against the Property, which was ultimately sold to third  
9 party Kibby Road LLC on March 18, 2015. (Id. ¶¶ 42-43; ECF No. 17-3 at 42, 47-48.) Plaintiff  
10 alleges that he received surplus funds in the amount of \$74,798.09 from the trustee's sale. (FAC  
11 ¶ 66(2).) The Property has since been re-sold to another third party. (FAC ¶ 44; ECF No. 17-3 at  
12 52.)

13 Plaintiff initially brought this action in state court, and defendants subsequently removed  
14 the case to this court invoking the court's diversity of citizenship jurisdiction. (ECF No. 1).  
15 After an initial round of motions to dismiss was filed, plaintiff amended his complaint as a matter  
16 of course pursuant to Federal Rule of Civil Procedure 15(a)(1)(B), and the initial motions to  
17 dismiss were consequently denied without prejudice as moot. (ECF Nos. 17, 18.) In the  
18 operative first amended complaint, filed on November 19, 2015, plaintiff asserts claims for  
19 violation of California Civil Code sections 2943 and 2924.17, wrongful foreclosure, fraud,  
20 negligent misrepresentation, trespass, invasion of privacy, negligent recording of false  
21 documents, negligence, negligent infliction of emotional distress, elder abuse, and violation of  
22 California Business and Professions Code section 17200. (ECF No. 17.) The only named  
23 defendants are BNY and Nationstar. (Id.)

#### 24 LEGAL STANDARD

25 A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6)  
26 challenges the sufficiency of the pleadings set forth in the complaint. Vega v. JPMorgan Chase  
27 Bank, N.A., 654 F. Supp. 2d 1104, 1109 (E.D. Cal. 2009). Under the "notice pleading" standard  
28 of the Federal Rules of Civil Procedure, a plaintiff's complaint must provide, in part, a "short and

1 plain statement” of plaintiff’s claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); see  
2 also Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). “To survive a motion to dismiss,  
3 a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that  
4 is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v.  
5 Twombly, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads  
6 factual content that allows the court to draw the reasonable inference that the defendant is liable  
7 for the misconduct alleged.” Id.

8 In considering a motion to dismiss for failure to state a claim, the court accepts all of the  
9 well-pled factual allegations in the complaint as true and construes them in the light most  
10 favorable to the plaintiff. Corrie v. Caterpillar, Inc., 503 F.3d 974, 977 (9th Cir. 2007). The court  
11 is “not, however, required to accept as true conclusory allegations that are contradicted by  
12 documents referred to in the complaint, and [the court does] not necessarily assume the truth of  
13 legal conclusions merely because they are cast in the form of factual allegations.” Paulsen, 559  
14 F.3d at 1071. The court must construe a *pro se* pleading liberally to determine if it states a claim  
15 and, prior to dismissal, tell a plaintiff of deficiencies in his complaint and give plaintiff an  
16 opportunity to cure them if it appears at all possible that the plaintiff can correct the defect. See  
17 Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000) (en banc); see also Hebbe v. Pliler, 627  
18 F.3d 338, 342 & n.7 (9th Cir. 2010) (stating that courts continue to construe *pro se* filings  
19 liberally even when evaluating them under the standard announced in Iqbal).

20 In ruling on a motion to dismiss filed pursuant to Rule 12(b)(6), the court “may generally  
21 consider only allegations contained in the pleadings, exhibits attached to the complaint, and  
22 matters properly subject to judicial notice.” Outdoor Media Group, Inc. v. City of Beaumont, 506  
23 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks omitted). Although the court may not  
24 consider a memorandum in opposition to a defendant’s motion to dismiss to determine the  
25 propriety of a Rule 12(b)(6) motion, see Schneider v. Cal. Dep’t of Corrections, 151 F.3d 1194,  
26 1197 n.1 (9th Cir. 1998), it may consider allegations raised in opposition papers in deciding  
27 whether to grant leave to amend, see, e.g., Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir.  
28 2003).

1 DISCUSSION

2 Violation of California Civil Code section 2943

3 To state a claim under California Civil Code section 2943, a plaintiff must generally  
4 allege that he was an entitled person, that the defendant was a beneficiary or its authorized agent,  
5 that a written demand for a payoff demand statement was made pursuant to Section 2943, that the  
6 defendant failed to deliver a payoff demand statement to the maker of the written demand within  
7 21 days of receiving the demand, and that the defendant’s failure was willful. See Cal. Civ. Code  
8 § 2943. Section 2943 provides for an award of statutory damages of \$300, as well as any actual  
9 damages. Cal. Civ. Code § 2943(e)(4).

10 Defendants do not appear to contest that plaintiff is an entitled person or that defendants  
11 are beneficiaries and/or authorized agents of beneficiaries. Additionally, based on the allegations  
12 of the first amended complaint, plaintiff’s September 16, 2013 letter clearly qualifies as a written  
13 demand for a payoff demand statement. The letter identified the Property by loan number and  
14 address; requested a “Payoff Demand Statement” pursuant to California Civil Code section 2943;  
15 and quoted subsection (a)(5) of that statute, which contains the definition of a payoff demand  
16 statement. Plaintiff also alleges that he sent it to the address for qualified written requests  
17 (“QWRs”) listed on his monthly mortgage statement, which appears to comply with Cal. Civ.  
18 Code § 2943(e)(5). Furthermore, plaintiff adequately alleged that defendants failed to respond to  
19 or provide a payoff demand statement within the prescribed period.<sup>4</sup>

20 Defendants contest whether plaintiff has properly alleged than any failure to respond was  
21 willful. Section 2943 defines willful as “an intentional failure to comply with the requirements of  
22 this section without just cause or excuse.” Cal. Civ. Code § 2943(e)(4). Courts have noted that  
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24 <sup>4</sup> Defendants also question whether plaintiff properly proved his identity by providing the  
25 acknowledgement along with the written demand. However, although the beneficiary has the  
26 right to request reasonable proof of identity, and, if that right is exercised, the beneficiary is not  
27 required to deliver the payoff demand statement until the proof has been provided, such proof  
28 need not be included in the initial written demand. See Cal. Civ. Code § 2943(e)(3). At least for  
purposes of the instant motion to dismiss, there is nothing in the record before the court that  
indicates that defendants actually requested plaintiff to provide proof of his identity. As such, the  
issue is immaterial to whether the first amended complaint states a claim under section 2943.

1 while the failure to respond to the initial request is insufficient to show willfulness under the  
2 statute, failure to respond to multiple subsequent letters is sufficient to indicate that defendant's  
3 behavior is willful. Consumer Sols. REO, LLC v. Hillery, 2010 WL 144988, at \*\*8-9 (N.D. Cal.  
4 Jan. 8, 2010), adhered to on reconsideration, 2010 WL 334417 (N.D. Cal. Jan. 28, 2010) (finding  
5 that the failure to respond to written demand and follow-up letter indicated willfulness for the  
6 purposes of section 2943); US Distressed Mortgage Fund, LLC v. Wells Fargo Bank, N.A., 2014  
7 WL 4370810, at \*8 (N.D. Cal. Sept. 3, 2014) (failure to respond to single written letter  
8 insufficient to show willfulness). Here, plaintiff has alleged that defendants' actions were willful;  
9 that defendants cashed the check accompanying plaintiff's written demand, but failed to provide  
10 the payoff demand statement; and that defendants also failed to respond to numerous subsequent  
11 letters from plaintiff. The court finds that such allegations are sufficient, at least at the pleadings  
12 stage, to show willfulness for purposes of a section 2943 claim.

13 Accordingly, the court concludes that the first amended complaint states a proper claim  
14 for violation of California Civil Code section 2943, at least for purposes of recovering statutory  
15 damages. As such, the court recommends that defendants' motion to dismiss be denied with  
16 respect to that claim.

17 However, plaintiff's related contention that a failure to timely respond to the payoff  
18 demand statement extinguished plaintiff's loan and its security, a theory on which the vast  
19 majority of plaintiff's other claims are based, is plainly erroneous and not cognizable. Section  
20 2943 sets forth very specific remedies, which do not include an automatic discharge of the  
21 underlying debt and security. See Cal. Civ. Code § 2943(e)(4). Furthermore, plaintiff's reliance  
22 on California Civil Code sections 1511 and 1512 in that regard is also unavailing, because those  
23 sections simply codify the common law defenses to failure to perform under a contractual  
24 obligation, and would only conceivably apply if defendants actually prevented plaintiff from  
25 meeting his contractual obligations. See Cal. Civ. Code §§ 1511, 1512. Here, defendants'  
26 alleged violation of California Civil Code section 2943 did not prevent plaintiff from performing  
27 his payment obligations under the loan or otherwise render performance impossible. Indeed,  
28 plaintiff admittedly defaulted on his loan payments even *before* the requested payoff demand

1 statement was due to be delivered. Furthermore, although the subsequent Notice of Default and  
2 Notice of Trustee's Sale provided the amounts due on the loan and/or provided contact  
3 information to obtain the updated payoff amount, plaintiff fails to allege that he made any further  
4 payments on the loan. Plaintiff's theory that the loan and its security were extinguished is plainly  
5 without merit.

#### 6 Other Claims Derivative of Loan/Security Interest Extinguishment Theory

7 As noted above, the vast majority of the remaining claims (more specifically, plaintiff's  
8 claims for violation of California Civil Code section 2924.17,<sup>5</sup> wrongful foreclosure, fraud,  
9 negligent misrepresentation, trespass, invasion of privacy, and negligent recording of false  
10 documents) are premised on plaintiff's above-mentioned theory that the loan and security interest  
11 were extinguished, and that the defendants, supposedly without having any interest in the  
12 Property, therefore wrongfully filed foreclosure-related documents, changed the locks on the  
13 Property, and ultimately foreclosed on the Property. Because plaintiff's theory is erroneous and  
14 not legally cognizable, all of those causes of actions are fatally deficient and should be dismissed  
15 with prejudice.

16 To the extent that plaintiff also bases his claims of fraud and negligent misrepresentation  
17 on the Declaration of Mortgage Servicer, which allegedly false represented that the mortgage  
18 servicer had unsuccessfully tried with due diligence to contact plaintiff to discuss his financial  
19 situation, plaintiff's claims nonetheless fail. Both fraud and negligent misrepresentation claims  
20 require allegations of actual and justifiable reliance by the plaintiff on the false representations.  
21 Cadlo v. Owens-Illinois, Inc., 125 Cal. App. 4th 513, 519 (2004). Even assuming, without  
22 deciding, that the representations in the Declaration of Mortgage Servicer were false, plaintiff

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23 <sup>5</sup> California Civil Code section 2924.17(b) provides that "[b]efore recording or filing any of the  
24 documents described in subdivision (a) [including a notice of default, notice of sale, etc.], a  
25 mortgage servicer shall ensure that it has reviewed competent and reliable evidence to  
26 substantiate the borrower's default and the right to foreclose, including the borrower's loan status  
27 and loan information." Plaintiff alleges that defendants improperly recorded the foreclosure-  
28 related documents, because the loan and security interest were extinguished by virtue of  
defendants' violation of California Civil Code section 2943. As discussed above, that theory is  
erroneous, and plaintiff himself has admitted that the loan was otherwise in default. As such,  
plaintiff's claim for violation of California Civil Code section 2924.17 is fatally deficient.



1 could not actually and justifiably have relied on those representations to his detriment in this  
2 context. If, as plaintiff alleges, he had sent defendants several letters that had been ignored, he  
3 would have known that the representations in the Declaration were false at the time that plaintiff  
4 reviewed them and could not justifiably have relied on them. Therefore, fraud and negligent  
5 misrepresentation claims based on the Declaration of Mortgage Servicer are likewise not viable.

6 Finally, plaintiff's claim for financial elder abuse is expressly premised on plaintiff's  
7 claims that defendants wrongfully foreclosed on the Property and/or defrauded plaintiff. (See  
8 FAC ¶ 129 ["Pursuant to the claim for wrongful foreclosure or the claim for fraud, the  
9 Defendants took or obtained Plaintiff's 145 Yosemite property with the intent to defraud the  
10 Plaintiff."].) However, because plaintiff's wrongful foreclosure and fraud claims fail for the  
11 reasons discussed above, this subsidiary claim also fails.

12 Consequently, the court recommends that plaintiff's claims for violation of California  
13 Civil Code section 2924.17, wrongful foreclosure, fraud, negligent misrepresentation, trespass,  
14 invasion of privacy, negligent recording of false documents, and financial elder abuse be  
15 dismissed with prejudice.

#### 16 Other Independent Claims

17 Plaintiff bases his common law negligence and negligent infliction of emotional distress  
18 claims on grounds independent from his loan extinguishment theory. Specifically, plaintiff  
19 alleges that the appointment of Ms. Wolford as a SPOC created a duty on the part of Nationstar to  
20 provide him with information and help him to avoid foreclosure. Instead, according to plaintiff,  
21 defendants failed to respond to several of his letters requesting information about options to avoid  
22 foreclosure, thereby breaching their duty and causing plaintiff harm.

23 "Under California law, a lender does not owe a borrower or third party any duties beyond  
24 those expressed in the loan agreement, excepting those imposed due to special circumstances or a  
25 finding that a joint venture exists." Resolution Trust Corp. v. BVS Development, Inc., 42 F.3d  
26 1206, 1214 (9th Cir. 1994) (citing Nymark v. Heart Fed. Sav. & Loan Ass'n, 231 Cal. App. 3d  
27 1089, 1096 (1991)). "Special circumstances" giving rise to a duty of care may exist when the  
28 "lender actively participates in the financed enterprise beyond the domain of the usual money

1 lender.” Nymark, 231 Cal. App. 3d at 1096.

2 In this case, there is nothing to suggest that defendants’ activities exceeded the traditional  
3 scope of a money lender. As allegedly wrongful or immoral as defendants’ purported failure to  
4 respond to plaintiff’s letters may have been, an issue on which the court expresses no opinion  
5 here, it did not create a legal duty of care to plaintiff to support a common law negligence claim.  
6 See Becker v. Wells Fargo Bank NA, Inc., 2014 WL 3891933, at \*\*19-21 (E.D. Cal. Aug. 7,  
7 2014) (collecting numerous cases and noting that “the majority of cases that have addressed the  
8 issue of whether a financial institution owes a duty to the borrower when engaging in the loan  
9 modification process have resulted in a holding that such activity generally does not exceed the  
10 traditional scope of a money lender, thus resulting in the lack of a duty of care owed by the  
11 lender.”). Because a legal duty is a necessary element of both negligence and negligent infliction  
12 of emotion distress claims, those claims fail as a matter of law. As such, the court recommends  
13 that they be dismissed with prejudice.

#### 14 Unfair Competition Law Claim

15 The final claim plaintiff raises is an alleged violation of California Business & Professions  
16 Code section 17200, also known as California’s Unfair Competition Law (“UCL”).

17 The UCL “prohibits unfair competition, including unlawful, unfair, and fraudulent  
18 business acts.” Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1143 (2003).  
19 “Section 17200 ‘borrows’ violations from other laws by making them independently actionable as  
20 unfair competitive practices.” Id. However, “in the aftermath of Proposition 64, only plaintiffs  
21 who have suffered actual damage may pursue a private UCL action. A private plaintiff must  
22 make a twofold showing: he or she must demonstrate injury in fact *and* a loss of money or  
23 property caused by unfair competition.” Peterson v. Cellco Partnership, 164 Cal. App. 4th 1583,  
24 1590 (2008) (emphasis in original). Additionally, while “the scope of conduct covered by the  
25 UCL is broad, its remedies are limited.” Korea Supply Co., 29 Cal. 4th at 1144. “A UCL action  
26 is equitable in nature; damages cannot be recovered.” Id. As such, “prevailing plaintiffs are  
27 generally limited to injunctive relief and restitution.” Id.

28 In this case, in light of the court’s conclusion that plaintiff’s first amended complaint

1 states a proper claim for violation of California Civil Code section 2943, plaintiff appears to have  
2 adequately pled a predicate unlawful business act for purposes of a UCL claim. However, the  
3 court finds that plaintiff's allegations do not show that plaintiff suffered a loss of money or  
4 property *caused* by such unfair competition. As discussed above, defendants' alleged violation of  
5 California Civil Code section 2943 did not prevent plaintiff from performing his payment  
6 obligations under the loan or otherwise render performance impossible. Indeed, plaintiff  
7 admittedly defaulted on his loan payments even *before* defendants allegedly violated that statute,  
8 and then failed to make any subsequent payments. As such, plaintiff's UCL claim is defective.

9 If failure to plead loss of money or property caused by the alleged unfair competition were  
10 the only defect in plaintiff's UCL claim, the court would have been inclined to grant leave to  
11 amend. Nevertheless, even if plaintiff could potentially cure that defect by amendment,  
12 plaintiff's UCL claim is not viable, because he cannot plead entitlement to a cognizable remedy  
13 under that statute. Plaintiff cannot obtain injunctive relief, because foreclosure has already  
14 occurred, the Property has since been sold to two successive third-party bona fide purchasers,  
15 those bona fide purchasers are not parties to this action, and there is no indication that plaintiff  
16 would have any grounds to proceed against them. Furthermore, there is no basis for restitution,  
17 because plaintiff admittedly defaulted on his loan prior to any alleged violation by defendants, the  
18 loan/mortgage was not extinguished, and plaintiff received the surplus funds from the foreclosure  
19 sale after the mortgage on the Property was paid off. Even if plaintiff could articulate some other  
20 theory of monetary damages, such damages are simply not recoverable in a UCL claim.

21 Therefore, the court recommends that plaintiff's UCL claim be dismissed with prejudice.

## 22 CONCLUSION

23 Accordingly, IT IS HEREBY RECOMMENDED that:

- 24 1. Defendants' motion to dismiss (ECF No. 19) be GRANTED IN PART and DENIED  
25 IN PART.
- 26 2. Plaintiffs' claims for violation of California Civil Code section 2924.17, wrongful  
27 foreclosure, fraud, negligent misrepresentation, trespass, invasion of privacy, negligent  
28 recording of false documents, negligence, negligent infliction of emotional distress,

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financial elder abuse, and violation of California Business and Professions Code section 17200 be DISMISSED WITH PREJUDICE.

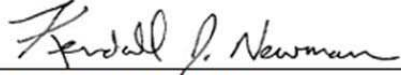
3. Plaintiff be directed to file a second amended complaint, limited to 15 pages, stating only a claim for violation of California Civil Code section 2943 against defendants BNY and Nationstar.

In light of those recommendations, IT IS ALSO HEREBY ORDERED that all pleading, discovery, and motion practice in this action are STAYED pending resolution of these findings and recommendations. With the exception of objections to the findings and recommendations or non-frivolous motions for emergency relief, the court will not entertain or respond to motions or other filings until the findings and recommendations are resolved.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14) days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections shall be served on all parties and filed with the court within fourteen (14) days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court’s order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

IT IS SO ORDERED AND RECOMMENDED.

Dated: May 11, 2016

  
KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE