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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PATRICK W. HOGGAN,

Plaintiff,

v.

SPECIALIZED LOAN SERVICING,
LLC; AFFINIA DEFAULT SERVICES,
LLC; and DOES 1–100, inclusive,

Defendants.

No. 2:21-cv-01862-TLN-CKD

ORDER

This matter is before the Court on Defendant Specialized Loan Servicing, LLC’s (“Defendant” or “SLS”)¹ Motion to Dismiss. (ECF No. 3.) Plaintiff Patrick W. Hoggan (“Plaintiff”) filed an opposition. (ECF No. 17.) Defendant filed a reply. (ECF No. 21.) For the reasons set forth below, Defendant’s motion is GRANTED in part and DENIED in part.

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¹ Affinia Default Services, LLC (“Affinia”) is also a named Defendant in this action, but does not join in the instant motion. The Court will refer to SLS and Affinia collectively as “Defendants.”

1 **I. FACTUAL AND PROCEDURAL BACKGROUND**

2 The instant action arises from Defendants’ alleged mishandling of Plaintiff’s home equity
3 line of credit (“HELOC”) for his property located at 6544 Arcade Creek Way, Orangevale, CA
4 95662 (the “Property”). (See ECF No. 1-1 at 5–16.) Plaintiff purchased the Property in 1998 and
5 entered into an agreement to refinance with Quicken Loans, Inc. (“Quicken”) on July 6, 2005.
6 (*Id.* at 7.) Quicken loaned Plaintiff \$52,500.000 (the “Loan”) secured by the Property — then and
7 now Plaintiff and his family’s primary residence and home — through a second position Deed of
8 Trust. (*Id.*) Mortgage Electronic Registration Systems, Inc. (“MERS”) was the named
9 beneficiary and Orange Coast Title Company was the named trustee. (*Id.* at 7–8.)

10 Plaintiff maintained his payments on the Loan until 2008, when he had a business failure
11 that ultimately resulted in a bankruptcy in 2010. (*Id.* at 8.) Plaintiff subsequently began to fall
12 behind on his payments and believed the second position Deed of Trust was extinguished during
13 bankruptcy proceedings. (*Id.*) Plaintiff entered into a modification with his first position Deed of
14 Trust through Ocwen Loan Servicing and believed his second position Deed of Trust was
15 extinguished with this refinance if it was not extinguished in the bankruptcy proceedings. (*Id.*)
16 On May 20, 2021, Affinia, on behalf of SLS, recorded a Notice of Default and Election to Sell
17 Under Deed of Trust (“Notice of Default”) on the Property. (*Id.*) Plaintiff maintains he was
18 never provided with notice or a recording to inform him the previous trustee — First American
19 Title — had assigned, transferred, or sold its rights as the trustee under Deed of Trustee to
20 Affinia. (*Id.*)

21 Plaintiff contacted SLS to confirm the debt and called SLS to request documents
22 authenticating the loan, but SLS did not respond. (*Id.*) On September 9, 2021, Affinia, on behalf
23 of SLS, recorded a Notice of Trustee’s Sale (“NOTS”) on the Property. (ECF No. 7 at 4.)
24 Plaintiff argues a controversy has arisen between himself and Defendants “because of
25 Defendant’s negligent misrepresentations preventing Plaintiff from curing [his] default and
26 extinguishing the transaction by operation of law.” (*Id.*) Plaintiff maintains Defendants acted in
27 concert to deprive him of his civil rights by taking the Property without due process of law. (*Id.*
28 at 4–5.)

1 On August 25, 2021, Plaintiff filed a Complaint in Sacramento County Superior Court
2 alleging claims for: (1) a violation of the Truth in Lending Act (“TILA”); (2) violations of the
3 Rosenthal Act and Federal Fair Debt Collection Practices Act (“FDCPA”); (3) promissory
4 estoppel; (4) wrongful foreclosure; (5) negligent misrepresentation; (6) unfair competition in
5 violation of Cal. Bus. & Prof. Code §§ 17200–17210; and (7) violation of Cal. Civ. Code §
6 2924.17. (ECF No. 1-1 at 9–16.) On October 8, 2021, Defendants removed the action to this
7 Court. (ECF No. 1.) On October 15, 2021, Defendant filed the instant motion to dismiss. (ECF
8 No. 3.) On December 2, 2021, Plaintiff filed an opposition.² (ECF No. 17.) On December 9,
9 2021, Defendant filed a reply. (ECF No. 21.)

10 II. STANDARD OF LAW

11 A motion to dismiss for failure to state a claim upon which relief can be granted under
12 Federal Rule of Civil Procedure (“Rule”) 12(b)(6) tests the legal sufficiency of a complaint.
13 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Rule 8(a) requires that a pleading contain
14 “a short and plain statement of the claim showing that the pleader is entitled to relief.” *See*
15 *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). Under notice pleading in federal court, the
16 complaint must “give the defendant fair notice of what the claim . . . is and the grounds upon
17 which it rests.” *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted).
18 “This simplified notice pleading standard relies on liberal discovery rules and summary judgment
19 motions to define disputed facts and issues and to dispose of unmeritorious claims.” *Swierkiewicz*
20 *v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

21 On a motion to dismiss, the factual allegations of the complaint must be accepted as true.
22 *Cruz v. Beto*, 405 U.S. 319, 322 (1972). A court is bound to give the plaintiff the benefit of every
23 reasonable inference to be drawn from the “well-pleaded” allegations of the complaint. *Retail*
24 *Clerks Int’l Ass’n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not allege
25 “‘specific facts’ beyond those necessary to state his claim and the grounds showing entitlement to

26 ² Plaintiff’s opposition contains arguments regarding a claim for breach of the implied
27 covenant of good faith and fair dealing. (ECF No. 17 at 12–13.) Because Plaintiff’s Complaint
28 does not allege a claim for breach of the implied covenant of good faith and fair dealing, the
Court need not and does not address this argument.

1 relief.” *Twombly*, 550 U.S. at 570.

2 Nevertheless, a court “need not assume the truth of legal conclusions cast in the form of
3 factual allegations.” *U.S. ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986).
4 While Rule 8(a) does not require detailed factual allegations, “it demands more than an
5 unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. A
6 pleading is insufficient if it offers mere “labels and conclusions” or “a formulaic recitation of the
7 elements of a cause of action.” *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678
8 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory
9 statements, do not suffice.”). Moreover, it is inappropriate to assume the plaintiff “can prove
10 facts that it has not alleged or that the defendants have violated the . . . laws in ways that have not
11 been alleged.” *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459
12 U.S. 519, 526 (1983).

13 Ultimately, a court may not dismiss a complaint in which the plaintiff has alleged “enough
14 facts to state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 697 (quoting
15 *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
16 content that allows the court to draw the reasonable inference that the defendant is liable for the
17 misconduct alleged.” *Id.* at 680. While the plausibility requirement is not akin to a probability
18 requirement, it demands more than “a sheer possibility that a defendant has acted unlawfully.”
19 *Id.* at 678. This plausibility inquiry is “a context-specific task that requires the reviewing court to
20 draw on its judicial experience and common sense.” *Id.* at 679.

21 In ruling on a motion to dismiss, a court may only consider the complaint, any exhibits
22 thereto, and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201.
23 *See Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988); *Isuzu Motors Ltd. v.*
24 *Consumers Union of U.S., Inc.*, 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998).

25 If a complaint fails to state a plausible claim, “[a] district court should grant leave to
26 amend even if no request to amend the pleading was made, unless it determines that the pleading
27 could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122,
28 1130 (9th Cir. 2000) (en banc) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)).

1 **III. ANALYSIS**

2 Defendant argues that Plaintiff’s claims are not adequately pleaded or that they fail to
3 state cognizable legal theories. (ECF No. 3 at 4.) The Court will address each claim in turn,
4 starting with Defendant’s request for judicial notice.

5 A. Defendant’s Request for Judicial Notice

6 Defendant requests judicial notice of Exhibits 1 through 4. (ECF No. 5 at 2.) Exhibit 1 is
7 the docket for Plaintiff’s Chapter 13 Bankruptcy Petition. (ECF No. 5-1.) Exhibit 2 is Plaintiff’s
8 Chapter 7 Voluntary Petition. (ECF No. 5-2.) Exhibit 3 is the Substitution of Trustee recorded
9 April 8, 2021, as document number 202104082104. (ECF No. 5-3.) Exhibit 4 is the Deed of
10 Trust recorded July 11, 2005 at book 20050711, at page 0098. (ECF No. 5-4.) Plaintiff does not
11 oppose this request. (ECF No. 17.)

12 This Court may take judicial notice of facts that can be “accurately and readily determined
13 from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). The
14 Ninth Circuit has held that the proceedings and determinations of the courts are a matter of public
15 record suitable for judicial notice. *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1198 (9th Cir.
16 1988). Deeds of Trust and similarly recorded public documents are also widely held as proper
17 subjects of judicial notice. *See, e.g., In the Matter of Manges*, 29 F.3d 1034, 1042 (5th Cir. 1994)
18 (taking judicial notice of deeds and assignments).

19 Exhibits 1 through 4 are either court documents of public record or publicly recorded
20 documents. Therefore, the request for judicial notice is GRANTED.

21 B. Claim One: Violation of the TILA

22 Defendant argues that Plaintiff cannot state a claim under 12 C.F.R. § 1026.41 (“§
23 1026.41”) because his HELOC was an open-credit transaction, and § 1026.41 applies to “a
24 closed-end consumer credit transaction.” (ECF No. 3 at 5.) Defendant argues in the alternative
25 that Plaintiff has failed to state with specificity who told him the HELOC was charged off and
26 when he was told the HELOC was charged off. (*Id.*) In opposition, Plaintiff argues that federal
27 law requires a lender/servicer to provide monthly statements unless a loan is in active bankruptcy
28 and he has not received any statements on his loan serviced by SLS, he has not opted out of his

1 right to receive such statements, nor is SLS exempt from the requirement to send such statements.
2 (ECF No. 17 at 9–10.) In reply, Defendant maintains § 1026.41 does not apply because it does
3 not apply to open-end credit transactions. (ECF No. 21 at 2.)

4 Section 1026.41 requires servicers of mortgage loans to “provide the consumer, for each
5 billing cycle, a periodic statement meeting the requirements of paragraphs (b), (c), and (d) of this
6 section.” 12 C.F.R. § 1026.41. Paragraphs (b), (c), and (d) set forth the timing, form, and content
7 requirements of the periodic statement. *Id.* Section 1026.41 also provides that it “applies to a
8 closed-end consumer credit transaction secured by a dwelling,” unless a specific exemption under
9 subsection (e) applies. *Id.* TILA defines “closed-end credit” as “consumer credit other than
10 ‘open-end credit.’” *Id.* § 1026(a)(10). TILA defines “open-end credit” as “consumer credit
11 extended by a creditor under a plan in which: (i) the creditor reasonably contemplates repeated
12 transactions; (ii) the creditor may impose a finance charge from time to time on an outstanding
13 unpaid balance; and (iii) the amount of credit that may be extended to the consumer during the
14 term of the plan (up to any limit set by the creditor) is generally made available to the extent that
15 any outstanding balance is repaid.” *Id.* § 1026(a)(20). Other courts have also found that
16 HELOCs are open-end lines of credit. *See Hofstetter v. Chase Home Finance, LLC*, 751 F. Supp.
17 2d 1116, 1124 (N.D. Cal. 2010); *Johnston v. Lindaur*, No. 2:07-cv-280-GEB-EFB, 2010 WL
18 147939, at *3 (E.D. Cal. Jan. 12, 2010).

19 In the instant case, Plaintiff’s HELOC is an “open-end credit” transaction because the
20 Loan provided for repeated extensions of credit. (*See* ECF No. 5-4 at 1 (“The Note provides for
21 loan advances to be made by the Lender to the Borrower from time to time, and for a period not
22 to exceed 10 years (the ‘Draw Period’), during which loan advances may be repaid and
23 reborrowed for up to an amount not to exceed the sum of US \$52,500.00.”).) Plaintiff’s HELOC
24 is an “open-credit” transaction and § 1026.41 only applies to “closed-end consumer credit
25 transactions.” Plaintiff also specifically states in his opposition that all the exemptions listed in
26 subsection (e) do not apply to him, with the exception of subsection (e)(5), which applies to
27 certain consumers in bankruptcy. (*See* ECF No. 17 at 10); 12 C.F.R. § 1026.41(e)(5). Plaintiff is
28 therefore currently unable to state a claim under 12 C.F.R. § 1026.41. Because the Court cannot

1 determine “that the pleading could not be cured by the allegation of other facts” — specifically
2 whether the exemption in § 1026.41(e)(5) applies to him — the Court will grant leave to amend.
3 *See Lopez*, 203 F.3d at 1130. Accordingly, Defendant’s motion to dismiss this claim is
4 GRANTED with leave to amend.

5 C. Claim Two: Violations of the Rosenthal Act and the FDCPA

6 Defendant argues that Plaintiff fails to cite which section of the FDCPA it allegedly
7 violated, “merely alleges that [Defendant] misrepresented the amount of debt by including
8 interest and fees,” and does not provide calculations of interest or fees. (ECF No. 3 at 6.)
9 Defendant further argues that to the extent this claim is based on a violation of 12 C.F.R. §
10 1026.41, because that regulation does not apply, this claim fails as well. (*Id.*) In opposition,
11 Plaintiff cites to 15 U.S.C. § 1692 and asserts Defendant violated that provision by
12 “misrepresent[ing] the amount of the debt by including interest and fees that it is federally
13 prohibited from collecting on Plaintiff[’s] Second Loan” (ECF No. 17 at 11.) Plaintiff
14 further asserts that Defendants failed to satisfy the notice and due diligence requirements of
15 California Civil Code § 2923.5, failed to follow TILA, as well as the FDCPA and Rosenthal Act.
16 (*Id.*) In reply, Defendant maintains that Plaintiff has not sufficiently pleaded facts to establish
17 that it violated the FDCPA and the Rosenthal Act. (ECF No. 21 at 2–3.)

18 In the instant case, the Court finds that Defendant is correct that Plaintiff does not
19 adequately allege in his Complaint what provision of the FDCPA or Rosenthal Act Defendant
20 violated. (*See* ECF No. 1-1 at 5–16.) Without identifying which statute has been violated,
21 Defendant does not have “fair notice of what the claim . . . is and the grounds upon which it
22 rests.” *Twombly*, 550 U.S. at 555. Accordingly, Defendant’s motion to dismiss this claim is
23 GRANTED with leave to amend.

24 D. Claim Three: Promissory Estoppel

25 Defendant argues that Plaintiff has not pleaded a clear promise sufficient to support this
26 claim, and instead he has pleaded that Defendant “never responded to [him],” which precludes a
27 clear promise. (ECF No. 3 at 6 (citing ECF No. 1-1 ¶ 21).) Defendant notes that “Plaintiff has
28 not set forth specific details of the promises, who made the promises or when they were made,” or

1 “that he would have been able to secure alternative loans and refinancing for the Property to show
2 detrimental reliance.” (*Id.* at 7.) In opposition, Plaintiff asserts that Defendant agreed “to send
3 [him] documentation confirming and verifying the amount of the debt and providing [him] with
4 loss mitigation options,” but instead he did not receive anything, relied upon those promises (and
5 the lack of monthly mortgage statements), thought the loan was “charged off,” and gave up
6 alternative loans and refinancing for the Property and to the underlying loans secured by the
7 Property in reliance upon Defendant’s promises. (ECF No. 17 at 13.) In reply, Defendant
8 maintains that Plaintiff has not pleaded “who he spoke to, when he spoke to them, whether it was
9 by telephone, what telephone number he called, what exactly he asked for[,] and what was
10 promised.” (ECF No. 21 at 3.) Defendant also notes that Plaintiff’s opposition does not show
11 how his Complaint adequately establishes that he gave up alternative loans and refinancing. (*Id.*)

12 “The elements of a promissory estoppel claim are as follows: (1) a promise clear and
13 unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3)[the] reliance
14 must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured
15 by his reliance.” *U.S. Ecology Inc. v. State of California*, 129 Cal. App. 4th 887, 901 (2005).

16 With respect to the first element, Plaintiff alleges that Defendant “agreed to send [him]
17 documentation confirming the debt and providing Plaintiff with loss mitigation options.” (ECF
18 No. 1-1 at 10.) With respect to the second element, Plaintiff alleges that he “relied on the
19 promises made by [Defendant]” and gave up “alternative loans and refinancing for the Property
20 and to the underlying Loans secured by the Property.” (*Id.*) With respect to the third element,
21 Plaintiff alleges his “reliance upon Defendant’s promises were reasonable and foreseeable, as
22 [Defendant] was the successor beneficiary under the Deed of Trust.” (*Id.*) With respect to the
23 fourth element, Plaintiff alleges he has been injured by relying on Defendant’s promises and
24 “now faces the imminent loss of title and possession to his Property.” (*Id.* at 11.) Plaintiff need
25 not allege “‘specific facts’ beyond those necessary to state his claim and the grounds showing
26 entitlement to relief.” *Twombly*, 550 U.S. at 570. Accordingly, Defendant’s motion to dismiss
27 this claim is DENIED.

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1 E. Claim Four: Wrongful Foreclosure

2 Defendant argues Plaintiff alleges it “violated California Civil Code §§ 2924[,] *et seq.*
3 without any specificity of how it was purportedly violated,” which “is insufficient to put
4 [Defendant] on notice of the allegations against it and insufficient to state a claim.” (ECF No. 3
5 at 7 (emphasis omitted).) Defendant states Plaintiff also fails to allege a sale has occurred, that he
6 tendered the amount of the secured indebtedness, or that he was excused from tender. (*Id.* at 8.)
7 In opposition, Plaintiff asserts Defendant has failed to comply with California Civil Code §§
8 2924, *et seq.* because it has failed to comply with the requirements of the Notice of Default
9 provisions within this section. (ECF No. 17 at 13–14.) Plaintiff also notes that there is no
10 “incidental right to enforce any deed of trust and proceed with a non-judicial foreclosure.” (*Id.* at
11 14.) In reply, Defendant argues Plaintiff’s opposition does not show a single fact was pleaded in
12 support of this claim, but only states that Defendant failed to comply with the requirements of
13 California Civil Code §§ 2924, *et seq.* (ECF No. 21 at 4.)

14 In the instant case, the Court finds that Plaintiff does not adequately allege in his
15 Complaint what provision of California Civil Code §§ 2924, *et seq.* was violated, other than
16 stating that Defendant “failed to comply with the requirements of the Notice of Default
17 provisions” within this section. (*See* ECF No. 1-1 at 11.) Without identifying which statute has
18 been violated, Defendant does not have “fair notice of what the claim . . . is and the grounds upon
19 which it rests.” *Twombly*, 550 U.S. at 555. In the alternative, if Plaintiff were trying to allege a
20 common law claim for wrongful foreclosure, it would also fail because Plaintiff does not allege
21 that Defendant actually caused a sale of the Property. *See Rockridge Tr. v. Wells Fargo, N.A.*,
22 985 F. Supp. 2d 1110, 1145 (N.D. Cal. Sept. 25, 2013) (to state a claim for wrongful foreclosure,
23 a plaintiff must allege: “(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully
24 oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the
25 party attacking the sale . . . was prejudiced or harmed; and (3) . . . the trustor or mortgagor
26 tendered the amount of the secured indebtedness or was excused from tendering.”). Accordingly,
27 Defendant’s motion to dismiss this claim is GRANTED with leave to amend.

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1 F. Claim Five: Negligent Misrepresentation

2 Defendant argues Plaintiff fails to allege what representations were made, when they were
3 made, or who made them. (ECF No. 3 at 8.) Defendant notes that this claim is not pleaded with
4 particularity, and negligent misrepresentation claims must include “the time, place, and specific
5 content of the false representations as well as . . . the names of the persons who made the
6 allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said
7 or wrote, and when it was said or written.” (*Id.* (quoting *Santana v. BSI Fin. Servs., Inc.*, 495 F.
8 Supp. 3d 926, 947 (S.D. Cal. 2020)).) In opposition, Plaintiff contends this claim is adequately
9 pleaded because Defendant was required under law “to send Plaintiff documentation confirming
10 and verifying the amount of the debt and providing Plaintiff with loss mitigation options,” but
11 Plaintiff did not receive anything. (ECF No. 17 at 14.) Plaintiff notes that he relied upon the
12 promises, the lack of statements, thought the loan was “charged off,” and gave up alternative
13 loans and refinancing for the Property and to the underlying loans secured by the Property in
14 reliance on Defendant’s promises. (*Id.*)

15 The elements of negligent misrepresentation are: (1) misrepresentation (false
16 representation, concealment, or nondisclosure); (2) knowledge of the falsity; (3) justifiable
17 reliance; and (4) resulting damage. *Saldate v. Wilshire Credit Corp.*, 268 F.R.D. 87, 101 (E.D.
18 Cal. 2010) (citing *Cadlo v. Owens-Illionis, Inc.*, 125 Cal. App. 4th 513, 519 (2004)). A negligent
19 misrepresentation claim must also comply with the heightened pleading standards of Rule
20 9(b). *Id.* Specifically, Rule 9(b) requires that “[i]n alleging fraud or mistake, a party must state
21 with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and
22 other conditions of a person’s mind may be alleged generally.” Fed. R. Civ. P. 9(b). The
23 allegations underlying a fraud claim must be “specific enough to give defendants notice of the
24 particular misconduct . . . so that they can defend against the charge.” *Vess v. Ciba-Geigy Corp.*
25 *USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotation marks omitted). “Averments of
26 fraud must be accompanied by ‘the who, what, when, where, and how’ of the misconduct
27 charged.” *Id.* (citing *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). “[A] plaintiff must
28 set forth more than the neutral facts necessary to identify the transaction. The plaintiff must set

1 forth what is false or misleading about a statement, and why it is false.” *Id.* (internal citation
2 omitted).

3 With respect to the first and second elements, Plaintiff alleges that Defendant, “through
4 [its] agents and employees, made representations to Plaintiff that they knew or should have
5 known were false, or had no reasonable grounds to believe were true.” (ECF No. 1-1 at 11.)
6 With respect to the third element, Plaintiff alleges he “actually and reasonably relied on the
7 representations made by [Defendant] and [its] agents and employees.” (*Id.* at 12.) With respect
8 to the fourth element, Plaintiff alleges that as a result of the misrepresentations, he “has been and
9 continue[s] to be damaged in an amount to be proven at trial” and “will seek leave of [this] Court
10 to amend this Complaint once the full amount of [his] damages has been ascertained.” (*Id.*) The
11 Court finds the foregoing allegations fail to adequately allege “‘the who, what, when, where, and
12 how’ of the misconduct charged.” *Vess*, 317 F.3d at 1106. The claim is not pleaded with the
13 specificity required by Rule 9(b). Accordingly, Defendant’s motion to dismiss this claim is
14 GRANTED with leave to amend.

15 G. Claim Six: Unfair Competition

16 Defendant argues this claim is duplicative of Plaintiff’s other failed claims and that this
17 claim requires “an allegation of an underlying violation of law.” (ECF No. 3 at 9.) Defendant
18 also argues Plaintiff does not have standing under this claim because he has not pleaded a loss of
19 money or property caused by the alleged wrongful conduct. (*Id.*) In opposition, Plaintiff
20 maintains Defendant’s business practices were unlawful, unfair, and fraudulent. (ECF No. 17 at
21 15–16.) Plaintiff asserts he has pleaded Defendant’s practices were unlawful “with the requisite
22 specificity that Defendant[’s] actions and failures . . . constitute a pattern and practice of behavior
23 in conscious disregard for [his] rights under TILA, and specifically 12 C.F.R. § 1026.41.” (*Id.* at
24 15.) Plaintiff asserts Defendant’s practices were unfair because they “were fraudulent and
25 violated public polic[y].” (*Id.* at 16.) Plaintiff asserts Defendant’s practices were fraudulent
26 because “defendant is misleading its customers who have put their trust in Defendant to act fairly
27 and honestly and not violate any laws or regulations.” (*Id.* at 17.) In reply, Defendant maintains
28 the only violation Plaintiff uses to support this claim is the alleged violation of 12 C.F.R. §

1 1026.41, which does not apply to Plaintiff’s Loan. (ECF No. 21 at 5.)

2 The UCL defines “unfair competition” as “any unlawful, unfair or fraudulent business act
3 or practice and unfair, deceptive, untrue or misleading advertising.” Cal. Bus. & Prof. Code
4 § 17200. “Because Business and Professions Code [§] 17200 is written in the disjunctive, it
5 establishes three varieties of unfair competition – actions or practices which are unlawful,
6 or unfair, or fraudulent.” *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th
7 163, 180 (1999) (quoting *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 647
8 (1996)). Plaintiff may therefore state a violation of the UCL based on conduct that
9 is unfair or fraudulent, even if that conduct is not unlawful. *Id.*

10 Because Plaintiff appears to assert a UCL claim based on all three prongs, the Court will
11 address the three prongs below. However, the Court will first address whether Plaintiff
12 adequately alleges UCL standing.

13 *i. UCL Standing*

14 Standing under the UCL requires that a party “(1) establish a loss or deprivation of money
15 or property sufficient to qualify as injury in fact, i.e. *economic injury*, and (2) show that that
16 economic injury was the result of i.e., *caused by*, the unfair business practice or false advertising
17 that is the gravamen of the claim.” *Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310, 322 (2011)
18 (emphasis in original). With respect to the first element, Plaintiff indeed alleges monetary
19 damages as he alleges that he “has been and continue[s] to be damaged in an amount to be proven
20 at trial” and that he has “a substantial, ascertainable loss.” (ECF No. 1-1 at 12, 14.) With respect
21 to the second element, Plaintiff alleges he “reasonably relied” on Defendant’s “misrepresentations
22 and failure to make accurate representations” and failure “to provide material information about”
23 his Loan. (*Id.* at 13–14.) The Court finds the reasonable inference from these allegations is that
24 this alleged unlawful, unfair, or fraudulent conduct caused Plaintiff’s damages. Accordingly, the
25 Court finds that Plaintiff adequately establishes standing.

26 *ii. Unlawful*

27 Under its “unlawful” prong, “the UCL borrows violations of other laws ... and makes
28 those unlawful practices actionable under the UCL.” *Prakashpalan v. Engstrom, Lipscomb &*

1 *Lack*, 223 Cal. App. 4th 1105, 1133 (2014) (internal citations omitted). Thus, “[t]o state a cause
2 of action based on an unlawful business act or practice under the UCL, a plaintiff must allege
3 facts sufficient to show a violation of some underlying law.” *Id.* In the instant case, the only
4 claim which the Court finds Plaintiff has adequately pleaded is a claim for promissory estoppel.
5 A remaining claim for promissory estoppel is insufficient to serve as the foundation for violation
6 of the UCL. *Helmer v. Bank of Am., N.A.*, No. CIV S-12-0733 KJM-GGH, 2013 WL 1192634, at
7 *7 (E.D. Cal. Mar. 22, 2013). Accordingly, Defendant’s motion to dismiss this claim based on
8 the unlawful prong is GRANTED with leave to amend.

9 *iii. Unfair*

10 An “unfair” business practices is “conduct that threatens an incipient violation of an
11 antitrust law, or violates the policy or spirit of one of those laws because its effects are
12 comparable to or the same as a violation of the law, or otherwise significantly threatens or harms
13 competition.” *Cel-Tech Commc’ns, Inc.*, 20 Cal. 4th at 187. In the instant case, Plaintiff only
14 states in a conclusory fashion that Defendant’s “business acts and practices . . . constitute ‘unfair’
15 business practices under the UCL in that said acts and practices offend public policy and are
16 substantially injurious to Plaintiff and all consumers.” (ECF No. 1-1 at 13.) Plaintiff identifies
17 those “business acts and practices” as “fail[ing] to provide Plaintiff with any periodic mortgage
18 statements” and “systematically violating the provision of California Civil Code [§§] 2924, *et*
19 *seq.*, as it pertains to their obligations under the Deed of Trust and proceeding with a non-judicial
20 foreclosure.” (*Id.* at 13–14.) As previously noted, Plaintiff has failed to adequately allege claims
21 for a violation of TILA or for wrongful foreclosure. Therefore, Plaintiff does not plead any facts
22 to suggest Defendant is engaging in conduct that “threatens an incipient violation of antitrust
23 law,” “violates the policy or spirit of one of those laws,” or “otherwise significantly threatens or
24 harms competition.” (*See id.* at 5–16.) Accordingly, Defendant’s motion to dismiss this claim
25 based on the unlawful prong is GRANTED with leave to amend.

26 *iv. Fraudulent*

27 “To state a claim under the fraudulent prong of the UCL, plaintiffs must prove ‘actual
28 reliance on the allegedly deceptive or misleading statements,’ . . . and that ‘the misrepresentation

1 was an immediate cause of the injury-producing conduct.” *Swafford v. Int’l Bus. Machines*
2 *Corp.*, 408 F. Supp. 3d 1131, 1152 (N.D. Cal. 2019) (quoting *Kwikset Corp.*, 51 Cal. 4th at 326;
3 *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009)). If a UCL claim is grounded in fraud, the
4 entire claim must meet the heightened pleading requirement of Rule 9(b). *Kearns v. Ford Motor*
5 *Co.*, 567 F.3d 1120, 1127 (2009).

6 In the instant case, Plaintiff alleges that Defendant engaged in fraudulent business
7 practices as the “said acts and practices are likely to deceive the public and affect[] consumers’
8 legal rights and obligations.” (ECF No. 1-1 at 14.) The “acts and practices” Plaintiff refers to are
9 the same “acts and practices” detailed above — “fail[ing] to provide Plaintiff with any periodic
10 mortgage statements” and “systematically violating the provision of California Civil Code [§§]
11 2924, *et seq.*, as it pertains to their obligations under the Deed of Trust and proceeding with a
12 non-judicial foreclosure.” (*Id.* at 13–14.) The Court finds the foregoing allegations fail to
13 adequately allege “‘the who, what, when, where, and how’ of the misconduct charged.” *Vess*,
14 317 F.3d at 1106. The claim is not pleaded with the specificity required by Rule 9(b).
15 Accordingly, Defendant’s motion to dismiss this claim based on the fraudulent prong is
16 GRANTED with leave to amend.

17 H. Claim Seven: Violation of Cal. Civ. Code § 2924.17

18 Defendant argues Plaintiff fails to allege what fees and interest were illegal with respect to
19 this claim, namely “what the debt actually is or what particular charges were improper.” (ECF
20 No. 3 at 10.) Defendant notes Plaintiff also has not pleaded “his HELOC was actually charged
21 off, . . . the particulars of who told him that, . . . [and] a basis [for] prohibiting any of the fees or
22 interest claimed to be improper.” (*Id.*) Plaintiff does not address this claim in opposition. (*See*
23 ECF No. 17.) In reply, Defendant notes that “when a plaintiff simply fails to address a particular
24 claim in its opposition to a motion to dismiss that claim, [the] court generally dismisses it with
25 prejudice” and therefore this claim should be dismissed. (ECF No. 21 at 4–5 (citing *Moore v.*
26 *Apple, Inc.*, 73 F. Supp. 3d 1191, 1205 (N.D. Cal. 2014)).)

27 Other courts have construed a plaintiff’s failure to address a claim in opposition to a
28 defendant’s motion to dismiss as “abandonment of the claim.” *Moore*, 73 F. Supp. 3d at 1205

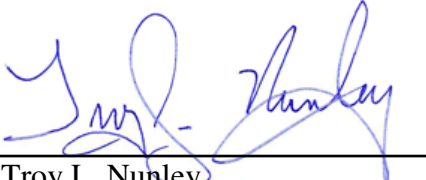
1 (citing cases). Plaintiff has not opposed Defendant's motion to dismiss this claim. Accordingly,
2 Defendant's motion to dismiss this claim is GRANTED without leave to amend.

3 **IV. CONCLUSION**

4 Based on the foregoing, the Court hereby GRANTS in part and DENIES in part
5 Defendant's Motion to Dismiss (ECF No. 3) as follows: (1) Defendant's Motion to Dismiss
6 Claims One, Two, and Four through Six is GRANTED with leave to amend; (2) Defendant's
7 Motion to Dismiss Claim Three is DENIED; and (3) Defendant's Motion to Dismiss Claim Seven
8 is GRANTED without leave to amend. Plaintiff may file an amended complaint within thirty
9 (30) days of the electronic filing date of this Order. Defendant's responsive pleading is due
10 within twenty-one (21) days of the electronic filing date of the amended complaint.

11 IT IS SO ORDERED.

12 DATED: September 15, 2022

13
14
15 
16 Troy L. Nunley
United States District Judge