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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SERGIO IVAN GUTIERREZ,

No. C 08-5586 SI

Plaintiff,

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS WITH LEAVE
TO AMEND and DENYING
PLAINTIFF'S MOTION FOR A
TEMPORARY RESTRAINING ORDER**

v.

WELLS FARGO BANK, *et al.*,

Defendants.

Defendants have filed a motion to dismiss plaintiff's complaint. This motion is scheduled for hearing on February 13, 2009. Pursuant to Civil Local Rule 7-1(b), the Court determines that the motion is appropriate for resolution without oral argument, and VACATES the hearing. Defendants' motion is GRANTED with leave to amend. If plaintiff chooses to amend the complaint, **the amended complaint must be filed and served no later than February 23, 2009.** Plaintiff has also filed a motion for a temporary restraining order. Docket No. 11. For the reasons discussed below, plaintiff's motion is DENIED.

BACKGROUND

Plaintiff filed his complaint on December 15, 2008 against numerous defendants, alleging unlawful foreclosure under the California Civil Code § 2924 *et seq.*, violations of the Fair Debt Collections Practices Act ("FDCPA") and various state law tort claims. The dispute centers on the property located at 342 Athens Street in San Francisco, California ("the Property"), which plaintiff occupied as his personal residence prior to foreclosure. On December 12, 2005, plaintiff secured a loan from defendants, which he used to purchase the Property. The Property was later foreclosed upon and

1 sold for \$625,000 because plaintiff allegedly defaulted on his loan payments.

2 It is unclear precisely what plaintiff intends to allege. His “counts” include fraud, usury, abuse
3 of process, intentional infliction of emotional distress, and trespass. In many instances, what follows
4 each heading appears to allege something else. The gravamen of plaintiff’s complaint, however, appears
5 to be that the foreclosure sale was unlawful because plaintiff did not default on his loan payments and
6 because defendants failed to provide plaintiff with a bonafide verification of his debt. Plaintiff also
7 avers that he was not provided proper notice of the foreclosure sale under California law, that defendants
8 committed fraud, and that the Property was sold “for cents on the dollar,” obtaining far less than its true
9 market value.

10 Defendants have moved to dismiss plaintiff’s claims pursuant to Federal Rule of Civil Procedure
11 12(b)(6), arguing that plaintiff fails to allege facts sufficient to state a claim for relief.

12 13 **LEGAL STANDARD**

14 Under Rule 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon
15 which relief can be granted. Fed. R. Civ. P. 12(b)(6). The question presented by a motion to dismiss
16 is not whether the plaintiff will prevail in the action, but whether the plaintiff is entitled to offer
17 evidence in support of the claim. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other*
18 *grounds by Davis v. Scherer*, 468 U.S. 183 (1984).

19 Dismissal of a complaint may be based “on the lack of a cognizable legal theory or the absence
20 of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d
21 696, 699 (9th Cir. 1990). In answering this question, the Court must assume that the plaintiff’s
22 allegations are true and must draw all reasonable inferences in the plaintiff’s favor. *See Usher v. City*
23 *of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

24 Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain a “short and plain
25 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). To survive
26 a Rule 12(b)(6) motion to dismiss, a plaintiff must provide “more than labels and conclusions, and a
27 formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic v. Twombly*, 550 U.S.
28 544, 127 S. Ct. 1955, 1964 (2007). While the complaint does not need detailed factual allegations, it

1 must contain sufficient factual allegations “to raise a right to relief above the speculative level.” *Id.* at
2 1965.

3 If the Court dismisses the complaint, it must then decide whether to grant leave to amend. The
4 Ninth Circuit has “repeatedly held that a district court should grant leave to amend even if no request
5 to amend the pleading was made, unless it determines that the pleading could not possibly be cured by
6 the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal
7 quotation marks omitted).

8 9 **DISCUSSION**

10 Defendants have moved to dismiss the complaint on a number of grounds, including the absence
11 of allegations specific to each defendant and the absence of specific factual allegations to support each
12 of the claims. The Court finds that the complaint is deficient in a number respects. Since plaintiff is
13 representing himself, the Court offers the following discussion by way of guidance, should plaintiff
14 choose to amend his complaint.

15 Defendants are correct that the overarching problem with the complaint is the lack of specific
16 factual allegations to support each claim. If plaintiff amends the complaint, plaintiff must ensure that
17 the complaint contains factual allegations showing why each named defendant is liable. Conclusory
18 statements are not enough, nor are declarations that all defendants violated some law or statute. Instead,
19 plaintiff must provide specific factual allegations for each element of each of his claims, and he must
20 state with specificity to which defendants each of his claims apply.

21 22 **A. Plaintiff’s Federal Claims**

23 **1. Alleged violations of the Fair Debt Collections Practices Act**

24 Plaintiff fails to allege specific facts demonstrating that defendants violated the FDCPA, which
25 is plaintiff’s only viable federal cause of action.

26 In order to establish a claim under the Fair Debt Collections Practices Act, plaintiff must show:
27 (1) that he is a consumer within the meaning of 15 U.S.C. §§ 1692a(3) and 1692c(d); (2) that the debt
28 arises out of a transaction entered into for personal purposes; (3) that the defendant is a debt collector

1 within the meaning of 15 U.S.C. § 1692a(6); and (4) that the defendant violated one of the provisions
2 of the FDCPA, 15 U.S.C. §§ 1692a-1692o. *See Creighton v. Emporia Credit Service, Inc.*, 981 F. Supp.
3 411, 414 (E.D. Va. 1997).

4 Plaintiff fails to specifically allege any of these elements, instead stating that all of the
5 defendants “did unlawfully violate the Fair Debt Collections Practices Act.” Compl. at ¶ 11. Plaintiff
6 alleges that he asked defendants to cease and desist all collections until they provided plaintiff a bona
7 fide validation of the debt. However, plaintiff’s claim remains insufficient because he fails to state with
8 specificity which defendants violated the FDCPA, whether they complied with his request to cease
9 collection efforts, and which specific provisions of the FDCPA they violated. Thus, the Court dismisses
10 plaintiff’s FDCPA claims with leave to amend.

11

12 **2. Alleged violations of the Single Family Mortgage Foreclosure Act of 1994**

13 While plaintiff does not specifically allege that defendants violated the Single Family Mortgage
14 Foreclosure Act (“SFMFA”), he cites multiple sections of the SFMFA as “mandatory authority,”
15 suggesting that he may intend to allege such a claim. The provisions that plaintiff cites only apply to
16 foreclosures on behalf of the Secretary of Housing and Urban Development (“HUD”). *See* 12 U.S.C.
17 § 3751. Plaintiff does not allege that HUD issued his mortgage or that HUD ever held his mortgage,
18 and absent evidence that the Secretary of HUD initiated foreclosure proceedings against the plaintiff,
19 he cannot state a claim under the SFMFA. *See Termarsch v. Homeq Servicing Corp.*, 399 F. Supp. 2d
20 827, 829 (W.D. Mich. 2005). Thus, to the extent that plaintiff states claims arising under the Single
21 Family Mortgage Foreclosure Act, those claims are dismissed without leave to amend, unless plaintiff
22 can demonstrate that the foreclosure sale was on behalf of HUD.

23

24 **B. Plaintiff’s State Law Claims**

25 While plaintiff alleges only one federal cause of action over which the Court has original
26 jurisdiction, the Court may exercise supplemental jurisdiction over “all other claims that are so related
27 to claims in the action within [the Court’s] original jurisdiction that they form part of the same case or
28 controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367. The Court has

1 discretion to hear such claims “where there is a substantial federal claim arising out of a common
2 nucleus of operative fact.” *Hoeck v. City of Portland*, 57 F.3d 781, 785 (9th Cir. 1995). If, however,
3 the state claims substantially predominate, the Court may dismiss them without prejudice and leave
4 them to state tribunals for resolution. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966).

5 In this case, plaintiff asserts his claims “With Supplemental of [sic] Jurisdiction.” Compl. at 2.
6 Without a claim over which the Court has original jurisdiction, it may not hear any of plaintiff’s state
7 law claims. The Court will defer deciding whether to exercise supplemental jurisdiction over plaintiff’s
8 state law claims until it determines whether plaintiff has a viable federal claim. The Court nonetheless
9 offers the following by way of guidance, should plaintiff choose to amend his complaint.

10
11 **1. Foreclosure proceedings under California Civil Code § 2924 et seq.**

12 **a. Plaintiff’s claim that foreclosure sale earned less than true market value**

13 Plaintiff alleges that defendants transferred his property to the bank “for cents on the dollar when
14 the actual fair market value was \$850,000.” Compl. at ¶ 15. Plaintiff, however, fails to allege any facts
15 demonstrating that the price obtained in the foreclosure sale was below market value. Moreover, given
16 that defendants have provided evidence that the price obtained at the foreclosure sale was \$625,000, the
17 Court is skeptical that plaintiff will be able to demonstrate that the price obtained was egregiously or
18 unlawfully below market value.¹ *See* Defs.’ Req. for Judicial Notice at Ex. 1.

19
20 **b. Plaintiff’s claim that defendants failed to provide notice**

21 Plaintiff alleges that defendants “never [sent] notice of time and location of where the ‘Sale’ was
22 going to take place” in violation of California Civil Code § 2924.3. Compl. at ¶ 15.

23 Section 2924.3 governs notice requirements for mortgagees and beneficiaries of a sale and
24 requires notice of the time and place of sale at least 15 days beforehand. *See* Cal. Civ. Code § 2924.3.
25 Where “the trustee’s deed recites that all statutory notice requirements and procedures required by law

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27 _____
28 ¹A court may take judicial notice of adjudicative facts. Fed. R. Evid. 201. Defendants' request for the Court to take judicial notice of the Trustee’s Deed Upon Sale, recorded in the County Recorder’s Office as DOC-2008-I6946760-00, is GRANTED.

1 for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has
2 been conducted regularly and properly.” *Moller v. Lien*, 25 Cal. App. 4th 822, 831 (Ct. App. 1994).
3 Defendants cite the Trustee’s Deed Upon Sale, which states that all statutory notice requirements have
4 been met. *See* Defs.’ Req. for Judicial Notice at Ex. 1. Plaintiff has not alleged facts sufficient to rebut
5 the presumption created by the Trustee’s Deed that the sale was conducted regularly and properly.

6
7 **c. Plaintiff’s allegations of unlawful foreclosure, malice, fraud and oppression**

8 Finally, plaintiff fails to allege facts demonstrating a cause of action for unlawful foreclosure,
9 malice, fraud or oppression. Plaintiff claims that defendants “unlawfully violate[d] [California Civil
10 Code § 2924.3(d)] foreclosure proceedings,” that they are “guilty of malice, fraud or oppression” under
11 California Civil Code § 3294 and that the foreclosure proceedings “violated the terms and conditions
12 of the original promissory note.” However, plaintiff does not provide any specific factual allegations
13 to support his claims, nor does he differentiate which allegations apply to which defendants.

14
15 **d. Plaintiff’s allegation that he was under bankruptcy protection**

16 Plaintiff argues in his opposition to defendants’ motion to dismiss that he was under the
17 protection of bankruptcy court at the time of the foreclosure sale. Pl.’s Reply at ¶ 4. The sale, plaintiff
18 argues, was therefore “irregular, improper and void” under California Civil Code § 2924. *Id.* Plaintiff’s
19 opposition is not the proper place for plaintiff to raise new claims. However, even if plaintiff’s claim
20 were properly stated, it would fail as a matter of law, because plaintiff had at least three bankruptcy
21 cases dismissed in 2008.² Defs.’ Sur-Req. for Judicial Notice at Ex. L-N. An automatic stay of
22 foreclosure proceedings does not vest where a plaintiff has had two or more bankruptcy filings
23 dismissed. 11 U.S.C. § 362(a)(4)(A)(I).

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²Defendants’ request for the Court to take judicial notice of the dismissal orders of three
28 Northern District of California Bankruptcy cases, Case Nos. 08-31476, 08-30141, and 08-30331, is
GRANTED.

1 **2. Fraud**

2 Plaintiff’s complaint claims to allege fraud against all defendants, but the ensuing paragraphs
3 suggest that plaintiff intends to allege both fraud and concealment. In any event, plaintiff fails to allege
4 facts sufficient to demonstrate of either of these claims.

5 To establish a cause of action for fraudulent misrepresentation, plaintiff must plead and prove
6 four elements: (1) a knowingly false representation by the defendant; (2) an intent to deceive or induce
7 reliance; (3) justifiable reliance by the plaintiff; and (4) resulting damages. *Service by Medallion, Inc.*
8 *V. Clorox Co.*, 44 Cal. App. 4th 1807, 1816 (Ct. App. 1996).

9 To establish a cause of action for fraudulent concealment, plaintiff must plead and prove five
10 elements: (1) the defendant must have concealed or suppressed a material fact; (2) the defendant must
11 have been under a duty to disclose the fact to the plaintiff; (3) the defendant must have intentionally
12 concealed or suppressed the fact with the intent to defraud the plaintiff; (4) the plaintiff must have been
13 unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed
14 fact; and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained
15 damage. *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.*, 6 Cal. App. 4th 603, 612-13 (Ct. App.
16 1992).

17 In addition to alleging facts sufficient to demonstrate each essential element of fraud, plaintiff’s
18 complaint must be pled with sufficient particularity to meet the heightened pleading standard for a fraud
19 claim. *See* Fed. R. Civ. P. 9(b) (“in all averments of fraud . . . the circumstances constituting fraud . .
20 . shall be stated with particularity.”). Thus, in addition to the “time, place and content of the alleged
21 misrepresentation [or concealment],” the plaintiff’s complaint “must set forth what is false or misleading
22 about a statement and . . . an explanation as to why the statement or omission complained of was false
23 or misleading.” *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 n.10 (9th Cir. 1999).

24 Plaintiff alleges simply that defendants collectively “failed to disclose certain facts that they
25 were . . . required to disclose and went further to conceal such facts knows [sic] by each of the
26 defendants.” Compl. at ¶ 26. However, plaintiff fails to plead with any specificity which facts were
27 material, which were and were not disclosed to him, which defendants concealed which facts, and which
28 defendants had a duty to disclose those facts to him.

1 **3. Breach of fiduciary duty**

2 Plaintiff, in his allegations for fraud, suggests that all the defendants breached a fiduciary duty.
3 However, because it appears that the plaintiff was in a borrower-lender relationship with the defendants,
4 their relationship was not fiduciary in nature. Rather, a commercial lender is entitled to pursue its own
5 economic interests in a loan transaction, and therefore generally does not owe a fiduciary duty to its
6 borrowers. *Nymark v. Heart Fed. Savings & Loan Ass'n.*, 283 Cal. App. 3d 1089, 1093 n.1 (Ct. App.
7 1991).

8
9 **4. Usury**

10 Plaintiff fails to allege facts in support of his claim for usury.

11 The essential elements of usury are: (1) the transaction must be a loan or forbearance; (2) the
12 interest to be paid must exceed the statutory maximum; (3) the loan and interest must be absolutely
13 repayable by the borrower; and (4) the lender must have a willful intent to enter into a usurious
14 transaction. *Ghirardo v. Antonioli*, 8 Cal. 4th 791, 798 (1994) (citations omitted).

15 Plaintiff alleges that defendants “never lent money” and provides the definition of usury from
16 Black’s Law Dictionary. Compl. at ¶¶ 36-37. He says that the banks only lent him credit, not money,
17 and he does not plead any specific facts regarding the interest rate paid on his loan, the statutory
18 maximum interest rate, or the intent of the lenders. *See id.*

19
20 **5. Abuse of process**

21 Plaintiff fails to allege facts in support of his claim that a judicial process was initiated against
22 him for an improper purpose. In fact, plaintiff’s abuse of process claim appears to actually allege that
23 defendants conspired to defraud him. To the extent that plaintiff intends to allege that defendants
24 conspired to commit fraud, the claim fails for the same reasons as his fraud claims failed, as outline
25 above.

26 If, however, plaintiff wishes to state a claim for abuse of process, plaintiff must show that
27 defendants used a legal process in a wrongful manner to accomplish a purpose for which it was not
28 designed. *Spellens v. Spellens*, 49 Cal. 2d 210, 231 (1957). The essential elements of this claim are:

1 (1) that defendants acted with an ulterior motive; and (2) that a willful act or threat was committed by
2 defendants, not authorized by the process and not proper in the regular conduct of some official
3 proceedings; and (3) that defendants’ misuse of the legal process was a cause of injury, damage, loss
4 or harm to plaintiff. *Id.* at 232. The nature of the tort is that it is committed by the misuse of process
5 — i.e., the use of process for a purpose other than that for which it is designed. Witkin, *Summary of*
6 *California Law* § 517 (2005).

7 Plaintiff alleges that defendants conspired against him and used their superior legal knowledge
8 to defraud him. Compl. at ¶¶ 40-43. These allegations do not state a claim for abuse of process.
9 Plaintiff does not allege that defendants acted in the context of any official proceedings, nor does he
10 allege that defendants acted with an ulterior motive or committed acts improper within the regular
11 conduct of an official proceeding.

12
13 **6. Intentional infliction of emotional distress**

14 Plaintiff fails to allege facts in support of his claim for intentional infliction of emotional distress.

15 The elements of intentional infliction of emotional distress are: (1) extreme and outrageous
16 conduct by the defendant with the intention of causing, or reckless disregard of the probability of
17 causing, emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress; and (3)
18 actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.
19 *Cervantez v. J. C. Penney Co.*, 24 Cal. 3d 579, 593 (1979) (citations omitted). “For [c]onduct to be
20 outrageous, [it] must be so extreme as to exceed all bounds of that usually tolerated in a civilized
21 community.” *Id.* (citations omitted).

22 Plaintiff alleges that defendants engaged in “unjustified malicious and heartless conduct” that
23 caused him emotional distress. Compl. at ¶ 46. However, plaintiff does not plead any facts
24 demonstrating that defendants’ conduct was so extreme as to exceed all bounds tolerated in a civilized
25 society. While defendants’ conduct may seem subjectively outrageous to him, plaintiff must demonstrate
26 that it was objectively outrageous to society.

1 **7. Trespass**

2 Plaintiff fails to allege facts in support of his claim for trespass.

3 “The essence of the cause of action for trespass is an unauthorized entry onto the land of
4 another.” *Miller v. Nat’l Broadcasting Co.*, 187 Cal. App. 3d 1463, 1480 (Ct. App. 1986). To establish
5 a claim for trespass, the plaintiff must prove: (1) that the plaintiff owned the property; (2) that the
6 defendant entered the plaintiff’s property without permission; (3) that plaintiff suffered harm; and (4)
7 that the defendant’s entry was a substantial factor in causing the plaintiff’s harm. *Id.*; *see also* Cal. Civ.
8 Jury Inst. § 2000 (2008).

9 Plaintiff merely concludes that defendants trespassed, without pleading facts sufficient to
10 demonstrate any of the elements of a trespass claim. Indeed, plaintiff has not even alleged that he
11 owned the property at the time of the trespass or that defendants entered the property without his
12 permission.

13
14 **8. Quiet title**

15 In addition to his claims for damages, plaintiff attempts to state a cause of action against all
16 defendants to quiet title to the Property. He alleges, simply, that “Defendant’s [sic] claim is without any
17 right.” Compl. at ¶ 50. In addition to lacking sufficient factual specificity (like many of plaintiff’s other
18 claims), plaintiff’s request to quiet title fails as a matter of law.

19 Under California law, a trustee’s foreclosure sale under a deed of trust is presumed valid. *Sierra-*
20 *Bay Fed. Land Bank Ass’n v. Superior Court*, 227 Cal. App. 3d 318, 336 (Ct. App. 1991). In order to
21 seek to quiet title, plaintiff must first seek to set aside the foreclosure sale. *See id.* To set aside the sale,
22 plaintiff must demonstrate such unfairness or irregularity, along with gross inadequacy in the price
23 obtained, that it becomes appropriate to invalidate the sale. *See id.*

24
25 **9. Article III, Section 306 of the Uniform Commercial Code**

26 Plaintiff alleges that defendants “did unlawfully violate Article 3 Section 306 of the Uniform
27 Commercial Code foreclosure proceedings.” Compl. at ¶ 13. However, as defendants correctly note
28 in their motion to dismiss, Section 306 does not provide any requirements for foreclosure proceedings.

1 Rather, Section 306 defines who is the holder of an instrument and who may be sued. *See* UCC § 3-306.
2 It does not provide any legal theory giving rise to a cause of action; it is merely a definition.

3

4 **C. Plaintiff's Motion for a Temporary Restraining Order**

5 A temporary restraining order ("TRO") may be issued only if "immediate and irreparable injury,
6 loss, or damage will result to the applicant" if the TRO does not issue. Fed. R. Civ. P. 65(b). This rule
7 requires the Court to consider the likelihood that plaintiff will prevail on the merits and the possible
8 harm to the parties from granting or denying the injunctive relief. *See Sierra On-Line, Inc. v. Phoenix*
9 *Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984). Because the Court finds that plaintiff is unlikely
10 to prevail on the merits, his motion for a TRO is DENIED.

11

12 **CONCLUSION**

13 For all of the foregoing reasons, the Court hereby GRANTS defendants' motion to dismiss with
14 leave to amend. If plaintiff wishes to amend the complaint, **the amended complaint must be filed and**
15 **served no later than February 23, 2009.**


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17 **IT IS SO ORDERED.**

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19 Dated: February 9, 2009

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SUSAN ILLSTON
United States District Judge

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