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

NADER SHATERIAN,)	Case No. 11-00920 SC
)	
Plaintiff,)	ORDER GRANTING IN PART AND
)	DENYING IN PART WELLS
v.)	FARGO'S MOTION TO DISMISS
)	AND DENYING WELLS FARGO'S
WELLS FARGO BANK, N.A., et al.,)	<u>MOTION TO STRIKE</u>
)	
Defendants.)	
)	
)	

I. INTRODUCTION

Defendant Wells Fargo Bank, N.A. ("Wells Fargo") moves to dismiss and strike Plaintiff Nader Shaterian's ("Shaterian") Second Amended Complaint ("SAC"). ECF Nos. 60 ("MTD"); 61 ("MTS"). Wells Fargo's motions are fully briefed, though Wells Fargo has not filed a reply brief in support of its Motion to Strike. ECF Nos. 72 ("MTS Opp'n"), 73 ("MTD Opp'n"), 74 ("MTD Reply"). For the reasons set forth below, the Court GRANTS in part and DENIES in part Wells Fargo's Motion to Dismiss and DENIES Wells Fargo's Motion to Strike.

II. BACKGROUND

As it must on a Rule 12(b)(6) motion to dismiss, the Court

1 takes all well-pleaded facts in the SAC as true. In 2003,
2 Shaterian purchased a home located at 511 Browning Court, Mill
3 Valley, California. ECF No. 56 ("SAC") ¶ 9. In August 2007,
4 Shaterian sought refinancing of his home "to take advantage of
5 lowering interest rates and to be able to withdraw a portion of the
6 equity in his home to be able to finish needed improvements to his
7 home." Id. ¶ 10. Shaterian alleges that he spent roughly \$300,000
8 to build two retaining walls to prevent his home from sliding down
9 the hill on which it was built. Id.

10 Shaterian alleges that, in August 2007, Diablo Funding Group,
11 Inc. ("Diablo")¹ and World Savings Bank ("WSB") qualified him for a
12 new mortgage loan for the property. Id. ¶ 12. WSB was a federal
13 savings bank regulated by the Office of Thrift Supervision ("OTS").
14 RJN² Exs. A ("WSB Certificate of Corp. Existence"), C ("Wachovia

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16 ¹ Diablo is not clearly identified in Shaterian's Complaint or the
17 papers filed before the Court. Shaterian alleges that Diablo is a
18 California corporation, SAC ¶ 7, and the facts pled suggest Diablo
19 was a mortgage broker.

20 ² Wells Fargo asks the Court to take judicial notice of a number of
21 documents. ECF No. 62 ("RJN"). Exhibits A-E are government
22 documents Wells Fargo relies on to establish that Wells Fargo is
23 the successor in interest to WSB. Exhibit F is the Deed of Trust.
24 Exhibit G is the Adjustable Rate Mortgage Note dated August 27,
25 2007 and signed by Plaintiff. Exhibit H is the Notice of Default
26 and Election to Sell Under Deed of Trust ("Notice of Default")
27 dated October 6, 2010 and recorded on October 7, 2010. Exhibit I
28 is the declaration of Shaterian in support of an application for
temporary restraining order filed in state court. Under Rule 201
of the Federal Rules of Evidence, a court may take judicial notice
of facts generally known within the territorial jurisdiction of the
trial court or capable of accurate and ready determination by
resort to sources whose accuracy cannot reasonably be questioned.
A court may also take judicial notice of a document if the
plaintiff's claim depends on the contents of the document, and the
parties do not dispute the authenticity of the document. Knievel
v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005). However, the Court
may not take judicial notice of the truth of the facts recited
within a judicially noticed document. Lee v. City of Los Angeles,

1 Mortgage FSB Charter"). WSB changed its name to Wachovia Mortgage
2 ("Wachovia"), but remained chartered under the Home Owner's Loan
3 Act ("HOLA") and overseen by OTS. RJN Ex. B ("Nov. 19, 2007 OTS
4 Ltr."); Wachovia Mortgage FSB Charter. Around November 2009,
5 Wachovia became a division of Wells Fargo, and consequently, Wells
6 Fargo became WSB's successor in interest. RJN Ex. D ("Off. Cert.
7 of the Comptroller of the Currency").

8 The type of loan provided to Shaterian was an Option
9 Adjustable Rate Mortgage ("Option ARM"). SAC ¶ 14. Shaterian also
10 describes his loan as a "pick-a-payment" loan. Id. ¶ 15. Pick-a-
11 payment loans "allow the borrower to select and make a minimum
12 payment amount for a limited time and subject to certain
13 conditions." Id. ¶ 16. Loan documents provided to Shaterian
14 included an Adjustable Rate Mortgage Note ("the Note") and a Truth-
15 in-Lending Disclosure Statement ("TILDS"). Id. On August 27,
16 2007, Shaterian signed a Deed of Trust, and it was recorded on
17 September 13, 2007. RJN Ex. F. ("Deed of Trust"). According to
18 the Deed of Trust, Shaterian received a \$985,000 loan from WSB
19 secured by his property. Id.

20 Shaterian alleges his loan was "intentionally designed to
21 result in negative amortization and obligations to pay compound
22 interest." Id. ¶¶ 15, 19. He claims he was unaware of the loan's
23 terms at the time he agreed to the loan due to "fraudulent non-
24 disclosure" of its terms and because the closing documents were
25 "executed in blank." Id. ¶ 15. He also claims that the

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27 250 F.3d 668, 688-90 (9th Cir. 2001). The Court GRANTS Wells
28 Fargo's RJN, but limits its review of the exhibits accordingly.

1 disclosures he did receive were misleading. Id. ¶ 17.

2 In April 2010, Shaterian contacted Wachovia (WSB's successor
3 in interest) about obtaining a loan modification, but received no
4 response. Id. ¶ 143. In June 2010 John H. Kearny ("Kearny"), a
5 Wells Fargo loan adjustment specialist, contacted Shaterian to
6 assist him with obtaining a loan modification and Shaterian
7 submitted a completed application later that month. Id. ¶¶ 144,
8 147. In August 2010, Kearny informed Shaterian that his
9 application had been rejected but that he could qualify for the
10 loan modification by showing an income of \$9,500 per month. Id. ¶¶
11 144, 148-49. Shaterian eventually increased his income to \$15,000
12 per month by expanding his business and reapplied for the loan
13 modification in both October and November 2010, but he was rejected
14 for a second and third time. Id. ¶¶ 150, 152.

15 On October 7, 2010, Cal-Western Reconveyance Corporation
16 ("Cal-Western"), the substituted trustee on Shaterian's Deed of
17 Trust, recorded a Notice of Default. SAC Ex. 4 ("Not. of
18 Default"). The Notice of Default stated that, as of October 6,
19 2010, Shaterian had accrued \$60,175.64 in arrears. Id. at 1. On
20 January 12, 2011, a Notice of Trustee's sale was recorded, setting
21 a sale date of February 1, 2011. ECF No. 1 ("Not. of Removal") Ex.
22 B. Shaterian later filed a Chapter 13 petition in bankruptcy
23 court, staying the scheduled foreclosure sale until July 18, 2011.
24 ECF No. 55 ("July 7, 2011 Order") at 1. It is unclear whether the
25 foreclosure sale has yet taken place.

26 On January 28, 2011 Shaterian commenced this action in the
27 Superior Court of California, County of Marin. Not. of Removal.
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1 Three days later, Shaterian filed a First Amended Complaint ("FAC")
2 in state court. Id. Defendants removed the case to federal court
3 on February 28, 2011, id., and moved to dismiss and strike the FAC
4 on March 13, 2011, ECF No. 10. Shaterian later moved for a
5 preliminary injunction to restrain the trustee's sale of his
6 property which the Court ultimately denied. ECF Nos. 16, 20, 52.
7 After denying the motion for a preliminary injunction and learning
8 of Shaterian's bankruptcy petition, the Court granted Shaterian
9 thirty days leave to amend his complaint and denied Wells Fargo's
10 pending motions to dismiss and strike as moot. July 7, 2011 Order
11 at 2. As Shaterian was allowed to file a third complaint, the
12 Court stated that "any claims dismissed on a subsequent motion to
13 dismiss will be dismissed without leave to amend," and that the
14 Court would only grant additional leave to amend if Shaterian filed
15 a motion under Federal Rule of Civil Procedure 15(a)(2)
16 establishing that justice so required. Id. at 2-3.

17 Shaterian filed his SAC on August 5, 2011. The SAC alleges
18 ten claims: (1) violation of the Truth in Lending Act ("TILA"), 15
19 U.S.C. § 1601 et seq.; (2) fraudulent omissions; (3) violation of
20 the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof.
21 Code § 17200 et seq.; (4) breach of contract; (5) breach of implied
22 covenant of good faith and fair dealing; (6) aiding and abetting
23 fraud; (7) violation of California Civil Code Section 2923.5; (8)
24 breach of oral contract; (9) fraud through misrepresentation in
25 oral contract; and (10) declaratory relief. Some of these claims
26 arise from the initial loan agreement; others involve the
27 subsequent foreclosure process and Wells Fargo's refusal to offer
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1 Shaterian a loan modification.

2 On September 2, 2011, Wells Fargo moved to dismiss each of
3 Shaterian's claims. Also on September 2, 2011, Wells Fargo moved
4 to strike Shaterian's punitive damages allegations on the grounds
5 that Shaterian does not allege a proper basis for recovering such
6 damages.

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8 **III. LEGAL STANDARD**

9 **A. Motion to Dismiss**

10 A motion to dismiss under Federal Rule of Civil Procedure
11 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
12 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
13 on the lack of a cognizable legal theory or the absence of
14 sufficient facts alleged under a cognizable legal theory."
15 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
16 1988). "When there are well-pleaded factual allegations, a court
17 should assume their veracity and then determine whether they
18 plausibly give rise to an entitlement to relief." Ashcroft v.
19 Iqbal, 129 S. Ct. 1937, 1950 (2009). However, "the tenet that a
20 court must accept as true all of the allegations contained in a
21 complaint is inapplicable to legal conclusions. Threadbare
22 recitals of the elements of a cause of action, supported by mere
23 conclusory statements, do not suffice." Id. (citing Bell Atl.
24 Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The allegations made
25 in a complaint must be both "sufficiently detailed to give fair
26 notice to the opposing party of the nature of the claim so that the
27 party may effectively defend against it" and "sufficiently

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1 plausible" such that "it is not unfair to require the opposing
2 party to be subjected to the expense of discovery." Starr v. Baca,
3 633 F.3d 1191, 1204 (9th Cir. 2011).

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5 **B. Motion to Strike**

6 Federal Rule of Civil Procedure 12(f) provides that a court
7 may, on its own or on a motion, "strike from a pleading an
8 insufficient defense or any redundant, immaterial, impertinent, or
9 scandalous matter." Motions to strike "are generally disfavored
10 because they are often used as delaying tactics and because of the
11 limited importance of pleadings in federal practice." Rosales v.
12 Citibank, 133 F. Supp. 2d 1177, 1180 (N.D. Cal. 2001). In most
13 cases, a motion to strike should not be granted unless "the matter
14 to be stricken clearly could have no possible bearing on the
15 subject of the litigation." Platte Anchor Bolt, Inc. v. IHI, Inc.,
16 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004).

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18 **IV. DISCUSSION**

19 **A. Wells Fargo's Motion to Dismiss**

20 **1. Claim for Violation of TILA (Claim 1)**

21 In his first claim for relief, Shaterian alleges that the Note
22 and TILDS violated TILA because they failed to "clearly and
23 conspicuously disclose": (1) "that payment schedules are not based
24 on the actual interest rate," (2) "negative amortization," (3) "the
25 legal obligations between the parties," and (4) "the effect of rate
26 and payment caps." SAC ¶ 36. Based on Wells Fargo's alleged TILA
27 violations, Shaterian seeks rescission, damages, attorney's fees,
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1 and costs. Id. ¶ 50. With respect to his rescission remedy,
2 Shaterian alleges that he "has the ability to tender the loan
3 amount with the help of business associates," but requests this
4 amount be offset by any TILA damages the Court awards him. Id. ¶
5 49.

6 TILA imposes several disclosure requirements on lenders of
7 consumer loans and their assignees. Generally, the law requires a
8 lender to disclose, among other things, the amount financed, the
9 total finance charge, the finance charge expressed as an annual
10 percentage rate, the sum of the amount financed and the finance
11 charge ("total of payments"), and the number, amount, and due dates
12 of payments scheduled to repay the total of payments. See 15
13 U.S.C. § 1638.

14 Wells Fargo first argues that Shaterian's TILA claim should be
15 dismissed because negative amortization need only be disclosed in
16 the Loan Program Disclosure and need not be repeated in the TILDS.
17 MTD at 6-7. Wells Fargo argues that the adjustable loan program
18 disclosure statement, which is not attached to the SAC or
19 Defendants' RJN, provided Shaterian with adequate disclosures under
20 TILA. Id.

21 Shaterian responds that Wells Fargo's argument misreads the
22 SAC because the alleged TILA violation is broader than just the
23 failure to disclose negative amortization. MTD Opp'n at 10-11.
24 Shaterian also argues that he did not allege Wells Fargo violated
25 TILA by failing to disclose the possibility of negative
26 amortization, but by failing to "clearly and conspicuously"
27 disclose that negative amortization was guaranteed to occur if
28

1 Shaterian followed the payment schedule provided. Id. at 11-12.

2 Neither party is particularly clear about exactly what TILA
3 requires with respect to the form and content of disclosures.
4 Nevertheless, based on the SAC and the available judicially
5 noticeable facts, the Court cannot conclude that all required TILA
6 disclosures were made. Wells Fargo's Motion to Dismiss does not
7 address all of the TILA violations alleged by Shaterian. Further,
8 the Loan Program Disclosure form, which Wells Fargo contends
9 disclosed that negative amortization would occur, is not before the
10 Court.

11 Wells Fargo next argues that Shaterian's TILA claim for
12 rescission fails because Shaterian cannot tender the money he
13 received through the loan. MTD at 7. Wells Fargo urges the Court
14 not to accept Shaterian's allegation that his business associates
15 will donate the tender amount, pointing to the fact that Shaterian
16 has filed for bankruptcy. Id. at 7.

17 TILA requires that a borrower return all money or property
18 received from the lender to complete a rescission. See 15 U.S.C.
19 1635(b). The Court finds that Shaterian has alleged sufficient
20 facts to show that he could tender the money he received through
21 the loan, and the Court must assume the veracity of all well-
22 pleaded factual allegations on a motion to dismiss. Shaterian need
23 not provide evidence of his ability to tender at this stage.
24 Viewing the SAC in the light most favorable to the pleader,
25 Shaterian's allegation that business associates will help him fund
26 the tender is not implausible.

27 Accordingly, the Court DENIES Wells Fargo's Motion to Dismiss
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1 with respect to Shaterian's first claim for violation of TILA.

2 **2. HOLA Preemption (Claims 2 through 10)**

3 Wells Fargo contends that Shaterian's remaining claims, all of
4 which are brought under state law, are preempted by HOLA. MTD at
5 1-6. Under HOLA, Congress gave OTS authority to issue regulations
6 concerning thrifts such as WSB, Wells Fargo's predecessor in
7 interest. See 12 U.S.C. 1464; Silvas v. E*Trade Mortg. Corp., 514
8 F.3d 1001, 1005 (9th Cir. 2008). Pursuant to HOLA, OTS promulgated
9 a regulation stating that OTS "occupies the entire field of lending
10 regulation for federal savings associations." 12 C.F.R. §
11 560.2(a). The regulation further provides that "federal savings
12 associations may extend credit as authorized under federal law . .
13 . without regard to state laws purporting to regulate or otherwise
14 affect their credit activities." Id. Preempted state laws include
15 those relating to "[t]he terms of credit, including amortization of
16 loans and the deferral and capitalization of interest,"
17 "[d]isclosure and advertising, including laws requiring specific
18 statements, information, or other content to be included in credit
19 application forms," and "[p]rocessing, origination, servicing, sale
20 or purchase of, or investment or participation in, mortgages." Id.
21 § 560.2(b). However, state "contract and commercial law," "real
22 property law," and "tort law," among other things, "are not
23 preempted to the extent that they only incidentally affect lending
24 operations . . . or are otherwise consistent with the purpose [of
25 the regulation]." Id. § 560.2(c).

26 OTS has outlined a framework for evaluating whether or not a
27 state law is preempted under 12 C.F.R. § 560.2:

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1 When analyzing the status of state laws under § 560.2,
2 the first step will be to determine whether the type of
3 law in question is listed in paragraph (b). If so, the
4 analysis will end there; the law is preempted. If the
5 law is not covered by paragraph (b), the next question
6 is whether the law affects lending. If it does, then, in
7 accordance with paragraph (a), the presumption arises
8 that the law is preempted. This presumption can be
9 reversed only if the law can clearly be shown to fit
10 within the confines of paragraph (c). For these
11 purposes, paragraph (c) is intended to be interpreted
12 narrowly. Any doubt should be resolved in favor of
13 preemption.

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

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1 at 20.

2 In light of this framework, the Court finds that Shaterian's
3 third, fourth, fifth, sixth, seventh, eighth, and ninth claims are
4 not preempted by HOLA. Wells Fargo argues that these claims are
5 preempted by 12 C.F.R. § 560.2(b) because they pertain to terms of
6 credit, disclosure, and the process, origination, or sale of
7 mortgages. MTD at 3. The Court disagrees. These claims relate to
8 general legal duties with which every business must comply and only
9 incidentally affect Wells Fargo's lending practices. Shaterian's
10 fraud claims, i.e., claims three, six, and nine, do not impose
11 additional requirements concerning lending operations regulated by
12 OTS other than the general requirement that Wells Fargo is
13 prohibited from misrepresenting material facts and defrauding its
14 borrowers. Shaterian's contract claims, i.e., claims four, five,
15 and eight, merely seek to force Wells Fargo to adhere to the terms
16 of its agreements with Shaterian. The Court has already held
17 Shaterian's claim for violation of California Civil Code Section
18 2923.5 is not preempted by HOLA. See ECF No. 52 at 8 n.7.

19 Additionally, these claims clearly fit within the categories of
20 laws which are exempted from preemption under 12 C.F.R. § 560.2(c)
21 as they sound in tort, contract, commercial, and real property law.

22 In contrast, Shaterian's second claim for fraudulent omissions
23 relates to substantive lending requirements. Other district courts
24 in this circuit have found that even claims for fraud or
25 misrepresentation may be preempted where they relate to inadequate
26 disclosures of fees, interest rates, or other loan terms. See

27
28 v. Loan City, No. 09-CV-02228-IEG (POR), 2010 U.S. Dist. LEXIS
6583, at *14-16 (S.D. Cal. Jan. 27, 2010).

1 DeLeon, 2011 U.S. Dist. LEXIS 8296, at *16-17. Such claims impose
2 additional substantive requirements relating to lending activities
3 regulated by OTS. See id. Shaterian's second claim for fraudulent
4 omissions relates to WSB's duty to make various disclosures in loan
5 documents, including the Note and the TILDS. See SAC ¶ 52.
6 Accordingly, this claim is preempted by HOLA.

7 Shaterian's tenth claim asks the court for a declaration
8 concerning the legal and factual issues set forth in the first nine
9 claims. The Court finds that this claim is preempted to the extent
10 it seeks a declaration concerning Shaterian's claim for fraudulent
11 omissions.

12 Accordingly, the Court DISMISSES Shaterian's second claim for
13 fraudulent omissions as it is preempted by HOLA.

14 **3. Claim for Violation of the California UCL (Claim 3)**

15 Shaterian alleges that Wells Fargo violated the California UCL
16 by luring him and other borrowers into Option ARM loans with
17 promises of low payments while withholding the fact that these
18 loans were designed to cause negative amortization. SAC ¶¶ 70-71.

19 Wells Fargo argues that Shaterian's UCL claim is preempted by
20 TILA because it asserts a failure to disclose information in the
21 TILDS or other required TILA disclosure. MTD at 19. The Court
22 disagrees. TILA does not preempt state laws, "except to the extent
23 that those laws are inconsistent" with TILA. 15 U.S.C. § 1610;
24 Silvas, 514 F.3d at 1007. For example, district courts in this
25 circuit have held that UCL claims based on false or misleading oral
26 representations are not preempted by TILA because TILA regulates
27 only written disclosures. See Yang v. Home Loan Funding, Inc., No.
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1 CV F 07-1454 AWI GSA, 2010 U.S. Dist. LEXIS 21837, at *28-29 (E.D.
2 Cal. Feb. 18, 2010); Kajitani v. Downey Sav. & Loan Ass'n, 647 F.
3 Supp. 2d 1208, 1220 (D. Haw. 2008). When the SAC is liberally
4 construed, Shaterian's UCL claim does not solely rest on allegedly
5 false statements in the TILDS or other written disclosures required
6 by TILA. The UCL claim is also predicated on allegations
7 concerning "promises of low payments" and other means by which
8 Wells Fargo "trumpeted their low payment loans to the public."
9 See, e.g., SAC ¶¶ 71, 73. The Court finds that Shaterian's UCL
10 claims are not preempted to the extent they are based on
11 allegations of misconduct outside of written deficiencies in the
12 TILDS or other required TILA disclosures.

13 Wells Fargo also argues that the UCL claim fails
14 "substantively" because the Note disclosed the possibility that the
15 principal amount due on the loan would increase if payments were
16 insufficient to cover interest. MTD at 20. Wells Fargo claims
17 that, with an ordinary calculator, Shaterian should have been able
18 to figure out that his principal amount would increase. Id. The
19 Court finds this argument unpersuasive, as it ignores Shaterian's
20 allegations concerning false promises of a "low, fixed payment" and
21 "only a small annual increase in the payment amount." See SAC ¶
22 70. As the terms of the Note were allegedly contradicted by these
23 false promises, it is plausible that Shaterian was misled.
24 Further, Wells Fargo offers no authority suggesting that a UCL
25 claim fails where a borrower should be able to see through alleged
26 lies and omissions by performing potentially complicated interest
27 and principal calculations. Nor does Wells Fargo point to any
28

1 particular language in the Note which indicated, in a
2 straightforward way, that the loan would result in negative
3 amortization.

4 Accordingly, the Court DENIES Wells Fargo's Motion to Dismiss
5 with respect to the third claim for violation of the California
6 UCL.

7 **4. Claim for Breach of Written Contract (Claim 4)**

8 As to the fourth claim for breach of contract, Shaterian
9 alleges that WSB "expressly and/or through its conduct and actions
10 agreed that Plaintiff's monthly payment obligation would be
11 sufficient to pay both the principal and interest owed on the
12 loan." SAC ¶ 94. Shaterian alleges that WSB and Wells Fargo
13 breached this agreement when they failed to apply any portion of
14 Shaterian's monthly payments towards the principal balance on the
15 loan. Id. ¶ 96.

16 Wells Fargo argues that Shaterian fails to allege a breach of
17 contract because the Note does not contain a promise that
18 Shaterian's payments would be sufficient to pay off both the
19 interest and principal on the loan. MTD at 7-8. Wells Fargo
20 points out that Shaterian has acknowledged that a pick-a-payment
21 loan allows a borrower to select an interest-only, or even smaller,
22 minimum payment. Id. at 8 (citing SAC ¶ 16). Thus, Wells Fargo
23 argues, it was Shaterian who determined whether his payments would
24 cover both principal and interest. Id. Shaterian responds by
25 quoting much of the language from his fourth claim without further
26 analysis, and by pointing to a provision in the Note that states:
27 "I [Shaterian] will pay Principal and interest by making payments
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1 every month." Id.

2 The Court finds that this language does not constitute a
3 promise by WSB or Wells Fargo that Shaterian's monthly payments
4 would cover principal and interest. Shaterian's conclusory
5 allegation that WSB "expressly and/or through its conduct" made
6 such a promise is insufficient to state a claim for breach of
7 contract. Accordingly, the Court DISMISSES Shaterian's fourth
8 claim.

9 **5. Claim for Breach of the Implied Covenant of Good**
10 **Faith and Fair Dealing (Claim 5)**

11 Shaterian's fifth claim for breach of the implied covenant of
12 good faith and fair dealing mirrors his claim for breach of
13 contract. Shaterian alleges that the Note and TILDS "expressly and
14 impliedly" provided that negative amortization would not occur if
15 Shaterian made his monthly payments. SAC ¶ 104. Shaterian further
16 alleges that, contrary to these provisions, WSB did not apply any
17 part of Shaterian's payments to the principal on the loan. Id. ¶
18 106.

19 Wells Fargo argues that the claim is time barred since the
20 statute of limitations for a breach of implied covenant of good
21 faith and fair dealing is two years, the breach allegedly occurred
22 in 2007, and Shaterian did not bring this action until 2011. MTD
23 at 10. Shaterian responds that the statute of limitations was
24 tolled by a 2007 class action in which he is a plaintiff. MTD
25 Opp'n at 16. Wells Fargo does not offer a response to this
26 argument. Accordingly, the Court finds the implied covenant claim
27 is not time-barred.

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1 Wells Fargo also argues that the implied covenant claim is
2 superfluous because it is duplicative of Shaterian's contract
3 claim. MTD at 10. Where allegations for breach of the implied
4 covenant "do not go beyond the statement of a mere contract breach
5 and, relying on the same alleged acts, simply seek the same damages
6 or other relief already claimed in a companion contract cause of
7 action, they may be disregarded as superfluous as no additional
8 claim is actually stated." Careau & Co. v. Sec. Pac. Bus. Credit,
9 Inc., 222 Cal. App. 3d 1371, 1395 (Ct. App. 1990). However, this
10 rule does not apply where a plaintiff alleges that the defendant
11 acted in bad faith to frustrate the contract's actual benefits.
12 See Celador Int'l Ltd. v. Walt Disney Co., 347 F. Supp. 2d 846, 852
13 (C.D. Cal. 2004); Guz v. Bechtel Nat'l, Inc., 24 Cal. 4th 317, 353
14 n.18 (2000).

15 In the instant case, Shaterian has not gone beyond alleging a
16 breach of the implied and express terms of the Note and TILDS. The
17 SAC alleges that Wells Fargo and WSB acted in bad faith by failing
18 to make clear and conspicuous disclosures concerning the monthly
19 payments sufficient to cover his interest and principal. However,
20 these actions were presumably taken to induce Shaterian to enter
21 into the contract, not to frustrate the benefits of the contract.
22 Further, Shaterian's bad faith allegations are too vague to state a
23 plausible claim for relief. Accordingly, the Court DISMISSES
24 Shaterian's fifth claim for breach of the implied covenant of good
25 faith and fair dealing.

26 **6. Claim for Aiding and Abetting Fraud (Claim 6)**

27 Shaterian's aiding and abetting fraud claim is premised on
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1 allegations that WSB and Diablo engaged in a "joint venture" to
2 induce borrowers, including Shaterian, to enter into unfavorable
3 loans. SAC ¶¶ 117-133. Wells Fargo moves to dismiss this claim on
4 the grounds that: (1) it lacks particularity; (2) Wells Fargo
5 cannot be held liable for Diablo's actions; (3) the claim does not
6 identify an actionable misrepresentation; and (4) the claim is
7 preempted by TILA. MTD at 16-19.

8 Rule 9(b) of the Federal Rules of the Civil Procedure requires
9 a plaintiff to "state with particularity the circumstances
10 constituting fraud." This includes "an account of the time, place,
11 and specific content of the false representations as well as the
12 identities of the parties to the misrepresentations." Swartz v.
13 KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (citation and
14 quotations omitted). Under California law, aiding and abetting
15 liability extends to a person who aids and abets an intentional
16 tort where that person: (1) had actual knowledge of the underlying
17 wrongful conduct, and (2) gave substantial assistance or
18 encouragement to another to so act. See Casey v. U.S. Bank Nat'l
19 Assn., 127 Cal. App. 4th 1138, 1144 (Cal. Ct. App. 2005).

20 Wells Fargo argues that Shaterian has not alleged with
21 particularity what misrepresentations Diablo made, or when and how
22 those statements were made. The court disagrees. Shaterian pled
23 that around August 2007 a Diablo agent, Juanita Garcia Apodaca
24 ("Apodaca"), told Shaterian that he qualified for a six percent
25 fixed rate loan that would eventually adjust to a lower rate and
26 encouraged him to sign blank documents. SAC ¶ 129. Shaterian
27 further alleges that these representations turned out to be false,
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1 as he entered into an Option ARM loan with an interest rate that
2 ultimately increased over time. These allegations meet the
3 heightened pleading standards of Rule 9(b).⁴

4 The Court also disagrees with Wells Fargo's contention that
5 Shaterian's allegations concerning the relationship between WSB and
6 Diablo are too conclusory to state a claim for aiding and abetting.
7 MTD at 17. Shaterian alleges that WSB and Diablo, Shaterian's
8 broker, entered into an agreement whereby WSB "dictated and pre-
9 approved" certain loan and disclosure documents which Diablo
10 provided to borrowers. SAC ¶ 125. Shaterian further alleges that
11 WSB was aware that these documents contained "fraudulent omissions"
12 and knew or should have known that Diablo encouraged borrowers to
13 sign blank loan documents, and that Diablo later completed these
14 loan documents with information which differed from the information
15 provided to the borrowers. Id. ¶¶ 127-128. Shaterian is informed
16 and believes that Diablo received "substantial remuneration" from
17 WSB for carrying out this scheme. Id. ¶ 121. Such allegations are
18 sufficient to establish that WSB had actual knowledge of the
19 alleged fraud and provided substantial assistance in carrying it
20 out. See Peel v. BrooksAmerica Mortg. Corp., No. 8:11-cv-0079-JST,
21 2011 U.S. Dist. LEXIS 60618, at *22-25 (C.D. Cal. June 1, 2011).

22 Wells Fargo further argues that it cannot be held liable for
23 the actions of Diablo since loan brokers are "customarily" the
24 agents of the borrower and because lenders do not owe borrowers a
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26 ⁴ Wells Fargo argues that Apodaca's representations are irrelevant
27 since the "loan unambiguously discloses" an adjustable interest
28 blank - of exactly what type of loan he was getting." SAC ¶ 15.

1 fiduciary duty of care. MTD at 18. These arguments are
2 unpersuasive and irrelevant. Regardless of the "customary
3 relationship" between brokers, lenders, and borrowers, Shaterian
4 has specifically alleged that WSB drafted and approved loan
5 documents Diablo used to mislead borrowers and that Diablo received
6 substantial remuneration from WSB. See SAC ¶¶ 121, 125. These
7 allegations are sufficient to establish the elements of aiding and
8 abetting. Further, under California law, a lender may owe a duty
9 to its borrowers where it "actively participates in the financed
10 enterprise beyond the domain of the usual money lender." Nymark v.
11 Heart Fed. Sav. & Loan Assn., 231 Cal. App. 3d 1089, 1096 (Cal. Ct.
12 App. 1991) (quotations and citation omitted). In the instant
13 action, Shaterian has alleged that WSB stepped out of its usual
14 role as a lender by engaging in a joint venture with Diablo to
15 induce Shaterian to agree to an unfavorable loan. See SAC ¶¶ 121,
16 125.

17 The Court also finds that Shaterian's aiding and abetting
18 fraud claim is not preempted by TILA. As discussed above, TILA
19 only preempts state law causes of action to the extent that they
20 are predicated on allegedly false statements in TILDS or other
21 written disclosures required by TILA. Shaterian's aiding and
22 abetting claim alleges other types of wrongful conduct, including
23 allegedly false statements made by Apodaca.

24 Accordingly, the Court DENIES Wells Fargo's motion to dismiss
25 with respect to Shaterian's sixth claim for aiding and abetting
26 fraud.

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7. Claim for Violation of California Civil Code Section
2923.5 (Claim 7)

California's Civil Code provides a framework for non-judicial foreclosure: the lender must first record a notice of default; once three months have elapsed, the lender must give notice of the planned foreclosure sale. Cal. Civ. Code § 2924. Section 2923.5 concerns the notice of default. It requires the "mortgagee, trustee, beneficiary, or authorized agent" seeking to file a notice of default to first contact the borrower in person or by telephone "in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." Id. § 2923.5(a)(2). The notice of default may not be filed until thirty days after this initial contact or after the statute's due diligence requirements are satisfied. Id. § 2923.5(a)(1). Further, the notice of default must include a declaration that the mortgagee, beneficiary, or authorized agent has contacted the borrower. Id. § 2923.5(b). During this initial contact, the party seeking to file a notice of default must advise the borrower that he or she has the right to request a subsequent meeting and, if requested, schedule the meeting within fourteen days. Id. § 2923.5(a)(2). The remedy available under Section 2923.5 is the postponement of a foreclosure sale until the requirements of the statute have been fulfilled. Mabry v. Super. Ct., 185 Cal. App. 4th 208, 213 (Cal. Ct. App. 2010).

In the declaration filed with the October 2010 Notice of Default, Wells Fargo vice president Sandra Garza ("Garza") declares that Wells Fargo contacted Shaterian on March 13, 2011 as required

1 by Section 2923.5. SAC ¶ 137; Not. of Default at 3. Shaterian
2 alleges that this declaration was false and that he had not been
3 contacted by anyone from Wells Fargo to assess his financial
4 situation and discuss options, or to arrange a subsequent meeting.
5 SAC ¶ 138. Shaterian asks the Court for an order declaring that
6 the Notice of Default is not valid and that Wells Fargo may not
7 proceed with foreclosure. Id. ¶ 140.

8 Wells Fargo argues that Shaterian's Section 2923.5 claim
9 should be dismissed because the SAC shows that it complied with the
10 statute. MTD at 19. Specifically, the SAC shows that Shaterian
11 had multiple discussions with Kearny, a Wells Fargo representative,
12 concerning a loan modification between June and August 2010, over
13 thirty days prior to the filing of the October 2010 Notice of
14 Default. See SAC ¶¶ 143-149. However, as Shaterian argues, these
15 later discussions with Kearny would not cure the alleged defect in
16 the Garza Declaration, which states that Shaterian was contacted in
17 March 2010. If, as Shaterian alleges, the Garza declaration is
18 false, then Wells Fargo failed to comply with Section 2923.5(b),
19 which requires that a notice of default include a declaration that
20 the "the mortgagee, beneficiary, or authorized agent" has contacted
21 the borrower. Allowing a Cal-Western to file a notice of default
22 based on a false declaration would defeat the purpose of the
23 statute.

24 Wells Fargo also argues that Shaterian's Section 2923.5 claim
25 fails because, in denying Shaterian's motion for a preliminary
26 injunction, the Court accepted evidence submitted by Wells Fargo
27 supporting the veracity of the Garza declaration. MTD at 19. The
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1 Court disagrees. In evaluating Shaterian's motion for a
2 preliminary injunction, the Court could consider evidence outside
3 the pleadings to determine whether Shaterian was likely to succeed
4 on the merits. Here, the Court may only consider whether Shaterian
5 states a plausible claim for relief. Assuming that Shaterian's
6 allegation concerning the veracity of the Garza declaration is
7 true, Shaterian states a plausible claim under Section 2923.5.

8 Finally, Wells Fargo contends that Shaterian's seventh claim
9 fails because the Court has already denied the only remedy
10 available under Section 2923.5 -- postponement of the foreclosure
11 sale. MTD at 20. This argument might be persuasive if the
12 foreclosure sale had already occurred. However, there is no
13 indication that it has. Further, although the Court denied
14 Shaterian's motion for a preliminary injunction, an injunction may
15 still issue if Shaterian is successful on the merits.

16 Accordingly, the Court DENIES Wells Fargo's Motion to Dismiss
17 with respect to Shaterian's seventh claim for violation of
18 California Civil Code Section 2923.5.

19 **8. Claim for Breach of Oral Contract (Claim 8)**

20 Shaterian's claim for breach of oral contract is based on
21 Kearny's alleged promise that Wells Fargo would modify Shaterian's
22 loan if he could demonstrate an income of at least \$9,500 per
23 month. SAC ¶¶ 149, 158. Wells Fargo allegedly breached this
24 promise by rejecting Shaterian's October and November 2010 loan
25 modification applications, even after Shaterian demonstrated a
26 monthly income of \$10,000 to \$15,000. Id. ¶¶ 150-51. Wells Fargo
27 argues that Kearny's promise did not create a contract because
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1 Shaterian did not offer any consideration in return. MTD at 12.
2 Shaterian responds that he offered consideration by providing Wells
3 Fargo with requested forms and access to his tax return
4 information. MTD Opp'n at 20. The Court agrees with Wells Fargo.

5 Under the California Civil Code, "[a] sufficient cause or
6 consideration" "is essential to the existence of a contract." Cal.
7 Civ. Code § 1550. Further, "a contract in writing may be modified
8 by an oral agreement supported by new consideration." Cal. Civ.
9 Code § 1698(c). Consideration is defined as either (1) "[a]ny
10 benefit conferred, or agreed to be conferred, upon the promisor, by
11 any other person, to which the promisor is not lawfully entitled,"
12 or (2) "any prejudice suffered, or agreed to be suffered, by such
13 person, other than such as he is at the time of consent lawfully
14 bound to suffer." Id. § 1605. "[I]f one of the promises leaves a
15 party free to perform or to withdraw from the agreement at his own
16 unrestricted pleasure, the promise is deemed illusory and it
17 provides no consideration." Reyes v. Wells Fargo Bank, N.A., No.
18 C-10-01667 JCS, 2011 U.S. Dist. LEXIS 2235, at *31 (N.D. Cal. Jan.
19 3, 2011) (quoting Pease v. Brown, 186 Cal. App. 2d 425, 431 (Cal.
20 Ct. App. 1960)).

21 In the instant action, Shaterian has not pled a benefit
22 conferred or prejudice suffered. The forms and tax returns
23 provided by Shaterian cannot constitute consideration because such
24 consideration has absolutely no value. See Mehta v. Wells Fargo
25 Bank, N.A., 737 F. Supp. 2d 1185, 1197 (S.D. Cal. 2010).
26 Additionally, the alleged oral contract did not place any
27 conditions on Shaterian and left him free to withdraw. Kearny

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1 merely informed Shaterian of the conditions under which a
2 resubmitted loan modification application might be approved --
3 Shaterian was under no obligation to resubmit the application.

4 As Shaterian has not pled adequate consideration, the Court
5 DISMISSES Shaterian's eighth claim for breach of oral contract.

6 **9. Claim for Fraud through Misrepresentation in Oral**
7 **Contract (Claim 9)**

8 Shaterian's ninth claim for fraud through misrepresentation in
9 oral contract is premised on the same conduct as his claim for
10 breach of oral contract. The Court has already found that
11 Shaterian has failed to allege the existence of a valid oral
12 contract. See supra section IV.A.8. Absent a valid contract,
13 Shaterian may not state a claim for fraud through misrepresentation
14 in an oral contract. See Newgent v. Wells Fargo Bank, N.A., NO.
15 09cv1525 WQH (WMC), 2010 U.S. Dist. LEXIS 18476, at *13 (S.D. Cal.
16 Mar. 2, 2010). Accordingly, the Court DISMISSES Shaterian's ninth
17 claim.

18 **10. Claim for Declaratory Relief (Claim 10)**

19 Shaterian's tenth claim seeks a declaration concerning the
20 rights and duties of the parties with respect to his first nine
21 claims. This claim is ultimately a request for relief, and
22 Shaterian is not entitled to such relief absent a viable underlying
23 claim. See Lomboy v. SCME Mortg. Bankers, C-09-1160 SC, 2009 U.S.
24 Dist. LEXIS 44158, at *8 (N.D. Cal. May 26, 2009). Accordingly,
25 the Court DISMISSES Shaterian's claim for declaratory relief to the
26 extent it seeks a declaration concerning Shaterian's dismissed
27 claims, i.e., claims two, four, five, eight, and nine.

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1 **B. Wells Fargo's Motion to Strike**

2 Wells Fargo moves to strike paragraphs 64, 65, 111, 116, 131,
3 133, and 174, all of which relate to punitive damages. This Order
4 only considers Well Fargo's Motion to Strike as it relates to
5 paragraphs 131, 133, and 174 -- which concern Shaterian's claim for
6 aiding and abetting fraud and his prayer for relief. Paragraphs
7 64, 65, 111, and 116 relate to Shaterian's second and fifth claims,
8 which are dismissed by this Order. Accordingly, Wells Fargo's
9 motion to strike is DENIED AS MOOT as to paragraphs 64, 65, 111,
10 and 116.

11 Under California law, punitive damages are permitted where "it
12 is proven by clear and convincing evidence that the defendant has
13 been guilty of oppression, fraud, or malice." Cal. Civ. Code §
14 3294(a). As Wells Fargo is a corporate employer, Shaterian must
15 show a Wells Fargo officer, director, or managing agent "authorized
16 or ratified the wrongful conduct . . . or was personally guilty of
17 oppression, fraud, or malice." Id. § 3294(b).

18 In his aiding and abetting fraud claim, Shaterian alleges that
19 the "conduct of DIABLO and WORLD SAVINGS was malicious, oppressive,
20 and/or fraudulent." SAC ¶ 131. He further alleges that WSB "knew,
21 or should have known, that DIABLO, through its agents, employees,
22 and assigns was using [WSB's] financing, name, and goodwill in a
23 fraudulent scheme that included breaches of fiduciary and
24 contractual duties." Id. ¶ 124. Wells Fargo argues that
25 Shaterian's punitive damages allegations should be struck because
26 he has not alleged that an officer, director, or managing agent
27 authorized or ratified wrongful conduct or acted with malice,
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1 oppression, or fraud. MTS at 1-2. In response, Shaterian argues
2 that pick-a-payment loans, which he contends are inherently
3 deceptive, would not have been made available but for the
4 authorization and ratification of high level employees at WSB. MTS
5 Opp'n at 6-7. He also argues WSB was put on notice of the toxicity
6 of pick-a-payment loans by lawsuits filed prior to the submission
7 of Shaterian's loan application. Id. at 7.

8 Viewing the SAC in the light most favorable to Shaterian, it
9 does not appear to contain "redundant, immaterial, impertinent, or
10 scandalous matter." See Fed. R. Civ. P. 12(f). Shaterian alleges
11 that he is entitled to punitive damages for his aiding and abetting
12 fraud claim because WSB knew or should have known that Diablo
13 engaged in a "fraudulent scheme" and the conduct of Diablo and WSB
14 was malicious, oppressive, and/or fraudulent." SAC ¶¶ 124, 131.
15 Shaterian also alleges certain facts suggesting that WSB authorized
16 or ratified his loan. As motions to strike are generally
17 disfavored, these allegations are sufficient. Accordingly, Wells
18 Fargo's Motion to Strike is DENIED.

19
20 **V. CONCLUSION**

21 For the foregoing reasons, the Court GRANTS in part and DENIES
22 in part Wells Fargo's Motion to Dismiss. This is the third
23 complaint filed by Shaterian. Further, as Shaterian has stated,
24 Wells Fargo's prior motion to dismiss, though never ruled on,
25 provided guidance as to which claims required more specificity and
26 which claims were likely to be preempted. See ECF No. 54 ("Joint
27 Statement") at 2. Accordingly, the Court DISMISSES Shaterian's
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1 second, fourth, fifth, eighth, and ninth claims WITHOUT LEAVE TO
2 AMEND. The Court DENIES Wells Fargo's Motion to Dismiss with
3 respect to Shaterian's first, third, sixth, seventh, and tenth
4 claims. The Court also DENIES Wells Fargo's Motion to Strike.

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6 IT IS SO ORDERED.

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8 Dated: November 7, 2011


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UNITED STATES DISTRICT JUDGE