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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.	)	
	)	
	)	

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**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")<sup>1</sup> 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 RJN<sup>2</sup> Exs. A ("WSB Certificate of Corp. Existence"), C ("Wachovia

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16 <sup>1</sup> 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 <sup>2</sup> 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

26  
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  
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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).

29 In Silvas, the Ninth Circuit employed this framework to  
30 determine whether a plaintiff's UCL claims, "as applied," were  
31 preempted under OTS regulations. 514 F.3d at 1004-07. In doing  
32 so, "the Ninth Circuit focused not on the nature of the cause of  
33 action allegedly preempted, but rather on the 'functional effect  
34 upon lending operations of maintaining the cause of action.'" Rumbaua v. Wells Fargo Bank, N.A., No. 11-1998 SC, 2011 U.S. Dist.  
35 LEXIS 95533, at \*19 (N.D. Cal. Aug. 25, 2011) (citation omitted).  
36 The pertinent question was whether applying a state law to a  
37 federal savings association would "impose requirements" concerning  
38 activities regulated by OTS. Id. This Court has previously held  
39 that claims "premised on fraud or promises made by Wells Fargo . .  
40 . are not necessarily preempted, because the only 'requirement'  
41 they impose on federal savings banks is that they be held  
42 responsible for the statements they make to their borrowers."<sup>3</sup> Id.

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<sup>3</sup> Other district courts in this Circuit have reached a similar  
conclusion. See Johannson v. Wachovia Mortg. FSB, No. C 11-02822  
WHA, 2011 U.S. Dist. LEXIS 86692, at \*21-23 (N.D. Cal. Aug. 5,  
2011); DeLeon v. Wells Fargo Bank, N.A., No. 10-CV-01390-LHK, 2011  
U.S. Dist. LEXIS 8296, at \*17-19 (N.D. Cal. Jan. 28, 2011); Ibarra

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  
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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).<sup>4</sup>

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 <sup>4</sup> 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