

1  
2  
3  
4 IN THE UNITED STATES DISTRICT COURT  
5 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
6

7 BRYAN J. VALVERDE, ) Case No. C-11-2423 SC  
8 )  
9 Plaintiff, ) ORDER GRANTING WELLS  
10 v. ) FARGO'S MOTIONS TO DISMISS  
11 ) AND STRIKE  
12 )  
13 WELLS FARGO BANK, N.A.; and ETS )  
14 SERVICES, LLC, INC., )  
15 )  
16 Defendants. )  
17

18 **I. INTRODUCTION**

19 Plaintiff Bryan J. Valverde ("Plaintiff") commenced this  
20 action against Defendants Wells Fargo Bank, N.A. ("Wells Fargo")  
21 and ETS Services, LLC ("ETS")<sup>1</sup> (collectively, "Defendants"),  
22 bringing twelve claims relating to unsuccessful loan modification  
23 discussions between Plaintiff and Wells Fargo and Defendants'  
24 subsequent attempts to foreclose on Plaintiff's home. ECF No. 1  
25 ("Notice of Removal") Ex. A ("Compl."). Two fully briefed motions  
26 are before the Court -- Wells Fargo moves to dismiss and to strike  
27 portions of Plaintiff's Complaint. ECF Nos. 12 ("MTS"), 13

24 <sup>1</sup> Pursuant to California Civil Code § 29241, ETS filed a  
25 declaration of non-monetary status in which it declares that it was  
26 named as a defendant in this action solely because it is the  
27 trustee under the deed of trust executed by Plaintiff. ECF No. 11.  
28 Because no objection to ETS's declaration has been served or filed,  
the Court finds that ETS shall not be required to participate in  
the action, shall not be subject to any monetary awards, and shall  
be bound by any court order relating to the subject deed of trust.  
Cal. Civ. Code § 29241(d).

1 ("MTD"), 17 ("MTD Opp'n"), 18 ("MTS Opp'n"), 27 ("MTD Reply"), 28  
2 ("MTS Reply").<sup>2</sup> For the following reasons, the Court GRANTS Wells  
3 Fargo's motions.

4  
5 **II. BACKGROUND**

6 As it must on a Rule 12(b)(6) motion, the Court assumes the  
7 truth of the well-pleaded facts in Plaintiff's Complaint.<sup>3</sup>  
8 Plaintiff, a resident of Marin County, held title to a property  
9 located at 122 Marion Avenue, Mill Valley, California, 94941-2617  
10 ("the property"). Compl. ¶ 6. On or about July 14, 2007,  
11 Plaintiff obtained a residential adjustable-rate home mortgage loan  
12 of \$1,045,000 from World Savings Bank FSB ("World Savings"). Id. ¶  
13 9. Plaintiff alleges, and Wells Fargo concedes, that World Savings  
14 later changed its name to Wachovia Mortgage, FSB ("Wachovia"), and  
15 is now a division of Wells Fargo. Id. ¶ 2.<sup>4</sup>

16 Plaintiff alleges that in offering the loan, World Savings  
17 engaged in "predatory lending" because it knew "that housing prices  
18 were inflated above real value" and it "intended to sell-off many

19 \_\_\_\_\_  
20 <sup>2</sup> Plaintiff's MTD Opposition exceeds Civil Local Rule 7-4(b)'s page  
21 limit by several pages. After filing it, Plaintiff filed a motion  
22 seeking leave to exceed this page limit, claiming that "Plaintiff's  
23 attorney momentarily failed to consider the page limitation  
24 requirement" and ensuring the Court that such error "will not occur  
25 again." ECF No. 22. The Court GRANTS Plaintiff's Motion, and puts  
26 the parties on notice that it will not condone future violations of  
27 court rules.

28 <sup>3</sup> However, the Court does not accept as true allegations that  
contradict exhibits attached to the Complaint or matters properly  
subject to judicial notice. Manzarek v. St. Paul Fire & Marine  
Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008).

<sup>4</sup> Wells Fargo seeks judicial notice of various documents in support  
of these contentions. ECF No. 14 ("RJN"). The Court judicially  
notices the above facts, as well as the fact that Wachovia  
converted to Wells Fargo Bank Southwest, N.A., which then merged  
with and into Wells Fargo Bank, N.A.

1 loans that had been made to borrowers with sub-standard credit" as  
2 part of a fraudulent scheme. Id. ¶ 10. Plaintiff alleges that due  
3 to the subsequent rapid reduction in home values, he was unable to  
4 sell or refinance his home, and if World Savings had notified him  
5 that housing prices were inflated and that a housing collapse was  
6 imminent, he never would have agreed to the loan. Id.

7 Plaintiff claims representatives of Wachovia told him that he  
8 must be sufficiently in default for three months in order to  
9 qualify for in-house modification of his loan. Id. ¶ 26.  
10 Plaintiff ultimately defaulted on his loan. Id. Plaintiff claims  
11 that when Wells Fargo took over Wachovia, it canceled this in-house  
12 modification program. Id. Plaintiff alleges that he worked toward  
13 loan modification with Defendants<sup>5</sup> for more than a year "while at  
14 the same time Wells Fargo Bank was continuing with their  
15 foreclosure on their dual track approach to loan modification,  
16 always holding out the carrot of a modification at the same time  
17 having the hammer over the homeowner with a foreclosure on his  
18 property." Id. Plaintiff was told he did not qualify for the  
19 government's HAMP loan modification program because it only went up  
20 to \$750,000. Id. He claims Defendants failed to process his loan  
21 modification application and instead continued to tell him that he  
22 needed to produce documentation that he had already produced. Id.  
23 He alleges that Defendants never intended to modify his loan, but  
24 led Plaintiff to believe otherwise. Id.

25 Plaintiff brings twelve causes of action. First, he brings a  
26 declaratory action challenging Defendants' standing to initiate  
27 foreclosure proceedings on the property. Id. ¶¶ 16-23. Second, he

28 <sup>5</sup> Plaintiff's Complaint attributes numerous actions to "Defendants"  
without identifying the specific parties by name.

1 seeks an injunction restraining Defendants from selling the  
2 property. Id. ¶ 24. Third and fourth, he claims intentional  
3 infliction of emotional distress ("IIED") and negligent infliction  
4 of emotional distress ("NIED") caused by Defendants' activity  
5 during the attempted mortgage modification and foreclosure. Id. ¶¶  
6 25-32. Fifth, he brings an action to quiet title to the property,  
7 alleging that Defendants have failed to establish a clear and  
8 unbroken chain of title for both the deed of trust and the  
9 promissory note. Id. ¶¶ 33-39. Sixth, he brings a claim for  
10 breach of the implied covenant of good faith and fair dealing  
11 ("good faith claim"), alleging that Defendants failed to evaluate  
12 Plaintiff's financial condition for foreclosure avoidance; advise  
13 Plaintiff of his statutory right to meet with Wells Fargo regarding  
14 such foreclosure avoidance; and advise Plaintiff of the toll-free  
15 HUD phone number regarding counseling opportunities to avoid the  
16 subject foreclosure. Id. ¶¶ 40-44. Seventh, Plaintiff brings a  
17 claim of deceit, alleging that on or about October 1, 2009,  
18 Defendants falsely told Plaintiff that Plaintiff would be placed in  
19 a loan modification program if he stopped making payments and went  
20 into default, and that until the loan review process was completed,  
21 the house would not be sold at a trustee's sale. Id. ¶¶ 45-55.  
22 Eighth, Plaintiff brings a claim for "fraud and deceit -- negligent  
23 misrepresentation." Id. ¶¶ 56-58. Ninth, Plaintiff brings a claim  
24 for promissory estoppel. Id. ¶¶ 59-64. Tenth, Plaintiff brings a  
25 claim for negligence, alleging Defendants owed Plaintiff a duty to  
26 disclose information "regarding the loan and to act in accordance  
27 with banking industry practice, statute, and regulations, and to  
28 act with respect to Plaintiff in good faith and with fair dealing."

1 Id. ¶¶ 65-68. Eleventh, Plaintiff brings a claim under section  
2 1798.82 of California's Civil Code, alleging "Defendants failed to  
3 timely disclose to Plaintiff the disclosure of his personal  
4 information." Id. ¶¶ 69-71. Twelfth, Plaintiff brings a claim  
5 under section 17200 of California's Business and Professions Code  
6 ("section 17200"), alleging that Defendants implemented and  
7 perpetrated a "fraudulent scheme of inducing Plaintiff to accept  
8 mortgages based on inflated property valuations." Id. ¶¶ 71-98.

9 Defendants removed this action from state court. See Notice  
10 of Removal. On June 30, 2011, Plaintiff filed an ex parte motion  
11 for a temporary restraining order, seeking to restrain Defendants  
12 from selling the property at a trustee's sale scheduled to occur on  
13 July 22, 2011. ECF No. 30. A hearing occurred on July 7, 2011;  
14 the Court denied Plaintiff's motion and permitted the trustee's  
15 sale to go forward as scheduled. ECF No. 34.

16 Wells Fargo moves to dismiss Plaintiff's Complaint. Wells  
17 Fargo argues that Plaintiff's claims are preempted by the Home  
18 Owners' Loan Act ("HOLA"); that Plaintiff lacks standing and is  
19 judicially estopped from asserting claims due to his failure to  
20 disclose them in bankruptcy; and that all of Plaintiff's claims  
21 fail to satisfy the relevant pleading requirements. See MTD.  
22 Wells Fargo also moves to strike portions of Plaintiff's Complaint  
23 in which fraud is alleged on the basis that Plaintiff has failed to  
24 plead facts sufficient to support them. See MTS.

25

26 **III. LEGAL STANDARD**

27 A motion to dismiss under Federal Rule of Civil Procedure  
28 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.

1 Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based  
2 on the lack of a cognizable legal theory or the absence of  
3 sufficient facts alleged under a cognizable legal theory.  
4 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
5 1990). "When there are well-pleaded factual allegations, a court  
6 should assume their veracity and then determine whether they  
7 plausibly give rise to an entitlement to relief." Ashcroft v.  
8 Iqbal, 129 S. Ct. 1937, 1950 (2009). However, "the tenet that a  
9 court must accept as true all of the allegations contained in a  
10 complaint is inapplicable to legal conclusions. Threadbare  
11 recitals of the elements of a cause of action, supported by mere  
12 conclusory statements, do not suffice." Iqbal, 129 S. Ct. at 1950  
13 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).  
14

15 **IV. DISCUSSION**

16 The allegations made in a complaint must be "sufficiently  
17 detailed to give fair notice to the opposing party of the nature of  
18 the claim so that the party may effectively defend against it."  
19 Starr v. Baca, 633 F.3d 1191, 1204 (9th Cir. 2011). As this Order  
20 explains, Plaintiff's Complaint fails to do this. Wells Fargo  
21 raises a number of compelling arguments in favor of prejudicial  
22 dismissal in its motions, but due to the vagueness of Plaintiff's  
23 Complaint, the Court cannot rule on these arguments with finality.  
24 Accordingly, and for the reasons below, the Court DISMISSES  
25 Plaintiff's Complaint. Plaintiff is granted LEAVE TO AMEND his  
26 Complaint to address the deficiencies identified below.

27 **A. HOLA Preemption**

28 Wells Fargo argues that all of Plaintiff's claims are

1 preempted by HOLA because they are "based on the origination of  
2 Plaintiff's mortgage loan and on Wells Fargo's subsequent servicing  
3 of the loan." MTD at 5.

4 Congress enacted HOLA "to charter savings associations under  
5 federal law, at a time when record numbers of homes were in default  
6 and a staggering number of state-chartered savings associations  
7 were insolvent." Silvas v. E\*Trade Mortg. Corp., 514 F.3d 1001,  
8 1004 (9th Cir. 2008). HOLA gives the Office of Thrift Supervision  
9 ("OTS") "broad authority to issue regulations governing thrifts."  
10 Id. at 1005 (citing 12 U.S.C. § 1464).

11 OTS, in turn, has promulgated regulations stating that OTS  
12 "occupies the entire field of lending regulation for federal  
13 savings associations." 12 C.F.R. § 560.2(a) ("section 560.2").  
14 Section 560.2 offers a framework for determining whether a state  
15 law claim is preempted by HOLA and its implementing regulations,  
16 and the Ninth Circuit has held that this framework controls.  
17 Silvas, 514 F.3d at 1005. Courts must first determine whether the  
18 state law is one of the enumerated types of laws expressly  
19 identified as preempted in section 560.2(b). Id. These include:

20 (4) The terms of credit, including amortization  
21 of loans and the deferral and capitalization of  
22 interest and adjustments to the interest rate,  
23 balance, payments due, or term to maturity of  
24 the loan, including the circumstances under  
which a loan may be called due and payable upon  
the passage of time or a specified event  
external to the loan;

25 . . . .

26 (9) Disclosure and advertising, including laws  
27 requiring specific statements, information, or  
28 other content to be included in credit  
application forms, credit solicitations,  
billing statements, credit contracts, or other  
credit-related documents and laws requiring

1 creditors to supply copies of credit reports to  
2 borrowers or applicants;

3 (10) Processing, origination, servicing, sale  
4 or purchase of, or investment or participation  
5 in, mortgages;

6 12 C.F.R. § 560.2(b).

7 If the state law is one of these enumerated types, "the  
8 analysis will end there; the law is preempted." Silvas, 514 F.3d  
9 at 1005. If not, the court should determine "whether the law  
10 affects lending." Id. If it does, the law is presumed to be  
11 preempted, subject to the exceptions provided by section 560.2(c).

12 Id. Section 560.2(c) provides:

13 State laws of the following types are not  
14 preempted to the extent that they only  
15 incidentally affect the lending operations of  
16 Federal savings associations or are otherwise  
17 consistent with the purposes of [section  
18 560.2(a)]:

19 (1) Contract and commercial law;

20 (2) Real property law;

21 (3) Homestead laws specified in 12 U.S.C. §  
22 1462a(f);

23 (4) Tort law;

24 (5) Criminal law; and

25 (6) Any other law that OTS, upon review, finds:

26 (i) Furthers a vital state interest; and

27 (ii) Either has only an incidental effect  
28 on lending operations or is not otherwise  
contrary to the purposes expressed in  
paragraph (a) of this section.

12 C.F.R. § 560.2(c). These exceptions are "to be interpreted  
narrowly." Silvas, 514 F.3d at 1005.

Wells Fargo argues that Plaintiff's claims are preempted under

1 section 560.2(b)(4), (b)(9), and (b)(10). MTD at 4. Wells Fargo  
2 argues that Plaintiff's chief allegations of wrongdoing -- that  
3 Defendants committed fraud, acted in bad faith, or otherwise  
4 violated the law during the loan modification discussions and the  
5 foreclosure procedure -- concern "processing" or "servicing" of the  
6 mortgage and thus compel preemption. Id.

7 Plaintiff argues that HOLA should not apply because only  
8 federal savings banks and associations are regulated by OTS and  
9 covered under HOLA, and while World Savings and Wachovia were  
10 federal savings banks, Wells Fargo is not. MTD Opp'n at 2-3.  
11 Wells Fargo counters that HOLA should apply because "in a merger  
12 the surviving entity succeeds to the rights of the prior entity."  
13 MTD Reply at 1. Wells Fargo cites several court orders from within  
14 this district in which HOLA was found to apply "even though the  
15 conduct at issue occurred after Wells Fargo merged with Wachovia."  
16 Haggarty v. Wells Fargo Bank, N.A., 2011 WL 445183 at \*4 (N.D. Cal.  
17 Feb. 2, 2011); DeLeon v. Wells Fargo Bank, N.A., 729 F. Supp. 2d  
18 1119, 1126 (N.D. Cal. 2010).

19 The Court finds that HOLA applies to this action, including  
20 Wells Fargo's servicing of the loan. However, HOLA preemption is  
21 not as broad as Wells Fargo argues it is. In Silvas, the Ninth  
22 Circuit focused not on the nature of the cause of action allegedly  
23 preempted, but rather on the "functional effect upon lending  
24 operations of maintaining the cause of action." Naulty v.  
25 GreenPoint Mortg. Funding, Inc., No. 09-1542, 2009 WL 2870620, at  
26 \*4 (N.D. Cal. Sep. 3, 2009). "The question was rather whether an  
27 application of a given state law to the activities of federal  
28 savings associations would 'impose requirements' regarding the

1 various activities broadly regulated by the OTS." Id. Courts have  
2 thus interpreted Silvas to not preempt all state law causes of  
3 action arising out of loan modification and/or foreclosure  
4 proceedings, but only those that impose new requirements on the  
5 lender. E.g., Susilo v. Wells Fargo Bank, N.A., No. 11-1814, 2011  
6 WL 2471167, at \*4-6 (C.D. Cal. June 21, 2011) (denying bank's  
7 motion to dismiss borrower's breach of contract, negligence, bad  
8 faith, and fraud claims as preempted by HOLA).

9 To the extent that Plaintiff's claims are premised on fraud or  
10 promises made by Wells Fargo, such claims are not necessarily  
11 preempted. For instance, Plaintiff alleges that Defendants  
12 encouraged him to pursue loan modification when Defendants had no  
13 intention of agreeing to modification; such a claim is not  
14 preempted. As the Court will discuss, this allegation fails to  
15 state a viable claim. However, it also does not impose a new  
16 requirement on Wells Fargo -- the only "requirement" it imposes on  
17 Wells Fargo is that it be held responsible for the statements it  
18 makes to its borrowers. If these causes of action were preempted,  
19 federal savings associations would be free to lie to their  
20 customers with impunity. On the other hand, Plaintiff's  
21 allegations that Wells Fargo failed to use proper care or comply  
22 with industry standards essentially seek to impose new requirements  
23 on the lender, and are thus preempted by HOLA.

24 In light of this analysis, several of Plaintiff's claims are  
25 extremely susceptible to HOLA preemption -- namely, Plaintiff's  
26 negligence, negligent misrepresentation, NIED, and good faith  
27 claims. And given HOLA's wide preemptive effect, Plaintiff has  
28 failed to plead sufficient facts to render any of his claims

1 plausible. Accordingly, the Court DISMISSES all twelve of  
2 Plaintiff's claims, WITH LEAVE TO AMEND. Because Plaintiff's  
3 claims suffer from several additional flaws, the Court continues  
4 its analysis below.

5 **B. Judicial Estoppel**

6 Wells Fargo alleges that Plaintiff filed for Chapter Seven  
7 bankruptcy in June 2010, and as a consequence, any cause of action  
8 Plaintiff possessed at that time is now property of the bankrupt  
9 estate and can no longer be brought by Plaintiff. MTD at 8. While  
10 Plaintiff's Complaint makes no mention of bankruptcy, Plaintiff  
11 admits that he declared bankruptcy. MTD Opp'n at 6-7. He argues  
12 that his causes of action had not yet accrued during the bankruptcy  
13 proceedings, as he was still in negotiation with Wells Fargo at  
14 that time. Id.

15 Wells Fargo is correct that the property of the bankruptcy  
16 estate includes the bankrupt entity's causes of action. Sierra  
17 Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705, 707 (9th  
18 Cir. 1986). Plaintiff's Complaint makes numerous allusions to  
19 wrongdoing on the part of World Savings in the initiation of his  
20 loan; because any claim arising from the 2007 loan origination  
21 would have accrued by the 2010 bankruptcy proceedings, Plaintiff  
22 lacks standing to bring any such claims. Plaintiff's Complaint is  
23 too vague as to Wells Fargo's alleged misrepresentations and  
24 promises for the Court to determine whether Plaintiff's claims  
25 plausibly accrued after the bankruptcy proceedings had concluded.  
26 Accordingly, Plaintiff's claims related to loan modification are  
27 DISMISSED WITH LEAVE TO AMEND for failure to plead with the  
28 required specificity.

1           **C. Claims Challenging the Foreclosure Sale**

2           Wells Fargo argues that Plaintiff's first, second, fifth, and  
3 twelfth claims challenging the foreclosure sale fail because  
4 Plaintiff has not tendered his indebtedness to Wells Fargo. MTD at  
5 11. Wells Fargo also argues that it need not be in possession of  
6 the original promissory note to initiate foreclosure proceedings,  
7 and so Plaintiff's declaratory relief and quiet title claims fail  
8 as a matter of law. Id. at 12.

9           Plaintiff admits that a tender of indebtedness is required to  
10 set aside a foreclosure, but argues that tender is not required to  
11 preemptively challenge a party's standing to foreclose on a  
12 property; Plaintiff cites no law for this novel proposition. MTD  
13 Opp'n at 12. Plaintiff also does not respond to Wells Fargo's  
14 challenges to his "failure to produce the note" theory. Id.

15           The Court agrees with Wells Fargo, and DISMISSES Plaintiff's  
16 first, second, fifth, and twelfth claims.<sup>6</sup> Because Plaintiff may  
17 cure these claims by tendering his indebtedness to Wells Fargo, the  
18 Court does so WITH LEAVE TO AMEND.

19           **D. NIED and IIED Claims**

20           An NIED claim has the same elements as a claim for negligence.  
21 Lawson v. Mgmt. Activities, 69 Cal. App 4th 626, 656 (1999).  
22 Accordingly, a plaintiff asserting an NIED claim must show that the  
23 defendant owed the plaintiff a duty of care. Id. To plead a claim  
24 for IIED, Plaintiff must allege: "(1) extreme and outrageous  
25 conduct by the defendant with the intention of causing, or reckless  
26 disregard of the probability of causing, emotional distress; (2)

27 \_\_\_\_\_  
28 <sup>6</sup> Furthermore, as the foreclosure sale was scheduled to occur in  
July 2011, the Court assumes it has already occurred, and so any  
challenge to Wells Fargo's standing is likely moot.

1 the plaintiff's suffering severe or extreme emotional distress; and  
2 (3) actual and proximate causation of the emotional distress by the  
3 defendant's outrageous conduct." Christensen v. Super. Ct., 54  
4 Cal. 3d 868, 903 (1991). Conduct is only "extreme and outrageous"  
5 when it was "so extreme as to exceed all bounds of that usually  
6 tolerated in a civilized community." Davidson v. City of  
7 Westminster, 32 Cal.3d 197, 185 (1982) (citation omitted). For  
8 emotional distress to be severe, it must be "of such substantial  
9 quantity or enduring quality that no reasonable man in a civilized  
10 society should be expected to endure it." Fletcher v. Western  
11 Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 397, (Ct. App. 1970).

12 Wells Fargo argues that Plaintiff's NIED and IIED claims fail  
13 as a matter of law. MTD at 14. Wells Fargo argues that to state  
14 an NIED claim, Plaintiff must allege Defendants breached a duty of  
15 care owed to Plaintiff, and argues that because a financial  
16 institution "owes no duty of care to a borrower when the  
17 institution's involvement in the loan transaction does not exceed  
18 the scope of its conventional role as a mere lender of money,"  
19 Plaintiff's NIED claim fails. Id. at 14-15 (citing Nymark v. Heart  
20 Fed. Savings & Loan, 231 Cal. App. 3d 1089, 1096 (Ct. App. 1991)).  
21 Plaintiff responds that "the bank exceeded its conventional role as  
22 money lender" by offering "comprehensive restructuring and loan  
23 modification services." MTD Opp'n at 14.

24 The Court agrees with Wells Fargo that Plaintiff's NIED and  
25 IIED claims are insufficiently pleaded. In rather broad strokes  
26 and with little detail, Plaintiff alleges that he suffered extreme  
27 emotional distress due to Defendants' conduct. He fails to state  
28 what about Defendants' conduct rendered it so extreme as to "exceed

1 all bounds of that usually tolerated in a civilized community." He  
2 fails to state what duty Wells Fargo owed him, and how that duty  
3 was breached. He fails to allege proper damages. However, the  
4 Court rejects Wells Fargo's arguments that these claims are barred  
5 as a matter of law.

6 **E. Fraud and Negligent Misrepresentation Claims**

7 Wells Fargo challenges Plaintiff's seventh and eighth claims,  
8 as well as other portions of Plaintiff's complaint which allege  
9 fraud. MTD at 17. Claims sounding in fraud are subject to a  
10 higher pleading standard. Fed. R. Civ. P. 9(b). "To satisfy Rule  
11 9(b), a pleading must identify the who, what, when, where, and how  
12 of the misconduct charged, as well as what is false or misleading  
13 about [the purportedly fraudulent] statement, and why it is false."  
14 Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d  
15 1047, 1055 (9th Cir. 2011) (internal quotation marks omitted).  
16 Plaintiff's Complaint obliquely refers to numerous unidentified  
17 "statements" by unidentified representatives of Defendants; he  
18 fails to sufficiently identify "what" these statements were, "when"  
19 they were made, or "who" said them. Far more detail is required  
20 than what Plaintiff supplies here. Accordingly, Plaintiff's  
21 seventh and eighth fraud claims are DISMISSED WITH LEAVE TO AMEND  
22 and Wells Fargo's MTS is GRANTED.

23 **F. Good Faith Claim**

24 In California, "[e]very contract imposes upon each party a  
25 duty of good faith and fair dealing in its performance and its  
26 enforcement." Carma Dev. (Cal.), Inc. v. Marathon Dev. California,  
27 Inc., 2 Cal. 4th 342, 371 (1992). "In general, the covenant  
28 imposes a duty upon a party to a contract not to deprive the other

1 party of the benefits of the contract." Sutherland v. Barclays  
2 American/Mort. Corp., 53 Cal. App. 4th 299, 314 (Ct. App. 1997).

3 Wells Fargo alleges that Plaintiff's good faith claim "is in  
4 actuality a claim that Wells Fargo breached Civil Code § 2923.5."  
5 MTD at 20. Wells Fargo argues that section 2923.5 is preempted by  
6 HOLA. Id. Wells Fargo also argues that "one of the elements of a  
7 breach of the covenant claim is that the plaintiff did all, or  
8 substantially all, of the significant things the contract  
9 required," and because Plaintiff admits that he defaulted on the  
10 loan, his claim fails. Id.

11 California's Civil Code provides a framework for non-judicial  
12 foreclosure: the lender must first record a notice of default; once  
13 three months have elapsed, the lender must give notice of the  
14 planned foreclosure sale. Cal. Civ. Code § 2924. Within this  
15 framework, section 2923.5 concerns the notice of default. It  
16 requires the "mortgagee, trustee, beneficiary, or authorized agent"  
17 seeking to file a notice of default to first contact the borrower  
18 in person or by telephone "in order to assess the borrower's  
19 financial situation and explore options for the borrower to avoid  
20 foreclosure." Cal. Civ. Code § 2923.5(a)(2). The notice of  
21 default may not be filed until thirty days after this initial  
22 contact or the statute's due diligence requirements are satisfied.  
23 Id. § 2923.5(a)(1). During this initial contact, the party seeking  
24 to file a notice of default must advise the borrower that he or she  
25 has the right to request a subsequent meeting and, if requested,  
26 schedule the meeting within fourteen days. Id. § 2923.5(a)(2).

27 The California Court of Appeal has narrowly interpreted  
28 section 2923.5 "as to avoid having the state law invalidated by

1 federal preemption." Mabry v. Super. Ct., 185 Cal. App. 4th 208,  
2 231 (Ct. App. 2010). The rights provided to borrowers under  
3 section 2923.5 are purely procedural -- there is no "right" to a  
4 loan modification. Id. The lender's obligations under section  
5 2923.5 to "assess" the borrower's financial situation and "explore"  
6 options to avoid foreclosure can be satisfied by simply asking the  
7 borrower "why can't you make your payments?" and "telling the  
8 borrower the traditional ways that foreclosure can be avoided  
9 (e.g., deeds 'in lieu,' workouts, or short sales)." Id. at 232.  
10 The statute does not place a duty on the lender "to become a loan  
11 counselor itself." Id. at 219. The only remedy section 2923.5  
12 offers is the postponement of a foreclosure sale until the lender  
13 comes into compliance with the statute. Mabry, 185 Cal. App. 4th  
14 at 213.

15 To the extent Plaintiff's bad faith claim is merely a claim of  
16 violation of section 2923.5, this claim is likely moot given the  
17 scheduled July 2011 foreclosure sale of the house, as the only  
18 remedy available under section 2923.5 -- postponement of the  
19 foreclosure sale -- would be no longer available. To the extent  
20 Plaintiff attempts to premise a separate good faith claim for  
21 damages on Wells Fargo's alleged failure to satisfy section 2923.5,  
22 such a claim is preempted under Mabry's analysis.

23 Because Plaintiff has failed to identify the contract at issue  
24 and the benefits deprived by Defendants, he has failed to plead  
25 this claim with the required specificity. However, the Court  
26 rejects Wells Fargo's argument that Plaintiff's failure to make  
27 payments under the note relieved Defendants of their duty to act in  
28 good faith in performing under the note and in enforcing it. As

1 such, Plaintiff may be able to plead a claim based on Defendants'  
2 conduct as a party to the deed of trust. Because Plaintiff has not  
3 pleaded sufficient facts, the Court DISMISSES, WITH LEAVE TO AMEND,  
4 Plaintiff's claim.

5 **G. Promissory Estoppel Claim**

6 The elements of a claim for promissory estoppel are: "(1) a  
7 promise clear and unambiguous in its terms; (2) reliance by the  
8 party to whom the promise is made; (3)[the] reliance must be both  
9 reasonable and foreseeable; and (4) the party asserting the  
10 estoppel must be injured by his reliance." Aceves v. U.S. Bank,  
11 N.A., 192 Cal. App. 4th 218, 225 (Ct. App. 2011).

12 Wells Fargo argues that Plaintiff's Complaint does not allege  
13 a clear and unambiguous promise upon which Plaintiff reasonably  
14 relied to his detriment. MTD at 21. Wells Fargo alleges that  
15 Plaintiff's assertion that Wells Fargo told Plaintiff to stop  
16 making mortgage payments in order to qualify for a loan  
17 modification is "implausible on its face." Id. It also alleges  
18 that Plaintiff's claim that his decision to default on the mortgage  
19 ruined his credit is implausible.

20 While the Court agrees with Wells Fargo that Plaintiff has  
21 failed to identify a "clear and unambiguous promise," it does not  
22 agree that Plaintiff's allegations are implausible on their face.<sup>7</sup>  
23 Plaintiff's Complaint alleges that representatives of Wachovia told  
24 him that he must be sufficiently in default for three months in  
25 order to qualify for in-house modification of his loan. Compl. ¶

26 \_\_\_\_\_  
27 <sup>7</sup> Wells Fargo seeks judicial notice of several filings in  
28 Plaintiff's bankruptcy proceeding in support of the factual  
argument that Plaintiff's indebtedness to Wells Fargo was dwarfed  
by his indebtedness to other creditors. The Court DECLINES this  
request.

1 26. He does not allege that these representatives promised him  
2 that he would qualify for the loan if he was sufficiently in  
3 default; he merely alleges that he would not qualify for in-house  
4 modification if he were not considerably in default. This pleading  
5 is not sufficient to support a promissory estoppel claim.  
6 Plaintiff must include considerably more detail in order to render  
7 this claim plausible. Furthermore, Plaintiff must establish that  
8 his cause of action is not duplicative of a claim for breach of  
9 contract, as "tort recovery for breach of the covenant is available  
10 only in limited circumstances, generally involving a special  
11 relationship between the contracting parties." Bionghi v. Met.  
12 Water Dist., 70 Cal. App. 4th 1358, 1370 (Ct. App. 1999).

13 Plaintiff alleges no special relationship here.

14 **H. California Civil Code § 1798.82 Claim**

15 In extremely brief language, Plaintiff claims Wells Fargo  
16 violated California Civil Code § 1798.82 by failing "to timely  
17 disclose to Plaintiff the disclosure of his personal information."  
18 Compl. ¶ 70. Wells Fargo calls this claim "as vague as can be."  
19 MTD at 23. The Court agrees. Nowhere in Plaintiff's twenty-five-  
20 page Complaint is there even a fleeting reference to facts that  
21 could support this claim. No "personal information" is discussed,  
22 much less improper disclosure of it. The Court therefore DISMISSES  
23 this claim.

24 **I. Section 17200 Claim**

25 Wells Fargo argues that Plaintiff's section 17200 claim --  
26 which is premised on Plaintiff's first eleven claims -- is not  
27 pleaded with the requisite particularity. MTD at 23-24. In  
28 particular, Wells Fargo contends that Plaintiff "lumps all

1 defendants together without identifying which defendant committed  
2 which alleged violation," and the claim "is defective to the same  
3 extent that its underlying claims are defective." Id. The Court  
4 agrees. The Complaint fails to state a single viable claim, and as  
5 such, the derivative section 17200 claim fails as well.

6 In sum, Plaintiff's Complaint falls far short of federal  
7 pleading standards. While Plaintiff is granted leave to amend his  
8 complaint to address the above shortcomings, he is put on notice  
9 that any claims dismissed on a subsequent motion to dismiss will be  
10 dismissed WITHOUT LEAVE TO AMEND. The Court will only grant  
11 additional leave to amend if Plaintiff files a motion under Rule  
12 15(a)(2) of the Federal Rules of Civil Procedure establishing that  
13 justice requires it.

14 Furthermore, the Court puts Plaintiff and his attorney on  
15 notice that under 28 U.S.C. § 1927, "[a]ny attorney . . . who so  
16 multiplies the proceedings in any case unreasonably and vexatiously  
17 may be required by the court to satisfy personally the excess  
18 costs, expenses, and attorneys' fees reasonably incurred because of  
19 such conduct." The Court may impose such sanctions sua sponte.  
20 Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.3d  
21 1112, 1118 (9th Cir. 2000). If Plaintiff makes any frivolous  
22 arguments in his amended complaint or pleads any clearly meritless  
23 claims, he and his counsel may be subject to sanctions under 28  
24 U.S.C. § 1927, Federal Rule of Civil Procedure 11, the Court's  
25 local rules, and the Court's inherent power.

26 ///  
27 ///  
28 ///

1 **V. CONCLUSION**

2 For the foregoing reasons, the Court GRANTS the motion to  
3 dismiss and the motion to strike filed by Defendant Wells Fargo  
4 Bank, N.A. Plaintiff Bryan J. Valverde's Complaint is DISMISSED,  
5 WITH LEAVE TO AMEND. Plaintiff is granted thirty (30) days' leave  
6 to file an amended complaint. If Plaintiff fails to file an  
7 amended complaint within this time frame, this action will be  
8 dismissed WITH PREJUDICE.

9  
10 IT IS SO ORDERED.

11  
12 Dated: August 25, 2011



13 UNITED STATES DISTRICT JUDGE

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28