

United States District Court  
For the Northern District of California

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

RICHARD SOWINSKI,	)	Case No. 11-6431-SC
	)	
Plaintiff,	)	ORDER GRANTING IN PART AND
	)	DENYING IN PART MOTION TO
v.	)	DISMISS SECOND AMENDED
	)	COMPLAINT AND GRANTING
WELLS FARGO BANK, N.A., and DOES	)	MOTION TO EXPUNGE LIS
1-10,	)	<u>PENDENS</u>
	)	
Defendants.	)	
	)	

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**I. INTRODUCTION**

Plaintiff Richard Sowinski ("Plaintiff") challenges Defendant Wells Fargo Bank, N.A.'s ("Wells Fargo") foreclosure of his residential mortgage and the subsequent trustee sale of his residence. In connection with this action, Plaintiff recorded a lis pendens against the subject property.<sup>1</sup> Now before the Court is Wells Fargo's motion to dismiss Plaintiff's Second Amended Complaint ("SAC") and motion to expunge the lis pendens. ECF Nos.

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<sup>1</sup> "A lis pendens is recorded by someone asserting a real property claim, to give notice that a lawsuit has been filed which may, if that person prevails, affect title to or possession of the real property described in the notice." Fed. Deposit Ins. Corp. v. Charlton, 17 Cal. App. 4th 1066, 1069 (Cal. Ct. App. 1993). "Once a lis pendens is filed, it clouds the title and effectively prevents the property's transfer until the litigation is resolved or the lis pendens is expunged." BGJ Associates, LLC v. Superior Court, 75 Cal. App. 4th 952, 966 (Cal. Ct. App. 1999).

1 39 (Motion to Dismiss ("MTD")), 41 (Motion to Expunge ("MTE")).  
2 The motions are fully briefed. ECF Nos. 45 ("Opp'n"), 46 ("Reply  
3 ISO MTD"); 47 ("Reply ISO MTE"). Pursuant to Civil Local Rule 7-  
4 1(b), the Court finds this matter appropriate for resolution  
5 without oral argument. For the reasons set forth below, Wells  
6 Fargo's motion to dismiss is GRANTED in part and DENIED in part,  
7 and its motion to expunge is GRANTED.

8  
9 **II. BACKGROUND**

10 On February 3, 2006 Plaintiff and his wife, Mary B. Sowinski  
11 borrowed \$672,000 from World Savings Bank, FSB ("WSB"). ECF No. 40  
12 (Request for Judicial Notice ("RJN")) Ex. 1. The loan was secured  
13 by a deed of trust recorded against Plaintiff's residence in Walnut  
14 Creek, California. RJN Ex. 2 ("DOT"). According to judicially  
15 noticeable correspondence from federal banking regulators, WSB  
16 later changed its name to Wachovia Mortgage, FSB, which was  
17 subsequently converted to Wells Fargo Bank Southwest, N.A., and  
18 then merged into Wells Fargo. RJN Exs. 3, 4.

19 At the time of the loan transaction, Plaintiff was sixty-eight  
20 years old and allegedly suffered from "pre-Alzheimers." ECF No. 38  
21 ("SAC") ¶ 1. Plaintiff alleges that he was intentionally misled as  
22 to the terms of the loan transaction. Id. ¶ 9. Specifically,  
23 Plaintiff alleges that: (1) WSB falsely represented that the  
24 interest rate on the loan was fixed rather than adjustable; (2) WSB  
25 falsely stated Plaintiff's income and the value of the property on  
26 the loan application; (3) Plaintiff was not permitted to read the  
27 loan documents and, "because of his weakened mental state," he  
28 could not have understood them if he had. Id. As a result of

1 these alleged misrepresentations, Plaintiff took out a loan he  
2 could not afford. Id. ¶ 12.

3 In January 2008, Plaintiff contacted Wells Fargo about  
4 increases to his monthly loan payments. Id. ¶ 25. One of Wells  
5 Fargo's agents offered to assist Plaintiff with a loan  
6 modification, and, for the next twenty-eight months, Plaintiff  
7 submitted and re-submitted loan modification application materials.  
8 Id. ¶¶ 25-26. Plaintiff alleges that Wells Fargo never reached a  
9 decision on his application. Id. ¶ 26.

10 On August 18, 2011, a notice of default was recorded with the  
11 Contra Costa County Recorder's Office, indicating that Plaintiff  
12 was over \$46,000 in arrears on his loan. RJN Ex. 5. On September  
13 23, 2011, a substitution of trustee was recorded, substituting NDeX  
14 West, LLC as the new trustee. SAC ¶ 18; RJN Ex. 6. The  
15 substitution was recorded by "WELLS FARGO BANK, NA SUCCESSOR BY  
16 MERGER TO WELLS FARGO BANK SOUTHWEST, NA F/K/A WACHOVIA MORTGAGE."  
17 RJN Ex. 6. Plaintiff alleges that Defendants concocted this name  
18 "so that it falsely appears as though there was no need for an  
19 actual sale/transfer/assignment and that it is the same entity as  
20 the originating bank proceeding with foreclosure under the law."  
21 SAC ¶ 24.

22 On December 2, 2011, Plaintiff filed the instant action in  
23 California Superior Court, and Wells Fargo timely removed to this  
24 Court. ECF No. 1 Ex A. On December 12, 2011, a few days after the  
25 action was filed, a trustee's sale was conducted, through which  
26 Wells Fargo allegedly sold the property to itself at a below-market  
27 price. SAC ¶ 28. According to the trustee's deed upon sale, the  
28 total debt at the time of sale was \$763,042.60. RJN Ex. 8.

1           On or about December 13, 2011, an unidentified local agent of  
2 Wells Fargo allegedly offered Plaintiff \$10,000 if he and his wife  
3 would vacate the property by January 2, 2012. SAC ¶ 29. Plaintiff  
4 told the agent that he and his wife needed more time and the agent  
5 allegedly agreed to give them until January 20, 2012. Id. Wells  
6 Fargo initiated unlawful detainer proceedings on January 4, 2012.  
7 RJN Ex. 9. There is no mention of the "cash for keys" agreement in  
8 the unlawful detainer complaint. See id. Plaintiff allegedly  
9 vacated the property on January 15, 2012. SAC ¶ 29. After  
10 Plaintiff surrendered his keys, the Wells Fargo agent allegedly  
11 revoked the offer because of Plaintiff's pending lawsuit. Id. ¶  
12 30. Wells Fargo's counsel informed Plaintiff's counsel that Wells  
13 Fargo would only pay the \$10,000 if Plaintiff agreed to dismiss  
14 this action with prejudice. Id. Plaintiff refused this offer.  
15 Id. On March 16, 2012, Wells Fargo obtained an unlawful detainer  
16 judgment against Plaintiff, RJN Ex. 11, allegedly destroying  
17 Plaintiff's credit rating, SAC ¶ 31.

18           On February 13, 2012, Wells Fargo moved to dismiss the first  
19 complaint. ECF No. 11. On February 27, 2012, the response  
20 deadline, Plaintiff filed an amended complaint, asserting claims  
21 for: (1) quiet title, (2) declaratory relief, (3) injunctive  
22 relief, and (4) violation of the California Unfair Competition Law  
23 ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq. ECF No. 14 (First  
24 Amended Complaint ("FAC")). After Wells Fargo filed an unopposed  
25 motion to dismiss the FAC, the Court dismissed Plaintiff's claims  
26 for declaratory relief and injunctive relief with prejudice. ECF

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1 No. 37 ("Nov. 26 Order").<sup>2</sup> The Court dismissed Plaintiff's other  
2 two claims with leave to amend. Id. at 3. The Court found that  
3 Plaintiff's quiet title claim failed because Plaintiff had not  
4 alleged a valid and viable offer of tender. Id. at 4. Plaintiff's  
5 UCL claim was dismissed because it was supported by nothing more  
6 than "legal conclusions and generalities." Id. Wells Fargo also  
7 filed an unopposed motion to expunge the lis pendens, which the  
8 Court denied in order to "give Plaintiff one last chance to  
9 establish the 'probable validity' of a claim concerning the real  
10 estate at issue." Id. at 6.

11 Plaintiff subsequently amended his complaint a second time.  
12 Like the FAC, the SAC asserts claims for quiet title and violation  
13 of the UCL. The SAC also asserts three new claims for breach of  
14 oral contract, rescission of written contract due to  
15 unconscionability, and elder abuse.<sup>3</sup> Wells Fargo now moves to  
16 dismiss all five claims pursuant to Federal Rule of Civil Procedure  
17 12(b)(6). Wells Fargo also moves to expunge the lis pendens.

18  
19 **III. DISCUSSION**

20 **A. Motion Dismiss**

21 A motion to dismiss under Federal Rule of Civil Procedure  
22 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.  
23 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based  
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25 <sup>2</sup> Sowinski v. Wells Fargo Bank, N.A., 2012 WL 5904711, 2012 U.S.  
Dist. LEXIS 168198 (N.D. Cal. Nov. 26, 2012).

26 <sup>3</sup> In the SAC, Plaintiff numbers his causes of action as follows:  
27 (1) quiet title, (2) breach of oral contract, (3) rescission, (5)  
28 elder abuse, and (6) UCL. The Court assumes that the omission of  
claim four was merely a numbering error and refers to Plaintiff's  
claims for elder abuse and UCL as claims (4) and (5), respectively.

1 on the lack of a cognizable legal theory or the absence of  
2 sufficient facts alleged under a cognizable legal theory."  
3 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
4 1988). "When there are well-pleaded factual allegations, a court  
5 should assume their veracity and then determine whether they  
6 plausibly give rise to an entitlement to relief." Ashcroft v.  
7 Iqbal, 556 U.S. 662, 664 (2009). However, "the tenet that a court  
8 must accept as true all of the allegations contained in a complaint  
9 is inapplicable to legal conclusions. Threadbare recitals of the  
10 elements of a cause of action, supported by mere conclusory  
11 statements, do not suffice." Id. at 663 (citing Bell Atl. Corp. v.  
12 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a  
13 complaint must be both "sufficiently detailed to give fair notice  
14 to the opposing party of the nature of the claim so that the party  
15 may effectively defend against it" and "sufficiently plausible"  
16 such that "it is not unfair to require the opposing party to be  
17 subjected to the expense of discovery." Starr v. Baca, 633 F.3d  
18 1191, 1204 (9th Cir. 2011).

19 With these principles in mind, the Court turns to each of the  
20 claims challenged by Wells Fargo.

21 1. Quiet Title

22 Defendants move to dismiss Plaintiff's first cause of action  
23 for quiet title on the ground that Plaintiff has once again failed  
24 to allege a valid and viable offer of tender. MTD at 4. Plaintiff  
25 responds that the tender requirement only applies in cases where a  
26 plaintiff alleges defects in the foreclosure process and Plaintiff  
27 has made no such allegation here. Opp'n at 10. Plaintiff cites no  
28 authority to support this proposition, and the case law holds

1 otherwise. See Ananiev v. Aurora Loan Services, LLC, C 12-2275 SI,  
2 2012 WL 4099568, at \*3 (N.D. Cal. Sept. 17, 2012). Further,  
3 Plaintiff has in fact alleged deficiencies in the foreclosure  
4 process. Specifically, Plaintiff alleges that Wells Fargo's claim  
5 to the property is based on a "fraudulent substitution of trustee."  
6 FAC ¶ 34.

7 Plaintiff also argues that he need not tender because he has  
8 alleged that the underlying loan transaction was unconscionable.  
9 Opp'n at 11. This argument has merit. As the California Court of  
10 Appeal held in Lona v. Citibank, N.A., "if the borrower's action  
11 attacks the validity of the underlying debt, a tender is not  
12 required since it would constitute an affirmation of the debt."  
13 202 Cal. App. 4th 89, 112 (Cal. Ct. App. 2011). Wells Fargo  
14 suggests that the Court's November 26 Order somehow precludes  
15 Plaintiff from asserting an exception to the tender rule. Mot. at  
16 4; Reply at 1. But nothing in that Order was intended to set aside  
17 well-established California law. Wells Fargo also asserts that  
18 Lona is inapposite because that case dealt with an equitable cause  
19 of action to set aside a trustee's sale, while this case concerns a  
20 claim for quiet title. Reply at 2. However, Wells Fargo does not  
21 explain why that distinction is significant or why the Court could  
22 not construe Plaintiff's claim as an equitable cause of action.  
23 Wells Fargo also argues that Lona's discussion of the  
24 unconscionability exception should be accorded limited weight since  
25 the defendant in that case only lost on the issue because it failed  
26 to brief it. Id. at 3. But Wells Fargo fails to address the long  
27 line of authority recognizing this particular exception to the  
28 tender rule. See, e.g., Shuster v. BAC Home Loans Servicing, LP,

1 211 Cal. App. 4th 505, 512 (Cal. Ct. App. 2012); Onofrio v. Rice,  
2 55 Cal. App. 4th 413, 424 (Cal. Ct. App. 1997); Stockton v. Newman,  
3 148 Cal. App. 2d 558, 564 (Cal. Ct. App. 1957).

4 Wells Fargo also argues that Plaintiff's claims of  
5 unconscionability are barred by the Home Owners Loan Act ("HOLA"),  
6 12 U.S.C. 1461 et seq. Pursuant to regulations promulgated by the  
7 Office of Thrift Supervision ("OTS"), state laws are preempted  
8 where they purport to impose requirements regarding "[t]he terms of  
9 credit, including amortization of loans and the deferral and  
10 capitalization of interest and adjustments to the interest rate,  
11 balance, payments due, or term to maturity of the loan . . . ." 12  
12 C.F.R. § 560.2(b)(4). However, state "contract and commercial  
13 law," "real property law," and "tort law," among other things, "are  
14 not preempted to the extent that they only incidentally affect  
15 lending operations . . . or are otherwise consistent with the  
16 purpose [of the regulation]." Id. § 560.2(c). Accordingly, "[t]o  
17 the extent that [a] [p]laintiff's claims are premised on fraud or  
18 promises made by [the lender], such claims are not necessarily  
19 preempted, because the only 'requirement' they impose on federal  
20 savings banks is that they be held responsible for the statements  
21 they make to their borrowers." Rumbaua v. Wells Fargo Bank, N.A.,  
22 No. 11-1998 SC, 2011 WL 3740828, at \*7 (N.D. Cal. Aug. 25, 2011).  
23 Such is the case here. Plaintiff alleges that he was given a loan  
24 he could not afford because WSB -- Wells Fargo's predecessor-in-  
25 interest -- misrepresented his income and the value of his property  
26 on a loan application and because WSB lied about the terms of the  
27 proposed loan. SAC ¶ 35. Contrary to Wells Fargo's argument,  
28 Plaintiff's claim for quiet title does not impose additional



1 requirements on the terms of credit that are included in the the  
2 loan agreement. Rather, the claim asserts that the terms of credit  
3 were the result of a series of misrepresentations. Such a claim is  
4 not preempted by HOLA.

5 Finally, Wells Fargo argues that, under principles of res  
6 judicata, the unlawful detainer action precludes Plaintiff from  
7 challenging the validity of the foreclosure sale. It is true that  
8 "subsequent fraud or quiet title suits founded upon allegations of  
9 irregularity in a trustee's sale are barred by [a] prior unlawful  
10 detainer judgment." Malkoskie v. Option One Mortg. Corp., 188 Cal.  
11 App. 4th 968, 974 (Cal. Ct. App. 2010) (quoting Vella v. Hudgins,  
12 20 Cal. 3d 251, 256 (Cal. 1977)). Plaintiff's quiet title claim  
13 is, in part, predicated on irregularities in the foreclosure sale.  
14 See FAC ¶ 34. However, as noted above, it is also based on  
15 allegations that Wells Fargo's predecessor-in-interest made a  
16 number of misrepresentations during loan origination. Accordingly,  
17 to the extent that Plaintiff's claim for quiet title is not  
18 predicated on alleged deficiencies in the foreclosure process, it  
19 is not precluded by the unlawful detainer judgment.

20 For these reasons, Wells Fargo's Motion to Dismiss is DENIED  
21 as to Plaintiff's first claim for quiet title.

22 2. Breach of Oral Contract

23 Plaintiff's second cause of action for breach of oral  
24 contract, along with his third and fourth causes of action, were  
25 not raised in either of his two prior complaints. After Plaintiff  
26 neglected to respond to Wells Fargo's last motion to dismiss, the  
27 Court dismissed Plaintiff's first amended complaint with leave to  
28 amend so that Plaintiff could cure certain pleading deficiencies.

1 The Court did not grant Plaintiff leave to amend to plead three  
2 additional causes of action, nor is there any indication that Wells  
3 Fargo consented to these amendments. Accordingly, the amendments  
4 are procedurally improper. See Fed. R. Civ. P. 15 (plaintiff may  
5 amend once as a matter of course and any other amendments require  
6 opposing party's written consent or court's leave). However, as  
7 leave to amend should be freely given, id. 15(a)(1)(B)(3), the  
8 Court declines to dismiss these new causes of action. Any future  
9 amendments which would add new causes of action should be made in  
10 accordance with Rule 15.

11 Plaintiff's second cause of action is predicated on  
12 Defendants' alleged breach of an oral agreement to pay Plaintiff  
13 \$10,000 if he and his wife moved out of the subject property by a  
14 certain date. Wells Fargo moves to dismiss on two grounds. First,  
15 it argues that the claim is barred by the statute of frauds. MTD  
16 at 5. This argument lacks merit. While the statute of frauds  
17 clearly applies to agreements for the sale of real property and  
18 agreements to pay an indebtedness secured by mortgage upon the  
19 property purchased, Cal. Civ. Code § 1624(a)(3), (6), Wells Fargo  
20 cites no authority suggesting that it also applies to the type of  
21 cash-for-keys agreement at issue here.

22 Wells Fargo's second argument, that Plaintiff has failed to  
23 plead the elements of an oral contract, MTD at 5-6, is more  
24 persuasive. According to the SAC, Wells Fargo's agent offered  
25 Plaintiff \$10,000 to move out of the property by January 2, 2012.  
26 SAC ¶ 38. Plaintiff counter-offered, and Wells Fargo's agent  
27 allegedly agreed to a January 20, 2012 move-out date. Id.  
28 However, it is unclear from the SAC -- and Plaintiff's opposition

1 -- whether there was a meeting of the minds over the counter-offer,  
2 i.e., whether the parties agreed that Plaintiff would be  
3 compensated for moving out by January 20. Plaintiff has also  
4 failed to plead whether the unidentified agent mentioned in the SAC  
5 had the authority to make such a deal on behalf of Wells Fargo.  
6 Plaintiff's opposition papers aver that Plaintiff confirmed the  
7 agent's authority, but the Court cannot consider facts asserted in  
8 the opposition without converting Wells Fargo's 12(b)(6) motion  
9 into a motion for summary judgment. See United States v. Ritchie,  
10 342 F.3d 903, 909 (9th Cir. 2003).

11 Accordingly, the Court DISMISSES Plaintiff's claim for breach  
12 of oral contract, but GRANTS Plaintiff leave to amend so as to  
13 plead the exact terms of the oral contract and the purported  
14 agent's authority to enter into the alleged contract.

15 3. Rescission

16 Wells Fargo argues that Plaintiff's third cause of action for  
17 "rescission of written contract due to unconscionability pursuant  
18 to [California] Civil Code § 1670.5" fails because  
19 unconscionability is an affirmative defense, not a cause of action.  
20 The Court agrees. Civil Code section 1670.5 provides that a court  
21 may refuse to enforce a contract if it finds "the contract or any  
22 clause of the contract to have been unconscionable at the time it  
23 was made." Cal. Civ. Code § 2670.5(a). Nothing in the statute  
24 provides for an independent cause of action. Prevailing case law  
25 is in accord. See Rubio v. Capital One Bank, 613 F.3d 1195, 1206  
26 (9th Cir. 2010). Plaintiff cites Lona, 202 Cal. App. 4th at 101,  
27 for the contrary proposition, but nothing in that decision suggests  
28 that a plaintiff can state an independent claim for

1 unconscionability. In any event, Plaintiff's rescission claim is  
2 largely, if not entirely, duplicative of his first cause of action.  
3 Compare FAC ¶¶ 45-47 with id. ¶ 35. For these reasons, Plaintiff's  
4 rescission claim is DISMISSED WITH PREJUDICE.

5 4. Elder Abuse

6 Wells Fargo argues that Plaintiff's fourth claim for elder  
7 abuse is time barred. The statute of limitations for financial  
8 elder abuse is four years, Cal. Wel. & Inst. Code § 15657.7, and  
9 Plaintiff alleges that he entered into the loan transaction in  
10 2006, see SAC ¶ 10, over five years before he filed the instant  
11 action.

12 Plaintiff counters that the statute of limitations has not run  
13 because his elder abuse claim relates to ongoing conduct over a  
14 series of years, culminating in the breach of the cash-for-keys  
15 agreement in January 2011. Opp'n at 16. However, Plaintiff has  
16 yet to allege any actionable conduct beyond the misrepresentations  
17 Defendants allegedly made in connection with the loan transaction.  
18 Plaintiff's allegation that Wells Fargo's actions somehow violated  
19 a February 2012 agreement with the Department of Justice is  
20 implausible, as all of the events involved in this case pre-date  
21 2012. See SAC ¶ 53. Plaintiff also asserts that Wells Fargo  
22 "h[eld] out the possibility of a loan modification and ke[pt]  
23 Plaintiff in the process for over 28 months," Opp'n at 16, but  
24 fails to explain how this conduct amounted to elder abuse. To the  
25 extent that Plaintiff means to plead that Wells Fargo engaged in  
26 double-tracking, i.e., purporting to review a loan modification  
27 request while at the very same time foreclosing on the property,  
28 his allegations amount to little more than legal conclusions.

1 Further, as noted in Section III.A.2 supra, Plaintiff's claim for  
2 breach of an oral contract is implausible as pled.

3 Accordingly, Plaintiff's claim for elder abuse is DISMISSED  
4 with leave to amend.

5 5. UCL

6 In its November 13 Order granting Wells Fargo's motion to  
7 dismiss the first amended complaint, the Court identified a number  
8 of defects in Plaintiff's UCL claim, including Plaintiff's failure  
9 to (1) identify the prong on which his UCL claim rests, (2) plead  
10 fraud with specificity, and (3) specify how his allegations support  
11 his UCL claim. Nov. 13 Order at 4-5. Plaintiff attempts to cure  
12 the third deficiency by copying and pasting allegations from other  
13 parts of the SAC into the UCL section (rather than incorporating  
14 the allegations by reference as he did last time), and largely  
15 ignores the rest of the Court's guidance. In his opposition brief,  
16 Plaintiff assures the Court that he is able to plead more facts.  
17 Opp'n at 17. But Plaintiff has already had the benefit of two  
18 amended complaints, three motions to dismiss, and one Court order  
19 providing specific guidance on this very point. As Plaintiff has  
20 failed to follow that guidance, the Court DISMISSES his UCL claim  
21 WITH PREJUDICE.

22 **B. Motion to Expunge Lis Pendens**

23 Plaintiff bears the burden of proving that the lis pendens  
24 should not be expunged, notwithstanding Wells Fargo being the  
25 moving party. Cal. Civ. Proc. Code § 405.30; Cua v. Mortgage Elec.  
26 Registration Sys., Inc., No. C 09-01605 SBA, 2012 WL 2792437, at \*1  
27 (N.D. Cal. July 9, 2012). "A lis pendens shall be expunged if the  
28 court finds either that the pleading on which the notice is based

1 does not contain a real property claim, or that the claimant failed  
2 to establish by a preponderance of the evidence the probable  
3 validity of the real property claim." Cua, 2012 WL 2792437, at \*1.

4 Wells Fargo's current motion to expunge the lis pendens is  
5 almost identical to its last motion to expunge the lis pendens.  
6 Compare MTE with ECF No. 19. Once again, Wells Fargo argues that  
7 (1) Plaintiff is incapable of bringing a claim that affects title  
8 since he cannot tender his debt, and (2) the lis pendens is void  
9 because it was not properly served and recorded. As Plaintiff's  
10 quiet title claim remains undisturbed, he is clearly capable of  
11 bringing a claim that affects the title to the property. See  
12 Section III.A.1 supra. However, Plaintiff has failed to respond to  
13 Wells Fargo's argument concerning the service and recordation of  
14 the lis pendens. In fact, Plaintiff appears to have ignored Wells  
15 Fargo's motion to expunge altogether. His opposition brief does  
16 not reference the motion, other than in the caption. Since  
17 Plaintiff bears the burden of proof in opposing the motion, his  
18 failure to respond is fatal to his lis pendens. While the Court  
19 was previously inclined to give Plaintiff another chance to  
20 establish the "probable validity" of a claim concerning the real  
21 estate at issue, Nov. 26 Order at 6, this is now the second time  
22 Plaintiff has failed to respond to a motion to expunge.

23 Accordingly, Wells Fargo's motion to expunge the lis pendens  
24 is GRANTED.

25

26 **V. CONCLUSION**

27 For the reasons set forth above, Defendant Wells Fargo Bank,  
28 N.A.'s motion to dismiss Plaintiff Richard Sowinski's second

1 amended complaint is GRANTED in part and DENIED in part.

- 2 • Plaintiff's first claim for quiet title remains undisturbed to
- 3 the extent it is not premised on deficiencies in the
- 4 foreclosure process.
- 5 • Plaintiff's second claim for breach of oral contract is
- 6 DISMISSED with leave to amend.
- 7 • Plaintiff's third claim for rescission is DISMISSED WITH
- 8 PREJUDICE.
- 9 • Plaintiff's fourth claim for elder abuse is DISMISSED with
- 10 leave to amend.
- 11 • Plaintiff's fifth claim for violation of the UCL is DISMISSED
- 12 WITH PREJUDICE.

13 The Court also GRANTS Defendants' motion to expunge the lis  
14 pendens. Plaintiff shall file an amended complaint within thirty  
15 (30) days of the signature date of this Order. Failure to do so  
16 may result in dismissal with prejudice of his causes of action for  
17 breach of oral contract and elder abuse. Plaintiff shall comply  
18 with Rule 15 prior to asserting any previously unpled causes of  
19 action.

20  
21 IT IS SO ORDERED.

22  
23 Dated: February 26, 2013

  
24 UNITED STATES DISTRICT JUDGE