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

ANTONIO R. BARRIENTOS,	)	Case No. 12-4653-SC
	)	
Plaintiff,	)	<u>ORDER DISMISSING CASE</u>
	)	
v.	)	
	)	
CITIMORTGAGE, INC., and DOES 1-10,	)	
inclusive,	)	
	)	
Defendants.	)	
	)	

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Plaintiff Antonio R. Barrientos ("Plaintiff") filed a complaint in California Superior Court on July 26, 2012, which Defendant CitiMortgage, Inc. ("Defendant") timely removed to this Court. ECF No. 1 ("Not. of Removal") Ex. A ("Compl."). On September 17, Defendant moved to dismiss Plaintiff's complaint. ECF No. 18 ("MTD"). Plaintiff failed to file a response, either before or after the October 1 deadline to do so. On October 3, Defendant filed a notice of nonopposition. ECF No. 15. On November 8, the Court ordered Plaintiff to show cause why his action should not be dismissed for failure to prosecute. ECF No. 18 ("OSC").

On November 15, 2012, Plaintiff's counsel timely responded to the OSC. ECF No. 19 ("OSC Response"). Counsel explains that he had "a family emergency during the time to file a timely opposition." Id. at 2. He does not explain, however, why he did not move for leave to file a late response -- or communicate with

1 the Court at all -- in the five weeks following Defendant's filing  
2 of its notice of nonopposition. That notice surely alerted  
3 Plaintiff's counsel to the fact that he needed to take action to  
4 save his client's case. He needed at least to ask a colleague to  
5 take over for him. Counsel apparently did neither. His inaction  
6 makes his response to the OSC implausible. Rather than excusing  
7 the failure to prosecute, counsel's response confirms it.

8 Counsel's inaction might not, by itself, supply sufficient  
9 reason to dismiss the case, even though the motion to dismiss  
10 remains unopposed. However, the Court observes that the motion to  
11 dismiss has merit. Plaintiff's complaint sets forth six claims:  
12 (1) breach of contract, (2) fraud, (3) negligence, (4) intentional  
13 tort, (5) a request to either force a loan modification or dissolve  
14 Plaintiff's existing loan in light of California's passage of the  
15 Foreclosure Prevention Act, and (6) declaratory and injunctive  
16 relief. The first four claims are preempted by HOLA to the extent  
17 they seek to impose additional disclosure requirements on  
18 Defendant. See, e.g., Gonzalez v. Wells Fargo Bank, 5:12-CV-03842  
19 EJD, 2012 WL 5350035, at \*5-6 (N.D. Cal. Oct. 29, 2012).  
20 Additionally, the first claim (breach of contract) fails because it  
21 is barred by the statute of frauds. Plaintiff alleges an "implied"  
22 agreement to modify the terms of his loan. Compl. ¶ 12. However,  
23 real estate loan modification contracts, like the initial loan  
24 contract, come within the statute of frauds. See Meadows v. First  
25 Am. Tr. Servicing Solutions, LLC, 11-CV-5754 YGR, 2012 WL 3945491,  
26 at \*2-3 (N.D. Cal. Sept. 10, 2012). Therefore, Plaintiff's claim  
27 for breach of an implied loan modification contract fails as a  
28 matter of law.

1           The second, third, and fourth claims are all premised on a  
2 single idea: that Defendant never intended to make good on its  
3 (purportedly contractual) implied promises to modify Plaintiff's  
4 loan and that its breach of those implied promises therefore was  
5 tortious. California's economic loss rule bars such claims, which  
6 seek to transform run-of-the-mill contract actions into tort claims  
7 subject to punitive damages. See JMP Sec. LLP v. Altair  
8 Nanotechnologies Inc., --- F. Supp. 2d ---, 2012 WL 3010965, at  
9 \*10-11 (N.D. Cal. 2012). As for Plaintiff's fifth claim, it merely  
10 points out California's policy in favor of loan modification and  
11 urges the Court, in light of that policy, to exercise its equitable  
12 powers to force a loan modification or, alternatively, dissolve the  
13 current loan. See Compl. ¶ 27. The Court declines to do either in  
14 the absence of a legal claim entitling Plaintiff to such relief.  
15 Lastly, Plaintiff's sixth "claim" for declaratory and injunctive  
16 relief is actually a prayer for such relief. Accordingly, it fails  
17 in the absence of a viable legal claim upon which such relief could  
18 be granted.

19           Because each of Plaintiff's claims fails as a matter of law,  
20 the Court GRANTS Defendant's unopposed motion to dismiss and  
21 dismisses Plaintiff's complaint WITH PREJUDICE.

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23           IT IS SO ORDERED.

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25           Dated: November 26, 2012

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UNITED STATES DISTRICT JUDGE