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UNITED STATES DISTRICT COURT
Northern District of California
San Francisco Division

MARK LESTER,

No. C 12-05491 LB

Plaintiff,

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS PLAINTIFF'S
COMPLAINT**

v.

J.P. MORGAN CHASE BANK, et al.,

Defendants.

[Re: ECF No. 8]

INTRODUCTION

Plaintiff Mark Lester instituted this action against defendants J.P. Morgan Chase Bank, N.A. (“Chase”) and Washington Mutual Bank (“WaMu”) to, among other things, stop Chase from foreclosing on his home. *See generally* Complaint, ECF No. 1.¹ Chase now moves to dismiss Mr. Lester’s complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* Motion, ECF No. 8.²

¹ Citations are to the Electronic Case File (“ECF”), with pin cites to the electronically-generated page numbers at the top of the document.

² Mr. Lester timely served Chase with the complaint, and both Mr. Lester and Chase consented to the undersigned’s jurisdiction. Proof of Service, ECF No. 4; Consent (Mr. Lester), ECF No. 5; Consent (Chase), ECF No. 9. But there is no indication in the record that Mr. Lester ever served WaMu with the complaint, and WaMu has neither consented to nor declined the undersigned’s jurisdiction. *See generally* Docket. Nevertheless, because an unserved defendant is not a party for purposes of consent under 28 U.S.C. § 636(c), the undersigned may rule on Chase’s motion to dismiss. *See Ornelas v. De Frantz*, C 00-1067 JCS, 2000 WL 973684, at *2 n.2 (N.D. Cal. June 29, 2000) (citing *Neals v. Norwood*, 59 F.3d 530, 532 (5th Cir. 1995)); *cf. United States v.*

1 Pursuant to Civil Local Rule 7-1(b), the court finds this matter suitable for determination without
2 oral argument and vacates the March 7, 2013 hearing. For the reasons stated below, the court
3 **GRANTS IN PART** and **DENIES IN PART** Chase’s motion.

4 **STATEMENT**

5 On April 30, 2007, Mr. Lester borrowed \$2,292,500 from WaMu to purchase property located at
6 934 Baileyana Road in Hillsborough, California (the “Property”). Complaint, ECF No. 1 ¶¶ 20-21.
7 Mr. Lester and WaMu executed two documents: a promissory note in the amount of \$2,292,500 that
8 names Mr. Lester as “Borrower” and WaMu as “Lender” (the “Note”), and a deed of trust that
9 secures the Note and names Mr. Lester as “Borrower,” WaMu as “Lender,” and California
10 Reconveyance Corporation (“CRC”) as “Trustee” (the “Deed of Trust”). *Id.*, Exh. A (Note and
11 Deed of Trust); Request for Judicial Notice (“RJN”), ECF No. 8-1, Exh. A (Deed of Trust).³ The

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13 *Real Property*, 135 F. 3d 1312, 1316 (9th Cir. 1997) (holding that the consent of an individual who
14 was not a party was not a precondition to the magistrate judge’s jurisdiction).

15 ³ Chase asks the court to take judicial notice of the following documents: (1) a deed of trust
16 that was recorded in the official records of San Mateo County on May 15, 2007; (2) a notice of
17 default that was recorded in the official records of San Mateo County on November 18, 2010; (3) a
18 notice of trustee’s sale that was recorded in the official records of San Mateo County on February
19 22, 2011; (4) a notice of rescission of the declaration of default and demand for sale that was
20 recorded in the official records of San Mateo County on May 20, 2011; and (5) a notice of default
21 that was recorded in the official records of San Mateo County on August 28, 2012. RJN, ECF No.
22 8-1, Exhs. A-E. And Mr. Lester asks the court to take judicial notice of an assignment of deed of
23 trust that was recorded in the official records of San Mateo County on November 18, 2010.
24 Plaintiff’s RJN, ECF No. 11-1, Exh. A.

25 Under Federal Rule of Evidence 201, “[t]he court may judicially notice a fact that is not
26 subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial
27 jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot
28 reasonably be questioned.” Fed. R. Evid. 201(b). A “high degree of indisputability is the essential
prerequisite” to taking judicial notice and “the tradition [of taking judicial notice] has been one of
caution in requiring that the matter be beyond reasonable controversy.” Fed. R. Evid. 201(a) & (b)
advisory committee’s notes (emphasis added). A court, then, may take judicial notice of undisputed
facts contained in public records, but it may not take judicial notice of disputed ones. *See Lee v.*
City of Los Angeles, 250 F.3d 668, 689-90 (9th Cir. 2001); *see also Muhammad v. California*,
C-10-1449-SBA, 2011 WL 873151, at *4 (N.D. Cal. Mar. 11, 2011) (denying request for judicial
notice of an address contained on a complaint filed in another case because the “underlying facts
relevant to Plaintiff’s residence are disputed and otherwise do not meet the requirements of Rule

1 Deed of Trust states, in relevant part, that “the Note or a partial interest in the Note (together with
2 this Security Instrument) can be sold one or more times without prior notice to Borrower [Mr.
3 Lester]” and that “Borrower [Mr. Lester] irrevocably grants and conveys to Trustee [CRC], in trust,
4 with power of sale,” the Property. RJN, ECF No. 8-1, Exh. A.

5 Mr. Lester alleges that WaMu “thereafter sold (or securitized) [his] loan into the Wa[M]u
6 Mortgage Pass-Through Certificates Series 2007-HY7 Trust” (the “WaMu 2007-HY7 Trust”).
7 Complaint, ECF No. 1 ¶ 22. WaMu “remained the server” of the WaMu 2007-HY7 Trust, and
8 “LaSalle Bank (Bank of America)” is the “Trustee” of the WaMu 2007-HY7 Trust. *Id.* Mr. Lester
9 further alleges that the pooling and service agreement that created the WaMu 2007-HY7 Trust
10 names “LaSalle Bank National Association” as “Trustee,” and states that “[t]he assets of the [WaMu
11 2007 HY7 Trust] shall remain in the custody of the Trustee of the Custodian, on behalf of the
12 [WaMu 2007 HY7 Trust], and shall be owned by the [WaMu 2007 HY7 Trust].” *Id.* ¶ 23. He
13 further alleges that the “closing date” for assets to be transferred to the WaMu 2007-HY7 Trust was
14 June 25, 2007. *Id.* ¶ 24.

15 On September 25, 2008, the Office of Thrift Supervision closed WaMu and appointed the FDIC
16 as receiver. *See id.* ¶ 24 & n.1. On the same date, Chase entered into a purchase and assumption
17 agreement with the FDIC by which Chase acquired certain assets and assumed certain liabilities of
18 WaMu. *See id.*

19 Concerned about declining property values and the increase in his mortgage payments that was
20 scheduled to take place in 2014, Mr. Lester contacted Chase, who apparently represented that it was
21 the lender, in November 2008 to inquire about receiving a loan modification. *Id.* ¶ 62. At some
22 point between then and March 2010, it appears that Mr. Lester received a trial loan modification,
23 pursuant to which Mr. Lester made three partial payments. *See id.* ¶ 65. Thereafter, Mr. Lester
24 alleges that he “was told by Chase representatives that they could not modify his loan unless he was

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26 201”). Here, neither party objects to the court taking judicial notice of the existence of these
27 documents—all of which are public records—but Mr. Lester does dispute the “facts” contained
28 within them (and, in fact, this appears to be the basis of one of the theories of his case). Therefore,
the court takes judicial notice only of the existence of the documents.

1 behind in [his] payments.” *Id.* “[I]n reliance o[n] this representation, [he] stopped making payments
2 because no one at Chase would contact him modification unless he was in arrears.” *Id.* Chase
3 “eventually contacted [him] and told him to submit financial information for a loan modification.”
4 *Id.* On March 10, 2010, Mr. Lester “faxed to Betty of Chase at (866) 282-5682 all requested
5 information for loan modification.” *Id.* On June 12, 2010, Mr. Lester “received a letter from Chase
6 stating that [it] could not continue to review his modification because [he] was in a middle of a
7 ‘Trial Period Plan,’” although “in the same letter Chase again requested addition information within
8 30 days.” *Id.* On June 29, 2010, Mr. Lester “faxed to Tamura Croslin of Chase at (866) 221-1019 a
9 new package with all supporting document[s].” *Id.* Chase, however, “claimed [it] never received
10 the information.” *Id.* On July 7, 2010, Mr. Lester “sent to Tamura Croslin at (866) 221-1019
11 information as specified,” and he “later ended up hand delivering the file to the Walnut Creek Home
12 Loan Modification Center and meeting with Christine Dreu of Chase and going through all of the
13 information with her because Chase claimed to have lost the information and would not accept the
14 information by email.” *Id.* Finally, on September 23, 2010, the trial loan modification expired “due
15 to [Mr. Lester’s] alleged failure to provide needed information, the same information Plaintiff sent to
16 Chase on at least 4 separate occasions, with numerous updates as time went on.” *Id.*

17 On November 18, 2010, apparently at the request of CRC, an Assignment of Deed of Trust was
18 recorded in the official records of San Mateo County (the “Assignment”). *Id.* ¶ 25, Exh. D;
19 Plaintiff’s RJN, ECF No. 11-1, Exh. A. It is signed by “Colleen Irby, Officer” of Chase (as
20 successor in interest to WaMu) and states, in relevant part, that “the undersigned hereby grants,
21 assigns and transfer to Bank of America, National Association successor by merger to LaSalle Bank
22 NA as trustee for WaMu Mortgage Pass-Through Certificates Series 2007-HY7 Trust all beneficial
23 interest under” the Deed of Trust, “as Trustor.” Complaint, ECF No. 1, Exh. D; Plaintiff’s RJN,
24 ECF No. 11-1, Exh. A. Mr. Lester, however, alleges that Ms. Irby was an employee of CRC, and
25 not Chase, at the time she signed the Assignment. Complaint, ECF No. 1 ¶ 26.

26 On that same date, CRC, “as Trustee,” recorded a notice of default in the official records of San
27 Mateo County which indicated that Mr. Lester was \$105,745.40 in arrears on his loan. *Id.* ¶ 25;
28 RJN, ECF No. 8-1, Exh. B.

1 Thereafter, Mr. Lester “sent in another loan modification packet at the request of Chase.”
2 Complaint, ECF No. 1 ¶ 65. On January 5, 2011, Mr. Lester “received a letter stating that he was
3 not qualified for [the Home Affordable Modification Program (“HAMP”)] because his loan was too
4 large,” information that, Mr. Lester alleges, “Chase obviously knew at the time [he] first submitted
5 the loan modification information.” *Id.*

6 On February 22, 2011, CRC, “as Trustee” under the Deed of Trust, recorded a notice of trustee’s
7 sale in the official records of San Mateo County. *Id.* ¶ 25; RJN, ECF No. 8-1, Exh. C. The notice
8 states, in relevant part, that “the present beneficiary under such Deed of Trust, has executed and
9 delivered to said Trustee [CRC], a written Declaration and Demand for Sale, and has deposited with
10 said duly appointed Trustee [CRC], such Deed of Trust and all documents evidencing the
11 obligations secured thereby, and has declared and does hereby declare all sums secured thereby
12 immediately due and payable and has elected and does hereby elect to cause the trust property to be
13 sold to satisfy the obligations secured thereby.” RJN, ECF No. 8-1, Exh. C.

14 In May 2011, Mr. Lester “immediately applied once again for loan modification” and continued
15 “to make regular payments.” Complaint, ECF No. 1 ¶ 65.

16 On May 20, 2011, CRC, again “as Trustee” under the Deed of Trust, recorded a notice of
17 rescission of the February 22, 2011 notice of trustee’s sale. *Id.* ¶ 25; RJN, ECF No. 8-1, Exh. D.
18 The notice of rescission lists the “Beneficiary” of the Deed of Trust as WaMu and states, in relevant
19 part, that “[t]he Beneficiary under that certain Deed of Trust hereinabove described [WaMu],
20 heretofore delivered to the Trustee thereunder written Declaration of Default and Demand for Sale”
21 and that “[n]otice was heretofore given by the Beneficiary [WaMu], of breach of the obligations for
22 which said Deed of Trust is security and of election to cause to be sold the property therein
23 described.” RJN, ECF No. 8-1, Exh. D.

24 On June 24, 2011, Mr. Lester “received a letter declining his eligibility for HAMP.” Complaint,
25 ECF No. 1 ¶ 65. After that, Mr. Lester “was told once again that he could not modify his loan or get
26 any attention from Chase while he was making payments,” so he “stopped making payments in
27 November 2011.” *Id.*

28 On January 30, 2012, Mr. Lester “received a letter notifying him that he was in default on the

1 loan and \$22,000 in arrears” on his loan.” *Id.* He then “once again submitted all of the financial
2 statements as requested,” and on March 30, 2012, he “submitted another loan modification
3 application with permissions to look at tax returns, credit report authorization, insurance information
4 and property tax bills.” *Id.*

5 On May 4, 2012, Mr. Lester “submitted his fourth loan modification request.” *Id.* On July 12,
6 2012, Mr. Lester “received a letter requesting additional financial information,” and on July 14,
7 2012, he submitted the requested information. *Id.* On July 20, 2012, he “received a letter from
8 Chase notifying him that he would [receive] an answer to the loan modification by August 2, 2012.”
9 *Id.* Mr. Lester “agreed and made an appointment with a Chase appraiser to come to his home to
10 appraise the property for the loan modification,” but “[a]fter the appointment was set, the appraiser
11 called [him] and told him that she [the appraiser] was not qualified to appraise the property because
12 the value of the loan was over \$1,000,000 and that Chase would reschedule with another appraiser.”
13 *Id.* Mr. Lester “never heard back.” *Id.* On July 30, 2012, Mr. Lester “received a letter from Chase
14 notifying him that he would receive an update on the loan modification by August 14, 2012,” and
15 “[a]nother appraiser called to schedule an appointment toward the end of August.” *Id.* On August 2,
16 2012, he “received a letter from Chase indicating that there ‘was help available at Chase at no fee’
17 and that [he] should contact Chase and apply for a loan modification.” *Id.* On August 13, 2012, he
18 “received a letter from Chase notifying him to expect an update on the loan modification by August
19 28, 2012.” *Id.* Chase then “introduced to [him] a new representative, Hillary Riley at (877)
20 496-9032,” and he “left several messages for [her] several times and received only one voicemail
21 message after numerous attempts and messages.” *Id.*

22 Then, “[a]n appraiser showed up to the property when [Mr. Lester] was not present” and “did not
23 leave a business card.” *Id.* “A week later [Mr. Lester] checked in with Johana Garcia Ardon,
24 apparently the Chase representative [who] replaced Hillary Riley.” *Id.* “Johana explained that
25 [Chase] had not received the appraisal.” *Id.* Mr. Lester “left a voicemail with the second appraiser
26 but received no return message after several calls.” *Id.* Eventually, “the appraisal of the property
27 was ultimately submitted to Chase.” *Id.*

28 On August 27, 2012, Mr. Lester “received a letter from Chase indicating that ‘more time’ was

1 needed to process the loan modification and that he would receive an update of the loan modification
2 by September 11, 2012.” *Id.*

3 On August 28, 2012, CRC, again “as Trustee” under the Deed of Trust, recorded another notice
4 of default in the official records of San Mateo County which indicated that Mr. Lester was
5 \$163,994.34 in arrears on his loan. RJN, ECF No. 8-1, Exh. C. Like the previously recorded notice,
6 the notice states, in relevant part, that “the present beneficiary under such Deed of Trust, has
7 executed and delivered to said Trustee [CRC], a written Declaration and Demand for Sale, and has
8 deposited with said duly appointed Trustee [CRC], such Deed of Trust and all documents evidencing
9 the obligations secured thereby, and has declared and does hereby declare all sums secured thereby
10 immediately due and payable and has elected and does hereby elect to cause the trust property to be
11 sold to satisfy the obligations secured thereby.” RJN, ECF No. 8-1, Exh. C.

12 On September 7, 2012, Mr. Lester “received a letter from Chase notifying him [again] that ‘more
13 time’ was required to process the loan modification.” Complaint, ECF No. 1 ¶ 65. On September
14 12, 2012, he “received a letter from Chase in response to his correspondence dated July 18, 2012
15 sent to the Consumer Financial Protection Bureau and explaining that the delays in the loan
16 modification process was due to ‘difficulties in getting an appraisal of the property.’” *Id.*

17 On September 12, 2012, Mr. Lester “received a Notice of Default.” *Id.* On September 14, 2012,
18 he “submitted to Chase additional information verifying income and other requested data in
19 connection with this fourth modification attempt.” *Id.* On September 20, 2012, Mr. Lester
20 “received a letter from Chase notifying him that after 2 reviews [he] was not eligible for a loan
21 modification.” *Id.*

22 Mr. Lester alleges that, “as he was put in Chase’s ‘modification program,’ was told by Chase
23 that he would not be put into foreclosure proceedings, but as [he was] in this ‘program’ Chase then
24 continuously asked [him] for the same documentation[,] prolonging [his] damages and causing [him]
25 to go further down the path of default instead of the promised path of loan modification.” *Id.* ¶ 67.
26 In sum, during this arduous process, Mr. Lester alleges that he “was led to believe that if he provided
27 the requested documents, his loan would be permanently modified.” *Id.* ¶ 69. “But instead of
28 modifying [his] loan or at least attempting to modify it, Chase has simply put Plaintiff on the ‘dual

1 track’ where, as Chase told [him] to modify his loan through Chase’s modification programs, they
2 used this time to convince [him] to stop paying payments, force him into default without his
3 knowledge, and to use this default to foreclose on [his] home.” *Id.*

4 Mr. Lester filed the instant complaint against Chase and WaMu on October 24, 2012.
5 Complaint, ECF No. 1. He asserts the following so-called causes of action: (1) Temporary
6 Restraining Order; (2) Declaratory Relief; (3) Promissory Estoppel; (4) Breach of Implied Covenant
7 of Good Faith and Fair Dealing; (5) Deceit—Intentional Misrepresentation; (6) Fraud and
8 Deceit—Negligent Misrepresentation; (7) Deceit—Suppression of Material Facts; (8)
9 Deceit—Promise Made Without Intent to Perform; (9) Quiet Title to Real Property; (10)
10 Accounting; (11) Cancellation of Instruments; and (12) Violation of California Business and
11 Professions Code § 17200. *Id.* ¶¶ 84-287.

12 Chase filed a motion to dismiss Mr. Lester’s complaint on November 30, 2012. Motion, ECF
13 No. 8. Mr. Lester filed an opposition brief, and Chase filed a reply brief. Opposition, ECF No. 11;
14 Reply, ECF No. 12.

15 ANALYSIS

16 I. LEGAL STANDARD

17 A court may dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) when it does
18 not contain enough facts to state a claim to relief that is plausible on its face. *See Bell Atlantic Corp.*
19 *v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads
20 factual content that allows the court to draw the reasonable inference that the defendant is liable for
21 the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). “The plausibility standard
22 is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a
23 defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 557.). “While a complaint
24 attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s
25 obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and
26 conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual
27 allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S.
28 at 555 (internal citations and parentheticals omitted).

1 In considering a motion to dismiss, a court must accept all of the plaintiff’s allegations as true
2 and construe them in the light most favorable to the plaintiff. *See id.* at 550; *see also Erickson v.*
3 *Pardus*, 551 U.S. 89, 93-94 (2007); *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir.
4 2007).

5 If the court dismisses the complaint, it should grant leave to amend even if no request to amend
6 is made “unless it determines that the pleading could not possibly be cured by the allegation of other
7 facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (*quoting Cook, Perkiss and Liehe, Inc.*
8 *v. Northern California Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990)). But when a party
9 repeatedly fails to cure deficiencies, the court may order dismissal without leave to amend. *See*
10 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992) (affirming dismissal with prejudice where
11 district court had instructed *pro se* plaintiff regarding deficiencies in prior order dismissing claim
12 with leave to amend).

13 **II. DISCUSSION**

14 Mr. Lester’s causes of action can be broken up into groups, based on the factual allegations
15 underlying them. Accordingly, the court addresses Mr. Lester’s causes of action in this way below.

16 **A. Mr. Lester’s Causes of Action that Challenge Chase’s Standing to Foreclose**

17 Mr. Lester’s first, second, ninth, and eleventh causes of action are premised on the argument that
18 Chase has no standing to foreclose upon the Property. *See* Complaint, ECF No. 1 ¶¶ 84-88, 89-108,
19 208-19, 224-30. Chase argues that these causes of action must be dismissed because his “argument
20 that the securitization of the Note somehow divests WaMu of [its] interest as the lender under the
21 Deed of Trust” fails as he is “incorrect in his belief” that “WaMu no longer owned the beneficial
22 interest in the [P]roperty and that Chase could not have purchased it.” Motion, ECF No. 8 at 12; *see*
23 *id.* at 12-13.

24 The court cannot address this argument because it is confused about what Mr. Lester’s theory
25 regarding the securitization of his loan actually is. First, it appears that his theory is this: that his
26 loan was transferred to the WaMu 2007-HY7 Trust before the Trust’s closing date of June 25, 2007,
27 and that this means the WaMu 2007-HY7 Trust owns his loan and that Chase could not have
28 purchased it from WaMu on September 25, 2008, and therefore Chase cannot foreclose. *See id.* ¶¶

1 24, 25, 35, 95(6), 96; *see also Javaheri v. JPMorgan Chase Bank, N.A.*, No. CV10–08185 ODW
2 (FFMx), 2011 WL 2173786, at *1-2, 5-6 (C.D. Cal. June 2, 2011) (plaintiff asserted a similar theory
3 against Chase; court granted in part and denied in part Chase’s and motion to dismiss); *Javaheri v.*
4 *JPMorgan Chase Bank, N.A.*, No. CV10–08185 ODW (FFMx), 2012 WL 6140962, at *5-8 (Dec.
5 11, 2012) (court granted Chase’s motion for summary judgment).⁴ This is the theory that seems to
6 be most prevalent in Mr. Lester’s complaint and which Chase addresses. (It also appears to the
7 theory that Mr. Lester highlighted in his opposition brief, *see* Opposition, ECF No. 11 at 2-3, 5, but
8 for purposes of this motion the court must look to the allegations in the complaint.) Second,
9 however, it appears (as the court understands it) that he has another theory, which is not pled in the
10 alternative: that his loan was not transferred to the WaMu 2007-HY7 Trust before the Trust’s
11 closing date (meaning the WaMu 2007-HY7 Trust does not own his loan), that the “securitization
12 process failed” and the Assignment of Deed of Trust recorded on November 18, 2010 therefore is
13 void, and so the Note has become separated from the Deed of Trust and Chase cannot foreclose. *See*
14 *id.* ¶¶ 31, 34, 43, 55, 95(1), 107, 108.⁵ Third, it appears that he has yet another theory: that Ms. Irby
15 did not have authority to sign the Assignment of Deed of Trust which purported to transfer from
16 Chase to “Bank of America, National Association successor by merger to LaSalle Bank NA as
17 trustee for WaMu Mortgage Pass-Through Certificates Series 2007-HY7 Trust all beneficial interest
18 under” the Deed of Trust, and so Chase cannot foreclose. *Id.* ¶¶ 26, 55, 95(4).

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21 ⁴ It appears that Mr. Lester’s theory also may have a twist. He alleges that “[e]ven if [his]
22 loan was an asset of the [WaMu 2007-HY7 Trust] . . . , it was not in default since according to [the
23 pooling and service agreement that created the WaMu 2007-HY7 Trust] both the Servicer and
24 Trustee have an obligation to make payments to the noteholders of the [WaMu 2007-HY7 Trust] in
25 the event that the borrower has defaulted on payments.” Complaint, ECF No. 1 ¶ 42; *see id.* ¶¶ 49,
51, 102, 212, 213. “Dispositively,” Mr. Lester alleges, “the note is not actually ‘in default’ because
insurance coverage protects these holders from realizing any loss or damages from the purported
default being used to justify foreclosure here.” *Id.* ¶ 51.

26 ⁵ The court also is confused because of the seeming contradictions of his allegations. For
27 instance, in Paragraph 95 Mr. Lester alleges that his loan “is owned by the [WaMu 2007-HY7 Trust]
28 and when Chase acquired assets of WaMu[, Chase] could not have acquired the security interest in
the loan,” but in Paragraph 97 he alleges that “if the loan is in the [WaMu 2007-HY7 Trust] then
Chase does own Plaintiff’s loan” *Compare* Complaint, ECF No. 1 ¶ 95(1) *with* ¶ 97.

1 Without understanding Mr. Lester’s allegations about the securitization of his loan, the court
2 cannot address Chase’s argument that nothing about that securitization prevents it from having
3 standing to foreclose on the Property.⁴ So, for this reason alone, Mr. Lester’s first, second, ninth,
4 and eleventh causes of action must be dismissed.

5 The question becomes, then, whether they should be dismissed with or without prejudice. To
6 make this determination, the court finds it worthwhile to address Chase’s other arguments. First,
7 Chase argues that Mr. Lester asserts that Chase must physically “produce” or “possess” the Note to
8 foreclose on the Property. Motion, ECF No. 8 at 14 (citing Complaint, ECF No. 1 ¶¶ 46-48, 50, 52).
9 While it is true that under California Civil Code § 2924(a)(1) no party needs to physically possess
10 the promissory note, *see Sicairos v. NDEX West, LLC*, No. 08cv2014-LAB (BLM), 2009 WL
11 385855, at *3 (S.D. Cal. Feb. 13, 2009), the court sees nothing in Mr. Lester’s complaint that raises
12 the issue of physical possession of the Note. *See generally* Complaint, ECF No. 1.

13 Second, Chase argues that Mr. Lester is precluded from challenging Chase’s standing to
14 foreclose under *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149 (2011). Motion,
15 ECF No. 8 at 15-16. The court disagrees. As Judge Chen has explained:

16 *Gomes* held that California Civil Code § 2924(a)(1) does not “provide for a judicial
17 action to determine whether the person initiating the foreclosure process is indeed
18 authorized.” *Id.* at 1155, 121 Cal. Rptr. 3d 819. But the issue in *Gomes* was not
19 whether the wrong entity had initiated foreclosure; rather, the issue was whether the
20 company selling the property in the nonjudicial foreclosure sale (MERS) was
21 authorized to do so by the owner of the promissory note. *See id.* at 1155, 121 Cal.
22 Rptr. 3d 819 (rejecting the argument that a plaintiff may test whether the person
initiating the foreclosure has the authority to do so; “[t]he recognition of the right to
bring a lawsuit to determine a nominee’s authorization to proceed with foreclosure on
behalf of the noteholder would fundamentally undermine the nonjudicial nature of the
process and introduce the possibility of lawsuits filed solely for the purpose of
delaying valid foreclosures”). Notably, the *Gomes* court distinguished a case cited by

23 ⁴ Citing no authority, Chase also argues that Mr. Lester’s theory—that he is not in default
24 because the “noteholders” of the WaMu 2007-HY7 Trust apparently still get paid regardless of
25 whether borrowers make their mortgage payments or not—fails as well. Motion, ECF No. 8 at 13-
26 14. And in his opposition Mr. Lester seems to disavow this theory anyway: “[Mr. Lester] does not
27 allege, as [Chase] suggests, that he does not have to repay the loan and any argument to that effect is
28 without merit.” Opposition, ECF No. 11 at 9. This disavowal, however, seems to conflict with the
allegations the court quoted in Footnote 2, *supra*. Regardless, given that the court dismisses Mr.
Lester’s first, second, ninth, and eleventh causes of action because of the confusion surrounding his
theory or theories generally, the court considers Chase’s argument on this issue to be moot.

1 the plaintiff precisely because, in that case, “the plaintiff alleged wrongful foreclosure
2 on the ground that assignments of the deed of trust had been improperly backdated,
3 and thus the wrong party had initiated the foreclosure process. No such infirmity is
4 alleged here.” *Id.* Thus, *Gomes* explicitly avoided the scenario pled here, in which
“the plaintiff’s complaint identified a specific factual basis for alleging that the
foreclosure was not initiated by the correct party.” *Id.* at 1156. *Gomes* is therefore
inapposite.

5 *Tamburri v. Suntrust Mortgage, Inc.*, No. C–11–2899 EMC, 2011 WL 6294472, *4 (N.D. Cal. Dec.
6 15, 2011) (footnote omitted); see *Naranjo v. SBMC Mortgage*, No. 11-cv-2229-L(WVG), 2012 WL
7 3030370, at *3 (S.D. Cal. July 24, 2012) (finding defendants’ reliance on *Gomes* to be “misguided”
8 where plaintiff alleged “that the transfer of rights to the WAMU Trust is improper, thus Defendants
9 consequently lack the legal right to either collect on the debt or enforce the underlying security
10 interest”). Here, Mr. Lester does not simply seek to determine whether Chase is authorized to
11 foreclose; rather, he specifically alleges that it is not and provides a specific factual basis for so
12 alleging. Accordingly, this court, too, finds that *Gomes* does not preclude Mr. Lester from
13 challenging Chase’s standing to foreclose.

14 Third, Chase argues that Mr. Lester’s first, second, ninth, eleventh, and twelfth causes of action
15 fail because he has not alleged that he is willing and able to tender the full amount that he owes.
16 Motion, ECF No. 8 at 16-18. Generally, the “tender rule” applies to claims to set aside a trustee’s
17 sale for procedural irregularities or alleged deficiencies in the sale notice. *Robinson v. Bank of Am.*,
18 No. 12–CV–00494–RMW, 2012 WL 1932842, at *3 (N.D. Cal. May 29, 2012); *Tamburri*, 2011 WL
19 6294472, at *3. “[T]he rationale behind the rule is that if plaintiffs could not have redeemed the
20 property had the sale procedures been proper, any irregularities in the sale did not result in damages
21 to the plaintiffs.” *Tamburri*, 2011 WL 6294472, at *3 (quoting *Cohn v. Bank of Am.*, No.
22 2:10–cv–00865 MCE KJN PS, 2011 WL 98840, at *9 (E.D. Cal. Jan. 12, 2011)).

23 The rule is not absolute, though. Indeed, “[t]ender may not be required where it would be
24 inequitable to do so.” See *Onofrio v. Rice*, 55 Cal. App. 4th 413, 424 (Cal. Ct. App. 1997) (person
25 who purchased the plaintiff’s property at the foreclosure sale was the plaintiff’s own foreclosure
26 consultant who represented that he would assist the plaintiff in avoiding foreclosure). In addition,
27 several federal courts sitting in California have held that the tender rule applies only in cases seeking
28 to set aside a completed sale, rather than an action to prevent a pending sale. See, e.g., *Robinson*,

1 2012 WL 1932842, at *4; *Vissuet v. Indymac Mortgage Serv.*, No. 09–CV–2321–IEG (CAB), 2010
2 WL 1031013, at *2 (S.D. Cal. Mar. 19, 2010); *Giannini v. Am. Home Mortgage Servicing, Inc.*, No.
3 11–04489 TEH, 2012 WL 298254, at *3 (N.D. Cal. Feb. 1, 2012). Moreover, tender is not required
4 where a plaintiff alleges a violation of California Civil Code § 2923.5, because, as one California
5 appellate court has stated, “[t]he whole point of section 2923.5 is to create a new, even if limited
6 right, to be contacted about the possibility of alternatives to full payment of arrearages. It would be
7 contradictory to thwart the very operation of the statute if enforcement were predicated on full
8 tender.” *Mabry v. Superior Court*, 185 Cal. App. 4th 208, 225 (Cal. Ct. App. 2010); *see Perez v.*
9 *Am. Home Mortgage Servicing, Inc.*, No. C 12–00932 WHA, 2012 WL 1413300, at *5 (N.D. Cal.
10 Apr. 23, 2012) (“Contrary to defendants’ contention, a borrower need not tender the full amount of
11 indebtedness to be entitled to her rights under Section 2923.5.”); *Valdez v. JPMorgan Chase Bank,*
12 *N.A.*, No. EDCV 11–0935 DOC (DTBx), 2012 WL 995278, at *5 n.5 (C.D. Cal. Mar. 20, 2012)
13 (citing *Mabry*); *Luciw v. Bank of Am., N.A.*, No. 5:10–cv–5969–JF (HRL), 2011 WL 1740114, at *2
14 (N.D. Cal. May 5, 2011). Finally, where a plaintiff alleges that the entity lacked authority to
15 foreclose on the property, the foreclosure sale would be void. *See Dimock v. Emerald Properties*
16 *LLC*, 81 Cal. App. 4th 868, 876 (2000). And “where a sale is void, rather than simply voidable,
17 tender is not required.” *Tamburri*, 2011 WL 6294472, at *4 (citing *Miller & Starr California Real*
18 *Estate 3d § 212*); *see also Martinez v. Am.’s Wholesale Lender*, 446 F. App’x 940, 943 (9th Cir.
19 2011) (“The tender rule does not apply to a void, as opposed to a voidable, foreclosure sale.”);
20 *Dimock*, 81 Cal. App. 4th at 878.

21 Here, Mr. Lester asserts that Chase does not have authority to foreclose on the Property and,
22 thus, that any foreclosure sale would be void. Accordingly, Mr. Lester does not need to allege
23 tender. *See Avila v. Wells Fargo Bank*, No. C 12–01237 WHA, 2012 WL 2953117, at *15 (N.D.
24 Cal. July 19, 2012) (“By alleging that the purported trustee, NDeX West, was not properly
25 substituted as trustee, had no interest in the subject property, and thus was not authorized to initiate a
26 non-judicial foreclosure when it recorded the notice of default, plaintiff alleges that the foreclosure
27 sale was void. As such, the tender rule does not apply.”) (internal citation omitted); *Vogan v. Wells*
28 *Fargo Bank*, No. 2:11-CV-02098-JAM-KJN, 2011 WL 5826016, at *7-8 (E.D. Cal. Nov. 17, 2011)

1 (“The Court holds that the tender requirement does not apply to this case because Plaintiffs are
2 challenging the beneficial interest held by U.S. Bank in the deed of trust, not the procedural
3 sufficiency of the foreclosure itself.”); *see also In re Salazar*, 448 B.R. 814, 819 (S.D. Cal. 2011)
4 (“If U.S. Bank was not authorized to foreclose the [Deed of Trust] under Civil Code section 2932.5,
5 the foreclosure sale may be void, and Salazar would not need to tender the full amount of the Loan
6 to set aside the sale.”).

7 Finally, Chase also attacks Mr. Lester’s first, second, ninth, and eleventh causes of action
8 individually. With respect to Mr. Lester’s first cause of action for “Temporary Restraining Order,”
9 as Chase correctly points out, an injunction is a remedy, not a cause of action. *See Marlin v. Aimco*
10 *Venezia, LLC*, 154 Cal. App. 4th 154, 162 (2007) (“A ‘cause of action’ must be distinguished from
11 the remedy sought. . . . [T]he relief is not to be confounded with the cause of action, one not being
12 determinative of the other. An injunction is a remedy, not a cause of action.” (citations omitted)); *see*
13 *also Gomez v. Wells Fargo Home Mortgage*, No. C 11–01725 LB, 2011 WL 5834949, at *13 (N.D.
14 Cal. Nov. 21, 2011) (“Injunctive relief, . . . ‘is a remedy, not a cause of action, and thus it must be
15 tethered to some independent legal duty owed by the defendant.’”) (quoting *Martone v. Burgess*, No.
16 C 08–2379 CW, 2008 WL 3916022, at *3 (N.D. Cal. Aug.25, 2008)); *Ayala v. Bank of Am.*, No.
17 09CV 1946, 2010 WL 1568577, at *4 (S.D. Cal. Apr.16, 2010). Mr. Lester states in his opposition
18 brief that his cause of action “is a separate and independent cause of action based on the facts of this
19 case,” but he cites no authority in support of this statement, and the statement clearly conflicts with
20 the authority cited above by the court. Accordingly, Mr. Lester’s first “cause of action” is

21 **DISMISSED WITH PREJUDICE.**⁵

22 With respect to Mr. Lester’s second cause of action for “Declaratory Judgment,” Chase argues
23 that it fails because Mr. Lester fails to allege that he is willing and able to tender the amount he owes
24 and because California law does not require physical possession of the Note. Motion, ECF No. 8 at
25 20-21. As stated above, the court finds that tender is not required here and that Mr. Lester does not

27 ⁵ The court notes that it is not ruling on whether Mr. Lester is entitled to injunctive relief;
28 rather it is ruling only that his request for injunctive relief is not properly asserted as a “cause of
action.”

1 appear to be asserting that Chase must have physical possession of the Note. Thus, Mr. Lester's
2 second cause of action is **DISMISSED WITHOUT PREJUDICE**.

3 With respect to Mr. Lester's ninth cause of action for "Quiet Title," Chase argues that it fails
4 because (1) he has not alleged that he is willing and able to tender the amount he owes, (2)
5 securitization does not affect Chase's power of sale, and (3) he has not identified which Defendant
6 asserts an adverse claim to the title. Motion, ECF No. 8 at 23-24.⁶ Under California law, a cause of
7 action for quiet title must be in a verified complaint and include: (1) a description of the property
8 that is the subject of the action, (2) the title of the plaintiff as to which a determination is sought and
9 the basis of the title, (3) the adverse claims to the title of the plaintiff against which a determination
10 is sought, (4) the date as of which the determination is sought, and (5) a prayer for the determination
11 of the title of the plaintiff against the adverse claims. *See* Cal. Code Civ. Pro. § 761.020; *Hamilton*
12 *v. Bank of Blue Valley*, 746 F. Supp. 2d 1160, 1177-78 (E.D. Cal. 2010); *Rosenfeld v. JPMorgan*
13 *Chase Bank, N.A.*, 732 F. Supp. 2d 952, 975-76 (N.D. Cal. 2010); *Ferguson v. Avelo Mortgage,*
14 *LLC*, 126 Cal. Rptr. 3d 586, 591 (2011). A review of Mr. Lester's allegations show that he has met
15 these basic pleading requirements. *See* Complaint, ECF No. 1 ¶¶ 208-19.

16 In most circumstances, however, a requirement of an action to quiet title is an allegation that
17 plaintiffs "are the rightful owners of the property, i.e., that they have satisfied their obligations under
18 the deed of trust." *Kelley v. Mortgage Elec. Registration Sys.*, 642 F. Supp. 2d 1048, 1057 (N.D.
19 Cal. 2009). "Thus, it [normally] is dispositive as to this claim that, under California law, a borrower
20 may not assert 'quiet title' against a mortgagee without first paying the outstanding debt on the
21 property." *Rosenfeld*, 732 F. Supp. 2d at 975 (N.D. Cal. 2010) (citing *Miller v. Provost*, 26 Cal.
22 App. 4th 1703, 1707 (1994) ("a mortgagor of real property cannot, without paying his debt, quiet his
23 title against the mortgagee") (citation omitted)). But here, as explained above, Mr. Lester does not
24 need to allege tender because he alleges that Chase does not have authority to foreclose on the
25

26 ⁶ Citing *Leeper v. Beltrami*, 53 Cal. 2d 195 (1959), Chase argues that quiet title is a remedy
27 and not a cause of action. Motion, ECF No. 8 at 24. *Leeper*, which discusses which statute of
28 limitations to apply when a plaintiff brings an action alleging fraud and to quiet title, does not state
that quiet title cannot be a separate cause of action. *See Leeper*, 53 Cal. 2d at 212-217.

1 Property and, thus, that any foreclosure sale would be void. *See Tamburri*, 2011 WL 6294472, at
2 *4; *Dimock*, 81 Cal. App. 4th at 878. Mr. Lester’s quiet title cause of action, then, does not fail for
3 lack of tender. *See Montgomery Nat’l City Mortgage*, No. C–12–1359 EMC, 2012 WL 1965601, at
4 *12 (N.D. Cal. May 31, 2012) (plaintiff’s quiet title cause of action did not fail for the lack of a
5 tender allegation where it was based on the allegations that, because of “National’s securitization of
6 the loan,” “none of the defendants is a holder of the Note, none of them can prove any interest in the
7 Note, and none of them can prove that the Note is secured by the deed of trust”). Accordingly, Mr.
8 Lester’s ninth cause of action is **DISMISSED WITHOUT PREJUDICE**.

9 And with respect to Mr. Lester’s eleventh cause of action for “Cancellation of Instruments,”
10 Chase argues that it fails because, contrary to Mr. Lester’s allegations, the securitization of his loan
11 “had no bearing on Chase’s purchase of WaMu’s interest on the loan.” Motion, ECF No. 8 at 26.
12 California Civil Code § 3412 provides that court-ordered cancellation of a written instrument is
13 appropriate if “there is a reasonable apprehension that if left outstanding it may cause serious injury
14 to a person against whom it is void or voidable” Cal. Civ. Code § 3412. As described above, it
15 appears that at least one of Mr. Lester’s theories is that Chase did not purchase his loan from WaMu
16 and so Chase has no interest in the deed of trust and the notices of default and notices of trustee’s
17 sale that were recorded in the official records of San Mateo County should be cancelled. As such,
18 assuming that this is his theory, Mr. Lester has sufficiently alleged that these documents are void or
19 voidable. His eleventh cause of action is **DISMISSED WITHOUT PREJUDICE**.

20 **B. Mr. Lester’s Causes of Action that Relate to the Modification of His Loan**

21 Mr. Lester’s third, fourth, fifth, sixth, seventh, and eighth causes of action all relate to his
22 allegations concerning his attempts to have his loan modified. *See Complaint*, ECF No. 1 ¶¶ 109-21,
23 122-35, 136-58, 159-77, 178-94, 195-207. Chase argues that these causes of action fail for several
24 reasons.

25 First, Chase argues that Mr. Lester’s third cause of action for promissory estoppel fails because
26 (1) he is not willing and able to tender the amount he owes and (2) he does not sufficiently allege a
27 promise. Motion, ECF No. 8 at 21-22. As for Chase’s first argument, the court already determined
28 that Mr. Lester does not need to allege tender. As for Chase’s second argument, under California

1 law, “[a] promise which the promisor should reasonably expect to induce action or forbearance on
2 the part of the promisee or a third person and which does induce such action or forbearance is
3 binding if injustice can be avoided only by enforcement of the promise.” *See Kajima/Ray Wilson v.*
4 *Los Angeles Cnty. Metro. Transp. Auth.*, 23 Cal. 4th 305, 310 (2000). Promissory estoppel is an
5 equitable doctrine whose remedy may be limited “as justice so requires.” *See id.* The elements of
6 promissory estoppel are: “(1) a clear promise; (2) reasonable reliance; (3) substantial detriment; and
7 (4) damages ‘measured by the extent of the obligation assumed and not performed.’” *See Errico v.*
8 *Pacific Capital Bank, N.A.*, 753 F. Supp. 2d 1034, 1048 (N.D. Cal. 2010) (citing and quoting *Poway*
9 *Royal Mobilehome Owners Ass’n. v. City of Poway*, 149 Cal. App. 4th 1460, 1470 (2007)).

10 To support his claim, Mr. Lester relies upon his allegations describing his efforts to get a loan
11 modification. *See* Complaint, ECF No. 1 ¶¶ 62-83, 109-21. The gist of the claim is that Chase told
12 him that it would consider him for a loan modification and would not foreclose on the Property
13 during this time, but then he never received one even though he complied with all of Chase’s
14 requirements, and foreclosure proceedings were instituted. But Chase is right that Mr. Lester does
15 not identify a “clear promise” made to him. For one, the court cannot tell whether the purported
16 promise was that he would receive a loan modification or if it was that foreclosure proceedings
17 would not be instituted, or both. In addition, the court cannot identify when or how such a promise
18 was made. For instance, is it based on Chase’s alleged representation that he “was told by Chase
19 representatives that they could not modify his loan unless he was behind [on his] payments”? *See*
20 *id.* ¶ 65. Is it based on the terms of the trial modification that he apparently entered into? *See id.* Is
21 it based on other conversations he had with Chase personnel during the time he was discussing his
22 loan modification applications? *See id.* On the Chase’s “ad” regarding loan modifications? *See id.*
23 ¶ 79. The court simply does not know. Because Mr. Lester does not identify a “clear promise,” his
24 third cause of action is **DISMISSED WITHOUT PREJUDICE**. *See Laks v. Coast Fed. Sav. &*
25 *Loan Ass’n*, 60 Cal. App. 3d 885, 890-91 (1976) (affirming dismissal of promissory estoppel claim
26 where the alleged “promise” was not “clear and unambiguous”).

27 Second, Chase argues that Mr. Lester’s fourth cause of action for breach of implied covenant of
28 good faith and fair dealing fails because he does not identify a contract to which he is a party or a

1 provision that Chase breached. Motion, ECF No. 8 at 22-23. The covenant of good faith and fair
2 dealing is implied in every contract and prevents one party from “unfairly frustrating the other
3 party’s right to receive the benefits” of the contract. *See Guz v. Bechtel Nat’l Inc.*, 24 Cal. 4th 317,
4 349 (2000). To allege a claim for breach of the covenant of good faith and fair dealing, a plaintiff
5 must allege the following elements: (1) the plaintiff and the defendant entered into a contract; (2) the
6 plaintiff did all or substantially all of the things that the contract require him to do or that he was
7 excused from having to do; (3) all conditions required for the defendant’s performance had occurred;
8 (4) the defendant unfairly interfered with the plaintiff’s right to receive the benefits of the contract;
9 and (5) the defendant’s conduct harmed the plaintiff. *See* Judicial Counsel of California Civil Jury
10 Instructions § 325 (2011); *see also Oculus Innovative Sciences, Inc. v. Nofil Corp.*, No. C 06-01686
11 SI, 2007 WL 2600746, at *4 (N.D. Cal. Sept. 10, 2007).

12 “Under California law, a claim for breach of the [implied covenant of good faith and fair
13 dealing] is necessarily based on the existence of an underlying contractual relationship. The essence
14 of the covenant is that no party to the contract will do anything which would deprive the others of
15 the benefits of the contract.” *Wolf v. Wells Fargo Bank, N.A.*, No. C11–01337 WHA, 2011 WL
16 4831208 at *4 (N.D. Cal. Oct. 12, 2011) (citing *McClain v. Octagon Plaza, LLC*, 159 Cal. App. 4th
17 784, 799 (2008)). To establish a breach of the covenant, then, a plaintiff must establish the existence
18 of a contractual obligation, along with conduct that frustrates the other party’s rights to benefit from
19 that contract. *Id.*

20 Like with Mr. Lester’s promissory estoppel claim, his breach of the covenant of good faith and
21 fair dealing claim fails because it is unclear what the contract is. It is true that he alleges that he
22 “entered into a trial payment plan agreement with [Chase] in June 2010” and “was told that [] if
23 partial payments were made[,] a permanent modification based on the terms offered would be made
24 and that [Chase] would not foreclose on the [P]roperty,” Complaint, ECF No. 1 ¶ 124, but he never
25 alleges the specific terms of this agreement or in what form this agreement took (e.g., oral, written?).
26 Moreover, he alleges that he entered into this agreement in June 2010, but his earlier allegation in
27 Paragraph 65 of his complaint suggests that he was already “in the middle of a ‘Trial Period Plan’”
28 at that time. Given this confusion, the court believes the best course of action is to dismiss Mr.

1 Lester’s claim and grant him leave to clarify it. Accordingly, the court **DISMISSES WITHOUT**
2 **PREJUDICE** Mr. Lester’s fourth cause of action.

3 Third, Chase argues that Mr. Lester’s fifth, sixth, seventh, and eighth causes of action fail
4 because (1) he fails to meet the heightened pleading standards under Federal Rule of Civil Procedure
5 9(b) and (2) he does not allege any misrepresentations. Motion, ECF No. 8 at 18-20. “A cause of
6 action for fraud [under California law] requires the plaintiff to prove (a) a knowingly false
7 misrepresentation by the defendant, (b) made with the intent to deceive or to induce reliance by the
8 plaintiff, (c) justifiable reliance by the plaintiff, and (d) resulting damages.” *Glenn K. Jackson Inc.*
9 *v. Roe*, 273 F.3d 1192 (9th Cir. 2001) (quoting *Wilkins v. Nat’l Broadcasting Co., Inc.*, 71 Cal. App.
10 4th 1066, 1082 (1999)); *see also* Cal. Civ. Code § 1572. Moreover, claims alleging fraud are subject
11 to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). *See Vess v.*
12 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003) (if “the claim is said to be
13 ‘grounded in fraud’ or to ‘sound in fraud,’ [then] the pleading of that claim as a whole must satisfy
14 the particularity requirement of Rule 9(b)”); *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994)
15 (claims based in fraud “must state precisely the time, place, and nature of the misleading statements,
16 misrepresentations, and specific acts of fraud”).

17 The court agrees with Chase that Mr. Lester’s allegations are unclear (despite being
18 voluminous). For example, in Paragraph 137, Mr. Lester alleges that Chase represented that (1) the
19 Note “would be placed in the loan modification program,” (2) “he should stop making his mortgage
20 payments in order for Defendants to qualify him for loan modification,” and (3) “[u]ntil the loan
21 modification review process was completed a Trustee’s Sale would not be conducted on the
22 Property.” Complaint, ECF No. 1 ¶ 137. He then alleges that these representations were false
23 because (1) “no adequate review of the loan modification process was in progress,” (2) “Defendants
24 did not intend to proceed with a loan modification refinance,” (3) “Defendants intended to proceed
25 with foreclosure on the [P]roperty,” and (4) “foreclosure processes were ongoing as [he] was now in
26 default even though [he] followed the instructions of Defendants.” *Id.* ¶ 138. These allegations are
27 unclear for several reasons. First, it is unclear whether “placed in the loan modification program”
28 means that Chase would give him a trial loan modification, that Chase would give him a permanent

1 loan modification, or that Chase would simply review his loan modification application. Second, it
2 is unclear because in Paragraph 65 he alleges that “Chase representatives” told him “that they could
3 not modify his loan unless he was behind [on his] payments,” but in Paragraph 137 he alleges that
4 Chase representatives told him that “he should stop making his mortgage payments.” *Compare id.* ¶
5 65 with ¶ 137. These are different allegations about the same event. Third, although Paragraph 138
6 alleges that “no adequate review of the loan modification process was in progress,” Paragraph 73
7 alleges that “Defendants never actually considered modification of [his] loan.” *Compare id.* ¶ 73
8 with ¶ 138. Is Mr. Lester alleging that Chase reviewed his loan modification application but did not
9 do so adequately, or that Chase did not even review his application? Fourth, in several
10 paragraphs Mr. Lester alleges only that “Defendants” made certain misrepresentations. *See, e.g., id.*
11 ¶¶ 73, 76, 138.

12 In short, the court is unclear what, exactly, Mr. Lester alleges Chase represented to him or why,
13 exactly, those representations were false or misleading. Accordingly, Mr. Lester’s fifth, sixth,
14 seventh, and eighth causes of action are **DISMISSED WITHOUT PREJUDICE**.

15 **C. Mr. Lester’s Two Other Causes of Action**

16 Mr. Lester alleges two other causes of action, and they do not fit into the two groups above.
17 With respect to Mr. Lester’s tenth cause of action for “Accounting,” *see* Complaint, ECF No. 1 ¶¶
18 220-23, Chase argues that it fails because no fiduciary duty exists between it and Mr. Lester and
19 because any accounting would not be complicated, Motion, ECF No. 8 at 24-25. Accounting is an
20 independent cause of action in equity. *Penney v. Wells Fargo Bank, NA*, No. 2:11-cv-05567-ODW
21 (MANx), 2012 WL 2071705, at *13 (C.D. Cal. June 8, 2012) (citing *Teselle v. McLoughlin*, 173
22 Cal. App. 4th 156, 180 (2009)). “A cause of action for an accounting requires a showing that a
23 relationship exists between the plaintiff and defendant that requires an accounting, and that some
24 balance is due the plaintiff that can only be ascertained by an accounting.” *Teselle*, 173 Cal. App.
25 4th at 179 (citing *Brea v. McGlashan*, 3 Cal. App. 2d 454, 460 (1934)); *see Mendoza v. Countrywide*
26 *Home Loans, Inc.*, No. C-09-3648 SC, 2009 WL 4706350, at *8 (N.D. Cal. Dec. 3, 2009). No
27 fiduciary relationship is required. *Teselle*, 173 Cal. App. 4th at 179; *see Shkolnikov v. JPMorgan*
28 *Chase Bank*, No. 12-03996 JCS, 2012 WL 6553988, at *23 (N.D. Cal. Dec. 14, 2012). But “[a]n

1 action for accounting is not available where the plaintiff alleges the right to recover a sum certain or
2 a sum that can be made certain by calculation.” *Penney*, 2012 WL 2071705, at *13 (citing *Teselle*,
3 173 Cal. App. 4th at 179).

4 Here, Mr. Lester alleges that he “received a Notice of Default for arrearages that included
5 undisclosed fees and costs associated with the foreclosure proceedings and fees for forced placed
6 insurance at a time [when he] maintained homeowner’s insurance” and that determining the amount
7 of these fees and costs “is so complicated that an accounting is necessary to determine the sum
8 certain charged back to the mortgage after Defendants rescinded the forced place insurance.”
9 Complaint, ECF No. 1 ¶¶ 221-22. Chase says that “[a]ll that would need to be done to determine the
10 sum certain would be to determine the period that [Mr. Lester] had his own insurance, and see what
11 insurance premiums were charged to his account during that time,” Motion, ECF No. 8 at 17, but
12 given the difficulties Mr. Lester has had in receiving timely and clear information from Chase, the
13 court finds Mr. Lester’s allegations to be sufficient. His tenth cause of action **SURVIVES**.

14 Mr. Lester’s twelfth cause of action is for violation of California’s Unfair Competition Law, Cal.
15 Bus. & Prof. Code § 17200 *et seq.* See Complaint, ECF No. 1 ¶¶ 231-287. From what the court can
16 tell, it appears to be based on several theories: first, Mr. Lester alleges simply that “Defendants”
17 “implement[ed] and perpetrat[ed] [a] fraudulent scheme [to] induc[e] [Mr. Lester] to accept
18 mortgages based on inflated property valuations and [an] undisclosed disregard of their own
19 underwriting standards and [then] sell[ing] [] overpriced collateralized mortgage pools” (*see id.* ¶
20 233); second, he alleges that “Defendants” disclosed some unspecified private information of his in
21 violation of his privacy rights under the California Constitution (*see id.* ¶¶ 234-48); third, that
22 “Defendants” did not diligently try to contact him before recording a notice of default, in violation
23 of California Civil Code § 2923.5 (*see id.* ¶ 249); fourth, that “Defendants” lacked standing to
24 foreclose (*see id.* ¶ 249); and fifth, that “Defendants” fraudulently misrepresented that he would
25 receive a loan modification (*see id.* ¶¶ 281-82).

26 None of these bases, as alleged, are sufficient to support Mr. Lester’s Unfair Competition Law
27 claim. His first theory is conclusory and not supported by factual allegations. His second theory is
28 insufficient because he does not allege, specifically, what private information was shared and how,

1 exactly, its sharing was unlawful. His third theory, while possible, is unsupported. Nowhere else in
2 the entire complaint does Mr. Lester allege anything about not being contacted in violation of
3 California Civil Code § 2923.5 or about why his other contact with Chase representatives do not
4 satisfy this requirement. And he court already determined, with respect to his first, second, ninth,
5 and eleventh causes of action, that his fourth theory, as alleged, is unclear. Likewise, the court
6 already determined, with respect to his third, fourth, fifth, sixth, seventh, and eighth causes of action,
7 that his fifth theory is unclear. Accordingly, Mr. Lester's twelfth cause of action is **DISMISSED**
8 **WITHOUT PREJUDICE**.

9 **CONCLUSION**

10 Based on the foregoing, the court **GRANTS IN PART** and **DENIES IN PART** Chase's motion.
11 The court **DISMISSES WITH PREJUDICE** Mr. Lester's first cause of action for "Temporary
12 Restraining Order" and **DISMISSES WITHOUT PREJUDICE** his second, third, fourth, fifth,
13 sixth, seventh, eighth, ninth, eleventh, and twelfth causes of action. Mr. Lester's tenth cause of
14 action **SURVIVES**. Mr. Lester shall have until March 28, 2013 to file a First Amended Complaint.

15 **IT IS SO ORDERED.**

16 Dated: February 20, 2013



17 _____
18 LAUREL BEELER
19 United States Magistrate Judge
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