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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA

6 PATRICK D. HOWARD,

7 Plaintiff,

8 v.

9 FIRST HORIZON HOME LOAN
10 CORPORATION, et al.,

11 Defendants.

Case No. 12-cv-05735-JST

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS; DENYING MOTION TO
STRIKE**

Re: ECF Nos. 67, 69

12 In this action for breach of contract and related claims, Defendant Metlife moves to
13 dismiss the claims that Plaintiff Howard has asserted against it and to strike Howard's request for
14 attorney's fees from the Second Amended Complaint ("SAC"). For the reasons set forth below,
15 the motion to dismiss is GRANTED IN PART and DENIED IN PART and the motion to strike is
16 DENIED.

17 **I. BACKGROUND**

18 **A. Howard's Claims**

19 This action arises out of the initiation of foreclosure proceedings on a residential property
20 located at 9235 Braquet Lane in Gilroy, California ("the property").

21 In 2005, Plaintiff Patrick D. Howard obtained a loan for \$930,000 from Defendant First
22 Horizon ("the loan"), which is secured by the property via a deed of trust executed in favor of First
23 Horizon.

24 Howard did not make any loan payments from October 2008 to October 2010. Howard
25 applied for a loan modification from First Horizon in November 2008. In August 2009, a First
26 Horizon agent told Howard that his requested loan modification had been approved and that the
27 terms of the deed of the trust had changed such that Howard's monthly payments with respect to
28 the loan would be reduced to \$3,833.48. Yet, in late 2009, Metlife, the servicer of the loan,

1 recorded a notice of default and a notice of trustee's sale with respect to the property. Howard
2 paid the arrears of \$73,633.53, and the notices of default and of trustee's sale were rescinded.

3 Howard received a notice from First Horizon in May 2011 projecting an escrow shortage
4 of \$31,577.64. Howard made regular monthly payments to Metlife following this notice. Then, in
5 May 2012, Howard received a notice from Defendant Nationstar, the new servicer of the loan,
6 stating that the loan had an escrow shortage of \$27,048.38. The following month, a Nationstar
7 employee told Howard that the property was in foreclosure. Then, in October 2012, a second
8 notice of default was recorded against the property.

9 Howard brings the following claims against Defendants First Horizon, the lender and
10 former trustee under the deed of trust; Metlife, the subservicer of the loan; Nationstar, the servicer
11 of the loan; and the Bank of New York, the successor trustee under the deed of trust: (1) breach of
12 contract against First Horizon and the Bank of New York only; (2) inducement of breach of
13 contract against Metlife and Nationstar only; (3) negligent misrepresentation against all
14 Defendants; (4) breach of the implied covenant of good faith and fair dealing against First Horizon
15 and the Bank of New York; (5) inducement of the implied covenant of good faith and fair dealing
16 against Metlife and Nationstar only; (6) invasion of privacy (false light) against all Defendants; (7)
17 violations of California's Unfair Competition Law; and (8) declaratory relief.

18 **B. Procedural History**

19 Metlife removed this action from the Superior Court of Santa Clara County on the basis of
20 diversity jurisdiction under 28 U.S.C. § 1332. ECF No. 1. In December 2012, Howard filed his
21 First Amended Complaint. ECF No. 28. The Court granted in part and denied in part Metlife's
22 motion to dismiss and motion to strike with leave to amend. ECF No. 59. Howard filed the SAC
23 on July 9, 2013. ECF No. 60.

24 **C. Jurisdiction**

25 The Court has jurisdiction over this action under 28 U.S.C. § 1332.

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1 **II. MOTION TO DISMISS**

2 **A. Legal Standard**

3 A pleading must contain a “short and plain statement of the claim showing that the pleader
4 is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A motion to dismiss under Federal Rule of Civil
5 Procedure 12(b)(6) tests the legal sufficiency of the claims in the complaint. Navarro v. Block,
6 250 F.3d 729, 732 (9th Cir. 2001). “To survive a motion to dismiss, a complaint must contain
7 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A
8 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw
9 the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v.
10 Iqbal, 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted). “Threadbare
11 recitals of the elements of a cause of action, supported by mere conclusory statements, do not
12 suffice.” Id. When dismissing a complaint, leave to amend must be granted unless it is clear that
13 the complaint’s deficiencies cannot be cured by amendment. Lucas v. Dep’t of Corrections, 66
14 F.3d 245, 248 (9th Cir. 1995). The district court, however, has “broad” discretion to deny leave to
15 amend “where plaintiff has previously amended the complaint.” Ascon Properties, Inc. v. Mobil
16 Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989).

17 **B. Analysis**

18 **1. Howard’s Motion for Leave to Assert New Claims is Granted**

19 Metlife moves under Rule 12(b)(6) to dismiss each of the claims that Howard has asserted
20 against it. Metlife argues that three of these claims—namely those for inducement of breach of
21 contract, inducement of breach of the implied covenant of good faith and fair dealing, and
22 invasion of privacy (false light)—must be dismissed on the basis that they were asserted for the
23 first time in the SAC without leave of court in violation of Federal Rule of Civil Procedure 15(a).
ECF No. 67 at 10.

24 Howard responds that the assertion of these three claims in the SAC was not improper
25 because such claims fall within the scope of the allegations in the First Amended Complaint. ECF
26 No. 71 at 3. Alternatively, Howard requests leave in his opposition to assert these three claims on
27 the grounds that Metlife will not be prejudiced and that discovery has not yet begun. Id.

28 Federal Rule of Civil Procedure 15(a) permits a party to amend a pleading once “as a

1 matter of course” within 21 days of serving it or within 21 days after a response to it has been
2 filed. Fed. R. Civ. P. 15(a)(1). Otherwise, “a party may amend its pleading only with the
3 opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). A district court
4 “should freely give leave” to amend a pleading “when justice so requires.” Id. “Four factors are
5 commonly used to determine the propriety of a motion for leave to amend. These are: bad faith,
6 undue delay, prejudice to the opposing party, and futility of amendment.” DCD Programs, Ltd. v.
7 Leighton, 833 F.2d 183, 186 (9th Cir. 1987) (citation omitted). “Not all of the factors merit equal
8 weight . . . it is the consideration of prejudice to the opposing party that carries the greatest
9 weight.” Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir.2003). “The
10 party opposing amendment bears the burden of showing prejudice.” DCD Programs, 833 F.2d at
11 187. Generally, a court must make the determination of whether to grant leave “with all
12 inferences in favor of granting the motion.” Griggs v. Pace Am. Grp., Inc., 170 F.3d 877, 880 (9th
13 Cir. 1999).

14 The Court concludes that Howard was required to seek leave of court under Rule 15(a)(2)
15 before asserting the three claims at issue in the SAC. The Court nevertheless finds that leave to
16 amend is appropriate with respect to these claims because Metlife provides no indication that it
17 would be prejudiced by the amendment, which is the factor that carries the most weight in the
18 Rule 15(a) analysis. See Eminence Capital, 316 F.3d at 1052. Additionally, the action is in its
19 early stages. Accordingly, Howard’s request for leave to assert the three claims at issue in the
20 SAC is GRANTED.

21 The Court now examines the legal sufficiency of each of the claims that Metlife seeks to
22 dismiss under Rule 12(b)(6).

23 **2. Inducement of Breach of Contract**

24 Howard alleges that Metlife induced First Horizon and the Bank of New York to breach
25 the deed of trust by failing to track and apply Howard’s loan payments and by failing to provide
26 Howard with accurate information pertaining to the loan. SAC ¶¶ 44-50. Howard further alleges
27 that Metlife “had knowledge” of the loan agreement, the terms of the deed of trust, and of the fact
28 that Howard had “cured his default” and “remained current on his loan payments.” Id. ¶¶ 45-46.

1 Metlife also allegedly “knew” that if it misapplied Howard’s mortgage payments, First Horizon
2 and the Bank of New York would foreclose on the property. Id. ¶¶ 45-46. Howard avers that,
3 despite having this knowledge, Metlife “refused” to properly apply and accept Howard’s loan
4 payments, which caused Howard to incur late fees and attorney’s fees, and placed Howard’s
5 property in danger of foreclosure. Id. ¶¶ 46-51.

6 Metlife moves to dismiss this claim on the grounds that (1) Howard has failed to allege
7 that Metlife intended to induce a breach of the deed of trust; and (2) that to the extent that the
8 claim is premised on a breach of any purported agreement to modify the loan and the deed of trust,
9 the claim is barred by the statute of frauds.

10 To state a claim for inducement of breach of contract, a plaintiff must plead “that the
11 defendant ‘had knowledge of the existence of the contract and intended to induce a breach thereof,
12 that the contract was in fact breached resulting in injury to plaintiff, and the breach and resulting
13 injury must have been proximately caused by defendant’s unjustified or wrongful conduct.’” 625
14 3rd St. Associates, L.P. v. Alliant Credit Union, 633 F. Supp. 2d 1041, 1048 (N.D. Cal. 2009)
15 (quoting Freed v. Manchester Serv., Inc., 165 Cal. App. 2d 186, 189 (1958)).

16 Here, contrary to Metlife’s arguments, Howard has sufficiently alleged intent to induce a
17 breach of the deed of trust with respect to Metlife. Specifically, Howard alleges that Metlife was
18 aware of all of the terms of the loan and the deed of trust, and that Howard was current on his
19 payments and had cured the default. Howard further alleges that Metlife nevertheless failed to
20 properly apply and accept Howard’s payments, which ultimately led First Horizon and the Bank of
21 New York to initiate foreclosure proceedings with respect to the property. These averments are
22 sufficient to plausibly allege that Metlife intended to induce a breach of contract. Accordingly,
23 Metlife’s motion to dismiss this claim on the ground that Howard has failed to allege intent must
24 be DENIED.

25 Metlife also argues that the claim must be dismissed to the extent it is premised on the
26 breach of an oral agreement to modify the loan and deed of trust, because such a claim is barred by
27 the statute of frauds. Metlife contends that Howard has not alleged the existence of a writing
28 memorializing the purported oral agreement to modify the loan and deed of trust.

1 Howard responds that this claim is premised on Defendants’ failure to “honor” the alleged
2 loan modification that First Horizon orally promised him and admits that the statute of frauds
3 would apply to any such modification. ECF No. 71 at 3-4. He argues, however, that the
4 modification falls within an exception to the statute of frauds, namely one that applies when the
5 promisee is fraudulently led to believe by the promisor that the modification is in writing and the
6 promisee relies upon this fraudulent conduct. Id. (citing Cal. Civ. Code § 1623).

7 Agreements “for the sale of real property, or of an interest therein” are subject to the
8 statute of frauds. Cal. Civ. Code. § 1624(a)(3); see also Secrest v. Sec. Nat. Mortgage Loan Trust
9 2002-2, 167 Cal. App. 4th 544, 547 (2008) (holding that “an agreement by which a lender agreed
10 to forbear from exercising the right of foreclosure under a deed of trust securing an interest in real
11 property comes within the statute of frauds”). “An agreement to modify a contract that is subject
12 to the statute of frauds is also subject to the statute of frauds.” Id. at 553 (citations omitted); see
13 also Cal. Civ. Code § 1698 (providing that, unless the contract expressly provides otherwise, a
14 written contract may be modified via oral agreement if the oral agreement is supported by new
15 consideration and the statute of frauds is “satisfied if the contract as modified is within its
16 provisions”). An agreement to modify a contract that falls within the statute of frauds need not
17 satisfy the statute of frauds, however, if it “is prevented from being put into writing by the fraud of
18 a party thereto.” Cal. Civ. Code § 1623. In this situation, “any other party who is by such fraud
19 led to believe that [the modification] is in writing, and acts upon such belief to his prejudice, may
20 enforce it against the fraudulent party.” Id.

21 Here, no party disputes that the purported modification to the loan and the deed of trust is
22 subject to the statute of frauds. The issue is whether Howard has alleged facts to show that the
23 modification falls within the fraud exception to the statute of frauds. See Cal. Civ. Code § 1623.
24 A review of the complaint reveals that it is devoid of any allegations suggesting that any of the
25 Defendants fraudulently failed to put the loan modification agreement into writing within the
26 meaning of section 1623. Indeed, the only allegations in the SAC pertaining to the
27 memorialization of the purported loan modification are that First Horizon approved of a loan
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1 modification in 2009 but never provided Howard with “the written documents specifying the
2 term[s]” of the modification. SAC ¶¶ 2, 12. Accordingly, Metlife’s motion to dismiss this claim
3 is GRANTED WITH LEAVE TO AMEND. If Howard choses to re-assert this claim in an
4 amended complaint, he must satisfy the pleading requirements of Federal Rule of Civil Procedure
5 9(b) to the extent that he intends to rely on the fraud exception to the statute of frauds.

6 3. Negligent Misrepresentation

7 Howard alleges that Metlife provided to the other Defendants “inaccurate, incomplete, or
8 otherwise incorrect information” about the status of the loan modification, Howard’s loan
9 payments, and property taxes. SAC ¶¶ 56-57. Howard also alleges that Metlife “perpetuated”
10 false statements made by First Horizon indicating that Howard “need not make payments under
11 either the old terms or the new terms until the paperwork had been processed.” *Id.* ¶ 55.

12 Metlife moves to dismiss this claim on the grounds that Howard fails to allege that any of
13 the statements at issue were made by Metlife to Howard, and that the allegations supporting this
14 claim fail to satisfy Rule 9(b).

15 Howard responds that the allegations in the SAC sufficiently state a claim for negligent
16 misrepresentation as to Metlife.

17 The Court first determines whether Rule 9(b)’s heightened pleading requirements apply to
18 a claim for negligent misrepresentation. The Ninth Circuit “has not yet decided” whether Rule
19 9(b) applies to negligent misrepresentation claims. *See Anschutz Corp. v. Merrill Lynch & Co.*,
20 785 F. Supp. 2d 799, 823 (N.D. Cal. 2011); *but see Miller v. Int’l Bus. Mach. Corp.*, 138
21 Fed.Appx. 12, 17 (9th Cir.2005) (unpublished decision finding negligent misrepresentation claim
22 only needs to satisfy Rule 8). Although several courts in this district have applied Rule 9(b) to
23 negligent misrepresentation claims, the Court will decline to do so here.

24 The Court is instead persuaded by the reasoning set forth in *Petersen v. Allstate Indem.*
25 *Co.*, 281 F.R.D. 413, 418 (C.D. Cal. 2012). There, the court concluded that the language and
26 underlying policy of Rule 9(b) do not support applying that rule to claims for negligent
27 misrepresentation because “Rule 9(b) is expressly limited to allegations of fraud or mistake,”
28 whereas a claim for negligent misrepresentation only “requires that the defendant lacked any

1 reasonable ground for believing [its] statement to be true.” Id. (citations and internal quotation
2 marks omitted). As such, “because an allegation of negligent misrepresentation suggests only that
3 the defendant failed to use reasonable care—an objective standard—it does not result in the kind
4 of harm that Rule 9(b) was designed to prevent.” Id. (citation and internal quotation marks
5 omitted). In addition to drawing on the language of and policy behind Rule 9(b), the Petersen
6 court also canvassed the recent decisional authority, including cases from the Fifth and Seventh
7 Circuits, and concluded that “the tide of precedent is turning” against applying Rule 9(b) to
8 negligent misrepresentation cases. Id.

9 This Court finds Judge Carter’s opinion in Petersen persuasive, and adopts both its
10 reasoning and its holding. Accordingly, the Court concludes that to allege a negligent
11 misrepresentation claim, Plaintiff must satisfy the requirements of Rule 8, but does not need to
12 satisfy the heightened pleading requirements of Rule 9(b).

13 The Court now turns to the question of whether Plaintiff has stated such a claim. To state a
14 claim for negligent misrepresentation, a plaintiff must plead “(1) the misrepresentation of a past or
15 existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to
16 induce another’s reliance on the fact misrepresented, (4) justifiable reliance on the
17 misrepresentation, and (5) resulting damage.” Apollo Capital Fund, LLC v. Roth Capital Partners,
18 LLC, 158 Cal. App. 4th 226, 243 (Cal. Ct. App. 2007).

19 Metlife argues that the claim must be dismissed because Howard has not alleged facts
20 showing that the statements that form the basis of the claim were made by Metlife to Howard.
21 The Court concludes that the claim cannot be dismissed on this basis. Under California law, “a
22 representation may be actionable even though it was not made directly to the party seeking
23 recovery.” Mirkin v. Wasserman, 5 Cal. 4th 1082, 1111 (Cal. 1993) (citations omitted). Indeed,
24 the California Supreme Court has held that “[a] misrepresentation is no less actionable . . . because
25 it was originally made to an intermediary who conveyed it to the party ultimately injured.” Id.
26 (citations omitted). For a claim for negligent misrepresentation to be actionable, “[t]he
27 representation must have been made with the intent to defraud plaintiff, or a particular class of
28 persons to which plaintiff belongs, whom defendant intended or reasonably should have foreseen

1 would rely upon the representation.” See Murphy v. BDO Seidman, LLP, 113 Cal. App. 4th 687,
2 776 (Cal. Ct. App. 2003).

3 Here, Howard alleges that Metlife provided inaccurate, incomplete or otherwise incorrect
4 information to Nationstar (the servicer of the loan) regarding the loan, including but not limited to
5 the status of the loan modification, the payments made by Howard, and the amount of property
6 taxes owed by Howard. SAC ¶¶ 56-58. Howard avers that Metlife made these statements with the
7 intent of inducing Howard to rely on them, and that these statements ultimately were made to him
8 by the other Defendants. Id. Howard further alleges that he relied on Metlife’s statements when
9 he decided not to pay certain amounts owed on the loan, which ultimately led to the initiation of
10 foreclosure proceedings on the property. Id. ¶¶ 4, 59. Because these allegations are sufficient to
11 state a claim for negligent misrepresentation, Metlife’s motion to dismiss this claim is DENIED.

12 **4. Inducement of Breach of the Implied Covenant of Good Faith and Fair
13 Dealing**

14 Howard alleges Metlife induced First National and the Bank of New York to breach the
15 implied covenant of good faith and fair dealing by failing to track and apply Howard’s loan
16 payments. SAC ¶¶ 74-79.

17 Metlife moves to dismiss this claim on the ground that it is not recognized under California
18 law and because it is duplicative of Howard’s claim for inducement of breach of contract.

19 Howard does not squarely address Metlife’s arguments; instead, he argues that this claim
20 should survive Metlife’s motion for “the same reasons [his] cause of action for inducing breach of
21 contract should survive.” ECF No. 71 at 4-5.

22 The Court concludes that this claim must be dismissed, as Howard does not cite any
23 authority establishing that a claim for inducement of breach of the implied covenant of good faith
24 and fair dealing is cognizable under California law. Metlife’s motion to dismiss this claim is
25 GRANTED WITHOUT LEAVE TO AMEND.

26 **5. Invasion of Privacy (False Light)**

27 In his opposition, Howard voluntarily withdrew this claim as to Metlife. ECF No. 71 at 5.
28 This claim is deemed DISMISSED WITH PREJUDICE as to Metlife. Accordingly, Metlife’s
motion to dismiss this claim is DENIED AS MOOT.

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6. Unfair Competition Law (“UCL”)

Howard alleges that Defendants violated California’s Unfair Competition Law by failing to accurately apply his loan payments, track his loan payments and property taxes, finalize his loan modifications, and by committing “other acts” in violation of California Civil Code § 2923.5. SAC ¶¶ 88-95.

California’s Unfair Competition Law (“UCL”) prohibits “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.” Cal Bus. & Prof. Code § 17200. “An act can be alleged to violate any or all of the three prongs of the UCL – unlawful, unfair, or fraudulent.” Berryman v. Merit Prop. Mgmt., 62 Cal. Rptr. 3d 177, 185 (Cal. Ct. App. 2007).

a. Unlawful Prong

An act is unlawful under the UCL if it violates another law. “[V]irtually any state, federal or local law can serve as the predicate for an action under section 17200.” Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1168 (9th Cir. 2012) (citation omitted).

Here, Howard fails to state a claim under the unlawful prong. First, to the extent his claim is premised on Metlife’s alleged failure to accurately apply and track Howard’s loan payments and to finalize his loan modification, Howard fails to allege the predicate law that was violated by these alleged acts. Second, to the extent that his claim is premised on the “other acts” that Metlife allegedly committed in violation of California Civil Code Section 2923.5, Howard fails to specify the nature of such acts. Accordingly, this claim is DISMISSED WITHOUT LEAVE TO AMEND, as the Court previously granted leave to amend to Howard to cure these deficiencies but Howard failed to do so in the SAC. See ECF No. 59 at 7; see also Ascon Properties, 866 F.2d at 1160 (holding that the district court has “broad” discretion to deny leave to amend “where plaintiff has previously amended the complaint”).

b. Unfair Prong

“An act or practice is unfair if the consumer injury is substantial, is not outweighed by any countervailing benefit to consumers or to competition, and is not an injury the consumers could reasonably have avoided.” Daugherty v. Am. Honda Motor Co., 51 Cal Rptr. 3d 118, 129 (Cal Ct.

1 App. 2006). “[T]he determination of whether a particular business practice is unfair necessarily
2 involves an examination of its impact on its alleged victim, balanced against the reasons,
3 justifications and motives of the alleged wrongdoing.” Berryman, 62 Cal. Rptr. 3d at 187 (Cal. Ct.
4 App. 2007).

5 The Court concludes that Howard’s allegations are sufficient to state a claim under the
6 unfair prong of the UCL. Howard alleges that, despite his efforts to obtain information about the
7 loan from Defendants and to stay current on his loan payments in accordance with Defendants’
8 representations about the amounts he owed, each of the Defendants, including Metlife, failed to
9 apply his loan payments, to provide him with accurate information about his loan account, and to
10 finalize his loan modification, which resulted in the initiation of foreclosure proceedings on the
11 property. SAC ¶¶ 4, 28, 50. These allegations are sufficient to raise the reasonable inference that
12 Metlife’s alleged acts are unfair within the meaning of the UCL. Accordingly, Metlife’s motion to
13 dismiss this claim is DENIED.

14 **c. Fraudulent Prong**

15 A plaintiff may bring a claim under the fraudulent prong of the UCL if the defendant’s
16 conduct is “likely to deceive.” Newsom v. Countrywide Home Loans, Inc., 714 F. Supp. 2d 1000,
17 1012 (N.D. Cal. 2010) (citing Morgan v. AT & T Wireless Servs., Inc., 99 Cal. Rptr. 3d 768, 785
18 (Cal. Ct. App. 2009)). To state a claim for fraud under the UCL, a plaintiff must allege the
19 existence of (1) a duty to disclose, and (2) reliance. Id. (citations omitted). Additionally, a claim
20 for fraudulent conduct under the UCL must meet the heightened pleading requirements of Rule
21 9(b). See Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009). A plaintiff satisfies his
22 pleading burden under Rule 9(b) by alleging the “who, what, where, when, and how” of the
23 charged misconduct. Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997).

24 Here, Howard fails to state a claim against Metlife under the fraudulent prong of the UCL.
25 His claim is premised on allegations that Metlife made misrepresentations to Howard concerning
26 the loan. The allegations supporting this claim, however, are insufficiently specific and therefore
27 do not satisfy the heightened pleading requirements of Rule 9(b). Notably, Howard’s opposition
28 contains no argument with respect to this claim; thus, Howard implicitly concedes that this claim

1 is subject to dismissal. Accordingly, Metlife’s motion to dismiss this claim as to Metlife is
2 GRANTED WITHOUT LEAVE TO AMEND, given that the Court previously granted leave to
3 amend to Howard to cure these deficiencies but Howard failed to do so in the SAC. See ECF No.
4 59 at 8; see also Ascon Properties, 866 F.2d at 1160 (holding that the district court has “broad”
5 discretion to deny leave to amend “where plaintiff has previously amended the complaint”).

6 **7. Declaratory Relief**

7 Howard alleges that an actual controversy exists between himself and each of the
8 Defendants with respect to their rights and obligations under the loan and deed of trust; he
9 therefore seeks a “judicial determination” of such rights. SAC ¶¶ 103-09.

10 Metlife moves to dismiss this claim, arguing that there is no legal controversy between it
11 and Howard because all of the claims that Howard has asserted against it fail as a matter of law.

12 “The fundamental basis of declaratory relief is the existence of an actual, present
13 controversy over a proper subject.” City of Cotati v. Cashman, 29 Cal. 4th 69, 79 (Cal. 2002).
14 When the issues invoked in a request for declaratory relief “already were fully engaged by other
15 causes of action,” however, then “declaratory relief [is] unnecessary and superfluous.” Hood v.
16 Superior Court, 33 Cal. App. 4th 319, 324 (Cal. Ct. App. 1995).

17 Here, the requested declaratory relief pertains to issues that are subsumed within Howard’s
18 claim for breach of contract. Accordingly, Howard’s claim for declaratory relief is DISMISSED
19 as superfluous.

20 **III. MOTION TO STRIKE**

21 **A. Legal Standard**

22 A district court may strike from a pleading “an insufficient defense or any redundant,
23 immaterial, impertinent or scandalous matter.” Fed. R. Civ. P. 12(f).

24 **B. Analysis**

25 Metlife moves to strike Howard’s request for attorney’s fees on the ground that Howard
26 has not alleged any legal or factual basis for the request.

27 Howard opposes the motion, arguing that he may seek attorney’s fees under section 1021.5
28 of the California Code of Civil Procedure, which permits a plaintiff who prevails on his UCL

1 claim to seek attorney’s fees as a private attorney general. ECF No. 72 at 2; see also Jackson v.
2 Sturkie, 255 F. Supp. 2d 1096, 1107-08 (N.D. Cal. 2003) (noting that “the court may award
3 attorney fees to a successful litigant in a UCL action” under section 1021.5). Section 1021.5
4 provides that:

5 Upon motion, a court may award attorneys’ fees to a successful
6 party against one or more opposing parties in any action which has
7 resulted in the enforcement of an important right affecting the public
8 interest if: (a) a significant benefit, whether pecuniary or
9 nonpecuniary, has been conferred on the general public or a large
10 class of persons, (b) the necessity and financial burden of private
11 enforcement, or of enforcement by one public entity against another
12 public entity, are such as to make the award appropriate, and (c)
13 such fees should not in the interest of justice be paid out of the
14 recovery, if any.

15 Cal. Code Civ. Proc. § 1021.5.

16 Before awarding fees under section 1021.5, however, “[t]he trial court must determine the
17 significance of the benefit and the size of the class receiving that benefit by realistically assessing
18 the gains that have resulted in a particular case.” Flannery v. California Highway Patrol, 61 Cal.
19 App. 4th 629, 635 (Cal. Ct. App. 1998).

20 Here, Howard’s claim under the unfair prong of the UCL has survived Metlife’s motion to
21 dismiss. Accordingly, because Howard may seek attorney’s fees in connection with this claim if
22 he satisfies the requirements of section 1021.5 later in the litigation, Metlife’s motion to strike
23 Howard’s request for attorney’s fees under section 1021.5 is DENIED.

24 **IV. CONCLUSION**

25 Metlife’s motion to dismiss each of the claims that Howard has asserted against it is
26 GRANTED IN PART and DENIED IN PART, and Metlife’s motion to strike is DENIED.

27 Howard may file an amended complaint that cures the deficiencies identified in this order within

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21 days of the date this order is filed. Howard may not re-assert any of the claims that were dismissed without leave to amend in any amended complaint.

IT IS SO ORDERED.

Dated: November 25, 2013



JON S. TIGAR
United States District Judge