

United States District Court
For the Northern District of California

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

CHARLES A. BONNER,
Plaintiff,
v.
SELECT PORTFOLIO SERVICING, INC., et
al.,
Defendants.

No. 10-00609 CW
ORDER GRANTING
DEFENDANTS SELECT
PORTFOLIO
SERVICING, INC.;
TIMOTHY J.
O'BRIEN; JASON H.
MILLER; AND
MATTHEW L.
HOLLINGSWORTH'S
MOTION TO DISMISS
AND DENYING AS
MOOT DEFENDANTS
SELECT PORTFOLIO
SERVICING, INC.;
TIMOTHY J.
O'BRIEN; JASON H.
MILLER; AND
MATTHEW L.
HOLLINGSWORTH'S
SECOND MOTION TO
DISMISS (Docket
Nos. 4 and 19)

Plaintiff Charles A. Bonner brings twenty-one claims against Defendants Select Portfolio Servicing, Inc.; Timothy J. O'Brien, Bryan M. Marshall; Jason H. Miller; Matthew L. Hollingsworth; Encore Credit Corp; and Option One Mortgage Corp. for their alleged conduct related to a loan he obtained. Defendants Select Portfolio, O'Brien, Miller and Hollingsworth (collectively, Select Portfolio) move to dismiss Plaintiff's complaint. Defendants Marshall, Encore Credit and Option One Mortgage do not appear to have been served and have not answered Plaintiff's complaint. Plaintiff opposes the motion. The motion was taken under submission on the papers. On July 21, 2010, Select Portfolio filed

1 a second motion to dismiss Plaintiff's complaint. Having
2 considered all the papers submitted by the parties, the Court
3 GRANTS Select Portfolio's first motion and dismisses Plaintiff's
4 claims against Select Portfolio, O'Brien, Miller and Hollingsworth.
5 The Court grants leave to amend. Because the Court grants Select
6 Portfolio's first motion to dismiss, their second motion to
7 dismiss, which is directed at the same complaint, is DENIED as
8 moot.

9 BACKGROUND

10 On December 5, 2005, Plaintiff obtained a \$900,000 loan from
11 Defendant Encore Credit for property located at 146-148 Buchanan
12 Court in Sausalito, California. Select Portfolio's Request for
13 Judicial Notice (RJN),¹ Ex. A. The deed of trust associated with
14 this loan, recorded on December 9, 2005, named Fidelity National
15 Title Insurance Company as trustee and Mortgage Electronic
16 Registration Systems, Inc. (MERS) as beneficiary. RJN, Ex. A at 2.

17 On January 21, 2009, a Notice of Default and Election To Sell
18 under Deed of Trust was recorded based on the December, 2005 deed.
19 The notice indicated that Plaintiff had defaulted on his payment
20 obligations and warned that his property could be sold three months
21 after the date of the notice. RJN, Ex. B at 1. At that time,
22 Plaintiff was past due in the amount of \$38,599.07. RJN, Ex. B at
23 1.

24
25 ¹ Select Portfolio requests judicial notice of documents filed
26 in the official records of the County of Marin. Plaintiff does not
27 oppose the request. Because the documents contain facts "capable
28 of accurate and ready determination by resort to sources whose
accuracy cannot reasonably be questioned," the Court grants Select
Portfolio's request. Fed. R. Evid. 201(b).

1 On February 24, 2009, Select Portfolio sought the recording of
2 a notice of "Corporate Assignment of Deed of Trust," which
3 indicated that MERS had assigned its beneficial interest in the
4 deed of trust to U.S. Bank. RJN, Ex. C. A Notice of Trustee's
5 Sale was then recorded on April 22, 2009, stating that Plaintiff's
6 property would be sold on May 13, 2009. RJN, Ex. D. U.S. Bank
7 purchased the property and acquired title to it on June 16, 2009.
8 RJN, Ex. E.

9 Plaintiff's complaint contains general allegations concerning
10 the residential mortgage industry and Select Portfolio. He alleges
11 that he provided "proof of payment on the deed of trust," but
12 Select Portfolio nevertheless "refused to reinstate the title" to
13 his property. Compl. ¶ 22. He also avers that Select Portfolio
14 foreclosed on his property, even though it lacked "the right to do
15 so" and knew that he did not have the "knowledge and means to
16 contest" the foreclosure. Compl. ¶ 26. He pleads that Select
17 Portfolio was not in possession of his mortgage note at the time of
18 foreclosure. According to Plaintiff, Defendants O'Brien, Marshall,
19 Miller and Hollingsworth are officers of Select Portfolio.²

20 Against all Defendants, Plaintiff brings twenty-one causes of
21 action: (1) violations of the Home Ownership Equity Protection Act
22 (HOEPA); (2) violations of the Real Estate Settlement Procedures
23 Act (RESPA); (3) violations of the Truth-in-Lending Act (TILA);

24

25 ² In his complaint, Plaintiff alleges that, as officers of
26 Select Portfolio, Defendants Miller and Hollingsworth "directed,
27 authorized, and ratified, the illegal conduct of AM CAL"
28 Compl. ¶¶ 7-8. AM CAL is not named as a Defendant and it is not
clear what role it played in Plaintiff's loan.

1 (4) violations of the Fair Credit Reporting Act (FCRA);
2 (5) fraudulent misrepresentation; (6) breach of fiduciary duty;
3 (7) unjust enrichment; (8) civil conspiracy; (9) civil RICO; (10) a
4 request to "set aside illegal trustee sales;" (11) quiet title;
5 (12) violation of California Business and Professions Code § 17200;
6 (13) wrongful foreclosure; (14) usury; (15) predatory lending;
7 (16) unfair debt collection practices; (17) slander of title;
8 (18) invasion of privacy; (19) "intentional infliction of emotion
9 distress;" (20) trespass; and (21) conversion.

10 Plaintiff's complaint appears similar to the one he filed in
11 Bonner v. Redwood Mortgage Corporation, No. 10-0479 WHA (N.D.
12 Cal.). In that case, the court dismissed Plaintiff's sixteen
13 claims and required him to seek leave to amend his complaint.
14 Bonner, 2010 WL 1267069, at *11. Plaintiff did not do so.

15 The complaint also bears some resemblance to that filed in
16 Jacob v. Aurora Loan Services, No. 10-1789 SC (N.D. Cal.), which
17 was filed on behalf of that plaintiff by Plaintiff's law firm.

18 LEGAL STANDARD

19 A complaint must contain a "short and plain statement of the
20 claim showing that the pleader is entitled to relief." Fed. R.
21 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a
22 claim is appropriate only when the complaint does not give the
23 defendant fair notice of a legally cognizable claim and the grounds
24 on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
25 (2007). In considering whether the complaint is sufficient to
26 state a claim, the court will take all material allegations as true
27 and construe them in the light most favorable to the plaintiff. NL

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1 Iqbal, 129 S. Ct. at 1949-50. Plaintiff must offer factual
2 allegations that, if taken as true, demonstrate his entitlement to
3 relief. Furthermore, in evaluating his claims, the Court considers
4 the documents proffered by Select Portfolio, which contain
5 undisputed facts concerning Plaintiff's loan and the foreclosure of
6 his property. See Lee v. City of Los Angeles, 250 F.3d 668, 688-89
7 (9th Cir. 2001).

8 Also, Plaintiff has alleged several fraud-based claims. As
9 discussed in further detail below, these claims trigger the
10 heightened pleading requirements of Rule 9(b); short and plain
11 statements do not suffice.

12 I. HOEPA and TILA Claims

13 Plaintiff asserts that Select Portfolio failed to disclose
14 information concerning his loan as required by HOEPA and TILA. He
15 seeks rescission of his loan and statutory damages.

16 HOEPA and TILA are part of the same statutory scheme and share
17 the same limitations periods. See, e.g., Runaj v. Wells Fargo
18 Bank, 667 F. Supp. 2d 1199, 1208 (S.D. Cal. 2009); Rendon v.
19 Countrywide Home Loans, 2009 WL 3126400, *9 (E.D. Cal.) ("HOEPA is
20 an amendment of TILA, and therefore is governed by the same
21 remedial scheme and statutes of limitations as TILA.") (citing
22 Kemezis v. Matthew, 2008 WL 2468377, *3 (E.D. Pa.)). Claims for
23 rescission are subject to a three-year statute of limitations, 15
24 U.S.C. § 1635(f), whereas those for damages must be brought within
25 one year from the date loan documents are signed, Meyer v.
26 Ameriquet Mortgage Co., 342 F.3d 899, 902 (9th Cir. 2003) (citing
27 15 U.S.C. § 1640(a),(e)). Plaintiff executed his loan on December
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1 5, 2005. Thus, on their face, his claims for rescission and
2 damages under HOEPA and TILA are untimely.

3 Plaintiff asserts that the limitations periods should be
4 equitably tolled based on his allegations of fraud. Equitable
5 tolling cannot apply to Plaintiff's claim for rescission. Section
6 "1635(f) is a statute of repose, depriving the courts of subject
7 matter jurisdiction when a § 1635 claim is brought outside the
8 three-year limitation period." Miquel v. Country Funding Corp.,
9 309 F.3d 1161, 1164 (9th Cir. 2002); see also Beach v. Ocwen
10 Federal Bank, 523 U.S. 410, 417 (1998). There is "no federal right
11 to rescind, defensively or otherwise, after the 3-year period of
12 § 1635(f) has run." Beach, 523 U.S. at 419. Thus, the Court lacks
13 subject matter jurisdiction over Plaintiff's claim for rescission
14 and cannot equitably toll the limitations period.³

15 Although his damages claims are susceptible to equitable
16 tolling, Plaintiff does not plead facts that entitle him to
17 application of the doctrine. Plaintiff's general allegations
18 concerning "DEFENDANTS and LENDERS," Compl. ¶¶ 40-42, do not
19 explain how Plaintiff was prevented from discovering, in the
20 exercise of reasonable diligence, the information necessary to
21 bring his damages claims within the one-year limitations period.
22 See, e.g., Meyer v. Ameriquest Mortgage Co., 342 F.3d 899, 902 (9th
23 Cir. 2003); Lingad v. Indymac Fed. Bank, 682 F. Supp. 2d 1142, 1147
24 (E.D. Cal. 2010) (rejecting equitable tolling at pleading stage

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26 ³ Plaintiff's property has already been sold. Thus, even if
27 he had brought suit within the limitations period, Plaintiff would
28 not have a right to rescind under HOEPA or TILA. See 15 U.S.C.
§ 1635(f).

1 when "plaintiff fails to allege any facts demonstrating that the
2 TILA violations alleged could not have been discovered by due
3 diligence") (citing Meyer). Equitable tolling is not warranted for
4 Plaintiff's damages claims.

5 Even if the limitations period were tolled, Plaintiff has not
6 alleged facts indicating that Select Portfolio is a "creditor" that
7 could be liable for the claims he brings. See 15 U.S.C. §§ 1605
8 and 1639. For the purposes of HOEPA and TILA, a "creditor" is a
9 person "who both (1) regularly extends, whether in connection with
10 loans, sales of property or services, or otherwise, consumer credit
11 which is payable by agreement in more than four installments or for
12 which the payment of a finance charge is or may be required, and
13 (2) is the person to whom the debt arising from the consumer credit
14 transaction is initially payable on the face of the evidence of
15 indebtedness" Id. § 1602(f); see also 12 C.F.R.
16 § 226.2(a)(17)(i). Plaintiff's loan documents name Defendant
17 Encore Credit as the lender, not Select Portfolio. Although
18 assignees of an original creditor could be held liable, Plaintiff
19 has not alleged facts that suggest Select Portfolio is such an
20 assignee. See 15 U.S.C. § 1641(d)(1).

21 Accordingly, Plaintiff's claims for rescission under HOEPA and
22 TILA are dismissed with prejudice because they are untimely.
23 Plaintiff's damages claims under HOEPA and TILA are dismissed with
24 leave to amend to allege facts that support equitable tolling and
25 to plead facts that show Select Portfolio is a "creditor" or
26 qualifying assignee under these statutes.

27 II. RESPA Claim

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1 Plaintiff asserts a claim under 12 U.S.C. § 2607 against
2 Select Portfolio, alleging that it "accepted charges for the
3 rendering of real estate services, which were in fact charges for
4 other than services actually performed." Compl. ¶ 72. Claims
5 under RESPA are subject to a one-year statute of limitations. See
6 12 U.S.C. § 2614. Although Plaintiff claims that he is entitled to
7 equitable tolling, this argument fails for the same reason stated
8 above. Further, Plaintiff has not alleged facts to suggest that
9 Select Portfolio rendered any "settlement service" for which it
10 could be held liable. See 12 U.S.C. §§ 2602(3) and 2607.

11 Accordingly, Plaintiff's RESPA claim against Select Portfolio
12 is dismissed with leave to amend to plead facts that support
13 equitable tolling and that suggest Select Portfolio offered a
14 "settlement service" as defined by 12 U.S.C. § 2602(3).

15 III. FCRA Claim

16 Plaintiff appears to bring a claim under 15 U.S.C. § 1681o,⁴
17 which provides that any "person who is negligent in failing to
18 comply with any requirement imposed under this subchapter with
19 respect to any consumer is liable to that consumer"
20 Plaintiff contends that Select Portfolio "wrongfully, improperly,
21 and illegally reported negative information" about him "to one or
22 more Credit Reporting Agencies" Compl. ¶ 79. However, he
23 has not plead facts explaining the nature of this information, how
24 it was negative and how it caused him injury. Nor has he made

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26 ⁴ Plaintiff also pleads that "15 U.S.C. Sec. 1681(s)(2)(b)"
27 affords him a private right of action. This section does not
28 exist, and the Court cannot determine the statute to which
Plaintiff intends to refer.

1 factual allegations to show how Select Portfolio negligently failed
2 to comply with the FCRA. The Court accordingly dismisses this
3 claim with leave to amend to plead a factual basis.

4 IV. Fraudulent Misrepresentation Claim

5 Plaintiff pleads that Select Portfolio failed to disclose
6 information, which constituted fraud under California law. To
7 state a claim for fraud, a plaintiff must plead
8 "(a) misrepresentation; (b) knowledge of falsity (or
9 scienter); (c) intent to defraud, i.e., to induce reliance;
10 (d) justifiable reliance; and (e) resulting damage.'" In re
11 Napster, Inc. Copyright Litig., 479 F.3d 1078, 1096 (9th Cir. 2007)
12 (quoting Small v. Fritz Cos., Inc., 30 Cal. 4th 167, 173 (2003));
13 see generally Cal. Civ. Code §§ 1709-10. Averments concerning
14 fraud "shall be stated with particularity." Fed. R. Civ. Proc.
15 9(b). The allegations must be "specific enough to give defendants
16 notice of the particular misconduct which is alleged to constitute
17 the fraud charged so that they can defend against the charge and
18 not just deny that they have done anything wrong." Semegen v.
19 Weidner, 780 F.2d 727, 731 (9th Cir. 1985). Statements of the
20 time, place and nature of the alleged fraudulent activities are
21 sufficient, id. at 735, provided the plaintiff sets forth "what is
22 false or misleading about a statement, and why it is false." In re
23 GlenFed, Inc., Secs. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994).
24 Scienter may be averred generally, simply by saying that it
25 existed. Id. at 1547; see Fed. R. Civ. Proc. 9(b) ("Malice,
26 intent, knowledge, and other condition of mind of a person may be
27 averred generally."). Allegations of fraud based on information
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1 and belief usually do not satisfy the particularity requirements of
2 Rule 9(b); however, as to matters peculiarly within the opposing
3 party's knowledge, allegations based on information and belief may
4 satisfy Rule 9(b) if they also state the facts upon which the
5 belief is founded. Wool v. Tandem Computers, Inc., 818 F.2d 1433,
6 1439 (9th Cir. 1987).

7 Plaintiff alleges two instances of fraud against Select
8 Portfolio. First, he avers that Select Portfolio fraudulently
9 misrepresented that it would restore title in his name after he
10 provided proof of payment on the deed of trust. However, he has
11 not alleged facts concerning how this fraud was perpetrated. He
12 broadly asserts these allegations against "DEFENDANT SELECT
13 PORTFOLIO SERVICING and LENDERS," but does not plead which
14 employees of Select Portfolio actually effectuated the fraud.
15 Compl. ¶ 22. Nor does he allege the time and place of this alleged
16 fraud. Plaintiff's general allegations do not satisfy the
17 requirements of Rule 9(b).

18 Second, Plaintiff alleges that Select Portfolio failed to
19 advise him of "any material facts affecting the terms and
20 conditions of the loans and [his] ability to pay the loan in full."
21 Compl. ¶ 38. However, he has not alleged that Select Portfolio was
22 even involved in the origination of his loan; as noted above,
23 Defendant Encore Credit was Plaintiff's lender. Even if Select
24 Portfolio was somehow involved, Plaintiff does not identify the
25 time, place and manner of this alleged fraud. Furthermore, the
26 documents provided by Select Portfolio suggest that Plaintiff
27 received information concerning the terms of his loan. See

1 generally RJN, Ex. A. Plaintiff does not plead how a fraud was
2 perpetrated, notwithstanding the disclosures contained in these
3 documents.

4 Plaintiff's fraudulent misrepresentation claim is therefore
5 dismissed with leave to amend. Plaintiff must allege facts
6 identifying the time, place and manner of the alleged fraud.
7 Furthermore, to the extent Plaintiff rests his fraud claim on
8 omissions concerning his loan's terms, he must alleged that Select
9 Portfolio was involved in the origination of his loan and plead how
10 the alleged non-disclosures constituted a fraud, notwithstanding
11 the information contained in his loan documents.

12 V. Claim for Breach of Fiduciary Duty

13 "A debt is not a trust and there is not a fiduciary relation
14 between debtor and creditor as such. The same principle should
15 apply with even greater clarity to the relationship between a bank
16 and its loan customers." Price v. Wells Fargo Bank, 213 Cal. App.
17 3d 465, 476 (1989) (internal quotations and citations omitted).
18 Generally, a financial institution does not owe a borrower a duty
19 of care. Nymark v. Heart Fed. Sav. & Loan Ass'n, 213 Cal. App. 3d
20 1089, 1095-96 (1991).

21 Plaintiff argues that Select Portfolio was his fiduciary
22 because it contracted "to provide mortgage loan services and a loan
23 program" to him. Compl. ¶ 90. This is not sufficient to create a
24 fiduciary relationship under California law. Accordingly,
25 Plaintiff's breach of fiduciary duty claim is dismissed with leave
26 to amend to plead facts suggesting the existence of a fiduciary
27 relationship.

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1 VI. Unjust Enrichment

2 California courts appear to be split as to whether there is an
3 independent cause of action for unjust enrichment. Baggett v.
4 Hewlett-Packard Co., 582 F. Supp. 2d 1261, 1270-71 (C.D. Cal. 2007)
5 (applying California law). One view is that unjust enrichment is
6 not a cause of action, or even a remedy, but rather a general
7 principle, underlying various legal doctrines and remedies.
8 McBride v. Boughton, 123 Cal. App. 4th 379, 387 (2004). In
9 McBride, the court construed a "purported" unjust enrichment claim
10 as a cause of action seeking restitution. Id. There are at least
11 two potential bases for a cause of action seeking restitution:
12 (1) an alternative to breach of contract damages when the parties
13 had a contract which was procured by fraud or is unenforceable for
14 some reason; and (2) where the defendant obtained a benefit from
15 the plaintiff by fraud, duress, conversion, or similar conduct and
16 the plaintiff chooses not to sue in tort but to seek restitution on
17 a quasi-contract theory. Id. at 388. In the latter case, the law
18 implies a contract, or quasi-contract, without regard to the
19 parties' intent, to avoid unjust enrichment. Id.

20 Another view is that a cause of action for unjust enrichment
21 exists and its elements are receipt of a benefit and unjust
22 retention of the benefit at the expense of another. Lectrodryer v.
23 SeoulBank, 77 Cal. App. 4th 723, 726 (2000); First Nationwide Sav.
24 v. Perry, 11 Cal. App. 4th 1657, 1662-63 (1992).

25 Plaintiff has failed to state a basis for a restitutionary
26 remedy. He alleges that he had an "implied contract" with Select
27 Portfolio "to ensure that [he] understood all fees which would be

1 paid . . . and to not charge any fees not related to the settlement
2 of the loans and without full disclosure" Compl. ¶ 95.
3 However, he has not plead facts to show how such an implied
4 contract arose. And, as with his RESPA claims, Plaintiff has not
5 alleged facts that tend to show Select Portfolio was involved in
6 any settlement activities related to his loan or collected any fees
7 from him. Accordingly, Plaintiff's unjust enrichment claim is
8 dismissed with leave to amend to plead facts supporting a claim
9 upon which a restitutionary remedy could be based.

10 VII. Civil Conspiracy

11 Civil conspiracy "is not a cause of action, but a legal
12 doctrine that imposes liability on persons who, although not
13 actually committing a tort themselves, share with the immediate
14 tortfeasors a common plan or design in its perpetration." Applied
15 Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 510
16 (1994) (citing Wyatt v. Union Mortg. Co., 24 Cal. 3d 773, 784
17 (1979)). "Standing alone, a conspiracy does no harm and engenders
18 no tort liability. It must be activated by the commission of an
19 actual tort." Applied Equip. Corp., 7 Cal. 4th at 511. "The
20 elements of an action for civil conspiracy are (1) formation and
21 operation of the conspiracy and (2) damage resulting to plaintiff
22 (3) from a wrongful act done in furtherance of the common design."
23 Rusheen v. Cohen, 37 Cal. 4th 1048, 1062 (2006) (citing Doctors'
24 Co. v. Superior Court, 49 Cal. 3d 39, 44 (1989))

25 Here, Plaintiff has not stated a cause of action on which
26 conspiratorial liability could be based. Even if he had, Plaintiff
27 has not plead facts to show the formation and operation of a

1 conspiracy. Id. Plaintiff's recitation of the elements of civil
2 conspiracy is not sufficient to sustain this theory of liability.

3 Accordingly, Plaintiff's civil conspiracy claim is dismissed
4 with leave to amend to state a claim on which conspiratorial
5 liability could be based and to plead facts showing the formation
6 and operation of a conspiracy.

7 VIII. Civil RICO Claim

8 To state a claim for relief in a private RICO action,
9 Plaintiff must allege four essential elements: (1) a pattern of
10 racketeering activity, (2) the existence of an enterprise engaged
11 in or affecting interstate or foreign commerce, (3) a nexus between
12 the pattern of racketeering activity and the enterprise and (4) an
13 injury to its business or property by reason of the above. Sedima
14 S.P.R.L. v. Imrex Co., Inc. et al., 473 U.S. 479 (1985).

15 The racketeering activities upon which Plaintiff appears to
16 rely are the federal offenses of mail fraud and wire fraud. "A
17 wire fraud violation consists of (1) the formation of a scheme or
18 artifice to defraud; (2) use of the United States wires or causing
19 a use of the United States wires in furtherance of the scheme; and
20 (3) specific intent to deceive or defraud." Odom v. Microsoft
21 Corp., 486 F.3d 541, 554 (9th Cir. 2008) (internal quotation marks
22 omitted); 18 U.S.C. § 1343. The elements of mail fraud differ only
23 in that they involve the use of the United States mails rather than
24 wires. See 18 U.S.C. § 1341. All such allegations must be plead
25 with particularity. Moore v. Kayport Package Express, Inc., 885
26 F.2d 531, 541 (9th Cir. 1989).

27 Plaintiff's RICO claim fails for several reasons. The claim
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1 rests on his allegations of fraud, which as noted above, are not
2 sufficiently plead. Indeed, Plaintiff does not identify which
3 deceptive statements were made by mail or by wire. Further, he
4 fails to allege a pattern of fraudulent activity. A pattern can be
5 shown through either closed- or open-ended continuity. Turner v.
6 Cook, 362 F.3d 1219, 1229 (9th Cir. 2004). To allege closed-ended
7 continuity, a plaintiff must aver a "series of related predicates"
8 that extends "over a substantial period of time" and threatens
9 future criminal conduct. Id. (citing Howard v. Am. Online, Inc.,
10 208 F.3d 741, 750 (9th Cir. 2000)) (editing marks omitted). To
11 plead open-ended continuity, a plaintiff "must charge a form of
12 predicate misconduct that 'by its nature projects into the future
13 with a threat of repetition.'" Turner, 362 F.3d at 1229 (quoting
14 Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 366 (9th Cir.
15 1992)). Plaintiff's allegations do not support either theory of
16 continuity.

17 Plaintiff recites the remaining elements of a RICO claim,
18 asserting that Select Portfolio is a RICO person⁵ and part of a
19 RICO enterprise. However, the mere recitation of these elements,
20 as noted above, is not sufficient to state a claim.

21 Accordingly, Plaintiff's RICO claim is dismissed with leave to
22 amend. Plaintiff must adequately allege facts that tend to show a
23 cognizable pattern of racketeering activity, the existence of an
24 enterprise, a nexus between the racketeering activity and the

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26 ⁵ Inexplicably, Plaintiff pleads that Select Portfolio is a
27 person "as defined by ORC Sec. 2923.31(G)," Compl. ¶ 105,
28 apparently referring to Ohio Rev. Code Ann. § 2923.31(G).

1 enterprise and injury. As already noted, any averments of fraud
2 must be made with particularity.

3 IX. Request to Set Aside Illegal Trustee Sale and Claim for
4 Wrongful Foreclosure

5 A plaintiff seeking to set aside a foreclosure sale must first
6 allege tender of the amount of the secured indebtedness. Abdallah
7 v. United Sav. Bank, 43 Cal. App. 4th 1101, 1109 (1996) (citing
8 FPCI RE-HAB 01 v. E & G Investments, Ltd., 207 Cal. App. 3d 1018,
9 1021-22 (1989)); Smith v. Wachovia, 2009 WL 1948829, at *3 (N.D.
10 Cal.). Without pleading tender or the ability to offer tender, a
11 plaintiff cannot seek to set aside a foreclosure sale. Karlsen v.
12 Am. Sav. & Loan Ass'n, 15 Cal. App. 3d 112, 117 (citing Copsey v.
13 Sacramento Bank, 133 Cal. 659, 662 (1901)); Smith, 2009 WL 1948829,
14 at *3 (citing Karlsen).

15 Although he alleges neither tender nor his ability to offer
16 tender, Plaintiff argues that "equity demands that [he] be afforded
17 . . . his day in court." Opp'n at 2. This unsubstantiated
18 assertion does not support the exercise of the Court's equitable
19 power. Accordingly, Plaintiff's claims to set aside the trustee
20 sale and for wrongful foreclosure are dismissed with leave to amend
21 to plead tender or the ability to offer tender.

22 X. Quiet Title

23 To state a claim for quiet title, a plaintiff's complaint must
24 contain: (1) a description of the property; (2) the title of the
25 plaintiff and its basis; (3) the adverse claims to that title;
26 (4) the date as of which the determination is sought; and (5) a
27 prayer for relief of quiet title. Cal. Civ. Proc. Code § 761.020.

1 Plaintiff's property has already been sold and he does not
2 plead tender or the ability to make tender; thus, he does not
3 appear to have a colorable claim to the property. See, e.g.,
4 Kelley v. Mortg. Elec. Registration Sys., 642 F. Supp. 2d 1048,
5 1057 (N.D. Cal. 2009); Agbabiaka v. HSBC Bank USA Nat'l Ass'n, 2010
6 WL 1609974, at *7 (N.D. Cal.). He also fails to allege facts
7 suggesting that Select Portfolio has made an adverse claim to the
8 property, the title to which appears to be held by U.S. Bank. RJN,
9 Ex. E. Plaintiff does not even plead the date as of which he seeks
10 a quiet title determination.

11 Accordingly, Plaintiff has not stated an action for quiet
12 title against Select Portfolio. This claim is dismissed with leave
13 to amend.

14 XI. Violations of California Business and Professions Code § 17200
15 California's Unfair Competition Law (UCL) prohibits any
16 "unlawful, unfair or fraudulent business act or practice." Cal.
17 Bus. & Prof. Code § 17200. The UCL incorporates other laws and
18 treats violations of those laws as unlawful business practices
19 independently actionable under state law. Chabner v. United Omaha
20 Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000). Violation of
21 almost any federal, state or local law may serve as the basis for a
22 UCL claim. Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-
23 39 (1994). In addition, a business practice may be "unfair or
24 fraudulent in violation of the UCL even if the practice does not
25 violate any law." Olszewski v. Scripps Health, 30 Cal. 4th 798,
26 827 (2003).

1 Plaintiff pleads the unfair prong of the UCL.⁶ California
2 courts appear to disagree on the definition of an unfair business
3 practice in the context of consumer actions. Morgan v. AT&T
4 Wireless Svcs., Inc., 177 Cal. App. 4th 1235, 1254 (2009). Some
5 courts apply the definition set forth by the California Supreme
6 Court in Cel-Tech Communications, Inc. v. Los Angeles Cellular
7 Telephone Co., which requires "any finding of unfairness to
8 competitors under section 17200 be tethered to some legislatively
9 declared policy or proof of some actual or threatened impact on
10 competition." 20 Cal. 4th 163, 186-87 (1999). However, the Cel-
11 Tech court explicitly stated that this test is limited to actions
12 "by a competitor alleging anticompetitive practices." Id. at 187
13 n.12. Other courts employ an alternative definition in consumer
14 actions, providing that "a practice is unfair if (1) the consumer
15 injury is substantial, (2) the injury is not outweighed by any
16 countervailing benefits to consumers or competition, and (3) the
17 injury is one that consumers themselves could not reasonably have
18 avoided." Morgan, 177 Cal. App. 4th at 1254-55 (citation omitted).

19 Under either standard, Plaintiff has failed to allege unfair
20 business practices. He has not plead facts to show that consumers
21 or competition were harmed by Select Portfolio's actions or that
22 consumers could not have avoided the harm of which he complains.
23 Furthermore, he seeks damages for his UCL claim. See Compl. ¶ 120.

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25 ⁶ In his opposition, Plaintiff argues that he has also plead
26 under the fraud prong of the UCL. However, his complaint clearly
27 states that he pleads the unfair prong. Compl. ¶ 120. Even if he
28 plead the fraudulent conduct, as noted above, he fails to plead
such fraud with particularity.

1 Damages are not available under the UCL. Korea Supply Co. v.
2 Lockheed Martin Corp., 29 Cal. 4th 1134, 1144 (2003) ("A UCL action
3 is equitable in nature; damages cannot be recovered.").

4 Plaintiff's UCL claim is therefore dismissed with prejudice to
5 the extent that it seeks damages. Insofar as he seeks restitution,
6 his UCL claim is dismissed with leave to amend to plead facts to
7 show that Select Portfolio engaged in an unfair business practice.

8 XII. Usury

9 The California Constitution provides, "No person, association,
10 copartnership or corporation shall by charging any fee, bonus,
11 commission, discount or other compensation receive from a borrower
12 more than the interest authorized by this section upon any loan or
13 forbearance of any money, goods or things in action." Cal. Const.
14 art. XV, § 1. "Under current California law, a loan that charges
15 an interest rate greater than 10 percent per annum is usurious."
16 321 Henderson Receivables Origination LLC v. Sioteco, 173 Cal. App.
17 4th 1059, 1076 (2009) (citation omitted).

18 "The essential elements of usury are: (1) The transaction must
19 be a loan or forbearance; (2) the interest to be paid must exceed
20 the statutory maximum; (3) the loan and interest must be absolutely
21 repayable by the borrower; and (4) the lender must have a willful
22 intent to enter into a usurious transaction." Ghirardo v.
23 Antonioli, 8 Cal. 4th 791, 798 (1994) (citations omitted).

24 Plaintiff has not plead facts to suggest that Select Portfolio
25 had any role in the initial lending transaction or, even if it were
26 a lender, that it received interest in excess of ten percent. Even
27 if Plaintiff made such allegations, it does not appear that his

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1 loan falls within the scope of California's usury laws. The
2 prohibition on usurious transactions does not apply to loans made
3 by real estate brokers. Cal. Civ. Code § 1916.1.

4 Accordingly, Plaintiff's claim for usury is dismissed with
5 leave to amend to allege that Select Portfolio was a lender in an
6 unlawful transaction that falls within the scope of California's
7 usury laws.

8 XIII. Predatory Lending

9 Plaintiff avers that Select Portfolio engaged in predatory
10 lending in violation of California Financial Code sections 4970-
11 4979.3. However, Plaintiff has not alleged facts showing that the
12 loan he obtained falls within the scope of California's predatory
13 lending laws. See Cal. Fin. Code § 4970(b), (d). He also fails to
14 plead how these laws were violated. Nor has he alleged facts to
15 show that Select Portfolio, which was not his original lender,
16 could be held liable for predatory lending. See Cal. Fin. Code
17 § 4979.8 (prohibiting application of predatory lending laws "on an
18 assignee that is a holder in due course"). Accordingly,
19 Plaintiff's predatory lending claim is dismissed with leave to
20 amend to allege facts showing the existence of predatory lending
21 and that Select Portfolio is an entity that could be held liable
22 under these laws.

23 XIV. Claim for Unfair Debt Collection

24 Plaintiff pleads that Select Portfolio violated the federal
25 Fair Debt Collections Practice Act (FDCPA), 15 U.S.C. §§ 1692, et
26 seq.; California's Rosenthal Fair Debt Collection Practices Act
27 (RFDCPA); and RESPA. Plaintiff did not respond to Select

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1 Portfolio's argument for dismissal of this claim to the extent it
2 rests on RFDCPA and RESPA. Accordingly, the Court dismisses this
3 claim with prejudice insofar as it is based on these two statutes.

4 Plaintiff has not alleged facts showing that Select Portfolio
5 is a "debt collector" subject to the FDCPA. See generally 15
6 U.S.C. § 1692a(6). Further, he has not alleged how Select
7 Portfolio violated the FDCPA. He contends that Select Portfolio
8 "made false promises to plaintiff" and failed to communicate with
9 him in good faith, but he does not make factual allegations in
10 support of these broad vague claims. Opp'n at 10.

11 Accordingly, Plaintiff's claim for unfair debt collection,
12 insofar it is based on the FDCPA, is dismissed with leave to amend
13 to plead facts indicating that Select Portfolio is a "debt
14 collector" that violated the FDCPA. To the extent that this claim
15 rests on violations of RFDCPA and RESPA, it is dismissed with
16 prejudice.

17 XV. Claim for Slander of Title

18 Plaintiff alleges that Select Portfolio made "false and
19 malicious written and/or spoken public statements disparaging his
20 title" to the Sausalito property. Compl. ¶ 138. Although not
21 explicitly stated, the statements of which Plaintiff complains
22 appear to be the publicly recorded notices concerning the
23 foreclosure sale.

24 Slander of title is "a tortious injury to property resulting
25 from unprivileged, false, malicious publication of disparaging
26 statements regarding the title to property owned by plaintiff, to
27 plaintiff's damage." Southcott v. Pioneer Title Co., 203 Cal. App.

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1 2d 673, 676 (1962) (citations omitted).

2 Plaintiff's slander of title claim fails because notices filed
3 pursuant to a non-judicial foreclosure action constitute privileged
4 communications. Cal. Civ. Code § 2924(d). Plaintiff maintains
5 that the notices were not privileged if "the foreclosure process
6 was achieved through fraud or as the result of fraudulent
7 misrepresentation" Opp'n at 10. However, as already
8 noted, Plaintiff has not adequately plead any fraudulent conduct.
9 Thus, there is no reason to believe that the foreclosure notices
10 were not privileged.

11 Accordingly, Plaintiff's slander of title claim is dismissed.
12 Plaintiff is granted leave to amend to plead facts showing that
13 Select Portfolio disseminated unprivileged, false and malicious
14 communications.

15 XVI. Claim for Invasion of Privacy

16 Plaintiff alleges that Defendants "have engaged in a pattern
17 and practice of misrepresenting themselves as Plaintiff to First
18 Party Lien Holders and making payments on said First Party Liens in
19 Plaintiff's name, fraudulently representing that they were
20 Plaintiff." Compl. ¶ 140. However, in his opposition, Plaintiff
21 maintains that these facts were alleged in error and that they
22 "were mistakenly included from a different complaint." Opp'n at
23 11. Plaintiff proffered a similar excuse in his opposition to the
24 defendants' motion to dismiss in the Redwood Mortgage Corporation
25 action. Case No. 10-0479 WHA, Docket No. 18 at 9-10.

26 Because Plaintiff concedes that he has not properly plead his
27 invasion of privacy claim, the Court dismisses it with leave to
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1 amend.

2 XVII. Claim for Intentional Infliction of Emotional Distress

3 A claim of intentional infliction of emotional distress
4 requires a plaintiff to plead: "(1) extreme and outrageous conduct
5 by the defendant with the intention of causing, or reckless
6 disregard of the probability of causing, emotional distress;
7 (2) the plaintiff's suffering severe or extreme emotional distress;
8 and (3) actual and proximate causation of the emotional distress by
9 the defendant's outrageous conduct." Christensen v. Superior
10 Court, 54 Cal. 3d 868, 903 (1991).

11 Plaintiff pleads that Select Portfolio committed "extreme and
12 outrageous conduct" by, among other things, violating the laws
13 discussed above, committing fraud, breaching fiduciary duties and
14 invading his privacy. However, as already discussed, he has not
15 plead sufficient facts showing that Select Portfolio committed any
16 of these acts. Without sufficiently pleading "extreme and
17 outrageous conduct," Plaintiff's claim for intentional infliction
18 of emotional distress fails.

19 Accordingly, Plaintiff's claim for intentional infliction of
20 emotional distress is dismissed with leave to amend.

21 XVIII. Claims for Trespass and Conversion

22 "Trespass is an unlawful interference with possession of
23 property." Girard v. Ball, 125 Cal. App. 3d 772, 788 (1981).

24 Under California law, a claim for conversion requires a plaintiff
25 to allege (1) "ownership or right to possession of property;" (2) a
26 defendant's wrongful act toward the property, causing interference
27 with the plaintiff's possession; and (3) damage to the plaintiff.

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1 PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil &
2 Shapiro, LLP, 150 Cal. App. 4th 384, 394 (2007).

3 Plaintiff's trespass and conversion claims against Select
4 Portfolio appear to arise from its participation in the non-
5 judicial foreclosure process. Opp'n at 12. However, the
6 foreclosure proceeded pursuant to rights granted under the deed of
7 trust. See, e.g., RJN, Ex. A § 9. Plaintiff has not plead any
8 facts to show that this process was unlawful.

9 Accordingly, Plaintiff's claims for trespass and conversion
10 are dismissed with leave to amend to plead facts showing an
11 unlawful interference with his property rights.

12 CONCLUSION

13 For the foregoing reasons, Select Portfolio's Motion to
14 Dismiss is GRANTED. (Docket No. 4.) Plaintiffs' claims against
15 Select Portfolio, O'Brien, Miller and Hollingsworth are dismissed
16 as follows:

- 17 1. Plaintiff's claims for rescission under HOEPA and TILA
18 are dismissed for lack of subject matter jurisdiction.
19 His claim for damages under these statutes are dismissed
20 with leave to amend. Plaintiff must allege facts that
21 support equitable tolling of the one-year statute of
22 limitations and that show Select Portfolio is a
23 "creditor" or qualifying assignee that could be held
24 liable under HOEPA and TILA.
- 25 2. Plaintiff's RESPA claim is dismissed with leave to amend
26 to plead facts that support equitable tolling of the one-
27 year statute of limitations and that show Select

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1 Portfolio rendered a "settlement service" as defined by
2 12 U.S.C. § 2602(3).

- 3 3. Plaintiff's FCRA claim is dismissed with leave to amend
4 because he fails to plead a factual basis. Plaintiff
5 must allege facts showing how Select Portfolio
6 negligently violated FCRA.
- 7 4. Plaintiff's fraudulent misrepresentation claim is
8 dismissed with leave to amend because he fails to satisfy
9 the heightened pleading requirements of Rule 9(b).
10 Plaintiff must plead fraud with sufficient specificity.
- 11 5. Plaintiff's claim for breach of fiduciary duty is
12 dismissed with leave to amend to plead facts showing the
13 existence of a fiduciary relationship and a breach
14 thereof.
- 15 6. Plaintiff's claim for unjust enrichment is dismissed with
16 leave to amend to plead facts that would warrant the
17 award of a restitutionary remedy.
- 18 7. Plaintiff's civil conspiracy charge is dismissed with
19 leave to amend to plead a tort on which conspiratorial
20 liability could be based and to plead facts showing the
21 formation and operation of a conspiracy.
- 22 8. Plaintiff's civil RICO claim is dismissed with leave to
23 amend to plead mail and wire fraud with particularity and
24 to allege facts showing a pattern of racketeering
25 activity, the existence of an enterprise, a nexus between
26 the pattern of racketeering activity and the enterprise
27 and an injury to Plaintiff arising from the racketeering

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conduct.

9. Plaintiff's claims to "set aside the illegal trustee sales" and wrongful foreclosure are dismissed with leave to amend. Plaintiff must plead tender or his ability to offer tender.
10. Plaintiff's quiet title action is dismissed with leave to amend to plead a colorable claim to the Sausalito property, an adverse claim by Select Portfolio and a date as of which he seeks a quiet title determination.
11. Plaintiff's UCL claim, to the extent he seeks damages, is dismissed with prejudice; damages are not available under the UCL. Insofar as he seeks restitution, Plaintiff's UCL claim is dismissed with leave to amend. If he intends to plead the unfair prong, he must adequately allege harm to competition or a harm to consumers that they could not avoid. If he intends to plead under the fraud prong, he must plead fraudulent conduct with particularity.
12. Plaintiff's "usury" claim is dismissed with leave to amend. Plaintiff must plead that Select Portfolio was a lender involved in an unlawful transaction that falls within the scope California's usury laws.
13. Plaintiff's claim for predatory lending is dismissed with leave to amend to allege facts indicating that Select Portfolio is an entity that could be held liable for predatory lending and that it engaged in such unlawful practices.

1 14. Plaintiff's claim for unfair debt collection, to the
2 extent that it is based on the RFDCPA and RESPA, is
3 dismissed with prejudice; Plaintiff did not respond to
4 Select Portfolio's argument addressing these statutes.
5 Insofar as this claim rests on the FDCPA, it is dismissed
6 with leave to amend. Plaintiff must plead facts that
7 show Select Portfolio is a "debt collector" that engaged
8 in conduct that violated the FDCPA.

9 15. Plaintiff's claim for slander of title is dismissed with
10 leave to amend. Plaintiff must allege unprivileged,
11 false and malicious communications that caused him
12 damage.

13 16. Plaintiff's claim for invasion of privacy is dismissed
14 with leave to amend.

15 17. Plaintiff's claim for intentional infliction of emotional
16 distress is dismissed with leave to amend to plead facts
17 that show Select Portfolio engaged in extreme and
18 outrageous conduct.

19 18. Plaintiff's claims for trespass and conversion are
20 dismissed with leave to amend. Plaintiff must plead
21 facts that Select Portfolio unlawfully interfered with
22 his property.

23 Plaintiff is granted leave to amend so long as he can cure the
24 abovementioned defects by truthfully alleging facts that are not
25 inconsistent with those contained in his current complaint. If he
26 can do so, Plaintiff may file an amended complaint within fourteen
27 days of the date of this Order. In any amended complaint,

1 Plaintiff must plead against which Defendants he brings each cause
2 of action and what each Defendant did to support relief under each
3 respective cause of action. Defendants may file a motion to
4 dismiss three weeks thereafter, with Plaintiff's opposition due two
5 weeks following and a reply, if any, due one week after that.
6 Defendants' motion will be taken under submission on the papers.

7 As noted above, Plaintiff filed a similar pleading in the
8 Bonner v. Redwood Mortgage Corporation action, which was dismissed
9 for reasons similar to those addressed by this Court. Thus,
10 Plaintiff is on ample notice that his pleadings are not sufficient
11 to state the claims he brings. Plaintiff, who is apparently an
12 attorney licensed to practice in California, is reminded of his
13 obligations under Federal Rule of Civil Procedure 11. In
14 particular, he must abide by the prohibition on filing pleadings
15 that are "presented for any improper purpose, such as to harass,
16 cause unnecessary delay, or needlessly increase the cost of
17 litigation." Fed. R. Civ. 11(b)(1). If he files an amended
18 complaint, Plaintiff's failure to make a good faith effort to
19 comply with Rule 11 will result in the imposition of sanctions and
20 a referral to the State Bar of California.

21 Within three days of the date of this Order, Plaintiff must
22 provide proof that he has served Defendants Marshall, Encore Credit
23 Corp. and Option One Mortgage Corp. If he fails to provide such
24 proof, Plaintiff's claims against these Defendants shall be
25 dismissed without prejudice. If Plaintiff has not served these
26 Defendants and still wishes to do so, he may, within three days of
27 the date of this Order, file a motion for an extension of time to
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1 serve these Defendants. Fed. R. Civ. P. 4(m). Leave will be
2 granted only if Plaintiff establishes good cause for his failure to
3 serve.

4 Select Portfolio's second motion to dismiss Plaintiff's
5 complaint is DENIED as moot. (Docket No. 19.) The case management
6 conference scheduled for August 3, 2010 is vacated. Unless this
7 case has been dismissed, a case management conference will be held
8 on October 26, 2010 at 2:00 p.m.

9 IT IS SO ORDERED.

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11 Dated: July 26, 2010



CLAUDIA WILKEN
United States District Judge

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