

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

JAMES P. MALVEAUX,
Plaintiff,

v.

WELLS FARGO BANK, N.A.;
BARRETT DAFFIN FRAPPIER TREDER
& WEISS, LLP; FIRST AMERICAN
TITLE COMPANY; BANK OF NEW
YORK MELLON f/k/a BANK OF NEW
YORK as Trustee for WORLD
SAVINGS REMIC TRUST, MORTGAGE
PASS-THROUGH CERTIFICATES,
SERIES 19; RALPH PARTNERS II,
LLC; AND ALL PERSONS KNOWN OR
UNKNOWN CLAIMING AN INTEREST
IN THE SUBJECT PROPERTY, and
DOES 2 through 50, inclusive,
Defendants.

Case No. 17-cv-05004-CW

ORDER GRANTING MOTIONS TO
DISMISS AND ORDER TO SHOW
CAUSE REGARDING SERVICE

(Docket Nos. 14, 15, 19, 20,
22)

On August 29, 2017, Plaintiff James P. Malveaux, then unrepresented by counsel, filed a complaint initiating this action. On September 18, 2017, Defendants Wells Fargo Bank, N.A., and the Bank of New York Mellon¹ moved to dismiss the complaint. Plaintiff did not respond to the motion within the fourteen days provided by Civil Local Rule 7-3(a) or file an amended complaint within the twenty-one days provided by Federal Rule of Civil Procedure 15(a)(1)(B). On October 18, 2017, the Court issued an order granting Plaintiff an extension of time to

¹ Except where otherwise noted, references in this order to "Defendants" refer to these two moving Defendants.

1 respond to the motion to dismiss. Instead of doing so, on
2 October 25, 2017, Plaintiff, now represented by counsel, filed a
3 first amended complaint (1AC), not accompanied by a stipulation
4 or a motion for leave. On November 1, 2017, Defendants again
5 moved to dismiss. Plaintiff opposed the motion and Defendants
6 filed a reply.

7 Having considered the parties' papers, the record in this
8 case and relevant authority, the Court grants leave for Plaintiff
9 to file the 1AC; denies as moot Defendants' motion to dismiss the
10 original complaint and request for judicial notice in support of
11 that motion; grants Defendants' motion to dismiss the 1AC; and
12 grants one further opportunity for Plaintiff to amend his claims.
13 The Court also grants Defendants' request for judicial notice,
14 filed in support of the motion to dismiss the 1AC, but sustains
15 Plaintiff's objection and does not take judicial notice of the
16 truth of disputed statements within the noticed documents.
17 Finally, the Court orders Plaintiff to show cause why his claims
18 against Defendants who have not yet appeared in this action
19 should not be dismissed without prejudice due to lack of timely
20 service.

21 BACKGROUND

22 Plaintiff alleges the following facts. Plaintiff owns a
23 single family residence in Pacifica, California. On or about
24 June 16, 2005, Plaintiff and his wife executed an adjustable rate
25 mortgage secured by the property, consisting of a deed of trust,
26 note, and adjustable rate rider. The deed of trust identifies
27 World Savings Bank, FSB as the lender and Defendant First
28 American Title Company as the title insurance company. Defendant

1 Wells Fargo Bank, N.A., "holds itself out as the current servicer
2 of Plaintiff's mortgage loan." 1AC ¶ 2. Other Defendants named
3 in this action include Barrett Daffin Frappier Treder & Weiss,
4 LLP (Barrett Daffin), which provides legal services and "default
5 and foreclosure services," id. ¶ 3; the Bank of New York Mellon
6 f/k/a the Bank of New York, which serves as trustee for the World
7 Savings Remic Trust, Mortgage Pass-Through Certificates, Series
8 19; and Defendant Ralph Partners II, LLC, added as a Defendant in
9 the 1AC, which purchased the property in a foreclosure sale.

10 A notice of default and election to sell under the deed of
11 trust was recorded on August 22, 2010. A notice of rescission of
12 this notice of default was recorded on August 8, 2014.

13 On October 29, 2015, a substitution of trustee was recorded,
14 substituting Barrett Daffin as trustee under the deed of trust.
15 Plaintiff alleges that this substitution violates the terms of
16 the deed of trust.

17 A second notice of default and election to sell under the
18 deed of trust was issued on February 18, 2016 by Barrett Daffin,
19 and recorded on February 22, 2016. Plaintiff alleges that this
20 notice was defective due to the July 2005 securitization of
21 Plaintiff's loan. A notice of trustee's sale was recorded on
22 December 20, 2016.

23 In January 2017, Plaintiff, represented by different
24 counsel, filed a lawsuit in San Mateo County Superior Court,
25 challenging Defendants' right to foreclose. Malveaux v. Wells
26 Fargo Bank, N.A., San Mateo Superior Court No. 17-civ-00328. On
27 January 25, 2017, the state court denied Plaintiff's petition for
28 a temporary restraining order (TRO) enjoining foreclosure.

1 Defendants filed a demurrer to the complaint, which the state
2 court sustained at a hearing on April 25, 2017, followed by a
3 written order filed May 11, 2017. The state court granted
4 Plaintiff leave to amend, but Plaintiff did not timely amend his
5 complaint and, on June 14, 2017, voluntarily dismissed the action
6 without prejudice. Plaintiff alleges that he did so because a
7 Wells Fargo representative informed him that the bank would allow
8 him to sell his home through his realtor or "give him a loan
9 modification if he qualified" only if he dismissed his lawsuit in
10 San Mateo Superior Court as well as a bankruptcy proceeding. 1AC
11 ¶¶ 64-66, 70.²

12 Plaintiff alleges that he began submitting the requested
13 documents for a loan modification application around the time
14 that he voluntarily dismissed his state court lawsuit. In late
15 June 2017, Plaintiff was informed that a trustee's sale was
16 scheduled for early July 2017. His realtor contacted Wells Fargo
17 and learned that Plaintiff had a new contact person for his loan
18 modification. On or about July 6, 2017, Barrett Daffin notified
19 Plaintiff that the trustee's sale of the property was postponed
20 to August 30, 2017. Compl. Ex. F. On August 25, 2017, an
21 unspecified Defendant "emailed Plaintiff that they were not going
22 to proceed with the loan modification process," but did not
23 inform him of his right to appeal the loan modification decision
24 or afford him the opportunity of selling his home through his
25 realtor. 1AC ¶¶ 71-73.

26
27 ² Plaintiff alleges that he dismissed the lawsuit in June,
28 1AC ¶¶ 64-66, and again in July, *id.* ¶ 70. The Court takes
judicial notice that the dismissal was filed in San Mateo County
Superior Court on June 14, 2017.

1 On August 29, 2017, Plaintiff filed this action and a motion
2 for a TRO enjoining the August 30, 2017 foreclosure sale. On the
3 same day, this Court denied the motion for a TRO because
4 Plaintiff had neither notified Defendants of the motion nor shown
5 why he should be excused from doing so. On August 30, 2017, at
6 1:15 p.m., Plaintiff recorded with the San Mateo Assessor-County
7 Clerk-Recorder a notice of the pendency of this action, and
8 brought a copy of the document to the place where the foreclosure
9 sale was being held. The person conducting the sale took a
10 picture of it with his cell phone. The trustee's sale took place
11 and Ralph Partners purchased the property.³

12 In the 1AC, Plaintiff alleges claims for: (1) wrongful
13 foreclosure; (2) quiet title; (3) unjust enrichment;
14 (4) violation of California Civil Code sections 2923.6(c),
15 2923.55(a), (b) (1); (5) violation of California Civil Code
16 section 2923.6(c) and/or section 2924; (6) violation of
17 California's Unfair Competition Law (UCL), Civil Code section
18 17200; (7) accounting and verification of the alleged debt;
19 (8) bank fraud under 18 U.S.C. § 1344; (9) fraud in the
20 inducement; (10) promissory estoppel; (11) slander of title; and
21 (12) violation of "each and every rule of the Federal Consumer
22 Protection Bureau."

23 LEGAL STANDARD

24 A complaint must contain a "short and plain statement of the
25

26 ³ Plaintiff pleads inconsistent dates regarding the filing of
27 the lawsuit, recording of the notice of pendency and foreclosure
28 sale. 1AC ¶¶ 74-77. It appears that the references in the
Complaint to September 2017 may be erroneous. In any amended
complaint, Plaintiff must ensure that the facts plead, including
all dates, are accurate. See Fed. R. Civ. P. 11(b).

1 claim showing that the pleader is entitled to relief." Fed. R.
2 Civ. P. 8(a). The plaintiff must proffer "enough facts to state
3 a claim to relief that is plausible on its face." Ashcroft v.
4 Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v.
5 Twombly, 550 U.S. 544, 570 (2007)). On a motion under Rule
6 12(b)(6) for failure to state a claim, dismissal is appropriate
7 only when the complaint does not give the defendant fair notice
8 of a legally cognizable claim and the grounds on which it rests.
9 Twombly, 550 U.S. at 555. A claim is facially plausible "when
10 the plaintiff pleads factual content that allows the court to
11 draw the reasonable inference that the defendant is liable for
12 the misconduct alleged." Iqbal, 556 U.S. at 678.

13 In considering whether the complaint is sufficient to state
14 a claim, the court will take all material allegations as true and
15 construe them in the light most favorable to the plaintiff.
16 Metzler Inv. GMBH v. Corinthian Colleges, Inc., 540 F.3d 1049,
17 1061 (9th Cir. 2008). The court's review is limited to the face
18 of the complaint, materials incorporated into the complaint by
19 reference, and facts of which the court may take judicial notice.
20 Id. at 1061. However, the court need not accept legal
21 conclusions, including threadbare "recitals of the elements of a
22 cause of action, supported by mere conclusory statements."
23 Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555).

24 Rule 9(b) provides that in "alleging fraud or mistake, a
25 party must state with particularity the circumstances
26 constituting fraud or mistake." Fed. R. Civ. P. 9(b). "It is
27 well-settled that the Federal Rules of Civil Procedure apply in
28 federal court, 'irrespective of the source of the subject matter

1 jurisdiction, and irrespective of whether the substantive law at
2 issue is state or federal.'" Kearns v. Ford Motor Co., 567 F.3d
3 1120, 1125 (9th Cir. 2009) (quoting Vess v. Ciba-Geigy Corp. USA,
4 317 F.3d 1097, 1102 (9th Cir. 2003). The allegations must be
5 "specific enough to give defendants notice of the particular
6 misconduct which is alleged to constitute the fraud charged so
7 that they can defend against the charge and not just deny that
8 they have done anything wrong." Semegen v. Weidner, 780 F.2d
9 727, 731 (9th Cir. 1985).

10 When granting a motion to dismiss, the court is generally
11 required to grant the plaintiff leave to amend, even if no
12 request to amend the pleading was made, unless amendment would be
13 futile. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv.
14 Inc., 911 F.2d 242, 246-47 (9th Cir. 1990). In determining
15 whether amendment would be futile, the court examines whether the
16 complaint could be amended to cure the defect requiring dismissal
17 "without contradicting any of the allegations of [the] original
18 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
19 Cir. 1990).

20 DISCUSSION

21 I. Filing of the First Amended Complaint

22 Defendants move to dismiss all claims because Plaintiff did
23 not oppose the motion to dismiss his original complaint, and
24 filed his amended complaint without Defendants' consent or leave
25 of court and outside of the time for amendment as a matter of
26 course under Federal Rule of Civil Procedure 15(a)(1). Plaintiff
27 responds that this Court's October 18, 2017 order extending the
28 time "to respond to the motion to dismiss" included leave to file

1 an amended complaint. This interpretation is not consistent with
2 the language of the order. Plaintiff's 1AC was untimely filed
3 without consent or leave, in violation of Rule 15.

4 However, the Court must liberally grant leave to amend in
5 the interest of justice, and the Court construes the October 25,
6 2017 declaration of Marianne Malveaux, Esq., and Plaintiff's
7 November 15, 2017 opposition to the motion to dismiss as
8 including a request for leave to file the 1AC. In the exercise
9 of discretion, the Court grants the motion and deems the 1AC
10 filed on October 25, 2017. The Court warns Plaintiff and his
11 counsel, however, that they must carefully follow rules and
12 orders in the future.

13 II. Loan Securitization and Chain of Title

14 Many of the claims in the 1AC are predicated on Plaintiff's
15 theory that his original lender, World Savings Bank, FSB,
16 transferred or "securitized" his loan in July 2005 and failed to
17 secure the chain of title to Wells Fargo, thereby depriving Wells
18 Fargo of the right to enforce the loan contract and to initiate a
19 non-judicial foreclosure. Indeed, Plaintiff alleges, "Simply
20 stated, there is no successor---lender [sic] to WORLD SAVINGS in
21 the mortgage loan." 1AC ¶ 15. Further, "the chain of title was
22 irreversibly broken to the Subject Property with the lender's
23 successor and assign (the true identity of the present
24 beneficiary) unassigned, undocumented and unknown to date. In
25 other words, there is no lender's successor and assign to WORLD
26 SAVINGS in the mortgage loan." 1AC ¶ 23. The Court has rejected
27 this argument previously, and Plaintiff has provided no reason to
28 deviate from the Court's prior analysis. See Jackson v. Atlantic

1 Sav. of Am., No. 13-cv-05755-CW, 2014 U.S. Dist. LEXIS 136521,
2 **19-22 (N.D. Cal. 2014). Numerous courts have reached the same
3 conclusion, including a recent and persuasive California
4 appellate decision. See Kalnoki v. First American Trustee
5 Servicing Solutions, LLC, 8 Cal. App. 5th 23, 41-44 (2017)
6 (holding that even assuming the truth of similar securitization
7 allegations, they would be insufficient to set aside
8 foreclosure).

9 Despite many paragraphs in the 1AC dedicated to boilerplate
10 allegations concerning the securitization process, Plaintiff
11 ultimately disclaims any reliance on a securitization theory.
12 See 1AC ¶ 48 ("Plaintiff is not alleging or challenging
13 'securitization.' Plaintiff is alleging that Defendants are not
14 the real parties in interest because of their failure to secure
15 the chain of title to the Subject Property during the
16 securitization process."); Opp. at 5 ("Plaintiff does not
17 challenge the securitization of Plaintiff's mortgage loan.
18 Instead, he points to the Bank Defendants [sic] failure to ensure
19 CLEAR the chain of title for each and every mortgage Bank
20 Defendants allegedly 'acquired' by whatever means.").

21 Plaintiff fails to plead any facts suggesting a defect in
22 the chain of title to his particular loan, as opposed to
23 unspecified loans of other borrowers. Moreover, judicially
24 noticeable documents demonstrate that due to the name change of
25 World Savings to Wachovia Mortgage, FSB, and Wachovia's
26 subsequent merger into Wells Fargo, Wells Fargo is indeed the
27 successor-in-interest to World Savings. Defs. RJN Exs. A-E. As
28 Defendants note, courts have recognized this corporate

1 transaction. See, e.g., Wolf v. Wells Fargo Bank, N.A.,
2 No. 11-cv-01337-WHA, 2011 U.S. Dist. LEXIS 117835, *3 (N.D. Cal.
3 Oct. 12, 2011) ("World Savings changed its name to Wachovia
4 Mortgage in late 2007. Wachovia Mortgage then became part of
5 Wells Fargo Bank in 2009 and is the current holder of the
6 note."); Nguyen v. Wells Fargo Bank, N.A., 749 F. Supp. 2d 1022,
7 1024-1025 (N.D. Cal. 2010) ("judicially noticeable documents
8 reveal that the original lender, World Savings Bank, FSB, simply
9 changed its name to Wachovia Mortgage, FSB, and is now a division
10 of Wells Fargo Bank, N.A., so transfers among those entities were
11 proper").

12 Because Plaintiff has failed to allege any defect in the
13 chain of title, or securitization, of his loan, all the claims
14 dependent on that theory fail, and the Court dismisses them.
15 This includes, in particular, the entirety of Claims 1,⁴ 2, 3 and
16 11,⁵ as well as Plaintiff's other claims to the extent that they
17 rely on this theory, including Claims 4, 6, 7, 8, 10 and 12. The
18 Court will grant leave to amend these claims, but Plaintiff must
19 allege facts plausibly supporting each claim and set forth a
20 viable legal theory.

21
22 ⁴ Plaintiff's wrongful foreclosure claim also suffers from
23 additional defects, including the fact that Plaintiff agreed when
24 he signed the trust deed that the lender could at any time
25 appoint a successor trustee. See 1AC Ex. A at § 27; see also id.
26 §§ 1(C) & 1(H) (specifying that successors and/or assignees of
27 World Savings Bank would become lenders and beneficiaries under
28 the deed of trust).

⁵ Plaintiff's slander of title claim also suffers from
additional defects, including that Plaintiff fails to plead any
facts showing that Defendants acted without privilege or
justification. See Stowers v. Wells Fargo Bank, N.A., No. 13-cv-
05426-RS, 2014 WL 1245070, *7 (N.D. Cal. Mar. 25, 2014).

1 III. Homeowner Bill of Rights

2 Plaintiff's fourth and fifth claims seek relief under
3 California's Homeowner Bill of Rights (HBOR), Cal. Civil Code
4 §§ 2923.6, 2923.55, 2924. In part, these claims seem predicated
5 on the same chain-of-title theory discussed above, and fail for
6 the same reasons. Plaintiff also, however, appears to assert a
7 claim on the independent theory that Defendants violated the
8 HBOR's prohibition on "dual-tracking," the practice of a mortgage
9 servicer continuing to pursue foreclosure of a property while a
10 complete loan modification application is pending. See Cal. Civ.
11 Code § 2923.6(c).

12 Defendants argue that this claim should be dismissed because
13 Plaintiff does not adequately allege that he had submitted a
14 complete loan modification application at the time that
15 Defendants proceeded with the foreclosure process. Section
16 2923.6(c) protects a borrower who "submits a complete application
17 for a first lien loan modification." Cal. Civ. Code § 2923.6(c).
18 The statute provides, "For purposes of this section, an
19 application shall be deemed 'complete' when a borrower has
20 supplied the mortgage servicer with all documents required by the
21 mortgage servicer within the reasonable timeframes specified by
22 the mortgage servicer." Cal. Civ. Code § 2923.6(h).

23 As this Court has explained previously, a loan modification
24 application is "complete" for the purpose of triggering the
25 protections of HBOR if a plaintiff has timely provided all
26 documents required in advance by a lender for the submission of a
27 loan modification application, even if the lender requires
28 supplemental documents later. See Di Loreto v. Chase Manhattan

1 Mortg. Corp., No. 17-cv-05187-CW, 2017 WL 5569834, at *5 (N.D.
2 Cal. Nov. 20, 2017) (citing Mace v. Ocwen Loan Servicing, LLC,
3 252 F. Supp. 3d 941, 946 (N.D. Cal. 2017)).

4 Plaintiff fails, however, to assert that his loan
5 modification application was complete before Defendants took any
6 prohibited foreclosure action. He alleges that he "began
7 submitting the requested documents," 1AC ¶ 67, but does not
8 allege that he completed the application. Nor does he allege
9 what documents were required for the application to be complete,
10 either pursuant to any instructions by Defendants or pursuant to
11 any agreement reached in connection with the dismissal of
12 Plaintiff's state court lawsuit. The same failure to allege
13 completeness requires dismissal of Plaintiff's claim that
14 Defendants only notified him of the denial of his loan
15 modification application by email, not in a compliant written
16 denial under section 2923.6(c)(1)-(3). See 1AC ¶¶ 71-72.

17 Additionally, to the extent that Plaintiff attempts to
18 assert a claim that Defendants did not provide him with
19 information in writing upon his request in violation of section
20 2923.55(b)(1), he does not adequately allege what information he
21 requested and when, or what, if any, response he received from
22 Defendants. Likewise, he does not allege facts supporting a
23 claim that Defendants' contacts with him prior to foreclosure
24 were insufficient under section 2923.55(a) despite the
25 declaration of compliance attached to the recorded notice of
26 default. See 1AC Ex. E. at 4. The Court does not assume the
27 truth of the declaration of compliance, but Plaintiff must allege
28 facts giving rise to a claim that the declaration of compliance

1 is inaccurate, not merely a conclusory allegation of the legal
2 standard. Iqbal, 556 U.S. at 678; see also Kamp v. Aurora Loan
3 Services, 2009 U.S. Dist. LEXIS 95245, **6-7 (C.D. Cal. 2009)
4 (holding that plaintiffs' "conclusory assertions are contradicted
5 by the notice of default" that included the HBOR declaration of
6 compliance).

7 The Court will dismiss Plaintiff's fourth and fifth claims,
8 seeking relief under HBOR, for failure to allege necessary facts,
9 but will grant leave to amend these claims so that Plaintiff may
10 clarify his legal theory and attempt to plead the required facts.

11 IV. Unfair Competition Law

12 Defendants contend that Plaintiff's UCL claim is entirely
13 derivative of his other defective claims, and must be dismissed
14 for the same reasons. In response, Plaintiff essentially
15 concedes that this is so. He argues that his HBOR claim under
16 section 2923.55 and his wrongful foreclosure claim survive
17 dismissal, and that therefore his UCL claim also survives.
18 Because the Court has dismissed Plaintiff's HBOR and wrongful
19 foreclosure claims, it dismisses his derivative UCL claim as
20 well.

21 Plaintiff's UCL claim suffers from additional defects.
22 Plaintiff fails adequately to allege that he lost money or
23 property as a result of Defendants' actions. Bus. & Prof. Code
24 § 17204; Daro v. Superior Court, 151 Cal. App. 4th 1079, 1098
25 (2007) ("a private person has standing to sue under the UCL only
26 if that person has suffered injury and lost money or property 'as
27 a result of such unfair competition.'"). In any amended
28 complaint, Plaintiff must plead facts sufficient to show the

1 causation and injury required by the UCL.

2 The UCL claim also contains a list of allegedly deceptive
3 business practices that appears to be erroneously copied from
4 another case. See 1AC ¶ 115 (referring to "MERS," "SLS," "MLF"
5 and "HSBC"). Plaintiff must carefully review any amended
6 complaint to ensure that he accurately pleads the facts of this
7 case.

8 V. Accounting

9 Defendants argue that Plaintiff's claim for an accounting
10 should be dismissed without leave to amend, because Plaintiff
11 cannot plead the necessary relationship between the parties, and
12 does not plead that any Defendant owes Plaintiff a definite sum
13 of money. "A cause of action for an accounting requires a
14 showing that a relationship exists between the plaintiff and
15 defendant that requires an accounting, and that some balance is
16 due the plaintiff that can only be ascertained by an accounting."
17 Teselle v. McLoughlin, 173 Cal. App. 4th 156, 179 (2009).

18 Plaintiff responds that Defendants owe him a sum of money
19 represented by the value of his home over and above the amount
20 that he owed Defendants when the home was sold, and requests
21 leave to amend to allege facts supporting this claim. This legal
22 theory is different from the theory set forth in the 1AC, which
23 is derivative of the failed "securitization" theory. See 1AC
24 ¶¶ 120-124 ("Defendants should provide an accounting of profits
25 made on the Subject Property from their Wall Street dealings.").
26 The Court dismisses Plaintiff's seventh cause of action, for an
27 accounting, as currently plead. However, in light of the facts
28 that Plaintiff pleads regarding the foreclosure sale of his home,

1 the Court cannot find that it would be futile to grant Plaintiff
2 leave to amend to allege facts in support of a claim for an
3 accounting of Defendants' profits at the foreclosure sale. Among
4 the other elements that Plaintiff must plead in support of any
5 amended claim for an accounting, he must plead facts giving rise
6 to a plausible claim that Defendants have not already provided
7 him with the information that he seeks, or that he does not
8 already have ready access to the information. See Teselle, 173
9 Cal. App. 4th at 179.

10 VI. Fraud

11 Plaintiff's eighth, ninth and tenth claims allege, under
12 various legal theories, that Defendants defrauded him by offering
13 him a loan modification to induce him to dismiss his state court
14 lawsuit, and then recanting the offer and foreclosing without
15 adequate notice after he dismissed his state court lawsuit in
16 reliance. Each of these claims suffers from a common defect.
17 Plaintiff alleges that Wells Fargo representatives "informed him
18 that Wells Fargo would give him a loan modification if he
19 qualified," 1AC ¶ 65 (emphasis added), and would not give him a
20 loan modification if his state court lawsuit remained pending,
21 id. ¶ 64. His factual allegations do not support his legal
22 claims that Defendants "breached an agreement to give Plaintiff a
23 Loan Modification," id. at ¶ 126 (bank fraud claim), made him an
24 "offer of a loan modification," id. at 130 (fraud in the
25 inducement claim), or "promised plaintiff that he would receive a
26 loan modification if he dropped his lawsuit in State court," id.
27 at ¶ 134 (promissory estoppel claim). In opposition to the
28 motion to dismiss, Plaintiff does not address his own factual

1 allegation that Wells Fargo only offered to consider him for a
2 loan modification if he dismissed his state court lawsuit, and
3 give him a loan modification if he qualified. Accordingly, the
4 Court finds that these claims must be dismissed because Plaintiff
5 has not plead any misrepresentation by Defendants. He does not
6 allege that Defendants did not consider him for a loan
7 modification after he dropped his state court lawsuit, only that
8 he did not receive a loan modification.

9 The Court will grant Plaintiff leave to amend these claims
10 to plead facts alleging each element of each claim, including the
11 “‘the who, what, when, where, and how’ of the misconduct
12 charged.” Kearns, 567 F.3d at 1124.⁶ Plaintiff must allege,
13 consistent with Federal Rule of Civil Procedure 11, the
14 statements that Defendants made to him and the actions that they
15 took that made those statements misleading or fraudulent. If
16 Plaintiff attempts to amend these claims, he may only allege
17 other facts consistent with his complaint and 1AC. Reddy,
18 912 F.2d at 297.

19 Defendants also argue that Plaintiff’s tenth claim, for
20 promissory estoppel, is barred by the statute of frauds, which
21 provides that any agreement “for the sale of real property, or of
22 an interest therein,” is invalid unless it is “in writing and
23 subscribed by the party to be charged or by the party’s agent.”
24 Cal. Civil Code § 1624(a), (a)(3). A mortgage is subject to the
25 statute of frauds. Cal. Civil Code § 2922. Plaintiff does not
26

27 ⁶ In future briefing, the parties should explain their
28 positions regarding which claims, if any, must be plead under the
heightened standard of Federal Rule of Civil Procedure 9(b).

1 oppose the motion to dismiss on this basis. Accordingly, the
2 Court will grant Defendants' motion to dismiss Plaintiff's
3 promissory estoppel claim on this additional ground. The Court
4 will grant Plaintiff leave to amend to allege facts supporting
5 the existence of a settlement agreement or other writing that
6 would satisfy the statute of frauds.

7 VII. Violation of Federal Consumer Protection Bureau Rules

8 Plaintiff claims that "Defendant Wells Fargo violated each
9 and every rule of the Federal Consumer Protection Bureau in this
10 matter." 1AC ¶ 140. This claim appears to be derivative of his
11 HBOR claims. Id. ¶¶ 141-42. Defendants move to dismiss it
12 because the conclusory allegations are insufficient to place them
13 on fair notice of what claim they are to defend. Plaintiff does
14 not oppose dismissal of this claim, or mention it in his
15 opposition, and the Court will dismiss it.

16 VIII. Failure to Join Indispensable Party

17 Defendants move to dismiss all claims in the 1AC for failure
18 to join an indispensable party. Plaintiff alleges that his wife
19 was a co-borrower, and the documents attached to the 1AC and
20 subject to judicial notice reflect this fact. Defendants argue
21 that Ms. Malveaux has a substantial interest in the claims in
22 this litigation and prejudice would result if she is not a party
23 to this action. In response, Plaintiff appears to have omitted
24 half of a sentence and a relevant exhibit that would explain his
25 opposition to dismissal on this ground. Opp. at 4.⁷

26 The Court does not reach this argument because it dismisses
27

28 ⁷ On October 26, 2017, the Clerk entered a notice to counsel
that Exhibit G was missing, but Plaintiff has not responded.

1 Plaintiff's claims on other grounds. However, in any amended
2 complaint, Plaintiff must either include Ms. Malveaux as a party
3 or allege facts showing why judgment rendered in her absence
4 would be adequate or why Rule 19 is inapplicable for other
5 reasons. Such facts will be particularly (although not only)
6 relevant to any claim for non-monetary relief, such as
7 Plaintiff's claim for quiet title.

8 In reply, Defendants contend that Ralph Partners, too, is an
9 indispensable party. Because Ralph Partners is already named as
10 a defendant in the 1AC, this argument fails. The Court does not
11 reach the question of whether Ralph Partners is indispensable,
12 although it may be raised again later if Plaintiff fails timely
13 to serve Ralph Partners.

14 Having dismissed the 1AC in its entirety, the Court does not
15 reach Defendants' remaining arguments for dismissal.

16 IX. Service

17 Only two Defendants, Wells Fargo and the Bank of New York
18 Mellon, have appeared in this case to date.

19 Defendants Barrett Daffin and First American Title Company
20 were named in the complaint filed August 29, 2017, but Plaintiff
21 has not sought issuance of summons to them. See Fed. R. Civ. P.
22 4(b). In their "Unilateral Rule 26(f) Report," Wells Fargo and
23 the Bank of New York Mellon contend that Barrett Daffin, as the
24 foreclosure trustee, is a "nominal party serving as Wells Fargo's
25 ministerial agent" which should not be required to join in the
26 joint case management statement. Neither Barrett Daffin nor
27 First American Title Company has appeared in this action, and
28 more than ninety days have passed after the filing of the

1 complaint. See Fed. R. Civ. P. 4(m).

2 Defendant Ralph Partners was first named in the 1AC
3 submitted on October 25, 2017. On December 13, 2017, Plaintiff
4 sought issuance of summons to Ralph Partners. Ninety days after
5 the filing of the 1AC will have passed on January 23, 2018.

6 The Court has dismissed all claims in the 1AC and granted
7 leave to amend. Accordingly, the Court will not also order
8 Plaintiff to show cause regarding service immediately. The Court
9 warns Plaintiff, however, that if he timely files a second
10 amended complaint, he must promptly seek issuance of summons as
11 to all Defendants who have not already been served and must serve
12 them in compliance with Federal Rule of Civil Procedure 4 if
13 waiver of service cannot be obtained. Within seven days after
14 filing a second amended complaint, Plaintiff must file a written
15 report with this Court regarding the status of service on all
16 named Defendants that have not already appeared in this action.
17 If Plaintiff asserts claims against Barrett Daffin and First
18 American Title, he must serve them in compliance with Rule 4, or
19 obtain waiver of service, before filing his status report, or
20 show cause why the claims against them should not be dismissed
21 without prejudice pursuant to Rule 4(m).

22 Plaintiff must file a written report regarding service on
23 Ralph Partners no later than January 24, 2018. If Plaintiff has
24 not served Ralph Partners or obtained a waiver of service by that
25 date, he must show cause why the claims against Ralph Partners
26 should not be dismissed without prejudice pursuant to Rule 4(m).

27 Failure to file either of the written status reports
28 regarding service or to comply in any respect with this order

1 shall result in dismissal without prejudice under Rule 4(m)
2 without further notice.

3 CONCLUSION

4 The Court GRANTS leave for Plaintiff to file the 1AC (Docket
5 No. 17).

6 The Court DENIES AS MOOT Defendants' motion to dismiss the
7 original complaint (Docket No. 14) and Defendants' request for
8 judicial notice in support of that motion to dismiss (Docket No.
9 15).

10 The Court grants Defendants' motions for judicial notice of
11 the documents submitted in support of the motion to dismiss the
12 1AC (Docket No. 20), but sustains Plaintiff's objection (Docket
13 No. 22) and does not take judicial notice of the truth of
14 disputed statements within the documents.

15 The Court GRANTS Defendants' motion to dismiss the 1AC
16 (Docket No. 19). Because the Court has dismissed all claims, the
17 Court does not reach Defendants' additional and alternative
18 arguments for dismissal of some of the claims. Plaintiff may
19 replead any or all of his dismissed claims if he can truthfully
20 allege, without contradicting the allegations in his previous
21 complaints, facts sufficient to show that he is entitled to
22 relief. Any second amended complaint is due within twenty-one
23 days after the date of this order and must be accompanied by the
24 filing of a redline version showing the changes made in the
25 second amended complaint.

26 If Plaintiff timely files a second amended complaint, he
27 must immediately seek issuance of summons as to all Defendants
28 who have not already been served and must serve them in

1 compliance with Federal Rule of Civil Procedure 4 if waiver of
2 service cannot be obtained. Within seven days after filing a
3 second amended complaint, Plaintiff must file a written report
4 with this Court regarding the status of service on all named
5 Defendants. If Defendant Ralph Partners has not appeared,
6 Plaintiff must file a further written report regarding the status
7 of service on Ralph Partners by January 24, 2018. Failure to
8 file either of the written status reports regarding service shall
9 result in dismissal without prejudice under Rule 4(m) without
10 further notice.

11 The response of Defendants Wells Fargo and the Bank of New
12 York Mellon shall be due within twenty-one days after the second
13 amended complaint is filed. The response of all other Defendants
14 shall be due within the time provided by the Federal Rules of
15 Civil Procedure.

16 If Plaintiff does not timely file a second amended
17 complaint, the Court will dismiss Plaintiff's claims against
18 Wells Fargo and the Bank of New York Mellon with prejudice
19 without further notice, and will dismiss Plaintiff's claims
20 against Defendants Barrett Daffin, First American Title Company
21 and Ralph Partners without prejudice.

22 Defendants shall notice any motions to dismiss the second
23 amended complaint for March 27, 2018, at 2:30 p.m. Defendants
24 shall join in a single motion to dismiss to the greatest extent
25 possible, and shall not file duplicative briefing. Plaintiff
26 shall file a single opposition brief in response to all motions
27 to dismiss.

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

The Court hereby continues the initial case management conference to March 27, 2018, at 2:30 p.m. The joint case management statement is now due March 20, 2018.

IT IS SO ORDERED.

Dated: December 28, 2017



CLAUDIA WILKEN
United States District Judge