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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN JOSE DIVISION**

11 MICHAEL BLOMQUIST, et al.,
12 Plaintiffs,
13 v.
14 WASHINGTON MUTUAL, et al.,
15 Defendants.

Case Number C 07-04108 JF (HRL)
ORDER¹ GRANTING MOTIONS TO
DISMISS SECOND AMENDED
COMPLAINT
[re: doc. nos. 157, 159, 160, 161, 162,
165, 172]

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18 On August 9, 2007, Plaintiff Michael Blomquist, a licensed mortgage and real estate
19 agent proceeding *pro se*, filed the instant action against Washington Mutual, Kerry K. Killinger,
20 Joseph W. Saunders, Countrywide Home Loans, Inc., Angelo Mozilo, Ken Thompson, Citigroup
21 Corp., Sandford Weill, Charles Prince, Goldman Sachs Group, Inc., Henry Paulson, Bear Stearns
22 Co., James Cayne, The McGraw Hill Co., Harold McGraw III, Wells Fargo & Co., Patricia R.
23 Callahan, Herbert M. Sandler, Rock Holdings, Inc., Experian Corp., Fimalac, Inc., Moodys
24 Corp., James E. Gilleran, John M. Reich, John D. Hawke Jr., John C. Dugan, Susan Schmidt
25 Bies, Donald E. Powell, Sheila C. Blair and Does 1-50 (collectively, "Defendants"). On July 23,
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¹ This disposition is not designated for publication in the official reports.

1 2008, the Court granted the motion by certain Defendants to dismiss Plaintiff's First Amended
2 Complaint ("FAC") without leave to amend, and granted Plaintiff leave to file a Second
3 Amended Complaint ("SAC") against the remaining Defendants. Those remaining Defendants
4 now move to dismiss the SAC for failure to state a claim upon which relief may be granted.²
5 Plaintiff did not file opposition to the motions. For the reasons set forth below, the motions to
6 dismiss will be granted, without leave to amend.
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8 **I. BACKGROUND**

9 Both Plaintiff's initial complaint and the FAC allege a broad conspiracy among lenders,
10 investment banks, and rating agencies to enable the funding of illegal home loans. Plaintiff
11 alleges that such actions were the root cause of the current housing market meltdown and
12 worldwide financial crisis. The Court dismissed the FAC without leave to amend as to the
13 investment banks and rating agencies, referred to herein as the Non-Lender Defendants, because
14 Plaintiff did not have standing to assert claims based upon alleged injuries to society as a whole.³
15 The Court granted Plaintiff leave to file an amended complaint with respect to the remaining
16 Defendants (the "Lender Defendants").⁴ To help Plaintiff address the standing issue, the Court
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20 ² Five individual motions to dismiss were filed by the various Lender Defendants and
21 their corporate officers. Two motions for joinder also were filed. Because of the similar
22 postures of the Lender Defendants, the motions for joinder will be granted and the motions to
dismiss will be considered together.

23 ³ The Non-Lender Defendants are Goldman Sachs Group, Inc., Henry Paulson, The
24 McGraw Hill Companies, Inc., Harold McGraw, III, Fitch Group, Inc. (sued as Fimalac, Inc.),
Moody's Corporation, and Experian Holdings, Inc. (sued as Experian Corp.). Final judgment
was entered in favor of the Non-Lender Defendants on July 25, 2008.

25 ⁴ The Lender Defendants include Washington Mutual, Countrywide Home Loans, Inc.,
26 Wachovia Corp., Wells Fargo & Co., Citigroup, The Bear Stearns Companies, Inc., Kerry
27 Killinger, Joseph Saunders, Patricia R. Callahan, Angelo Mozilo, Sanford Weill, Charles Prince,
James Cayne, Herbert M. Sandler, and Ken Thompson. On November 10, 2008, Washington
28 Mutual filed a notice of automatic stay in light of its bankruptcy filing. Accordingly, this order
applies to all Lender Defendants except Washington Mutual.

1 instructed that “[i]n his amended complaint, [Plaintiff] must allege specifically which Lender
2 Defendants approached him or his agents about arranging illegal loans and when they did it.”
3 July 23, 2008 Order at 6.
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5 Plaintiff filed the SAC on September 4, 2008, several days after the deadline imposed by
6 the Court for filing any amended pleading.⁵ The operative SAC contains many of the same
7 allegations contained within the prior pleadings.⁶ Essentially, the thrust of the SAC is that
8 Plaintiff lost business as a result of the Lender Defendants’ fraudulent loan practices. Because he
9 refused to participate in the issuance of loans that allegedly were based on inflated income and
10 other false representations, Plaintiff’s revenue declined, and eventually Plaintiff had to close his
11 real estate business.
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13 The SAC contains few allegations of any direct contact with the Lender Defendants or
14 their agents. In the few instances of such contact that are alleged, the nature of the interaction is
15 that an agent of one of the Lender Defendants would approach Plaintiff or one of Plaintiff’s
16 employees and offer to engage in a home loan transaction. Plaintiff alleges that he refused to do
17 business with the Lender Defendants on these occasions because he had concerns about engaging
18 in potentially fraudulent transactions. The SAC does not allege that Plaintiff actually entered
19 into a financial transaction with any of the Lender Defendants.
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23 ⁵ After Plaintiff failed to file the SAC within the time allotted by the Court, several of the
24 Lender Defendants moved to dismiss the SAC. Because Plaintiff is proceeding *pro se*, the Court
allowed the instant action to proceed despite Plaintiff’s tardiness.

25 ⁶ In granting leave to file the SAC, the Court explicitly instructed Plaintiff not only to
26 omit any claims against the Non-Lender Defendants but also to omit any claims against the
27 Lender Defendants for securities fraud. In contravention of these instructions, the SAC contains
28 claims against the Non-Lender Defendants and alleges claims for securities fraud against all
Defendants. On October 1, 2008, the Court ordered that any allegations against the Non-Lender
Defendants and any allegations of securities fraud against the Lender Defendants be stricken
from the SAC.

1 The SAC asserts seven “counts” against all the named defendants: two counts based on
2 alleged RICO violations, 18 U.S.C. § 1960 *et seq.*; two counts based on alleged antitrust
3 violations under the Sherman Act, 15 U.S.C. §§ 1, 15; one count under California’s Unfair
4 Competition Law (“UCL”), Cal. Bus. & Prof. Code, § 17200 *et seq.*; one count for negligence;
5 and one count for negligent and intentional infliction of emotional distress. *See* SAC ¶¶135-185.
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7 II. LEGAL STANDARD

8 When considering a motion to dismiss, the plaintiff’s allegations are taken as true and the
9 Court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v.*
10 *McKeithen*, 395 U.S. 411, 421 (1969). A complaint may be dismissed for failure to state a claim
11 upon which relief can be granted for one of two reasons: (1) lack of a cognizable legal theory or
12 (2) insufficient facts under a cognizable legal theory. *Bell Atl. Corp. v. Twombly*, 127 S. Ct.
13 1955 (2007). *See also Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir.
14 2008) (“Dismissal is appropriate only where the complaint lacks a cognizable legal theory or
15 sufficient facts to support a cognizable legal theory.”).
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18 The pleading of a *pro se* litigant is held to a less stringent standard than a pleading drafted
19 by an attorney and is to be afforded the benefit of any doubt. *Haines v. Kerner*, 404 U.S. 519,
20 520 (1972). A *pro se* litigant must be given leave to amend at least once unless it is absolutely
21 clear that the deficiencies of the complaint cannot be cured by amendment. *See Lucas v. Dep’t of*
22 *Corr.*, 66 F.3d 245, 248 (9th Cir. 1995). Nevertheless, “[w]hile a complaint attacked by a Rule
23 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to
24 provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions,
25 and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 127 S. Ct.
26 at 1964-65 (2007) (citations omitted).
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1 **III. DISCUSSION**

2 The Lender Defendants argue that Plaintiff again has failed to allege sufficient facts
3 showing that he has standing to assert a viable claim based upon any of the numerous legal
4 theories set forth in the SAC. In addition, even assuming that Plaintiff has standing, the Lender
5 Defendants contend that Plaintiff has failed to plead sufficient facts to support any of the claims.
6 As noted previously, Plaintiff did not file a written opposition to these arguments.⁷

8 A. Standing

9 Article III of the Constitution “requires the party who invokes the court’s authority to
10 show that he personally has suffered some actual or threatened injury as a result of the putatively
11 illegal conduct of the defendant, and that the injury can be fairly traced to the challenged action
12 and is likely to be redressed by a favorable decision.” *Valley Forge Christian Coll. v. Am.*
13 *United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (internal quotations
14 omitted). Thus, standing to bring a federal claim requires (1) injury in fact, (2) causation,
15 and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The elements
16 necessary to establish standing are “not mere pleading requirements but rather an indispensable
17 part of the Plaintiffs’ case, [and] each element must be supported in the same way as any other
18 matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of
19 evidence required at the successive stages of the litigation.” *Id.* at 561.

20 As a threshold matter, it bears repeating that Plaintiff may not assert claims on behalf of
21 society as a whole. *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (“when the asserted harm is a
22 ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens,
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28 ⁷ Plaintiff did attend the hearing on the instant motions on December 5, 2008 and was permitted to make comments on the record.

1 that harm alone normally does not warrant exercise of jurisdiction.”). As relevant here, Plaintiff
2 lacks standing to assert claims for any alleged injuries to third parties.

3 The SAC also fails to set forth sufficient facts with respect to any harm alleged to have
4 been suffered by Plaintiff personally. Plaintiff must allege at least one injury that is fairly
5 traceable to the conduct of a Lender Defendant. The three specific incidents described within the
6 SAC fail to satisfy this requirement. In paragraph 63 of the SAC, Plaintiff alleges that Lender
7 Defendant Wells Fargo was aware that Plaintiff’s name had been added unlawfully to an account
8 owned by an loan originator. The SAC contains no further details as to the significance of Wells
9 Fargo’s alleged awareness and does not state that Plaintiff suffered any injury as a result. *See*
10 SAC ¶63. Plaintiff also alleges that on at least two occasions, a Countrywide representative
11 approached one of Plaintiff’s loan agents regarding refinancing for two separate borrowers who
12 would not qualify for loans unless their income was inflated. *Id.* at ¶¶117-120. In each instance,
13 the Countrywide agent solicited Plaintiff’s agent to participate in a loan supported by income
14 inflation. *Id.* However, Plaintiff barred his agent from participating in the transaction because he
15 did not want to participate in the fraudulent procurement of a loan. *See id.* at ¶120. The SAC
16 does not contain any information with respect to whether the borrowers ultimately received a
17 loan from Countrywide. It appears that the alleged injury in each of these instances was that
18 Plaintiff lost business revenue because he refused to participate in a questionable transaction with
19 Countrywide.
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24 When an alleged injury results from a plaintiff’s voluntary decision to abstain from
25 certain activity, rather than engaging in the allegedly wrongful act itself, it is not “fairly
26 traceable” to the challenged conduct. *See McConnell v. FEC*, 540 U.S. 93, 226-28 (2003). In
27 *McConnell*, a group of candidates for political office challenged a provision in the Bipartisan
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1 Campaign Reform Act of 2002 (BCRA) increasing the “hard money” limits on campaign
2 donations. *Id.* at 226-28. The basis for their claim was that the BCRA put them at a competitive
3 disadvantage in fundraising because they did not wish to accept the donations allowable under
4 the increased limits—which they believed were fundamentally unfair—whereas their political
5 opponents would accept such donations. *See id.* at 228. The Court held the plaintiffs’ “own
6 personal ‘wish’ not to solicit or accept large contributions” was “their personal choice.” *Id.* As
7 such, the plaintiffs failed “to allege an injury in fact that is ‘fairly traceable’ to BCRA.” *Id.*

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9 In the instant case, any alleged economic injury to Plaintiff arose out of his refusal to do
10 business with the Lender Defendants. This is a form of injury that the Supreme Court has found
11 to not be redressable because it is not “fairly traceable” to any conduct on the part of the Lender
12 Defendants. *See McConnell*, 540 U.S. at 228. Accordingly, the statutory claims based upon
13 Plaintiff’s alleged economic damages, namely Plaintiff’s claims under RICO and the Sherman
14 Act, fail for lack of standing. Plaintiff’s UCL claim also fails for lack of standing because it too
15 is subject to the standing requirements of Article III. *See Daro v. Sup. Ct.*, 151 Cal. App. 4th
16 1079, 1097 (2007). Accordingly, because Plaintiff has failed to comply with the Court’s express
17 instructions with respect to standing and because Plaintiff has failed to oppose the instant
18 motions, the RICO, antitrust, and UCL claims will be dismissed without leave to amend.⁸

19 20 21 B. Negligence and Emotional Distress

22 The SAC adds claims for negligence, negligent infliction of emotional distress, and
23 intentional infliction of emotional distress to Plaintiff’s original allegations. To assert a claim for
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27 ⁸ Even if Plaintiff had standing to assert such claims, the SAC includes mostly legal
28 conclusions, rather than factual allegations, in support of such claims. *See Twombly*, 127 S. Ct.
at 1964-65 (to survive a motion to dismiss, the SAC must contain more than “labels and
conclusions, and a formulaic recitation of the elements of a cause of action will not do.”).

1 negligence, a plaintiff must allege that the defendant owed a duty to the plaintiff that
2 subsequently was breached, and such breach was the proximate cause of the plaintiff's injury.
3 *See Ditto v. McCurdy*, 510 F.3d 1070, 1078 (9th Cir. 2007). Negligent infliction of emotional
4 distress has the same elements as a claim for negligence. *Lawson v. Mgmt. Activities*, 69 Cal.
5 App. 4th 652, 656 (1999). Accordingly, such a claim requires that a duty existed that was
6 breached, and such breach was the direct cause of emotional distress. *Id.* at 657. Here, the SAC
7 contains no facts that show that any Lender Defendant owed a duty to Plaintiff. Accordingly,
8 Plaintiff's claims for negligence and negligent infliction of emotional distress are subject to
9 dismissal. Because Plaintiff added these claims without leave of the Court and failed to oppose
10 the instant motions, leave to amend will be denied.

13 Intentional infliction of emotional distress requires that a plaintiff plead "(1) outrageous
14 conduct by the defendant, (2) intention to cause or reckless disregard of the probability of
15 causing emotional distress, (3) severe emotional suffering and (4) actual and proximate causation
16 of the emotional distress." *Bogard v. Employers Cas. Co.*, 164 Cal. App. 3d 602, 616 (1985).
17 Plaintiff's claim fails because he has not alleged the first required element, which courts have
18 defined as requiring extreme and outrageous conduct going beyond all bounds of decency. *See*
19 *Schneider v. TRS, Inc.*, 938 F. 2d 986, 992 (9th Cir. 1991). At most, the behavior by the Lender
20 Defendants may have violated certain laws, but that uncertainty regarding the legality
21 demonstrates that as a matter of law such behavior was not extreme or outrageous. The claim for
22 intentional infliction of emotional distress also will be dismissed and leave to amend will be
23 denied for the same reasons applicable to Plaintiff's other newly added and unauthorized claims.
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1 **IV. ORDER**

2 Good cause therefor appearing, IT IS HEREBY ORDERED that the Lender Defendants'
3 motions to dismiss Plaintiff's SAC are GRANTED, without leave to amend. Because Plaintiff
4 did not file written opposition to the instant motions, he was foreclosed from presenting any
5 substantive arguments in opposition. Plaintiff may file a motion under Fed. R. Civ. P. 60(b) if he
6 believes there are valid grounds for relief from this order.
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8 IT IS SO ORDERED.

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10 DATED: December 15, 2008

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12 JEREMY FOGEL
13 United States District Judge
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