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\*\*E-Filed 5/24/2010\*\*

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

TIMOTHY POWELL,

Plaintiff,

v.

RESIDENTIAL MORTGAGE CAPITAL,  
NATIONAL HOME EQUITY, GENERAL  
MOTORS ACCEPTANCE CORPORATION,  
NOEL McCORD, FIRST NET MORTGAGE, and  
DOES 1-100, inclusive,

Defendants.

Case Number C 09-04928 JF (PVT)

ORDER GRANTING DEFENDANTS'  
MOTIONS TO DISMISS

[re: doc. nos. 21, 41, 42]

**I. BACKGROUND**

**A. Factual Background**

This action arises out of a residential mortgage transaction. Plaintiff Timothy Powell alleges that on October 23, 2006 he obtained financing from Residential Mortgage Capital (“Residential”) and PNC Bank, National Association (“PNC”), sued as National Home Equity, for the purpose of purchasing the subject property located at 811 Larkin Valley Road, Watsonville, CA (“the Property”). Complaint ¶¶ 21, 22. Plaintiff alleges that Residential and PNC were the loan originators and that Defendant GMAC Mortgage, LLC (“GMAC”),

1 erroneously sued as General Motors Acceptance Corporation, is the current servicing company of  
2 the loan. *Id.* ¶ 23. It appears that Plaintiff did obtain a loan in the principal amount of  
3 \$924,000.00 funded by Residential (“primary loan”), but that PNC’s predecessor, National City  
4 Bank, issued Plaintiff a home equity line of credit (“HELOC”) with a maximum principal  
5 obligation limit of \$115,000.00. PNC’s Request for Judicial Notice (“RJN”), Exs. A (“Deed of  
6 Trust”) (identifying Plaintiff and Avelia Powell, husband and wife, as joint tenants and the  
7 borrowers, and Residential as the lender, as well as the amount owed as \$924,000.00); B (“Deed  
8 of Trust”) (identifying Plaintiff and Avelia Powell, husband and wife, as the trustor and National  
9 City Bank as the Trustee and Lender, a well as the maximum obligation limit as \$115,000.00).<sup>1</sup>

10 Plaintiff alleges that Defendants stated an inflated income on his loan application,  
11 Complaint ¶¶ 24-26, “rushed [him] through signing the [loan] documents and... “[a]ny and all  
12 documents Plaintiff received also failed to include initial disclosure and final disclosures,  
13 includ[ing] [RESPA] disclosures. *Id.* ¶ 28. Plaintiff also claims that Residential and PNC  
14 violated the Truth in Lending Act (“TILA”), 15 U.S.C. § 1601 et seq., by not disclosing that a  
15 mortgage would be placed on the property, and that they made the loan based upon his collateral  
16 rather than his ability to repay the loan. *Id.* ¶¶ 39-40. Plaintiff does not differentiate between the  
17 primary loan and HELOC in his complaint. While it is not clear which obligation is the subject  
18 of which of Plaintiff’s allegations, it appears that the allegations relate to the Primary Loan rather  
19 than the HELOC, as Plaintiff asserts that “the terms of the loan were memorialized in a  
20 Promissory Note, which was secured by a Deed of Trust on the Property, the Deed of Trust  
21 identified First American Title Company as Trustee, and Defendant Residential Mortgage Capital  
22 as the Lender.” *Id.* ¶ 28. Finally, Plaintiff alleges that the property is “now in the foreclosure  
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25 <sup>1</sup> PNC requests that the Court take judicial notice of four documents: the Deed of Trust  
26 on the primary loan, Ex. A; the deed of trust pertaining to the HELOC, Ex. B; the Notice of  
27 Default pertaining to the primary loan, Ex. C; and the Notice of Sale pertaining to the primary  
28 loan, Ex. D. Plaintiff does not oppose PNC’s request. All four documents were recorded as  
official records by the Santa Cruz County Recorder’s Office. Accordingly, the Court will take  
judicial notice of the documents pursuant to Fed. R. Evid. 201(b).

1 process.” *Id.* ¶ 30. Again Plaintiff does not identify which obligation is in the foreclosure  
2 process. However, PNC has submitted a copy of the notice of default and election to sell  
3 recorded on May 28, 2009, and these documents pertain to the primary loan. RJN, Ex. C (Notice  
4 of Default and Election to Sell) (indicating that Plaintiff was in default on the primary loan in an  
5 amount of \$14,774.74. A Notice of Sale regarding the primary loan was recorded on August 28,  
6 2009. RJN, Ex. D (Notice of Sale).

### 7 **A. Procedural Background**

8 Plaintiff filed his complaint on October 16, 2009 against Defendants GMAC, PNC,  
9 Residential Mortgage Capital,<sup>2</sup> Noel McCord, First Net Mortgage, and Does 1-100, alleging the  
10 following claims for relief: (1) violation of TILA and the Home Ownership and Equity  
11 Protection Act (“HOEPA”),<sup>3</sup> (2) violation of the California Rosenthal Act, Cal. Civ. Code § 1788  
12 et seq.; (3) violation of the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2605  
13 et seq.; (4) fraud; (5) breach of fiduciary duty; (6) breach of contract; (7) breach of the covenant  
14 of good faith and fair dealing; (8) violation of California Financial Code § 4970 et seq.; (9)  
15 violation of California Business and Professions Code § 17200 et seq.; (10) negligence; (11)  
16 usury; and (12) accounting. Plaintiff also filed an application for a temporary restraining order  
17 (“TRO”) and order to show cause re preliminary injunction. On October 27, 2009, the Court  
18 approved a stipulation submitted by Plaintiff and GMAC taking the TRO application off calendar  
19 and postponing a foreclosure sale scheduled to occur on October 29, 2009.

20 Now before the Court are two separate motions to dismiss Plaintiff’s complaint, one filed  
21 by GMAC, and the second filed by PNC. PNC also moves to strike particular paragraphs of the  
22 complaint requesting punitive damages and attorney’s fees, as well as for a more definite  
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24 <sup>2</sup> Plaintiff voluntarily dismissed the instant action without prejudice as to Defendant  
25 Residential Mortgage Capital.

26 <sup>3</sup> Plaintiff appears to allege two separate claims for relief under TILA – one based  
27 primarily upon a failure to make certain material disclosures and the other premised upon  
28 Defendants’ alleged failure to deliver notices of Plaintiff’s right to cancel and “placing terms  
prohibited by TILA into the transaction.” Complaint ¶ 52.

1 statement. Plaintiff opposes GMAC’s motion to dismiss, but he did not file opposition to PNC’s  
2 motions.

## 3 II. LEGAL STANDARD

4 “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a  
5 cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendondo v.*  
6 *Centinela Hosp. Medical Center*, 521 F.3d 1097, 1104 (9th Cir.2008). For purposes of a motion  
7 to dismiss, “all allegations of material fact are taken as true and construed in the light most  
8 favorable to the nonmoving party.” *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-338 (9th  
9 Cir.1996). However, “[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does  
10 not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle  
11 [ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the  
12 elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555,  
13 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (internal citations omitted). Leave to amend must be  
14 granted unless it is clear that the complaint’s deficiencies cannot be cured by amendment. *Lucas*  
15 *v. Department of Corrections*, 66 F.3d 245, 248 (9th Cir.1995).

## 16 III. DISCUSSION

### 17 A. GMAC’s motion to dismiss

18 GMAC contends that all of Plaintiff’s claims for relief are insufficient because Plaintiff  
19 does not distinguish between the actions of GMAC, the current servicer, and the other defendants  
20 named in the instant action. The complaint in some instances refers to Residential and PNC and  
21 in others to “Defendants” generally, but refers specifically to GMAC only on two occasions: (1)  
22 “Plaintiff is informed and believes that Defendants Residential Mortgage Capital, National Home  
23 Equity and [GMAC] are corporations doing business in Santa Cruz County, California and/or the  
24 Trustee of that certain Deed of Trust listing Plaintiff as Borrower, which is the subject of this  
25 Complaint”, Complaint ¶ 8; and (2) “GMAC is the current servicing company of said loan.” *Id.*  
26 ¶ 23. Plaintiff makes no specific allegations of wrongdoing tied specifically to GMAC and in  
27 many cases refers to “Defendants” generally when alleging facts related to the loan’s origination,  
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1 of which GMAC could not have been a part.

2 Treating disparate parties identically without explanation, as Plaintiff does throughout the  
3 complaint, deprives each individual defendant a fair and meaningful opportunity to defend itself.  
4 *Twombly*, 550 U.S. at 553-55; *In re Sagent Technology, Inc., Derivative Litigation*, 278  
5 F.Supp.2d 1079, 1094-95 (N.D. Cal. 2003) (holding that a “complaint that lumps together  
6 thirteen ‘individual defendants,’ where only three of the individuals was alleged to have been  
7 present for the entire period of the events alleged in the complaint, fails to give ‘fair notice’ of  
8 the claim to those defendants.”). In his opposition papers, Plaintiff argues in conclusory fashion  
9 that GMAC is “vicariously liable” for the actions of the loan originators. However, the  
10 complaint makes no factual allegation, nor do Plaintiff’s opposition papers cite any case law, in  
11 support of this assertion. Plaintiff must plead facts sufficient to put GMAC on notice of the  
12 claims asserted against it, and such facts must be specific enough to be more than speculation.  
13 *Twombly*, 550 U.S. at 535-55; *Aschroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

14 The Court has grave reservations as to whether Plaintiff can state viable claims for relief  
15 against GMAC. Among other things, Plaintiff has not alleged an ability to tender, many of  
16 Plaintiff’s claims appear to be time-barred, and Plaintiff asserts in his opposition papers only that  
17 GMAC “might” own the loan. Opposition at 12-13. However, because the operative complaint  
18 is Plaintiff’s first pleading and in keeping with the strong policy in the Ninth Circuit favoring  
19 amendment, leave to amend as to GMAC will be granted. *Lucas*, 66 F.3d at 248.

## 20 **B. PNC’s motion to dismiss**

### 21 **1. TILA and HOEPA damages claim**

22 After reciting various terms of art found in TILA’s statutory language, *see* Complaint ¶¶  
23 33-37, Plaintiff alleges that Defendants violated the requirements of HOEPA and Regulation Z  
24 by failing to disclose a notice mandated by Regulation Z, 12 C.F.R. § 226.32(c)(1), *Id.* ¶ 39; and  
25 “extending credit based on Plaintiff’s collateral rather than considering Plaintiff’s current and  
26 expected income, current obligations and employment status,” *id.* ¶ 41. However, Plaintiff’s  
27 allegations fail to distinguish between PNC and the other named defendants, as well as

1 neglecting to identify the obligation to which the allegations refer – the primary loan or the  
2 HELOC in which PNC’s predecessor was involved. These general and conclusory allegations  
3 fail to meet even the liberal pleading standard of Rule 8.

4 Moreover, Plaintiff seeks money damages for which the applicable limitations period is  
5 one year. See 15 U.S.C. § 1640(e). The complaint alleges that the loan transaction at issue in this  
6 action closed on October 23, 2006. Complaint ¶ 28. Plaintiff did not file his original complaint  
7 until October 16, 2009, almost three years after the loan transaction was consummated. “A claim  
8 under HOEPA is subject to TILA’s one year statute of limitations.” *Periguerra v. Meridas*  
9 *Capital, Inc.*, 2010 WL 395932, at \*6 (N.D. Cal. Feb. 1, 2010), citing *In re Comty. Bank of N.*  
10 *Va.*, 418 F.3d 277, 304-305 (3rd Cir.2005) (“An affirmative action under HOEPA must be  
11 brought within one year of the violation”). Plaintiff does not oppose the motion or allege facts  
12 indicating when he discovered the alleged fraud or non-disclosures. *Santa Maria v. Pac Bell*,  
13 202 F.3d 1170, 1178 (9th Cir. 2000) (holding that the statute of limitations may be tolled where  
14 "a reasonable plaintiff would not have known of the existence of a possible claim within the  
15 limitations period."). Accordingly, Plaintiff’s TILA damages claim appears to be time-barred.

## 16 2. TILA rescission claim

17 PNC argues that Plaintiff’s claim for rescission is barred because the loan at issue was a  
18 purchase money mortgage and such mortgages may not be rescinded under the statute. PNC is  
19 correct. As another district court recently explained:

20 Residential mortgage transactions are expressly excluded from TILA’s rescission  
21 provisions. See 15 U.S.C. § 1635(e)(1). A “residential mortgage transaction” is  
22 defined by 15 U.S.C. § 1602(w) to include “a mortgage, deed of trust, . . . or  
23 equivalent consensual security interest . . . created . . . against the consumer’s  
24 dwelling to finance the acquisition . . . of such dwelling.” Thus, while home  
equity loans and refinancing transactions could be amenable to rescission,  
Plaintiff’s purchase money mortgage for is not. (See Compl. at ¶ 14.) Plaintiff’s  
TILA rescission claim is therefore dismissed.

25 *Watts v. Decision One Mortg. Co.*, No. 09 CV 0043 JM (BLM), 2009 WL 1657424, at \* 3 (S.D.  
26 Cal. June 11, 2009). The complaint does not distinguish between the primary loan and HELOC  
27 loan. In fact, Plaintiff does not acknowledge the existence of the HELOC in his complaint.

28 Plaintiff also fails to allege ability to tender. Although the Ninth Circuit has not

1 addressed the issue directly, it has held that a court may require a borrower seeking rescission of  
2 a mortgage transaction under TILA to demonstrate the ability to tender the loan proceeds.  
3 *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1168 (9th Cir. 2003) (holding that it is within a  
4 district court's "discretion to condition rescission on tender by the borrower of the property he  
5 had received from the lender") (internal quotation marks and citation omitted).

6 District courts within the circuit are split. A number of them have extended *Yamamoto* to  
7 hold that a claim for rescission under TILA is subject to dismissal at the pleading stage if the  
8 borrower fails to allege a present ability to tender the loan proceeds. *See, e.g., Garcia v.*  
9 *Wachovia Mortg. Corp.*, 676 F.Supp.2d 895, 901-905 (C.D. Cal. 2009); *Del Valle v. Mortg. Bank*  
10 *of California*, No. CV-F-09-1316 OWW/DLB, 2009 WL 3786061, at \*8 (E.D. Cal. Nov. 10,  
11 2009); *ING Bank v. Korn*, No. C09-124Z, 2009 WL 1455488, at \*1 (W.D. Wash., May 22,  
12 2009); *Garza v. American Home Mortg.*, No. CV F 08-1477 LJO GSA, 2009 WL 188604, at \*5  
13 (E.D. Cal. Jan. 27, 2009) (granting motion to dismiss TILA rescission claim in light of  
14 complaint's failure to allege ability to tender, since "[r]escission is an empty remedy without  
15 [plaintiff]'s ability to pay back what she has received"). However, other courts have held that  
16 failure to allege ability to tender is not fatal to a TILA rescission claim. *See, e.g., Singh v.*  
17 *Washington Mut. Bank*, No. C-09-2771 MMC, 2009 WL 2588885, at \*4 (N.D. Cal. Aug. 19,  
18 2009) ("Notably, *Yamamoto* does not hold that a claim for rescission cannot survive a motion to  
19 dismiss until the right to rescind is adjudicated in the plaintiff's favor."); *ING Bank v. Ahn*, No. C  
20 09-995 TEH, 2009 WL 2083965, at \*2 (N.D. Cal. July 13, 2009) (noting that "Yamamoto did not  
21 hold that a district court must, as a matter of law, dismiss a case if the ability to tender is not  
22 pleaded. Rather, all of these cases indicate that it is within the trial court's discretion to choose to  
23 dismiss where the court concludes that the party seeking rescission is incapable of  
24 performance."); *Pelayo v. Home Capital Funding*, No. 08-CV-2030 IEG (POR), 2009 WL  
25 1459419, at \*7 (S.D. Cal. May 22, 2009) (rejecting argument that, under *Yamamoto*, claim for  
26 rescission was subject to dismissal where plaintiff "failed to offer tender in the complaint of the  
27 funds she borrowed"); *Harrington v. Home Capital Funding, Inc.*, No. 08cv1579 BTM (RBB),  
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1 2009 WL 514254, at \*3 (S.D. Cal. Mar. 2, 2009) (holding "[t]ender by the borrower is not always  
2 a precondition to rescission and does not have to be pled to state a claim for rescission");  
3 *Burrows v. Orchid Island TRS, LLC*, No. 07CV1567-BEN (WMC), 2008 WL 744735, at \*6  
4 (C.D. Cal. Mar.18, 2008) (rejecting, on motion to dismiss, defendant's argument that "there [was]  
5 no evidence" that plaintiff could return loan proceeds).

6 This Court finds the second line of cases more persuasive in that they appear to be more  
7 consistent with the liberal pleading standard of Fed. R. Civ. P. 8. However, the Court agrees  
8 with the reasoning of the first line of cases that "it was not the intent of Congress to reduce the  
9 mortgage company to an unsecured creditor," *Del Valle*, 2009 WL at \*8, and that "[r]escission is  
10 an empty remedy without [plaintiff]'s ability to pay back what she has received," *Garza*, 2009  
11 WL at \*5. Accordingly, the Court will exercise the discretion conferred upon it by Yamamoto to  
12 require that Plaintiff allege either the present ability to tender the loan proceeds or the  
13 expectation that he will be able to tender within a reasonable time.<sup>4</sup> At the end of the day,  
14 Plaintiff "will not be entitled to rescission" unless he can tender the principal balance of the loan.  
15 *See Clemens v. J.P. Morgan Chase Nat. Corporate Services, Inc.*, No. 09-3365 EMC, 2009 WL  
16 4507742, at \*5 (N.D. Cal. Dec. 1, 2009). It makes little sense to let the instant rescission claim  
17 proceed absent some indication that the claim will not simply be dismissed at the summary  
18 judgment stage after needless depletion of the parties' and the Court's resources.

### 19 **3. California Rosenthal Fair Debt Collection Practices Act ("RFDCPA")**

20 The purpose of the RFDCPA is "to prohibit debt collectors from engaging in unfair or  
21 deceptive practices in the collection of consumer debts and to require debtors to act fairly in  
22 entering into and honoring such debts." Cal. Civ.Code, § 1788.1(b). The RFDCPA defines "debt  
23 collector" as "any person who, in the ordinary course of business, regularly, on behalf of himself  
24 or herself or others, engages in debt collection." Cal. Civ. Code, § 1788.2(c).

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26 <sup>4</sup> For example, a TILA plaintiff might be able to allege that while he lacks the liquidity to  
27 tender the loan proceeds at the time he files the rescission claim, he has sufficient equity in the  
28 home and a willingness to sell that would render it likely that he could tender the loan proceeds if  
given a reasonable period of time.



1 Plaintiff's conclusory allegations regarding PNC's violation of the RFDCPA are limited  
2 to the following: (1) PNC is a "debt collector[]" within the meaning of the Rosenthal Act in that  
3 [it] regularly, in the course of [its] business, on behalf of [itself] or others, engage in the  
4 collection of debt, Complaint ¶ 56; and (2) Defendants' actions constitute a violation of the  
5 Rosenthal Act in that they threatened to take actions not permitted by law, including but not  
6 limited to the following: making false reports to credit reporting agencies, foreclosing upon a  
7 void security interest, falsely stating the amount of a debt, increasing the amount of a debt by  
8 including amounts that are not permitted by law or contract, and using unfair and unconscionable  
9 means in an attempt to collect a debt. *Id.* ¶ 57. These allegations again fail to specify whether  
10 the conduct alleged pertains to the primary loan or HELOC. However, as discussed above, it  
11 appears that the allegations with respect to foreclosure apply to the primary loan. RJN Exs. A, C,  
12 and D (the Notice of Default and Notice of Sale refer back to the Deed of Trust identifying the  
13 primary loan). PNC's predecessor is identified as the lender and trustee on the Deed of Trust for  
14 the HELOC, not the primary loan. RJN Ex. B (Deed of Trust).

15 Moreover, the Court need not accept Plaintiff's conclusory allegation that PNC is a debt  
16 collector under the Act. "[F]oreclosing on the property pursuant to a deed of trust is not the  
17 collection of a debt within the meaning of the FDCPA." *Hulse v. Ocwen Federal Bank, FSB*, 195  
18 F.Supp.2d 1188, 1204 (D.Or. 2002). As the fellow district court in *Hulse*, 195 F.Supp.2d at 1204,  
19 explained:

20 Foreclosing on a trust deed is distinct from the collection of the obligation to pay  
21 money. The FDCPA is intended to curtail objectionable acts occurring in the  
22 process of collecting funds from a debtor. But, foreclosing on a trust deed is an  
23 entirely different path. Payment of funds is not the object of the foreclosure  
24 action. Rather, the lender is foreclosing its interest in the property.  
25 ... Foreclosure by the trustee is not the enforcement of the obligation because it is  
26 not an attempt to collect funds from the debtor.

27 Accordingly, Plaintiff fails to state a RFDCPA claim for relief against PNC.

#### 28 **4. RESPA claim**

Plaintiff alleges that all named defendants violated RESPA by failing to provide him with  
an initial good faith estimate, final good faith estimate, notice of assignment, sale or transfer of

1 servicing rights, and escrow account disclosure. Complaint ¶ 65. Plaintiff also claims that all  
2 named defendants violated RESPA by “providing a person with a fee, kickback or thing of value  
3 pursuant to any agreement or understanding...involving a federally related mortgage loan” and  
4 “providing a fee portion, split or percentage of any charge made or received for the rendering of a  
5 real estate settlement service in connection with a transaction involving a federally related  
6 mortgage loan other than for services actually performed. *Id.* ¶ 66. He asserts that Defendants  
7 required, as a condition to selling the property, that Plaintiff purchase title insurance covering the  
8 property from a particular title company. *Id.* ¶ 67. He also alleges that all named Defendants  
9 violated RESPA by failing and refusing to provide a proper written explanation or response to  
10 Plaintiff’s Qualified Written Requests. Finally, Plaintiff alleges that “Defendants have engaged  
11 in a pattern or practice of non-compliance with the requirements of the mortgage services  
12 provisions of RESPA.” *Id.* ¶ 69. As with his other claims, Plaintiff fails to identify which of the  
13 Defendants is responsible for any of the alleged wrongdoing and to which loan the conduct  
14 pertains.

15 At best, Plaintiff’s allegations are threadbare recitals of RESPA’s statutory prohibitions  
16 without any mention of facts particular to Plaintiff’s claim. “While legal conclusions can provide  
17 the complaint's framework, they must be supported by factual allegations.” *Iqbal*, 129 S.Ct.  
18 1937, 1940 (2009). For example, Plaintiff alleges that “Defendants” violated RESPA by failing  
19 to respond to their QWR. Complaint ¶ 68. However, Plaintiff does not allege when he sent the  
20 QWR, or its contents, or the method by which it was sent.

## 21 5. Fraud

22 Although his fraud claim arises under state law, Plaintiff's allegations are subject to the  
23 pleading requirements of the Federal Rules. Accordingly, the claim is subject to the heightened  
24 pleading requirements of Fed. R. Civ. P. 9(b). *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d  
25 1097, 1103-04 (9th Cir. 2003) (if "the claim is said to be 'grounded in fraud' or to 'sound in  
26 fraud,' [then] the pleading of that claim as a whole must satisfy the particularity requirement of  
27 Rule 9(b)."); *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir.1994) (claims based in fraud "must  
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1 state precisely the time, place, and nature of the misleading statements, misrepresentations, and  
2 specific acts of fraud.").

3 Plaintiff alleges that “Defendants” knowingly entered an inflated income into Plaintiff’s  
4 loan documents without disclosing the change to him and with the intention of defrauding him.  
5 Complaint ¶¶ 76-80. The fraud claim fails for many of the same reasons as Plaintiff’s federal  
6 claims – Plaintiff does not specify which, if any, of the Defendants engaged in the alleged  
7 conduct or to which obligation the wrongdoing relates. Plaintiff does not come close to meeting  
8 Rule 9’s heightened pleading standard, as he does not identify the “who” or “what” that are the  
9 subject of his claim.

#### 10 **6. Breach of Fiduciary Duty**

11 Plaintiff alleges that PNC “owed a fiduciary to the Plaintiff to act primarily for his  
12 benefit, to act with proper skill and diligence, and not to make a personal profit from the agency  
13 at the expense of [its] principal, the Plaintiff.” Complaint ¶ 86. However, it is well established  
14 that a "lender owes no duty of care to a borrower when the institution's involvement in the  
15 transaction does not exceed the scope of its conventional role as a mere lender of money."  
16 *Benham v. American Servicing Co.*, No. C 09-01099 JSW, 2009 WL 4456386, at \*3 (N.D. Cal.  
17 Nov. 30, 2009), citing *Nymark*, 231 Cal.App.3d at 1095-96, 283 Cal.Rptr. 53; *Oaks Management*  
18 *Corp. v. Superior Court*, 145 Cal.App.4th 453, 466, 51 Cal.Rptr.3d 561 (2006); *Union Bank v.*  
19 *Superior Court*, 31 Cal.App.4th 573, 579 n. 2, 37 Cal.Rptr.2d 653 (1995); *Kim v. Sumitomo*  
20 *Bank*, 17 Cal.App.4th 974, 979, 21 Cal.Rptr.2d 834 (1993).

#### 21 **7. Breach of Contract**

22 To state a claim for breach of contract under California law, a plaintiff must allege (1) the  
23 existence of a contract; (2) plaintiff's performance or excuse for nonperformance of the contract;  
24 (3) defendant's breach of the contract; and (4) resulting damages. *Armstrong Petroleum Corp. v.*  
25 *Tri-Valley Oil & Gas Co.*, 116 Cal.App.4th 1375, 1390, 11 Cal.Rptr.3d 412 (2004). Plaintiff  
26 alleges that he “entered into an agreement with Defendants, whereby Defendants promised to  
27 provide Plaintiff with an affordable loan.” Complaint ¶ 92. As another district court addressing  
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1 nearly identical allegations recently explained. “[t]his supposed promise to provide an ‘affordable  
2 loan’ is vague, and do[e]s not allege where such a promise is memorialized or what consideration  
3 was given for such a promise. Such a vagues promise is not sufficient to show the existence of a  
4 contract.” *Blanco v. American Home Mortg. Servicing, Inc.*, No. CIV. 2:09-578 WBS DAD,  
5 2009 WL 4674904, at \*7 (E.D. Cal. Dec. 4, 2009); *see also See Hardy v. Indymac Federal Bank*,  
6 263 F.R.D. 586, 591 (E.D. Cal. 2009).

7 Plaintiff then claims that Defendants breached the alleged agreement by “failing to  
8 exercise reasonable efforts and due diligence as promised, thus failing to provide Plaintiff with  
9 an affordable loan,” “committing wrongful acts, including but not limited to, intentionally or  
10 negligently failing to obtain payment and interest rates as promised, failing to submit an accurate  
11 loan application, failing to supervise, failing to provide loan documents for Plaintiff’s review  
12 prior to closing...failing to explain the loan documents,” and “failing to offer Plaintiff a loan  
13 modification.” *Id.* ¶ 94. Plaintiff alleges no facts supporting the existence of a contract requiring  
14 PNC to perform any of the purported obligations. *Iqbal*, 129 S.Ct. at 1949. “Without alleging  
15 facts that make the existence of a contract to provide an affordable loan plausible, plaintiff  
16 cannot state a claim for breach of contract.” *Blanco*, 2009 WL 4674904 at \*7, citing *Hardy*, 263  
17 F.R.D. at 591. Finally, even if Plaintiff had alleged the existence of a contract, he again fails to  
18 specify with which Defendant he contracted and to which obligation the agreement pertains.  
19 Moreover, as argued by PNC, the allegations appear to relate to the actions of a mortgage broker,  
20 not a lender such as PNC’s predecessor in interest.

### 21 **8. Breach of Covenant of Good Faith and Fair Dealing**

22 “The prerequisite for any action for breach of the implied covenant of good faith and fair  
23 dealing is the existence of a contractual relationship between the parties, since the covenant is an  
24 implied term in the contract.” *Smith v. City and County of San Francisco*, 225 Cal.App.3d 38,  
25 49, 275 Cal.Rptr. 17 (1990). The “implied covenant of good faith and fair dealing is limited to  
26 assuring compliance with the express terms of the contract, and cannot be extended to create  
27 obligations not contemplated by the contract.” *Pasadena Live, LLC v. City of Pasadena*, 114  
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1 Cal.App.4th 1089, 1093-1094, 8 Cal.Rptr.3d 233 (2004) (citation omitted.) “Without a  
2 contractual relationship, [a plaintiff] cannot state a cause of action for breach of the implied  
3 covenant.” *Smith*, 225 Cal.App.3d at 49, 275 Cal.Rptr. 17. As discussed above, Plaintiff has  
4 failed to plead the existence of a contract between himself and PNC. *See supra*, III.B.7.

5 **9. Predatory Lending pursuant to California Financial Code § 4970 et seq.**

6 Beyond generally incorporating by reference paragraphs one through thirty of his  
7 complaint, Plaintiff’s sole allegation regarding PNC’s violation of Section 4970 is that PNC’s  
8 “conduct...was in violation of California’s predatory lending laws, as set forth in Financial Code  
9 § 4970 et seq.” Complaint ¶ 106. Plaintiff then alleges that this conduct was malicious,  
10 fraudulent, oppressive, and with reckless disregard, and that Plaintiff is entitled to special,  
11 general, and punitive damages, and attorney’s fees and costs. *Id.* ¶¶ 107-109. Plaintiff alleges no  
12 specific facts nor does he identify which predatory lending laws were violated or in what way.  
13 Plaintiff does not even allege that his loan is covered by California’s predatory lending laws. *See*  
14 *Fimbres v. Chapel Mortg. Corp.*, No. 09-CV-0886-IEG (POR), 2009 WL 4163332, at \*7 (S.D.  
15 Cal. Nov. 20, 2009) (dismissing plaintiffs’ predatory lending claim which contained nearly  
16 identical allegations), citing Cal. Fin. Code § 4970(b) (2009) (defining "covered loan").

17 **10. California Business and Professions Code § 17200 et seq.**

18 The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair,  
19 deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. Accordingly,  
20 "[a]n act can be alleged to violate any or all of the three prongs of the UCL-unlawful, unfair, or  
21 fraudulent." *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal.App.4th 1544, 1554, 62 Cal.Rptr.3d  
22 177 (2007). Plaintiff alleges that PNC’s “acts, as alleged herein, constitute unlawful, unfair,  
23 and/or fraudulent business practices, as defined in the California Business and Professions Code  
24 § 17200 et seq.” Complaint ¶ 111.

25 These allegations are purely conclusory and fail to state a claim. Plaintiff’s allegations of  
26 “unlawful” business acts or practices do not “borrow” violations of other laws. To the extent that  
27 Plaintiff premises his UCL claim on his TILA, HOEPA, or RESPA claims, it is insufficient for  
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1 the reasons already discussed. Plaintiff also fails to allege any acts by PNC in particular that  
2 constitute either “unfair” or “fraudulent” business acts or practices.

### 3 **11. Negligence**

4 A claim for negligence requires the existence of a legal duty to exercise reasonable care.  
5 *See, e.g., Mendoza v. City of Los Angeles*, 66 Cal.App.4th 1333, 1339, 78 Cal.Rptr.2d 525 (1998)  
6 (identifying the elements as "(1) a legal duty to use reasonable care, (2) breach of that duty, and  
7 (3) proximate cause between the breach and (4) the plaintiff's injury"); *Nymark v. Heart Federal*  
8 *Savings & Loan Ass'n*, 231 Cal.App.3d 1089, 1095, 283 Cal.Rptr. 53 (1991) ("The existence of a  
9 duty of care owed by a defendant to a plaintiff is a prerequisite to establishing a claim for  
10 negligence."); *see also Shopoff & Cavallo LLP v. Hyon*, 167 Cal.App.4th 1489, 1509, 85  
11 Cal.Rptr.3d 268 (2008) (holding that a plaintiff must demonstrate the existence of a fiduciary  
12 relationship, breach of that duty, causation, and damages). The "question of the existence of a  
13 legal duty of care ... presents a question of law which is to be determined by the courts alone."  
14 *First Interstate Bank of Ariz., N.A. v. Murphy, Weir & Butler*, 210 F.3d 983, 986 (9th Cir. 2000).

15 Plaintiff alleges that PNC “owed a duty of care to Plaintiff,” which was breached when  
16 “Defendants...used their knowledge and skill to direct Plaintiff into a loan for which Plaintiff was  
17 not qualified based on his income as stated to Defendants” and “direct[ed] him into a loan that he  
18 may not have otherwise qualified for by industry standards, resulting in excessive fees paid by  
19 Plaintiff and payments in excess of Plaintiff’s ability to pay.” Complaint ¶¶ 115-117. Again  
20 Plaintiff fails to allege which obligation is the subject of these allegations - the primary loan or  
21 the HELOC.

22 Moreover, Plaintiff’s negligence claim, like his others, consists of little more than a  
23 “formulaic recitation” of the elements of a claim for negligence. *See Twombly*, 550 U.S. at 555,  
24 127 S.Ct. 1955. First, Plaintiff’s conclusory assertion that PNC “owed a duty of care” is  
25 insufficient; the Court need not accept Plaintiffs' legal conclusions as true. *See Iqbal*, 129 S.Ct.  
26 at 1449. Plaintiff does not allege that he had anything more than a borrower-lender relationship  
27 with the PNC. As discussed above, *see supra* III.B.6, “as a general rule, a financial institution  
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1 owes no duty of care to a borrower when the institution's involvement in the loan transaction  
2 does not exceed the scope of its conventional role as a mere lender of money.” *Nymark*, 283  
3 Cal.Rptr. at 57. “Liability to a borrower for negligence arises only when the lender ‘actively  
4 participates’ in the financed enterprise ‘beyond the domain of the usual money lender.’ ” *Id.*  
5 (citation and quotation marks omitted). Finally, to the extent that Plaintiff’s claim is based upon  
6 the loan origination, the claim is barred by the two-year statute of limitations. See Cal. Code.  
7 Civ. P. § 335.1 (two-year limitation on commencing actions other than for recovery of real  
8 property). Plaintiff entered into the HELOC loan agreement with PNC’s predecessor in October  
9 2006, but he did not file suit until October 2009, nearly three years later.

## 10 **12. Usury**

11 Plaintiff alleges that “the annual interest rate on the loan is usurious in violation of  
12 section 1 of Article XV of the California Constitution. Complaint ¶ 122. He claims that the  
13 interest rate on the loan violates the statutory maximum rate set in either Section 1(1) or 1(2). *Id.*

14 Article XV, Section 1 of the California Constitution provides that: “No person,  
15 association, copartnership or corporation shall by charging any fee, bonus, commission, discount  
16 or other compensation receive from a borrower more than the interest authorized by this section  
17 upon any loan or forbearance of any money, goods or things in action.” Cal. Const. art. XV, § 1.  
18 However, this provision contains many exemptions, including “any other class of persons  
19 authorized by statute.” *Id.* “The essential elements of usury are: (1) the transaction must be a  
20 loan or forbearance of the use of money; (2) the loan or forbearance must be made by a  
21 non-exempt lender and in a nonexempt transaction; (3) the interest received by the lender must  
22 be in excess of the statutory maximum rate that is applicable to the transaction; and (4) the lender  
23 must have a willful intent to enter a usurious transaction.” *Ghirardo v. Antonioli*, 8 Cal.4th 791,  
24 798, 35 Cal.Rptr.2d 418, 883 P.2d 960 (1994).

25 Plaintiff does not allege sufficiently that the interest rate for the obligation exceeds the  
26 statutory maximum rate; in fact, Plaintiff does not allege the interest rate of the primary loan or  
27 the HELOC at all. Second, Plaintiff does not allege that the loan was made by a non-exempt  
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1 lender in a non-exempt transaction.

2 **13. Accounting**

3 Plaintiff alleges that “[t]he amount of money due, if any, from Plaintiff to Defendants is  
4 unknown to Plaintiff and cannot be determined without an accounting.” Complaint ¶ 129. “A  
5 cause of action for an accounting requires a showing that a relationship exists between the  
6 plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that  
7 can only be ascertained by an accounting.” *Teselle v. McLoughlin*, 173 Cal.App.4th 156, 92  
8 Cal.Rptr.3d 696, 715 (Ct. App. 2009). Here, while Plaintiff does not allege clearly whether he  
9 owes an amount past due on the primary loan, the HELOC, or both, one thing that is clear is that  
10 PNC does not owe *Plaintiff* any money. Failure to plead “some balance is due the plaintiff” is  
11 fatal to an accounting claim. Moreover, “an accounting can be a cause of action when a  
12 defendant has a fiduciary duty to a plaintiff which requires an accounting, and that some balance  
13 is due to the plaintiff that can only be ascertained by an accounting.” *Pantoja v. Countrywide*  
14 *Home Loans, Inc.*, 640 F.Supp.2d 1177, 1191-92 (N.D. Cal. 2009). Here, the balance due can be  
15 ascertained by looking to the Notice of Default on the primary loan, which clearly informed  
16 Plaintiff as to the amount necessary to stop the foreclosure process. RJN, Ex. C (Notice of  
17 Default).

18 **IV. ORDER**

19 Good cause therefor appearing, the motions to dismiss the complaint are GRANTED.  
20 Because the complaint is Plaintiff's first pleading that has been reviewed by the Court, and  
21 because Plaintiff submitted opposition to GMAC's motion to dismiss, leave to amend will be  
22 granted as to GMAC. Because Plaintiff did not oppose PNC's motion and fails to offer any  
23 credible explanation for not doing so, leave to amend is denied as to PNC.<sup>5</sup> Any amended  
24 complaint shall be filed within thirty (30) days of the date this order is filed.

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27 <sup>5</sup> Because it will grant PNC's motion to dismiss without leave, the Court need not  
28 address PNC's motion to strike and alternative motion for a more definite statement.



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**IT IS SO ORDERED.**

DATED: May 24, 2010



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JEREMY FOGEL  
United States District Judge