



1 foreclose upon it. On April 9, 2010, the Court granted OWB's unopposed motion to dismiss.<sup>2</sup> In  
2 its order granting the motion, the Court identified many specific pleading deficiencies and  
3 explained that the complaint overall consisted of insufficiently broad, conclusory allegations of  
4 violations of law by the "Defendants" and failed to specify which claims were alleged against  
5 which Defendants. The Court granted Plaintiff leave to amend and directed him to allege  
6 precisely what role each Defendant played in the loan transaction at issue, and how each  
7 Defendant's actions violated particular provisions of the applicable statutes. OWB now moves  
8 again pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Plaintiff's "amended complaint" for failure  
9 to state a claim upon which relief may be granted.<sup>3</sup> Again, the motion is unopposed.

## 10 II. LEGAL STANDARD

11 "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a  
12 cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v.*  
13 *Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). For purposes of a motion to  
14 dismiss, the plaintiff's allegations are taken as true, and the court must construe the complaint in  
15 the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S.Ct. 1843,  
16 23 L.Ed.2d 404 (1969). "To survive a motion to dismiss, a complaint must contain sufficient  
17 factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has  
18 facial plausibility when the plaintiff pleads factual content that allows the court to draw the  
19 reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, ---  
20 U.S. ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009), *Bell Atl. Corp. v. Twombly*, 550  
21 U.S. 544, 556, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Thus, a court need not accept as  
22 true conclusory allegations, unreasonable inferences, legal characterizations, or unwarranted  
23 deductions of fact contained in the complaint. *Clegg v. Cult Awareness Network*, 18 F.3d 752,

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24  
25 <sup>2</sup> Padayachi appeared at the hearing on OWB's previous motion to dismiss and informed  
the Court that he was unaware that a motion to dismiss had been filed.

26  
27 <sup>3</sup> Defendants Indymac Bank and Quality Loan Service Corp. have not joined in OWB's  
28 motion to dismiss. Indymac Bank has not yet appeared in this case. Quality Loan Service Corp.  
has filed a declaration of nonmonetary status, stating that it has been named only in its capacity  
as trustee under the deed of trust at issue. *See* Dkt. 26.

1 754-755 (9th Cir.1994).

2 Leave to amend must be granted unless it is clear that the complaint's deficiencies cannot  
3 be cured by amendment. *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir.1995). When  
4 amendment would be futile, however, dismissal may be ordered with prejudice. *Dumas v. Kipp*,  
5 90 F.3d 386, 393 (9th Cir.1996).

### 6 III. DISCUSSION

7 The Court has reviewed the moving papers and concludes that OWB's motion once again  
8 is well-taken. The document filed by Plaintiff on May 6, 2010 is not the "short and plain  
9 statement" of a claim required pursuant to Fed. R. Civ. P. 8 ("A pleading which sets forth a claim  
10 for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's  
11 jurisdiction depends, unless the court already has jurisdiction and the claim needs no new  
12 grounds for jurisdiction to support it, (2) a short and plain statement of the claim showing that  
13 the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.").  
14 Instead, Plaintiff's "amended complaint" consists solely of a letter to an unspecified recipient  
15 purporting to be a qualified written request ("QWR") pursuant to section 6 of the Real Estate  
16 Settlement Procedure Act, as well as a "MRS Loan Audit," and a "Summary of Applicable  
17 Laws."

18 It appears that Plaintiff did not understand this Court's earlier order granting him leave to  
19 amend his complaint. The Court acknowledges that Plaintiff is proceeding pro se.<sup>4</sup> An amended  
20 complaint replaces rather than supplements a prior pleading. Plaintiff must assert his factual  
21 allegations in a new document that provides a short and plain statement of (1) the grounds for the  
22 court's jurisdiction, (2) the claims showing that he is entitled to relief, and (3) a demand for the  
23 relief sought. Fed. R. Civ. P. 8. With respect to his fraud claim, Plaintiff must meet the  
24 heightened pleadings standards of Fed. R. Civ. P. 9(b). Rule 9(b) requires that Plaintiff "state

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26  
27 <sup>4</sup>"Although a pro se litigant . . . may be entitled to great leeway when the court construes  
28 his [or her] pleadings, those pleadings nonetheless must meet some minimum threshold in  
providing a defendant with notice of what it is that it allegedly did wrong." *Brazil v. United  
States Dept. of Navy*, 66 F.3d 193, 199 (9th Cir. 1995).

1 with particularity the circumstances constituting fraud....” To maintain a viable claim for fraud,  
2 the plaintiff must be able to allege the “‘who, what, when, where, and how’ of the misconduct”  
3 he asserts took place. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)  
4 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). This requires alleging “‘more  
5 than the neutral facts necessary to identify the transaction. The plaintiff must set forth what is  
6 false or misleading about a statement, and why it is false.’” *Id.* (quoting *In re GlenFed., Inc. Sec.*  
7 *Lit.*, 42 F.3d 1541, 1548 (9th Cir. 1994)).

8 Because Plaintiff has yet to make any changes to his original complaint, the Court directs  
9 Plaintiff to read carefully the guidance provided in the Court’s previous order. For Plaintiff’s  
10 convenience, that guidance is repeated below:

11 **A. Declaratory Relief**

12 Padayachi seeks a judicial determination of the parties' rights and  
13 obligations, and a declaration as to who owns the Property. Compl. ¶¶ 120-25. A  
14 claim for declaratory relief, however, is not a stand-alone claim, but instead  
15 depends upon some other substantive basis for liability. See *Glue-Fold, Inc. v.*  
16 *Slautterback Corp.*, 82 Cal. App. 4th 1018, 1023 fn.3 (2000) (noting that  
17 equitable forms of remedy "have no separate viability" if plaintiff's other causes of  
18 action fail); *Singh v. Wells Fargo Bank. N.A.*, 2009 WL 2365881 \* 2 (N.D. Cal.  
19 July 30, 2009) (assessing plaintiff's request for declaratory relief as to whether a  
20 fraud was committed based upon the viability of the claim of fraud). In this case,  
21 Padayachi may not maintain a claim for declaratory relief unless one of his other  
22 claims survives the motion to dismiss.

18 **B. Fraud**

19 Padayachi alleges that on May 4, 2007, the date of the subject loan  
20 transaction, Defendants were engaged in an illegal scheme to make loans to  
21 unqualified borrowers. He alleges that Defendants made representations to him  
22 that they were acting in his best interests to find a loan that would not be beyond  
23 his financial means and limitations. Compl. ¶ 128. He alleges that Defendants  
24 intentionally secured a loan with excessively high interest rates that benefitted the  
25 lenders and that he could not pay, and that Defendants failed to disclose the true  
26 costs of the loan or the cost of fees paid to them outside of escrow. *Id.* ¶ 129-34.  
27 Padayachi contends that he reasonably relied upon Defendants' intentional  
28 misrepresentations, and as a result suffered injury in the form of higher loan  
payments, foreclosure, mental distress, and the costs of the resultant litigation. *Id.*  
¶¶ 136-50.

A claim based upon fraud must meet the heightened pleadings standards of  
Fed. R. Civ. P. 9(b). Rule 9(b) requires allegations that "state with particularity  
the circumstances constituting fraud...." To maintain a viable claim for fraud, the  
plaintiff must be able to allege the “‘who, what, when, where, and how’ of the  
misconduct” he asserts took place. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d  
1097, 1106 (9th Cir. 2003) (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir.

1 1997)). This requires alleging "more than the neutral facts necessary to identify  
2 the transaction. The plaintiff must set forth what is false or misleading about a  
3 statement, and why it is false." *Id.* (quoting *In re GlenFed., Inc. Sec. Lit.*, 42 F.3d  
4 1541, 1548 (9th Cir. 1994)).

5 Padayachi's general allegations are not sufficiently detailed to meet the  
6 heightened pleading requirements of Rule 9(b). For example, the complaint  
7 states:

8 Defendants, and each of them, presented a loan to Plaintiffs whereby  
9 Defendants represented that they did qualify for ordinary underwriting, and  
10 that the loan was within Plaintiffs' personal financial needs and limitations  
11 given the confidential financial information that Plaintiffs shared with  
12 Defendants, however the true (sic) is that the loan payments exceeded  
13 Plaintiffs' established retirement income.

14 Compl. ¶ 132. Statements to this effect fail to specify *which* Defendants made  
15 false or misleading representations, *what* those representations were, and how  
16 they were false or misleading, in addition to when and where the allegedly  
17 fraudulent transactions took place. See *Vess*, 317 F.3d at 1106.

18 OWB argues additionally that Padayachi's fraud claim actually is a claim  
19 for fraudulent concealment, based on the concealment or suppression of a material  
20 fact with the intention to defraud. A claim for fraudulent concealment requires  
21 the plaintiff to establish that the defendant had a duty to disclose. See Cal. Civ. C.  
22 § 1710(3) (defining deceit to include "[t]he suppression of a fact, by one who is  
23 bound to disclose it..."). Because Padayachi's fraud claims do not meet the  
24 heightened pleading standard, the Court need not address OWB's contention that  
25 as a bank in a lending relationship, it owed no fiduciary duty to Padayachi.

### 26 C. RESPA Claims

27 Padayachi alleges that Defendants violated the Real Estate Settlement  
28 Procedures Act ("RESPA"), 12 U.S.C. § 2607 et seq., in both its "terms and  
spirit." Compl. ¶ 153. Although the complaint outlines the intent of Congress in  
passing the RESPA, it alleges no particular actions taken by the Defendants that  
would constitute a violation. The only specific allegation is that Defendants  
violated section 2607(b) by failing to respond to the "Notice of Dispute and  
Request for Accounting, Notice Pursuant to R.E.S.P.A." that Padayachi allegedly  
sent to Defendants "on or about 8/3/2009." See Compl. ¶¶ 18, 23, 156. This  
document and other communications that Defendants "substantially failed to  
respond to" allegedly are attached to the complaint as Exhibit B. *Id.* ¶ 18.

However, the complaint as filed with the Court does not contain an  
Exhibit B, and in any event the RESPA allegations as they currently stand do not  
contain sufficient factual content to allow "the court to draw the reasonable  
inference that the defendant is liable for the misconduct alleged." *See Iqbal*, 129  
S. Ct. at 1949. Additionally, Padayachi's claim under RESPA may be barred by the  
one-year statute of limitations. *See Singh*, 2009 WL 2365881 at \*2; 12 U.S.C. §  
2614. Padayachi obtained the loan at issue on May 4, 2007 but did not file the  
instant suit until November 23, 2009. Finally, a plaintiff alleging a RESPA  
violation also must identify damages that flowed from the violation. See 12  
U.S.C. § 2605(f)(1)(A). Padayachi has failed to allege any actual damages he  
incurred as a result of Defendants' alleged violation of RESPA.

1                                   **D.       "Reformation as Against Bank2 FC1 Lender Services"**

2                                   Padayachi's claim for reformation appears to have been borrowed from a  
3 form pleading. The complaint states conclusorily that pursuant to Cal. Civ. C. §  
4 3399 the Court may "reform the terms of the loan to meet the Plaintiffs'  
5 expectations of the loan" and asks that "the court place fair market value of the  
6 property of approximately \$###, for purposes of reforming the terms and  
7 conditions of the loan." Compl. ¶ 169. Padayachi restates his claim of fraudulent  
8 misrepresentation and alleges that the loan contract was procedurally and  
9 substantively unconscionable because his monthly payments under the loan  
10 exceeded his available monthly income and he was not afforded any explanation  
11 of the terms and conditions in the relevant documents. Compl. ¶¶ 160-68.  
12 Padayachi also claims that "Indymac or One West Bank" was responsible for  
13 devising the fraudulent scheme and unconscionable loan terms, but he does not  
14 specify how each bank was involved.

15                                   Section 3399 of the California Civil Code provides that a contract may be  
16 revised if, through fraud or mistake, "a written contract does not truly express the  
17 intention of the parties." Without sufficient factual allegations supporting his  
18 claim of fraud or his request for revision of the loan terms, Padayachi fails to state  
19 a claim for reformation.

20                                   **E.       Quiet Title and Set Aside Foreclosure**

21                                   In support of his claim to quiet title and set aside foreclosure, Padayachi  
22 alleges that "Defendants ... represented that they would not make a loan to  
23 Plaintiffs (sic) unless he could afford the loan, and that they would not make the  
24 loan unless and until he had passed the underwriting guidelines of the lender ...."  
25 Compl. ¶ 172. He alleges that in fact Defendants allowed closing costs to be  
26 financed, failed to provide mandatory disclosures, and intentionally placed  
27 Padayachi in a sub-prime loan scheme with excessively high interest rates. *Id.* ¶  
28 173.

                                  "A basic requirement of an action to quiet title is an allegation that  
plaintiffs 'are the rightful owners of the property, i.e., that they have satisfied their  
obligations under the Deed of Trust.'" *Santos v. Countrywide Home Loans*, 2009  
WL 3756337 \*4 (E.D. Cal. Nov. 6, 2009) (quoting *Kelley v. Mortgage Elec. Reg.*  
*Sys., Inc.*, 642 F. Supp. 2d 1048, 1057 (N.D. Cal. 2009)). "[A] mortgagor cannot  
quiet his title against the mortgagee without paying the debt secured." *Watson v.*  
*MTC Financial, Inc.*, 2009 WL 2151782 \*4 (E.D. Cal. Jul. 17, 2009) (quoting  
*Shimpones v. Stickney*, 219 Cal. 637, 649 (1934)). Padayachi's claim for quiet  
title is defective as currently pled because Padayachi does not allege an ability to  
tender repayment of the debt on the mortgage. Moreover, the complaint must be  
verified as required by Cal. C. Civ. P. § 761.020. *See Singh*, 2009 WL 2365881  
\*6.

**F.       Unfair Competition Law – Bus. & Prof. C. § 17200**

                                  Padayachi states that as a direct result of Defendants' acts, he has suffered  
actual damages, both monetary and emotional, and risks the loss of his personal  
residence if foreclosure is allowed to proceed. Compl. ¶¶ 177-80. Padayachi  
claims statutory penalties and punitive damages based upon his assertion that  
Defendants' actions were willful, vexatious, outrageous and calculated. *Id.* ¶ 181.  
California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et  
seq., prohibits any "unlawful, unfair, or fraudulent business act or practice."

1 Kelley, 642 F. Supp. 2d at 1055. "An act can be alleged to violate any or all of the  
2 three prongs of the UCL – unlawful, unfair, or fraudulent." *Berryman v. Merit*  
3 *Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1554 (2007). The law effectively  
4 "'borrows' violations of other laws and treats them as unlawful practices that the  
5 unfair competition law makes independently actionable." *Kelley*, 642 F. Supp. 2d  
6 at 1055.

7 Unless Padayachi can successfully state a claim for some other predicate  
8 violation, for instance alleging adequately that the loan transaction at issue was  
9 unlawful, the UCL claim cannot survive. *See id.* (holding that plaintiff must be  
10 able to explain why defendants' actions constituted predicate offenses under the  
11 law to maintain a UCL claim). Similarly, to maintain a claim under the fraudulent  
12 prong of the UCL, Padayachi must meet the heightened pleading standard  
13 required to sustain his general allegations of fraud.

14 Padayachi also alleges that Defendants' actions violated the "unfair" prong  
15 of the UCL. "[A] practice may be deemed unfair even if not specifically  
16 proscribed by some other law." *Cel-Tech Communications, Inc. v. Los Angeles*  
17 *Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). However, to state a claim under  
18 this prong, a plaintiff still must allege: (1) substantial consumer injury, (2) that is  
19 not outweighed by any countervailing benefits to consumers or competition, and  
20 (3) that the consumers themselves could not reasonably have avoided. *See*  
21 *Camacho v. Automobile Club of Southern California*, 142 Cal. App. 4th 1394,  
22 1403 (2006). Padayachi's current allegations are too general and conclusory to  
23 meet this standard.

#### 24 **G. Cal. Civil Code § 2923.6**

25 Padayachi next alleges that Defendants have a duty under Cal. Civ. Code §  
26 2923.6 to accept the loan modification provided in the complaint. Section 2923.6,  
27 which is entitled "legislative findings and declarations; pooling and service  
28 agreements; loan modification or workout plan" represents only a statement of  
legislative intent. It "in no way confers standing on a borrower to contest a breach  
of that duty." *Pittman v. Barclay's Capital Real Estate, Inc.*, 2009 WL 1108889  
\*3 (S.D. Cal. April 24, 2009). At most, section 2923.6(a) refers to a loan  
servicer's duty "owed to all parties in a loan pool, not to any particular parties."  
Padayachi has not alleged that he is a party to any "pooling and service  
agreement" that might trigger the statute, and so does not state a claim under the  
statute. *See Pittman*, 2009 WL 1108889 at \*3 (dismissing plaintiff's claim  
because he is not a member of a a loan pool).

#### 29 **H. California Rosenthal Fair Debt Collection Practices Act**

30 Padayachi claims that Defendants violated the provisions of the Rosenthal  
31 Fair Debt Collection Practices Act ("RFDCPA"), Cal. Civ. Code § 1788.17 et  
32 seq., presumably in connection with the prospective foreclosure of the Property.  
33 See Compl. ¶¶ 195-200.

34 As with his other claims for relief, Padayachi fails to specify any particular  
35 acts by the individual Defendants in connection with collection actions related to  
36 the loan. Instead, the complaint states in general terms that Defendants engaged  
37 in conduct, "the natural consequence of which is to harass, oppress, and abuse  
38 persons in connection with the collection of the alleged debt...." *Id.* ¶ 196. In  
order to be "plausible on its face," the claim must provide more particular factual  
allegations that identify the parties who engaged in the allegedly intentional,

1 persistent, and frequent collection actions in violation of the statute. *See*  
2 *Twombly*, 127 S. Ct. at 1974.

3 Moreover, numerous courts have held that foreclosure on a deed of trust  
4 does not trigger the protections of the Rosenthal Act, because "a residential  
5 mortgage loan does not qualify as a 'debt' under the statute." *Pittman*, 2009 WL  
6 1108889 at \*3. *See also Rosal v. First Federal Bank of California*, 671 F. Supp.  
7 2d 1111, 1135 (N.D. Cal. 2009) (dismissing RFDCPA claim because plaintiff  
8 failed to plead that defendant fell within the statutory definition of "debt collector"  
9 and foreclosure on a property is not the collection of a debt within the meaning of  
10 the statute); *Benham v. Aurora Loan Servs.*, 2009 WL 2880232 \*2 (N.D. Cal.  
11 Sept. 1, 2009) (same).

### 8 **I. California Civil Code § 1572**

9 Padayachi alleges separately that Defendants committed "actual fraud" as  
10 defined in Cal. Civ. Code § 1572. Compl. ¶¶ 202-212. As noted above, claims of  
11 fraud are subject to Rule 9(b)'s heightened pleading standard. In its current form,  
12 the complaint does not provide sufficient specificity with respect to the  
13 circumstances of the alleged fraud to meet this heightened pleading standard.

### 12 **J. Injunctive Relief**

13 Finally, Padayachi requests an injunction to prevent "wrongful  
14 foreclosure." Compl. ¶¶ 214-17. At present, Padayachi has failed to state any  
15 claim upon which relief may be granted. Accordingly, Padayachi cannot establish  
16 a present right to injunctive relief, which in part requires a showing of likelihood  
17 of success on the merits.

18 Dkt. No. 22 at 4-10.

## 17 **IV. ORDER**

18 OWB contends that leave to amend should be denied because Plaintiff failed to comply  
19 with the Court's last order or oppose the instant motion to dismiss. However, in light of  
20 Plaintiff's *pro se* status and in keeping with the strong policy in the Ninth Circuit favoring  
21 amendment, the Court will afford Plaintiff one additional opportunity to amend his pleading.  
22 Any amended complaint must allege precisely what role each Defendant played in the loan  
23 transaction at issue and how each Defendant's actions violated particular provisions of the  
24 applicable statutes. Accordingly, OWB's motion to dismiss will be GRANTED, WITH LEAVE  
25 TO AMEND. Any amended complaint must be filed within thirty (30) days of the date of this  
26 order.<sup>5</sup>

27  
28 <sup>5</sup> As the Court concluded in its last order, because there appears to be no reasonable  
possibility that the legal deficiencies in Plaintiff's claims under the Rosenthal Act and Cal. Civ.

1 **IT IS SO ORDERED.**

2 DATED: July 23, 2010

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JEREMY FOGEL  
United States District Judge

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Code § 2923.6 could be cured by amendment, leave to amend will be denied as to those two claims.

1 A copy of this order has been served upon the following persons:

2 Yasish Mogam Padayachi  
27204 Lemay Way  
3 Hayward, CA 94544

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