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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

PHONG TRAN,)	Case No.: 12-4507 PSG
)	
Plaintiff,)	ORDER GRANTING DEFENDANTS'
v.)	MOTION TO DISMISS
)	
BANK OF AMERICA, N.A., et al,)	(Re: Docket No. 38)
)	
Defendants.)	
)	

In this foreclosure action, Defendants Bank of America, et al, (“Defendants”) move to dismiss the first amended complaint filed by Plaintiff Phong Tran (“Tran”) pursuant to Fed. R. Civ. P. 12(b)(6). As explained in detail below, the court does not consider Tran’s untimely opposition to the motion. Having reviewed the amended complaint and the motion to dismiss, the court GRANTS Defendants’ motion and dismisses the complaint without leave to amend.

I. BACKGROUND

In its January 17, 2013 order granting Defendants’ motion to dismiss Tran’s original complaint, the court provided the factual background of this case and so does not repeat those facts

1 here.¹ In his first amended complaint (“FAC”), Tran added seven causes of action after the court
2 earlier held that res judicata barred him from attempting to recover on his slander of title and
3 California Business and Professions Code Section 17200 claims.² He now asserts claims arising
4 from: (1) violations of the Homeowners Equity Protection Act (“HOEPA”), 15 U.S.C. § 1640; (2)
5 breach of express agreements between Tran and Defendants, specifically the Deed of Trust and
6 Pooling Service Agreements (“PSA”); (3) breach of implied agreements between Tran and
7 Defendants; (4) violation of California Civil Code Section 2923.5; (5) violation of California
8 Business and Professions Code Section 17200; (6) wrongful foreclosure; and (7) violation of the
9 Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1962.³

11 In considering the viability of Tran’s claims, the court does not consider his untimely
12 opposition. Despite the March 14, 2013 deadline for his response, Tran did not file an opposition
13 to Defendants’ motion until April 2, 2013 – one week before the hearing on the motion.⁴ Tran
14 filed an ex parte application seeking leave to file his opposition late based on “inadvertence or
15 excusable neglect,” citing a “flu-like illness” afflicting the employees of his retained counsel’s law
16 firm.⁵ Neither Tran nor his attorney appeared for the April 9, 2013 hearing regarding the motion to
17 dismiss, despite the court not extending the hearing date and Tran’s attorney making an appearance
18 that same morning in this same court for a different case.

20 Were this the first time Tran failed to file a timely opposition to a motion to dismiss, the
21 court may have been willing to consider his papers in making its decision. But Tran already used
22 up that chance when he filed his opposition two weeks late to Defendants’ motion to dismiss his
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24 ¹ See Docket No. 35.

25 ² See *id.*

26 ³ See *id.*

27 ⁴ See Docket No. 43.

28 ⁵ See Docket No. 42.

1 first amended complaint.⁶ The similarities in the untimely filings are striking. At that time, Tran,
2 or more properly his counsel, provided no explanation for the failure to adhere to the deadline. In
3 an exercise of its discretion, the court nevertheless considered the papers. More importantly, the
4 court does not find that the illness apparently affecting the office from January until March
5 constitutes the kind of excusable neglect that warrants further leniency.⁷ The ex parte application
6 is DENIED, and the court thus proceeds as if Tran did not file an opposition at all.

7 8 **II. LEGAL STANDARD**

9 A complaint must contain “a short and plain statement of the claim showing that the pleader
10 is entitled to relief.”⁸ If a plaintiff fails to proffer “enough facts to state a claim to relief that is
11 plausible on its face,” the complaint may be dismissed for failure to state a claim upon which relief
12 may be granted.⁹ A claim is facially plausible “when the pleaded factual content allows the court to
13 draw the reasonable inference that the defendant is liable for the misconduct alleged.”¹⁰
14 Accordingly, under Fed. R. Civ. P. 12(b)(6), which tests the legal sufficiency of the claims alleged
15 in the complaint, “[d]ismissal can be based on the lack of a cognizable legal theory or the absence of
16 sufficient facts alleged under a cognizable legal theory.”¹¹

17
18 On a motion to dismiss, the court must accept all material allegations in the complaint as
19 true and construe them in the light most favorable to the non-moving party.¹² The court’s review is
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22 ⁶ See Docket Nos. 25, 35.

23 ⁷ See Fed. R. Civ. P. 6(b).

24 ⁸ Fed. R. Civ. P. 8(a)(2).

25 ⁹ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

26 ¹⁰ *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

27 ¹¹ *Balistreri v. Pacifica Police Dep’t.*, 901 F.2d 696, 699 (9th Cir. 1990).

28 ¹² See *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008).

1 limited to the face of the complaint, materials incorporated into the complaint by reference, and
2 matters of which the court may take judicial notice.¹³ However, the court need not accept as true
3 allegations that are conclusory, unwarranted deductions of fact, or unreasonable inferences.¹⁴
4 “Dismissal with prejudice and without leave to amend is not appropriate unless it is clear . . . that
5 the complaint could not be saved by amendment.”¹⁵

6 III. DISCUSSION

7 A. HOEPA

8 HOEPA, which is an amendment to the Truth in Lending Act (“TILA”), provides for
9 additional disclosures “for a special class of regulated loans that are made at higher interest rates or
10 with excessive fees and costs.”¹⁶ As an amendment to TILA, it is subject to the same statute of
11 limitations,¹⁷ one year for damages and three years for rescission.¹⁸ But as Tran alleges in the
12 complaint and as also provided in the Deed of Trust that the court judicially noticed, Tran signed
13 his note and deed in October 2006 and so under either a rescission or a damages theory, his claim is
14 time-barred. The HOEPA claim is DISMISSED WITHOUT LEAVE TO AMEND.
15

16 B. Breach of Express Agreements

17 Tran alleges that Defendants breached the Deed of Trust and a PSA. To state a claim for
18 breach of an express agreement, Tran must allege (1) “the contract,” (2) Tran’s “performance or
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22 ¹³ See *id.* at 1061.

23 ¹⁴ See *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); see also *Twombly*,
24 550 U.S. at 561 (“a wholly conclusory statement of [a] claim” will not survive a motion to
dismiss).

25 ¹⁵ *Eminence Capital, LLC v. Asopeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

26 ¹⁶ *Kimball v. Flagstar Bank F.S.B.*, 881 F. Supp. 2d 1209, 1223 (S.D. Cal. 2012).

27 ¹⁷ See *id.*

28 ¹⁸ See 16 U.S.C. § 1639.

1 excuse for nonperformance,” (3) Defendants’ breach, and (4) damage to Tran from the breach.¹⁹

2 As to the Deed of Trust part of his claim, even assuming it serves as a contract, Tran fails to allege
3 that he performed his obligations or provide any excuse for nonperformance of his obligations.

4 Because he fails to plead an element of the claim, this theory of breach must fail. Given that Tran
5 has had multiple opportunities to add factual allegations – such as not being in default on the loan –
6 that would support this cause of action but has not, the court finds leave to amend on this claim
7 futile.

8
9 The PSA breach claim likewise fails. Tran does not allege that he is a party to the PSA,
10 only that because Defendants allegedly violated the PSA he was harmed. That set of factual
11 allegations is insufficient under a breach of express contract theory. Because Tran has had multiple
12 opportunities to amend his complaint to allege that he is a party or in some other way has standing
13 to assert claims under the PSA, the court finds further amendment attempts would be futile.

14 The breach-of-express-agreement claims are DISMISSED WITHOUT LEAVE TO
15 AMEND.

16
17 **C. Breach of Implied Agreement**

18 Tran next alleges that Defendants, Bank of America in particular, created some kind of
19 indemnification obligation to him that they in turn breached. Tran’s factual allegations, however,
20 do not support the existence of an implied agreement because they reveal nothing about the nature
21 of this agreement or how it was reached between the parties. Given the underlying factual
22 allegations that Defendants improperly noticed foreclosure on Tran’s home and given Tran’s
23 multiple attempts to amend his complaint, the court finds further attempts to amend would be
24 futile. The breach-of-implied-agreement claim is DISMISSED WITHOUT LEAVE TO AMEND.
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28 ¹⁹ *Wall Street Network, Ltd. v. N.Y. Times Co.*, 164 Cal. App. 4th 1171, 1178 (2008).

1 **D. California Civil Code Section 2923.5**

2 Although Defendants²⁰ do not raise the preemption of Section 2923.5 by the Home
3 Owners' Loan Act ("HOLA")²¹ and its implementing regulations,²² the court nevertheless
4 concludes, as do numerous other courts,²³ that HOLA preempts Section 2923.5. Washington
5 Mutual ("WaMu") was, by Tran's own allegations,²⁴ the originator of the loan. As a federally-
6 chartered savings bank, it was organized and operated under HOLA. Thus, HOLA preempts all
7 conduct relating to the loan, and so Tran cannot state a Section 2923.5 cause of action. The claim
8 therefore is DISMISSED WITHOUT LEAVE TO AMEND.
9

10 **E. Wrongful Foreclosure**

11 Tran's wrongful foreclosure claim mirrors the cause of action he raised before the Santa
12 Clara County Superior Court and on which the state court sustained demurrer.²⁵ As the court
13 explained in its January 17 order, claims raised before the state court and dismissed by the state
14 court without leave to amend are barred by res judicata in this court.²⁶ The court adopts that same
15 reasoning for the wrongful foreclosure claim.
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18 ²⁰ Defendants instead refer to Section 2923.5(i), which from the court's research is not a part of
19 Section 2923.5.

20 ²¹ 12 U.S.C. § 1461.

21 ²² See, e.g., 12 C.F.R. § 560.

22 ²³ See, e.g., *Varela v. Wells Fargo Home Mortg.*, Case No. C-12-3502 KAW, 2012 WL 6680261,
23 at *6 (N.D. Cal. Dec. 21, 2012) (quoting 12 C.F.R. §560.2(b)(10)); see also *Ngoc Nguyen v. Wells*
Fargo Bank, N.A., 749 F.Supp.2d 1022, 1033 (N.D. Cal. Oct. 27, 2010), *DeLeon v. Wells Fargo*
Bank, N.A., 729 F.Supp.2d 1119, 1127 (N.D. Cal. 2010) (collecting cases with similar holdings),
24 *Parcray v. Shea Mortg., Inc.*, Case No. CV-F-09-1942 OWW/GSA, 2010 WL 1659369, at *9 (E.D.
25 Cal. Apr. 23, 2010) (concluding that HOLA preempts section 2923.5 because it "concerns the
processing and servicing of [the plaintiff]'s mortgage").

26 ²⁴ See Docket No. 36 ¶ 12.

27 ²⁵ See Docket No. 14 Exs. E, F.

28 ²⁶ See Docket No. 35.

1 As noted in its earlier order, the parties are identical. The state court determined that Tran's
2 wrongful foreclosure claim was not ripe and that he could not rely on a violation of Section 2923.5
3 as the basis for the wrongful foreclosure.²⁷ Although Tran restyles some of his allegations in the
4 FAC, the underlying claim is the same.²⁸ The three requirements for the application of res judicata
5 under California law are present here.²⁹ As the court opined in its previous order and repeats here,
6 Tran's recourse for evaluation of claims that he believes the state court erroneously dismissed is
7 with the state appellate courts not federal district court.³⁰ Because res judicata bars this claim, the
8 court DISMISSES it WITHOUT LEAVE TO AMEND.
9

10 **F. Section 17200**

11 Tran bases his Section 17200 claim on two grounds: (1) Defendants' violations of Section
12 2923.5 and HOEPA and (2) Defendants' unfair business practices.³¹ As the court explained above,
13 the Section 2923.5 and HOEPA claims are not viable and so those claims cannot be grounds for a
14 Section 17200 claim.³²

15 Tran's unfair business practices allegations are different than the factual allegations
16 underlying his state court claim, which the state court dismissed without leave to amend.³³ In state
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19 ²⁷ See Docket No. 14 Ex. F.

20 ²⁸ Although Tran suggests in this section of his complaint that the foreclosure was "completed," see
21 Docket No. 36 ¶ 57, he alleged the same facts – that the Notice of Trustee Sale had been recorded
22 – with the state court, which still found the claim was not ripe. Compare Docket No. 14 Ex. E ¶¶
23 8-14, 22 with Docket No. 36 ¶¶ 12-19, 72.

24 ²⁹ *Boeken v. Philip Morris USA, Inc.*, 48 Cal. 4th 788, 797 (2010).

25 ³⁰ See *Carollow v. Vericrest Financial Inc.*, Case No. 11-cv-4767 YGR, 2012 WL 4343816, at *6
26 (N.D. Cal. Sept. 21, 2012) (noting "[p]laintiff did not seek appellate review before reasserting in
27 federal court the same claims that had been dismissed without leave to amend in state court" and so
28 "further litigation is barred").

³¹ See Docket No. 36 at ¶¶ 49-50.

³² See *Berryman v. Merit Prop. Mgmt, Inc.*, 152 Cal. App. 4th 1544, 1554 (2007) (noting that "a
violation of another law is a predicate for stating a cause of action under the UCL's unlawful
prong").

1 court, he based the Section 17200 claim on Defendants’ violations of the notice requirements of
2 Section 2923.5.³⁴ Here, he alleges that Defendants filed a false assignment of the Deed of Trust
3 because JP Morgan never had the requisite interest to transfer.³⁵ As a result, res judicata does not
4 bar this claim because there is insufficient identity with the state court claim.

5 Tran’s Section 17200 claim nevertheless fails because he has not asserted the requisite
6 harm. He alleges that because of Defendants’ unfair business practices, “a cloud has been placed
7 on Plaintiff’s title and [his] interest in the Subject Property has been placed in jeopardy.”³⁶ But
8 California Business and Professions Code Section 17204 requires plaintiffs to establish that they
9 have suffered an “injury in fact and ha[ve] lost money or property as a result of the unfair
10 competition.”³⁷ Tran has not alleged that he lost either money or property as a result of
11 Defendants’ actions.
12

13 Given that this is Tran’s second attempt at establishing a Section 17200 claim in this court,
14 the court finds further attempts at amendment will be futile. Tran’s Section 17200 claim is
15 DISMISSED WITHOUT LEAVE TO AMEND.
16

17 **G. RICO**

18 Tran alleges that Defendant violated 18 U.S.C. § 1962, although he does not specify under
19 which section the claims arise. He refers specifically only to Section 1962(d),³⁸ which prohibits
20 conspiring to violate Sections 1962(a), 1962(b), and 1962(c), although he does not state which of
21 the sections he claims Defendants conspired to violate. His allegations also suggest that
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23 ³³ See Docket No. 12 Ex. F.

24 ³⁴ See *id.* Ex. E.

25 ³⁵ See Docket No. 36 at ¶ 49.

26 ³⁶ *Id.* at ¶ 52.

27 ³⁷ See *Walker v. Geico Gen. Ins. Co.*, 558 F.3d 1025, 1027 (9th Cir. 2009).

28 ³⁸ See Docket No. 36 at ¶ 85.

1 Defendants engaged in activity prohibited by Section 1962(a), and so the court considers his
2 allegations under the rubrics of both Section 1962(a) and Section 1962(d). In either case, his
3 claims fail.

4 To state a claim under Section 1962(a), Tran must allege that (1) “a person receives income
5 derived directly or indirectly from a pattern of racketeering activity or unlawful debt”; (2) “that
6 person uses or invests, directly or indirectly, any part or proceeds of such income in the acquisition
7 of any interest in, or the establishment or operation of any enterprise”; and (3) “that enterprise is
8 engaged in or its activities affect interstate or foreign commerce.”³⁹ Tran must also allege “that the
9 investment of racketeering income was the proximate cause of his injury.”⁴⁰ To state a claim under
10 Section 1962(d), on the other hand, he need not allege any action in furtherance of a RICO
11 violation.⁴¹ He is required only to allege that Defendants agreed to act in a way that violates one of
12 the other sections of 18 U.S.C. § 1962.⁴²

13
14 Under either provision, Tran also must allege that Defendants engaged in or agreed to
15 engage in one of the activities listed in 18 U.S.C. § 1961(a) as a predicate act of racketeering.⁴³ If
16 the predicate act of racketeering involves fraud, Tran is subject to the heightened pleading
17 requirements of Fed. R. Civ. P. 9(b).⁴⁴

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19 Defendants assert that Tran fails to allege facts sufficient to state a RICO claim. Tran’s
20 allegations regarding the underlying racketeering activity appear to address two types of fraudulent
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22 ³⁹ *Jalili v. Far East Nat. Bank*, Case No. C 12-5962 SBA, 2013 WL 1832648, at *3 (N.D. Cal. May
23 1, 2013).

24 ⁴⁰ *Id.*

25 ⁴¹ *See Salinas v. United States*, 522 U.S. 52, 63 (1997).

26 ⁴² *See id.* at 64.

27 ⁴³ *See Occupational-Urgent Care Health Sys., Inc. v. Sutro & Co., Inc.*, 711 F. Supp. 1016, 1021
(E.D. Cal. 1989).

28 ⁴⁴ *See id.*

1 conduct on the part of Defendants. First, he appears to claim that Defendants' failure to inform
2 him of the securitization of the loan instrument was a fraudulent omission on which he relied to his
3 detriment.⁴⁵ Second, Tran claims that Defendants engaged in "the theft of real property through
4 illegal foreclosure liens."⁴⁶ He alleges that through the securitization of loans, Defendants
5 conspired to upend traditional recording requirements, and then through the use of the mail and the
6 internet, they filed documents with false claims regarding their interests in the properties upon
7 which they sought to foreclose.⁴⁷

8
9 Although Tran's complaint contains an exposition of the ills that the banking industry,
10 including Defendants, have wrought on the American economy, the judicial system, and
11 homeowners,⁴⁸ it fails to include the details of the alleged mail and wire fraud supposedly giving
12 rise to the RICO claim.⁴⁹ Rule 9(b) requires Tran to state "the time, place, and specific content of
13 the false representations as well as the identities of the parties to the misrepresentation."⁵⁰ Tran's
14 allegations fail to meet this standard. As a preliminary matter, Tran's shift between the types of
15 fraud on which he bases his RICO claims already reveals that he has not alleged with specificity
16 the predicate acts. Is the RICO claim based on the allegedly fraudulent omission regarding the
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20 ⁴⁵ See Docket No. 36 ¶¶ 74, 77-82.

21 ⁴⁶ *Id.* at ¶ 85.

22 ⁴⁷ See *id.* at ¶¶ 83, 86, 94.

23 ⁴⁸ See, e.g. *id.* at ¶ 83 ("[Defendants] undermined long established [sic] rights and sabotaged the
24 judicial process itself by de-emphasizing the importance of, and eventually eliminating,
25 'troublesome' documentation requirements."); *id.* at ¶ 97 ("The conspirators intended to maintain
an absolute stranglehold on the American economy for many decades, if not centuries into the
future.").

26 ⁴⁹ See *Blake v. Dierdorff*, 856 F.2d 1365, 1368 (9th Cir. 1988) (applying Rule 9(b) to RICO claim
27 based on fraud); see also *Occupational-Urgent*, 711 F. Supp. at 1021 (noting Rule 9(b) applies to
RICO claims based on fraud).

28 ⁵⁰ *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

1 securitization of the loan or is it based on alleged misrepresentations about the proper beneficiary
2 of the loan? The complaint does not provide the answer.

3 The allegations he does make further reveal that he has failed to meet the requirements of
4 Rule 9(b). For example, he asserts that “[a] separate count of Mail Fraud took place each and
5 every time a fraudulent pleading, Affidavit, Promissory Note assignment, mortgage or mortgage
6 assignment was sent by a Defendant through the use of the US [sic] mail.”⁵¹ Nothing in that
7 statement explains which documents were fraudulent, which defendants sent the fraudulent
8 documents, when they sent the document, or what in the documents was false. Another example
9 highlights the broad generalization of Tran’s complaint. He asserts that “[t]hese Defendants
10 intentionally participated in a scheme to defraud everyone, including the Plaintiff” and that they
11 thereby “contribut[ed] to the foreclosure crisis.”⁵² These allegations do not suffice to meet the
12 particularity necessary to allege successfully a claim of fraud. And so, to the extent that Tran
13 alleges a violation of Section 1962(a), his claim fails.
14

15 His attempt to allege a Section 1962(d) claim likewise fails. Tran asserts conclusorily that
16 Defendants conspired to steal real property through illegal foreclosure liens,⁵³ but the actual facts
17 he alleges do not support that claim. He asserts that various “securitizers/underwriters,” “bankers,”
18 and Defendants essentially agreed to undermine the traditional mortgage and lending system
19 through the securitization of loans and a failure to abide by traditional recording mechanisms.⁵⁴
20 But these actions do not coincide with any of the listed predicate activities under Section 1961(a),
21 which is required to state a RICO claim. Even assuming that the allegations could support some
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25 ⁵¹ Docket No. 36 at ¶ 86.

26 ⁵² *Id.* at ¶ 76.

27 ⁵³ *See id.* at ¶ 85.

28 ⁵⁴ *See id.* at ¶¶ 94-98.


1 kind of mail fraud claim against Defendants, nothing in Tran's allegations supports that Defendants
2 and any of the unnamed co-conspirators agreed to engage in the fraud.⁵⁵

3 Tran has had three opportunities – once in state court and twice in this court – to attempt to
4 plead a successful RICO claim and has failed to do so. Combined with the lack of any additional
5 factual allegations in the untimely opposition that could aid in amendment of the complaint, the
6 court finds leave to amend would be futile. The RICO claim is DISMISSED WITHOUT LEAVE
7 TO AMEND.

8 The court dismisses all of the claims without leave to amend. A judgment shall follow.

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10 **IT IS SO ORDERED.**

11 Dated: May 29, 2013

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14 PAUL S. GREWAL
15 United States Magistrate Judge

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28 ⁵⁵ See, e.g. *id.* at 86 (alleging false documents were sent through the mail but not alleging any agreement to do so).