

1 reply.¹ From these documents and others records of Plaintiff’s prior proceedings of which the
2 Court takes judicial notice sua sponte pursuant to Fed. R. Evid. 201(b), the Court has gleaned the
3 following factual background.

4 Since 1978, Plaintiff was the owner of a parcel of real property located at 1650 Pomona
5 Avenue, San Jose, CA, 95110 (“the Property”). See Request for Judicial Notice, Doc. No. 13-1,
6 (“Request for Judicial Notice”) Ex. A, Compl., *Farahani v. Banca Privata, et. al.*, 1-08-CV-
7 109826, Santa Clara Superior Court (“2008 Superior Court Action”). In 2007, Plaintiff obtained a
8 loan from Defendant Floria in the sum of \$1,235,000.00, secured by the Property. See *id.* at 5;
9 Mot. at 2.² Plaintiff alleges that on or around January, 2008, he discovered that his loan was a
10 “‘bait and switch’ type” and that Defendants were unlicensed, usurious lenders. Compl. ¶ 7. As
11 discussed in detail below, Plaintiff has pursued various avenues of relief since that time. However,
12 no court has invalidated the mortgage. The final trustee’s sale of the Property took place on
13 January 25, 2013, and the Trustee’s Deed was recorded on January 29, 2013. Supplemental
14 Request for Judicial Notice, Doc. No. 29-1 (“Supplemental Request for Judicial Notice”), Ex. S.
15 Plaintiff and his family were evicted from the Property on March 27, 2013. See Doc. No. 34. Two

16 ¹ Although a district court generally may not consider any material beyond the pleadings in
17 deciding a Rule 12(b)(6) motion, the Court may take judicial notice of documents referenced in the
18 complaint, as well as matters in the public record, without converting a motion to dismiss into one
19 for summary judgment. See *Lee v. City of L.A.*, 250 F.3d 668, 688–89 (9th Cir. 2001). A matter
20 may be judicially noticed if it is either “generally known within the territorial jurisdiction of the
21 trial court” or “can be accurately and readily determined from sources whose accuracy cannot
22 reasonably be questioned.” Fed. R. Evid. 201(b). Here, Exhibit E (Trustee’s Deed recorded on
23 September 14, 2102); Exhibit M (Rescission of Trustee’s Deed recorded on September 14, 2012);
24 and Exhibit S (Trustee’s Deed recorded on January 29, 2013) are records filed with the County
25 Recorder, of which courts routinely take judicial notice. See, e.g., *Liebelt v. Quality Loan Serv.*
26 *Corp.*, No. 09–cv–05867, 2011 WL 741056, at *6 n. 2 (N.D.Cal. Feb. 24, 2011) (Koh, J); *Reynolds*
27 *v. Applegate*, No. C 10–04427, 2011 WL 560757, at *1 n. 2 (N.D.Cal. Feb.14, 2011) (Breyer, J.);
28 *Giordano v. Wachovia Mortg., FSB*, No. 10–cv–04661, 2010 WL 5148428, at *1 n. 2 (N.D.Cal.
Dec. 14, 2011) (Fogel, J.). The remaining documents submitted for judicial notice are all
documents filed in previous and concurrent lawsuits, which are similarly suitable for judicial notice
under Fed. R. Evid. 201(b). See *Dawson v. Mahoney*, 451 F.3d 550, 551 (9th Cir. 2006) (allowing
for judicial notice in federal court of state court orders and proceedings); *United States v. Black*,
482 F.3d 1035, 1041 (9th Cir. 2007) (records, including judgments and other court documents, are
also proper subjects of judicial notice). Accordingly, Defendant’s Request for Judicial Notice and
Supplemental Request for Judicial Notice are GRANTED.

² Plaintiff has also alleged that the actual loan was in the amount of \$1,250,000. See Opp’n at 8.

1 of Plaintiff's tenants attended the April 11 hearing, at which they complained that they had paid
2 rent to Plaintiff, but were evicted from the Property on March 27, 2013, with no advance notice.
3 Plaintiff subsequently filed the post-eviction motions referenced above. *See* Doc. No. 32; Doc. No.
4 34; Doc. No. 35.

5 As elaborated below, Plaintiff has thus far pursued the following legal remedies and
6 avenues of relief from foreclosure. First, Plaintiff initiated three bankruptcy proceedings
7 (including two appeals). Plaintiff's wife also initiated a bankruptcy proceeding. All four
8 bankruptcy proceedings were dismissed prior to the final sale of the Property. Plaintiff filed two
9 Santa Clara Superior Court actions, both of which remain pending. Plaintiff filed three other cases
10 before the federal judiciary, namely: a previous filing in this Court, which was dismissed; a petition
11 for a writ of mandamus to the Ninth Circuit, which was denied; and the current action.

12 **A. Bankruptcy Court Proceedings and Related Appeals**

13 Since 2007, Plaintiff has initiated three separate bankruptcy proceedings, and his wife has
14 initiated one. All proceedings, which are described below, were dismissed before the final sale of
15 the Property.

16 On April 28, 2008, Plaintiff filed a Chapter 11 bankruptcy proceeding before Judge Roger
17 Efremsky ("Plaintiff's First Bankruptcy Proceeding"). *See In re Fred Farmahin Farahani*, Case
18 No. 08-52082-RLE, Doc. No. 1 (Bankr. N.D.Cal. Apr. 28, 2008). On November 24, 2008, Judge
19 Efremsky issued an order terminating the automatic stay pursuant to 11 U.S.C. § 362(a), with
20 respect to the Property, effective December 31, 2008. *See id.*, Doc. No. 57. On December 31,
21 2008, Plaintiff appealed Judge Efremsky's termination of the automatic stay to the U.S. District
22 Court in San Jose. *Id.*, Doc. No. 65. On May 20, 2009, the underlying bankruptcy case was
23 dismissed. *See id.*, Doc. 83. On June 25, 2009, U.S. District Judge James Ware dismissed
24 Plaintiff's appeal, because Plaintiff failed to file an appeal brief or a Case Management Statement
25 after the Court admonished Plaintiff that failure to do so would result in dismissal pursuant to Rule
26 41(b) of the Federal Rules of Civil Procedure. *See In re Fred Farmahin Farahani*, Case No. 09-
27 00130-JW, Doc. No. 5 (N.D.Cal. June 25, 2009).

1 On June 17, 2009, Plaintiff filed a second Chapter 11 bankruptcy proceeding before Judge
2 Arthur Weissbrodt (“Plaintiff’s Second Bankruptcy Proceeding”). *See In re Fred Farmahin*
3 *Farahani*, Case No. 09-54725-ASW, Doc. No. 1 (Bankr. N.D.Cal. Jun. 17, 2009). Judge
4 Weissbrodt dismissed this case on May 20, 2012. *Id.*, Doc. No. 246.

5 On May 18, 2012, Plaintiff filed a third Chapter 11 Petition (“Plaintiff’s Third Bankruptcy
6 Proceeding”). *See In re Fred Farmahin Farahani*, Case No. 12-53818-CN, Doc No. 1 (Bankr.
7 N.D.Cal. May 18, 2012). That case proceeded before Bankruptcy Judge Charles Novack, until
8 Judge Novack dismissed the case on September 14, 2012. *See id.*, Doc. No. 122. On August 1,
9 2012, Judge Novack denied Plaintiff’s motion to extend the automatic stay, and reiterated that no
10 automatic stay was in effect. *See Request for Judicial Notice, Ex. J.* During the course of this
11 bankruptcy proceeding, Plaintiff appealed Judge Novack’s order denying Plaintiff’s motion to
12 extend an automatic stay to the Bankruptcy Appellate Panel of the Ninth Circuit. *See id.*, Doc. No.
13 44. The Bankruptcy Appellate Panel dismissed the appeal as moot on December 18, 2012, because
14 the underlying case had been dismissed on September 10, 2012. *Id.*, Doc. No.126.

15 On September 10, 2012, Plaintiff’s wife, Farnaz Farahani, filed for Chapter 13 bankruptcy,
16 claiming a community property interest in the Property. Supplemental Request for Judicial Notice,
17 Ex. L. The case proceeded before Judge Weissbrodt. *Id.* While Farnaz Farahani’s bankruptcy
18 case was pending, Defendant Floria voluntarily rescinded the original trustee’s sale that he had
19 held on September 11, 2012. Request for Judicial Notice, Ex. E; Supplemental Request for
20 Judicial Notice, Ex. M. Farnaz Farahani’s bankruptcy was dismissed on November 14, 2012.
21 Supplemental Request for Judicial Notice, Ex. N. Defendant Floria obtained an Order granting
22 him “in rem” relief under the Bankruptcy Code, such that future bankruptcies should not affect the
23 foreclosure of the Property. Supplemental Request for Judicial Notice, Ex. O.

24 **B. State Court Actions**

25 In addition to Plaintiff’s proceedings before the Bankruptcy Court, Plaintiff has also filed
26 two cases before the Superior Court of Santa Clara County (“the Superior Court”), both of which
27 remain pending.

1 **1. 2008 Superior Court Action**

2 Prior to commencing the First Bankruptcy Proceeding, Plaintiff filed a complaint with the
3 Superior Court on April 3, 2008. In that action (the “2008 Superior Court Action”), Plaintiff
4 named current Defendants Ronald A. Floria and PLM Lender Services, Inc.,³ as well as
5 Defendants Banca Privata, N.A., LLC, d/b/a Pronto Mortgage Express; Warren Mickelson; Al
6 Rossie a/k/a Albert J. Ingallinera; Thomas Breza; and Does 1 through 25, inclusive. The 2008
7 Superior Court Action complaint alleged *inter alia* fraud, breach of fiduciary duty, breach of
8 contract, and usury relating to the loan that Plaintiff obtained from Defendants in 2007. Compl. ¶
9 8; Request for Judicial Notice, Ex. A. According to the Superior Court docket, Defendants Floria
10 and PLM Lender Services, Inc. were dismissed with prejudice from that action in February, 2009.
11 *See* Request for Judicial Notice, Ex. B (document dismissing Ronald A. Floria from the 2008
12 Superior Court Action on February 17, 2009); Request for Judicial Notice, Ex. I, tentative ruling of
13 Court and Docket of 2008 Superior Court Action (“Tentative Denial of Motion to Rejoin and
14 Docket Sheet”). Plaintiff alleges that this dismissal took place on October 20, 2008. Compl. ¶ 11.
15 However, he provides no evidence to support this allegation, and it is contradicted by the above
16 documents of which the Court has taken judicial notice.⁴

17
18 ³ In his complaint, Plaintiff does not distinguish between Defendants Floria, PLM Lender Services,
19 [Inc.], and Defendant Salazar, whom he refers to collectively as “Defendants.” *See* Compl. ¶ 5.
20 However, Defendant Salazar was not named in the 2008 Superior Court Action. Defendant PLM
21 Lender Services, Inc. is named in the caption of this proceeding as “PLM Lender Services,” but has
22 filed documents with the Court as PLM Lender Services, Inc. *See* Doc. 12.

23 ⁴ The exact date in February that Defendants were dismissed is not clear from the documents
24 submitted in the Request for Judicial Notice. It appears that Defendant Ronald A. Floria was
25 dismissed on February 17, 2009. *See* Request for Judicial Notice, Ex. B. The case docket,
26 submitted as Exhibit I, and available electronically at www.sccaseinfo.org, shows that requests for
27 dismissal for both Defendant Floria and Defendant PLM Lender Services, Inc. were filed on
28 February 17, 2009. The docket also reflects “Ntc:Entry Of Dismissal W/Pos” for PLM Lender
Services, Inc. on February 26, 2009, and for Ronald A. Floria on February 27, 2009. The docket
also indicates an “Objection to disml, Fred Farahani, Pro Per” on February 17, 2009. By contrast,
the only other docket entry between June 2008 and February 2009 is on October 22, 2008, which is
recorded as a “Declaration of plt re: osc re: dismissal.” This discrepancy in dates is significant to
Plaintiff’s allegations regarding whether an automatic stay was in effect, as discussed *infra*,
because Judge Efremsky’s order terminating the automatic stay had an effective date of December
31, 2008.

1 Plaintiff now alleges that Defendants were improperly dismissed from the 2008 Superior
2 Court Action. Compl. ¶ 10-11. Specifically, Plaintiff alleges that Defendants, acting through the
3 attorney, Benjamin Levinson, threatened Plaintiff with foreclosure and financial ruin if he refused
4 to agree to enter into a forbearance agreement (“the forbearance agreement”), which provided, *inter*
5 *alia*, that Defendants would be dismissed with prejudice. *Id.* Defendants allegedly pressured
6 Plaintiff to enter into the forbearance agreement while Plaintiff was recovering from a severe
7 stroke, and was limited in both physical and mental capacity, and was not actively represented by
8 counsel. *Id.* Defendants allegedly concealed from Plaintiff the fact that he was shielded from
9 immediate foreclosure by his Chapter 11 bankruptcy proceeding, and that none of the parties could
10 lawfully enter into such an agreement without prior approval of the Bankruptcy Court. *Id.* While
11 neither the instant complaint nor the motion to dismiss allege a date for this forbearance agreement,
12 subsequent proceedings indicate the agreement was entered into on February 11, 2009. *See In re*
13 *Fred Farmahin Farahani*, Case No. 09-54725-ASW, Doc. No. 147 (“Transcript Vacating
14 Forbearance Agreement”), Tr. 4:17-19; *Id.*, Doc. No. 150 (“Order Vacating Forbearance
15 Agreement”), at 1.

16 On December 7, 2010, in the course of Plaintiff’s Second Bankruptcy Proceeding, Judge
17 Weissbrodt vacated this forbearance agreement as unenforceable. Transcript Vacating Forbearance
18 Agreement, Tr. 4:5-9:11; Order Vacating Forbearance Agreement, at 1. Judge Weissbrodt
19 acknowledged that the parties disputed the exact content of the forbearance agreement. Tr. 5:4-7.
20 However, it was undisputed that the agreement (1) added Defendant’s attorney’s fees to the amount
21 of the secured debt; (2) caused Plaintiff to dismiss Defendant from a pending State Court action,
22 and that such action belonged to Plaintiff’s bankruptcy estate as an asset of the estate; and (3)
23 reduced the interest rate on Defendant’s loan to Plaintiff from 13.99 percent to 11.25 percent and
24 extended the maturity date. *Id.* at 5:4-20. Judge Weissbrodt noted that this forbearance agreement
25 took place on February 11, 2009, during the course of Plaintiff’s First Bankruptcy Proceeding
26 before Judge Efremsky. *Id.* at 4:13-19. Judge Weissbrodt further found that no automatic stay was
27 in place at that time, since Judge Efremsky had granted Defendant Floria relief from the automatic
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1 stay on November 24, 2008. *Id.* at 4:14-17. However, Judge Weissbrodt found that relief from the
2 stay “did not grant [Plaintiff] authorization to incur new debt or to enter into a settlement with
3 [Defendant].” *Id.* at 7:4-24. Rather, Judge Weissbrodt found that the settlement of a state court
4 cause of action during bankruptcy proceedings without the Bankruptcy Court’s approval violated
5 Federal Rule of Bankruptcy Procedure 9109(a) and rendered the settlement unenforceable. *Id.* at
6 8:12-24 (citations omitted). Judge Weissbrodt also emphasized that Defendant’s “experienced
7 bankruptcy attorney” negotiated the forbearance agreement with Plaintiff and Plaintiff’s agent,
8 rather than with Plaintiff’s attorney whose motion to withdraw had not been granted at that time.
9 *Id.* at 4:19-5:1. Thus, Judge Weissbrodt found the agreement unenforceable, both by statute and
10 based on the equities of the transaction. *Id.* at 8:1-9:11.

11 However, Judge Weissbrodt also emphasized that Plaintiff’s motion to vacate the
12 agreement did not seek to determine the validity, priority, or extent of Defendant Floria’s lien. *Id.*
13 at 6:20-7:1. Rather, the result of Judge Weissbrodt’s decision to vacate the forbearance agreement
14 reduced the amount of Defendant Floria’s lien, by striking the addition of Defendant Floria’s
15 attorney’s fees to the amount of the secured debt. *See id.* at 6:23-25. As noted above, Judge
16 Weissbrodt dismissed Plaintiff’s Second Bankruptcy Proceeding without prejudice on May 20,
17 2012. *See In re Fred Farmahin Farahani*, Case No. 09-54725-ASW, Doc. No. 246.

18 Despite Judge Weissbrodt’s finding that the forbearance agreement was unenforceable,
19 Plaintiff’s repeated attempts to vacate the dismissal of Defendants from the 2008 Superior Court
20 Action have been unsuccessful. Prior to Judge Weissbrodt’s decision vacating the agreement, the
21 Superior Court denied Plaintiff’s motion for an order granting relief from the voluntary dismissals
22 on July 21, 2009, and denied Plaintiff’s motion for rescission of the mutual settlement agreement
23 and forbearance agreement on August 11, 2009. Request for Judicial Notice, Ex. C, Superior Court
24 “Order Denying Motion for Order Granting Relief from Voluntary Dismissals” and “Order
25 Denying Motion for Rescission of Mutual Settlement Agreement & Forbearance Agreement.”
26 Subsequent to the Bankruptcy Court’s decision vacating the forbearance agreement, Plaintiff filed
27 a motion for rejoinder of dismissed Defendants Floria and PLM Lender Services, Inc. in the 2008
28

1 Superior Court Action, that was heard on September 4, 2012. Compl. ¶ 14. Defendant has
2 represented that this motion was denied. *See* Request for Judicial Notice, Ex. I, Tentative Denial of
3 Motion to Rejoin and 2008 Superior Court Action Docket Sheet.

4 **2. 2012 Superior Court Action**

5 On November 30, 2012, Plaintiff filed a second action in Santa Clara Superior Court (“2012
6 Superior Court Action”), naming current Defendants Ronald Floria and PLM Lender Services, Inc.,
7 as well as Defendants 123TD.com, LLC; Pronto Mortgage Express; Premier Trust Deed
8 Investments; Albert Joseph Ingallinera a/k/a Al Rossi; Warren M. Mickelson; Thomas Breza; and
9 Does 1 through 25, inclusive. The complaint alleges 14 causes of action, including all of the
10 causes of action alleged in the 2008 Superior Court Action except for usury. The complaint
11 requests damages, injunctive, and declaratory relief. *See* Supplemental Request for Judicial Notice,
12 Ex. P. This case also remains pending. *Id.*

13 **C. Plaintiff’s Filings in This Court and with the Ninth Circuit**

14 On December 30, 2008, the day before Plaintiff appealed Judge Efremsky’s termination of
15 the automatic stay to this Court, Plaintiff also filed a document in this Court alleging that
16 Defendant Floria violated various laws, and Plaintiff requested a temporary restraining order. *See*
17 *In re Fred Farmahin Farahani*, Case No. 08-05786-RMW (N.D.Cal. Dec. 30, 2008). U.S. District
18 Judge Ronald M. Whyte denied Plaintiff’s request for a temporary restraining order on December
19 30, 2008. *See id.*, Doc. No. 4. The case was subsequently reassigned to Judge James Ware, who
20 was presiding over Plaintiff’s appeal of Judge Efremsky’s termination of the automatic stay, which
21 Judge Ware dismissed on June 25, 2009, as discussed in Section I.A above. On May 12, 2009,
22 Judge Ware dismissed Case No. 08-05786 with prejudice for lack of prosecution pursuant to Rule
23 41(b) of the Federal Rules of Civil Procedure, and entered judgment against Plaintiff in favor of
24 Defendants Benjamin R. Levinson, PLM Lender Services, and three other Defendants. *See id.*,
25 Doc. No.13; Doc. No. 14.⁵

26 _____
27 ⁵ Judge Whyte aptly described Mr. Farahani’s filing as “difficult to comprehend.” No Defendants
28 have alleged that this previous judgment precludes the current action, nor was Defendant Floria
named in that action.

1 Plaintiff filed the complaint in the instant action on September 5, 2012. Although no causes
2 of action were enumerated, the complaint alleged “usurious lending practices and violations of the
3 automatic stay” under the Bankruptcy Code, 11 U.S.C. § 362 *et seq.* Doc. No. 1. On September
4 10, 2012, the day before a scheduled foreclosure sale, Plaintiff filed an *ex parte* motion for a
5 temporary restraining order barring the sale. Also on September 10, 2012, Judge Ronald Whyte
6 denied the motion. Doc. No. 7.

7 On September 28, 2012, Defendant Ronald A. Floria filed a motion to dismiss for lack of
8 standing and failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(1) and
9 12(b)(6). *See* Doc. No. 13. Pursuant to Civil Local Rule 7-3(a), Plaintiff’s opposition to the
10 motion to dismiss was due on October 12, 2012. On January 7, 2013, when Plaintiff had not filed
11 an opposition or statement of nonopposition to this motion to dismiss, this Court issued an order
12 converting the January 31, 2013 hearing on Defendant’s motion to dismiss to a hearing ordering
13 Plaintiff to show cause why the case should not be dismissed for failure to prosecute. Doc. No. 16.
14 On January 30, 2013, Plaintiff filed a motion for a 45 day extension of the deadline to show cause.
15 *See* Doc. Nos. 19-20. Plaintiff’s motion and supporting declaration explained that Plaintiff (1) was
16 proceeding pro se; (2) was not registered for PACER; (3) learned of the order to show cause on
17 January 20, 2013, after contacting the Clerk’s Office regarding another matter; (4) is permanently
18 disabled as a result of a stroke; and (5) had a broken foot.

19 Plaintiff appeared pro se at the order to show cause hearing on January 31, 2013. On that
20 date, the Court declined to dismiss the case, rescheduled the briefing and hearing on Defendant’s
21 motion to dismiss, and referred Plaintiff to the Federal Legal Assistance Self-Help Center
22 (“FLASH”) at the San Jose Courthouse. At the hearing, Plaintiff represented that Defendant
23 Adolfo Salazar had been served, and the Court ordered Plaintiff to file proof of service of
24 Defendant Adolfo Salazar by February 1, 2013. Doc. No. 21.⁶ As of April 11, 2013, no proof of
25

26 ⁶ None of the briefing in the current action makes clear the role of Defendant Salazar. Other
27 documents reveal that Adolfo Salazar is a junior creditor. *See* Case No. 08-05786-RMW, *In re:*
28 *Fred Farmahin Farahani*, Doc. No. 4. Defendant Salazar has not filed an appearance or any
documents in this case.

1 service of the complaint was entered on ECF. At the April 11 hearing, Plaintiff again represented
2 that he had timely served Defendant Salazar and that Plaintiff would file a proof of service by April
3 15, 2013. On April 12, 2013, a proof of service of Defendant Salazar was entered into ECF. *See*
4 Doc. No. 43. The document bears a stamp indicating that it was filed in paper copy with the
5 Clerk's office on September 19, 2012. *See id.* Accordingly, the Court finds that Defendant Salazar
6 was timely served in this action.

7 Plaintiff filed an opposition to Defendant Floria's motion to dismiss on February 19, 2013,
8 in compliance with the adjusted deadline set by the Court. Doc. No. 23. Defendant Floria filed his
9 reply on February 26, 2013, in compliance with the Court's adjusted deadline. Doc. No. 39.
10 Following Plaintiff's eviction on March 27, 2013, Plaintiff filed the three post-eviction motions,
11 discussed at length below. Doc. No. 32; Doc. 34; Doc. No. 35. On April 9, 2013, Plaintiff filed a
12 pre-case management statement containing further allegations of improper eviction, and a
13 "proposed order" not identified as a motion. *See* Doc. No. 39; Doc. 40.

14 Additionally, on January 22, 2013, Plaintiff filed a petition for Writ of Mandamus in the
15 Ninth Circuit Court of Appeals, requesting "to stay the sale of real property until petitioner's cases
16 are heard," and "to transfer all of petitioner's cases to the San Francisco District of the United
17 States District Court of Northern California." *See* Doc. No. 17. On January 25, 2013, the Ninth
18 Circuit denied Plaintiff's petition. *See* Doc. No. 18.

19 **II. LEGAL STANDARD**

20 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if
21 it fails to state a claim upon which relief can be granted. To survive a motion to dismiss, the
22 plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl.*
23 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "facial plausibility" standard requires the
24 plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted
25 unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In deciding whether the plaintiff has stated a
26 claim, a court must assume the plaintiff's allegations are true and draw all reasonable inferences in
27 the plaintiff's favor. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

1 However, a court is not required to accept as true “allegations that contradict matters
2 properly subject to judicial notice” or “allegations that are merely conclusory, unwarranted
3 deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055
4 (9th Cir. 2008). The Court “has a duty to ensure that pro se litigants do not lose their right to a
5 hearing on the merits of their claim due to ignorance of technical procedural requirements.”
6 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.1990). Nonetheless, “although pro
7 se pleadings are construed liberally, even pro se pleadings ‘must meet some minimum threshold in
8 providing a defendant with notice of what it is that it allegedly did wrong.’” *Doe v. Fed. Dist.*
9 *Court*, 467 F. App’x 725, 727 (9th Cir. 2012) (quoting *Brazil v. United States Dep’t of Navy*, 66
10 F.3d 193, 199 (9th Cir.1995)).

11 In granting a motion to dismiss, a court should grant leave to amend unless the pleading
12 could not possibly be cured by the allegation of other facts. *Lopez v. Smith*, 203 F.3d 1122, 1130
13 (9th Cir. 2000). If amendment would be futile, however, the court may dismiss with prejudice.
14 *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

15 **III. DISCUSSION**

16 For the reasons set forth below, the Court GRANTS Defendant Floria’s motion to dismiss,
17 and dismisses the complaint with respect to all Defendants, with leave to amend as set forth below.
18 The Court also DENIES Plaintiff’s post-eviction motions.

19 **A. Motion to Dismiss**

20 **1. Failure to State a Claim**

21 Although only Defendant Floria has filed a motion to dismiss in this action, Plaintiff’s
22 complaint fails to differentiate between the three named Defendants, and the defects in the
23 complaint identified by Defendant Floria apply equally to the other two Defendants.⁷ Specifically,

24 ⁷ The Court notes that on September 27, 2012, Defendant PLM Lender Services, Inc. filed a notice
25 of non-monetary status in lieu of an answer, to which Plaintiff did not object. Doc. No. 12.
26 California Civil Code Section 2924l permits a trustee to declare non-monetary status if the trustee
27 “maintains a reasonable belief that it has been named in the action or proceeding solely in its
28 capacity as trustee, and not arising out of any wrongful acts or omissions on its part in the
performance of its duties as trustee.” Cal. Civ.Code § 2929l (a). If there is no objection to the
declaration within 15 days of filing, the trustee gains non-monetary status. Cal. Civ. Code § 2929l

1 Plaintiff's pro se complaint does not enumerate any causes of action, and contains minimal factual
2 allegations, some of which conflict with the facts presented in the documents of which the Court
3 has taken judicial notice. *See supra*; Doc. No. 1. As such, the complaint fails to give any
4 Defendant "fair notice of what the ... claim is and the grounds upon which it rests." *See Iqbal*, 556
5 U.S. 662 at 698-99 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Defendant Floria's motion
6 to dismiss is therefore GRANTED, and Plaintiff's complaint is dismissed with respect to all
7 Defendants. *See Silverton v. Dep't of the Treasury*, 644 F.2d 1341, 1345 (9th Cir. 1981) (A court
8 "may properly on its own motion dismiss an action as to defendants who have not moved to
9 dismiss where such defendants are in a position similar to that of moving defendants or where
10 claims against such defendants are integrally related."); *see also Abaghinin v. Amvac Chem. Corp.*,
11 545 F.3d 733, 742-743 (9th Cir. 2008).

12 2. Violation of Automatic Stay

13 For the reasons set forth below, the Court grants Defendant Floria's motion to dismiss with
14 prejudice as to Plaintiff's claims arising out of an alleged violation of an automatic stay. The Court
15 finds that any amendment to these claims would be futile in light of the documents of which the
16 Court has taken judicial notice. *See Lopez*, 203 F.3d 1122; *Dumas*, 90 F.3d 986.

17 Plaintiff has repeatedly alleged that "Defendants" violated the automatic bankruptcy stay,
18 but has failed to identify any improper action taken by any of the Defendants while an automatic
19 stay was in effect. Although Plaintiff has alleged that the dismissal of Defendants Floria and PLM
20 Lender Services, Inc. from the 2008 Superior Court Action violated an automatic stay, the Court

21 (d). *Cf. Wise v. Suntrust Mortg., Inc.*, 11-CV-01360-LHK, 2011 WL 1466153 (N.D. Cal. Apr. 18,
22 2011). Further, in the 2008 Superior Court Action complaint, Plaintiff stated that "PLM Lender
23 Services, Inc. is a corporation . . . doing business . . . as a foreclosure sales trustee" and "is named
24 herein solely to establish the Court's jurisdiction over it, and not for any monetary recovery, and
25 specifically for purposes of perfecting a binding order and judgment from the court in Plaintiff's
26 causes of action alleged herein for injunctive relief." Request for Judicial Notice, Ex. A, ¶ 4. As
27 stated above, PLM Lender Services, Inc. has now transferred all of its right, title and interest in the
28 Property to Defendant Floria, and Plaintiff's prayer for injunctive relief is now moot. *See*
Supplemental Request for Judicial Notice, Ex. S. At the April 11 hearing, Plaintiff indicated an
untimely objection to Defendant PLM Lender Services, Inc.'s non-monetary status; however, he
did not identify any basis for this objection. As such, the Court considers PLM Lender Services,
Inc. a nominal party in this action.

1 has taken judicial notice of the fact that the dismissal with prejudice of Defendant Floria and
2 Defendant PLM Lender Services, Inc. from that case was in February, 2009, at a time when no
3 bankruptcy stay was in effect. *See*, e.g. Compl. ¶ 10-11; Request for Judicial Notice, Ex. B; Ex. I.
4 In denying Plaintiff’s request for a temporary restraining order and preliminary injunction, Judge
5 Whyte similarly noted that no automatic stay was in effect in February, 2009. *See* Doc. No. 7
6 (observing that Bankruptcy Judge Roger Efremsky had issued an order terminating the automatic
7 stay pursuant to the bankruptcy laws as of December 31, 2008) (citing *In re Fred Farmahin*
8 *Farahani*, Case No. 08-52082-RLE, Doc. No. 57, 1-2).

9 At the April 11 hearing, Plaintiff again alleged that a violation of a stay took place in
10 October, 2008. However, Plaintiff provided no evidence to dispute the record that the forbearance
11 agreement and subsequent dismissal of Defendants Floria and PLM Lender Services, Inc. took
12 place in February, 2009, after the automatic stay had been lifted on December 31, 2008. Nor has
13 Plaintiff alleged that any bankruptcy stay was in effect at the time of the actual effective
14 foreclosure sale on January 25, 2013. Consequently, the Court finds that any further factual
15 allegations with respect to a violation of an automatic stay would be futile, and this claim is
16 DISMISSED with prejudice. *See Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

17 **3. Leave to Amend**

18 In light of the Court’s duty to protect a pro se litigant’s right to a hearing on the merits of
19 his claim despite ignorance of the technical procedural requirements, Plaintiff is hereby given leave
20 to amend his complaint within 21 days to specify causes of action with supporting factual
21 allegations. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). However,
22 Plaintiff may not add either new parties or causes of action that could not reasonably be construed
23 to be included in the original complaint, without leave of the Court or stipulation of the parties
24 pursuant to Federal Rule of Civil Procedure 15.

25 Because Plaintiff is pro se, the Court provides additional guidance as to what Plaintiff must
26 address in an amended complaint. In addition to specifying causes of action with supporting
27 factual allegations, Plaintiff’s amended complaint must address with specificity (a) why this Court
28

1 is the proper forum to hear this case, including identifying a valid basis for federal jurisdiction; and
2 (b) the availability of equitable relief. A failure to adequately address these issues or to comply
3 with the 21 day deadline will result in a dismissal with prejudice. Plaintiff is advised that he must
4 have a good faith basis, in both law and fact, for any amendments. *See* Fed. R. Civ. P. 11. Any
5 future allegations that lack a good faith basis may subject Plaintiff to sanctions, including monetary
6 sanctions. *See id.*; *Warren v. Guelker*, 29 F.3d 1386, 1388 (9th Cir.1994) (noting that Rule 11
7 applies to pro se litigants); *Sears v. Cnty. of Monterey*, 11-CV-01876-SBA, 2012 WL 368688 at
8 *13 (N.D. Cal. Feb. 3, 2012).

9 **a. Proper Forum**

10 In light of Plaintiff's two pending state court actions, multiple dismissed bankruptcy
11 proceedings, two dismissed bankruptcy appeals, two denials of temporary restraining orders, and
12 denial of writ of mandamus by the Ninth Circuit, the Court has significant concerns about whether
13 this Court is the proper forum for Plaintiff's claims. Most saliently, Plaintiff has thus far failed to
14 identify any valid basis of federal jurisdiction. Plaintiff has never asserted a basis for diversity
15 jurisdiction in this case.⁸ Rather, the complaint alleges only that this Court has jurisdiction because
16 the case "involves usurious lending practices and violations of the automatic stay, 11 U.S.C. §
17 362." Compl. ¶ 1. Neither of these bases is sufficient. As discussed above, the claims of violation
18 of an automatic stay have been dismissed with prejudice. Nor do usurious lending allegations
19 under California law alone provide a basis for federal jurisdiction.

20 However, it appears that Plaintiff may seek to assert violations of the federal Truth in
21 Lending Act (TILA), which were raised for the first time in Plaintiff's *ex parte* motion for a
22 constructive trust, and referenced by Plaintiff at the April 11 hearing. If Plaintiff does rely on
23 TILA as the basis for federal jurisdiction, Plaintiff must address the statute of limitations, which
24 appears to bar Plaintiff's claim for either rescission or damages.

25 _____
26 ⁸ *See* Request for Judicial Notice, Ex. A (Plaintiff's Complaint in the 2008 Superior Court Action,
27 alleging that that Defendant Floria "is a resident of California, and investing in mortgages secured
28 by real property in Santa Clara County, and that PLM Lender Services, Inc. is a corporation doing
business in Santa Clara County, CA.) Plaintiff has not suggested that he is a citizen of another
state, or that he is not a legal permanent resident domiciled in California. *See* 28 U.S.C. 1332.

1 With respect to the right of rescission, TILA imposes an absolute limitation that bars any
2 claims filed more than three years after the consummation of the transaction or after the sale of the
3 property, with certain exceptions not relevant here. 15 U.S.C. § 1635(f). Section 1635(f) is
4 considered a “statute of repose” that “depriv[es] the courts of subject matter jurisdiction when a §
5 1635 claim is brought outside the three-year limitation period.” *Miguel v. Country Funding Corp.*,
6 309 F.3d 1161, 1164 (9th Cir. 2002). The three-year period is not subject to equitable tolling. *See*
7 *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998) (holding that “§ 1635(f) completely
8 extinguishes the right of rescission at the end of the 3-year period.”). Therefore, Plaintiff would
9 have needed to file any TILA rescission claim arising out of Plaintiff’s 2007 loan no later than
10 2010. Because Plaintiff has not yet filed a TILA claim as of the date of this order, any future filing
11 appears to be barred by the statute of limitations.⁹

12 Although Plaintiff has not explicitly sought damages, it is likely that any damages under
13 TILA would also be barred by TILA’s one year statute of limitations. *See* 15 U.S.C. § 1640(e);
14 *King v. California*, 784 F.2d 910, 915 (9th Cir. 1986). As a general rule, TILA’s statute of
15 limitations runs from the date of the consummation of the credit transaction at issue. *Id.* In this
16 case, consummation occurred in 2007, when Plaintiff entered into the loan agreement. Request for
17 Judicial Notice, Ex. A, at 5. The statute of limitations therefore expired in 2008, and Plaintiff has
18 not yet filed a TILA claim as of the date of this order.¹⁰ Accordingly, unless equitable tolling
19 applies to suspend the statute of limitations, Plaintiff’s TILA damages claims are also time-barred.

20 The Ninth Circuit has held that “the doctrine of equitable tolling may, in the appropriate
21 circumstances, suspend the limitations period until the borrower discovers or had reasonable
22 opportunity to discover the fraud or nondisclosures that form the basis of the TILA action.” *King*,
23 784 F.2d at 915. Plaintiff alleges in his complaint that he discovered that his loan was a “‘bait and
24 switch’ type” on or around January 2008. Compl. ¶ 7. If Plaintiff seeks to allege more recent
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26 ⁹ Even if the Court construed Plaintiff’s September 25, 2012 complaint (which does not enumerate
27 any cause of action) as alleging a TILA claim, that complaint was filed well after the three year
28 statute of limitations had expired.

¹⁰ Again, even Plaintiff’s September 25, 2012 complaint was filed well after the statute of
limitations had expired.

1 discoveries of TILA violations, he is reminded that equitable tolling applies in cases where,
2 “despite all due diligence, a plaintiff is unable to obtain vital information bearing on the existence
3 of his claim.” *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000), *overruled on other*
4 *grounds by Socop–Gonzalez v. I.N.S.*, 272 F.3d 1176, 1194–96 (9th Cir. 2001) (en banc).
5 Plaintiff’s failure to show due diligence and equitable tolling in his amended complaint will result
6 in dismissal with prejudice.

7 If Plaintiff alleges that this Court has federal jurisdiction on the basis of another federal
8 cause of action, that cause must be clearly identified, and any applicable statute of limitations must
9 be clearly addressed. If the Court dismisses Plaintiff’s federal claims, it will likely decline to assert
10 supplemental jurisdiction over Plaintiff’s state law claims. *See* 28 U.S.C. § 1367(c); *Acri v. Varian*
11 *Assocs., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997).¹¹

12 **b. Availability of Equitable Relief**

13 If Plaintiff properly alleges cognizable causes of action, and identifies a basis for federal
14 jurisdiction, any future complaint must also clearly identify the relief requested. To the extent that
15 Plaintiff seeks equitable relief, he cannot do so without pleading the ability to “tender” the amount
16 owed to Defendant Floria. *See* Mot. at 10; Cal. Civ. Code § 1691(b) (“[T]o effect a rescission a
17 party to the contract must ... [r]estore to the other party everything of value which he has received
18

19 ¹¹ If Plaintiff’s amended complaint identifies a valid basis for federal jurisdiction and also alleges
20 causes of action raised in the 2008 Superior Court Action, the Court will consider Defendant
21 Floria’s allegations that the *Rooker-Feldman* doctrine bars this Court’s review of such claims. *See*
22 Mot. at 7-9. Specifically, the Court will address whether Plaintiff’s claims challenge a “legal error
23 by the state court[]” and are thus barred by the *Rooker-Feldman* doctrine, or whether this Court
24 retains jurisdiction because Plaintiff challenges “a wrongful act by the adverse party.” *See*
25 *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140-41 (9th Cir. 2004). The Court will further consider
26 whether Defendant’s dismissal with prejudice is sufficiently final to implicate the *Rooker-Feldman*
27 doctrine. *See Mothershed v. Justices of Supreme Court*, 410 F3d 602, 604 n.1 (9th Cir. 2005). The
28 Court notes that, subsequent to Judge Weissbrodt’s 2010 decision vacating the forbearance
agreement, Plaintiff made one attempt to rejoin Defendants Floria and PLM Lender Services, Inc.
to the 2008 Superior Court Action, which was rejected on procedural grounds. *See* Request for
Judicial Notice, Ex. I (Superior Court’s “Tentative Ruling” that Plaintiff has failed to comply with
California Code of Civil Procedure section 1008(b) but not foreclosing future requests). The Court
reemphasizes its concern that the Superior Court may be the more appropriate venue to pursue
Plaintiff’s claims. If the *Rooker-Feldman* does not bar review, the Court will weigh whether
discretionary abstention may be appropriate to promote the “conservation of judicial resources and
comprehensive disposition of litigation.” *See Colorado River Water Conservation Dist. v. United*
States, 424 U.S. 800, 818 (1976).

1 from him under the contract or offer to restore the same upon condition that the other party do
2 likewise.”); *Davenport v. Litton Loan Servicing, LP*, 725 F.Supp.2d 862, 880 (N.D.Cal. 2010); *Das*
3 *v. WMC Mortg. Corp.*, 831 F. Supp. 2d 1147, 1162 (N.D. Cal. 2011).

4 It is undisputed that Plaintiff owed Floria a principal sum of at least \$1,235,000. The
5 Trustee’s Deed shows that the successful bid for the property, both in the initial voluntarily
6 rescinded sale and in the more recent sale, was \$100,000. *See* Request for Judicial Notice, Ex. E,
7 Supplemental Request for Judicial Notice, Ex. S. There is no further suggestion that Plaintiff
8 would be able to tender the full amount owing to Defendant. (Indeed, Plaintiff has emphasized that
9 he is “of limited income,” Opp’n at 23, and can no longer afford an attorney. *See* Doc. No. 35.)¹²
10 However, Plaintiff is granted leave to amend, in the possibility that he can plausibly plead facts that
11 would be sufficient to show his ability to tender the amount owed to Defendant Floria.

12 **B. Post-Eviction Motions**

13 The Court also denies Plaintiff’s three post-eviction motions. Plaintiff’s one-page “motion
14 for emergency hearing,” is DENIED as moot, in light of the April 11 hearing and the dismissal of
15 the underlying action. Plaintiff’s one-page “motion for a one-on-one appointment with judge” is
16 also DENIED.¹³ Plaintiff’s third motion purports to be an “*ex parte* motion [requesting a]
17 constructive trust for defendants [sic] malicious abuse of process[;] change of venue.” The motion
18 is captioned with a reference to the current action, and also references the 2008 Superior Court
19 Action and the 2012 Superior Court Action. The motion names Defendant Floria, Defendant PLM
20 Lender Services, Inc., and several others also named in the Superior Court Actions. It does not

21 _____
22 ¹² Defendant Floria has alleged that Plaintiff admitted that the current value of the Property is
23 \$600,000 in the context of the third bankruptcy. *See* Request for Judicial Notice, Ex. K. Plaintiff
24 has disputed the validity of this estimate. *See* Doc. No. 27 (“Declaration: Attachment to Response
25 That Was Filed on Feb. 19, 2013”). Defendant Floria has objected to Plaintiff’s statement, as
26 beyond the scope of the complaint and beyond the scope of judicial notice. *See* Doc. No. 29-3.
27 Because Plaintiff has not alleged that he could tender the full amount owing to Defendant,
28 Plaintiff’s statements would not alter the Court’s decision.

¹³ The Court refers Plaintiff to the Civil Local Rules governing *ex parte* communications, and
especially Civil Local Rule 11-4, cmt. (c) (prohibiting *ex parte* communication between a party and
the Court, except as authorized by the Local Rules or ordered by the Court). The Court further
notes that the Code of Conduct for United States Judges generally bars a judge from initiating,
permitting, or considering *ex parte* communications, with certain exceptions not relevant here. *See*
Code of Conduct for U.S. Judges, Canon 3.

1 name Defendant Salazar. *Id.* Based on the caption, the Court construes this filing as a further
2 motion in the instant action, (1) seeking a constructive trust; (2) alleging a new cause of action of
3 “malicious abuse of process”; and (3) requesting a change of venue. As discussed below, the Court
4 DENIES this motion.

5 **1. Request for a Constructive Trust**

6 Plaintiff seeks a constructive trust “because all of his records are located at [the Property],
7 and plaintiff needs these records to prosecute his usury fraud lawsuits, and if they evict him from
8 his property. Plaintiff is disabled, and he his wife [sic], and his disabled son will have to live in a
9 shelter and he won’t access [sic] to his records to fight his usury fraud lawsuits.” *Id.* at 2.

10 A constructive trust is “an equitable remedy that compels the transfer of wrongfully held
11 property to its rightful owner.” *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 908-09 (9th Cir.
12 2010). In order to seek a constructive trust, Plaintiff must show “(1) the existence of a *res*
13 (property or some interest in property); (2) the right of a complaining party to that *res*; and (3)
14 some wrongful acquisition or detention of the *res* by another party who is not entitled to it.”
15 *Communist Party of U.S. v. 522 Valencia, Inc.*, 35 Cal.App.4th 980, 990 (1995); *see also* Cal. Civ.
16 Code § 2223. Plaintiff’s request for a constructive trust was not included in Plaintiff’s complaint,
17 and is not properly before the Court. Moreover, as discussed above, Plaintiff has thus far failed to
18 plead facts sufficient to allege the wrongful acquisition of the Property, and this action has been
19 dismissed. The Court therefore DENIES Plaintiff’s request. However, because this legal theory is
20 sufficiently related to the facts alleged in the initial complaint, Plaintiff is granted leave to include
21 this request for relief in an amended complaint, if Plaintiff can make the showing necessary for a
22 constructive trust as set forth above.

23 **2. Malicious Abuse of Process**

24 Regarding the allegation of malicious abuse of process, Plaintiff concedes that he would
25 need to prove that the Defendant (1) entertained an ulterior motive in using the process and (2)
26 committed a willful act in a wrongful manner. *See* Doc. No. 32 at 4 (citing *Coleman v. Gulf*
27 *Insurance Group*, 41 Cal.3d 782, 792 (1986)). *Cf. Rusheen v. Cohen*, 37 Cal. 4th 1048, 1056-57,
28

1 128 P.3d 713, 718 (2006) (“The common law tort of abuse of process arises when one uses the
2 court's process for a purpose other than that for which the process was designed.”) California
3 courts have recognized that a claim for abuse of process “requires an act outside the purpose of the
4 process.” *See Brown v. Kennard*, 94 Cal. App. 4th 40, 44 (2001).

5 Plaintiff’s “malicious abuse of process” motion appears to assert a new cause of action that
6 was not included in the original complaint, and is thus not properly before the Court. The Court
7 notes that no allegations in the complaint support the existence of an ulterior motive in Defendant’s
8 use of any court’s process, and thus this cause of action would not be proper to include in the
9 amended complaint. Moreover, abuse of process claims arising out of allegations of a violation of
10 an automatic stay are foreclosed by the Court’s dismissal with prejudice of that claim. Lastly, the
11 Court explicitly rejects Plaintiff’s suggestion that Defendant’s reliance on the *Rooker-Feldman*
12 doctrine is an “abuse of process,” ECF No. 32, at 6. Defendant’s citation to this doctrine is neither
13 a wrongful act nor indicative of any ulterior motive. The Court thus DENIES Plaintiff’s motion for
14 malicious abuse of process without prejudice.

15 3. Change of Venue

16 Plaintiff also sought to transfer venue to the United States District Court of Northern
17 California San Francisco. *See* Doc. No. 32 at 8. However, Plaintiff withdrew that request orally at
18 the April 11 hearing, and through a notice filed with the Court on April 12, 2013. *See* Doc. No. 44.
19 Therefore, the Court DENIES as moot Plaintiff’s request for change of venue.

20 IV. CONCLUSION

21 The Court GRANTS Defendant’s motion to dismiss and DISMISSES the complaint with
22 respect to all Defendants, as set forth above. Plaintiff may file an amended complaint consistent
23 with this order within 21 days. A failure to meet the 21 day deadline to file an amended complaint,
24 or to address the issues identified in this order will result in a dismissal of this case with prejudice.
25 As discussed above, the Court DENIES Plaintiff’s post-eviction motions.

26 **IT IS SO ORDERED.**

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Dated: April 19, 2013

Lucy H. Koh

LUCY H. KOH
United States District Judge