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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GILBERT CHAVEZ,
Plaintiff,
v.
CITIMORTGAGE, INC.
Defendant.

Case No. 17-cv-01205 NC

**ORDER DENYING IN PART, AND
GRANTING IN PART,
CITIMORTGAGE'S MOTION TO
DISMISS WITH LEAVE TO
AMEND**

Re: Dkt. No. 8

Plaintiff Gilbert Chavez's home was foreclosed upon by defendant CitiMortgage, Inc. Though his complaint seeks relief on a number of grounds, the heart of his complaint is his allegation that while he diligently sought to obtain a loan modification from his mortgage servicer, CitiMortgage, CitiMortgage was playing both hands. On one hand it worked with him on his loan modification while on the other it unlawfully proceeded with the foreclosure process.

As drafted, Chavez's complaint states a claim only under Cal. Civil Code § 2923.6. The motion to dismiss that claim is DENIED. All other claims are DISMISSED WITH LEAVE TO AMEND.

I. BACKGROUND

A. Factual Allegations

Chavez is the former homeowner of a property in San Jose, California. Dkt. No. 1-
Case No. 17-cv-01205 NC

1 1 (Complaint) at 4. CitiMortgage previously served, and apparently still serves, as a
2 mortgage servicer for the property. Dkt. No. 9-1 at 59, 64.¹ As of around May 2016,
3 Chavez no longer was able to make payments on his mortgage loan due to financial
4 hardship. Dkt. No. 1-1 at 5. Per Chavez, beginning in April 2016, he began seeking a loan
5 modification from CitiMortgage, and “sent all requested documentation and forms
6 attendant to submitting a complete loan modification application.” *Id.* at 6. The
7 representations from CitiMortgage allegedly stated that if he entered into a loan
8 modification with CitiMortgage, he could avoid foreclosure. *Id.* Chavez allegedly relied
9 on these representations such that he took no other steps to avoid foreclosure. *Id.*

10 What followed were a series of exchanges between Chavez, his single point of
11 contact within CitiMortgage, Danny Trevino, and CitiMortgage. These exchanges resulted
12 in repeated requests for the same or new documentation over a period of approximately six
13 months, Chavez’s alleged furnishing of the documents, and the foreclosure of Chavez’s
14 home. *Id.* at 7-14. Chavez alleges that at no point did CitiMortgage ever inform him it
15 denied his loan modification. *Id.* at 14. Chavez’s home was sold on December 28, 2016 to
16 U.S. Bank Association as trustee for CMALT REMIC Series 2007-A5 - REMIC PASS-
17 THROUGH CERTIFICATES SERIES 2007-A5. Dkt. No. 9-1 at 64 (“Trustee’s Deed
18 Upon Sale”).²

19 Chavez informed Trevino of his home’s sale, because Trevino thought Chavez was
20 still in the loan modification process. *Id.* at 15. On or about January 27, 2017,
21 CitiMortgage provided Chavez with a three-day eviction notice to quit his property. *Id.*

23 ¹ CitiMortgage requests judicial notice of recorded documents tracing the chain of title of
24 the property. The Court GRANTS CitiMortgage’s request for judicial notice, observing
25 that all of the documents requested to be noticed are undisputed and in the public record as
26 recorded documents. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (citing
27 Fed. R. Evid. 201). The Court notes the documents’ existences in the public record, not
28 necessarily the truth of their contents.

² The complaint states two different dates on which the Trustee’s sale was held. First, it
states that the sale was to occur on December 28, 2016. Dkt. No. 1-1 at 13. Then, it states
that the sale occurred on December 8, 2016. *Id.* at 14. Based on the judicially noticeable
documents filed with the Court, the Court accepts the December 28, 2016 date based on
the Trustee’s Deed Upon Sale.

1 Chavez still resides on the property.

2 **B. Procedural History**

3 Chavez filed this case in Santa Clara County Superior Court on February 6, 2017,
4 and CitiMortgage timely removed this case based on diversity jurisdiction on March 8,
5 2017. Dkt. No. 1. Chavez alleges claims for (1) breach of contract, (2) breach of covenant
6 of good faith and fair dealing, (3) promissory estoppel, (4) fraudulent misrepresentation,
7 (5) wrongful foreclosure in violation of Cal. Civil Code § 2923.5, (6) dual tracking in
8 violation of Cal. Civil Code § 2923.6, (7) violations of Cal. Business and Professions Code
9 § 17200, (8) violations of the Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code
10 § 1788 *et. seq.*, and (9) quiet title. Dkt. No. 1-1. CitiMortgage filed a motion to dismiss
11 the complaint on March 15, 2017. Dkt. No. 8. Both parties consented to the jurisdiction of
12 a magistrate judge under 28 U.S.C. § 636(c). Dkt. Nos. 7, 15.

13 **II. LEGAL STANDARD**

14 **A. Federal Rule of Civil Procedure 12(b)(6)**

15 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal
16 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). On a
17 motion to dismiss, all allegations of material fact are taken as true and construed in the
18 light most favorable to the non-movant. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-
19 38 (9th Cir. 1996). The Court, however, need not accept as true “allegations that are
20 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re*
21 *Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Although a complaint need
22 not allege detailed factual allegations, it must contain sufficient factual matter, accepted as
23 true, to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,
24 550 U.S. 544, 570 (2007). A claim is facially plausible when it “allows the court to draw
25 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*
26 *v. Iqbal*, 556 U.S. 662, 678 (2009).

27 **B. Leave to Amend**

28 Under Federal Rule of Civil Procedure 15(a), a court should grant leave to amend

1 “when justice so requires,” because “the purpose of Rule 15. . . [is] to facilitate decision on
2 the merits, rather than on the pleadings or technicalities.” *Lopez*, 203 F.3d at 1127. A
3 court may deny leave to amend for several reasons, including “undue delay, bad faith, . . .
4 [and] futility of amendment.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048,
5 1052 (9th Cir. 2003).

6 **III. DISCUSSION**

7 CitiMortgage moves to dismiss the complaint in its entirety. Chavez opposes.

8 **A. Breach of Contract**

9 CitiMortgage first seeks to dismiss Chavez’s breach of contract claim. Under
10 California law, the elements of breach of contract are: “(1) the contract, (2) plaintiff’s
11 performance or excuse for nonperformance, (3) defendant’s breach, and (4) the resulting
12 damages to plaintiff.” *Reichert v. Gen. Ins. Co. of Am.*, 68 Cal. 2d 822, 830 (1968).

13 Chavez alleges that the breached contract is the original loan contract on his home, and
14 that the breach was of section 16 of the deed of trust, which states that the “rights and
15 obligations of the Security Instrument” are subject to applicable law. Dkt. No. 13 at 8. It
16 is unclear whether Chavez’s dual tracking allegations constitute a breach of contract based
17 on the vagueness of the language in the complaint. What is clear, however, is that Chavez
18 admitted in the complaint that at the time of the alleged breach, *he* was not performing on
19 the contract at issue because he had fallen behind on his loan payments. Dkt. No. 1-1 at
20 16. Thus, the breach of contract claim is DISMISSED WITHOUT PREJUDICE.

21 **B. Breach of the Covenant of Good Faith and Fair Dealing**

22 Second, CitiMortgage moves to dismiss Chavez’s breach of the covenant of good
23 faith and fair dealing. The duty of good faith and fair dealing is implied by law into every
24 contract, functioning “as a supplement to the express contractual covenants, to prevent a
25 contracting party from engaging in conduct which (while not technically transgressing the
26 express covenants) frustrates the other party’s rights to the benefits of the contract.”

27 *Gonzalez v. JPMorgan Chase Bank, N.A.*, No. 14-cv-02558 EMC, 2014 WL 5462550, at
28 *7 (N.D. Cal. Oct. 28, 2014) (quoting *Thrifty Payless, Inc. v. Americana at Brand, LLC*,

1 218 Cal. App. 4th 1230, 1244 (2013)).

2 This claim is DISMISSED WITHOUT PREJUDICE for the same reason that the
3 breach of contract claim was dismissed: Chavez also breached the contract. *Rosenfeld v.*
4 *JPMorgan Chase Bank, N.A.*, 732 F. Supp. 2d 952, 968 (N.D. Cal. 2010) (citing Judicial
5 Council of California Civil Jury Instruction 325) (the elements of a breach of the covenant
6 of good faith and fair dealing claim are: “(1) the parties entered into a contract; (2) *the*
7 *plaintiff fulfilled his obligations under the contract*; (3) any conditions precedent to the
8 defendant’s performance occurred; (4) the defendant unfairly interfered with the plaintiff’s
9 rights to receive the benefits of the contract; and (5) the plaintiff was harmed by the
10 defendant’s conduct” (emphasis added)).

11 **C. Promissory Estoppel**

12 Third, CitiMortgage moves to dismiss Chavez’s promissory estoppel claim.
13 “Promissory estoppel requires: (1) a promise that is clear and unambiguous in its terms; (2)
14 reliance by the party to whom the promise is made; (3) the reliance must be reasonable and
15 foreseeable; and (4) the party asserting the estoppel must be injured by his or her reliance.”
16 *Boon Rawd Trading Int’l Co. v. Paleewong Trading Co.*, 688 F. Supp. 2d 940, 953 (N.D.
17 Cal. 2010). A promise must be “sufficiently definite to support promissory estoppel.”
18 *Garcia v. World Sav., FSB*, 183 Cal. App. 4th 1031, 1045 (2010). “To be enforceable, a
19 promise need only be definite enough that a court can determine the scope of the duty, and
20 the limits of performance must be sufficiently defined to provide a rational basis for the
21 assessment of damages.” *Id.* The promise at issue here is CitiMortgage’s alleged April
22 2016 “offer” to Chavez to conduct a “good faith review of a loan modification through the
23 submission of a completed [loan modification] application.” Dkt. No. 1-1 at 23. There
24 was no promise to actually grant a loan modification.

25 The Court stops at the first element. Even if Chavez can prove that CitiMortgage
26 failed to deliver on the alleged “offer” to conduct a “good faith review,” that failure is not
27 actionable as a matter of law. *Hosseini v. Wells Fargo Bank, N.A.*, No. 13-cv-02066
28 DMR, 2013 WL 4279632, at *6 (N.D. Cal. Aug. 9, 2013) (“The only promise made by

1 Defendant that Plaintiffs identify is the statement that it would provide a ‘good faith
2 evaluation’ of the loan modification application. Although this representation implies
3 something about the future, it is not a clear, unambiguous, enforceable promise that would
4 support a promissory estoppel claim.”); *accord Alvarez v. Nationstar Mortg. LLC*, No. 15-
5 cv-04204 BLF, 2017 WL 1153029, at *4 (N.D. Cal. Mar. 28, 2017). If Chavez wishes to
6 replead this claim, the alleged promise in that claim must be “clear and unambiguous in its
7 terms.” *Boon Rawd*, 688 F. Supp. 2d at 953. The promissory estoppel claim is
8 DISMISSED WITHOUT PREJUDICE.

9 **D. Fraudulent Misrepresentation**

10 Fourth, CitiMortgage moves to dismiss Chavez’s fraudulent misrepresentation
11 claim. The elements of fraudulent misrepresentation under California law are: “(1) the
12 defendant misrepresents material facts; (2) with knowledge of the falsity of the
13 representations or the duty of disclosure; (3) with intent to defraud or induce reliance; (4)
14 which induces justifiable reliance by the plaintiff; (5) to his or her detriment.” *Terra Ins.*
15 *Co. v. N.Y. Life Inv. Mgmt. LLC*, 717 F. Supp. 2d 883, 890 (N.D. Cal. 2010) (citing *Hahn*
16 *v. Mirda*, 147 Cal. App. 4th, 740, 748 (2007)).

17 A plaintiff bringing a claim for fraud must plead “with particularity the
18 circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). The pleading must “be
19 specific enough to give defendants notice of the particular misconduct . . . so that they can
20 defend against the charge and not just deny that they have done anything wrong.” *Sanford*
21 *v. Memberworks, Inc.*, 625 F.3d 550, 558 (9th Cir. 2010). To avoid dismissal, “the
22 complaint must describe the time, place, and specific content of the false representations
23 and identify the parties to the misrepresentations.” *NavCom Tech., Inc. v. Oki Elec. Indus.*
24 *Co., Ltd.*, No. 12-cv-04175 EJD, 2014 WL 991102, at *4 (N.D. Cal. Mar. 11, 2014).

25 The allegations in the complaint do not meet the heightened pleading requirements
26 of Rule 9(b). The fraud allegations boil down to CitiMortgage’s having allowed Chavez to
27 file a loan modification application, Mr. Trevino telling him nothing else needed to be
28 filed, and CitiMortgage’s later foreclosure on his home less than seven days after

1 informing him that his application was no longer under review. Dkt. No. 1-1 at 27-29. It
2 is unclear which representations made to Chavez by CitiMortgage or Mr. Trevino were
3 false. All the complaint says to this effect is that “Defendant has repeatedly made
4 representations to Plaintiff that it knew or should have known were deliberately and
5 detrimentally misleading.” *Id.* at 29. The Court is at a loss to guess which representations
6 were misleading. The other elements of fraudulent misrepresentation are likewise
7 insufficiently pled because it is unclear which misrepresentations were knowingly made,
8 the intent behind them, and Chavez’s justifiable reliance on such misrepresentations. *See*
9 *Alvarez*, 2017 WL 1153029, at *4. Thus, the fraudulent misrepresentation claim is
10 DISMISSED WITHOUT PREJUDICE.

11 **E. Wrongful Foreclosure**

12 Fifth, Chavez’s wrongful foreclosure claims are twofold, and bear more discussion.

13 **1. Tender Rule**

14 As to CitiMortgage’s argument that Chavez’s wrongful foreclosure claims fail
15 because he failed to allege that he was willing to tender the full loan proceeds, the Court
16 rejects this argument. Dkt. No. 8 at 17. There are four exceptions to the tender rule. *Lona*
17 *v. Citibank, N.A.*, 202 Cal. App. 4th 89, 112 (2011). As relevant here, one exception is that
18 “a tender may not be required where it would be inequitable to impose such a condition on
19 the party challenging the sale.” *Id.* at 113 (citation omitted). This is because “[c]ase law
20 requiring payment or tender of the full amount of payment before any foreclosure sale can
21 be postponed . . . arises out of a paradigm where, *by definition*, there is no way that a
22 foreclosure sale can be avoided absent payment of all the indebtedness.” *Majd v. Bank of*
23 *Am., N.A.*, 243 Cal. App. 4th 1293, 1306 (2015), *as modified* (Jan. 14, 2016) (emphasis in
24 original). In *Majd*, for example, the California court allowed claims for wrongful
25 foreclosure and under the Unfair Competition Law to survive on these grounds despite the
26 fact that the debtors could not tender the full loan amount. *Id.* The Court does the same
27 here, despite Chavez’s failure to allege “prejudice in that he may have been able to avoid
28 the foreclosure had [CitiMortgage] completed the modification review process in good

1 faith.” *Id.* at 1307. The Court will not throw out these claims on a technical deficiency in
2 the complaint. However, in the amended complaint, Chavez must plead that he suffered
3 prejudice in CitiMortgage not having completed the loan modification review process.

4 Chavez presents two theories of wrongful foreclosure. He alleges that CitiMortgage
5 violated Cal. Civil Code § 2923.5 and § 2923.6.

6 **2. Cal. Civil Code § 2923.5**

7 CitiMortgage moves to dismiss Chavez’s claim under Cal. Civil Code § 2923.5
8 because it provided a recorded declaration attached to the notice of default attesting to its
9 compliance with an analogous Cal. Civil Code provision. Dkt. No. 8 at 18. Chavez
10 contends he stated a claim under this statute because CitiMortgage did not fulfill its duty to
11 provide him with options to avoid foreclosure. Dkt. No. 13 at 12.

12 As relevant here, § 2923.5 requires a “mortgage servicer, mortgagee, trustee,
13 beneficiary, or authorized agent” to “contact the borrower in person or by telephone in
14 order to assess the borrower’s financial situation and explore options for the borrower to
15 avoid foreclosure” before recording a notice of default. Cal. Civ. Code § 2923.5.
16 CitiMortgage presented to the Court a declaration tracking an analogous code section, with
17 identical language, dated April 5, 2016. Dkt. No. 9-1 at 59 (“California Declaration of
18 Compliance, Cal. Civ. Code § 2923.55(c)” stating, “The mortgage servicer has contacted
19 the borrower pursuant to California Civil Code § 2923.55(b)(2) to ‘assess the borrower’s
20 financial situation and explore options for the borrower to avoid foreclosure.’”). Section
21 2923.55(b)(2) requires a mortgage servicer to “contact the borrower in person or by
22 telephone in order to assess the borrower’s financial situation.”

23 The notice of default was not recorded until May 3, 2016. *Id.* at 56. The timing of
24 the declaration, the notice of default, and Chavez’s own allegations undermine any claim
25 for violations of § 2923.5 because, consistent with the declaration, Chavez alleges in the
26 complaint that “in April of 2016, [CitiMortgage] did offer [Chavez] an opportunity for a
27 good faith review of a loan modification through the submission of a completed
28 application.” Dkt. No. 1-1 at 30. Chavez’s opposition defending the viability of this claim

1 is devoid of factual or legal authority. Thus, this claim is DISMISSED WITHOUT
2 PREJUDICE.

3 **3. Cal. Civil Code § 2923.6**

4 Chavez alleges CitiMortgage instituted “foreclosure proceedings against his
5 property while” CitiMortgage “claimed to be working with him on his loan modification
6 application.” Dkt. No. 1-1 at 33. CitiMortgage contends that because Chavez did not
7 submit a complete loan modification application, this claim fails. Dkt. No. 8 at 19.

8 Dual tracking “occurs when a financial institution ‘continue[s] to pursue foreclosure
9 even while evaluating a borrower’s loan modification application.’” *Foronda v. Wells
10 Fargo Home Mortg., Inc.*, No. 14-cv-03513 LHK, 2014 WL 6706815, at *6 (N.D. Cal.
11 Nov. 26, 2014) (quoting *Rockridge Trust v. Wells Fargo, N.A.*, 985 F. Supp. 2d 1110, 1149
12 (N.D. Cal. 2013)). The prohibition against dual tracking is codified at California Civil
13 Code § 2923.6(c). Section 2923.6(c) provides that “[i]f a borrower submits a complete
14 application for a first lien loan modification offered by, or through, the borrower’s
15 mortgage servicer, a mortgage servicer . . . shall not record a notice of default or notice of
16 sale, or conduct a trustee’s sale, while the complete first lien loan modification application
17 is pending.” “[A]n application shall be deemed ‘complete’ when a borrower has supplied
18 the mortgage servicer with all documents required by the mortgage servicer within the
19 reasonable timeframes specified by the mortgage servicer.” Cal. Civ. Code § 2923.6(h).

20 As relevant here, after a completed application is submitted to the mortgage
21 servicer, the servicer may not “conduct a trustee’s sale until any of the following occurs:
22 (1) The mortgage servicer makes a written determination that the borrower is not eligible
23 for a first lien loan modification, and any appeal period pursuant to subdivision (d) has
24 expired.” Subsection (d) provides that upon denial of an application, the borrower must be
25 given “at least 30 days from the date of the written denial to appeal the denial and to
26 provide evidence that the mortgage servicer’s determination was in error.” § 2923.6(d).

27 For purposes of this motion, Chavez sufficiently alleged he submitted a “complete”
28 application based on his allegations of CitiMortgage’s repeated requests for information

1 and his prompt compliance with these requests. Dkt. No. 1-1 at 6-14. While CitiMortgage
 2 was requesting additional information in September 2016, Chavez alleges that he “received
 3 a Notice of Trustee Sale informing that his property was scheduled to be sold on or about
 4 October 10, 2016.” *Id.* at 9. At about the same time, Chavez alleges, Mr. Trevino
 5 informed Chavez “that his application had now been provided to the underwriters for
 6 review,” and that “no further documentation was needed.” *Id.* Chavez was soon after told
 7 that his application was incomplete and that he needed to provide additional documents,
 8 which he did. *Id.* at 10, 12. Thus, this pattern of CitiMortgage requesting additional
 9 information it had already received while it rescheduled the trustee’s sale continued until
 10 late December. *Id.* at 10-14. Chavez alleges he sent CitiMortgage all information
 11 requested. *Id.* at 13-14. On December 21, 2016, CitiMortgage informed Chavez that his
 12 loan modification was no longer under review due to his failure to produce a stamped 2015
 13 tax document. *Id.* at 14.

14 Though the Court agrees that Chavez did not explicitly state he submitted the
 15 stamped 2015 tax document, *see* dkt. no. 19 at 6, at the motion to dismiss stage, the Court
 16 construes all allegations of material fact in the light most favorable to Chavez. *Cahill*, 80
 17 F.3d at 337-38. Chavez’s repeated protestations that he complied with all requests for
 18 documents are construed as true. The Court will find for purposes of this motion that
 19 Chavez submitted a completed application. Because Chavez allegedly submitted a
 20 completed application, he has stated a claim for relief under § 2923.6 because (1) his
 21 application was never formally denied, and (2) even if it was denied, he was given no
 22 opportunity to appeal that denial pursuant to § 2923.6(d). Yet Chavez is warned that if he
 23 cannot show he submitted a completed loan modification application to CitiMortgage, his
 24 claim for violations of § 2923.6 will be dismissed.

25 **F. Unfair Competition Law**

26 Sixth, Chavez alleges a violation of California Unfair Competition Law (UCL), Cal.
 27 Bus. & Prof. Code § 17200. Section 17200 prohibits “any unlawful, unfair or fraudulent
 28 business act or practice.” Cal. Bus. & Prof. Code § 17200. A private person has standing

1 to sue for relief from unfair competition only if that person suffered injury in fact and lost
2 money or property as a result of the unfair competition. Cal. Bus. & Prof. Code § 17204;
3 *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223, 227 (2006). To have
4 standing, a plaintiff must sufficiently allege that (1) he has “lost ‘money or property’
5 sufficient to constitute an ‘injury in fact’” and (2) there is a “causal connection” between
6 the defendant’s alleged UCL violation and the plaintiff’s injury. *Rubio v. Capital One*
7 *Bank*, 613 F.3d 1195, 1203-04 (9th Cir. 2010) (citations omitted); *see also Alvarez*, 2017
8 WL 1153029, at *9. Chavez failed to allege any loss of money or property in the
9 complaint other than providing the bare assertion that because of CitiMortgage, he suffered
10 “various damages and injuries, including the cost of attempting to prevent the loss of title
11 to the Property.” *See* Dkt. No. 1-1 at 36-38. Such allegations are insufficient to constitute
12 an injury in fact. The Court DISMISSES this claim WITHOUT PREJUDICE because
13 Chavez may be able to amend this claim to state a claim under the “unfair” prong of the
14 UCL, or the “unlawful” or fraudulent” prongs.

15 **G. Rosenthal Fair Debt Collection Practices Act**

16 Seventh, Chavez alleges a violation of the Rosenthal Fair Debt Collection Practices
17 Act (RFDCPA). Chavez asserts CitiMortgage “knowingly made false and misleading
18 statements to [Chavez] in an attempt to collect a debt. . . . Specifically, [CitiMortgage] told
19 [Chavez] that, if [Chavez] entered and completed a loan modification application with [it]
20 and forwent other avenues for foreclosure avoidance, [CitiMortgage] would halt
21 [Chavez’s] foreclosure for good faith review of the application.” Dkt. No. 1-1 at 39-40.
22 CitiMortgage moves to dismiss this claim.

23 The RFDCPA forbids creditors and debt collectors from making false, deceptive, or
24 misleading representations in an effort to collect a debt. Cal. Civ. Code § 1788, *et seq.* A
25 “debt collector” is “any person who, in the ordinary course of business, regularly, on
26 behalf of himself or herself or others, engages in debt collection.” Cal. Civ. Code, §
27 1788.2(c).

28 The Court first notes that “offering an evaluation of a loan modification application

1 or performing a foreclosure proceedings are not debt collection activities.” *Alvarez*, 2017
 2 WL 1153029, at *10; *Rosal v. First Fed. Bank of California*, 671 F. Supp. 2d 1111, 1135
 3 (N.D. Cal. 2009). Defendant argues this point, and in opposition, Chavez alleges that his
 4 RFDCPA claim is not based on CitiMortgage’s foreclosure efforts, but rather on its “debt
 5 collection efforts.” Dkt. No. 13 at 15. Chavez urges the Court to rely on *Ohlendorf v. Am.*
 6 *Home Mortg. Servicing*, 279 F.R.D. 575 (E.D. Cal. 2010), which another court in a nearly
 7 identical case with nearly identical factual allegations, also filed by Chavez’s counsel,
 8 already found inapposite under these circumstances. *Alvarez*, 2017 WL 1153029, at *10
 9 (“the plaintiff in *Ohlendorf* made specific allegations that the defendant made ‘false reports
 10 to credit reporting agencies,’ falsely stated the amount of debt, and falsely stated a debt
 11 was owed, all in an effort to collect payment from the plaintiff. [citation omitted] In
 12 contrast, the SAC relies only on the allegations that Nationstar offered Alvarez an
 13 opportunity to complete a loan modification application and to delay a foreclosure
 14 proceeding”).

15 Chavez has not alleged which provision of the RFDCPA CitiMortgage violated. Nor
 16 has he alleged that CitiMortgage is a “debt collector.” The Court DISMISSES the
 17 RFDCPA claim WITHOUT PREJUDICE.

18 **H. Quiet Title**

19 Lastly, Chavez brings a claim to quiet title. To state a claim for quiet title under
 20 California law, the plaintiff must include the following in the complaint:

- 21 (a) A description of the property that is the subject of the action;
- 22 (b) The title of the plaintiff as to which a determination under
- 23 this chapter is sought and the basis of the title; (c) The adverse
- 24 claims to the title of the plaintiff against which a determination
- is sought; (d) The date as of which the determination is sought;
- (e) A prayer for the determination of the title of the plaintiff
- against the adverse claims.

25 *Wong v. First Magnus Fin. Corp.*, No. 09-cv-01612 RMW, 2009 WL 2580353, at *4 (N.D.
 26 Cal. Aug. 20, 2009) (citing Cal. Code Civ. P. § 761.020). Courts have clarified that “[a]
 27 mortgagor cannot quiet his title against the mortgagee without paying the debt secured.”
 28 *Shimpones v. Stickney*, 219 Cal. 637, 649 (1934). Thus, tender is required to maintain an

1 action to quiet title unless the “borrower challenges the validity of the underlying debt.”
2 *Lona*, 202 Cal. App. 4th at 112. Here, Chavez did not allege he tendered the remaining
3 balance on his mortgage loan before or after his home was foreclosed upon. Nor did he
4 allege the underlying mortgage loan was invalid, for example, that it was predatory, or that
5 Chavez lacked the capacity to enter into the loan. As a result, the Court DISMISSES
6 WITHOUT PREJUDICE, Chavez’s quiet title claim.

7 **IV. CONCLUSION**

8 For the reasons stated above, the Court DENIES IN PART, and GRANTS IN
9 PART CitiMortgage’s motion to dismiss Chavez’s complaint WITH LEAVE TO
10 AMEND. Consistent with this order, the amended complaint must be filed by June 7,
11 2017. Chavez may not add additional claims or parties absent leave of Court.
12 CitiMortgage need not answer the complaint until Chavez files an amended complaint or
13 files notice that he will not amend.

14
15 **IT IS SO ORDERED.**

16
17 Dated: May 17, 2017



NATHANAEL M. COUSINS
United States Magistrate Judge