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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 TIMOTHY J. WELLMAN,

12 Plaintiff,

13 v.

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15 FIRST FRANKLIN HOME LOAN
16 SERVICES,

17 Defendant.

CASE NO. 09 CV 1257 JM (NLS)

ORDER:

**1) GRANTING IN PART AND
DENYING IN PART
DEFENDANT'S MOTION TO
DISMISS; and
2) REMANDING TO STATE
COURT**

Doc. No. 4

18 On April 28, 2009, Plaintiff Timothy J. Wellman ("Plaintiff"), appearing *pro se*, filed a breach
19 of contract action in state court, raising claims arising out of a mortgage transaction. (Doc. No. 1,
20 Exh. 1, "Compl.") Defendant Home Loan Services ("HLS"), erroneously sued as First Franklin Home
21 Loan Services, removed the action to federal court based on federal question jurisdiction. (Doc. No.
22 1.) Although Plaintiff's form complaint noted causes of action for breach of contract and violations
23 of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, it also referred to violations of the
24 Home Ownership and Equity Protection Act ("HOEPA"), 15 U.S.C. § 1602 *et seq.*, the Real Estate
25 Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2605 *et seq.*, the Home Mortgage Disclosure Act
26 ("HMDA"), 12 U.S.C. § 2801, and the "Consumer Protection Act."¹ (Compl. at 2.) Attached to the
27

28 ¹ Although HLS argues federal questions are presented within the context of Plaintiff's breach
of contract claim, the court construes the Complaint as reciting separate federal law claims.

1 Complaint is a “Mortgage Loan Audit & Loan Review” allegedly performed by Real Estate Attorney
2 Support Services. (Compl., “Audit.”)

3 Pending before the court is HLS’s Motion to Dismiss Plaintiff’s Complaint for failure to state
4 a claim pursuant to Federal Rule of Civil Procedure (“Rule”) 12(b)(6). (Doc. No. 4, “Mot.”)
5 Defendant’s motion was accompanied by a Request for Judicial Notice. (Doc. No. 5, “RJN.”) To
6 date, Plaintiff has filed no opposition nor a statement of non-opposition as required by Civil Local
7 Rule 7.1. When an opposing party does not file papers in the manner required by Civ.L.R. 7.1(d)(2),
8 the court may deem the failure to “constitute a consent to the granting of a motion or other request for
9 ruling by the court.” Civ.L.R. 7.1(f)(3)(c). Notwithstanding Plaintiff’s failure to respond, the court
10 reviews the motion on the merits to ensure dismissal is appropriate. Pursuant to Civ.L.R. 7.1(d), this
11 matters was taken under submission by the court without oral argument on July 24, 2009.

12 For the reasons set forth below, the court **GRANTS** Defendants’ motion to dismiss.

13 **I. BACKGROUND**

14 On November 9, 2006, Plaintiff purchased his primary residence at 2041 Zlatibor Ranch Road,
15 Escondido, California (the “Property”) with a loans of \$1,320,000 and \$300,000 from lender First
16 Franklin.² (Audit at 1, 5, 9; RJN, Exh. 1.) The loans were secured by two deeds of trust on the
17 Property, which were recorded on November 14, 2006. (RJN, Exhs. 1-2.)

18 Plaintiff’s Complaint itself alleges only that, “[b]ased on a professional forensic loan audit &
19 review, at a min., the defendant has violated the Truth-in-Lending Act. The APR and Finance Charge
20 were deceptively and fraudulently disclosed to the plaintiff.” (Compl. at 2.) The Audit alleges
21 improper or lacking TILA disclosures regarding nonrefundable fees, the terms and mechanism for rate
22 changes for adjustable rate mortgages, the annual percentage rate and finance charges applicable to
23 Plaintiff’s loan, and the total amount payable over the life of the loan. (Audit at 3, 7-8.) The Audit
24 did not test RESPA compliance and concludes HOEPA’s provisions do not apply to the loan. (Audit
25 at 12-13.) Nevertheless, the Audit opines the violations “include but are not limited to, the Truth in
26 Lending Act, Consumer Protection Act, Real Estate Settlement Procedures Act, the Home Ownership
27 and Equity Protection Act, and the Home Mortgage Disclosure Act.” (Audit at 1.) Plaintiff seeks

28 ² It appears the Audit reviewed only the loan for \$1,320,000 and not the second loan.

1 damages of \$1,600,000 plus interest and attorney's fees (despite the fact he is unrepresented).
2 (Compl. at 2.)

3 **II. DISCUSSION**

4 **A. Legal Standards**

5 A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the pleadings. De
6 La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir. 1978). In evaluating the motion, the court must construe
7 the pleadings in the light most favorable to the plaintiff, accepting as true all material allegations in
8 the complaint and any reasonable inferences drawn therefrom. See, e.g., Broam v. Bogan, 320 F.3d
9 1023, 1028 (9th Cir. 2003). While Rule 12(b)(6) dismissal is proper only in "extraordinary" cases,
10 the complaint's "factual allegations must be enough to raise a right to relief above the speculative
11 level..." U.S. v. Redwood City, 640 F.2d 963, 966 (9th Cir. 1981); Bell Atlantic Corp. v. Twombly,
12 550 US 544, 555 (2007). The court should grant 12(b)(6) relief only if the complaint lacks either a
13 "cognizable legal theory" or facts sufficient to support a cognizable legal theory. Balistreri v. Pacifica
14 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

15 In testing the complaint's legal adequacy, the court may consider material properly submitted
16 as part of the complaint or subject to judicial notice. Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th
17 Cir. 2007). Under the "incorporation by reference" doctrine, the court may refer to documents "whose
18 contents are alleged in a complaint and whose authenticity no party questions, but which are not
19 physically attached to the [plaintiff's] pleading." Janas v. McCracken (In re Silicon Graphics Inc. Sec.
20 Litig.), 183 F.3d 970, 986 (9th Cir. 1999) (internal quotation marks omitted). Consideration of matters
21 of public record "does not convert a Rule 12(b)(6) motion to one for summary judgment." Mack v.
22 South Bay Beer Distributors, 798 F.2d 1279, 1282 (9th Cir. 1986), abrogated on other grounds by
23 Astoria Fed. Sav. and Loan Ass'n v. Solimino, 501 U.S. 104, 111 (1991). To this end, the court
24 considers the first Deed of Trust, as sought by Defendants in their Request for Judicial Notice.³ (RJN,
25 Exh. 1.)

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28 ³ Because the Audit, and thus Plaintiff's Complaint, address only the \$1,320,000 loan, the court
need not consider the second Deed of Trust (RJN, Exh. 2) in ruling on the instant motion.

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