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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ELEAZAR SALAZAR,

Plaintiff,

v.

ACCREDITED HOME LENDERS,
INC., et al.,

Defendants.

CASE No: 10-CV-0319W (AJB)

**ORDER GRANTING IN-PART
AND DENYING IN-PART
DEFENDANTS' MOTION TO
DISMISS [DOC. 4] AND
GRANTING DEFENDANTS'
MOTION TO STRIKE [DOC. 5]**

On February 9, 2009, Plaintiff Eleazar Salazar filed this lawsuit against Accredited Home Lenders, Inc., Litton Loan Servicing, Inc., Quality Loan Service Corporation, Mortgage Electronic Registration Systems, Inc., and U.S. Bank National Association. On February 16, 2010, U.S. Bank and Litton ("Defendants") moved to dismiss and strike the Complaint. Plaintiff has opposed the motions.

The Court decides the matter on the papers submitted and without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the following reasons, the Court **GRANTS IN-PART** and **DENIES IN-PART** Defendants' motion to dismiss (Doc. 4) and **GRANTS** Defendants' motion to strike (Doc. 5).

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1 **I. BACKGROUND**

2 In October 2005, Plaintiff obtained a mortgage loan from Defendants to refinance
3 real property located at 1268 Emerald Way, Calexico, California. (*Not. of Removal*
4 (*NOR*) [Doc. 1¹], 6:27; *see also Mt. to Dismiss (MTD)* [Doc. 4], 1:11.) In early 2009,
5 Plaintiff began having difficulty making payments on his mortgage, and on May 7, 2009,
6 Defendants served Plaintiff with a “Notice of Default And Election to Sell Under Deed
7 of Trust.” (*Request for Judicial Not. (RJN)* [Doc. 6-2], Ex. B.)

8 On January 5, 2010, Plaintiff filed a civil action in the Superior Court of Imperial
9 County (Case No. ECU05622) asserting sixteen claims against the Defendants,
10 including (1) Violation of the Truth in Lending Act (TILA), 15 U.S.C. § 1601;
11 (2) Violation of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601;
12 (3) Violation of Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692; (4)
13 Quiet Title; (5) Wrongful Foreclosure; (6) Order to Set Aside Trustee’s Sale;
14 (7) Cancellation of Trustee’s Deed; (8) Slander of Title; (9) Civil Conspiracy;
15 (10) Unfair Business Practices; (11) Violation of RICO, 18 U.S.C. § 1961;
16 (12) Imposition of Constructive Trust; (13) Fraud; (14) Violation of California Civil
17 Code § 2923.5; (15) Violation of California Civil Code § 2923.6; and (16) Breach of
18 Contract.

19 On February 9, 2010, Defendants removed the case to this Court. On February
20 16, 2010, Defendants moved to dismiss and strike.

21
22 **II. MOTION TO DISMISS - RULE 12(B) (6)**

23 **A. Legal Standard.**

24 The court must dismiss a cause of action for failure to state a claim upon which
25 relief can be granted. Fed.R.Civ.P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)
26 tests the complaint’s sufficiency. See North Star Int’l v. Arizona Corp. Comm’n., 720
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¹All docket references refer to Case No. 10-CV-0319W (AJB)

1 F.2d 578, 581 (9th Cir. 1983). All material allegations in the complaint, “even if
2 doubtful in fact,” are assumed to be true. Id. The court must assume the truth of all
3 factual allegations and must “construe them in light most favorable to the nonmoving
4 party.” Gompper v. VISX, Inc., 298 F.3d 893, 895 (9th Cir. 2002); see also Walleri v.
5 Fed. Home Loan Bank of Seattle, 83 F.3d 1575, 1580 (9th Cir. 1996).

6 As the Supreme Court recently explained, “[w]hile a complaint attacked by a
7 Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s
8 obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels
9 and conclusions, and a formulaic recitation of the elements of a cause of action will not
10 do.” Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1964 (2007). Instead, the
11 allegations in the complaint “must be enough to raise a right to relief above the
12 speculative level.” Id. at 1964-65. A complaint may be dismissed as a matter of law
13 either for lack of a cognizable legal theory or for insufficient facts under a cognizable
14 theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984).

15 Generally, courts may not consider material outside the complaint when ruling
16 on a motion to dismiss. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d
17 1542, 1555 n.19 (9th Cir. 1990). However, courts may consider documents specifically
18 identified in the complaint whose authenticity is not questioned by parties. Fecht v.
19 Price Co., 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (superceded by statutes on other
20 grounds). Moreover, courts may consider the full text of those documents, even when
21 the complaint quotes only selected portions. Id. Courts may also consider material
22 properly subject to judicial notice without converting the motion into one for summary
23 judgment. Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994) (citing Mack v. South
24 Bay Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986); *abrogated on other grounds*
25 *by* Astoria Federal Savings and Loan Ass’n v. Solimino, 501 U.S. 104 (1991)).

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1 **B. Plaintiff's Claims for TILA and RESPA Violations are Time Barred.**

2 Defendants argue that Plaintiff's TILA and RESPA claims are time barred. The
3 Court agrees.

4 TILA damage claims are subject to a one-year statute of limitations. 15 U.S.C.
5 § 1640(e). TILA rescission claims are subject to a three-year statute of limitations. 15
6 U.S.C. § 1635(f). The statute runs from the consummation of the loan. Meyer v.
7 Ameriquist Mort. Co., 331 F.3d 1028 (9th Cir. 2003).

8 Here, although the Complaint indicates the loan was consummated in October
9 2005 (*see Compl.* ¶ 20-22), Plaintiff alleges in the opposition that the closing documents
10 were delivered a month late and, therefore, the mortgage actually closed "in mid to late
11 November 2005." (*Opp. to MTD* [Doc. 8], 6:2.) Giving Plaintiff the benefit of the
12 November 2005 closing, this lawsuit is time barred because it was filed in January, 2010,
13 over 4 years later. (*Compl.*, at p.1.)

14 Plaintiff argues, however, that because Plaintiff did not accept his demand for
15 rescission within the 3-year period, the limitations period is extended by one additional
16 year under 15 U.S.C. 1640(e). But even if the Court were to grant Plaintiff a one-year
17 extension under section 1640(e), because Plaintiff filed the lawsuit more than four years
18 later, the lawsuit would still be time barred.

19 Plaintiff also argues that equitable tolling should also be applied to the TILA
20 rescission claim. However, Plaintiff has failed to allege facts that suggest tolling is
21 applicable. Equitable tolling "applies in situations . . . 'where the complainant has been
22 induced or tricked by his adversary's misconduct into allowing the filing deadline to
23 pass.'" Velazquez v. GMAC Mortg. Corp., 605 F.Supp.2d 1049, 1061 (C.D.Cal. 2008)
24 (quoting O'Donnell v. Vencor, Inc., 465 F.3d 1063, 1068 (9th Cir. 2008)). Nowhere
25 does the Plaintiff claim that Defendants' "trickery" caused him to miss the TILA
26 deadline. Moreover, the Ninth Circuit has found that the rescission limitations period
27 is an "absolute limitation on rescission actions." Miguel v. Country Funding Corp, 309
28 F.3d 1161, 1164 (9th Cir. 2002). It represents a "statute of repose, depriving the courts

1 of subject matter jurisdiction when a [TILA] claim is brought outside the three-year
2 limitation period.” Id. Accordingly, Plaintiff’s TILA claims are time barred.²

3 Finally, Plaintiff’s RESPA claims are also subject to a one-year limitations period.
4 See 12 U.S.C. § 2614 (RESPA statute of limitations.) Because Plaintiff filed this lawsuit
5 more than four years after the loan was consummated, Plaintiff’s RESPA claims are also
6 time barred.

7
8 **C. Plaintiff Fails to Plead the Elements of a FDCPA Claim.**

9 Defendants argue that foreclosures are not covered by the FDCPA and,
10 therefore, Plaintiff’s claim fails. The Court agrees.

11 The declared purpose of FDCPA is to “eliminate abusive debt collection practices
12 by debt collectors . . . and to promote consistent state action to protect consumers
13 against debt collection abuses.” 15 U.S.C. § 1692. The FDCPA defines “debt” as “any
14 obligation or alleged obligation of a consumer to pay money arising out of a transaction
15 in which the money, property, insurance, or services which are the subject of the
16 transaction are primarily for personal, family, or household purposes, whether or not
17 such obligation has been reduced to judgment.” 15 U.S.C. § 1692a(5). In Hulse v.
18 Ocwen Fed. Bank, 195 F. Supp. 2d 1188 (D. Or. 2002), the district court held that
19 foreclosing on a deed of trust is distinct from the collection of a debt as defined by
20 FDCPA:

21
22 Foreclosing on a trust deed is distinct from the collection of the
23 obligation to pay money. The FDCPA is intended to curtail objectionable
24 acts occurring in the process of collecting funds from a debtor. But,
25 foreclosing on a trust deed is an entirely different path. Payment of funds
is not the object of the foreclosure action. Rather, the lender is
foreclosing its interest in the property.

26 Id. at 1204.

27
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² In the opposition, Plaintiff does not argue that his TILA damages claim is saved by
equitable tolling.

1 The Court agrees with this reasoning. Accordingly, because Plaintiff's lawsuit
2 arises from the foreclosure of his property (*see e.g. Compl.*, ¶ 6), Plaintiff has failed to
3 state a claim for violation of the FDCPA.

4
5 **D. Plaintiff Lacks Standing to Sue for Wrongful Foreclosure, Setting Aside**
6 **Trustee's Sale and Cancellation of Trustee's Deed.**

7 Defendants argue that Plaintiff lacks standing to pursue the state-based "causes
8 of action" for wrongful foreclosure, setting aside trustee's sale, and cancellation of
9 trustee's deed. The Court agrees.

10 It is well established under California law that a "valid and viable" tender of
11 payment for the debt owed is essential to an action to cancel a sale under a deed of trust.
12 Karlsen v. American Sav. & Loan Assn., 15 Cal.App.3d 112, 117 (Cal. Ct. App. 1971);
13 see also Copsey v. Sacramento Bank, 133 Cal. 659, 662 (Cal. 1901) ("an action to set
14 aside the sale, unaccompanied by an offer to redeem, would not state a cause of action
15 which a court of equity would recognize.") Here, there is no dispute that Plaintiff has
16 not alleged an ability to tender the debt.

17 Plaintiff nevertheless appears to argue that the tender requirement does not apply
18 because his "rescission is based on [TILA]. . ." (*Opp. to MTD*, 7:20.) This argument
19 is not persuasive for at least two reasons. First, Plaintiff's TILA claim has been
20 dismissed, and thus Plaintiff is not entitled to rescission under TILA. Second, and more
21 importantly, even if TILA does not require an ability to tender, the state-based claims
22 do. Because Plaintiff did not allege an ability to tender, he has failed to state claims for
23 wrongful foreclosure, setting aside trustee's sale, and cancellation of trustee's deed.

24
25 **E. Plaintiff's Slander of Title Claim Fail as a Matter of Law.**

26 Defendants argue that Plaintiff's slander of title claim fails because under the
27 California Civil Code, their communications with the Plaintiff were absolutely
28 privileged. The Court agrees.

1 Civil Code § 47(b) states in relevant part:

2 A privileged publication or broadcast is one made: . . . (b) in any (1)
3 legislative proceeding, (2) judicial proceeding, (3) in any other official
4 proceeding authorized by law, or (4) in the initiation or course of any
5 other proceeding authorized by law and reviewable pursuant to Chapter
6 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of
7 Civil Procedure . . .”

8 The legislature has expressly stated foreclosure proceedings fall within the protections
9 of this section. California’s Civil Code § 2924(d), states: “the following shall constitute
10 privileged communications pursuant to Section 47: (1) The mailing, publication, and
11 delivery of notices as required by this section. (2) Performance of the procedures set
12 forth in this article.”

13 Here, Plaintiff’s slander of title claim is based on Defendants’ communications in
14 connection with the foreclosure. (*See Compl.*, ¶ 83.) Accordingly, Defendants’
15 communications are privileged under section 47(b) and, therefore, cannot form the basis
16 of a slander of title action.³

17 **F. Plaintiff Fails to State a Claim of RICO or Fraud.**

18 Defendants argue that Plaintiff has failed to allege sufficient facts for a RICO or
19 fraud claim. The Court agrees.

20 Under Federal Rule of Civil Procedure 9(b), fraud claims must be pled with
21 particularity. In *In re GlenFed, Inc. Securities Litigation*, 42 F.3d 1541 (9th Cir. 1994)
22 (superseded by statute on other grounds), the Ninth Circuit explained that this rule
23 requires,

24 more than simply a reiteration of requirements stated elsewhere. Rule 9(b)
25 requires particularized allegations of the circumstances *constituting* fraud.
26 The time, place, and content of an alleged misrepresentation may identify
27 the statement or the omission complained of, but these circumstances do
28 not ‘constitute’ fraud. The statement in question must be false to be
fraudulent. Accordingly, our cases have consistently required that
circumstances indicating falseness be set forth.

³Plaintiff contends that the privilege under section 47(b) presumes a valid foreclosure.
(*Opp. to MTD*, 5:5–7.) Plaintiff, however, cites no authority for this proposition.

1 Id. at 1547–1548. Additionally, Rule 9(b)’s particularity requirements apply to RICO
2 claims predicated on mail and wire fraud. Murr Plumbing, Inc. v. Scherer Bros.
3 Financial Services, 48 F.3d 1066, 1069 (8th Cir. 1995).

4 Here, Plaintiff names Defendants U.S. Bank and Litton in the fraud and RICO
5 causes of action. However, U.S. Bank is not even mentioned in the Complaint’s
6 “factual background,” nor is it mentioned in the body of the RICO and fraud causes of
7 action. Thus, Plaintiff has clearly failed to plead RICO and fraud claims against
8 Defendant U.S. Bank.

9 With respect to Litton, there are simply no factual allegations suggesting that
10 Litton engaged in fraud. The only factual allegations relating to Litton are that it “was
11 not identified as the servicer on the Deed of Trust” (*Compl.*, ¶ 21), that Plaintiff “was
12 making timely loan modification payments to LITTON” (*Id.*, ¶ 23), and that “LITTON
13 knew it was working on a workout plan” (*Id.*, ¶ 26). These acts simply do not amount
14 to fraud, or racketeering activity. Accordingly, Plaintiff has also failed to plead RICO
15 and fraud claims against Defendant Litton.⁴

16
17 **G. Plaintiff’s Civil Code § 2923.5 Claim Has Been Properly Pled.**

18 Defendants argue that they have complied with Civil Code § 2923.5 and that
19 Plaintiff’s claim should be dismissed. The Court disagrees.

20 Civil Code § 2923.5 requires a lender to contact the borrower before a notice of
21 default is recorded. As proof of said contact, Defendants offer the declaration of one
22 of Litton’s agents stating that the lender complied with section § 2923.5. (*See RJN*, Ex.
23 B.) Plaintiff, however, disputes the validity of Litton’s agent’s statement. (*Compl.*, ¶
24 119-125.) Determining the factual validity of Litton’s agent’s self-serving statement is

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26
27 ⁴Furthermore, there is no independent tort in California for civil conspiracy.
28 Entertainment Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d 1211 (9th
Cir.1997). Plaintiff appears to base his civil conspiracy claim on the RICO claim. Since the
moving Defendants have been dismissed from the RICO claim, Defendants must be dismissed
from the civil conspiracy claim as well.

1 not within the scope of a 12(b)(6) motion. Accordingly, Defendants' motion to dismiss
2 this claim must be denied.

3
4 **H. There is No Private Right of Action Under Civil Code § 2923.6.**

5 Defendants argue that § 2923.6 does not create a private right of action for
6 borrowers. The Court agrees.

7 Civil Code § 2923.6 provides:

8 (a) The Legislature finds and declares that any duty servicers may have
9 to maximize net present value under their pooling and servicing
10 agreements is owed to all parties in a loan pool, not to any particular
11 parties, and that a servicer acts in the best interests of all parties if it
12 agrees to or implements a loan modification or workout plan for which
13 both of the following apply: (1) The loan is in payment default, or
14 payment default is reasonably foreseeable. (2) Anticipated recovery
15 under the loan modification or workout plan exceeds the anticipated
16 recovery through foreclosure on a net present value basis. (b) It is the
17 intent of the Legislature that the mortgagee, beneficiary, or authorized
18 agent offer the borrower a loan modification or workout plan if such a
19 modification or plan is consistent with its contractual or other authority.

20 Similar to other district courts that have faced this issue, this Court finds the
21 permissive language of § 2923.6(b) does not provide a cause of action for Plaintiff. See
22 Nool v. HomeQ Servicing, 653 F.Supp.2d 1047, 1052 (E.D.Cal. 2009) (“[T]he language
23 of section (b) belies the imposition of any duty to engage in loan modification
24 discussions, as the provision merely expresses legislative “intent” that the mortgagee,
25 beneficiary, or authorized agent offer the borrower a loan modification if doing so is
26 consistent with its authority.”); see also Pantoja v. Countrywide Home Loans, Inc., 640
27 F.Supp.2d 1177, 1188 (N.D.Cal. 2009) (“The Court finds that the wording in Section
28 (b) does not impose any duty on Defendants. Since Defendants do not owe Plaintiff a
statutory duty under this section, Plaintiff has no cause of action.”). Accordingly,
Plaintiff's § 2923.6 claim must be dismissed.

///

1 **I. Plaintiff Has Failed to State a Claim Under California Business and**
2 **Professions Code § 17200.**

3 Plaintiff's section 17200 claim is premised on Defendants' alleged violations of
4 TILA and the FDCPA. Because this Court has dismissed the TILA and FDCPA claims,
5 Plaintiff's section 17200 claim must be dismissed as well.

6
7 **III. MOTION TO STRIKE - RULE 12(F)**

8 Rule 12(f) provides that a federal court may strike from the pleadings any
9 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.
10 FED. R. CIV. P. 12(f). The function of a motion to strike is to avoid the unnecessary
11 expenditures that arise throughout litigation by dispensing of any spurious issues prior
12 to trial. Sidney-Vinsein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983); Chong
13 v. State Farm Mut. Auto. Ins. Co., 428 F.Supp.2d 1136, 1139 (S.D. Cal. 2006).

14 Here, Defendants have moved to strike Plaintiff's prayer for punitive damages.
15 All of the claims on which Plaintiff prayed for punitive damages against Defendant U.S.
16 Bank and Litton have been dismissed. Accordingly, Defendants' motion to strike is
17 granted as to the moving Defendants.

18
19 **IV. CONCLUSION & ORDER**

20 In light of the foregoing, the Court the Court **GRANTS** Defendants' motion to
21 strike (Doc. 5), and **GRANTS IN-PART** and **DENIES IN-PART** Defendants' motion
22 to dismiss (Doc. 4) as follows:

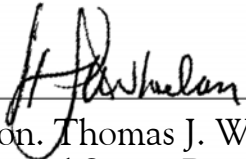
- 23 1. Plaintiff's TILA and RESPA claims are time barred and dismissed with
24 prejudice as to all defendants.
- 25 2. Because this lawsuit arises out of the foreclosure of Plaintiff's property, the
26 FDCPA claim is dismissed with prejudice as to all defendants.
- 27 3. Because Plaintiff has failed to allege the ability to tender, the state claims
28 for wrongful foreclosure, setting aside trustee's sale and cancellation of
 trustee's deed are dismissed with leave to amend as to all defendants.

- 1 4. Plaintiff's slander of title claim against Defendants U.S. Bank and Litton
2 is based on their alleged communications in connection with the
3 foreclosure. Accordingly, Plaintiff's slander of title claim is dismissed with
4 prejudice as to Defendants U.S. Bank and Litton.
- 5 5. Plaintiff's fraud, RICO and civil conspiracy claims are insufficiently pled as
6 to Defendants U.S. Bank and Litton. Accordingly, those claims are
7 dismissed with leave to amend as to Defendants U.S. Bank and Litton.
- 8 6. Plaintiff's Civil Code § 2923.5 claim has been properly pled and
9 Defendant's motion to dismiss the claim is, therefore, denied.
- 10 7. Because there is no private right of action under Civil Code § 2923.6,
11 Plaintiff's claim is dismissed with prejudice as to all defendants.
- 12 8. Plaintiff Business and Professions Code § 17200 claim is dismissed with
13 leave to amend as to all defendants.

14 If Plaintiff decides to file an amended complaint, it must be filed on or before **July**
15 **23, 2010.**

16
17 **IT IS SO ORDERED.**

18
19 DATED: July 2, 2010

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22 
23 Hon. Thomas J. Whelan
United States District Judge

24
25 CC: ALL PARTIES AND COUNSEL OF RECORD