

1 The Court decides the matters on the papers submitted and without oral
2 argument pursuant to Civil Local Rule 7.1(d)(1). For the following reasons, the Court
3 **GRANTS IN-PART** the motion to dismiss [Doc. 16], **DENIES WITHOUT**
4 **PREJUDICE** the motion to strike [Doc. 17], and **REMANDS** the remaining claims to
5 state court.

6
7 **I. BACKGROUND**

8 In October 2005, Plaintiff obtained a mortgage loan from Defendants to refinance
9 real property located at 1268 Emerald Way, Calexico, California. (FAC [Doc. 15], 7:5.)
10 In early 2009, Plaintiff began having difficulty making payments on his mortgage, and
11 on May 7, 2009, Defendants served Plaintiff with a “Notice of Default And Election to
12 Sell Under Deed of Trust.” (*Id.*, Ex. 1.)

13 On January 5, 2010, Plaintiff filed a civil action in the Imperial County Superior
14 Court (Case No. ECU05622) asserting sixteen claims against the Defendants, including
15 four federal claims and twelve state claims. On February 9, 2010, Defendants removed
16 the case to this Court based on federal-question jurisdiction. (*See Removal Notice* [Doc.
17 1], 2:12–19.) Defendants then moved to dismiss and strike. On July 2, 2010 this Court
18 granted in part and denied in part Defendants’ motion to dismiss with leave to amend
19 and granted the motion to strike. (*See Order* [Doc. 11].)

20 Plaintiff filed the FAC on August 9, 2010, asserting eighteen causes of action
21 against the Defendants, including (1) Violation of the Truth in Lending Act (TILA),
22 15 U.S.C. § 1601; (2) Violation of the Real Estate Settlement Procedures Act (RESPA),
23 12 U.S.C. § 2601; (3) Violation of Fair Debt Collection Practices Act (FDCPA), 15
24 U.S.C. § 1692; (4) Quiet Title; (5) Wrongful Foreclosure; (6) Order to Set Aside
25 Trustee’s Sale; (7) Cancellation of Trustee’s Deed; (8) Elder Abuse; (9) Civil
26 Conspiracy; (10) Unfair Business Practices; (11) Violation of RICO, 18 U.S.C. § 1961;
27 (12) Imposition of Constructive Trust; (13) Fraud; (14) Violation of California Civil
28 Code § 2923.5; (15) Violation of California Civil Code § 2923.6; (16) Breach of

1 Contract; (17) Negligence; and (18) Violation of Covenant of Good Faith and Fair
2 Dealing.

3 On August 12, 2010 Defendants again moved to dismiss and strike the
4 Complaint. Plaintiff opposed the motions.

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6 **II. LEGAL STANDARD**

7 The court must dismiss a cause of action for failure to state a claim upon which
8 relief can be granted. Fed.R.Civ.P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)
9 tests the complaint's sufficiency. See North Star Int'l v. Arizona Corp. Comm'n., 720
10 F.2d 578, 581 (9th Cir. 1983). All material allegations in the complaint, "even if
11 doubtful in fact," are assumed to be true. Id. The court must assume the truth of all
12 factual allegations and must "construe them in light most favorable to the nonmoving
13 party." Gompper v. VISX, Inc., 298 F.3d 893, 895 (9th Cir. 2002); see also Walleri v.
14 Fed. Home Loan Bank of Seattle, 83 F.3d 1575, 1580 (9th Cir. 1996).

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

24 Generally, courts may not consider material outside the complaint when ruling
25 on a motion to dismiss. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d
26 1542, 1555 n.19 (9th Cir. 1990). However, courts may consider documents specifically
27 identified in the complaint whose authenticity is not questioned by parties. Fecht v.
28 Price Co., 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (superceded by statutes on other

1 grounds). Moreover, courts may consider the full text of those documents, even when
2 the complaint quotes only selected portions. Id. Courts may also consider material
3 properly subject to judicial notice without converting the motion into one for summary
4 judgment. Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994) (citing Mack v. South
5 Bay Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986); *abrogated on other grounds*
6 *by Astoria Federal Savings and Loan Ass'n v. Solimino*, 501 U.S. 104 (1991)).

7 8 **III. DISCUSSION**

9 **A. Plaintiff's TILA and RESPA claims are time barred.**

10 In the July 2, 2010 Order, this Court dismissed with prejudice both the TILA and
11 RESPA causes of action without leave to amend. (*Order* at 10:23.) Therefore, these
12 causes of action should not have been re-pled in the FAC. Nevertheless, even if leave
13 to amend had been granted, the facts alleged in the FAC confirm that the TILA and
14 RESPA claims are time barred.

15 TILA damage claims are subject to a one-year statute of limitations. 15 U.S.C.
16 § 1640(e). TILA rescission claims are subject to a three-year statute of limitations. 15
17 U.S.C. § 1635(f). If a lender fails to accept a demand for rescission made within the 3-
18 year period the borrower is permitted an additional one year from the refusal of
19 cancellation to bring an action to enforce the rescission. 15 U.S.C. § 1640(e). The
20 statute of limitations runs from the consummation of the loan. Meyer v. Ameriquist
21 Mort. Co., 331 F.3d 1028 (9th Cir. 2003).

22 Here, Plaintiff argues that under 15 U.S.C. § 1635(f), he was entitled to an
23 additional year in which to file this lawsuit. (*Opp'n* [Doc. 19], 6:13.) Section 1635(f)
24 grants a plaintiff an additional year beyond the 3-year statute of limitations period where
25 a creditor wrongfully refuses to honor a borrower's notice of rescission. However, the
26 plaintiff must exercise the right to rescind before the expiration of the initial 3-year
27 limitations period. Miguel v. Country Funding Corp., 309 F.3d 1161, 11164-65 (9th Cir.
28 2002).

1 Plaintiff alleges that he sent Defendants a Qualified Written Request that
2 included a rescission notice, and that Defendants failed to honor the notice. However,
3 Plaintiff admits that the notice was sent on November 1, 2009 (*FAC*, ¶ 33; *Opp'n*,
4 5:27–6:1), approximately four years after the statute of limitations began to run.
5 Because Plaintiff failed to exercise his right to rescind within the 3-year period, he is not
6 entitled to the additional year under section 1635(f).¹

7 Additionally, even if the Court were to grant Plaintiff the additional year, thereby
8 extending the statute of limitations to 4 years, Plaintiff's TILA and RESPA claims would
9 still be time barred. As stated in the July 2, 2010 Order, the statute of limitations began
10 to run in late November 2005, when the closing documents were delivered to Plaintiff.
11 Because the lawsuit was not filed until January 5, 2010, more than 4-years later,
12 Plaintiff's claims are not saved by a four-year limitations period.

13 Finally, Plaintiff also argues that equitable tolling should also be applied to the
14 TILA rescission claim. However, Plaintiff has failed to allege facts that suggest tolling
15 is applicable. Equitable tolling “applies in situations . . . ‘where the complainant has
16 been induced or tricked by his adversary’s misconduct into allowing the filing deadline
17 to pass.’” *Velazquez v. GMAC Mortg. Corp.*, 605 F.Supp.2d 1049, 1061 (C.D.Cal. 2008)
18 (quoting *O'Donnell v. Vencor, Inc.*, 465 F.3d 1063, 1068 (9th Cir. 2008)). Nowhere
19 does the Plaintiff claim that Defendants’ “trickery” caused him to miss the TILA
20 deadline. Moreover, the Ninth Circuit has found that the rescission limitations period
21 is an “absolute limitation on rescission actions.” *Miguel*, 309 F.3d at 1164. It represents
22 a “statute of repose, depriving the courts of subject matter jurisdiction when a [TILA]

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27 ¹ Plaintiff appears to argue that the additional one-year period under section 1635(f)
28 does not begin to run until plaintiff exercises the right to rescind. Such a theory lacks merit
as it would allow the plaintiff to dictate the length of the limitations period by simply delaying
the exercise of the right to rescind. For example, in Plaintiff's case, the limitations period
would have been extended by 2 years, resulting in a 5-year statute of limitations.

1 claim is brought outside the three-year limitation period.” *Id.* Accordingly, Plaintiff’s
2 TILA claims are dismissed with prejudice.²

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4 **B. The FDCPA does not apply to foreclosures.**

5 The July 2, 2010 Order found that foreclosures are not covered by the FDCPA,
6 and, therefore, dismissed Plaintiff’s FDCPA claim. (*Order*, 5:9–6:3.) Accordingly, for
7 the reasons stated in that Order, Plaintiff’s FDCPA claim is dismissed with prejudice.

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9 **C. There is no private right of action under Civil Code § 2923.6.**

10 The July 2, 2010 Order found that there is no private right of action under
11 California Civil Code § 2923.6. (*Order*, 9:5–26.) Accordingly, for the reasons stated
12 in that Order, Plaintiff’s section 2923.6 claim is dismissed with prejudice.

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14 **D. The FAC fails to state a RICO or fraud claim.**

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

17 To state a RICO claim, plaintiffs must allege that defendant (a) received income
18 derived from a pattern of racketeering activity, and used the income to acquire or invest
19 in an enterprise in interstate commerce; (b) acquired or maintained an interest in, or
20 control of, an enterprise engaged in interstate commerce through a pattern of
21 racketeering activity; (c) caused an enterprise engaged in interstate commerce, while
22 employed by the enterprise, to conduct or participate in a pattern of racketeering
23 activity; or (d) conspired to engage in any of these activities. 18 U.S.C. § 1962. Plaintiff
24 must also plead that defendants’ violation was both the “but for” and proximate cause
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27 _____
28 ² As stated in the July 2, 2010 Order, Plaintiff’s RESPA claims are also subject to a one-
year limitations period. (*See Order*, 5:3–6, citing 12 U.S.C. § 2614 (RESPA statute of
limitations.)) Accordingly, Plaintiff’s RESPA claims are also time barred and dismissed with
prejudice.

1 of a concrete financial injury. Resolution Trust Corp. v. Keating, 186 F.3d 1110, 1117
2 (9th Cir.1999).

3 Predicate acts of mail fraud and wire fraud must be alleged with particularity
4 under Federal Rule of Civil Procedure 9(b). In In re GlenFed, Inc. Securities Litigation,
5 42 F.3d 1541 (9th Cir. 1994) (superseded by statute on other grounds), the Ninth
6 Circuit explained that this rule requires,

7 more than simply a reiteration of requirements stated elsewhere. Rule 9(b)
8 requires particularized allegations of the circumstances *constituting* fraud.
9 The time, place, and content of an alleged misrepresentation may identify
10 the statement or the omission complained of, but these circumstances do
11 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.

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

15 Plaintiffs allege that defendants “conducted and participated , directly and
16 indirectly, in the conduct of the affairs of said enterprise through a pattern of
17 racketeering activity in violation of 18 United States Code § 1962(c).” (FAC, 30:22.)
18 They also allege that Defendants, for the purpose of executing this scheme “placed in
19 post offices . . . things to be sent or delivered by the Postal Service, caused matter and
20 things to be delivered by commercial interstate carrier . . . including but not limited to
21 loan applications, loan documents, collection notices, default and foreclosure related
22 notices.” (*Id.*, 31:1-6.) Plaintiff asserts Defendants acted “for the purpose of executing
23 this scheme to defraud Plaintiff.” (*Id.*, 31:10.)

24 The allegations making up the RICO and fraud claims in the FAC are the same
25 allegations alleged in the original Complaint, and which this Court already found are
26 insufficient under Bell Atlantic Corp. v. Twombly, 550 U.S. 544, (2007). (*See Order*,
27 7:17–8:15.) Accordingly, Plaintiff’s RICO and fraud claims are dismissed without leave
28 to amend, and with prejudice.

1 **IV. SUPPLEMENTAL JURISDICTION**

2 A federal court may decline to exercise supplemental jurisdiction under any of the
3 following circumstances: (1) the state law claim involves a novel or complex issue of
4 state law; (2) the state law claim substantially predominates over the federal claim; (3)
5 the federal claim has been dismissed; and (4) exceptional circumstances. 28 U.S.C. §
6 1367(c).

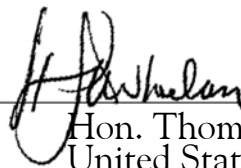
7 Here, Plaintiff's federal causes of action have been dismissed with prejudice. The
8 remaining causes of action are based on violations of California law. Because the state-
9 law claims predominate, the Court declines to exercise supplemental jurisdiction over
10 the remaining state-law claims, and orders this case remanded to the Imperial County
11 Superior Court.

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13 **V. CONCLUSION & ORDER**

14 For the foregoing reasons, the Court **GRANTS IN PART** Defendants' motion
15 to dismiss [Doc. 16], **DENIES WITHOUT PREJUDICE** Defendants' motion to strike
16 [Doc. 17], and **ORDERS** this case remanded to the Imperial County Superior Court.

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18 **IT IS SO ORDERED.**

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20 DATED: March 30, 2011

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