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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

GREG EDWARDS,

vs.

WACHOVIA MORTGAGE, a division of
Wells Fargo Bank, N.A., WORLD SAVINGS
BANK, FSB, IRVINE FUNDING
CORPORATION, CAL-WESTERN
RECONVEYANCE CORPORATION,
DOES 1-10,

Defendants.

CASE NO. 10CV1763 WQH (POR)
ORDER

HAYES, Judge:

The matter before the Court is the Motion to Dismiss Plaintiff’s Complaint for Failure to State a Claim filed by Wells Fargo Bank, N.A. (“Wells Fargo”). (ECF No. 6).

BACKGROUND

On August 24, 2010, this case was removed from the Superior Court for the County of San Diego. (ECF No. 1). On August 31, 2010, Defendant Wells Fargo, who was “sued erroneously” as Wachovia Mortgage and World Savings Bank, FSB, filed a Motion to Dismiss. (ECF No. 6).

On October 5, 2010, this Court issued an Order noting that Plaintiff’s counsel had resigned and provided Plaintiff with additional time to respond to the Motion to Dismiss. (ECF No. 8). On October 29, 2010, a Substitution of Counsel was filed for Plaintiff. (ECF

1 No. 12).

2 On December 6, 2010, Plaintiff's Opposition to Defendant Wells Fargo's Motion to
3 Dismiss was filed. (ECF No. 14). On December 13, 2010, Wells Fargo filed a Reply. (ECF
4 No. 15).

5 ALLEGATIONS OF THE COMPLAINT

6 Plaintiff alleges that on July 6, 2007, Plaintiff refinanced his loan on his primary
7 residence located at 3343 Bayside Walk #B, San Diego, CA 92109 ("the Property"). (ECF No.
8 1 at 11 ¶ 5). Plaintiff alleges that in July 2007, Defendant Irvine Funding Corp. offered to
9 refinance Plaintiff's loan to provide Plaintiff with a lower monthly mortgage payment of about
10 \$3,000. *Id.* at 12 ¶ 7. "Soon after Plaintiff started making his mortgage payments, the monthly
11 payments adjusted upward to over \$6,000 per month... [and] continued to adjust upward and
12 would have reached up to more than \$12,000 per month." *Id.* at ¶ 9. Plaintiff alleges that he
13 listed his accurate income on his application, but Defendants approved the loan based on
14 inflated stated income. *Id.* at ¶¶ 10,11. Plaintiff alleges that he has received a notice of
15 default. *Id.* at 13 ¶ 17.

16 The Complaint asserts nine causes of action as follows: (1) Intentional
17 Misrepresentation; (2) Breach of Fiduciary Duty; (3) Action for Quiet Title; (4) Violation of
18 California Financial Code Section 4970 *et seq.*; (5) Violation of California Business and
19 Professions Code Section 17200 *et seq.*; (6) Violation of California Civil Code Section 2923.6;
20 (7) Violation of California Civil Code Section 2923.5; (8) Fraudulent Concealment; and (9)
21 Constructive Fraud.¹ *Id.* at 13-23.

22 DISCUSSION

23 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for "failure to state a claim
24 upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Federal Rule of Civil Procedure
25 8(a) provides: "A pleading that states a claim for relief must contain ... a short and plain
26

27 ¹ Plaintiff states that claim two for breach of fiduciary duty is not asserted against Wells
28 Fargo and withdraws his sixth and seventh claims for violation of Cal. Civ. Code §§ 2923.5
and 2923.6. (ECF No. 12 at 11-12). Wells Fargo's Motion to Dismiss claims two, six, and
seven is granted.

1 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).
2 Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal
3 theory or sufficient facts to support a cognizable legal theory. *See Balistreri v. Pacifica Police*
4 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

5 To sufficiently state a claim to relief and survive a Rule 12(b)(6) motion, a complaint
6 “does not need detailed factual allegations” but the “[f]actual allegations must be enough to
7 raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
8 555 (2007). “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’
9 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause
10 of action will not do.” *Id.* (quoting Fed. R. Civ. P. 8(a)(2)). When considering a motion to
11 dismiss, a court must accept as true all “well-pleaded factual allegations.” *Ashcroft v. Iqbal*,
12 --- U.S. ----, 129 S. Ct. 1937, 1950 (2009). However, a court is not “required to accept as true
13 allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
14 inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *see, e.g.,*
15 *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 683 (9th Cir. 2009) (“Plaintiffs’ general
16 statement that Wal-Mart exercised control over their day-to-day employment is a conclusion,
17 not a factual allegation stated with any specificity. We need not accept Plaintiffs’ unwarranted
18 conclusion in reviewing a motion to dismiss.”). “In sum, for a complaint to survive a motion
19 to dismiss, the non-conclusory factual content, and reasonable inferences from that content,
20 must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret*
21 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted).

22 **I. Fraud - Claims One, Eight, and Nine**

23 Defendant contends that Plaintiff’s claims of intentional misrepresentation, fraudulent
24 concealment, and constructive fraud against fail because they are not sufficiently pled.
25 Plaintiff contends that the fraud claims have been adequately alleged, but “Plaintiff is more
26 than happy to file an Amended Complaint to clarify any deficiencies.” (ECF No. 14 at 10-11).

27 Pursuant to Rule 9(b) of the Federal Rules of Civil Procedure, “in alleging fraud or
28 mistake, a party must state with particularity the circumstances constituting fraud or mistake.”

1 Fed. R. Civ. P. 9(b). Rule 9(b) requires that the pleader state the time, place and specific
2 content of the false representations as well as the identities of the parties to the
3 misrepresentation. *Id.*; *Sebastian International, Inc. v. Russolillo*, 128 F. Supp. 2d 630, 634-35
4 (C.D. Cal. 2001). Rule 9(b) does not allow a complaint to merely lump multiple defendants
5 together but “require[s] plaintiffs to differentiate their allegations when suing more than one
6 defendant . . . and inform each defendant separately of the allegations surrounding his alleged
7 participation in the fraud.” *Swartz v. v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007).
8 “[T]he plaintiffs must, at a minimum, ‘identify the role of each defendant in the alleged
9 fraudulent scheme.’” *Id.* (quoting *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541
10 (9th Cir. 1989)).

11 **A. Intentional Misrepresentation - Claim One**

12 In Plaintiff’s first claim of intentional misrepresentation asserted against Wells Fargo,
13 Irvine Funding Corporation, and a Doe Defendant, Plaintiff alleges that Defendants concealed
14 material facts from Plaintiff during the loan transaction including inflating Plaintiff’s stated
15 income, failing to properly assess Plaintiff’s ability to repay the loan, placing Plaintiff in a loan
16 with a high probability of default, failing to provide Plaintiff with the best loan available to
17 him, failing to consider the long term viability of the loan, and approving the loan based on
18 credit score and a belief that the property value would increase. Plaintiff alleges that he would
19 not have agreed to the loan if these facts were revealed to him.

20 To state a claim for fraud, a plaintiff must allege: (1) a misrepresentation, (2)
21 knowledge that the representation was false, (3) intent to induce reliance on the
22 misrepresentation, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.
23 *Agosta v. Astor*, 120 Cal. App. 4th 596, 599, 603 (2005); 5 Witkin Summary of Cal. Law (10th
24 ed. 2005) Torts §772, p. 1121.

25 The Complaint alleges that “Defendants” concealed material facts from Plaintiff.
26 However, the Complaint does not specify which Defendant made what misrepresentation. The
27 Court concludes that the Complaint fails to allege this claim of fraud with the requisite
28 particularity because the Complaint fails to “identify the role of each defendant in the alleged

1 fraudulent scheme.” *Swartz*, 476 F.2d at 541. Accordingly, the Motion to Dismiss the
2 intentional misrepresentation claim is granted.

3 **B. Fraudulent Concealment - Claim Eight**

4 In Plaintiff’s claim for fraudulent concealment asserted against Wells Fargo, Irvine
5 Funding Corporation, Cal-Western Reconveyance Corp., and a Doe Defendant, Plaintiff
6 alleges that “Defendants fraudulently concealed the true cost of the loan by providing false
7 Truth in Lending documents and statements.” (ECF No. 1 at ¶ 57.) Plaintiff alleges that
8 “Defendants failed to provide disclosures” required by law. *Id.* at ¶ 58. Plaintiffs allege that
9 “Defendants had knowledge [of] the falsity of material omissions” and Defendants intended
10 Plaintiff rely on the false documents as a part of Defendants’ business plan. *Id.* at ¶ 61.

11 “There are ‘four circumstances in which nondisclosure or concealment may constitute
12 actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2)
13 when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3)
14 when the defendant actively conceals a material fact from the plaintiff; and (4) when the
15 defendant makes partial representations but also suppresses some material facts.’” *LiMandri*
16 *v. Judkins*, 52 Cal. App. 4th 326, 336 (1997) (quoting *Heliotis v. Schuman*, 181 Cal. App. 3d
17 646, 651 (1986)).

18 The Complaint alleges that “Defendants” provided “false” documents, “failed to provide
19 disclosures,” to Plaintiffs. However, the Complaint does not specify which Defendant made
20 what concealment. The Court concludes that the Complaint fails to allege this claim of fraud
21 with the requisite particularity because the Complaint fails to “identify the role of each
22 defendant in the alleged fraudulent scheme.” *Swartz*, 476 F.2d at 541. Accordingly, the
23 Motion to Dismiss the fraudulent concealment claim is granted.

24 **C. Constructive Fraud - Claim Nine**

25 In Plaintiff’s claim for constructive fraud asserted against Wells Fargo, Irvine Funding
26 Corporation, Cal-Western Reconveyance Corp., and a Doe Defendant, Plaintiff alleges that
27 “Defendants had a fiduciary relationship with the Plaintiff as the Plaintiff’s lender/mortgage
28 broker.” (ECF No. 1 at 22 ¶ 68). Plaintiff alleges that “Defendant, through its agent, who at

1 this time is still unknown, made false statements and provided false documents about the
2 affordability of the loan and forwarded false documents to Plaintiff.” *Id.* at ¶ 69. Plaintiff
3 alleges that Defendants had an advantage over Plaintiff because Plaintiff trusted their expertise
4 and believed that “Defendant was supposed to look out for [Plaintiff’s] best interests.” *Id.* at
5 ¶ 70. Plaintiff alleges that Defendants took advantage of Plaintiff by improperly obtaining the
6 highest yield spread premiums possible.

7 California Civil Code Section 1573 defines constructive fraud as follows:

8 (1) In any breach of duty which, without an actually fraudulent intent, gains
9 an advantage to the person in fault, or any one claiming under him, by
10 misleading another to his prejudice, or to the prejudice of any one claiming
under him; or, (2) In any such act or omission as the law specially declares to
be fraudulent, without respect to actual fraud.

11 Cal. Civ. Code § 1573.

12 The Complaint alleges that “Defendants” had a fiduciary relationship with Plaintiff and
13 “made false statements and provided false documents” to “gain advantage” over Plaintiff.
14 However, the Complaint does not specify which Defendant provided what false statements and
15 documents. The Court concludes that the Complaint fails to allege this claim of fraud with the
16 requisite particularity because the Complaint fails to “identify the role of each defendant in the
17 alleged fraudulent scheme.” *Swartz*, 476 F.2d at 541. Accordingly, the Motion to Dismiss the
18 constructive fraud claim is granted.

19 II. Quiet Title - Claim Three

20 Defendants contend that Plaintiff’s quiet title claim fails because Plaintiff has not
21 alleged an ability to tender. Plaintiff contends that quiet title is proper and the note may have
22 already been paid by a third-party and “[t]his information is necessary to determine if there
23 even remains an underlying obligation of Plaintiff to tender any loan proceeds at all.” (ECF
24 No. 14 at 11).

25 In Plaintiff’s claim for quiet title, Plaintiff alleges that he is the owner of the property
26 but Defendants have made claims adverse to Plaintiff’s ownership. “Plaintiff intends that this
27 Complaint be deemed a notice of [rescission] ... Plaintiff is willing and able and hereby offers
28 to tender any and all amounts due to any [Defendant], upon condition that [Defendants] do

1 likewise, as said amounts are determined in a judgment by this court.” (ECF No. 1 at 17 ¶ 35.

2 To state a claim to quiet title, “the complaint shall be verified” and must include all of
3 the following: (1) a legal description of the property and its street address or common
4 designation; (2) the title of the plaintiff and the basis of the title; (3) the adverse claims to the
5 title of the plaintiff; (4) the date as of which the determination is sought; and (5) a prayer for
6 the determination of the title of the plaintiff against the adverse claims. Cal. Code Civ. Pro.
7 § 761.020. “In order to allege a claim to quiet title, Plaintiff must allege tender or offer of
8 tender of the amounts borrowed.” *Ricon v. Recontrust Co.*, Case No. 09cv937-IEG-JMA, 2009
9 WL 2407396, at *6 (S.D. Cal. Aug. 4, 2009); *Rosenfeld v. JPMorgan Chase Bank, N.A.*, 2010
10 WL 3155808, at *20 (N.D. Cal. Aug. 9, 2010) (“[A] borrower may not assert ‘quiet title’
11 against a mortgagee without first paying the outstanding debt on the property.”); *see also*
12 *Jozinovich v. JP Morgan Chase Bank, N.A.*, No. C09-03326 TEH, 2010 WL 234895, at *3
13 (N.D. Cal. Jan. 14, 2010) (finding that plaintiff failed to allege an ability to tender where
14 plaintiff claimed he could tender the amount of the note less a set off to be determined by the
15 court).

16 Plaintiff does not allege an ability to tender the full amount of the note, but alleges an
17 ability to tender conditioned upon Defendants also tendering an amount to be determined by
18 the Court. The Court finds that Plaintiff has failed to allege an ability to tender the principal
19 balance of the loan. *See Jozinovich*, 2010 WL 234895, at *3; *Ricon*, 2009 WL 2407396, at *6.
20 Accordingly, the Motion to Dismiss the quiet title claim is granted.

21 **III. California Financial Code Section 4970 - Claim Four**

22 Defendant contends that Plaintiff’s claim under Cal. Fin. Code Section 4970 fails
23 because it is insufficiently pled and it is preempted by federal law. Plaintiff contends that his
24 claim is not preempted.

25 In Plaintiff’s claim for violation of California Financial Code Section 4970 *et seq.*,
26 Plaintiff alleges that the actions of Wells Fargo constitute predatory lending. Plaintiff alleges
27 that Defendants committed acts of predatory lending maliciously, fraudulently, and
28 oppressively, with reckless disregard for Plaintiff’s rights.

1 California Financial Code Section 4970 provides limits on the points and fees
2 permissible in covered consumer loans. Cal. Fin. Code § 4970. State law causes of action may
3 be preempted by federal law regulating lending operations. *See Naulty v. GreenPoint Mortg.*
4 *Funding, Inc.*, Case Nos. C 09-1542 MHP, C 09-1545 MHP, 2009 WL 2870620, at *4 (N.D.
5 Cal. Sept. 3, 2009) (finding that plaintiff’s state law causes of action, including those related
6 to lending operations, were “committed by Congress to regulation by a federal agency.”)
7 (citing *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001 (9th Cir. 2008); *see also Hilton v.*
8 *Washington Mut. Bank*, Case No. C 09-1191 SI, 2009 WL 3485953, at *5 (N.D. Cal. Oct. 28,
9 2009). “[A] cause of action for violation of California’s predatory lending laws, codified at
10 California Financial Code § 4970 *et seq.*, is preempted by HOLA and OTS regulations.” *Ibarra*
11 *v. Loan City*, Case No. 09-CV-02228-IEG (POR), 2010 WL 415284, at *6 (S.D. Cal. Jan. 27,
12 2010); *see also Coppes v. Wachovia Mortg. Corp.*, Case No. 2:10-cv-01689-GEB-DAD, 2010
13 WL 4483817, at *9 (E.D. Cal Nov. 1, 2010) (finding plaintiff’s predatory lending claim under
14 Cal. Fin. Code § 4970 to be preempted); 12 CFR §560.2(b) (providing a list of state laws
15 which are preempted by federal occupation of laws affecting the operations of federal savings
16 associations and includes “loan-to-value ratios,” “terms of credit,” “loan related fees,”
17 “disclosure and advertising,” “processing, origination, servicing, sale or purchase
18 of...mortgages,” and “interest rate ceilings.”).

19 Plaintiff’s claim under California Financial Code Section 4970 is preempted. *See*
20 *Coppes*, 2010 WL 4483817, at *9; *Ibarra*, 2010 WL 415284, at *6. Accordingly, the Motion
21 to Dismiss the California Financial Code Section 4970 claim is granted.

22 **IV. California Business & Professions Code Section 17200 - Claim Five**

23 Defendant Wells Fargo contends that Plaintiff’s claim pursuant to California Business
24 & Professions Code Section 17200 fails because all other claims against Wells Fargo fail.
25 Plaintiff contends that because his other claims are properly pled, the unfair competition claim
26 should survive the Motion to Dismiss.

27 In Plaintiff’s claim for violation of California Business and Professions Code Section
28 17200 *et seq.*, Plaintiff alleges that “Defendants have engaged in said practice, which will be

1 specifically stated when learned and for which Plaintiff will pray for leave to amend when such
2 facts become known or as proved at the time of trial.” (ECF No. 1 at 18 ¶ 44). Plaintiff alleges
3 that Defendants violated California Business & Professions Code Section 17200 “by
4 consummating an unlawful, unfair and fraudulent business practice, designed to deprive
5 Plaintiff of his equity in said property.” *Id.*


6 California law prohibits unfair competition, defined as “any unlawful, unfair or
7 fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. “By proscribing ‘any
8 unlawful’ business practice, section 17200 borrows violations of other laws and treats them
9 as unlawful practices that the unfair competition law makes independently actionable.”
10 *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999)
11 (quoting Cal. Bus. & Prof. Code § 17200).

12 As discussed above, Plaintiff has failed to adequately allege a claim against Wells
13 Fargo. Accordingly, the Motion to Dismiss the California Business & Professions Code
14 Section 17200 claim is granted.

15 **CONCLUSION**

16 **IT IS HEREBY ORDERED** that the Motion to Dismiss is **GRANTED**. (ECF No. 6).
17 Plaintiff’s claims against Wells Fargo are **DISMISSED**. Plaintiff may file a first amended
18 complaint no later than thirty days from the date of this Order.

19 DATED: February 10, 2011

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21 **WILLIAM Q. HAYES**
22 United States District Judge
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