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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

OSCAR MIRANDA,  
Plaintiff,  
v.  
FIELD ASSET SERVICES and  
INDYMAC MORTGAGE SERVICES  
a/k/a IndyMac Federal Bank, FSB,  
Defendants.

Case No. 3:11-cv-1514-GPC-JMA  
**ORDER GRANTING DEFENDANT  
ONEWEST BANK’S MOTION TO  
DISMISS WITHOUT LEAVE TO  
AMEND  
(ECF NO. 29)**

**INTRODUCTION**

Presently before the Court is a motion to dismiss filed by Defendant OneWest Bank, erroneously sued as IndyMac Mortgage Services (“OneWest”). (ECF No. 29.) Plaintiff opposed the motion, (ECF No. 32), and OneWest replied, (ECF No. 33). The Court finds the OneWest’s Motion to Dismiss suitable for disposition without oral argument. See CivLR 7.1.d.1. For the reasons below, the Court **GRANTS** One West’s Motion to Dismiss **WITHOUT LEAVE TO AMEND**.

**PROCEDURAL BACKGROUND**

On July 16, 2012, Plaintiff’s initial complaint was dismissed with leave to amend. (ECF No. 18.) Plaintiff thereafter filed a First Amended Complaint (“FAC”).

1 (ECF No. 19.) Plaintiff’s FAC asserted four claims for (1) violations of the Fair Debt  
2 Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 et seq.; (2) violations of the  
3 Rosenthal Fair Debt Collection Practices Act (“Rosenthal Act”), Cal. Civ. Code §§  
4 1788-1788.32; (3) conversion; and (4) negligence.

5 On January 9, 2013, the Court granted OneWest’s Motion to Dismiss Plaintiff’s  
6 FDCPA and Rosenthal Act Claims as to OneWest without leave to amend and  
7 Plaintiff’s conversion and negligence claims as to OneWest with leave to amend. (ECF  
8 No. 27.) On January 30, 2013, Plaintiff filed a Second Amended Complaint (“SAC”),  
9 asserting against OneWest only a claim for negligence. (ECF No. 28.)

10 **SECOND AMENDED COMPLAINT**<sup>1</sup>

11 On some date prior to August 18, 2010, Plaintiff obtained a loan from OneWest  
12 to purchase real property located at 864 Compass Way, San Diego, California (“the  
13 Property”). Plaintiff thereafter defaulted on the loan and then entered into an  
14 agreement with OneWest to sell the Property to a third party in a “short sale” rather  
15 than enter foreclosure proceedings. Plaintiff asserts he listed the Property for sale in  
16 an attempt to mitigate any losses to OneWest because of his default and inability to  
17 continue making payments. A potential buyer apparently expressed interest in the  
18 Property, offering to purchase it from OneWest. At some point during this period,  
19 OneWest “assigned, placed, or otherwise transferred” the loan to defendant Field Asset  
20 Services (“FAS”), hiring FAS for the purpose of collecting on the payments owing  
21 and/or repossessing the Property.

22 Plaintiff alleges FAS advertises its services for the sole purpose of collecting  
23 defaulted debts, has engaged in debt collection activities for over twelve years, and  
24 deals regularly with twenty-six major mortgage companies to assist in the collection  
25 of debts. FAS’s services include “locking out delinquent debtors from property being  
26 collected upon” as well as providing assistance to other debt collectors like “collection  
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28 <sup>1</sup>Unless otherwise noted, all factual allegations in this section are taken from Plaintiff’s SAC.  
(ECF No. 28.)

1 lawyers” to “manage the legal process” of collecting debts.

2 On or about August 18, 2010, “Defendant FAS, at the direction of Defendant  
3 [OneWest],” went to the Property while Plaintiff was not present and “physically broke  
4 into Plaintiff’s home,” and changed the locks, without any “present legal right” of  
5 possession. During that same visit, FAS or an agent of FAS removed certain items  
6 from the Property, including a flat screen television, a Panasonic surround sound  
7 system, a television wall mount, and an entertainment system cabinet.

8 As a result, Plaintiff was denied entry into his “home and place of abode,” was  
9 prevented from having access to or enjoying the use of his personal property, and  
10 suffered “actual damages including, but not limited to, stress and humiliation,  
11 specifically because Plaintiff is a law enforcement officer[r].”

### 12 **REQUEST FOR JUDICIAL NOTICE**

13 In support of its argument, and pursuant to Federal Rule of Evidence 201,  
14 OneWest has requested that the Court take judicial notice of facts contained in four  
15 documents: (1) A Deed of Trust dated June 9, 2005, recorded on June 30, 2005, and  
16 listing Plaintiff as borrower, DHI Mortgage Company, LTD., LP. as lender, Mortgage  
17 Electronic Registration Systems, Inc. (“MERS”) as beneficiary, and First American  
18 Title as trustee; (2) A Notice of Default and Election to Sell Under Deed of Trust dated  
19 March 29, 2010, stating \$12,374 as the amount owed on that date, indicating Plaintiff  
20 should contact OneWest for more information, listing NDEx West as trustee and  
21 MERS as beneficiary, and recorded March 30, 2010; (3) Notice of Trustee’s Sale  
22 recorded July 1, 2010, indicating Plaintiff’s default under the Deed of Trust executed  
23 June 9, 2005, and informing Plaintiff that the Property would be sold at public auction  
24 by Trustee NDEx West on July 22, 2010, at 10:00 A.M. at a specified location; and (4)  
25 A Grant Deed dated August 13, 2010, and recorded on August 25, 2010, in which  
26 Plaintiff granted ownership of the Property in fee simple to William L. Mercado and  
27 Stevie Kaufman. (ECF No. 29-2.)

28 These documents are already part of the record, as the Court took judicial notice

1 of these same documents as part of the Court’s Order Granting Defendants’ Motion to  
2 Dismiss the Plaintiff’s first complaint. (ECF No. 18.)

3 Plaintiff filed an Objection to OneWest’s Request for Judicial Notice, arguing  
4 that the documents are irrelevant to the issues presently before the court. (ECF No. 32-  
5 1.) These documents, however, concern Plaintiff’s legal relationship to the Property,  
6 an issue that has been addressed by both parties and is relevant to the question of  
7 whether Plaintiff, as OneWest contends in its Motion to Dismiss, is improperly seeking  
8 purely economic damages.<sup>2</sup>

9 Furthermore, as matters of public record, the documents submitted by OneWest  
10 are properly subject to judicial notice under Federal Rule of Evidence 201. See  
11 Fimbres v. Chapel Mortgage Corp., 2009 WL 4163332, at \*3 (S.D. Cal. Nov. 20, 2009)  
12 (taking judicial notice of a deed of trust, notice of default, notice of trustee’s sale,  
13 assignment of deed of trust, and substitution of trustee, as each was a public record);  
14 Heuslein v. Chase Bank U.S.A., N.A., 2009 WL 3157484, at \*3 (S.D. Cal. Sept. 24,  
15 2009) (taking judicial notice of a deed of trust, notice of default and election to sell  
16 under deed of trust, and notice of trustee’s sale that had been recorded in the San Diego  
17 County Recorder’s Office).

18 Thus, the Court will consider the facts contained in the four public documents  
19 attached as exhibits in support of OneWest’s Motion to Dismiss.

## 20 DISCUSSION

### 21 **I. Legal Standard**

22 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the  
23 defense that the complaint “fail[s] to state a claim upon which relief can be granted,”  
24 generally referred to as a motion to dismiss. The Court evaluates whether a complaint  
25 states a cognizable legal theory and sufficient facts in light of Federal Rule of Civil  
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28 <sup>2</sup> Plaintiff himself puts his legal relationship to the Property at issue in his Opposition to  
OneWest’s Motion to Dismiss; in his Opposition, Plaintiff argues that his claim is not barred, in part  
because he is seeking to recover damages for the loss of use of his “home.” (ECF No. 32.)

1 Procedure 8(a), which requires a “short and plain statement of the claim showing that  
2 the pleader is entitled to relief.” Although Rule 8 “does not require ‘detailed factual  
3 allegations,’ it [does] demand[] more than an unadorned, the-defendant-unlawfully-  
4 harmed-me accusation.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl.  
5 Corp. v. Twombly, 550 U.S. 544, 555 (2007)). In other words, “a plaintiff’s obligation  
6 to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and  
7 conclusions, and a formulaic recitation of the elements of a cause of action will not  
8 do.” Twombly, 550 U.S. at 555 (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)).  
9 “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further  
10 factual enhancement.’” Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 557). “To  
11 survive a motion to dismiss, a complaint must contain sufficient factual matter,  
12 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Id. (quoting  
13 Twombly, 550 U.S. at 570); see also Fed. R. Civ. P. 12(b)(6). A claim is facially  
14 plausible when the facts pled “allow[] the court to draw the reasonable inference that  
15 the defendant is liable for the misconduct alleged.” Id. (citing Twombly, 550 U.S. at  
16 556). That is not to say that the claim must be probable, but there must be “more than  
17 a sheer possibility that a defendant has acted unlawfully.” Id. Facts “‘merely  
18 consistent with’ a defendant’s liability” fall short of a plausible entitlement to relief.  
19 Id. (quoting Twombly, 550 U.S. at 557).

20 Further, the Court need not accept as true “legal conclusions” contained in the  
21 complaint. Id. This review requires context-specific analysis involving the Court’s  
22 “judicial experience and common sense.” Id. at 679 (citation omitted). “[W]here the  
23 well-pleaded facts do not permit the court to infer more than the mere possibility of  
24 misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is  
25 entitled to relief.’” Id.

## 26 **II. Analysis**

27 A defendant is liable for the tort of negligence where (1) the defendant has a  
28 legal duty to use reasonable care, (2) the defendant breached that duty, and (3) the

1 defendant's breach was a proximate cause of (4) the plaintiff's injury. Mendoza v. City  
2 of Los Angeles, 66 Cal. App. 4th 1333, 1339 (1998).

3 OneWest argues Plaintiff's negligence claim should be dismissed as to OneWest  
4 because: (1) Plaintiff failed to allege adequate damages; (2) Plaintiff failed to allege  
5 OneWest breached a duty of care owed to Plaintiff; and (3) Plaintiff failed to allege  
6 OneWest's actions constituted a proximate cause of Plaintiff's injuries.

### 7 **A. Damages**

8 OneWest argues Plaintiff's negligence claim is barred by California's economic  
9 loss rule, which, according to OneWest, provides that "plaintiffs may seek remedies for  
10 strict liability and negligence only for physical injury to person or property, and not for  
11 pure economic losses."

12 Plaintiff asserts in response that he "has asked for special, general, compensatory  
13 and punitive damages," arguing his claim is not barred by the economic loss rule  
14 because his alleged damages are not purely economic in nature. Plaintiff claims he  
15 "lost the use of his home, and his personal property due to the Defendant's negligent  
16 hiring of [FAS]." (ECF No. 32.)

17 In reply, OneWest argues that, ultimately, Plaintiff "can only claim economic  
18 damages for his lost personal property, and therefore his negligence claim is barred by  
19 law." (ECF No. 33.) More specifically, OneWest asserts: (1) Plaintiff "has not alleged  
20 any physical injury that would justify recovery for emotional distress," (2) Plaintiff may  
21 not recover for damage to the Property because Plaintiff "sold the house in a short sale  
22 and it now belongs to someone else," and (3) Plaintiff may not recover punitive  
23 damages because Plaintiff's SAC lacks sufficient allegations related to malice,  
24 oppression, or fraud.

### 25 **1. Economic Loss Rule**

26 As a preliminary matter, the Court concludes Plaintiff's negligence claim is not  
27 barred by the economic loss rule.

28 In Robinson Helicopter Company, Inc. v. Dana Corporation, the Supreme Court

1 of California explained that it “first developed and applied the economic loss rule in  
2 the context of product liability claims,” and that “[t]he function of the economic loss  
3 rule is to prevent tort law from shifting back to sellers a specific risk that better rests  
4 with buyers—the risk that a product will not perform to a particular level beyond that  
5 warranted by the seller.” 34 Cal. 4th 979, 997 (2004).

6 This case does not involve a defective product or the relationship between buyer  
7 and seller. Instead, Plaintiff alleges OneWest was negligent in hiring FAS as a debt  
8 collector. Therefore, the economic loss rule does not bar Plaintiff’s negligence claim.  
9 See N. Am. Chem. Co v. Super. Ct., 59 Cal. App. 4th 764, 780 (1997) (holding that the  
10 economic loss rule does not apply to negligence claims involving the performance of  
11 services because the policy concerns underlying the economic loss rule are not present  
12 in such situations).

## 13 2. Emotional Distress Damages

14 In California, although damages for emotional distress may be recovered in the  
15 absence of either physical injury or impact, Molien v. Kaiser Found. Hospitals, 27 Cal.  
16 3d 916, 930 (1980), the extent to which defendants may be liable for negligent  
17 infliction of emotional distress without physical injury has been limited due to public  
18 policy considerations. Bro v. Glaser, 22 Cal. App. 4th 1398, 1440-41(1994).

19 The Supreme Court of California has repeatedly stressed that “negligent  
20 infliction of emotional distress” is not an independent tort doctrine. See, e.g, Potter v.  
21 Firestone Tire & Rubber Co., 6 Cal. 4th 965, 984 (1993) (“there is no independent tort  
22 of negligent infliction of emotional distress”); Burgess v. Superior Court, 2 Cal. 4th  
23 1064, 1072 (1992) (“We have repeatedly recognized that the *negligent* causing of  
24 emotional distress is not an independent tort, but the tort of *negligence*.” (emphasis in  
25 original) (internal quotations omitted)).

26 As a result, recovery for emotional distress in negligence cases is not available  
27 “unless malice, breach of a fiduciary duty, physical injury or impact, or some other  
28 unusually extreme or outrageous circumstance, can be shown.” Branch v. Homefed

1 Bank, 6 Cal. App. 4th 793, 801 (1992).

2 Here, Plaintiff has not adequately alleged that he is entitled recover damages for  
3 emotional distress pursuant to his claim for negligence against OneWest. Although  
4 Plaintiff cites the Restatement (Second) of Torts for the proposition that physical  
5 impairment of land or chattels may be classified as a “physical harm,” damage to  
6 property alone is insufficient to support a recovery of emotional distress damages in  
7 a negligence cause of action. Ragland v. U.S. Bank Nat. Assn., 209 Cal. App. 4th 182,  
8 206 (2012) (holding that plaintiff asserting a negligence claim against lender could not  
9 recover damages for emotional distress because defendants’ conduct resulted only in  
10 injury to property).

11 Furthermore, although there was a pre-existing relationship between Plaintiff and  
12 OneWest, Plaintiff does not allege it was the type of fiduciary relationship that would  
13 permit Plaintiff to recover damages for emotional distress. See id. (holding that the  
14 relationship between plaintiff borrower and defendant lender did not support recovery  
15 of emotional distress damages because “[n]o fiduciary duty exists between a borrower  
16 and lender in an arm’s length transaction”).

17 Plaintiff has also failed to allege the type of malicious or outrageous conduct that  
18 would support recovery of emotional distress damages. In his SAC, Plaintiff alleges  
19 “[OneWest]’s conduct involved circumstances of aggravation and outrage with  
20 fraudulent and evil motive on the part of [OneWest], with such a conscious and  
21 deliberate disregard of the interests of Plaintiff that [OneWest]’s conduct may be called  
22 willful and wanton.” (ECF No. 28.) These conclusory allegations, however, are not  
23 supported by the type of factual allegations necessary to support recovery of damages  
24 for emotional distress.

25 Plaintiff’s claim is that OneWest was negligent in “hiring an overzealous debt  
26 collector with a questionable reputation and directing said debt collector in a manner  
27 that violated federal and state law.” (Id.) The ability to recover emotional distress  
28 damages requires a level of malicious and/or outrageous conduct not adequately



1 alleged in Plaintiff's SAC. Cf. Molién, 27 Cal. 3d at 930 (holding that plaintiff may  
2 recover damages for negligent infliction of emotional distress, absent physical injury,  
3 where defendants erroneously diagnosed plaintiff's wife with syphilis during a routine  
4 examination, resulting in extreme emotional distress and a dissolution of the plaintiff's  
5 marriage); Branch, 6 Cal. App. 4th at 800-01 (holding that plaintiff may not recover  
6 damages for emotional distress, where plaintiff was induced to leave his former  
7 employer and accept a job with defendant bank based on false representations, and then  
8 was mistreated and harassed after approaching upper management in an attempt to  
9 resolve the dispute, because "while blameworthy, the bank's conduct in no sense can  
10 be described as 'extreme' or 'outrageous,' in terms of the conduct resulting in special  
11 damage."); Yu v. Signet Bank/Virginia, 69 Cal. App. 4th 1377, 1397 (1999) (holding  
12 that plaintiff credit card holders may not recover for emotional distress resulting from  
13 defendant's 'long-arm' debt collection program designed to achieve default judgments  
14 against certain creditors).

15 Because Plaintiff has not sufficiently alleged physical injury, breach of a  
16 fiduciary duty, malice, or extreme and outrageous conduct, Plaintiff may not recover  
17 damages for emotional distress pursuant to his negligence claim against OneWest.

### 18 **3. Damages to Real Property**

19 Plaintiff alleges he is entitled to recover for "damages to his home." (ECF No.  
20 32.) OneWest argues Plaintiff cannot recover for damages to the Property because  
21 Plaintiff "sold the house in a short sale and it now belongs to someone else." (ECF No.  
22 33.) For the reasons stated below, the Court finds Plaintiff may not recover for  
23 damages to the Property.

24 Plaintiff alleges that, "at the time FAS intentionally took possession of Plaintiff's  
25 personal and real property . . . Plaintiff had the sole right to use and possess Plaintiff's  
26 personal and real property." (ECF No. 28.) This allegation, however, is contradicted  
27 by the Grant Deed dated August 13, 2010, which indicates that Plaintiff granted  
28 ownership of the Property in fee simple to William L. Mercado and Stevie Kaufman

1 five days before the incident at issue occurred. Although the court will generally  
2 accept as true all factual allegations contained in the complaint for the purposes of a  
3 motion to dismiss, “[t]he court need not, however, accept as true allegations that  
4 contradict matters properly subject to judicial notice.” Sprowell v. Golden State  
5 Warriors, 266 F.3d 979, 988 (9th Cir. 2001). Because the Grant Deed demonstrates  
6 that Plaintiff had relinquished his interest in the Property by the time of the incident on  
7 August 18, 2010, Plaintiff may not recover based on the alleged damages to the  
8 Property.

#### 9 4. Damages to Personal Property

10 Plaintiff alleges FAS took possession of a television, television wall mount, a  
11 sound system, and an entertainment system cabinet. While Plaintiff alleges FAS had  
12 no right to do this and that, in fact, FAS’s conduct was criminal, Plaintiff does not  
13 allege what ultimately happened to his personal property. In his opposition to  
14 OneWest’s Motion to Dismiss, Plaintiff asserts only that he “lost the use of . . . his  
15 personal property due to [OneWest]’s negligent hiring of [FAS].” (ECF No. 32 at 15.)

16 The Court finds Plaintiff’s allegations regarding the lost use of his personal  
17 property to be insufficient. Plaintiff does not, for example, allege his personal property  
18 was never returned to him or that it was returned in a damaged condition. Neither does  
19 Plaintiff allege how long he was deprived of the use of his personal property or what  
20 the consequences of that deprivation, if any, were. Without more, Plaintiff’s  
21 allegations do not plausibly establish that he was more than nominally damaged by any  
22 lost use of his personal property. See Duarte v. Zachariah, 22 Cal. App. 4th 1652,  
23 1661-62 (1994) (“[A]ctual damage’ in the sense of ‘harm’ is necessary to a cause of  
24 action in negligence; nominal damages are not awarded.”).

25 Moreover, the Court notes that it pointed to this deficiency in Plaintiff’s FAC  
26 with regard to Plaintiff’s claim that OneWest was liable for the conversion of  
27 Plaintiff’s personal property. (ECF No. 27.) There, the Court found that “[a]dditional  
28 facts [were] needed regarding whether FAS prevented Plaintiff from reclaiming his

1 personal property.” Instead of providing those additional facts, Plaintiff chose not to  
2 reassert his conversion claim against OneWest.

### 3 **5. Punitive Damages**

4 Plaintiff’s SAC lacks sufficient factual allegations to support an award of  
5 punitive damages against OneWest. Plaintiff alleges “[OneWest]’s conduct involved  
6 circumstances of aggravation and outrage with fraudulent and evil motive on the part  
7 of [OneWest], with such a conscious and deliberate disregard of the interests of  
8 Plaintiff that [OneWest]’s conduct may be called willful and wanton.” (ECF No. 28.)  
9 Such conclusory allegations of “fraudulent” conduct and “evil motive,” however, are  
10 insufficient to support the recovery of punitive damages. Brousseau v. Jarrett, 73 Cal.  
11 App. 3d 864, 972 (1977) (holding that the “conclusory characterization of defendant’s  
12 conduct as intentional, willful and fraudulent” was “patently insufficient” to support  
13 the recovery of punitive damages). Thus, Plaintiff has not adequately alleged he is  
14 entitled to recover punitive damages.

15 In sum, Plaintiff has failed to adequately allege he was damaged by OneWest’s  
16 allegedly negligent hiring of FAS. Therefore, the Court need not address OneWest’s  
17 remaining arguments to conclude that Plaintiff’s negligence claim against OneWest  
18 should be dismissed.

### 19 **B. Leave to Amend**

20 Where a motion to dismiss is granted, “leave to amend should be granted ‘unless  
21 the court determines that the allegation of other facts consistent with the challenged  
22 pleading could not possibly cure the deficiency.’” DeSoto v. Yellow Freight Sys., Inc.,  
23 957 F.2d 655, 658 (9th Cir. 1992) (quoting Schreiber Distrib. Co. v. Serv-Well  
24 Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, where leave to  
25 amend would be futile, the Court may deny leave to amend. See Desoto, 957 F.2d at  
26 658; Schreiber, 806 F.2d at 1401.


27 Here, the Court notes that Plaintiff has now had three opportunities to state a  
28 claim against OneWest and that Plaintiff has been unsuccessful each time. Further, the

1 damages Plaintiff alleges he suffered because of OneWest's negligent conduct have,  
2 as set forth above, been whittled down to damages arising from the lost use of  
3 Plaintiff's personal property. As noted above, the Court offered Plaintiff the  
4 opportunity to elaborate on the lost use of his personal property in its order dismissing  
5 Plaintiff's FAC. Plaintiff, however, failed to do so. Accordingly, the Court finds it  
6 would be futile to grant Plaintiff a fourth chance to assert a claim against OneWest.

7  
8 **CONCLUSION**

9 After considering the parties' submissions, the record, and the applicable law,  
10 and for the foregoing reasons **IT IS HEREBY ORDERED** that OneWest's Motion to  
11 Dismiss, (ECF No. 29), is **GRANTED WITHOUT LEAVE TO AMEND**. The  
12 hearing on OneWest's Motion, currently set for June 28, 2013, is hereby **VACATED**.

13 DATED: June 27, 2013

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15 HON. GONZALO P. CURIEL  
16 United States District Judge  
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