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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 FERNANDO D. LOPEZ,

12 Plaintiff,

13 v.

14 WELLS FARGO BANK, N.A.; WELLS
15 FARGO HOME MORTGAGE; FIRST
16 AMERICAN TITLE INSURANCE CO.;
17 US BANK NATIONAL ASSOCIATION,
18 ET AL.,

Defendants.

Case No.: 16-cv-0811-AJB-DHB

**ORDER GRANTING DEFENDANTS
WELLS FARGO, US BANK, AND
FIRST AMERICAN'S MOTIONS TO
DISMISS PLAINTIFF'S SECOND
AMENDED COMPLAINT FOR
FAILURE TO STATE A CLAIM.
(DOC. NOS. 32, 33)**

19 Presently before the Court is Defendants WELLS FARGO BANK, N.A. (also sued
20 as Wells Fargo Home Mortgage) ("Wells Fargo") and US BANK NATIONAL
21 ASSOCIATION's ("US Bank") (collectively "Defendants") motion to dismiss Fernando
22 Lopez's ("Plaintiff") second amended complaint ("SAC"). (Doc. No. 33.) Also pending is
23 Defendant FIRST AMERICAN TITLE INSURANCE COMPANY's ("First American")
24 motion to dismiss the SAC. (Doc. No. 32.) The Court finds these motions suitable for
25 determination on the papers and without oral argument in accordance with Civil Local Rule
26 7.1.d.1. For the reasons set forth more fully below, the Court **GRANTS** Defendants' and
27 First American's motions to dismiss.
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1 **I. BACKGROUND**

2 **A. General Allegations**

3 The following facts are taken from the SAC and construed as true for the limited
4 purpose of resolving the pending motions. *See Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir.
5 1994). In 2003, Plaintiff purchased real property located at 947 Merced River Road, Chula
6 Vista, California 91913 (the “Property”). (Doc. No. 31 ¶ 9.) In 2004, Plaintiff executed a
7 loan (the “Loan”) with Wells Fargo. (*Id.*) The Loan was secured by a Deed of Trust in
8 favor of Wells Fargo, encumbering the Property (“Deed of Trust”). (*Id.* ¶ 10.) On June 16,
9 2005, Wells Fargo placed the Loan into a “Pooling and Servicing Agreement” and
10 converted it into stock as Wells Fargo Mortgage-Backed Securities (“Trust”). (*Id.* ¶ 11.)

11 In 2009, Plaintiff requested a loan modification from Wells Fargo. (*Id.* ¶¶ 26-27.)
12 Wells Fargo then advised Plaintiff to stop making timely loan payments. (*Id.* ¶ 27.) Plaintiff
13 complied and as a result defaulted on the Loan. (*Id.*) On November 17, 2009, a Notice of
14 Default was recorded against the Property. (*Id.* ¶ 30.) In 2010, Plaintiff filed a Chapter 13
15 Bankruptcy Petition. (*Id.* ¶ 27.)

16 On December 22, 2009, First American was recorded as the substitution trustee
17 under the Deed of Trust. (*Id.* ¶ 31.) Plaintiff alleges that this document was not signed by
18 Wells Fargo but signed by Chet Sconyers who is the Vice President at First American
19 Trustee Servicing and is allegedly involved in the robo-signing of loan and mortgage
20 documents. (*Id.*) The beneficial interest of the Deed of Trust was then transferred by
21 assignment to US Bank on January 6, 2010. (*Id.* ¶ 32.) On June 5, 2012, a Notice of Trustee
22 Sale was recorded and on April 3, 2013, a Notice of Default and election to sell under the
23 Deed of Trust was recorded. (*Id.* ¶¶ 34-35.) Subsequently, First American recorded a
24 Notice of Trustee Sale on July 1, 2013. (*Id.* ¶ 35.) Plaintiff claims that this document was
25 executed by rubber stamp and the signor’s signature is illegible. (*Id.*) On September 16,
26 2014, Plaintiff sent a Notice of Validation of Alleged Debt to First American. (*Id.* ¶ 36.)
27 On June 11, 2015, Plaintiff filed another Chapter 13 petition. (*Id.* ¶ 40.) As of the date of
28 this filing, the Property has not yet been sold. (*See generally id.*)

1 In sum, Plaintiff alleges that his loan was underwritten without proper due diligence
2 and that Wells Fargo illegally or deceptively qualified Plaintiff for a loan they should have
3 known that Plaintiff could not afford.¹ (*Id.* ¶¶ 20-21.) Furthermore, Plaintiff argues that
4 First American and Defendants unlawfully assigned, and transferred their ownership and
5 security interest in Plaintiff’s home. (*Id.* at 2.)² As a result, Plaintiff contends that
6 Defendants and First American intentionally and negligently foreclosed on Plaintiff’s
7 property with no authority to do so. (*Id.* ¶ 42.)

8 **B. Procedural History**

9 On April 5, 2016, Plaintiff filed a complaint against Defendants and First American
10 asserting several claims for relief. (Doc. No. 1.) On April 26, 2016, Defendants filed a
11 motion to dismiss for failure to state a claim. (Doc. No. 8.) On May 23, 2016, First
12 American filed a motion to dismiss for failure to state a claim and for lack of subject matter
13 jurisdiction. (Doc. No. 12.) On July 1, 2016, the Court dismissed the complaint for lack of
14 subject matter jurisdiction and denied as moot Defendants and First American’s motions
15 to dismiss. (Doc. No. 19.) On July 28, 2016, Plaintiff filed his first amended complaint
16 (“FAC”). (Doc. No. 20.) Thereafter, on August 10, and 16, 2016, First American and
17 Defendants moved to dismiss Plaintiff’s FAC. (Doc. Nos. 21, 23.) On November 23, 2016,
18 the Court granted Defendants and First American’s motions to dismiss Plaintiff’s FAC
19 without prejudice. (Doc. No. 30.) Plaintiff’s claims under the Truth in Lending Act, Fair
20 Housing Act, and Equal Credit Opportunity Act were dismissed with prejudice. (*Id.* at 22.)

21 On December 7, 2016, Plaintiff filed his SAC. (Doc. No. 31.) Plaintiff alleges the
22 following causes of actions against Defendants and First American: (1) lack of standing to
23 foreclose; (2) fraud in concealment and inducement; (3) violation of the Rosenthal Fair
24 Debt Collection Practices Act (“Rosenthal Act”); (4) violation of the Real Estate
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26 ¹ Plaintiff alleges that the interest only payments on the loan exceeded \$2,300 a month, which
27 represented nearly 100% of Plaintiff’s household income. (Doc. No. 31 ¶ 25.)

28 ² Page numbers are in reference to the automatically generated CM/ECF page numbers and not the
original document numbers.

1 Settlement Procedures Act (“RESPA”); (5) intentional infliction of emotional distress
2 (“IIED”); (6) slander of title; (7) unlawful and fraudulent business practice; (8) violation
3 of Homeowners Bill of Rights (“HBOR”); (9) quiet title; and (10) declaratory relief. (*Id.* at
4 1.) On December 22 and 23, 2016, First American and Defendants moved to dismiss
5 Plaintiff’s SAC. (Doc. Nos. 32, 33.) Plaintiff filed a single opposition to both Defendants’
6 and First American’s motions to dismiss. (Doc. No. 39.)

7 **II. LEGAL STANDARD**

8 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a plaintiff’s
9 complaint and allows a court to dismiss a complaint upon a finding that the plaintiff has
10 failed to state a claim upon which relief may be granted. *See Navarro v. Block*, 250 F.3d
11 729, 732 (9th Cir. 2001). “[A] court may dismiss a complaint as a matter of law for (1) lack
12 of a cognizable legal theory or (2) insufficient facts under a cognizable legal claim.”
13 *SmileCare Dental Grp. v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996)
14 (citation omitted). However, a complaint will survive a motion to dismiss if it contains
15 “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v.*
16 *Twombly*, 550 U.S. 544, 570 (2007). In making this determination, a court reviews the
17 contents of the complaint, accepting all factual allegations as true, and drawing all
18 reasonable inferences in favor of the nonmoving party. *Cedars-Sinai Med. Ctr. v. Nat’l*
19 *League of Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir. 2007).

20 Notwithstanding this deference, the reviewing court need not accept “legal
21 conclusions” as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is also improper for a
22 court to assume “the [plaintiff] can prove facts that [he or she] has not alleged.” *Associated*
23 *Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526
24 (1983). However, “[w]hen there are well-pleaded factual allegations, a court should assume
25 their veracity and then determine whether they plausibly give rise to an entitlement to
26 relief.” *Iqbal*, 556 U.S. at 679.

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1 **III. DISCUSSION**

2 **A. Judicial Notice**

3 The Court first turns to Defendants and First American’s request for judicial notice
4 pursuant to Federal Rule of Evidence 201. (Doc. Nos. 32-2, 33-4.) Defendants and First
5 American request the Court take judicial notice of several documents of public record
6 including a grant deed, deed of trust, assignment of deed of trust, several notices of default
7 and election to sell, notice of trustee sale, and copies of U.S. Bankruptcy court case files.
8 (*Id.*)

9 While, “as a general rule, a district court may not consider materials not originally
10 included in the pleadings in deciding a Rule 12 motion . . . it may take judicial notice of
11 matters of public record and consider them without converting a Rule 12 motion into one
12 for summary judgment.” *U.S. v. 14.02 Acres of Land*, 547 F.3d 943, 955 (9th Cir. 2008)
13 (quotation and citations omitted). Plaintiff contends First American’s request for judicial
14 notice should be denied because the documents are in dispute and constitute inadmissible
15 hearsay.³ (Doc. No. 39 at 13-18.) In support of this argument Plaintiff cites to *Willis v.*
16 *State of Cal.*, 22 Cal. App. 4th 287 (1994), and *Neighborhood Assistance Corp. of Am. v.*
17 *First One Lending Corp.*, No. SACV 12-463 DOC (MLGx), 2012 WL 1698368 (C.D. Cal.
18 May 15, 2012). However, the Court highlights that the facts of those cases are inapposite
19 to the present matter. In *Willis*, 22 Cal. App. 4th at 291, the plaintiff simply requested
20 judicial notice without presenting the court a certified copy. Similarly in *Neighborhood*
21 *Assistance Corp. of Am.*, 2012 WL 1698368, at *11, the court held that the facts defendants
22 requested judicial notice of were not generally known, and the alleged facts were based
23 only on information from defendants’ website.

24 Here, Defendants and First American request the Court take judicial notice of
25 official records of the County of San Diego, and copies of U.S. Bankruptcy Court
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28 ³ The Court notes that Plaintiff has only filed an opposition to First American’s request for judicial
notice. (*See generally*, Doc. No. 39.)

1 documents. Thus, as these are documents that are matters of public record, the Court finds
2 judicial notice appropriate. *See, e.g., Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th
3 Cir. 2001); *Lingad v. Indymac Fed. Bank*, 682 F. Supp. 2d 1142, 1146 (E.D. Cal. 2010);
4 *Tiqui v. First Nat'l Bank of Arizona*, No. 09cv1750 BTM (BLM), 2010 WL 1345381, at
5 *1 n.2 (S.D. Cal. Apr. 5, 2010). Moreover, Plaintiff references the documents in his
6 complaint, and the Court has already taken judicial notice of the documents at issue in its
7 Order dated November 23, 2016. (Doc. No. 30 at 6.) *See Tekle v. United States*, No. CV
8 01-11096 RSWL EX., 2002 WL 1988178, at *3 (C.D. Cal. 2002) (holding that a court may
9 take judicial notice of a prior complaint with exhibits). Accordingly, First American's
10 request for judicial notice and Defendants' unopposed request for judicial notice are
11 **GRANTED**.

12 **B. Plaintiff's Objections**

13 Next as a procedural matter, the Court will turn to Plaintiff's objections to the
14 documents submitted by First American. (Doc. No. 39 at 20.) Plaintiff asks the Court to
15 strike First American's Exhibits A-P for various reasons including: (1) that the documents
16 constitute inadmissible hearsay; (2) they lack foundation; and (3) they are irrelevant to the
17 matter at hand. (*See generally*, Doc. No. 39 at 20-26.) The Court notes that it acknowledges
18 that Plaintiff disputes the validity of the documents that First American requests judicial
19 notice of.⁴ Therefore, the Court will take judicial notice of the documents not for the truth
20 of the facts recited therein, but only for the existence of the documents filed. Accordingly,
21 the Court **DENIES** Plaintiff's objections in whole.⁵

22 **C. Lack of Factual Specificity**

23 The Court first notes that Plaintiff only filed a single opposition brief in response to
24 both First American's and Defendants' motions to dismiss. (Doc. No. 39.) Additionally
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26 ⁴ Plaintiff does not object to Defendants' documents submitted in support of its motion to dismiss.

27 ⁵ The Court notes that it disagrees with Plaintiff's objection that the documents lack foundation. The
28 Court finds that Plaintiff has mischaracterized the meaning of Federal Rule of Evidence 401 as Rule 401
states that evidence is relevant if the "fact is of consequence in determining the action." Fed. R. Ev.
401(b).

1 and most importantly for purposes of this motion, Plaintiff's opposition groups all three
2 Defendants together without distinguishing between them. Therefore, the Court finds that
3 Plaintiff's SAC lacks sufficient factual specificity as to which Defendant did what.

4 Federal Rule of Civil Procedure 8 requires that allegations be pled with sufficient
5 specificity so as to put the opposing party on notice of the wrong they allegedly committed
6 so that they can adequately defend themselves. Fed. R. Civ. P. 8; *see Gauvin v. Trombatore*,
7 682 F. Supp. 1067, 1071 (N.D. Cal. 1988) (lumping together multiple defendants in one
8 broad allegation fails to satisfy the notice requirement of Rule 8(a)(2)). Accordingly,
9 though the Court appreciates that Plaintiff is proceeding *pro se*, the Court highlights that
10 this type of group pleading fails to satisfy Rule 8's standard. Accordingly, if Plaintiff
11 wishes to proceed and amend the operative complaint, Plaintiff is advised to properly and
12 clearly respond to the allegations made by Defendants and First American separately. *See*
13 *United States v. Merrill*, 746 F.2d 458, 465 (9th Cir. 1984) (noting that even pro se litigants
14 must follow the same rules of procedure that govern other litigants). The Court will now
15 turn to analyze the rest of Plaintiff's causes of action.

16 **1. Lack of Standing**

17 Defendants and First American argue that Plaintiff lacks standing to challenge the
18 foreclosure sale. (Doc. No. 33-1 at 3-4; Doc. No. 32-1 at 10-11.) Further, Defendants and
19 First American also contend that Plaintiff has still failed to provide facts to support his
20 allegation that they do not have standing to foreclose on the Property. (*Id.*) Plaintiff alleges
21 that Defendants and First American do not have standing because they do not have a valid
22 security interest in the Property, are not the true beneficiaries, and the Loan was not
23 assigned to First American or US Bank. (Doc. No. 31 ¶¶ 44, 47-48.) Additionally, Plaintiff
24 asserts he has standing to challenge the foreclosure because the assignment of the Deed of
25 Trust is invalid and void. (Doc. No. 39 at 5.)

26 The Court in its Order dated November 23, 2016, clearly stated that California law
27 does not permit the use of a lawsuit to delay or prevent a foreclosure sale that has not yet
28 occurred. *See Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal. App. 4th 497, 511-12

1 (2013), *disapproved on other ground by Yvanova v. New Century Mortg. Corp.*, 62 Cal.
2 4th 919 (2016). Here, Plaintiff has again failed to allege facts indicating that the Property
3 has been sold. Accordingly, the Court confirms its previous holding that Plaintiff does not
4 have standing to challenge the impending foreclosure sale. Moreover, the Court illustrates
5 that a majority of district courts in California have held that borrowers do not have standing
6 to challenge the assignment of a loan because borrowers are not a party to the assignment
7 agreement. *See Patel v. Mortg. Elec. Registration Sys. Inc.*, Case No. 4:13-cv-1874 KAW,
8 2013 WL 4029277, at *3 (N.D. Cal. Aug. 6, 2013); *see also Aniel v. GMAC Mortg., LLC*,
9 No. C 12-04201 SBA, 2012 WL 5389706, at *5 (N.D. Cal. Nov. 2, 2012). Accordingly, as
10 Plaintiff lacks standing himself, he is unable to attack First American and Defendants’
11 standing in the present matter. *See Vasquez v. U.S. Bank*, Case No. 15-cv-02146-DMR,
12 2015 WL 5158538, at *3-5 (N.D. Cal. Sep. 2, 2015).

13 Additionally, the Court still finds that Plaintiff’s SAC does not sufficiently allege
14 that the assignment of the Deed of Trust is void, that the foreclosure was not initiated by
15 the correct party, or that Defendants and First American are not the true beneficiaries.
16 Plaintiff only broadly claims that Defendants and First American did not comply with their
17 own securitization requirements. (Doc. No. 31 ¶ 46.) Therefore, as Plaintiff has failed to
18 state a claim that is plausible on its face, his assertion that Defendants and First American
19 lack standing is **DISMISSED**.

20 **2. Fraud⁶**

21 Plaintiff next alleges fraud in concealment and inducement. (*Id.* ¶¶ 53, 74-76.)
22 Defendants and First American contend Plaintiff’s fraud claims are not pled with the
23 requisite specificity under California and federal law. (Doc. No. 32-1 at 11-13; Doc. No.
24 33-1 at 4-7.) The Court agrees.

25 Federal and California law dictate that claims for fraud must be pled with

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27 ⁶ The elements of fraud are: (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e., to
28 induce reliance; (4) justifiable reliance; and (5) resulting damage. *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 990 (2004).

1 particularity. *See* Fed. R. Civ. P. 9(b); *Stansfield v. Starkey*, 220 Cal. App. 3d 59, 73 (1990)
2 (“Every element of the cause of action for fraud must be alleged . . . with sufficient
3 specificity to allow defendant to understand fully the nature of the charge made.”).
4 Additionally, Plaintiff must clearly state what is false or misleading about a statement and
5 explain why it is false. *See Miron v. Herbalife Intern., Inc.*, 11 Fed. App’x. 927, 930 (9th
6 Cir. 2001) (requiring plaintiff to provide facts that show defendant did not intend to
7 perform promises *at the time they were made*) (emphasis added). Further, a fraud action
8 against a corporation requires the Plaintiff “to allege the name of the persons who made
9 the allegedly fraudulent representations, their authority to speak, to whom they spoke, what
10 they said or wrote, and when it was said or written.” *Tarmann v. State Farm Mut. Auto.*
11 *Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991) (citations omitted).

12 Plaintiff’s SAC still fails to allege the specifics of who, what, when, where, and how
13 the fraudulent actions took place to satisfy Rule 9. Specifically, the Court is unable to
14 determine the actions of each Defendant as Plaintiff has grouped all three Defendants
15 together and only broadly claims that they intended to induce Plaintiff, failed to disclose
16 the material terms of the transaction, and falsely advised Plaintiff. (Doc. No. 31 ¶¶ 66-69.)
17 Further, under a claim for fraudulent concealment, Plaintiff must provide the Court with
18 facts alleging a fiduciary duty between Plaintiff and Defendants, and Plaintiff and First
19 American. *See Nymark v. Heart Fed. Sav. & Loan Ass’n.*, 231 Cal. App. 3d 1089, 1095
20 (1991) (“[A]s a general rule, a financial institution owes no duty of care to a borrower when
21 the institution’s involvement in the loan transaction does not exceed the scope of its
22 conventional role as a mere lender of money.”).

23 Lastly, fatal to Plaintiff’s fraud claims is that the statute of limitations for fraud is
24 three years. Code Civ. Proc. § 338(d). Generally, “the three-year period does not begin to
25 run until the plaintiff has actual or constructive notice of the facts constituting the fraud.”
26 *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). “Constructive notice is
27 knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus
28 putting him on inquiry.” *Id.*

1 Here, all of the loan terms were contained in the loan documents that Plaintiff signed,
2 so Plaintiff had constructive notice of all terms at the time of origination. *See e.g., Hague*
3 *v. Wells Fargo Bank, N.A.*, C 11-02366 TEH, 2012 WL 1029668, at *5 (N.D. Cal. Mar.
4 26, 2012) (fraud claim was time-barred when the terms of the loan were provided at
5 signing, such that “reasonable diligence would have enabled Plaintiff to discover the
6 problem”). In order for a delay in filing to be excused, “a plaintiff must plead and prove
7 their lack of means of obtaining knowledge of the fraud through the exercise of reasonable
8 diligence.” *Id.* Accordingly, as Plaintiff’s SAC is not pled with particularity, and the SAC
9 fails to plead facts to explain the delay in discovering the alleged fraud, Plaintiff’s claim
10 for fraud in concealment and inducement are **DISMISSED**.

11 3. The Rosenthal Fair Debt Collection Practices Act

12 Plaintiff alleges that Defendants and First American violated the Rosenthal Act in
13 attempting to collect his debt.⁷ (Doc. No. 31 ¶¶ 88, 98.) Defendants and First American
14 contend that Plaintiff’s claim fails for failure to plead facts implicating any wrongdoing
15 under the Rosenthal Act and that foreclosure is not “debt collection” covered by the Act.
16 (Doc. No. 32-1 at 13-14; Doc. No. 33-1 at 7-8.)

17 Even if the Court determined that Defendants and First American’s alleged activities
18 did constitute “debt collection,”⁸ Plaintiff’s claim still fails to allege sufficient facts. Like
19 above, Plaintiff makes conclusory accusations of violations without providing factual
20 support of what actions each Defendant took. *See McHenry v. Renne*, 84 F.3d 1172, 1180
21 (9th Cir. 1996) (“Something labeled a complaint but . . . without simplicity, conciseness
22 and clarity as to whom plaintiffs are suing for what wrongs, fails to perform the essential
23 functions of a complaint.”). Moreover, Plaintiff makes a variety of claims arguing that the
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25 ⁷ The Court notes that Plaintiff only alleges that First American and U.S. Bank are debt collectors. (Doc.
26 No. 31 ¶ 89.)

27 ⁸ While California district courts have found foreclosing on a property pursuant to a deed of trust does
28 not constitute “debt collection,” other circuits have found the contrary to be true while the Ninth Circuit
has not yet issued an opinion on the issue. *See Horton v. Cal. Credit Corp. Ret. Plan*, 835 F. Supp. 2d
879, 890 (S.D. Cal. 2011); *see, e.g., Kaltenback v. Richards*, 464 F.3d 524, 528–29 (5th Cir. 2006).

1 documents at issue show signs that they were recorded fraudulently. (Doc. No. 31 ¶ 94.)
2 However, Plaintiff fails to provide the corresponding section of the Rosenthal Act it
3 allegedly violates. Therefore, Plaintiff’s claim under the Rosenthal Act is **DISMISSED**.

4 **4. Real Estate Settlement Procedures Act**

5 Plaintiff next alleges that Defendants and First American violated RESPA by
6 “failing to timely inform him of any Appointments, Assignments, and transfers of the
7 mortgage,” and by not responding to his inquiries. (Doc. No. 31 ¶¶ 104, 106.) Defendants
8 and First American argue that Plaintiff’s claim is conclusory, lacks sufficient support, and
9 that there is no private right of action under RESPA for failure to disclose an appointment,
10 assignment, or loan transfer. (Doc. No. 32-1 at 14-15; Doc. No. 33-1 at 8-9.) First American
11 further argues that Plaintiff’s claim fails because he has not alleged that First American is
12 a loan servicer as required under section 2605(e) of RESPA. (Doc. No. 32-1 at 15.)

13 The Court reiterates that there is no private right of action under RESPA for failure
14 to disclose an appointment or assignment. *See Bloom v. Martin*, 865 F. Supp. 1377, 1383
15 (N.D. Cal. 1994). Additionally, Plaintiff’s alleged claims fail to indicate which sections of
16 RESPA Defendants and First American allegedly violated. (*See* Doc. No. 31 ¶¶ 101-108.)
17 As a result, Plaintiff again fails to provide Defendants and First American notice of the
18 claims brought against them. *See Adobe Sys. Inc. v. Blue Source Grp., Inc.*, 125 F. Supp.
19 3d 945, 964 (N.D. Cal. 2015) (“[W]hen a pleading fails to allege what role each Defendant
20 played in the alleged harm this makes it exceedingly difficult . . . for individual Defendants
21 to respond to Plaintiffs’ allegations.”) (citations and quotations omitted).⁹ For this reason,
22 and the reasons stated above, Plaintiff’s RESPA claim is **DISMISSED**.

23 **5. Intentional Infliction of Emotional Distress**

24 Plaintiff alleges Defendants and First American’s intentional misrepresentation of
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26 ⁹Furthermore, private RESPA claims carry a one-year statute of limitations. 12 U.S.C. § 2614; *see also*
27 *Bloom*, 865 F. Supp. at 1386. Plaintiff claims that Defendants violated RESPA’s servicing provisions by
28 not providing any response as to why Plaintiff’s mortgage payments and arrears increased. (Doc. No. 31
¶ 106.) Without a time frame to base this allegation on, the Court is unable to determine if Plaintiff’s
RESPA claim is untimely.

1 authority in enforcing the Deed of Trust and attempted foreclosure on the Property was
2 outrageous and extreme. (Doc. No. 31 ¶¶ 111-121.) As a result, Plaintiff contends he suffers
3 severe emotional distress, fear, embarrassment, lack of sleep, severe depression, lack of
4 appetite, loss of workplace productivity, and loss of steady income from a boarding tenant.
5 (*Id.* ¶¶ 118, 125.) In opposition, Defendants and First American contend Plaintiff has not
6 alleged facts demonstrating conduct sufficient to state an IIED claim. (Doc. No. 32-1 at
7 15-16; Doc. No. 33-1 at 9-10.) First American also argues that its conduct is authorized by
8 California law and is privileged. (Doc. No. 32-1 at 15.)

9 The Court first notes that any cause of action for IIED is governed by the two-year
10 statute of limitations set forth in Code of Civil Procedure Section 335.1. *See Pugliese v.*
11 *Superior Ct.*, 146 Cal. App. 4th 1144, 1450 (2007). Thus, Plaintiff’s allegations regarding
12 the Deed of Trust, Defendants’ alleged advice to stop making mortgage payments, the loan
13 modification, and Defendants’ initiation in starting allegedly fraudulently foreclosure
14 proceedings are all time-barred.¹⁰ As to the rest of Plaintiff’s IIED claims, Plaintiff fails to
15 allege the time-period in which they occurred, thus it is impossible for the Court to discern
16 whether they are within the statute of limitations.

17 Nevertheless, even if Plaintiff’s remaining claims are not time-barred, the Court still
18 finds that as currently pled, they still fail to rise to the requisite level of “outrageous
19 conduct” for an IIED claim.¹¹ *See Ragland v. U.S. Bank Nat. Ass’n.*, 209 Cal. App. 4th 182,
20 204 (2002) (holding that a claim for IIED had been satisfied as plaintiff claimed that
21 defendants induced her to skip the April loan payment, refused to later accept loan
22 payments, and sold plaintiff’s home at foreclosure); *see also Davidson v. City of*
23 _____

24 ¹⁰ Plaintiff asserts that he was induced into an unaffordable loan with Wells Fargo in 2004, the Deed of
25 Trust was signed in 2004, and Wells Fargo allegedly told Plaintiff to stop making loan payments in
26 2009. (*Id.* ¶¶ 9-10, 27.) Thus, these IIED claims were time-barred in 2006 and 2011 respectively.

27 ¹¹ The elements of the tort of IIED are: “(1) extreme and outrageous conduct by the defendant with the
28 intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the
[plaintiff] suffering severe or extreme emotional distress; and (3) actual and proximate causation of the
emotional distress by the defendant’s outrageous conduct.” *Christensen v. Superior Court of Los*
Angeles Cnty., 54 Cal. 3d 868, 903 (1991).

1 *Westminster*, 32 Cal. 3d 197, 209 (1982) (“[c]onduct to be outrageous must be so extreme
2 as to exceed all bounds of that usually tolerated in a civilized community.”). Moreover, the
3 Court reiterates that Defendants and First American’s performance of the required
4 foreclosure procedures and delivery of notices are privileged communications under
5 California law. *See* Cal. Civ. Code § 2924(d). Accordingly, Plaintiff’s IIED claim is
6 **DISMISSED**.

7 **6. Slander of Title**

8 Plaintiff alleges that Defendants and First American disparaged and slandered his
9 title to the Property by publishing, recording, posting, and preparing the foreclosure
10 documents when they knew or should have known that such documents were improper.
11 (Doc. No. 31 ¶¶ 128, 129.) Defendants and First American argue Plaintiff’s slander of title
12 claim fails to allege facts that would suggest impropriety and that the act of recording title
13 documents is privileged under California law. (Doc. No. 32-1 at 16; Doc. No. 33-1 at 10-
14 11.)

15 In its order dismissing Plaintiff’s FAC, the Court stated that Plaintiff’s claim of
16 slander was dismissed because of his failure to allege facts supporting direct pecuniary
17 loss. (Doc. No. 30 at 17.) The Court would like to acknowledge that Plaintiff has corrected
18 this deficiency in his SAC by claiming loss of steady income from a tenant. (*See* Doc. No.
19 31 ¶ 132.) However, based on the facts alleged in the SAC, it is not clear to the Court which
20 Defendant left the alleged fraudulent documents on Plaintiff’s driveway which caused this
21 loss. Moreover, the recordation of a notice of default and notice of trustee’s sale is a
22 privileged act on which no tort claim, other than malicious prosecution, may be based. Cal.
23 Civ. Code § 2934a(c). Accordingly, Plaintiff’s claim for slander of title is **DISMISSED**.

24 **7. Unlawful, Unfair, and Fraudulent Business Practices**

25 To adequately plead a UCL claim, Plaintiff must have private standing. *See Kwikset*
26 *Corp. v. Superior Court*, 51 Cal. 4th 310, 322 (2011). Plaintiff must then show either: (1)
27 “unlawful, unfair, or fraudulent business act or practice,” or (2) “unfair, deceptive, untrue
28 or misleading advertising.” *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033,

1 1043 (9th Cir. 2003) (quoting Cal. Bus. & Prof. Code § 17200). Like Plaintiff's fraud
2 claims, *supra* pp. 8-10, Plaintiff has failed to provide the Court with the necessary factual
3 specificity detailing the alleged deception and fraud. Moreover, Plaintiff has still failed to
4 allege an underlying violation of law upon which a UCL claim may lie. Accordingly, based
5 on the above, Plaintiff's UCL claim is **DISMISSED**.

6 **8. Homeowners Bill of Rights**

7 Plaintiff alleges Defendants and First American violated section 2923.55 of the
8 California Civil Code, enacted with the HBOR. (Doc. No. 31 ¶ 151.) Defendants and First
9 American contend Plaintiff has failed to allege facts sufficient to substantiate his HBOR
10 claim. (Doc. No. 32-1 at 17-18; Doc. No. 33-1 at 13.) The Court agrees.

11 Plaintiff has again failed to sufficiently allege the actions of each specific Defendant
12 and their alleged violations of the HBOR. Moreover, the Court highlights that the HBOR
13 took effect on January 1, 2013, and currently does not have any retroactive effect. *See*
14 *Sabherwal v. Bank of New York Mellon*, No. 11cv2874 WQH-BGS, 2013 WL 4833940, at
15 *10 (S.D. Cal. Sept. 10, 2013). Accordingly, Plaintiff's claims revolving around the Notice
16 of Default, alleged failure to assess the borrower's financial situation, and 2009 loan
17 modification are all time-barred as they occurred before 2013.¹² Accordingly, Plaintiff's
18 HBOR claim is **DISMISSED**.

19 **9. Quiet Title¹³**

20 Plaintiff asks the Court to quiet title to the Property in his and his wife's name. (Doc.
21 No. 31 ¶ 168.) Initially, Plaintiff's quiet title claim failed in his FAC because he did not
22

23 ¹² Here, Plaintiff's SAC alleges that he applied for the Loan in 2003, refinanced the loan in 2004,
24 applied for a loan modification in 2009, a notice of default was recorded in 2009, and the latest deed of
25 trust recorded was in 2012. (Doc. No. 31 ¶¶ 9-10, 30-31, 35.)

26 ¹³ Under California law, a plaintiff must allege five elements to state a claim for quiet title in a verified
27 complaint: (1) a legal description and street address of the property; (2) the plaintiff's title to which
28 determination is sought and the basis of that title; (3) the adverse claims to the title against which
determination is sought; (4) the date as of which the determination is sought; and (5) a prayer for the
determination of the title of plaintiff against the adverse claims. *See Ruiz v. Wells Fargo Bank, N.A.*, No.
CV 13-1114 PA (JCx), 2013 WL 1235841, at *2 (C.D. Cal. Mar. 27, 2013) (citing Cal. Code Civ. P. §
761.020).

1 assert the ability to tender the remaining amounts owed on the Loan. (Doc. No. 30 at 20-
2 21.) Plaintiff's SAC has amended this deficiency. (Doc. No. 31 ¶ 164.) However, Plaintiff
3 has failed to satisfy the threshold requirement of submitting the claim in a verified
4 complaint. *See Adams v. Am. Mortg. Network, Inc.*, No. 09cv0340-LAB (JMA), 2010 WL
5 3069227, at *2 (S.D. Cal. Aug. 4, 2010). For this reason, Plaintiff's quiet title claim is
6 **DISMISSED**.

7 **10. Declaratory Relief**

8 Plaintiff requests various forms of declaratory relief, including a judicial
9 determination of the ownership rights to the Property in his favor. (Doc. No. 31 ¶¶ 169-
10 179.) However, as Plaintiff's claim for declaratory relief is wholly derivative of the
11 previous causes of action that have all been dismissed, Plaintiff's claim for declaratory
12 relief is also **DISMISSED**. *See Ball v. FleetBoston Fin. Corp.*, 164 Cal. App. 4th 794, 800
13 (2008) (holding that plaintiff's claim for declaratory relief was properly dismissed as the
14 claim was "wholly derivative" of the statutory claim).

15 **C. Leave to Amend**

16 Federal Rule of Civil Procedure 15 advises courts to grant leave to amend freely
17 "when justice so requires." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc).
18 This policy is to be applied liberally. *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d
19 708, 712 (9th Cir. 2001). Furthermore, "the rule favoring liberality in amendments to
20 pleadings is particularly important for pro se litigants." *Lopez*, 203 F.3d at 1131. (citation
21 omitted). Given Plaintiff is a pro se litigant and has only been granted two prior leaves to
22 amend, the Court finds that justice requires he be given another chance to cure the
23 deficiencies in the instant pleading.

24 **IV. CONCLUSION**

25 For the above stated reasons, the Court orders as follows:

- 26 (1) Defendants Wells Fargo and US Bank's motion to dismiss, (Doc. No. 33), is
27 **GRANTED WITH LEAVE TO AMEND**;
- 28 (2) First American's motion to dismiss, (Doc. No. 32), is **GRANTED WITH**

1 **LEAVE TO AMEND;**

2 (3) Defendants and First American's requests for judicial notice are **GRANTED;**
3 and

4 (4) Plaintiff's objections to First American's documents submitted in support of
5 its motion to dismiss is **DENIED.**

6 If Plaintiff can cure the deficiencies of the causes of action he may file a third
7 amended complaint within **fourteen (14) days** of the date of this order. Failure to do so
8 will result in the dismissal of this case with prejudice.

9
10 **IT IS SO ORDERED.**

11
12 Dated: April 5, 2017



Hon. Anthony J. Battaglia
United States District Judge