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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 RUSSELL C. MANSON,

12 Plaintiff,

13 v.

14 GUARANTY BANK, et al.,

15 Defendants.
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Case No.: 16cv2921-MMA (JLB)

**ORDER GRANTING DEFENDANT
GUARANTY BANK'S MOTION TO
DISMISS**

[Doc. No. 3]

21 Plaintiff Russell C. Manson brings suit against Defendant Guaranty Bank alleging
22 violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§
23 17200-17210, and negligence. Defendant moves to dismiss Plaintiff's complaint in its
24 entirety pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* Doc. No. 3. Plaintiff
25 filed an opposition, to which Defendant replied. *See* Doc. Nos. 4, 5. The Court took the
26 motion under submission on the papers and without oral argument pursuant to Civil
27 Local Rule 7.1(d)(1). *See* Doc. No. 6. For the reasons set forth below, the Court
28 **GRANTS** Defendant's motion to dismiss.

1 **BACKGROUND**¹

2 This action arises out of events related to the non-judicial foreclosure and sale of
3 Plaintiff’s home, located at 13070 Texana Street, San Diego, California, 92129 (“the
4 property”). In 2005, Plaintiff entered into a written loan agreement and obtained a home
5 equity line of credit (“HELOC”) loan in the amount of \$95,000, secured by the property
6 through a Deed of Trust, recorded on October 28, 2005. Plaintiff suffered a significant
7 financial setback due to the economy. As such, Plaintiff contacted Defendant to inquire
8 about a loan modification. Defendant promised that if Plaintiff submitted a complete
9 application for a loan modification, it would not initiate foreclosure proceedings while
10 Plaintiff’s loan modification application was in review. Plaintiff submitted a complete
11 loan modification application as instructed. Defendant did not provide any written
12 acknowledgement of the documents submitted by Plaintiff in connection with his request
13 for a loan modification.

14 On January 28, 2016, Defendant recorded a Notice of Default against the property.
15 Plaintiff did not believe that Defendant was reviewing Plaintiff’s loan modification
16 application in good faith. On or around May 6, 2016, Defendant recorded a Notice of
17 Trustee Sale against the property. On or around June 1, 2016, Defendant sold the
18 property, and initiated action to take possession of the property and to evict Plaintiff from
19 his home. Plaintiff alleges that Defendant wrongfully delayed the processing of
20 Plaintiff’s loan modification application.

21 Based on these allegations, Plaintiff alleges causes of action for violation of
22 California’s UCL, negligence, and cancellation of instrument.

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¹ Because this matter is before the Court on a motion to dismiss, the Court must accept as true the
28 allegations set forth in the FAC. *See Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 740
(1976).

1 LEGAL STANDARD

2 A Rule 12(b)(6) motion to dismiss challenges the legal sufficiency of the
3 complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “While a complaint
4 attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations,
5 a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more
6 than labels and conclusions, and a formulaic recitation of the elements of a cause of
7 action will not do. Factual allegations must be enough to raise a right to relief above the
8 speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal
9 quotations, brackets, and citations omitted).

10 In reviewing the motion to dismiss under Rule 12(b)(6), the court must assume the
11 truth of all factual allegations, and construe them in the light most favorable to the
12 nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996).
13 However, “conclusory allegations of law and unwarranted inferences are not sufficient to
14 defeat a motion to dismiss,” *Pareto v. Fed. Deposit Ins. Corp.*, 139 F.3d 696, 699 (9th
15 Cir. 1998), and it is improper for a court to assume a plaintiff “can prove facts that [he or
16 she] has not alleged,” see *Assoc. Gen. Contractors of California, Inc. v. California State
17 Council of Carpenters*, 459 U.S. 519, 526 (1983).

18 Federal Rule of Civil Procedure 9(b) sets forth a heightened pleading standard for
19 allegations of fraud, requiring parties to “state with particularity the circumstances
20 constituting fraud or mistake.” In general, fraud allegations must be “specific enough to
21 give defendants notice of the particular misconduct ... so that they can defend against the
22 charge and not just deny that they have done anything wrong.” *Vess v. Ciba-Geigy Corp.
23 USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting *Bly-Magee v. California*, 236 F.3d
24 1014, 1019 (9th Cir. 2001)). Specifically, plaintiffs are required to supplement
25 allegations of fraud with the “who, what, when, where, and how” of the purported
26 misconduct, in addition to why the statement or conduct is false or misleading. *Id.*
27 Failure to satisfy this heightened pleading standard can result in dismissal of the claim.
28 *Id.* at 1107.

1 DISCUSSION

2 **A. Request for Judicial Notice**

3 Defendant requests that the Court take judicial notice of certain public records
4 relating to Plaintiffs' complaint. *See* Doc. No. 3-3. These records include: (1) Deed of
5 Trust, recorded on March 1, 2005; (2) Deed of Trust, recorded on October 28, 2005; (3)
6 Assignment of Deed of Trust, recorded on January 28, 2016; (4) Substitution of Trustee,
7 recorded on January 28, 2016; (5) Trustee's Deed Upon Sale, recorded June 15, 2016;
8 and (6) Full Reconveyance, recorded on July 20, 2016.

9 Generally, a district court's review on a 12(b)(6) motion to dismiss is limited to the
10 complaint. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) *overruled on*
11 *other grounds by Galbraith v. Cnty. Of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).
12 However, "a court may take judicial notice of matters of public record," *id.* at 689
13 (internal quotations and citations omitted), and of "documents whose contents are alleged
14 in a complaint and whose authenticity no party questions, but which are not physically
15 attached to the pleading," *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled*
16 *on other grounds by Galbraith v. Cnty. Of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).
17 Judicially noticed facts "may be considered on a motion to dismiss." *Mullis v. United*
18 *States Bankr. Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987).

19 No party questions the authenticity of the public records contained in Defendant's
20 request for judicial notice. Therefore, to the extent the Court references facts contained
21 within the above documents, the Court **GRANTS** Defendants' Request for Judicial
22 Notice.

23 **B. Motion to Dismiss**

24 As an initial matter, Defendant moves to dismiss Plaintiff's complaint to the extent
25 that he is attempting to bring his claims pursuant to the California Home Owner's Bill of
26 Rights ("HOBR"). Pursuant to California Civil Code § 2923.6, "[i]f a borrower submits
27 a complete application for a *first lien* loan modification," a mortgage servicer "shall not
28 record a notice of default or notice of sale, or conduct a trustee's sale, while the complete

1 *first lien* loan modification application is pending” until “the mortgage servicer makes a
2 written determination that the borrower is not eligible for a *first lien* modification, and
3 any appeal period” has expired. Cal. Civ. Code § 2923.6(c) (emphasis added). Plaintiff
4 contends throughout his complaint that Defendant violated the HOBR by recording a
5 Notice of Sale while Plaintiff’s loan modification application remained pending.
6 However, as Defendant correctly notes, Plaintiff alleges that he applied for a modification
7 of a second lien loan, to wit, his HELOC loan. The HOBR by its plain terms does not
8 apply to second lien loans. Cal. Civ. Code § 2924.15(a). Thus, in so far as Plaintiff bases
9 his claims on Defendant’s purported violation of the HOBR, Plaintiff’s claims fail.
10 Plaintiff also fails to state plausible claims for the following reasons.

11 1. California’s Unfair Competition Claim

12 Plaintiff alleges that Defendant violated California’s UCL by engaging in
13 deceptive business practices with respect to mortgage loan servicing, foreclosure of
14 residential properties, and related matters, by misrepresenting the availability of a loan
15 modification and foreclosing on the property. Plaintiff further claims that Defendant
16 engaged in fraudulent acts or practices by concealing material facts, to induce Plaintiff to
17 pay the marked up and/or unnecessary fees for default-related services. Plaintiff alleges
18 that if he had known the true nature of the fees, he would have been aware of the inflated
19 and unnecessary fees, and would not have paid the fees.

20 California Business & Professions Code § 17200 prohibits “any unlawful, unfair or
21 fraudulent business act.” Each “prong” of the UCL is “a separate and distinct theory of
22 liability.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009). An action
23 brought under the “unlawful” prong of this statute “borrows” violations of other laws
24 when committed pursuant to business activity. *Farmers Ins. Exchange v. Superior Court*,
25 2 Cal.4th 377, 383 (1992). Plaintiff claims that Defendant has engaged in “unlawful”
26 business practices based on violations of Title 18, United States Code, sections 1341,
27 1343, and 1962; California Civil Code sections 1572, 1573, 1709, 1710, and 1711, and
28 the common law.

1 Under all three prongs of the UCL, the gravamen of Plaintiff’s claim sounds in
2 fraud. *See Kearns*, 567 F.3d at 1127. For example, Plaintiff relies upon the federal mail
3 fraud, wire fraud, and racketeering statutes to support the “unlawful” prong of his claim.
4 However, fraud is a necessary element of the mail and wire fraud statutes, and any
5 derivative RICO claim sounds in fraud. As such, Plaintiff’s UCL claim must be pleaded
6 with particularity. Fed. R. Civ. P. 9(b); *Odom v. Microsoft Corp.*, 486 F.3d 541, 553-54
7 (9th Cir. 2006). Allegations of fraud under section 17200 must comply with Rule 9(b).
8 *Kearns*, 567 F.3d at 1125 (applying Rule 9(b) particularity requirement to UCL claim
9 grounded in fraud). Plaintiff must set forth “the time, place, and specific content of the
10 false representations as well as the identities of the parties to the misrepresentation.”
11 *Odom*, 486 F.3d at 553 (internal quotation marks omitted). Plaintiff does not do so.
12 Plaintiff has not satisfied the Rule 9(b) requirement and consequently, fails to assert a
13 plausible claim under either the “fraudulent” or “unfair” prong of the UCL.

14 2. Negligence

15 Plaintiff alleges that Defendant is negligent for failing to exercise reasonable care
16 in processing and reviewing Plaintiff’s loan modification application. Specifically,
17 Plaintiff claims that Defendant breached its duty to Plaintiff by: (1) failing to review
18 Plaintiff’s loan modification application in a timely manner; (2) misplacing Plaintiff’s
19 application documents; (3) mishandling Plaintiff’s application by relying on incorrect
20 information; (4) misrepresenting the status of Plaintiff’s loan modification application;
21 and (5) continuing foreclosure in violation of public policy and federal regulations.

22 Under California law, the elements of a claim for negligence are that: (1) defendant
23 had a legal duty to plaintiff, (2) defendant breached this duty, (3) defendant was the
24 proximate and legal cause of plaintiff’s injury, and (4) plaintiff suffered damage. Cal.
25 Civ. Code § 1714; *Merrill v. Navegar, Inc.*, 26 Cal. 4th 465, 500 (2001). As a general
26 rule, under California law, “a financial institution owes no duty of care to a borrower
27 when the institution’s involvement in the loan transaction does not exceed the scope of its
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1 conventional role as a mere lender of money.” *Nymark v. Heart Fed. Sav. & Loan Ass’n*,
2 231 Cal. App. 3d 1089, 1095-96 (1991).

3 In an unpublished opinion, the Ninth Circuit has ruled that, under California law,
4 lenders do not owe borrowers a duty of care to process a borrower’s loan modification
5 application within a particular time frame. *See Anderson v. Deutsche Bank Nat. Trust*
6 *Co. Americas*, 649 F. App’x 550 (9th Cir. 2016). The Ninth Circuit explained that
7 because the borrower’s default necessitates the modification, the resulting harm is “not . .
8 . . closely connected to the lender’s conduct,” and the lender’s conduct is not blameworthy.
9 *Id.* (quoting *Lueras v. BAC Home Loans Servicing, LP*, 221 Cal.App.4th 49, 67 (2013)).
10 Here, Defendant did not cause Plaintiff to need a loan modification, and the harm that
11 Plaintiff experienced is primarily attributable to his default, not Defendant’s actions.
12 Plaintiff cannot state a negligence claim premised solely upon Defendant’s delay in
13 processing his loan modification application and actions related thereto. Plaintiff fails to
14 plead any non-conclusory allegations sufficient to demonstrate that Defendant otherwise
15 owed him a duty of care by making “explicit promises to him or affirmatively
16 discourag[ing] him from seeking other remedies.” *Ivey v. JP Morgan Chase Bank N.A.*,
17 Case No. 16-cv-00610-HSG, 2016 U.S. Dist. LEXIS 174471, at *7 (N.D. Cal. 2016). As
18 such, Plaintiff’s negligence claim is subject to dismissal.

19 3. Cancellation of Instrument

20 Plaintiff also brings a cause of action for cancellation of instrument pursuant to
21 California Civil Code section 3412. Plaintiff seeks to cancel the Notice of Default and
22 Notice of Sale, which would essentially operate to set aside the trustee’s sale. However,
23 in order to set aside the sale of the property, Plaintiff must allege facts sufficient to show
24 tender in the amount of his indebtedness, or a valid excuse to the tender requirement.
25 *Morgan v. Aurora Loan Servs., LLC*, 646 Fed. Appx. 546, 551 (9th Cir. 2016) (citing
26 *Lona v. Citibank, N.A.*, 202 Cal. App. 4th 89 (Ct. App. 2011)). Plaintiff fails to do so.
27 As such, this claim is subject to dismissal.

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1 **C. Leave to Amend**

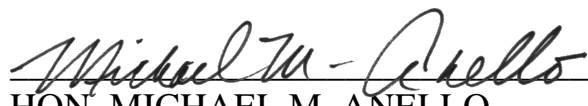
2 Plaintiff's claims arise in large part out of Defendant's purported violation of
3 provisions in California's HOBRA which simply do not apply to the loan at issue.
4 Amendment will not cure this fundamental underlying defect in Plaintiff's complaint.
5 Nevertheless, in the Ninth Circuit, a district court must grant a plaintiff leave to amend
6 his claims "unless the court determines that the allegation of other facts consistent with
7 the challenged pleading could not possibly cure the deficiency." *DeSoto v. Yellow*
8 *Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schreiber Distrib. Co. v.*
9 *ServWell Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)). The Court cannot
10 conclude at this preliminary stage that it would be impossible for Plaintiff to sufficiently
11 amend his claims. Accordingly, the Court will grant Plaintiff leave to file an amended
12 complaint.

13 **CONCLUSION**

14 Based on the foregoing, the Court **GRANTS** Defendant's motion to dismiss.
15 Plaintiff must file an amended complaint that cures the deficiencies identified herein on
16 or before **April 5, 2017**.

17 **IT IS SO ORDERED.**

18 DATE: March 22, 2017

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20 HON. MICHAEL M. ANELLO
21 United States District Judge
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