**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| NIMAL SUSANTHA DIUNUGALA, an individual, on behalf of himself and all others similarly situated,<br><br>Plaintiff,<br><br>vs.<br><br>JP MORGAN CHASE BANK, N.A.; THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A; AMERICAN HOME MORTGAGE SERVICING, INC.; POWER DEFAULT SERVICES, INC.; and DOES 1 through 10, inclusive,<br><br>Defendants. | CASE NO. 12cv2106-WQH-NLS<br><br>ORDER |

HAYES, Judge:

The matter before the Court is the Motion to Dismiss Plaintiff's First Amended Complaint for Failure to State a Claim filed by all Defendants. (ECF No. 20).

## I. Background

On July 25, 2012, Plaintiff Nimal Sustantha Diunugala initiated this action by filing a Complaint in San Diego County Superior Court. (ECF No. 1-2). On August 24, 2012, all Defendants jointly filed a Notice of Removal to this Court, alleging diversity jurisdiction. (ECF No. 1). On January 18, 2013, the Court granted Defendants' motion to dismiss the Complaint. (ECF No. 15).

On May 19, 2013, Plaintiff filed the First Amended Complaint. (ECF No. 19). On June 6, 2013, Defendants filed the Motion to Dismiss Plaintiff's First Amended Complaint for Failure to State a Claim ("Motion to Dismiss"). (ECF No. 20). On July 2, 2013, Plaintiff filed an opposition and evidentiary objections.[1] (ECF Nos. 21, 22). On July 8, 2013, Defendants filed a reply. (ECF No. 24). On August 12, 2013 and August 27, 2013, Plaintiff filed Notices of New Legal Authority. (ECF Nos. 25, 28). On August 21, 2013, Defendants filed a response to Plaintiff's August 12, 2013 Notice of New Legal Authority. (ECF No. 27).

## II. Allegations of the First Amended Complaint

In early 2006, Plaintiff purchased real property at 987 Merced River Road in Chula Vista, California, 91913 for use as his personal residence. (ECF No. 19 ¶ 12). Plaintiff paid $206,458.33 in cash as a down payment on the property to be secured by a conventional loan from American Broker Conduit. *Id.* ¶ 13. Plaintiff's initial monthly payments on the loan were $1,752.06. *Id.* ¶ 14.

In late 2010, Plaintiff sent a Qualified Written Request to Defendant American Home Mortgage Servicing ("AHMSI"), who responded on January 11, 2011 with a letter informing Plaintiff that "the owner/creditor of his loan was 'Structured Asset Mortgage Investments II Trust 2006-AR5 Pass Though Certificates, Series 2006-AR5' ('MBS trust') .... [and that] 'The Bank of New York Mellon Corporation' was the trustee of the MBS trust." *Id.* ¶¶ 17-18.

The "MBS trust required that all loans being transferred to the trust had to be funded according to the terms of the pooling and servicing agreement.... The four corners of the [pooling and servicing agreement] bind the trust to the only actions which can lawfully be taken with respect to the administration of its assets...." *Id.* ¶¶ 23-24. "Defendant [Bank of New York Mellon Corporation ('BONY')] was not made a successor trustee of the MBS trust as set forth in the [pooling and servicing]

[1] Plaintiff objects to Defendants' request for judicial notice, filed in conjunction with the Motion to Dismiss. (ECF No. 20-2). In deciding the Motion to Dismiss, the Court has not relied upon the materials attached to the request for judicial notice.

Agreement.... Yet, defendant AHMSI continued to use BONY's underwriting standards when evaluating plaintiff for a loan modification which failed and plaintiff's home was taken at foreclosure auction on April 9, 2012." *Id.* ¶¶ 27-28.

"Six months after AHMSI represented that BONY was the trustee of the MBS trust and as such was the creditor of Plaintiff's loan, on June 15, 2011, [Defendant] Power Default [Services, Inc.] caused a Notice of Default and Election to Sell Under Deed of Trust ... to be recorded which stated it was for the benefit of ... JP Morgan Chase Bank, National Association ['JP Morgan'], Not Individually But Solely As Trustee For The Holders Of Structured Asset Mortgage Investments II Inc., Mortgage Pass-Through Certificates, Series 2006-AR5." *Id.* ¶ 83. "The [Notice of Default] stated Plaintiff was in default in the amount of $27,388.55 as of June 21, 2011," and the "Beneficiary was named 'JP Morgan Chase Bank, National Association' as trustee of the MBS trust." *Id.* ¶¶ 84-85.

On September 12, 2011, "a Notice of Sale was executed" which "represented the outstanding obligation was $684,361.54." *Id.* ¶¶ 90-91. "On April 13, 2012, contrary to the Chain of Title, a Trustee's Deed Upon Sale ... was recorded representing that the beneficiary who was the grantee taking by credit bid was ... The Bank of New York Mellon...." *Id.* ¶ 92. The Trustee's Deed Upon Sale "stated the property was taken by credit bid by defendant The Bank of New York Mellon as trustee for the MBS trust on April 19, 2012 for the sum of $425,000.00...." *Id.* ¶ 94.

The Trustee's Deed Upon Sale "is fraudulent, void and conveyed no interest in the Property" because:

a. Defendant BONY did not receive a valid assignment of the debt in any manner.

b. On June 15, 2011, a [Notice of Default] was recorded which clearly stated [Defendant JP Morgan] was the beneficiary.

c. The MBS trust is a publicly recorded document created in 2006 and the [pooling and servicing agreement] ... show[s] that JP Morgan Chase Bank is the trustee of the MBS trust.

d. The [Trustee's Deed Upon Sale] depends solely and entirely on the [Notice of Default], to substantiate its validity and the fact these

> documents are inconsistent on their face establishes the invalidity of the [Trustee's Deed Upon Sale].
>
> e. And the 'Lender' as later identified to the IRS was in fact, neither JP Morgan nor BONY but was Homeward Residential, Inc.

*Id.* ¶ 101. "BONY then proceeded to evict plaintiff based on the false and fraudulent [Trustee's Deed Upon Sale]." *Id.* ¶ 105.

"Under the strict rules of this [pooling and servicing agreement] to this MBS trust, the Sponsor ... was required to provide a substitute mortgage loan or purchase the related mortgage loan within 180 days if the Note or other required assignments were not effectuated within 90 days of the closing date." *Id.* ¶ 119. "The note on [Plaintiff]'s loan was not transferred within 90 days or repurchased ... within 180 days as required by the [pooling and servicing agreement] of the MBS trust." *Id.* ¶ 123.

The First Amended Complaint asserts the following causes of action: (1) negligence; (2) violation of Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2605; (3) violation of Truth in Lending Act ("TILA"), 15 U.S.C. § 1641g; (4) cancellation of documents to set aside the foreclosure sale; (5) fraud; and (6) violation of California Business & Professions Code § 17200. The First Amended Complaint purports to assert a class action pursuant to California Business & Professions Code § 17203 on behalf of the following putative class: "All ... borrowers who received conflicting notifications from defendant AHMSI, BONY or JP Morgan of the identity of their investor, or creditor as required under 15 USC §1641g after May 5, 2009"; and "All ... borrowers who received conflicting notifications from defendant AHMSI of the identity of their investor, or creditor as required under 12 USC §2605 within the past two years." (ECF No. 19 ¶ 39).

## III. Standard of Review

Federal Rule of Civil Procedure 12(b)(6) permits dismissal for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "A pleading that states a claim for relief must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Dismissal under Rule

12(b)(6) is appropriate where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. *See Balistreri v. Pac. Police Depot*, 901 F.2d 696, 699 (9th Cir. 1990).

"[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). When considering a motion to dismiss, a court must accept as true all "well-pleaded factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). However, a court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted).

## IV. Discussion

### A. Negligence

The first cause of action for negligence alleges that JP Morgan and/or BONY breached a duty of care owed to Plaintiff to provide notice pursuant to TILA; AHMSI "erroneously continued to use BONY's underwriting standards when reviewing Plaintiff's loan for a modification"; and, "[a]s a consequence of defendants' actions and/or failure to act, plaintiff has not been given a meaningful opportunity to modify his loan in order to save his home from foreclosure." (ECF No. 19 ¶¶ 60-61). Defendants contend that the negligence cause of action must be dismissed because "Plaintiff has not alleged any special circumstances that would impose a duty of care on Defendants." (ECF No. 20-1 at 12). Plaintiff contends that AHMSI is a loan servicer rather than a lender, and AHMSI, BONY and JP Morgan all owed Plaintiff a duty of care because they "had an ongoing relationship with the borrower while the

borrower was attempting to modify the loan." (ECF No. 21 at 11).

"The elements of a cause of action for negligence are (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate cause between the breach and (4) the plaintiff's injury." *Mendoza v. City of Los Angeles*, 66 Cal. App. 4th 1333, 1339 (1998) (citation omitted). "The existence of a legal duty to use reasonable care in a particular factual situation is a question of law for the court to decide." *Vasquez v. Residential Invs., Inc.*, 118 Cal. App. 4th 269, 278 (2004). A court may consider "various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." *Biakanja v. Irving*, 49 Cal. 2d 647, 650 (1958).

"[F]or purposes of a negligence claim, 'as a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.'" *Das v. Bank of Am., N.A.*, 186 Cal. App. 4th 727, 740 (2010) (quoting *Nymark v. Heart Fed. Sav. & Loan Assn.*, 231 Cal. App. 3d 1089, 1096 (1991)); *see also Wagner v. Benson*, 101 Cal. App. 3d 27, 34-35 (1980). Absent "special circumstances ... a loan transaction is at arm's length and there is no fiduciary relationship between the borrower and lender." *Oaks Mgmt. Corp. v. Superior Court*, 145 Cal. App. 4th 453, 466 (2006). Likewise, a loan servicer generally does not owe a duty to the borrower of the loan it is servicing. *See Castaneda v. Saxon Mortg. Servs.*, 687 F. Supp. 2d 1191, 1198 (E.D. Cal. 2009). Absent special circumstances, there is no duty for a servicer to modify a loan. *See Bunce v. Ocwen Loan Servicing, LLC*, No. 13-00976, 2013 WL 3773950, at *5-*6 (E.D. Cal. July 17, 2013) (collecting cases); *Gonzalez v. Wells Fargo Bank*, No. 12cv3842, 2012 WL 5350035 *6 (N.D. Cal. Oct. 29, 2012) ("A loan modification, which is nothing more than a renegotiation of loan

terms, falls well within a[n] institution's conventional money-lending role.") (citations omitted).

Plaintiff relies upon *Jolley v. Chase Home Finance*, 213 Cal. App. 4th 872 (2013), which held that a bank had a duty to a borrower under a construction loan that obligated the bank to disburse funds as the construction progressed. The lender allegedly breached its obligation to disburse funds when the lender lost the loan documents, resulting in an eight month delay of construction. *See id*. at 878. The court held that there was a triable issue of fact as to whether the lender was negligent. The court stated: "We note that we deal with a construction loan, not a residential home loan where, save for possible loan servicing issues, the relationship ends when the loan is funded. By contrast, in a construction loan the relationship between lender and borrower is ongoing, in the sense that the parties are working together over a period of time, with disbursements made throughout the construction period, depending upon the state of progress towards completion." *Id*. at 901. The Court finds *Jolley* to be inapposite to this case, which involves a residential home loan and related loan servicing issues.

The Court finds that the First Amended Complaint fails to adequately allege that any Defendant exceeded the scope of its "conventional role as a mere lender of money." *Nymark*, 231 Cal. App. 3d at 1096. The allegations related to the negligence cause of action are conclusory and fail to indicate that the *Biakanja* factors weigh in favor of finding a duty. *See Bunce*, 2013 WL 3773950, at *5 (same). The allegations of the First Amended Complaint are insufficient to plausibly suggest that any Defendant owed Plaintiff a duty of care. The Motion to Dismiss the first cause of action for negligence is granted.

**B. RESPA**

The second cause of action for violation of RESPA alleges that, "[i]f AHMSI had properly conducted an investigation with any diligence in determining the true identity of the creditor, AHMSI would have realized that the trustee for the MBS trust it stated

in the response to the QWR [i.e, 'Qualified Written Request'] was JP Morgan and not BONY. As a result, AHMSI is strictly liable for violating 12 U.S.C. § 2605 entitling plaintiff to damages." (ECF No. 19 ¶¶ 71-72). Defendants contend that "this claim is defective because it fails to allege actual damage caused by the alleged failure to respond to the purported QWR." (ECF No. 20-1 at 13). Plaintiff contends that "defendants are strictly liable for their failure to promptly make an accurate disclosure after a reasonable investigation and statutory damages are awarded if there are no actual damages," and Plaintiff suffered damage because he "lost the opportunity to modify his home [loan] after paying tens of thousands of dollars to the servicer." (ECF No. 21 at 14-15).

"If any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days ... unless the action requested is taken within such period." 12 U.S.C. § 2605(e)(1)(A). Section 2605 specifies the contents of a proper QWR and the required response to a borrower's QWR. If a loan servicer fails to comply with the provisions of 12 U.S.C. § 2605, a borrower is entitled to "any actual damages to the borrower as a result of the failure" and "any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of [12 U.S.C. § 2605]." 12 U.S.C. § 2605(f)(1).

"Numerous courts have read Section 2605 as requiring a showing of pecuniary damages to state a claim." *Molina v. Wash. Mut. Bank*, No. 09-CV-894, 2010 WL 431439 at *7 (S.D. Cal. Jan. 29, 2010). "This pleading requirement has the effect of limiting the cause of action to circumstances in which plaintiff can show that a failure to respond or give notice has caused them actual harm." *Shepherd v. Am. Home Mortg. Servs., Inc.*, No. 2:09-1916, 2009 WL 4505925, at *3 (E.D. Cal. Nov. 20, 2009) (citation omitted). A plaintiff is entitled to recover for the loss that relates to the RESPA violation, not for all losses related to foreclosure activity. *See Lal v. Am. Home*

*Servicing, Inc.*, 680 F. Supp. 2d 1218, 1223 (E.D. Cal. 2010) ("[T]he loss alleged must be related to the RESPA violation itself."); *Torres v. Wells Fargo Home Mortg., Inc.*, No. 10-4761, 2011 WL 11506, at *8 (N.D. Cal. Jan. 4, 2011) ("The plaintiff must ... allege a causal relationship between the alleged damages and the RESPA violation."); *cf. Lawther v. OneWest Bank*, No. C-10-54, 2010 WL 4936797, at *7 (N.D. Cal. Nov. 30, 2010) (granting motion to dismiss RESPA claim for failure to adequately allege actual damages because "[w]hat remains unexplained ... is how the QWR failure itself is causally connected to the claimed distress of Lawther or his family").

The First Amended Complaint fails to allege facts plausibly suggestive of a causal connection between the alleged RESPA violation and any alleged damages. The First Amended Complaint fails to allege facts indicating how the alleged failure to adequately respond to the QWR caused Plaintiff to lose "the opportunity to modify his home [loan] after paying tens of thousands of dollars to the servicer." (ECF No. 21 at 14-15). The First Amended Complaint also fails to allege "a pattern or practice of noncompliance with the requirements of [12 U.S.C. § 2605]." 12 U.S.C. § 2605(f)(1) (allowing "any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of [12 U.S.C. § 2605]"). The Court concludes that Plaintiff has not alleged sufficient facts to support a cause of action for violation of RESPA. *See Twombly*, 550 U.S. at 555. The Motion to Dismiss the second cause of action for violation of RESPA is granted.

**C. TILA**

The third cause of action for violation of TILA alleges that, "[a]fter May 20, 2009, JP Morgan and BONY were required to notify the plaintiff in writing of the transfer of the loan from lender to new creditor or assignee pursuant to 15 U.S.C. § 1641.... Both JP Morgan and BONY failed to notify Plaintiff and those similarly situated within 30 days of the purported assignment or transfer of Plaintiff's loan when it believed it became the new creditor or assignee after May 20, 2009 and failed to give proper notice as described in 15 USC §1641g.... Although [Plaintiff] was attempting

to get a loan modification approved by his new creditor after May 20, 2009, it was never a settled matter who the trustee of the MBS trust was or what the underwriting guidelines were while he was facing imminent foreclosure." (ECF No. 19 ¶¶ 75, 77, 79). The third cause of action for violation of TILA is brought against JP Morgan and BONY only.

Defendants contend that the TILA claim fails because (1) "Plaintiff does not allege who was required to provide him notice"; (2) the claim is barred by the one-year statute of limitations; and (3) Plaintiff fails to plead actual damages sustained by Plaintiff as a result of the alleged failure to give notice. (ECF No. 20-1 at 14-15). Plaintiff contends that the First Amended Complaint alleges transfers occurred within the statute of limitations, and "Plaintiff alleged that he was entitled to actual damages for the failure of the servicer to use the correct underwriting standard when attempting to modify the loan" as well as statutory damages. (ECF No. 21 at 19).

TILA provides that, "not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer, including (A) the identity, address, telephone number of the new creditor; (B) the date of transfer; (C) how to reach an agent or party having authority to act on behalf of the new creditor; (D) the location of the place where transfer of ownership of the debt is recorded; and (E) any other relevant information regarding the new creditor." 15 U.S.C. § 1641(g). A creditor that fails to comply with any requirement imposed under § 1641(g) faces liability "in an amount equal to the sum of—" "any actual damage sustained by such a person as a result of the failure," and "in the case of an individual action twice the amount of any finance charge in connection with the transaction," and "in the case of a class action, such amount as the court may allow...." 15 U.S.C. § 1640(a)(1)-(2). The TILA statute of limitations provision states that "any action under this section may be brought ... within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e).

The Complaint was filed on July 25, 2012. (ECF No.1-2). The First Amended Complaint alleges that "Defendant Power Default represented JP Morgan was the creditor/assignee in the Notice of Default recorded on June 15, 2011.... Defendant Power Default also represented BONY was plaintiff's creditor/assignee in the Trustee's Deed Upon Sale on April 13, 2012.... Defendant Power Default was acting as defendant BONY and defendant JP Morgan's authorized agent at the time each of these representations were made." (ECF No. 19 ¶¶ 56-58). Viewing reasonable inferences in Plaintiff's favor, *see Moss*, 572 F.3d at 969, these allegations are sufficient to allege that BONY was required to provide notice pursuant to 15 U.S.C. § 1641(g) within the one-year statute of limitations period.

The Court does not decide whether the First Amended Complaint adequately pleads actual damages, because Plaintiff adequately pleads entitlement to statutory damages pursuant to 15 U.S.C. § 1640(a) (providing that damages are recoverable "in the case of an individual action twice the amount of any finance charge in connection with the transaction," and "in the case of a class action, such amount as the court may allow...."). *See Vogan v. Wells Fargo Bank, N.A.*, No. 11cv2098, 2011 WL 5826016, at *5 (E.D. Cal. Nov. 17, 2011) ("Even if plaintiffs are not entitled to actual damages based on the allegations in their Complaint [for violation of 15 U.S.C. § 1641(g)], they did adequately plead that they are entitled to attorneys' fees and statutory damages."); *cf. Gutierrez v. U.S. Bank, NA*, No. CV-12-4713, 2013 WL 399140, at *3 n.3 (C.D. Cal. Feb. 1, 2013) (requiring plausible allegations of actual damages because plaintiff "fails to identify any statutory damages to which she would be entitled" and "the statutory damages provision at 16 U.S.C. § 1640(a)(2)(A) does not apply in the circumstances of this case").

The Motion to Dismiss the third cause of action for violation of TILA is denied.

**D. Cancellation of Documents**

In the fourth cause of action for "cancellation of documents," the First Amended Complaint alleges that the "actions by JP Morgan ... and BONY purporting that either

had standing as Trustee of the MBS trust to foreclose or assign this mortgage loan to the Trust in 2012 were in contravention of the trust and were void." (ECF No. 19 ¶ 127). The fourth cause of action requests "an order cancelling the fraudulent ... [Notice of Default], [Trustee's Deed Upon Sale], [Notice of Sale] and Substitution of Trustee" pursuant to California Civil Code § 3412. *Id.* ¶ 131. Defendants contend that "Plaintiff cannot challenge the foreclosing entities' standing to foreclose on the Property"; "Plaintiff cannot predicate a viable claim on an allegedly 'invalid' assignment of deed of trust" because "assignments of a deed of trust need never be recorded in order to nonjudicially foreclose"; Plaintiff "lacks standing to challenge any assignments"; and "Plaintiff fails to tender." (ECF No. 20-1 at 15, 18-19, 21). Plaintiff contends that "BONY Mellon has no right to use JP Morgan Chase's [Notice of Default]" to initiate nonjudicial foreclosure proceedings, and "Cal. Civ. Code § 3412 does not require tender." (ECF No. 21 at 21).

California's nonjudicial foreclosure scheme does not "provide for a judicial action to determine whether the person initiating the foreclosure process is indeed authorized." *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 1155 (2011) ("The recognition of the right to bring a lawsuit to determine a nominee's authorization to proceed with foreclosure on behalf of the noteholder would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures."). "[D]istrict courts have held that borrowers who were not parties to the assignment of their deed—and whose rights were not affected by it—lacked standing to challenge the assignment's validity because they had not alleged a concrete and particularized injury that is fairly traceable to the challenged assignment." *Marques v. Fed. Home Loan Mortg. Corp.*, No. 12-cv-1873, 2012 WL 6091412, at *4 (S.D. Cal. Dec. 6, 2012) (citations omitted); *see id.* at *5 ("[T]he validity of the assignment does not affect whether [the] borrower owes its obligations, but only to whom [the] borrower is obliged.") (quotation omitted). "To the extent [a] Plaintiff bases her claims on the

theory that [Defendant] allegedly failed to comply with the terms of the [pooling and servicing agreement], the court finds that she lacks standing to do so because she is neither a party to, nor a third party beneficiary of, that agreement." *McLaughlin v. Wells Fargo Bank, N.A.*, No. 12-1114, 2012 WL 5994924, at *6 (C.D. Cal. Nov. 30, 2012) (citing *Sami v. Wells Fargo Bank*, No. 12-108, 2012 WL 967051, at *5 (N.D. Cal. Mar. 21, 2012)); *see also Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal. App. 4th 497, 514-15 (2013) ("As an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note, [plaintiff] lacks standing to enforce any agreements, including the investment trust's pooling and servicing agreement, relating to such transactions. Furthermore, even if any subsequent transfers of the promissory note were invalid, [plaintiff] is not the victim of such invalid transfers because her obligations under the note remained unchanged.") (citations omitted); *cf. Murphy v. Allstate Ins. Co.*, 17 Cal. 3d 937, 944 (1976) ("A third party should not be permitted to enforce covenants made not for his benefit, but rather for others.... As to any provision made not for his benefit but for the benefit of the contracting parties or for other third parties, he becomes an intermeddler.").

Plaintiff relies upon *Glaski v. Bank of America, N.A.*, 218 Cal. App. 4th 1079 (2013). (ECF No. 25). In *Glaski*, the California Court of Appeal held that, under New York trust law, a transfer of a deed of trust in contravention of the trust documents is "void, not merely voidable," and, under California law, "a borrower can challenge an assignment of his or her note and deed of trust if the defect asserted would void the assignment." *Id*. at 461 (citation omitted). This Court finds the reasoning in the above-cited caselaw to be more persuasive than that in *Glaski*. *See Deutsche Bank Nat'l Trust Co. v. Adolfo*, No. 12 C 759, 2013 WL 4552407, at *3 (N.D. Ill. Aug. 28, 2013) ("[W]e are persuaded by the courts that have held that a transfer that does not comply with a PSA is voidable, not void.") (expressly disagreeing with *Glaski*) (citations omitted). Moreover, even if *Glaski* was correctly decided, California courts have held that in

order to state a claim challenging a foreclosure sale, "it [is] not enough for plaintiff to allege that [the] purported assignment of the note in the assignment of deed of trust was ineffective. Instead, plaintiff [is] required to allege that [defendant] did not receive a valid assignment of the debt *in any manner*." *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 271-72 (2011); *see also Herrera v. Fed. Nat'l Mortg. Ass'n*, 205 Cal. App. 4th 1495, 1506 (2012) (same). And even if *Glaski* were correctly decided, and Plaintiff alleged that the foreclosing Defendant did not receive a valid assignment of the debt in any manner, the California Court of Appeal has held that plaintiffs must "allege ... facts showing that they suffered prejudice as a result of any lack of authority of the parties participating in the foreclosure process." *Siliga v. Mortg. Elec. Reg. Sys., Inc.*, --- Cal. Rptr. 3d ----, 2013 WL 4522474, at *5 (Cal. Ct. App. Aug. 27, 2013) ("The Siligas do not dispute that they are in default under the note. The assignment of the deed of trust and the note did not change the Siligas' obligations under the note, and there is no reason to believe that Accredited as the original lender would have refrained from foreclosure in these circumstances. Absent any prejudice, the Siligas have no standing to complain about any alleged lack of authority or defective assignment.").

The First Amended Complaint alleges that the purported assignments of the loan did not comply with the rules of the relevant pooling and servicing agreement and/or the MBS trust. The Court concludes that the First Amended Complaint fails to adequately allege that Plaintiff has standing to challenge the assignments. The First Amended Complaint also fails to allege sufficient facts indicating that Defendant "did not receive a valid assignment of the debt *in any manner*." *Fontenot*, 198 Cal.App. 4th at 272. The First Amended Complaint does not allege that Plaintiff was current on his mortgage obligations, or that more than one entity concurrently attempted to collect mortgage payments from him or foreclose on the property. Although Plaintiff alleges that the loan servicer failed to use the correct underwriting standards when offering Plaintiff a loan modification, Plaintiff fails to plausibly allege that the loan modification offer would have been materially different had a different company's underwriting

standards been used. The First Amended Complaint fails to adequately allege that Plaintiff suffered prejudice from the allegedly invalid assignments. The Motion to Dismiss the fourth cause of action for cancellation of documents is granted.

**E. Fraud**

The fifth cause of action for fraud alleges that "Plaintiff was fraudulently thrown into foreclosure by a Servicer Driven Default from AHMSI." (ECF No. 19 ¶ 133). Defendants contend that the fraud claim is not pled with the requisite specificity required by Federal Rule of Civil Procedure 9(b); "Plaintiff does not allege how the[] statements were false"; "Plaintiff alleges no damages resulting from the alleged misstatements, nor could he, given his allegation that he was actually offered a loan modification"; and to the extent Plaintiff's claim is based upon misrepresentations which were allegedly made in 2007 and 2008, the claim is barred by the three-year statute of limitations. (ECF No. 20-1 at 23). Plaintiff contends that the fraud claim against AHMSI is pled with the requisite specificity. (ECF No. 21 at 21).

**1. Allegations Supporting the Claim for Fraud**

Sometime between June 2007 and November 2007, "Plaintiff contacted AHMSI at phone number 1-877-304-3100 where he was directed to the Loan Administration – Research Department and explained that he wanted to modify his loan." (ECF No. 19 ¶ 140). "The AHMSI representative on the telephone, who did not disclose his name, told Plaintiff he could obtain a fixed rate loan with payments similar to the monthly payment he was now making at $1,752.06 per month if he sent in an additional $31,752.06 to pay towards his principal." *Id.* ¶ 141. "[T]his representation was false." *Id.* ¶ 143. "[O]n November 27, 2007 plaintiff withdrew $30,000 from his IRA account and sent AHMSI an additional $31,752.06 to be applied to his loan toward principal in reliance on the statements made to him by AHMSI on the phone and based on the belief that he could obtain a loan with similar monthly payments at a fixed interest rate." *Id.* ¶ 142. "AHMSI accepted and cashed the check, but AHMSI did not then offer Plaintiff the refinancing of his loan as promised." *Id.* ¶ 144.

"Plaintiff called AHMSI at 1-877-304-3100 on or about August 7, 2008 and asked for a modification of his loan." *Id.* ¶ 149. "AHMSI's employee ... reached at this number, who did not disclose his name, told Plaintiff that he appeared to qualify for a modification but he had to first default on three of his monthly mortgage payments before AHMSI would consider him for a modification (aka a Servicer Driven Default)." *Id.* ¶ 150. Plaintiff "stopped making his payments," "submitted paperwork," and, on April 1, 2010, AHMSI sent Plaintiff an offer to modify his loan that "was worse than [Plaintiff's] regular monthly terms." *Id.* ¶ 155. After "futile" discussions with an AHMSI representative, Plaintiff signed the modification offer and began making the agreed monthly payments. *Id.* ¶ 159; *see also id.* ¶ 161.

On January 11, 2011, AHMSI responded to Plaintiff's QWR and represented that "BONY was the trustee AHMSI was dealing with, with regard to modification requests." *Id.* ¶ 163. Plaintiff sent a loan modification package to AHMSI on August 2, 2011, and "AHMSI responded by way of letter dated September 26, 2011 incorrectly asserting that the package was incomplete." *Id.* ¶ 167. Plaintiff sent a letter to an AHMSI representative on January 6, 2012, and "AHMSI responded by way of letter on February 14, 2012 stating his loan modification was being reviewed. There was no mention that any documents were missing." *Id.* ¶ 169. "Plaintiff received a modification denial letter dated March 1, 2012 stating that his loan modification was denied due to missing paperwork." *Id.* ¶ 171. Plaintiff's property was sold at foreclosure auction on April 9, 2012. *Id.* ¶ 172.

**2. Analysis**

The elements of a claim for fraud are: "(1) a misrepresentation, which includes a concealment or nondisclosure; (2) knowledge of the falsity of the misrepresentation, i.e., scienter; (3) intent to induce reliance on the misrepresentation; (4) justifiable reliance; and (5) resulting damages." *Cadlo v. Owens-Illinois, Inc.*, 125 Cal. App. 4th 513, 519 (2004) (citing *Small v. Fritz Cos., Inc.*, 30 Cal. 4th 167, 173 (2003)). "It is well-established in the Ninth Circuit that ... claims for fraud ... must meet Rule 9(b)'s

particularity requirement." *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003); *see also Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003) ("Rule 9(b)'s particularity requirement applies to state-law causes of action."). Pursuant to Federal Rule of Civil Procedure 9(b), a party alleging fraud must satisfy a heightened pleading standard by stating with particularity the circumstances constituting fraud. *See* Fed. R. Civ. P. 9(b). "Rule 9(b) demands that, when averments of fraud are made, the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct so that they can defend against the charge and not just deny that they have done anything wrong." *Vess*, 317 F.3d at 1106 (quotations omitted). "Averments of fraud must be accompanied by 'the who, what, when, where and how' of the misconduct charged." *Id.* (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1994)).

Claims of fraud must be filed within three years of the discovery by the aggrieved party "of the facts constituting the fraud." *See* Cal. Code Civ. P. § 338(d). The Complaint was filed on July 25, 2012. (ECF No.1-2). With respect to the allegedly false representation made by an AHMSI representative in 2007, the First Amended Complaint alleges that, in November of 2007, "AHMSI accepted and cashed [Plaintiff's] check, but AHMSI did not then offer Plaintiff the refinancing of his loan as promised." (ECF No. 19 ¶ 144). Based upon the allegations of the First Amended Complaint, it is not plausible that Plaintiff failed to discover the "facts constituting the fraud" concerning the alleged 2007 false representation prior to July 25, 2009 (i.e., three years prior to the filing of the Complaint). Cal. Code Civ. P. § 338(d). Accordingly, to the extent the claim for fraud is based upon the alleged 2007 false representation, the claim is barred by the applicable statute of limitations.

With respect to the alleged August 7, 2008 representation that Plaintiff "appeared to qualify for a modification but he had to first default on three of his monthly mortgage payments before AHMSI would consider him for a modification," ECF No. 19 ¶ 150, Plaintiff fails to adequately allege that this representation was false. Plaintiff alleges

that he was offered a loan modification as a result of this inquiry. *Id*. ¶ 153. Although Plaintiff was not satisfied with the terms of the modification offer, Plaintiff does not allege that the AHMSI representative made any representations on August 7, 2008 concerning the terms of the forthcoming offer.

With respect to the alleged representation in the January 11, 2011 QWR that BONY was the trustee, Plaintiff fails to allege that he relied on this alleged misrepresentation and then suffered damages as a result. For instance, Plaintiff fails to plausibly allege that Plaintiff would have responded differently had AHMSI informed Plaintiff that another entity was the trustee. With respect to the alleged misrepresentation that Plaintiff's loan modification application package was incomplete on September 26, 2011, Plaintiff fails to allege that he justifiably relied on this representation. Instead, Plaintiff alleges that he believed that representation to be untrue at the time. *See id*. ¶ 168. With respect to the alleged representation in the February 14, 2012 letter that Plaintiff's "loan modification was being reviewed," *id*. ¶ 169, Plaintiff fails to adequately allege that this representation was false. Plaintiff's application was denied on March 1, 2012. *Id*. ¶ 171. Plaintiff does not allege that the February 14, 2012 letter represented that Plaintiff's loan modification application was complete and not missing any required paperwork.

Accordingly the Motion to Dismiss the fifth cause of action for fraud is granted.

**F. Unfair Competition Law**

The sixth cause of action alleges that Defendants violated California's Unfair Competition Law ("UCL"), California Business and Professions Code § 17200.

Defendants contend that "Plaintiff lacks standing to bring a UCL claim against Defendants"; "Plaintiff has not pled the violation of any law on which he could hinge his UCL claim"; and the UCL claim is otherwise inadequately pled. (ECF No. 20-1 at 24-25). Plaintiff contends that the UCL claim is adequately pled. (ECF No. 21 at 23-25).

The UCL prohibits any "unlawful, unfair or fraudulent business act or practice."

Cal. Bus. & Prof. Code § 17200. A plaintiff alleging a UCL claim must satisfy UCL standing requirements. *See Birdsong v. Apple, Inc.*, 590 F.3d 955, 960 n.4 (9th Cir. 2009). Private standing under the UCL is limited to "a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204; *see also Degelmann v. Advanced Med. Optics, Inc.*, 659 F.3d 835, 839 (9th Cir. 2011). The intent of section 17204 is to "confine standing to those actually injured by a defendant's business practices." *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 321 (2011). Several courts have found that a plaintiff has not suffered an injury in fact when the loss suffered is a result of a plaintiff's default on the loan. *See, e.g., Bernardi v. JPMorgan Chase Bank, N.A.*, No. 11-cv-4212, 2012 WL 2343679, at *5 (N.D. Cal. June 20, 2012); *Serna v. Bank of Am., N.A.*, No. 11-10598, 2012 WL 2030705, at *5 (C.D. Cal. June 4, 2012); *DeLeon v. Wells Fargo Bank, N.A.*, No. 10-cv-1390, 2011 WL 311376, at *7 (N.D. Cal. Jan. 28, 2011).

Plaintiff concedes that he was in default on his mortgage obligation. (ECF No. 21 at 20). As discussed above with respect to the causes of action for violation of RESPA and cancellation of documents, the First Amended Complaint fails to adequately allege that Plaintiff lost his property as a result of the alleged unlawful, unfair or fraudulent business acts or practices. For example, Plaintiff fails to plausibly allege that the loan modification offer he received would have been materially different had AHMSI used a different company's underwriting standards. The First Amended Complaint fails to adequately allege that Plaintiff has standing to assert a claim pursuant to the UCL. *See, e.g., Bernardi*, 2012 WL 2343679, at *5. The Motion to Dismiss the sixth cause of action for violation of California Business and Professions Code § 17200 is granted.

## V. Conclusion

IT IS HEREBY ORDERED that the Motion to Dismiss Plaintiff's First Amended Complaint is GRANTED in part and DENIED in part. (ECF No. 20). The Motion to Dismiss the third cause of action for violation of TILA is denied. In all other respects,

the Motion to Dismiss is granted, and the remaining causes of action are dismissed without prejudice.

DATED: October 3, 2013

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