FERNANDO D. LOPEZ, Plaintiff,
v.
WELLS FARGO BANK, N.A.; WELLS FARGO HOME MORTGAGE; FIRST AMERICAN TITLE INSURANCE CO.; US BANK NATIONAL ASSOCIATION, ET AL., Defendants.

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

United States District Court, S.D. California.

April 5, 2017.

Fernando D. Lopez, Plaintiff, Pro Se.

Wells Fargo Bank, N.A., Defendant, represented by Kenneth Sur Miller, Severson & Werson.

Wells Fargo Home Mortgage, Defendant, represented by Kenneth Sur Miller, Severson & Werson.

First American Title Insurance Co., Defendant, represented by Lemuel Bryant Jaquez, First American Law Group.

US Bank National Association, Defendant, represented by Kenneth Sur Miller, Severson & Werson.

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)

ANTHONY J. BATTAGLIA, District Judge.

Presently before the Court is Defendants WELLS FARGO BANK, N.A. (also sued as Wells Fargo Home Mortgage) ("Wells Fargo") and US BANK NATIONAL ASSOCIATION's ("US Bank") (collectively "Defendants") motion to dismiss Fernando Lopez's ("Plaintiff") second amended complaint ("SAC"). (Doc. No. 33.) Also pending is Defendant FIRST AMERICAN TITLE INSURANCE COMPANY's ("First American") motion to dismiss the SAC. (Doc. No. 32.) The Court finds these motions suitable for determination on the papers and without oral

argument in accordance with Civil Local Rule 7.1.d.1. For the reasons set forth more fully below, the Court GRANTS Defendants' and First American's motions to dismiss.

I. BACKGROUND

A. General Allegations

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

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

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

In sum, Plaintiff alleges that his loan was underwritten without proper due diligence and that Wells Fargo illegally or deceptively qualified Plaintiff for a loan

they should have known that Plaintiff could not afford.[1] (*Id.* ¶¶ 20-21.) Furthermore, Plaintiff argues that First American and Defendants unlawfully assigned, and transferred their ownership and security interest in Plaintiff's home. (*Id.* at 2.)[2] As a result, Plaintiff contends that Defendants and First American intentionally and negligently foreclosed on Plaintiff's property with no authority to do so. (*Id.* ¶ 42.)

B. Procedural History

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

On December 7, 2016, Plaintiff filed his SAC. (Doc. No. 31.) Plaintiff alleges the following causes of actions against Defendants and First American: (1) lack of standing to foreclose; (2) fraud in concealment and inducement; (3) violation of the Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act"); (4) violation of the Real Estate Settlement Procedures Act ("RESPA"); (5) intentional infliction of emotional distress ("IIED"); (6) slander of title; (7) unlawful and fraudulent business practice; (8) violation of Homeowners Bill of Rights ("HBOR"); (9) quiet title; and (10) declaratory relief. (*Id.* at 1.) On December 22 and 23, 2016, First American and Defendants moved to dismiss Plaintiff's SAC. (Doc. Nos. 32, 33.) Plaintiff filed a single opposition to both Defendants' and First American's motions to dismiss. (Doc. No. 39.)

II. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a plaintiff's complaint and allows a court to dismiss a complaint upon a finding that the

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

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

III. DISCUSSION

A. Judicial Notice

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

While, "as a general rule, a district court may not consider materials not originally included in the pleadings in deciding a Rule 12 motion . . . it may take judicial notice of matters of public record and consider them without converting a Rule 12 motion into one for summary judgment." *U.S. v. 14.02 Acres of Land*, 547 F.3d 943, 955 (9th Cir. 2008) (quotation and citations omitted). Plaintiff contends First American's request for judicial notice should be denied because the documents are in dispute and constitute inadmissible hearsay.[3] (Doc. No. 39 at 13-18.) In support of this argument Plaintiff cites to *Willis v. State of Cal.*, 22 Cal. App. 4th 287 (1994), and *Neighborhood Assistance Corp. of Am. v. First One Lending Corp.*, No. SACV 12-463 DOC (MLGx), 2012 WL 1698368 (C.D. Cal. May 15,

2012). However, the Court highlights that the facts of those cases are inapposite to the present matter. In *Willis*, 22 Cal. App. 4th at 291, the plaintiff simply requested judicial notice without presenting the court a certified copy. Similarly in *Neighborhood Assistance Corp. of Am.*, 2012 WL 1698368, at *11, the court held that the facts defendants requested judicial notice of were not generally known, and the alleged facts were based only on information from defendants' website.

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

B. Plaintiff's Objections

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

C. Lack of Factual Specificity

The Court first notes that Plaintiff only filed a single opposition brief in response to both First American's and Defendants' motions to dismiss. (Doc. No. 39.)

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

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

1. Lack of Standing

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

The Court in its Order dated November 23, 2016, clearly stated that California law does not permit the use of a lawsuit to delay or prevent a foreclosure sale that has not yet occurred. *See* *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal. App. 4th 497, 511-12 (2013), *disapproved on other ground by* *Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919 (2016). Here, Plaintiff has again failed to allege facts indicating that the Property has been sold. Accordingly, the Court confirms its previous holding that Plaintiff does not have standing to challenge the

impending foreclosure sale. Moreover, the Court illustrates that **a majority of district courts in California have held that borrowers do not have standing to challenge the assignment of a loan because borrowers are not a party to the assignment agreement.** *See Patel v. Mortg. Elec. Registration Sys. Inc.*, Case No. 4:13-cv-1874 KAW, 2013 WL 4029277, at *3 (N.D. Cal. Aug. 6, 2013); *see also Aniel v. GMAC Mortg., LLC*, No. C 12-04201 SBA, 2012 WL 5389706, at *5 (N.D. Cal. Nov. 2, 2012). Accordingly, as Plaintiff lacks standing himself, he is unable to attack First American and Defendants' standing in the present matter. *See Vasquez v. U.S. Bank*, Case No. 15-cv-02146-DMR, 2015 WL 5158538, at *3-5 (N.D. Cal. Sep. 2, 2015).

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

2. Fraud[6]

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

Federal and California law dictate that claims for fraud must be pled with particularity. *See* Fed. R. Civ. P. 9(b); *Stansfield v. Starkey*, 220 Cal. App. 3d 59, 73 (1990) ("**Every element of the cause of action for fraud must be alleged . . . with sufficient specificity to allow defendant to understand fully the nature of the charge made."). Additionally, Plaintiff must clearly state what is false or misleading about a statement and explain why it is false.** *See Miron v. Herbalife Intern., Inc.*, 11 Fed. App'x. 927, 930 (9th Cir. 2001) (**requiring plaintiff to provide facts that show defendant did not intend to perform promises *at the time they were made***) (emphasis added). Further, **A FRAUD ACTION AGAINST A CORPORATION REQUIRES THE PLAINTIFF "TO ALLEGE THE NAME OF THE PERSONS WHO MADE THE ALLEGEDLY FRAUDULENT REPRESENTATIONS, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or**

written." *Tarmann v. State Farm Mut. Auto. Ins. Co.*,2 Cal. App. 4th 153, 157 (1991) (citations omitted).

Plaintiff's SAC still fails to allege the specifics of who, what, when, where, and how the fraudulent actions took place to satisfy Rule 9. Specifically, the Court is unable to determine the actions of each Defendant as Plaintiff has grouped all three Defendants together and only broadly claims that they intended to induce Plaintiff, failed to disclose the material terms of the transaction, and falsely advised Plaintiff. (Doc. No. 31 ¶¶ 66-69.) Further, **under a claim for fraudulent concealment, Plaintiff must provide the Court with facts alleging a fiduciary duty between Plaintiff and Defendants, and Plaintiff and First American**. *See Nymark v. Heart Fed. Sav. & Loan Ass'n.*, 231 Cal. App. 3d 1089, 1095 (1991) ("**[A]s 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.**").

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

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

3. The Rosenthal Fair Debt Collection Practices Act

Plaintiff alleges that Defendants and First American violated the Rosenthal Act in attempting to collect his debt.[7] (Doc. No. 31 ¶¶ 88, 98.) Defendants and First

American contend that Plaintiff's claim fails for failure to plead facts implicating any wrongdoing under the Rosenthal Act and that foreclosure is not "debt collection" covered by the Act. (Doc. No. 32-1 at 13-14; Doc. No. 33-1 at 7-8.)

Even if the Court determined that Defendants and First American's alleged activities did constitute "debt collection,"[8] Plaintiff's claim still fails to allege sufficient facts. Like above, Plaintiff makes conclusory accusations of violations without providing factual support of what actions each Defendant took. *See* *McHenry v. Renne*, 84 F.3d 1172, 1180 (9th Cir. 1996) ("Something labeled a complaint but . . . without simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs, fails to perform the essential functions of a complaint."). Moreover, Plaintiff makes a variety of claims arguing that the documents at issue show signs that they were recorded fraudulently. (Doc. No. 31 ¶ 94.) However, Plaintiff fails to provide the corresponding section of the Rosenthal Act it allegedly violates. Therefore, Plaintiff's claim under the Rosenthal Act is DISMISSED.

4. Real Estate Settlement Procedures Act

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

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

omitted).[9] For this reason, and the reasons stated above, Plaintiff's RESPA claim is DISMISSED.

5. Intentional Infliction of Emotional Distress

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

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

Nevertheless, even if Plaintiff's remaining claims are not time-barred, the Court still finds that as currently pled, they still fail to rise to the requisite level of "outrageous conduct" for an IIED claim.[11] *See* *Ragland v. U.S. Bank Nat. Ass'n.*, 209 Cal. App. 4th 182, 204 (2002) (holding that **a CLAIM FOR IIED HAD BEEN SATISFIED AS PLAINTIFF CLAIMED THAT DEFENDANTS INDUCED HER TO SKIP THE APRIL LOAN PAYMENT, REFUSED TO LATER ACCEPT LOAN PAYMENTS, AND SOLD PLAINTIFF'S HOME AT FORECLOSURE**); *see also* *Davidson v. City of Westminster*, 32 Cal. 3d 197, 209 (1982) ("[c]onduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community."). Moreover, the Court reiterates that Defendants and First American's performance of the required foreclosure procedures and delivery of notices are privileged communications under California law. *See* Cal. Civ. Code § 2924(d). Accordingly, Plaintiff's IIED claim is DISMISSED.

6. Slander of Title

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

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

7. Unlawful, Unfair, and Fraudulent Business Practices

To adequately plead a UCL claim, Plaintiff must have private standing. *See* *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 322 (2011). Plaintiff must then show either: (1) "`unlawful, unfair, or fraudulent business act or practice,'" or (2) "`unfair, deceptive, untrue or misleading advertising.'" *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1043 (9th Cir. 2003) (quoting Cal. Bus. & Prof. Code § 17200). Like Plaintiff's fraud claims, *supra* pp. 8-10, Plaintiff has failed to provide the Court with the necessary factual specificity detailing the alleged deception and fraud. Moreover, Plaintiff has still failed to allege an underlying violation of law upon which a UCL claim may lie. Accordingly, based on the above, Plaintiff's UCL claim is DISMISSED.

8. Homeowners Bill of Rights

Plaintiff alleges Defendants and First American violated section 2923.55 of the California Civil Code, enacted with the HBOR. (Doc. No. 31 ¶ 151.) Defendants and First American contend Plaintiff has failed to allege facts sufficient to

substantiate his HBOR claim. (Doc. No. 32-1 at 17-18; Doc. No. 33-1 at 13.) The Court agrees.

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

9. Quiet Title[13]

Plaintiff asks the Court to quiet title to the Property in his and his wife's name. (Doc. No. 31 ¶ 168.) Initially, Plaintiff's quiet title claim failed in his FAC because he did not assert the ability to tender the remaining amounts owed on the Loan. (Doc. No. 30 at 20-21.) Plaintiff's SAC has amended this deficiency. (Doc. No. 31 ¶ 164.) However, Plaintiff has failed to satisfy the threshold requirement of submitting the claim in a verified complaint. *See Adams v. Am. Mortg. Network, Inc.*, No. 09cv0340-LAB (JMA), 2010 WL 3069227, at *2 (S.D. Cal. Aug. 4, 2010). For this reason, Plaintiff's quiet title claim is DISMISSED.

10. Declaratory Relief

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

C. Leave to Amend

Federal Rule of Civil Procedure 15 advises courts to grant leave to amend freely "when justice so requires." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc). This policy is to be applied liberally. *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001). Furthermore, "the rule favoring liberality in amendments to pleadings is particularly important for pro se

litigants." *Lopez*, 203 F.3d at 1131. (citation omitted). Given Plaintiff is a pro se litigant and has only been granted two prior leaves to amend, the Court finds that justice requires he be given another chance to cure the deficiencies in the instant pleading.

IV. CONCLUSION

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

(1) Defendants Wells Fargo and US Bank's motion to dismiss, (Doc. No. 33), is GRANTED WITH LEAVE TO AMEND;
(2) First American's motion to dismiss, (Doc. No. 32), is GRANTED WITH LEAVE TO AMEND;
(3) Defendants and First American's requests for judicial notice are GRANTED; and
(4) Plaintiff's objections to First American's documents submitted in support of its motion to dismiss is DENIED.

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

IT IS SO ORDERED.

[1] Plaintiff alleges that the interest only payments on the loan exceeded $2,300 a month, which represented nearly 100% of Plaintiff's household income. (Doc. No. 31 ¶ 25.)

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

[3] The Court notes that Plaintiff has only filed an opposition to First American's request for judicial notice. (*See generally*, Doc. No. 39.)

[4] Plaintiff does not object to Defendants' documents submitted in support of its motion to dismiss.

[5] The Court notes that it disagrees with Plaintiff's objection that the documents lack foundation. The 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).

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

[7] The Court notes that Plaintiff only alleges that First American and U.S. Bank are debt collectors. (Doc. No. 31 ¶ 89.)

[8] While California district courts have found foreclosing on a property pursuant to a deed of trust does 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).

[9] Furthermore**, private RESPA claims carry a one-year statute of limitations**. 12 U.S.C. § 2614; *see also Bloom*, 865 F. Supp. at 1386. Plaintiff claims that Defendants violated RESPA's servicing provisions by 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.

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

[11] **The elements of the tort of IIED are: "(1) extreme and outrageous conduct by the defendant with the 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).

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

[13] Under California law, a plaintiff must allege five elements to state a claim for quiet title in a verified complaint: (1) a legal description and street address of the property; (2) the plaintiff's title to which 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).