

1 Stuart W. Price (SBN 125918)
swprice@bryancave.com
2 Stacey L. Herter (SBN 185366)
stacey.herter@bryancave.com
3 Michael T. Levin (SBN 238682)
michael.levin@bryancave.com
4 **BRYAN CAVE LLP**
3161 Michelson Dr., Suite 1500
5 Irvine, California 92612-4414
Telephone: (949) 223-7000
6 Facsimile: (949) 223-7100
7 Attorneys for Defendants
RECONTRUST COMPANY and
8 COUNTRYWIDE HOME LOANS, INC.

9
10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**
12

13 GABRIEL HERNANDEZ,

14 Plaintiff,

15 vs.

16 RECONTRUST COMPANY,
17 MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC. C/O
18 COUNTRYWIDE HOME LOANS,
INC., and DOES 1-50, inclusive,

19 Defendants.
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Case No.: 08 CV 1899 BTM POR

(Superior Court Case No. 37-2008-
00058194-CU-OR-NC)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION BY DEFENDANTS
RECONTRUST COMPANY AND
COUNTRYWIDE HOME LOANS,
INC., TO DISMISS COMPLAINT
OR, IN THE ALTERNATIVE, FOR
MORE DEFINITE STATEMENT**

Hearing

Date: December 19, 2008

Time: 11:00 a.m

Place: Courtroom 15

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BRYAN CAVE LLP
3161 MICHELSON DRIVE, SUITE 1500
IRVINE, CALIFORNIA 92612-4414

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I. INTRODUCTION

Plaintiff Gabriel Hernandez (“Plaintiff”) seeks to avoid foreclosure and has filed this lawsuit as a means to that end. His Complaint alleges no facts that would give rise to a right to such relief. His Complaint is filled with boilerplate allegations and generalized contentions, with no regard to their truth or falsity, and no relation to his own facts and circumstances. Plaintiff admits he does not know the facts which give rise to many of the legal claims he asserts.

Plaintiff’s pleading does not meet the minimal pleading requirements of either California or Federal law, including Rule 8 of the Federal Rules of Civil Procedure, which requires him to plead “enough facts to state a claim to relief that is *plausible on its face*” and “above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965, 1974, 167 L. Ed. 2d 929 (2007) (emphasis added).

Plaintiff admits he is in default on his loan (*See* Complaint ¶ 8), but alleges that the unnamed noteholder may not have the original endorsed note, or, in the alternative, that Plaintiff’s lender is charging improper, but unspecified, costs and fees on Plaintiff’s loan. (*Id.* ¶ 17.)

No requirement exists under California law that the original of the promissory note be produced by anyone as a condition to conducting a non-judicial foreclosure. Nor does Plaintiff identify the fees and costs that he claims are objectionable.

Plaintiff’s claims are not supported by the scant facts alleged in the Complaint. Plaintiff’s claims should be dismissed.

II. SUMMARY OF PLAINTIFF’S ALLEGATIONS AND PROCEDURAL HISTORY

Mr. Hernandez is in default on a residential loan secured by a Deed of Trust. The Deed of Trust appoints Defendant ReconTrust as Trustee. (*See* Complaint, ¶¶ 1 and 5, Exh. 1.) Plaintiff names MERS as the “holder of the note identified in the security instrument that is identified [sic] in Exhibit 1” of the Complaint. (*Id.*, ¶ 7.) Plaintiff further alleges that MERS “is the natural person or entity that has directed

1 and is directing said Trustee [ReconTrust] to proceed under a power of sale to
2 foreclose” on Plaintiff’s property. (*Id.* ¶ 2.)

3 Plaintiff alleges that MERS “is not in possession of the note properly
4 endorsed to it, nor is it otherwise entitled by law in this State to initiate foreclosure
5 under the security instrument identified in Exhibit 1.” (*Id.* ¶ 7.) Plaintiff further
6 alleges that “assuming, *arguendo* that [defendants] do have a right to proceed to
7 foreclose under the note” that defendants conspired “to profit from those actions in
8 amounts greater than their rights under the note to do so,” and that they “added costs
9 and charges to the payoff amount of the note that were not justified and proper
10 under the terms of the note or the law.” (*Id.* ¶¶ 13, 17.) Plaintiff does not identify
11 the charges, fees, or other sums that he contends are improper.

12 Plaintiff asserts three causes of action seeking relief under various federal
13 statutes, together with a prayer for injunctive relief. Plaintiff’s Complaint sets forth
14 an alphabet soup of federal statutes that Plaintiff contends were violated by
15 ReconTrust, MERS, and Countrywide, including the federal Fair Debt Collections
16 Act (“FDCA”), 15 U.S.C. § 1692 et seq.; Real Estate Settlement Procedures Act
17 (“RESPA”), 12 U.S.C. §§ 2601-2617; Home Ownership and Equity Protection Act,
18 15 U.S.C. § 1637; Truth In Lending Act, 15 U.S.C. § 1601 et seq. (“TILA”);
19 Regulation Z, 12 C.F.R. § 226 et seq.; Federal Trade Commission Act (“FTC Act”),
20 15 U.S.C. §§ 41-58; and the Racketeer Influenced and Corrupt Organizations law
21 (“RICO”), 18 U.S.C. § 1961 et seq. (*See* Complaint ¶¶ 20, 23, 26.) Plaintiff also
22 asserts derivative claims under California’s Fair Debt Collection Practices Act, Cal.
23 Civil Code § 1788(e) and (f). (*Id.* ¶ 20.)

24 Plaintiff does not identify which portions of these various laws he contends
25 were violated by ReconTrust, MERS, Countrywide, or any other defendant, or the
26 conduct that resulted in the claimed violations. Instead, Plaintiff alleges that there
27 were various statutory violations, “the specifics of which are unknown, but which
28

are subject to discovery and with respect to which the specifics will be alleged by amendment to this complaint when ascertained.” (*Id.* ¶ 23.)

Defendants personally received a copy of Plaintiff’s Complaint on September 16, 2008. The Complaint bears a stamp indicating that it was filed on September 4, 2008 in the San Diego County Superior Court.

On October 16, 2008, within 30 days of Defendants’ first receipt of Plaintiff’s initial pleading, Defendants caused this action to be removed to the United States District Court, Southern District of California, because federal questions are framed by the pleading.

Defendants now respectfully request that the Court dismiss Plaintiff’s claims pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

III. LEGAL STANDARDS APPLICABLE TO A MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

To state a claim for relief in compliance with Rule 8 of the Federal Rules of Civil Procedure, “each plaintiff must plead a short and plain statement of the elements of his or her claim, identifying the transaction or occurrence giving rise to the claim and the elements of the prima facie case.” *Bautista v. Los Angeles County*, 216 F.3d 837, 840 (9th Cir. 2000). The United States Supreme Court has tightened the pleading standards under Rule 8 and has held that a plaintiff must allege “enough facts to state a claim to relief that is *plausible on its face*.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (emphasis added). The Court explained:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . 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 actions will not do. . . . Factual allegations must

1 be enough to raise a right to relief *above the speculative*
 2 *level.*

3 *Id.* at 1964-65 (emphasis added, internal citations omitted).

4 A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the claims
 5 asserted in the complaint. *Cairns v. Franklin Mint Co.*, 24 F. Supp. 2d 1013, 1023
 6 (C.D. Cal. 1998). Dismissal under Rule 12(b)(6) may be based either on the “lack
 7 of a cognizable legal theory” or on “the absence of sufficient facts alleged under a
 8 cognizable legal theory.” *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th
 9 Cir. 1988). A motion to dismiss is also proper when Plaintiff seeks remedies to
 10 which he is not entitled as a matter of law. *See, e.g., King v. California*, 784 F.2d
 11 910 (9th Cir. 1986), cert. denied, 484 U.S. 802 (1987).

12 Although the Court must construe the facts in the light most favorable to the
 13 non-moving party, “conclusory allegations of law and unwarranted inferences are
 14 not sufficient to defeat a motion to dismiss.” *Associated Gen. Contrs. of Am. v.*
 15 *Metropolitan Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998) (citation omitted).
 16 “[T]he court is not required to accept legal conclusions cast in the form of factual
 17 allegations if those conclusions cannot reasonably be drawn from the facts alleged.”
 18 *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

19 The Court may also consider on this Motion to Dismiss the Notice of
 20 Trustee’s Sale attached as an exhibit to Plaintiff’s complaint as well as any other
 21 matters that may be judicially noticed. *See Sumner Peck Ranch v. Bureau of*
 22 *Reclamation*, 823 F. Supp. 715, 720 (E.D. Cal. 1993) (holding that the Court “may
 23 disregard allegations in the complaint if contradicted by facts established by exhibits
 24 attached to the complaint” or by documents referred to in the complaint). *See also*
 25 *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994) (holding that a document not
 26 attached to the complaint whose contents are alleged in the complaint and whose
 27 authenticity is not questioned may be considered on a Rule 12(b)(6) motion to
 28 dismiss); *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 n.3 (9th Cir. 1998) (documents

1 integral to a plaintiff's claims may be attached to a motion to dismiss, because the
2 plaintiff is obviously aware of contents).

3 **IV. THE COMPLAINT DOES NOT ALLEGE FACTS ESTABLISHING**
4 **WRONGDOING BY DEFENDANTS**

5 As a threshold matter, Plaintiff's claims against Defendants should be
6 dismissed because the Complaint fails to allege any actionable wrongdoing under
7 the various federal and state statutes identified in the Complaint, including FDCA,
8 RESPA, TILA, Regulation Z, HOEPA, FTC Act, or RICO. To state a claim for
9 relief in compliance with Rule 8 of the Federal Rules of Civil Procedure, Plaintiff
10 "must plead a short and plain statement of the elements of [his] claim, identifying
11 the transaction or occurrence giving rise to the claim and the elements of the prima
12 facie case." *Bautista*, 216 F.3d at 840.

13 Plaintiff also must not allege mere "labels and conclusions," but rather
14 "enough facts to state a claim to relief that is *plausible on its face*." *Twombly*, 127
15 S. Ct. at 1964-1965, 1974. Plaintiff has failed to satisfy this burden with respect to
16 his claims against Defendants because they are based on "conclusory allegations of
17 law and unwarranted inferences," which, under the applicable pleading rules, "are
18 not sufficient to defeat a motion to dismiss." *Associated Gen. Contrs. of Am.*, 159
19 F.3d at 1181.

20 **A. Defendants' Actions Are In Accordance With Applicable Law And**
21 **Plaintiff's Deed Of Trust.**

22 Defendants have acted in accordance with applicable law, as set forth in Cal.
23 Civil Code §§ 2924-2924i and the loan documents signed by Plaintiff. Sections
24 2924-2924i set forth the requirements for conducting a non-judicial foreclosure.

25 This comprehensive statutory framework established to govern
26 trustee sales is intended to be exhaustive. *Homestead Savings v.*
27 *Darmiento* (1991) 234 Cal.App.3d 424, 432-433. It includes a
28 myriad of rules relating to standing, notice and right to cure. It

1 is inconsistent with the comprehensive and exhaustive statutory
 2 scheme regulating trustee sales to incorporate other unrelated
 3 provisions into the proceeds.

4 *Moeller v. Lien* 25 Cal. App. 4th 822, 834 (1994). *See also I. E. Associates v.*
 5 *Safeco Title Insurance* 39 Cal. 3d 281, 288 (1985) (holding the nonjudicial
 6 foreclosure statute supplants common law as to the rights and duties of the parties to
 7 a deed of trust).

8 Plaintiff's allegation that Defendants have no right to foreclose on his
 9 property is incorrect. The California statutory scheme allows for the foreclosure
 10 process to be conducted by the "trustee, mortgagee or beneficiary or any of their
 11 authorized agents." Cal. Civ. Code § 2924(a)(1). ReconTrust has the statutory
 12 right, as trustee under Plaintiff's Deed of Trust, to initiate the foreclosure process on
 13 behalf of his lender and the owners of the note. Plaintiff's allegations to the
 14 contrary lack any legal basis.

15 Similarly, Plaintiff's assertion that Defendants cannot produce his original
 16 note also has no basis in law or fact. California law does not require production of
 17 the original note in order to proceed with a nonjudicial foreclosure. Cal. Civ. Code
 18 § 2924(a) et seq.

19 Because Plaintiff does not allege a violation of applicable law or Plaintiff's
 20 loan agreements, the Complaint fails to establish that Defendants lack the right to
 21 foreclose. Defendants acted properly under the terms of Plaintiff's loan agreements
 22 and the law. Plaintiff's Complaint should be dismissed.

23 **B. Plaintiff's Unfair Debt Collection Practices Claim Should Be**
 24 **Dismissed Because It Is Based On Conclusory And**
 25 **Unsubstantiated Allegations.**

26 Plaintiff alleges "Unfair Debt Collection Practices." Plaintiff does not allege
 27 that Defendants engaged in any harassment or abuse, as defined in 15 U.S.C
 28 § 1692d, that it used any false or misleading representations in violation of 15

1 U.S.C. § 1692e, or that it used any unfair practices in violation of 15 U.S.C. § 1692f.
 2 The absence of these allegations also results in the failure of Plaintiff's unfair debt
 3 collection claim under California Civil Code § 1788 et seq., California's Fair Debt
 4 Collection Practices Act.

5 Plaintiff instead alleges that the unnamed noteholder does not, in fact, hold
 6 the note. (*See* Complaint ¶ 17.) California law does not require possession of the
 7 original note as a condition to proceeding with a non-judicial foreclosure. Nor is
 8 there an obligation to produce originals of either the promissory note or the deed of
 9 trust. In California, a lender is only obligated to provide a *copy* of the promissory
 10 note twenty-one days after a homeowner provides an adequate request. Cal. Civil
 11 Code § 2934(b)(1).

12 Plaintiff also predicates his Unfair Debt Collection Practices claim on alleged
 13 RESPA violations, but fails to identify the provisions of RESPA that were violated.
 14 (*See* Complaint ¶ 20.) Plaintiff does not allege any improper kickbacks in violation
 15 of 12 U.S.C. § 2607. To the extent that Plaintiff claims disclosure-related
 16 violations, the claims must be dismissed because there is no private right of action
 17 under the disclosure rules of RESPA. *Bloom v. Martin*, 865 F. Supp. 1377, 1384-85
 18 (N.D. Cal. 1994).

19 In any event, Plaintiff's RESPA claims are time-barred. Section 16 of
 20 RESPA provides that any private suit must be brought "within one year from the
 21 date of the occurrence of the violation." 12 U.S.C. § 2614. The loan documents
 22 attached to the Request for Judicial Notice reflect a transaction date of August 6,
 23 2007. Plaintiff's action accrued, and the one-year statute of limitations began to run,
 24 on that date. Plaintiff failed to file this suit for more than one year after he signed
 25 his loan documents. His RESPA claims are conclusively barred. 12 U.S.C.
 26 § 2614(a).

1 **C. Plaintiff Fails To State A Claim Against Defendants Under RICO.**

2 Plaintiff's cause of action for violations of RICO, 18 U.S.C. § 1961 et seq.,
3 should be dismissed because Plaintiff has not alleged facts to satisfy the statutory
4 elements of the claim. The Complaint is devoid of any facts that would show either
5 the existence of "racketeering activity" or a "pattern of racketeering activity" or of
6 an "unlawful debt." 18 U.S.C. § 1961, subds. (1), (5), and (6). *See also id.* § 1962,
7 subd. (a), (c). Because Plaintiff has not met his burden of pleading facts showing
8 the existence of any potential RICO violations, the Fourth Cause of Action must be
9 dismissed. *See Andrews v. Heaton*, 483 F.3d 1070, 1076 (10th Cir. 2007) (affirming
10 the dismissal of RICO claims that were based on "vague and conclusory allegations
11 of fraud"); *Reidy v. Meritor Sav., F.S.B.*, 705 F. Supp. 39, 41 (D. D.C. 1989) (aff'd
12 without op., 888 F.2d 898 (D.C. Cir. 1989)) (granting defendant's motion to dismiss
13 because the complaint failed to allege sufficient facts to show that defendant was
14 engaged in the collection of an "unlawful debt" as defined in the RICO statutes).

15 Plaintiff has not alleged any facts that show that Defendants engaged in any
16 indictable acts punishable by a year or more in prison, let alone the two or more
17 criminal acts required to show a "pattern of racketeering activity" under 18 U.S.C.
18 §§ 1961(5) and 1962. Similarly, Plaintiff does not allege that the loan constitutes an
19 "unlawful debt," meaning that it is an illegal gambling debt or a debt that carries an
20 interest rate "at least twice the enforceable rate." *Reidy*, 705 F. Supp. at 41.

21 Plaintiff's RICO claim also fails because he cannot satisfy the damages
22 requirement. To state a claim for RICO, in addition to the other required elements,
23 Plaintiff "must allege facts tending to show that he or she was injured by the use or
24 investment of racketeering income." *Nugget Hydroelectric, L.P. v. Pacific Gas &*
25 *Elec. Co.*, 981 F.2d 429, 437 (9th Cir. 1992) (affirming the dismissal of plaintiff's
26 RICO claim without leave to amend).

27 Plaintiff's Complaint does not contain the required allegations. Plaintiff's
28 RICO claim should be dismissed.

V. PLAINTIFF’S CLAIMS SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS NOT TENDERED THE AMOUNTS OWED ON THE LOAN

Plaintiff’s claims against Defendants, including his request for injunctive relief, should also be dismissed because Plaintiff has not alleged that he has tendered the payments owed under the Loan. Plaintiff does not deny that he signed a note, incurred the debt at issue or that he is delinquent. (*See, e.g.,* Complaint ¶ 11 [discussing payoff amounts for the loan].)

Plaintiff asks this Court to enjoin the foreclosure sale on his property (*see* Complaint, p. 5:16-22 [Prayer for Relief ¶¶ 1-2]). A party cannot enjoin a foreclosure sale unless he has tendered the obligation in full. *See United States Cold Storage v. Great W. Sav. & Loan Ass’n*, 165 Cal. App. 3d 1214, 1222 (1985) (“[T]he law is long-established that a trustor or his successor must tender the obligation in full as a prerequisite to challenge of the foreclosure sale”); Roger Bernhardt, *California Mortgage & Deed of Trust Practice* (C.E.B. 3d ed.) § 7.37 (“Courts usually require the trustor to pay or to tender payment of any amounts admittedly owed the beneficiary as a condition for issuing a temporary restraining order or preliminary injunction.”). Because Plaintiff has not tendered the amounts still owing on his loan, Plaintiff cannot obtain an injunction against any foreclosure sale under the deed of trust securing the loan or obtain any other relief based on the claimed wrongful foreclosure on his property.

VI. PLAINTIFF’S CLAIM FOR ATTORNEY FEES AND TREBLE DAMAGES SHOULD BE STRICKEN

Federal Rule of Civil Procedure 12(f) allows the court to strike any “immaterial” or “impertinent” matter from pleadings. A prayer for relief may be stricken where the damages sought are not recoverable as a matter of law. *See Bureerong v. Uvawas*, 922 F. Supp. 1450, 1479, n. 34 (C.D. Cal. 1996) (citing *Tapley v. Lockwood Green Engineers, Inc.*, 502 F.2d 559, 560 (8th Cir. 1974)).

1 Plaintiff's Complaint seeks attorney fees and treble damages "as may be
2 permitted by law." Plaintiff's allegations state no basis for such relief. Plaintiff's
3 prayer for attorney fees and treble damages should be stricken from the Complaint.

4 **VII. PLAINTIFF SHOULD BE ORDERED TO PROVIDE A MORE**
5 **DEFINITE STATEMENT OF ANY REMAINING CLAIMS**

6 If this Court does not dismiss all of the causes of action asserted in the
7 Complaint, the Court should order Plaintiff to provide a more definite statement of
8 the remaining claims.

9 Rule 12(e) authorizes a motion for more definite statement to be granted
10 when the pleading is "so vague or ambiguous that [the defendant] cannot reasonably
11 be required to frame a responsive pleading." Fed. R. Civ. P. 12(e).

12 The Complaint does not "plead a short and plain statement" of the elements of
13 Plaintiff's claim. The Complaint does not satisfy the *Twombly* standard requiring
14 "more than labels and conclusions" to plead claims that are "plausible on [their]
15 face." *Twombly*, 127 S. Ct. at 1964-1965, 1974. If this Court allows any of
16 Plaintiff's claims to survive, Plaintiff should be ordered to set forth in detail the
17 specific facts supporting each count he asserts.

18 **VIII. CONCLUSION**

19 For all the foregoing reasons, Defendants respectfully request that the Court
20 dismiss the Complaint of Plaintiff Gabriel Hernandez as set forth above. In the
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BRYAN CAVE LLP
3161 MICHELSON DRIVE, SUITE 1500
IRVINE, CALIFORNIA 92612-4414

1 alternative, Defendants respectfully request that the Court order Plaintiff to provide
2 a more definite statement of his claims.

3
4 Dated: October 23, 2008

Stuart W. Price, Esq.
Stacey L. Herter, Esq.
Michael T. Levin, Esq.
BRYAN CAVE LLP

7
8 By: /s/ Michael T. Levin

Michael T. Levin
Attorneys for Defendant
RECONTRUST COMPANY; and
COUNTRYWIDE HOME LOANS, INC.

BRYAN CAVE LLP
3161 MICHELSON DRIVE, SUITE 1500
IRVINE, CALIFORNIA 92612-4414