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7 and Harold W. McGraw III

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN JOSE DIVISION  
11

12 MICHAEL BLOMQUIST,  
13 Plaintiff,

14 v.

15 WASHINGTON MUTUAL, KERRY K.  
16 KILLINGER, JOSEPH W. SAUNDERS,  
17 COUNTRYWIDE HOME LOANS, INC.,  
18 ANGELO MOZILLO, WACHOVIA  
CORPORATION, KEN THOMPSON,  
19 CITIGROUP, SANFORD WEILL, CHARLES  
PRINCE, GOLDMAN SACHS GROUP, INC.,  
HENRY PAULSON, BEAR STERNS  
20 COMPANIES, INC., JAMES CAYNE, THE  
MCGRAW HILL COMPANY, INC., HAROLD  
21 MCGRAW III, WELLS FARGO &  
22 COMPANY, PATRICIA R. CALLAHAN,  
HERBERT M. SANDLER, ROCK HOLDINGS,  
23 INC., EXPERIAN CORPORATION,  
FIMALAC, INC., MOODY'S CORPORATION,  
24 JAMES E. GILLERAN, JOHN M. REICH,  
JOHN D. HAWKE JR., JOHN C. DUGAN,  
25 SUSAN SCHMIDT BIES, DONALD E.  
26 POWELL, and SHEILA C. BAIR,

27 Defendants

Case No. C-07-04108-JF (HRL)

**DEFENDANTS THE MCGRAW-HILL  
COMPANIES, INC. AND HAROLD W.  
MCGRAW III'S NOTICE OF MOTION  
AND MOTION TO DISMISS THE  
AMENDED COMPLAINT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

Date: July 11, 2008  
Time: 9:00 a.m.  
Before: Hon. Jeremy Fogel

**TABLE OF CONTENTS**

1

2 NOTICE OF MOTION AND MOTION ..... 1

3 STATEMENT OF ISSUES (CIVIL L.R. 7-4)..... 1

4 MEMORANDUM OF POINTS AND AUTHORITIES ..... 1

5 PRELIMINARY STATEMENT AND BACKGROUND FACTS ..... 2

6 ARGUMENT ..... 4

7 I. PLAINTIFF FAILS TO STATE A CLAIM AGAINST THE MCGRAW-HILL

8 DEFENDANTS FOR “FALSE, MISLEADING, UNFAIR OR DECEPTIVE

9 STATEMENTS REGARDING LOANS” (COUNT I) ..... 4

10 A. Twelve of the Fifteen Statutes Relied Upon By Plaintiff With Respect to

11 Count I Either Do Not Provide For a Private Cause of Action or Plaintiff

12 Lacks Standing to Assert A Claim Thereunder..... 5

13 B. Plaintiff Has No Claim Under Section 17200..... 6

14 C. Plaintiff Has No Claim Under Section 17500..... 8

15 D. Plaintiff Has No Claim Under the Federal Antitrust Laws ..... 9

16 1. Plaintiff Does Not Allege An Anti-Competitive Injury ..... 9

17 2. Plaintiff Does Not Allege An “Agreement, Conspiracy or

18 Combination” ..... 10

19 3. Plaintiff’s Antitrust Claim Fails Under Rule 9(b) As Well..... 11

20 II. PLAINTIFF FAILS TO STATE A CLAIM AGAINST THE MCGRAW-HILL

21 DEFENDANTS FOR “UNSAFE AND UNSOUND LENDING” (COUNT II)..... 12

22 A. Plaintiff Has No Claim Under § 17043 of the Cal. Bus. and Prof. Code..... 12

23 B. Plaintiff’s Remaining Claims In Count II Also Fail ..... 13

24 III. PLAINTIFF FAILS TO STATE A CLAIM AGAINST THE MCGRAW-HILL

25 DEFENDANTS FOR “SELLING PRODUCTS BELOW COST” (COUNT III)..... 13

26 IV. PLAINTIFF FAILS TO STATE A CLAIM AGAINST THE MCGRAW-HILL

27 DEFENDANTS FOR “FRAUD AND CONSPIRACY” (COUNT IV) ..... 14

28 V. PLAINTIFF FAILS TO STATE A CLAIM AGAINST THE MCGRAW-HILL

DEFENDANTS FOR “FRAUDULENT TRANSACTION OF DOMESTIC

SECURITIES” (COUNT VI)..... 15

A. Plaintiff Lacks Standing to Sue Under the Federal Securities Laws..... 15

B. The Complaint Fails In Any Event to State a Claim Under Section 10(b) of

the 1934 Act ..... 16

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

- 1. The Complaint Contains No Allegation of Any Material Misstatement by the McGraw-Hill Defendants, Let Alone One that Is Sufficiently Particularized..... 17
- 2. The Complaint Fails to Raise a Strong Inference of Scienter Against the McGraw-Hill Defendants ..... 18
- 3. Plaintiff Has Failed to Plead Reliance..... 19
- 4. The Complaint Fails to Plead Loss Causation ..... 20
- C. The Complaint Fails to State a Claim Under Section 9 of the 1934 Act ..... 20
- IV. CONCLUSION ..... 21

**TABLE OF AUTHORITIES**

**Cases**

1

2

3

4 *Basic, Inc. v. Levinson*

5       485 U.S. 224 (1988) ..... 20

6 *Bell Atlantic Corp. v. Twombly*

7       127 S. Ct. 1955 (2007) ..... 10-11

8 *Berclain America Latina, S.A. v. Baan Co.*

9       74 Cal. App. 4th 401 (1999)..... 5

10 *Berryman v. Merit Prop. Mgmt., Inc.*

11       152 Cal. App. 4th 1544 (2007)..... 6

12 *Blue Chip Stamps v. Manor Drug Stores*

13       421 U.S. 723 (1975) ..... 15-16

14 *Bosse v. Crowell Collier & MacMillan*

15       565 F.2d 602 (9<sup>th</sup> Cir. 1977)..... 7

16 *Central Bank, N.A. v. First Interstate Bank, N.A.*

17       511 U.S. 164 (1994) ..... 18

18 *County of Orange v. McGraw Hill Cos.*

19       245 B.R. 151 (C.D. Cal. 1999)..... 3, 4

20 *In re Daou Sys., Inc. Sec. Litig.*

21       411 F.3d 1006 (9th Cir. 2005)..... 11-12

22 *Dooley v. Crab Boat Owners Ass’n*

23       271 F. Supp. 2d 1207 (N.D. Cal. 2003) ..... 12

24 *Dura Pharms., Inc. v. Broudo*

25       544 U.S. 336 (2005) ..... 16-17, 20

26 *In re Enron Corp. Sec., Derivative & “ERISA” Litig.*

27       511 F. Supp. 2d 742 (S.D. Tex. 2005) ..... 3, 4

28 *G.H.I.I. v. MTS, Inc.*

      147 Cal. App. 3d 256 (1983)..... 12

*GIA-GMI, LLC v. Michener*

      No. C-06-7949, 2007 WL 2070280 (N.D. Cal. July 16, 2007)..... 17

*Gulf Corp. v. Mesa Petroleum Co.*

      582 F. Supp. 1110 (D. Del. 1984) ..... 21

*Inter-Mark USA, Inc. v. Intuit, Inc.*

      No. C-07-04178, 2008 WL 552482 (N.D. Cal. Feb. 27, 2008) ..... 8

1 *Kamen v. Lindly*  
 94 Cal. App. 4th 197 (2001)..... 21

2

3 *Kendall v. Visa U.S.A., Inc.*  
 518 F.3d 1042 (9th Cir. 2008)..... 11

4 *Khoury v. Maly’s, Inc.*  
 14 Cal. App. 4th 612 (1993)..... 6

5

6 *Les Shockley Racing, Inc. v. Nat’l Hot Rod Ass’n*  
 884 F.2d 504 (9th Cir. 1989)..... 9-10

7 *Lum v. Bank of America*  
 361 F.3d 217 (3d Cir. 2004)..... 11

8

9 *McGlinchy v. Shell Chemical Co.*  
 845 F.2d 802 (9th Cir. 1988)..... 9, 10

10 *Musick, Peeler & Garrett v. Employers Ins. of Wausau*  
 508 U.S. 286 (1993) ..... 20

11

12 *Neubronner v. Milken*  
 6 F.3d 666 (9th Cir. 1993)..... 7

13 *O’Brien v. Camisasca Automotive Mfg., Inc.*  
 161 Cal. App. 4th 388 (2008)..... 8

14

15 *Posern v. Prudential Sec., Inc.*  
 No. C-03-0507, 2004 WL 771399 (N.D. Cal. Feb. 18, 2004) ..... 17

16 *Rutman Wine Co. v. E. & J. Gallo Winery*  
 829 F.2d 729 (9<sup>th</sup> Cir. 1987)..... 10

17

18 *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*  
 806 F.2d 1393 (9th Cir. 1986)..... 7

19 *In re Scott Paper Co. Sec. Litig.*  
 145 F.R.D. 366 (E.D. Pa. 1992) ..... 3

20

21 *Shurkin v. Golden State Vinters, Inc.*  
 471 F. Supp. 2d 998 (N.D. Cal. 2006) ..... 17, 19

22 *In re Silicon Graphics, Inc. Sec. Litig.*  
 183 F.3d 970 (9th Cir. 1999)..... 19

23

24 *Silicon Knights, Inc. v. Crystal Dynamics, Inc.*  
 983 F. Supp. 1303 (N.D. Cal. 1997) ..... 6

25 *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*  
 128 S. Ct. 761 (2008) ..... 18

26

27 *Swartz v. KPMG LLP*  
 476 F.3d 756 (9th Cir. 2007)..... 7

28

1 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*  
 127 S. Ct. 2499 (2007) ..... 17, 18-19

2

3 *Terarecon, Inc. v. Fovia, Inc.*  
 No. C 05-4407, 2006 WL 1867734 (N.D. Cal. July 6, 2006) ..... 7

4 *In re Valence Tech. Sec. Litig.*  
 No. C 95-20459, 1996 WL 67326 (N.D. Cal. Feb. 13, 1996)..... 18

5

6 *In re Vantive Corp. Sec. Litig.*  
 110 F. Supp. 2d 1209 (N.D. Cal. 2000), *aff'd*, 283 F.3d 1079 (9th Cir. 2002)..... 19

7 *Vess v. Ciba-Geigy Corp. USA*  
 317 F.3d 1097 (9th Cir. 2003)..... 7, 11

8

9 **Statutes**

10 12 U.S.C. § 1828 ..... 13

11 15 U.S.C. § 1 ..... *passim*

12 15 U.S.C. § 52 ..... 6, 13

13 15 U.S.C. § 57a ..... 6, 13

14 15 U.S.C. § 77uuu ..... 15

15 15 U.S.C. § 77w ..... 15

16 15 U.S.C. § 78b ..... 15

17 15 U.S.C. § 78c ..... 3

18 15 U.S.C. § 78i ..... 15, 20-21

19 15 U.S.C. § 78j ..... *passim*

20 15 U.S.C. § 78k-1 ..... 15

21 15 U.S.C. § 78l ..... 15

22 15 U.S.C. § 78o-6 ..... 15

23 15 U.S.C. § 78u-4 ..... 17,18

24 18 U.S.C. § 371 ..... 13, 14

25 18 U.S.C. § 1001 ..... 14

26 18 U.S.C. § 1005 ..... 13, 14

27 18 U.S.C. § 1007 ..... 13, 14

28

1 18 U.S.C. § 1014 ..... 13, 14

2 18 U.S.C. § 1341 ..... 6, 13, 14

3 18 U.S.C. § 1343 ..... 6, 13, 14

4 18 U.S.C. § 1344 ..... 6, 13, 14

5 18 U.S.C. § 1348 ..... 6, 13, 14

6 18 U.S.C. § 1349 ..... 6, 13, 14

7 18 U.S.C. § 1350 ..... 6, 13, 14

8 California Business and Professions Code Section 17043 ..... 12, 13, 14

9 California Business and Professions Code Section 17071 ..... 12, 14

10 California Business and Professions Code Section 17200 ..... *passim*

11 California Business and Professions Code Section 17500 ..... 5, 8, 9

12 California Civil Code Section 1667 ..... 5, 13, 14

13 California Civil Code Section 1668 ..... 13, 14

14 California Civil Code Section 1920 ..... 13, 14

15 California Civil Code Section 3294 ..... 14

16 California Financial Code Section 3353 ..... 5

17 California Financial Code Section 22161 ..... 6

18 California Financial Code Section 50503 ..... 6, 13

19

20 **Federal Rules and Regulations**

21 Federal Rule of Civil Procedure 8 ..... 1, 2, 8

22 Federal Rule of Civil Procedure 9(b) ..... *passim*

23 Federal Rule of Civil Procedure 12(b)(6) ..... 1, 2

24 12 C.F.R. § 34.D ..... 13

25 12 C.F.R. § 208.C ..... 13

26 12 C.F.R. § 365.2 ..... 13

27 12 C.F.R. § 560.101 ..... 13

28

1  
2  
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28

**Other Authorities**

Order Granting Resignation of Standard & Poor's Ratings Services, Exchange Act Release  
No. 34-56513 (Sept. 24, 2007) ..... 3

H.R. Conf. Rep. No. 104-369 at 41 (1995). ..... 17

*Form 10-K of The McGraw-Hill Companies, Inc. filed February 29, 2008t*  
*available at [http://www.sec.gov/Archives/edgar/data/](http://www.sec.gov/Archives/edgar/data/64040/000095012308002305/y5026e10vk.htm)*  
*64040/000095012308002305/y5026e10vk.htm* ..... 3

1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that, on July 11, 2008, at 9:00 a.m., or as soon thereafter as the  
3 matter may be heard, before the Honorable Jeremy Fogel, United States District Court Judge, in  
4 the United States District Court for the Northern District of California, San Jose Division, 280  
5 South First Street, Fourth Floor, San Jose, California, defendants The McGraw-Hill Companies,  
6 Inc. and Harold W. McGraw III (collectively, the “McGraw-Hill Defendants”)  
7 shall, and hereby do, move the Court pursuant to pursuant to Fed. R. Civ. P. 8, 9(b) and 12(b)(6)  
8 for an order dismissing all claims asserted against the McGraw-Hill Defendants in the Amended  
9 Complaint.

10 This motion is made and based upon this Notice of Motion and Motion, the  
11 attached Memorandum of Points and Authorities, all pleadings and papers on file herein, and such  
12 additional evidence and argument as may hereinafter be presented to the Court.

13 **STATEMENT OF ISSUES TO BE DECIDED**

14 (N.D. Cal. Civ. L.R. 7-4)

- 15 1. Whether Plaintiff failed to state a claim against the McGraw-Hill Defendants in  
16 Count I of the Amended Complaint for “false or deceptive statements.”
- 17 2. Whether Plaintiff failed to state a claim against the McGraw-Hill Defendants in  
18 Count II of the Amended Complaint for “unsafe and unsound lending.”
- 19 3. Whether Plaintiff failed to state a claim against the McGraw-Hill Defendants in  
20 Count III of the Amended Complaint for “selling products below cost.”
- 21 4. Whether Plaintiff failed to state a claim against the McGraw-Hill Defendants in  
22 Count IV of the Amended Complaint for “fraud and conspiracy.”
- 23 5. Whether Plaintiff failed to state a claim against the McGraw-Hill Defendants in  
24 Count VI of the Amended Complaint for “fraudulent transaction [sic] of domestic securities.”

25 **MEMORANDUM OF POINTS AND AUTHORITIES**

26 Defendants The McGraw-Hill Companies, Inc. and Harold W. McGraw III (collectively,  
27 the “McGraw-Hill Defendants”) respectfully submit this brief in support of their motion to dismiss  
28

1 the Amended Complaint pursuant to Fed. R. Civ. P. 8, 9(b) and 12(b)(6). The McGraw-Hill  
2 Defendants respectfully request oral argument on their motion.

3 **PRELIMINARY STATEMENT AND BACKGROUND FACTS**

4 Plaintiff Michael Blomquist (“Blomquist”),<sup>1</sup> a former mortgage and real estate agent, has  
5 filed a scattershot six-count amended complaint (“Amended Complaint” or “AC”). The rambling  
6 allegations clump together 30 corporate and individual defendants including residential mortgage  
7 lenders, investment banks and ratings agencies as well as current and former directors of several  
8 federal agencies (collectively, “the Defendants”). Without any clarity or coherent theory of  
9 liability, the Amended Complaint indiscriminately purports to assign blame to all of the  
10 Defendants for supposed misdeeds involving the issuance of residential mortgage loans and  
11 related securities.

12 Plaintiff asserts that he was injured when “[a]gainst Plaintiffs’ [sic] advice and Plaintiffs’  
13 [sic] unwillingness to commit unlawful acts,” his “clients, referrals and prospective clients were  
14 enticed to and transacted business” with certain of the Defendants instead of Plaintiff. (AC ¶ 5).  
15 He also claims, inexplicably, that he was injured when, after searching for “replacement income,”  
16 because he thought securities sold by certain of the Defendants would *decrease* in value, he  
17 invested in certain other unspecified securities. (AC ¶ 6).

18 As to the McGraw-Hill Defendants, the Amended Complaint is deficient on its face and  
19 should be dismissed. Although Plaintiff cites a laundry list of civil and criminal statutes  
20 throughout the Amended Complaint, the factual allegations he pleads in support of his theories are  
21 virtually non-existent with respect to the McGraw-Hill Defendants. In fact, Plaintiff’s only  
22 mention of the McGraw-Hill Defendants in the 40-page Amended Complaint are two paragraphs

23 \_\_\_\_\_  
24 <sup>1</sup> The original complaint, filed on August 9, 2007, named Michael Scott Properties, Inc. as an  
25 additional plaintiff. On August 10, 2007, United States Magistrate Judge Richard Seeborg issued  
26 an order stating, *inter alia*, that “Corporations cannot appear in Court except through licensed  
27 attorneys. Accordingly, the corporate plaintiff must obtain counsel or be dismissed from this  
28 action.” As stated in his Motion to Reconsider his Application to Proceed In Forma Pauperis,  
Plaintiff was unsuccessful in his attempt to find counsel that would represent him in this action.  
On September 10, 2007, Plaintiff filed his Amended Complaint dropping the corporate plaintiff.

1 incorrectly describing McGraw-Hill as “the parent company” of Standard and Poor’s (“S&P”) and  
2 mistakenly identifying Mr. McGraw as the CEO of S&P (AC ¶¶ 20, 20a) and three identical  
3 boilerplate allegations that “Ratings” (defined in the Amended Complaint as “S&P, Fitch &  
4 Moody’s”) “ratified . . . endorsed or permitted others” to engage in certain non-particularized acts  
5 of allegedly fraudulent misconduct (AC ¶¶ 48(A), (F), (G)).

6 In fact, The McGraw-Hill Companies, Inc. “is a leading global information services  
7 provider serving the financial services, education and business information markets with a wide  
8 range of information products and services.” *See* Form 10-K of The McGraw-Hill Companies,  
9 Inc. filed February 29, 2008, *available* at [http://www.sec.gov/Archives/edgar/data/  
10 64040/000095012308002305/y50265e10vk.htm](http://www.sec.gov/Archives/edgar/data/64040/000095012308002305/y50265e10vk.htm). Harold W. McGraw III is the Chairman,  
11 President and Chief Executive Officer of McGraw-Hill. *Id.* Standard & Poor’s Ratings Services,  
12 a division of McGraw-Hill, is a nationally recognized statistical rating organization under Section  
13 15E of the Securities Exchange Act of 1934 for the following classes of credit ratings: financial  
14 institutions, brokers, or dealers; insurance companies; corporate issuers; issuers of asset-backed  
15 securities; and issuers of government securities, municipal securities, or securities issued by a  
16 foreign government. *See* Order Granting Registration of Standard & Poor’s Ratings Services,  
17 Exchange Act Release No. 34-56513 (Sept. 24, 2007); 15 U.S.C. § 78c (a)(62)(B)(i)-(v).

18 As recognized by other federal courts, S&P, as a credit rating agency, “rates and comments  
19 on the creditworthiness of public companies and their securities and disseminates that information  
20 to the public through its several periodicals”; “S&P does not advise specific clients on their  
21 purchases or sales and has no personal interest in whether its subscribers actually purchase the  
22 securities which it rates.” *See In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. 366, 367, 370 (E.D.  
23 Pa. 1992). Unlike other Defendants in this case, credit rating agencies, like S&P, have repeatedly  
24 been held to receive significant First Amendment protection, because its opinions on  
25 creditworthiness are, by their very nature, protected speech. *See, e.g., County of Orange v.*  
26 *McGraw-Hill Cos.*, 245 B.R. 151, 157 (C.D. Cal. 1999) (“[T]he First Amendment protects S&P’s  
27 preparation and publication of its ratings.”); *In re Enron Corp. Sec., Derivative & “ERISA” Litig.*,

28

1 511 F. Supp. 2d 742, 825 (S.D. Tex. 2005) (recognizing the “policy of heightened protection for  
2 credit reports under the First Amendment, which are matters of public concern”).<sup>2</sup>

3 For the reasons set forth below, each of the claims asserted against the McGraw-Hill  
4 Defendants fails to state a valid cause of action. Accordingly, the McGraw-Hill Defendants move  
5 to dismiss all counts asserted against them in the Amended Complaint in their entirety.

6 **ARGUMENT**

7 **I. PLAINTIFF FAILS TO STATE A CLAIM AGAINST THE MCGRAW-HILL**  
8 **DEFENDANTS FOR “FALSE, MISLEADING, UNFAIR OR DECEPTIVE**  
9 **STATEMENTS REGARDING LOANS” (COUNT I)**

10 In Count I of the Amended Complaint, Plaintiff asserts that the “Lenders” — defined as  
11 five defendants not including either of the McGraw-Hill Defendants — “violated and continue to  
12 violate” various statutes that Plaintiff claims make “it unlawful to make or disseminate false,  
13 misleading, unfair or deceptive statements regarding loans.” (AC ¶¶ 50, 51). Plaintiff asserts that  
14 the Lenders (which McGraw-Hill is not) violated these statutes “by advertising, publishing,  
15 distributing, broadcasting, causing or permitting . . . untrue or misleading statements with the  
16 intent to induce mortgage transactions or purchase related mortgage securities.” (AC ¶ 51).

17 Neither of the McGraw-Hill Defendants are alleged to have violated any of the 15 statutes  
18 Plaintiff cites as the basis for Count I. Rather, Plaintiff vaguely asserts that “[a]ll defendants”  
19 “made, encouraged, caused, ratified, or permitted others to make untrue or misleading statements  
20 that could restrain trade” and knew or “should have known, that the false, misleading, unfair or  
21 deceptive statements would restrain trade for business entities not willing to engage in unlawful  
22 activities.” (AC ¶ 52). Plaintiff refers to Paragraph 48 of the Amended Complaint for the alleged

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23 <sup>2</sup> Although Plaintiff refers briefly to S&P (AC ¶ 20), the Amended Complaint does not take issue  
24 with any of S&P’s ratings. If it was intending to, in addition to the reasons set forth herein, such a  
25 claim would fail because Plaintiff cannot satisfy the even more heightened pleading requirements  
26 mandated by the First Amendment. *See, e.g., County of Orange*, 245 B.R. at 157 (“Because the  
27 County alleges harm arising from S&P’s expressive activity, . . . the County must therefore satisfy  
28 the heightened pleading standards of the First Amendment.”); *In re Enron*, 511 F. Supp. 2d at 827  
29 (“In conclusion, because [plaintiff] has failed to meet the requirements of heightened pleading to  
30 pierce First Amendment protection and because the Court concludes as a matter of law and public  
31 policy that there was no duty of care owed by the Credit Rating Agencies to [plaintiff] regarding  
32 its loan to Enron, the Court grants the Rating Agencies’ motion to dismiss the negligent  
33 misrepresentation claim.”).

1 false or misleading “statements” that he asserts as the basis for Count I. Paragraph 48 sets forth  
2 several general statements allegedly made by the Lenders to unspecified “borrowers” — not one is  
3 a statement allegedly made by either of the McGraw-Hill Defendants. On this basis alone, the  
4 claims against the McGraw-Hill Defendants in Count I must be dismissed.

5 While Plaintiff cites 15 statutes as the basis for Count I, twelve of them either do not  
6 provide for a private cause of action or Plaintiff lacks standing to assert a claim under them. *See*  
7 Section I.A below. Although the remaining three statutes — Section 17200 of Cal. Bus. and Prof.  
8 Code, Section 17500 of Cal. Bus. and Prof. Code and 15 U.S.C. § 1 — provide for a private cause  
9 of action in certain circumstances, Plaintiff’s claims under those statutes fail as against the  
10 McGraw-Hill Defendants for the reasons set forth below.


11 **A. Twelve of the Fifteen Statutes Relied Upon By Plaintiff With Respect to Count**  
12 **I Either Do Not Provide For a Private Cause of Action or Plaintiff Lacks**  
13 **Standing to Assert A Claim Thereunder**

14 Plaintiff’s claim under Section 1667 of Cal Civ. Code, which defines an “unlawful  
15 contract,” fails as Plaintiff does not (and cannot) allege that any contract existed between him and  
16 either of the McGraw-Hill Defendants. In fact, Plaintiff has not alleged the existence of any  
17 contract between any of the parties in this case. Moreover, even if some contract existed, Plaintiff  
18 has not pleaded that he is either a signatory to such a contract or that he was the intended third-  
19 party beneficiary of any contract. Thus, Plaintiff has no standing to assert a contract claim under  
20 Section 1667. *See Berclain America Latina, S.A. v. Baan Co.*, 74 Cal. App. 4th 401, 405 (1999).  
21 (“It is elementary that a party asserting a claim must have standing to do so. In asserting a claim  
22 based upon a contract, this generally requires the party to be a signatory to the contract, or to be an  
23 intended third party beneficiary.”).

24 Similarly, Plaintiff has no claim against the McGraw-Hill Defendants under Section 3353  
25 of the California Financial Code. That statute declares that any “director, officer, agent, or  
26 employee of a bank” who knowingly makes a false material statement in any written report or  
27 statement of its affairs is guilty of a felony. McGraw-Hill is not a bank (nor is it alleged to be)  
28 and Mr. McGraw is not (nor is he alleged to be) a “director, officer, agent or employee” of a bank  
subject to this section of the California Financial Code.

1 As for Plaintiff's citation to 15 U.S.C. §§ 52, 57a(f); 18 U.S.C. §§ 1341, 1343, 1344, 1348,  
2 1349, and 1350(b); and Sections 22161 and 50503(a)(2) of Cal. Fin. Code, none of these statutes  
3 provide for a private cause of action.

4 **B. Plaintiff Has No Claim Under Section 17200**

5 Section 17200 of Cal. Bus. and Prof. Code broadly prohibits all "unlawful, unfair or  
6 fraudulent business act[s] or practice[s]." "A plaintiff alleging unfair business practices under  
7 [§ 17200]," however, "must state with reason  particularity the facts supporting the statutory  
8 elements of the violation." See, e.g., *Khoury v. Maly's, Inc.*, 14 Cal. App. 4th 612, 619 (1993)  
9 (affirming dismissal of § 17200 claim where "complaint identifies no particular section of the  
10 statutory scheme . . . violated and fails to describe with any reasonable particularity the facts  
11 supporting violation"); *Silicon Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F. Supp. 1303, 1315-  
12 16 (N.D. Cal. 1997) (dismissing § 17200 claim where complaint "consist[ed] of nothing but  
13 conclusory allegations of fraud, misappropriation of trade secrets, and equally vague claims of  
14 interference with business relations") (internal quotations omitted); *Berryman v. Merit Prop.*  
15 *Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1554, 1556 (2007) (dismissing § 17200 claim where, inter  
16 alia, plaintiff provided only "a laundry list of state and federal statutes [that defendant] allegedly  
17 violated" but "fail[ed] to plead facts to support its allegations" and the facts pled did "not state a  
18 claim that as a result of any wrongful conduct by [defendant], plaintiffs suffered a substantial,  
19 unavoidable injury").

20 Here, Plaintiff fails to state a claim against the McGraw-Hill Defendants under Section  
21 17200. Plaintiff purports to base his Section 17200 claim in Count I on the Lenders' alleged  
22 practice of making misleading statements to borrowers to induce mortgage transactions. (AC ¶  
23 51). The only time Plaintiff even attempts to reference the McGraw-Hill Defendants is to make  
24 the wholly conclusory allegation that "[a]ll defendants" either "made, encouraged, caused, ratified,  
25 or permitted others" to make misleading statements. (AC ¶ 52). At no point does Plaintiff plead  
26 any facts, let alone with the required "reasonable particularity," to support a claim that the  
27 McGraw-Hill Defendants made any false or deceptive statements, nor does Plaintiff offer any facts  
28

1 that would support a claim that the McGraw-Hill Defendants — or indeed any other non-Lender  
2 Defendant — “encouraged, caused, ratified, or permitted others” to make material misstatements.

3 Moreover, because Count I sounds in fraud, it must also comply with the pleading  
4 requirements of Fed. R. Civ. P. 9(b). *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105-06  
5 (9th Cir. 2003) (noting that although “[f]raud is not an essential element of a claim [under  
6 § 17200],” where plaintiff alleges fraud without particularity, such “allegations should be  
7 ‘disregarded’ or ‘stripped from the claim’ for failure to satisfy Rule 9(b)” and where the entirety of  
8 a claim was “comprised of allegations of a unified fraudulent course of conduct,” the claim was  
9 “grounded in fraud” and “the complaint as a whole must satisfy . . . Rule 9(b)”); *Terarecon, Inc. v.*  
10 *Fovia, Inc.*, No. C 05-4407, 2006 WL 1867734, at \*5 (N.D. Cal. July 6, 2006) (dismissing  
11 § 17200 claim, holding that “[t]he misrepresentation allegations must be disregarded because they  
12 are not alleged with the required specificity [under Rule 9(b)]”). The Amended Complaint fails to  
13 comply with Rule 9(b) in all respects.

14 To satisfy Rule 9(b), Plaintiff was required to “state the time, place, and specific content of  
15 the false representations as well as the identities of the parties to the misrepresentation.” *Schreiber*  
16 *Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986); *Neubronner v.*  
17 *Milken*, 6 F.3d 666, 671 (9th Cir. 1993) (plaintiff must provide “allegations of fraud [that] are  
18 specific enough to give defendants notice of the particular misconduct which is alleged”) (internal  
19 quotations omitted). Plaintiff must identify the circumstances constituting the alleged fraud with  
20 such particularity that the defendant can adequately prepare a response. *See Bosse v. Crowell*  
21 *Collier & MacMillan*, 565 F.2d 602, 611 (9th Cir. 1977). Moreover, where, as here, a plaintiff  
22 asserts fraud against multiple defendants, the complaint must, “at a minimum, identify the role of  
23 each defendant in the alleged fraudulent scheme.” *Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th  
24 Cir. 2007) (internal quotations omitted).

25 Here, Plaintiff makes no averments whatsoever against the McGraw-Hill Defendants that  
26 could satisfy the strict Rule 9(b) requirements. In fact, the Amended Complaint does not set forth  
27 any act or statement allegedly made by the McGraw-Hill Defendants. No claim under Section  
28 17200 can thus be sustained.

1           **C. Plaintiff Has No Claim Under Section 17500**

2           California’s False Advertising Law (“FAL”), Section 17500 et seq. of the Cal. Bus. &  
3 Prof. Code, “prohibits consumer deception.” *See O’Brien v. Camisasca Automotive Mfg., Inc.*,  
4 161 Cal. App. 4th 388, 397 (2008). In bringing a claim under the FAL, a plaintiff must allege that  
5 “(1) he or she has suffered actual injury in fact, and (2) such injury occurred *as a result of* the  
6 defendant’s alleged unfair competition or false advertising. . . . For a plaintiff to suffer ‘injury in  
7 fact . . . *as a result of*’ the alleged unfair business practice or false advertising, . . . the plaintiff  
8 must have actually *relied* on the false advertising or unfair business practice, and *as a result*,  
9 suffered injury therefrom.” *Id.* at 400 (emphasis in original).

10           Plaintiff lacks standing to bring a Section 17500 claim against any of the Defendants.  
11 Plaintiff does not allege that he entered into a transaction with any of the Defendants, let alone that  
12 he did so in reliance on the allegedly false and misleading statements he asserts the Lenders made  
13 to potential borrowers. In fact, Plaintiff claims quite the opposite; he alleges that he believed the  
14 Lenders’ advertisements to be false and misleading and cautioned his clients and potential  
15 customers not to enter into transactions with them. (AC ¶ 5). This allegation contradicts any  
16 attempt to assert reliance and, as such, Plaintiff cannot establish standing under Section 17500.  
17 *See O’Brien*, 161 Cal. App. 4th at 401 (holding that “causation in the form of reliance is an  
18 element of standing under Proposition 64 in an action alleging misrepresentation in violation of  
19 the UCL or the FAL”).

20           Even if Plaintiff had standing to bring a Section 17500 claim against anyone, Plaintiff has  
21 not satisfied even the basic pleading requirements of Fed. R. Civ. P. 8 with respect to the  
22 McGraw-Hill Defendants. *See Inter-Mark USA, Inc. v. Intuit, Inc.*, No. C-07-04178, 2008 WL  
23 552482, at \*10 (N.D. Cal. Feb. 27, 2008) (dismissing § 17500 claim where “Plaintiff has not met  
24 the more liberal requirements of Rule 8” and “refers only to unspecified ‘commercial  
25 advertisements’ and a ‘variety of promotional materials.’ Because Plaintiff does not identify any  
26 specific statements, this claim does not provide adequate notice to Defendant of the alleged  
27 wrongful conduct.”). Here, Plaintiff does not allege that the McGraw-Hill Defendants made any  
28 statement to anyone; nor does he describe any other alleged act that could serve as the basis for a

1 claim against the McGraw-Hill Defendants under Section 17500. His pleading therefore fails  
2 under Rule 8.

3 **D. Plaintiff Has No Claim Under the Federal Antitrust Laws**

4 The Sherman Act, 15 U.S.C. § 1, prohibits “[e]very contract, combination in the form of  
5 trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or  
6 with foreign nations.” The asserted “restraint of trade” tacked on to all five of Plaintiff’s claims  
7 against the McGraw-Hill Defendants is based on Plaintiff’s allegation that Blomquist (a licensed  
8 real estate broker) was “individually restrained from mortgage and real estate commerce because  
9 of legal, fiduciary, ethical, and moral conflicts” as a result of the unspecified actions of the  
10 Defendants. (AC ¶ 4). For at least two basic reasons, Plaintiff fails to state a claim against the  
11 McGraw-Hill Defendants under 15 U.S.C. § 1.

12 **1. Plaintiff Does Not Allege An Anti-Competitive Injury**

13 “To establish a section 1 violation under the Sherman Act, a plaintiff must demonstrate,”  
14 *inter alia*, an actual “injury to competition, beyond the impact on the claimant, within a field of  
15 commerce in which the claimant is engaged (*i.e.*, ‘antitrust injury’).” *McGlinchy v. Shell*  
16 *Chemical Co.*, 845 F.2d 802, 811 (9th Cir. 1988). Accordingly, to properly plead an antitrust  
17 claim, a plaintiff “must allege ‘antitrust injury, which is to say injury of the type the antitrust laws  
18 were intended to prevent’ . . . . It is injury to the market or to competition in general, not merely  
19 injury to individuals or individual firms that is significant.” *Id.* at 811-12 (affirming dismissal of  
20 Sherman Act claim where plaintiffs’ “allegations amount to an assertion that [plaintiffs’] own  
21 fittings business has been injured by the defendants’ conduct” and holding that “[e]ven if  
22 [plaintiffs] claim a substantial loss to their flare fitting business within the broader . . . market,  
23 economic injury to a competitor does not equal injury to competition”) (emphasis in original;  
24 internal quotations omitted).

25 Plaintiff’s periodic and wholly unsupported invocations of the words “restrains trade”  
26 throughout the Amended Complaint are insufficient to plead anti-competitive injury. “In order  
27 successfully to allege injury to competition, a section one claimant may not merely recite the bare  
28 legal conclusion that competition has been restrained unreasonably. Rather, a claimant must, at a

1 minimum, sketch the outline of the antitrust violation with allegations of supporting factual  
2 detail.” *Les Shockley Racing, Inc. v. Nat’l Hot Rod Ass’n*, 884 F.2d 504, 507-08 (9th Cir. 1989)  
3 (internal citation omitted). *See also Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736  
4 (9th Cir. 1987) (“The pleader may not evade [the pleading] requirements [of the Sherman Act] by  
5 merely alleging a bare legal conclusion; if the facts do not at least outline or adumbrate a violation  
6 of the Sherman Act, the plaintiffs will get nowhere merely by dressing them up in the language of  
7 antitrust.”) (internal quotations omitted). Plaintiff has not done so here.

8 In fact, the only actual injury Plaintiff attempts to assert is that he suffered some  
9 nonspecific decrease in his market share because of Plaintiff’s claimed unwillingness to engage in  
10 certain lending practices. (AC ¶ 5). This does not begin to make out an antitrust claim. Even  
11 assuming the truth of this allegation, “[t]he elimination of a single competitor, without more, does  
12 not prove anticompetitive effect.” *McGlinchy*, 845 F.2d at 812 (internal citation omitted). “This  
13 limitation on the reach of the Sherman Act is reflected in [the Ninth Circuit’s] repeated injunctions  
14 that section one claimants must plead and prove a reduction of competition in the market in  
15 general and not mere injury to their own positions as competitors in the market.” *Les Shockley*,  
16 884 F.2d at 508 (“Plaintiffs insist that their allegation of market exclusion and resulting loss of  
17 income are sufficient to plead an outline of facts showing injury to competition that would enable  
18 a factfinder to conclude that defendants violated Sherman Act § 1. We cannot agree.”); *Rutman*,  
19 829 F.2d at 734 (“While appellant clearly pleads injury to itself, its conclusion that competition  
20 has been harmed thereby does not follow.”).

21 Plaintiff’s failure to allege any anti-competitive injury precludes his Sherman Act claim.

## 22 2. Plaintiff Does Not Allege An “Agreement, Conspiracy or Combination”

23 Section 1 of the Sherman Act prohibits only restraints of trade “effected by a contract,  
24 combination, or conspiracy.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007)  
25 (internal quotations omitted). Accordingly, in pleading a claim under 15 U.S.C. § 1, a plaintiff  
26 must plead “enough factual matter (taken as true) to suggest than an agreement was made,” *i.e.*,  
27 “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal  
28 agreement.” *Id.* at 1965. “[A]n allegation of parallel conduct and a bare assertion of conspiracy

1 will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory  
2 allegation of agreement at some unidentified point does not supply facts adequate to show  
3 illegality.” *Id.* at 1966.

4 Here, the Amended Complaint contains no allegations of the existence of any agreement,  
5 conspiracy or combination between the McGraw-Hill Defendants and any other party. Rather,  
6 Plaintiff twice proposes, in identical boilerplate and without explanation or support, the existence  
7 of a conspiracy evidently engulfing all Defendants named in the Amended Complaint. (AC ¶¶ 54,  
8 63). Aside from this “formulaic recitation” of one of the required elements of the claim, Plaintiff  
9 provides no factual underpinning at all that would indicate that there was an agreement involving  
10 the McGraw-Hill Defendants or, indeed, among any of the Defendants. *See Twombly*, 127 S. Ct.  
11 at 1964-65 (holding that “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to  
12 relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a  
13 cause of action will not do”).

14 Accordingly, for this independent reason as well, Plaintiff has not stated a viable claim  
15 under the Sherman Act. *Id.* at 1970-71 & n. 9 (allegations that defendants “engaged in a ‘contract,  
16 combination or conspiracy’ and agreed not to compete with one another” were “merely legal  
17 conclusions” and insufficient to state a claim); *see also Kendall v. Visa U.S.A., Inc.*, 518 F.3d  
18 1042, 1047-48 (9th Cir. 2008) (affirming dismissal of Sherman Act claim where plaintiffs  
19 “pleaded only ultimate facts, such as conspiracy, and legal conclusions” and “failed to plead the  
20 necessary evidentiary facts to support those conclusions”).

### 21 3. Plaintiff’s Antitrust Claim Fails Under Rule 9(b) As Well

22 Finally, because an antitrust claim based on allegedly misleading statements sounds in  
23 fraud, it must also conform with Rule 9(b). *See, e.g., Lum v. Bank of America*, 361 F.3d 217, 220  
24 (3d Cir. 2004) (applying Rule 9(b) to an antitrust claim that was “based on fraud”). Even where  
25 fraud is not a necessary element of a cause of action, as shown above, a plaintiff who alleges a  
26 unified course of fraudulent conduct and relies on that conduct as the basis for his claim subjects  
27 that claim to the strictures of Rule 9(b). *See Vess*, 317 F.3d at 1103-04; *see also In re Daou Sys.*,

28

1 *Inc. Sec. Litig.*, 411 F.3d 1006, 1028 (9th Cir. 2005). As demonstrated above, Plaintiff does not  
2 come close to satisfying the particularity requirements of Rule 9(b).

3 **II. PLAINTIFF FAILS TO STATE A CLAIM AGAINST THE MCGRAW-HILL**  
4 **DEFENDANTS FOR “UNSAFE AND UNSOUND LENDING” (COUNT II)**

5 In Count II, Plaintiff refers to 21 statutes and claims that all “the Defendants” violated  
6 those statutes “by originating, selling, endorsing, causing, ratifying or permitting loans without  
7 minimum standards for net worth, cash flow, and debt service coverage of the borrower or  
8 underlying property; unclear loan to value limits; lack of monitoring real estate lending policies;  
9 lack of prudent real estate appraisals and other issues listed within the Agencies’ real estate  
10 lending standards and within the Lenders’ corporate standards.” (AC ¶ 55). There is no basis at  
11 all for such a claim against the McGraw-Hill Defendants.

12 **A. Plaintiff Has No Claim Under § 17043 of the Cal. Bus. and Prof. Code**

13 California Business and Professions Code Sections 17043 and 17071 relate to the practice  
14 of selling a product below cost. Section 17043 states that it is unlawful to “sell any article or  
15 product at less than the cost thereof to such vendor, or to give away any article or product, for the  
16 purpose of injuring competitors or destroying competition.” Section 17071 does not itself prohibit  
17 the sale of goods below cost, but rather states that: “[i]n all actions brought under this chapter  
18 proof of one or more acts of selling or giving away any article or product below cost or at  
19 discriminatory prices, together with proof of the injurious effect of such acts, is presumptive  
20 evidence of the purpose or intent to injure competitors or destroy competition.”

21 The Amended Complaint does not state a claim against the McGraw-Hill Defendants  
22 under either of these sections. To state a claim under Section 17043, a plaintiff must allege the  
23 sale of a product at less than cost to the seller for the purpose of injuring competitors or destroying  
24 competition. *See Dooley v. Crab Boat Owners Ass’n*, 271 F. Supp. 2d 1207, 1215 (N.D. Cal.  
25 2003). In so alleging, “the plaintiff must allege defendant’s sales price, its cost in the product and  
26 its cost of doing business,” which must be stated in “other than conclusionary terms.” *G.H.I.I. v.*  
27 *MTS, Inc.*, 147 Cal. App. 3d 256, 275 (1983).

28

1 No such allegations are asserted against the McGraw-Hill Defendants. In fact, the  
2 McGraw-Hill Defendants are not alleged to have sold *any* product, let alone one at less than cost.  
3 Moreover, Plaintiff has not made any assertions — as he is required to do — as to the general cost  
4 of the products he believes were sold under cost. Plaintiff’s complete failure to allege these  
5 fundamental elements mandates the dismissal of any claim under Section 17043.

6 **B. Plaintiff’s Remaining Claims In Count II Also Fail**

7 As in Count I, Plaintiff lacks standing under Section 1667 as he has failed to allege that  
8 Plaintiff entered into any contract with either of the McGraw-Hill Defendants. Plaintiff’s Section  
9 1668 claim in Count II fails for the same reason.<sup>3</sup>

10 In Count II, Plaintiff again cites Section 17200 of the Cal. Bus. & Prof. Code and Section 1  
11 of the Sherman Act. For all the reasons that Plaintiff’s Section 17200 claim and Sherman Act  
12 claim fail in Count I, they fare no better under Count II. Plaintiff has not adequately pled a claim  
13 under these statutes.

14 The remaining statutes and regulations Plaintiff cites in Count II provide no private cause  
15 of action. *See* 12 U.S.C. § 1828(a)(1)(B); Section 1920(a) of the Cal. Civ. Code; Section  
16 50503(a)(2) of the Cal. Fin. Code; 15 U.S.C. §§ 52, 57a(f); 18 U.S.C. §§ 371, 1005, 1007, 1014,  
17 1341, 1343, 1344, 1348, 1349, 1350(b); 12 C.F.R. §§ 560.101, 365.2, 34.D, 208.C.

18 **III. PLAINTIFF FAILS TO STATE A CLAIM AGAINST THE MCGRAW-HILL  
19 DEFENDANTS FOR “SELLING PRODUCTS BELOW COST” (COUNT III)**

20 In Count III, a claim that appears to mirror Count II in its utter insubstantiality, Plaintiff  
21 asserts that all “the Defendants” violated various statutes “by originating, selling, endorsing,  
22 causing, ratifying or permitting loans or mortgage securities to be sold below cost.” (AC ¶ 59).  
23 Plaintiff cites five statutes as the basis for Count III.

24 \_\_\_\_\_  
25 <sup>3</sup> Section 1668 of the California Civil Code provides that “[a]ll contracts which have for their  
26 object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful  
27 injury to the person or property of another, or violation of law, whether willful or negligent, are  
28 against the policy of the law.”

1 For the reasons set forth in Sections I and II above, Plaintiff's attempt to base Count III on  
 2 15 U.S.C. § 1, Section 1667 of the Cal. Civ. Code and Sections 17043 & 17071 of the Cal. Bus.  
 3 and Prof. Code is insufficient as he has failed to plead the basic elements for a claim under these  
 4 statutes. Among other reasons, the McGraw-Hill Defendants are not (and cannot be) alleged to be  
 5 the "seller" of any loan or mortgage security. The remaining statute cited by Plaintiff in Count III  
 6 (Section 1920(a) of the Cal. Civ. Code) does not provide for a private cause of action.

7 **IV. PLAINTIFF FAILS TO STATE A CLAIM AGAINST THE MCGRAW-HILL**  
 8 **DEFENDANTS FOR "FRAUD AND CONSPIRACY" (COUNT IV)**

9 In Count IV, Plaintiff asserts that "[a]ll defendants" "made, encouraged, caused, ratified, or  
 10 permitted others to commit fraud or conspire to commit fraud." (AC ¶ 63). Plaintiff also asserts  
 11 that "[a]ll defendants" knew or should have known that fraud and conspiracy "is unlawful and  
 12 would restrain trade for business entities not willing to participate in unlawful activities" and that  
 13 the Defendants' "participation in alleged violations . . . could aid and abet Lenders with  
 14 fraudulent security transactions." (*Id.*) Plaintiff cites 15 statutes as the basis for Count IV.

15 Again, the vast majority of the statutes Plaintiff cites do not provide for a private cause of  
 16 action. *See* 18 U.S.C. §§ 371, 1001, 1005, 1007, 1014, 1341, 1343, 1344, 1348, 1349, 1350(b);  
 17 Section 1920(a) of the Cal. Civ. Code; and Section 3294 of the Cal. Civ. Code.<sup>4</sup> Plaintiff's claims  
 18 under the remaining two statutes cited in Count IV (Sections 1667 & 1668 of the Cal. Civ. Code)  
 19 also fail for lack of standing for the reasons set forth above.

20 Finally, although he does not expressly articulate such a claim, to the extent that Plaintiff is  
 21 attempting to state a claim for common law fraud in Count IV, as its title suggests, his claim must  
 22 be dismissed for failure to comply with the pleading requirements of Rule 9(b).

23 \_\_\_\_\_  
 24 <sup>4</sup> Section 3294 of the California Civil Code simply deals with damages. It declares that "[i]n an  
 25 action for the breach of an obligation not arising from contract, where it is proven by clear and  
 26 convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the  
 27 plaintiff, in addition to the actual damages, may recover damages for the sake of example and by  
 28 way of punishing the defendant." As discussed above, Plaintiff has not pled the existence of any  
 contract and therefore is not entitled to any damages, much less punitive damages under this  
 section. Moreover, Plaintiff has provided no factual allegations whatsoever that would support a  
 finding of "oppression, fraud, or malice" on the part of the McGraw-Hill Defendants.

1 **V. PLAINTIFF FAILS TO STATE A CLAIM AGAINST THE MCGRAW-HILL**  
 2 **DEFENDANTS FOR “FRAUDULENT TRANSACTION OF DOMESTIC**  
 3 **SECURITIES” (COUNT VI)**

4 In Count VI,<sup>5</sup> Plaintiff asserts that all Defendants “engaged, participated, aided or abetted  
 5 fraudulent securities transactions; in particular the OTS’s over-sight of the WAMU and Providian  
 6 merger.” (AC ¶ 69). Plaintiff also claims that all Defendants knew or should have known that  
 7 “security violations have occurred and are occurring as a result of a violation or combination of  
 8 violations identified in the First through Fifth causes of action.” (*Id.*)

9 Among other pleading failures requiring dismissal, Plaintiff does not specify the securities,  
 10 if any, that he allegedly purchased or sold or the alleged misstatement(s) supposedly made in  
 11 connection with the purchase or sale of any such securities. Rather Plaintiff merely asserts that in  
 12 “looking to find replacement income” (after being allegedly closed out of the real estate market),  
 13 he purchased securities which he believed “would benefit [him] from decreases in some of the  
 14 Defendants’ stocks” but which instead resulted in “security losses.” (AC ¶ 6). Similarly,  
 15 although Plaintiff vaguely references the “WAMU and Providian merger” in Count VI, he does  
 16 not attempt to connect either of the McGraw-Hill Defendants in any way to such an event (nor  
 17 could he). Such allegations cannot satisfy any pleading requirement, let alone the heightened  
 18 pleading requirements of Rule 9(b) and the Private Securities Litigation Reform Act (“PSLRA”).

19 **A. Plaintiff Lacks Standing to Sue Under the Federal Securities Laws**

20 As a starting point, six of the eight statutes cited by Plaintiff (15 U.S.C. §§ 77w, 78b(3),  
 21 78k-1, 78l, 78o-6 & 77uuu) provide no private right of action and thus cannot form the foundation  
 22 for any claim. Even where Plaintiff’s rote list of statutes does hit on a provision that permits a  
 23 private claim (*i.e.*, Sections 9 and 10 of the 1934 Act, 15 U.S.C. §§ 78i, 78j), Plaintiff lacks  
 24 standing to assert one.

25 Sections 9 and 10 of the 1934 Act apply only to misconduct or misstatements “in  
 26 connection with the purchase or sale,” or that “affect[]” the price, of securities. 15 U.S.C. §§  
 27 78j(b), 78i(e). It is well established that in order to have standing under either of these provisions,

28 <sup>5</sup> Count V of the Amended Complaint is not asserted against the McGraw-Hill Defendants.

1 a plaintiff must be a purchaser or seller of the securities so affected. *Blue Chip Stamps v. Manor*  
2 *Drug Stores*, 421 U.S. 723, 731, 736 (1975). The Amended Complaint does not even attempt to  
3 satisfy this threshold requirement.

4 Nowhere does Plaintiff allege that he purchased or sold any security of or from the  
5 McGraw-Hill Defendants. Rather, in Count VI, Plaintiff alludes to “[p]rior damage” suffered  
6 “through securities losses” and identifies three companies (two other defendants and an entity that  
7 merged with a defendant) that were “involve[d]” with the securities losses. (AC ¶ 69). Yet,  
8 Plaintiff never alleges that he purchased or sold the stock of these Defendants — or any other.  
9 Indeed, Plaintiff appears to plead just the opposite: the only securities Plaintiff asserts he did buy  
10 were unidentified securities purchased in an effort “to find replacement income.” (AC ¶ 6). He  
11 goes on to allege that he purchased these unidentified securities in the hope that the Defendants’  
12 allegedly “unlawful and unsustainable” activities would adversely impact the price of Defendants’  
13 stocks and “benefit” the stocks he bought. (*Id.*) All of this is insufficient to plead a claim under  
14 the federal securities laws.

15 Absent an allegation (which Plaintiff cannot, in any event, make) that Plaintiff purchased  
16 or sold a security “in connection with” or “affected by” Defendants’ alleged misconduct or  
17 misstatements, Plaintiff has no standing to pursue the claims he now asserts and his securities  
18 claims should be dismissed on this ground alone. *See Blue Chip Stamps*, 421 U.S. at 747 (the  
19 “virtue” of the standing rule adopted by the Court is that “it limits the class of plaintiffs to those  
20 who have at least dealt in the security to which the prospectus, representation, or omission  
21 relates”).

22 **B. The Complaint Fails In Any Event to State a Claim Under Section 10(b) of the**  
23 **1934 Act**

24 Plaintiff’s Section 10(b) claim should also be dismissed for the independent reason that the  
25 Amended Complaint fails to plead the required elements for such a claim against the McGraw-Hill  
26 Defendants in accordance with the PSLRA and the law of this Circuit.

27 To survive a motion to dismiss, a Section 10(b) plaintiff must plead: (1) a material  
28 misrepresentation (or omission); (2) scienter; (3) a connection with the purchase or sale of a

1 security; (4) reliance; (5) economic loss; and (6) loss causation. *Dura Pharms., Inc. v. Broudo*,  
 2 544 U.S. 336, 341-42 (2005). The sufficiency of a plaintiff's Section 10(b) allegations must be  
 3 tested against the heightened pleading requirements of Rule 9(b) and the PSLRA. *GIA-GMI, LLC*  
 4 *v. Michener*, No. C-06-7969, 2007 WL 2070280, at \*6 (N.D. Cal. July 16, 2007).

5 As discussed above, Rule 9(b), which applies to "all averments of fraud," requires a  
 6 plaintiff to plead "with particularity" the "circumstances constituting fraud." The PSLRA raises  
 7 the bar higher still. *Posern v. Prudential Sec., Inc.*, No. C-03-0507, 2004 WL 771399, at \*4 (N.D.  
 8 Cal. Feb. 18, 2004) ("[c]ompared with Rule 9(b), [the] PSLRA created 'uniform and more  
 9 stringent pleading requirements to curtail the filing of meritless lawsuits'" (quoting H.R. Conf.  
 10 Rep. No. 104-369 at 41 (1995)). In order to satisfy the PSLRA's even "more stringent"  
 11 requirements, a plaintiff must "state with particularity both the facts constituting the alleged  
 12 violation, and the facts evidencing scienter." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.  
 13 Ct. 2499, 2504 (2007). Thus, a plaintiff must "specify each statement alleged to have been  
 14 misleading [and] the reason or reasons why the statement is misleading," 15 U.S.C. § 78u-4(b)(1),  
 15 and "state with particularity facts giving rise to a strong inference that the defendant acted with the  
 16 required state of mind," 15 U.S.C. § 78u-4(b)(2). Where, as here, a plaintiff alleges that multiple  
 17 defendants violated Section 10(b), the "material misrepresentation" and "scienter" elements must  
 18 be pled with particularity as to *each* defendant. *See Shurkin v. Golden State Vinters, Inc.*, 471 F.  
 19 Supp. 2d 998, 1016 (N.D. Cal. 2006); 15 U.S.C. §§ 78u-4(b)(1), (2); Fed. R. Civ. P. 9(b).

20 For the reasons set forth below, any one of which would suffice to require dismissal of the  
 21 Count, Plaintiff fails in his attempt to plead the required elements of a Section 10(b) claim.

22 **1. The Complaint Contains No Allegation of Any Material Misstatement**  
 23 **by the McGraw-Hill Defendants, Let Alone One that Is Sufficiently**  
 24 **Particularized**

25 Far from having pled with specificity "each statement alleged to have been misleading  
 26 [and] the reason or reasons why," 15 U.S.C. § 78u-4(b)(1), Plaintiff has failed to plead any  
 27 material misrepresentation or omission by the McGraw-Hill Defendants whatsoever.

28 Rather, the Amended Complaint repeatedly alleges that the Defendants "ratified . . .  
 endorsed or permitted others to commit" certain non-particularized acts of allegedly fraudulent

1 misconduct. (AC ¶¶ 48(A), (F), (G)). At most, such statements allege a claim for aiding and  
 2 abetting a Section 10(b) violation. Yet, as the Supreme Court has affirmed time and time again,  
 3 most recently in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, “there is no private right  
 4 of action for aiding and abetting a § 10(b) violation.” 128 S. Ct. 761, 767 (2008). *See also*  
 5 *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 177-78 (1994) (rejecting aiding  
 6 and abetting liability under Section 10(b)).

7 Moreover, even if merely ratifying, endorsing, or permitting others to engage in securities  
 8 violations were actionable under Section 10(b), the Amended Complaint fails to provide even a  
 9 single particularized fact indicating how (or where, or when) the McGraw-Hill Defendants  
 10 allegedly did even that.<sup>6</sup> Plaintiff’s complete failure to allege the fundamental element of a  
 11 material misstatement by the McGraw-Hill Defendants mandates dismissal of Count VI. *See, e.g.*,  
 12 *In re Valence Tech. Sec. Litig.*, No. C 95-20459, 1996 WL 67326, at \*5 (N.D. Cal. Feb. 13, 1996)  
 13 (dismissing Section 10(b) claim premised in part on a “wholly conclusory” allegation that “failed  
 14 to identify any alleged misstatement or particular incident” of fraud).

## 15 2. The Complaint Fails to Raise a Strong Inference of Scienter Against the 16 McGraw-Hill Defendants

17 Plaintiff’s sparse allegations are equally deficient in raising, as they must, a “*strong*  
 18 inference that [the McGraw-Hill Defendants] acted with the required state of mind.” 15 U.S.C. §  
 19 78u-4(b)(2) (emphasis added). Indeed, they raise no inference of a culpable state of mind at all.

20 In *Tellabs*, the Supreme Court recently clarified the meaning of the PSLRA’s “strong  
 21 inference” requirement in a manner that, by contrast, illustrates the fatal defects of the Amended  
 22 Complaint here:

23 the inference of scienter must be more than merely ‘reasonable’ or ‘permissible’--  
 24 it must be cogent and compelling, thus strong in light of other explanations. A  
 25 complaint will survive . . . only if a reasonable person would deem the inference

26 <sup>6</sup> Plaintiff’s unsupported assertion that the “Agencies, Ratings and Bankers” “[sold] . . . untested  
 27 debt to unsuspecting investors” (AC ¶ 48(G)) is entirely lacking in the particularity required by the  
 28 PSLRA and Rule 9(b) and is contradicted by Plaintiff’s own description of the McGraw-Hill  
 Defendants from elsewhere in the Amended Complaint. *See* AC ¶ 20.

1 of scienter cogent and at least as compelling as any opposing inference one could  
2 draw from the facts alleged.

3 127 S. Ct. at 2510; *see also In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 974, 985 (9th  
4 Cir. 1999) (under the PSLRA, a plaintiff “must plead, in great detail, facts that constitute strong  
5 circumstantial evidence of deliberately reckless or conscious misconduct. . . . [A] mere  
6 speculative inference . . . or even a reasonable inference” is not enough).

7 As already noted, Plaintiff’s allegations as to the McGraw-Hill Defendants are limited to  
8 the boilerplate accusation that the Defendants “ratified . . . endorsed or permitted others to  
9 commit” certain acts, with no particularized facts whatsoever suggesting how the Defendants  
10 allegedly did so. (AC ¶¶ 48(A), (F), (G)). These conclusory assertions are insufficient to properly  
11 allege scienter. *Silicon Graphics*, 183 F.3d at 976-77; *see In re Vantive Corp. Sec. Litig.*, 110 F.  
12 Supp. 2d 1209, 1218 (N.D. Cal. 2000) (“boilerplate allegations” concerning defendants’  
13 knowledge based on assumptions about their positions are insufficient), *aff’d*, 283 F.3d 1079 (9th  
14 Cir. 2002). Moreover, any general allegations as to the state of mind of all Defendants, *see, e.g.*,  
15 AC ¶ 69, add nothing to the relevant analysis of whether each Defendant *individually* possessed  
16 the required mental state. *See, e.g., Shurkin*, 471 F. Supp. 2d at 1016.

17 Because Plaintiff does not provide the “great detail” necessary to raise a “strong inference”  
18 of scienter on the part of the McGraw-Hill Defendants, his claims under the federal securities laws  
19 must be dismissed. *Silicon Graphics*, 183 F.3d at 974, 985.

### 20 **3. Plaintiff Has Failed to Plead Reliance**

21 Notwithstanding the fact that Plaintiff does not appear to have purchased or sold a security  
22 on which to base a claim in the first place, *see* Section V.A., he readily admits in the Amended  
23 Complaint that he never relied on *any* allegedly fraudulent misstatement or deceptive act by any of  
24 the Defendants. To the contrary, Plaintiff concedes that his eyes have long been wide open to  
25 what he believes are the Lenders’ unlawful practices. *See, e.g.*, AC ¶ 45 (“Plaintiffs [sic] have  
26 been writing, filing complaints and commenting on advanced notices of proposed rulemaking . . .  
27 for years. Plaintiffs’ [sic] activities . . . [concern] the unsafe and unsound lending standards  
28 including misleading option ARMs, fraudulent NIVs, fraudulent concealment of existing

1 delinquencies and antitrust issues”). Speaking of the unidentified securities he claims to have  
 2 purchased in his search for “replacement income” (AC ¶ 6), Plaintiff goes so far as to  
 3 acknowledge that he made these purchases “*realizing that the Defendants’ activities were*  
 4 *unlawful and unsustainable*” (AC ¶ 6; emphasis added) in the hopes of making a profit. These  
 5 allegations negate any attempt to plead “reliance” and are insufficient to sustain a claim under  
 6 Section 10(b). *Basic, Inc. v. Levinson*, 485 U.S. 224, 248-49 (1988).

#### 7 **4. The Complaint Fails to Plead Loss Causation**

8 In order to plead loss causation, another required element under Section 10(b), Plaintiff  
 9 must allege “a causal connection between the material misrepresentation and the loss.” *Dura*, 544  
 10 U.S. at 342, 347 (dismissing Section 10(b) claim where the complaint failed to “provide[] the  
 11 defendants with notice of what the relevant economic loss might be or of what the causal  
 12 connection might be between that loss and the misrepresentation”). Here, Plaintiff makes no  
 13 attempt to draw a causal connection between any alleged misrepresentation and the loss he  
 14 allegedly suffered. In fact, because Plaintiff alleges that his stock purchase was made in  
 15 connection with his “realiz[ation]” that the Defendants were engaged in alleged unlawful  
 16 activities, there would appear to be no set of facts that Plaintiff could allege that could establish  
 17 that any alleged misrepresentation proximately caused Plaintiff’s alleged economic loss.  
 18 Accordingly, Plaintiff’s claim under Section 10(b) must fail for this reason too. *Dura*, 544 U.S. at  
 19 347.

#### 20 **C. The Complaint Fails to State a Claim Under Section 9 of the 1934 Act**

21 As for Plaintiff’s claim under Section 9 of the 1934 Act, he provides no indication  
 22 whatsoever as to which of Section 9’s many provisions he believes were violated by the  
 23 Defendants in this case. However, because Section 9 imposes liability only on those who  
 24 “willfully participate” in a violation of the Section, Plaintiff’s claim must fail in any form for the  
 25 reasons set forth in Section V.B.2. *See also* 15 U.S.C. 78i(e); *see Musick, Peeler & Garrett v.*  
 26 *Employers Ins. of Wausau*, 508 U.S. 286, 296 (1993) (noting that Section 9 requires scienter).

27 Moreover, to the extent Plaintiff’s Section 9 claim is premised on a violation of subsection  
 28 (a)(4), which prohibits false or misleading statements made for the purpose of inducing the

