

1 **I. Background**

2 The factual allegations in this action are presented at length
3 in the court's Order Granting Defendants' Motion to Dismiss With
4 Leave to Amend Certain Claims (the "Order"), dated February 19,
5 2013. Because the basic allegations of the First Amended Complaint
6 ("FAC") are identical, the court will not recite them again.

7 On February 19, 2013, the court granted Bank of America
8 Corporation's Motion to Dismiss as to all claims, giving Plaintiffs
9 leave to amend the four fraud-based claims (Claims 5, 6, 7, and 8)
10 to meet Rule 9(b)'s particularity requirements and leave to amend
11 the conspiracy claim (Claim 9).

12 **II. Legal Standard**

13 A complaint may be dismissed for failure to state a claim upon
14 which relief can be granted. See Fed. R. Civ. P. 12(b)(6). "To
15 survive a motion to dismiss, a complaint must contain sufficient
16 factual matter, accepted as true, to 'state a claim to relief that
17 is plausible on its face.' A claim has facial plausibility when
18 the plaintiff pleads factual content that allows the court to draw
19 the reasonable inference that the defendant is liable for the
20 misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
21 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

22 Although the court must accept as true all of the factual
23 allegations in a complaint, that principle "is inapplicable to
24 legal conclusions. Threadbare recitals of the elements of a cause
25 of action, supported by mere conclusory statements, do not
26 suffice." Id.

27 To determine whether a complaint states a claim sufficient to
28 withstand dismissal, a court considers the contents of the

1 complaint and its attached exhibits, documents incorporated into
2 the complaint by reference, and matters properly subject to
3 judicial notice. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551
4 U.S. 308, 322-23 (2007); Lee v. City of Los Angeles, 250 F.3d 668,
5 688 (9th Cir. 2001).

6 Where a motion to dismiss is granted, a district court should
7 provide leave to amend unless it is clear that the complaint could
8 not be saved by any amendment. Manzarek v. St. Paul Fire & Marine
9 Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008) (citation omitted).

10 **III. Discussion**

11 **A. Negligence and Breach of Fiduciary Duty Claims**

12 Plaintiff concedes that the claims for negligence and breach
13 of fiduciary duty were dismissed without leave to amend. These
14 claims are therefore DISMISSED from the FAC.

15 **B. Fraud-Based Claims**

16 "A cause of action for fraud requires the plaintiff to prove
17 (a) a knowingly false misrepresentation by the defendant, (b) made
18 with the intent to deceive or to induce reliance by the plaintiff,
19 (c) justifiable reliance by the plaintiff, and (d) resulting
20 damages." Glenn K. Jackson, 273 F.3d at 1201 (quoting Wilkins v.
21 Nat'l Broad. Co., 71 Cal. App. 4th 1066 (Cal. Ct. App. 1999))
22 (internal quotation marks omitted). The elements of a claim for
23 fraud in the inducement of a contract are the same as for actual
24 fraud. Rodriguez v. JP Morgan Chase & Co., 809 F. Supp. 2d 1291,
25 1296 (citing Cal. Civ. Code § 1572; Zinn v. Ex-Cell-O Corp., 148
26 Cal. App. 2d 56, 68 (Cal. Ct. App. 1957)). Negligent
27 misrepresentation is a "species of the tort of deceit." Bily v.
28 Arthur Young & Co., 3 Cal. 4th 370, 407 (1992). Justifiable

1 reliance on the misrepresentation by the plaintiff is a key element
2 of a cause of action for negligent misrepresentation. Id. at 413.

3 BANA argues that Plaintiffs' fraud-based claims in the FAC
4 should be dismissed because, as in the original Complaint,
5 Plaintiffs fail to allege justifiable reliance and fail to plead
6 their fraud claims with particularity.

7 **1. Justifiable Reliance**

8 The court's Order indicated that it was implausible that
9 Plaintiffs could have relied on the Bank Officer's statements when
10 they chose to enter into the loan agreement because those
11 statements were made on February 9 and the agreement was dated
12 February 1. BANA argues that the FAC does not correct this
13 deficiency. The FAC does include as an exhibit email
14 correspondence concerning the agreement suggesting that the
15 agreement was signed later in February and backdated to February 1.
16 (FAC Exh. 5.) However, the FAC does not specifically allege that
17 date upon which the agreement was in fact signed, or that the
18 parties agreed to backdate the agreement. Paragraph 30 states only
19 that after the February 9 call, "Plaintiffs went ahead with
20 concluding negotiations for the NRL, and entered into an agreement
21 regarding the NRL with Defendant OCP. The agreement is dated
22 effective as of February 1, 2012." Paragraph 30 thus implies
23 without alleging specifically that the agreement was backdated.

24 Assuming arguendo that Plaintiffs have sufficiently alleged
25 that the agreement was backdated, BANA also argues that any
26 reliance was not justifiable. The court's Order stated: "simply
27 because [Plaintiffs] failed to do adequate due diligence does not
28 make the Bank Officer's statements fraudulent, and it makes their

1 alleged reliance on those statements less justifiable." (Order at
2 19-20.) Plaintiffs assert in their Opposition to this Motion that
3 they did due diligence with respect to the Oriana Defendants, and
4 that this due diligence led them to "reasonably believ[e] the
5 representations made by" the Bank officer. (Opp. at 5.)

6 The court finds that even if the FAC is read to allege that
7 the agreement was backdated, Plaintiffs have still not alleged
8 facts to show that any reliance was justifiable. The court's Order
9 indicated that in the original Complaint Plaintiffs

10 d[id] not allege what kind of evidence the Bank Officer
11 relied on in making his statements, nor d[id] they allege
12 that they requested any supporting documentation from the
13 Bank Officer or any additional information about his
14 ability to comment on the Oriana Defendants' financial
15 resources. Plaintiffs are purportedly sophisticated
16 parties who owned complex securities and were represented
17 by counsel in their transaction with Oriana.

18 (Order at 19.) Likewise, in the FAC, Plaintiffs have not alleged
19 any such facts, nor have they alleged any other facts showing that
20 reliance was justifiable. They allege only that they did due
21 diligence with respect to the Oriana Defendants, but this does not
22 amount to due diligence with respect to the Bank Officer and his
23 representations, particularly when the representations that Oriana
24 Defendants had sufficient financial resources were critical to
25 Plaintiffs' decision to enter into the agreement. Ordinarily due
26 diligence in such a situation would include requesting proof of the
27 Oriana Defendants' financial resources or other factual bases upon
28 which the Bank Officer relied for his representations.

1 **2. Pleading with Particularity**

2 The court's Order dismissed Plaintiffs' fraud-based claims for
3 the additional reason that Plaintiffs failed to plead those claims
4 with the level of particularity required by Rule 9(b). (Order at
5 20.) Specifically, the court indicated that "[m]erely because at a
6 later time the Oriana Defendants did not disburse the loan funds
7 and stated that they did not have the capacity to do so does not
8 mean that the Bank Officer's statements about the Oriana
9 Defendants' financial resources were untrue at that earlier time. .
10 . . [Plaintiffs] allege no facts to show that the Bank Officer had
11 access to other information at the time of the phone call that
12 would have contradicted his assessment of the Oriana Defendants'
13 financial resources." (Id. at 20-21.)

14 Plaintiffs cite ¶¶ 22-44 and ¶¶ 115-51 of the FAC to
15 demonstrate that they have now pleaded the fraud claims with
16 particularity. The only paragraph that might be seen as being
17 intended to cure the above-noted deficiency is ¶ 131, where
18 Plaintiffs allege that "[w]hen BOA Bank Officer/John Doe 1 made the
19 representations and statements alleged above, he knew these
20 representations to be false." However, this conclusory allegation
21 is not sufficiently particular to meet the pleading standard for
22 fraud claims; indeed, it is a bare allegation with no particularity
23 at all. There is no indication that Plaintiffs could amend so as
24 to cure this deficiency.

25 Additionally, the court noted in the Order that in an amended
26 complaint, Plaintiffs would need to present phone records
27 establishing that the alleged call took place. (Order at 22
28 ("[a]ny amended pleading must attach and incorporate any telephone

1 records allegedly evidencing the telephone call in question.”).)
2 Plaintiffs have failed to do so, despite the four months that have
3 elapsed since the court’s Order.

4 For these reasons, and because any amendment would be futile,
5 the court DISMISSES the fraud-based claims without leave to amend.

6 **C. Conspiracy Claim**

7 As discussed in the court’s Order, a plaintiff must “clearly
8 allege specific action on the part of each defendant that
9 corresponds to the elements of a conspiracy [The] plaintiff
10 cannot indiscriminately allege that conspiracies existed between
11 and among all defendants.” AccuImage Diagnostics Corp. v.
12 Terarecon, Inc., 260 F. Supp. 2d 941, 948 (N.D. Cal. 2003). In the
13 court’s Order, the court indicated that the conspiracy claim
14 against Bank of America in the original Complaint was deficient
15 because “[a]lthough the Bank of America Bank Officer is listed as a
16 defendant under the heading for the conspiracy claim, the
17 allegations do not specifically mention the Bank Officer’s actions,
18 and BAC is entirely absent from this claim. Plaintiffs therefore
19 fail to allege any specific action on the part of any Bank of
20 America defendants with respect to the alleged conspiracy.” (Order
21 at 23.) The FAC does not correct this deficiency. Again, BANA is
22 not named at all in the conspiracy allegations.

23 Additionally, BANA argues that Plaintiffs’ conspiracy claim
24 fails because BANA does not owe Plaintiffs any underlying duty, and
25 a conspiracy can “only be formed by parties who are already under a
26 duty to the plaintiff, the breach of which will support a cause of
27 action against them - individually and not as conspirators - in
28 tort.” Chavers v. Gatke Corp., 107 Cal. App. 4th 606, 614

1 (2003) (emphasis in original). Since the court found that
2 Plaintiffs have not pleaded their fraud-based claims with
3 sufficient particularity and dismissed those claims without leave
4 to amend, the court also finds that Plaintiffs have not stated a
5 claim for any duty owed by BANA to Plaintiffs and DISMISSES the
6 conspiracy claim without leave to amend.

7 **IV. Conclusion**

8 For the reasons stated above, BANA's Motion to Dismiss is
9 GRANTED. The FAC is dismissed in its entirety against BANA with
10 prejudice.

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12 IT IS SO ORDERED.

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15 Dated: June 7, 2013

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DEAN D. PREGERSON
United States District Judge

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