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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CORY PHILLIPS and JILISSA
SPENCER,

Plaintiffs,

v.

"MERS" MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, et al.,

Defendants.

1:09-CV-01028-OWW-SMS

MEMORANDUM DECISION RE:
DEFENDANT DHI MORTGAGE
COMPANY'S MOTION TO DISMISS
PLAINTIFFS' COMPLAINT FOR
FAILURE TO STATE A CLAIM FOR
WHICH RELIEF CAN BE GRANTED
(Doc. 4)

I. INTRODUCTION

Defendant lender DHI Mortgage Company, Ltd. ("DHI Mortgage") moves to dismiss as meritless *pro se* Plaintiffs Cory Phillips and Jilissa Spencer's ("Plaintiffs") thirteen claims arising from default and foreclosure on their first and second mortgages which were secured by deeds of trust on real property located at 722 Orestimba Peak Drive, Newman, California 95360; APN: 026-061-014. Defendant DHI Mortgage served the motion on *pro se* Plaintiffs at their Orestimba Peak Drive address on June 23, 2009. (Doc. 8.) To date, Plaintiffs have not filed an opposition to DHI's motion. Nor have Plaintiffs file a statement of non-opposition pursuant to

1 Local Rule 78-230(c).¹

2
3 **II. BACKGROUND**

4 This case arises out of the purchase of a single family home
5 in California in April 2006 by Plaintiffs, Cory Phillips and
6 Jilissa Spencer.² On April 20, 2006, Plaintiffs purchased the
7 property with funds obtained from DHI Mortgage's first and second
8 mortgage, and secured by deeds of trust and corresponding
9 promissory notes. A December 8, 2008 notice of default and
10 intention to sell was recorded for the property with the Stanislaus
11 County Recorder.

12 The Complaint, which is devoid of any specific facts as to
13 Plaintiff's loan, contains general allegations that have been
14 serially asserted against Defendant DHI Mortgage in numerous other
15 lawsuits.³ Plaintiffs allege that defendants participated in

16
17 ¹ In connection with its motion to dismiss, Plaintiff
18 submitted a request for judicial notice of Complaints filed in
19 three other actions not involving the parties to the present
20 lawsuit. (Doc. 6.) According to DHI, these Complaints are "almost
21 identical versions of the Complaint Plaintiffs filed in this
22 action." DHI's unopposed request is GRANTED. Federal courts may
23 "take notice of proceedings in other courts, both within and
24 without the federal judicial system, if those proceedings have a
25 direct relation to the matters at issue." *U.S. ex rel Robinson*
26 *Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th
27 Cir. 1992).

28 ² In addition to DHI Mortgage, the complaint names as
defendants Chicago Title Company, Mortgage Electronic Registration
Systems, Indymac Bank FSB, and NDEX WEST, LLC. Each defendant is
either a loan service provider or deed of trust provider. These
defendants are "somewhere in the chain of loan service providers
and [have] no other interest in this Note." (Compl. ¶ 3(a)-(f).)

³ Plaintiffs' Complaint is attached as "Exhibit A" to
Defendants' Notice of Removal, filed on June 11, 2009. (Doc. 1.)

1 "unethical business practices" and "violated both State and Federal
2 Law" by selling and distributing loans "that would ultimately be
3 sold to unqualified applicants." (Compl. ¶ 12.) Plaintiffs
4 contend that defendants had information that "reflected their
5 inability to pay for the risky loan," and that "defendants knew or
6 should have known [the sale of such loans] may result in
7 foreclosure, absent serial refinancing into even higher cost
8 loans." (Compl. ¶ 19.) The complaint further alleges:

9 These loans were neither proper nor suitable for
10 [plaintiffs'] condition and station in life. These
11 loans exceeded the reasonable expected value of the
12 property at that time and in the foreseeable future,
13 based upon expected market changes. Those loans were
14 an attempt to acquire mortgage broker premiums,
15 appraiser fees, lender service fees and sub-prime
16 loans, all to the advantage of the defendants and
17 disadvantage of the plaintiff. This was done as a
18 group of individuals in this industry through
19 concerted action or through civil conspiracy, all to
20 the disadvantage of the Plaintiff.

21 (Compl. ¶ 30.)

22 On April 13, 2009, Plaintiffs filed the instant action in
23 Stanislaus County Superior Court, alleging thirteen causes of
24 action: (1) Suitability; (2) Negligence; (3) Negligence Per se;
25 (4) Breach of Fiduciary Duty; (5) Negligent Misrepresentation; (6)
26 Intentional Misrepresentation; (7) Breach of the Covenant of Good
27 Faith and Fair Dealing; (8) Failure to Produce the Notes; (9)
28 Unfair Lending Practices; (10) Restoral of Good Credit History;
(11) Violation of Cal. Civ.Code 2923.5; (12) Unfair Lending
Practices; and (13) "To Restrain a Wrongful Foreclosure Agent."

 Plaintiffs seek to recover compensatory, statutory, and
punitive damages. (Compl. ¶ 94-96.) Plaintiffs also request
"[i]njunctive relief including the issuance of a restraining order

1 and thereafter a preliminary injunction to maintain the status quo
2 pending final adjudication." (Compl. ¶ 97.)

3 On June 11, 2009, this case was removed on the basis of
4 federal question jurisdiction. The notice of removal asserts that
5 Plaintiffs' action is founded on claims arising under federal laws,
6 including the federal Real Estate Settlement Procedures Act
7 ("RESPA"), 12 U.S.C. §§ 2601-2617, and Regulation Z, 12 C.F.R. §
8 226 et seq. (Doc. 1, ¶ 2.)

9 On June 23, 2009, DHI filed a motion to dismiss. Plaintiff
10 did not oppose the motion.

11 III. LEGAL STANDARD

12 DHI Mortgage attacks Plaintiffs' claims as incognizable and
13 lacking necessary elements and factual allegations. Under Federal
14 Rule of Civil Procedure 12(b)(6), a motion to dismiss can be made
15 and granted when the complaint fails "to state a claim upon which
16 relief can be granted." Dismissal under Rule 12(b)(6) is
17 appropriate where the complaint lacks a cognizable legal theory or
18 sufficient facts to support a cognizable legal theory. *Balistreri*
19 *v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

20 To sufficiently state a claim for relief and survive a
21 12(b)(6) motion, a complaint "does not need detailed factual
22 allegations" but the "[f]actual allegations must be enough to raise
23 a right to relief above the speculative level." *Bell Atl. Corp. v.*
24 *Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).
25 Mere "labels and conclusions" or a "formulaic recitation of the
26 elements of a cause of action will not do." *Id.* Rather, there must
27 be "enough facts to state a claim to relief that is plausible on
28 its face." *Id.* at 570. In other words, "[t]o survive a motion to

1 dismiss, a complaint must contain sufficient factual matter,
2 accepted as true, to state a claim to relief that is plausible on
3 its face." *Ashcroft v. Iqbal*, --- U.S. ----, 129 S.Ct. 1937, 1949,
4 173 L.Ed.2d 868 (2009) (internal quotation marks omitted). "The
5 plausibility standard is not akin to a probability requirement, but
6 it asks for more than a sheer possibility that a defendant has
7 acted unlawfully. Where a complaint pleads facts that are merely
8 consistent with a defendant's liability, it stops short of the line
9 between possibility and plausibility of entitlement to relief."
10 *Id.* (internal citation and quotation marks omitted).

11 In deciding whether to grant a motion to dismiss, the court
12 must accept as true all "well-pleaded factual allegations." *Iqbal*,
13 129 S.Ct. at 1950. A court is not, however, "required to accept as
14 true allegations that are merely conclusory, unwarranted deductions
15 of fact, or unreasonable inferences." *Sprewell v. Golden State*
16 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); see, e.g., *Doe I v.*
17 *Wal-Mart Stores, Inc.*, --- F.3d ----, 2009 WL 1978730, at *3 (9th
18 Cir. July 10, 2009) ("Plaintiffs' general statement that Wal-Mart
19 exercised control over their day-to-day employment is a conclusion,
20 not a factual allegation stated with any specificity. We need not
21 accept Plaintiffs' unwarranted conclusion in reviewing a motion to
22 dismiss.").

23 The Ninth Circuit has summarized the governing standard, in
24 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint
25 to survive a motion to dismiss, the non-conclusory factual content,
26 and reasonable inferences from that content, must be plausibly
27 suggestive of a claim entitling the plaintiff to relief." *Moss v.*
28 *U.S. Secret Service*, 572 F.3d 962, 2009 WL 2052985, at *6 (9th Cir.

1 July 16, 2009) (internal quotation marks omitted).
2

3 IV. DISCUSSION

4 A. Suitability (Count I)

5 The complaint's suitability claim alleges that "defendants
6 breached their professional duties and obligations by providing a
7 sub-prime loan that was neither suitable nor appropriate for the
8 plaintiffs' personal financial condition and well-being." (Compl.
9 ¶ 33.)

10 DHI Mortgage notes that suitability is an incognizable claim
11 by a borrower against a lender. "The unsuitability doctrine is
12 premised on New York Stock Exchange Rule 405-Know Your Customer
13 Rule and the National Association of Securities Dealers Rules of
14 Fair Practice." *O'Connor v. R.F. Lafferty & Co., Inc.*, 965 F.2d
15 893, 897 (10th Cir. 1992). DHI Mortgage correctly observes that
16 California law does not extend the suitability doctrine to the
17 mortgage lender-borrower relationship. "Public policy does not
18 impose upon the Bank absolute liability for the hardships which may
19 befall the [borrower] it finances." *Wagner v. Benson*, 101 Cal.
20 App. 3d 27, 34 (1980). The success of a borrower's investment "is
21 not a benefit of the loan agreement which the Bank is under a duty
22 to protect." *Wagner*, 101 Cal. App. 3d at 34 (lender lacked duty to
23 disclose "any information it may have had"). Plaintiffs'
24 suitability claim fails as incognizable against DHI Mortgage.

25 Plaintiffs' conclusory assertions that DHI breached its
26 professional obligations, which were not developed pursuant to a
27 timely filed opposition, lack evidentiary and legal support.
28 Plaintiffs' "suitability" cause of action is not cognizable legal

1 theory against DHI Mortgage. The motion to dismiss this claim is
2 GRANTED.

3 B. Negligence (Count II)

4 The complaint's negligence claim alleges that defendants
5 breached their "professional services" duty in that "plaintiffs
6 were placed into loans that were inappropriate for their personal
7 financial circumstances." (Compl. ¶ 34.) DHI Mortgage contends
8 that the negligence claim fails in absence of "a legally recognized
9 duty that a lender has to a borrower." (Doc. 4, 4:23-4:25.)

10 "The elements of a cause of action for negligence are (1) a
11 legal duty to use reasonable care, (2) breach of that duty, and (3)
12 proximate [or legal] cause between the breach and (4) the
13 plaintiff's injury." *Mendoza v. City of Los Angeles*, 66
14 Cal.App.4th 1333, 1339 (1998) (citation omitted). "The existence
15 of a legal duty to use reasonable care in a particular factual
16 situation is a question of law for the court to decide." *Vasquez*
17 *v. Residential Investments, Inc.*, 118 Cal. App. 4th 269, 278 (2004)
18 (citation omitted).

19 DHI Mortgage correctly notes the absence of an actionable duty
20 between a lender and borrower in that loan transactions are
21 arms-length and do not invoke fiduciary duties. Absent "special
22 circumstances" a loan transaction "is at arms-length and there is
23 no fiduciary relationship between the borrower and lender." *Oaks*
24 *Management Corp. v. Superior Court*, 145 Cal.App.4th 453, 466
25 (2006). A lender "owes no duty of care to the [borrowers] in
26 approving their loan. Liability to a borrower for negligence
27 arises only when the lender 'actively participates' in the financed
28 enterprise 'beyond the domain of the usual money lender.'" *Wagner*,

1 101 Cal.App.3d at 35 (citations omitted). "[A] s a general rule, a
2 financial institution owes no duty of care to a borrower when the
3 institution's involvement in the loan transaction does not exceed
4 the scope of its conventional role as a mere lender of money."
5 *Nymark v. Heart Fed. Savings & Loan Assn.*, 231 Cal. App. 3d 1089,
6 1096 (1991).

7 DHI Mortgage recognizes the absence of a lender's duty to
8 ensure a loan is suitable for a borrower. "No such duty exists"
9 for a lender "to determine the borrower's ability to repay the loan
10 The lender's efforts to determine the creditworthiness and
11 ability to repay by a borrower are for the lender's protection, not
12 the borrower's." *Renteria v. United States*, 452 F.Supp.2d 910,
13 922-923 (D.Ariz. 2006) (borrowers "had to rely on their own
14 judgment and risk assessment to determine whether or not to accept
15 the loan").

16 Plaintiffs' negligence claim lacks a recognized legal duty
17 owed by DHI Mortgage to them. The complaint lacks allegations that
18 Plaintiffs relied on DHI Mortgage's loan processing to ensure their
19 ability to repay the loan. The complaint further lacks facts of
20 special circumstances to impose duties on DHI Mortgage in that the
21 complaint depicts an arms-length home loan transaction, nothing
22 more. A complaint must contain sufficient factual matter, accepted
23 as true, to "state a claim to relief that is plausible on its
24 face." *Iqbal*, 129 S.Ct. 1937, 1949 (quoting *Bell Atlantic Corp. v.*
25 *Twombly*, 550 U.S. 544, 570.). A claim is plausible "when the
26 plaintiff pleads factual content that allows the court to draw the
27 reasonable inference that the defendant is liable for the
28 misconduct alleged." *Id.* Plaintiffs do not meet this burden. The

1 motion to dismiss its negligence is GRANTED.

2 DHI Mortgage also contends that the economic loss doctrine
3 "precludes recover under a negligence theory because Plaintiffs'
4 claims for damages are purely economic damages." (Doc. 4, 6:25-
5 6:28.) "[P]laintiffs may recover in tort for physical injury to
6 person or property, but not for purely economic losses that may be
7 recovered in a contract action." *W.R. Grace & Company*, 37 Cal.
8 App. 4th 1318, 1327 (1995). "In California, plaintiffs may seek
9 remedies for strict liability and negligence only for physical
10 injury to person or property, and not for pure economic losses."
11 *Cal. Dept. Of Toxic Substances v. Payless Cleaners*, 368 F. Supp. 2d
12 1069, 1084 (E.D.Cal. 2005) (citing *Seely v. White Motor Co.*, 63
13 Cal.2d 9, 18-19, (1965)). "Therefore, unless physical injury
14 occurs, a plaintiff cannot state a cause of action for strict
15 liability or negligence." *Payless Cleaners*, 368 F.Supp.2d at 1084.

16 Since Plaintiffs' alleged damages are purely economic, the
17 economic loss doctrine supports dismissal of the negligence claim.
18 DHI Mortgage's motion to dismiss is GRANTED.

19
20 C. Negligence Per Se (Count III)

21 The complaint's negligence per se claim alleges that
22 defendants are "subject to California Statutes and Provisions that
23 govern and direct their conduct. Plaintiffs are members of the
24 class of citizens of the State of California for whose benefit the
25 Statutes and Codes are enacted, and for whose protection the
26 Statutes dealing with the Fair Lending Act under California Law are
27 meant to provide." (Compl. ¶ 38.) DHI Mortgage contends that the
28 negligence per se claim fails as a matter of law because negligence

1 per se doctrine does not apply to mortgage lending.

2 California Evidence Code section 669(a) addresses negligence
3 per se and provides that a presumption of failure to exercise due
4 care if: (1) Defendant violated a statute, ordinance, or regulation
5 of a public entity; (2) the violation proximately caused death or
6 injury to person or property; (3) the death or injury resulted from
7 an occurrence of the nature which the statute, ordinance or
8 regulation was designed to prevent; and (4) the injured party was
9 one of the class of persons for whose protection the statute,
10 ordinance, or regulation was adopted.

11 DHI Mortgage submits that the negligence per se doctrine does
12 not establish a cause of action distinct from negligence. This
13 argument is meritorious. "[A]n underlying claim of ordinary
14 negligence must be viable before the presumption of negligence of
15 Evidence Code section 669 can be employed." *Cal. Service Station
16 and Auto. Repair Ass'n v. American Home Assurance Co.*, 62 Cal. App.
17 4th 1166, 1178 (1998). The negligence per se doctrine assists as
18 evidence to prove negligence. "[I]t is the tort of negligence, and
19 not the violation of the statute itself, which entitles a plaintiff
20 to recover civil damages. In such circumstances the plaintiff is
21 not attempting to pursue a private cause of action for violation of
22 the statute; rather, he is pursuing a negligence action and is
23 relying upon the violation of a statute, ordinance, or regulation
24 to establish part of that cause of action." *Sierra-Bay Fed. Land
25 Bank Assn. v. Superior Court*, 227 Cal. App. 3d 318, 333 (1991).

26 Plaintiffs' negligence per se claim fails just as their
27 negligence claim fails, i.e., there is no liability absent a viable
28 duty. In support of dismissal, DHI Mortgage also faults the

1 negligence per se claim's failure to identify a specific statute
2 that DHI Mortgage violated and the class of persons that the
3 unidentified statute was intended to protect. DHI Mortgage is
4 correct, and for these reasons, the negligence per se claim fails
5 against DHI Mortgage.

6 Defendant's motion to dismiss the negligence per se claim is
7 GRANTED.

8
9 D. Breach of Fiduciary Duty (Count IV)

10 The complaint's breach of fiduciary duty claim alleges that
11 defendants breached their fiduciary duty by failing "to perform
12 their duties, obligations and functions in a fair, upstanding,
13 honest and forthright manner, to conduct themselves so that the
14 plaintiff would experience the benefit or [sic] their professional
15 education and training, and to place plaintiff's interests above
16 and before the interest of the defendants."

17 Fatal to Plaintiffs' fiduciary duty claim is the absence of a
18 fiduciary duty between lender and borrower. "The relationship
19 between a lending institution and its borrower-client is not
20 fiduciary in nature." *Nymark*, 231 Cal. App. 3d at 1093, n. 1
21 (citing *Price v. Wells Fargo Bank*, 213 Cal. App. 3d 465, 476-478
22 (1989)). A commercial lender is entitled to pursue its own
23 economic interests in a loan transaction. *Nymark*, 231 Cal. App. 3d
24 at 1093, n. 1 (citing *Kruse v. Bank of America*, 202 Cal. App. 3d
25 38, 67, 1988)). Absent "special circumstances" a loan transaction
26 is "at arms-length and there is no fiduciary relationship between
27 the borrower and lender." *Oaks Management*, 145 Cal. App. 4th at
28 466 ("the bank is in no sense a true fiduciary").

1 "[T]o plead a cause of action for breach of fiduciary duty,
2 there must be shown the existence of a fiduciary relationship, its
3 breach, and damage proximately caused by that breach. The absence
4 of any one of these elements is fatal to the cause of action."
5 *Pierce v. Lyman*, 1 Cal.App.4th 1093, 1101 (1991).

6 Here, the complaint fails to demonstrate existence of a
7 fiduciary duty. In the absence of alleged special circumstances
8 and a legal duty owed by DHI Mortgage, the breach of fiduciary duty
9 claim fails. Defendant's motion to dismiss the breach of fiduciary
10 claim is GRANTED.

11
12 **E. Negligent and Intentional Misrepresentation (Counts V-VI)**

13 The complaint's negligent misrepresentation claim alleges that
14 defendant breached their duty "to provide accurate, truthful and
15 complete information by failing to provide the information to the
16 plaintiff in a manner that they could understand" and "failed to
17 provide all the information necessary for the plaintiff to make a
18 complete, accurate and well-thought decision." (Compl. ¶ 46.) The
19 complaint's intentional misrepresentation claim alleges that
20 defendants "intentionally misrepresented the nature of loans."
21 (Compl. ¶ 50.)

22 DHI Mortgage argues that Plaintiffs' fifth and sixth causes of
23 action should be dismissed for failure to state a claim because the
24 claims are not pled with particularity, as required by Rule 9 of
25 the Federal Rules of Civil Procedure.⁴

26
27 ⁴ Rule 9(b)'s particularity requirement applies to state law
28 causes of action: "[W]hile a federal court will examine state law
to determine whether the elements of fraud have been pled

1 Rule 9(b) requires a party to "state with particularity the
2 circumstances constituting fraud." In the Ninth Circuit, "claims
3 for fraud and negligent misrepresentation must meet Rule 9(b)'s
4 particularity requirements." *Neilson v. Union Bank of California,*
5 *N.A.*, 290 F.Supp.2d 1101, 1141 (C.D.Cal. 2003). A fraud claim is
6 subject to dismissal when its allegations fail to satisfy Rule
7 9(b)'s heightened pleading requirements. *Vess v. Ciba-Geigy Corp.*
8 *USA*, 317 F.3d 1097, 1107 (9th Cir.2003). A motion to dismiss a
9 claim "grounded in fraud" under Rule 9(b) for failure to plead with
10 particularity is the "functional equivalent" of a Rule 12(b)(6)
11 motion to dismiss for failure to state a claim. *Vess*, 317 F.3d at
12 1107. As a counter-balance, Rule 8(a)(2) requires from a pleading
13 "a short and plain statement of the claim showing that the pleader
14 is entitled to relief."

15 Rule 9(b)'s heightened pleading standard "is not an invitation
16 to disregard Rule 8's requirement of simplicity, directness, and
17 clarity" and "has among its purposes the avoidance of unnecessary
18 discovery." *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996).
19 "A pleading is sufficient under Rule 9(b) if it identifies the
20 circumstances constituting fraud so that the defendant can prepare
21 an adequate answer from the allegations." *Neubronner v. Milken*, 6
22 F.3d 666, 671-672 (9th Cir. 1993) (internal quotations omitted;
23 citing *Gottreich v. San Francisco Investment Corp.*, 552 F.2d 866,
24 866 (9th Cir.1997)). The Ninth Circuit Court of Appeals has

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26
27 sufficiently to state a cause of action, the Rule 9(b) requirement
28 that the circumstances of the fraud must be stated with
particularity is a federally imposed rule." *Vess v. Ciba-Geigy*
Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003) (citations omitted).

1 explained:

2 Rule 9(b) requires particularized allegations of the
3 circumstances constituting fraud. The time, place and
4 content of an alleged misrepresentation may identify
5 the statement or the omission complained of, but these
6 circumstances do not "constitute" fraud. The statement
7 in question must be false to be fraudulent.
8 Accordingly, our cases have consistently required that
9 circumstances indicating falseness be set forth....
10 [W]e [have] observed that plaintiff must include
11 statements regarding the time, place, and nature of
12 the alleged fraudulent activities, and that "mere
13 conclusory allegations of fraud are insufficient." ...
14 The plaintiff must set forth what is false or
15 misleading about a statement, and why it is false. In
16 other words, the plaintiff must set forth an
17 explanation as to why the statement or omission
18 complained of was false or misleading....

19 In certain cases, to be sure, the requisite
20 particularity might be supplied with great simplicity.

21 *In Re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541,
22 1547-1548 (9th Cir.1994) (en banc) (italics in original) superseded
23 by statute on other grounds as stated in *Marksman Partners, L.P. v.*
24 *Chantal Pharm. Corp.*, 927 F.Supp. 1297 (C.D.Cal. 1996); see *Cooper*
25 *v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997) ("fraud allegations
26 must be accompanied by "the who, what, when, where, and how" of the
27 misconduct charged).

28 The elements of a California fraud claim are: (1)
misrepresentation (false representation, concealment or
nondisclosure); (2) knowledge of the falsity (or "scienter"); (3)
intent to defraud, i.e., to induce reliance; (4) justifiable
reliance; and (5) resulting damage. *Lazar v. Superior Court*, 12
Cal.4th 631, 638 (1996). The same elements comprise a cause of
action for negligent misrepresentation, except there is no
requirement of intent to induce reliance. *Caldo v. Owens-Illinois,*
Inc., 125 Cal. App. 4th 513, 519 (2004).

1 "[T]o establish a cause of action for fraud a plaintiff must
2 plead and prove in full, factually and specifically, all of the
3 elements of the cause of action. *Conrad v. Bank of America*, 45
4 Cal.App.4th 133, 156 (1996). There must be a showing "that the
5 defendant thereby intended to induce the plaintiff to act to his
6 detriment in reliance upon the false representation" and "that the
7 plaintiff actually and justifiably relied upon the defendant's
8 misrepresentation in acting to his detriment." *Conrad*, 45
9 Cal.App.4th at 157.

10 The complaint is severely lacking and fails to satisfy Rule
11 9(b) "who, what, when, where and how" requirements as to DHI
12 Mortgage, as well the other defendants. See *Tarmann v. State Farm*
13 *Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991) (a plaintiff
14 asserting fraud against a corporate employer must "allege the names
15 of the persons who made the allegedly fraudulent representations,
16 their authority to speak, to whom they spoke, what they said or
17 wrote, and when it was said or written.") The complaint fails to
18 establish fraud elements. The fraud allegations do not target
19 particular defendants, and the complaint's global approach is
20 unsatisfactory. The fraud claims' deficiencies are so severe to
21 suggest no potential improvement from an attempt to amend. The
22 fifth and sixth causes of action are DISMISSED against DHI
23 Mortgage.

24
25 F. Implied Covenant of Good Faith and Fair Dealing (Count VII)

26 The complaint's seventh claim alleges that DHI Mortgage
27 breached the covenant of good faith and fair dealing, which,
28 according to Plaintiffs, required DHI to "deal fairly and in good

1 faith with the plaintiff and not seek to take an undue advantage of
2 the plaintiff in their weakened bargaining position and with their
3 lesser knowledge, skill, education and ability regarding the loan
4 transactions." (Compl. ¶ 56.)

5 DHI Mortgage notes the uncertainty whether the claim proceeds
6 under contract or tort law.

7
8 i. Contract

9 "The prerequisite for any action for breach of the implied
10 covenant of good faith and fair dealing is the existence of a
11 contractual relationship between the parties, since the covenant is
12 an implied term in the contract." *Smith v. City and County of San*
13 *Francisco*, 225 Cal. App. 3d 38, 49 (1990). The "implied covenant of
14 good faith and fair dealing is limited to assuring compliance with
15 the express terms of the contract, and cannot be extended to create
16 obligations not contemplated by the contract." *Pasadena Live, LLC*
17 *v. City of Pasadena*, 114 Cal.App.4th 1089, 1093-1094 (2004)
18 (citation omitted.) "Without a contractual relationship, [a
19 plaintiff] cannot state a cause of action for breach of the implied
20 covenant." *Smith*, 225 Cal. App. 3d at 49.

21 DHI Mortgage correctly notes that the absence of allegations
22 to identify a particular contract or breach. The complaint
23 references "oral and/or written agreements with all defendants" but
24 fails to specify or detail such agreements. The complaint's
25 conclusory allegations fail to support a contractual relationship
26 upon which to base an alleged breach of the implied covenant of
27 good faith and fair dealing. DHI Mortgage further faults the
28 breach of implied covenant of good faith and fair dealing claim for

1 addressing alleged wrongs prior to contract formation. DHI is
2 correct that it could not have breached a contractual obligation
3 prior to contract formation. To the extent it was advanced,
4 Plaintiffs' purported contract claim fails. The implied covenant
5 of good faith claim is DISMISSED.

6
7 ii. Tort

8 DHI Mortgage also challenges the breach of covenant of good
9 faith and fair dealing claim's failure to allege a special
10 relationship to invoke tort liability. "Generally, no cause of
11 action for the tortious breach of the implied covenant of good
12 faith and fair dealing can arise unless the parties are in a
13 'special relationship' with 'fiduciary characteristics.'" *Pension*
14 *Trust Fund v. Federal Ins. Co.*, 307 F.3d 944, 955 (9th Cir. 2002)
15 (applying California law). "Moreover, even if there were a
16 contractual relationship between the parties, [plaintiffs] have
17 pled no facts establishing a 'special relationship' between them
18 which could justify extending tort liability for bad faith to the
19 present context." *Smith*, 225 Cal. App. 3d at 49.

20 The "implied covenant tort is not available to parties of an
21 ordinary commercial transaction where the parties deal at arms'
22 length." *Pension Trust Fund*, 307 F.3d at 955. California courts
23 do not invoke a special relationship between a lender and borrower.
24 See *Kim v. Sumitomo Bank*, 17 Cal. App. 4th 974, 979 (1993) ("the
25 relationship of a bank-commercial borrower does not constitute a
26 special relationship for the purposes of the covenant of good faith
27 and fair dealing"); *Mitsui Manufacturers Bank v. Superior Court*,
28 212 Cal. App. 3d 726, 729 (borrower precluded to assert tortious

1 breach of implied covenant of good faith and fair dealing claim
2 against lender). A lender generally owes no fiduciary duty to a
3 borrower unless "it excessively controls or dominates the
4 borrower." *Pension Trust Fund*, 307 F.3d at 955.

5 No special relationship arises between mortgage lender DHI
6 Mortgage and the borrower plaintiff. The complaint makes no
7 attempt to allege such a special relationship with meaningful
8 facts. The breach of implied covenant of good faith and fair
9 dealing claim fails in absence of allegations of a sufficient
10 contractual or special relationship between DHI Mortgage and
11 plaintiffs. The implied covenant tort claim is DISMISSED.

12
13 G. Failure to Produce the Note (Count VIII)

14 The complaint's eighth cause of action alleges that defendants
15 "have not produced the Note to prove who the real party in interest
16 is" and "[n]one of the defendants are the real party in interest as
17 they have not provided nor can they provide the Note." (Compl. ¶¶
18 61-63.)

19 Like many other borrowers subject to foreclosure, Plaintiffs
20 appear to argue DHI needs to possess the original promissory note
21 to permit foreclosure. This is not the law in California and a
22 totally discredited claim within the meaning of Rule 11 of the
23 Federal Rules of Civil Procedure.

24 It is well-established that non-judicial foreclosures can be
25 commenced without producing the original promissory note. Non-
26 judicial foreclosure under a deed of trust is governed by
27 California Civil Code section 2924, et seq. Section 2924(a)(1)
28 provides that a "trustee, mortgagee or beneficiary or any of their

1 authorized agents" may conduct the foreclosure process. California
2 courts have held that the Civil Code Provisions "cover every
3 aspect" of the foreclosure process, *I.E. Assoc. v Safeco Title Ins.*
4 *Co.*, 39 Cal. 3d 281, 285 (1985), and are "intended to be
5 exhaustive," *Moeller v. Lien*, 25 Cal. App. 4th 822, 834 (1994).
6 There is no requirement that the party initiating foreclosure be in
7 possession of the original note. See, e.g., *Candelo v. NDEX West,*
8 *LLC*, 2008 WL 5382259, at *4 (E.D. Cal. Dec. 23, 2008) ("No
9 requirement exists under statutory framework to produce the
10 original note to initiate non-judicial foreclosure."); *Putkkuri v.*
11 *ReconTrust Co.*, 2009 WL 32567, *2 (S.D. Cal. Jan 5, 2009)
12 ("Production of the original note is not required to proceed with
13 a non-judicial foreclosure."); see also *Vargas v. Reconstruction*
14 *Co.*, 2008 U.S. Dist. LEXIS 100115, at *8-9 (E.D. Cal. Dec. 1,
15 2008). Plaintiffs' eighth cause of action for failure to produce
16 the note is incognizable and fails as matter of law. It is
17 DISMISSED.

18 19 H. Unfair Lending Practices (Count IX)

20 The complaint's unfair lending practices claim alleges that
21 defendants "violated various California Statutes defining unfair
22 lending practices" and "made a home loan to the plaintiffs without
23 determining or using commercially reasonable means or mechanisms
24 that the borrowers had the ability to repay the loan." (Compl. ¶¶
25 66-67.) However, the complaint neither identifies the specific
26 statutes violated by DHI Mortgage nor DHI Mortgage's wrongs to
27 violate such statutes. While Rule 8 does not demand detailed
28 factual allegations, "it demands more than an unadorned,

1 the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S.Ct.
2 1937, 1949. "Threadbare recitals of the elements of a cause of
3 action, supported by mere conclusory statements, do not suffice."
4 *Id.* The unfair lending practices claim fails far short of an
5 identifiable claim and is DISMISSED.

6
7 I. Restoral of Good Credit History (Count X)

8 The complaint's tenth cause of action for "restoral of good
9 credit history" requests "restoral" of Plaintiffs' "reputation and
10 good credit history."

11 DHI Mortgage correctly notes that the claim merely states a
12 remedy, not a cause of action, and fails since it is premised on
13 Plaintiffs' other flawed claims. The tenth claim is DISMISSED.

14
15 J. Wrongful Foreclosure (Count XI)

16 The complaint's eleventh claim is comprised of one untitled
17 paragraph, however, it appears to claim wrongful foreclosure:

18 "Defendants, each of them, were aware of senate [sic]
19 Bill 1137, which became law September 8, 2008 and as
20 stated in [California Civil Code] 2923.5, due
21 diligence, which set forth the requirement that any or
22 all notice of default and or [sic] Notice of Trustee
23 Sale must include a statement of affirmation
24 reflecting that the Beneficiary and or [sic] its
25 authorize [sic] trustee has complied within the herein
26 above statute. Plaintiff state [sic] that the Notice
27 of Default filed on DECEMBER 08, 2008 must be set
28 aside for willful failure to comply with the law."

(Compl. ¶ 70.)

California Civil Code section 2923.5 ("section 2923.5")
requires a lender or its agent to attempt to contact a defaulted
borrower prior to foreclosure. Section 2923.5(a)(2) requires a

1 "mortgagee, beneficiary or authorized agent" to "contact the
2 borrower in person or by telephone in order to assess the
3 borrower's financial situation and explore options for the borrower
4 to avoid foreclosure." Section 2923.5(b) requires a default notice
5 to include a declaration "from the mortgagee, beneficiary, or
6 authorized agent" of compliance with section 2923.5, including
7 attempt "with due diligence to contact the borrower as required by
8 this section."

9 Here, the complaint does not include a single factual
10 allegation that DHI Mortgage participated in the notice of default
11 or notice of trustee sale; the complaint also fails to identify who
12 issued and recorded the notice of default. DHI Mortgage is correct
13 that the claim lacks sufficient allegations for a viable claim.
14

15 K. Unfair Lending Practices (Count XII)

16 The complaint's twelfth cause of action is entitled "Unfair
17 Lending Practices" but appears to attempt to re-allege fraud and
18 breach of fiduciary claims. The twelfth cause of action alleges
19 that "defendants committed acts of misrepresentations and fraud as
20 so [sic] the terms of the loans, mortgage, and sale of the property
21 with the intent to exert undue influence." The claim further
22 alleges: "Due the defendants [sic] undue influence, they received
23 a deed of trust to the property for a loan that plaintiffs should
24 not have given or been allowed to take."

25 To the extent Plaintiffs' twelfth claim seeks to recover for
26 fraud and breach of fiduciary duty, it fails for the reasons
27 discussed above, i.e., Plaintiffs' allegations do not satisfy Rule
28 9(b) and there is no fiduciary relationship between Plaintiffs and

1 DHI Mortgage. To the extent it attempts to allege undue influence,
2 the complaint also fails due to the absence of allegations of a
3 pattern of activity to support undue influence.⁵ Plaintiffs'
4 twelfth cause of action is DISMISSED.

5
6 L. Wrongful Foreclosure (Count XIII)

7 The complaint's thirteenth claim entitled "To restrain a
8 Wrongful Foreclosure," alleges that the "representation as stated
9 on the Notice of Default were [sic] a false representation" and
10 that defendants "have foreclosed on a property that they had no
11 right to foreclose upon." The claim includes identical allegations
12 as the eighth cause of action regarding lack of physical possession
13 of the promissory notes.

14 Like similar claims, the restraint of wrongful foreclosure
15 claim is deficient. The claim fails to allege that DHI Mortgage
16 commenced foreclosure and to identify the text, source and alleged
17 reliance on a misrepresentation. The claim pinpoints no alleged
18 wrongdoing to a specific defendant with requisite sufficiency. To
19 the extent the claim seeks equitable relief, it fails in that it is
20

21 ⁵ Undue influence "involves a type of mismatch." *Myerchin v.*
22 *Family Benefits, Inc.*, 162 Cal. App. 4th 1526, 1540 (2008). Undue
23 influence is "generally accompanied by certain characteristics
24 which tend to create a pattern. The pattern usually involves
25 several of the following elements: (1) discussion of the
26 transaction at an unusual or inappropriate time, (2) consummation
27 of the transaction in an unusual place, (3) insistent demand that
28 the business be finished at once, (4) extreme emphasis on untoward
consequences of delay, (5) the use of multiple persuaders by the
dominant side against a single servient party, (6) absence of
third-party advisers to the servient party, (7) statements that
there is no time to consult financial advisers or attorneys."
Myerchin, 162 Cal. App. 4th at 1540.

1 premised on the other flawed claims. The thirteenth claim is
2 DISMISSED.

3
4 M. Punitive Damages

5 The intentional misrepresentation and unfair lending practices
6 claims and complaint's prayer reference punitive damages. DHI
7 Mortgage seeks to strike the punitive damages claims in the absence
8 of viable fraud and undue influence claims.

9 Rule 12(f) empowers a court to strike from a pleading "any
10 redundant, immaterial, impertinent, or scandalous matter." Motions
11 to strike may be granted if "it is clear that the matter to be
12 stricken could have no possible bearing on the subject matter of
13 the litigation." *LeDuc v. Kentucky Central Life Ins. Co.*, 814
14 F.Supp. 820, 830 (N.D.Cal. 1992); *Colaprico v. Sun Microsystems,*
15 *Inc.*, 758 F.Supp. 1335, 1339 (N.D.Cal. 1991). "[T]he function of a
16 [F.R.Civ.P.] 12(f) motion to strike is to avoid the expenditure of
17 time and money that must arise from litigating spurious issues by
18 dispensing with those issues prior to trial." *Sidney-Vinstein v.*
19 *A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). "[A] motion to
20 strike maybe used to strike any part of the prayer for relief when
21 the damages sought are not recoverable as a matter of law."
22 *Bureerong v. Uvawas*, 922 F.Supp. 1450, 1479, n. 34 (C.D.Cal. 1996).

23 In the absence of viable claims, Plaintiffs lack a claim for
24 punitive damages to warrant striking references to and prayer for
25 punitive damages. The motion to strike punitive damages is
26 GRANTED.

1 N. Attempt At Amendment

2 Plaintiffs' claims are incognizable or barred as a matter of
3 law. Plaintiffs are unable to cure their claims by allegation of
4 other facts and thus are not granted an attempt to amend.
5 Defendant DHI Mortgage's motion is GRANTED WITH PREJUDICE.

6
7 V. CONCLUSION.

8 For the reasons stated:

9 (1) The action against DHI Mortgage is DISMISSED with
10 prejudice.

11 Defendant DHI Mortgage shall submit a form of order consistent
12 with, and within five (5) days following electronic service of,
13 this memorandum decision.

14
15 IT IS SO ORDERED.

16 Dated: October 2, 2009

/s/ Oliver W. Wanger
 UNITED STATES DISTRICT JUDGE