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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

ANTONIO LOPEZ,)	1: 09-CV-1838 AWI JLT
)	
Plaintiff,)	MEMORANDUM OPINION
)	AND ORDER GRANTING
v.)	DEFENDANTS' MOTION TO
)	DISMISS
WASHINGTON MUTUAL BANK, F.A.)	
et. al.,)	(Document #10)
Defendants.)	

BACKGROUND

On September 18, 2009, Plaintiffs filed an action in the Superior Court of California for the County of Kern. The first cause of action alleges a violation of California Civil Code § 1632. The second cause of action alleges a violation of California Business and Professions Code § 17200 based on Defendants' fraudulent business practices. The third cause of action alleges a violation of California Business and Professions Code § 17200 based on violations of 15 U.S.C. § 1601. The fourth cause of action alleges a violation of California Business and Professions Code § 17200 based on violations of California Financial Code § 22302. The fifth cause of action alleges fraudulent omission. The sixth cause of action requests injunctive relief. The seventh cause of action alleges breach of the covenant of good faith and failure dealing. The eighth cause of action alleges unjust enrichment. The ninth cause of action alleges failure to provide accounting. The tenth cause of action alleges negligence. The eleventh cause of action alleges breach of fiduciary duty. On October 20, 2009, Defendants removed the complaint to

1 this court.

2 On October 27, 2009, Defendants filed a motion to dismiss. Defendants contends that
3 none of the causes of action in the complaint can be asserted against Defendants, and as such, the
4 complaint must be dismissed.

5 Plaintiff did not file an opposition to Defendants' motion.

6 On January 25, 2010, Defendants filed a reply brief.

7 LEGAL STANDARD

8 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure a claim may be dismissed
9 because of the plaintiff's "failure to state a claim upon which relief can be granted." Fed. R. Civ.
10 P. 12(b)(6). A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal
11 theory or on the absence of sufficient facts alleged under a cognizable legal theory. Johnson v.
12 Riverside Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008); Navarro v. Block, 250 F.3d 729,
13 732 (9th Cir. 2001).

14 In reviewing a complaint under Rule 12(b)(6), all of the complaint's material allegations
15 of fact are taken as true, and the facts are construed in the light most favorable to the non-moving
16 party. Marceau v. Balckfeet Hous. Auth., 540 F.3d 916, 919 (9th Cir. 2008); Vignolo v. Miller,
17 120 F.3d 1075, 1077 (9th Cir. 1999). The court must also assume that general allegations
18 embrace the necessary, specific facts to support the claim. Smith v. Pacific Prop. and Dev.
19 Corp., 358 F.3d 1097, 1106 (9th Cir. 2004). However, the court is not required "to accept as true
20 allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
21 inferences." In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1056-57 (9th Cir. 2008); Sprewell v.
22 Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). Although legal conclusions may
23 provide the framework of a complaint, they are not accepted as true and "[t]hreadbare recitals of
24 elements of a cause of action, supported by mere conclusory statements, do not suffice."
25 Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50 (2009); see also Warren v. Fox Family Worldwide,
26 Inc., 328 F.3d 1136, 1139 (9th Cir. 2003). As the Supreme Court has explained:

1 While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need
2 detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his
3 'entitlement to relief' requires more than labels and conclusions, and a formulaic
4 recitation of the elements of a cause of action will not do. Factual allegations must
be enough to raise a right to relief above the speculative level, on the assumption
that all the allegations in the complaint are true (even if doubtful in fact).

5 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Thus, "a complaint must contain
6 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."
7 Iqbal, 129 S.Ct. at 1949. "A claim has facial plausibility when the plaintiff pleads factual
8 content that allows the court draw the reasonable inference that the defendant is liable for the
9 misconduct alleged." Iqbal, 129 S.Ct. at 1949.

10 The plausibility standard is not akin to a 'probability requirement,' but it asks
11 more than a sheer possibility that a defendant has acted unlawfully. Where a
12 complaint pleads facts that are 'merely consistent with' a defendant's liability, it
stops short of the line between possibility and plausibility of 'entitlement to
relief.'

13 . . .
14 Determining whether a complaint states a plausible claim for relief will . . . be a
15 context specific task that requires the reviewing court to draw on its judicial
experience and common sense. But where the well-pleaded facts do not permit
the court to infer more than the mere possibility of misconduct, the complaint has
alleged – but it has not shown – that the pleader is entitled to relief.

16 Iqbal, 129 S.Ct. at 1949-50. "In sum, for a complaint to survive a motion to dismiss, the non-
17 conclusory 'factual content,' and reasonable inferences from that content, must be plausibly
18 suggestive of a claim entitling the plaintiff to relief." Moss v. United States Secret Service, 572
19 F.3d 962, 969 (9th Cir. 2009).

20 If a Rule 12(b)(6) motion to dismiss is granted, "[the] district court should grant leave to
21 amend even if no request to amend the pleading was made, unless it determines that the pleading
22 could not possibly be cured by the allegation of other facts." Lopez v. Smith, 203 F.3d 1122,
23 1127 (9th Cir. 2000) (en banc). In other words, leave to amend need not be granted when
24 amendment would be futile. Gompper v. VISX, Inc., 298 F.3d 893, 898 (9th Cir. 2002).

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1 **JUDICIAL NOTICE**

2 In deciding whether to dismiss a claim under Rule 12(b)(6), the court is generally limited
3 to reviewing only the complaint, but the court may review materials which are properly
4 submitted as part of the complaint and the court may take judicial notice of public records
5 outside the pleadings. Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001);
6 Campanelli v. Bockrath, 100 F.3d 1476, 1479 (9th Cir. 1996); MGIC Indem. Corp. v. Weisman,
7 803 F.2d 500, 504 (9th Cir. 1986). Further, under the “incorporation by reference” doctrine,
8 courts may review documents “whose contents are alleged in a complaint and whose authenticity
9 no party questions, but which are not physically attached to the plaintiff’s pleading.” Knievel v.
10 ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005); Lapidus v. Hecht, 232 F.3d 679, 682 (9th Cir. 2000).
11 The “incorporation by reference” doctrine also applies “to situations in which the plaintiff’s claim
12 depends on the contents of a document, the defendant attaches the document to its motion to
13 dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff
14 does not explicitly allege the contents of that document in the complaint.” Knievel, 393 F.3d at
15 1076 (citing Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998)).

16 Defendants request that the court take judicial notice of the deed of trust and other
17 recorded documents concerning the property at issue in this action and the property’s title. “In
18 deciding whether to dismiss a claim under Fed.R.Civ.P. 12(b)(6), a court may look beyond
19 plaintiff’s complaint to matters of public record.” Shaw v. Hahn, 56 F.3d 1128, 1129 n. 1 (9th
20 Cir. 1995). Thus, the court will take judicial notice of the documents provided by Defendants.

21 **FACTS**

22 **A. Complaint’s Alleged Facts**

23 The complaint alleges that Defendants sell, procure, and facilitate a variety of home
24 loans. The complaint alleges that the adjustable rate mortgage (“ARM”) is the type of loan that
25 is the subject of the complaint.

26 The complaint alleges that Defendants failed to disclose pertinent information in a clear
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1 and conspicuous manner to Plaintiff, in writing, as required by law when he obtained a loan.
2 The complaint alleges that Defendants failed to inform Plaintiff that he could not actually qualify
3 for the loan.

4 The complaint alleges that Defendants engaged in unlawful, fraudulent, and unfair
5 business acts and practices and failed to provide Plaintiff pertinent information required by law.

6 **B. Facts of Which the Court Takes Judicial Notice**

7 Plaintiff and his spouse, Claudia Villanueva, recorded a Deed of Trust with the Kern
8 County Recorder's Office on the real property that is the subject of this dispute on or about
9 September 28, 2006, as instrument number 0206240380. The real property is located at 11217
10 Baron Avenue, Bakersfield, CA 93312 ("Subject Property").

11 Plaintiff and Ms. Villanueva obtained a loan in the sum of \$279,200.00 ("Loan") in
12 connection with the Subject Property. The Loan was secured by a Deed of Trust ("DOT")
13 encumbering the Subject Property that was recorded on or about September 28, 2006, with the
14 Kern County Recorder's Office as instrument number 0206240318. The DOT identifies Plaintiff
15 and Ms. Villanueva as the trustors, Jackie Miller as the trustee, Suntrust Mortgage ("Suntrust")
16 as the lender and Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary.

17 On April 3, 2009, an Assignment of the Deed of Trust ("Assignment") was recorded with
18 the Kern County Recorder's Office as instrument number 0209047511. The Assignment assigns
19 and transfers to Deutsche Bank National Trust CO as trustee for Long Beach Mortgage Loan
20 Trust 2006-11 all beneficial interest under the DOT.

21 On April 3, 2009, a Substitution of Trustee ("Substitution") was recorded with the Kern
22 County Recorder's Office as instrument number 0209047512. The Substitution substituted
23 California Reconveyance Company as trustee under the Deed of Trust.

24 On April 3, 2009, a Notice of Default and Election to Sell Under the DOT ("NOD") was
25 recorded with the Kern County Recorder's Office as instrument number 0209047513. The NOD
26 states that as of April 2, 2009, the amount in arrears was \$9,365.48.

1 JPMorgan acquired certain assets and liabilities of Washington Mutual Bank from the
2 FDIC acting as receiver, including Washington Mutual's interest in the Loan pursuant to a
3 Purchase and Assumption Agreement ("Agreement") between the FDIC and JPMorgan dated
4 September 25, 2008.

5 DISCUSSION

6 A. Violation of California Civil Code § 1632

7 The first cause of action alleges that at the time the DOT and Promissory Note were
8 signed, Plaintiff was not conversationally fluent in English and could not read or understand
9 English. Plaintiff contends that the failure to provide him with the DOT, Promissory Note, and
10 related documents in the Spanish language violated California Civil Code § 1632.

11 California Civil Code § 1632 provides, in relevant part:

12 (b) Any person engaged in a trade or business who negotiates primarily in
13 Spanish, Chinese, Tagalog, Vietnamese, or Korean, orally or in writing, in the
14 course of entering into any of the following, shall deliver to the other party to the
15 contract or agreement and prior to the execution thereof, a translation of the
16 contract or agreement in the language in which the contract or agreement was
17 negotiated, which includes a translation of every term and condition in that
18 contract or agreement:

16 (1) A contract or agreement subject to the provisions of Title 2 (commencing with
17 Section 1801) of, and Chapter 2b (commencing with Section 2981) and Chapter
18 2d (commencing with Section 2985.7) of Title 14 of, Part 4 of Division 3.

17 (2) A loan or extension of credit secured other than by real property, or unsecured,
18 for use primarily for personal, family or household purposes.

18 (3) A lease, sublease, rental contract or agreement, or other term of tenancy
19 contract or agreement, for a period of longer than one month, covering a dwelling,
20 an apartment, or mobilehome, or other dwelling unit normally occupied as a
21 residence.

20 (4) Notwithstanding paragraph (2), a loan or extension of credit for use primarily
21 for personal, family or household purposes where the loan or extension of credit is
22 subject to the provisions of Article 7 (commencing with Section 10240) of
23 Chapter 3 of Part 1 of Division 4 of the Business and Professions Code, or
24 Division 7 (commencing with Section 18000), or Division 9 (commencing with
25 Section 22000) of the Financial Code.

24 Cal. Civ.Code § 1632(b). The statute was enacted "to increase consumer information and
25 protections for the state's sizeable and growing Spanish-speaking population." Cal. Civ.Code §
26 1632(a)(1).

1 Generally, Section 1632 does not require delivery of Spanish language documents where
2 a loan is secured by real property. However, Section 1632(b)(4) contains an exception, which
3 requires a Spanish translation if the “loan or extension of credit is for use primarily for personal,
4 family, or household purposes where the loan or extension of credit is subject to the provisions of
5 Article 7 . . .” Cal. Civ.Code § 1632(b)(4). Article 7, in turn, applies to certain loans secured by
6 real property, which are negotiated by a real estate broker. See Cal. Bus. & Prof.Code § 10240.
7 To take advantage of Section 1621(b)(4)’s exception, a plaintiff must allege that a defendant
8 either acted as the real estate broker or had a principal-agent relationship with the broker who
9 negotiated the loan. Patacsil v. Wilshire Credit Corp., 2010 WL 500466, *8 (E.D.Cal. 2010);
10 Castaneda v. Saxon Mortg. Services, Inc., – F.Supp.2d – , 2009 WL 4640673 at *7 (E.D.Cal.
11 2009); Ortiz v. Accredited Home Lenders, Inc., 639 F.Supp.2d 1159, 1166 (S.D.Cal. 2009);
12 Delino v. Platinum Cmty. Bank, 628 F.Supp.2d 1226, 1234 (S.D.Cal. 2009); Alvara v. Aurora
13 Loan Serv., Inc., 2009 WL 1689640, 3* (N.D.Cal. 2009). “More clearly, California law
14 requiring translation of a contract or agreement for a loan or extension of credit for use primarily
15 for personal, family or household purposes only applies to real estate brokers, rather than to
16 lenders and subsequent services.” Patacsil, 2010 WL 500466 at *8.

17 Plaintiff does not allege that Defendants negotiated the loan or were real estate brokers.
18 These parties therefore cannot be liable for disclosure violations at the time of loan origination.
19 Thus, the complaint does not allege sufficient facts showing that the loan at issue falls within the
20 exception stated in Section 1632(b)(4). Accordingly, the first cause of action based on Section
21 1632 must be dismissed.

22 **B. Section 17200 Causes of Action**

23 The complaint alleges several violations of California Business and Professions Code §
24 17200. Section 17200 provides: “[U]nfair competition shall mean and include any unlawful,
25 unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading
26 advertising.” Cal. Bus. & Prof.Code § 17200. ““Because . . . section 17200 is written in the
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1 disjunctive, it establishes three varieties of unfair competition-acts or practices which are
2 unlawful, or unfair, or fraudulent.’ . . . ‘A practice is prohibited as ‘unfair’ or ‘deceptive’ even if
3 not ‘unlawful’ or vice versa.’” Lippitt v. Raymond James Fin. Servs., Inc., 340 F.3d 1033, 1043
4 (9th Cir. 2003) (quoting Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal.4th
5 163, 180 (1999)).

6 A business act or practice is “unfair” when the conduct “threatens an incipient violation
7 of an antitrust law, or violates the policy or spirit of one of those laws because its effects are
8 comparable to a violation of the law, or that otherwise significantly threatens or harms
9 competition.” Cel-Tech Communications, Inc. v. L.A. Cellular Tel. Co., 20 Cal.4th 163, 187
10 (1999). To sufficiently plead an action based on an “unfair” business act or practice, a plaintiff
11 must allege facts showing the “unfair” nature of the conduct and that the harm caused by the
12 conduct outweighs any benefits that the conduct may have. Motors, Inc. v. Times Mirror Co., 102
13 Cal.App.3d 735, 740 (1980).

14 A “fraudulent” business act or practice is one in which members of the public are likely
15 to be deceived. Hall v. Time, Inc., 158 Cal.App.4th 847, 849 (2008). In order to state a cause
16 of action based on a “fraudulent” business act or practice, the plaintiff must allege that
17 consumers are likely to be deceived by the defendant's conduct. Committee on Children's
18 Television, Inc. v. General Foods Corp., 35 Cal.3d 197, 212 (1983).

19 To constitute an “unlawful” business act, Section 17200 “borrows” violations of other
20 laws and treats them as unlawful business practices independently actionable under Section
21 17200. Farmers Ins. Exch. v. Superior Court, 2 Cal.4th 377, 383 (1992). “Violation of almost
22 any federal, state, or local law may serve as the basis for a[n] [unfair competition] claim .”
23 Plascencia v. Lending 1st Mortg., 583 F.Supp.2d 1090, 1098 (N.D.Cal. 2008) (citing Saunders v.
24 Superior Court, 27 Cal.App.4th 832, 838-39 (1994)).

25
26 **1. Unfair and Fraudulent Business Practices - Failure to Research Plaintiff's Ability to Re-**
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1 **Pay the Loan**

2 The complaint contends that Defendants extended to Plaintiff the Loan on stated gross
3 monthly income and did not conduct an adequate due diligence inquiry to determine if Plaintiff
4 could pay the Loan back. The complaint alleges Defendants approved the Loan when they knew
5 Plaintiff could not qualify for the Loan based upon his credit rating, income, and his asset to debt
6 ratio. The complaint states these actions violate Section 17200.

7 Plaintiff's basic contention is that Defendants should have done more research into
8 Plaintiff's financial condition before making the Loan. "However, no such duty exists for a
9 lender to determine the borrower's ability to repay the loan. The lender's efforts to determine the
10 creditworthiness and ability to repay by a borrower are for the lender's protection, not the
11 borrower's." Camillo v. Washington Mut. Bank, F.A., 2009 WL 3614793, *6 (E.D.Cal. 2009);
12 Phillips v. MERS Mortgage Electronic Registration Systems, 2009 WL 3233865, *4 (E.D.Cal.
13 2009); Renteria v. United States, 452 F.Supp.2d 910, 922-923 (D. Ariz. 2006)). "[A] lender
14 owes no duty of care to the [borrowers] in approving their loan. Liability to a borrower for
15 negligence arises only when the lender 'actively participates' in the financed enterprise 'beyond
16 the domain of the usual money lender.'" Phillips, 2009 WL 3233865, *4; Wagner v. Benson,
17 101 Cal.App.3d 27, 34 (1980); see also Nymark v. Heart Fed. Sav. & Loan Assn, 231
18 Cal.App.3d 1089, 1096 (1991). Without factual allegations that show Defendants stand in the
19 place of Plaintiff's agents, there is no violation alleged and dismissal is appropriate.

20 **2. TILA**

21 The complaint alleges that Defendants failed to comply with the disclosure requirements
22 mandated by the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.* The complaint
23 contends that the failure to comply with TILA constitutes an unlawful business practice within
24 the meaning of Section 17200.

25 There is a one-year statute of limitations period in which to file an action for damages
26 under TILA. See 15 U.S.C. § 1640(e); Beach v. Ocwen Federal Bank, 523 U.S. 410, 412 (1998).

1 The one-year limitations period of 15 U.S.C. § 1640(e) runs from the date of consummation of
2 the transaction. “Consummation” is defined as “the time that a consumer becomes contractually
3 obligated on a credit transaction.” 12 C.F.R. § 226.2(a)(13); Grimes v. New Century Mortg.
4 Corp., 340 F.3d 1007, 1009 (9th Cir. 2003). Plaintiff did not file any claim based on the TILA
5 within one-year of the loan’s closing. Thus, no TILA claim is available. See 15 U.S.C. §
6 1640(e); Beach, 523 U.S. at 412.

7 Because Plaintiff’s TILA claim is barred, Plaintiff cannot base his Section 17200 claim
8 on a violation of TILA. “There are limits on the causes of action that can be maintained under
9 section 17200. A court may not allow a plaintiff to ‘plead around an absolute bar to relief simply
10 by recasting the cause of action as one for unfair competition.’” Chabner v. United of Omaha
11 Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000) (quoting Cel-Tech Communications, Inc. v.
12 Los Angeles Cellular Tel. Co., 20 Cal.4th 163, 182 (1999)); see also Morris v. Bank of America,
13 2010 WL 761318, *7 (N.D.Cal. 2010); Gonzalez v. First Franklin Loan Services, 2010 WL
14 144862, *15 (E.D.Cal. 2010); Garcia v. Wachovia Mortg. Corp., – F.Supp.2d – , 2009 WL
15 3837621, *11 (C.D.Cal. 2009). Because any claim based on the TILA is barred by the statute of
16 limitations, Plaintiff’s Section 17200 claim based on the TILA is subject to dismissal.

17 **3. California Financial Code § 22302**

18 The complaint alleges that any consumer loan found to be unconscionable violates
19 Financial Code § 22302, and the Loan is unconscionable because of the relative bargaining
20 positions of the parties. The complaint contends that the violation of Section 22302 constitutes
21 an unlawful business practice within the meaning of Section 17200.

22 California Financial Code § 22302 incorporates California Civil Code § 1670.5's
23 prohibition on unconscionability into loan agreements. Civil Code Section 1670.5(a) allows the
24 court to refuse to enforce all or part of a contract if the court finds as a matter of law that the
25 contract or any clause of the contract was unconscionable at the time it was made. Cal. Civ.
26 Code § 1670.5(a). The term “unconscionable” is not defined by statute but has been defined by

1 the California courts. Trend Homes, Inc. v. Superior Court, 131 Cal.App.4th 950, 956 (2005).
2 “[U]nconscionability has both a ‘procedural’ and a ‘substantive’ element.” Armendariz v.
3 Foundation Health Psychcare Services, Inc., 24 Cal.4th 83, 114 (2000). The procedural element
4 of unconscionability focuses on oppression and surprise. Discover Bank v. Superior Court, 36
5 Cal.4th 148, 160 (2005). “Oppression’ arises from an inequality of bargaining power which
6 results in no real negotiation and ‘an absence of meaningful choice.” Bruni v. Didion, 160
7 Cal.App.4th 1272, 1289 (2008); Aron v. U-Haul Co. of California, 143 Cal.App.4th 796, 808
8 (2006). “Surprise’ involves the extent to which the supposedly agreed-upon terms of the bargain
9 are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms.”
10 Bruni, 160 Cal.App.4th at 1289; Aron, 143 Cal.App.4th at 808 (2006). Id. “The substantive
11 element of unconscionability focuses on the actual terms of the agreement and evaluates whether
12 they create ‘overly harsh’ or ‘one-sided’ results as to ‘shock the conscience.’” Bruni, 160
13 Cal.App.4th at 1289; Aron, 143 Cal.App.4th at 808. “Both elements must be present, but the
14 more substantively oppressive the contract term, the less evidence of procedural
15 unconscionability is required to come to the conclusion that the term is unenforceable, and vice
16 versa.” Trend Homes, 131 Cal.App.4th at 956 (internal quotes and cites omitted); Woodside
17 Homes of California, Inc. v. Superior Court, 107 Cal.App.4th 723, 736 (2003).

18 The complaint alleges that the relative bargaining positions between the parties were
19 unequal, Plaintiff could not negotiate or change any of the Loan documents’ terms, and the Loan
20 documents were so one-sided that they could only lead to one result – a significant loss of money
21 to Plaintiff. Plaintiff is describing a contract of adhesion. “The term [contract of adhesion]
22 signifies a standardized contract, which, imposed and drafted by the party of superior bargaining
23 strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject
24 it.” Armendariz, 24 Cal.4th at 113. “[A] contract of adhesion is fully enforceable according to
25 its terms unless certain other factors are present which, under established legal rules legislative or
26 judicial operate to render it otherwise.” Graham v. Scissor-Tail, Inc., 28 Cal.3d 807, 819-20

1 (1981) (internal cites omitted); DVD Copy Control Ass'n, Inc. v. Kaleidescape, Inc., 176
2 Cal.App.4th 697, 716 (2009).

3 Plaintiff's claim of unconscionability fails. The complaint does not allege that the actual
4 obligations imposed on Plaintiff by the contract were unclear from the Loan documents' terms.
5 In addition, defaulting on a loan or the inability to make payments on a loan after approximately
6 three years time does not "shock the conscience". Finally, the conclusory allegation that the
7 contract was designed to cost Plaintiff a "significant loss of money" also does not show
8 unconscionability. See Camillo v. Washington Mut. Bank, F.A., 2009 WL 3614793, *7
9 (E.D.Cal. 2009). No factual allegations plausibly suggest an unconscionable agreement. See
10 Iqbal, 129 S.Ct. at 1949. Thus, dismissal is appropriate.

11 **C. Fraudulent Omission**

12 The complaint alleges that Defendants failed to inform Plaintiff that based solely on his
13 stated income, credit rating, and ratio of assets and liabilities, Plaintiff would not qualify for the
14 Loan and Defendants only qualified Plaintiff based on the initial payment amount without
15 including future increased payments. It appears that Plaintiff is alleging this failure to disclose
16 information constituted fraud under California law.

17 To state a claim for fraudulent deceit a plaintiff must plead: (a) misrepresentation (false
18 representation, concealment, or nondisclosure); (b) knowledge of falsity (or scienter); (c) intent
19 to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage. In re
20 Napster, Inc. Copyright Litig., 479 F.3d 1078, 1096 (9th Cir. 2007); Small v. Fritz Cos., Inc., 30
21 Cal.4th 167, 173 (2003). Deceit is defined as the "suppression of a fact, by one who is bound to
22 disclose it, or who gives information of other facts which are likely to mislead for want of
23 communication of that fact." Cal. Civ. Code § 1710.

24 Federal Rule of Civil Procedure 9(b) requires that, when averments of fraud are made, the
25 circumstances constituting the alleged fraud must be "specific enough to give defendants notice
26 of the particular misconduct . . . so that they can defend against the charge and not just deny that
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1 they have done anything wrong.” Fed. R. Civ. Pro. 9(b); Vess v. Ciba-Geigy Corp. USA, 317
2 F.3d 1097, 1106 (9th Cir. 2003). Although the substantive elements of fraud may be set by a state
3 law, those elements must be pled in accordance with the requirements of Rule 9(b). See Vess,
4 317 F.3d at 1103. Allegations of fraud should specifically include “an account of the time, place,
5 and specific content of the false representations as well as the identities of the parties to the
6 misrepresentations.” Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007). “The plaintiff
7 must set forth what is false or misleading about a statement, and why it is false.” Vess, 317 F.3d
8 at 1106. Stated differently, the complaint must identify “the who, what, when, where, and how”
9 of the fraud. Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009).

10 The complaint’s allegations do not satisfy the heightened pleading requirement for fraud
11 required by Rule 9(b). The complaint does not identify the time, place, and manner of the
12 alleged omissions. The complaint also fails to name any of Defendants’ employees who
13 allegedly failed to inform Plaintiff he would be unable to qualify for the Loan if future increased
14 payments were considered. The complaint also fails to allege how Defendants are responsible
15 for any such fraud as they were not parties to the original loan. Finally, Plaintiff has offered no
16 information on how these Defendants owed Plaintiff a duty to explain the difference between
17 qualifying for the Loan based on the initial payment as opposed to future potential payments.
18 Thus, Plaintiff’s fraud claim is subject to dismissal.

19 **D. Injunctive Relief**

20 The complaint’s sixth cause of action alleges a claim for injunctive relief. Under Federal
21 law, an injunction is a remedy to another claim or cause of action and not a claim or cause of
22 action in and of itself. Lima v. American Home Mortg. Servicing, Inc., 2010 WL 144810 at *2
23 (N.D.Cal. 2010); see also Washington Toxics Coalition v. Environmental Protection Agency,
24 413 F.3d 1024, 1034 (9th Cir. 2005) (holding injunction is remedy for violation of the
25 Endangered Species Act); Catholic Social Services, Inc. v. I.N.S., 182 F.3d 1053, 1062 (9th Cir.
26 1999) (stating injunction is remedy for claims against INS). Similarly, under California law, a
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1 claim or cause of action for an injunction is improper because an injunction is a remedy, not a
2 cause of action. Shamsian v. Atlantic Richfield Co., 107 Cal.App.4th 967, 985 (2003); Roberts
3 v. Los Angeles County Bar Ass'n, 105 Cal.App.4th 604, 618 (2003). Because an injunction is
4 merely a remedy and is not a cause of action, a cause of action must exist before injunctive relief
5 may be granted. Tapia v. Aurora Loan Services, LLC, 2009 WL 2705853 at *3 (E.D.Cal. 2009).
6 Thus, Plaintiff's of action for injunctive relief must be dismissed.

7 **E. Covenant of Good Faith and Fair Dealing**

8 The seventh cause of action alleges that Defendants breached the implied covenant of
9 good faith and fair dealing. The complaint alleges that Defendants breached the implied
10 covenant of good faith and fair dealing when they "used their superior knowledge in the real
11 estate, lending and finance industries to intentionally hide the fact that Plaintiff would not and
12 could not qualify for the ARM loan for which Plaintiff applied, and the LOAN would in fact cost
13 Plaintiff significantly more than what was stated by" Defendants.

14 There is an implied covenant of good faith and fair dealing in every contract that neither
15 party will do anything that will injure the right of the other to receive the benefits of the
16 agreement. Kransco v. American Empire Surplus Lines Ins. Co., 23 Cal.4th 390, 400 (2000);
17 Rest.2d Contracts, § 205. However, the duty of good faith and fair dealing is "a supplement to
18 an existing contract, and thus it does not require parties to negotiate in good faith prior to any
19 agreement." McClain v. Octagon Plaza, LLC, 159 Cal.App.4th 784, 799 (2008). Thus, to the
20 extent the complaint's allegations stem from the formation and negotiation of the Loan,
21 Plaintiff's claim for a breach of the covenant must be dismissed.

22 Moreover, no implied covenant tort is available to Plaintiff. "Generally, no cause of
23 action for the tortuous breach of the implied covenant of good faith and fair dealing can arise
24 unless the parties are in a 'special relationship' with 'fiduciary characteristics.'" Pension Trust
25 Fund v. Federal Ins. Co., 307 F.3d 944, 955 (9th Cir. 2002); Saldate v. Wilshire Credit Corp.,
26 2010 WL 582069, *18 (E.D. Cal. 2010). The "implied covenant tort is not available to parties in
27

1 an ordinary commercial transaction where the parties deal at arms' length." Pension Trust Fund,
2 307 F.3d at 955. California courts do not invoke a special relationship between a lender and
3 borrower. Oaks Management Corp. v. Superior Court, 145 Cal.App.4th 453, 466 (2006); Kim v.
4 Sumitomo Bank, 17 Cal.App.4th 974, 979 (1993). A loan transaction is an arms' length
5 transaction, and there is no fiduciary relationship between the borrower and lender absent special
6 circumstances with "fiduciary characteristics". Oaks Management Corp., 145 Cal.App.4th at 466;
7 Union Bank v. Superior Court, 31 Cal.App.4th 573, 579 n. 2 (1995); Kim, 17 Cal.App.4th at
8 979; Mitsui Mfrs. Bank v. Superior Court, 212 Cal.App.3d 726, 730 (1989). The complaint does
9 not allege facts establishing a "special relationship" between Plaintiff and Defendants that could
10 justify extending tort liability. Thus, Plaintiff's claim for a breach of the covenant of good faith
11 and fair dealing must be dismissed.

12 **F. Unjust Enrichment**

13 The complaint alleges that "Defendants unjustly received and retained benefits and
14 payments at the expense of plaintiff and persons similarly situated, who is therefore entitled to
15 restitution." The complaint contends the complaint's allegations state a cause of action for
16 unjust enrichment.

17 The elements of an unjust enrichment claim are receipt of a benefit and unjust retention
18 of the benefit at the expense of another. Peterson v. Cellco Partnership, 164 Cal.App.4th 1583,
19 1593 (2008); Lectrodryer v. SeoulBank, 77 Cal.App.4th 723, 726 (2000). However, "the mere
20 fact that a person benefits another is not of itself sufficient to require the other to make restitution
21 therefor." Peterson, 164 Cal.App.4th at 1593. Unjust enrichment is typically sought in
22 connection with a "quasi-contractual" claim in order to avoid unjustly conferring a benefit upon a
23 defendant where there is no valid contract. McBride v. Boughton, 123 Cal.App.4th 379, 388
24 (2004).

25 The complaint's unjust enrichment claim fails because the complaint fails to state any
26 facts in support of the contention that Defendants received and retained benefits and payments to
27

1 which they were not entitled. In addition, under California law, an action in quasi-contract does
2 not lie “when an enforceable, binding agreement exists defining the rights of the parties.”
3 Paracor Fin. v. Gen. Elec. Capital Corp., 96 F.3d 1151, 1167 (9th Cir. 1996); Hedging Concepts,
4 Inc. v. First Alliance Mortgage Co., 41 Cal.App.4th 1410, 1419-20 (1996). The complaint
5 alleges Plaintiff and Defendants entered into the Loan, and no allegations in the complaint
6 support a claim that no contract exists between the parties. The complaint does not allege
7 sufficient facts to maintain a plausible claim for unjust enrichment.

8 In addition, most California courts agree that there is no cause of action in California for
9 unjust enrichment. Walker v. Equity 1 Lenders Group, 2009 WL 1364430, *9 (S.D. Cal. 2009);
10 Jogani v. Superior Court, 165 Cal.App.4th 901, 911 (2008); Melchior v. New Line Productions,
11 Inc., 106 Cal.App.4th 779, 794 (2003). “The phrase ‘Unjust Enrichment’ does not describe a
12 theory of recovery, but an effect: the result of a failure to make restitution under circumstances
13 where it is equitable to do so.” Lauriedale Associates, Ltd. v. Wilson, 7 Cal.App.4th 1439, 1448
14 (1992). “Unjust enrichment is a general principle, underlying various legal doctrines and
15 remedies, rather than a remedy itself.” Melchior, 106 Cal.App.4th at 784. Thus, the unjust
16 enrichment claim is subject to dismissal.

17 **G. Accounting**

18 The complaint seeks from Defendants “a detailed accounting calculation and summary of
19 the payoff balance they are demanding, including the unpaid principal balance, accrued interest,
20 unpaid interest, daily interest charges and all other fees, costs or expenses comprising the payoff
21 sum.”

22 “A cause of action for an accounting requires a showing that a relationship exists between
23 the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff
24 that can only be ascertained by an accounting.” Teselle v. McLoughlin, 173 Cal.App.4th 156,
25 179 (2009). An accounting will not be awarded if a sum certain is alleged in the complaint.
26 Lawrence v. Aurora Loan Services LLC, 2010 WL 364276, *10 (E.D.Cal. 2010); Civic Western

1 Corp. v. Zila Industries, Inc., 66 Cal.App.3d 1, 14 (1977); St. James Church v. Superior Court,
2 135 Cal.App.2d 352, 359 (1955). A suit for an accounting will also not lie where it appears from
3 the complaint that no accounting is necessary or that there is an adequate remedy at law.
4 Lawrence, 2010 WL 364276 at *10; Civic Western, 66 Cal.App.3d at 14.

5 The complaint does not allege a balance due to Plaintiff. Instead, Plaintiff seeks an
6 accounting to determine how much money he owes. Plaintiff has not cited any authority to
7 support the right to seek an accounting under these circumstances. The failure to plead “some
8 balance is due” to Plaintiff is fatal to Plaintiff’s accounting cause of action. See Fimbres v.
9 Chapel Mortg. Corp., 2009 WL 4163332, *8 (S.D. Cal. 2009); Reynoso v. Paul Financial, LLC,
10 2009 WL 3833298, *5 (N.D.Cal. 2009). Accordingly, the claim for an accounting must be
11 dismissed.

12 **H. Negligence**

13 The tenth cause of action alleges that Defendants were negligent because the finance
14 charge on the Loan was not properly disclosed. Defendants contend that Plaintiff’s negligence
15 claim fails because they owed no duty to Plaintiff.

16 “Under California law, ‘[t]he elements of negligence are: (1) defendant’s obligation to
17 conform to a certain standard of conduct for the protection of others against unreasonable risks
18 (duty); (2) failure to conform to that standard (breach of duty); (3) a reasonably close connection
19 between the defendant’s conduct and resulting injuries (proximate cause); and (4) actual loss
20 (damages).’” Corales v. Bennett, 567 F.3d 554, 572 (9th Cir. 2009) (quoting McGarry v. Sax,
21 158 Cal.App.4th 983, 994, (2008) (internal quotations omitted)). In general, a financial
22 institution owes no duty of care to a borrower when the institution's involvement in the loan
23 transaction does not exceed the scope of its conventional role as a mere lender of money. Nymark
24 v. Heart Fed. Sav. & Loan Ass'n, 231 Cal.App.3d 1089, 1096 (1991); Bojorquez v. Gutierrez,
25 2010 WL 1223144, *7 (N.D. Cal. 2010); Gonzalez v. First Franklin Loan Services, 2010 WL
26 144862, *8 (E.D.Cal. 2010); Yoo v. JPMorgan Chase Bank, 2009 WL 4823376, *4 (C.D.Cal.

1 2009); Fimbres v. Chapel Mortg. Corp., 2009 WL 4163332, *4 (S.D.Cal. 2009). Parties to a
2 contractual relationship, such as a mortgagor and mortgagee, cannot bring a tort claim for
3 negligence unless a legal duty independent of the contract itself has been violated. Bojorquez,
4 2010 WL 1223144, at *7; Gaitan v. Mortgage Electronic Registration Systems, 2009 WL
5 3244729, *8 (C.D.Cal. 2009).

6 The complaint fails to allege a special lending relationship or an actionable breach of duty
7 to substantiate a negligence claim. The complaint depicts an arms' length loan transaction.
8 Plaintiff does not allege any facts to support a finding that a fiduciary relationship existed. The
9 complaint only alleges a borrower-lender relationship. Thus, the negligence claim must be
10 dismissed.

11 **I. Breach of Fiduciary Duty**

12 The eleventh cause of action alleges that Defendants breached their fiduciary duty to
13 Plaintiff. The complaint alleges that Defendants were engaged in a fiduciary relationship to
14 Plaintiff and breached the fiduciary duties they owed Plaintiff.

15 Plaintiff's cause of action for breach of fiduciary duty fails because he cannot plausibly
16 plead the existence of any fiduciary duty between himself and Defendants. A loan transaction is
17 at arms-length and there is no fiduciary relationship between the borrower and lender. Oaks
18 Management Corp., 145 Cal.App.4th at 466; Union Bank, 31 Cal.App.4th at 579 n. 2; Kim, 17
19 Cal.App.4th at 979. Neither does a trustee under a Deed of Trust owe fiduciary duties to the
20 borrower. Justo v. Indymac Bancorp, 2010 WL 623715, *6 (C.D.Cal. 2010); Abdallah v. United
21 Savings Bank, 43 Cal.App.4th 1101, 1109 (1996); Miller and Starr CALIFORNIA REAL ESTATE §
22 10:4 (2010). Thus, the breach of fiduciary duty claim is subject to dismissal.

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24 //

26 **ORDER**

1 Accordingly, for the reasons stated in the above memorandum opinion, the court
2 ORDERS that:

- 3 1. Defendants motion to dismiss is GRANTED;
- 4 2. The complaint is DISMISSED with leave to amend;
- 5 3. Any amended complaint SHALL be filed by May 7, 2010; and
- 6 4. Failure to file an amended complaint that is consistent with this court's
7 memorandum opinion will result in this action's dismissal.

8
9 IT IS SO ORDERED.

10 **Dated:** April 16, 2010

/s/ Anthony W. Ishii
CHIEF UNITED STATES DISTRICT JUDGE