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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSE LUIS BARBOZA,

Plaintiff,

v.

DEUTSCHE BANK SECURITIES, INC.,
LITTON LOAN SERVICING, LP. *et al.*,

Defendants.

1:10-CV-0559 OWW DLB

MEMORANDUM DECISION GRANTING
DEUTSCHE BANK SECURITIES, INC. &
LITTON LOAN SERVICING, LP. (Docs.
9 & 15).

I. INTRODUCTION

On February 16, 2010, Plaintiff filed a complaint in the Superior Court of the State of California, County of Kern, alleging five causes of action against Defendants Deutsche Bank Securities Inc. ("Deutsche") and Litton Loan Servicing, LP, ("Litton") regarding a mortgage loan for property located in Wasco, California. On March 31, 2010, Deutsche removed the case to federal court pursuant to 28 U.S.C. §§ 1332, 1441 based on diversity jurisdiction. (Doc. 1.)

Plaintiff alleges (1) fraud; (2) unconscionable contract;

1 (3) breach of covenant of good faith and fair dealing; (4)
2 violation of business and professions code § 17200 and (5)
3 reformation. (Doc. 1-2, Compl.)

4 Before the Court for decision are motions to dismiss
5 pursuant to Federal Rules of Civil Procedure 12(b)(6) brought by
6 Deutsche and Litton (Docs. 9 & 15), and Deutsche's Motion to
7 Strike pursuant to Rule 12(f) (Doc. 10). Plaintiff filed an
8 opposition. (Doc. 21.) Defendants filed a joint reply. (Doc.
9 22.) The matter came on for hearing in Courtroom 3 (OWW) on June
10 21, 2010, at 10:00 a.m.

11 II. LEGAL STANDARDS

12 A. Rule 12(b)(6) Motion to Dismiss.

13
14 A motion to dismiss brought under Federal Rule of Civil
15 Procedure 12(b)(6) "tests the legal sufficiency of a claim."
16 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In deciding
17 whether to grant a motion to dismiss, the court "accept[s] all
18 factual allegations of the complaint as true and draw[s] all
19 reasonable inferences" in the light most favorable to the
20 nonmoving party. *Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9th
21 Cir. 2002). To survive a motion to dismiss, a complaint must
22 "contain sufficient factual matter, accepted as true, to 'state a
23 claim to relief that is plausible on its face.'" *Ashcroft v.*
24 *Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp v.*
25 *Twombly*, 550 U.S. 544, 570 (2007)).
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1 A claim has facial plausibility when the plaintiff
2 pleads factual content that allows the court to draw
3 the reasonable inference that the defendant is liable
4 for the misconduct alleged. The plausibility standard
5 is not akin to a "probability requirement," but it asks
6 for more than a sheer possibility that defendant has
acted unlawfully. Where a 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.'"

7 *Id.* (citing *Twombly*, 550 U.S. 556-57). Dismissal also can be
8 based on the lack of a cognizable legal theory. *Balistreri v.*
9 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

11 **B. Rule 9(b) Heightened Pleading.**

12 All claims for fraud must be pled with sufficient
13 particularity. Fed. R. Civ. P. 9(b). "To comply with Rule 9(b),
14 allegations of fraud must be specific enough to give defendants
15 notice of the particular misconduct which is alleged to
16 constitute the fraud" *Swartz v. KPMG LLP*, 476 F.3d 756, 764
17 (9th Cir. 2007) (internal quotation marks omitted). Allegations
18 of fraud must include the "time, place, and specific content of
19 the false representation as well as the identities of the parties
20 to the misrepresentations." *Id.* (internal quotation marks
21 omitted). "Averments of fraud must be accompanied by the who,
22 what, when, where, and how of the misconduct charged." *Kearns v.*
23 *Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (internal
24 quotation marks omitted). A plaintiff alleging fraud "must set
25 forth more than the neutral facts necessary to identify the
26 transaction. The plaintiff must set forth what is false or
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1 misleading about a statement, and why it is false." *Vess v.*
2 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)
3 (emphasis and internal quotation marks omitted).
4

5 C. Motion to Strike.

6 Rule 12(f) provides that the Court "may order stricken from
7 any pleading any insufficient defense or any redundant,
8 immaterial, impertinent, or scandalous matter." Motions to
9 strike are disfavored and infrequently granted. *Neveu v. City of*
10 *Fresno*, 392 F. Supp. 2d 1159, 1170 (E.D. Cal. 2005). A motion to
11 strike should not be granted unless it is clear that the matter
12 to be stricken could have no possible bearing on the subject
13 matter of the litigation. *Id.* The function of a Rule 12(f)
14 motion to strike is to avoid the expenditure of time and money
15 that might arise from litigating spurious issues by dispensing
16 with those issues prior to trial. *Fantasy, Inc. v. Fogerty*, 984
17 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S.
18 517 (1994). A motion to strike may be used to strike any part of
19 the prayer for relief when the recovery sought is unavailable as
20 a matter of law. See *Bureerong v. Uvawas*, 922 F. Supp. 1450,
21 1479 n. 34 (C.D. Cal. 1996).
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24 III. BACKGROUND

25 On October 25, 2006, Plaintiff "obtained a mortgage loan for
26 the property located at 1001 Pistachio Street, Wasco, CA 93280."
27 (Compl. ¶ 3.) Plaintiff promised to repay \$168,000 to Fremont
28

1 Investment & Loan ("Fremont"). (Doc 9 [Def.'s Mot. To Dismiss.])
2 On March 9, 2009, Plaintiff failed to make payments and the
3 beneficiary "iniate[d] foreclosure of the property." (*Id.*) On
4 March 10, 2009, a notice of default was recorded. (*Id.*) On
5 March 9, 2009, Quality Loan Service Corporation was substituted
6 as trustee. (*Id.*) On October 22, 2009 the trustee completed
7 foreclosure by power of sale under the power of sale contained in
8 the deed and trust. (*Id.*)
9

10 Plaintiff primarily speaks Spanish and alleges that he was
11 not provided with a Spanish translation of the loan terms.
12 (Compl. ¶ 5.) Plaintiff recorded a notice of *lis pendes* on
13 February 16, 2010. (Doc. 9.)
14

15 IV. ANALYSIS

16 A. Motion to Dismiss for Failure to State a Claim.

17 i. Fraud.

18 Plaintiff's first cause of action alleges fraud by each
19 Defendant. Plaintiff generally claims "representatives, agents,
20 and/or employees of Defendants and each of them, made false
21 representations to Plaintiff in order to fund a loan." (Compl. ¶
22 24.) Plaintiff further alleges that "Defendants represented that
23 they would not make a loan to Plaintiff unless he could afford
24 the loan, and each of them, represented that they would not make
25 a loan to plaintiff unless he could afford the loan." (Compl. ¶
26 25.) The Complaint also alleges that "[a]s part of defendants'
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1 continuing scheme intentionally placed Plaintiff in a sub-prime
2 loan to the benefit of the defendants ... and Defendants repeatedly
3 used coercive tactics in order to force Plaintiff to sign loan
4 documents." (Compl. 26.)

5 In California, the elements for the claim of fraud are:

6 (1) misrepresentation; (2) knowledge of falsity; (3) intent to
7 defraud; (4) justifiable reliance; and (5) resulting damage.

8 *Small v. Fritz Companies, Inc.*, 30 Cal. 4th 167, 173 (2003).

9 Upon removal to federal court, all claims for fraud must be pled
10 with sufficient particularity to satisfy Rule 9(b). "[W]hile a
11 federal court will examine state law to determine whether the
12 elements of fraud have been pled sufficiently to state a cause of
13 action, the Rule 9(b) requirement ... is a federally imposed
14 rule." *Vess*, 317 F.3d at 1103 (quoting *Hayduk v. Lanna*, 775 F.2d
15 441, 443 (1st Cir. 1985)).

16 "Rule 9(b) does not allow a complaint merely to lump
17 multiple defendants together but require(s) [p]laintiff to
18 differentiate the allegations when suing more than one defendant
19 ... and inform each defendant separately of the allegations
20 surrounding his alleged participation in fraud." *Swartz*, 476
21 F.3d at 764-65. Here, Plaintiff fails to differentiate the
22 conduct of the various Defendants. This does not give sufficient
23 notice to Defendants of the specific details of the fraud claim.

24 The complaint does not specify the "who, what, where, when,
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1 and how" of the alleged fraud. See *Kearns*, 567 F.3d at 1124.
2 When claiming fraud against multiple defendants, at the very
3 least, the roles of each party need to be identified. *Swartz*,
4 476 F.3d at 764-65. Plaintiff only uses the name "Defendant" to
5 include each party. No details are provided on the specific
6 content of false representation or how it was made by each
7 Defendant. Plaintiff uses phrases like "coercive tactics" but
8 does not describe the tactics in the complaint.
9

10 Plaintiff's fraud claim is DISMISSED WITH LEAVE TO AMEND.

11 ii. Unconscionable Contract.

12 Plaintiff alleges the contract is unconscionable under
13 California Civil Code § 1670.5. Plaintiff claims that as a non-
14 English speaking party, Plaintiff made an "uninformed decision,"
15 and that Defendants took advantage of Plaintiff to misrepresent
16 the contract.
17

18 Here Plaintiff claims unconscionability as a cause of action
19 and not a defense. "There is no cause of action for
20 unconscionability and the doctrine is only a defense to contract
21 enforcement." *Maguca v. Aurora Loan Services*, 2009 WL 3467750 at
22 *5 (C.D. Cal. Oct. 28, 2009) (citing *Jones v. Wells Fargo Bank*,
23 112 Cal. App. 4th 205, 217 (1994)). Plaintiff's unconscionability
24 claim is DISMISSED WITHOUT LEAVE TO AMEND.
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1 iii. Breach of Covenant of Good Faith and Fair Dealing

2 Plaintiff claims a breach of covenant of good faith and fair
3 dealing, alleging "defendants intentionally acted with the
4 knowledge that their actions were invalid and further; any
5 reasonable person in Defendants position would consider the acts
6 or conduct ... unreasonable." (Compl. ¶ 55.)
7

8 The implied covenant of good faith and fair dealing exists
9 in every contract, and "is aimed at making effective the
10 agreement's promises." *Kransco v. Am. Empire Surplus Lines Ins.*
11 *Co.*, 23 Cal. 4th 390 (2000). "Broadly stated, that covenant
12 requires that neither party do anything which will deprive the
13 other of the benefits of the agreement." *Freeman & Mills, Inc.*
14 *v. Belcher Oil Co.*, 11 Cal. 4th 85 (1995).
15

16 The implied covenant "does not extend beyond the terms of
17 the contract at issue." *Poway Royal Mobilehome Owners Ass'n v.*
18 *City of Poway*, 149 Cal. App. 4th 1460, 1477 (2007). Instead, it
19 "is limited to assuring compliance with the express terms of the
20 contract." *Pasadena Live, LLC v. City of Pasadena*, 114 Cal. App.
21 4th 1089, 1094 (2004). "The prerequisite for any action for
22 breach of the implied covenant of good faith and fair dealing is
23 the existence of a contractual relationship between the parties
24" *Smith v. City & County of San Francisco*, 225 Cal. App. 3d
25 38, 49 (1990). The implied covenant "rests upon the existence of
26 some specific contractual obligation" and there "is no obligation
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1 to deal fairly or in good faith absent an existing contract."
2 *Racine & Laramie, Ltd.*, 11 Cal. App. 4th at 1031-32 (1992).
3 Here, Defendants were not a party to the original mortgage.
4 Plaintiff has failed to show a valid contract between the
5 parties.
6

7 Defendants' motion to dismiss the implied covenant claim is
8 GRANTED WITH LEAVE TO AMEND, if Plaintiff can do so in compliance
9 with Federal Rule of Civil Procedure 11.

10
11 iv. Violation of Business and Professions Code §
12 17200.

13 Plaintiff brings a claim for "unlawful business practices"
14 under California Business and Professions Code § 17200, et seq.
15 Such a claim depends on the viability of an underlying claim of
16 unlawful conduct. *Ingels v. Westwood One Broadcasting Servs.*,
17 129 Cal. App. 4th 1050, 1060 (2005).

18 Here, because none of Plaintiffs' other claims survive
19 dismissal, his § 17200 claim must be dismissed as well.

20 Defendants' motion to dismiss the implied covenant claim
21 against it is GRANTED WITH LEAVE TO AMEND.
22

23 v. Reformation.

24 Plaintiff seeks reformation under California Civil Code §
25 3399, which provides:

26 When, through fraud or a mutual mistake of the parties,
27 or a mistake of one party, which the other at the time
28 knew or suspected, a written contract does not truly

1 express the intention of the parties, it may be
2 revised, on the application of a party aggrieved, so as
3 to express that intention, so far as it can be done
4 without prejudice to rights acquired by third persons,
5 in good faith and for value.

6 Plaintiff alleges Defendants defrauded him, made
7 misrepresentations, and that the documents do not represent his
8 intent when the contract was formed.

9 "The essential purpose of reformation is to reflect the
10 intent of the parties." *Jones v. First Am. Title Ins. Co.*, 107
11 Cal. App. 4th 381, 389 (2003). "Although a court of equity may
12 revise a written instrument to make it conform to the real
13 agreement, it has no power to make a new contract for the
14 parties...." *American Home Ins. Co. v. Travelers Indemnity Co.*,
15 122 Cal. App. 3d 951, 963 (1981).

16 A complaint for the reformation of a contract should
17 allege what the real agreement was, what the agreement
18 as reduced to writing was, and where the writing fails
19 to embody the real agreement. It is also necessary to
20 aver facts showing how the mistake was made, whose
21 mistake it was, and what brought it about, so the
22 mutuality may appear.

23 *Lane v. Davis*, 172 Cal. App. 2d. 302, 309 (1959).

24 A claim for reformation is also subject to Rule 9(b).
25 *Jensen v. Quality Loan Service Corp.*, 2010 WL 1136005 at *13
26 (E.D. Cal., 2010). Here, Plaintiff failed to specifically
27 articulate what the time and terms of the agreement between the
28 parties were, in what way the written agreement failed to embody
the real agreement, who made the mistake, what brought it about,

1 and when and where any such mistakes occurred.

2 Moreover, Defendants are not proper parties to a reformation
3 claim, as Defendants were not a party to the Note or Deed of
4 trust. *Cisneros v. Instant Capital Funding Group, Inc.*, 263
5 F.R.D. 595 (E.D. Cal. 2009).

6
7 Plaintiff's reformation claim is DISMISSED WITH LEAVE TO
8 AMEND, if Plaintiff can amend in compliance with Rule 11.

9 B. Motion to Strike

10 Deutsch Bank also moves to strike Plaintiff's allegation of
11 fraudulent conduct in paragraph 10, 39, 41 and 56. (Doc. 10
12 [Def.'s Mot. To Strike]).

13
14 (1) Paragraph 10: "[e]ach of Defendants harassing
15 acts were so willful, vexatious and outrageous,
16 oppressive and maliciously calculated enough, so
17 as to warrant statutory penalties and punitive
18 damages."

19 (2) Paragraph 39: "[d]efendants' conduct as set
20 forth above was intentional, oppressive,
21 fraudulent, and malicious so as to justify an
22 award of punitive damages in an amount sufficient
23 that such conduct will not be repeated."

24 (3) Paragraph 41: "[t]he actions of Defendants and
25 each of them were fraudulent, oppressive, and
26 malicious so as to warrant the imposition of
27 exemplary damages, and that by virtue of
28 Defendants' conducts as set forth herein Plaintiff
is entitled to exemplary damages."

(4) Paragraph 56: "[a]t all times relevant,
Defendants' conduct, as alleged herein, was
malicious, oppressive and/or fraudulent.

1 (Comp. ¶ 10, 39, 41, and 56.) Defendant argues that Plaintiff
2 "fails to make the required showing of any oppressive,
3 fraudulent, or malicious behavior on the part of Defendant in
4 order to be entitled to punitive damages". (Doc. 10.) Defendant
5 asserts the complaint is conclusory and does not state sufficient
6 support for the "oppressive, fraudulent, and malicious behavior"
7 allegations. (*Id.*)
8

9 The right to recover punitive damages is governed by
10 California Civil Code section 3294 which states in relevant part
11 that:

12 (a) In an action for the breach of an obligation not arising
13 from contract, where it is proven by clear and convincing
14 evidence that the defendant has been guilty of oppression,
15 fraud or malice, the plaintiff, in addition to the actual
16 damages, may recover damages for the sake of example and by
17 way of punishing the defendant.

18 ***

19 (c) As used in this section, the following definitions shall
20 apply:

21 (1) "Malice" means conduct, which is intended by the
22 defendant to cause injury to the plaintiff or
23 despicable conduct, which is carried on by the
24 defendant with a willful and conscious disregard for
25 the rights or safety of others.

26 (2) "Oppression" means despicable conduct that subjects
27 a person to cruel and unjust hardship in conscious
28 disregard of that persons' rights.

(3) "Fraud" means an intentional misrepresentation,
deceit, or concealment of a material fact known to the
defendant with the intention on the part of the
defendant of thereby depriving a person of property or
legal rights or otherwise causing injury.

Cal. Civ. Code § 3294. Unless a defendant is found guilty of
"oppression, fraud, or malice," rising to the level of despicable

1 conduct, punitive damages cannot be recovered by the plaintiff.
2 *Gaffney v. Downey Savings & Loan Assn.*, 200 Cal. App. 3d 1154,
3 1169 (1988). Conclusory allegations of fraud, misrepresentation,
4 bad faith, oppression, malice and the like are insufficient.
5 *Lavine v. Jessup*, 161 Cal. App. 2d 59, 69 (1958). Plaintiffs'
6 prayer for punitive damages is wholly unsupported by any factual
7 allegations. Plaintiffs do not oppose Defendants' motion to
8 strike the punitive damages prayer.
9

10 The motion to strike the punitive damages request in
11 Paragraph 10 is GRANTED.

12 V. CONCLUSION

13 For the reasons set forth above:

14 (1) Deutsche's and Litton's motions to dismiss are GRANTED
15 in their entirety;
16

17 (2) Deutsche's motion to strike is GRANTED as to the
18 punitive damages request. Otherwise the motion to strike is
19 DENIED AS MOOT.

20 Defendants shall submit a form of order consistent with this
21 memorandum decision within five (5) days of electronic service.
22

23 SO ORDERED

24 Dated: June 29, 2010

25 /s/ Oliver W. Wanger
26 Oliver W. Wanger
27 United States District Judge
28