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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

EDWARD GOMEZ,

Plaintiff,

v.

WORLD SAVINGS BANK FSB, et
al.,

Defendants.

1:10-cv-01463-OWW-DLB
MEMORANDUM DECISION REGARDING
MOTION TO DISMISS (Doc. 16)

I. INTRODUCTION.

Plaintiff Edward Gomez proceeds *pro se* with an action for damages and injunctive relief. Plaintiff filed a first amended complaint ("FAC") in California Superior Court, and certain Defendants removed the action to federal court on August 12, 2010. (Doc. 1). Defendants Wells Fargo Bank, Wachovia Mortgage, and Wells Fargo Home Mortgage filed a motion to dismiss Plaintiff's complaint on October 26, 2010. (Doc. 16). Defendants also filed a motion to strike portions of the complaint and a request for judicial notice. (Doc. 18). Plaintiff has not filed opposition to Defendants' motion.

II. FACTUAL BACKGROUND.

On or about June 25, 2008, Plaintiff obtained a loan secured by a First Trust Deed of Trust for the purpose of purchasing a

1 residence ("subject loan"). (FAC at 4). "Defendants" serviced the
2 loan. (FAC at 4). The complaint alleges that "Defendants"
3 conspired to cause Plaintiff to enter into instruments that would
4 result in foreclosure of Plaintiff's residence. (FAC at 5).

5 According to the complaint, the terms and conditions of the
6 subject loan were not fully explained to him, and the subject loan
7 extended to Plaintiff exceeded the expected value of the property.
8 (FAC at 6). Plaintiff complains that he was not provided
9 sufficient time to read all the documents at the closing of the
10 loan transaction, and that he was not provided copies of the loan
11 documents, including documents regarding the cost of the credit
12 Plaintiff received. (FAC at 6).

13 Plaintiff was unable to make payments on the loan he received
14 and has been harassed by "Defendants" and unknown parties to vacate
15 his residence. (FAC at 7). Plaintiff alleges he has not been
16 afforded an opportunity to effect a good faith modification of his
17 loan. (FAC at 7).

18 **III. LEGAL STANDARD.**

19 Dismissal under Rule 12(b)(6) is appropriate where the
20 complaint lacks sufficient facts to support a cognizable legal
21 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th
22 Cir.1990). To sufficiently state a claim to relief and survive a
23 12(b)(6) motion, the pleading "does not need detailed factual
24 allegations" but the "[f]actual allegations must be enough to raise
25 a right to relief above the speculative level." *Bell Atl. Corp. v.*
26 *Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).
27 Mere "labels and conclusions" or a "formulaic recitation of the
28 elements of a cause of action will not do." *Id.* Rather, there must

1 be "enough facts to state a claim to relief that is plausible on
2 its face." *Id.* at 570. In other words, the "complaint must contain
3 sufficient factual matter, accepted as true, to state a claim to
4 relief that is plausible on its face." *Ashcroft v. Iqbal*, --- U.S.
5 ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal
6 quotation marks omitted).

7 The Ninth Circuit has summarized the governing standard, in
8 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint to
9 survive a motion to dismiss, the nonconclusory factual content, and
10 reasonable inferences from that content, must be plausibly
11 suggestive of a claim entitling the plaintiff to relief." *Moss v.*
12 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.2009) (internal
13 quotation marks omitted). Apart from factual insufficiency, a
14 complaint is also subject to dismissal under Rule 12(b)(6) where it
15 lacks a cognizable legal theory, *Balistreri*, 901 F.2d at 699, or
16 where the allegations on their face "show that relief is barred"
17 for some legal reason, *Jones v. Bock*, 549 U.S. 199, 215, 127 S.Ct.
18 910, 166 L.Ed.2d 798 (2007).

19 In deciding whether to grant a motion to dismiss, the court
20 must accept as true all "well-pleaded factual allegations" in the
21 pleading under attack. *Iqbal*, 129 S.Ct. at 1950. A court is not,
22 however, "required to accept as true allegations that are merely
23 conclusory, unwarranted deductions of fact, or unreasonable
24 inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988
25 (9th Cir.2001). "When ruling on a Rule 12(b)(6) motion to dismiss,
26 if a district court considers evidence outside the pleadings, it
27 must normally convert the 12(b)(6) motion into a Rule 56 motion for
28 summary judgment, and it must give the nonmoving party an

1 opportunity to respond." *United States v. Ritchie*, 342 F.3d 903,
2 907 (9th Cir.2003). "A court may, however, consider certain
3 materials-documents attached to the complaint, documents
4 incorporated by reference in the complaint, or matters of judicial
5 notice-without converting the motion to dismiss into a motion for
6 summary judgment." *Id.* at 908.

7 **IV. DISCUSSION.**

8 The FAC is comprised primarily of general allegations and
9 legal conclusions. For the most part, the FAC does not identify
10 the conduct of any individual Defendant. Rather, the FAC makes
11 conclusory allegations that purportedly apply to all Defendants,
12 but fails to allege facts needed to provide the individual
13 Defendants fair notice of the nature of Plaintiff's claims against
14 them. Because the factual deficiencies of the FAC require
15 dismissal pursuant to Rule 8, adjudication of Defendants'
16 preemption and statute of limitations arguments is unnecessary with
17 respect to most of Plaintiff's claims.

18 **A. First Claim for Relief: "Predatory Lending"**

19 Plaintiff's first claim for relief is for "predatory lending"
20 predicated on alleged violations of California Financial Code §
21 4970, the federal Home Loan and Equity Protection Act ("HOEPA"),
22 the federal Truth in Lending Act ("TILA"),¹⁵ U.S.C. §1637, and
23 California Business and Professions Code § 17500. (FAC at 7). The
24 FAC fails to state facts sufficient to properly allege any
25 statutory violations.

26 The FAC fails to allege facts sufficient to establish that the
27 subject loan is a "covered loan" under California Financial Code
28 section 4970. Whether or not a loan is covered depends on the size

1 of the loan and "[t]he total points and fees payable by the
2 consumer." Cal. Fin. Code § 4970(b). Because the FAC fails to
3 make any averments as to the specific terms of the loan, it fails
4 to describe these facts and does not state a claim for relief under
5 section 4670.

6 The FAC alleges facts which establish that HOEPA is not
7 applicable to the subject loan. HOEPA does not apply to
8 residential mortgage transactions, 12 C.F.R. 226.32(a)(2)(i), and
9 the FAC alleges that the subject loan was obtained for the purpose
10 of purchasing Plaintiff's residence. (FAC at 4).

11 The FAC does not allege facts that establish that the subject
12 loan was an "open end consumer credit plan" within the meaning of
13 15 U.S.C. §1637 and does not state such a claim.

14 Plaintiff's TILA claim is time-barred as pled in the FAC. A
15 TILA violation occurs at the closing of the transaction, *Meyer*
16 *v. Ameriquest Mort. Co.*, 342 F.3d 899, 902 (9th Cir. 2003), and a
17 TILA claim for damages must be filed within one year of the
18 occurrence of the violation, 15 U.S.C. §1640(e). The subject loan
19 closed on or about June 25, 2008, and Plaintiff did not file the
20 initial complaint in this action until 2010. (Doc. 1). TILA's
21 rescision provision, which entails a three-year statute of
22 limitations, is not applicable to residential mortgage
23 transactions. 15 U.S.C. §1635(e)(1).

24 Finally, Plaintiff's claim for violation of California's False
25 Advertising statute, California Civil Code section 17500, fails to
26 provide Defendants fair notice of the nature of the claim.
27 Plaintiff's conclusory allegation that "Defendants fabricated facts
28 and figures that would show the plaintiff had the ability to repay

1 the subject loan" is fatally vague without identifying the date,
2 time, or speaker. To state a claim under section 17500, a
3 Plaintiff must establish that "members of the public are likely to
4 be deceived" by an entity's misleading statements. *E.g. In re*
5 *Tobacco II Cases*, 46 Cal. 4th 298, 311 (Cal. Ct. App. 2009). As
6 the complaint is devoid of what misleading or deceptive statements
7 were made to Plaintiff, Defendants do not have fair notice of the
8 nature of the claim.

9 Plaintiff's "predatory lending" claim is DISMISSED, with
10 prejudice.

11 **B. Second Claim for Relief: RESPA**

12 Plaintiff's second claim for relief alleges Defendants failed
13 to respond to a qualified written request in violation of RESPA.
14 With respect to Plaintiff's claim for violation of 12 U.S.C.
15 2605(e)(2), the complaint fails to alleges facts sufficient to
16 establish that Plaintiff actually sent a qualified written request
17 ("QWR") to any Defendant subject to RESPA's requirements. Further,
18 the FAC does not allege the purpose of the QWR Plaintiff allegedly
19 sent to "Defendants." Because the purpose of the QWR Plaintiff
20 sent is material to ascertaining the nature of the alleged RESPA
21 violation, *see, e.g., Patacsil v. Wilshire Credit Corp.*, 2010 U.S.
22 Dist. LEXIS 10414 * 12 (E.D. Cal. 2010) (distinguishing between QWR
23 related to loan origination from QWR related to servicing errors),
24 the FAC's conclusory, vague allegations do not provide Defendants
25 fair notice of Plaintiff's claim and do not comply with Rule 8.
26 Similarly, Plaintiff's vague, conclusory allegation that
27 "Defendants individually or collectively received kickbacks,
28 unearned fees, or a thing of value as part of the real estate

1 settlement" does not meet Rule 8's notice requirement.

2 With respect to Plaintiff's claim under 12 U.S.C. 2605(a), the
3 complaint fails to allege facts sufficient to establish that the
4 subject loan entailed assignment, sale, or transfer rights such
5 that the notice requirements of section 2605(a) applied to it.
6 Plaintiff's RESPA claims are dismissed, with prejudice.

7 **C. Third Claim for Relief: Unfair Competition Law Claims**

8 Plaintiff's third claim for relief alleges violation of
9 California Business and Professions Code 17200 and 17500,
10 California's Unfair Competition Law ("UCL").

11 The FAC does not allege facts supporting Plaintiff's claims
12 under California's UCL; instead, the complaint advances conclusory
13 allegations stating that "Defendants" generally extend loans to
14 "borrowers" without providing "sufficient, accurate, and
15 understandable" information. (FAC at 10). Plaintiff alleges
16 Defendants engaged in conduct that violates the "spirit" of various
17 state and federal statutes, however, the FAC does not allege
18 sufficient facts to support such allegations. Plaintiff's UCL
19 claim is DISMISSED, with prejudice.

20 **D. Fourth Claim for Relief: Conspiracy to Commit Fraud, Conversion**

21 Plaintiff's fourth claim for relief alleges conspiracy to
22 commit fraud and conversion. Federal Rule of Civil Procedure 9(b)
23 imposes an elevated pleading standard with respect to fraud claims.
24 Rule 9(b) provides:

25 In alleging fraud or mistake, a party must state with
26 particularity the circumstances constituting fraud or
27 mistake. Malice, intent, knowledge, and other conditions
of a person's mind may be alleged generally.

28 "To comply with Rule 9(b), allegations of fraud must be specific

1 enough to give defendants notice of the particular misconduct which
2 is alleged to constitute the fraud." *Swartz v. KPMG LLP*, 476 F.3d
3 756, 764 (9th Cir. 2007) (internal quotation marks omitted).
4 Allegations of fraud must include the "time, place, and specific
5 content of the false representations as well as the identities of
6 the parties to the misrepresentations." *Id.* (internal quotation
7 marks omitted). The "[a]verments of fraud must be accompanied by
8 the who, what, when, where, and how of the misconduct charged."
9 *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009)
10 (internal quotation marks omitted). A plaintiff alleging fraud
11 "must set forth more than the neutral facts necessary to identify
12 the transaction. The plaintiff must set forth what is false or
13 misleading about a statement, and why it is false." *Vess v.*
14 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).

15 The FAC's general allegations lack the particularity needed to
16 satisfy Rule 9. The FAC contains merely general allegations such
17 as "Defendants...knew that Plaintiff was not qualified to make
18 payments under the loan terms" but does not provide any supporting
19 facts. (FAC at 12). Plaintiff's conspiracy to commit fraud claim
20 related to conversion of Plaintiff's property is DISMISSED, with
21 prejudice.

22 **E. Fifth Claim for Relief: Conspiracy to Commit Fraud, MERS System**

23 Plaintiff's fifth claim for relief alleges a conspiracy to
24 commit fraud related to the MERS system. Plaintiff alleges that
25 Defendants conspired to create the MERS system in order to
26 facilitate the securitization of mortgages and to remove real
27 estate transactions from the public record. (FAC at 14-15).
28 Plaintiff's fifth claim for relief also includes a random reference

1 to a failed attempt at Plaintiff's loan modification. (FAC at 17).

2 Plaintiff's fifth claim for relief fails to meet the
3 particularity requirements of Rule 9 and is DISMISSED, with
4 prejudice.

5 **F. Sixth Claim for Relief: Unjust Enrichment**

6 Plaintiff's sixth claim for relief alleges unjust enrichment
7 based on allegedly unfair interest and fees associated with
8 Plaintiff's loan. However, the FAC fails to allege which
9 Defendants receive what monies and thus fails to provide fair
10 notice of the nature of Plaintiff's unjust enrichment claim.
11 Plaintiff's unjust enrichment claim is DISMISSED, with prejudice.

12 **G. Seventh Claim for Relief: Vacate and Set Aside Foreclosure**

13 Plaintiff's seventh claim for relief seeks to vacate and set
14 aside the foreclosure sale. However, Plaintiff fails to allege a
15 tender of indebtedness, which is a prerequisite to an action to set
16 aside a foreclosure sale effected under a deed of trust in
17 California. *E.g. Karlsen v. American Savings and Loan Assoc.*, 15
18 Cal. App. 3d 112, 117-18 (Cal. Ct. App. 1971). Further, the basis
19 for Plaintiff's claim is alleged violation of California Civil Code
20 section 2923.5, which does not provide the remedy Plaintiff
21 seeks—the sole remedy provided by section 2923.5 is additional time
22 to explore alternatives to foreclosure prior to its occurrence.
23 *Mabry v. Sup. Ct. Orange County*, 185 Cal.App.4th, 208, 235 (2010)
24 ("the only remedy provided [for a violation of §2923.5] is a
25 postponement of the sale before it happens."). Plaintiff's claim
26 is DISMISSED, with prejudice.

27 **H. Eighth Claim for Relief: Quiet Title**

28 Plaintiff's eighth claim for relief is for quiet title.

1 However, Plaintiff fails to allege a tender of indebtedness, which
2 is a prerequisite to an action for quiet title in California. *E.g.*
3 *Kelley v. Mortgage Electronic Registration*, 642 F. Supp. 2d 1048,
4 1057 (N.D. Cal. 2009). Plaintiff's claim is DISMISSED, with
5 prejudice.

6 **I. Ninth Cause of Action: Fraud**

7 Plaintiff's ninth cause of action alleges fraud in the
8 inducement of the subject loan. Plaintiff's ninth claim for relief
9 fails to meet the particularity requirements of Rule 9 and is
10 DISMISSED, with prejudice.

11 **J. Tenth Cause of Action: Cal. Civ. Code. §§ 1916.7, 1920, 1921**

12 Plaintiff's tenth cause of action asserts that Defendants
13 entered into an "illegal pooling agreement" in violation of
14 California Civil Code sections 1916.7, 1920 and 1921. The FAC
15 contains only a conclusory statement that Defendants have violated
16 California Civil Code sections 1916.7, 1920 and 1921 and does not
17 contain any supporting factual allegations. Rather, the facts pled
18 under the tenth cause of action concern whether or not MERS had
19 authority to act as a foreclosing beneficiary on the deed of trust.
20 (FAC at 20-21). Although there are no facts alleged under the
21 tenth cause of action establishing why MERS did not have standing,
22 it appears Plaintiff's argument is premised on the discredited
23 contention that a foreclosing entity must be in physical possession
24 of the note at the time of foreclosure. (See FAC at 4-5). Because
25 the allegations contained in the FAC do not provide fair notice of
26 the nature of Plaintiff's tenth cause of action, it is DISMISSED,
27 with prejudice.

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1 **K. Eleventh Cause of Action: Inspection and Accounting**

2 Plaintiff's eleventh cause of action is for inspection and
3 accounting. The FAC fails to plead the requisite elements of an
4 action for accounting under California law. See, e.g., *Teselle v.*
5 *McLoughlin*, 173 Cal. App. 4th 156, 179 (Cal. Ct. App. 2009) ("cause
6 of action for an accounting requires a showing that a relationship
7 exists between the plaintiff and defendant that requires an
8 accounting, and that some balance is due the plaintiff that can
9 only be ascertained by an accounting"). The FAC does not plead the
10 nature of the purported relationship between Plaintiff and each
11 Defendant, rather, the FAC simply makes the conclusory statement
12 that "Defendants" owe him an accounting. Further, Plaintiff's
13 claim for accounting appears to be based on the discredited
14 contention that the only "true sums" Plaintiff owes are to "the
15 true holder of the note." (FAC at 22). The FAC also references
16 RESPA and Plaintiff's alleged submission of a QWR in his accounting
17 claim, however, as discussed above, the FAC fails to plead
18 sufficient facts to give Defendants fair notice of the facts
19 underlying Plaintiff's purported QWR. Plaintiff's claim for
20 accounting is DISMISSED, with prejudice.

21 **L. Twelfth Cause of Action: Injunctive and Declaratory Relief**

22 Plaintiff's twelfth cause of action is for injunctive and
23 declaratory relief. As the FAC fails to properly plead any cause
24 of action, Plaintiff's claim for injunctive and declaratory relief
25 must be DISMISSED, with prejudice.

26 **ORDER**

27 For the reasons stated, IT IS ORDERED

28 1) Plaintiff's FAC is DISMISSED in its entirety, with

1 prejudice;

2 2) Defendants' Motion to Strike (Doc. 17) is MOOT;

3 3) Defendants shall submit a form of order consistent with
4 this Memorandum Decision within five (5) days following
5 electronic service of this decision.

6 IT IS SO ORDERED.

7 **Dated: December 10, 2010**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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