

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

**CHAD DILLON SANDRY,**  
  
**Plaintiff,**  
  
**v.**  
  
**FIRST FRANKLIN FINANCIAL**  
**CORP., et al.,**  
  
**Defendants.**

1:10-cv-01923-OWW-SKO

MEMORANDUM DECISION REGARDING  
DEFENDANTS' MOTION TO DISMISS  
FIRST AMENDED COMPLAINT (Doc.  
20).

**I. INTRODUCTION.**

Plaintiffs Chad Dillon Sandry and Melanie E. Seasholtz ("Plaintiffs") proceed with an action for damages and injunctive relief. On December 28, 2010, Plaintiffs filed a first amended complaint ("FAC").

Defendants First Franklin Financial Corp., Home Loan Services, Inc., and Mortgage Electronic Registration Systems, Inc. ("Defendants") filed a motion to dismiss the FAC on January 7, 2011. (Doc. 20). Defendants also filed a motion to strike portions of the FAC. (Doc. 22).

Plaintiffs filed opposition to Defendants' motions on February 1, 2011. (Docs. 29, 30). Defendants filed a reply on March 14, 2011. (Docs. 14, 15).

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1 910, 166 L.Ed.2d 798 (2007).

2 In deciding whether to grant a motion to dismiss, the court  
3 must accept as true all "well-pleaded factual allegations" in the  
4 pleading under attack. *Iqbal*, 129 S.Ct. at 1950. A court is not,  
5 however, "required to accept as true allegations that are merely  
6 conclusory, unwarranted deductions of fact, or unreasonable  
7 inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988  
8 (9th Cir.2001). "When ruling on a Rule 12(b)(6) motion to dismiss,  
9 if a district court considers evidence outside the pleadings, it  
10 must normally convert the 12(b)(6) motion into a Rule 56 motion for  
11 summary judgment, and it must give the nonmoving party an  
12 opportunity to respond." *United States v. Ritchie*, 342 F.3d 903,  
13 907 (9th Cir.2003). "A court may, however, consider certain  
14 materials-documents attached to the complaint, documents  
15 incorporated by reference in the complaint, or matters of judicial  
16 notice-without converting the motion to dismiss into a motion for  
17 summary judgment." *Id.* at 908.

#### 18 **IV. DISCUSSION.**

##### 19 **A. First Cause of Action: Deceit**

20 Plaintiffs' first cause of action asserts a claim under  
21 California Civil Code section 1572 for "deceit." Section 1572  
22 defines fraud, but it does not create a cause of action; rather  
23 California Civil Code section 1709 creates liability for fraudulent  
24 deceit. Cal. Civ. Code § 1709. The FAC's first cause of action  
25 mirrors the allegations of the original complaint's first cause of  
26 action for fraud. The memorandum decision dismissing the fraud  
27 claim pled in Plaintiffs' original complaint provides in part:

28 Federal Rule of Civil Procedure 9(b) imposes an elevated

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

20 The complaint fails to satisfy Rule 9(b)'s particularity  
21 requirement. The only allegations contained in the  
22 complaint that approach compliance with Rule 9 concern  
23 allegedly false representations made by Hogget, however,  
24 the complaint does not contain sufficient factual  
25 allegations to permit Hogget's statements to be  
26 attributed to Defendants.

27 (Doc. 17 at 5).

28 Rule 9(b) applies to claims that "sound in fraud" or are  
"grounded in fraud." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125  
(9th Cir. 2009). Plaintiffs' claim for deceit is indisputably  
subject to Rule 9(b), as it is based on an allegation of actual  
fraud. 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 (Cal. 1996). The memorandum decision dismissing  
Plaintiffs' original complaint advised Plaintiffs that allegations  
of fraud must include the "time, place, and specific content of the

1 false representations as well as the identities of the parties to  
2 the misrepresentations." *E.g., Swartz*, 476 F.3d at 764. The only  
3 individual identified in the FAC who made false statements is  
4 Hoggett. The FAC alleges Hoggett made the following  
5 misrepresentations: 1) Hoggett "informed Plaintiffs that he would  
6 get the 'best possible' loan for them;" and 2) "Hoggett, submitted  
7 a loan application to First Franklin containing information both  
8 knew was false."

9 Hoggett's statement that he would get Plaintiffs "the best  
10 loan possible," is not an actionable misrepresentation as currently  
11 pled. Expressions of opinion are not generally treated as  
12 representations of fact, and thus are not grounds for a  
13 misrepresentation cause of action. *E.g., Gentry v. Ebay, Inc.*, 99  
14 Cal. App. 4th 816, 835 (Cal. Ct. App. 2004); *see also Vega v.*  
15 *Jones, Day, Reavis & Pogue*, 121 Cal. App. 4th 282, 291 (Cal. Ct.  
16 App. 2004) (citation omitted) ("While expressions of professional  
17 opinion are sometimes treated as representations of fact, a 'casual  
18 expression of belief' is not similarly treated"). Hoggett's  
19 alleged statement about which loan would be "best" for Plaintiffs  
20 constitutes a representation of subjective value, an opinion, not  
21 a fact. *See Neu-Visions Sports v. Soren/McAdam/Bartells*, 86 Cal.  
22 App. 4th 303, 308 (Cal. Ct. App. 2003) ("Representations of value  
23 are opinions."). Even assuming *arguendo* Hoggett's statement of  
24 opinion is actionable, Plaintiffs do not plead justifiable reliance  
25 on Hoggett's statement or damages resulting from such reliance.

26 As to the "false information" submitted in Plaintiffs' loan  
27 application, Plaintiffs do not identify what information was false  
28 that Plaintiffs justifiably relied on or how Plaintiffs were

1 harmed. Nor are their facts alleged in the complaint sufficient to  
2 raise an inference that Defendants intended to induce Plaintiffs to  
3 accept the subject loan by making the alleged false statements  
4 contained in the loan application. See Cal. Civ. Code § 1709 ("One  
5 who willfully deceives another with intent to induce him to alter  
6 his position to his injury or risk, is liable for any damage which  
7 he thereby suffers"). As the complaint continues to be factually  
8 deficient, analysis of Defendants' statute of limitations and  
9 agency arguments is unnecessary. Plaintiffs' first cause of action  
10 is DISMISSED, with prejudice.

11 **B. Third Cause of Action: Negligence**

12 The third cause of action asserts negligence against First  
13 Franklin and Loan Review. To prove negligence, it must be  
14 demonstrated that the defendant owed a duty to the plaintiff, that  
15 the defendant breached that duty, and that the breach proximately  
16 caused the plaintiff's injuries. *E.g. Wiener v. Southcoast*  
17 *Childcare Centers, Inc.*, 32 Cal. 4th 1138, 1145 (2004). As  
18 previously noted in the dismissal of the negligence claim in  
19 Plaintiffs' original complaint, a financial institution generally  
20 owes no duty of care to a borrower when the institution's  
21 involvement in the loan transaction does not exceed the scope of  
22 its conventional role as a mere lender of money. *E.g. Nymark v.*  
23 *Heart Fed. Savings & Loan Assn.*, 231 Cal. App. 3d 1089, 1096 (Cal.  
24 Ct. App. 1991).

25 Plaintiffs allege that Defendants acted beyond the role of a  
26 traditional lender by committing various wrongful acts. Assuming  
27 *arguendo* that Plaintiffs' allegations are sufficient to establish  
28 that Defendants owed Plaintiffs a duty of care and breached such

1 duty, the complaint fails to allege that Defendants' breach  
2 proximately caused Plaintiffs any damages. The complaint  
3 references the "possibility of the loss of [Plaintiffs'] family  
4 residence," however, this speculative future injury was not  
5 actuated. The complaint does not allege facts sufficient to  
6 establish how Defendants caused Plaintiffs any damages.

7 As the complaint is factually deficient, analysis of  
8 Defendants' statute of limitations and agency arguments is  
9 unnecessary. Plaintiff's third cause of action is DISMISSED,  
10 without prejudice.

11 **C. Fifth Cause of Action: California's Unfair Competition Law**

12 Plaintiffs' fifth cause of action asserts claims under  
13 California Business and Professions Code § 17200 *et seq.*,  
14 California's Unfair Competition Law ("UCL"). The memorandum  
15 decision dismissing the UCL claim pled in Plaintiffs' original  
16 complaint provides:

17 The fifth cause of action asserted in the complaint is  
18 for violation of California's Unfair Competition Law  
19 (UCL). Plaintiffs' opposition asserts the following  
20 basis for the UCL claim: (1) Defendants violated the law  
21 by acting negligently, breaching their fiduciary duty,  
22 and engaging in fraud; (2) Defendants' agent, Hoggett,  
23 engaged in a scheme designed to deceive the public by  
24 assuring borrowers that the loans he was extending were  
25 the "best available on the market." (Opposition at 11).  
26 The complaint does not contain the factual allegations  
27 necessary to sustain any of the purported bases for  
28 Plaintiffs UCL claim.

24 (Doc. 17 at 9). The FAC suffers from the same deficiency.  
25 Plaintiffs' UCL claim is predicated in part on Plaintiffs'  
26 allegation of fraud, however, the FAC does not properly allege a  
27 claim for fraud for the reasons set forth above. Plaintiffs'  
28 negligence claim is also insufficient to support a UCL claim, as



1 the complaint does not allege damages proximately caused by any of  
2 the Defendants actions. Under the UCL, standing extends only to "a  
3 person who has suffered injury in fact and has lost money or  
4 property as a result of the unfair competition." *E.g., Kwikset*  
5 *Corp. v. Superior Court*, 51 Cal. 4th 310, 322 (Cal. 2011) (citation  
6 omitted).

7 **D. Remaining Claims**

8 Plaintiffs' remaining causes of action for civil conspiracy  
9 and declaratory relief do not provide independent basis for relief.  
10 Both causes of action are derivative of Plaintiffs' underlying  
11 substantive claims, none of which remain.

12 **E. Remand**

13 The FAC does not assert any federal claims, and Plaintiffs  
14 made no attempt to amend the deficient federal claims pled in the  
15 original complaint. As there are no federal claims remaining in  
16 this action, remand is appropriate under 28 U.S.C. § 1367, as there  
17 is no federal interest to justify the intervention of a federal  
18 court.

19 **ORDER**

20 For reasons stated, IT IS ORDERED:

- 21 1) Plaintiffs' complaint is DISMISSED in its entirety, without  
22 prejudice;
- 23 2) Defendants' Motion to Strike (Doc. 22) is MOOT;
- 24 3) Plaintiffs' action is REMANDED to the State Court, and  
25 4) Defendants shall submit a form of order consistent with  
26 this Memorandum Decision within five (5) days following  
27 electronic service of this decision.

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1 IT IS SO ORDERED.

2 **Dated:** April 19, 2011

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE

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