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 10 **FIRST FRANKLIN FINANCIAL CORPORATION;**
 11 **HOME LOAN SERVICES, INC. (sued erroneously as**
 12 **“Home Loan, Inc. dba First Franklin Loan Services”); and**
 13 **MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.**

14 **UNITED STATES DISTRICT COURT**
 15 **EASTERN DISTRICT OF CALIFORNIA**
 16 **FRESNO DIVISION**

17 **CHAD DILLON SANDRY and MELANIE**
 18 **ELIZABETH SEASHOLTZ,**

19 **Plaintiffs,**

20 **v.**

21 **FIRST FRANKLIN FINANCIAL CORP., an**
 22 **operational subsidiary of MLB & T Co., FSB;**
 23 **MORTGAGE ELECTRONIC REGISTRATION**
 24 **SYSTEMS, INC.; HOME LOAN, INC., dba FIRST**
 25 **FRANKLIN LOAN SERVICES; LOAN REVIEW**
 26 **INCORPORATED; and DOES 1 through 50,**
 27 **inclusive,**

28 **Defendants.**

Case No.: 1:10-cv-01923-OWW-SKO

Assigned to the Honorable Oliver W. Wanger

ORDER RE MOTION TO DISMISS
PLAINTIFFS’ FIRST AMENDED
COMPLAINT BY DEFENDANTS FIRST
FRANKLIN FINANCIAL CORPORATION,
HOME LOAN SERVICES, INC. AND
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.

Date: February 14, 2011
 Time: 10:00 a.m.
 Ctrm: 3

29 The Motion to Dismiss by defendants FIRST FRANKLIN FINANCIAL CORPORATION,
 30 HOME LOAN SERVICES, INC. (sued erroneously as “Home Loan, Inc. dba First Franklin Loan
 31 Services”), and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (collectively
 32 hereinafter as “Defendants”) the Complaint filed by Plaintiffs CHAD DILLON SANDRY and
 33 MELANIE ELIZABETH SEASHLOTZ (“Plaintiffs”) came on regularly for hearing on February 14,
 34 2011, at 10:00 a.m., in Courtroom 3 of the above-entitled Court. All appearances are noted on the
 35 record.

36 ///

1 The Court, having read and considered the moving and opposing papers filed in this matter,
2 as well as the oral argument of counsel, being fully advised, and good cause appearing, finds as
3 follows:

4 **I. INTRODUCTION**

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

8 Defendants First Franklin Financial Corp., Home Loan Services, Inc., and Mortgage
9 Electronic Registration Systems, Inc. (“Defendants”) filed a motion to dismiss the FAC on January
10 7, 2011. (Doc. 20). Defendants also filed a motion to strike portions of the FAC. (Doc. 22).

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

13 **II. FACTUAL BACKGROUND**

14 This action arises out of a loan Plaintiffs obtained for the purchase of their home in or about
15 2007 (“subject loan”). Plaintiffs first met with David Hoggett (“Hoggett”), an employee of
16 Loan Review. Hoggett told Plaintiff’s he would get “the best possible” loan for them. Hoggett
17 submitted a loan application to First Franklin. The loan application overstated the value of the
18 property by \$95,000.00; Plaintiffs were not aware of this falsification. The actual value of the
19 property was insufficient to qualify for the loan.

20 Plaintiffs allege that First Franklin and Loan Review had an agreement in place whereby
21 First Franklin would accept loans containing knowingly false information. Plaintiffs further allege
22 that Loan Review held itself out as First Franklin’s agent, and that First Franklin paid Loan Review
23 for leading Plaintiff’s into a loan they did not qualify for. Loan Review told Plaintiffs that it “dealt
24 directly with First Franklin and they would fund or approve the loan due to the relationship with
25 First Franklin.”

26 Plaintiffs allege that Defendants never explained the full terms of their loan, including but
27 not limited to the interest rate, how the rate would be calculated, what the payment schedule would
28 be, the risks and disadvantages of the loan, prepayment penalties, and other information. Plaintiffs

1 were rushed into signing the documents. Defendants failed to disclose that the loan was designed to
2 guarantee negative amortization if Plaintiffs followed the payment schedule.

3 **III. LEGAL STANDARD**

4 Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks sufficient facts to
5 support a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th
6 Cir. 1990). To sufficiently state a claim to relief and survive a 12(b) (6) motion, the pleading “does
7 not need detailed factual allegations” but the “[f]actual allegations must be enough to raise
8 a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.
9 Ct. 1955, 167 L.Ed.2d 929 (2007). Mere “labels and conclusions” or a “formulaic recitation of the
10 elements of a cause of action will not do.” *Id.* Rather, there must be “enough facts to state a claim
11 to relief that is plausible on its face.” *Id.* at 570. In other words, the “complaint must contain
12 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”
13 *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S. Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal
14 quotation marks omitted).

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

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

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

6 **IV. DISCUSSION**

7 **A. First Cause of Action: Deceit**

8 Plaintiffs’ first cause of action asserts a claim under California Civil Code section 1572 for
9 “deceit.” Section 1572 defines fraud, but it does not create a cause of action; rather California Civil
10 Code section 1709 creates liability for fraudulent deceit. Cal. Civ. Code § 1709. The FAC’s first
11 cause of action mirrors the allegations of the original complaint’s first cause of action for fraud. The
12 memorandum decision dismissing the fraud claim pled in Plaintiffs’ original complaint provides in
13 part:

14 Federal Rule of Civil Procedure 9(b) imposes an elevated pleading standard with respect to
15 fraud claims... "To comply with Rule 9(b), allegations of fraud must be specific enough to
16 give defendants notice of the particular misconduct which is alleged to constitute the fraud."
17 *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (internal quotation marks omitted).
18 Allegations of fraud must include the "time, place, and specific content of the false
19 representations as well as the identities of the parties to the misrepresentations." *Id.* (internal
20 quotation marks omitted). The "[a]verments of fraud must be accompanied by the who,
21 what, when, where, and how of the misconduct charged." *Kearns v. Ford Motor Co.*, 567
22 F.3d 1120, 1124 (9th Cir. 2009) (internal quotation marks omitted). A plaintiff alleging
23 fraud "must set forth more than the neutral facts necessary to identify the transaction. The
24 plaintiff must set forth what is false or misleading about a statement, and why it is false."
25 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). The complaint fails to
26 satisfy Rule 9(b)'s particularity requirement. The only allegations contained in the complaint
27 that approach compliance with Rule 9 concern allegedly false representations made by
28 Hogget, however, the complaint does not contain sufficient factual allegations to permit
Hogget's statements to be attributed to Defendants.

(Doc. 17 at 5).

24 Rule 9(b) applies to claims that "sound in fraud" or are "grounded in fraud." *Kearns v. Ford*
25 *Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). Plaintiffs’ claim for deceit is indisputably
26 subject to Rule 9(b), as it is based on an allegation of actual fraud. The elements of a California
27 fraud claim are: (1) misrepresentation (false representation, concealment or nondisclosure); (2)
28 knowledge of the falsity (or "scienter"); (3) intent to defraud, i.e., to induce reliance; (4) justifiable

1 reliance; and (5) resulting damage. *Lazar v. Superior Court*, 12 Cal.4th 631, 638 (Cal. 1996). The
2 memorandum decision dismissing Plaintiffs’ original complaint advised Plaintiffs that allegations
3 of fraud must include the "time, place, and specific content of the false representations as well as the
4 identities of the parties to the misrepresentations." *E.g., Swartz*, 476 F.3d at 764. The only
5 individual identified in the FAC who made false statements is Hoggett. The FAC alleges Hoggett
6 made the following misrepresentations: 1) Hoggett “informed Plaintiffs that he would get the ‘best
7 possible’ loan for them;” and 2) “Hoggett, submitted a loan application to First Franklin containing
8 information both knew was false.”

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

21 As to the “false information” submitted in Plaintiffs’ loan application, Plaintiffs do not
22 identify what information was false that Plaintiffs justifiably relied on or how Plaintiffs were
23 harmed. Nor are their facts alleged in the complaint sufficient to raise an inference that Defendants
24 intended to induce Plaintiffs to accept the subject loan by making the alleged false statements
25 contained in the loan application. *See* Cal. Civ. Code § 1709 (“One who willfully deceives another
26 with intent to induce him to alter his position to his injury or risk, is liable for any damage which
27 he thereby suffers”). As the complaint continues to be factually deficient, analysis of Defendants’
28 statute of limitations and agency arguments is unnecessary. Plaintiffs’ first cause of action

1 is DISMISSED, with prejudice.

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

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

11 Plaintiffs allege that Defendants acted beyond the role of a traditional lender by committing
12 various wrongful acts. Assuming *arguendo* that Plaintiffs' allegations are sufficient to establish
13 that Defendants owed Plaintiffs a duty of care and breached such duty, the complaint fails to allege
14 that Defendants' breach proximately caused Plaintiffs any damages. The complaint references the
15 "possibility of the loss of [Plaintiffs'] family residence," however, this speculative future injury was
16 not actuated. The complaint does not allege facts sufficient to establish how Defendants caused
17 Plaintiffs any damages.

18 As the complaint is factually deficient, analysis of Defendants' statute of limitations and
19 agency arguments is unnecessary. Plaintiff's third cause of action is DISMISSED, without
20 prejudice.

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

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

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

1 (Doc. 17 at 9). The FAC suffers from the same deficiency. Plaintiffs' UCL claim is predicated in
2 part on Plaintiffs' allegation of fraud, however, the FAC does not properly allege a claim for fraud
3 for the reasons set forth above. Plaintiffs' negligence claim is also insufficient to support a UCL
4 claim, as the complaint does not allege damages proximately caused by any of the Defendants
5 actions. Under the UCL, standing extends only to "a person who has suffered injury in fact and has
6 lost money or property as a result of the unfair competition." *E.g., Kwikset Corp. v. Superior Court*,
7 51 Cal. 4th 310, 322 (Cal. 2011) (citation omitted).

8 **D. Remaining Claims**

9 Plaintiffs' remaining causes of action for civil conspiracy and declaratory relief do not
10 provide independent basis for relief. 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 made no attempt to amend the
14 deficient federal claims pled in the original complaint. As there are no federal claims remaining in
15 this action, remand is appropriate under 28 U.S.C. § 1367, as there is no federal interest to justify the
16 intervention of a federal court.

17 **ORDER**

18 For reasons stated, IT IS ORDERED:

- 19 1) Plaintiffs' complaint is DISMISSED in its entirety, without prejudice;
20 2) Defendants' Motion to Strike (Doc. 22) is MOOT;
21 3) Plaintiff's action is REMANDED to the State Court.

22
23 IT IS SO ORDERED.

24 Dated: May 4, 2011

/s/ OLIVER W. WANGER
UNITED STATES DISTRICT COURT JUDGE