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

CONSTANCE CRAVER,
Plaintiff,

No. CIV S-09-1276-MCE-CMK

vs.

FINDINGS AND RECOMMENDATIONS

NATIONAL CITY BANK, et al.,
Defendants.

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Plaintiff, proceeding pro se, brings this action to “quiet title.” This case was originally filed in the Superior Court of California, County of Shasta. On May 8, 2009, Defendants removed the action to this court pursuant to 28 U.S.C. § 1441 *et seq.* Pending before the court is Defendant’s motion to dismiss (Doc. 8) and Defendant’s motion to strike (Doc. 10), to which Plaintiff failed to file any opposition. Instead, Plaintiff filed a motion to remand this matter back to the Shasta County Superior Court (Doc. 20), to which Defendant filed an opposition (Doc. 25), and Plaintiff filed a reply (Doc. 28).

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1 **I. Motion to Remand**

2 The court will first address Plaintiff's motion to remand, in order to address
3 whether this court has proper jurisdiction to rule on the other pending motions.

4 Plaintiff alleges Defendant improperly removed this action from the Superior
5 Court of Shasta County. She claims this action does not meet the requirements of diversity
6 jurisdiction under 28 U.S.C. § 1441(b) as the amount in controversy does not exceed \$75,000
7 because that she is only requesting \$53,293.23 in monetary damages plus whatever accumulates
8 during the pendency of this action, and all parties are citizens of California because Defendant
9 maintained a branch office in Redding, California until 2007. In addition, she claims this case
10 does not involve a federal question. Defendant, in response, argues that the amount in
11 controversy does exceed \$75,000 as Plaintiff is attempting to rescind a \$195,000 mortgage, it is a
12 citizen of Ohio, the location of it's main office, and this court's jurisdiction is based on diversity,
13 not federal question.

14 28 U.S.C. § 1332(a) provides that

15 district courts shall have original jurisdiction of all civil actions
16 where the matter in controversy exceeds the sum or value of
17 \$75,000, exclusive of interests and costs, and is between – (1)
 citizens of different States

18 Here, the undersigned agrees that the amount in controversy exceeds \$75,000. Although Plaintiff
19 argues that she is only asking for monetary damages, she has asked that

20 title to the subject property is vested in plaintiff, Constance Craver
21 alone as of 02/01/2009 and that the defendant, National City
22 Mortgage herein, and each of them, be declared to have no estate,
23 right, title or interest in the subject property and that said
 defendant, National City Mortgage, and each of them, be forever
 enjoined from asserting any estate, right, title or interest in the
 subject property adverse to Plaintiff herein.

24 (Compl. at 14). In addition, she is requesting legal title and possession be transferred to her. No
25 where in her prayer for relief does she ask for monetary damages; instead she is requesting the
26 court declare her to be the rightful holder of title to the property, free and clear of any mortgage

1 loan Defendant may claim to hold. In essence, she is asking for the full value of the loan, which
2 both parties seems to agree is roughly \$195,000. The value of that mortgage loan would bring
3 the amount in controversy within the jurisdiction of this court. In addition, Defendant has filed a
4 declaration by Richard Klein, Vice President and Senior Attorney for National City Bank, which
5 supports its claim that it is a citizen of Ohio. Plaintiff fails to refute this evidence.

6 Accordingly, the undersigned finds this court has diversity jurisdiction to hear this
7 matter, and will recommend the motion to remand be denied.

8 **II. Motion to Dismiss**

9 Defendant filed a motion to dismiss, or in the alternative for a more definite
10 statement, pursuant to Federal Rules of Civil Procedure 12(b)(6), (e). Defendant argues
11 Plaintiff's claims are unavailable, she fails to allege facts sufficient to state a claim, and are
12 vague and ambiguous.

13 **A. Plaintiff's Allegations**

14 Plaintiff's complaint does not clearly set out her claims. To the best of the court's
15 ability, her allegations are summarized below. Plaintiff titled this action as a complaint for quiet
16 title, and has listed her "causes of action" to be offset, rescission, fraud and misrepresentation,
17 actual damages, and declaratory relief.

18 In her complaint, Plaintiff, who contends she is a real estate salesperson, alleges
19 she "mistakenly believed that combining my two mortgages onto [sic] one, lower interest rate
20 mortgage would help me to pay off my home faster." (Compl. at 4). Plaintiff states that she first
21 approached her bank in order to refinance her mortgage, but after she was rejected, she was
22 referred to a mortgage broker. She claims that on or about February 14, 2007, she and Defendant
23 entered into a written contract wherein she agreed to refinance her property in the amount of
24 \$195,000 at an interest rate of 6.375% APR. Pursuant to that written contract, Defendant paid
25 off Plaintiff's first mortgage and her equity line of credit, for a combined total of \$186,314.15.
26 Included in this new loan were "payoffs in excess amounts to a second mortgage broker that I

1 was unaware of at the time.” (Compl. at 3). There were also closing costs and payoff fees in the
2 amount of \$8,685.85, which were included in the principle of the new loan. She discovered, two
3 years later (while studying the requirements for the California broker’s exam), that it would take
4 her approximately three years and four months, at a cost of over \$50,000 in payments (principle
5 and interest), to bring her principal balance back down to the original amount (\$186,314.15).

6 She argues that after two years of dedicated payments, having paid Defendant a
7 total of \$36,210.48, her loan balance is still at \$190,318.92. The total she paid in that two year
8 period included \$22,843.55 in interest, \$4,681.08 in principal, and \$8,685.85 in closing costs and
9 fees. Based on these figures, she has determined that “this loan had no Verifiable Benefit for me,
10 unbeknownst to me at the time because, at that time, I did not know what was done to me or who
11 I was dealing with.” (Compl. at 4).

12 She claims that she has made payments for two years, under the terms of the
13 contract, until February 1, 2009, when she “deliberately redirected my family’s income towards
14 paying off a line of credit” which was then in excess of \$11,000. (Compl. at 3). Plaintiff claims
15 she discovered the basis for this action on or about October 31, 2008. Upon discovery of her
16 alleged injustice, she claims she contacted Defendant in order to rectify the situation.

17 Plaintiff further alleges that upon reviewing her loan documents, she discovered
18 “TILA violations” (presumably referring to the federal Truth in Lending Act, 15 U.S.C. § 1601 *et*
19 *seq.* (“TILA”)) and sent a Notice of Rescission and a Qualified Written Request on January 26,
20 2009. She does not specify what violations she discovered. Instead she make the conclusory
21 statement that “[w]ithin those documents, I found many violations and one gross miscalculation
22 about our income.” (Compl. at 5). She also sent what appears to be a settlement demand to
23 Defendant, for the amount of \$47,210.48 (which apparently includes what she believes are her
24 damages from the increased mortgage amount).

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1 She then alleges that the new loan was based on inaccurate income amounts, and
2 that her “debt-to-income ratio was extremely high for this loan.” (Compl. at 6). While she
3 claims she provided pay stubs and W2's, the loan application incorrectly stated an income of
4 \$4,200 per month, when her actual income was only \$2,500 per month, which was supported by
5 the pay stubs and W2's she provided to the bank and mortgage broker. She claims that she did
6 not sign most of the paper work until after the close of escrow. Specifically, she claims that
7 “[o]nly a briefly typed loan application was signed 6 days after closing and it was the only
8 signature that we put to paper, concerning this number.” (Compl. at 6). She further alleges that
9 Defendant “either knowingly or incompetently received false information that they neglected to
10 verify.” (Compl. at 12).

11 **B. Standards**

12 In considering a motion to dismiss, the court must accept all allegations of
13 material fact in the complaint as true. See Erickson v. Pardus, 551 U.S. 89, 93-94 (2007). The
14 court must also construe the alleged facts in the light most favorable to the plaintiff. See Scheuer
15 v. Rhodes, 416 U.S. 232, 236 (1974); see also Hospital Bldg. Co. v. Rex Hospital Trustees, 425
16 U.S. 738, 740 (1976); Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam). All
17 ambiguities or doubts must also be resolved in the plaintiff's favor. See Jenkins v. McKeithen,
18 395 U.S. 411, 421 (1969). However, legally conclusory statements, not supported by actual
19 factual allegations, need not be accepted. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50
20 (2009). In addition, pro se pleadings are held to a less stringent standard than those drafted by
21 lawyers. See Haines v. Kerner, 404 U.S. 519, 520 (1972).

22 Rule 8(a)(2) requires only “a short and plain statement of the claim showing that
23 the pleader is entitled to relief” in order to “give the defendant fair notice of what the . . . claim is
24 and the grounds upon which it rests.” Bell Atl. Corp v. Twombly, 550 U.S. 544, 555 (2007)
25 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). However, in order to survive dismissal for
26 failure to state a claim under Rule 12(b)(6), a complaint must contain more than “a formulaic

1 recitation of the elements of a cause of action;” it must contain factual allegations sufficient “to
2 raise a right to relief above the speculative level.” Id. at 555-56. The complaint must contain
3 “enough facts to state a claim to relief that is plausible on its face.” Id. at 570. “A claim has
4 facial plausibility when the plaintiff pleads factual content that allows the court to draw the
5 reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 129 S. Ct. at
6 1949. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more
7 than a sheer possibility that a defendant has acted unlawfully.” Id. (quoting Bell Atl. Corp., 550
8 U.S. at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s
9 liability, it ‘stops short of the line between possibility and plausibility for entitlement to relief.”
10 Id. (quoting Bell Atl. Corp., 550 U.S. at 557).

11 To determine whether a complaint states a claim upon which relief can be granted,
12 the court generally may not consider materials outside the complaint and pleadings. See Cooper
13 v. Pickett, 137 F.3d 616, 622 (9th Cir. 1998); Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir.
14 1994). The court may, however, consider: (1) documents whose contents are alleged in or
15 attached to the complaint and whose authenticity no party questions, see Branch, 14 F.3d at 454;
16 (2) documents whose authenticity is not in question, and upon which the complaint necessarily
17 relies, but which are not attached to the complaint, see Lee v. City of Los Angeles, 250 F.3d 668,
18 688 (9th Cir. 2001); and (3) documents and materials of which the court may take judicial notice,
19 see Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994).

20 Finally, leave to amend must be granted “[u]nless it is absolutely clear that no
21 amendment can cure the defects.” Lucas v. Dep’t of Corr., 66 F.3d 245, 248 (9th Cir. 1995) (per
22 curiam); see also Lopez v. Smith, 203 F.3d 1122, 1126 (9th Cir. 2000) (en banc).

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1 **C. Discussion**

2 Plaintiff’s complaint attempts to set forth several “causes of action.” As
3 Defendant contends, several of Plaintiff’s “causes of action” are actually requests for remedies,
4 and others are more properly used as defenses not as affirmative claims.¹ Reading the complaint
5 as broadly as possible, and in the light most favorable to the Plaintiff, it appears Plaintiff is
6 attempting to set forth claims for fraud and violation of TILA.

7 1. Fraud

8 The elements of a California fraud claim are: (1) misrepresentation (false
9 representation, concealment or nondisclosure); (2) knowledge of the falsity (or “scienter”); (3)
10 intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. Lazar
11 v. Superior Court, 49 Cal. Rptr. 2d 377, 380-81 (Cal. 1996). In addition, Federal Rule of Civil
12 Procedure 9(b) requires that “the circumstances constituting fraud or mistake shall be stated with
13 particularity.” This heightened pleading standard “requires a pleader of fraud to detail with
14 particularity the time, place, and manner of each act of fraud, plus the role of each defendant in
15 each scheme.” Lancaster Cmty. Hosp. v. Antelope Valley Dist., 940 F.2d 397, 405 (9th Cir.
16 1991). Thus, “allegations of fraud must be specific enough to give defendants notice of the
17 particular misconduct which is alleged to constitute the fraud charged so that they can defend
18 against the charge and not just deny that they have done anything wrong.” Bly-Magee v.
19 California, 236 F.3d 1014, 1019 (9th Cir. 2001) (citation and internal quotations omitted).

20 Rule 9(b)’s heightened pleading standard “is not an invitation to disregard Rule
21 8's requirement of simplicity, directness, and clarity” and “has among its purposes the avoidance
22 of unnecessary discovery.” McHenry v. Renne, 84 F.3d 1172, 1178 (9th Cir. 1996). “A pleading
23 is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the

24 ¹ Such “causes of action” include offset, rescission, actual damages and declaratory
25 relief. Rescission, damages and declaratory relief are the remedies she is requesting, and offset is
26 more properly used as a defense or counterclaim. See Steinmeyer v. Warner Cons. Corp., 116
Cal. Rptr. 57, 59-60 (Cal. App. 1974), Cal. Civ. Proc. Code § 431.70.

1 defendant can prepare an adequate answer from the allegations.” Neubronner v. Milken, 6 F.3d
2 666, 671-672 (9th Cir. 1993) (internal quotations omitted; citing Gottreich v. San Francisco Inv.
3 Corp., 552 F.2d 866, 866 (9th Cir. 1997)). The Ninth Circuit Court of Appeals has explained:

4 Rule 9(b) requires particularized allegations of the circumstances
5 *constituting* fraud. The time, place and content of an alleged
6 misrepresentation may identify the statement or the omission
7 complained of, but these circumstances do not “constitute” fraud.
8 The statement in question must be false to be fraudulent.
9 Accordingly, our cases have consistently required that
10 circumstances indicating falseness be set forth. . . . [W]e [have]
11 observed that plaintiff must include statements regarding the time,
12 place, and *nature* of the alleged fraudulent activities, and that
13 “mere conclusory allegations of fraud are insufficient.” . . . The
14 plaintiff must set forth what is false or misleading about a
15 statement, and why it is false. In other words, the plaintiff must set
16 forth an explanation as to why the statement or omission
17 complained of was false or misleading. . . . In certain cases, to be
18 sure, the requisite particularity might be supplied with great
19 simplicity.

20 In Re Glenfed, Inc. Sec. Litig., 42 F.3d 1541, 1547-1548 (9th Cir. 1994) (en banc) (italics in
21 original) *superseded by statute on other grounds as stated in* Marksman Partners, L.P. v. Chantal
22 Pharm. Corp., 927 F. Supp. 1297 (C.D. Cal. 1996); *see* Cooper v. Pickett, 137 F.3d 616, 627 (9th
23 Cir. 1997) (“fraud allegations must be accompanied by “the who, what, when, where, and how”
24 of the misconduct charged).

25 Here, Defendant argues Plaintiff’s complaint is insufficient to state a claim for
26 fraud. Specifically, Defendant argues that while Plaintiff alleges her debt-to-income ratio in the
loan documents was inaccurate, and misrepresented Plaintiff’s actual income, she fails to make
any allegations that Defendant prepared or had any control over those false and inaccurate
documents. In addition, Defendant points out that while Plaintiff alleges the documents
contained false and inaccurate information, and she was told by some unidentified person and/or
entity that the documents were just a formality, she admits that she signed the documents which
were submitted to Defendant.

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1 The undersigned agrees. Plaintiff fails to allege any actual wrong doing by
2 Defendant. To the extent Plaintiff claims Defendant relied on false information contained in the
3 loan documents, she fails to allege Defendant was somehow responsible for including that false
4 information in the documents. She does allege that Defendant knew, or should have known, that
5 the amount of income included in the loan documents was inflated because she also included pay
6 stubs and W2s, she fails to explain how knowledge of an inconsistency between the loan
7 documents and the pay stubs/W2s constitutes fraud. To the extent she claims she did not receive
8 the loan she had requested, she fails to explain how the loan she did receive was not what she
9 requested. She implies that there were additional fees included in the loan which she was not
10 made aware of, but she fails to specify how Defendant fraudulently included these additional
11 fees.

12 Based on the facts alleged in her complaint, it appears to the undersigned that
13 Plaintiff voluntarily sought to refinance her mortgages in one mortgage with a lower, fixed
14 interest rate. She approached her bank, but was not able to secure a new mortgage based on her
15 self-employed status. Thus, she was referred to an unknown (and unnamed) mortgage broker,
16 who successfully assisted her in completing her goal of refinancing her mortgage into a lower
17 interest mortgage (presumably with a lower monthly payment than she had with her previous first
18 and second). However, she was not aware of how much the refinancing would cost her in the
19 short term. While the court is sympathetic to Plaintiff's financial difficulties, it appears that she
20 received what she bargained for, a lower interest consolidated loan. It is hard for the court to
21 understand how a licensed real estate agent was unable to understand that refinancing a mortgage
22 would not involve significant costs which would not be recouped in the short term.

23 While the undersigned believes it will be difficult, based on what is before the
24 court presently, for Plaintiff to amend her complaint to state a claim, leave to amend is to be
25 freely given. Therefore, the court should allow Plaintiff an opportunity to amend her complaint
26 to see if she can allege sufficient facts to state claim.

1 2. Truth in Lending Act Violations

2 Plaintiff also appears to claim that Defendant somehow violated the TILA. These
3 allegations are unclear. Plaintiff simply makes conclusory statements that while reviewing her
4 documents, she discovered “many violations.” (Compl. at 5). As discussed above, conclusory
5 allegations are insufficient to state a claim. Plaintiff fails to provide any facts as to what the
6 violations were, or who violated TILA. She therefore fails to state a claim for violation of TILA.

7 A lender's violation of TILA allows the borrower to seek damages or to rescind a
8 consumer loan secured by the borrower's primary dwelling. There is a one-year statute of
9 limitations applicable to TILA damages claims. See 15 U.S.C. § 1640(e). It appears to the
10 undersigned that the limitations period in this case accrued at the time Plaintiff signed the loan
11 documents, in February 2007. See Meyer v. Ameriquest Mortg. Co., 342 F.3d 899, 902 (9th
12 Cir.2003). Accordingly, it would appear that Plaintiff's claims for damages under TILA, barring
13 some unforeseen grounds for equitable tolling, are now time-barred. See King v. California, 784
14 F.2d 910, 915 (1986). However, Plaintiff has also requested rescission.

15 As to plaintiff's claim for rescission based violations of TILA, “an obligor’s right
16 of rescission shall expire three years after the date of consummation of the transaction or upon
17 the sale of the property, whichever occurs first[.]” 15 U.S.C. § 1635(f). Therefore, assuming
18 Plaintiff is able to state a claim for violation of TILA, it does not appear at this time that her
19 claims for rescission would be barred by the statute of limitations.

20 As such, Plaintiff claims for violation of TILA should be dismissed. However, it
21 does not appear impossible for Plaintiff to amend her complaint to allege sufficient facts to state
22 a claim.

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1 **III. Motion to Strike**

2 Defendant also requests this court strike several paragraphs of Plaintiff's
3 complaint, in the event the court were to deny Defendant's motion to dismiss. As the
4 undersigned is recommending granting the motion to dismiss, the motion to strike is moot. If the
5 undersigned's recommendation is not adopted, the court will address the motion to strike.

6 **VI. Conclusion**

7 Plaintiff's complaint fails to allege with any specificity how Defendant's actions
8 constituted fraud and how the TILA was violated. As such, Defendant's motion to dismiss
9 should be granted. However, it does not appear impossible for Plaintiff to amend her complaint
10 to allege sufficient facts to state a claim. Plaintiff should, therefore, be given an opportunity to
11 file an amended complaint.

12 Plaintiff is informed that, as a general rule, an amended complaint supersedes the
13 original complaint. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992). Thus,
14 following dismissal with leave to amend, all claims alleged in the original complaint which are
15 not alleged in the amended complaint are waived. See King v. Atiyeh, 814 F.2d 565, 567 (9th
16 Cir. 1987). Therefore, if plaintiff amends the complaint, the court cannot refer to the prior
17 pleading in order to make plaintiff's amended complaint complete. See Local Rule 15-220. An
18 amended complaint must be complete in itself without reference to any prior pleading. See id.

19 Based on the foregoing, the undersigned recommends that

- 20 1. Plaintiff's motion to remand (Doc. 20) be denied;
- 21 2. Defendant's motion to dismiss Plaintiff's complaint (Doc. 8) be granted
22 with leave to amend;
- 23 3. Plaintiff be allowed, but not required to, file an amended complaint;
- 24 4. If no amended complaint is filed within the time provided, this case be
25 dismissed without leave to amend; and

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