

1
2
3
4
5
6
7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 JAMES SALONDAKA,

12 Plaintiff,

13 v.

14 COUNTRYWIDE FINANCIAL)
15 CORPORATION, a business entity)
16 form unknown; COUNTRYWIDE HOME)
17 LOANS, INC., a business entity)
18 form unknown; all persons or)
19 entities unknown claiming any)
20 legal or equitable right, title)
21 estate, lien or interest in the)
22 property described in this)
23 Complaint adverse to)
24 Plaintiff's title thereto, and)
25 DOES 1 through 25, inclusive,

26 Defendants.
27
28

2:09-CV-01550-JAM-JEM

ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS

29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

This matter is before the Court on Countrywide Financial Corporation ("CFC") and Countrywide Home Loans, Inc. ("CHL") (collectively "Defendants'"), motions to dismiss James Salondaka's ("Plaintiff's") Complaint pursuant to Federal Rules

1 of Civil Procedure 9 and 12(b)(6), and Defendants' alternative
2 motion to strike portions of the Complaint pursuant to Federal
3 Rule of Civil Procedure 12(f) ("Motion to Strike"). Plaintiff
4 opposes the Motions.
5

6 Plaintiff filed his Complaint on October 14, 2008 in
7 Superior Court alleging sixteen state and federal causes of
8 action related to the foreclosure of a property located at 3871
9 Iron Wheel Court, Rocklin, CA 95765 ("Subject Property"). See
10 Complaint, Docket # 2, Exh. A. The action was removed to this
11 Court on June 5, 2009. Notice of Removal, Docket # 2.
12

13 For the following reasons, Defendant's Motion to
14 Dismiss the Complaint is GRANTED.¹
15

16 FACTUAL AND PROCEDURAL BACKGROUND

17 Plaintiff obtained a loan from defendant CHL to finance the
18 purchase of the Subject Property in March 2006. Complaint,
19 Docket # 2, Exh. A, ¶ 13. Plaintiff is Trustor of a Deed of
20 Trust executed on June 19, 2006. Id. at ¶ 1. During the
21 application process for the loan, CHL allegedly inflated
22 Plaintiff's income to place him in an unaffordable loan, failed
23 to provide a good faith estimate of the cost of the loan, failed
24 to provide certain disclosures concerning adjustable rate
25
26
27

28 ¹ This motion was determined to be suitable for decision
without oral argument. E.D. Cal. L.R. 78-230(h).

1 mortgages, and misinformed Plaintiff about the interest rate on
2 the mortgage. Id. at ¶¶ 14-17.

3 Plaintiff defaulted on the loan and Defendants caused to be
4 recorded a Notice of Default with the Placer County Recorder's
5 Office in or around June 2008. Id. at ¶ 19. A sale of the
6 property was scheduled for October 15, 2008. Id. at ¶¶ 19, 25.
7 Plaintiff sent Defendants a letter on October 13, 2008
8 purporting to cancel the loan agreement pursuant to 15 U.S.C. §
9 1635, Regulation Z § 226.23. Id. at ¶ 21.

10 Plaintiff filed this action alleging various fraud claims,
11 breach of fiduciary duty, and negligence, as well as alleging
12 violations of the Truth in Lending Act ("TILA"), the implied
13 covenant of good faith and fair dealing ("Implied Covenant"),
14 the Real Estate Settlement Procedures Act ("RESPA"), and
15 California Civil Code §§ 1916.7, 1920 and 1921. Id. at ¶¶ 28-
16 34, 35-42, 43-46, 47-54. 55-109, 110-116, and 117-125.

17 Defendants now file these motions seeking to dismiss the
18 Complaint for failure to state a claim and for failure to state
19 fraud claims with the required particularity, and also seeking
20 to strike portions of the Complaint as immaterial. Plaintiff
21 opposes both motions, but does not challenge a number of
22 Defendants' arguments. Plaintiff does not challenge the motion
23 to dismiss the claims for declaratory relief and breach of the
24 implied covenant, but requests leave to amend both claims.

1 Opposition, Docket # 9, ¶¶ C and D. Plaintiff also requests
2 leave to amend the quiet title claim and agrees to remove
3 allegations related to punitive damages. Id. at ¶¶ I and J.
4

5 OPINION

6 A party may move to dismiss an action for failure to state
7 a claim upon which relief can be granted pursuant to Federal
8 Rule of Civil Procedure 12(b)(6). In considering a motion to
9 dismiss, the court must accept the allegations in the complaint
10 as true and draw all reasonable inferences in favor of the
11 plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1975),
12 overruled on other grounds by Davis v. Scherer, 468 U.S. 183
13 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions that
14 are mere "legal conclusions," however, are not entitled to the
15 assumption of truth. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1950
16 (2009), citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
17 (2007). To survive a motion to dismiss, a plaintiff needs to
18 plead "enough facts to state a claim to relief that is plausible
19 on its face." Twombly, 550 U.S. at 570. Dismissal is
20 appropriate where the plaintiff fails to state a claim
21 supportable by a cognizable legal theory. Balistreri v.
22 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).
23
24
25

26 "In alleging fraud or mistake, a party must state with
27 particularity the circumstances constituting fraud or mistake.
28 Malice, intent, knowledge, and other conditions of a person's

1 mind may be alleged generally." Fed. R. Civ. P. 9(b). A claim
2 of statutory violation that is "grounded in fraud" must also
3 satisfy the particularity requirement of Rule 9(b). Vess v.
4 Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-04 (9th Cir. 2003). A
5 claim is "grounded in fraud" where a plaintiff alleges a course
6 of fraudulent conduct and relies on that course of conduct to
7 lay the basis of a claim. Id.

8
9 In general, a court may not consider materials other than
10 the facts alleged in the complaint when ruling on a motion to
11 dismiss. Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir.
12 1996). The court may, however, consider additional materials if
13 the plaintiff has alleged their existence in the complaint and
14 if their authenticity is not disputed. See Branch v. Tunnell,
15 14 F.3d 449, 454 (9th Cir. 1994), overruled on other grounds by
16 Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir.
17 2002). Here, Plaintiff has attached to his Complaint as Exhibit
18 A his letter purporting to cancel the loan. Complaint, Docket #
19 2, Exh. A. Defendants have not questioned the validity of this
20 document. Accordingly, the Court will consider this document in
21 deciding Defendants' motions.

22
23 Upon granting a motion to dismiss, a court has discretion
24 to allow leave to amend the complaint pursuant to Federal Rule
25 of Civil Procedure 15(a). "Absent prejudice, or a strong
26 showing of any [other relevant] factor[], there exists a
27
28

1 presumption under Rule 15(a) in favor of granting leave to
2 amend." Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d
3 1048, 1052 (9th Cir. 2003). "Dismissal with prejudice and
4 without leave to amend is not appropriate unless it is clear
5 . . . that the complaint could not be saved by amendment." Id.
6 Accordingly, a court should grant leave to amend the Complaint
7 unless the futility of amendment warrants dismissing a claim
8 with prejudice.
9

10
11 Plaintiff does not challenge Defendants' Motion to Dismiss
12 with respect to his First, Second, and Sixteenth Causes of
13 Action but requests leave to amend. Accordingly, those causes
14 of action will be dismissed without prejudice.
15

16
17 TILA, Third Cause of Action

18 An action for damages under TILA must be brought "within
19 one year from the date of the occurrence of the violation." 15
20 U.S.C. § 1640(e). A TILA violation occurs on "the date of
21 consummation of the transaction," King v. California, 784 F.2d
22 910, 915 (9th Cir. 1986), and "consummation" means "the time
23 that a consumer becomes contractually obligated on a credit
24 transaction," 12 C.F.R. § 226(a)(13). The doctrine of equitable
25 tolling, however, may "suspend the limitations period until the
26 borrower discovers or had reasonable opportunity to discover the
27
28

1 fraud or nondisclosures that form the basis of the TILA action."
2 King, 784 F.2d at 915.

3 Here, Plaintiff consummated his loan in March 2006, but his
4 state-court complaint was not filed until October 14, 2008, over
5 one year later. Plaintiff's Complaint, moreover, does not
6 contain any relevant dates or similar information to provide a
7 basis from which to allege equitable tolling. Rather, Plaintiff
8 states in conclusory fashion that, "Any and all statute(s) of
9 limitations relating to disclosure and notices required pursuant
10 to 15 U.S.C. Section 1601, et seq. were equitably tolled due to
11 Defendants' failure to effectively provide the required
12 disclosures and notices." Complaint, Docket # 2, Exh. A, ¶ 38;
13 see also Ashcroft v. Iqbal, 129 S.Ct. 1937, 1950 (2009)
14 ("Threadbare recitals of the elements of a cause of action,
15 supported by mere conclusory statements, do not suffice.").
16 Accordingly, the Court grants Defendants' motion to dismiss
17 Plaintiff's TILA claim for damages without prejudice.
18

19 Plaintiff's claim under TILA for rescission also fails
20 because it pertains to a "residential mortgage transaction" as
21 that term is defined by TILA. See 15 U.S.C. § 1602(w) ("The term
22 'residential mortgage transaction' means a transaction in which
23 a mortgage, deed of trust, purchase money security interest
24 arising under an installment sales contract, or equivalent
25 consensual security interest is created or retained against the
26
27
28

1 consumer's dwelling to finance the acquisition or initial
2 construction of such dwelling.").

3 Under TILA, the right to rescind does not extend to
4 residential mortgage transactions such as this one. 12 C.F.R. §
5 226.23(f); see also 15 U.S.C. § 1635(e)(1) (providing that the
6 "right of rescission" for consumer credit transactions "does not
7 apply to . . . a residential mortgage transaction as defined in
8 section 1602(w)"). Accordingly, because the loan obtained to
9 purchase the Subject Property is expressly exempted from TILA's
10 rescission provision, the Court must dismiss Plaintiff's claim
11 for rescission under TILA with prejudice.
12
13
14

15 RESPA, Fourth Cause of Action

16 Plaintiff claims that Defendants failed to provide him with a
17 Good Faith Estimate as required by 12 U.S.C. § 2604(c).
18 However, courts are clear that there exists no private right of
19 action for violation of 12 U.S.C. 2604(c). See Collins v. FMHA-
20 USDA, 105 F.3d 1366, 1368 (11th Cir. 1997) ("there is no private
21 civil action for a violation of 12 U.S.C. § 2604(c)").
22 Accordingly, this cause of action is dismissed with prejudice.
23
24

25 California Civil Code §§ 1916.7, 1920, and 1921, Fifth and Sixth 26 Causes of Action

27 In his fifth cause of action, Plaintiff claims that
28 Defendants violated California Civil Code Sections 1920 and 1921

1 by "failing to meet the requirements" of those sections.
2 Plaintiff fails to sufficiently allege any facts to indicate the
3 nature of the violations. See Iqbal, 129 S.Ct. at 1950
4 ("Threadbare recitals of the elements of a cause of action,
5 supported by mere conclusory statements, do not suffice.").
6 Accordingly, Plaintiff's fifth cause of action is dismissed
7 without prejudice.
8

9 Furthermore, Defendants contend that the Alternative
10 Mortgage Transaction Parity Act (AMTPA) preempts all of
11 Plaintiff's state law statutory claims, including his claim
12 under California Civil Code § 1917.6. 12 C.F.R. 560.220.
13 "Congress enacted the AMTPA with the intention of permitting
14 non-federally chartered housing creditors to engage in
15 alternative mortgage financing under federal law." Hafiz v.
16 Greenpoint Mortgage Funding, Inc., No. 09-01729, 2009 U.S. Dist.
17 LEXIS 60818, at *18 (N.D. Cal. July 15, 2009) (citing 12 U.S.C.
18 §§ 3801-3802) (finding that AMTPA preempts disclosure
19 requirement in California Civil Code § 1917.6). Plaintiff has
20 failed to allege that his loan originated pursuant to Cal. Civil
21 Code § 1917.6 as opposed to AMPTA. See Pagtalunan v. Reunion
22 Mortg., Inc., No. 09-00162, 2009 U.S. Dist. LEXIS 34811, at * 12
23 (N.D. Cal. Apr. 8, 2009) ("Defendants note that the majority of
24 adjustable rate mortgage loans in California originate under the
25 federal Alternative Mortgage Transaction Parity Act, ("AMTPA"),
26
27
28

1 12 U.S.C. § 3803(b), which preempts state laws. Plaintiff fails
2 to allege facts showing that his loan originated under state
3 laws rather than under AMTPA.") (internal citation omitted).
4 Accordingly, Plaintiff's sixth cause of action is dismissed
5 without prejudice.
6

7 Fraud Claims, Seventh through Twelfth and Fourteenth Causes of
8 Action²

9 "In all averments of fraud or mistake, the circumstances
10 constituting fraud or mistake shall be stated with
11 particularity. Malice, intent, knowledge and other condition of
12 mind of a person may be averred generally." Fed. R. Civ. Proc.
13 9(b). A claim of fraud must have the following elements: "(a) a
14 misrepresentation (false representation, concealment, or
15 nondisclosure); (b) knowledge of falsity (or 'scienter'); (c)
16 intent to defraud, i.e., to induce reliance; (d) justifiable
17 reliance; and (e) resulting damage." In re Estate of Young, 160
18 Cal. App. 4th 62, 79 (2008) (quoting Lazar v. Superior Court, 12
19 Cal. 4th 631, 638 (1996)) (internal quotation marks omitted).
20 The Ninth Circuit has "interpreted Rule 9(b) to mean that the
21 pleader must state the time, place, and specific content of the
22 false representations as well as the identities of the parties
23
24
25
26
27

28 ² Plaintiff mistakenly included two causes of action
numbered "12" and omitted a cause of action "13."

1 to the misrepresentation." Alan Neuman Productions, Inc. v.
2 Albright, 862 F.2d 1388, 1393 (9th Cir. 1988).

3 Plaintiff has not alleged fraud with the required
4 particularity to state a plausible claim for relief.
5 Specifically, Plaintiff fails to mention any times, places, or
6 identities of parties engaged in the alleged fraud. In his
7 Opposition, Plaintiff relies on Moore v. Kayport Package
8 Express, 885 F.2d 531, 540 (9th Cir. 1989) for the proposition
9 that Rule 9(b) "may be relaxed as to matters within the opposing
10 party's knowledge." However, in this instance, all of the
11 relevant alleged misrepresentations were made directly to
12 Plaintiff. Accordingly, Plaintiff's fraud claims are dismissed
13 without prejudice.

14
15
16
17
18 Breach of Fiduciary Duty and Negligence, Fourteenth and
19 Fifteenth Causes of Action

20 "The elements of a cause of action for breach of
21 fiduciary duty are: 1) the existence of a fiduciary duty; 2) a
22 breach of the fiduciary duty; and 3) resulting damage."
23 Pellegrini v. Weiss, 165 Cal. App. 4th 515, 524 (2008). "A
24 fiduciary duty . . . can arise when confidence is reposed by
25 persons in the integrity of others, and if the latter
26 voluntarily accepts or assumes to accept the confidence, he or
27 she may not act so as to take advantage of the other's interest
28

1 without that person's knowledge or consent." Pierce v. Lyman,
2 1 Cal. App. 4th 1093, 1101-02 (1991). In the lending context,
3 "financial institutions owe no duty of care to a borrower when
4 the institution's involvement in the loan transaction does not
5 exceed the scope of its convention role as a mere lender of
6 money." Nymark v. Heart Fed. Sav. & Loan Ass'n, 231 Cal. App.
7 3d 1089, 1096 (1991). Although California law imposes a
8 fiduciary duty on a mortgage broker, no such duty is imposed on
9 a lender. Price v. Wells Fargo Bank, 213 Cal. App. 3d 465, 476
10 (1989) ("A debt is not a trust and there is not a fiduciary
11 relation between debtor and creditor as such.' The same
12 principle should apply with even greater clarity to the
13 relationship between a bank and its loan customers." (quoting
14 Downey v. Humphreys, 102 Cal. App. 2d 323, 332 (1951))).

15
16
17
18 Plaintiff fails to allege that Defendants are mortgage
19 brokers as opposed to lenders. Accordingly, Plaintiff's
20 fourteenth cause of action is dismissed without prejudice.

21 Similarly, Plaintiff's cause of action is premised on
22 Defendants' duties as a mortgage broker. Because Plaintiff has
23 failed to allege that Defendants were mortgage brokers as
24 opposed to lenders, his fifteenth cause of action must also be
25 dismissed without prejudice.
26
27
28

ORDER

For the reasons stated above, Defendants' Motion to Dismiss is GRANTED without prejudice as to causes of action 1,2, 3 with respect to the TILA damages claim, and 5-16. Defendants' Motion to Dismiss is GRANTED with prejudice as to causes of action 3 with respect to the TILA rescission claim and 4. Plaintiff is hereby ordered to file an amended complaint within twenty (20) days of the issuance of this Order.

IT IS SO ORDERED.

DATED: September 18, 2009


JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE