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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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NANSYVONG SOMSANITH,
Plaintiff,

NO. CIV. S-09-1791 WBS

v.

MEMORANDUM AND ORDER RE:
MOTION TO DISMISS

BANK OF AMERICA, N.A.,
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,
and DOES 1 through 50,
inclusive,

Defendants.

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Plaintiff Nansyvong Somsanith filed this action against
Bank of America, N.A ("Bank of America") and Mortgage Electronic
Registration Systems, Inc. ("MERS") alleging various state claims
relating to loans s/he¹ obtained to refinance her home in Davis,

¹The sex of Nansyvong Somsanith is unclear in plaintiff's pleadings, as plaintiff's first amended complaint uses both the masculine and feminine pronouns when describing the plaintiff. The court will proceed by referring to the plaintiff in the feminine.

1 California. Having removed this action to federal court, Bank of
2 America now moves to dismiss plaintiff's First Amended Complaint
3 ("FAC") pursuant to Federal Rule of Civil Procedure 12(b)(6) for
4 failure to state a claim upon which relief can be granted.
5 Plaintiff Somsanith did not oppose the motion. Nor did plaintiff
6 file a statement of non-opposition pursuant to Civil Local Rule
7 78-230(c). Therefore, the hearing date of November 9, 2009 was
8 vacated pursuant to Civil Local Rule 78-230(c), and the court
9 took defendant's motion to dismiss under submission without oral
10 argument.

11 To survive a motion to dismiss, a plaintiff needs to
12 plead "only enough facts to state a claim to relief that is
13 plausible on its face." Bell Atl. Corp. v. Twombly, 127 S. Ct.
14 1955, 1974 (2007). This "plausibility standard," however, "asks
15 for more than a sheer possibility that a defendant has acted
16 unlawfully," and where a complaint pleads facts that are "merely
17 consistent with" a defendant's liability, it "stops short of the
18 line between possibility and plausibility." Ashcroft v. Iqbal,
19 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at
20 556-57). "[T]he tenet that a court must accept as true all of
21 the allegations contained in a complaint is inapplicable to legal
22 conclusions." Id. at 1949.

23 As a whole, plaintiff's complaint lacks even basic
24 facts regarding plaintiff's loans, such as when she took out her
25 mortgages or who her mortgage broker was. While plaintiff
26 alleges a conspiracy existed between Bank of America and MERS to
27 direct her mortgage broker to make misrepresentations to her, she
28 fails to allege facts that would support finding any connection

1 between her unnamed mortgage broker and either of the defendants
2 here. Because the alleged misrepresentations of plaintiff's
3 unnamed, non-party mortgage broker form the core of plaintiff's
4 claims in this action, plaintiff's failure to allege any
5 connection between the broker and Bank of America proves fatal to
6 her complaint. Nevertheless, the court will address each of
7 plaintiff's causes of action in turn.

8 A. California Financial Code Section 4973 et seq.

9 Plaintiff alleges that Bank of America engaged in
10 predatory lending in violation of California Financial Code
11 section 4973. (FAC 17.) Section 4973 prohibits specific acts in
12 connection with "covered loans." A "Covered loan" is:

13 A consumer loan in which the original principal balance
14 of the loan does not exceed the most current conforming
15 loan limit for a single-family first mortgage loan
16 established by the Federal National Mortgage
17 Association in the case of a mortgage or deed of trust,
18 and where one of the following conditions are met:

19 (1) For a mortgage or deed of trust, the annual
20 percentage rate at consummation of the transaction will
21 exceed by more than eight percentage points the yield
22 on Treasury securities having comparable periods of
23 maturity on the 15th day of the month immediately
24 preceding the month in which the application for the
25 extension of credit is received by the creditor.

26 (2) The total points and fees payable by the consumer
27 at or before closing for a mortgage or deed of trust
28 will exceed 6 percent of the total loan amount.

Cal. Fin. Code § 4970(b) (West 2008). The most current
conforming loan limit for a single family mortgage loan
established by the Federal National Mortgage Association is

1 \$417,000.00.² The current conforming loan limit for a high-
2 balance single family mortgage loan in Yolo County is
3 \$474,950.00.³ Plaintiff alleges that the principal of her loan
4 is \$448,000.00, (FAC ¶ 39), but does not allege either that the
5 annual percentage rate at consummation of the transaction
6 exceeded the Treasury securities rate by more than eight
7 percentage points or that the total points and fees paid by the
8 consumer at or before closing exceeded six percent of the total
9 loan amount. Plaintiff merely reincorporates the allegations in
10 her complaint without specifying which defendant allegedly
11 engaged in predatory lending or providing any facts to support
12 such a claim.

13 B. Fraud

14 In California, the essential elements of a claim for
15 fraud are "(a) a misrepresentation (false representation,
16 concealment, or nondisclosure); (b) knowledge of falsity (or
17 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d)
18 justifiable reliance; and (e) resulting damage." In re Estate of
19 Young, 160 Cal. App. 4th 62, 79 (2008). Under the heightened
20 pleading requirements for claims of fraud under Federal Rule of
21 Civil Procedure 9(b), "a party must state with particularity the
22 circumstances constituting the fraud." Fed. R. Civ. P. 9(b).
23 The plaintiffs must include the "who, what, when, where, and how"

25 ²See Fannie Mae, About Fannie Mae: Loan Limits, available
26 at: <http://fanniemae.com/aboutfm/loanlimits/jhtml> (last visited
November 4, 2009).

27 ³Fannie Mae, Loan Limit Look-Up Table, available at:
28 <https://www.efanniemae.com/sf/refmaterials/loanlimits/jumboconf/xls/loanlimref.xls> (last visited November 4, 2009).

1 of the fraud. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1006
2 (9th Cir. 2003) (citation omitted). "The plaintiff must set
3 forth what is false or misleading about a statement, and why it
4 is false." Decker v. Glenfed, Inc., 42 F.3d 1541, 1548 (9th Cir.
5 1994). Additionally, "[w]here multiple defendants are asked to
6 respond to allegations of fraud, the complaint must inform each
7 defendant of his alleged participation in the fraud." Ricon v.
8 Reconstrust Co., No. 09cv937, 2009 WL 2407396, at *3 (S.D. Cal.
9 Aug. 4, 2009) (quoting DiVittorio v. Equidyne Extractive Indus.,
10 822 F.2d 1242, 1247 (2d Cir. 1987)).

11 Plaintiff alleges that Bank of America directed her
12 mortgage broker to make false and misleading statements to her to
13 obtain a deed of trust. (FAC ¶ 50.) This oft-repeated, yet bare
14 assertion is a mere "label and conclusion" which "stops short of
15 the line between possibility and plausibility" required of
16 Federal Rule of Civil Procedure 8, as plaintiff has not alleged
17 any facts whatsoever to support it. Ashcroft v. Iqbal, 129 S.
18 Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 556-57). It
19 also clearly falls short of the heightened pleading standard of
20 Rule 9(b), as these allegations fail to identify plaintiff's
21 mortgage broker and when and where the statements were allegedly
22 made.

23 Furthermore, plaintiff alleges that Bank of America and
24 MERS were engaged in a conspiracy to withhold information about
25 plaintiff's loan terms from her. However, "the tenet that a
26 court must accept as true all of the allegations contained in a
27 complaint is inapplicable to legal conclusions." Id. at 1949.
28 Plaintiff fails to allege any facts that would support a finding

1 that MERS and Bank of America were engaged in a conspiracy to
2 defraud plaintiff. Neither has plaintiff alleged any facts that
3 support her allegations that defendants kept key loan information
4 from her; indeed, plaintiff provides almost no information at all
5 about the terms and conditions of her loan or other loan
6 documents. Absent any supporting facts, plaintiff's allegations
7 are nothing more than bare assertions which clearly fail to meet
8 the requirements of Rule 8 and the heightened pleading
9 requirements of Rule 9(b).

10 C. Breach of Implied Covenant of Good Faith and Fair
11 Dealing

12 Bank of America seeks dismissal of plaintiff's fourth
13 cause of action for breach of implied covenant of good faith and
14 fair dealing on the grounds that this claim avers only a
15 contractual violation and is therefore duplicative of plaintiff's
16 ninth cause of action for breach of loan contracts. (Mot. to
17 Dismiss 8.) "The prerequisite for any action for breach of the
18 implied covenant of good faith and fair dealing is the existence
19 of a contractual relationship between the parties." Smith v.
20 City & County of San Francisco, 225 Cal. App. 3d 38, 49 (1990).
21 "To establish a breach of an implied covenant of good faith and
22 fair dealing, a plaintiff must establish the existence of a
23 contractual obligation, along with conduct that frustrates the
24 other party's rights to benefit from the contract." Fortaleza v.
25 PNC Fin. Servs. Group, Inc., 2009 U.S. Dist. LEXIS 64624, at
26 **15-16 (N.D. Cal. July 27, 2009). However, "[i]f the
27 allegations do not go beyond the statement of a mere contract
28 breach and, relying on the same alleged acts, simply seek the

1 same damages or other relief already claimed in a companion
2 contract cause of action, they may be disregarded as superfluous
3 as no additional claim is actually stated." Careau & Co. v.
4 Sec'y Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1395 (1990).
5 Plaintiff's fourth cause of action alleges the same conduct
6 alleged in plaintiff's ninth cause of action for breach of
7 contract. Like plaintiff's breach of contract claim, plaintiff's
8 breach of implied covenant claim seeks damages for her mortgage
9 payments that were inappropriately applied to interest.
10 Plaintiff's request for attorney's fees and costs is likewise
11 already made in plaintiff's fifth cause of action for conversion
12 and sixth cause of action for breach of fiduciary duty.
13 Plaintiff does not allege any facts or request any relief not
14 already present in her complaint. Plaintiff's claim for breach
15 of the implied covenant, therefore, is superfluous.

16 Additionally, plaintiff's general allegations against
17 "Defendants" fail to allege that defendants did "anything which
18 [would] have the effect of destroying or injuring the right of
19 [Plaintiff] to receive the fruits of [a] contract [into which
20 Plaintiff entered with Defendants]." Waller v. Truck Ins.
21 Exchange, Inc., 11 Cal.4th 1, 36 (1995). The "implied covenant
22 of good faith and fair dealing is limited to assuring compliance
23 with the express terms of the contract, and cannot be extended to
24 create obligations not contemplated by the contract." Pasadena
25 Live, LLC v. City of Pasadena, 114 Cal. App. 4th 1089, 1093-1094
26 (2004). Plaintiff offers only bare assertions that her loan
27 amount was improperly inflated and her home over-valued at the
28 time she took out the mortgages on her home. The only fact that

1 plaintiff offers in support of this assertion is that her home
2 today is worth \$450,000.00. These assertions form the basis of
3 plaintiff's allegation that the defendants conspired and mis-
4 applied the "excess" in plaintiff's mortgage payments to interest
5 rather than to principal in violation of her loan contract.
6 Plaintiff further alleges that defendants breached the implied
7 covenant by refusing to refinance her loan and charging monthly
8 payments that plaintiff could not afford. Plaintiff fails to
9 explain what contractual agreement is the basis for this cause of
10 action, merely asserting that her "loan contracts" imposed duties
11 on Bank of America and other defendants. If plaintiff is
12 referring to her Deed of Trust or other written agreement, she
13 must allege facts showing that Bank of America was a party to it
14 and that she was denied the benefit of the contract.

15 D. Conversion

16 Defendants also seek dismissal of plaintiff's
17 conversion claim. "Conversion is any act of dominion wrongfully
18 exerted over another's personal property in denial of or
19 inconsistent with his rights therein," which includes assuming
20 "control or ownership over the property," or applying the
21 property to one's own use. Messerall v. Fulwider, 199 Cal. App.
22 3d 1324, 1329 (1988) (citing Igauye v. Howard, 114 Cal. App. 2d
23 122, 126 (1952)). The basic elements of a conversion claim are
24 (1) the plaintiff's ownership or right to possession of personal
25 property; (2) the defendant's disposition of the property in a
26 manner that is inconsistent with the plaintiff's property rights;
27 and (3) resulting damages. Fremont Indemnity Co. v. Fremont Gen.
28 Corp., 148 Cal. App. 4th 97, 119 (2007) (citing Burlesci v.

1 Petersen, 68 Cal. App. 4th 1062, 1066 (1998)). Legal title to
2 property is not necessary for an action for damages in
3 conversion; a plaintiff must only show that she was "entitled to
4 immediate possession at the time of conversion." Messerall v.
5 Fulwider, 199 Cal. App. 3d 1324, 1329 (1988) (citing Bastanchury
6 v. Times-Mirror Co., 68 Cal. App. 2d 217, 236 (1945)).

7 As a preliminary matter, plaintiff's conversion claim
8 fails because plaintiff generally alleges her conversion claim
9 against all "defendants" without identifying which defendants
10 allegedly improperly converted plaintiff's mortgage payments to
11 interest. As such, plaintiff fails to put Bank of America on
12 notice of the claim or claims being asserted against it.
13 Furthermore, plaintiff's conversion allegations fail to allege
14 facts that make it plausible that Bank of America exercised
15 dominion over plaintiff's personal property in manner that was
16 inconsistent with plaintiff's rights at the time. Plaintiff's
17 claim is premised on a fraudulently obtained loan by defendants.
18 However, as discussed above, plaintiff has not adequately alleged
19 any causes of action sounding in fraud. While plaintiff does
20 allege that Bank of America "set an unjustly high monthly payment
21 by artificially inflating the value of the property to
22 fraudulently justify a larger mortgage," (FAC ¶ 63), this
23 allegation does not constitute an exercise of dominion by Bank of
24 America over plaintiff's property. Vague allegations that are
25 unsupported by facts are mere "labels and conclusions"
26 insufficient to withstand a motion to dismiss. See Twombly, 127
27 S. Ct. at 1964-65.

28 E. Breach of Fiduciary Duty

1 Bank of America moves to dismiss plaintiff's sixth
2 cause of action for breach of fiduciary duty. Plaintiff alleges
3 that "defendants" were part of a conspiracy to direct her
4 mortgage broker to make the false and misleading statements that
5 form the basis of her complaint. Because plaintiff's mortgage
6 broker owes plaintiff a fiduciary duty, plaintiff alleges that
7 defendants, including Bank of America, can be liable for
8 conspiring to breach the broker's fiduciary duty to plaintiff.
9 (FAC ¶ 69.) "The elements of a cause of action for breach of
10 fiduciary duty are: 1) the existence of a fiduciary duty; 2) a
11 breach of the fiduciary duty; and 3) resulting damage."
12 Pellegrini v. Weiss, 165 Cal. App. 4th 515, 524 (2008).

13 While plaintiff correctly points out that mortgage
14 brokers in California owe a fiduciary duty to their clients,
15 "[t]he relationship between a lending institution and its
16 borrower-client is not fiduciary in nature." Nymark v. Heart
17 Fed. Savings & Loan Assn., 231 Cal. App. 3d 1089, 1093 n. 1, 1096
18 (1991) ("[A]s a general rule, a financial institution owes no
19 duty of care to a borrower when the institution's involvement in
20 the loan transaction does not exceed the scope of its
21 conventional role as a mere lender of money."); see also Oaks
22 Management Corp. v. Superior Court, 145 Cal. App. 4th 453, 466
23 (2006) (absent special circumstances, a loan transaction is at
24 arms-length and there is no fiduciary relationship between the
25 borrower and lender). A commercial lender is entitled to pursue
26 its own economic interests in a loan transaction. Nymark, 231
27 Cal. App. 3d at 1093 n. 1 (citing Kruse v. Bank of America, 202
28 Cal. App. 3d 38, 67 (1988)).

1 As previously discussed, plaintiff's allegations of a
2 conspiracy between defendants and with plaintiff's unnamed
3 mortgage broker are mere "labels and conclusions" that are
4 insufficient to withstand a motion to dismiss. Plaintiff does
5 allege, however, that Bank of America is her loan originator and
6 current servicer of her loan. Absent special circumstances,
7 therefore, Bank of America does not owe plaintiff a fiduciary
8 duty. Plaintiff has not alleged any facts suggesting the
9 existence of special circumstances such that a fiduciary
10 relationship between herself and Bank of America was created, or
11 that Bank of America acted outside the scope of their
12 conventional role as a mere money lender. Therefore, plaintiff's
13 cause of action for breach of fiduciary duty fails.

14 F. Civil Code Section 2923.5

15 Section 2923.5 of the California Civil Code provides
16 that a declaration shall be included in a notice of default
17 stating that "the mortgagee, beneficiary, or authorized agent . .
18 . has contacted the borrower . . . or tried with due diligence to
19 contact the borrower." In support of this claim, plaintiff only
20 alleges that "defendants" failed to properly contact plaintiff
21 and give notice of the Notice of Default. (FAC ¶¶ 76-77.) The
22 FAC simply makes a general allegation as to two defendants. This
23 general allegation gives Bank of America insufficient notice of
24 whether it has committed any conduct to violate section 2923.5,
25 and Bank of America should not be forced to guess whether they
26 are individually liable for this conduct. See Associated Gen.
27 Contractors of Cal., Inc. v. Cal. State Council of Carpenters,
28 459 U.S. 519, 526 (1983).

1 G. Wrongful Foreclosure

2 Plaintiff's eighth claim asserts a wrongful foreclosure
3 claim against "defendants" that is predicated on alleged fraud by
4 defendants in obtaining the loan and violations of Sections
5 2923.5 and 2924 of the California Civil Code. (FAC ¶¶ 82-83.)
6 Plaintiff alleges that the subject loan at issue was obtained due
7 to fraud and material misrepresentations, and that as a result of
8 such fraud, "there was no valid [residential mortgage loan] on
9 the property and therefore, no possibility of default to give
10 rise to a foreclosure by the Defendants." (FAC ¶ 82.) Plaintiff
11 accordingly requests that the "foreclosure proceedings be
12 stopped." Id. ¶ 81.

13 Preliminarily, plaintiff's cause of action fails
14 because plaintiff does not allege any specific claim against any
15 specific defendant. As such, plaintiff fails to place Bank of
16 America on notice of the claim or claims being asserted against
17 it. Even if plaintiff had properly alleged her claim as to Bank
18 of America, however, the claim would still fail. As discussed
19 above, plaintiff has failed to meet the heightened pleading
20 standard of Rule 9(b) as to plaintiff's fraud allegations and has
21 failed to allege a viable cause of action under California Civil
22 Code section 2923.5.

23 Plaintiff also cites California Civil Code § 2924 for
24 her wrongful foreclosure claim. According to plaintiff, the
25 notice of default was defective. Section 2924 sets forth various
26 requirements for notices of default, including that they contain:

27 (A) A statement identifying the mortgage or deed of
28 trust by stating the name or names of the trustor or
trustors and giving the book and page, or instrument

1 number, if applicable, where the mortgage or deed of
2 trust is recorded or a description of the mortgaged or
trust property;

3 (B) A statement that a breach of the obligation for
4 which the mortgage or transfer in trust is security has
occurred.

5 (C) A statement setting forth the nature of each breach
6 actually known to the beneficiary and of his or her
7 election to sell or cause to be sold the property to
8 satisfy that obligation and any other obligation
secured by the deed of trust or mortgage that is in
default.

9 Cal. Civ. Code § 2924(a)(1)(A)-(C). Plaintiff does not allege a
10 single fact that would support a finding that the notice under
11 section 2924 was defective. Plaintiff merely asserts that "the
12 amount stated as due and owing in the Notice of Default is
13 incorrect for the following reasons: an incorrect interest rate
14 adjustment, incorrect tax impound accounts, and misapplied
15 payments." (FAC ¶ 84.) Notably absent from plaintiff's FAC is
16 any statement that plaintiff did not breach her mortgage
17 obligations. So successfully plead an action for wrongful
18 foreclosure pursuant to section 2924, plaintiff must identify the
19 specific subsection of section 2924 that defendants allegedly
20 violated and must allege facts showing that the notice of default
21 violated this provision.

22 H. Breach of Loan Contracts

23 Bank of America moves to dismiss plaintiff's ninth
24 cause of action for breach of contract. In California, "[a]
25 cause of action for breach of contract requires proof of the
26 following elements: (1) existence of the contract; (2)
27 plaintiff's performance or excuse for nonperformance; (3)
28 defendant's breach; and (4) damages to plaintiff as a result of

1 the breach." CDF Firefighters v. Maldonado, 158 Cal. App. 4th
2 1226, 1239 (2008). Plaintiff vaguely alleges that she entered
3 into "written agreements" with Bank of America, and that Bank of
4 America subsequently breached its contracts by "failing to
5 accurately credit homeowners' payments to their accounts,
6 assessing and demanding substantial, unwarranted costs and fees
7 under threat of foreclosure, and other behavior in breach of the
8 contract." (FAC ¶ 93.) This allegation fails to allege any
9 actions with respect to plaintiff or plaintiff's contract, and
10 instead alleges a pattern of general behavior on the part of Bank
11 of America. Therefore, this fails to allege a breach of
12 plaintiff's contract with Bank of America.

13 Plaintiff further alleges that "defendants" violated
14 the loan contract "by applying the extra payments to interest
15 that was not legitimately owed by Plaintiff." Id. ¶ 94. This
16 general allegation does not give Bank of America sufficient
17 notice of whether it has committed any conduct that could serve
18 as a basis for a breach of contract claim, and Bank of America
19 should not be forced to guess whether they are individually
20 liable for this conduct. See Associated Gen. Contractors of
21 Cal., Inc., 459 U.S. at 526. Even if plaintiff were to plead as
22 to Bank of America specifically, plaintiff has not alleged
23 sufficient facts to support a finding that Bank of America
24 artificially inflated the value of plaintiff's home so to
25 increase the amount of plaintiff's loan and monthly mortgage
26 payments. Because this alleged inflation provides the basis for
27 plaintiff's claim that plaintiff made mortgage payments in excess
28 of the amount owed and that "defendants" improperly applied the

1 excess to interest rather than to principal, plaintiff fails to
2 state a claim upon which relief can be granted.

3 Finally, plaintiff alleges that Bank of America failed
4 to perform upon its "false promises" allegedly made to plaintiff
5 by plaintiff's mortgage broker to induce plaintiff to enter into
6 the mortgage loan agreement. (FAC ¶¶ 89, 92.) Because plaintiff
7 does not allege that these representations are a part of her loan
8 agreement with Bank of America, these allegations fail to state a
9 cause of action for breach of contract.

10 I. California Business & Professions Code Section 17200

11 California's Unfair Competition Law ("UCL"), Cal. Bus.
12 & Prof. Code §§ 17200-17210, prohibits "any unlawful, unfair, or
13 fraudulent business act or practice." Cal-Tech Communic'ns, Inc.
14 v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999).

15 "By proscribing 'any unlawful' business practice, section 17200
16 'borrows' violations of other laws and treats them as unlawful
17 practices that the unfair competition law makes independently
18 actionable." Id. (citation omitted). This cause of action is
19 generally derivative of some other illegal conduct or fraud
20 committed by a defendant, and "[a] plaintiff must state with
21 reasonable particularity the facts supporting the statutory
22 elements of the violation." Khoury v. Maly's of Cal., Inc., 14
23 Cal. App. 4th 612, 619 (1993).

24 Plaintiff here alleges that "defendants" made untrue or
25 misleading statements to plaintiff and caused such statements to
26 be made by plaintiff's mortgage broker to plaintiff with the
27 intent to induce her into entering into the mortgage loan
28 agreement. (FAC ¶ 46.) Plaintiff's FAC provides a description

1 of such statements that "defendants" allegedly made. Like many
2 other of plaintiff's causes of action, these generalized
3 allegations fail to sufficiently put Bank of America on notice as
4 to whether it has committed any conduct that could serve as a
5 basis for a section 17200 claim. See Associated Gen. Contractors
6 of Cal., Inc., 459 U.S. at 526. Furthermore, as explained above,
7 plaintiff has not alleged facts to support the allegation that
8 Bank of America was engaged in a conspiracy either with MERS or
9 with plaintiff's unnamed mortgage broker.

10 Plaintiff further alleges that she paid significantly
11 more than the fair market value of her home because of Bank of
12 America's practice of giving mortgage loans to subprime borrowers
13 and "fraudulently inflating the assessed values of properties."
14 (FAC ¶ 47.) As to the first allegation, plaintiff does not
15 explain how granting loans to "subprime" borrowers is unlawful,
16 unfair, or fraudulent. While plaintiff alleges that subprime
17 borrowers including plaintiff "were not actually qualified" for
18 their loans, this allegation does not support the conclusion that
19 it was somehow unlawful, unfair, or fraudulent for Bank of
20 America to loan money to those borrowers. The second allegation
21 of fraudulently inflating the value of homes, as explained above,
22 does not meet the pleading requirements of Federal Rule of Civil
23 Procedure 8, or the heightened pleading standard for allegations
24 of fraud under Rule 9(b). Neither of these allegations,
25 therefore, can survive a motion to dismiss.

26 Plaintiff also alleges that, as a result of Bank of
27 America's lax lending standards and role in the alleged
28 conspiracy to cause her mortgage broker to make misleading

1 statements, she was fraudulently induced into a loan that she
2 could not actually afford. (FAC ¶ 47.) For the same reasons
3 described above, this allegation fails to meet the heightened
4 pleading standard of Federal Rule of Civil Procedure 9(b).

5 J. Sanctions

6 If plaintiff's attorney could not draft a complaint
7 that contained a single claim upon which relief could be granted,
8 the very least he could have done was to comply with Local Rule
9 78-230(c) and told the court he had no opposition to the granting
10 of defendants' motion. Instead, as he has done in at least one
11 other court, he ignored the local rule and did nothing in
12 response to the motion to dismiss his complaint.⁴ Counsel's
13 failure to comply with Local Rule 78-230(c) and timely file any
14 response to Bank of America's motion to dismiss is inexcusable,
15 and has put this already burdened court to the task of examining
16 the merits of a motion that for all practical purposes was
17 unopposed.

18 Local Rule 11-110 authorizes the court to impose
19 sanctions for "[f]ailure of counsel or of a party to comply with
20 these Rules." Therefore, the court will sanction plaintiff's
21 counsel, Lawrence P. Ramirez, \$200.00 payable to the Clerk of the
22 Court within ten days from the date of this Order, unless he
23 shows good cause for his failure to comply with the Local Rules.


24
25 ⁴ This is not the first time Mr. Ramirez has failed to
26 comply with the equivalent of Local Rule 78-230(c). In Fortaleza
27 v. PNC Financial Services Group, Inc., Mr. Ramirez similarly
28 failed to file any papers in response to a motion to dismiss.
No. 09-2004, 2009 WL 2246212, at *1 (N.D. Cal. July 27, 2009).
Such repeated disregard for the Local Rules should not go
unsanctioned.

1 IT IS THEREFORE ORDERED that Bank of America's motion
2 to dismiss be, and the same hereby is, GRANTED as to Bank of
3 America.

4 IT IS FURTHER ORDERED that within ten days of this
5 Order Lawrence P. Ramirez shall either (1) pay sanctions of
6 \$200.00 to the Clerk of the Court, or (2) submit a statement of
7 good cause explaining his failure to comply with Local Rule 78-
8 230(c).

9 Plaintiff is given 20 days from the date of this Order
10 to file an amended complaint consistent with this order.

11 DATED: November 5, 2009

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14 WILLIAM B. SHUBB
15 UNITED STATES DISTRICT JUDGE
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