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

FRANK WILLIAMS AND CINDY)
WILLIAMS,)
)
Plaintiffs,)
)
v.)
BANK OF AMERICA f/k/a)
COUNTRYWIDE HOME LOANS;)
AMERICA'S WHOLESALE LENDER;)
MERIDIAN CAPITAL, INC.; ANATOLY)
STAVCHANSKY; WILLIAM J HAND)
JR.; JEFFREY B WIND; and DOES)
1-20, inclusive,)
)
Defendants.)
/

2:09-CV-3060-JAM-KJM

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS AND DENYING
PLAINTIFFS' CROSS MOTION TO
DISMISS

This matter comes before the Court on Defendant Countrywide Home Loans, Inc. d/b/a America's Wholesale Lender's ("AWL's") and Defendant BAC Home Loans Servicing, L.P.'s ("BAHL's") (erroneously sued as "Bank of America f/k/a Countrywide Home Loans") (collectively "Defendants'") Combined Motion to Dismiss and Motion to Strike ("MTD") Plaintiff Frank Williams' and Plaintiff Cindy Williams' (collectively "Plaintiffs'") First

1 Amended Complaint. The motion to dismiss is brought pursuant to
2 Federal Rule of Civil Procedure 12(b)(6) for failure to state a
3 claim upon which relief can be granted. The motion to strike is
4 brought pursuant to Federal Rule of Civil Procedure 12(f).
5 Plaintiff also bring a Cross Motion to Dismiss for Lack of
6 Jurisdiction (Doc. 24), and a Cross Motion to Strike (Doc. 29).
7 Defendants oppose Plaintiffs' cross motions.¹

8
9 I. FACTUAL AND PROCEDURAL BACKGROUND

10 On February 21, 2007, Plaintiffs entered into a loan
11 agreement with Defendant AWL to refinance property at 757
12 Bramblewood Avenue, Lathrop, California ("subject property").
13 The terms of the loan were memorialized in a Promissory Note,
14 which was secured by a Deed of Trust ("Deed"). The Deed
15 identified ReconTrust Company N.A. as Trustee, and Defendant AWL
16 as Lender.
17

18 Plaintiffs allege that Defendants willfully and
19 fraudulently placed them into an improper loan and failed to
20 provide required disclosures. Plaintiffs filed a First Amended
21 Complaint ("FAC") on February 18, 2010 alleging seven state
22 causes of action. (Doc. No. 13.) Defendants filed this motion on
23 March 3, 2010. (Doc. No. 19.) Plaintiffs filed a Statement of
24 Non-Opposition on May 5, 2010 in which Plaintiffs did not
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28 ¹All motions were determined to be suitable for decision without
oral argument. E.D. Cal. L.R. 230(g).

1 address the MTD but rather asked the Court to dismiss
2 Plaintiffs' claims for lack of subject matter jurisdiction.
3 (Doc. No. 23.) On the same day, Plaintiffs filed a Cross Motion
4 to Dismiss for lack of subject matter jurisdiction.

5 II. OPINION

6 A. Legal Standard

7
8 A party may move to dismiss an action for failure to state
9 a claim upon which relief can be granted pursuant to Federal
10 Rule of Civil Procedure 12(b)(6). In considering a motion to
11 dismiss, the court must accept the allegations in the complaint
12 as true and draw all reasonable inferences in favor of the
13 plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1975),
14 overruled on other grounds by Davis v. Scherer, 468 U.S. 183
15 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions that
16 are mere "legal conclusions," however, are not entitled to the
17 assumption of truth. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950
18 (2009), citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
19 (2007). To survive a motion to dismiss, a plaintiff must plead
20 "enough facts to state a claim to relief that is plausible on
21 its face." Twombly, 550 U.S. at 570. Dismissal is appropriate
22 where the plaintiff fails to state a claim supportable by a
23 cognizable legal theory. Balistreri v. Pacifica Police Dep't,
24 901 F.2d 696, 699 (9th Cir. 1990). Upon granting a motion to
25 dismiss for failure to state a claim, the court has discretion
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1 to allow leave to amend the complaint pursuant to Federal Rule
2 of Civil Procedure 15(a). "Dismissal with prejudice and without
3 leave to amend is not appropriate unless it is clear . . . that
4 the complaint could not be saved by amendment." Eminence
5 Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir.
6 2003).

7
8 Generally, the court may not consider material beyond the
9 pleadings in ruling on a motion to dismiss for failure to state
10 a claim. Sherman v. Stryker Corp., 2009 WL 2241664, at *2 (C.D.
11 Cal. Mar. 30, 2009) (internal citations omitted). There are two
12 exceptions: when material is attached to the complaint or relied
13 on by the complaint, or when the court takes judicial notice of
14 matters of public record, provided the facts are not subject to
15 reasonable dispute. Id. Here, Defendants request judicial notice
16 of the Note, Deed of Trust, Truth in Lending Disclosure
17 Statement, Loan Application Disclosure Acknowledgements, Uniform
18 Residential Loan Application, and U.S. Party Index/Case Name
19 Search Results for cases filed by attorney Sharon Lapin against
20 various mortgage companies. (Docket No. 19.) The Court takes
21 judicial notice of the documents as requested, as they are
22 either relied on by Plaintiffs in their FAC or matters of public
23 record.
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27 A motion to strike is appropriate where the matter pled in
28 the complaint is "redundant, immaterial, impertinent or

1 scandalous." Fed. R. Civ. P. 12(f). A court may strike prayers
2 for relief which seek remedies that are unavailable as a matter
3 of law, on the grounds that such remedies are immaterial. See
4 Moreno v. The GEO Group, Inc., 2009 WL 841139, at *5 (E.D. Cal.
5 Mar. 26, 2009).

6 B. Jurisdiction

7
8 "[I]n any civil action of which the district courts have
9 original jurisdiction, the district courts shall have
10 supplemental jurisdiction over all other claims that are so
11 related to claims in the action within such original
12 jurisdiction that they form part of the same case or controversy
13 under Article III of the United States Constitution." 28 U.S.C.
14 1367(a). "Under 28 U.S.C. § 1367(c), a district court 'may
15 decline to exercise supplemental jurisdiction ... [if] the
16 district court has dismissed all claims over which it has
17 original jurisdiction.' The court's discretion to decline
18 jurisdiction over state law claims is informed by the values of
19 judicial economy, fairness, convenience, and comity." Meza v.
20 Matrix Servicing, 2010 WL 366623, at *3 (E.D. Cal. Jan. 26,
21 2010) (internal citations omitted)).
22
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24 This case has been pending since November 2009.
25 Plaintiffs' FAC does not address any of the issues alleged in
26 Defendants' previous Motion to Dismiss for failure to state a
27 claim, filed in December 2009. Rather, Plaintiffs omit the
28

1 federal claims from the FAC and attempt to have the case
2 dismissed for lack of subject matter jurisdiction. Plaintiffs
3 had the opportunity to file a notice of voluntary dismissal
4 pursuant to Fed. R. Civ. P. 41(a) and re-file this case in state
5 court. However, Plaintiffs chose to consume judicial resources
6 and delay the proceedings. In the interest of fairness,
7 convenience, and judicial economy, the Court does not wish to
8 delay this matter any longer. Accordingly, the Court exercises
9 its discretion to retain supplemental jurisdiction over this
10 matter and rule on the merits. Plaintiffs' Cross Motion to
11 Dismiss for Lack of Jurisdiction is DENIED.
12

13 C. Claims for Relief

14 1. Fraud

15 A claim of fraud must have the following elements: "(a) a
16 misrepresentation (false representation, concealment, or
17 nondisclosure); (b) knowledge of falsity (or 'scienter'); (c)
18 intent to defraud, i.e., to induce reliance; (d) justifiable
19 reliance; and (e) resulting damage." In re Estate of Young, 160
20 Cal. App. 4th 62, 79 (2008) (quoting Lazar v. Superior Court, 12
21 Cal. 4th 631, 638 (1996) (internal quotation marks omitted)).
22

23 "In all averments of fraud or mistake, the circumstances
24 constituting fraud or mistake shall be stated with
25 particularity. Malice, intent, knowledge and other conditions
26 of the mind of a person may be averred generally." Fed. R. Civ.
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1 P. 9(b). The Ninth Circuit has "interpreted Rule 9(b) to mean
2 that the pleader must state the time, place and specific content
3 of the false representations as well as the identities of the
4 parties to the misrepresentation." Alan Neuman Prods., Inc. v.
5 Albright, 862 F.2d 1388, 1393 (9th Cir. 1988). "Moreover, in a
6 fraud action against a corporation, a plaintiff must allege the
7 names of the persons who made the allegedly fraudulent
8 representations, their authority to speak, to whom they spoke,
9 what they said or wrote, and when it was said or written."
10 Saldate v. Wilshire Credit Corp., 2010 WL 582074, *at 9 (E.D.
11 Cal. Feb. 12, 2010). (Quoting Tarmann v. State Farm Mut. Auto.
12 Ins. Co., 2 Cal. App. 4th 153, 157 (1991) (internal quotation
13 marks omitted)).

16 Plaintiffs allege that Defendants committed fraud by: (1)
17 approving a loan that they knew or should have known Plaintiffs
18 were not qualified for, thereby misrepresenting to Plaintiffs
19 that they could afford it; (2) failing to follow the legal
20 requirements for transferring a negotiable instrument under
21 California Commercial Code § 3301 ("Cal. Comm. Code § 3301"); and
22 (3) misrepresenting to Plaintiffs that Defendant BAML had
23 acquired servicing rights.

26 As Defendants argue, Cal. Civ. Code § 2924, et seq., and
27 not Cal. Comm. Code § 3301, governs non-judicial foreclosures.
28 See Pok v. American Home Mortg. Servicing, Inc., 2010 WL 476674,

1 at *7 (E.D. Cal. Feb. 3, 2010); Peay v. Midland Mortg. Co., 2010
2 WL 476677, at *4 (E.D. Cal. Feb 3, 2010) (Cal. Comm. Code § 3301
3 does not apply to non-judicial foreclosure.).

4 Furthermore, Plaintiffs fail to allege fraud with the
5 required particularity to state a plausible claim for relief.
6 The FAC fails to satisfy the "who, what, when, where and how"
7 requirements as to Defendants. See Day v. American Home Mortg.
8 Servicing Inc., 2010 WL 2231988, at *2 (E.D. Cal. June 3, 2010);
9 Sorenson v. Countrywide Home Loans, Inc., 2010 WL 308794, at *7
10 (E.D. Cal. Jan. 12, 2010) ("Simply alleging that Defendant's
11 misrepresented themselves is insufficient."). Plaintiffs'
12 allegations that they were harmed and suffered damages are
13 conclusory and insufficient to support a fraud-based claim under
14 Rule 9(b). Consequently, the FAC fails to state a claim upon
15 which relief can be granted and further amendment would be
16 futile. Accordingly, Plaintiffs' claim for fraud is DISMISSED,
17 with prejudice.
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21 2. Breach of Fiduciary Duty

22 "The elements of a cause of action for breach of fiduciary
23 duty are: 1) the existence of a fiduciary duty; 2) a breach of
24 the fiduciary duty; and 3) resulting damage." Pellegrini v.
25 Weiss, 165 Cal. App. 4th 515, 524 (2008). In the lending
26 context, "financial institutions owe no duty of care to a
27 borrower when the institution's involvement in the loan
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1 transaction does not exceed the scope of its conventional role
2 as a mere lender of money." Nymark v. Heart Fed. Sav. & Loan
3 Ass'n, 231 Cal. App. 3d 1089, 1096 (1991). Although California
4 law imposes a fiduciary duty on a mortgage broker, no such duty
5 is imposed on a lender. Price v. Wells Fargo Bank, 213 Cal.
6 App. 3d 465, 476 (1989). Thus, as the "mere lender of money",
7
8 AWL holds no fiduciary duty towards Plaintiffs. As such,
9 Plaintiffs fail to state a claim upon which relief can be
10 granted and the FAC cannot be saved by amendment. Accordingly,
11 Plaintiffs' claim for breach of fiduciary duty is DISMISSED,
12 with prejudice.

14 3. Breach of Contract

15 In California, "[a] cause of action for breach of contract
16 requires proof of the following elements: (1) existence of the
17 contract; (2) plaintiff's performance or excuse for
18 nonperformance; (3) defendant's breach; and (4) damages to
19 plaintiff as a result of the breach." CDF Firefighters v.
20 Maldonado, 158 Cal. App. 4th 1226, 1239 (2008).

22 Plaintiffs allege that "Defendant AWL breached its
23 agreement with Plaintiffs when it approved and sold Plaintiffs a
24 predatory loan with toxic terms." Plaintiffs does not allege
25 where in the loan agreement, or any contract, these promises
26 were explicitly memorialized. A breach of contract claim rests
27 upon the actual terms of a contract and Plaintiffs fail to
28

1 allege any breach of the express provisions of a contract. See
2 Nichols v. Greenpoint Mortgage Funding, Inc., 2008 WL 3891126,
3 at *4 (C.D. Cal. Aug. 19, 2008) (dismissing breach of contract
4 claim where “[p]laintiff has failed to set forth any provisions
5 of the Notes that were breached.”). Consequently, the FAC fails
6 to state a claim upon which relief can be granted and further
7 amendment would be futile. Accordingly, Plaintiffs’ claim for
8 breach of contract is DISMISSED, with prejudice.
9

10 4. Rescission of Contract (in the alternative)

11 Cal. Civ. Code 1691(b) requires a party seeking rescission
12 to “[r]estore to the other party everything of value which he
13 has received from him under the contract or offer to restore the
14 same upon condition that the other party do likewise. . . .” See
15 Garza v. Am. Home Mortgage, 2009 WL 188604, at *4-5 (E.D. Cal.
16 Jan 27, 2009) (dismissing rescission request because “rescission
17 is an empty remedy without [Plaintiff’s] ability to pay back
18 what she has received.”). As Defendant argues, Plaintiffs are
19 not entitled to rescission because they have not alleged tender
20 of the loan pursuant to Cal. Civ. Code 1691(b). As such, the FAC
21 fails to state a claim upon which relief can be granted and
22 further amendment would be futile. Accordingly, Plaintiffs’
23 claim for rescission of contract is DISMISSED with prejudice.
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1 5. Breach of Implied Covenant of Good Faith and Fair
2 Dealing

3 Plaintiffs allege that Defendant AWL breached the implied
4 covenant of good faith and fair dealing by: (1) failing to
5 provide disclosures; (2) directing Plaintiffs into a toxic loan;
6 (3) abetting Plaintiffs' brokers' allegedly tortuous conduct;
7 (4) failing to pay at least as much regard to Plaintiffs'
8 interests as to Defendants' interests; and (5) failing to comply
9 with applicable laws.
10

11 “To establish a breach of an implied covenant of good faith
12 and fair dealing, a plaintiff must establish the existence of a
13 contractual obligation, along with conduct that frustrates the
14 other party's rights to benefit from the contract.” Fortaleza
15 v. PNC Fin. Servs. Group, Inc., 2009 U.S. Dist. LEXIS 64624
16
17 **15-16 (N.D. Cal. July 27, 2009).
18

19 Here, Plaintiffs cannot establish a plausible claim for
20 relief. As discussed above, Defendants owe no duty to Plaintiffs
21 to act in their interest. Indeed, “[a] commercial lender is
22 entitled to pursue its own economic interest in a loan
23 transaction.” Nymark, 231 Cal. App. 3d at 1093, n.1.
24 Furthermore, Plaintiffs have not plead sufficient facts to
25 support an agency allegation under which Defendants could be
26 responsible for the actions of Plaintiffs' brokers. Further
27 amendment would be futile, thus Plaintiffs' claim for breach of
28

1 implied covenant of good faith and fair dealing is DISMISSED
2 with prejudice.

3 6. Negligence

4 In order to state a cause of action for negligence, a
5 plaintiff must allege: (1) the defendant has a legal duty to use
6 due care; (2) the defendant breached such legal duty; (3) the
7 defendant's breach was the proximate or legal cause of the
8 resulting injury; and (4) damage to the plaintiff. Ladd v.
9 County of San Mateo, 12 Cal. 4th 913, 917 (1996). The existence
10 of a legal duty on the part of the defendant is a question of
11 law to be determined by the court. Ky. Fried Chicken of Cal.,
12 Inc. v. Superior Court, 14 Cal. 4th 814, 819 (1997); Isaacs v.
13 Huntington Mem'l Hosp., 38 Cal. 3d 112, 124 (1985).
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16 In the lending context, "financial institutions owe no duty
17 of care to a borrower when the institution's involvement in the
18 loan transaction does not exceed the scope of its conventional
19 role as a mere lender of money." Nymark, 231 Cal. App. 3d at
20 1096. Therefore, AWL, as lender, owes no duty to Plaintiff. As
21 such, Plaintiffs fail to state a plausible claim for negligence
22 and the FAC cannot be saved by amendment. Accordingly,
23 Plaintiffs' claim for negligence is DISMISSED, with prejudice.
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26 7. Violation of the California Rosenthal Act

27 Plaintiffs allege that Defendant BAML violated the
28 California Rosenthal Fair Debt Collection Practices Act

1 ("RFDCPA") by: (1) using unfair and unconscionable means to
2 collect a debt not owed to it; (2) making false reports to
3 credit reporting agencies about Plaintiff's credit standing; and
4 (3) charging excessive fees not permitted by law or contract.

5 Based on the language of the RFDCPA, courts have declined
6 to regard a residential mortgage loan as a 'debt' under the
7 RFDCPA. See Ines v. Countrywide Home Loans, Inc., 2008 WL
8 4791863, at *3 (S.D. Cal. 2008) (stating Plaintiff's mortgage
9 debt claim did not fall within the meaning of the RFDCPA);
10 Pittman v. Barclays Capital Real Estate, Inc., 2009 WL 1108889,
11 at *3 (S.D. Cal. Apr. 24, 2009) (dismissing Plaintiff's
12 mortgage-related RFDCPA claim for failing to "invoke statutory
13 protections"). Thus Defendant BAHL, a loan servicer, is not a
14 "debt collector" under the statute.
15

16
17 Plaintiffs have failed to demonstrate that the RFDCPA
18 applies to Defendant. Plaintiffs have not stated a plausible
19 claim under the RFDCPA and the FAC cannot be saved by amendment.
20 Accordingly, Plaintiffs' claim for violation of RFDCPA is
21 DISMISSED, with prejudice.
22

23 8. Violation of Bus. & Prof. Code § 17200, et seq.

24 The California Business & Professions Code § 17200, et seq.
25 ("UCL") prohibits unfair competition. This statute has a "broad
26 scope that allows for 'violations of other laws to be treated as
27 unfair competition that is independently actionable' while also
28

1 'sweep[ing] within its scope acts and practices not specifically
2 proscribed by any other law.'" Hauk v. JPMorgan Chase Bank USA,
3 552 F.3d 1114, 1122 (9th Cir. 2009) (quoting Kasky v. Nike,
4 Inc., 27 Cal. 4th 939, 949 (2002)).

5 While the statute is broad in scope, a plaintiff must still
6 plead his claim so as to establish a violation of the "other
7 law" or unfair practice in question. See Constantini v.
8 Wachovia Mortg. FSB, 2009 WL 1810122, at *3 (E.D. Cal. June 24,
9 2009) (citing Walker v. Countrywide Home Loans, Inc., 98 Cal.
10 App. 4th 1158, 1169-70 (2002)). As discussed above, Plaintiffs
11 have failed to state any claim upon which relief can be granted.
12 Accordingly, Plaintiffs' UCL claim is DISMISSED with prejudice.
13

14 D. Motions to Strike

15
16 Because the Court is dismissing all of Plaintiffs' claims
17 with prejudice, Defendants' motion to strike is MOOT.

18 Plaintiffs bring a cross motion to strike. The declaration
19 and documents which Plaintiffs ask the Court to strike pertain
20 to a motion for sanctions which has not yet been filed by
21 Defendants.
22

23 E. Sanctions

24 Defendants have asked the Court for leave to file a motion
25 for sanctions against Plaintiffs' attorney, Sharon Lapin, and
26 Ms. Lapin's supervising attorney, James Sandison, for delay and
27 improper conduct in this case. Defendants also submitted various
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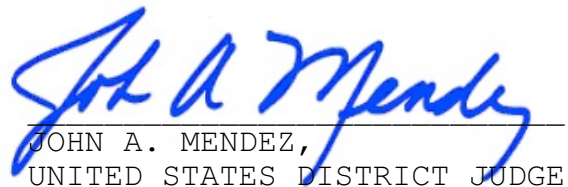
1 documents and a declaration to support their request for
2 sanctions. (Docs. 27, 28, 30). In response, Plaintiffs filed a
3 motion to strike the supporting documents (Doc. 29), which
4 Defendants oppose. (Doc. 30). As discussed above, Plaintiffs'
5 motion to strike is premature as it concerns documents which
6 Defendants apparently intend to use in support of a motion not
7 yet filed. Accordingly, Plaintiffs' motion to strike is DENIED,
8 without prejudice to re-file should Defendants file a motion for
9 sanctions. The Court also refuses to respond to Defendants
10 request for leave to file a motion for sanctions since such
11 request is not properly before the Court and appears to seek an
12 improper advisory opinion on an issue (sanctions) that is not
13 formally before this Court.
14
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16 III. ORDER

17 For the reasons set forth above, the Court GRANTS
18 Defendants' motion to dismiss and DISMISSES all of Plaintiffs'
19 claims WITH PREJUDICE. Defendants' motion to strike is MOOT.
20 Plaintiffs' Cross Motion to Dismiss for Lack of Jurisdiction is
21 DENIED. Plaintiffs' Cross Motion to Strike is DENIED.
22
23

24 IT IS SO ORDERED.

25 DATED: July 29, 2010

26 
27 JOHN A. MENDEZ,
28 UNITED STATES DISTRICT JUDGE