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

6 THE 1849 CONDOMINIUMS  
7 ASSOCIATION, INC., a California  
8 nonprofit mutual benefit  
9 corporation,

10 Plaintiff,

11 v.

12 GEOFFREY BRUNER and DOES 1  
13 through 20, inclusive,

14 Defendant.

15  
16 GEOFFREY BRUNER and DOES 1  
17 through 20, inclusive,

18 Counterclaimant,

19 v.

20 THE 1849 CONDOMINIUMS  
21 ASSOCIATION, INC., a California  
22 nonprofit mutual benefit  
23 corporation,

24 Counterdefendant.  
25 \_\_\_\_\_/

No. 2:09-cv-03339-JAM-EFB

ORDER GRANTING  
COUNTERDEFENDANT'S MOTION TO  
DISMISS

26 This matter comes before the Court on Counterdefendant The  
27 1849 Condominiums Association, Inc.'s ("Association's") Motion  
28 to Dismiss Counterclaimant Geoffrey Bruner's ("Bruner's")

1 Counterclaim ("Counterclaim") pursuant to Federal Rule of Civil  
2 Procedure 12(b)(6). Bruner opposes the motion.<sup>1</sup>

3 For the reasons stated below, the Association's Motion to  
4 Dismiss is GRANTED.  
5

6 I. FACTUAL AND PROCEDURAL BACKGROUND

7 For all times relevant hereto, the Association, a  
8 California non-profit mutual benefit corporation, was an owners  
9 association managing the 1849 Condominium project ("Condo  
10 Project") in Mammoth Lakes, California. Counterclaim ¶ 1. The  
11 Condo Project is governed by a Declaration of Covenants,  
12 Conditions and Restrictions for the Condo Project ("CC&R's").  
13 Id. Bruner, a resident of Clark County, Nevada, owns Unit No.  
14 306 in the Condo Project. Id. ¶ 2.  
15

16 In December 2007, the Association presented a proposed  
17 renovation project ("Renovation Project") to the unit owners for  
18 their approval. Id. ¶ 4. The Renovation Project was to include  
19 the remodel, repair, replacement, and/or renovation of the Phase  
20 1 and 2 buildings in the Condo Project. Id. ¶ 6. The cost of the  
21 proposed Renovation Project and the special assessment to the  
22 unit owners was \$9,500,000 ("Assessment"). Id. ¶ 7. The unit  
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28 <sup>1</sup> Because oral argument will not be of material assistance, the  
Court orders this matter submitted on the briefs. E.D. Cal.  
L.R. 230(g).

1 owners approved the Renovation Project and the associated  
2 special assessment. Id. ¶ 8.

3        Since the approval of the Renovation Project, the  
4 Association charged the entire Assessment, but has not completed  
5 the Renovation Project as promised. Id. ¶ 9. The Association has  
6 allegedly failed to construct several components of the  
7 Renovation Project, unlawfully tabled, changed or removed  
8 several aspects of the project, and mismanaged the project. Id.  
9 Bruner asserts the Association did not seek competing  
10 construction bids to reduce the overall cost of the Renovation  
11 Project. Id. ¶¶ 12-13.

14        Furthermore, Bruner alleges the Renovation Project does not  
15 comply with the CC&R's. Id. ¶ 10. Portions of the Renovation  
16 Project are not within the scope of the Association's authority  
17 under the CC&R's. Id. Additionally, the Association purportedly  
18 failed to properly allocate the Assessment among the unit owners  
19 in accordance with the CC&R's and the Association's own  
20 governing documents. Id. ¶ 11.

22        The Association filed a Complaint ("Complaint") in Mono  
23 County Superior Court on October 22, 2009 (Case No. 16857),  
24 alleging Bruner failed to pay common area assessments. On  
25 November 30, 2009, the action was removed to this Court based on  
26 diversity of citizenship pursuant to 28 U.S.C. § 1332. On  
27  
28

1 December 15, 2009, Bruner filed the Counterclaim against the  
2 Association, alleging sixteen state law claims.

## 3 4 II. OPINION

### 5 A. Legal Standard

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).

26 Upon granting a motion to dismiss for failure to state a  
27 claim, the court has discretion to allow leave to amend the  
28 complaint pursuant to Federal Rule of Civil Procedure 15(a).

1 "Absent prejudice, or a strong showing of any [other relevant]  
2 factor[], there exists a presumption under Rule 15(a) in favor  
3 of granting leave to amend." Eminence Capital, L.L.C. v.  
4 Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). "Dismissal  
5 with prejudice and without leave to amend is not appropriate  
6 unless it is clear . . . that the complaint could not be saved  
7 by amendment." Id.

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9 B. First, Second, Third and Fourth Claims

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11 Bruner alleges four claims based on contract principles:  
12 Violation of Governing Documents, Selective Enforcement and/or  
13 Abandonment of Governing Documents, Breach of Contract and  
14 Breach of Implied Covenant of Good Faith and Fair Dealing. The  
15 Association argues that these claims should be dismissed because  
16 there is no contract, and even if there is a contract, the  
17 Counterclaim fails to explain which provisions were violated.

18  
19 Condominium law allows a homeowner to sue the association  
20 for damages and an injunction to compel the association to  
21 enforce the provisions of the declaration. Posey v. Leavitt, 229  
22 Cal. App. 3d 1236, 1246 (1991) (citations omitted). "The  
23 covenants and restrictions in the declaration shall be  
24 enforceable equitable servitudes...[that] may be enforced by any  
25 owner of a separate interest, or by the association, or by  
26 both." Cal. Civ. Code § 1354(a). These agreements are enforced  
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1 based on contract principles. Nahrstedt v. Lakeside Vill. Condo.  
2 Ass'n, 8 Cal. 4th 361, 380 (1994).

3 To establish a breach of contract claim, a plaintiff must  
4 establish the following elements: "(1) existence of the  
5 contract; (2) plaintiff's performance or excuse for  
6 nonperformance; (3) defendant's breach; and (4) damages to  
7 plaintiff as a result of the breach." CDF Firefighters v.  
8 Maldonado, 158 Cal. App. 4th 1226, 1239 (2008).

9  
10 A contractual obligation is a prerequisite to a breach of  
11 an implied covenant of good faith and fair dealing. Fortaleza v.  
12 PNC Fin. Servs. Group, Inc., 2009 U.S. Dist. LEXIS 64624, at  
13 \*\*15-16 (N.D. Cal. July 27, 2009).

14  
15 Here, Bruner alleges sufficient facts to establish a  
16 contract between Bruner and the Association. Bruner alleges that  
17 the Association is managed by the CC&R's and its own governing  
18 documents. Bruner is the owner of Unit No. 306 in the Project.  
19 Thus, Bruner sufficiently alleges that these documents  
20 constitute an agreement between the Association and the unit  
21 owners, and that either party can sue to enforce these  
22 provisions.  
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25 However, Bruner fails to allege what provisions in the  
26 CC&R's, or any other contract, were violated by the Association  
27 in performing the Renovation Project. A breach of contract claim  
28 rests upon the actual terms of the contract, but Bruner fails to

1 attach the CC&R's or other governing documents, which would  
2 provide the Association's obligations. As such, Bruner has  
3 failed to give the Association "fair notice of what the claim is  
4 and the grounds upon which it rests." Twombly, 550 U.S. at 555.  
5 Accordingly, Bruner's first four claims are dismissed, with  
6 leave to amend.  
7

#### 8 C. Declaratory Relief

9 Bruner's fifth claim requests declaratory relief to  
10 determine whether the CC&R's and other governing documents of  
11 the Association are enforceable, and if so, to determine the  
12 rights of the parties. However, Bruner's fifth claim is based on  
13 the same conclusory allegations as the preceding claims and  
14 thus, fails to allege what provisions in the CC&R's, or any  
15 other contract, were violated by the Association. Bruner has not  
16 plead "enough facts to state a claim to relief that is plausible  
17 on its face." Twombly, 550 U.S. at 570. Accordingly, Bruner's  
18 fifth claim for declaratory relief is dismissed, with leave to  
19 amend.  
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#### 22 D. Negligence Per Se/Violation of Statutes and Administrative 23 Regulations

24 Bruner alleges that through oversight, management and  
25 administration of the Project and Renovation Project, the  
26 Association violated, "without limitation, the Davis-Stirling  
27 Common Interest Development Act, California Civil Code § 1350,  
28

1 et seq., and any corresponding regulations promulgated  
2 thereunder.” Counterclaim ¶ 44.

3 Without citing any specific provision of the Davis-Stirling  
4 Common Interest Development Act or California Civil Code, Bruner  
5 has failed to sufficiently allege a claim. Bruner has the  
6 burden to put the Association on notice of the provisions  
7 allegedly violated. Merely citing to an entire Act and section  
8 of the California Civil Code and stating in the Opposition that  
9 this is “more than sufficient for the Association to figure out  
10 for itself which of the many provisions it violated” fails to  
11 plead enough facts to state a claim to relief that is plausible  
12 on its face. Bruner’s Opposition 12:11-12. Accordingly,  
13 Bruner’s sixth claim for negligence per se/violation of  
14 unidentified statutes and regulations is dismissed, with leave  
15 to amend.  
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19 E. Constructive Fraud and Breach of Fiduciary Duty

20 Bruner alleges that the Association breached their duty to  
21 affirmatively disclose material facts to Bruner and the other  
22 unit owners regarding the Renovation Project. Some of the  
23 alleged material facts not disclosed include the purposes,  
24 goals, plans and specifications of the Renovation project, the  
25 components included in the Renovation Project and the actual and  
26 projected costs of the Renovation Project. Counterclaim ¶ 53.  
27  
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1        "In all averments of fraud or mistake, the circumstances  
2        constituting fraud or mistake shall be stated with  
3        particularity." Fed. R. Civ. Proc. 9(b). However, courts do not  
4        apply this heightened pleading standard to constructive fraud  
5        claims. Cendant Corp. v. Shelton, 474 F. Supp. 2d 377, 380 (D.  
6        Conn. 2007).

8        "Constructive fraud comprises any act, omission or  
9        concealment involving a breach of legal or equitable duty, trust  
10       or confidence which results in damage to another even though the  
11       conduct is not otherwise fraudulent." Harmon v. Kobrin (In re  
12       Harmon), 250 F.3d 1240, 1249 n.10 (9th Cir. 2001) (citing  
13       Assilzadeh v. Cal. Fed. Bank, 98 Cal. Rptr. 2d 176, 186 (Cal.  
14       Ct. App. 2000) (internal quotation marks and citations  
15       omitted)). The failure to disclose material facts may constitute  
16       constructive fraud. Assilzadeh, 98 Cal. Rptr. 2d at 186.

19       "The elements of a cause of action for breach of fiduciary  
20       duty are: 1) the existence of a fiduciary duty; 2) a breach of  
21       the fiduciary duty; and 3) resulting damage." Pellegrini v.  
22       Weiss, 165 Cal. App. 4th 515, 524 (2008). A homeowners  
23       association owes a fiduciary duty to its members. See Cohen v.  
24       Kite Hill Cmty. Ass'n, 142 Cal. App. 3d 642 (1983).

26       Here, Bruner sufficiently alleges that the Association had  
27       a fiduciary duty to him. However, Bruner fails to sufficiently  
28       allege that the Association breached their fiduciary duty by

1 failing to disclose material facts about the Renovation Project.  
2 Although the Counterclaim commits a long paragraph to explaining  
3 what the Association did not disclose to the unit owners, these  
4 allegations are too vague and broad. Accordingly, Bruner's  
5 seventh and eighth claims for constructive fraud and breach of  
6 fiduciary duty are dismissed, with leave to amend.  
7

8 F. Injunctive Relief

9 Bruner's ninth claim for relief seeks an injunction  
10 prohibiting the Association from proceeding with the Renovation  
11 Project, or attempting to collect the balance of the  
12 Assessments; and a mandatory injunction compelling the  
13 Association to turn over all relevant documents, to give a full  
14 accounting, to reallocate the Assessments, and to disgorge any  
15 funds wrongfully assessed.  
16

17 The traditional bases for injunctive relief are irreparable  
18 injury and inadequacy of legal remedies. Amoco Prod. Co. v.  
19 Village of Gambell, 480 U.S. 531, 542 (1987). Here, Bruner does  
20 not sufficiently plead facts to support a finding that he is  
21 suffering irreparable injury. Moreover, the preceding eight  
22 claims for relief demonstrate that Bruner has failed to plead  
23 any actionable tort or breach of contract by the Association.  
24 The Court finds there is no factual basis, as currently plead in  
25 the Counterclaim, for any legal remedy. Accordingly, Bruner's  
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ninth claim for injunctive relief is dismissed, with leave to amend.

G. Intentional Misrepresentation/Fraudulent Concealment

"In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge and other conditions of a person's mind may be alleged generally." Fed. R. Civ. Proc. 9(b). A claim of fraud must have the following elements: "(a) a misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." In re Estate of Young, 160 Cal. App. 4th 62, 79 (2008) (quoting Lazar v. Superior Court, 12 Cal. 4th 631, 638 (1996)) (internal quotation marks omitted).

Here, Bruner has not alleged fraud with the required particularity to state a plausible claim for relief. Bruner's conclusory statements that the Association made "false representations and omissions of material fact" and "intentionally covered over, suppressed, minimized the importance of, or otherwise concealed such information" do not sufficiently allege any real misrepresentation or intent to defraud. Counterclaim ¶¶ 71, 72. Nowhere in the Counterclaim does Bruner describe specific facts of the alleged fraud except to describe a laundry list of vague and broad allegations

1 against the Association. These conclusory allegations are  
2 insufficient to state a claim for relief. Accordingly, Bruner's  
3 tenth claim for intentional misrepresentation/fraudulent  
4 concealment is dismissed, with leave to amend.  
5

6 H. Negligent Misrepresentation/Concealment

7 "In alleging fraud or mistake, a party must state with  
8 particularity the circumstances constituting fraud or mistake."  
9 Fed. R. Civ. P. 9(b). In cases where fraud is not a necessary  
10 element of a claim, but a plaintiff chooses nonetheless to  
11 allege the defendant engaged in fraudulent conduct, the claim is  
12 said to be "grounded in fraud." Vess v. Ciba-Geigy Corp. USA,  
13 317 F.3d 1097, 1103-04 (9th Cir. 2003). Those allegations that  
14 aver fraud must satisfy the particularity requirement of Rule  
15 9(b). Id. "Fraud can be averred by specifically alleging fraud,  
16 or by alleging facts that necessarily constitute fraud (even if  
17 the word 'fraud' is not used)." Id. at 1105.  
18  
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20 Here, Bruner's "negligent misrepresentation/concealment"  
21 claim is "grounded in fraud" because Bruner essentially uses the  
22 same allegations from the intentional misrepresentation claim to  
23 allege this claim. Bruner's two main paragraphs for this claim  
24 were copied from the intentional misrepresentation claim,  
25 stating that the Association "made false representations and  
26 omissions of material fact" and "intentionally covered over,  
27 suppressed, minimized the importance of, or otherwise concealed  
28

1 such information." Counterclaim ¶¶ 82, 83. Thus, these  
2 allegations are grounded in fraud, and must satisfy the  
3 heightened pleading standard. These conclusory statements and  
4 legal conclusions fail to meet the particularity requirement of  
5 Rule 9(b). Accordingly, Bruner's eleventh claim for negligent  
6 misrepresentation/concealment is dismissed, with leave to amend.  
7

#### 8 I. Negligence

9 In order to state a claim for negligence, a plaintiff must  
10 allege: (1) the defendant has a legal duty to use due care; (2)  
11 the defendant breached such legal duty; (3) the defendant's  
12 breach was the proximate or legal cause of the resulting injury;  
13 and (4) damage to the plaintiff. Ladd v. County of San Mateo,  
14 12 Cal. 4th 913, 917 (1996).  
15

16 Bruner fails to sufficiently state a claim for negligence  
17 because he does not allege facts stating how the Association  
18 breached its legal duty to Bruner. Other than the vague and  
19 conclusory allegations that the Association failed to disclose  
20 information to the unit owners, Bruner fails to allege any facts  
21 to support this claim. Accordingly, Bruner's twelfth claim for  
22 negligence is dismissed, with leave to amend.  
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#### 25 J. Unjust Enrichment

26 An unjust enrichment claim requires (1) the receipt of a  
27 benefit and (2) the unjust retention of the benefit at the  
28 expense of another. Peterson v. Cellco Partnership, 164 Cal.

1 App. 4th 1583, 1593 (2008). Bruner's Counterclaim alleges that  
2 the Association "misappropriated, converted, accepted, retained,  
3 used, enjoyed, and appreciated all of the Special Assessment."  
4 Counterclaim ¶ 94. These conclusory allegations fail to state  
5 sufficient facts to support this claim. Accordingly, Bruner's  
6 thirteenth claim for unjust enrichment is dismissed, with leave  
7 to amend.  
8

9 K. An Accounting  
10

11 "A cause of action for an accounting requires a showing  
12 that a relationship exists between the plaintiff and defendant  
13 that requires an accounting, and that some balance is due the  
14 plaintiff that can only be ascertained by an accounting."  
15

16 Teselle v. McLoughlin, 173 Cal. App. 4th 156, 179 (2009)

17 (citations omitted). "An action for accounting is not available  
18 where the plaintiff alleges the right to recover a sum certain  
19 or a sum that can be made certain by calculation." Id.  
20 (citations omitted).  
21

22 Here, Bruner fails to allege sufficient facts to support an  
23 accounting claim. Although Bruner establishes in the  
24 Counterclaim that Bruner and the Association have a special  
25 relationship, Bruner fails to state how the amount in damages  
26 from the Association retaining the Special Assessment and  
27 mismanaging the Renovation Project would be uncertain after a  
28

1 calculation. Accordingly, Bruner's fourteenth claim for an  
2 accounting is dismissed, with leave to amend.

3 L. Constructive Trust

4 A constructive trust may be imposed if three conditions are  
5 met: (1) existence of a res; (2) the plaintiff's right to that  
6 res; and (3) the defendant's gain of the res by fraud, accident,  
7 mistake, undue influence or other wrongful act. United States v.  
8 Pegg, 782 F.2d 1498, 1500 (9th Cir. 1986). Here, a constructive  
9 trust is not an appropriate remedy as plead in this case. Bruner  
10 has failed to sufficiently allege that the Association received  
11 the money through fraud or other wrongful act. Accordingly,  
12 Bruner's fifteenth claim for a constructive trust is dismissed,  
13 with leave to amend.

14 M. Attorney's Fees

15 "Attorney fees are allowable as an item of costs when  
16 authorized by contract, statute or law." Arias v. Katella  
17 Townhouse Homeowners Ass'n., Inc., 127 Cal. App. 4th 847, 852  
18 (2005). Here, Bruner's sixteenth claim does not plead any legal  
19 basis for recovery of attorney's fees, neither a statutory  
20 ground nor any contractual provision for attorney's fees.  
21 Accordingly, Bruner's sixteenth claim for attorney's fees is  
22 dismissed, with leave to amend.

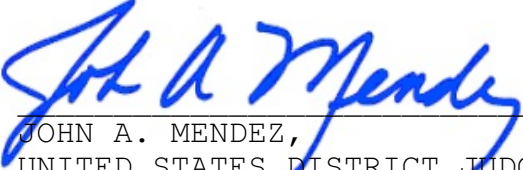
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III. ORDER

For the reasons set forth above, the Association's Motion to Dismiss Bruner's Counterclaim is GRANTED, with leave to amend. Bruner has twenty (20) days from the date of this Order to file an Amended Counterclaim consistent with this Order.

IT IS SO ORDERED.

DATED: June 18, 2010

  
\_\_\_\_\_  
JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE