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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

WILLIAM ALLEN SMITH,)	Case No. 2:10-CV-00359 JAM-JFM
)	
Plaintiff,)	ORDER GRANTING IN PART AND
)	DENYING IN PART DEFENDANT
v.)	PNC's MOTION TO DISMISS
)	
NATIONAL CITY MORTGAGE, UNITED)	
LENDERS GROUP; JEFF MOORE;)	
KONDAUR CAPITAL CORPORATION;)	
DOES I through 100, inclusive,)	
)	
)	
Defendants.)	
)	

This matter comes before the Court on Defendant PNC Bank National Association's ("PNC") Motion to Dismiss (Doc. 16) and Motion to Strike Portions of Plaintiff's First Amended Complaint (Doc. 19). PNC asks the Court to dismiss and to strike portions the First Amended Complaint ("FAC") (Doc. 13) filed by Plaintiff William Allen Smith ("Plaintiff"). Plaintiff opposes the motions.¹

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

1 I. FACTUAL AND PROCEDURAL BACKGROUND

2 Plaintiff alleges that Defendants National City Mortgage,²
3 United Lenders Group ("United"), Jeff Moore ("Moore"), and
4 Kondaur Capital Corporation ("Kondaur") fraudulently conspired
5 to induce him into an usurious loan for their financial gain and
6 that his right to cancel the loan agreement was improperly
7 reneged by PNC.

8 In October of 2006, Plaintiff sought a construction loan to
9 finance the construction of a home located at 5 Stonefield
10 Court, Sacramento, California. One week after being denied a
11 loan from PNC, Plaintiff was contacted by Moore, an independent
12 broker, who allegedly stated that he had been directed by PNC to
13 broker Plaintiff's loan through United.

14 Moore allegedly advised Plaintiff that he could get him the
15 best deal and the best interest rate available on the market.
16 On or about January 31, 2007, PNC approved Plaintiff for a
17 construction loan at a 30-year fixed rate of 7.825% to borrow a
18 principal sum of \$880,000.00 with a monthly mortgage payment of
19 \$6,350.10 per month. Based on PNC's alleged verbal
20 authorization, Plaintiff began construction on his home.

21 Plaintiff alleges that United and Moore overstated his
22 income on the loan application without Plaintiff's knowledge or
23 consent. Plaintiff claims he accurately stated his income as
24 \$23,000.00 per month whereas Moore stated his income as
25 \$33,000.00 per month. Plaintiff avers that since Plaintiff

26 _____
27 ² PNC is a successor by merger to National City Bank, previously
28 doing business as National City Mortgage. The Court will refer to
PNC instead of National City Mortgage since it is the current party
in interest.

1 already gave PNC his correct income in his initial loan
2 application, PNC was aware that Moore inflated Plaintiff's
3 income in order to qualify him for the loan.

4 On February 9, 2007, the day of the loan closing, Plaintiff
5 alleges that the loan terms presented were worse than the terms
6 he had been promised. On closing day, the loan was an
7 adjustable rate loan that included a ten year interest-only
8 provision and required twice the down payment. Plaintiff claims
9 he felt pressured to sign the loan documents because
10 construction had already began on his house. Plaintiff alleges
11 that he would not have signed the loan agreement except that the
12 loan documents contained a right to cancel notification citing
13 the Truth in Lending Act ("TILA"). Plaintiff claims the escrow
14 agent reassured him that the TILA notice gave him the right to
15 cancel the loan within three days of signing. Plaintiff alleges
16 that he agreed to sign the documents based on the promise he
17 could rescind the loan.

18 Plaintiff alleges that within the three day cancellation
19 period, he exercised and delivered the loan cancellation to the
20 lender and title company. Plaintiff was notified by
21 representatives of PNC and Moore that the construction loan
22 could not be cancelled.

23 In or around June 2008, Plaintiff sought a forbearance
24 settlement and Plaintiff was allegedly advised by a PNC
25 representative that he would be eligible for a permanent
26 modification of his loan after a three month trial payment
27 period, if Plaintiff reduced his unsecured debt. On or about
28 July 3, 2008, PNC sent a "forbearance agreement" to Plaintiff

1 requesting payments of \$2,895.00 respectively, for Plaintiff's
2 July, August, and September mortgage payments. Plaintiff
3 alleges that at PNC's direction, he filed Chapter 7 bankruptcy
4 on July 30, 2008 to reduce his unsecured debt. On December 15,
5 2008, Plaintiff contacted PNC and was advised by a PNC customer
6 representative that PNC had approved the loan modification and
7 that the modification paperwork was forthcoming.

8 While waiting for the loan modification confirmation,
9 Plaintiff was allegedly notified by PNC that his loan had been
10 sold to Kondaur, who would finalize the loan modification. On
11 February 12, 2009, Plaintiff alleges he was assured by a Kondaur
12 representative that the modification began by PNC would continue
13 to be processed. On the same day, Kondaur issued a Notice of
14 Default to Plaintiff.

15 Plaintiff brings this action alleging nine causes of action
16 for fraud, declaratory relief (T.I.L.A.), breach of fiduciary
17 duty, declaratory relief (U.C.C. and California Commercial
18 Code), accounting, violation of the Rosenthal Debt Collection
19 Act, unjust enrichment, negligence and violation of California
20 Business and Professions Code Section 17200 et. seq.

22 II. OPINION

23 A. Legal Standard

24 1. Motion to Dismiss

25 A party may move to dismiss an action for failure to state
26 a claim upon which relief can be granted pursuant to Federal
27 Rule of Civil Procedure section 12(b)(6). In considering a
28 motion to dismiss, the court must accept the allegations in the

1 complaint as true and draw all reasonable inferences in favor of
2 the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1975),
3 overruled on other grounds by Davis v. Scherer, 468 U.S. 183
4 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions that
5 are mere "legal conclusions," however, are not entitled to the
6 assumption of truth. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1950
7 (2009), citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555
8 (2007). To survive a motion to dismiss, a plaintiff needs to
9 plead "enough facts to state a claim to relief that is plausible
10 on its face." Twombly, 550 U.S. at 570. Dismissal is
11 appropriate where the plaintiff fails to state a claim
12 supportable by a cognizable legal theory. Balistreri v.
13 Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1990).

14 Upon granting a motion to dismiss for failure to state a
15 claim, the court has discretion to allow leave to amend the
16 complaint pursuant to Federal Rule of Civil Procedure § 15(a).
17 "Dismissal with prejudice and without leave to amend is not
18 appropriate unless it is clear . . . that the complaint could
19 not be saved by amendment." Eminence Capital, L.L.C. v. Aspeon,
20 Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).

21 2. Motion to Strike

22 Rule 12(f) provides in pertinent part that:

23 The Court may order stricken from any pleading any
24 insufficient defense or any redundant, immaterial,
25 impertinent, or scandalous matter. . . . Motions to
26 strike are disfavored and infrequently granted. A
27 motion to strike should not be granted unless it is
28 clear that the matter to be stricken could have no
 possible bearing on the subject matter of the
 litigation.

Bassett v. Ruggles, et al., 2009 WL 2982895 at *24 (E.D.

1 Cal. Sept. 14, 2009) (internal citations omitted).

2
3 B. Claims for Relief

4 1. Fraud

5 PNC argues that Plaintiff does not plead his first claim
6 for fraud with particularity. Plaintiff responds that he pleads
7 the fraud elements with sufficient detail to satisfy Rule 9(b)'s
8 heightened pleading requirements.

9 While pleadings generally require "a short and plain
10 statement of the claim showing that the pleader is entitled to
11 relief," FED.R.CIV.P. 8(a)(2), when fraud is alleged "a party
12 must state with particularity the circumstances constituting
13 fraud. . . ." FED.R.CIV.P. 9(b).

14 Rule 9(b) requires fraud claims to be "specific enough to
15 give defendants notice of the particular misconduct . . . so
16 that they can defend against the charge and not just deny that
17 they have done anything wrong." Bly-Magee v. California, 236
18 F.3d 1014, 1019 (9th Cir. 2001) (internal quotations omitted).
19 "Averments of fraud must be accompanied by the who, what, when,
20 where, and how of the misconduct charged." Vess v. Ciba-Geigy
21 Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal
22 citations omitted). While Rule 9(b) requires a heightened
23 pleading standard, it "does not require nor make legitimate the
24 pleading of detailed evidentiary matter." Walling v. Beverly
25 Enterprises, 476 F.2d 393, 397 (9th Cir. 1973).

26 To plead a cause of action for fraud, Plaintiff must show:
27 (1) a misrepresentation; (2) knowledge of falsity; (3) intent to
28 defraud; (4) justifiable reliance; and (5) resulting damage.

1 Buckland v. Threshold Enterprises, Ltd., 155 Cal.App.4th 798,
2 807 (Cal. Ct. App. 2d 2007). PNC's main argument is that
3 Plaintiff does not properly allege the intent to defraud and the
4 justifiable reliance elements of the fraud allegation.

5 The Court finds that Plaintiff has sufficiently pled the
6 intent to defraud element by alleging that PNC "paid Moore and
7 United commissions based on their ability to make these false
8 statements and induce Plaintiff into the loan agreement." Id.
9 at ¶ 114. Plaintiff also alleges a scheme in which PNC's intent
10 "under the securitization process, was to trap as many
11 unsuspecting borrowers as possible . . . regardless of the
12 borrower's credit history or ability to pay, take as much of the
13 borrower's equity as possible, then sell the note to an entity
14 who could foreclose upon the note free from fraud allegations."
15 Id. at ¶ 43.

16 Furthermore, Plaintiff has properly alleged justifiable
17 reliance. Plaintiff avers that he signed the loan documents
18 because he was given a written agreement that he had the right
19 to cancel the loan within three days and he was verbally assured
20 he could rescind within those three days. Id. at ¶ 61-62.
21 Plaintiff also alleges that he paid his mortgage payments in
22 reliance on PNC's promises that he could receive a loan
23 modification. Id. at ¶ 69.

24 The FAC is specific enough to put PNC on notice of the
25 charges. Accordingly, PNC's motion to dismiss Claim 1 alleging
26 fraud is DENIED.

27 2. Breach of Fiduciary Duty

28 PNC argues that Claim 3, alleging a breach of fiduciary

1 duty, fails to state a claim because Moore represented himself
2 to be Plaintiff's fiduciary, not PNC. Additionally, as a matter
3 of California law, financial institutions owe no legal or
4 fiduciary duty of care to borrowers. Plaintiff counters that
5 since PNC referred Moore to Plaintiff, the fiduciary
6 relationship that existed between Moore and Plaintiff extended
7 to PNC through agency principles and, as a matter of law, a
8 fiduciary relationship exists between a real estate loan broker
9 and a borrower.

10 "The elements of a cause of action for breach of fiduciary
11 duty are: 1) the existence of a fiduciary duty; 2) a breach of
12 the fiduciary duty; and 3) resulting damage." Pellegrini v.
13 Weiss, 165 Cal.App.4th 515, 524 (Cal. Ct. App. 6d 2008). In the
14 lending context, "a financial institution owes no duty of care
15 to a borrower when the institution's involvement in the loan
16 transaction does not exceed the scope of its conventional role
17 as a mere lender of money." Nymark v. Heart Federal Savings &
18 Loan Ass'n, 231 Cal.App.3d 1089, 1096 (Cal. Ct. App. 3d 1991).

19 Plaintiff does not state a claim for breach of fiduciary
20 duty. PNC was the "mere lender of money" in this case and holds
21 no fiduciary duty towards Plaintiff. As such, without the
22 existence of a fiduciary relationship, there can be no claim for
23 relief against PNC. Accordingly, PNC's motion to dismiss Claim
24 3 alleging a breach of fiduciary duty is GRANTED WITH PREJUDICE.

25 3. Declaratory Relief

26 In Claim 2, Plaintiff pleads that he had the right to
27 rescind the loan based on TILA, 15 U.S.C § 1635(a), and
28 Regulation Z, 12 C.F.R. § 226.15. In Claim 4, Plaintiff pleads

1 that PNC violated the California Commercial Code § 3301, et seq.
2 PNC argues that both of Plaintiff's claims fail as a matter of
3 law so there is no controversy necessitating declaratory relief.

4 "Declaratory relief is appropriate (1) when the judgment
5 will serve a useful purpose in clarifying and settling the legal
6 relations in issue, and (2) when it will terminate and afford
7 relief from the uncertainty, insecurity, and controversy giving
8 rise to the proceeding." Guerra v. Sutton, 783 F.2d 1371, 1376
9 (9th Cir. 1986) (citations omitted).

10 Plaintiff's claims for declaratory relief fail as a matter
11 of law. Claim 2 alleges that PNC violated Plaintiff's right to
12 cancel the loan as prescribed by TILA, 15 U.S.C. § 1635(a) and
13 Regulation Z, 12 C.F.R. § 226.15. However, the rescission
14 provision does not apply to "residential mortgage
15 transaction[s]." 15 U.S.C. 1635(e); 12 C.F.R. § 226.15(f). A
16 residential mortgage transaction is "a transaction in which a
17 mortgage . . . is created . . . to finance the acquisition or
18 *initial construction* of such dwelling." 15 U.S.C. § 1602(w)
19 (emphasis added). Here, Plaintiff alleges that the loan was a
20 construction loan to finance the construction of a home for his
21 family. FAC ¶ 45. Therefore, TILA's rescission provision does
22 not apply to this loan as a matter of law.

23
24 Similarly, the Court cannot issue a declaratory judgment under
25 Claim 4. Plaintiff seeks a declaratory judgment stating that PNC
26 and the other defendants did not follow the legal requirements of
27 the California Commercial Code § 3301, et seq. to produce a proper
28 promissory note with which to foreclose the property. However,

1 nonjudicial foreclosures are not governed by California Commercial
2 Code § 3301. Singh v. America's Servicing Co., No. 2:10-CV-0836,
3 2010 WL 3853325, at *2 (E.D.Cal. Sept. 30, 2010). Nonjudicial
4 foreclosures are governed by California Civil Code § 2924 which
5 does not require possession of a promissory note to initiate
6 foreclosure proceedings. Pok v. American Home Mortgage Servicing,
7 Inc., No. 2:09-2385, 2010 WL 476674, at *7 (E.D. Cal. Feb. 3,
8 2010). Therefore, because Claim 4 is premised upon the alleged
9 violation of an inapplicable Commercial Code provision, there is no
10 actual controversy and the Court cannot issue declaratory relief.
11 Accordingly, PNC's motion to dismiss Claim 2 and Claim 4 is GRANTED
12 WITH PREJUDICE.

13 4. Accounting

14 PNC argues that with respect to Claim 5, Plaintiff fails to
15 state a cause of action for an accounting because there is no
16 fiduciary duty between PNC and Plaintiff and because Plaintiff does
17 not allege that he is confused about who he owes or that any funds
18 are owed to him. Plaintiff alleges that there is a fiduciary
19 relationship between PNC and Plaintiff and an agency relationship
20 between PNC and the other defendants. Plaintiff also alleges that
21 because the loan was modified and sold to a third party and there
22 are various parties contesting the amount of the note, he needs an
23 accounting.

24 Under California law, "a fiduciary relationship between the
25 parties is not required to state a cause of action for accounting.
26 All that is required is that some relationship exists that requires
27 an accounting". Teselle v. McLoughlin, 173 Cal.App.4th 156, 179
28 (Cal. Ct. App. 3d 2009).

1 An action for an accounting is equitable in nature.
2 It may be brought to compel the defendant to account
3 to the plaintiff for money or property, (1) where a
4 fiduciary relationship exists between the parties, or
5 (2) where, even though no fiduciary relationship
exists, the accounts are so complicated that an
ordinary legal action demanding a fixed sum is
impracticable.

6 Quinteros v. Aurora Loan Services, No. CIV-F-09-2200, 2010
7 WL 3817541, at * 5 (E.D.Cal. Sept. 30, 2010).

8 Accounts that are complicated enough to warrant an
9 accounting generally involve a dispute where the plaintiff
10 claims the defendant owes him money. See Union Bank v.
11 Superior Court, 31 Cal.App.4th 573, 593-94 (Cal. Ct. App.
12 2d 1995) (dismissing the accounting claims since the
13 defendant owed no money to plaintiffs and did not deprive
14 them of any monies).

15 As this Court found, supra, there is no fiduciary
16 relationship between PNC and Plaintiff. Additionally, the
17 amounts at issue are monies Plaintiff owes to PNC under the
18 mortgage. "Plaintiffs, as the party owing money, not the party
19 owed money, has no right to seek an accounting." Hernandez v.
20 First American Loanstar Trustee Services, No. 10cv00119, 2010 WL
21 1445192 *5 (S.D. Cal. Apr. 12, 2010). Plaintiff argues that he
22 needs an accounting because there are multiple parties connected
23 to his note and that the parties are contesting the amount
24 Plaintiff owes. These allegations are not sufficient to merit
25 an accounting. "A suit for an accounting will not lie where it
26 appears from the complaint that none is necessary. . . ." St.
27 James Church of Christ Holiness v. Superior Court In and For Los
28 Angeles County, 135 Cal.App.2d 352, 359 (Cal. Ct. App. 2d 1955).

1 Accordingly, PNC's motion to dismiss Claim 5 is GRANTED WITH
2 PREJUDICE.

3 5. Unjust Enrichment

4 PNC argues that Claim 7, alleging unjust enrichment, is
5 flawed because the allegations are vague, conclusory and fail to
6 reflect any facts showing that PNC was unjustly enriched.

7 Plaintiff has not responded to this argument, and a review of
8 this claim reveals that it lacks factual detail. A plaintiff
9 must allege sufficient factual detail to support violations of
10 the elements of the alleged causes of action. Ashcroft v.

11 Iqbal, 129 S.Ct. 1937, 1950 (2009). The FAC alleges, in a
12 conclusory manner, the elements for unjust enrichment but does
13 not provide any supporting facts alleging how any of the
14 commissions and fees PNC received by selling the loan to Kandaur
15 constitutes unjust enrichment. Accordingly, PNC's motion to
16 dismiss the unjust enrichment claim is GRANTED WITH LEAVE TO
17 AMEND.

18 6. Negligence

19 PNC argues that Claim 8 fails to state a claim against PNC for
20 negligence. Plaintiff's reply clarifies that he is not alleging a
21 claim for negligence against PNC. Accordingly, PNC's motion to
22 dismiss Claim 8 is GRANTED WITH PREJUDICE.

23 7. Business and Professions Code § 17200

24 PNC argues that Plaintiff does not state a claim under
25 California Business and Professions Code ("UCL") § 17200 because he
26 fails to sufficiently plead any unlawful conduct by PNC, he fails
27 to plead any fraudulent conduct by PNC, and he fails to plead
28 damages capable of restitution.

1 Section 17200 prohibits any "unlawful, unfair or fraudulent
2 business act or practice." Cal. Bus. & Prof. Code § 17200. An
3 action based on this statute "borrows violations of other laws and
4 treats these violations, when committed pursuant to business
5 activity, as unlawful practices independently actionable under
6 § 17200 and subject to the distinct remedies provided thereunder."
7 Farmers Insurance Exchange v. Superior Court, 2 Cal. 4th 377, 383
8 (Cal. 1992) (internal quotations omitted). Therefore, a cause of
9 action under this section must be based on some predicate act
10 involving a violation of some other statute. Cal-Tech
11 Communications v. L.A. Cellular Telephone Co., 20 Cal. 4th 163, 180
12 (Cal. 1999).

13 Here, Plaintiff alleges that PNC violated several laws:
14 (1) Plaintiff alleges PNC violated the California Commercial Code
15 § 3301 et seq. for improper procedures surrounding the mortgage
16 note; (2) breach of fiduciary duty; (3) negligence for breaching
17 its fiduciary duty; (4) fraud for approving Plaintiff's loan; and
18 (5) fraud and a violation of predatory lending laws when it
19 allegedly ordered and authorized Moore's conduct. As discussed,
20 supra, Plaintiff does not have a claim for a violation of § 3301
21 since this is a nonjudicial foreclosure and PNC does not owe
22 Plaintiff a fiduciary duty. Thus, only the fraud claims are
23 potentially actionable under the UCL.

24 As with allegations of fraud, "a plaintiff alleging unfair
25 business practices under these statutes must state with reasonable
26 particularity the facts supporting the statutory elements of the
27 violation." Quintero Family Trust v. OneWest Bank, F.S.B., No. 09-
28 CV-1561, 2010 WL 2618729, at * 12 (S.D. Cal. June 25, 2010). As

1 discussed, supra, Plaintiff adequately pled the fraud allegations.

2 Plaintiff has not, however, alleged an injury in fact, a
3 necessary element for a § 17200 claim. Plaintiff alleges that as a
4 result of PNC's business practices, he was required to pay usurious
5 loan payments and he now suffers from a negative credit rating due
6 to petitioning for Chapter 7 bankruptcy, allegedly at PNC's
7 direction.

8 "A plaintiff suffers an injury in fact for purposes of
9 standing under the UCL when he or she has: (1) expended money due
10 to the defendant's acts of unfair competition; (2) lost money or
11 property; or (3) been denied money to which he or she has a
12 cognizable claim." Marilao v. McDonald's Corp., 632 F.Supp. 2d
13 1008, 1012 (S.D. Cal. 2009) (internal citations omitted). "This
14 statutory limitation requires that a plaintiff show he has suffered
15 losses capable of restitution." Small v. Mortgage Electronic
16 Registration Systems, Inc., Nos. 2:09-cv-0458 & 2:10-cv-0342, 2010
17 WL 3719314, at *12 (E.D. Cal. Sept. 16, 2010) (internal citations
18 omitted). "Ordinarily when we say someone has 'lost' money we mean
19 that he has parted, deliberately or otherwise, with some
20 identifiable sum formerly belonging to him or subject to his
21 control; it has passed out of his hands by some means, such as
22 being spent or mislaid." Silvaco Data Systems v. Intel Corp., 184
23 Cal.App.4th 210, 244 (Cal. Ct. App. 6d 2010).

24 The mortgage payments are not subject to restitutionary
25 damages. Plaintiff made his mortgage payments pursuant to his
26 contractual obligations and in accordance with the terms and
27 conditions of the loan, which he knew and understood at the time of
28 closing. Likewise, the negative credit rating due to filing for

1 bankruptcy is not a loss capable of restitution. A negative credit
2 rating is not an identifiable sum of money. See Manabat v. Sierra
3 Pacific Mortgage Co. Inc., No. CV F 10-1018, 2010 WL 2574161, at
4 *15 (E.D. Cal. June 25, 2010) ("UCL claim offers an insufficient,
5 bare allegation that unlawful business practices 'damaged
6 plaintiff's creditworthiness.'"). Accordingly, PNC's motion to
7 dismiss the \$ 17200 claim is GRANTED WITH PREJUDICE.

8 C. Motion to Strike

9 PNC asks the Court to strike reference to punitive or
10 exemplary damages and attorneys' fees. A motion to strike must
11 survive a stringent standard and "should not be granted unless it
12 is absolutely clear that the matter to be stricken could have no
13 possible bearing on the litigation." Brewer v. Indymac Bank, 609
14 F.Supp. 2d 1101, 1113 (E.D. Cal. 2009).

15 1. Punitive or Exemplary Damages

16 PNC uses the Motion to Strike as another opportunity to
17 reargue that Plaintiff has not sufficiently alleged fraud and
18 therefore is unable to recover punitive damages. Since the
19 Court found supra that Plaintiff properly alleged the fraud
20 claim and since Plaintiff could possibly recover punitive
21 damages if he proves that PNC engaged in "oppression, fraud, and
22 malice," California Civil Code § 3294, Plaintiff's request for
23 punitive damages could bear on the litigation. Accordingly,
24 PNC's motion to strike Plaintiff's request for punitive damages
25 is DENIED.

26 2. Attorneys' Fees

27 PNC argues that Plaintiff cannot recuperate attorneys' fees
28 because Plaintiff does not allege a breach of the loan contract.

1 PNC reasons that even though the loan contract has an attorneys'
2 fees provision, Plaintiff is not trying to enforce that contract so
3 he is not entitled to attorneys' fees. PNC also argues that
4 attorneys' fees are not available under the UCL. Plaintiff
5 counters that attorneys' fees can be recovered as costs of suit
6 when there is an express provision in the contract that provides
7 for recovery of fees, and the parties to the litigation are parties
8 to the contract containing the attorneys' fees provision.
9 Plaintiff also argues that the UCL provides attorney's fees.

10 California Code of Civil Procedure § 1033.5(a)(10)(A) permits
11 recovery of attorney fees "when authorized by . . . Contract."
12 California Civil Code § 1717(a) addresses recovery of attorney fees
13 in contract actions and provides:

14 In any action on a contract, where the contract
15 specifically provides that attorney's fees and costs,
16 which are incurred to enforce that contract, shall be
17 awarded either to one of parties or to the prevailing
18 party, then the party who is determined to be the party
19 prevailing on the contract . . . shall be entitled to
20 reasonable attorney's fees in addition to other costs.

21 Even though Plaintiff is not directly alleging a breach of
22 contract, he alleges fraud which could ultimately undermine the
23 validity of the contract. "[A]n obligation to pay attorney fees
24 incurred in the enforcement of a contract 'includes attorneys' fees
25 incurred in defending against a challenge to the underlying
26 validity of the obligation.'" Siligo v. Castellucci, 21
27 Cal.App.4th 873, 878 (Cal. Ct. App. 6d 1994) (internal citations
28 omitted). Since the Eastern District of California has awarded
attorneys' fees to defendants who must litigate to maintain their
property rights in a promissory note, so might this Court award
attorneys' fees to Plaintiff if he can successfully prove that the

1 note is tainted by fraud. See Whittle v. Wells Fargo Bank, N.A.,
2 No. CV F 10-0029, 2010 WL 1444675, at * 3 (E.D. Cal. Apr. 12,
3 2010).

4 As to the UCL claim for attorneys' fees, the Court decided
5 supra to dismiss Plaintiff's TILA claim. Thus, he is not entitled
6 to attorneys' fees under the UCL. Accordingly, PNC's motion to
7 strike Plaintiff's request for attorneys' fees is DENIED.

8
9 III. ORDER

10 For the reasons set forth above,

11 PNC's motion to dismiss Claim 1 alleging fraud claim is
12 DENIED.

13 PNC's motion to dismiss Claim 2 requesting declaratory relief
14 is GRANTED WITH PREJUDICE.

15 PNC's motion to dismiss Claim 3 alleging a breach of
16 fiduciary duty is GRANTED WITH PREJUDICE.

17 PNC's motion to dismiss Claim 4 requesting declaratory
18 relief is GRANTED WITH PREJUDICE.

19 PNC's motion to dismiss Claim 5 requesting an accounting is
20 GRANTED WITH PREJUDICE.

21 PNC's motion to dismiss Claim 7 alleging unjust enrichment
22 claim is GRANTED WITH LEAVE TO AMEND.

23 PNC's motion to dismiss Claim 8 alleging negligence is
24 GRANTED WITH PREJUDICE.

25 PNC's motion to dismiss Claim 9 alleging a violation of
26 § 17200 is GRANTED WITH PREJUDICE.

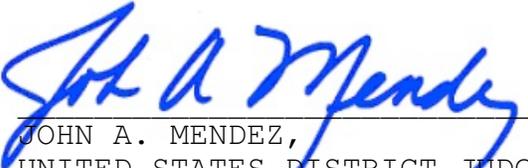
27 PNC's motion to strike reference to punitive damages is
28 DENIED.

1 PNC's motion to strike reference to attorneys' fees is
2 DENIED.

3 Plaintiff shall file his amended complaint within twenty
4 (20) days of the date of this Order.

5 IT IS SO ORDERED.

6 Dated: December 29, 2010



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

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