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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

BRIAN THIEL,

No. 2:10-cv-00645-MCE-DAD

Plaintiff,

v.

MEMORANDUM AND ORDER

GMAC MORTGAGE, LLC and DOES 1  
through 100, inclusive

Defendants.

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Presently before the Court is a Motion by Defendant GMAC Mortgage, LLC ("Defendant") to dismiss the claims alleged in Plaintiff Brian Thiel's ("Plaintiff") Second Amended Complaint for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure Rule of 12(b)(6)<sup>1</sup>. For the reasons set forth below, Defendant's Motion is granted.

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<sup>1</sup> Because oral argument will not be of material assistance, the Court orders this matter submitted on the briefs. E.D. Cal. Local Rule 230(g).

1 **BACKGROUND<sup>2</sup>**

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3 Plaintiff entered into a mortgage loan transaction to  
4 purchase his home in Pleasant Grove, California. In December  
5 2008, Plaintiff contacted Defendant to request a loan  
6 modification or mortgage refinance. In January 2009, Plaintiff  
7 was notified by one of Defendant's telephone representatives that  
8 a loan modification would only be granted once Plaintiff was in  
9 default on his mortgage loan.

10 Based on Defendant's statement and subsequent phone  
11 conversations, Plaintiff purposefully withheld payments on his  
12 loan, although, on his own admission, he financially could have  
13 made the payments. In May 2009, Defendant informed Plaintiff  
14 that his loan would not be modified because he was behind on his  
15 payments and his monthly income was too high. After subsequent  
16 attempts to modify his loan proved futile, Plaintiff filed the  
17 instant suit.

18  
19 **STANDARD**

20  
21 On a motion to dismiss for failure to state a claim under  
22 Rule 12(b)(6), all allegations of material fact must be accepted  
23 as true and construed in the light most favorable to the  
24 nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336,  
25 337-38 (9th Cir. 1996).

26  
27 \_\_\_\_\_  
28 <sup>2</sup> The factual assertions in this section are based on the  
allegations in Plaintiff's Second Amended Complaint unless  
otherwise specified

1 Rule 8(a)(2) requires only "a short and plain statement of the  
2 claim showing that the pleader is entitled to relief," to "give  
3 the defendant fair notice of what the...claim is and the grounds  
4 upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544,  
5 555 (2007) (internal citations and quotations omitted). Though  
6 "a complaint attacked by a Rule 12(b)(6) motion" need not contain  
7 "detailed factual allegations, a plaintiff's obligation to  
8 provide the 'grounds' of his 'entitlement to relief' requires  
9 more than labels and conclusions, and a formulaic recitation of  
10 the elements of a cause of action will not do." Id. at 555  
11 (quoting Papasan v. Allain, 478 U.S. 265, 2869 (1986)). A  
12 plaintiff's "factual allegations must be enough to raise a right  
13 to relief above the speculative level." Id. (citing 5 C. Wright  
14 & A. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)  
15 ("[T]he pleading must contain something more...than...a statement  
16 of facts that merely creates a suspicion [of] a legally  
17 cognizable right of action.")).

18 Further, "Rule 8(a)(2)...requires a 'showing,' rather than a  
19 blanket assertion, of entitlement to relief. Without some  
20 factual allegation in the complaint, it is hard to see how a  
21 claimant could satisfy the requirements of providing...grounds on  
22 which the claim rests." Twombly, 550 U.S. at 555 n.3 (internal  
23 citations omitted). A pleading must then contain "only enough  
24 facts to state a claim to relief that is plausible on its face."  
25 Id. at 570. If the "plaintiffs...have not nudged their claims  
26 across the line from conceivable to plausible, their complaint  
27 must be dismissed." Id.

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1 Nothing in Plaintiff's Second Amended Complaint suggests the  
2 parties had any sort of binding oral agreement based upon these  
3 telephone conversations. Even interpreting the facts in the  
4 light most favorable to Plaintiff, the facts do not demonstrate  
5 there was consideration, or anything, evidencing that Defendant's  
6 oral promise in some way constituted a binding and enforceable  
7 oral contract. Therefore, Defendant's Motion to Dismiss this  
8 cause of action is granted.

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10 **B. Fraud**

11  
12 Plaintiff alleges that Defendant falsely represented that  
13 Plaintiff would be granted a loan modification if he became  
14 delinquent on his loan. Additionally, Plaintiff alleges that at  
15 the time the misrepresentation was made, Defendant knew it was  
16 false, or made the misrepresentation with reckless disregard for  
17 its truth. The Court previously denied Defendant's request to  
18 dismiss Plaintiff's fraud claim, because it was determined the  
19 facts had been sufficiently pled (See ECF No. 29). However, upon  
20 further review, Plaintiff's claim cannot stand.

21 Under California law, actual fraud is the commission of any  
22 of the following as a party to a contract, with the intent to  
23 deceive or induce the other party into the contract: (1) the  
24 suggestion of an untrue fact by someone who knows its not true;  
25 (2) the "positive assertion, in a manner not warranted by the  
26 information of the person making it," of something untrue when  
27 they know it's untrue; (3) suppressing a true fact; or

28 ///

1 (4) a promise made with no intention of performing it, or any  
2 "other act fitted to deceive." CA Civ. Code § 1572. In addition  
3 to meeting Rule 8 requirements, complaints alleging fraud must  
4 also meet the pleading requirements of Rule 9(b), which states  
5 that fraud allegations must be stated "with particularity the  
6 circumstances constituting fraud or mistake."

7 Allegations of fraud must be "specific enough to give  
8 defendants notice of the particular misconduct which is alleged  
9 to constitute the fraud charged so that they can defend against  
10 the charge and not just deny that they have done anything wrong."

11 Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985).

12 Statements of the time, place and nature of the alleged  
13 fraudulent activities are sufficient, id. at 735, provided the  
14 plaintiff sets forth "what is false or misleading about a  
15 statement and why it is false." In re GlenFed, Inc., Securities  
16 Litigation, 42 F.3d 1541, 1548 (9th Cir. 1994).

17 Even assuming, arguendo, that Plaintiff's multiple telephone  
18 conversations with Defendant's representatives constitute some  
19 form of contract or created some contractual obligation,  
20 Plaintiff is required to show here that Defendant intended to  
21 deceive him when they told him to cease making his mortgage  
22 payments. Nothing in Plaintiff's Second Amended Complaint  
23 suggests that Plaintiff actually knew, or subsequently learned,  
24 that Defendant's statements were intended to defraud, or that the  
25 representations made were in fact false, as required by the  
26 statute. In addition, no evidence is provided that suggests  
27 Plaintiff's reliance on such statements is the SOLE reason for  
28 his current predicament.

1 **CONCLUSION**

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3 As a matter of law, and for the reasons set forth above,  
4 Defendant's Motion to Dismiss Plaintiff's Second Amended  
5 Complaint (ECF No. 32) is GRANTED. Plaintiff's claims will not  
6 be cured with further amendment, and therefore the case is  
7 dismissed with prejudice. The Clerk is ordered to close the  
8 case.

9 IT IS SO ORDERED.

10 Dated: January 26, 2011

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13 MORRISON C. ENGLAND, JR.  
14 UNITED STATES DISTRICT JUDGE