

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

MARK MILLER,

No. 2:11-cv-00257-MCE-DAD

Plaintiff,

v.

**MEMORANDUM AND ORDER**

GMAC MORTGAGE, LLC; QUICKEN  
LOANS INCORPORATED; MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS,  
INC.; and DOES 1 through 50,  
inclusive,

Defendants.

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Through this action, Plaintiff Mark Miller ("Plaintiff") seeks redress for the alleged deceit and negligence of Defendants GMAC Mortgage, LLC ("GMAC"), Quicken Loans Inc. ("Quicken"), and Mortgage Electronic Registration Systems, Inc. ("MERS") (collectively "Defendants") in connection with a home mortgage transaction. There are two matters presently before the Court.

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1 First, on February 2, 2011, Defendants GMAC and MERS filed an  
2 Amended Motion to Dismiss for failure to state a claim upon which  
3 relief can be granted pursuant to Rule 12(b)(6) of the Federal  
4 Rules of Civil Procedure.<sup>1</sup> (ECF No. 10.) Plaintiff has not  
5 filed a timely opposition to that motion. Second, on  
6 February 17, 2011, Quicken filed a separate Motion to Dismiss  
7 pursuant to Rule 12(b)(6). (ECF No. 12.) Plaintiff did file a  
8 timely opposition to Quicken's motion to dismiss. (ECF No. 15.)  
9 For the reasons set below, both motions are granted.<sup>2</sup>

### 10 11 **BACKGROUND**<sup>3</sup>

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13 The instant dispute arises out of an alleged mortgage  
14 transaction between Plaintiff and Quicken. In December 2007,  
15 Plaintiff spoke with Suren Srabian ("Srabian"), a mortgage broker  
16 employed by Quicken, about purchasing real property. Plaintiff  
17 allegedly provided Srabian with his financial information so that  
18 Srabian could complete Plaintiff's loan application. Although  
19 Plaintiff's actual monthly income was \$6,083.33, Srabian  
20 allegedly listed Plaintiff's income on the application as  
21 \$8,125.00.

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24 <sup>1</sup> All subsequent references to 'rule' or 'rules' are to the  
Federal Rules of Civil Procedure unless otherwise noted.

25 <sup>2</sup> Because oral argument will not be of material assistance,  
26 the Court orders this matter submitted on the briefs. E.D. Cal.  
Local Rule 230(g).

27 <sup>3</sup> The factual assertions in this section are based on the  
28 allegations in Plaintiffs' Complaint (ECF No. 1) unless otherwise  
specified.

1 As a result, Plaintiff's monthly income on the mortgage  
2 application was inflated by \$2,041.66. Based on the application,  
3 Quicken agreed to issue a loan to Plaintiff.

4 On January 11, 2008, Plaintiff signed the loan documents in  
5 the presence of a notary, who was sent to Plaintiff's home by  
6 Quicken to execute the documents. Quicken, and/or Srabian,  
7 purportedly did not explain the terms of the loan, and did not  
8 counsel Plaintiff to read the documents carefully. Plaintiff  
9 further claims that he was rushed when signing the loan  
10 documents, and did not have an adequate opportunity to read them.  
11 Srabian and Quicken allegedly guaranteed that the loan would  
12 become more affordable as Plaintiff's salary increased, and that  
13 the loan could later be refinanced.

14 Plaintiff alleges that GMAC is currently the servicer of the  
15 subject loan, and that MERS is the beneficiary on the deed of  
16 trust. Although Plaintiff alleges that Defendants have initiated  
17 collection proceedings, and threatened foreclosure, Plaintiff  
18 does not allege that foreclosure proceedings have actually been  
19 instituted. In its pending motion to dismiss, Quicken asserts  
20 that Plaintiff is current on his payments, and that foreclosure  
21 proceedings have not been initiated.

#### 22 23 **STANDARD** 24

25 On a motion to dismiss for failure to state a claim under  
26 Rule 12(b)(6), all allegations of material fact must be accepted  
27 as true and construed in the light most favorable to the  
28 nonmoving party.

1 Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir.  
2 1996). Rule 8(a)(2) requires only "a short and plain statement  
3 of the claim showing that the pleader is entitled to relief," to  
4 "give the defendant fair notice of what the...claim is and the  
5 grounds upon which it rests." Bell Atl. Corp. v. Twombly,  
6 550 U.S. 544, 555 (2007) (internal citations and quotations  
7 omitted). Although "a complaint attacked by a Rule 12(b)(6)  
8 motion" need not contain "detailed factual allegations, a  
9 plaintiff's obligation to provide the 'grounds' of his  
10 'entitlement to relief' requires more than labels and  
11 conclusions, and a formulaic recitation of the elements of a  
12 cause of action will not do." Id. at 555 (quoting Papasan v.  
13 Allain, 478 U.S. 265, 2869 (1986)). A plaintiff's "factual  
14 allegations must be enough to raise a right to relief above the  
15 speculative level." Id. (citing 5 C. Wright & A. Miller, Federal  
16 Practice and Procedure § 1216 (3d ed. 2004) ("[T]he pleading must  
17 contain something more...than...a statement of facts that merely  
18 creates a suspicion [of] a legally cognizable right of  
19 action.")).

20 Further, "Rule 8(a)(2)...requires a 'showing,' rather than a  
21 blanket assertion, of entitlement to relief. Without some  
22 factual allegation in the complaint, it is hard to see how a  
23 claimant could satisfy the requirements of providing ...grounds  
24 on which the claim rests." Twombly, 550 U.S. at 555 n.3  
25 (internal citations omitted). A pleading must therefore contain  
26 "enough facts to state a claim to relief that is plausible on its  
27 face." Id. at 570.

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1 If the "plaintiffs...have not nudged their claims across the line  
2 from conceivable to plausible, their complaint must be  
3 dismissed." Id.

4 Once the court grants a motion to dismiss, they must then  
5 decide whether to grant a plaintiff leave to amend. Rule 15(a)  
6 authorizes the court to freely grant leave to amend when there is  
7 no "undue delay, bad faith, or dilatory motive on the part of the  
8 movant." Foman v. Davis, 371 U.S. 178, 182 (1962). In fact,  
9 leave to amend is generally only denied when it is clear that the  
10 deficiencies of the complaint cannot possibly be cured by an  
11 amended version. See DeSoto v. Yellow Freight Sys., Inc.,  
12 957 F.2d 655, 658 (9th Cir. 1992); Balistieri v. Pacifica Police  
13 Dept., 901 F. 2d 696, 699 (9th Cir. 1990) ("A complaint should  
14 not be dismissed under Rule 12(b)(6) unless it appears beyond  
15 doubt that the plaintiff can prove no set of facts in support of  
16 his claim which would entitle him to relief.") (internal  
17 citations omitted).

## 18 19 ANALYSIS

### 20 A. Motion To Dismiss By GMAC And MERS

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22 On February 4, 2011, GMAC and MERS filed the pending Amended  
23 Motion to Dismiss for failure to state a claim upon which relief  
24 can be granted pursuant to Rule 12(b)(6). Plaintiff has not  
25 filed a timely opposition to that motion as is required by Local  
26 Rule 230(c). As a result, the amended motion to dismiss filed by  
27 GMAC and MERS is granted with leave to amend.

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1           **B.     Motion To Dismiss By Quicken**

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3           On February 17, 2011, Quicken filed a motion to dismiss  
4 pursuant to Rule 12(b)(6) for failure to state a claim upon which  
5 relief can be granted. Plaintiff has filed a timely opposition  
6 to Quicken's motion to dismiss. However, after consideration of  
7 the merits of the motion, the Court concludes that Quicken's  
8 motion to dismiss is also granted.

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10           **1.     Deceit**

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12           Under California law, a claim for deceit is essentially a  
13 allegation of fraud, and a plaintiff must prove the following  
14 elements: (1) misrepresentation; (2) "knowledge of falsity;"  
15 (3) intent to defraud; (4) justifiable reliance; and (5)  
16 "resulting damage." City Solutions, Inc. v. Clear Channel Comm.,  
17 365 F.3d 835, 839 (9th Cir. 2004). In addition, any claim for  
18 fraud must additionally meet the heightened pleading requirements  
19 of Rule 9(b), which requires that a party must "state with  
20 particularity the circumstances constituting fraud or mistake."

21           Plaintiff alleges that Defendants are liable for deceit  
22 presumably based on allegedly false statements made to Plaintiff  
23 by broker Suren Srabian. However, Plaintiff does not allege  
24 specifically what statements are at issue, or when and where they  
25 were made. Because Plaintiff has not pled the underlying facts  
26 alleged to constitute deceit with sufficient particularity,  
27 Quicken's motion to dismiss as to this cause of action is  
28 granted.

## 2. Civil Conspiracy

Plaintiff alleges in his Second Cause of Action that Defendants are liable for civil conspiracy. Civil conspiracy is not an independent tort in California. Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc., 131 Cal. App. 4th 802, 823 (Cal. Ct. App. 2005). Instead, it is a legal doctrine making each member of a conspiracy jointly liable for an underlying tort. Id. The Court fails to follow Plaintiff's reasoning as to why any claim for civil conspiracy should stand, and therefore, Defendant's Motion to dismiss as to this cause of action is granted with leave to amend.

## 3. Negligence

Plaintiff asserts negligence as its Third Cause of Action. The existence of duty is the threshold element of a negligence cause of action. Friedman v. Merck & Co., 107 Cal. App. 4th 454, 463 (Cal. Ct. App. 2003). A lender does not generally owe a duty of care to a borrower unless it exceeds the scope of a its "conventional role as a mere lender of money." Nymark v. Heart Fed. Sav. & Loan Ass'n, 231 Cal. App. 3d 1089, 1096 (Cal. Ct. App. 1991). However, a court may conclude that a "mere lender" owes a duty of care after balancing the following factors:

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1 (a) the extent to which the transaction was intended to affect  
2 the plaintiff; (b) the foreseeability of harm to him; (c) the  
3 degree of certainty that the plaintiff suffered injury; (d) the  
4 closeness of the connection between the defendant's conduct and  
5 the injury suffered; (e) the moral blame attached to the  
6 defendant's conduct; and (f) the policy of preventing future  
7 harm. Id. at 1098.

8 In the instant case, Plaintiff alleges that Srabian  
9 misstated Plaintiff's income on the loan application, and that  
10 Quicken issued a loan knowing that the application misstated  
11 Plaintiff's monthly income. Plaintiff alleges no facts to  
12 suggest that Quicken's actions exceeded the conventional role of  
13 a mere lender. As a result, it is necessary to consider the  
14 Nymark factors. The subject transaction was likely intended to  
15 affect Plaintiff. Plaintiff may have obtained the loan based on  
16 the inflated monthly income listed in the application.  
17 Similarly, harm to Plaintiff may have been foreseeable, because  
18 it is less likely that Plaintiff could afford the loan payments  
19 given his actual income.

20 However, it is far from certain that Plaintiff suffered  
21 injury caused by Quicken's allegedly negligent acts, because  
22 foreclosure proceedings have not been initiated against  
23 Plaintiff. Further, given that it is not certain that Plaintiff  
24 has suffered any cognizable injury, the closeness of the  
25 connection between Defendants' conduct and the injury weighs  
26 against finding a duty. As a result, the Court concludes that  
27 the facts as pled in the Complaint do not support a finding that  
28 Quicken owed Plaintiff a duty of care.



1 Plaintiff contends that Watkinson v. Mortgageit Inc. offers  
2 authority for finding a duty of care in the instant case.  
3 However, Watkinson does not alter the Court's analysis as it is  
4 distinguishable and non-binding on this Court. In Watkinson, a  
5 lender overstated a borrower's income and the value of the  
6 property in a loan application. No. 10-cv-327-IEG (BLM), 2010 WL  
7 2196083 (S.D. Cal. June 1, 2010). The court held that a lender  
8 "arguably owed [borrower] a duty of care in processing  
9 [borrower's] loan application." Id. at \*8. Like the instant  
10 case, the court reasoned that the transaction was intended to  
11 affect the borrower, and that the harm was foreseeable. Id.  
12 However, the lender in Watkinson had initiated foreclosure  
13 proceedings. Id. Because Quicken has not initiated foreclosure  
14 proceedings in the instant case, the Nymark factors do not  
15 similarly weigh in favor of finding that Quicken owed Plaintiff a  
16 duty of care. Given that the facts as pled do not establish a  
17 duty of care, Quicken's motion to dismiss is granted as to this  
18 cause of action with leave to amend.

#### 19 20 **4. Breach of Fiduciary Duty**

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22 Plaintiff purports to state a claim for breach of fiduciary  
23 duty as its Fourth Cause of Action. However, a lender does not  
24 owe a fiduciary duty to a borrower. Smith v. Home Loan Funding,  
25 Inc., 192 Cal. App. 4th 1331, 1335 (Cal. Ct. App. 2011). In  
26 contrast, a mortgage broker does owe a fiduciary duty to a  
27 borrower. Id. In the instant case, Plaintiff alleges only that  
28 Quicken acted as a lender. (See Compl. ¶ 3.)

1 Because Plaintiff has not provided any evidence that Quicken  
2 acted as a broker in the subject mortgage transaction, Quicken  
3 does not owe a fiduciary duty to Plaintiff under the facts as  
4 pled. As a result, Quicken's motion to dismiss Plaintiff's  
5 Fourth Cause of Action is granted.

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7 **5. Violations of Business and Professions Code**  
8 **§ 17200 et seq.**

9 As his Fifth Cause of Action, Plaintiff asserts that  
10 Defendants' conduct constituted "unfair and/or fraudulent  
11 business practices, as defined by California Business and  
12 Professions Code § 17200 et seq." (Compl. ¶ 122.) However,  
13 beyond the bare assertion that Defendants engaged in unfair  
14 and/or fraudulent business practices, the Complaint does not  
15 include any specific factual allegations in support of the cause  
16 of action. Moreover, Plaintiff does allege a violation of any  
17 specific section of the California Business and Professions Code.  
18 As a result, Plaintiff has not provided Quicken with fair notice  
19 of his claim as required by Rule 8(a) and Twombly. Consequently,  
20 Quicken's motion to dismiss is granted as to Plaintiff's Fifth  
21 Cause of Action.

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23 **6. Declaratory and Injunctive Relief**  
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25 Plaintiff expressly concedes that dismissal of the Sixth  
26 Cause of Action against Quicken for declaratory and injunctive  
27 relief is appropriate. As a result, Plaintiff's sixth Cause of  
28 Action against Quicken is dismissed without leave to amend.

1 **CONCLUSION**

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3 Based on the foregoing, Defendants' Motions to Dismiss (ECF  
4 Nos. 10 & 12.) are GRANTED with leave to amend, except  
5 Plaintiff's Sixth Cause of Action is dismissed without leave to  
6 amend as to Defendant Quicken. Plaintiff may file an amended  
7 complaint not later than twenty (20) days after the date this  
8 Memorandum and Order is filed electronically. If no amended  
9 complaint is filed within said twenty (20)-day period, without  
10 further notice, Plaintiff's claims will be dismissed without  
11 leave to amend.

12 IT IS SO ORDERED.

13 DATED: April 21, 2011

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17 MORRISON C. ENGLAND, JR.  
18 UNITED STATES DISTRICT JUDGE  
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