

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERT L. STEINBERG,
Plaintiff,
v.
PROVIDENT FUNDING ASSOCIATES,
L.P.,
Defendant.

Case No. 15-cv-03743-JST

**ORDER GRANTING MOTION TO
DISMISS**

Re: ECF No. 16

This is a putative class action brought by Plaintiff Robert Steinberg against Defendant Provident Funding Associates, L.P (“Provident”), alleging claims for breach of contract, “unconscionability,” conversion, unjust enrichment, and violation of the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”). Before the Court is Provident’s Motion to Dismiss Class Action Complaint and Motion to Strike. ECF No. 16. For the reasons set forth below, the Court will grant the Motion to Dismiss and deny the Motion to Strike.

I. BACKGROUND

A. Allegations in the Complaint

Plaintiff alleges that he and Provident entered into a written contract “whereby Provident agreed to fund and service his mortgage.” ECF No. 1 ¶ 37. Under the loan agreement, payments are due to Provident on the 1st of each month. *Id.* ¶ 16. If payment is not received by the 16th of the month, Provident assesses a late fee. *Id.* According to Plaintiff, “[e]ven when customers making their monthly mortgage payment by check or money order submit payment on time, Provident assesses a late fee.” *Id.* ¶ 18.

On February 7, 2015, Plaintiff’s wife, who is also a signatory to the loan agreement, mailed their February mortgage payment to Provident via regular mail. *Id.* ¶ 19. On February 18, 2015, Plaintiff’s wife received a telephone call from Provident informing her that Provident had

1 not received the mortgage payment for February. Id. ¶ 20. After speaking with a Provident
2 representative that same day, Plaintiff’s wife completed the February mortgage payment online.
3 Id. ¶ 22. On February 19, 2015, Provident sent a letter to Plaintiff stating that Provident had
4 received Plaintiff’s February mortgage check but that it was “unable to apply the funds to
5 [Plaintiff’s] account due to the following reason: Payment stop on check.” Id. ¶ 23, Exhibit A.
6 Neither Plaintiff nor his wife ever placed a stop payment order on the February mortgage check.
7 Id. ¶ 23. Provident subsequently assessed a late fee of approximately \$200 on Plaintiff’s account.
8 Id. ¶ 24.

9 Plaintiff bolsters his own allegations regarding the allegedly fraudulent late fees by quoting
10 numerous consumer complaints posted online. Id. ¶ 18. For instance, one of the online
11 complaints claimed that Provident “sent me a late notice when they had check in hand.” Id.
12 Another complaint stated: “Provident has ‘lost’ my mailed payments and charged me late fees
13 when the payment was mailed with a week to spare.” Id. Still another complaint stated: “Late fee
14 is incurred if received after the 16th of the month. I mailed payment on the 9th. Provident said
15 they didn’t receive it until the 17th which is BS because I mailed an insurance payment to a
16 company in [California] the same day . . . and they received it on the 13th.” Id. A fourth
17 complaint “wonder[ed] if [Provident was] just holding onto the checks to purposely make them
18 late so that they can charge a late fee.” Id.

19 **B. Defendant’s Requests for Judicial Notice**

20 Pursuant to Federal Rule of Evidence 201, Defendant asks the Court to take judicial notice
21 of (1) a November 29, 2011 Note (the “mortgage loan agreement”) between Plaintiff and Bank of
22 Texas, which loan agreement Defendant asserts forms the basis of Plaintiff’s claims; (2) a
23 November 29, 2011 Purchase Money Mortgage between Plaintiff and Bank of Texas; and (3) a
24 May 20, 2015 Satisfaction of Mortgage between Plaintiff and Defendant. ECF No. 17. Plaintiff
25 does not oppose Defendant’s request for judicial notice. ECF No. 18. The Court grants judicial
26 notice of the November 29, 2011 mortgage loan agreement because it is a “document whose
27 contents are alleged in a complaint and whose authenticity no party questions, but which [is] not
28 physically attached to the [plaintiff’s] pleading.” Knieval v. ESPN, 393 F.3d 1068, 1076 (9th Cir.

1 2005) (internal quotation marks omitted). The Court also grants judicial notice of the second and
2 third documents submitted by Defendant, as these documents are both recorded in the official
3 records of Monroe County, Florida. See Lee v. City of Los Angeles, 250 F.3d 668, 669 (9th Cir.
4 2001) (“[A] court may take judicial notice of ‘matters of public record.’”) (internal quotation
5 marks omitted); see also Rosal v. First Fed. Bank of Cal., 671 F. Supp. 2d 1111, 1121 (N.D. Cal.
6 2009) (taking judicial notice of “documents recorded in the Official Records of Alameda
7 County”).

8 **C. Jurisdiction**

9 The Court has jurisdiction pursuant to 28 U.S.C. § 1332(d)(2).

10 **II. MOTION TO DISMISS**

11 **A. Legal Standard**

12 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal
13 sufficiency of a complaint. Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). When
14 addressing a motion to dismiss, courts must determine whether a plaintiff has pled “enough facts
15 to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544,
16 570 (2007). Courts must accept both the material facts alleged in the complaint and any
17 reasonable inferences to be drawn from those facts as true. Navarro v. Block, 250 F.3d 729, 732
18 (9th Cir. 2001). But “threadbare recitals of a cause of action’s elements, supported by mere
19 conclusory statements” are insufficient bases to support a complaint. Ashcroft v. Iqbal, 556 U.S.
20 662, 678 (2009). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks
21 for more than a sheer possibility that a defendant has acted unlawfully.” Id.

22 When any of a complaint’s causes of action allege fraud, Federal Rule of Civil Procedure
23 9(b) imposes a heightened pleading standard. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097,
24 1106 (9th Cir. 2003). This heightened standard requires the complainant to identify “what is false
25 or misleading about a statement, and why it is false.” Decker v. GlenFed, Inc., 42 F.3d 1541,
26 1548 (9th Cir.1994). In essence, a cause of action governed by Rule 9(b) must include “the who,
27 what, when, where, and how” of the allegedly fraudulent conduct. Cooper v. Pickett, 137 F.3d
28 616, 627 (9th Cir.1997). Courts must apply this standard to both claims in which fraud is an

1 essential element and those in which the complainant “allege[s] a unified course of fraudulent
2 conduct and rel[ies] entirely on that course of conduct as the basis of a claim.” Vess, 317 F.3d at
3 1103. The heightened pleading standard should not, however, be applied to causes of action
4 neither rooted individually in fraud nor attached to a claim in which fraudulent conduct is an
5 essential element. Id. at 1105.

6 “Where averments of fraud are made in a claim in which fraud is not an element, an
7 inadequate averment of fraud does not mean that no claim has been stated. The proper route is to
8 disregard averments of fraud not meeting Rule 9(b)’s standard and then ask whether a claim has
9 been stated.” Id. (quoting Lone Star Ladies Inv. Club v. Schlotzsky’s Inc., 238 F.3d 363, 368 (5th
10 Cir. 2001)). “Thus, if particular averments of fraud are insufficiently pled under Rule 9(b), a
11 district court should ‘disregard’ those averments, or ‘strip’ them from the claim. The court should
12 then examine the allegations that remain to determine whether they state a claim.” Id.

13 **B. Analysis¹**

14 **1. Breach of Contract**

15 Plaintiff’s first cause of action is for breach of contract and breach of the covenant of good
16 faith and fair dealing. ECF No. 1 ¶¶ 36–41. Generally, “[a] breach of contract claim falls outside
17 the reach of Rule 9(b) because such a claim does not require intent to defraud, a false
18 representation, or other elements of fraudulent misrepresentation.” Ronpak, Inc. v. Elecs. for
19 Imaging, Inc., No. 14-cv-04058-JST, 2015 WL 179560, at *4 (N.D. Cal. Jan. 14, 2015) (citing
20 Vess, 317 F.3d at 1105–06). Here, however, Plaintiff alleges that “Provident has breached the
21 covenant of good faith and fair dealing in its contracts with Plaintiff and the Class by assessing
22 fraudulent late fees and associated penalties.” Id. ¶ 39. Because Plaintiff has made an averment
23 of fraud “in a claim in which fraud is not an element, . . . [t]he proper route is to disregard” such
24 averment of fraud if it does not meet Rule 9(b)’s standard and “then ask whether a claim has been
25 stated” under Rule 8’s more lenient standard. Vess, 317 F.3d at 1105 (quoting Lone Star

26

27 _____
28 ¹ The parties do not dispute that Florida law governs Plaintiff’s claims. See ECF No. 16 at 10;
ECF No. 18 at 11 n.5 (failing to explicitly address which law governs Plaintiff’s claims, but noting
that “the late fees at issue here are sufficiently identifiable under Florida law.”).

1 Ladies, 238 F.3d at 368).

2 Defendant argues that under either standard of review Plaintiff’s claim must be dismissed
3 because “[t]he Complaint lacks a critical, foundational fact: Plaintiff never alleges that Provident
4 received the Steinbergs’ late payment within fifteen calendar days of the February 1 due date.”
5 ECF No. 16 at 5 (emphasis in original). Rather, “[t]he Complaint alleges only that [Plaintiff’s]
6 wife mailed the payment on Saturday, February 7; that Provident claimed not to have received it at
7 some point on February 18, and that on February 19, Provident returned the check along with a
8 form letter stating that the check could not be cashed due to a stop payment.” ECF No. 16 at 5–6
9 (citing ECF No. 1 ¶¶19–23). According to Defendant, Plaintiff’s failure to allege when payment
10 was received by Defendant is fatal to Plaintiff’s breach of contract claim because that claim
11 “depends on the theory that Plaintiff’s payment was timely received.” ECF No. 16 at 6 (quoting
12 ECF No. 1 at ¶ 39 (alleging that Provident “breached the covenant of good faith and fair dealing . .
13 . by assessing fraudulent late fees and associated penalties.”).

14 The Court agrees with Defendant’s argument in this respect. Plaintiff’s breach of contract
15 claim is premised on a loan agreement between Plaintiff and Bank of Texas,² which provides: “If
16 the Note Holder has not received the full amount of any monthly payment by the end of 15
17 calendar days after the date it is due, I [the borrower] will pay a late charge to the Note Holder.”
18 ECF No. 17-1 at §6(A) (emphasis added). However, Plaintiff does not allege in the Complaint
19 when Defendant received his February payment. See ECF No. 1 ¶¶ 19–23. It does not require the
20 formal exercise of judicial notice to observe that sometimes, when an item of correspondence is
21 mailed, it does not reach its destination. While Plaintiff does allege that his wife mailed the
22 February mortgage payment check on February 7, 2015, id. ¶ 19, Plaintiff has not pled facts upon
23 which the Court can draw a reasonable inference that Defendant breached the loan agreement by
24 charging Plaintiff a late fee despite its having received payment by February 16, 2015. See ECF
25 No. 17-1 at §6(A).

26 Plaintiff’s arguments to the contrary are unpersuasive. First, Plaintiff argues that the Court
27

28 ² The servicing of Plaintiff’s mortgage appears to have been transferred to Defendant in August 2013. See ECF No. 1 ¶ 6; ECF No. 16 at 2.

1 should apply a presumption that mail is received within 3 days of its mailing. ECF No. 18 at 2–3.
2 However, none of the cases cited by Plaintiff stand for this proposition. Indeed, most of the cases
3 cited by Plaintiff involved application of what was then Fed. R. Civ. P. 6(e) (now Fed. R. Civ. P.
4 6(d)), which provided: “Whenever a party has the right or is required to do some act or take some
5 proceedings within a prescribed period after the service of a notice or other paper upon the party
6 and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed
7 period.” The rule does not create a legal presumption that mail is received within 3 days of its
8 mailing, and by its terms does not apply in this case, since no deadline here is alleged to be
9 triggered by “the service of a notice or other paper.” Accordingly, the Court rejects Plaintiff’s
10 argument in this respect.

11 Second, Plaintiff argues that the Complaint “includes a number of internet postings by
12 other consumers who have gone through the same experience with Provident, in some cases
13 mailing their payments more than two weeks prior to expiration of the grace period.” ECF No. 18
14 at 3. According to Plaintiff, these complaints “illustrate that Provident is doing the same thing it
15 did to [Plaintiff] to others” Id. at 3–4. However, these complaints suffer from the same fatal
16 deficiency as Plaintiff’s own allegations: they fail to provide the Court with sufficient facts from
17 which the Court could draw a reasonable inference that Defendant breached its contract with the
18 complainants because none of the complaints sufficiently allege that Defendant received a
19 mortgage payment before the due date. Rather, the online complaints merely claim that a
20 mortgage check was sent in a “timely” fashion and that Defendant nonetheless assessed a late
21 charge. See, e.g., ECF No. 1 at 6 (“Provident has ‘lost’ my mailed payments and charged me late
22 fees when the payment was mailed with a week to spare.”); id. at 8 (Provident “claim[s] not to
23 have received my check twice that I mailed on time each month.”); id. at 9 (“We mailed our
24 mortgage in a timely fashion. . . . I wonder if they’re just holding onto the checks to purposely
25 make them late so that they can charge a late fee.”); id. at 9 (“In October, I mailed my check at the
26 post office on the 4th and it was not credited until the 19th.”); id. at 10 (“I used to mail my
27 payment by [the 8th or 10th] of each month as it is due by the 16th. We have noticed that, at least
28 once a year, [Provident] ask[s] us to pay \$50 penalty for late charge. . . . We strongly believe that

1 [Provident], even if they receive the payment before the 16th, they accuse the post office for
2 delivering it late.”).³

3 Therefore, the Court grants Defendant’s motion to dismiss Plaintiff’s first cause of action
4 for breach of contract and breach of the covenant of good faith and fair dealing without prejudice.

5 **2. Unconscionability, Conversion, Unjust Enrichment, and Violation of**
6 **FDUTPA**

7 Plaintiff also brings claims for “unconscionability,” conversion, unjust enrichment, and
8 violation of the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”), Fla. Stat. §
9 501.201, et seq. ECF No. 1 ¶¶47–73. As Defendants note, however, each of these claims is
10 premised on the same allegedly fraudulent conduct as Plaintiff’s breach of contract claim, namely
11 Defendant’s alleged practice of fraudulently collecting late fees. ECF No. 1 ¶ 43
12 (unconscionability) (“Provident’s late fee policies and practices are substantively and procedurally
13 unconscionable”); *id.* ¶ 49 (conversion) (“Provident has wrongfully collected late fees from
14 Plaintiff and the Class”); *id.* ¶60 (unjust enrichment) (“Provident . . . retain[ed] benefits it
15 received, and is still receiving, without justification, from the imposition of fraudulent late fees on
16 Plaintiff and the Class”); *id.* ¶ (FDUTPA) (“Provident’s conduct, as alleged herein,
17 constitutes unconscionable, unfair, and deceptive acts or practices in violation of the DUTPA.”)
18 As discussed above, Plaintiff has failed to sufficiently allege that Defendant charged Plaintiff a
19 late fee in violation of the loan agreement. Plaintiff does not attempt to plead any other wrongful
20 or fraudulent conduct committed by Defendant in relation to the imposition of late fees.⁴ Nor does

21 ³ The Court denies Defendant’s motion to strike the online complaints from the Complaint. ECF
22 No. 16 at 8–9. While the Court concludes that these complaints are not sufficient to satisfy Rule
23 8’s pleading standard, the Court does not find that these complaints are “redundant, immaterial,
24 impertinent or scandalous.” Fed. R. Civ. P. 12(f); *see also Colaprico v. Sun Microsystems, Inc.*,
25 758 F. Supp. 1335, 1339 (N.D. Cal. 1991) (“Motions to strike should not be granted unless it is
26 clear that the matter to be stricken could have no possible bearing on the subject matter of the
27 litigation.”). Both Plaintiff and the online complaints allege that Defendant conducted similar
28 fraudulent conduct related to the imposition of late fees, and thus the Court cannot conclude that
these online complaints will have “no possible bearing on the subject matter of the litigation.” *Id.*

⁴ Plaintiff does allege that “after a customer places a stop payment order on his or her mortgage
check in reliance on Provident’s representation that the check was never received, Provident will
attempt to cash the check and then, after the bank declines, assess further monetary penalties and
fees upon the customer.” ECF No. 1 ¶ 4. This theory, however, is never developed in the
Complaint, nor in Plaintiff’s briefing. Moreover, Plaintiff admits that “[n]either Plaintiff nor his
wife ever placed a stop payment order” on their February 2015 mortgage check. *Id.* ¶ 23.

1 Plaintiff offer any argument why the Court should not dismiss these claims upon a finding that
2 Plaintiff has not sufficiently pleaded a violation of the terms of the loan agreement. See ECF No.
3 18 at 10–18. Accordingly, the Court dismisses Plaintiff’s claims for conversion, unjust
4 enrichment, and violation of the FDUTPA with leave to amend. For reasons discussed below, the
5 Court dismisses Plaintiff’s claim for “unconscionability” without leave to amend.⁵

6 **3. Unconscionability**

7 Plaintiff alleges that “Provident’s late fee policies and practices are substantively and
8 procedurally unconscionable.” ECF No. 1 ¶ 20. The parties dispute (1) whether unconscionability
9 is a cause of action under Florida law, as opposed to an affirmative defense; and (2) whether such
10 a claim can seek damages. See ECF No. 16 at 11–12; ECF No. 18 at 5–8. The Court need not
11 address these arguments, however, because Plaintiff’s claim suffers from an even more basic
12 deficiency.

13 As a case relied upon by Plaintiff notes, to succeed on a claim of unconscionability under
14 Florida law, Plaintiff must demonstrate both procedural and substantive unconscionability. In re
15 Checking Account Overdraft Litigation, 694 F. Supp. 2d 1302, 1319 (S.D. Fla. 2010). Substantive
16 unconscionability, in turn, “requires an assessment of whether the contract terms are so
17 outrageously unfair as to shock the judicial conscience.” Id. (quoting Bland v. Health Care & Ret.
18 Corp. of Am., 927 So. 2d 252, 256 (Fla. Dist. Ct. App. 2006)) (emphasis added). Plaintiff’s
19 unconscionability claim, however, is premised not on an outrageously unfair contract term, but
20 rather on “Provident’s late fee policies and practices.” ECF No. 1 ¶ 43 (“Provident does not
21 disclose . . . its policy of deliberately denying or delaying receipt of mortgage payments in order to
22 impose late fees [and] refuses to waive fraudulently imposed late fees”); see also id. ¶ 44
23 (“The imposition of fraudulent late fees and associated monetary penalties is itself
24 unconscionable.”). While Plaintiff attempts to re-characterize his unconscionability claim as
25

26
27 ⁵ The Court need not address the additional, independent reasons why Defendant argues these
28 claims should be dismissed. See ECF No. 16 at 13–16. The Court will address these arguments if
and when Plaintiff cures the deficiencies in the Complaint identified here and Defendant raises
these arguments again in a subsequent motion to dismiss.

1 challenging Provident’s “enforce[ment] of the Challenged Provision,”⁶ Plaintiff fails to cite any
2 authority for the proposition that the enforcement of a contractual provision can itself be
3 unconscionable, as opposed to a breach of the underlying contract.

4 Accordingly, the Court dismisses Plaintiff’s unconscionability claim because Plaintiff has
5 failed to allege any contract term which is allegedly “so outrageously unfair as to shock the
6 judicial conscience.” In re Checking Account Overdraft Litigation, 694 F. Supp. 2d at 1319.
7 Because the Court finds that amendment of this claim would be futile, the Court dismisses
8 Plaintiff’s unconscionability claim it with prejudice.

9 **4. Standing to Pursue Injunctive Relief**

10 “Standing must be shown with respect to each form of relief sought, whether it be
11 injunctive relief, damages or civil penalties.” Bates v. United Parcel Serv., Inc., 511 F.3d 974, 985
12 (9th Cir. 2007) (citing Friends of the Earth, Inc. v. Laidlaw Env’tl Servs. (TOC), Inc., 528 U.S.
13 167, 185 (2000)). “In a class action, standing is satisfied if at least one named plaintiff meets the
14 requirements.” Id. “The standing formulation for a plaintiff seeking prospective injunctive relief”
15 requires the plaintiff to “demonstrate that he has suffered or is threatened with a ‘concrete and
16 particularized’ legal harm, coupled with ‘a sufficient likelihood that he will again be wronged in a
17 similar way.’” Id. (internal citation omitted) (quoting Lujan v. Defenders of Wildlife, 504 U.S.
18 555, 560 (1992)). “As to the second inquiry, [Plaintiff] must establish a ‘real and immediate threat
19 of repeated injury.’” Id. (quoting O’Shea v. Littleton, 414 U.S. 488, 496 (1974)).

20 Defendant argues that Plaintiff lacks standing to bring any claim seeking injunctive or
21 declaratory relief because Plaintiff “paid off his mortgage in full prior to filing his Complaint”
22 and, as a result, Provident could not “assess any late charges going forward.” ECF No. 16 at 17.
23 Plaintiff does not dispute that he has paid of his mortgage in full. ECF No. 18 at 18–20. Instead,
24 Plaintiff argues that he has standing to seek injunctive relief because “Plaintiff has not alleged that
25 he would not consider entering into another mortgage with Defendant in the event Defendant
26

27 ⁶ Plaintiff defines the “Challenged Provision” as the provision of the loan agreement under which
28 “Plaintiff agreed to Provident’s assessment of a late fee if his mortgage payment was not received
within 15 days of its due date.” ECF No. 18 at 6–7.

1 changes its unlawful practices.” Id. at 20. The Court finds that such allegations do not establish a
2 “real and immediate threat of repeated injury.” O’Shea, 414 U.S. at 496; see also Opperman v.
3 Path, Inc., 84 F. Supp. 3d 962, 988 (N.D. Cal. 2015).⁷ Accordingly, Plaintiff’s prayer for
4 injunctive relief is dismissed without prejudice for lack of standing.

5 **5. Joinder of Required Party**

6 Finally, Defendant argues that the Complaint should be dismissed under Fed. R. Civ. P.
7 12(b)(7) for failure to join Plaintiff’s wife as a required party. “[T]o determine whether dismissal
8 is appropriate, the Court engages in ‘three successive inquiries.’” Edwards v. Fed. Home Loan
9 Mortgage Corp., No. 12-cv-04868-JSW, 2012 WL 5503532, at *3 (N.D. Cal. Nov. 13, 2012)
10 (quoting EEOC v. Peabody Western Coal Co., 400 F.3d 774, 779 (9th Cir. 2005)). “First, the
11 district court must determine whether the absent party is a ‘required’ party.” Id. A party is
12 “required” under Fed. R. Civ. P. 19(a)(1) if: “(A) in that person’s absence, the court cannot accord
13 complete relief among existing parties; or (B) that person claims an interest relating to the subject
14 of the action and is so situated that disposing of the action in the person’s absence may: (i) as a
15 practical matter impair or impede the person’s ability to protect the interest; or (ii) leave an
16 existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent
17 obligations because of the interest.”

18 The Court agrees with Defendant’s argument that because Plaintiff’s wife is a signatory to
19

20 ⁷ Each of the cases relied on by Plaintiff to support a finding of standing is inapposite. See, e.g.
21 Fortyune v. Am. Multi-Cinema, Inc., No. 10-cv-5551, 2002 WL 32985838, at *7 (C.D. Cal. Oct.
22 22, 2002) (“Because Plaintiff and his wife frequent the theater and the lack of accommodation
23 continues to exist, the court finds that Plaintiff has established a likelihood of future injury.”); Ries
24 v. Ariz. Beverages USA LLC, 287 F.R.D. 523, 533 (N.D. Cal. 2012) (“[T]he record is devoid of
25 any grounds to discount plaintiffs’ stated intent to purchase in the future, thereby satisfying the
26 requisites for standing.”). While Henderson v. Gruma Corp. provides some support for Plaintiff’s
27 argument, that case is distinguishable because the Court’s finding of a lack of standing here would
28 not “allow an alleged wrongdoer to evade the court’s jurisdiction so long as he does not injure the
same person twice,” as the Henderson court found. No. 10-cv-4173, 2011 WL 1362188, at *7
(C.D. Cal. Apr. 11, 2011) (quoting Fortyune, 2002 WL 32985838, at *7). Likewise, while
Koehler v. Litehouse, Inc., No. 13-cv-3482, 2014 WL 325241-SI (N.D. Cal. Dec. 13, 2012)
provides some support for Plaintiff’s argument, Defendant notes that Judge Illston subsequently
disavowed the reasoning in Koehler and instead held that “to establish standing, plaintiff must
allege that he intends to” act in such a way that he may be harmed in the future if not for the
requested injunctive relief. Rahman v. Mott’s LLP, No. 13-cv-3482, 2014 WL 325241, at *10 &
n. 9 (N.D. Cal. Jan. 29, 2014). Plaintiff, here, has not alleged that he intends to obtain another
mortgage from Defendant.

1 the loan agreement, “[u]nless she appears, there can be no guarantee she will not sue Provident
2 over the same alleged wrongdoing in a separate lawsuit or in another forum.” ECF No. 16 at 17–
3 18. As a result, Provident “faces a substantial risk of double, multiple, or otherwise inconsistent
4 obligations.” Id. at 18. Accordingly, the Court concludes that Plaintiff’s wife is a “required”
5 party in this action. See Edwards, 2012 WL 5503532, at *3 (finding husband of Plaintiff a
6 “required” party because “Defendants have a substantial risk of incurring double, multiple, or
7 otherwise inconsistent obligations by reason of Plaintiff’s and [her husband’s] mutual interests
8 relating to the Property.”).⁸

9 Second, because Plaintiff’s wife is a “required” party, the Court must determine whether
10 joinder is feasible. Id. at *4. Under Rule 19(a), “joinder is not ‘feasible’ when: (1) venue is
11 improper; (2) the absentee party is not subject to personal jurisdiction; and (3) when joinder would
12 destroy subject matter jurisdiction.” Id. Defendants do not argue, and the Court finds no reason to
13 suggest, that joinder of Plaintiff’s wife would not be feasible.⁹ Accordingly, if Plaintiff elects to
14 file an amended complaint, he must join his wife as a party.

15 **CONCLUSION**

16 For the foregoing reasons, the Court dismisses with leave to amend Plaintiff’s breach of
17 contract, conversion, unjust enrichment, and FDUTPA claims. The Court also dismisses without
18 prejudice Plaintiff’s prayer for injunctive relief, as it relates to each of Plaintiff’s claims, for lack
19 of standing. The Court dismisses without leave to amend Plaintiff’s “unconscionability” claim. If

20 ///
21 ///
22 ///

23 _____
24 ⁸ Although Plaintiff seeks to distinguish this case from Edwards because this case involves alleged
25 consumer fraud, whereas Edwards involved an allegedly wrongful foreclosure, Plaintiff does not
26 offer any reasoning why this distinction should lead to a different result regarding Plaintiff’s
27 wife’s status as a required party. ECF No. 18 at 21. Moreover, Plaintiff cites no authority
28 suggesting that a plaintiff’s spouse is not a required party “in a class action alleging consumer
fraud when the alleged damages affected a shared account.” Id.

⁹ As the Edwards court noted, “[t]he third inquiry is whether in ‘equity and good conscience’ the
action can continue without the absent party. However, courts only engage in this inquiry if the
absent party is necessary and joinder is not feasible.” 2012 WL 5503532, at *4 n.3 (citation
omitted).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Plaintiff elects to file an amended complaint, Plaintiff shall join his wife as a plaintiff, and shall file the amended complaint within 30 days of this order.

IT IS SO ORDERED.

Dated: December 22, 2015



JON S. TIGAR
United States District Judge