

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BUENA VISTA, LLC,
Plaintiff,
v.
NEW RESOURCE BANK, et al.,
Defendants.

No. 10-1502 CW
ORDER GRANTING
DEFENDANTS'
MOTIONS TO
DISMISS AND
DENYING
DEFENDANTS'
MOTIONS TO STRIKE

_____ /
This case concerns loans made to Plaintiff Buena Vista, LLC to fund the construction of an eight-unit residential project in Martinez, California. Defendants New Resource Bank, Ferguson & Brewer Investment Company and Marcus & Millichap Company separately move to dismiss the claims asserted against them. Defendants New Resource Bank and Ferguson & Brewer also move to strike Plaintiff's jury demand. Plaintiffs oppose the motions. The matter was heard on July 15, 2010. After hearing oral argument and considering all of the papers filed by the parties, the Court grants Defendants' motions to dismiss and denies the motions to strike. The Court also grants Plaintiff leave to amend its complaint.

BACKGROUND

Plaintiff Buena vista is a developer "dedicated to providing sustainable, ecologically friendly living spaces to residents in

1 the Martinez area." Compl. ¶ 8. The company is owned by Isidro
2 and Anamarie Farias. In October, 2006, Buena Vista took out a
3 construction loan from Defendant New Resource Bank for \$2,718,000.
4 The maturity date on the loan was January 3, 2008. After the
5 building was constructed, Buena Vista had difficulty selling the
6 units because of "the declining real estate market." Compl. ¶ 64.
7 To mitigate its losses, Buena Vista sought to change its business
8 strategy from selling the units to renting them. During the time
9 in which Buena Vista was attempting to sell and rent the units, it
10 obtained two separate loan extensions. Despite the extensions,
11 Buena Vista could only sell one of the units and the remaining
12 units did not generate sufficient rental revenue. Buena Vista
13 sought significant loan concessions from New Resource Bank and in
14 July, 2009, New Resource Bank sold the loan to Defendant Ferguson &
15 Brewer Investment Company. Defendant Marcus & Millichap, a real-
16 estate firm in San Francisco, brokered the sale.

17 Buena Vista alleges that, after the initial loan agreement was
18 executed, New Resource breached a number of oral agreements between
19 the two parties, including unilaterally changing the loan-to-value
20 ratio, failing to grant loan extensions automatically without
21 additional terms, delaying refinancing options and initially
22 refusing to consider the "rental option" as promised. Buena Vista
23 alleges that the sale of the loan from New Resource Bank to
24 Ferguson & Brewer was improper because, before the purchase, New
25 Resource Bank turned over Buena Vista's confidential financial
26 information to Marcus & Millichap, which then gave that information
27 to Ferguson & Brewer. Plaintiff alleges that this confidential
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1 information was relied upon by Ferguson & Brewer when it decided to
2 purchase the loan.

3 Plaintiff alleges eight causes of action: (1) violation of the
4 Racketeer Influenced and Corrupt Organizations (RICO) Act,
5 (2) breach of contract, (3) breach of the implied covenant of good
6 faith and fair dealing, (4) violation of California Business &
7 Professions Code sections 17200 et seq., (5) fraud, (6) unjust
8 enrichment, (7) intentional interference with prospective economic
9 advantage and (8) negligence.

10 LEGAL STANDARD

11 A complaint must contain a "short and plain statement of the
12 claim showing that the pleader is entitled to relief." Fed. R.
13 Civ. P. 8(a). When considering a motion to dismiss under Rule
14 12(b)(6) for failure to state a claim, dismissal is appropriate
15 only when the complaint does not give the defendant fair notice of
16 a legally cognizable claim and the grounds on which it rests.
17 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In
18 considering whether the complaint is sufficient to state a claim,
19 the court will take all material allegations as true and construe
20 them in the light most favorable to the plaintiff. NL Indus., Inc.
21 v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this
22 principle is inapplicable to legal conclusions; "threadbare
23 recitals of the elements of a cause of action, supported by mere
24 conclusory statements," are not taken as true. Ashcroft v. Iqbal,
25 ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550
26 U.S. at 555).

27 When granting a motion to dismiss, the court is generally
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1 required to grant the plaintiff leave to amend, even if no request
2 to amend the pleading was made, unless amendment would be futile.
3 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
4 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment
5 would be futile, the court examines whether the complaint could be
6 amended to cure the defect requiring dismissal "without
7 contradicting any of the allegations of [the] original complaint."
8 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).

9 DISCUSSION

10 I. RICO

11 Buena Vista alleges a civil RICO claim against all Defendants.
12 To state a claim for relief in a private RICO action, Buena Vista
13 must allege four essential elements: (1) a pattern of racketeering
14 activity, (2) the existence of an enterprise engaged in or
15 affecting interstate or foreign commerce, (3) a nexus between the
16 pattern of racketeering activity and the enterprise and (4) an
17 injury to its business or property by reason of the above. Sedima
18 S.P.R.L. v. Imrex Company, 473 U.S. 479 (1985).

19 The racketeering activities upon which Buena Vista appears to
20 rely are the federal offenses of mail fraud and wire fraud. "A
21 wire fraud violation consists of (1) the formation of a scheme or
22 artifice to defraud; (2) use of the United States wires or causing
23 a use of the United States wires in furtherance of the scheme; and
24 (3) specific intent to deceive or defraud." Odom v. Microsoft
25 Corp., 486 F.3d 541, 554 (9th Cir. 2008) (internal quotation marks
26 omitted); 18 U.S.C. § 1343. The elements of mail fraud differ only
27 in that they involve the use of the United States mails rather than
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1 wires. See 18 U.S.C. § 1341. All such allegations must be plead
2 with particularity. Moore v. Kayport Package Express, Inc., 885
3 F.2d 531, 541 (9th Cir. 1989).

4 Buena Vista's RICO claim fails for several reasons. Buena
5 Vista does not identify which deceptive statements were made by
6 mail or by wire or how the fraud was furthered by particular
7 mailings or telephone calls. Moreover, a RICO claim based on wire
8 fraud must allege an interstate telephone call. See 18 U.S.C.
9 § 1343 (criminalizing schemes to defraud "by means of wire, radio,
10 or television communication in interstate or foreign commerce
11"); see also First Pacific Bancorp, Inc. v. Bro, 847 F.2d
12 542, 547 (9th Cir. 1988) (holding that the "allegation of wire
13 fraud is also unsupported, since there is no evidence of interstate
14 wire communication.").

15 Even if Buena Vista adequately plead fraudulent acts, it fails
16 to allege a pattern of such activity. A pattern can be shown
17 through either closed- or open-ended continuity. Turner v. Cook,
18 362 F.3d 1219, 1229 (9th Cir. 2004). To allege closed-ended
19 continuity, a plaintiff must aver a "series of related predicates"
20 that extends "over a substantial period of time" and threatens
21 future criminal conduct. Id. (citing Howard v. Am. Online, Inc.,
22 208 F.3d 741, 750 (9th Cir. 2000)) (editing marks omitted). To
23 plead open-ended continuity, a plaintiff "must charge a form of
24 predicate misconduct that 'by its nature projects into the future
25 with a threat of repetition.'" Turner, 362 F.3d at 1229 (quoting
26 Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 366 (9th Cir.
27 1992)). Buena Vista's allegations do not support either theory of
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1 continuity.

2 Buena Vista relies on an Order to Cease and Desist, in which
3 New Resource Bank stipulated with regulatory agencies, the Federal
4 Deposit Insurance Corporation and the California Department of
5 Financial Institutions, to ensure that New Resource Bank manages
6 its funds in a risk-averse manner. Buena Vista's Request for
7 Judicial Notice (RJN), Ex. A.¹ Nothing in the Order relates to
8 Buena Vista's allegations of fraud.

9 Accordingly, Buena Vista's RICO claim is dismissed.

10 II. Breach of Contract

11 Buena Vista alleges a breach of contract against New Resource
12 Bank and Ferguson & Brewer.

13 To assert a cause of action for breach of contract, a
14 plaintiff must plead: (1) existence of a contract; (2) the
15 plaintiff's performance or excuse for non-performance; (3) the
16 defendant's breach; and (4) damages to the plaintiff as a result of
17 the breach. Armstrong Petrol. Corp. v. Tri-Valley Oil & Gas Co.,
18 116 Cal. App. 4th 1375, 1391 n.6 (2004).

19 Buena Vista claims that New Resource Bank breached four oral
20 agreements and one written agreement. The first three oral
21 agreements were made before the execution of the original written
22 construction loan agreement between Buena Vista and New Resource
23 Bank. Buena Vista alleges that New Resource Bank orally agreed
24 (1) to change the terms of the loan to convert the loan into a

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26 ¹The Court grants Buena Vista's request for judicial notice of
27 the Order to Cease and Desist because it is "capable of accurate
28 and ready determination by resort to sources whose accuracy cannot
reasonably be questioned." Fed. R. Evid. 201.

1 rental property loan should the need arise, (2) to finance the
2 construction project based on a sixty-nine percent loan-to-value
3 ratio, and (3) to grant two loan extensions of up to a year each
4 after construction was complete, without adding any additional
5 terms. Plaintiff claims that New Resource breached these
6 agreements, respectively, by (1) failing to transition to a rental
7 property loan more timely, (2) financing the construction project
8 based on a seventy percent loan-to-value ratio and (3) adding terms
9 to a second loan extension. In the fourth oral agreement, made
10 after the original written agreement was executed, New Resource
11 Bank allegedly promised to reduce a refinancing agreement to
12 writing "immediately." Buena Vista claims that this promise was
13 broken when it took New Resource Bank "over a month" to do so, and
14 that this delay caused it to miss out on other refinancing
15 opportunities.

16 The original construction loan agreement contains an
17 integration clause, which states in full, "This Agreement, together
18 with any Related Documents, constitutes the entire understanding
19 and agreement of the parties as to the matters set forth in this
20 Agreement. No alteration of or amendment to this Agreement shall
21 be effective unless given in writing and signed by the party or
22 parties sought to be charged or bound by the alteration or
23 amendment." New Resource Bank RJN, Ex. A at 8.² The matters set

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25 ²The Court denies New Resource Bank's request to take judicial
26 notice of the October 3, 2006 Construction Loan Agreement, the
27 December 9, 2008 Business Loan Agreement and the December 9, 2008
28 Promissory Note. However, the Court will consider these contracts
on the motion to dismiss because their contents are alleged in the
complaint and their authenticity is not disputed. Branch v.

1 forth in the agreement include all of the terms on which New
2 Resource Bank would loan money for the "project," which is
3 generally defined in the agreement as the construction of the eight
4 townhouse units. Because all of the alleged oral promises dealt
5 with the terms of the loan for this project, they cannot form the
6 basis of any breach of contract claim.

7 The written agreement that New Resource Bank allegedly
8 breached is the "Interest Reserve Provision." The provision states
9 that the "sum of \$225,000 shall be set aside within the Loan,
10 sufficient to pay interest due on the Note." In its complaint,
11 Buena Vista fails to allege how this provision was breached, but
12 its brief argues that New Resource Bank demanded more than \$225,000
13 to be held in the reserve and it "threatened to pull funds from
14 Plaintiff's project without an additional \$30,000"
15 Opposition at 13. In a motion to dismiss, the Court reviews the
16 adequacy of Buena Vista's claims asserted in the complaint, not the
17 claims it asserts in its brief. Schneider v. Cal. Dept. of
18 Corrections, 151 F.3d 1194, 1197 n. 1 (9th Cir.1998) ("In
19 determining the propriety of a Rule 12(b)(6) dismissal, a court may
20 not look beyond the complaint to a plaintiff's moving papers, such
21 as a memorandum in opposition to a defendant's motion to dismiss.")
22 (emphasis in original). However, even if the Court considers Buena
23 Vista's allegation not asserted in its complaint, it does not state
24 a cognizable breach of contract claim. Buena Vista has not alleged

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26 Tunnell, 14 F.3d 449, 454 (9th Cir. 1994) (holding that courts may
27 properly consider documents "whose contents are alleged in a
28 complaint and whose authenticity no party questions, but which are
not physically attached to the [plaintiff's] pleadings.").

1 any negative consequence as a result of this alleged new demand and
2 threat. It does not allege that it actually paid any amount over
3 the \$225,000 reserve or that the loan was cancelled because of any
4 non-payment in relation to the demand.

5 Buena Vista argues that it has alleged numerous oral and
6 written contracts that Ferguson & Brewer breached. However, none
7 of Buena Vista's allegations concerns Ferguson & Brewer. They all
8 relate to New Resource Bank. Even though Ferguson & Brewer
9 purchased the note from New Resource Bank, the buyer of such a
10 negotiable instrument takes the note free from all claims and
11 defenses. Cal. Com. Code § 3202(b) ("the shelter doctrine"); see
12 also Finalco, Inc. v. Roosevelt, 235 Cal. App. 3d 1301, 1305-06
13 (1991). Therefore, Buena Vista's breach of contract claim fails
14 against Ferguson & Brewer because it does not allege that any terms
15 of any oral or written contract between itself and Ferguson &
16 Brewer were breached.

17 III. Breach of the Implied Covenant of Good Faith and Fair Dealing

18 Buena Vista alleges a breach of the implied covenant of good
19 faith and fair dealing against New Resource Bank only. To assert a
20 cause of action for breach of the implied covenant of good faith
21 and fair dealing, a plaintiff must also plead the existence of a
22 contractual relationship because "the covenant is an implied term
23 in the contract." Smith v. City & County of San Francisco, 225
24 Cal. App. 3d 38, 49 (1990). "The implied covenant of good faith
25 and fair dealing is limited to assuring compliance with the express
26 terms of the contract, and cannot be extended to create obligations
27 not contemplated by the contract." Pasadena Live, LLC v. City of

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1 Pasadena, 114 Cal. App. 4th 1089, 1094 (2004). "This covenant not
2 only imposes upon each contracting party the duty to refrain from
3 doing anything which would render performance of the contract
4 impossible by any act of his own, but also the duty to do
5 everything that the contract presupposes that he will do to
6 accomplish its purpose." Harm v. Frasher, 181 Cal. App. 2d 405,
7 417 (1960).

8 Buena Vista's breach of the implied covenant claim is based on
9 the same allegations as its breach of contract claim. Its
10 allegations do not concern the performance of the existing explicit
11 contract terms so much as a claim that New Resource Bank explicitly
12 made several additional oral agreements. Therefore, Buena Vista's
13 breach of the implied covenant claim fails.

14 IV. California Business & Professions Code § 17200

15 California's Unfair Competition Law (UCL) prohibits any
16 "unlawful, unfair or fraudulent business act or practice." Cal.
17 Bus. & Prof. Code § 17200. The UCL incorporates other laws and
18 treats violations of those laws as unlawful business practices
19 independently actionable under state law. Chabner v. United Omaha
20 Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000). Violation of
21 almost any federal, state or local law may serve as the basis for a
22 UCL claim. Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-
23 39 (1994). In addition, a business practice may be "unfair or
24 fraudulent in violation of the UCL even if the practice does not
25 violate any law." Olszewski v. Scripps Health, 30 Cal. 4th 798,
26 827 (2003).

27 Buena Vista pleads under all three prongs of the UCL against
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1 all Defendants. Its allegations under the unlawful prong rely on
2 its claims that Defendants violated the RICO Act. However, because
3 Buena Vista fails to state claims for violations of the RICO Act,
4 its UCL claims must be dismissed insofar as they are based on that
5 Act.

6 Plaintiff has also failed to allege sufficient facts to state
7 a claim for relief under the "unfair practices" prong. Where, as
8 here, an action is brought by a consumer, rather than a competitor,
9 an "unfair" business practice occurs "when it offends an
10 established public policy or when the practice is immoral,
11 unethical, oppressive, unscrupulous or substantially injurious to
12 consumers." See People v. Casa Blanca Convalescent Homes, Inc.,
13 159 Cal. App. 4th 509, 530 (1984).

14 Here, Buena Vista alleges Defendants' business practices were
15 unfair because they were aimed at "intentionally harming borrowers'
16 interests." Compl. ¶ 242. Buena Vista claims that Defendants
17 "worked in concert to take advantage of [Buena Vista's] precarious
18 financial situation, bilk [Buena Vista] of thousands of dollars for
19 Defendants' own profit, and foreclose on Villa Del Sol." Id.
20 ¶ 241. These conclusory allegations do not support a claim that
21 Defendants' actions "offend[] an established public policy" or
22 that they are "immoral, unethical, oppressive, unscrupulous or
23 substantially injurious to consumers." See Casa Blanca, 159 Cal.
24 App. 4th at 530. Accordingly, Buena Vista's claim for relief under
25 the "unfair practices" prong also fails.

26 A claim based upon the fraudulent business practice prong of
27 the UCL is distinct from common law fraud. "A fraudulent business
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1 practice is one that is likely to deceive members of the public.”
2 Morgan v. AT&T Wireless Svcs., Inc., 177 Cal. App. 4th 1235, 1254
3 (2009). “A [common law] fraudulent deception must be actually
4 false, known to be false by the perpetrator and reasonably relied
5 upon by a victim who incurs damages. None of these elements are
6 required to state a claim for . . . relief under the UCL. This
7 distinction reflects the UCL’s focus on the defendant’s conduct,
8 rather than the plaintiff’s damages, in service of the statute’s
9 larger purpose of protecting the general public against
10 unscrupulous business practices.” In re Tobacco II Cases, 46 Cal.
11 4th 298, 312 (2009) (internal quotation marks and citations
12 omitted). Buena Vista’s claim under the fraud prong fails because
13 it has not alleged that “members of the public are likely to be
14 deceived” by any of Defendants’ actions. Further, Buena Vista has
15 not plead its fraudulent business practice claim with
16 particularity, as required under Federal Rule of Civil Procedure
17 9(b). See Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir.
18 2009) (holding that UCL claims sounding in fraud must meet the
19 heightened pleading standard of Rule 9(b)).

20 Defendants maintain that Buena Vista’s UCL claim must be
21 dismissed because Buena Vista seeks damages, not restitution.
22 Under the UCL, private plaintiffs may only seek injunctive or
23 restitutionary relief. See Cal. Bus. & Prof. Code § 17203; see
24 also Madrid v. Perot Sys. Corp., 130 Cal. App. 4th 440, 452-53
25 (2005). In “the context of the UCL, ‘restitution’ is limited to
26 the return of property or funds in which the plaintiff has an
27 ownership interest (or is claiming through someone with an

1 ownership interest)." Madrid, 130 Cal. App. 4th at 453 (citation
2 omitted).

3 Buena Vista does not address this argument in its opposition.
4 In its complaint, it provides conclusory statements that it seeks
5 "restitution of all monies due to Buena Vista or wrongfully taken
6 by Defendants from the Buena Vista, and disgorged profits from the
7 unlawful business practices of Defendants." Complaint ¶ 244.
8 However, Buena Vista has not plead how restitution of these monies
9 is connected to Defendants' alleged unlawful business practices.
10 Because Buena Vista failed to plead the basis of its request for
11 restitution, its UCL claim is dismissed.

12 V. Fraud

13 Buena Vista alleges a claim of fraud against all Defendants.
14 To state a claim for fraud, a plaintiff must plead
15 "'(a) misrepresentation; (b) knowledge of falsity (or scienter);
16 (c) intent to defraud, i.e., to induce reliance; (d) justifiable
17 reliance; and (e) resulting damage.'" In re Napster, Inc.
18 Copyright Litig., 479 F.3d 1078, 1096 (9th Cir. 2007) (quoting
19 Small v. Fritz Cos., Inc., 30 Cal. 4th 167, 173 (2003)); see
20 generally Cal. Civ. Code §§ 1709-10. Averments concerning fraud
21 "shall be stated with particularity." Fed. R. Civ. Proc. 9(b).
22 The allegations must be "specific enough to give defendants notice
23 of the particular misconduct which is alleged to constitute the
24 fraud charged so that they can defend against the charge and not
25 just deny that they have done anything wrong." Semegen v. Weidner,
26 780 F.2d 727, 731 (9th Cir. 1985). Statements of the time, place
27 and nature of the alleged fraudulent activities are sufficient, id.

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1 at 735, provided the plaintiff sets forth "what is false or
2 misleading about a statement, and why it is false." In re GlenFed,
3 Inc., Secs. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994). Scierter
4 may be averred generally, simply by saying that it existed. Id. at
5 1547; see Fed. R. Civ. Proc. 9(b) ("Malice, intent, knowledge, and
6 other condition of mind of a person may be averred generally.").
7 Allegations of fraud based on information and belief usually do not
8 satisfy the particularity requirements of Rule 9(b); however, as to
9 matters peculiarly within the opposing party's knowledge,
10 allegations based on information and belief may satisfy Rule 9(b)
11 if they also state the facts upon which the belief is founded.
12 Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1439 (9th Cir.
13 1987).

14 Buena Vista claims that New Resource Bank fraudulently induced
15 it to take out a construction loan by making promises that New
16 Resource Bank did not intend to keep. Buena Vista alleges that New
17 Resource Bank stated that converting the loan into a rental
18 property loan would not be a problem, that New Resource Bank would
19 support a change in the loan terms at a later date and that New
20 Resource Bank would automatically agree to two loan extensions.
21 Although the integration clause bars these pre-execution promises
22 from becoming part of the loan agreement, these promises allegedly
23 induced Buena Vista into contracting with New Resource Bank.
24 However, for these statements to form the basis for fraudulent
25 inducement, they have to be false representations. Buena Vista
26 admits in its complaint that each of the promises was fulfilled:
27 New Resource Bank (1) converted the loan into a rental property
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1 loan, (2) agreed to changes in loan terms and (3) granted two loan
2 extensions. Thus, the statements allegedly made by New Resource
3 Bank prior to the construction loan agreement are not false and
4 cannot form the basis of a fraudulent inducement claim.

5 Further, Buena Vista's fraud claims against Ferguson & Brewer
6 and Marcus & Millichap are not cognizable. Buena Vista does not
7 make any allegations that Ferguson & Brewer made any intentional
8 misrepresentations concerning the original construction loan
9 agreement between Buena Vista and New Resource Bank. Rather, the
10 fraud allegations against Ferguson & Brewer are limited to claims
11 that Ferguson & Brewer became aware of Buena Vista's financial
12 "struggles" and obtained confidential financial information about
13 the borrower and the note, worked in concert with New Resource Bank
14 to buy the loan from the Bank and interfered with loan
15 modifications between the Bank and a "potential refinancer." Comp.
16 ¶¶ 253-257. None of these allegations concern any
17 misrepresentations made by Ferguson & Brewer to Buena Vista.
18 Moreover, Buena Vista does not allege that it relied on any
19 misrepresentations by Ferguson & Brewer. Further, there is nothing
20 fraudulent about Ferguson & Brewer's possession of information
21 about Buena Vista's financial state. For all of these reasons,
22 Buena Vista's fraud claim against Ferguson & Brewer fails.

23 Similarly, the fraud claim against Marcus & Millichap fails
24 because Buena Vista does not specifically allege any
25 misrepresentations made by Marcus & Millichap. Buena Vista alleges
26 that Marcus & Millichap improperly obtained Buena Vista's
27 confidential financial information and passed that information to
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1 Ferguson & Brewer. These allegations do not constitute a fraud.

2 VI. Unjust Enrichment

3 Buena Vista asserts a claim of unjust enrichment against all
4 Defendants. California courts appear to be split as to whether
5 there is an independent cause of action for unjust enrichment.
6 Baggett v. Hewlett-Packard Co., 582 F. Supp. 2d 1261, 1270-71 (C.D.
7 Cal. 2007) (applying California law). One view is that unjust
8 enrichment is not a cause of action, or even a remedy, but rather a
9 general principle, underlying various legal doctrines and remedies.
10 McBride v. Boughton, 123 Cal. App. 4th 379, 387 (2004). In
11 McBride, the court construed a "purported" unjust enrichment claim
12 as a cause of action seeking restitution. Id. There are at least
13 two potential bases for a cause of action seeking restitution:
14 (1) an alternative to breach of contract damages when the parties
15 had a contract which was procured by fraud or is unenforceable for
16 some reason; and (2) where the defendant obtained a benefit from
17 the plaintiff by fraud, duress, conversion, or similar conduct and
18 the plaintiff chooses not to sue in tort but to seek restitution on
19 a quasi-contract theory. Id. at 388. In the latter case, the law
20 implies a contract, or quasi-contract, without regard to the
21 parties' intent, to avoid unjust enrichment. Id.

22 Another view is that a cause of action for unjust enrichment
23 exists and its elements are receipt of a benefit and unjust
24 retention of the benefit at the expense of another. Lectrodryer v.
25 SeoulBank, 77 Cal. App. 4th 723, 726 (2000); First Nationwide
26 Savings v. Perry, 11 Cal. App. 4th 1657, 1662-63 (1992).

27 Buena Vista has not stated a basis for a restitutionary remedy
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1 for its fraud claim against New Resource Bank, Marcus & Millichap
2 and Ferguson & Brewer. Therefore, Buena Vista's unjust enrichment
3 claim is dismissed.

4 VII. Intentional Interference with Prospective Economic Advantage
5 (IIPEA)

6 Buena Vista brings an IIPEA claim against all Defendants. To
7 state a claim for this tort, Buena Vista must show, for each
8 Defendant: (1) an economic relationship between Buena Vista and a
9 third party containing the probability for future economic benefit
10 for Buena Vista; (2) Defendants' knowledge of this relationship;
11 (3) intentional acts by Defendants designed to disrupt the
12 relationship; (4) actual disruption of the relationship;
13 (5) damages proximately caused by Defendants' acts; and (6) that
14 Defendants' acts were wrongful by some legal measure other than the
15 fact of the interference itself. Korea Supply Co. v. Lockheed
16 Martin Corp., 29 Cal. 4th 1134, 1153-54 (2003).

17 Buena Vista fails to allege this tort against Defendants.
18 Buena Vista claims that New Resource Bank interfered with its
19 prospective economic advantage in three ways: (1) by interfering
20 with Buena Vista's relationships with probable refinancers, (2) by
21 interfering with Buena Vista's relationship with its marketing
22 team, prompting the team to quit due to New Resource Bank's delay
23 in transitioning the loan to a rental option and (3) by providing
24 Buena Vista's financial information to Marcus & Millichap. None of
25 these theories has merit. Concerning the lenders, Buena Vista has
26 not alleged that there was any probability of a future economic
27 relationship with any particular lender. Further, Buena Vista
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1 merely alleges that New Resource Bank was not willing to refinance
2 the loan on terms more favorable to Buena Vista, even though such
3 refinancing was not required by the loan. This allegation does not
4 constitute a specific action taken by New Resource Bank intended to
5 disrupt a relationship with a potential lender. Moreover, Buena
6 Vista has not alleged that any of New Resource Bank's acts resulted
7 in actual damage or economic loss.

8 As to Buena Vista's relationship with its marketing team,
9 Buena Vista has also failed to allege any intentional act by New
10 Resource Bank that interfered with that relationship. At most,
11 Buena Vista has alleged that it was negotiating a transition to a
12 rental option with New Resource Bank when the marketing team quit.
13 This negotiation does not constitute an intentional disruption of
14 Buena Vista's relationship with its own marketing team.

15 As to the claim concerning New Resource Bank's release of
16 Buena Vista's financial records, Buena Vista has not alleged any
17 probable economic relationship that was injured by the release of
18 this information.

19 Buena Vista's IIPEA claims against Ferguson & Brewer and
20 Marcus & Millichap fail for similar reasons. Buena Vista has not
21 alleged that Ferguson & Brewer did anything other than use the
22 information provided to it to negotiate a deal with the bank.
23 Further, Buena Vista has not alleged that these Defendants did
24 anything intentionally to interfere with an actual prospective
25 business relationship.

26 Perhaps most importantly, Buena Vista fails to allege element
27 (6) of the cause of action, that any of Defendants' actions were

1 wrongful by some legal measure other than the interference itself.
2 In Korea Supply, the California Supreme Court explained that an
3 "act is independently wrongful if it is unlawful, that is, if it is
4 proscribed by some constitutional, statutory, regulatory, common
5 law, or other determinable legal standard." 29 Cal. 4th at 1159.
6 Buena Vista alleges that New Resource Bank's independent wrongful
7 conduct concerned purposeful delay of refinancing negotiations
8 "with the intent to retain [Buena Vista's] excessive interest only
9 payments and foreclose on Villa Del Sol." Opposition at 21. Buena
10 Vista alleges that New Resource Bank accomplished the purposeful
11 delay through the wrongful means of releasing its confidential
12 financial records to Marcus & Millichap.

13 However, according to the express language of the loan
14 agreement, Buena Vista agreed to the disclosure of all information
15 related to the loan to potential purchasers of the note. That
16 provision of the loan agreement states, "Lender may provide,
17 without any limitation whatsoever, to any one or more purchasers,
18 or potential purchasers, any information or knowledge Lender may
19 have about Borrower or about any other matter relating to the Loan,
20 and Borrower hereby waives any rights to privacy Borrower may have
21 with respect to such matters." New Resource Bank RJN, Ex. B at 6.
22 Buena Vista makes much of the allegation that New Resource Bank
23 turned over information to Marcus & Millichap, which was a real
24 estate broker and not technically a potential purchaser of the
25 loan. However, Marcus & Millichap is alleged to be the agent of
26 New Resource Bank and an agent is authorized to perform any acts
27 which a principal might do. See Cal. Civ. Code § 2304. Because
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1 New Resource Bank was authorized to provide Buena Vista's private
2 financial information to Ferguson & Brewer, Marcus & Millichap as
3 its agent was also authorized to do the same thing. Therefore, New
4 Resource Bank is not alleged to have committed any independent
5 wrongful act other than the interference itself.

6 Buena Vista alleges that the same disclosure of confidential
7 information serves as the independent wrongful act to support IIPEA
8 claims against Ferguson & Brewer and Marcus & Millichap. Because
9 Ferguson & Brewer was a "potential purchaser" of the note, it was
10 expressly allowed to view Buena Vista's confidential information.
11 And as described above, Marcus & Millichap did not commit any
12 wrongdoing by viewing and passing along this information. For all
13 of these reasons, the IIPEA claims against New Resource Bank,
14 Ferguson & Brewer and Marcus & Millichap fail.

15 VIII. Negligence

16 Buena Vista alleges a negligence claim against New Resource
17 Bank only, stating that New Resource Bank owed it a duty to use
18 ordinary care to prevent injury to it because it "was a borrower
19 and a client" of New Resource Bank. Compl. ¶ 290. New Resource
20 Bank asserts that it did not have a relationship with Buena Vista
21 that would impose a duty of care.

22 A cause of action for negligence must allege (1) the
23 defendant's legal duty of care to the plaintiff; (2) the
24 defendant's breach of duty; (3) injury to the plaintiff as a result
25 of the breach; and (4) damage to the plaintiff. Hoyem v. Manhattan
26 Beach City Sch. Dist., 22 Cal. 3d 508, 513 (1978). "The legal duty
27 of care may be of two general types: (a) the duty of a person to

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1 use ordinary care in activities from which harm might reasonably be
2 anticipated, or (b) an affirmative duty where the person occupies a
3 particular relationship to others." McGettigan v. Bay Area Rapid
4 Transit Dist., 57 Cal. App. 4th 1011, 1016-17 (1997).

5 "[A]s a general rule, a financial institution owes no duty of
6 care to a borrower when the institution's involvement in the loan
7 transaction does not exceed the scope of its conventional role as a
8 mere lender of money." Nymark v. Heart of Fed. Savings & Loan
9 Assn., 231 Cal. App. 3d 1089, 1095 (1991); see also Kinner v. World
10 Savings & Loan Assn., 57 Cal. App. 3d 724, 732 (1976) (holding no
11 duty of care owed by lender to borrower to ensure adequacy of
12 construction loan); Wagner v. Benson, 101 Cal. App. 3d 27, 35
13 (1980) (finding no duty owed by lender to borrower where lender is
14 not involved extensively in borrower's business).

15 Buena Vista has not alleged facts to show that New Resource
16 Bank's involvement in the loan transaction exceeded the scope of
17 its conventional role as a lender. Accordingly, Buena Vista's
18 claim for negligence is dismissed because it fails to show that New
19 Resource Bank owed it a duty of care.

20 IX. Motion to Strike Jury Demand

21 The Court denies this motion without prejudice to refileing
22 because, at this stage in the case, it is not clear on which claims
23 Buena Vista will proceed. Once the pleadings have closed, the
24 Court can determine whether language in the loan agreement waives
25 Buena Vista's right to a jury trial on its cognizable claims.

26 CONCLUSION

27 For the foregoing reasons, the Court grants Defendants'

1 motions to dismiss (Docket Nos. 16, 22, 26) and denies without
2 prejudice Defendants' motions to strike (Docket Nos. 18, 23).
3 Buena Vista may file an amended complaint addressing the
4 deficiencies detailed above within fourteen days of the date of
5 this Order. If Buena Vista does so, National Resource Bank may
6 file a motion to dismiss two weeks thereafter. Ferguson & Brewer
7 and Marcus & Millichap may file their motions, of up to eight pages
8 of non-repetitive argument, one week later. Two weeks later, Buena
9 Vista may file a consolidated opposition of up to the total number
10 of pages utilized by Defendants. One week later, Defendants may
11 file a joint fifteen page reply or separate five page replies. The
12 motions will be decided on the papers.

13 IT IS SO ORDERED.

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15 Dated: 08/31/10



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CLAUDIA WILKEN
United States District Judge