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3 UNITED STATES DISTRICT COURT  
4 NORTHERN DISTRICT OF CALIFORNIA  
56  
7 LEROY TYLER,

8 Plaintiff,

No. C 10-3415 PJH

9 v.

**ORDER GRANTING MOTION  
TO DISMISS**10 NATIONAL CITY MORTGAGE CO.,  
11 et al.,12 Defendants.  
\_\_\_\_\_ /

13 The motion of defendant PNC Bank, N.A., as successor by merger to National City  
14 Bank, previously doing business as "National City Mortgage" ("National City"), to dismiss  
15 the claims asserted against it (first, second, fourth, fifth, seventh, and eighth causes of  
16 action) came on for hearing before this court on December 22, 2010. Plaintiff Leroy Tyler  
17 appeared by his counsel Veronica Garcia, and National City appeared by its counsel  
18 Joshua Bryan. Having read the parties' papers and carefully considered their arguments,  
19 the court hereby GRANTS the motion as follows for the reasons stated at the hearing.

20 1. The motion to dismiss all claims as time-barred is GRANTED, with leave to  
21 amend to allege facts supporting application of the discovery rule. See Grisham v. Phillip  
22 Morris U.S.A., Inc., 40 Cal. 4th 623, 638 (2007); see also Yumul v. Smart Balance, Inc., \_\_\_  
23 F.Supp. 2d \_\_\_, 2010 WL 3359674 at \*6 (C.D. Cal., July 30, 2010); Stearns v. Select  
24 Comfort Retail Corp., \_\_\_ F.Supp. 2d \_\_\_, 2010 WL 2898284 at \*24 (N.D. Cal., July 21,  
25 2010).

26 2. The motion to dismiss the first cause of action for civil conspiracy is  
27 GRANTED, with leave to amend to specify the underlying action and to allege facts  
28 supporting that action. See Von Grabe v. Sprint PCS, 312 F.Supp. 2d 1285, 1308 & n.21

1 (S.D. Cal. 2003) (citing Katzberg v. Regents of Univ. of California, 29 Cal. 4th 300, 327  
2 (2002)). To the extent that the underlying action is fraud, the elements must be pled with  
3 particularity as required by Federal Rule of Civil Procedure 9(b). See In re GlenFed Sec.  
4 Litig., 42 F.3d 1541, 1547-49 (9th Cir.1994).

5 3. The motion to dismiss the second cause of action for fraud is GRANTED, with  
6 leave to amend to plead the facts supporting the elements of the claim with particularity, as  
7 required by Rule 9(b).

8 4. The motion to dismiss the fourth cause of action for breach of fiduciary duty is  
9 GRANTED. The dismissal is with prejudice. See Peterson Dev. Co. v. Torrey Pines Bank,  
10 233 Cal. App. 3d 103, 116 (1991); Nymark v. Heart Fed. Sav. & Loan Ass'n, 231 Cal. App.  
11 3d 1089, 1096 (1991).

12 5. The motion to dismiss the fifth cause of action for declaratory and injunctive  
13 relief is GRANTED. The dismissal of the claim for injunctive relief is with prejudice, as  
14 injunctive relief is a remedy. See Hamilton v. Bank of Blue Valley, \_\_\_ F.Supp. 2d \_\_\_, 2010  
15 WL 4222724 at \*19 (E.D. Cal., Oct. 20, 2010). The dismissal of the claim for declaratory  
16 relief is with leave to amend to clarify the basis of the claim and the relief sought. If the  
17 claim is duplicative of another cause of action, it should be omitted from the amended  
18 complaint.

19 6. The motion to dismiss the seventh cause of action for breach of the implied  
20 covenant of good faith and fair dealing is GRANTED, with leave to amend to allege facts  
21 clarifying the underlying contractual obligation. See Pasadena Live, LLC v. City of  
22 Pasadena, 114 Cal. App. 4th 1089, 1093-94 (2004); Smith v. City & County of San  
23 Francisco, 225 Cal. App. 3d 38, 49 (1990).

24 7. The motion to dismiss the eighth cause of action for violation of California  
25 Business and Professions Code § 17200 is GRANTED, with leave to amend to clarify  
26 whether the business practice on which the claim is predicated is alleged to be unlawful  
27 (and if so, based on what law), fraudulent (and if so, based on what particularized facts  
28 showing that the public is likely to be deceived), or unfair (and if so, based on what anti-

1 competitive activity).

2 8. The amended complaint, which shall be filed no later than January 21, 2010,  
3 shall allege no new claims and name no new defendants unless plaintiff has obtained the  
4 agreement of defendants or leave of court; shall include the correct name of the National  
5 City defendant; and shall use correct statutory citations.

6 9. No later than January 21, 2010, plaintiff shall file a proof of service of the  
7 summons and complaint on defendant U.S. Bancorp. If plaintiff fails to do this, U.S.  
8 Bancorp will be dismissed from the action.

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10 **IT IS SO ORDERED.**

11 Dated: December 23, 2010



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PHYLLIS J. HAMILTON  
United States District Judge

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