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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for INDYMAC BANK F.S.B.,  
  
vs.  
  
GERALD LEVITT, dba GERALD LEVITT APPRAISAL,  
  
Plaintiff,  
  
Defendant.

CASE NO. 11cv1284 JM(BLM)  
  
ORDER DENYING MOTION TO DISMISS; GRANTING MOTION TO STRIKE; GRANTING LEAVE TO AMEND

Defendant Gerald Levitt (“Levitt”), dba Gerald Levitt Appraisal, moves to dismiss the claims alleged by Plaintiff Federal Deposit Insurance Corporation (“FDIC”), as receiver for IndyMac Bank, pursuant to Fed.R.Civ.P. 12(b)(6) and to strike its claim for attorney’s fees and costs pursuant to Fed.R.Civ.P. 12(f). The FDIC only opposes the motion to dismiss. Pursuant to Local Rule 7.1(d)(1), this matter is appropriate for decision without oral argument. For the reasons set forth below, the court denies the motion to dismiss, grants the motion to strike the prayer for attorney’s fees without prejudice, and grants 10 days leave to amend from the date of entry of this order.

**BACKGROUND**

On June 10, 2011 the FDIC, as receiver for IndyMac Bank, (Compl. ¶1), filed a

1 complaint against Levitt alleging six claims for relief: three for breach of contract and  
2 three for negligent misrepresentation. The complaint also requests an award of  
3 attorney's fees and costs. In broad brush, FDIC alleges that Levitt negligently  
4 misrepresented and breached its contractual duties by preparing property appraisals  
5 containing numerous material misrepresentations, including gross over-evaluation of  
6 the properties at issue, which resulted in damages to the FDIC.

7 In 2007, the FDIC alleges that Levitt entered into agreements with three separate  
8 mortgage brokers - - Diamond Valley Funding, Southern Fidelity Mortgage, LLC, and  
9 Western Thrift and Loan - - to prepare appraisals for real properties located in San  
10 Marcos, El Cajon, and San Diego, California. (Compl. ¶¶8, 18, 28). With respect to  
11 each appraisal, Levitt agreed and represented that:

12 The lender/client may disclose or distribute this appraisal report to:  
13 . . . another lender at the request of the borrower, the mortgagee or its  
14 successors and assigns, mortgage insurers, government sponsored  
enterprises, and other secondary market participants . . . without having to  
get the appraiser's consent. . .

15 The borrower, another lender at the request of the borrower, the  
16 mortgagee or its successors and assigns, mortgage insurers, government  
17 sponsored enterprises, and other secondary market participants may rely  
on this appraisal report as part of any mortgage finance transaction that  
involves one or more of these parties.

18 Any intentional or negligent misrepresentation(s) contained in this  
19 appraisal report may result in civil liability. . . .

20 (Compl. ¶¶12, 22, 32).

21 FDIC alleges that Levitt breached the appraisal contract by, among other things,  
22 (1) misrepresenting the value of the properties; (2) using improper and negligently  
23 selected comparable sales; and (3) did not comply with the Uniform Standards of  
24 Professional Appraisal Practice ("USPAP"). (Compl. ¶¶14, 24, 34). FDIC alleges it  
25 suffered damages on the San Marcos, El Cajon, and San Diego properties in the  
26 amounts of \$376,458, \$362,588, and \$355,006, respectively. FDIC also seeks interest,  
27 costs and attorney's fees.

28 Levitt now moves to dismiss both claims and to strike the prayer for attorney's  
fees.

## DISCUSSION

### Legal Standards

Federal Rule of Civil Procedure 12(b)(6) dismissal is proper only in "extraordinary" cases. United States v. Redwood City, 640 F.2d 963, 966 (9th Cir. 1981). Courts should grant 12(b)(6) relief only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient facts to support a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). Courts should dismiss a complaint for failure to state a claim when the factual allegations are insufficient "to raise a right to relief above the speculative level." Bell Atlantic Corp v. Twombly, 550 U.S. 544, 555 (2007) (the complaint's allegations must "plausibly suggest[]" that the pleader is entitled to relief); Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009) (under Rule 8(a), well-pleaded facts must do more than permit the court to infer the mere possibility of misconduct). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. at 1949. Thus, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. The defect must appear on the face of the complaint itself. Thus, courts may not consider extraneous material in testing its legal adequacy. Levine v. Diamantheset, Inc., 950 F.2d 1478, 1482 (9th Cir. 1991). The courts may, however, consider material properly submitted as part of the complaint. Hal Roach Studios, Inc. v. Richard Feiner and Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989).

Finally, courts must construe the complaint in the light most favorable to the plaintiff. Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995), cert. dismissed, 116 S. Ct. 1710 (1996). Accordingly, courts must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. Holden v. Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992). However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a Rule 12(b)(6) motion. In Re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996).

1 **The Breach of Contract Claim**

2 Levitt argues that the complaint fails to identify any contract between him and  
3 the three mortgage brokers. As a consequence, Levitt concludes that FDIC fails to state  
4 a claim for breach of contract or that FDIC is a third party beneficiary of the contract.

5 To establish a breach of contract, FDIC must show (1) the existence of a contract,  
6 (2) plaintiff’s performance under the contract, (3) defendant’s material breach of the  
7 contract, and (4) damages arising from the breach. See Smith v. Royal Mfg. Co., 185  
8 Cal.App.2d 315, 328 (1960); Roth v. Malson, 67 Cal.App.4th 552, 557 (1998). Here,  
9 the complaint alleges that (1) Levitt contracted with the mortgage brokers to prepare  
10 appraisals for the properties, (Compl. ¶¶ 8, 9, 18, 19, 28, 29); (2) the mortgage brokers  
11 complied with their obligations under the contract, (Compl. ¶¶15,25, 35), by, among  
12 other things, providing “valuable consideration” in exchange for the appraisals, (Compl.  
13 ¶¶8, 18, 28); (3) Levitt did not comply with the obligations and representations  
14 contained in the appraisals and the USPAP, (Compl. ¶¶14, 24, 34); and (4) IndyMac  
15 suffered consequential damages. (Compl. ¶¶26, 36, 46).

16 The court notes that the complaint generally alleges that the mortgage brokers  
17 contracted with Levitt to conduct the property appraisals. While no particularized  
18 written or oral contract is alleged in the complaint, FDIC alleges the approximate date  
19 of the agreement (i.e. the date whereby the mortgage brokers requested, ordered, or  
20 otherwise contracted for an appraisal with Levitt). (Compl. ¶18, 28, 38). While these  
21 allegations are not specific, the allegations provide Levitt (in combination with his  
22 unique knowledge of the underlying transactions) with sufficient notice such that he is  
23 able to conduct discovery and to adequately respond to the complaint.

24 The court also finds that the complaint sufficiently alleges that FDIC is an alleged  
25 third party beneficiary of the agreements between Levitt and the mortgage brokers.  
26 “For a third party to qualify as a beneficiary under a contract, the contracting parties  
27 must have intended to benefit that third party, and their intent must appear from the  
28 terms of the contract.” Kirst v. Silna, 103 Cal.App.3d 759, 763 (1980) (citing

1 Cal.Civ.Code § 1559). The contracted for appraisals expressly provide, as set forth in  
2 paragraph 23 of the certificates allegedly attached to the appraisals:

3           The borrower, another lender at the request of the borrower, the  
4 mortgagee or its successors and assigns, mortgage insurers, government  
5 sponsored enterprises, and other secondary market participants may rely  
6 on this appraisal report as part of any mortgage finance transaction that  
7 involves one or more of these parties.

8 (Compl. ¶¶ 12, 13, 22, 23, 32, 33). This provision expressly provides that mortgagees  
9 may rely upon and benefit from the appraisals. Accordingly, the court concludes that  
10 this provision permits FDIC to enforce the provisions and to prosecute the action in its  
11 own name. See Restatement 2nd of Torts §552.

12           In sum, the motion to dismiss the breach of contract claims is denied.

### 13 **The Negligent Misrepresentation Claim**

14           For the tort of negligent misrepresentation, the California Supreme Court has  
15 adopted the test articulated in the Restatement Second of Torts. See Bily v. Arthur  
16 Young & Co., 3 Cal. 4th 370, 414 (1992). Under the Restatement rule, a person who  
17 negligently supplies false information is liable for a loss suffered “(a) by the person or  
18 one of a limited group of persons for whose benefit and guidance he [or she] intends to  
19 supply the information or knows that the recipient intends to supply it; and (b) through  
20 reliance upon it in a transaction that he [or she] intends the information to influence or  
21 knows that the recipient so intends or in a substantially similar transaction.” Rest.2d  
22 Torts (1977) § 552, subd. (2); Glenn K. Jackson Inc. R. Roe, 273 F.3d 1192 1200 (9th  
23 Cir. 2001). Stated another way, the elements of negligent misrepresentation include:  
24 (1) misrepresentation of a past or existing material fact, (2) without reasonable ground  
25 for believing it to be true, (3) with intent to induce another's reliance on the  
26 misrepresentation, (4) ignorance of the truth and justifiable reliance on the  
27 misrepresentation by the party to whom it was directed, and (5) resulting damage. Fox  
28 v. Pollack, 181 Cal.App.3d 954, 962 (1986). A misrepresentation claim must comply  
with the particularity requirements of Fed.R.Civ.P. 9(b). Kearns v. Ford Motor Co.,  
567 F.3d 11210, 1127 (9th Cir. 2009).

1 Here, the complaint alleges that Levitt prepared the three appraisals at issue; the  
2 dates the appraisals were prepared; the appraisals materially over-represented the value  
3 of the properties; the appraisals used improper and negligently selected comparable  
4 sales for comparisons; the appraisals did not comply with USPAP; the appraisals were  
5 made in the course of Levitt's business; IndyMac was an intended beneficiary of the  
6 appraisals and used them in connection with mortgage finance transactions; IndyMac  
7 justifiably relied on the appraisals in deciding to fund the loans; and IndyMac was  
8 damaged as the appraisals significantly overvalued the properties. (Comp. ¶¶38-42, 44-  
9 48, 50-54). Nothing more is required to state a claim for negligent misrepresentation.

10 In sum, the motion to dismiss the negligent misrepresentation claims is denied.

11 **The Motion to Strike**


12 Levitt moves to strike the prayer for attorney's fees and costs because Plaintiff  
13 fails to identify any statutory or contractual provision permitting such fees. See  
14 Santisas v. Goodin, 17 Cal.4th 5999, 608 (1998). Plaintiff did not oppose the motion  
15 to strike but requests leave to file an amended complaint. As leave to amend is to be  
16 freely given, Fed.R.Civ.P. 15(a), the court grants the motion to amend.

17 In sum, the court denies the motion to dismiss, grants the motion to strike, and  
18 grants FDIC 10 days leave to amend from the date of entry of this order.

19 **IT IS SO ORDERED.**

20 DATED: October 3 , 2011

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Hon. Jeffrey T. Miller  
United States District Judge