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

BENNETT GOLDBERG,  
  
Plaintiff,  
  
vs.  
  
BAC HOME LONAS SERVICING,  
LP; HSBC BANK USA, N.A.,  
  
Defendants.

CASE NO. 13cv0036 JM(BLM)  
  
ORDER GRANTING MOTION  
TO DISMISS BREACH OF  
CONTRACT CLAIM;  
GRANTING MOTION TO  
DISMISS REMAINDER OF  
STATE LAW CLAIMS;  
GRANTING LEAVE TO  
AMEND

Defendants Bank of America, N.A., as successor by merger to BAC Home Loans Servicing LP, (“BAC”) and HSBC Bank USA, N.A. (“HSBC”) move to dismiss all claims asserted in the First Amended Complaint (“FAC”). Plaintiff Bennett Goldberg opposes the motion. Pursuant to Local Rule 7.1(d)(1), the court finds the matters presented appropriate for decision without oral argument. For the reasons set forth below, the court grants the motion to dismiss the breach of contract claim, grants the motion to dismiss the remainder of the state law claims, and grants Plaintiff fifteen days’ leave to amend from the date of entry of this order.

**BACKGROUND**

On January 8, 2013, Defendants removed this diversity action from the Superior County for the County of San Diego. The FAC, filed on March 22, 2013, alleges eight causes of action for breach of contract, breach of the covenant of good faith and fair

1 dealing, promissory estoppel, fraud, negligent misrepresentation, violation of the  
2 Rosenthal Fair Debt Collection Practices Act, unfair business practices under Bus. &  
3 Prof. Code section 17200, and declaratory relief.

4 Plaintiff's claims relate to a June 2004 two-year adjustable rate mortgage in the  
5 amount of \$400,000 originally obtained from Countrywide Mortgage and subsequently  
6 refinanced through Wilshire Mortgage Corporation ("WMC"). (FAC ¶9). In 2007  
7 Plaintiff's home was severely damaged by the Witch Creek Fire. At that time, WMC  
8 informed Plaintiff that he should not make any more payments on the loan "due to the  
9 federal government's financial relief program for fire disaster victims." (FAC ¶10).  
10 In October 2009, Plaintiff was informed that he did not qualify for federal disaster  
11 relief because he had returned to live in the home. (FAC ¶12).

12 In early 2010, Plaintiff received notice that the servicing of the loan was  
13 transferred to BAC. (FAC ¶13). Plaintiff was allegedly unable to obtain information  
14 about the status of his mortgage and, on August 23, 2010, Plaintiff commenced an  
15 action against BAC in state court alleging, among other things, claims for fraud,  
16 negligence and violations of various lending statutes. (FAC ¶16).

17 On March 27, 2011, Plaintiff signed the First Mutual Settlement Agreement  
18 requiring Plaintiff to (1) dismiss the state court action, (2) vacate the property, (3) leave  
19 the property in "broom clean" condition, (4) pay and maintain all utilities until Plaintiff  
20 vacated the premises, and (5) execute a deed transferring Plaintiff's interest in the  
21 property to HSBC. (FAC ¶17). In return, HSBC and BAC were to pay Plaintiff \$2,500  
22 within five days after he vacated the property. (FAC ¶18).

23 In May 2011, allegedly concerned that there were additional liens on the  
24 property, the parties entered into a Second Mutual Settlement Agreement. This  
25 agreement added one additional condition providing that "HSBC shall have the option  
26 of either accepting a deed from GOLDBERGS or proceeding with foreclosure on the  
27 PROPERTY." (FAC ¶21). Knowing that there were no additional loans on the  
28 property, Plaintiff executed the Second Mutual Settlement Agreement on May 21, 2011

1 and, on May 23, 2011, Plaintiff “sent to Defendants a quit claim deed.” (FAC ¶22).<sup>1</sup>  
2 By July 14, 2011, Defendants provided Plaintiff with two checks totaling \$2,500.  
3 (Compl. ¶24). “Defendants never indicated that they rejected the Quit Claim Deed or  
4 believed the Quit Claim Deed was unacceptable in any way.” (FAC ¶23).

5 At the heart of Plaintiff’s claim is the allegation that BAC and HSBC have  
6 continued to report to credit reporting agencies that Plaintiff is in default of his  
7 mortgage. (FAC ¶24). In August 2012, “one year after accepting the Quit Claim  
8 Deed,” Plaintiff learned that Defendants intended to foreclose on the property. On  
9 November 12, 2012, Defendants filed a Notice of Rescission of a Trustee’s Deed Upon  
10 Sale. (Defendants RJN Exh. L).

11 On March 11, 2013, the court granted Defendants’ motion to dismiss the original  
12 complaint and granted Plaintiff leave to amend. (Ct. Dkt. 11). The FAC does not  
13 allege any wrongful foreclosure claims. In an opposed motion, Defendants now move  
14 to dismiss all claims alleged in the FAC.

## 15 DISCUSSION

### 16 Legal Standards

17 Federal Rule of Civil Procedure 12(b)(6) dismissal is proper only in  
18 "extraordinary" cases. United States v. Redwood City, 640 F.2d 963, 966 (9th Cir.  
19 1981). Courts should grant 12(b)(6) relief only where a plaintiff's complaint lacks a  
20 "cognizable legal theory" or sufficient facts to support a cognizable legal theory.  
21 Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). Courts should  
22 dismiss a complaint for failure to state a claim when the factual allegations are  
23 insufficient “to raise a right to relief above the speculative level.” Bell Atlantic Corp  
24 v. Twombly, 550 U.S. 544, 555 (2007) (the complaint’s allegations must “plausibly  
25 suggest[.]” that the pleader is entitled to relief); Ashcroft v. Iqbal, 566 U.S. 662 (2009)  
26 (under Rule 8(a), well-pleaded facts must do more than permit the court to infer the

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28 <sup>1</sup> The court highlights that the Quit Claim Deed allegedly sent by Plaintiff to Defendants on May 23, 2011, (FAC ¶22), was executed by Plaintiff on March 30, 2011. (FAC Exh. 3).

1 mere possibility of misconduct). “The plausibility standard is not akin to a ‘probability  
2 requirement,’ but it asks for more than a sheer possibility that a defendant has acted  
3 unlawfully.” Id. at 678. Thus, “threadbare recitals of the elements of a cause of action,  
4 supported by mere conclusory statements, do not suffice.” Id. The defect must appear  
5 on the face of the complaint itself. Thus, courts may not consider extraneous material  
6 in testing its legal adequacy. Levine v. Diamantheset, Inc., 950 F.2d 1478, 1482 (9th  
7 Cir. 1991). The courts may, however, consider material properly submitted as part of  
8 the complaint. Hal Roach Studios, Inc. v. Richard Feiner and Co., 896 F.2d 1542, 1555  
9 n.19 (9th Cir. 1989).

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

## 17 **The Motion**

### 18 The Parol Evidence Rule

19 The primary issue on several of Plaintiff’s claims is whether the alleged oral  
20 condition (i.e. that Defendants would accept the quit claim deed in lieu of foreclosure  
21 unless there were liens against the property) is barred by the parol evidence rule.  
22 Riverisland Cold Storage, Inc. v. Fresno–Madera Production Credit Ass'n, 55 Cal.4th  
23 1169, 1174 (2013), explains the basis for the parol evidence rule:

24 It is founded on the principle that when the parties put all the terms of  
25 their agreement in writing, the writing itself becomes the agreement. The  
26 written terms supersede statements made during the negotiations.  
27 Extrinsic evidence of the agreement's terms is thus irrelevant, and cannot  
28 be relied upon.... [T]he parol evidence rule, unlike the statute of frauds,  
does not merely serve an evidentiary purpose; it determines the  
enforceable and incontrovertible terms of an integrated written  
agreement.... The purpose of the rule is to ensure that the parties' final  
understanding, deliberately expressed in writing, is not subject to change.  
(Citations and internal quotations omitted.)

1 See also Casa Herrera, Inc. v. Beydoun, 32 Cal.4th 336, 343 (2004) (“The parol  
2 evidence rule ... prohibits the introduction of any extrinsic evidence, whether oral or  
3 written, to vary, alter or add to the terms of an integrated written instrument.”) (internal  
4 citations and quotation marks omitted). Moreover, any agreement to modify the terms  
5 of a loan agreement must be made in writing. Seacrest v. Sec. Nat. Mortg. Loan Trust  
6 2002–2, 167 Cal.App. 4th 544, 553 (2008) (“An agreement to modify a contract that  
7 is subject to the statute of frauds is also subject to the statute of frauds.”) (internal  
8 citations omitted). However, the parol evidence rule does not render inadmissible  
9 proof of a contemporaneous agreement collateral to and not inconsistent with a written  
10 contract where the latter is either incomplete or silent on the subject and the  
11 circumstances justify an inference that it was not intended to constitute a final inclusive  
12 statement of the transaction. See Mangini v. Wolfschmidt, Limited, 165 Cal.App.2d  
13 192, 198–199 (1958).

14 Application of the parol evidence rule is a two-part analysis: “1) was the writing  
15 intended to be an integration, i.e., a complete and final expression of the parties’  
16 agreement, precluding any evidence of collateral agreements; and 2) is the agreement  
17 susceptible of the meaning contended for by the party offering the evidence?” Wang  
18 v. Massey Chevrolet, 97 Cal.App.4th 856, 873 (2002) (quoting Banco Do Brasil, S.A.  
19 v. Latian, Inc., 234 Cal.App.3d 973, 1001 (1991). Here, the Settlement Agreement is  
20 an integrated contract, representing the final expression of the parties’ intent. (FAC  
21 Exh. 2). The integration provision provides, in part, that “[t]here are no other  
22 agreements, covenants, promises or arrangements other than those set forth herein.”  
23 (FAC Exh. 2 ¶6).

24 Plaintiff argues that Defendants “accepted the Quit Claim Deed” once it was  
25 faxed/mailed to them on May 23, 2011 and that the condition set forth in the option  
26 was satisfied at that point in time. Plaintiff contends that the oral representation, made  
27 at an unidentified point in time by an unidentified individual, provides context to the  
28 parties’ conduct. (Oppo. at p.9:24-25). However, Plaintiff fails to explain the nature

1 of that context. At the time of contract formation on May 21, 2011, Defendants  
2 expressly retained the ability to either accept the deed or to seek to foreclose on the  
3 property. There appears to be no basis for Plaintiff's argument that by faxing the Quit  
4 Claim Deed on May 23, 2011, Defendants "accepted" the deed in lieu of foreclosure  
5 and therefore Defendants could no longer exercise the option in the Settlement  
6 Agreement. Accepting Plaintiff's argument, the alleged "acceptance" contradicts and  
7 is at variance with the written agreement. Further, under Plaintiff's view it appears that  
8 there would be no basis for the option because any outstanding liens against the  
9 property were easily ascertainable at the time of contract formation. In fact, Plaintiff  
10 alleges that there were no liens on the property as of the date of execution of the  
11 Second Settlement Agreement. (FAC ¶21). Rather than explain the option, Plaintiff's  
12 argument contradicts that express term because, as of the contract execution date of  
13 May 21, 2011, Plaintiff alleges that there were no outstanding liens and therefore no  
14 basis to amend the First Settlement Agreement. The oral condition contradicts the  
15 express contractual condition that Defendants possessed the ability to exercise the  
16 option to seek the remedy of foreclosure.

17 In sum, the court concludes that the parol evidence rule bars Plaintiff's  
18 contradictory oral condition.

19 The Breach of Contract Claim

20 At the outset, the court notes the breach of contract claim is premised upon  
21 breach of the Second Mutual Settlement Agreement, and not the original agreement.  
22 The elements for a breach of contract claim are: (1) existence of a contract; (2)  
23 performance of all conditions on the claimant's part or the claimant's excuse for  
24 nonperformance; (3) breach by the defendant; and (4) resulting damage to the claimant.  
25 See Reichert v. General Ins. Co., 68 Cal.2d 822, 830 (1968).

26 Plaintiff alleges that the parties entered into the Second Settlement Agreement,  
27 Plaintiff performed all obligations, Defendants breached its obligations by failing to  
28 record the Quit Claim Deed, and that Plaintiff suffered damages. (FAC ¶¶27-29). At

1 issue is the third element. The disputed material condition at issue provides: “HSBC  
2 shall have the option of either accepting a deed from GOLDBERGS or proceeding with  
3 foreclosure on the Property.” (FAC Exh. 2 at p.2). Plaintiff also alleges that it  
4 complied with all its obligations under the Second Settlement Agreement by  
5 dismissing the state court action, vacating the property, leaving the property in a broom  
6 clean condition, paid and kept all utilities connected, and provided Defendants with a  
7 Quit Claim Deed. (FAC ¶22). Plaintiff complied with all his material conditions by  
8 approximately early July 2011. By July 14, 2011, Defendants provided Plaintiff with  
9 checks in the amount of \$2,500. (FAC ¶23). As the breach of contract claim pled is  
10 based upon the oral condition barred by the parol evidence rule, this oral condition  
11 cannot serve as a basis for a breach of contract claim.

12 Although not argued by Plaintiff, nor alleged in the complaint, Plaintiff may still  
13 be able to state a breach of contract claim. Defendants, while in possession of the Quit  
14 Claim Deed on May 23, 2011, took no steps to either record the Quit Claim Deed or  
15 to foreclose on the property until August 2012 when it sought to foreclose on the  
16 property. (FAC ¶24). The Second Settlement Agreement provides guidance as to the  
17 time frame in which the parties were to comply with the material conditions. The  
18 Second Settlement Agreement provides that the “[t]ime is of the essence for the  
19 performance of each and every covenant and the satisfaction of each and every  
20 condition.” (FAC Exh. 2, ¶17). Here, Defendants’ alleged failure to timely exercise  
21 the option of either accepting the Quit Claim Deed or pursuing the remedy of  
22 foreclosure may, if alleged, state a breach of contract claim against Defendants.  
23 Defendants’ one-year delay in exercising the option provided for in the Second  
24 Settlement Agreement appears, if alleged, to violate the time is of the essence  
25 provision.

26 The court also briefly addresses the remaining arguments raised by Defendants  
27 in support of their motion to dismiss this claim. First, Defendants argue that the Second  
28 Settlement Agreement attached to the FAC is not executed by Defendants and therefore



1 “cannot serve a basis for Plaintiff’s claims” because it violates the statute of frauds.  
2 (Motion at p. 5:17). The court rejects this argument and notes that the present pleading  
3 motion arises under Rule 12(b)(6), and is not an evidentiary motion pursuant to Rule  
4 56. Discovery will afford the parties an opportunity to explore this claim in further  
5 detail to discover whether the parties even executed the contract at issue. The court  
6 also rejects Defendants’ argument that the settlement release contained in the Second  
7 Settlement Agreement bars Plaintiff’s claims. Plaintiff’s claims arise from events  
8 occurring subsequent to executing the settlement release. The court similarly rejects  
9 Defendants’ argument that Plaintiff lacks standing to challenge the foreclosure.  
10 Plaintiff is not suing for wrongful foreclosure, but for breach of contract.

11 Finally, the court rejects one argument raised by Plaintiff. Plaintiff argues that  
12 Defendant was obligated to accept the Quit Claim Deed when he mailed it to them in  
13 June 2011. The difficulty with this argument is that the contract specifically provided  
14 that Defendants had the option of either accepting the deed or proceeding with  
15 foreclosure. In either case, as noted above, Defendants were required to exercise the  
16 option in a timely manner.

17 In sum, the court grants the motion to dismiss the breach of contract claim.

18 The Breach of the Covenant of Good Faith and Fair Dealing Claim

19 Plaintiff alleges that Defendants breached the implied covenant of good faith and  
20 fair dealing when Defendants failed to record the Quit Claim Deed and sought to  
21 foreclose on the property. This claim is based on the alleged oral representation by an  
22 unknown agent of Defendants that they would not “foreclose on the Subject Property  
23 unless there were any known liens on the property.” (FAC ¶33).

24 The implied covenant of good faith and fair dealing “is limited to assuring  
25 compliance with the express terms of the contract, and cannot be extended to create  
26 obligations not contemplated by the contract.” Pasadena Live, LLC v. City of  
27 Pasadena, 114 Cal.App.4th 1089, 1094 (2004). The “implied covenant imposes upon  
28 each party the obligation to do everything that the contract presupposes they will do



1 to accomplish its purpose.” Careau & Co. v. Security Pacific Business Credit, Inc., 222  
2 Cal.App.3d 1371,1393 (1990).

3 “[A]llegations which assert such a claim must show that the conduct of  
4 the defendant, whether or not it also constitutes a breach of a consensual  
5 contract term, demonstrates a failure or refusal to discharge contractual  
6 responsibilities, prompted not by an honest mistake, bad judgment or  
7 negligence but rather by a conscious and deliberate act, which unfairly  
8 frustrates the agreed common purposes and disappoints the reasonable  
9 expectations of the other party thereby depriving that party of the benefits  
of the agreement.... [¶] If the allegations do not go beyond the statement  
of a mere contract breach and, relying on the same alleged acts, simply  
seek the same damages or other relief already claimed in a companion  
contract cause of action, they may be disregarded as superfluous as no  
additional claim is actually stated.” Id. at 1395.

10 To the extent Plaintiff bases this claim on the alleged oral condition or the failure  
11 of Defendants to timely elect to either accept the deed or to seek foreclosure, such  
12 violation of an express contractual claim cannot serve as the basis for a breach of the  
13 covenant of good faith and fair dealing claim. See Pasadena Live, 114 Cal.App.4th  
14 at 1094.

15 In sum, the court grants the motion to dismiss this claim.

#### 16 The Remaining State Law Claims

17 The remaining causes of action also appear to arise directly from Plaintiff’s  
18 arguments that Defendants breached the Second Settlement Agreement, and not from  
19 independent duty imposed by law. As noted in Applied Equipment,

20 Conduct amounting to a breach of contract becomes tortious only when  
21 it also violates an independent duty arising from principles of tort law. .  
22 . . This duty is independent of the contract.... ‘[A]n omission to perform  
a contract obligation is never a tort, unless that omission is also an  
omission of a legal duty.’ ” ( Jones v. Kelly, 208 Cal. 251, 255 (1929).

23 In sum, the court grants the motion to dismiss the breach of contract claim,  
24 grants the motion to dismiss the remaining state law claims, and grants Plaintiff 15  
25 days’ leave to amend from the date of entry of this order. The court also informs

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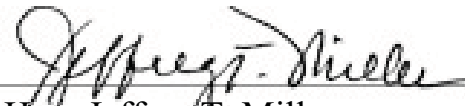
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1 Plaintiff that the failure to state a claim in the Second Amended Complaint will likely  
2 result in the dismissal of the complaint with prejudice.

3 **IT IS SO ORDERED.**

4 DATED: May 30, 2013

  
\_\_\_\_\_  
Hon. Jeffrey T. Miller  
United States District Judge

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6 cc: All parties

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