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

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

CASE NO. 13cv0036 JM(BLM)  
  
ORDER DENYING 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 Second Amended Complaint (“SAC”). 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 denies the motion to dismiss the breach of contract claim, grants the motion to dismiss the remainder of the state law claims, and grants Plaintiff ten 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 SAC, filed on June 12, 2013, alleges five causes of action for breach of contract, promissory estoppel, fraud, negligent

1 misrepresentation, and declaratory relief.

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

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

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

21 In May 2011, allegedly concerned that there were additional liens on the  
22 property, the parties entered into a Second Mutual Settlement Agreement ("SMSA").  
23 This agreement added one additional condition providing that "HSBC shall have the  
24 option of either accepting a deed from GOLDBERGS or proceeding with foreclosure  
25 on the PROPERTY." (SAC ¶21). Knowing that there were no additional loans on the  
26 property, Plaintiff executed the SMSA on May 21, 2011 and, on May 23, 2011, Plaintiff  
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1 “sent to Defendants a quit claim deed.” (SAC ¶23).<sup>1</sup> The SMSA also contained a time  
2 is of the essence provision. (SAC ¶22). By July 14, 2011, Defendants provided  
3 Plaintiff with two checks totaling \$2,500. (SAC ¶24). Plaintiff believed that he had  
4 complied with all the terms of the SMSA. (SAC ¶25)

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 on his  
7 mortgage. (SAC ¶26). 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). On May 30, 2013, the  
13 court granted in part and denied in part the motion to dismiss the First Amended  
14 Complaint and granted leave to amend. (Ct. Dkt. 17). Defendants now move to dismiss  
15 all claims alleged in the SAC.

## 16 DISCUSSION

### 17 Legal Standards

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

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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, (SAC ¶23), was executed by Plaintiff on March 30, 2011.  
(FAC Exh. 3).

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

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

## 18 **The Motion**

### 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 SMSA, Plaintiff performed all  
27 obligations, Defendants breached its obligations by failing to timely exercise the option  
28 to either record the Quit Claim Deed or to foreclose, and that Plaintiff suffered

1 damages. (SAC ¶¶28-32). Defendants contend that Plaintiff fails to adequately allege  
2 the third and fourth elements.

3 It is well-established that a contract, in the absence of a specified date or a time  
4 is of the essence provision, must be performed within a reasonable time. See Leiter v.  
5 Hadelsman, 125 Cal.App.2d 243, 250 (1954). “The degree to which time is of the  
6 essence and what constitutes timely performance under a contract must be construed  
7 from all of the terms of the agreement.” Baypoint Mortgage Corp. v. Crest Premium  
8 Real Estate et., 168 Cal.App.3d 818, 825-27 (1985). Here, the court concludes, even  
9 in the absence of the time-essence provision, that whether Defendants acted timely to  
10 exercise their option presents a question of fact, not properly resolved on a motion to  
11 dismiss. See Consolidated World Inv. v. Lido Preferred Ltd, 9 Cal.App.4th 373, 381  
12 (1992). In Consolidated, the court noted that “[w]here no time limit is specified for the  
13 performance of an act, a reasonable time is allowed.” Id. However, “what constitutes  
14 a ‘reasonable time’ for performance is a question of fact.” Id. (quoting Henry v.  
15 Sharma, 154 Cal.App.3d 665, 672 (1984). Accordingly, the SAC adequately pleads a  
16 breach of the SMSA by Defendants.<sup>2</sup>

17 Next, Defendants argue that Plaintiff has not adequately pled damages. Here,  
18 even if Plaintiff may be challenged to establish damages, pursuant to Fed.R.Civ.P. 8,  
19 the complaint adequately alleges damages at the pleading stage. (SAC ¶¶27, 32). The  
20 issue of damage presents a question of fact. See Colvig v. RKO General, Inc., 232  
21 Cal.App.2d 56, 68-69 (1965).

22 In sum, the court denies the motion to dismiss the breach of contract claim.

### 23 The Promissory Estoppel Claim

24 “If the promisee's performance was requested at the time the promisor made his  
25 or her promise and that performance was bargained for, the doctrine of promissory

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27 <sup>2</sup> The court also rejects Defendants’ argument that Plaintiff waived timely  
28 enforcement of the SMSA. Whether Plaintiff waived this right presents a question of  
fact not properly addressed on this motion to dismiss. See Boyd v. A.E.J. Chivers Co.,  
134 Cal.App. 566, 569 (1933) (“It will be conceded that a waiver is a question of fact  
to be considered under all the evidence.”).

1 estoppel is inapplicable and the law of consideration applies.” Raedeke v. Gibraltar  
2 Sav. & Loan Assn., 10 Cal. 3d 665, 672 (1974) (quoting Youngman v. Nevada  
3 Irrigation Dist., 70 Cal.2d 240, 249 (1969). The doctrine of promissory estoppel  
4 “employs equitable principles to satisfy the requirement that consideration must be  
5 given in exchange for the promise sought to be enforced.” Id. Here, the SMSA is  
6 supported by adequate consideration without application of the doctrine of promissory  
7 estoppel. Plaintiff alleges that he (1) dismissed the state court action, (2) vacated the  
8 property, (3) left the property in “broom clean” condition, (4) paid and maintained all  
9 utilities until Plaintiff vacated the premises, and (5) executed a deed transferring  
10 Plaintiff’s interest in the property to HSBC. (SAC ¶17). In return, HSBC and BAC  
11 were to pay Plaintiff \$2,500 within five days after he vacated the property. (SAC ¶18).  
12 The SMSA was supported by adequate consideration and the doctrine of promissory  
13 estoppel does not apply under the circumstances.<sup>3</sup> Resolution of this case simply does  
14 not turn on resolution of equitable principles. Id. at 674.

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

#### 16 The Fraud and Negligent Misrepresentation Claims

17 Claims that sound in fraud must comply with the particularity requirements of  
18 Fed.R.Civ.P. 9(b). Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009).  
19 The particularity requirements of Rule 9(b) require Plaintiff to plead the “who, what,  
20 when, where, and how” of the fraudulent activity. Decker v. GlenFed, Inc., 42 F.3d  
21 1541, 1548 (9th Cir. 1994); Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir.1993)  
22 (“[Rule 9(b) requires] the times, dates, places, benefits received, and other details of the  
23 alleged fraudulent activity.”). Under this standard, both claims are inadequately pled.

24 The SAC simply fails to allege the basic essentials of fraud-based claims.  
25 Plaintiff does not identify the precise alleged misrepresentation, who made the  
26 statements, when the statements were made, the authority of the individual allegedly

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28 <sup>3</sup> Whether the oral condition applies under the circumstances depends on the  
applicability of the parol evidence rule, discussed in an earlier order of the court. (Ct.  
Dkt. 17).

1 making the representation, and the circumstances attendant to the misrepresentations.  
2 The heightened pleading standard ensures that “allegations of fraud are specific enough  
3 to give defendants notice of the particular misconduct which is alleged to constitute the  
4 fraud charged so that they can defend against the charge and not just deny that they  
5 have done anything wrong.” Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir.1985).

6 In sum, the court grants the motion to dismiss the fraud and negligent  
7 misrepresentation claims.<sup>4</sup>

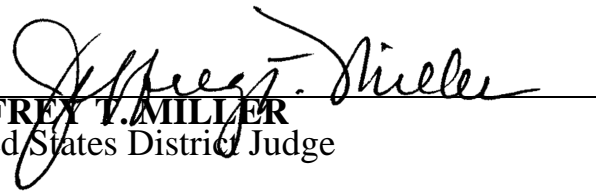
8 **Leave to Amend**

9 Plaintiff requests leave to amend. In light of the liberal amendment policy of  
10 Fed.R.Civ.P. 15(a), the court grants Plaintiff ten days leave to file an amended  
11 complaint from the date of entry of this order. The court also advises Plaintiff that the  
12 failure to state a claim in a fourth complaint will likely result in the dismissal of those  
13 claims with prejudice.

14 In sum, the court denies the motion to dismiss the breach of contract claim, grants  
15 the motion to dismiss the remainder of the claims asserted in the SAC, and grants  
16 Plaintiff ten days leave to amend from the date of entry of this order.

17 **IT IS SO ORDERED.**

18 DATED: August 21, 2013

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**JEFFREY T. MILLER**  
United States District Judge

21 cc: All parties  
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26 <sup>4</sup> The court does not consider the declaratory relief claim a separate cause of  
27 action. See Progeny Ventures, Inc. v. Wesberg Union Fin. Servs., Inc., 752 F.Supp.2d  
28 1127, 1135 (C.D. Cal.2010) (“[D]eclaratory relief is a remedy and not a cause of  
action[.]”); Sullivan v. JP Morgan Chase Bank, NA, 725 F.Supp.2d 1087, 1099 (E.D.  
Cal.2010) (“Under federal law, an injunction is a remedy, not a claim in and of itself.  
Similarly, under California law, an injunction is a remedy, not a cause of action.”  
(citations omitted)).