

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 ROBERT A. FREDERICK,)
4)
5 Plaintiff,)
6 vs.)
7 FEDERAL NATIONAL MORTGAGE)
8 ASSOCIATION, et al.,)
9 Defendants.)

Case No.: 2:11-cv-00522-GMN-CWH

ORDER

10 This is a foreclosure case initiated by pro se Plaintiff Robert A. Frederick in state court,
11 against Defendants Federal National Mortgage Association (“Fannie Mae”), Cal-Western
12 Reconveyance Corp. (“Cal-Western”), Aurora Loan Servicing, LLC (“Aurora”), Centex Mortgage
13 Services (“Centex”), MERSCORP, Inc. (“MERSCORP”), Mortgage Electronic Registration
14 Systems, Inc. (MERS), and Shalom Rubanowitz, an individual.

15 Pending before the Court is the Motion to Dismiss (ECF No. 8) filed by Defendants
16 Fannie Mae and Aurora (collectively “Moving Defendants”), along with their Request for
17 Judicial Notice (ECF No. 9). Plaintiff filed a Response (ECF No. 13) and Moving Defendants
18 filed a Reply (ECF No. 14) that was corrected and re-filed (ECF No. 15) the same day.

19 **I. BACKGROUND**

20 Plaintiff’s Complaint alleged thirteen (13) causes of action relating to the mortgage and
21 foreclosure proceedings instituted against his property located at 5713 Earthsong Street, Las
22 Vegas, Nevada, 89081, APN# 124-25-812-028 (“the property”): (1) Violations of Unfair Lending
23 Practices – NRS 598(D); (2) Deceptive Trade Practices – all named Defendants; (3) Wrongful
24 Foreclosure; (4) Conspiracy to Commit Fraud and Conversion; (5) Conspiracy to Commit Fraud
25 Related to MERS System; (6) Inspection and Accounting; (7) Unjust Enrichment; (8) Quiet Title

1 – all named Defendants; (9) Breach of Good Faith and Fair Dealing; (10) Wrongful Filing of
2 Unlawful Detainer [misabeled as “Ninth Cause of Action”]; (11) Injunctive Relief;
3 (12) Declaratory Relief; (13) Rescission. (ECF No. 1-3.)

4 The Complaint appears to be a form complaint that has come before this Court in other
5 cases.¹ The thirteen causes of action in the body of the Complaint do not distinguish which
6 actions are attributed to each Defendant, nor does the Complaint allege specific facts supporting
7 each cause of action. The Complaint also includes allegations that Bank of America violated
8 truth in lending laws, although Bank of America is not a party to this litigation. (See Compl.,
9 23:¶132.)

10 **II. LEGAL STANDARD**

11 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
12 that fails to state a claim upon which relief can be granted. See *North Star Int'l. v. Arizona Corp.*
13 *Comm'n.*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule
14 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not
15 give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. See
16 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is
17 sufficient to state a claim, the Court will take all material allegations as true and construe them in
18 the light most favorable to the plaintiff. See *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th
19 Cir. 1986).

20 The Court, however, is not required to accept as true allegations that are merely
21 conclusory, unwarranted deductions of fact, or unreasonable inferences. See *Sprewell v. Golden*
22 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
23 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation
24

25 ¹ See, e.g., *Lee v. BAC Home Loans Servicing, LP*, No. 2:11-cv-1583-JCM-PAL, 2011 WL 5827202, 2011 U.S. Dist. LEXIS 133697 (D. Nev. Nov. 18, 2011).

1 is plausible, not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*,
2 550 U.S. at 555) (emphasis added).

3 A court may also dismiss a complaint pursuant to Federal Rule of Civil Procedure 41(b)
4 for failure to comply with Federal Rule of Civil Procedure 8(a). *Hearns v. San Bernardino Police*
5 *Dept.*, 530 F.3d 1124, 1129 (9th Cir.2008). Rule 8(a)(2) requires that a plaintiff’s complaint
6 contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”
7 Fed. R. Civ. P. 8(a)(2). “Prolix, confusing complaints” should be dismissed because “they
8 impose unfair burdens on litigants and judges.” *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th
9 Cir.1996). Mindful of the fact that the Supreme Court has “instructed the federal courts to
10 liberally construe the ‘inartful pleading’ of pro se litigants,” *Eldridge v. Block*, 832 F.2d 1132,
11 1137 (9th Cir. 1987), the Court will view Plaintiff’s pleadings with the appropriate degree of
12 leniency.

13 “Generally, a district court may not consider any material beyond the pleadings in ruling
14 on a Rule 12(b)(6) motion However, material which is properly submitted as part of the
15 complaint may be considered on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner*
16 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, “documents
17 whose contents are alleged in a complaint and whose authenticity no party questions, but which
18 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
19 motion to dismiss” without converting the motion to dismiss into a motion for summary
20 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule of Evidence
21 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay Beer Distrib.*,
22 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers materials outside
23 of the pleadings, the motion to dismiss is converted into a motion for summary judgment. See
24 *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

25 If the court grants a motion to dismiss, it must then decide whether to grant leave to

1 amend. The court should “freely give” leave to amend when there is no “undue delay, bad
2 faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party by
3 virtue of . . . the amendment, [or] futility of the amendment” Fed. R. Civ. P. 15(a); Foman v.
4 Davis, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear that
5 the deficiencies of the complaint cannot be cured by amendment. See DeSoto v. Yellow Freight
6 Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992).

7 **III. DISCUSSION**

8 The Court takes judicial notice of the documents submitted by Moving Defendants (ECF
9 No. 9) and makes the following findings: (1) the allegations in the Complaint are merely
10 conclusory, unwarranted deductions of fact, or unreasonable inferences; (2) Plaintiff has failed to
11 plead facts showing that violations are plausible, not just possible; (3) even taking all material
12 allegations as true and construing them in the light most favorable to the Plaintiff, the Complaint
13 does not give Defendants fair notice of a legally cognizable claim and the grounds on which it
14 rests. Therefore, the Complaint will be dismissed pursuant to Rule 12(b)(6) for failure to state a
15 claim upon which relief can be granted.

16 Because Plaintiff is representing himself pro se, the Court construes his pleadings with
17 leniency. As discussed below, the Court will grant Plaintiff leave to amend the following causes
18 of action.

19 **(1) Violations of Unfair Lending Practices – NRS 598(D)**

20 Plaintiff obtained the instant loan on April 18, 2005. At the time of this loan, it was an
21 unfair lending practice to approve a loan without considering a borrower’s ability to repay,
22 pursuant to NRS 598D. The statute of limitations for claims alleging a violation of the unfair
23 lending practices act is three years. See NRS 11.190(3)(a) (creating a three-year statutory period
24 for claims premised on a violation of a statute). Therefore, this cause of action accrued in 2005,
25 when the loan was finalized. Plaintiff does not allege facts supporting tolling of the statute of

1 limitations. If Plaintiff can do so, the Court will grant him leave to amend his Complaint to
2 reflect those allegations.

3 **(2) Deceptive Trade Practices. – all named Defendants**

4 Plaintiff's second cause of action alleges deceptive trade practices pursuant to NRS
5 598.0915 and 598.0923. (Compl., 10:¶36). Subsection 598.0915 makes knowingly making any
6 false representation in a transaction a deceptive trade practice. Here, Plaintiff alleges that
7 "Defendants did not furnish Plaintiff the correct Notice of Servicing that the loan may be
8 assigned, sold, or transferred to any other person in violation of 12 U.S.C. 2605(a)." (Compl.
9 10:¶39). This claim is barred by the applicable statute of limitations for a claim under the
10 Deceptive Trade Practices Act, which is four years. NRS 11.190(2)(d). Again, Plaintiff's claim
11 arises from the origination of the loan in 2005, and the instant action was filed in 2011, more than
12 four years later.

13 Subsection 598.0923 does not apply to this case: (1) Plaintiff has not alleged, under
14 subsection one, that any Defendant has been conducting its business without a required license;
15 (2) subsections two and three apply to the sale or lease of goods or services; (3) Plaintiff has not
16 alleged that any Defendant, under subsection four, has used coercion, duress or intimidation in a
17 transaction; and (4) no Defendant was the seller in a land sale installment contract under
18 subsection five.

19 Moreover, courts have recognized that the Deceptive Trade Practices act does not apply to
20 real property transactions, but to the sale of goods and services. See Reyna v. Wells Fargo Bank,
21 N.A., No. 2:10-cv-01730-KJD-RJJ, 2011 WL 2690087, *9 (D. Nev. July 11, 2011) ("N.R.S. §
22 598 ... applies only to goods and services and not to real estate loan transactions."); see also
23 Alexander v. Aurora Loan Services, No. 2:09-cv-1790-KJD-LRL, 2010 WL 2773796, *2 (D.
24 Nev. July 8, 2010) ("Plaintiff's claim deals with the sale or lease of real property, not goods or
25 services; therefore [N.R.S. § 598] does not provide an avenue of relief to [p]laintiff."); Parker v.

1 GreenPoint Mortgage Funding, No. 3:11-cv-00039-ECR-RAM, 2011 WL 2923949, (D. Nev.
2 July 15, 2011) (N.R.S. § 598 “does not cover a mortgage foreclosure”).

3 Accordingly, Plaintiff’s second cause of action is dismissed.

4 **(3) Wrongful Foreclosure**

5 Under Nevada law, “[a]n action for the tort of wrongful foreclosure will lie if the trustor
6 or mortgagor can establish that at the time the power of sale was exercised or the foreclosure
7 occurred, no breach of condition or failure of performance existed on the mortgagor’s or trustor’s
8 part which would have authorized the foreclosure or exercise of the power of sale.” Collins v.
9 Union Fed. Sav. & Loan Ass’n, 662 P.2d 610, 623 (Nev. 1983). In order to state a claim for
10 wrongful foreclosure, Plaintiff must allege that he had not breached any condition of the loan that
11 would have authorized the foreclosure or exercise of the power of sale. Plaintiff did not do so.
12 Accordingly, Plaintiff’s third cause of action is dismissed.

13 **(4) Conspiracy to Commit Fraud and Conversion; and**

14 **(5) Conspiracy to Commit Fraud Related to MERS System**

15 To allege a conspiracy to defraud, a complaint must meet the particularity requirements of
16 Federal Rule of Civil Procedure 9(b) and inform each defendant of its actions that constituted
17 joining the conspiracy. *Graziose v. Am. Home Products Corp.*, 202 F.R.D. 638, 642 (D.
18 Nev.2001). Allegations of conspiracy should be accompanied by the who, what, when, where,
19 and how of the misconduct. *Ness v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).

20 Here, Plaintiff makes conclusory allegations of fraud and fails to individualize the
21 Defendants’ conduct. For example, Plaintiff alleges that Defendants “did willfully and
22 knowing[ly] conspire and agree among themselves to engage in a conspiracy to promote,
23 encourage, facilitate and actively engage in fraudulent and predatory lending practices.” (Compl.
24 13:¶64.) The Complaint alleges that MERS was created as a fraudulent venture to take
25 advantage of unwitting borrowers and that the defendants “acted as creators for the conspiracy.”

1 (Compl. ¶ 72-73.) Such general and vague allegations are not sufficient to meet the heightened
2 pleading standard of Rule 9(b). Accordingly, the fourth and fifth causes of action are dismissed
3 as to all Defendants. If Plaintiff can amend these allegations of fraud with the required
4 specificity, he is given leave to do so.

5 **(6) Inspection and Accounting**

6 An action for inspection and accounting will prevail only where the plaintiff can establish
7 that there exists a relationship of special trust between the plaintiff and defendant. *McCurdy v.*
8 *Wells Fargo*, 2010 WL 4102943 (D. Nev. 2010). Absent special circumstances, no such
9 relationship exists between a lender and a borrower. *Giles v. Gen. Motors Acceptance Corp.*, 494
10 F.3d 865, 882 (9th Cir. 2007).

11 Plaintiff alleges that “[d]ue to the unfair and deceptive nature of the Plaintiff’s loan
12 transaction, the defendants were paid excessive interest and fees Therefore proper discovery
13 and accounting will reveal the ‘true realized’ status of the account as stated.” (Compl. 16:¶80.)
14 However, Plaintiff has failed to allege any special circumstances that would create the requisite
15 fiduciary relationship between himself as the borrower, and one or more Defendants as a lender.
16 See *McCurdy*, 2010 WL 4102943 (dismissing an action for inspection and accounting where
17 plaintiff failed to allege the requisite relationship of trust). Accordingly, the sixth cause of action
18 is dismissed as to all Defendants.

19 **(7) Unjust Enrichment**

20 “An action based on a theory of unjust enrichment is not available when there is an
21 express, written contract, because no agreement can be implied when there is an express
22 agreement.” *Leasepartners Corp. v. Robert L. Brooks Trust*, 942 P.2d 182, 187 (Nev. 1997) (per
23 curiam). Thus the doctrine of unjust enrichment only “applies to situations where there is no
24 legal contract but where the person sought to be charged is in possession of money or property
25 which in good conscience and justice he should not retain but should deliver to another [or

1 should pay for].” Id.

2 Plaintiff’s Complaint admits that he entered into an express contract when he executed the
3 deed of trust and note. (Compl. 4:¶2.) Accordingly, his cause of action for unjust enrichment
4 must fail.

5 **(8) Quiet Title – all named Defendants**

6 In Nevada, a quiet title action may be brought “by any person against another who claims
7 an estate or interest in real property, adverse to the person bringing the action, for the purpose of
8 determining such adverse claim.” NRS 40.010. “In a quiet title action, the burden of proof rests
9 with the plaintiff to prove good title in himself.” *Breliant v. Preferred Equities Corp.*, 918 P. 2d
10 314, 318 (Nev. 1996). “Additionally, an action to quiet title requires a plaintiff to allege that she
11 has paid any debt owed on the property.” *Lalwani v. Wells Fargo Bank, N.A.*, No. 2-11-cv-
12 00084, 2011 WL 4574338 at *3 (D. Nev. Sep. 30, 2011) (citing *Ferguson v. Avelo Mortg., LLC*,
13 No. B223447, 2011 WL 2139143 at *2 (Cal. App. 2d June 1, 2011). Plaintiff has failed to allege
14 that he is not in breach of the loan agreement. Accordingly, his eighth cause of action is
15 dismissed.

16 **(9) Breach of Good Faith and Fair Dealing**

17 To state a claim of breach of the covenant of good faith and fair dealing, Plaintiff must
18 allege: (1) Plaintiff and Defendants were parties to an agreement; (2) Defendants owed a duty of
19 good faith to the Plaintiff; (3) Defendants breached that duty by performing in a manner that was
20 unfaithful to the purpose of the contract; and (4) Plaintiff’s justified expectations were denied.
21 *Perry v. Jordan*, 900 P.2d 335, 338 (Nev. 1995). In Nevada, an implied covenant of good faith
22 and fair dealing exists in every contract, *Consolidated Generator–Nevada v. Cummins Engine*,
23 917 P.2d 1251, 1256 (Nev. 1998), and a plaintiff may assert a claim for its breach if the
24 defendant deliberately contravenes the intention and spirit of the agreement, *Morris v. Bank Am.*
25 *Nev.*, 886 P.2d 454 (Nev. 1994). The covenant of good faith and fair dealing “only applies after

1 a binding contract is formed.” *Crellin Techs., Inc. v. Equipmentlease Corp.*, 18 F.3d 1, 10 (1st
2 Cir. 1994).

3 Plaintiff alleges that Defendants breached the duty in two ways. First, Plaintiff contends
4 that by failing to pay equal consideration to Plaintiff’s financial interests, Defendants acted in
5 bad faith. Second, Plaintiff argues that Defendants refused to negotiate with Plaintiff in good
6 faith after plaintiff requested payment assistance under the Home Affordable Modification
7 Program (“HAMP”).

8 Plaintiff’s first contention must fail because it is established that lenders owe no fiduciary
9 obligations to borrowers absent exceptional circumstances. See *Kwok v. CR Title Co.*, No. 2:09-
10 cv-2298 (D. Nev. June 23, 2010). No exceptional circumstances or special relationship was
11 alleged here.

12 Plaintiff’s second allegation regarding the covenant of good faith and fair dealing alleges
13 that Defendants failed to meet their obligations under the federal HAMP program, and that the
14 failure constitutes a breach of the covenant of good faith and fair dealing. (Compl. 19:¶¶99-101.)
15 However, even if Plaintiff has a private right of action under HAMP, Plaintiff has failed to allege
16 any conduct by Defendants which deliberately contravened the intention and spirit of any
17 agreement between them. Accordingly, Plaintiff’s ninth cause of action is dismissed as to all
18 Defendants.

19 **(10) Wrongful Filing of Unlawful Detainer [mislabeled as “Ninth Cause of Action”]**

20 Wrongful filing of an unlawful detainer is not a tort recognized as a cause of action in
21 Nevada. *Goodwin v. Executive Trustee Services, LLC*, 2010 WL 5056192, at *4 (D. Nev. 2010).
22 Accordingly, Plaintiff’s tenth cause of action is dismissed.

23 **(11) Injunctive Relief; (12) Declaratory Relief; and (13) Rescission**

24 Plaintiff’s eleventh, twelfth and thirteenth causes of action are not recognized as causes of
25 action in Nevada. Injunctive relief, declaratory relief, and rescission are remedies, not claims.

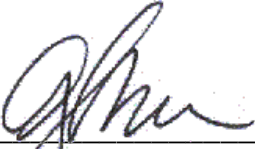
1 Accordingly, these “causes of action” are dismissed.

2 **IV. CONCLUSION**

3 **IT IS HEREBY ORDERED** that the Motion to Dismiss (ECF No. 8) is **GRANTED**.

4 **IT IS FURTHER ORDERED** that Plaintiff is given leave to amend his Complaint
5 consistent with this order **by May 14, 2012**.

6 **DATED** this 18th day of April, 2012.

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11 Gloria M. Navarro
12 United States District Judge
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