

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 Tranquilino Antonio Chavez,)
4)
5 Plaintiff,)
6 vs.)
7 Deutsche Bank Trust,)
8 Defendant.)
9)

Case No.: 2:13-cv-00732-GMN-PAL

ORDER

10 Pending before the Court is the Motion to Dismiss (ECF No. 6) and Motion to Expunge
11 Lis Pendens (ECF No. 7) filed by Defendant Deutsche Bank National Trust Company, to which
12 pro se Plaintiff Tranquilino Antonio Chavez has filed a Response (ECF No. 14) and Defendant
13 has filed a Reply (ECF No. 17).

14 **I. BACKGROUND**

15 Plaintiff originally filed his Complaint (ECF No. 1-1) in state court, and on April 29,
16 2013, Defendant removed the action to this Court. (ECF No. 1.) On July 3, 2013, the Court
17 entered an Order (ECF No. 19) dismissing “Lehman Brothers, Inc.” from the action.

18 Plaintiff’s two-page Complaint (ECF No. 1-1), appears to be a form complaint, in which
19 causes of action for intentional misrepresentation and negligent misrepresentation appear to be
20 alleged. Defendant filed the instant Motion to Dismiss (ECF No. 6) along with a Request for
21 Judicial Notice (ECF No. 8) and an Errata (ECF No. 15) correcting its exhibits.

22 **II. LEGAL STANDARD**

23 Rule 12(b)(6) of the Federal Rules of Civil Procedure mandates that a court dismiss a
24 cause of action that fails to state a claim upon which relief can be granted. *See North Star Int’l*
25 *v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to
dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the

1 complaint does not give the defendant fair notice of a legally cognizable claim and the grounds
2 on which it rests. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering
3 whether the complaint is sufficient to state a claim, the Court will take all material allegations
4 as true and construe them in the light most favorable to the plaintiff. See *NL Indus., Inc. v.*
5 *Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

6 The Court, however, is not required to accept as true allegations that are merely
7 conclusory, unwarranted deductions of fact, or unreasonable inferences. See *Sprewell v. Golden*
8 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
9 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a
10 violation is plausible, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
11 *Twombly*, 550 U.S. at 555) (emphasis added).

12 In order to survive a motion to dismiss, a complaint must allege “sufficient factual
13 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,
14 556 U.S. 662, 678 (2009) (internal quotation marks omitted). “A claim has facial plausibility
15 when the plaintiff pleads factual content that allows the court to draw the reasonable inference
16 that the defendant is liable for the misconduct alleged.” *Id.*

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

1 Beer Distrib., 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers
2 materials outside of the pleadings, the motion to dismiss is converted into a motion for
3 summary judgment. See Fed. R. Civ. P. 12(d); Arpin v. Santa Clara Valley Transp. Agency, 261
4 F.3d 912, 925 (9th Cir. 2001).

5 If the court grants a motion to dismiss, it must then decide whether to grant leave to
6 amend. Pursuant to Rule 15(a), the court should “freely” give leave to amend “when justice so
7 requires,” and in the absence of a reason such as “undue delay, bad faith or dilatory motive on
8 the part of the movant, repeated failure to cure deficiencies by amendments previously allowed,
9 undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the
10 amendment, etc.” Foman v. Davis, 371 U.S. 178, 182 (1962). Generally, leave to amend is
11 only denied when it is clear that the deficiencies of the complaint cannot be cured by
12 amendment. See DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992).

13 **III. DISCUSSION**

14 To state a claim for fraud or misrepresentation, a plaintiff must allege three factors: (1) a
15 false representation by the defendant that is made with either knowledge or belief that it is false
16 or without sufficient foundation; (2) an intent to induce another’s reliance; and (3) damages that
17 result from this reliance. See Nelson v. Heer, 163 P.3d 420, 426 (Nev. 2007). A claim of “fraud
18 or mistake” must be alleged “with particularity.” Fed. R. Civ. P. 9(b). A complaint alleging
19 fraud or mistake must include allegations of the time, place, and specific content of the alleged
20 false representations and the identities of the parties involved. See Swartz v. KPMG LLP, 476
21 F.3d 756, 764 (9th Cir. 2007). Rule 9(b) does not allow a complaint to merely lump multiple
22 defendants together but requires plaintiffs to differentiate their allegations when suing more
23 than one defendant and inform each defendant separately of the allegations surrounding his
24 alleged participation in the fraud.” Id.

25 Here, Plaintiff’s allegations, taken together with the judicially noticeable documents

1 submitted to the Court by Defendant, demonstrate an insufficient factual basis to satisfy the
2 pleading requirements of Rule 9(b). Furthermore, even taking all material allegations as true
3 and construe them in the light most favorable to Plaintiff, the Court cannot find that Plaintiff
4 has alleged sufficient facts so as to render plausible an inference that Defendant has committed
5 the violations Plaintiff claims. For this reason, Plaintiff's Complaint must be dismissed
6 pursuant to Rule 12(b)(6) for failure to state a legally cognizable claim and the grounds upon
7 which it rests.

8 However, the Court finds no basis to determine that there is no possibility for Plaintiff to
9 cure this deficiency through amendment; and accordingly, the Court will grant leave to amend
10 pursuant to Rule 15(a).

11 **IV. CONCLUSION**

12 **IT IS HEREBY ORDERED** that the Motion to Dismiss (ECF No. 6) is **GRANTED**.
13 Plaintiff's Complaint is dismissed without prejudice, with leave to file an amended pleading
14 curing the deficiencies identified in this Order by January 31, 2014.

15 **IT IS FURTHER ORDERED** that the Motion to Expunge Lis Pendens (ECF No. 7) is
16 **DENIED without prejudice**.

17
18 **DATED** this 3rd day of January, 2014.

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20 _____
21 Gloria M. Navarro
22 United States District Judge
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