

THE HONORABLE JOHN C. COUGHENOUR

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SMOKIAM RV RESORT LLC,

Plaintiff,

v.

WILLIAM JORDAN CAPITAL, INC., *et al.*,

Defendants.

CASE NO. C17-0885-JCC

ORDER DENYING
DEFENDANTS’ MOTION TO
TRANSFER AND
GRANTING DEFENDANTS’
MOTION TO DISMISS

This matter comes before the Court on Defendants’ Motion to Transfer (Dkt. No. 10) and Defendants’ Motion to Dismiss (Dkt. No. 11). Having thoroughly considered the parties’ briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES the Motion to Transfer and GRANTS the Motion to Dismiss without prejudice for the reasons explained herein.

I. BACKGROUND

Plaintiff Smokiam RV Resort LLC (“Smokiam”) is a Washington Limited Liability Company operating an RV resort in Grant County, Washington. (Dkt. No. 1 at 1.) Its principal place of business is King County, Washington. (*Id.*) Smokiam brings suit against Service One Inc., dba BSI Financial Services, Inc. (“BSI”), a Delaware corporation with a principal place of business in Texas, and William Jordan Capital, Inc. (“WJCI”), a California corporation with a

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1 principal place of business in California. (*Id.* at 1–2.) Kingdom Trust Company (“Kingdom”) is
2 not named in the suit, but is a party to the transaction at issue.

3 Smokiam executed a Secured Promissory Note (“Note”) on July 31, 2015 with Kingdom
4 in exchange for a construction loan. (*Id.* at 2.) The Note requires monthly interest-only payments.
5 (Dkt. Nos. 1 at 2, 10-2 at 1.) Principal is payable upon maturity—August 31, 2016. (*Id.*) The
6 Note has a variety of fee and penalty provisions for late interest and principal payments. (Dkt.
7 Nos. 1 at 2, 10-2 at 2.) Further, the Note includes the following forum-selection and choice-of-
8 law clause:

9 [Kingdom] and [Smokiam] specifically acknowledge and agree that this Note and
10 its interpretation and enforcement are governed by the Laws of the State of
11 California. Furthermore, each of [Kingdom] and [Smokiam] irrevocably: (i)
12 submits to the jurisdiction of any court of the state of California, located in
13 Orange County for the purposes of any suit, action or other proceeding arising out
14 of this note . . . (ii) agrees that all claims in respect of any Proceeding may be
15 heard and determined in any such court . . . (iv) agrees not to commence any
16 Proceeding other than in such courts; and (v) waives, to the fullest extent
17 permitted by law, any claim that such Proceeding is brought in an inconvenient
18 forum.

19 (Dkt. No. 10-2 at 6.)¹ Defendants are not a party to this agreement. They service the Note. (Dkt.
20 No. 1 at 3.)

21 Smokiam alleges that Defendants made numerous errors in servicing the Note, including
22 issuing incorrect monthly statements, failing to post some of Smokiam’s monthly interest
23 payments, and charging improper late fees. (*Id.* at 3–4.) Smokiam further alleges that Defendants
24 refused to timely communicate with Smokiam to remedy these errors. (*Id.* at 4.) Smokiam claims
25 that, as a result of Defendants’ actions, it was unable to obtain long-term financing guaranteed by
26 the U.S. Department of Agriculture (“USDA”) to refinance its construction financing with
Kingdom, and will be unable to do so in the future due to a change in USDA policy. (*Id.* at 5.) It

¹ The Court judicially notices the documents attached to Defendants’ motion. See Fed. R. Evid. 201.

1 further alleges Defendants were aware of the pending change to USDA policy yet failed to
2 remedy its errors in a timely manner. (*Id.*) Smokiam asserts claims for negligence and violations
3 of the Washington Consumer Protection Act (“WCPA”), Wash. Rev. Code § 19.86. (*Id.* at 5–7.)

4 Defendants move to transfer this case to another venue pursuant to 28 U.S.C. § 1404(a).
5 (Dkt. No. 10 at 5–8.) Defendants also move to dismiss pursuant to Federal Rule of Civil
6 Procedure 12(b)(6). (Dkt. No. 11 at 3–6.)

7 **II. DISCUSSION**

8 Defendants rely heavily on the forum-selection and choice-of-law clause in making their
9 arguments. (Dkt. Nos. 10 at 5–8, 11 at 3–4.) But the clause only has force as between Kingdom
10 and Smokiam. (Dkt. No. 10-2 at 6.) Defendants do not allege that they represent Kingdom,²
11 succeed in Kingdom’s interest, or constitute a third-party beneficiary. *Britton v. Co-op Banking*
12 *Grp.*, 4 F.3d 742, 745–48 (9th Cir. 1993); *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1298 n.9
13 (3d Cir. 1996). Therefore, the Court will not give effect to the clause in resolving Defendants’
14 motions.

15 **A. Motion to Transfer**

16 A federal district court may transfer a civil action to any other district court in which the
17 action may have been brought “[f]or the convenience of parties and witnesses, in the interest of
18 justice.” 28 U.S.C. § 1404(a). Before doing so, the Court must make an individualized, case-by-
19 case determination of convenience and fairness. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22,
20 29 (1988). Factors for a court to consider include: “(1) the location where the relevant
21 agreements were negotiated and executed, (2) the state that is most familiar with the governing
22 law, (3) the plaintiff’s choice of forum, (4) the respective parties’ contacts with the forum, (5) the
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24 ² It would seem Defendants may be acting as an agent for Kingdom. Defendants fail to
25 plausibly make this argument. Therefore, the Court will not consider it. *See Indep. Towers of*
26 *Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (“Our adversarial system relies on the
advocates to inform the discussion and raise the issues to the court.”).

1 contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the
2 costs of litigation in the two forums, (7) the availability of compulsory process to compel
3 attendance of unwilling nonparty witnesses, (8) the ease of access to sources of proof," (9)
4 whether a forum-selection clause is present, and (10) the public policy for the forum state. *Jones*
5 *v. GNC Franchising, Inc.*, 211 F.3d 495, 498–99 (9th Cir. 2000). "[U]nless the balance of factors
6 is strongly in favor of the defendants, the plaintiff's choice of forum should rarely be disturbed."
7 *Sec. Inv'r Prot. Corp. v. Vigman*, 764 F.2d 1309, 1317 (9th Cir. 1985). Further, transfer must do
8 more than "merely shift inconvenience" from one party to another. *Nike, Inc. v. Lombardi*, 732
9 F. Supp. 2d 1146, 1158 (D. Or. 2010) (citing *Decker Coal Co. v. Commonwealth Edison Co.*,
10 805 F.2d 834, 843 (9th Cir.1986)).

11 On balance, the *Jones* factors do not support transfer. Factors (1)–(6) and (8) militate
12 against it. Factors (7), (9), and (10) are neutral. No factor militates for it. Factor #1 (against): the
13 loan was made to an entity whose principal place of business is in Washington, secured by a
14 Deed of Trust on property in Washington, and personally guaranteed by a Washington citizen.
15 (Dkt. No. 1 at 1–2.) Factor #2 (against): while California and Washington are both familiar with
16 tort law, a court sitting in Washington would be more familiar with the WCPA. Factor #3
17 (against): Smokiam opposes transfer. (Dkt. No. 15.) Factor #4 (against): Smokiam has
18 substantial contacts in Washington. Defendant BSI gives no indication that it has comparable
19 contacts in California. (Dkt. Nos. 10, 18.) Factor #5 (against): the cause of action did not arise in
20 California, it arose in Washington (where loan payments originated) and in Pennsylvania (where
21 BSI issued its erroneous statements). (Dkt. Nos. 1 at 2, 16 at 2.) Factor #6 (against): the total
22 litigation costs would be higher in California, as all parties would need to travel to the venue.
23 Only Defendants need to travel to Washington. (Dkt. No. 16 at 15.) Factor #7 (neutral): neither
24 party has plead what witnesses may be relevant in this matter. Factor #8 (against): the sources of
25 proof are located in Washington and either Texas or Pennsylvania, but not California. (*Id.*)

1 Factor #9 (neutral): the forum-selection clause is not applicable to Defendants. Factor #10
2 (neutral): no compelling public policy argument is made by either side.

3 Based on the factors described above, Smokiam’s choice of forum should be preserved.
4 Defendants’ motion to transfer is DENIED.

5 **B. Motion to Dismiss**

6 A court must dismiss an action if a plaintiff “fails to state a claim upon which relief can
7 be granted.” Fed. R. Civ. P. 12(b)(6). Under Rule 12(b)(6), a court accepts all factual allegations
8 in the complaint as true and construes them in the light most favorable to the nonmoving party.
9 *Vasquez v. L.A. County*, 487 F.3d 1246, 1249 (9th Cir. 2007). However, to survive a motion to
10 dismiss, a plaintiff must cite facts supporting a “plausible” cause of action, consistent with
11 Federal Rule of Civil Procedure 8(a)(2). *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56
12 (2007). A claim has “facial plausibility” when the party seeking relief “pleads factual content
13 that allows the Court to draw the reasonable inference that the defendant is liable for the
14 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (quotations omitted). Although
15 a court must accept as true a complaint’s well-pleaded facts, “conclusory allegations of law and
16 unwarranted inferences will not defeat an otherwise proper motion to dismiss.” *Vasquez*, 487
17 F.3d at 1249 (quotation omitted).

18 1. Negligence Claim

19 Smokiam alleges that Defendants were negligent when they included erroneous charges
20 on its mortgage statements, failed to credit Smokiam for payments properly made, and refused to
21 communicate and resolve the issues in a timely manner once identified. (Dkt. No. 1 at 3–6.)
22 Smokiam further claims it was injured as a result of these errors. (*Id.*) Defendants assert that
23 even if these allegations are true, Smokiam fails to state a claim for which relief can be granted
24 because they owed no duty of care to Smokiam. (Dkt. No. 11 at 4.)

25 As a threshold matter, the Court must determine what substantive law to apply.

26 Defendants allege that California law controls, based on the Note’s forum-selection and choice-
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1 of-law clause. (Dkt. No. 11 at 3–4.) As discussed above, the Court will not give effect to the
2 provision. *See Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1165 (9th Cir. 1996)
3 (“A choice-of-law clause . . . may not be invoked by one who is not a party to the contract in
4 which it appears.”). Instead, the Court looks to the rules of the forum state to determine what
5 state’s substantive law to apply. *Id.* at 1164. Under that approach, absent an actual conflict
6 between Washington law and that of another potentially-applicable state, the Court applies
7 Washington substantive law. *Burnside v. Simpson Paper Co.*, 864 P.2d 937, 942 (Wash. 1994).
8 The parties identify California and Washington as potentially-applicable states,³ but fail to
9 identify an actual conflict between the two. (*See* Dkt. No. 11 at 4) (“Washington law . . . is in
10 accord”); (Dkt. No. 15 at 9) (pointing out the similarity between Washington and California
11 substantive law). Therefore, the Court will apply Washington substantive law.

12 That said, there is little distinction between Washington and California negligence law in
13 this area. Both jurisdictions require the following showings to support a negligence claim: (1) the
14 existence of a duty, (2) a breach of that duty, (3) a resulting injury, and (4) causation. *Lowman v.*
15 *Wilbur*, 309 P.3d 387, 389 (Wash. 2013); *Mendoza v. City of Los Angeles*, 66 Cal. App. 4th
16 1333, 1339 (1998). Defendants attack the adequacy of Smokiam’s Complaint on the first
17 element: the existence of a duty. (Dkt. No. 11 at 3–4.) Defendants assert Smokiam’s claim must
18 fail because a loan service provider owes no duty of care to a borrower under either California or
19 Washington law. (*Id.*) Our courts concur. *See, e.g., Syed v. JP Morgan Chase Bank N.A.*, 2016
20 WL 9175632 at *6–7 (W.D. Wash. Nov. 22, 2016); *Johnson v. JP Morgan Chase Bank N.A.*,
21 2015 WL 4743918 at *8 (W.D. Wash. Aug. 11, 2015); *see also Tokarz v. Frontier Fed. Sav. &*
22 *Loan Assoc.*, 656 P.2d 1089, 1092 (Wash. App. 1982) (reaching a similar conclusion as our
23 courts). So long as a loan servicer’s activities do not exceed the scope of a conventional lender,
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25 ³ Pennsylvania substantive law could conceivably apply, as BSI issued its allegedly
26 erroneous statements from this jurisdiction. (Dkt. No. 16 at 2.) But none of the parties make this
assertion.

1 the servicer will be treated as a lender for purposes of determining its duty to a borrower. *See,*
2 *e.g., Syed*, 2016 WL 9175632 at *6; *Johnson*, 2015 WL 4743918 at *8; *Khan v. CitiMortgage,*
3 *Inc.*, 975 F. Supp. 2d 1127, 1147 (E.D. Cal. 2013). And “[l]enders do not owe a fiduciary duty to
4 borrowers because they conduct their transactions at arm’s length.” *Tokarz*, 656 P.2d at 1092.
5 Smokiam does not present any plausible facts to support the assertion that Defendants’ actions in
6 servicing the loan between Smokiam and Kingdom exceeded that of a traditional lender.

7 Therefore, under Washington law, Defendants do not owe Smokiam a duty of care.

8 Smokiam argues for a different approach. It suggests the Court should apply the factors
9 articulated in *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958), to determine whether a duty is
10 owed by Defendants to Smokiam. (Dkt. No. 15 at 14–17.) But those factors only apply when
11 determining the scope of a third party’s duty in a negligence action. *Cooper v. Jevne*, 56 Cal.
12 App. 3d 860, 869 (1976). Such analysis is not relevant here. Defendants, acting as a loan service
13 provider, owe the same duty of care to Smokiam as that of the lender—Kingdom. *Khan*, 975 F.
14 Supp. 2d at 1147. Kingdom, as the lender, owes no duty of care to Smokiam.

15 Smokiam fails to state a negligence claim for which relief can be granted. The portion of
16 Defendants’ Motion to Dismiss addressing Claim #1 (Dkt. No. 11 at 3–4) is GRANTED.
17 Furthermore, further pleading will not cure the infirmity here. *Krainski v. Nev. ex rel. Bd. of*
18 *Regents of Nev. Sys. of Higher Educ.*, 616 F.3d 963, 972 (9th Cir. 2010). Therefore, the Court
19 dismisses this claim with prejudice.

20 2. WCPA Claim

21 Smokiam alleges Defendants violated the Washington Consumer Protection Act
22 (WCPA), Revised Code of Washington § 19.86, based on the manner it serviced Smokiam’s loan
23 from Kingdom. (Dkt. No. 1 at 6.) A properly plead WCPA violation requires facts demonstrating
24 the following elements: (1) an unfair or deceptive act or practice, (2) occurring in trade or
25 commerce, (3) that impacts the public interest, (4) that causes injury to the Plaintiffs’ business or
26 property, and (5) causation. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 719 P.2d

1 531, 533 (Wash. 1986). Defendants assert Smokiam failed to adequately plead the first, third,
2 and fifth elements for a WCPA claim. (Dkt. No. 11 at 5–6.)

3 Regarding the first element, an unfair or deceptive act or practice, Smokiam alleges that
4 BSI included incorrect balance amounts on its statements, refused to allow Smokiam to pay the
5 correct amount, and when Smokiam was unable to pay the incorrect amount, BSI charged
6 Smokiam a late fee. (Dkt. No. 1 at 3.) Unfair acts can be *per se* unfair, or can be unfair based
7 upon the capacity of the act to deceive a substantial portion of the public. *Indoor*
8 *Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 170 P.3d 10, 18 (Wash.
9 2007). Smokiam satisfies the second requirement. The allegations contained in its Complaint are
10 sufficient to demonstrate that a substantial portion of the public *could* be deceived by BSI’s
11 practices. *See Dwyer v. J.I. Kislak Mortg. Corp.*, 13 P.3d 240, 242 (Wash. App. 2000) (including
12 additional amounts as part of the balance due in a mortgage statement could deceive the public
13 for purposes of a WCPA claim). This is all that is required to satisfy the first element.

14 Regarding the third element, impact to the public interest, Smokiam fails to provide
15 sufficient facts in its Complaint to satisfy its pleading requirement. *See Fed. R. Civ. P. 8(a)(2);*
16 *Iqbal*, 556 U.S. at 672. Smokiam merely alleges that “Defendants’ actions are contrary and
17 injurious to the public interest,” but fails to provide the how and why. (Dkt. No. 1 at 6.) Only in
18 response to Defendants’ Motion to Dismiss does Smokiam provide the facts necessary to satisfy
19 its pleading requirement. *Iqbal*, 556 U.S. at 672. That being said, the Court “should freely give
20 leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). Dismissal without leave to
21 amend a complaint is “improper unless it is clear, upon *de novo* review, that the complaint could
22 not be saved by any amendment.” *Krainski*, 616 F.3d at 972. Here, it appears the infirmity could
23 be cured with proper pleading. Therefore, the Court grants leave to amend.

24 Regarding the fifth element, causation, Smokiam alleges that it was unable to refinance
25 its obligation with Kingdom through a loan with Old West Federal Credit Union, guaranteed by
26 the USDA, because of Defendants’ actions. But Smokiam fails to plead any facts supporting *why*

1 Defendants caused this outcome. (Dkt. No. 1 at 4–5.) Facts must be plead to allow the Court to
2 draw a sufficient inference. *Iqbal*, 556 U.S. at 672 (2009). Like the third element, this deficiency
3 may be curable through amendment. The Court grants leave to amend.

4 The portion of Defendants’ Motion to Dismiss addressing Claim #2 (Dkt. No. 11 at 4–6)
5 is GRANTED without prejudice.

6 **III. CONCLUSION**

7 For the foregoing reasons, Defendants’ Motion to Transfer (Dkt. No. 10) is DENIED and
8 Defendants’ Motion to Dismiss (Dkt. No. 11) is GRANTED with prejudice as to Claim #1
9 (Negligence) and without prejudice as to Claim #2 (WCPA violation).

10 The Court GRANTS Smokiam leave to amend its Complaint, but only with respect to
11 facts necessary to support a claim based on a violation of WCPA. If Smokiam chooses to file this
12 amendment, it must be done within thirty (30) days of the date of this Order.⁴ The Court’s
13 dismissal of Smokiam’s WCPA claim will only take effect if Smokiam does not file an
14 amendment to its Complaint within the prescribed time.

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16 DATED this 22nd day of September 2017.

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22 John C. Coughenour
23 UNITED STATES DISTRICT JUDGE
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26 ⁴ The Court cautions Plaintiff that any amendment to its Complaint would supersede the
current Complaint. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 925 (9th Cir. 2012).