

FILED

JAN 08 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 355268

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BAKER BOYER NATIONAL BANK,

Plaintiff/Respondent,

v.

JAMES PATTERSON FOUST, JR.,

Defendant/Appellant.

REPLY BRIEF OF APPELLANT

Lenard L. Wittlake, PLLC
WSBA No. 15451
Attorney for James Patterson Foust, Jr., Appellant

P.O. Box 1233
Walla Walla, WA 99362
(509) 529-1529

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT IN REPLY	
	A. The Special Relationship Between Bank and Foust Created a Duty to Disclose to Foust What the Bank Knew About GreenFlex Housing’s Lack of Income to Service His Contract	1
	B. The Relationship Between Bank and Foust Supports Foust’s Claim of Negligent Misrepresentation	9
	C. Bank Mischaracterizes the Issue Under the Equal Credit Opportunity Act	10
	D. Motion to Reconsider Should Be Granted	11
III.	CONCLUSION.....	18

TABLE OF AUTHORITIES

Cases

August, et al v. US Bancorp, et al, 146 Wn.App. 328, 190 P.3d 86 (Div 3, 2008)..... 9

Colonial Imports v Carlton Northwest, Inc., 121 Wn.2d 726, 853 P.2d 913 (1993)..... 16

Hendryx v. People’s United Church of Spokane, 42, Wash. 336, 346, 84 P. 1123, 1127 (1906) 2

Hutson v. Wenatchee Federal Savings and Loan Assoc., 22 Wn.App. 91, 588 P.2d 1192 (1978) 14

Pedersen v. Bibioff, 64 Wash.App., 710, 722, 828 P.2d 1113(1992)...2, 15

Tokarz v. Frontier Federal Savings and Loan Assoc., 33 Wn.App. 456, 656 P.2d 1089 (Div. 3 1982)..... 3, 5

Van Dinter v. Orr, 157 Wn.2d 329, 138 P.3d 608 (2006) 8, 9

Watkinson v. MortgageIT, Inc., 2010 WL 2196083 (SD Cal. 2010) 14

Wilcox v. Lexington Eye Ist., 130 Wn.App. 234 (2005)..... 17

Statutes

15 USC 1691(d)(2)16

Regulations and Rules

12 CFR 1002.9(a)(2)13

Other

Restatement (Second) of Torts (1977) § 551 14

I. INTRODUCTION

Respondent Baker Boyer National Bank (Bank) has reformulated the facts of this case to allege that Appellant James Foust (Foust) was the one that insisted on using Greenflex Housing, LLC (GFH), to manage his company's (JPFE) rental units in North Dakota. Respondent's Brief p. 7. This is an effort to avoid the finding of a relationship beyond normal bank lending where Bank provided to Foust a supposed income stream that it knew was phantom income. Bank claims it "performed a routine underwriting investigation to decide whether the borrower was likely to be able to repay the loan." Respondent's Brief p. 6. That is not how the bank employee, Mr. Sentz, described it. He called it a "unique underwriting process."

The evidence clearly shows that Foust has accurately and consistently presented the true relationship between himself and Bank. The Bank misled Foust about the financial viability of his investment so it could put his personal assets behind the loan. The Bank's current argument only highlights the genuine issues of material fact that require a remand for trial on all issues.

II. ARGUMENT IN REPLY

A. The Special Relationship Between Bank and Foust Created a Duty To Disclose to Foust What the Bank Knew About Greenflex Housing's Lack of Income to Service His Contract.

1. The Bank argues that it had no duty to disclose because Foust agreed it had no such duty. Respondent's Brief p. 12. This alleged agreement

came by signing the commercial guaranty form. This argument fails for reasons already presented based on the language of the form and based on law and public policy regardless of the language of the form. Washington caselaw states that “fraud vitiates all transactions.” *Hendryx v. People’s United Church of Spokane*, 42, Wash. 336, 346, 84 P. 1123, 1127 (1906).

The Bank repeatedly asserts that Foust has not produced sufficient evidence to sustain his case. Fraud in the inducement is a misrepresentation of motivating factors such as value, usefulness, age or other characteristic of the property or item in question. *Pedersen v. Bibioff*, 64 Wn.App., 710, 722, 828 P.2d 1113 (1992). The record contains evidence that could, when read most favorably to Foust, lead a reasonable person to conclude that Mr. Sentz represented to Foust that GFH had the necessary expertise and experience to manage his rental properties to produce a profit after paying his loan payment; that obtaining the loan was not possible without the contract with GFH; that GFH in fact could not pay enough to pay the loan let alone generate a profit; that Mr. Sentz knew the cash flow was insufficient to service the loan; that Mr. Sentz intended that Foust rely on the cash flow from the GFH contract; that Foust did not know that the track record of GFH did not support Mr. Sentz’s assertion; that Foust relied on the anticipated cash flow to repay the loan and produce a profit; that Foust had a right to so rely because there was no other way to

repay the loan but to rent the units he was buying; and that Foust was damaged by the inability of GFH to pay enough to service the loan and provide a profit that would allow Foust to sell his income stream as he intended and as he discussed with Mr. Sentz.

2. The Bank points out there is no duty without a “special relationship.” Respondent’s Brief p. 14. A special relationship existed between Foust and Bank such that Bank had a duty to disclose what it knew about the problems surrounding the cash flow to service the loan. The difference between this case and a case of normal loan underwriting is that the Bank chose Foust’s business partner for him. Bank did not recommend; it decided. That made JPFE completely reliant on GFH and, indirectly, Badlands, as its sole source of income. There is no indication and no allegation by the Bank that Foust had any control or management influence on GFH or Badlands. Bank thrust itself into the role of adviser and created the relationship mentioned in *Tokarz* that required the Bank to disclose to Foust that his investment was not viable. *Tokarz v. Frontier Federal Savings and Loan Assoc.*, 33 Wn.App. 456, 459, 656 P.2d 1089, 1092 (Div. 3 1982).
3. The Bank argues that there is no evidence the bank provided services other than normal financing and underwriting. Respondent’s Brief p. 15. Bank attempts to divert the focus from choosing the business partner to simply requiring a means to repay a loan. The crucial difference is that here Foust was led to believe that the required

business partner could perform. CP 145 lines 6-10, CP 146-147. The Bank already had experience making these loans and dealing with GFH. It was logical for Foust to rely on the apparent expertise of Bank, and it was reasonable for Foust to infer that GFH would perform as represented. After all, he had a contract that should produce up to \$45,000 per month income and an estimated loan payment of about \$16,000 per month. Even with the projected 15% vacancy rate, which Foust did not know, the income would be over \$38,000 per month or well over twice the loan payment. These numbers are easily calculated from the information provided at CP 325-327, 329, 331.

4. The Bank argues that there is no evidence the bank knew about the *Badlands v. Greenflex* lawsuit, and Foust could have found out about it from Greenflex. Respondent's Brief p. 18. John Eakin said he discussed the lawsuit with both Mr. Sentz and Mr. Blackmon. But knowledge of this particular lawsuit is not the issue. The issue is the ongoing dispute that led to the lawsuit. The Bank knew of the "badlands problems." CP 252. The Bank wanted to make sure "details back in North Dakota were taken care of before proceeding with your loan." CP 256. The Bank knew of Badlands' alleged embezzlement from GFH. CP 249. The lawsuit itself is not the issue. The issue is the problems with Badlands that jeopardized Foust's entire investment, and the Bank clearly knew. Furthermore, as already discussed, GFH had a motivation not to tell Foust because its

principals did not want to be sued by Sundseth. They wanted him refinanced and bought out. Foust was the opportunity for that to happen.

5. The Bank argues that there is no evidence the bank realized an “economic benefit” other than that associated with normal banking functions. This is one of the possibilities noted in *Tokarz* where it was stated that Tokarz did not allege any such extra benefit by the lender. But the Tokarz court also stated, after noting the general rule of no duty to disclose,

However, "special circumstances" may dictate otherwise: one who speaks must say enough to prevent his words from misleading the other party; one who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party; and one who stands in a confidential or fiduciary relation to the other party to a transaction must disclose material facts.

Tokarz, 33 Wn.App. at 459.

Later the court gives the laundry list of matters that Tokarz did not allege such as extra economic benefit. The court also noted that the evidence supported the lender’s assertion that it had no information about the financial difficulties at the time of loan approval. *Id.* at 463. That is clearly not the case here. Bank did know long before loan approval of the financial difficulties of GFH, as shown by evidence.

Bank argues that Sundseth’s loan was not actually in default. The point is that GFH was not paying Sundseth and the Bank knew it. On August 21, 2013, after Sentz told Foust the deal was off and he would

send a declination letter, GFH told Sentz that they (GFH) were \$20,000 behind in payments to Sundseth before the Badlands problems. CP 252. Then GFH told Bank they were only paying \$320 per unit, CP 326-7, which was far below the promised \$1,500 to Foust. So whether Bank had declared default or not it knew the Sundseth deal was in trouble. It gained an economic benefit by averting the need to foreclose. See CP 486-594 for the economic cost of this case. The Bank cannot reasonably argue that a foreclosure is a noneconomic event.

6. The Bank argues that there is no evidence of fraud even if the bank required Foust to contract with Greenflex. Respondent's Brief p. 24. The argument goes so far as to state that Foust presents "no evidence [GFH] could not perform, and no evidence the bank knew that before making the loan." Respondent's Brief p. 25. To the contrary, Mr. Sentz had information directly from GFH showing income for the 30 units JPFE was to purchase of \$9,600 per month (30x\$320) while proposing a loan payment by JPFE of approximately \$16,000. CP 326, 327, 329. In fact, the actual income reported by GFH to Mr. Sentz was under \$300 per unit per month, but GFH was paying out \$320 "because its easiest for everyone to just do \$320 a unit." CP 326. Furthermore, Mr. Sentz knew that GFH was having a hard time figuring out "how to account for money Badlands has effectively embezzled." CP 249. Mr. Sentz was also told that "prior to the

badlands problems, we were in arrears for \$20,000 to [Jason Sundseth]. I counted his units in the 66 we have leases with as I thought Jim Foust was going to buy them, but then I just heard that Jason turned down Jim's offer. ... so, it's kind of a grey area." CP 252. So Mr. Sentz knew the underperformance by GFH was an ongoing matter, not a one-time aberration. ALL of this information was given to Mr. Sentz before making the loan. NONE of this information was given to Foust. CP 242 last line, CP 319 last line. Everyone else (Bank, GFH, Sundseth) had a vested interest in making sure that Foust went through with the refinancing and purchase.

Bank misstates the evidence at Respondent's Brief p. 25 when alleging that Foust brought GFH to the Bank. The email from Foust to Sentz at CP 108 begins by commenting on their conversation, a point omitted in Bank's discussion. Foust stated his "expectations" based on their discussion. Mr. Sentz then replied with his "assumptions" after their discussion and after Foust's conclusions based on that discussion. CP 107. Bank keeps repeating the mantra "no evidence" hoping it will become truth when in fact Bank has no evidence to refute Foust's sworn testimony that it was Bank that required this particular rental manager. CP 146, 335.

Foust has from the beginning of this case consistently maintained that Bank required him to contract specifically with GFH, even though Mr. Sentz had information that GFH was unable to perform the

contract. Foust alleged in his counterclaim that Bank required JPFE to contract with GFH as manager for rental of the mobile homes. CP 19 ¶ 6. Foust stated in his first declaration that he was told by Bank that his deal depended on using GFH to manage the units. CP 25 ¶ 5. Foust stated in his second declaration that the Bank required the contract with GFH. CP 241 ¶ 3, CP 242 ¶ 4. Foust stated twice in his deposition that using GFH was a prerequisite to him pursuing business with the Bank. CP 146 lines 13-14, CP 335 lines 7-10. He also was told by Mr. Blackmon and Mr. Sentz about the expected income stream from GFH. CP 146. He also was told by Mr. Sentz that GFH had a great deal of experience managing rentals. CP 335. Neither Mr. Sentz nor Mr. Blackmon refuted Foust's statements. At no time has the Bank produced any evidence to refute these sworn statements by Foust. Instead, Bank argues that Foust has not produced evidence that the Bank required the involvement of GFH. Respondent's Brief p. 25. The Bank argues that this court should believe the statements made by Bank employees but discount the unrefuted statements made by Foust. This is exactly the opposite of construing the facts most favorably to the nonmoving party. In fact, Bank's contradiction on this point shows the need for a trial. Foust did not "[bring GFH] with him to the Bank" as argued in Respondent's Brief at p. 25. Bank was communicating directly with GFH at least in 2012, long before Foust was involved. CP 242 ¶ 5, CP 245.

B. The Relationship Between Bank and Foust Supports Foust's

Claim of Negligent Misrepresentation.

The facts that show a duty to disclose discussed above also show a duty to disclose to support a claim of negligent misrepresentation.

This section of Respondent's Brief beginning at page 28 relies in part on *Van Dinter v. Orr*, 157 Wn.2d 329, 138 P.3d 608 (2006) for a list of elements of negligent misrepresentation and the statement that an omission can constitute a negligent misrepresentation when there is a duty to disclose. There is evidence here that Bank supplied information to Foust to guide his business transaction that was false; Bank knew the information supplied to guide Foust's business transaction; Bank was negligent in communicating the information; Foust relied on the information; Foust's reliance was reasonable under the surrounding circumstances; and the false information was the proximate cause of damages.

The *Van Dinter* case involved a seller of a vacant lot not telling the buyer that a capital facilities rate could be imposed to pay for its share of the municipal sewer if the lot was developed. Van Dinter purchased the lot and proceeded to build a car dealership. The capital facilities rate was imposed that would exceed \$10,000 over a 20-year period. Van Dinter made a claim to the title company claiming an undisclosed encumbrance. The court noted that Van Dinter admitted they knew the sewer system had been recently constructed and could have easily discovered that if they

developed the lot there would be a capital facilities rate applied depending on the type of development. The court concluded that, under those circumstances, there was no duty to disclose. *Van Dinter*, 157 Wn.2d at 331. Here the circumstances are different. Here Foust could not easily obtain the hidden information because everyone involved wanted him to proceed with the transaction.

C. **Bank Mischaracterizes the Issue Under the Equal Credit Opportunity Act.**

Bank argues that the federal law does not apply because Foust does not allege discrimination. The law imposes the requirement for the statement of reasons upon an adverse action, not upon an allegation of discrimination. Mr. Sentz stated that the letter would be sent, thereby acknowledging that an adverse action had occurred. This is part of Foust's affirmative defense of estoppel as well as his counterclaims. Had the bank complied with the law, Foust would have had valuable information that he was in fact denied.

Bank again refuses to acknowledge this court's decision in *August, et al v. US Bancorp, et al*, 146 Wn.App. 328, 190 P.3d 86 (Div 3, 2008) relating to the motion for reconsideration. Bank is not prejudiced by Foust presenting more of the Bank's email on reconsideration and even making a new argument that does not change its theory of the case.

/

/

D. The Motion to Reconsider Should Have Been Granted.

The following table arranges some of the email messages in this case in chronological order (Sentz is the banker, JPF is Foust, Cassidy and Eakin are Greenflex Housing (GFH)):

CP #	Date and Time	From / To	Comments and Quotes
CP 245 Ex 5	12/17/2012 11:07 a.m.	Sentz to Cassidy, Eakin	Before Foust was involved, Mr. Sentz was talking to Mr. Eakin about a trip to North Dakota and visit with Badlands.
CP 325 Ex 11	5/22/2013 12:48 p.m.	Eakin to Sentz	Mentions high vacancy factor; forwards previous day's email from Cassidy to Eakin noting high vacancy. The expected low 15% vacancy rate never happened.
CP 325 Ex 10	7/02/2013 3:43 p.m.	Sentz to Cassidy, Eakin	Requests updated rent rolls. Bank notes that not all units are rented and is working on a new buyer. The bank is fully informed about underperforming rentals.
CP 330 Ex 39	8/20/2013 11:11 a.m.	Sentz to JPF	Notice to Foust that loan is declined; states that bank will send declination letter.
CP 324 Ex 7	8/20/2013 5:04 p.m.	Sentz to Cassidy and Eakin	"I don't know where things stand with Jim Foust as of today, but if that deal is to progress we will need to show the financial viability of the company (Greenflex Housing) providing the contract of guaranteed monthly payments."
CP 252	8/21/2013	Cassidy to Sentz	GFH \$20,000 in arrears to Vindans before the Badlands problems; no lease with

Ex 19	10:02 a.m.		Vindans but GFH counted them as managed units because they thought Foust was buying them.
CP 327 Ex 17	8/23/2013 3:04 p.m.	Cassidy to Sentz	Bank is informed that GFH is paying only \$320 per unit
CP 326 Ex 15	8/23/2013 4:31 p.m.	Cassidy to Sentz	Bank is again told that Vindans' 30 units (which Foust bought) were generating only \$320/month = \$9,600. Bank is also told GFH is accruing the liability of the lease rate minus \$320 for everyone on a lease. So it appears GFH may be insolvent.
CP 331 Ex 40	8/26/2013 1:30 p.m.	Sentz to JPF	"Some things have occurred which once again allow me to consider financing you ..." It also states an approximate monthly loan payment of \$14,928 which is far above the \$9,600 per month income generated by the units.
CP 328 Ex 31	8/26/2013 6:07 p.m.	Sentz to Cassidy and Eakin	Mentions "your GF contracts" and states that "the contract is a key component of our financing..." He knew GFH was <i>NOT</i> paying the contract rate. It was a sham. Bank also asks for GFH's "Master Lease with RV Park." Banker also mentions "my underwriting of GreenFlex."
CP 333 Ex 42	9/04/2013 11:06 a.m.	Sentz to JPF	Bank is showing Foust the extent of its investigation, leading Foust to believe it is

			covering the bases for him.
CP 329 Ex 36	10/03/2013 3:33 pm.	Sentz to JPF	Mentions pending items and notes "this unique underwriting process." NOT the unique facts, the unique <u>process</u> . This was NOT an ordinary arms-length loan. Also, approximate loan payment is now up to \$16,000.
CP 334 Ex 45	11/15/2013 3:09 p.m.	Sentz to JPF	States that John Blackmon was the advocate for the loans, he is no longer with the bank, and the North Dakota loans were "way outside the box for our conservative little Bank." This was NOT an ordinary arms-length loan. This was a special, unique process to underwrite a known bad loan.

As seen above in exhibits 10 and 11, in May and July 2013, the bank was aware of underperformance by the North Dakota rentals. At least by July, the bank knew that Mr. Sundseth (Vindans LLC) wanted out of the business. The bank was working on a loan to Foust to buy out Vindans.

On August 20 Mr. Sentz tells Foust at 11:11 a.m. his "requested financing for units in North Dakota is no longer a viable possibility" and that the bank will send a declination letter. That letter is required to contain the reasons why the loan is declined. 12 CFR 1002.9(a). That letter was never sent. On the same day at 5:04 p.m. Mr. Sentz emails to

GFH about proving the financial viability of GFH in order to keep the Foust deal alive. After being told three days later that the 30 units generated only \$9,600 monthly income (30 x \$320), Mr. Sentz then three days after that offers a purchase money loan to Foust with a \$14,928 monthly payment. Because the banker not only knew it was a losing deal but the bank required a contract with this particular company, this was not an ordinary lender – borrower relationship. This was not an ordinary arms-length transaction. The bank had a duty to tell Foust what it knew about GFH, Badlands and the financial viability of the investment. *See, Hutson v. Wenatchee Federal Savings and Loan Assoc.*, 22 Wn.App. 91, 588 P.2d 1192 (1978).

The above emails from Chris Cassidy of GFH to Chris Sentz of Baker Boyer Bank informed the bank that GFH was paying only \$320 per unit to the owners. That \$9,600 per month is \$35,400 less per month than Foust's contract. The bank knew of the substantial underperformance by GFH due to the Badlands problem. By requiring Foust to contract with GFH, the bank overstated the expected income from the units knowing it was a false number and misled Foust into guaranteeing the loan. The bank knew this before making the loan. The bank knew the loan was not going to be paid. The bank did not tell Foust. That was fraudulent concealment. The Bank owed a duty to Foust. *See, Watkinson v. MortgageIT, Inc.*, 2010

WL 2196083 (SD Cal. 2010)¹. Here, as in the *Watkinson* case in California, the bank overstated Foust's GFH income, knew it was false, induced him into a loan he could not afford, then started foreclosure proceedings against him (his company JPFE): The bank exceeded the conventional role as a lender. Foust's harm was readily foreseeable by the banker and his injury certain.

Fraud in the inducement refers to fraud that induces the transaction "by misrepresentation of motivating factors such as value, usefulness, age, or other characteristic of the property or item in question. ... If fraud in the inducement is shown, the transaction is voidable." *Pedersen v. Bibioff*, 64 Wash.App. 710, 722, 828 P.2d 1113 (1992).

Our court has adopted the Second Restatement of Torts as the standard governing claims of negligent misrepresentation.

Section 551 of the Restatement explains the circumstances under which a duty to disclose will arise:

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

¹ Borrower that claimed lender overstated his income and the value of his property on a mortgage loan application and knew that both pieces of information were false, sufficiently alleged that lender owed him a duty of care based on the fact that lender intended to induce him to enter into the loan transaction. Potential harm to the borrower and increased likelihood of default on the loan was readily foreseeable. Injury to borrower was certain in that he lost an opportunity to obtain a loan he could afford and there were foreclosure proceedings instituted against him.

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading;....

(Italics ours.) Restatement § 551. Section 551(2)(a) of the Restatement deals specifically with the duty to disclose when a fiduciary relationship exists. On the other hand, section 551(2)(b) creates a duty to disclose which is wholly independent from the fiduciary relationship discussed in section 551(2)(a). See Restatement § 551, Comment on Subsection (1). Hence, by the clear terms of the Restatement, a duty to disclose can be found outside of the fiduciary context.

Case law is in accord with the Restatement.

Colonial Imports v Carlton Northwest, Inc., 121 Wn.2d 726, 731, 853 P.2d 913 (1993).

In Washington, the court will find a duty to disclose where the court can conclude there is a quasi-fiduciary relationship, where a special relationship of trust and confidence has been developed between the parties, where one party is relying upon the superior specialized knowledge and experience of the other, where a seller has knowledge of a material fact not easily discoverable by the buyer, and where there exists a statutory duty to disclose.

Colonial Imports, at 732.

Here, there was a statutory duty on the bank to disclose the reasons for denying the loan to Foust. See 12 CFR 1002.9(a)(2)(i). The federal statute imposes a duty to disclose the specific reasons for loan denial. 15 USC 1691(d)(2). (Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor.) The bank did not comply with federal law. The reason(s) for

the denial were not given to Foust. The email from the bank stated that the loan was “no longer a viable possibility.” It also stated that an official declination letter would be sent by mail, thereby acknowledging that an adverse action had occurred. That letter would have given Foust the reasons for loan denial, such as the impossibility of the company paying rent to perform its contract. Instead, the banker started looking for a way to show the financial viability of GFH. CP 246.

Furthermore, Foust was justifiably relying on the banker’s specialized knowledge of this particular property manager. This banker was in constant contact with John Eakin and Chris Cassidy of GFH. The bank had made several similar loans with GFH involvement. CP 242.

The bank knew that Badlands had embezzled money from GFH, knew that GFH had a lower than expected census on its rental occupancy, and knew that the contract between Foust and GFH would not be performed as written. The bank’s manipulation of the underwriting process, described by the banker as a “unique underwriting process,” (CP 329) creates the kind of special relationship that requires full disclosure under Washington case law. Foust has been injured and deserves a trial.

It appears that even the bank officer, Mr. Blackmon, agrees that that information was critical. Mr. Blackman said, “As I remember this loan, without the personal guarantee the Bank’s only source of collection would have been the trailers and an otherwise empty LLC.” CP 53. He knew that there was nothing of substance going into this deal for Foust.

III. CONCLUSION

Bank's argument is an illustration of repeating something many times ("there is no evidence that...") hoping that it will become perceived as truth. Affidavits/declarations provide evidence for summary judgment motions. Foust's statements are unrefuted by either of the bank employees directly involved in his loan. There is sufficient evidence in the record for a fair minded person, reading it most favorably to the nonmoving party, to decide that Foust is entitled to a trial.

The trial court decision should be reversed and the case remanded for trial on all issues.

Respectfully submitted this 5th day of January, 2018.

LENARD L. WITTLAKE, PLLC



Lenard L. Wittlake, WSBA No. 15451
Attorney for Appellant

Appendix

Foreign Case

1. **Watkinson v. MortgageIT, Inc.**

 KeyCite Yellow Flag - Negative Treatment
Declined to Follow by *Odle v. MGC Mortgage Inc.*, C.D.Cal., May 16, 2016

2010 WL 2196083
Only the Westlaw citation is currently available.
United States District Court,
S.D. California.

Don Tobin WATKINSON, Plaintiff,
v.
MORTGAGEIT, INC., Defendant.

No. 10-CV-327-IEG (BLM).

June 1, 2010.

ORDER:

(1) GRANTING IN PART AND DENYING IN PART
MOTION TO DISMISS [Doc. No. 31]; and

(2) GRANTING IN PART AND DENYING IN PART
MOTION TO STRIKE [Doc. No. 32].

IRMA E. GONZALEZ, Chief Judge.

*1 Currently before the Court are Defendant's Motion to Dismiss and Motion to Strike. Having considered the parties' arguments, the Court GRANTS IN PART and DENIES IN PART the Motion to Dismiss and GRANTS IN PART and DENIES IN PART the Motion to Strike.

West KeySummary

1 Mortgages and Deeds of Trust

⚡ Pleading

Under California law, borrower who claimed that lender overstated his income and the value of his property on a mortgage loan application and knew that both pieces of information were false, sufficiently alleged that lender owed him a duty of care based on the fact that lender intended to induce him to enter into the loan transaction. Potential harm to the borrower and increased likelihood of default on the loan was readily foreseeable. Injury to borrower was certain in that he lost an opportunity to obtain a loan he could afford and there were foreclosure proceedings instituted against him.

19 Cases that cite this headnote

BACKGROUND

I. Factual background

Plaintiff Don Tobin Watkinson resides at real property located at 8151 Caminito Santaluz Sur, San Diego, CA 92127 ("Property"). On November 11, 2006, Plaintiff obtained a loan from Defendant MortgageIT, Inc. Plaintiff alleges that he was offered an adjustable rate loan, even though he applied for a 30-year fixed rate loan. Shortly after closing the loan, however, Plaintiff encountered unexpected medical bills associated with a serious illness suffered by his wife, and therefore could no longer produce the necessary income to support his new mortgage. On April 3, 2009, Plaintiff alleges he contacted Defendant for a loan modification, but no modification proposal was ever given to him.

II. Procedural background

Plaintiff originally filed the suit in the District Court for the Eastern District of California. Plaintiff's Complaint alleges nine cause of action: (1) violation of the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601 et seq.; (2) violation of the Real Estate Settlement Procedures Act

Attorneys and Law Firms

Mitchell L. Abdallah, Abdallah Law Group, Sacramento, CA, for Plaintiff.

Kristine H. Chen, Reed Smith LLP, San Francisco, CA, for Defendant.

(“RESPA”), 12 U.S.C. §§ 2601 et seq.; (3) rescission; (4) unfair competition in violation of Section 17200 of the California Business and Professions Code; (5) unjust enrichment; (6) predatory lending; (7) negligence; (8) resulting trust; and (9) constructive trust.

On February 9, 2010, the case was transferred to this Court. Subsequently, Defendant filed the present Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and Motion to Strike pursuant to Fed.R.Civ.P. 12(f). Plaintiff filed late oppositions to both motions, and Defendant replied. The Court took the motions under submission pursuant to Civil Local Rule 7.1(d)(1).

LEGAL STANDARD

I. Motion to dismiss

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the pleadings. A complaint survives a motion to dismiss if it contains “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The court may dismiss a complaint as a matter of law for: (1) “lack of cognizable legal theory,” or (2) “insufficient facts under a cognizable legal claim.” *SmileCare Dental Group v. Delta Dental Plan of Cal.*, 88 F.3d 780, 783 (9th Cir.1996) (citation omitted). The court only reviews the contents of the complaint, accepting all factual allegations as true, and drawing all reasonable inferences in favor of the nonmoving party. *al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir.2009) (citation omitted).

Despite the deference, the court need not accept “legal conclusions” as true. *Ashcroft v. Iqbal*, — U.S. —, 129 S.Ct. 1937, 1949–50, 173 L.Ed.2d 868 (2009). It is also improper for the court to assume “the [plaintiff] can prove facts that [he or she] has not alleged.” *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). On the other hand, “[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Iqbal*, 129 S.Ct. at 1950.

II. Motion to strike

*2 Under Rule 12(f), the court may “strike from a pleading ... any redundant, immaterial, impertinent, or

scandalous matter.” FED. R. CIV. P. 12(f). “Immaterial” matter is that which has “ ‘no essential or important relationship to the claim for relief or the defenses being pleaded.’ ” *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir.1993) (citation omitted), *rev’d on other grounds*, 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994). “Impertinent” matter consists of statements that “ ‘do not pertain, and are not necessary, to the issues in question.’ ” *Id.* (citation omitted). In ruling upon a motion to strike, just as with a motion to dismiss, the court must view the pleadings in a light most favorable to the nonmoving party. *In re 2TheMart.com, Inc. Sec. Litig.*, 114 F.Supp.2d 955, 965 (C.D.Cal.2000).

The purpose of a Rule 12(f) motion is “to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.” *Sidney-Vinsein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir.1983) (citation omitted). However, courts often view motions to strike with disfavor, and therefore will not grant a motion to strike “unless the matter to be stricken clearly could have no possible bearing on the subject of the litigation.” *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F.Supp.2d 1048, 1057 (N.D.Cal.2004) (citations omitted); *see also Bureerong v. Uvawas*, 922 F.Supp. 1450, 1478 (C.D.Cal.1996). The court should deny the motion to strike if “there is *any doubt* as to whether the allegations might be an issue in the action.” *In re 2TheMart.com*, 114 F.Supp.2d at 965 (citing *Fantasy*, 984 F.2d at 1527) (emphasis in original).

DISCUSSION

I. Motion to dismiss

A. TILA violations

Plaintiff’s first cause of action alleges Defendant violated TILA by “failing to provide Plaintiff with accurate and clear and conspicuous material disclosures required under TILA” and by not fully informing him “of the pros and cons of adjustable rate mortgages in a language (both written and spoken) that [he] can understand and comprehend.” (Compl.¶ 57.) Defendant moves to dismiss this cause of action, arguing that the TILA claim for damages is time-barred and that the TILA claim for rescission fails because Plaintiff has not properly complied with the notice requirements and has not alleged that he is able to tender the loan proceeds.

1. TILA claim for rescission

Section 1635 governs the borrower's right under TILA to rescind a "consumer credit transaction ... in which a security interest ... is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended." 15 U.S.C. § 1635(a). While the borrower's right of rescission must normally be exercised within a three-day period, TILA extends that period to three years where the lender fails to provide the borrower with certain "material disclosures" or with the notice of the right to cancel. *See id.* § 1635(f); 12 C.F.R. § 226.23(a)(3).

*3 In the present case, however, the allegations in the Complaint are insufficient to extend the limitations period to three years. The only alleged TILA violation that is ascertainable from Plaintiff's Complaint is that Defendant allegedly violated TILA by providing Plaintiff with only three, instead of four, copies of the Notice of Right to Cancel. (*See* Compl. ¶ 47.) However, under TILA, the creditor is only required to deliver "two copies of the notice of the right to rescind to each consumer entitled to rescind." 12 C.F.R. § 226.23(b)(1) (emphasis added). Accordingly, Defendant's failure to deliver four copies of the notice of the right to cancel does not constitute an actionable TILA violation.

Finally, apart from the alleged failure to provide a proper number of copies of the notice of the right to cancel, the Complaint fails to allege what specific material disclosures were not provided to Plaintiff or what specific provisions of TILA were violated. Rather, Plaintiff merely alleges in a conclusory fashion that:

Defendants violated TILA by failing to provide Plaintiff with accurate and conspicuous material disclosures required under TILA and not taking into account the intent of the Legislature in approving this statute which was to fully inform borrowers of the pros and cons of adjustable rate mortgages in a language (both written and spoken) that they can understand and comprehend; and to advise them to compare similar loan products that might be more advantageous for the borrower under the same qualifying matrix.

(Compl.¶ 57.) Such conclusory allegations, however, are insufficient "to raise a right to relief above the speculative level." *See Twombly*, 550 U.S. at 555. Accordingly,

because Plaintiff has not demonstrated that he is entitled to the longer limitations period of three years, the Court **GRANTS** the motion to dismiss and **DISMISSES WITH LEAVE TO AMEND** the TILA claim for rescission.

2. TILA claim for damages

As to Plaintiff's TILA claim for damages, that claim is clearly barred on the face of the complaint. As Defendant points out, claims for damages under TILA must be commenced within one year following the date of the alleged violation. *See* 15 U.S.C. § 1640(e); *see also Lynch v. RKS Mortgage Inc.*, 588 F.Supp.2d 1254, 1259 (E.D.Cal.2008). The date of violation refers to the date of the consummation of the transaction, unless the doctrine of equitable tolling applies. *King v. State of Cal.*, 784 F.2d 910, 915 (9th Cir.1986). In the present case, because the loan transaction took place on November 11, 2006, but the complaint was not filed until November 7, 2009, the running of the statute of limitations on Plaintiff's TILA claim for damages is clear on the face of the complaint.

Moreover, Plaintiff is not entitled to equitable tolling because he has not carried his burden of showing that it applies in this context. Plaintiff had all of the information he needed to discover and bring an action regarding the alleged wrongs when the loan transaction closed, and he has not alleged that he was prevented in any way from doing so. *See Hubbard v. Fidelity Fed. Bank*, 91 F.3d 75, 79 (9th Cir.1996) (concluding that plaintiff was not entitled to tolling where "nothing prevented [her] from comparing the loan contract, [defendant's] initial disclosures, and TILA's statutory and regulatory requirements" (citing *King*, 784 F.2d at 915)). Accordingly, because Plaintiff's TILA claim for damages is time-barred on the face of the complaint, it fails to allege sufficient facts to state a claim for relief that is plausible on its face. *See Twombly*, 550 U.S. at 570.

*4 For the foregoing reasons, the Court **GRANTS** the motion to dismiss in this regard and **DISMISSES WITH PREJUDICE** Plaintiff's TILA claim for damages.

B. RESPA claim

Plaintiff's second cause of action alleges Defendant violated RESPA "because the payments to the mortgage broker and to the lender in regard to the principal balance and the interest adjustment were misleading and designed to create a windfall," whereby Defendant was paid a "yield spread premium" of approximately \$9,000. (Compl.¶ 66.) According to Plaintiff, this premium was Defendant's "incentive for placing Plaintiff in a less

attractive loan.” (*Id.*)

Plaintiff’s allegations of an improper “yield spread premium” and adjustments that were “designed to create a windfall” appear to fall under Section 2607, which prohibits kickbacks and unearned fees. *See* 12 U.S.C. § 2607. However, because recovery under Section 2607 is governed by a one-year statute of limitations, Plaintiff’s claims in this regard are untimely on the face of the complaint. *See id.* § 2614. Accordingly, because Plaintiff’s second cause of action fails, the Court **DISMISSES** it **WITH PREJUDICE**.

C. Rescission

In his third cause of action, Plaintiff alleges that he is entitled to rescind the loan for all of the foregoing reasons: (1) TILA violations; (2) failure to provide a Mortgage Loan Origination Agreement; (3) failure to adequately provide loan documents and options in plain English, in which the agreement was negotiated; (4) Plaintiff was given three copies of the Notice of Right to Cancel, which is in contradiction to the lender’s instructions; (5) failure to properly provide Truth in Lending disclosures; and (6) Defendants refused to accept Plaintiff’s properly executed and delivered rescission. (Compl. ¶ 70.) Plaintiff also alleges that he was “mistaken, misled and deceived about the material terms of the alleged loan.” (*Id.* ¶ 71.) Finally, Plaintiff indicates that upon rescission, he “will provide restitution to Defendant or the amount Plaintiff has been enriched.” (*Id.* ¶ 72.)

The Court has already dealt with rescission based on TILA. To the extent Plaintiff’s third cause of action alleges additional grounds for rescission, the Court notes that “[r]escission is not a cause of action; it is a remedy.” *Nakash v. Super. Ct.*, 196 Cal.App.3d 59, 70, 241 Cal.Rptr. 578 (1987) (citations omitted); *accord Gayduchik v. Countrywide Home Loans, Inc.*, No. 2:09-cv-03524 JAM-GGH, 2010 WL 1737109, at *4 (E.D.Cal. Apr.22, 2010); *Tiqui v. First Nat’l Bank of Az.*, No. 09cv1750 BTM (BLM), 2010 WL 1345381, at *7 (S.D.Cal. Apr. 5, 2010). Accordingly, to the extent Plaintiff attempts to assert a *cause of action* for rescission on grounds other than TILA, the Court **DISMISSES WITH PREJUDICE** that cause of action. Plaintiff’s request for rescission as a *remedy*, however, remains viable-provided Plaintiff is successful on the merits of one of his other causes of action.

D. Unfair competition claim

*5 Plaintiff’s fourth cause of action alleges Defendant

violated California’s unfair competition law (“UCL”) “by consummating an unlawful, unfair, and fraudulent practice.” (Compl. ¶ 78.) Section 17200 defines unfair competition as “any unlawful, unfair or fraudulent business act or practice” and “unfair, deceptive, untrue or misleading advertising.” CAL. BUS. & PROF.CODE § 17200. Because the statute is written in the disjunctive, it prohibits three separate types of unfair competition: (1) *unlawful* acts or practices, (2) *unfair* acts or practices, and (3) *fraudulent* acts or practices. *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999). In the present case, Plaintiff’s fourth cause of action alleges that Defendant violated all three sub-parts of the unfair competition law.

1. Standing

Defendant first argues that Plaintiff lacks standing, which is a prerequisite for a private plaintiff to bring suit under Section 17200. *See Californians For Disability Rights v. Mervyn’s, LLC*, 39 Cal.4th 223, 232–33, 46 Cal.Rptr.3d 57, 138 P.3d 207 (2006). A private person has standing to assert a UCL claim only if he or she (1) “has suffered injury in fact” and (2) “has lost money or property as a result of the unfair competition.” CAL. BUS. & PROF.CODE § 17204. In this case, accepting Plaintiff’s allegations as true, he has adequately pled that he suffered an injury and lost money as a direct result of Defendant’s actions.

2. Unlawful practices

By proscribing “any unlawful” business practice, Section 17200 “borrows” violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable. *Id.* “Violation of almost any federal, state, or local law may serve as the basis for a[n] [unfair competition] claim.” *Plascencia v. Lending 1st Mortg.*, 583 F.Supp.2d 1090, 1098 (N.D.Cal.2008) (citing *Saunders v. Super. Ct.*, 27 Cal.App.4th 832, 838–39, 33 Cal.Rptr.2d 438 (1994)).

In this case, Plaintiff alleges that Defendant’s actions were unlawful because they violated TILA as well as Sections 1632, 1916.7(c), and 2923.6 of the California Civil Code. (*See* Compl. ¶¶ 79, 84.) However, because the Court has already determined that the Complaint fails to state a cause of action under TILA, that statute cannot form the basis of Plaintiff’s UCL claim. As for the other statutes alleged in Plaintiff’s fourth cause of action, none of those are applicable in this case. First, there are no allegations in the Complaint that the loan transaction at issue here was negotiated in a language other than

English, as required by Section 1632. See CAL. CIV. CODE § 1632. Second, Plaintiff has not alleged any facts to show that Section 1916.7, which governs adjustable rate mortgages, applies to her loan. See *id.* § 1916.7(c). Rather, as Defendant points out, the majority of adjustable rate mortgage loans in California originate under the federal Alternative Mortgage Transaction Parity Act, 12 U.S.C. § 3803(b), which preempts state laws. See, e.g., *Pagtalunan v. Reunion Mortg., Inc.*, No. C-09-00162 EDL, 2009 WL 961995, at *4 (N.D. Cal. Apr. 8, 2009) (citing *Nat'l Home Equity Mortg. Ass'n v. Face*, 239 F.3d 633, 637 (4th Cir. 2001)). Finally, as other courts have noted with respect to Section 2923.6, “nothing in Cal. Civ. Code § 2923.6 imposes a duty on servicers of loans to modify the terms of loans or creates a private right of action for borrowers.” *Farmer v. Countrywide Home Loans*, No. 08cv2193 BTM (AJB), 2009 WL 189025, at *2 (S.D. Cal. Jan. 26, 2009); accord *Pantoja v. Countrywide Home Loans*, 640 F.Supp.2d 1177, 1188 (N.D. Cal. 2009). Accordingly, because there is no predicate violation that can form the basis of Plaintiff’s UCL claim, Plaintiff has failed to state a claim for relief under the “unlawful practices” prong.

3. Fraudulent practices

*6 Likewise, with respect to the “fraudulent practices” prong, Plaintiff has failed to allege sufficient facts to state a claim for relief. To prove fraud under California law, the plaintiff must demonstrate: “(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or “scienter”); (c) intent to defraud, i.e. to induce reliance; (d) justifiable reliance; and (e) resulting damage.” *Engalla v. Permanente Med. Group, Inc.*, 15 Cal.4th 951, 974, 64 Cal.Rptr.2d 843, 938 P.2d 903 (1997) (citation and internal quotations marks omitted). Moreover, to establish “fraudulent acts” under the UCL, the plaintiff must show that “members of the public are likely to be deceived.” *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1152 (9th Cir. 2008) (citation omitted); accord *South Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal.App.4th 861, 888, 85 Cal.Rptr.2d 301 (1999).

In addition, Rule 9(b) of the Federal Rules of Civil Procedure requires allegations of fraud or mistake to be stated “with particularity.” In the Ninth Circuit, this rule “has been interpreted to mean the pleader must state the time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation.” *Misc. Serv. Workers, Drivers & Helpers v. Philco-Ford Corp.*, 661 F.2d 776, 782 (9th Cir. 1981) (citations omitted); see also *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)

(“Averments of fraud must be accompanied by ‘the who, what, when, where, and how’ of the misconduct charged.” (citation omitted)).

In the present case, Plaintiff has failed to satisfy the heightened pleading requirement of Rule 9(b). The fourth cause of action alleges in a conclusory fashion that Defendants’ conduct was fraudulent because “Defendants gave information to Plaintiff, that was factually incorrect” and because “Defendants omitted to provide information, which he [sic] was bound by law to provide.” (Compl. ¶¶ 80–81.) However, it is unclear from these allegations what was the *specific content* of the fraudulent misrepresentations or *who* on behalf of Defendant made those representations. Likewise, apart from conclusory allegations, the Complaint fails to allege *why* Plaintiff believes the statements were false when made. Fraudulent intent cannot be proven by simply pointing to the defendant’s subsequent nonperformance. See *Tenzer v. Superscope, Inc.*, 39 Cal.3d 18, 30–31, 216 Cal.Rptr. 130, 702 P.2d 212 (1985). Rather, “the plaintiff must plead facts explaining why the statement was false when it was made.” *Smith v. Allstate Ins. Co.*, 160 F.Supp.2d 1150, 1152 (S.D. Cal. 2001) (citation omitted). In the present case, Plaintiff’s unfair competition claim cannot survive the motion to dismiss because Plaintiff fails to plead this cause of action with the specificity required by Rule 9(b).²

4. Unfair practices

Finally, Plaintiff has failed to allege sufficient facts to state a claim for relief under the “unfair practices” prong. Where direct competitors are concerned, the California Supreme Court has concluded that the word “unfair” means “conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.” *Cal. Tech.*, 20 Cal.4th at 187, 83 Cal.Rptr.2d 548, 973 P.2d 527. On the other hand, when an action is brought by a consumer or a competitor alleging a different kind of violation, as is the case here, it appears a broader definition would apply. In that context, an “unfair” business practice occurs “when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” See *People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal.App. 4th 509, 530 (1984), *abrogated on other grounds in Cal. Tech.*, 20 Cal.4th at 186–87 & n. 12, 83 Cal.Rptr.2d 548, 973 P.2d 527; accord *McDonald v. Coldwell Banker*, 543 F.3d 498, 506 (9th Cir. 2008).

*7 In this case, Plaintiff alleges Defendants’ conduct was

unfair because “Defendants failed to provide disclosures that could be understood by Plaintiff, thus making it likely that Plaintiff would be deceived.” (Compl.¶ 82.) However, the Court cannot conclude from these conclusory allegations whether Defendants’ actions “offend[] an established public policy” or if they are “immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” See *Casa Blanca*, 159 Cal.App.4th at 530, 71 Cal.Rptr.3d 582. Accordingly, Plaintiff’s claim for relief under the “unfair practices” prong also fails.

For the foregoing reasons, the Court **GRANTS** the motion to dismiss and **DISMISSES WITH LEAVE TO AMEND** the entire UCL claim.

E. Unjust enrichment

Plaintiff’s fifth cause of action alleges unjust enrichment by Defendants. Under California law, “[t]he theory of unjust enrichment requires one who acquires a benefit which may not justly be retained, to return either the thing or its equivalent to the aggrieved party so as not to be unjustly enriched.” *Otworth v. Southern Pac. Transp. Co.*, 166 Cal.App.3d 452, 460, 212 Cal.Rptr. 743 (1985) (citations omitted). However, unjust enrichment is inapplicable where the defendant has merely obtained that to which it was entitled pursuant to a contract between the parties. See *Jones v. Wells Fargo Bank*, 112 Cal.App.4th 1527, 1541, 5 Cal.Rptr.3d 835 (2003).

In the present case, there are no allegations that Defendant has received any benefit at Plaintiff’s expense such that it was unjustly enriched. Rather, it appears the only allegation of unjust enrichment is that Defendant *might* receive a windfall in case there is a forced sale of Plaintiff’s home. (Compl.¶ 91.) Such allegations, however, are insufficient to “to raise a right to relief above the speculative level.” See *Twombly*, 550 U.S. at 555. Moreover, unjust enrichment is inapplicable to the extent that any benefit derived by Defendant would be pursuant to the loan contract between the parties. See *Jones*, 112 Cal.App.4th at 1541, 5 Cal.Rptr.3d 835. Accordingly, the Court **GRANTS** the motion to dismiss and **DISMISSES WITH LEAVE TO AMEND** the unjust enrichment claim.

F. Predatory lending

Plaintiff’s sixth cause of action alleges Defendant committed predatory lending by marketing the subject loan in whole or in part on the basis of fraud, exaggeration, misrepresentation, and concealment of

material facts. (Compl.¶ 96.) According to Plaintiff, the loan contains terms whereby the borrower can never realistically repay the loan, which is representative of “Bait & Switch” tactics. Plaintiff, however, fails to indicate any legal basis for his “predatory lending” cause of action. As a result, both the Court and Defendant are left to guess whether this claim is based on an alleged violation of federal law, state law, common law, or some combination of the above. Accordingly, the Court **GRANTS** the motion to dismiss in this regard and **DISMISSES WITH LEAVE TO AMEND** the predatory lending claim. See *Twombly*, 550 U.S. at 555 (noting that “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions”).³

G. Negligence

*8 Plaintiff’s seventh cause of action alleges negligence against Defendant. To state a claim for negligence, a plaintiff must allege: (1) the defendant’s legal duty of care to the plaintiff; (2) breach of that duty; (3) causation; and (4) resulting injury to the plaintiff. *Merrill v. Navegar, Inc.*, 26 Cal.4th 465, 500, 110 Cal.Rptr.2d 370, 28 P.3d 116 (2001). In the present case, Defendant argues the negligence cause of action fails because Plaintiff cannot demonstrate that Defendant owed him a duty of care.

As a general rule, “a financial institution owes no duty of care to a borrower when the institution’s involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.” *Nymark v. Heart Fed. Sav. & Loan Ass’n*, 231 Cal.App.3d 1089, 1095–96, 283 Cal.Rptr. 53 (1991) (citations omitted). However, there are instances where the law imposes a duty on the lender. In California, the test for determining whether a duty exists between a lender and a borrower-client “ ‘involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant’s conduct and the injury suffered, [5] the moral blame attached to the defendant’s conduct, and [6] the policy of preventing future harm.’ ” *Connor v. Great Western Sav. & Loan Ass’n*, 69 Cal.2d 850, 865, 73 Cal.Rptr. 369, 447 P.2d 609 (1968) (quoting *Biakanja v. Irving*, 49 Cal.2d 647, 650, 320 P.2d 16 (1958)); accord *Nymark*, 231 Cal.App.3d at 1098, 283 Cal.Rptr. 53.

In the present case, Plaintiff alleges that Defendant overstated Plaintiff’s income and the value of the Property on the loan application, knowing that both of those were

false. (Compl. ¶¶ 20, 27.) Taking these allegations as true, Defendant arguably owed Plaintiff a duty of care in processing Plaintiff's loan application. The transaction at issue was undoubtedly "intended to affect the plaintiff" in that the outcome of the loan application determined what type of loan Plaintiff would qualify for. Likewise, it was readily foreseeable that misstating the amounts on the application and providing Plaintiff with a loan for which he was not qualified would potentially harm Plaintiff in that it increased the likelihood that he would default on the loan. The injury to Plaintiff is also certain because Plaintiff lost an opportunity to obtain a loan that he could afford and there are now foreclosure proceedings instituted against him. All of these factors weigh in favor of finding a duty of care in this case.

On the other hand, because Plaintiff's inability to pay the mortgage was caused by his wife's sudden illness, there might not be a close connection between Defendant's conduct and the injury suffered. Similarly, at this stage of the proceedings, it is unclear whether moral blame should attach to Defendant's conduct and whether public policy will be better served in prohibiting lenders from extending loans to individuals who might not be qualified for them. On balance, however, these factors do not necessarily weigh against the finding of duty of care in this case.

*9 Finally, even the court in *Nymark*, on which Defendant relies, noted that the "general rule" that a lender does not owe a duty of care to a borrower is not absolute. On the contrary, in holding there was no duty of care in that case, the court noted that "[t]he complaint does not allege, nor does anything in the summary judgment papers indicate, that the appraisal was intended to induce plaintiff to enter into the loan transaction or to assure him that his collateral was sound." *Nymark*, 231 Cal.App.3d at 1096–97, 283 Cal.Rptr. 53. In this case, however, Plaintiff does allege Defendant misstated the value of the Property in order to induce him into acquiring the more riskier loan. (Compl. ¶¶ 20, 23, 27, 29–30.)

Accordingly, based on the consideration of the above factors and the fact that Defendant intended to induce Plaintiff to enter into the loan transaction, the Complaint contains sufficient facts to allege that Defendant owed Plaintiff a duty of care when it allegedly misstated Plaintiff's income and the value of the Property on Plaintiff's loan application. See *Garcia v. Ocwen Loan Serv., LLC*, No. C 10–0290 PVT, 2010 WL 1881098, at *3 (N.D.Cal. May 10, 2010) (finding that a lender owed a duty of care to a borrower-client in processing the borrower's loan modification application). Therefore, the Court **DENIES IN PART** the motion to dismiss in this regard.

On the other hand, the Court **GRANTS IN PART** the motion to dismiss to the extent Plaintiff's seventh cause of action alleges that there was an explicit or implicit duty of care to Plaintiff pursuant to the Note or the Deed of Trust because the Complaint fails to demonstrate how Defendant's obligations in this regard exceeded the scope of Defendant's "conventional role as a mere lender of money." See *Nymark*, 231 Cal.App.3d at 1095–96, 283 Cal.Rptr. 53. Similarly, there is no duty of care pursuant to the TILA because the Court has already rejected Plaintiff's contention that he was entitled to four, instead of three, copies of the notice of the right to cancel. For the foregoing reasons, the Court **DISMISSES WITH PREJUDICE** these allegations in the seventh cause of action.

H. Resulting and constructive trust

Finally, Plaintiff's eighth and ninth causes of action are titled "resulting trust" and "constructive trust," respectively. In his eighth cause of action, Plaintiff appears to argue that if the foreclosure sale is allowed to go through, there should be a resulting trust created. (Compl. ¶ 106.) In his ninth cause of action, Plaintiff alleges that any foreclosure sale of the Property would be "improper and contrary to law," and therefore Defendant should be required to hold the Property as a constructive trustee for the benefit of Plaintiff. (*Id.* ¶¶ 108–110, 283 Cal.Rptr. 53.) However, as Defendant correctly points out, neither a "constructive trust" nor a "resulting trust" is an independent *cause of action*; rather, each of these is merely a type of a *remedy*. See *Batt v. City & County of S.F.*, 155 Cal.App.4th 65, 82, 65 Cal.Rptr.3d 716 (2007) ("A constructive trust is 'not an independent cause of action but merely a type of remedy,' and an equitable remedy at that." (internal citations omitted)); *Stansfield v. Starkey*, 220 Cal.App.3d 59, 76, 269 Cal.Rptr. 337 (1990) ("In their third amended complaint appellants alleged, as causes of action, a resulting trust and a constructive trust. But neither is a cause of action[,] only a remedy." (internal citations omitted)). Accordingly, the Court **GRANTS** the motion to dismiss in this regard and **DISMISSES WITH PREJUDICE** Plaintiff's causes of action for resulting and constructive trust. Plaintiff's request for a resulting or a constructive trust as a *remedy*, however, remains viable—provided Plaintiff is successful on the merits of one of his other causes of action.

II. Motion to strike

A. Request for punitive damages

*10 Defendant moves to strike Plaintiff's request for punitive damages, arguing that it is not adequately supported by factual allegations in the Complaint. In doing so, Defendant relies on mostly California cases that set forth a heightened pleading standard for plaintiffs seeking punitive damages under Section 3294(a) of the California Civil Code.

The Court declines to grant the motion to strike on these grounds. Section 3294 provides for recovery of punitive damages where a plaintiff establishes by clear and convincing evidence that a defendant acted with "oppression, fraud, or malice." CAL. CIV.CODE § 3294(a). However, while Section 3294 governs Plaintiff's substantive claim for punitive damages, the Federal Rules of Civil Procedure govern the punitive damages claim procedurally with respect to the adequacy of pleadings. See *Clark v. State Farm Mut. Auto. Ins. Co.*, 231 F.R.D. 405, 406-07 (C.D.Cal.2005); *Jackson v. East Bay Hosp.*, 980 F.Supp. 1341, 1353 (N.D.Cal.1997); *Bureerong*, 922 F.Supp. at 1480. Pursuant to these rules, a pleading need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief" and "a demand for the relief sought." FED. R. CIV. P. 8(a)(2), (3). Moreover, with respect to "[m]alice, intent, knowledge, and other conditions of a person's mind," the Federal Rules provide that these allegations "may be alleged generally." FED. R. CIV. P. 9(b).

In the present case, the Complaint contains sufficient allegations to support the request for punitive damages. See, e.g., Compl. ¶ 27 ("Defendants even went so far as to blatantly misrepresent and overstate Plaintiff's income on his loan application"); *id.* ("Defendants intentionally misled Plaintiff"); *id.* ¶ 30 ("Defendants knew and should have known that Plaintiff's loans would likely result in default and foreclosure"); *id.* ¶ 38 ("Defendants did whatever it took to sell more loans, faster...."). The fact that these allegations might be conclusory is not relevant at this stage because under the federal pleading standards, the plaintiff may rely on conclusory averments of malice or fraudulent intent to plead the mental state required by Section 3294. See *Clark v. Allstate Ins. Co.*, 106 F.Supp.2d 1016, 1019 (S.D.Cal.2000) ("In federal court, a plaintiff may include a "short and plain" prayer for punitive damages that relies entirely on unsupported and conclusory averments of malice or fraudulent intent."); accord *Align Tech., Inc. v. Fed. Ins. Co.*, 673 F.Supp.2d 957, 965 (N.D.Cal.2009); *Clark v. State Farm Mut. Auto. Ins. Co.*, 231 F.R.D. at 406-07.

Accordingly, because Defendant failed to demonstrate that these allegations otherwise constitute "redundant,

immaterial, impertinent, or scandalous matter," the Court **DENIES** the motion to strike in this regard. The Court, however, does not express any opinion as to whether these allegations satisfy the substantive requirements of Section 3294(a). To the extent Defendant challenges the sufficiency of the factual allegations underlying the claim for punitive damages, the proper medium is a motion to dismiss under Rule 12(b)(6), not Rule 12(f).

B. Reference to conduct that is not actionable under TILA

*11 Defendant next asks the Court to strike the following allegation in paragraph 57 of the Complaint with respect to the TILA requirements: "It also requires the lender to offer other loan products that might be more advantageous for the borrower under the same qualifying matrix." According to Defendant, this allegation impermissibly expands the scope of TILA because TILA does not dictate the terms and conditions under which credit can be extended.

However, in enacting TILA, the Congress expressly found that "[t]he informed use of credit results from an awareness of the cost thereof by consumers." 15 U.S.C. § 1601(a). Thus, TILA's purpose was "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." *Id.* Arguably, there is a relation between this congressional intent and Plaintiff's allegations that the lender should be required to "offer other loan products that might be more advantageous for the borrower." Accordingly, because it is not entirely clear to the Court that the challenged allegation in paragraph 57 of the Complaint "could have no possible bearing on the subject of the litigation," the Court **DENIES** the motion to strike in this regard. See *Platte Anchor Bolt*, 352 F.Supp.2d at 1057 ("A motion to strike should not be granted unless the matter to be stricken clearly could have no possible bearing on the subject of the litigation." (citations omitted)).

C. Prayer for relief under TILA

Defendant next asks the Court to strike Plaintiff's request for actual and statutory damages as well as for "equitable restitution and disgorgement of profits obtained by Defendants" in connection with Plaintiff's TILA claim. The Court has already determined that Plaintiff's TILA claim for damages is barred by the applicable one-year

statute of limitations. *See* 15 U.S.C. § 1640(e). This includes both actual and statutory damages. *See id.* § 1640(a). As for Plaintiff's request for equitable restitution and disgorgement, the Court agrees with Defendant that these are not remedies that are available under TILA. *See, e.g., Christ v. Beneficial Corp.*, 547 F.3d 1292, 1298 (11th Cir.2008) ("Because we do not expect Congress to 'expressly preclude' remedies, we do not read TILA to confer upon private litigants an implied right to an injunction or other equitable relief such as restitution or disgorgement." (citation omitted)); *Perrone v. Gen. Motors Acceptance Corp.*, 232 F.3d 433, 439 (5th Cir.2000) ("If Congress had meant for restitution to be the measure of actual damages [under TILA], it could have easily said so in the statute. It did not. The fact that restitution is an available remedy for some purposes does not mean that Congress intended for this to be the measure of all other damages."). Accordingly, the Court **GRANTS** the motion to strike and **STRIKES WITH PREJUDICE** the following paragraphs of the Complaint as they relate to the TILA claim:

*12 59. An actual controversy now exists between Plaintiff, who contends that he has the right to damages for Defendants' violations related to the loan on the Subject Property alleged in this complaint, and Defendants.

60. As a direct and proximate result of Defendants' violations, Plaintiff has incurred and continues to incur damages in an amount according to proof but not yet ascertained including without limitation, statutory damages and all amounts paid or to be paid in connection with the transaction.

61. Defendants were unjustly enriched at the expense of Plaintiff who is therefore entitled to equitable restitution and disgorgement of profits obtained by Defendants.

D. Prayer for relief under the unfair competition law

Finally, Defendant asks the Court to strike Plaintiff's request for damages as it relates to Plaintiff's UCL claim. As Defendant correctly argues, and Plaintiff concedes, Section 17200 of the California Business and Professions Code limits the plaintiff's remedies to restitution and injunctive relief. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144, 131 Cal.Rptr.2d 29, 63 P.3d 937 (2003) ("While the scope of conduct covered by the UCL is broad, its remedies are limited. A UCL action is equitable in nature; damages cannot be recovered." (internal citations omitted)); *Cel-Tech*, 20 Cal.4th at 179, 83 Cal.Rptr.2d 548, 973 P.2d 527

("Prevailing plaintiffs [under the UCL] are generally limited to injunctive relief and restitution. Plaintiffs may not receive damages, much less treble damages, or attorney fees." (internal citations omitted)). Accordingly, the Court **GRANTS** the motion to strike in this regard and **STRIKES WITH PREJUDICE** the following paragraph of the Complaint as it relates to the UCL claim:

85. By reasons of the foregoing, Plaintiff has suffered and continues to suffer damages in a sum not yet ascertained, to be proven at trial.

CONCLUSION

I. Motion to dismiss

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** the motion to dismiss. Specifically, the Court **ORDERS** as follows:

— The Court **GRANTS** the motion to dismiss and **DISMISSES WITH PREJUDICE** the following causes of action: (1) the first cause of action to the extent it alleges a TILA claim for damages; (2) the second cause of action for rescission; (3) the third cause of action for violation of the unfair competition law; (4) the seventh cause of action to the extent it alleges a duty of care for a violation other than Defendant's alleged misstatement of Plaintiff's income and the value of the Property on the loan application; and (5) the eighth and ninth causes of action for resulting and constructive trusts.

— The Court **GRANTS** the motion to dismiss and **DISMISSES WITH LEAVE TO AMEND** the following causes of action: (1) the first cause of action to the extent it alleges a TILA claim for rescission; (2) the fourth cause of action for violation of the unfair competition law; (3) the fifth cause of action for unjust enrichment; and (4) the sixth cause of action for predatory lending. Plaintiff shall have **thirty (30) days** from the filing of this Order to file a First Amended Complaint.

*13 — The Court **DENIES** the motion to dismiss in all other regards.

II. Motion to strike

The Court also **GRANTS IN PART** and **DENIES IN PART** the motion to strike. Specifically, the Court **GRANTS** the motion and **STRIKES WITH**

PREJUDICE paragraphs 59, 60, and 61 of the Complaint as they relate to Plaintiff's TILA claim, and paragraph 85 of the Complaint as it relates to Plaintiff's UCL claim. The Court **DENIES** the motion to strike in all other respects.

All Citations

Not Reported in F.Supp.2d, 2010 WL 2196083

IT IS SO ORDERED.

Footnotes

- 1 The term "material disclosures" means "the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in §§ 226.32(c) and (d) and 226.35(b)(2)." 12 C.F.R. § 226.23(a)(3) n. 48.
- 2 The remainder of the Complaint is not helpful in discerning the precise scope of Plaintiff's UCL claim. For example, the Complaint alleges in conclusory manner that: (1) Defendants claimed to maintain underwriting guidelines that assessed the ability of the borrower to repay the debt; (2) they purposefully relaxed those guidelines and sold risky loan products to other borrowers like Plaintiff; (3) Defendants failed to clearly and conspicuously disclose the key provisions of the loans, even though they were very complicated; (4) Defendants provided undisclosed incentives to their agents and officers for marketing and selling these risky loans; and (5) Defendants misrepresented the true terms of the loans. (*See generally* Compl. ¶¶ 14–42.) However, none of these allegations provide any specific allegations as to *who* on behalf of Defendants made these representations, *how* Defendants misrepresented the terms of the loans, or *why* the statements were false or misleading. *See Vess*, 317 F.3d at 1106 ("Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." (citation omitted)); *Misc. Serv. Workers*, 661 F.2d at 782 (noting that "the pleader must state the time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation" (citations omitted)).
- 3 To the extent Plaintiff cites Cal. Civ.Code § 17200 in his predatory lending claim, that allegation is duplicative of the fourth cause of action for violation of the UCL.

1 Lenard L. Wittlake, PLLC
2 Attorney & Counselor at Law
3 P.O. Box 1233
4 Walla Walla, WA 99362
5 (509) 529-1529

6
7 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
8 DIVISION III

9 BAKER BOYER NATIONAL BANK,

10 Plaintiff/Respondent,

11 vs.

12 JAMES PATTERSON FOUST, JR.,

13 Defendant/Appellant.

No. 355268

CERTIFICATE OF SERVICE

(APPELLANT'S REPLY BRIEF)

14 SHELLIE STILTZ declares under penalty of perjury under the laws of the
15 State of Washington: That I am a citizen of the United States, over the age of 18
16 years, and that on January 5, 2018, a true and correct copy of the
17 APPELLANT'S REPLY BRIEF, as well as a copy of this CERTIFICATE OF
18 SERVICE, were mailed by regular first class mail, postage prepaid, to:

19 Todd Reuter
20 Foster Pepper PLLC
21 618 W. Riverside, Ste. 300
22 Spokane, WA 99201-5102

23 Signed at Walla Walla, WA, this 5th day of January, 2018.

24 *Shellie Stiltz*
25 SHELLIE STILTZ