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Court of Appeals of Utah.
COMMONWEALTH PROPERTY ADVOCATES, LLC, Plaintiff and Appellant,
v.
MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC.; CitiMortgage, Inc.; and John Does of unknown number, Defendants and Appellees.

No. 20100888–CA.
July 14, 2011.
Rehearing Denied Aug. 10, 2011.

Background: Transferee of interest in property that was secured by promissory note on which transferor defaulted brought action against nominee for lender and lender's successors for estoppel, declaratory judgments, refunds and to quiet title. The Fourth District Court, Provo Department, James R. Taylor, J., entered summary judgment in favor of nominee. Transferee appealed.

Holdings: The Court of Appeals, Davis, P.J., held that:
(1) securitization of promissory note following default did not nullify rights of nominee and lender's successors and assigns and servicer of loan;
(2) statute that stated that transfer of any debt secured by a trust deed operated as a transfer of the security therefor did not prevent lender from acting as nominee; and
(3) any error in conversion of motion to dismiss to one for summary judgment was harmless.

Affirmed.

J. Frederic Voros, Jr., J., concurred in the result.

West Headnotes

[1] Appeal and Error 30 ⚷0

30 Appeal and Error
Legal questions are reviewed for correctness.

[2] Appeal and Error 30 ⚷0

30 Appeal and Error
A district court's ruling on either a motion to dismiss or a motion for summary judgment is a legal question which Court of Appeals reviews for correctness; in order to justify reversal, the appellant must show error that was substantial and prejudicial in the sense there is at least a reasonable likelihood that in the absence of the error the result would have been different.

[3] Mortgages 266 ⚷0

266 Mortgages
Securitization of promissory note following default did not nullify rights of nominee for lender and lender's successors and assigns and servicer of loan under terms of deed of trust, which named nominee as such and extended to nominee the right to exercise any or all of lender's interests; even in the face of securitization, provisions of deed of trust continued to grant nominee authority to initiate foreclosure proceedings, appoint trustee, and foreclose and sell property, and securitization of note did not revoke language of deed of trust.

[4] Statutes 361 ⚷0

361 Statutes
When interpreting statutes, Court of Appeals presumes that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning.

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[5] Statutes 361 0

361 Statutes
Court of Appeals reads the plain language of a statute as a whole and interprets its provisions in harmony with other statutes in the same chapter and related chapters.

[6] Statutes 361 0

361 Statutes
If the plain meaning of the statute can be discerned from its language, no other interpretive tools are needed.

[7] Liens 239 0

239 Liens
Statute that stated that transfer of any debt secured by a trust deed operated as a transfer of the security therefor did not prevent nominee for lender from acting as nominee for lender and lender's successors and assigns with regard to promissory note following default, when it was permitted by the deed of trust, where maker agreed to the terms of the note that identified the servicing entity as such, deed explicitly gave nominee the right to foreclose on behalf of lender and lender's successors and assigns, statute did not prohibit parties from contracting for these arrangements, and nowhere in the documents themselves was nominee explicitly prohibited from assigning its beneficial interest under the note to servicing entity. Utah Code Ann. § 57–1–35 ; Restatement (Third) of Prop.: Mortgages § 5.4 cmt. a .

[8] Statutes 361 0

361 Statutes
Court of Appeals' clear preference is the reading of a statute that reflects sound public policy, as Court presumes that must be what the legislature intended.

[9] Appeal and Error 30 0

30 Appeal and Error
In order to justify reversal the appellant must show error that was substantial and prejudicial in the sense there is at least a reasonable likelihood that in the absence of the error the result would have been different.

[10] Appeal and Error 30 0

30 Appeal and Error
In reviewing a dismissal pursuant to rule allowing dismissal for failure to state a claim for which relief may be granted, Court of Appeals assumes that the factual allegations in the complaint are true and draws all reasonable inferences in the light most favorable to the plaintiff. Rules Civ.Proc., Rule 12(b)(6).

[11] Motions 267 0

267 Motions
Mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal or summary judgment; because these are legal conclusions rather than pleaded facts, Court of Appeals need not accept them as true. Rules Civ.Proc., Rule 12(b)(6).

[12] Appeal and Error 30 0

30 Appeal and Error
The propriety of a district court's decision on a motion to dismiss is a question of law, which Court of Appeals reviews for correctness.

[13] Judgment 228 0

228 Judgment
Any error in conversion of motion to dismiss for failure to state a claim for which relief could be granted to motion for summary judgment was harmless, where district court's ruling that nominee and servicing entity lost their rights under the deed of trust when the note was securitized would not have been any different had it ruled on the original motion to dismiss.

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Fourth District, Provo Department, 100400594; The Honorable James R. Taylor.E. Craig Smay, Salt Lake City, for Appellant.

Anthony C. Kaye, Angela W. Adams, and Steven D. Burt, Salt Lake City, for Appellees.

Before Judges DAVIS, McHUGH, and VOROS.

OPINION

DAVIS, Presiding Judge:

***1** ¶ 1 **Commonwealth** Property Advocates, LLC (CPA) appeals from the district court's grant of summary judgment in favor of defendants Mortgage Electronic Registration System, Inc. (**MERS**) and CitiMortgage, Inc. (Citi). We affirm.

BACKGROUND

¶ 2 A home buyer (Home Buyer) executed a promissory note (the Note) in favor of her lending bank (Lender) for $417,000 secured under the terms of a Deed of Trust describing property in Eagle Mountain, Utah, as collateral for the debt. The Deed of Trust identified **MERS** as the "nominee for Lender and Lender's successors and assigns" and as the "beneficiary under this Security Instrument." In the original Note, Lender assigned its servicing rights to Citi, which at all relevant times remained the servicer of the Note and to which Home Buyer made payments. Home Buyer defaulted on the Note, and on approximately December 8, 2009, the Successor Trustee to the Deed of Trust recorded a Notice of Default and Election to Sell.[FN1] On December 6, 2009, **MERS** assigned its "beneficial interest" to Citi, which was recorded on January 6, 2010. On December 31, 2009, a quitclaim deed was recorded by which Home Buyer transferred her interest in the Eagle Mountain property to CPA.

¶ 3 CPA filed a complaint in February 2010 that stated four causes of action based upon its assertion that the Deed of Trust was separated from the Note shortly after being executed and therefore is and "has been unenforceable by defendant[s]" for quite some time. In support of its arguments, CPA alleged that Lender promptly sold the debt represented by the Note to the Federal National Mortgage Association (Fannie Mae) and subsequently securitized Home Buyer's debt.[FN2] CPA argues that the

> sale of the loan to Fannie Mae, and any further re-sale as mortgage-backed securities, transferred the beneficial interest in the trust deed to the current owner of the debt, [i.e., the investors in the mortgage-backed securities] and that defendants, having been paid off in the sale of the loan, could not seek a second payoff by foreclosure of the Trust Deed.

This principle, CPA argues, is supported by Utah Code section 57–1–35, *see* Utah Code Ann. § 57–1–35 (2010) ("The transfer of any debt secured by a trust deed shall operate as a transfer of the security therefor."). The securitization, CPA claims, separated the debt from the security, "releas[ing] the realty from enforcement of the security by" **MERS** and Citi. Although CPA claims this does not exonerate the debt obligation, it also argues, somewhat contrarily, that this leaves the Note entirely unsecured by the property under the terms of the Deed of Trust.[FN3] It is for this alleged "cloud on the title" that CPA initiated the immediate lawsuit seeking estoppel, declaratory judgments, quiet title, and refunds.

¶ 4 **MERS** and Citi moved to dismiss CPA's complaint, stating that CPA's argument "that transferring a note secured by a trust deed as part of a securities transaction renders the note an unsecured obligation ... is without legal support and fails as a matter of law." In its memorandum decision, the district court converted the motion to dismiss to one for summary judgment because of what it determined to be extraneous document evidence attached to both parties' pleadings. *See generally Oakwood Vill. LLC v. Albertsons, Inc.,* 2004 UT 101, ¶ 12, 104 P.3d 1226 ("[A] motion to dismiss 'shall be converted into one for summary judgment if matters outside the pleadings are presented to and not excluded by the court.' " (quoting Utah R. Civ. P. 12(b))). The district court subsequently granted

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summary judgment in favor of **MERS** and Citi. In rendering its decision, the district court ruled that "[t]he premise underlying each of [CPA's] causes of action is an assertion that Defendants lost the right to initiate foreclosure proceedings on the property when the Note was 'securitized.' " The district court then characterized this underlying principle as a "mere conclusory allegation[ ]," *see Chapman ex rel. Chapman v. Primary Children's Hosp.,* 784 P.2d 1181, 1186 (Utah 1989), and found that "the express terms of the Trust Deed unassailably provide that **MERS** has the right to foreclose upon the Property, even if [Lender] sold the Note." CPA moved to reconsider on the ground that the conversion of the motion to dismiss into a motion for summary judgment was improper. The district court denied CPA's motion to reconsider. CPA now appeals from the final summary judgment order, arguing again that the district court's conversion of the motion to dismiss into a motion for summary judgment was improper. CPA requests that we reverse and remand with instructions for the district court to deny **MERS** and Citi's motion to dismiss based on its assertion that its "underlying principle"-that securitization stripped **MERS** and Citi of the right to initiate foreclosure proceedings on the Eagle Mountain property-is a factual statement. *See generally Berneau v. Martino,* 2009 UT 87, ¶ 3, 223 P.3d 1128 (explaining that when ruling on a motion to dismiss, the district court must assume the factual statements contained in the complaint are true).

ISSUES AND STANDARDS OF REVIEW

***2** [1] ¶ 5 Although often overlapping, CPA basically presents two issues on appeal. First, CPA argues that under the terms of the Deed of Trust, the securitization of the Note stripped the assignee of its ability to foreclose on behalf of successor beneficiaries and that Utah Code section 57–1–35 supports this contention. This presents a legal question, which we review for correctness. *See State v. Pena,* 869 P.2d 932, 935–36 (Utah 1994) ("Legal determinations ... are defined as those which are not of fact but are essentially of rules or principles uniformly applied to persons of similar qualities and status in similar circumstances.").

[2] ¶ 6 Second, CPA argues that the district court erred when it converted the motion to dismiss into one for summary judgment and that it would have been inappropriate to grant the motion to dismiss. A district court's ruling on either a motion to dismiss or a motion for summary judgment is a legal question which we review for correctness, *see U.S.A. United Staffing Alliance, LLC v. Workers' Comp. Fund,* 2009 UT App 160, ¶ 7, 213 P.3d 20; *see also Jacobsen Constr. Co. v. Teton Builders,* 2005 UT 4, ¶ 10, 106 P.3d 719 (observing that the district court's denial of a motion to dismiss is a legal question to be reviewed under a correctness standard). "In order to justify reversal[,] the appellant must show error that was substantial and prejudicial in the sense there is at least a reasonable likelihood that in the absence of the error the result would have been different." *Ortega v. Thomas,* 14 Utah 2d 296, 383 P.2d 406, 408 (1963); *see also* Utah R. Civ. P. 61 (providing that a harmless error is one that "does not affect the substantial rights of the parties" and must be disregarded).

ANALYSIS

I. Effect of Securitization

¶ 7 CPA's complaint raises three substantive causes of action.[FN4] First, CPA seeks an "Estoppel/Declaratory Judgment," alleging that **MERS** and Citi failed to respond to information requests regarding the interests of their "assignees." Without this information, CPA argues, Home Buyer and CPA, as Home Buyer's successor in title, are at risk of multiple claims on the Note that render proper discharge of the obligation impossible. CPA argues that this refusal to supply information estopped **MERS** and Citi from foreclosing on the Deed of Trust and that a declaratory judgment should be entered declaring "that defendants ... lack any interest under the Trust Deed."

¶ 8 In its second cause of action, CPA again seeks a declaratory judgment that **MERS** and Citi lack any interest under the terms of the Deed of

Trust. In support of this contention, CPA argues that **MERS**, Citi, and any investors who invested in Home Buyer's securitized debt, failed to obtain assignment of the Deed of Trust. Because of this, and in light of CPA's claimed acquisition of the property as a "bona fide purchaser" for value without notice of the other parties' claim under the Deed of Trust, CPA contends that **MERS**, Citi, and the securities investors cannot assert any rights under the Deed of Trust. As mentioned in the first cause of action, CPA attributes its lack of notice to **MERS's** and Citi's failure to respond to its information requests.

***3** ¶ 9 Third, CPA seeks a decree quieting title in its favor, "leaving any obligation under the Note unsecured by any interest in the subject property." As stated in the first two causes of action, CPA claims that because **MERS** and Citi failed to retain an interest under the Note, and because of the fragmentation of the debt via securitization, CPA no longer knows who the obligee of the debt is and therefore cannot safely discharge the obligation under the Note.

[3] ¶ 10 We agree with the district court that CPA's "underlying principle" that securitization of the Note nullified **MERS's** and Citi's rights under the terms of the Deed of Trust is a "mere conclusory allegation[ ]," *see Chapman ex rel. Chapman v. Primary Children's Hosp.,* 784 P.2d 1181, 1186 (Utah 1989), an "inference suggested but not established," and an "assumption." This conclusion is not affected by whether CPA was prepared for the motion to be treated as one for summary judgment; rather, our conclusion is consistent with the rights carved out for **MERS** by the terms of the Deed of Trust incorporated into the complaint, which, as the district court explained by adopting **MERS** and Citi's arguments, apply "regardless of who may have purchased, in whatever form, the right to receive payment under the Note." FN5 The Deed of Trust names **MERS** as "nominee for Lender and Lender's successors and assigns" and extends to **MERS** the right "to exercise any or all of [Lender's] interests, including, but not limited to, the right to foreclose and sell the Property, and to take any action required of Lender including, but not limited to, releasing and canceling th[e] Security Instrument." In interpreting an identical trust deed provision, the United States District Court for the District of Utah has held numerous times that even in the face of securitization, the provisions of the Deed of Trust continue to grant **MERS** "the authority to initiate foreclosure proceedings, appoint a trustee, and to foreclose and sell the property." *See* ***Commonwealth*** *Prop. Advocates, LLC v. Mortgage Elec. Registration Sys., Inc.,* No. 2:10–CV–340–TS, 2010 WL 3743643, at *3 (D.Utah Sept.20, 2010) (mem.); *see also* ***Commonwealth*** *Prop. Advocates, LLC v. First Horizon Home Loan Corp.,* No. 2:10–CV–375, 2010 WL 4788209, at *2 (D.Utah Nov.16, 2010) (mem.); *Burnett v. Mortgage Elec. Registration Sys., Inc.,* No. 1:09–CV–00069–DAK, 2009 WL 3582294, at *4 (D.Utah Oct.27, 2009) (mem.). We agree. We also agree with the federal district court's related rulings and the ruling of the state district court involved in this action that CPA has failed to explain how the securitization of the Note could have revoked this language in the Deed of Trust. *See First Horizon Home Loan Corp.,* 2010 WL 4788209, at *2 (involving identical language in a trust deed and a very similar fact pattern to the one in this case and concluding, "Plaintiff has not satisfied the pleading requirement to show that because of the alleged securitization **MERS** is no longer the lender's nominee with the authority to foreclose on behalf of the note holders.").

***4** ¶ 11 CPA relies on Utah Code section 57–1–35 in support of its "underlying principle" that **MERS** and Citi lost their rights under the Deed of Trust when the Note was securitized. CPA argues that the statute provides that the Deed of Trust, and all of the rights associated with it, were transferred with the Note to the investors when the Note was securitized, thereby stripping **MERS** and Citi of any rights carved out in the terms of the Deed of Trust. Impliedly, CPA argues that the statute prevents the original parties to the Deed of

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Trust from contracting in a manner that binds Lender's successors and assigns. Additionally, somewhat contrary to its reliance on section 57–1–35, CPA seeks a decree quieting title in its favor even though such a decree would, as CPA frames it, "leav[e] any obligation under the Note unsecured by any interest in the subject property."

[4][5][6] ¶ 12 When interpreting a statute, our goal "is to give effect to the legislature's intent." *State v. Harker,* 2010 UT 56, ¶ 12, 240 P.3d 780 (internal quotation marks omitted).

> To discern legislative intent, we look first to the statute's plain language. Also, when interpreting statutes, [w]e presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning. Additionally, [w]e read the plain language of [a] statute as a whole and interpret its provisions in harmony with other statutes in the same chapter and related chapters. Furthermore, if the plain meaning of the statute can be discerned from its language, no other interpretive tools are needed.

Id. (alterations in original) (internal quotation marks and footnotes omitted).FN6

[7][8] ¶ 13 Here, we believe the plain meaning of the statute is clear. The statute simply states, "The transfer of any debt secured by a trust deed shall operate as a transfer of the security therefor." Utah Code Ann. § 57–1–35 (2010). The plain language of this statute simply describes the long-applied principle in our jurisprudence that when a debt is transferred, the underlying security continues to secure the debt. *See Carpenter v. Longan,* 16 Wall. 271, 83 U.S. 271, 275, 21 L.Ed. 313 (1872) ("The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter."). Otherwise, separation of a debt from its security undermines the efficacy of the debt instrument, *see* Restatement (Third) of Prop.: Mortgages § 5.4 cmt. a (1997). *See also Best Fertilizers of Ariz., Inc. v. Burns,* 117 Ariz. 178, 571 P.2d 675, 676 (Ariz.Ct.App.1977) ("The note is the cow and the mortgage the tail. The cow can survive without a tail, but the tail cannot survive without the cow."), *rev'd on other grounds,* 116 Ariz. 492, 570 P.2d 179 (Ariz.1977). Essentially, an unsecured note is "economically wasteful and confers an unwarranted windfall on the mortgagor." *See* Restatement (Third) of Prop.: Mortgages § 5.4 cmt. a. A windfall for the mortgagor is a result that is contrary to the plain meaning of the statute and that does not coincide with the context of Chapter 1 of Title 57, which explains the foundational nuts and bolts of conveyancing, *see* Utah Code Ann. §§ 57–1–1 to –46. Because "[o]ur clear preference is the reading [of the statute] that reflects sound public policy, as we presume that must be what the legislature intended," *State v. Redd,* 1999 UT 108, ¶ 12, 992 P.2d 986, we interpret section 57–1–35 as ensuring the basic presumption that "[a] transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise," *see* Restatement (Third) of Prop.: Mortgages § 5.4. The plain language of the statute does nothing to prevent **MERS** from acting as nominee for Lender and Lender's successors and assigns when it is permitted by the Deed of Trust. Therefore, contrary to CPA's liberal citation of section 57–1–35, we do not interpret the statute as preventing, implying, or somehow indicating that the original parties to the Note and Deed of Trust cannot validly contract at the outset "to have someone other than the beneficial owner of the debt act on behalf of that owner to enforce rights granted in [the security instrument]," *see Marty v. Mortgage Elec. Registration Sys.,* No. 1:10–CV–00033–CW, 2010 WL 4117196, at *5 (D.Utah Oct.19, 2010) (mem.); *see also id.* at *6 ("Nothing in law or logic supports that such a delegation would constitute a separation of the rights under the trust deed from the ownership of the note, even accepting Plaintiff's interpretation of Utah Code Ann. § 57–1–35.").

***5** ¶ 14 Here, Home Buyer agreed to the terms of the Note that identified Citi as the servicing entity, and to the terms of the Deed of Trust that stated "[t]he Note or a partial interest in the Note

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(together with this Security Instrument) can be sold one or more times." Additionally, the Deed of Trust explicitly gave **MERS** the right to foreclose on behalf of "Lender and Lender's successors and assigns." The statute does not prohibit parties from contracting for these arrangements, and nowhere in the documents themselves is **MERS** explicitly prohibited from then assigning its beneficial interest under the Note to Citi.[FN7] Therefore, we reject CPA's assertion that Utah Code section 57–1–35 prohibits the original parties to the Note and Deed of Trust from agreeing "to have someone other than the beneficial owner of the debt act on behalf of that owner [and its successors and assigns] to enforce rights granted in a trust deed," *see id.*

II. Conversion of the Motion

[9] ¶ 15 Next, CPA argues that the district court erred by converting the motion to dismiss into a motion for summary judgment. "In order to justify reversal the appellant must show error that was substantial and prejudicial in the sense there is at least a reasonable likelihood that in the absence of the error the result would have been different." *Ortega v. Thomas,* 14 Utah 2d 296, 383 P.2d 406, 408 (1963). Because we believe CPA's case would have been dismissed with prejudice regardless of whether the district court converted the motion, we will proceed directly into the "reasonable likelihood" analysis and assume, without deciding, that the district court did err in converting the motion.

[10][11][12] ¶ 16 "In reviewing a dismissal pursuant to Utah Rule of Civil Procedure 12(b)(6), we assume that the factual allegations in the complaint are true and we draw all reasonable inferences in the light most favorable to the plaintiff." *Berneau v. Martino,* 2009 UT 87, ¶ 3, 223 P.3d 1128 (internal quotation marks omitted). "[M]ere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal or summary judgment." *Chapman ex rel. Chapman v. Primary Children's Hosp.,* 784 P.2d 1181, 1186 (Utah 1989); *accord Marty,* 2010 WL 4117196, at *2 ("The court need not, however, consider allegations which are conclusory, or that do not allege the factual basis for the claim." (internal quotation marks omitted)). Moreover, "[b]ecause these are legal conclusions rather than pleaded facts, we need not accept them as true." *Osguthorpe v. Wolf Mountain Resorts, L.C.,* 2010 UT 29, ¶ 11, 232 P.3d 999; *accord Marty,* 2010 WL 4117196, at *2 ("[T]he court is not bound by a complaint's legal conclusions, deductions, and opinions couched as facts." (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007))). The propriety of a district court's decision on a motion to dismiss is a question of law, which we review for correctness. *See Saint Benedict's Dev. Co. v. Saint Benedict's Hosp.,* 811 P.2d 194, 196 (Utah 1991).

***6** [13] ¶ 17 In arguing that the conversion of the motion to one for summary judgment was fatal to its case in a way a motion to dismiss would not be, CPA argues that its assertions regarding the role of securitization in this matter are factual allegations, rather than legal conclusions, deductions, or opinions. *See Marty,* 2010 WL 4117196, at *2. If that were so, the general rule that factual allegations in the complaint are presumed true for purposes of ruling on a motion to dismiss, *see Berneau,* 2009 UT 87, ¶ 3, 223 P.3d 1128, would control and the motion to dismiss would likely have to be denied. However, as we stated previously, we agree with the district court's determination that CPA's "underlying principle"-that **MERS** and Citi lost their rights under the Deed of Trust when the Note was securitized-is a not a factual allegation, but a statement of law, and an incorrect one at that, *see supra* ¶ 10. For that reason, we do not believe the district court's ruling would have been any different had it ruled on the original motion to dismiss because the district court need not take as true the non-factual statements pleaded in a complaint, *see Osguthorpe,* 2010 UT 29, ¶ 11, 232 P.3d 999. Thus, assuming without deciding that the conversion of the motion to dismiss to one for summary judgment was improper, it nonetheless constituted a harmless error. *See generally Jones v. Cyprus Plateau Min-*

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ing Corp., 944 P.2d 357, 360 (Utah 1997) ("Harmless errors are those that are sufficiently inconsequential so no reasonable likelihood exists that the error affected the outcome of the proceedings."); *Ortega,* 383 P.2d at 408.

CONCLUSION

¶ 18 CPA's "underlying principle" that securitization nullified **MERS's** and Citi's rights as expressly set forth in the Deed of Trust is an incorrect legal assertion. Thus, even if the district court had not converted Defendants' motion to dismiss into a motion for summary judgment, its ruling on the motion to dismiss would have produced the same result-a dismissal of CPA's case. In other words, any presumed error in converting the motion was harmless. Therefore, we affirm the district court's order dismissing CPA's complaint.

¶ 19 I CONCUR: CAROLYN B. McHUGH, Associate Presiding Judge.
¶ 20 I CONCUR IN THE RESULT: J. FREDERIC VOROS JR., Judge.

FN1. The property was sold at a trustee's sale on April 8, 2010, which resulted in Home Buyer's obligation under the Note being fully satisfied. The parties do not argue and we, accordingly, do not address the applicability of Utah Code section 57–1–28(3), *see* Utah Code Ann. § 57–1–28(3) (2010) ("The trustee's deed shall operate to convey to the purchaser, without right of redemption, the trustee's title and all right, title, interest, and claim of the trustor and the trustor's successors in interest and of all persons claiming by, through, or under them, in and to the property sold, including all right, title, interest, and claim in and to the property acquired by the trustor or the trustor's successors in interest subsequent to the execution of the trust deed, which trustee's deed shall be considered effective and relate back to the time of the sale.").

FN2. In general, securitization refers to the process of pooling debts, such as mortgage loans, and selling shares in the pool to investors as a means of infusing the lending markets with more capital. *See* Christopher L. Peterson, *Predatory Structured Finance,* 28 Cardozo L.Rev. 2185, 2186 n. 1 (2007); *see also id.* at 2188, 383 P.2d 406 (explaining that when securitization is not fraught with predatory lending practices, it generally provides consumers with "new access to cheap capital, making ... home ownership more affordable at the margins"); *id.* at 2196–2200, 383 P.2d 406 (explaining that securities investments offered through the government-sponsored organizations, Fannie Mae and Freddie Mac, and the government-backed organization, Ginnie Mae, are considered relatively liquid and low risk). **MERS** is a regular player in securitization and maintains a massive computer database that tracks the ownership and servicing rights associated with about half of all mortgages in the United States. *See id.* at 2211–12, 383 P.2d 406. **MERS** is also increasingly named as a "nominee" on mortgage notes, a position intended to simplify the note holder's ability to foreclose on a securitized mortgage. *See id.* at 2212–13, 383 P.2d 406 (explaining that **MERS's** role as nominee also serves the purpose of avoiding fees associated with updating county records to reflect ever-changing assignment interests). Ultimately, the financial crisis marking recent years, in a simplified sense, was a result of securitization and the predatory lending abuses common in its practice, *see id.* at 2214–15 & n. 182, 383 P.2d 406 (describing predatory lending practices to include lenders' disregard for their own underwriting guidelines, "misleading terms[,] high pressure sales[,] unnecessary insurance[,] unnecessarily harsh prepayment penalties[,] forgery [,] collusion with

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disreputable home improvement contractors or other vendors[,] distorting loan structure to avoid the application of consumer statutes[, and] extending credit without regard to the borrower's ability to repay”). Thus, when housing prices dropped around 2008, so did the value of mortgage-backed securities, as well as other “asset-backed securities,” causing a domino effect that “spread to other asset classes, causing financial institutions that were reliant on short-term collateralized debt for their funding[ ] severe liquidity problems.” *See* Bernard S. Sharfman, *Using the Law to Reduce Systemic Risk,* 36 J. Corp. L. 607, 611 (2011).

FN3. This argument rests on the bare assertion that the investors, in addition to **MERS** and Citi, failed to obtain an assignment under the Deed of Trust, thereby leaving the Deed of Trust in limbo—a tail without a cow, *see infra* ¶ 13. This argument is one of many made by CPA that appear to evolve throughout the record. For instance, in its complaint, CPA requested that title to the property be quieted in its name and sought a declaratory judgment stating the same. Yet during the hearing on the motion for summary judgment, CPA claimed it was merely seeking the opportunity to settle Home Buyer's debt with the securities investors, whom it deems to be the current owners of the debt. Likewise, in its reply brief, CPA explains that it is not arguing that “securitization ‘splits' the debt and the security, or that it renders either unenforceable[,] ... [but] that securitization lodges both in the investors.” However, a few pages later, CPA states, “Any theory upon which, following sale of the debt by lender, **MERS** retains rights in the trust deed, except as agent of the new owner of the debt, plainly effects a separation of the debt and security, rendering the security unenforceable.” Indeed, throughout the record, CPA's statements of numerous issues are often inconsistent to the point they appear self-contradictory. Thus, our recitation of CPA's issue statements are taken primarily from CPA's complaint and opening brief. We do so in recognition of rule 24 of the Utah Rules of Appellate Procedure, *see* Utah R.App. P. 24, compliance with which “permit[s] meaningful appellate review” by enabling us to understand the issues on appeal, *see Burns v. Summerhays,* 927 P.2d 197, 199 (Utah Ct.App.1996). Additionally, we decline to address arguments raised in CPA's reply brief to the extent that they are new arguments rather than responses to issues raised in the Appellees' opening brief and contradict statements made in CPA's opening brief and complaint. *See Brown v. Glover,* 2000 UT 89, ¶¶ 21, 23, 16 P.3d 540 (explaining the general rule that arguments raised for the first time in a reply brief may not be considered if the arguments are not addressing new issues raised in the appellee's brief).

FN4. The fourth cause of action sought reimbursement of expenses, fees, and reasonable attorney fees.

FN5. CPA argues that its “underlying principle” is a factual assertion, rather than a legal assertion. *See infra* ¶ 17. For reasons discussed in this opinion, we determine not only that CPA's securitization arguments are legal assertions, but that under the facts and circumstances of this case, they are incorrect legal assertions.

FN6. To the extent we could have resolved the matters on appeal without addressing CPA's statutory arguments, we nonetheless believe it is important to take this opportunity to interpret Utah Code section 57–1–35 because of the proliferation of

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nearly identical cases in the United States District Court for the District of Utah relying on this Utah statute. *Cf. In re S.A.,* 2001 UT App 308, ¶ 19, 37 P.3d 1172 ("[A]lthough this court, as a general rule, does not issue advisory opinions, we may address the construction of a statute that is frequently applied by the trial courts."). *See generally **Commonwealth** Prop. Advocates v. Mortgage Elec. Registration Sys., Inc.,* No. 2:11–CV–214–TS, 2011 WL 1897826, at *2 (D.Utah May 18, 2011) (mem.) (explaining that "the Court has seen a glut of ... cases flood its docket" in which the plaintiff argues that securitization strips **MERS** of its rights under the trust deed); *Scarborough v. LaSalle Bank,* No. 2:10–CV–0624–CW, 2011 WL 1549432, at *3 n. 5 (D.Utah Apr.21, 2011) (mem.) (calling plaintiff's interpretation of Utah Code section 57–1–35 "dubious"); *West v. Mortgage Elec. Registration Sys., Inc.,* No. 2:10–CV–1047, 2011 WL 1321404 (D.Utah Apr.6, 2011) (mem .); ***Commonwealth** Prop. Advocates v. CitiMortgage, Inc.,* No. 2:10–CV–00885–CW, 2011 WL 98491 (D.Utah Jan.12, 2011) (mem.), *reconsideration denied,* 2011 WL 675422 (D.Utah Feb.16, 2011); *Marty v. Mortgage Elec. Registration Sys.,* No. 1:10–CV–00033–CW, 2010 WL 4117196 (D.Utah Oct.19, 2010) (mem.).

FN7. In its reply brief, CPA obliquely argues that Lender's sale of the Note to Fannie Mae, and the Note's subsequent securitization, terminated any authority granted to **MERS** by the trust deed terms absent "some further agreement signed by the investors," as is required by the statute of frauds. CPA describes the trust deed provision as an "agreement for services not to be performed within one year [and] a transfer of an interest in realty, including the trustee's powers under a deed of trust." CPA argues that "agreement[s] subject to the statute of frauds cannot be assigned or assumed, except by a writing." CPA describes this statute of frauds concern as one of many potential issues that could arise upon securitization in general, and has not outright alleged that this is what has happened here. The inference, however, is that this concern is one of many that CPA would have researched during discovery had the case not been dismissed by the district court. Nonetheless, even assuming this argument had merit, we decline to address it because CPA raises it for the first time in its reply brief. *See Allen v. Friel,* 2008 UT 56, ¶ 8, 194 P.3d 903 ("It is well settled that issues raised by an appellant in the reply brief that were not presented in the opening brief are considered waived and will not be considered by the appellate court." (internal quotation marks omitted)).

Utah App.,2011.
Commonwealth Property Advocates, LLC v. Mortg. Electronic Registration System, Inc.
--- P.3d ----, 2011 WL 2714429 (Utah App.), 686 Utah Adv. Rep. 11, 2011 UT App 232

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C

Supreme Court of Utah.
FRAILEY
v.
McGARRY.

No. 7312.
Nov. 18, 1949.

Action by Vern Frailey against John C. McGarry to rescind a contract for the sale of land on the ground of fraud, and because the contract was a speculation on the part of the defendant in public waters of the state.

The 5th Judicial District Court, Iron County, Will L. Hoyt, J., entered a decree for the defendant, and the plaintiff appealed.

The Court, Latimer, J., held that the plaintiff had waived right to rescind, that the contract was not a speculation in the public waters of the state, and that the plaintiff had breached the contract, and affirmed the judgment.

FN1. Taylor v. Moore, 87 Utah 493, 51 P.2d 222.

FN2. McKellar Real Estate & Investment Co. v. Paxton, 62 Utah 97, 218 P. 128.

FN3. Le Vine v. Whitehouse, 37 Utah 260, 109 P. 2, Ann.Cas.1912C, 407.

West Headnotes

[1] Contracts 95 ⚷271

95 Contracts
95IV Rescission and Abandonment
95k271 k. Election to Rescind and Notice. Most Cited Cases

A person claiming the right to rescind a contract because of misrepresentations or fraud, must, after discovery of the fraud, announce his purpose and adhere to it.

[2] Vendor and Purchaser 400 ⚷120

400 Vendor and Purchaser
400III Modification or Rescission of Contract
400III(C) Rescission by Purchaser
400k120 k. Election to Rescind, and Notice. Most Cited Cases

The purchaser must evidence his intent to rescind by some unequivocal act either by notice or some act amounting to notice of intent to rescind.

[3] Contracts 95 ⚷271

95 Contracts
95IV Rescission and Abandonment
95k271 k. Election to Rescind and Notice. Most Cited Cases

A defrauded party, after learning the truth, will not be permitted to go on deriving benefits from the transaction and later elect to rescind, nor will he be permitted to go on with the contract for the purpose of securing benefits which, although not directly conferred by the contract, are, nevertheless, made possible as a result of the contract, only to later claim a right to rescind when he discovers the benefits to be acquired will not be great enough to compensate him for the loss he will sustain by reason of the fraud.

[4] Vendor and Purchaser 400 ⚷114

400 Vendor and Purchaser
400III Modification or Rescission of Contract
400III(C) Rescission by Purchaser
400k114 k. Estoppel or Waiver. Most Cited Cases

Where the purchaser discovered in March, 1946, that there was not ample water available to irrigate 960 acres covered in contract of purchase, as represented by the vendor, and expressed dissatisfaction with the contract, and thereafter attempted

to obtain water rights under the contract, and did not notify the vendor of intention to rescind until some ten months later, right to rescind on ground of alleged fraud was waived.

[5] Vendor and Purchaser 400 ⚷120

400 Vendor and Purchaser
400III Modification or Rescission of Contract
400III(C) Rescission by Purchaser
400k120 k. Election to Rescind, and Notice. Most Cited Cases

Mere expression of dissatisfaction with contract for purchase of land is not sufficient notice of election to rescind.

[6] Vendor and Purchaser 400 ⚷120

400 Vendor and Purchaser
400III Modification or Rescission of Contract
400III(C) Rescission by Purchaser
400k120 k. Election to Rescind, and Notice. Most Cited Cases

Purchaser of land after learning that representations of the vendor were fraudulent could not claim an interest in the contract, and upon failure to benefit himself then claim the right to rescind.

[7] Contracts 95 ⚷108(2)

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k108 Public Policy in General
95k108(2) k. Particular Contracts. Most Cited Cases

Speculation in the public waters of the state is against the best interests of the people and the statute against such speculation merely states the general rule that would obtain in the absence of statute. U.C.A.1943, 100-3-8.

[8] Contracts 95 ⚷108(1)

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k108 Public Policy in General
95k108(1) k. In General. Most Cited Cases

Contracts 95 ⚷141(3)

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k141 Evidence
95k141(3) k. Weight and Sufficiency. Most Cited Cases

Contract obligations in contravention of public policy may ordinarily be avoided by the contracting parties, but the law favors the right of men of full age and competent understanding to contract freely, and before this right is denied on the grounds of public policy there must be a showing free from doubt that the contract is against public policy and not merely one that has turned out unfortunately for one party or one that was imprudently made.

[9] Contracts 95 ⚷153

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k153 k. Construction to Give Validity and Effect to Contract. Most Cited Cases

If by any reasonable construction the contract can be declared lawful and not in contravention of public welfare, it is the duty of the court to so interpret it.

[10] Contracts 95 ⚷108(2)

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k108 Public Policy in General
95k108(2) k. Particular Contracts.

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Most Cited Cases

A provision in contract for sale of land that on default purchaser defendant would become the assignee of any water rights which might be acquired by the purchaser in order to irrigate such land was not against public policy of the state on the ground that the vendor was seeking to speculate in public waters of the state, but was lawful since it merely permitted the purchaser to add improvements to the land he was purchasing on condition that in the event of default the improvements should revert to vendor. U.C.A.1943, 100-3-8.

[11] Vendor and Purchaser 400 ⚷123

400 Vendor and Purchaser
400III Modification or Rescission of Contract
400III(C) Rescission by Purchaser
400k123 k. Actions for Rescission. Most Cited Cases

Where purchaser was not certain whether he requested vendor to furnish an abstract or deliver a deed, and claimed that he had made a written demand but the contents of the writing and the date of sending the notice were never disclosed, the showing was too uncertain to justify a decree rescinding contract for failure of the vendor to comply with demand for abstract.

[12] Vendor and Purchaser 400 ⚷92

400 Vendor and Purchaser
400III Modification or Rescission of Contract
400III(B) Rescission by Vendor
400k88 Right to Rescind
400k92 k. Breach of Covenant or Condition in General. Most Cited Cases

Where purchaser had failed to pay the taxes and had not tilled or cultivated any of the land and had refused to drill well and had attempted to change the points of diversion of water and had notified the vendor that he had rescinded and would not comply with the conditions of the contract, court properly decreed that purchaser had forfeited all rights under the contract.

****842 *506** Elias Hansen, Salt Lake City, for appellant.

Cline, Wilson & Cline, Milford, for respondent.

LATIMER, Justice.

This is an action to rescind a contract for the sale of nine hundred and sixty acres of land located in Beryl Valley in the southern part of the state. The agreement was entered into by and between plaintiff and defendant on the 7th day of December, 1945. The parties will be referred to as they appeared in the court below.

The contract provides that plaintiff is to buy and defendant to sell the land for the sum of $28,800.00, two thousand six hundred dollars of which was received as a down payment. The provision for paying the remaining balance of $26,200.00 is as follows: 'On any and all lands where water well permits are granted and allowing water for any given acerage, said acerage is to be tilled and cropped. On or before January 1st. being termed the end of each harvest season said buyer is to pay to said seller, the sum of Ten Dollars per acre cash and in addition thereto five percent (5%) interest on all defered payments on each and every acre tilled and cropped, until this full purchase price together with interest has been paid. The above given $2,600.00 cash payment ***507** receipted herein is to be credited on the next payment which becomes due and payable on or before January 1st. 1947.'

A further provision of the contract material to the case is: 'It is agreed that in the event the buyer or any assignee shall make application to appropriate water or shall procure a certificate of appropriation to appropriate water or shall procure a certificate to appropriate water from wells located upon the said premises and said buyer or assignee or assignees shall thereafter default in this contract, the seller shall immediately become the assignee of any such application or appropriation and the State Engineer of the State of Utah is hereby authorized to

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recognize said seller as the assignee of any such application and in the event a certificate of appropriation has issued to the said buyer, the water rights thereunder shall be considered as appurtenant to the said premises and in the event of default, the title thereto shall immediately pass to the seller.'

Plaintiff sought to rescind the contract on four theories stated in separate causes of action: (1) that plaintiff was induced to enter into the contract by fraudulent representations made by defendant; (2) that defendant refused to furnish plaintiff an abstract of title to the property upon demand as required in the contract; (3) that the contract is against the public policy of this state and particularly 100-3-8, U.C.A. 1943, in that defendant by the contract is seeking to speculate in the public waters of this state; (4) that the contract is so uncertain as to render it invalid.

Defendant filed general demurrers to all four causes of action which were by the court sustained to all except plaintiff's first cause of action. The court later reinstated the cause of action dealing with the right of plaintiff to rescind because of defendant's speculation in the sale of public waters. Defendant filed his answer and counterclaim in which he denied he had perpetrated any fraud upon the plaintiff. He counterclaimed and sought to have the court declare that plaintiff had breached and abandoned the contract, that the amount paid by plaintiff was forfeited, that he, defendant, be released from all obligations ***508** to convey the premises, and that he be given the right to immediate possession.

The cause was tried to the court without a jury. The trial judge held the contract was subject to rescission because of misrepresentations made by defendant to the plaintiff as to the availability of water for irrigation of the land in dispute, but decreed that defendant would not be required to refund the $2,600.00 received by him under the contract unless the plaintiff and his brother-in-law, J. E. Thompson, would assigns and transfer to defendant the rights they have acquired under the applications to appropriate water filed by them in connection with the contract. The court granted plaintiff fifteen days in which to elect whether to transfer to defendant the ****843** water rights acquired by himself and Thompson. The court further provided that, should plaintiff elect not to convey the rights obtained then defendant would be released from any obligation to convey the land or refund the down payment and plaintiff's rights under the contract would be forfeited for his breach of covenants.

The plaintiff refused to comply with the conditions imposed and the court thereafter decreed that the contract was not subject to rescission, that plaintiff had defaulted in and breached certain conditions of the contract, and, that all of plaintiff's rights under the contract were lost and forfeited. From the judgment as entered, plaintiff has appealed.

It appears that plaintiff was formerly a resident of Tulelake, California. While there he read certain advertisements published by defendant in 1945 regarding land for sale in the Beryl Valley near Cedar City, Utah. As a result of thesd advertisements, plaintiff made a trip to Cedar City to learn more about this land. He made several trips into the valley with the defendant and studied charts regarding the rating of the land. The parties discussed the availability of water with which to irrigate land in the ***509** valley. Plaintiff testified that defendant informed him there was an abundance of water flowing into a large underground lake under the valley; that there had never been any trouble obtaining plenty of water for irrigation; and, that it was a mere formality to acquire such water, the only requirement being, to apply to the State Engineer for permission to drill and after the applications had been advertised for thirty to sixty days, permits would be granted. Plaintiff informed defendant he was interested in acquiring land upon which to raise potatoes, hay and grain and after being assured the land was suitable for such purposes he entered into a contract with defendant to purchase one hundred and sixty acres. He immediately made application

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for one well. Plaintiff then left for California to secure some heavy machinery he owned in order to farm the land he had purchased. While in California plaintiff received a letter from defendant informing him that he, defendant, could sell plaintiff a better and larger tract of land than the one plaintiff had already purchased. On plaintiff's return to Cedar City, he, with defendant's consent, returned the contract for the one hundred and sixty acres, assigned the water application to defendant and entered into the contract involved in this lawsuit. Immediately thereafter, the plaintiff signed five underground water applications and had his brother-in-law Jerold E. Thompson, sign four more. However, all the land was to be owned by plaintiff and the applications in Thompson's name were to be for plaintiff's benefit and used on plaintiff's land. Plaintiff indicated that Thompson would work for him on a salary and if Thompson cared to purchase some of plaintiff's land in the future, he would have the right to do so and would be given water sufficient to irrigate the land he purchased.

After signing the contract and making the water applications, plaintiff again returned to California. He testified that within a month or so he began hearing rumors that there was not an abundance of water in the valley and he ***510** became worried when his applications were not advertised by the State Engineer as he had been told would be done. He discussed the matter with defendant who advised him it would be best to go to Salt Lake City and contact the State Engineer personally. He followed this advice and learned from the assistant state engineer that the applications would not be approved. The date of this conference is not fixed. On March 2, 1946, he received a letter from the State Engineer informing him that an alarming number of applications for water in the Beryl Valley had been filed in his office within the last few years, and it would be impossible to satisfy them all; that as a result, no applications had been approved by the State Engineer for some time prior to the filing of plaintiff's applications; that none of them would be approved until the engineer had had an opportunity to investigate the water available in the Beryl Valley underground water system; and, that he, the engineer, felt certain plaintiff's applications would not receive favorable ****844** consideration for at least a year. Plaintiff testified this news came to him as a terrible shock. On April 10, 1946, the Governor of this state, by proclamation, suspended the right of the public to appropriate surplus or unappropriated waters in the Beryl Valley. On April 21, 1946, plaintiff by letter, requested permission of the State Engineer to drill two of his proposed nine wells. On April 25, 1946, the State Engineer in answer to the letter, indicated that in a recent meeting, the water users of Beryl Valley had expressed their willingness to permit some additional wells to be drilled in the area in order to develop the valley and they were of the opinion that more water could be obtained without seriously impairing existing rights; and that under these conditions, plaintiff could proceed to drill these two wells, but with the understanding that he did so at his own risk and without definite assurance that he would be given a permanent water right.

Thereafter, on May 23rd, 1946, plaintiff sent another letter to the State Engineer asking if he could change the ***511** point of drilling his wells to land some six miles away which he anticipated he would purchase. He also asked whether defendant could prevent him from doing so. In reply to plaintiff's letter, the State Engineer indicated he, the plaintiff, could change his point of diversion under the law unless he had contracted with defendant to turn the applications over to him in case he, the plaintiff, should default. Shortly thereafter, plaintiff contracted an attorney who, by letter, advised the State Engineer, on June 13, 1946, that plaintiff had decided to let the land go back and forfeit the contract but wanted to move the wells off the land before he was in default. The next day, plaintiff filed his change applications with the State Engineer, and on August 9, 1946, his brother-in-law, Thompson, filed change applications on the wells in his name. These were all protested by defendant. It was not until January 15, 1947, that plaintiff gave

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defendant notice that he intended to rescind.

Plaintiff has relied upon various grounds in claiming the right to rescind the contract. The principal one asserted by him is that he was induced to enter into the contract by reason of fraudulent representations made by defendant. Plaintiff testified that at the time he entered into the contract he was not aware of the legal procedure to be followed in order to secure underground water rights in the State of Utah; that he informed defendant that he, the plaintiff, was only interested in purchasing lands suitable for agricultural purposes and would not purchase lands upon which water was not available for the irrigation and maturing of crops; that notwithstanding plaintiff's statements, defendant, as a real estate salesman, represented to plaintiff that he, the defendant, was familiar with the nature and extent of water available for the irrigation of the land in question; that it would be a mere formality to apply to the State Engineer for irrigation water and in the course of sixty days the plaintiff would be permitted to drill wells for enough water to irrigate the lands here involved; and that by reason of defendant's representations, he entered ***512** into the contract fully believing he would be able to secure water sufficient to irrigate the nine hundred and sixty acres he had purchased.

[1][2][3] After reviewing the record of events as they transpired, we find it unnecessary to determine whether defendant, by fraud, induced the plaintiff to enter into the contract. There are facts present in the instant case which preclude plaintiff from rescinding the contract for the reasons he alleges. It is well settled by decisions from this court that a person claiming the right to rescind a contract because of misrepresentations or fraud, must, after discovery of the fraud, announce his purpose and adhere to it. Taylor v. Moore, 87 Utah 493, 51 P.2d 222. We have also held that the purchaser must evidence his intent to rescind by some unequivocal act either by notice or some act amounting to notice of intent to rescind. McKellar Real Estate & Investment Co. v. Paxton, 62 Utah 97, 218 P. 128. Moreover, a defrauded party, after learning the truth will not be permitted to go on deriving benefits from the transaction and later elect to rescind. ****845**Le Vine v. Whitehouse, 37 Utah 260, 109 P. 2, Ann.Cas. 1912C, 407. Nor will he be permitted to go on with the contract for the purpose of securing benefits which although not directly conferred by the contract, are nevertheless made possible as a result of the contract, only to later claim a right to rescind when he discovers the benefits to be acquired will not be great enough to compensate him for the loss he will sustain by reason of the fraud.

[4][5][6] The fraud alleged by plaintiff as grounds for rescission consisted of the alleged statements made by defendant that there was ample water available to irrigate the 960 acres covered in the contract and that it was a mere formality to secure the right to drill wells in order to obtain that water. The falsity of such statements, if made, was made known to the defendant many months before he decided to rescind the contract. He became aware of the fact that there was a supposed shortage of water ***513** and that it would be more than a mere formality to secure permission to drill his wells when he received his first disappointing letter from the State Engineer on March 2, 1946. Yet he did not notify defendant of his intention to rescind until some 10 months later. Black in his work on Rescission and Cancellation, Sec. 536 states the law to be: '* * * It must be remembered that a contract induced by fraud, false representations, mistake, etc., is not void but only voidable, and it is entirely within the right of the injured party to affirm it or treat it as valid and subsisting. In this respect he has a choice or election, and he should not be required to make his decision instantly. The true doctrine is that, after discovering the facts justifying rescission, the party is entitled to a reasonable time in which to decide upon the course he will take. But this does not mean that he will be indulged in a vacillating or tesitating course of conduct, but that he must act with such a measure of promptness as can fairly be called 'reasonable' with reference to all

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the circumstances of the particular case. Particularly, he must, if possible, avoid such a delay as will make the ensuing rescission injurious to the other party or to the intervening interests of third persons. He must use reasonable diligence in ascertaining the facts which may entitle him to rescind, and must act so soon after the discovery of them as that the opposite party will not be unnecessarily prejudiced by the delay. 'The rule is that he who would rescind the contract must offer to do so promptly on discovering the facts that will justify a rescission, and while he is able of himself, or by the judgment of the court, to place the opposite party substantially in statu quo.''

Plaintiff had little or no cause for an extended delay in rescinding as he does not claim he was subsequently led to believe that he would be able to secure water sufficient to irrigate 960 acres or any substantial part thereof. Even when he received permission to drill two wells at his own risk, he could not possibly have thought they would be sufficient to irrigate the entire tract. As a matter of fact, he attempted to induce defendant to reduce the number of acres he would be required to purchase under the contract when it became apparent to him that it would be difficult if not impossible to secure enough water for his purposes. For almost a year plaintiff vacilated between reliance on the contract, obtaining a modified contract, abandonment ***514** of the contract and finally rescission. When he finally concluded to adopt the latter course, he still maintained his right to retain the benefits he received under the contract.

In attempting to justify his delay in electing to rescind the contract, plaintiff argues this is not a case which permits a party to readily ascertain whether there is sufficient water available to supply the needs of the land which plaintiff sought to purchase. While we agree that the situation in which plaintiff found himself prevented him from being able to tell how much, if any, water he would eventually be given, we think the record is clear that he was informed early in 1946 that in all probability he would not get any water for at least one year and that he never would secure enough water to irrigate 960 acres or any acreage approximately that amount. No good reason appears to justify a delay of some ten months time.

****846** Plaintiff further contends that his acts and conduct after he learned he would not be able to secure the water he needed, made it clear to defendant that he, the plaintiff, did not intend to be bound by the contract. We do not so interpret them. There is a difference between an expression of dissatisfaction and one of intent to rescind. While the record contains evidence of the fact that defendant was dissatisfied with the contract, we are convinced that plaintiff's conduct was insufficient to convey to the defendant the impression that plaintiff was electing to rescind the contract. Plaintiff admitted that he did not make up his mind to rescind until September, 1946, some six months after he was informed he would never obtain the water he would need to irrigate the land. He apparently wanted to keep the contract in good standing until the water rights were transferred to other lands and his attorney and agent, in substance and effect so informed the State Engineer. At that time, plaintiff was not considering rescission; he was contemplating abandonment. If, the day before plaintiff gave defendant written notice he was rescinding the contract, he had found the contract advantageous***515** in spite of his original disappointment, he could have enforced the contract. An expression of great disappointment may suggest some subsequent legal action but not necessarily rescission. Moreover, long after the expression of disappointment plaintiff was seeking to realize benefits from the contract. Subsequent to being informed he would, in all probability, never receive water sufficient to irrigate 960 acres, plaintiff continued his efforts to secure some of the water for which he had applied. After permission to drill two wells was granted he asked the defendant to reduce the acreage and failing in this he asked the State Engineer to allow him to change the points of diversion and use to land obtained or to be obtained from other parties. Plaintiff could

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not have secured water rights in the valley without having land upon which to use it and after having used the contract to obtain the rights he could not get permission from the State Engineer to change his point of diversion or use so long as defendant claimed an interest in the contract. Plaintiff founded his claim to water in that valley on his interest in the contract and he relied on the contract all of the time he was attempting to deal with the state engineer to change the use and point of diversion. While prior to the Governor's proclamation, plaintiff might have used other land as the basis for applications for water, the fact remains that he continued to use the contract in question for his own benefit until he fully realized his rights to deal with the applications were being defeated by the contract. He cannot claim an interest in a contract under these circumstances and upon failure to benefit himself then claim the right to rescind.

The plaintiff next contends that under 100-3-8, U.C.A. 1943, the contract is against the public policy of this state and that the court therefore erred in striking plaintiff's third cause of action. This cause of action was reinstated so the problem is whether the court erred in not holding the contract void because inimical to public welfare. The portion of that statute to which we have been referred by counsel provides as follows: ***516** 'It shall be the duty of the state engineer, upon the payment of the approval fee, to approve an application if * * * 4. The applicant has the financial ability to complete the proposed works and the application was filed in good faith and not for purposes of speculation or monoply'.

We accept the trial court's finding that at the time of the sale the land was worth $1.50 per acre without water and $30.00 per acre with water sufficient to irrigate it. Referring back to the terms of the contract it will be observed that the necessity, the right and the expense of making application for the appropriation of water was to be vested in and assumed by the plaintiff. Also, that should be plaintiff default in the contract defendant would become the assignee of any water rights which might be acquired by the plaintiff. Plaintiff argues that under the contract defendant is to receive a profit of $27,360.00 if and when the plaintiff, at his sole expense, made application to appropriate ****847** water or procured a certificate to appropriate water from wells located on the property and that the contract so construed clearly evinces planned speculation in the public waters of this state.

[7][8][9][10] We do not so view the contract. There can be no doubt concerning the duty of this court to invalidate contracts which have a tendency to be injurious to the public welfare. It is equally clear that speculation in the public waters of this state is against the best interests of its people. Although the legislature has given formal expression to this principle, the principle would be equally true in the absence of statute. While contract obligations in contravention of public policy may ordinarily be avoided by the contracting parties, the law favors the right of men of full age and competent understanding to contract freely and before this right is denied on the grounds of public policy, there must be a showing free from doubt that the contract is against public policy and not merely one that has turned out unfortunately for one party or one that was imprudently made. If by any reasonable construction the ***517** contract can be declared lawful and not in contravention of public welfare, it is our duty to so interpret it.

The provision of the statute upon which plaintiff relies places a duty on the State Engineer to approve an application for water if filed in good faith and not for the purpose of speculation and monopoly. Leaving aside the fact that the State Engineer approved three of plaintiff's applications, which would inferentially suggest no violation of the section, we are unable to follow plaintiff's theory that defendant is the speculator. Neither party is seeking to enforce the terms of the contract. Plaintiff is seeking rescission and defendant is seeking forfeiture. Defendant's only right to the use of the water or to any filings does not come into ex-

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istence unless plaintiff defaults in his contract. Plaintiff's complaint seems to be that he could, in good faith, obtain the water for use on the land but that if he were to default, the water obtained in good faith, could not revert to the seller because he, the seller, would then be speculating in water or obtaining a monopoly. If plaintiff could acquire the right to use all of the water and such use would not create a monopoly in his hands, it would not create a monopoly in the hands of the defendant. Likewise, if the plaintiff was not obtaining the water for speculative purposes then the defendant could not be charged with obtaining the water for such purposes. Rather than construing the contract as being contrary to public policy we construe it to be a contract which permits the plaintiff to add improvements to the land he is purchasing and in the event he defaults, the improvements so constructed revert to the seller. In so construing the contract, we do not wish to be understood as touching on the question of the reasonableness and fairness of the terms imposed.

Plaintiff next contends the court erred in granting defendant's motion to strike the second cause of action in which plaintiff founded his right to rescind upon defendant's failure and refusal to furnish plaintiff with an abstract of title, notwithstanding plaintiff's demand for such ***518** abstract. The provision of the contract relied upon by plaintiff in this connection is as follows: 'The Seller on receiving the payments herein reserved to be paid at the times and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances except as herein mentioned and except as may have accrued by or through the acts or neglect of the Buyer, and to furnish at his expense, an abstract or a policy of title insurance, at the option of the Seller, brought to date at time of sale or at time of delivery of deed at the option of Buyer.'

[11] Defendant's duty under this clause of the contract was to furnish, at his expense, an abstract or policy of title insurance (at his option) at the time of sale or at the time of delivery of the deed (at the option of the plaintiff). According to plaintiff's testimony, he was not certain whether he requested defendant to furnish an abstract or deliver a deed. Furthermore, while he claimed to have made a written demand the contents of this writing and the date of sending were never disclosed. Such ****848** an uncertain showing would not justify a court in entering a decree rescinding a contract for failure of the other party to comply with the demand.

[12] Plaintiff next complains that the court erred in awarding defendant relief under his counterclaim and particularly in adjudging that plaintiff had defaulted in the contract; that the contract was forfeited and terminated and that all rights of the plaintiff in and to all of the property therein described were lost, cancelled, forfeited and terminated. The record discloses that plaintiff admitted not having paid the taxes and not having tilled or cultivated any of the land. The failure to pay taxes constituted a breach of the contract and this, together with the acts and conduct of plaintiff in refusing to proceed with drilling a well, in attempting to change the points of diversion, and in notifying the defendant he had rescinded and would not comply with the conditions of the contract ***519** justified the court in declaring that the rights plaintiff acquired under the contract were forfeited. The decree is appropriate insofar as plaintiff is involved and we need not concern ourselves with the rights of persons not parties in this suit. While some of the applications for water were filed in the name of Thompson the record shows plaintiff to be the true owner and that Thompson was selected as a convenient applicant to avoid close scrutiny by the State Engineer.

We have reviewed the other errors assigned by plaintiff and find them without substantial merit. The judgment of the lower court is therefore affirmed. Costs to respondent.

PRATT, C. J., and WADE and McDONOUGH, JJ.,

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concur.
WOLFE, Justice.
I concur.

Assuming for the case that McGarry's representations were actionable misrepresentations, which I doubt, I think that some or perhaps most of Frailey's efforts set out in the opinion were legitimate and reasonable efforts to get himself out of a bad situation into which McGarry's representations had induced him to enter. They would take time to work out. In such a case as this what is a reasonable time to decide and announce the intent to rescind may be considerably longer than in the case where the contract presents a simple matter for extrication. And even Frailey's inquiries into the possibilities of obtaining a change in the point of diversion and point of use of the water applied for with an intent to desert the contract may be in line with an exploration into means of retiring with as little loss as possible from a bad situation brought about by the supposed misrepresentation of McGarry. But the total time taken from March 2, 1946 (when Frailey was informed that there was insufficient water in the basin ***520** to supply all prior applications), until January 15, 1947, in electing to rescind the contract is longer than a reasonable time to elect to rescind, in view of the fact that he knew in March, 1946, that there was insufficient water and in June, 1946, that he could not transfer the water he had applied for because he would then not be in position to restore McGarry's rights. As I understand the prevailing opinion, it is not in any way contrary to this view that considerable time might be accorded to exercise an election to rescind in cases such as this where the grounds of rescission may not be so clear and where the election may depend upon reducing to a reasonable certainty some of the contingencies which may be in the path of rescission. I understand the opinion desires to lay before the reader the panorama of events stretching between the making of the contract in December of 1945, and the actual announced election to rescind which occurred on January 15, 1947, in order to present the entire picture of hesitation and vacillation rather than to bear down on any or all of the various events in the panorama as indicative of showing that the ‘point of no return’ had been passed, and that the over-all picture reveals a stretch of time beyond what the law would consider reasonable in this case to unequivocally elect to rescind and to notify McGarry of such election.

As to the question of McGarry's speculation in water rights or his efforts to obtain ****849** a monopoly in water as meant by the statute, I concede that the record does not disclose such as far as this case is concerned. I think the place to head off speculation in water or a tendency to gain a monopoly in a water source must be in the Engineer's office.

I am not sure that I can fully concur in the test that if in this case it could not be said that Frailey was speculating in water, it could not be said that McGarry was doing so. They may stand on different levels insofar as their opportunity or potentialities for speculation or monopoly are concerned. But I am not prepared to say that in this case there is evidence that McGarry's enterprise involved or was directed to speculation or the obtaining of a monopoly.

Utah 1949
Frailey v. McGarry
116 Utah 504, 211 P.2d 840

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Supreme Court of Utah.
Karl WINSNESS and Associates, a partnership, Plaintiff and Appellant,
v.
M. J. CONOCO DISTRIBUTORS, INC., a Utah Corporation, Defendant and Respondent.

No. 15501.
March 6, 1979.

Lessor brought action against lessee for breach of service station lease agreement. The Third District Court, Tooele County, Peter F. Leary, J., directed verdict for lessee, and lessor appealed. The Supreme Court, Stewart, J., held that: (1) evidence consisting of traffic flow data, expert testimony with respect to percentage of passing cars which would be expected to stop, and gallonage figures for periods of known continuous operation was sufficient to create jury question as to damages arising from breach of provision of lease agreement requiring lessee to keep service station open 24 hours per day, and (2) issue remained as to whether lessee's failure to construct sewage lagoon pursuant to lease agreement was an independent covenant or whether it was dependent upon lessor's building of restaurant.

Reversed and remanded.

West Headnotes

[1] Trial 388 ⚷142

388 Trial
388VI Taking Case or Question from Jury
388VI(A) Questions of Law or of Fact in General
388k142 k. Inferences from Evidence. Most Cited Cases

Trial 388 ⚷178

388 Trial
388VI Taking Case or Question from Jury
388VI(D) Direction of Verdict
388k178 k. Hearing and Determination. Most Cited Cases

In reviewing evidence on directed verdict, court is required to view evidence in light most favorable to plaintiff, and if court finds there is doubt as to whether reasonable minds might arrive at different conclusions, then matter presents question of fact that should be determined by jury.

[2] Contracts 95 ⚷141(1)

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k141 Evidence
95k141(1) k. Presumptions and Burden of Proof. Most Cited Cases

Party who seeks to escape from obligation of contract because of governmental regulation has burden of proving such government regulation.

[3] Damages 115 ⚷184

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k184 k. In General. Most Cited Cases

Where there is strong evidence of fact of damage, defendant should not escape liability because amount of damage cannot be proved with precision.

[4] Landlord and Tenant 233 ⚷134(6)

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(B) Possession, Enjoyment, and Use
233k134 Use of Premises
233k134(6) k. Actions by Landlord. Most Cited Cases

In action for breach of service station lease

agreement, evidence including traffic flow data, expert testimony with respect to percentage of passing cars which would be expected to stop, and gallonage figures for periods of known continuous operation was sufficient to create jury question as to damages arising from breach of provision of lease requiring lessee to keep service station open 24 hours per day.

[5] Landlord and Tenant 233 157(1)

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(D) Repairs, Insurance, and Improvements
233k157 Improvements by Tenant and Covenants Therefor
233k157(1) k. Covenant by Lessee to Make Improvements. Most Cited Cases

In action for breach of service station lease agreement, issue existed as to whether lessee's promise to build sewage lagoon pursuant to agreement was an independent covenant or whether it was dependent upon lessor's building of restaurant.

***1303** Thomas A. Duffin, Craig Stephens Cook, Salt Lake City, for plaintiff and appellant.

Allen H. Tibbals and Michael Z. Hayes of Tibbals & Staten, Salt Lake City, for defendant and respondent.

STEWART, Justice:

Plaintiff and defendant entered into a land lease agreement dated November 24, 1971, wherein plaintiff ("Lessor") leased certain land to defendant ("Lessee") in Delle, Utah, for the purpose of constructing and operating a service station thereon. Delle is located approximately 50 miles west of Salt Lake City on the road to Wendover and consists of an old, small cafe, motel, and service station. Subsequent to the signing of the land lease agreement, Lessee constructed a gasoline service station on the interstate highway which it opened to the public sometime in July, 1972. The November 24 lease agreement provided, inter alia, that Lessee would operate the station 24 hours each day and pay rental based in part on the quantity of motor fuel sold. On ***1304** October 3, 1972, plaintiff sued defendant for failure to operate the station continuously and for other breaches of the agreement. That action resulted in a judgment pursuant to a stipulation on April 22, 1974. The judgment ordered that the lease be continued in effect with certain modifications. As relevant here the provisions of the judgment are that (1) Lessee would, during the remaining lease term, operate the station on a 24-hour per day basis except as product shortage might compel curtailment, and (2) Lessee would within one year construct a sewage lagoon of specified length and width which would meet minimum state and county requirements.

On August 25, 1975, Lessor instituted this action claiming damages subsequent to the date of the stipulated judgment. The complaint, as amended, alleged five claims for relief. The first claim for relief alleged damages for failure to operate the station on a 24-hour basis as provided in the lease and subsequent stipulated judgment. The second claim for relief claimed damages based upon Lessee's incorrect reporting of actual gallons sold; the third claim sought damages based on a violation of the lease and the judgment and alleged that the Lessee failed to complete the sewage lagoon; the fourth claim sought damages for failure to keep the station in good repair; and the fifth claim sought punitive damages for intentional violation of the lease and the 1974 judgment.

At the close of Lessor's evidence, the trial court granted a directed verdict as to all Lessor's claims. Lessor raises as error in this Court the granting of the directed verdict only as to the first and third claims for relief.

[1] In reviewing the evidence on a directed verdict, we are required to view the evidence in the light most favorable to plaintiff,[FN1] and if we find there is doubt as to whether reasonable minds

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might arrive at different conclusions, then the matter presents a question of fact that should be determined by a jury.[FN2] Applying these rules to this case, we reverse and remand.

FN1. Mildon v. Bybee, 13 Utah 2d 400, 375 P.2d 458 (1962).

FN2. Newton v. Oregon Short Line R. Co., 43 Utah 219, 134 P. 567 (1913).

Lessor presented substantial evidence on the issues of Lessee's failure to operate the station on a 24-hour per day basis. Lessor produced witnesses who had frequent, if intermittent, occasion to observe the fact that the station was frequently closed, but there was no evidence indicating the exact amount of time that the station was closed. The witnesses included the operator of a restaurant near the station, a highway patrolman, and a former employee of Lessee. Their testimony was specific that the station was seldom open late at night or on Sunday, and that it was often closed during the day. One of Lessee's officers, Mr. Miller, testified that he believed, based on conversations with Mr. Winsness, that a 7:00 a. m. to 10:00 p. m. operation would satisfy the Lessee's obligations. If, as appears, the closing of the station was a breach of the lease agreement, the evidence clearly establishes more than a technical breach. It provides an ample basis for the inference that the station was closed a substantial portion of the time.

[2] The evidence of breach adduced by Lessor having been substantial and persuasive, it was the burden of the Lessee to prove a justification, for the breach, because the facts, if any, were particularly within Lessee's knowledge. [FN3] Because the matter is here on appeal from a directed verdict at the close of Lessor's case, the record includes no evidence indicating whether Lessee's nonoperation of the station can be attributed to any cause (e. g., government allocation of gasoline) referred to in the 1974 stipulation as a justification for less than a 24-hour per day operation. A party who seeks to escape from the obligation of a contract because of the occurrence***1305** of such an event has the burden of proving its occurrence. [FN4]

FN3. Shumak v. Shumak, 30 Ill.App.3d 188, 332 N.E.2d 177 (1975), and cases there cited.

FN4. Javierre v. Central Altagracia, 217 U.S. 502, 30 S.Ct. 598, 54 L.Ed. 859 (1910). See also Zion's Properties, Inc. v. Holt, 538 P.2d 1319 (Utah 1975).

It is evident from the transcript of argument (although not from the language of the order appealed from) that the trial court was not so concerned about the proof of breach and the fact of some damage as it was about the adequacy of the proof of the amount of damage. The crucial issue as to the first claim for relief is whether Lessor adduced evidence from which a jury could have reached a conclusion as to the amount of Lessor's money damages based on something more substantial than speculation.

For the jury to have arrived at a loss of income figure under the first claim for relief, it was necessary only to have determined the number of gallons of motor fuel the Lessee would have sold had it kept the station open compared with the number of gallons actually sold. Lessor's evidence included (1) the sales data of the closest service station to Delle for the relevant years, (2) the sales data of the Delle station for post-stipulation years and for 1972, the last year the station was concededly in nearly continuous operation, and (3) the testimony of an expert witness as to the quantity of motor fuel a station at the location should sell if in constant operation. This testimony was based in part upon Utah Department of Transportation traffic counts for the years 1971 and 1973 through 1976. The trial court sustained objections to the admissibility of testimony as to the business experience of the nearest service station. The Lessor does not complain about that ruling. The trial court also sustained an objection to the receipt of the exhibit showing the gallonage sold at the Delle station dur-

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ing 1972. Foundational testimony indicated that the west-east traffic flow past the station (the primary source of sales) was heavier in the years relevant to the litigation than in 1972. The exhibit was therefore conservative insofar as traffic flow was concerned.

The trial court excluded the exhibit because the data related to a period prior to the 1974 stipulated judgment. The trial court apparently ruled that the receipt of that data would have constituted a reopening of the controversy settled by the 1974 judgment. Lessor was not, however, offering the evidence as proof of pre-1974 damages, but as an index to the volume of sales which could have been anticipated from a constant operation in post-judgment years. This exhibit was material and relevant and should have been admitted. It was for the jury to determine how much weight it deserved based upon foundational elements showing comparability of operations in 1972 compared with the damage period. It appears that a jury could make a reasoned inference of damage based upon the exhibit and other evidence referred to above.

We recognize that comparability between 1972 and the relevant period cannot be exact and that several circumstances existed in 1972 that may have affected patronage that did not exist in the damage period. But the dissimilarities were not the basis of the trial court's ruling of admissibility. Those dissimilarities affect whatever weight is to be given the exhibit by the jury.

The trial court permitted Lessor's expert to offer his opinion concerning the quantity of motor vehicle fuel a station at the Delle location should have sold if in continuous operation and under the traffic circumstances which obtained during post-judgment years. Although the validity of his testimony was open to some question because of an error as to the time of one traffic count, his testimony was not based solely on this count and had sufficient validity to go to the jury.[FN5]

FN5. See Redevelopment Agency of Salt Lake City v. Mitsui Investment Inc., 522 P.2d 1370 (Utah 1974).

[3] The subject of certainty of proof as to damages has frequently concerned this Court and most others. While subscribing to the doctrine that a verdict based on ***1306** "mere speculation" cannot be upheld, we have consistently recognized that some degree of uncertainty is inevitable in damage determinations of the type involved in this suit. In Security Development Company v. Fedco, Inc., 23 Utah 2d 306, 462 P.2d 706 (1969), the issue was the determination of the loss of profits sustained by a lessee whose floor space was periodically reduced in violation of a lease agreement. The evidence in that case was that plaintiff's gross sales diminished with reduction of floor space despite a constant or increasing clientele. We held such evidence to provide a sufficient basis for a determination of damages, even though there was some uncertainty concerning what plaintiff's sales would have been with more floor space. Where there is strong evidence of the fact of damage, a defendant should not escape liability because the amount of damage cannot be proved with precision.[FN6]

FN6. Gould v. Mountain States Telephone & Telegraph Company, 6 Utah 2d 187, 309 P.2d 802 (1957).

Professor Corbin states the controlling principles which are consistent with the Utah cases:

. . . There is little that can be regarded as "certain," especially with respect to what would have happened if the march of events had been other than it in fact has been. Neither court nor jury is required to attain "certainty" in awarding damages; and this is just as true with respect to "value" as with respect to "Profits." Therefore, the term "speculative and uncertain profits" is not really a classification of profits, but is instead a characterization of the evidence that is introduced to prove that they would have been made if the defendant had not committed a breach of contract. The law requires that this evidence shall not be so meager or

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uncertain as to afford no reasonable basis for inference, leaving the damages to be determined by sympathy and feelings alone. The amount of evidence required and the degree of its strength as a basis of inference varies with circumstances. A greater amount and a higher degree are required in those cases in which it is usually possible to produce it than in cases where it is usually impossible or difficult and the defendant had reason to know it. . . .[FN7]

FN7. Corbin on Contracts, Vol. 5, s 1022.

[4] In this case, the evidence as to damages is not so meager as to invite sheer speculation; imprecise it is, but counsels' arguments, the court's instructions, and the common sense of the jury will, no doubt, place the evidence in perspective for proper resolution of the damage issue. With traffic flow data, expert testimony with respect to the percentage of passing cars which could be expected to stop, and gallonage figures for periods of known continuous operation, the jury could base a damage determination on substantial, probative evidence.

The third claim for relief, for failure to construct the sewage lagoon pursuant to agreement, was also dismissed for failure to prove damages. The record is not clear as to the contract theory underlying the court's ruling. Clearly the 1974 stipulation and the judgment are subject to judicial construction as to the relative obligations of the parties.[FN8] On its face the stipulation imposes on Lessee the duty to construct on the leased premises a sewage lagoon which (1) has a specific area, and (2) satisfies minimum state and county requirements for a sewage disposal facility. The judgment states that the "lagoon system is to serve the defendant's service station and the new restaurant to be built by Karl Winsness." The restaurant has not been built.

FN8. The record does not reveal whether the trial court has construed the lease and stipulation so as to call for a fully equipped lagoon or to make the obligation to build the lagoon to the exact specifications dependent on the Lessor's building of a restaurant making necessary a larger lagoon than was built just for one station.

Lessee constructed a lagoon to the specified dimensions, but the evidence is competent and undisputed that the facility does ***1307** not satisfy State Health Department standards in that the pumps are not automatic, at least one flowway is not adequately insulated, and the banks are not sloped or rip-rapped to minimum standards. Lessor presented the testimony of an expert, whose qualifications are not questioned, as to the cost of upgrading the lagoon to agency prescribed standards.

The evidence would support a judicial finding that final agency approval could not be forthcoming until there is a source of effluent (such as the stipulation and lease contemplate will be provided by a restaurant) which, when added to the station effluent, would supply enough liquid to test the facility and enable it to function properly.

The trial court appears to have acted on the conviction that Lessor could prove no damage since it had failed to construct a new restaurant and therefore could show no loss of income. It is true that Lessor maintained no ongoing business enterprise whose success would be influenced by the presence or absence of a lagoon; however, it is not clear that loss of profits is the only possible measure of damages.[FN9] It may be that the parties intended that the lagoon be built simply as an improvement to the property irrespective of whether a restaurant was built.

FN9. Security Development Co. v. Fedco, Inc., supra.

The measure of damages where there has been defective or incomplete performance of a construction contract is set forth in the Restatement of Contracts, Section 346(1) (1932) as:

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. . . the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; . . .

We adopted the Restatement view in Rex T. Fuhriman, Inc. v. Jarrell, 21 Utah 2d 298, 445 P.2d 136 (1968). The measure of damages issue as it relates to building contracts, is also discussed at length and a similar conclusion reached in Williston on Contracts, 3rd Ed., Sec. 1363 and Corbin on Contracts, Vol. 5, s 1089 et seq. and by an extensive annotation at 76 A.L.R.2d 805. Accordingly, if this be the proper measure of damages, Lessor made an adequate showing of damages by proving the reasonable costs of completion to the specifications required by the 1974 stipulation and judgment.

[5] However, it may be that the promise to complete the lagoon to specifications was in fact dependent upon Lessor's building of a restaurant which would, in addition to the station, use the lagoon for sewage disposal. Indeed, for a lagoon of the size contemplated by the parties to operate properly, the quantity of effluent that would be produced by both the station and the restaurant would be necessary. A determination should be made whether the promise to build the lagoon was an independent covenant, or whether it was dependent on the building of a restaurant. If the latter, the trial court was correct in directing a verdict on the third claim for relief. Since it would be inappropriate for this Court to attempt to resolve that issue, it is necessary that this matter also be remanded for further consideration.

Costs to the appellant.

CROCKETT, C. J., and MAUGHAN, WILKINS and HALL, JJ., concur.

Utah, 1979.
Winsness v. M. J. Conoco Distributors, Inc.
593 P.2d 1303

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Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
D. Utah,
Central Division.
COMMONWEALTH PROPERTY ADVOCATES, LLC, Plaintiff,
v.
FIRST HORIZON HOME LOAN CORPORATION, et al., Defendants.

No. 2:10-CV-375.
Nov. 16, 2010.

E. Craig Smay, Salt Lake City, UT, for Plaintiff.

Matthew M. Cannon, Michael D. Mayfield, Ray Quinney & Nebeker, Salt Lake City, UT, Joseph F. Yenouskas, Goodwin Procter LLP, Washington, DC, for Defendants.

MEMORANDUM DECISION AND ORDER
DEE BENSON, District Judge.

***1** This matter is before the Court on Defendants First Horizon Home Loan Corporation ("First Horizon") and Mortgage Electronic Registration System's ("MERS") Motion to Dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (*See* Dkt. No. 8.) On October 28, 2010, the Court held a hearing on the motion. At the hearing, Craig Smay represented Plaintiff Commonwealth Property Advocates ("CPA"). Michael Mayfield and Matthew Cannon represented Defendants. After taking the motion under advisement, the Court has further considered the law and facts relating to the motion. Being fully advised, the Court renders the following Memorandum Decision and Order.

BACKGROUND

On February 27, 2007, Plaintiff's predecessor in title, Dwayne Watson ("Watson"), obtained financing from First Horizon to purchase a home in Alpine, Utah. Watson executed a promissory note in the amount of $1,000,000 in favor of First Horizon ("Note 1"). Along with signing Note 1, Mr. Watson executed a Deed of Trust which was recorded on February 28, 2007 ("Deed of Trust 1"). Mr. Watson signed a second note in the amount of $250,000 in favor of First Horizon ("Note 2"). Note 2 is secured by the same property, evidenced by a Deed of Trust recorded on February 28, 2007 ("Deed of Trust 2"). Deed of Trust 1 and Deed of Trust 2 designate MERS as the beneficiary to act as "nominee for Lender and Lender's successors and assigns." In defining MERS' authority under the Deeds, the Deeds provide:

> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument; but if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns), has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property.

(*See* Dkt. No. 2.)

In July 2009, Mr. Watson defaulted under the terms of the Notes. As a result, on July 14, 2009, the trustee recorded a Notice of Default and Election To Sell in the Utah County records. The property was scheduled to be sold on January 12, 2010. That sale never occurred because on December 21, 2009, Watson executed a quitclaim deed conveying his interest in the property to CPA. CPA then filed a lawsuit against the same Defendants as this case plus various unknown Doe defendants on December 29, 2009. The case was assigned to Judge Ted Stewart who on April 15, 2010, granted Defendants' motion to dismiss for lack of subject-matter jurisdiction. CPA then filed this lawsuit on April 27, 2010.[FN1]

FN1. In this case, CPA cured the subject-matter jurisdiction defect by voluntarily dismissing all unknown Doe defendants.

STANDARD OF REVIEW

In considering a motion to dismiss under Rule 12(b)(6), all well-pleaded factual allegations, as distinguished from conclusory allegations, are accepted as true and viewed in the light most favorable to Plaintiff as the nonmoving party. *Ruiz v. McDonnell,* 299 F.3d 1173, 1181 (10th Cir.2002). CPA must provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 547 (2007). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz,* 948 F.2d 1562, 1565 (10th Cir.1991).

***2** Recently, in *Ashcroft v. Iqbal* the United States Supreme Court stated that while Rule 8 of the Federal Rules of Civil Procedure does not require detailed factual allegations, it nonetheless requires "more than unadorned, the-defendant-unlawfully-harmed-me accusation[s]. 129 S.Ct. 1937, 1949 (2009). A pleading that offers 'labels or conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' *Id.* (quoting *Twombly,* 550 U.S. at 555). Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " *Id.* (quoting *Twombly,* 550 U.S. at 557).

DISCUSSION

CPA's request for relief challenges MERS' authority to foreclose on Deed of Trust 1 and Deed of Trust 2. As noted above, the Deeds of Trust state:

> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument; but if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns), has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property.

(*See* Dkt. No. 2.)

In *Burnett v. Mortgage Electronic Registration Systems, Inc.,* Judge Dale Kimball, of this district court, in a similar lawsuit with an identical MERS provision, recently issued a written decision.

> [T]he Deed of Trust expressly gives MERS ... the authority to foreclose.... [W]hen Plaintiff defaulted on her contractual monthly payments, MERS had authority under the Deed of Trust to initiate foreclosure proceedings.... Upon Burnett's default in payments, MERS had authority to 'take any action' required of Lender.... Under the terms of the trust deed, Plaintiff cannot successfully claim that there was no right to possession.

Burnett v. Mortgage Electronic Registration Systems, Inc., No. 1:09-CV-69 DAK, 2009 WL 3582294, *4 (D.Utah Oct. 27, 2009).

This case requires the same result. By the clear language of the deeds of trust, MERS has the authority to foreclose and sell the property on behalf of both the original lender and the "lender's successors."

This conclusion is not changed by CPA's allegation in this case that the underlying note was securitized. Plaintiff has not satisfied the pleading requirement to show that because of the alleged securitization MERS is no longer the lender's nominee with the authority to foreclose on behalf of the note holders. CPA's arguments ignore the fact that securitization merely creates "a separate contract, distinct from Plaintiff's debt obligations under the reference credit (i.e. the Note)." *Larota-Florez v. Goldman Sachs Mortgage Co.,* 2010 WL 1444026 *6 (E.D.Va. Apr. 8, 2010). Any new contract that is the result of securitization does not free Watson or CPA from the express terms of Deed of Trust 1 and Deed of Trust 2. Therefore, the Court GRANTS Defendants' Motion to Dismiss all of CPA's claims

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for relief.

CONCLUSION

***3** For the reasons set forth above, Defendants' Motion to Dismiss the Complaint is GRANTED. This case is dismissed with prejudice.

D.Utah,2010.
Commonwealth Property Advocates, LLC v. First Horizon Home Loan Corp.
Slip Copy, 2010 WL 4788209 (D.Utah)

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Only the Westlaw citation is currently available.

United States District Court,
D. Utah,
Central Division.
Todd N. TAYLOR and Julie A. Taylor, Plaintiffs,
v.
CITIMORTGAGE, INC.; U.S. Bank N.A.; and Mortgage Electronic Registration Systems, Defendants.

No. 2:10-CV-505 TS.
Nov. 10, 2010.

Jeremy M. Rogers, Murray, UT, for Plaintiffs.

Anthony C. Kaye, Steven D. Burt, Angela W. Adams, Quinton J. Stephens, Ballard Spahr LLP, Amy F. Sorenson, Snell & Wilmer, Salt Lake City, UT, for Defendants.

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AND DENYING AS MOOT DEFENDANT'S MOTION TO STRIKE

TED STEWART, District Judge.

***1** This matter is before the Court on two Motions to Dismiss filed by Defendants CitiMortgage, Inc. ("CitiMortgage") and U.S. Bank N.A. ("U.S.Bank"). In addition, Defendant CitiMortgage has filed a Motion to Strike Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss. For the reasons discussed below, the Court will grant the Motions to Dismiss, rendering the Motion to Strike moot.

I. BACKGROUND

On or about June 26, 2008, Plaintiffs obtained a loan from Defendant CitiMortgage for the purchase of a home in Provo, Utah. On or about that same date, Plaintiffs obtained a home equity loan from Defendant U.S. Bank. Plaintiffs executed a Promisory Note in favor of CitiMortgage on June 26, 2008 (the "First Position Note"). Plaintiffs executed a second Promisory Note in favor of U.S. Bank on that same date (the "Second Position Note"). Plaintiffs also executed a Deed of Trust (the "First Position Deed of Trust") on June 26, 2008, which identified Plaintiffs as borrowers, CitiMortgage as lender, First American Title Company as trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS") as beneficiary. On June 27, 2008, Plaintiffs executed a Deed of Trust in favor of U.S. Bank Trust Company (the "Second Position Trust Deed").

Plaintiffs filed this action on May 8, 2010. Plaintiffs' first cause of action for estoppel/declaratory judgment request the Court issue declaratory judgment that "defendant Beneficiaries, and such assignees ... are estopped to assert any present default on the Notes, or power of sale under the Trust Deeds." FN1 Plaintiffs' second cause of action alleges violations of the Real Estate Settlement Procedures Act ("RESPA"). Plaintiffs' third cause of action alleges violations of the Truth in Lending Act ("TILA") and seeks to rescind the transaction. Plaintiffs' fourth cause of action for declaratory judgment seeks an "Order declaring that defendants ... lack any interest under the Trust Deeds which may be enforced by lien upon or sale of the subject property." FN2 Plaintiff's fifth cause of action requests an order "quieting title to the subject property in Plaintiffs and against defendants ... freeing title to the subject property of the lien of the Trust Deeds and leaving any obligations under the Notes unsecured by any interest in the subject property." FN3 Plaintiffs' final cause of action seeks refund, fees, and costs.

FN1. Docket No. 1 at ¶ 33.

FN2. *Id.* at ¶ 48.

FN3. *Id.* at ¶ 53.

II. STANDARD OF REVIEW

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In considering a motion to dismiss under Rule 12(b)(6), all well-pleaded factual allegations, as distinguished from conclusory allegations, are accepted as true and viewed in the light most favorable to Plaintiff as the nonmoving party.[FN4] Plaintiff must provide “enough facts to state a claim to relief that is plausible on its face.” [FN5] All well-pleaded factual allegations in the amended complaint are accepted as true and viewed in the light most favorable to the nonmoving party.[FN6] But, the court “need not accept conclusory allegations without supporting factual averments.” [FN7] “The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted.” [FN8] The Supreme Court has explained that a plaintiff must “nudge[ ][his] claims across the line from conceivable to plausible” in order to survive a motion to dismiss.[FN9] Thus, the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims.[FN10]

FN4. *Ruiz v. McDonnell,* 299 F.3d 1173, 1181 (10th Cir.2002).

FN5. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 547 (2007) (dismissing complaint where Plaintiffs “have not nudged their claims across the line from conceivable to plausible”).

FN6. *GFF Corp. v. Associated Wholesale Grocers, Inc.,* 130 F.3d 1381, 1384 (10th Cir.1997).

FN7. *Southern Disposal, Inc., v. Texas Waste,* 161 F.3d 1259, 1262 (10th Cir.1998); *Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir.1991).

FN8. *Miller v. Glanz,* 948 F.2d 1562, 1565 (10th Cir.1991).

FN9. *Id.*

FN10. *The Ridge at Red Hawk, LLC v. Schneider,* 493 F.3d 1174, 1177 (10th Cir.2007).

***2** The Supreme Court recently explained the standard set out in *Twombly* in *Ashcroft v. Iqbal.* [FN11] In *Iqbal,* the Court reiterated that while Fed.R.Civ.P. 8 does not require detailed factual allegations, it requires “more than unadorned, the-defendant-unlawfully harmed-me accusation[s].” [FN12] “A pleading that offers ‘labels and conclusions' or ‘a formulaic recitation of the elements of a cause of action will not do.’ “ [FN13] “Nor does a complaint suffice if it tenders ‘naked assertion[s]” devoid of ‘further factual enhancement.’ “ [FN14]

FN11. 556 U.S. ----, 129 S.Ct. 1937 (2009) .

FN12. *Id.* at 1949.

FN13. *Id.* (quoting *Twombly,* 550 U.S. at 555).

FN14. *Id.* (quoting *Twombly,* 550 U.S. at 557).

The Court in *Iqbal* stated:

Two working principles underlie our decision in *Twombly.* First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for

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relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not show[n]-that the pleader is entitled to relief.

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When 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.[FN15]

FN15. *Id.* at 1949-50 (internal quotation marks and citations omitted).

III. DISCUSSION

A. RESPA

Plaintiffs' second cause of action is for a violation of the Real Estate Settlement Procedures Act ("RESPA"). In their Complaint, Plaintiffs allege that Defendants are subject to the provisions of RESPA, that Defendants violated RESPA by "Defendants accept[ing] charges for the rendering of real estate services which were in fact charges for other than services actually performed," and that they are entitled to damages.[FN16]

FN16. Docket No. 1 at ¶¶ 37-39.

Plaintiffs' RESPA claim does not fall within the one year statute of limitations.[FN17] According to the language of the Complaint, any claim that Plaintiffs have under RESPA must have occurred at the time of closing. As a result, any claim that Plaintiff could have under RESPA needed to be brought by June 26, 2009. Plaintiffs did not bring this action until nearly one year later on May 28, 2010. Therefore, Plaintiffs' second of cause of action is barred by the statute of limitations and must be dismissed.

FN17. 12 U.S.C. § 2614.

B. TILA

***3** In their third cause of action, Plaintiffs assert that they are entitled to rescission under the Truth in Lending Act ("TILA") for alleged violations of that Act. This claim fails. First, any TILA violations are barred by the statute of limitations.[FN18] Further, a number of courts,[FN19] including this one,[FN20] have held that the rescission provisions in TILA do not apply to a residential mortgage transaction, such as the one here.

FN18. 15 U.S.C. § 1640(e).

FN19. *See, e.g., Betancourt v. Countrywide Home Loans, Inc.,* 344 F.Supp.2d 1253, 1261 (D.Colo.2004) ("[T]here is no statutory right or rescission ... where the loan at issue involves the creation of a first lien to finance the acquisition of a dwelling in which the customer resides or expects to reside.") (collecting cases).

FN20. *See Grealish v. Am. Brokers Conduit,* 2009 WL 2992570, at *2 (D.Utah Sept. 16, 2009).

C. THE REMAINING CLAIMS

Plaintiffs' remaining claims are based on the allegation that Defendants transferred, pooled, and securitized Plaintiffs' notes and, as a result, have no authority under the notes. This argument must be rejected.

First, Plaintiff has alleged no factual support to demonstrate that the note was the subject of securitization. Under the standard set forth above, Plaintiffs' claims must be dismissed. Second, even assuming that the notes were the subject of securitization, Plaintiff's arguments ignore the fact that securitization merely creates "a separate contract, distinct from Plaintiff[']s debt obligations under the

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reference credit (i.e. the Note) ." FN21 Thus, the separate contract that is the result of securitization does not free Plaintiffs from the terms agreed upon in the Deeds of Trust. As one court has stated "[t]here is no legal authority that the sale or pooling of investment interests in an underlying note can relieve borrowers of their mortgage obligations or extinguish a secured party's rights to foreclose on secured property." FN22 Therefore, these claims must be dismissed.

FN21. *Larota-Florez v. Goldman Sachs Mortgage Co.,* 2010 WL 1444026, at *6 (E.D.Va. Apr. 8, 2010)

FN22. *Upperman v. Deutsche Bank Nat'l Trust Co.,* 2010 WL 1610414, at *2 (E.D.Va. Apr. 16, 2010).

IV. MOTION TO STRIKE

Defendant CitiMortgage seeks to strike Plaintiffs' untimely response to its Motion to Dismiss. Plaintiffs argue that their untimeliness should be excused. Even considering the Memorandum in Opposition filed by Plaintiffs, the outcome set forth above remains the same. Therefore, the Court need not strike the response.

V. CONCLUSION

It is therefore

ORDERED that Defendant CitiMortgage's Motion to Dismiss (Docket No. 8) is GRANTED. It is further

ORDERED that Defendant U.S. Bank's Motion to Dismiss (Docket No. 12) is GRANTED. It is further

ORDERED that Defendant CitiMortgage's Motion to Strike (Docket No. 22) is DENIED AS MOOT.

Counsel for Plaintiffs is reminded of his responsibilities under Federal Rule of Civil Procedure 11 and the Utah Rules of Professional Conduct, as adopted and interpreted by this Court, and the possible penalties for violating those rules.FN23 Counsel should consider the following when filing matters with this Court, especially those matters that have been continually rejected by the Court.

FN23. *See* Fed.R.Civ.P. 11 and DUCivR 83-1.5.1(a).

Utah Rule of Professional Conduct 3.1 states: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law." Rule 3.3(a)(2) provides that a lawyer shall not knowingly "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Under Rule 8.4(a) it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct.

***4** Under Fed.R.Civ.P. 11(b)

By presenting to the court a pleading, written motion, or other paper-whether by signing, filing, submitting, or later advocating it-an attorney ... certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

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(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Pursuant to Rule 11, “the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.” [FN24] “The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.” [FN25]

FN24. Fed.R.Civ.P. 11(c)(1).

FN25. Fed.R.Civ.P. 11(c)(4).

Counsel is put on notice that violation of the above-listed rules may result in the issuance of sanctions and/or disciplinary action.

D.Utah,2010.
Taylor v. CitiMortgage, Inc.
Slip Copy, 2010 WL 4683881 (D.Utah)

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2010 WL 1610414
Only the Westlaw citation is currently available.
United States District Court, E.D. Virginia,
Alexandria Division.

Matthew D. UPPERMAN, Plaintiff,
v.
DEUTSCHE BANK NATIONAL
TRUST COMPANY, et al., Defendants.

Civil Action No. 01:10-cv-149. April 16, 2010.

Attorneys and Law Firms

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Opinion

MEMORANDUM OPINION

CLAUDE M. HILTON, District Judge.

****1*** This matter comes before the Court on Defendants' Motions to Dismiss. Plaintiff Matthew Upperman failed to pay his mortgage and, despite a subsequent foreclosure sale, has not vacated the property. Plaintiff claims title to the property based on the legal theory that securitization of his mortgage loan renders his note unenforceable.

Plaintiff alleges that he entered into a "consumer credit transaction" to purchase his home, 21025 Laporte Terrace, Ashburn, Virginia 20147 (the "Property"). At the closing, on March 23, 2006, Plaintiff executed two promissory notes and deeds of trust that placed a security interest in the Property. For the first note for $413,600, UMG Mortgage LLC was the initial lender and MERS was the beneficiary. The Allonge shows that this note was subsequently transferred to IndyMac Bank, F.S.B. The first note is the only loan at issue in this case, as it is the one secured by the Deed of Trust under which the foreclosure occurred.

According to the Complaint, Plaintiff also executed a second note for $103,400 with OneWest's predecessor in interest, IndyMac Bank, F .S.B., as the initial lender. The Plaintiff alleges that the loans were then "securitized" by being placed in a "loan trust, pool, or REMIC (real estate mortgage investment conduit)."

In 2008 and continuing into 2009, Plaintiff began to receive demands for payment on the first note. In advance of foreclosure, Equity Trustees LLC was appointed the Substitute Trustee under the Deed. The Plaintiff was declared to be in default of the note and on August 27, 2009, Equity Trustees LLC gave notice that the Property would be sold at foreclosure sale. The Property was sold in foreclosure to Defendant Shan Lin on September 9,2009. The Deed explicitly allows the sale and transfer of the Note (together with the Deed), without prior notice to the Borrower.

Plaintiff filed the instant Complaint on December 23, 2009 in the Circuit Court for Loudoun County, Virginia. Defendants timely removed this action to this Court on February 18, 2010.

A federal district court should grant a motion to dismiss "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984). While the Court must take all factual allegations made in a complaint as true, *see Eastern Shore Markets, Inc. v. JD Assocs. Ltd. P'ship,* 213 F.3d 175, 180 (4th Cir.2000), the United States Supreme Court heightened a plaintiff's pleading requirements in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007). In order to survive a motion to dismiss, the "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the allegations in the complaint are true...." 550 U.S. at 555 (Internal citations omitted). Indeed, the Fourth Circuit has concluded that the Supreme Court's decision in *Twombly* establishes a regime that is "more favorable to dismissal of a complaint." *Giarratano v. Johnson,* 521 F.3d 298, 304 n. 3 (4th Cir.2008).

****2*** Specifically, a plaintiff's claim must be dismissed if he fails to allege "enough facts to state a claim to relief that is plausible on its face" such that he has "nudged [his] claims across the line from conceivable to plausible...." *Twombly,* 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (2009).

In *Iqbal,* the Court established a two-step approach for determining whether a complaint may survive dismissal. First, a district court need not accept legal conclusions as true, as "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal, Id.* at 1949. Second, only a complaint that states a plausible claim for relief should survive a motion to dismiss, and making such a determination is a "context-specific" task where the court must apply its judicial experience and common sense. *Id.* at 1950. Therefore, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.*

Here, Plaintiff's Complaint is comprised entirely of legal conclusions which are not entitled to the assumption of truth and must be disregarded. The same erroneous legal theory forms the basis for all of Plaintiff's claims: that Defendants have no legal authority or standing under the security instrument to foreclose upon the Property because the alleged securitization of a mortgage loan purportedly renders a Note unenforceable and unsecured. There is no legal authority that the sale or pooling of investment interests in an underlying note can relieve borrowers of their mortgage obligations or extinguish a secured party's rights to foreclose on secured property. Plaintiff's theory contradicts not only Virginia's well-established status as a non-judicial foreclosure state, but also the authority vested in a trustee under Virginia law to foreclose and sell property that is provided as security for a loan. *See* VA. CODE ANN. §§ 55-59.1-59.4. In addition, the Deed clearly confers authority on Defendants to foreclose on the Property in the event of Plaintiff's default is undisputed.

As a threshold matter, there are no specific factual allegations in the Complaint supporting any of Plaintiff's claims for relief as to Deutsche Bank and MERS, other than to briefly identify these entities and allege that MERS failed to disclose that the loans may be securitized. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S.Ct. at 1949. Here, none of Plaintiff's counts are supported by any pertinent factual allegations.

3 The Plaintiff's claims for Declaratory Action (Counts I and II), Breach of Fiduciary Duties (Count III), Quiet Title (Count IV), and Violation of the FDCPA (Count V)-are based on the erroneous legal theory that the securitization of a mortgage loan renders a note and corresponding security interest unenforceable and unsecured.

Plaintiff argues that his obligation to perform on the Note was relieved by the individual investors in the trust and, for this reason, Plaintiff need not repay his mortgage loan but may hold on to the Property. There is no authority, however, that the mere existence of a pooling and servicing agreement or investment trust can relieve borrowers of their obligations to perform under a duly executed promissory note and deed of trust.

On the contrary, federal laws explicitly allow for the creation of mortgage-related securities, such as the Securities Act of 1933 and the Secondary Mortgage Market Enhancement Act of 1984. Indeed, pursuant to 15 U.S.C. § 77r-1, "[a]ny person, trust, corporation, partnership, association, business trust, or business entity ... shall be authorized to purchase, hold, and invest in securities that are ... mortgage related securities." *Id.* § 77r-1(A)(1)(B). Even if the Note was securitized, Plaintiff's claim that such securitization renders the Notes and Deeds of Trust unenforceable is legally flawed. As such, both declaratory judgment actions, Counts I and II, seeking to invalidate the Notes on this legal theory are baseless. Count IV, which is a quiet title action is based on the same legal theory, and likewise fails.

Plaintiff's legal theory that Defendants do not have the right to enforce the Deed given as security for the Note also is contrary to Virginia law and the language contained in the Deed. Specifically, Plaintiff alleges that an assignment of the Note would "split" it from the underlying security interest, such that the Note becomes unenforceable. Under Virginia law, however, the assignment or transfer of a note or bond secured by a deed of trust or mortgage "carries with it" that security. *Stimpson v. Bishop,* 82 Va. 190, 200-01 (1886) ("It is undoubtedly true that a transfer of a secured debt carries with it the security without formal assignment or delivery.") "[I]n Virginia, as to common-law securities, the law is that both deeds of trust and mortgages are regarded in equity as mere securities for the debt, and whenever the debt is assigned the deed of trust or mortgage is assigned or transferred with it." *Williams v. Gifford,* 139 Va. 779, 780, 124 S.E. 403, 404 (1924). If there has been a "split" between the Note and Deed, as alleged by Plaintiff, the transferee of the Note nevertheless receives the debt in equity as a secured party. *See id.*

Plaintiff agreed when he executed the loan documents that the Note or interests in the Note could be sold "one or more times without prior notice to the Borrower." To the extent Plaintiff

challenges the appointment of the substitute trustee, nothing in the Deed states, either explicitly or implicitly, that only the original Lender may appoint substitute trustees. Rather, the Deed explicitly allows the sale and transfer of the Note, even without prior notice to the Borrower.

**4* Plaintiff's "standing" argument is equally unpersuasive. According to Plaintiff, Defendants have no legal authority or "standing" under the security instrument to foreclose upon the Property because the loan has been securitized. Under Plaintiff's theory, every foreclosing party would have to prove its "standing" or authority in court and prior to foreclosure, and would be unable to do so if the loan is securitized. As a threshold matter, Plaintiff misuses the term "standing" in referring to a secured party's "authority" to foreclose upon a property, rather than its actual meaning of a party's standing to file an action in state court. These arguments fail to recognize that both Federal Rule 17 and "standing," as termed by Plaintiff, are irrelevant to Defendants' authority to initiate non-judicial foreclosure proceedings.

In any event, Plaintiff's legal theory contradicts Virginia's well-established status as a non-judicial foreclosure state, as well as the authority vested in a trustee under Virginia law to foreclose and sell property that is provided as security for a loan. *See* VA. CODE §§ 55-59.1-59.4. Under these procedures, in the event of default by a borrower, a trustee under a Deed of Trust may "declare all the debts and obligations secured by the deed of trust at once due and payable and may take possession of the property and proceed to sell the same ..." VA. CODE ANN. § 55-59(7). These procedures are also set forth in the Deed. Plaintiff's Complaint acknowledges that Defendants complied with these procedures when the appointed substitute trustee sent demands for payment and foreclosed on the Property.

To the extent Plaintiff applies this same legal theory in an attempt to undermine the appointment of a substitute trustee, such theory also contradicts Virginia law: "The party secured by the deed of trust, or the holders of greater than fifty percent of the monetary obligations secured thereby, shall have the right and power to appoint a substitute trustee ... by executing and acknowledging an instrument designating and appointing a substitute ... [which] shall be vested with all the powers, rights, authority and duties vested in the trustee ... in the original deed of trust." VA. CODE ANN. § 55-59(9). Yet Plaintiff has not alleged the Deed of Appointment of Substitute Trustee is void. The Complaint contains no allegations that the substitute trustee was appointed by anyone other than "the party secured by the deed of trust, or holders of the greater than fifty percent of the monetary obligations secured thereby." *Id.* Plaintiff's Complaint lacks sufficient factual allegations and Plaintiff's novel "standing" argument is completely inconsistent with Virginia's statutory framework for non-judicial foreclosures.

In the alternative, Count V, "Violation of the FDCPA" should be dismissed because Plaintiff's FDCPA claim is barred by the one-year statute of limitations imposed by the FDCPA. Plaintiff's FDCPA claims are absolutely time-barred. An action brought pursuant to the FDCPA must be brought within one year of the date on which the alleged violation occurred. *See* 15 U.S.C. § 1692k(d). Even assuming that Defendants failure to inform Plaintiff that the Note would be securitized constitutes an FDCPA claim, Plaintiff's claim is nevertheless time-barred because it accrued at the time the loan was settled in 2006. Yet Plaintiff did not file his Complaint until December 2009, more than three years after settlement. Accordingly, any FDCPA claim is time-barred.

**5* Finally, Count III of the Complaint alleges that Equity Trustees breached a fiduciary duty to the Plaintiff by "failing to perform reasonable due diligence" and "failing to remain impartial." However, a trustee under a deed of trust has no such duties. *See Carter v. Countrywide Home Loans, Inc.,* No. 3:07-cv651, 2008 WL 4167931, at *11 (E.D.Va. Sept. 3, 2008) ("[T]he trustee only owes those duties that are listed in the deed of trust itself.") (citing *Belvin's Ex'r v. Belvin,* 167 Va. 355, 189 S.E. 315, 318)); *See also Fleet Finance v. Burke & Herbert Bank & Trust,* 1992 WL 884461, at *3 (Va.Cir.Ct. Jan. 28, 1992). Plaintiff does not allege that the Deed of Trust lists either of these duties and the Deed of Trust does not, in fact, list either of these duties. Because no such duties exist they could not have been breached by Equity Trustees.

For these reasons, Defendants' Motions to Dismiss should be GRANTED. An appropriate Order shall issue.

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Only the Westlaw citation is currently available.
United States District Court,
D. Arizona.

In re MORTGAGE ELECTRONIC REGISTRATION SYSTEMS (MERS) LITIGATION.
This Order Applies to: CV 10-215-PHX-JAT CV 10-216-PHX-JAT CV 10-220-PHX-JAT CV 10-221-PHX-JAT CV 10-457-PHX-JAT CV 10-460-PHX-JAT CV 10-471-PHX-JAT CV 10-485-PHX-JAT CV 10-487-PHX-JAT CV 10-488-PHX-JAT CV 10-489-PHX-JAT CV 10-492-PHX-JAT CV 10-493-PHX-JAT CV 10-494-PHX-JAT.

MDL Docket No. 09-2119-JAT. Jan. 25, 2011.

Opinion

ORDER

JAMES A. TEILBORG, District Judge.

****1*** Before the Court are forty motions to dismiss for failure to state a claim under Rule 12(b)(6) brought by various defendants in the above-captioned fourteen member cases of this multi-district litigation. The Court heard oral argument on January 18, 2010. [1] As thirteen of the fourteen cases share nearly identical causes of action, the Court will group similar claims together and address the 12(b)(6) motions pertaining to each set of claims. For the reasons that follow, the Court grants all forty motions to dismiss. [2]

I. BACKGROUND

In all of the above-captioned member cases, Plaintiffs initially filed their complaints in the District of Nevada. The cases were then transferred to this Court by the MDL Panel.

In *Stoffels, et al. v. GRP Financial Services, et al.,* CV 10-215-PHX-JAT, after Plaintiffs' case was transferred to this Court, Plaintiffs filed a Second Amended Complaint in the District of Nevada. *See* Doc. 139, *Stoffels,* 3:08-cv-00468-ECR-GWF (D. Nev. filed Feb. 16, 2010). Although Plaintiffs have yet to file a copy of the Second Amended Complaint in this Court, the Court considered it when determining which claims were transferred to the MDL and which were remanded to the transferor court. The claims which were held to have been transferred, at least in part, include wrongful foreclosure, intentional/negligent misrepresentation, slander of title, unjust enrichment, conspiracy to commit fraud related to MERS system, injunctive relief, and declaratory relief. Defendants filed two motions to dismiss (Doc. 707, 1168) and Plaintiffs responded (Doc. 890, 1177).

In *Hearne v. Countrywide Home Loans, Inc., et al.,* CV 10-216-PHX-JAT, Plaintiff Treva Hearne alleges seven causes of action, all of which were transferred at least in part: wrongful foreclosure; fraud in the inducement; conspiracy to commit fraud by creation, operation and use of the MERS system; conspiracy to commit wrongful foreclosure by creation, operation and use of the MERS system; unjust enrichment; and injunctive relief; and declaratory relief. Defendants filed two motions to dismiss (Doc. 471, 700) and Plaintiffs responded (Doc. 614, 855).

In *Burke, et al. v. First Centennial Title, et al.,* CV 10-220-PHX-JAT, Plaintiffs Timothy Burke, Dawn Burke, Russell L. Smith, and Shirley Hope Smith allege six causes of action, all of which were transferred at least in part: wrongful foreclosure; fraud in the inducement; conspiracy to commit fraud by creation, operation and use of the MERS system; conspiracy to commit wrongful foreclosure by creation, operation and use of the MERS system; unjust enrichment; and injunctive relief, declaratory relief, reformation and quiet title. Defendants filed seven motions to dismiss (Doc. 442, 455, 456, 459, 467, 472, 694) and Plaintiffs responded (Doc. 603, 855).

In *Dalby et al. v. Citimortgage, Inc., et al.,* CV 10-221-PHX-JAT, Plaintiffs Randall Dalby and Kandi Deconti-Dalby, Molly England, Walt Swickla and Sharon Swickla, Shane Synder, Jennifer R. Quilici, Rick Bell, Jewel Shepard; and Jean Merkelbach allege six causes of action, all of which were transferred at least in part: wrongful foreclosure; fraud in the inducement; conspiracy to commit fraud by creation, operation and use of the MERS system; conspiracy to commit wrongful foreclosure by creation, operation and use of the MERS system; unjust enrichment; and injunctive relief, declaratory relief, reformation and quiet title. Defendants filed five motions to dismiss (Doc. 444, 460, 463, 469, 698) and Plaintiffs responded (Doc. 619, 855).

****2*** In *Mason, et al. v. Countrywide Home Loans, Inc., et al.,* CV 10-457-PHX-JAT, Plaintiffs allege six causes of action, five of which were transferred at least in part: wrongful foreclosure; fraud in the inducement; conspiracy to commit fraud by creation, operation and use of the MERS system;

conspiracy to commit wrongful foreclosure by creation, operation and use of the MERS system; and injunctive relief, declaratory relief, reformation and quiet title. Defendants filed four motions to dismiss (Doc. 737, 755, 758, 794) and Plaintiffs responded (Doc. 922).

In *Fitzgerald v. Quality Loan Service Corporation, et al.,* CV 10-460-PHX-JAT, Plaintiff alleges six causes of action, five of which were transferred at least in part: wrongful foreclosure; fraud in the inducement; conspiracy to commit fraud by creation, operation and use of the MERS system; conspiracy to commit wrongful foreclosure by creation, operation and use of the MERS system; and injunctive relief, declaratory relief, reformation and quiet title. Defendants filed four motions to dismiss (Doc. 729, 738, 759, 1085) and Plaintiff responded (Doc. 879, 947).

In *Whalen v. Mortgage Electronic Registration Systems, Inc., et al.,* CV 10-471-PHXJAT, Plaintiff's Complaint contains only two causes of action, both of which were transferred to this Court: injunctive relief and declaratory relief. Defendants filed two motions to dismiss (Doc. 583, 703) and Plaintiff responded (Doc. 829, 842, 858).

In *Berilo v. HSBC Mortgage Corporation, USA, et al.,* CV 10-485-PHX-JAT, Plaintiff alleges thirteen causes of action, nine of which were transferred at least in part: wrongful foreclosure; fraud in the inducement; conspiracy to commit fraud by creation, operation and use of the MERS system; conspiracy to commit wrongful foreclosure by creation, operation and use of the MERS system; unjust enrichment; injunctive relief; declaratory relief; quiet title; and rescission. Defendants filed two motions to dismiss (Doc. 689, 739) and Plaintiff responded (Doc. 828, 866).

In *Fitzwater, et al. v. BAC Home Loans Servicing, LP, et al.,* CV 10-487-PHX-JAT, Plaintiffs allege thirteen causes of action, seven of which were transferred at least in part: wrongful foreclosure; fraud in the inducement; conspiracy to commit fraud by creation, operation and use of the MERS system; conspiracy to commit wrongful foreclosure by creation, operation and use of the MERS system; unjust enrichment; injunctive relief; and declaratory relief. Defendants filed a motion to dismiss (Doc. 745) and Plaintiffs responded (Doc. 863).

In *Evans v. Aurora Loan Services, LLC, et al.,* CV 10-488-PHX-JAT, Plaintiff alleges fourteen causes of action, eight of which were transferred at least in part: wrongful foreclosure; fraud in the inducement; conspiracy to commit fraud by creation, operation and use of the MERS system; conspiracy to commit wrongful foreclosure by creation, operation and use of the MERS system; unjust enrichment; injunctive relief; declaratory relief; and quiet title. Defendants filed two motions to dismiss (Doc. 765, 798) and Plaintiff responded (Doc. 880).

***3** In *Kartman v. Ocwen Loan Servicing, LLC, et al.,* CV 10-489-PHX-JAT, Plaintiff alleges eleven causes of action, nine of which were transferred at least in part: wrongful foreclosure; fraud in the inducement; conspiracy to commit fraud by creation, operation and use of the MERS system; conspiracy to commit wrongful foreclosure by creation, operation and use of the MERS system; unjust enrichment; injunctive relief; declaratory relief; quiet title; and rescission. Defendants filed two motions to dismiss (Doc. 593, 740) and Plaintiff responded (Doc. 725, 861).

In *Bricker v. Wells Fargo Bank, N.A., et al.,* CV 10-492-PHX-JAT, Plaintiff alleges seven causes of action, all of which were transferred at least in part: wrongful foreclosure; fraud in the inducement; conspiracy to commit fraud by creation, operation and use of the MERS system; conspiracy to commit wrongful foreclosure by creation, operation and use of the MERS system; unjust enrichment; declaratory relief; and quiet title. Defendants filed three motions to dismiss (Doc. 575, 691, 747) and Plaintiff responded (Doc. 827, 862, 1039).

In *Boyd v. Wells Fargo Bank, N.A., et al.,* CV 10-493-PHX-JAT, Plaintiff alleges fifteen causes of action, nine of which were transferred at least in part: wrongful foreclosure; fraud in the inducement; conspiracy to commit fraud by creation, operation and use of the MERS system; conspiracy to commit wrongful foreclosure by creation, operation and use of the MERS system; unjust enrichment; injunctive relief; declaratory relief; quiet title; and rescission. Defendants filed two motions to dismiss (Doc. 697, 744) and Plaintiff responded (Doc. 826, 864).

In *Golding v. Amtrust Bank, et al.,* CV 10-494-PHX-JAT, Plaintiff alleges eight causes of action, seven of which were transferred at least in part: wrongful foreclosure; fraud in the inducement; conspiracy to commit fraud by creation, operation and use of the MERS system; conspiracy to commit wrongful foreclosure by creation, operation and use of the MERS system; unjust enrichment; declaratory relief; and quiet title. Defendants filed two motions to dismiss (Doc. 746, 1011) and Plaintiff responded (Doc. 865).

II. LEGAL STANDARD

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"A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a claim." *Navarro v. Block,* 250 F.3d 7129, 732 (9th Cir.2001). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal,* 129 S.Ct. at 1949. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.' " *Id.* (quoting *Twombly,* 550 U.S. at 557).

***4** "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of the cause of action will not do." *Twombly,* 550 U.S. at 545 (internal quotations, citations and alterations omitted). "Determining whether a complaint states a plausible claim for relief ... [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.' " *Iqbal,* 129 S.Ct. at 1950 (quoting Fed. Rule. Civ. P. 8(a)(2)) (citation omitted).

Under Rule 9(b), plaintiffs have an even higher pleading standard in all allegations of fraud, especially in multi-defendant cases such as these. The Ninth Circuit has repeatedly emphasized that "Rule 9(b) does not allow a complaint to merely lump multiple defendants together but require[s] plaintiffs to differentiate their allegations when suing more than one defendant ... and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Swartz v. KPMG LLP,* 476 F.3d 756, 765 (9th Cir.2007) (internal citation omitted); *Kendall v. Visa U .S.A., Inc.,* 518 F.3d 1042, 1048 (9th Cir.2008) ("membership in an association does not render an association's members automatically liable" for a conspiracy); *N. Cal. Pharm. Ass'n v. United States,* 306 F.2d 379, 388-89 (9th Cir.1962) (trade association membership "does not mean, however, that every member of the Association, by reason of his membership alone, becomes a coconspirator"). This heightened pleading standard also applies to claims for misrepresentation under Nevada law. *See Larson v. HomeComings Fin.,* 680 F.Supp.2d 1230, 12343 (D.Nev.2009).

III. WRONGFUL FORECLOSURE

In thirteen of these fourteen member cases, Plaintiffs assert claims for wrongful foreclosure. Each claim fails to state a claim as a matter of law for at least two reasons.

A. Failure to Allege Lack of Default

First, Nevada law is clear that "[a]n action for the tort of wrongful foreclosure will lie if the trustor or mortgagor can establish at the time the power of sale was exercised or the foreclosure occurred, no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the power of sale." *Ernestburg v. Mortgage Investors Group,* No. 2:08-cv-01304-RCJ-RJJ, 2009 WL 160241, at *6 (D.Nev. Jan. 22, 2009) (internal citations and quotations omitted). The plaintiff must establish that they were not "in default when the power of sale was exercised." *Id.* (citing *Collins v. Union Fed. Sav. & Loan Ass'n,* 662 P.2d 610, 623 (Nev.1983)). Furthermore, a claim for wrongful foreclosure does not arise until the power of sale is exercised. *Collins,* 662 P.2d at 623.

***5** By failing to plead that their loans are not in default, all of Plaintiffs' claims for wrongful foreclosure are barred as a matter of law and will be dismissed for failure to state a claim. Further, for many of the claims in these actions, Plaintiffs do not allege that the power of sale has been exercised. For these plaintiffs, these claims for wrongful foreclosure are premature and not actionable.

B. MERS and MERS-appointed trustees have power to foreclose

Even if Plaintiffs' claims for wrongful foreclosure were not barred by their failure to plead absence of default, Plaintiffs' claims suffer other deficiencies. Plaintiffs have failed to allege facts upon which the Court could draw the reasonable inference that the foreclosure trustees were not properly appointed and thus lacked the power to exercise the power of sale. Plaintiffs' "split the note" theory has been recognized by several courts in a particular context and to a limited extent. MERS has been found to be less than a traditional beneficiary in that it holds the deed of trust, but not the accompanying mortgage note and the payments made on account of such loans. *See In re Hawkins,* No. BK-

S-07-13593-LBR, 2009 WL 901766 (Bankr.D.Nev. Mar. 31, 2009). This "splitting" of the note from the deed of trust does affect the parties' legal rights and thus, when MERS or a participant in the MERS system has needed a Court to grant affirmative relief-for example, when it needs relief from an automatic stay in a bankruptcy court-Courts have not granted that relief. *See In re Hawkins* (denying relief from automatic state in bankruptcy proceedings); *In re Vargas,* 396 B.R. 511, 517 (Bankr.C.D.Cal.2008) (same); *Bellistri v. Ocwen Loan Servicing, L.L.C.,* 284 S.W.3d 619 (Mo.Ct.App.2009) (denying relief to a foreclosure trustee appointed by MERS for lack of "interest" in the property).

However, the situation in the cases before the Court differ in one important respect: they concern non-judicial foreclosures under Nevada law. "Defendants do not need to produce the note to the property in order to proceed with a non-judicial foreclosure." *Urbina v. Homeview Lending Inc.,* 681 F.Supp.2d 1254 (D.Nev.2009) (dismissing Plaintiffs' allegations that Defendants did not possess the original note); *see also Mansour v. Cal-Western Reconveyance Corp.,* 618 F.Supp.2d 1178, 1181 (D.Ariz.2009) (rejecting similar "show me the note" argument under Arizona's similar non-judicial foreclosure law and collecting cases with similar holdings).

Some Plaintiffs further argue that because "the note and deed of trust were no longer together" the holders of the notes "are no longer allowed to enforce the note through non-judicial foreclosure." *See, e.g.,* Doc. 828 at 10. Yet Plaintiffs have failed to allege any facts suggesting that MERS is not the nominee of the current owner of the promissory note; nor do Plaintiffs allege any facts supporting their assertion that the promissory note and the deed of trust have been truly bifurcated. Plaintiffs have not cited any legal authority where the naming of MERS-and the consequent "splitting of the note"-was cause to enjoin a non-judicial foreclosure as wrongful. Indeed Nevada case law universally [3] holds that these deeds are enforceable. *See Orzoff v. MERS,* No. 2:08-cv-01512, 2009 WL 4643229, at *6 (D.Nev. Mar. 26, 2009) ("Plaintiff has cited no authority that is controlling upon this Court that holds MERS cannot have standing as a nominee beneficiary in connection with a nonjudicial foreclosure proceeding under Nevada law. This Court has previously determined that MERS does have such standing."); *Vazquez v. Aurora Loan Servs.,* No 2:08-cv-01800, slip op. at 2 (D.Nev. Mar. 30, 2009) (loan documents sufficiently demonstrated standing by Defendants, including MERS, "with respect to the loan and the foreclosure"); *Gonzalez v. Home American Mortgage Corp.,* Case No. 2:09-cv-00244, slip op. at 7-9 (D.Nev. Mar. 12, 2009) (MERS and successor trustee have the power to initiate non-judicial foreclosure without presenting the note); *Ramos v. MERS, Inc.,* Case No. 2:08-cv-1089-ECR-RJJ, 2009 WL 5651132, at *3 (D.Nev. Mar. 5, 2009) ("under the deed of trust, MERS was empowered to foreclose on the property and to appoint [a] substitute trustee for purpose of conducting the foreclosure"). Therefore, for this additional reason, Plaintiffs' claims for wrongful foreclosure fail to state a claim.

***6** Several Plaintiffs argue that because "the investors that funded this loan were strangers to the purported loan transactions and which parties were and are unknown to Plaintiffs and, none of these servicers funded the Plaintiffs' loans with any of their own assets and are not owed any of the funds to be repaid by Plaintiffs, and do not stand to suffer any loss should they be enjoined from foreclosing." *See, e.g., Mason* Complaint, CV 10-457-PHX-JAT, Doc. 1-1 at 10. No Plaintiff, however, alleges specific facts that would support such a theory or identifies any legal authority where this "holder in due course" argument is a bar to non-judicial foreclosure.

In sum, Plaintiffs' actions for wrongful foreclosure are all dismissed for failure to state a claim.

III. CONSPIRACY TO COMMIT WRONGFUL FORECLOSURE

A. Lack of Underlying Claim

In thirteen of these fourteen member cases, Plaintiffs also assert claims for conspiracy to commit wrongful foreclosure. Since Plaintiffs fail to state a claim for wrongful foreclosure, their claims for conspiracy to commit wrongful foreclosure also must fail. It is well settled that a plaintiff cannot prevail on a claim for conspiracy if the underlying claim is defective. *Grisham v. Philip Morris USA,* 403 F.3d 631, 635 (9th Cir.2000) (claim for civil conspiracy fails if underlying cause of action fails). "Civil conspiracy is not an independent cause of action-it must arise from some underlying wrong." *Paul Steelman Ltd. v. HKS, Inc.,* No. 2:05-cv-01330-BES-RJJ, 2007 WL 295610, at *3 (D.Nev. Jan. 26, 2007) ("having concluded that Plaintiffs' claim of tortious interference is not actionable as pleaded, Steelman's civil conspiracy claim must also fail") (citing *Sahara Gaming Corp. v. Culinary Workers Union Local 226,* 984 P.2d 164, 165 (Nev.1999)). Accordingly, because plaintiffs have not and cannot present a valid claim for wrongful foreclosure, these claims are dismissed as a matter of law.

B. Failure to Allege Specific Facts to Support Inference of a Conspiracy

Regardless of the merits of Plaintiffs' underlying claims for fraud, Plaintiffs' claim that Defendants conspired to commit wrongful foreclosure is insufficient both for a failure to plead conspiracy with the requisite particularity and for a failure to plead an agreement to participate in the wrongful foreclosure.

For a conspiracy-to-defraud action to lie under Nevada law, a plaintiff must plead and prove that there is: "(1) a conspiracy agreement ...; (2) an overt act of fraud in furtherance of the conspiracy; and (3) resulting damages to the plaintiff." *Jordan v. State ex rel. Dept. of Motor Vehicles and Pub. Safety,* 110 P.3d 30, 51 (Nev.2005). "To prevail in a civil conspiracy action, a plaintiff must prove an agreement between the tortfeasors, whether explicit or tacit." *GES, Inc. v. Corbitt,* 21 P.3d 11, 15 (Nev.2001). Thus, to maintain a viable conspiracy claim a plaintiff must allege with sufficient factual particularity the "specific time, place, or person involved in the alleged conspiracies to give a defendant seeking to respond to allegations of a conspiracy an idea of where to begin." *Kendall v. Visa U.S.A., Inc.,* 518 F.3d 1042, 1047 (9th Cir.2008) (quotations and citation omitted). Put another way, plaintiffs must plead the "who, what, when, where and how of the misconduct charged" necessary to satisfy the requirements of Federal Rule of Civil Procedure 9(b). *See Gowen v. Tiltware LLC,* No. 2:08-CV-1581, 2009 WL 1441653, at *9 (D.Nev. May 19, 2009) (quoting *Vess v. Ciba-Geigy Corp. USA,* 317 F.3d 1097, 1106 (9th Cir.2003)). Specifically, "a plaintiff must allege with sufficient factual particularity that defendants reached some explicit or tacit understanding or agreement. It is not enough to show that defendants might have had a common goal unless there is a factually specific allegation that they directed themselves towards this wrongful goal by virtue of a mutual understanding or agreement." *S. Union Co. v. Sw. Gas Corp.,* 165 F.Supp.2d 1010, 1020-21 (D.Ariz.2001) (quoting *Alfus v. Pyramid Technology Corp.,* 745 F.Supp. 1511, 1521 (N.D.Cal.1990)).

***7** Plaintiffs allege that Defendants: (1) formed an association to conspire in order to deprive Plaintiffs of their property; (2) knew Plaintiffs would be unable to pay the loans and, thus, Defendants would be in a position to seize Plaintiffs' real property through foreclosure; and (3) targeted Plaintiffs for the purpose of misrepresenting the terms of the loans in order to seize Plaintiffs' properties. However, Plaintiffs do not plead any of these allegations with sufficient factual allegations. Plaintiffs have failed to plead how or even when Defendants formed this purported association to conspire. Neither have Plaintiffs included any factual allegations pertaining to how Defendants targeted Plaintiffs. Plaintiffs' allegations amount to a claim that Defendants *somehow* formed a conspiracy with the intent to provide Plaintiffs with a loan, the terms of which they could not afford, thus permitting Defendants to gain control of the properties through foreclosure. "But terms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation-for example, identifying a written agreement or even a basis for inferring a tacit agreement-but a court is not required to accept such terms as a sufficient basis for a complaint. The case law on this point is ample." *DM Research, Inc. v. Coll. of Am. Pathologists,* 170 F.3d 53, 56 (1st Cir.1999) (cited with approval in *Twombly,* 550 U.S. at 557). Plaintiffs have failed to provide any specific, factual allegations inferring even a tacit agreement. As such, Plaintiffs' claims for conspiracy fall short of the requirements of Rule 9(b), *Twombly,* and *Iqbal.*

Plaintiffs' claim for conspiracy to commit wrongful foreclosure fails both because Plaintiffs have not stated a claim for the underlying tort-wrongful foreclosure-and because Plaintiffs fail to state the basic elements of conspiracy. Thus, the Court will grant the motions to dismiss these claims.

IV. FRAUD IN THE INDUCEMENT

In twelve of these fourteen member cases, this Court has retained at least part of Plaintiffs' claims for Fraud in the Inducement. In Nevada, to state a claim for fraud in the inducement, a plaintiff must allege (1) a false representation of material fact made by the defendant; (2) defendant's knowledge or belief that the representation is false; (3) defendant's intention to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation; (4) plaintiff's justifiable reliance upon the misrepresentation; and (5) damage to the plaintiff resulting from such reliance. *Albert H. Wohlers & Co. v. Bartgis,* 114 Nev. 1249, 1260-61 (1998).

Plaintiffs do not state a claim for fraud. As a representative example, Plaintiff Hearne alleges that Defendants "failed to advise the Plaintiff that the obligations on their notes had been discharged" and "concealed the true terms of the loans." Such lack of disclosure can only support a claim for fraudulent inducement if the defendant is under a fiduciary duty to disclose the fact in question. *Rivera v. Philip Morris, Inc.,* 395 F.3d 1142, 1154 (9th Cir.2005). Lenders have no such duty

under Nevada law. *See Gamboa v. World Sav. Bank, FSB,* No. 3:10-CV-454-ECR-VPC, 2010 WL 5071166 (D.Nev. Dec. 6, 2010); *Yerrington Ford, Inc. v. GMAC,* 359 F.Supp.2d 1075 (D.Nev.2004), *overruled on other grounds sub. nom. Giles v. GMAC,* 494 F.3d 865 (9th Cir.2007).

***8** Additionally, none of Plaintiffs' allegations with respect to fraud are not made with particularity. Rather, Plaintiffs' allegations amount to mere conclusory statements and general averments of fraud. As such, Plaintiffs' complaints fall short of the requirements of Rule 9(b), *Twombly,* and *Iqbal.*

Thus, due both a lack of duty to disclose and insufficient factual allegations under the Rule 9(b) standard, the Court will dismiss these claims for failure to state a claim.

V. CONSPIRACY TO COMMIT FRAUD RELATED TO THE MERS SYSTEM

In thirteen of these fourteen member cases, Plaintiffs assert that various named Defendants conspired to commit fraud through the MERS system. From the complaints, Plaintiffs' claims for conspiracy to commit fraud appears to be an attack on the legitimacy of the MERS system itself. A nearly identical claim for Conspiracy to Commit Fraud Related to the MERS® System was dismissed with prejudice by this Court in *Cervantes v. Countrywide Home Loans,* CV 09-517-PHX-JAT, 2009 WL 3157160 (D.Ariz. Sep. 24, 2009), because no facts were alleged showing any fraud was committed by MERS or in the MERS system. In an effort to distinguish the present cases from *Cervantes,* some Plaintiffs, in their responses, argue that they "have not alleged that the MERS system is fraudulent, and Plaintiffs have not alleged that MERS committed any fraud" (Doc. 922, Ex. 1 at 5). Instead, Plaintiffs now maintain that these claims:

> "are about how the defendants named as co-conspirators created and used the MERS system to facilitate the securitization and sale of loans procured by fraud (also known as predatory loans, subprime loans, and toxic loans), and how the defendants created and used the MERS system to facilitate wrongful foreclosures on the parties who were the victims of predatory lending, and how the MERS system was used to facilitate wrongful foreclosures on others in Nevada"

Id. Under both Plaintiffs' complaints and the gloss provided by these plaintiffs' responses, Plaintiffs fail to state a claim. For the sake of thoroughness, the Court will consider each of these constructions-that the MERS system is itself fraudulent or that the MERS system "facilitated" fraudulent activity in turn.

A. The MERS system is not fraudulent, and MERS has not committed any fraud

While some plaintiffs have conceded this point, it is helpful to provide an overview of the facts. MERS is a wholly owned subsidiary of MERSCORP, a Virginia corporation. Various of the named Defendant banks and lending institutions are shareholders in MERSCORP and participants in the MERS system. Under the MERS system, at the origination of a residential loan, the lender takes possession of a promissory note and the borrower and lender agree to designate MERS as the beneficiary under a deed of trust. Under the MERS system, the rights to the mortgage are tracked internally and not recorded in the public records each time the rights to the mortgage are bought and sold, so long as the buyer is a member of the MERS system.

***9** This Court in *Cervantes* considered two possible ways in which this MERS system could be considered fraudulent: (1) MERS is never really a beneficiary under the deed of trust because it never acquires a true beneficial interest; and (2) the MERS system is a means of circumventing the public recording requirements. The Court found that Plaintiffs' claims for conspiracy to commit fraud fail as a matter of law under Rule 12(b)(6) in that it failed to assert several elements of a claim for fraud. The Court relies on the analysis put forward in *Cervantes.* The elements of a fraud claim under Nevada law are largely similar to the elements of fraud under Arizona law which applied in *Cervantes.* Under both theories considered in *Cervantes,* several elements of a fraud claim under Nevada law-falsity, reliance, and injury-are lacking from Plaintiffs' complaints.

B. MERS "facilitated" fraudulent practices

Plaintiffs' claims that Defendants conspired to commit fraud related to MERS is insufficient both for a failure to plead conspiracy with the requisite particularity and for a failure to plead an agreement to participate in the facilitation of fraud. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed.R.Civ.P. 9(b). Plaintiffs' allegations with respect to fraud were not made with particularity. Rather, Plaintiffs' allegations amount to mere conclusory statements and general averments of fraud. As set forth above section III.B above, Plaintiffs' complaints fall short of the requirements of Rule 9(b), *Twombly,* and *Iqbal.*

Thus, due to insufficient allegations of conspiracy, the facilitation gloss advanced by Plaintiffs in their responses fails to save their claims for conspiracy to commit fraud. The Court will dismiss these claims for failure to state a claim.

VI. INTENTIONAL/NEGLIGENT MISREPRESENTATION

Plaintiffs assert a claim for intentional/negligent misrepresentation in *Stoffels.* To support an intentional misrepresentation claim, a plaintiff must allege "(1) a false representation that is made with either knowledge or belief that it is false ..., (2) an intent to induce another's reliance, and (3) damages that result from this reliance." *Nelson v. Heer,* 163 P.3d 420, 426 (Nev.2007). Negligent misrepresentation requires Plaintiff to allege (1) "a false statement ... made through a failure to exercise reasonable care," (2) "that the statement was made in the course of business," (3) "that the statement was for the guidance of others in a business transaction," and (4) that "the injured party justifiably relied on their statement." *Georgiou Studio, Inc. v. Boulevard Inv.,* 663 F.Supp.2d 973, 982 (D.Nev.2009).

The *Stoffels* Complaint fails to allege the necessary facts to maintain either of these claims. Plaintiffs neither allege that Defendants intended Plaintiffs to rely on the purported misrepresentations-an indispensable element for intentional misrepresentation-nor that Plaintiffs justifiably relied on the purported misrepresentations to enter their loan. Plaintiffs do not allege that they were somehow induced into entering into their loans based upon a misunderstanding of the MERS system. Therefore, the Court will dismiss the claim for intentional/negligent misrepresentation

VII. SLANDER OF TITLE

***10** Plaintiffs assert a claim for slander of title in *Stoffels.* A claim for slander of title requires "false and malicious communications, disparaging to one's title in land, and causing special damages." *Executive Mgmt., Ltd. v. Ticor Title Co.,* 963 P.2d 465, 478 (Nev.1998). Here, Plaintiffs have not sufficiently alleged the falsity of these communications. Just as in *Ramos v. Mortgage Electronic Registrations* [sic] *Systems, Inc.,* No. 2:08-cv-1089-ECR-RJJ, 2009 WL 5651132, at *4 (D.Nev. Mar. 5, 2009), "Plaintiffs do not dispute that they were in default on their loan. Nor is it false that the property was to be sold at a trustee's sale.... It is not clear, therefore, what Plaintiffs might assert to be false or malicious about the recorded notice." In *Stoffels,* the only alleged falsity emerges from Plaintiffs' argument that the MERS recordation process splits the note from the deed of trust, renders the note unenforceable, and thus all subsequent action-including these recordations-are invalid and false. As dealt with elsewhere in this Order, this argument is not supported by the law. Therefore, the Court will dismiss Plaintiffs' claims for slander of title for failure to state a claim.

VIII. QUIET TITLE

In ten of these fourteen member cases, Plaintiffs allege that they are entitled to quiet title because defendants have no standing to collect on their notes. This argument rests completely on the "split the note" theory which, as noted above, has limited application in a non-judicial foreclosure state. Plaintiffs have not cited any legal authority for the proposition that a borrower may quiet title when the note has been split. Therefore, the Court will dismiss Plaintiffs' claims for quiet title.

IX. UNJUST ENRICHMENT

In thirteen of these fourteen member cases, Plaintiffs set forth claims for unjust enrichment. To set forth a claim for unjust enrichment under Nevada law, a plaintiff must allege that a defendant unjustly retained money or property of another against fundamental principles of equity. *See Asphalt Prods. Corp. v. All Star Ready Mix,* 898 P.2d 699, 700 (Nev.1995). Unjust enrichment must be premised on some independent basis which establishes a duty on the part of the defendant and the failure of the defendant to abide by that duty. In and of itself, the phrase "unjust enrichment" does not describe a theory of recovery. Rather, it is a way of describing the failure to make restitution where equity requires. *See Melchior v. New Line Prods., Inc.,* 106 Cal.App.4th 779, 792, (Cal.Ct.App.2003);

Here, the Court finds that Plaintiffs have failed to state any other claims for relief. Thus, as a matter of law, Defendants cannot have been unjustly enriched and equity does not demand any restitution. Therefore, the Court will also dismiss the claims for unjust enrichment for failure to state a claim.

X. DECLARATORY RELIEF, INJUNCTIVE RELIEF, RESCISSION, REFORMATION

***11** All Plaintiffs seek injunctive and declaratory relief. Several also seek reformation or rescission. However, for the

various reasons discussed above, the Court has already found that all of Plaintiffs' other claims before this Court must be dismissed. Therefore, these requests for remedies premised upon those underlying legal theories must likewise fail.

Of particular interest, in the *Whalen* case Plaintiff requests injunctive and declaratory relief attached to no independent cause of action. Thus, the Court will dismiss the *Whalen* complaint in its entirety.

XI. LEAVE TO AMEND

Plaintiffs do not explicitly seek leave of this Court to file amended complaints. However, some Plaintiffs have undertaken to remind the Court that it "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *See, e.g.,* Doc. 619 at 32 (quoting *Doe v. United States,* 58 F.3d 494, 496-97 (9th Cir.1995) (internal quotations omitted)). Leave to amend a complaint is within the Court's sound discretion, and in exercising this discretion, the Court must be guided by the command of Rule 15(a), which provides that "leave shall be freely given when justice so requires." *Allen v. City of Beverly Hills,* 911 F.2d 367, 373 (9th Cir.1990) (citing Fed.R.Civ.P. 15(a)). "In exercising its discretion [,] ... 'a court must be guided by the underlying purpose of Rule 15-to facilitate decision on the merits rather than on the pleadings or technicalities.' ... Thus, 'Rule 15's policy of favoring amendments to pleadings should be applied with extreme liberality.' " *Eldridge v. Block,* 832 F.2d 1132, 1135 (9th Cir.1987) (citations omitted). The Court should consider five factors when assessing whether to allow leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether the plaintiff has previously amended the complaint. *Foman,* 371 U.S. at 182.

The Court finds that Plaintiffs' indirect requests to amend their complaints do not constitute bad faith, have not resulted from undue delay, and would not result in undue prejudice to the opposing parties. Because Plaintiffs have not formally moved for leave to amend, they have deprived the Court of the benefit of the redlined proposed amended complaint that would be helpful in making a determination about the futility of amendment. The Court also notes that in some of these cases, Plaintiffs have already amended their complaints and are seeking leave to do so for a second or third time.

Yet the Court finds no reason to depart from Rule 15's liberal amendment policy and will grant all of Defendants' motions to dismiss without prejudice.

To facilitate the streamlining of this MDL, the Court directs Plaintiffs, if they choose to seek leave to amend, to jointly file a proposed consolidated amended complaint together with the various plaintiffs whose actions are currently joined to this MDL. The Court gave this same instruction in its September 30, 2010 Order, yet the plaintiffs in the first six actions filed a motion for leave to file a consolidated amended master complaint (Doc. 1229). The Court finds this motion to be premature and will deny it. The Court will continue to conduct an initial round of pretrial motions for the other member cases as provided for in the various practices and procedures orders until such time as it is appropriate to set forth a timetable for filing this consolidated amended complaint. [4]

CONCLUSION

**12* Accordingly,

IT IS ORDERED regarding *Stoffels* that Defendants' two motions to dismiss (Doc. 707, 1168) are GRANTED.

IT IS FURTHER ORDERED regarding *Hearne* that Defendants' two motions to dismiss (Doc. 471, 700) are **GRANTED.**

IT IS FURTHER ORDERED regarding *Burke* that Defendants' seven motions to dismiss (Doc. 442, 455, 456, 459, 467, 472, 694) are **GRANTED.**

IT IS FURTHER ORDERED regarding *Dalby* that Defendants' five motions to dismiss (Doc. 444, 460, 463, 469, 698) are **GRANTED .**

IT IS FURTHER ORDERED regarding *Mason* that Defendants' four motions to dismiss (Doc. 737, 755, 758, 794) are **GRANTED.**

IT IS FURTHER ORDERED regarding *Fitzgerald* that Defendants' four motions to dismiss (Doc. 729, 738, 759, 1085) are **GRANTED.**

IT IS FURTHER ORDERED regarding *Whalen* that Defendants' two motions to dismiss (Doc. 583, 703) are **GRANTED.**

IT IS FURTHER ORDERED regarding *Berilo* that Defendants' two motions to dismiss (Doc. 689, 739) are **GRANTED.**

IT IS FURTHER ORDERED regarding *Fitzwater* that Defendants' motion to dismiss (Doc. 745) is **GRANTED.**

IT IS FURTHER ORDERED regarding *Evans* that Defendants' two motions to dismiss(Doc. 765, 798) are **GRANTED.**

IT IS FURTHER ORDERED regarding *Kartman* that Defendants' two motions to dismiss (Doc. 593, 740) are **GRANTED.**

IT IS FURTHER ORDERED regarding *Bricker* that Defendants' three motions to dismiss (Doc. 575, 691, 747) are **GRANTED.**

IT IS FURTHER ORDERED regarding *Boyd* that Defendants' two motions to dismiss (Doc. 697, 744) are **GRANTED.**

IT IS FURTHER ORDERED regarding *Golding* that Defendants' two motions to dismiss (Doc. 746, 1011) are **GRANTED.**

IT IS FURTHER ORDERED that Plaintiffs' First Motion for Leave to File Motion for Leave to File Consolidated Amended Master Complaint Regarding Claims Related to the Formation and Operation of the MERS System (Doc. 1229) is DENIED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that the Clerk of the Court shall terminate the following motions for judicial notice: Doc. 477, Doc. 445, Doc. 690, Doc. 693, Doc. 702, Doc. 704, and Doc. 730.

Footnotes

1 At oral argument, counsel for various plaintiffs attempted to read portions of a deposition into the record. The deposition was taken in an unrelated action, was clearly beyond the scope of a hearing on a motion to dismiss, and was submitted to the Court in a last-minute filing. For all these reasons, the Court has not considered the contents of the deposition before issuing this Order.

2 Several Defendants have joined in various motions to dismiss and/or replies in support of motions to dismiss. To the extent the Court need address these joinders, they are granted.

3 On the eve of oral argument, Plaintiffs submitted-as supplemental authority-two orders from two Nevada State Court cases: *Logan v. World Savings Bank, et al.,* Case No. CV-10-02354 (Nev.2d J. Dist. Jan. 12, 2011) (order denying Motion to Dismiss) and *Spinnato v. Regional Trustee Services Corp., et al.,* Case No. CV-09-02927 (Nev.2d J. Dist. Jan. 12, 2011) (order denying Motion to Dismiss). *See* Doc. 1236. In both of these cases, Nevada District Judge Patrick Flanagan held that similar causes of action for wrongful foreclosure survived motions to dismiss, but neither interlocutory order endorses the proposition that Nevada law prohibits the authorization of a foreclosure sale due to the operation of MERS.

4 Should there arise a need for any plaintiff to seek preliminary injunctive relief, that party should file a proposed amended complaint concurrently with the motion for preliminary injunction. Such a proposed amended complaint need not conform with this Court's instruction that a consolidated amended complaint be filed.

In a departure from prior practice, any motions relating to less than all member cases, should be filed in the individual case numbers assigned to each case.

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C

Supreme Court of Utah.
R. Lamar BAIRD, a resident of the State of Utah for and on behalf of all other residents similarly situated, Plaintiff and Respondent,
v.
STATE of Utah, State Industrial Commission, Occupational Safety and Health Division, Utah Occupational Safety and Health Review Commission, Defendants and Appellants.

No. 14984.
Jan. 9, 1978.

An appeal was taken from a judgment of the Third District Court, Salt Lake County, Bryant H. Croft, J., declaring Utah Occupational Safety and Health Act unconstitutional. The Supreme Court, Maughan, J., held that: (1) plaintiff who alleged that he was employed and employing but who did not assert legally protected interest in subject matter of declaratory judgment action and who did not plead any facts indicating that he would be directly affected by enforcement of Act lacked standing to urge that Act was unlawful as violative of doctrine of separation of powers; (2) plaintiff could not base claim of unconstitutionality of Act upon legal rights of third parties, and (3) trial court should have dismissed the action for lack of jurisdiction to render advisory opinion.

Reversed.

Ellett, C. J., filed an opinion concurring in the result in which Crockett, J., concurred.

West Headnotes

[1] Declaratory Judgment 118A 362

118A Declaratory Judgment
118AIII Proceedings
118AIII(F) Hearing and Determination
118Ak361 Dismissal Before Hearing
118Ak362 k. Grounds for Involuntary Dismissal in General. Most Cited Cases

Where plaintiff merely alleged that he was employed and employing within geographical confines of Utah and that he was member of class of persons with similar complaints, alleged adverse actions consisted of creation, administration and enforcement of Utah Occupational Safety and Health Act, allegations concerning constitutionality of Act were pleaded in abstract and there were no concrete facts pleaded indicating any specific injury sustained or threatened to plaintiff personally and no allegations that plaintiff had sustained particularized injury setting him apart from public generally, trial court should have dismissed action for declaratory judgment for lack of jurisdiction to render advisory opinion. U.C.A.1953, 35-9-1 et seq.

[2] Action 13 6

13 Action
13I Grounds and Conditions Precedent
13k6 k. Moot, Hypothetical or Abstract Questions. Most Cited Cases

Constitutional Law 92 2600

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)6 Advisory Opinions
92k2600 k. In General. Most Cited Cases
(Formerly 92k69)

Courts are not a forum for hearing academic contentions or rendering advisory opinions.

[3] Declaratory Judgment 118A 61

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(D) Actual or Justiciable Controversy
118Ak61 k. Necessity. Most Cited Cases

To maintain an action for declaratory relief, plaintiff must show that the justiciable and jurisdic-

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tional elements requisite in ordinary actions are present, for a judgment can be rendered only in a real controversy between adverse parties.

[4] Declaratory Judgment 118A ⚷62

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(D) Actual or Justiciable Controversy
118Ak62 k. Nature and Elements in General. Most Cited Cases

Generally, before declaratory judgment action can be maintained, there must be a justiciable controversy, interests of parties must be adverse, party seeking such relief must have legally protectible interest in controversy and issues between parties involved must be ripe for judicial determination.

[5] Declaratory Judgment 118A ⚷61

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(D) Actual or Justiciable Controversy
118Ak61 k. Necessity. Most Cited Cases

Courts have no jurisdiction to render a declaratory judgment in the absence of a justiciable or actual controversy.

[6] Declaratory Judgment 118A ⚷62

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(D) Actual or Justiciable Controversy
118Ak62 k. Nature and Elements in General. Most Cited Cases

A mere general contention between parties which has not been formulated into definite controversy does not warrant declaratory relief.

[7] Declaratory Judgment 118A ⚷65

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(D) Actual or Justiciable Controversy
118Ak65 k. Moot, Abstract or Hypothetical Questions. Most Cited Cases

For a declaratory adjudication, concrete legal issues must be present, not abstractions.

[8] Declaratory Judgment 118A ⚷292

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak292 k. Interest in Subject Matter. Most Cited Cases

A party seeking a declaration of constitutionality of statute must have real interest therein as against his adversary whose rights and contentions must be opposition to those of plaintiff.

[9] Declaratory Judgment 118A ⚷292

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak292 k. Interest in Subject Matter. Most Cited Cases

General rule is that a party having only such interest as the public generally cannot maintain action seeking declaration of unconstitutionality of statute.

[10] Declaratory Judgment 118A ⚷315

118A Declaratory Judgment
118AIII Proceedings
118AIII(D) Pleading
118Ak312 Complaint, Petition or Bill
118Ak315 k. Statutes and Ordinances. Most Cited Cases

A plaintiff may seek and obtain a declaration as to whether a statute is constitutional by averring in his pleadings the grounds upon which he will be directly damaged in his person or property by its enforcement and by alleging facts indicating how he will be damaged by its enforcement, that defendant is enforcing such statute or has duty or ability to enforce it and that enforcement will impinge upon plaintiff's legal or constitutional rights.

[11] Declaratory Judgment 118A ⚷300

118A Declaratory Judgment
118AIII Proceedings

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118AIII(C) Parties
118Ak299 Proper Parties
118Ak300 k. Subjects of Relief in General. Most Cited Cases

To invoke judicial power to determine validity of executive or legislative action, plaintiff must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of that action; it is insufficient to assert general interest shared in common with all members of public.

[12] Declaratory Judgment 118A ⚷300

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak299 Proper Parties
118Ak300 k. Subjects of Relief in General. Most Cited Cases

Plaintiff who alleged he was employed and employing in Utah but who did not assert legally protected interest in subject matter of declaratory judgment action challenging constitutionality of Utah Occupational Safety and Health Act and who did not plead any facts indicating he would be directly affected by enforcement of Act and whose complaint that Act violated doctrine of separation of powers by improperly combining legislative, executive and judicial authority in one agency was public in character had no standing to urge unlawfulness of Act. U.C.A.1953, 35-9-1 et seq., 78-33-2; Const. art. 5, § 1.

[13] Constitutional Law 92 ⚷2454

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)1 In General
92k2454 k. Determination of Constitutionality of Statutes. Most Cited Cases

(Formerly 92k42.2(1))

It is not duty of court to sit in judgment upon action of legislative branch of government except when litigant claims to be adversely affected on particular ground by legislative act.

[14] Declaratory Judgment 118A ⚷292

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak292 k. Interest in Subject Matter. Most Cited Cases

(Formerly 92k42.1(1))

Plaintiff in declaratory judgment action could assert only his legal rights and could not base his claim of unconstitutionality of Occupational Safety and Health Act upon legal rights of third parties. U.C.A.1953, 35-9-1 et seq.

[15] Constitutional Law 92 ⚷915

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)11 Equal Protection
92k915 k. In General. Most Cited Cases

(Formerly 92k42.2(2))

Denial of equal rights can be urged only by those who show they belong to alleged discriminated class.

[16] Constitutional Law 92 ⚷885

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)10 Due Process
92k885 k. In General. Most Cited Cases

(Formerly 92k42.2(1))

An asserted violation of due process can be urged only by those who claim an impairment of their rights in application of challenged statute to them.

[17] Constitutional Law 92 ⚷897

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92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)10 Due Process
92k896 Labor and Employment
92k897 k. In General. Most Cited Cases
(Formerly 92k42.2(1))

Constitutional Law 92 928

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)11 Equal Protection
92k927 Labor and Employment
92k928 k. In General. Most Cited Cases
(Formerly 92k42.2(2))

Challenges that Utah Occupational Safety and Health Act denied equal protection and deprived an "accused" of life, liberty and property without due process could only be charged by those whose rights were impaired by contested legislation. U.C.A.1953, 35-9-1 et seq.

[18] Declaratory Judgment 118A 126

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(E) Statutes
118Ak124 Statutes Relating to Particular Subjects
118Ak126 k. Employees, Labor Relations and Unemployment Compensation. Most Cited Cases

Remedy by way of declaratory judgment declaring Utah Occupational Safety and Health Act unconstitutional would be denied with respect to allegations that Act improperly delegated legislative power, that legislature did not establish sufficient standards to guide commission in exercise of its rule-making power, that Act permitted federal agency to make rules for state and that grant of quasi-judicial powers to commission was an improper delegation of judicial authority, in light of statutory provisions for an appeal from action of administrative body; proper procedure was to challenge Act and administration thereof by judicial review after final administrative action had been taken. Const. art. 6, § 1; art. 8, § 1; U.C.A.1953, 35-1-19 to 35-1-40, 35-9-6(6), 35-9-11(1).

***715** Robert B. Hansen, Atty. Gen., Harry E. McCoy II, Spec. Asst. Atty. Gen., James B. Lee, Kent W. Winterholler of Parsons, Behle & Latimer, Salt Lake City, for defendants and appellants.

Loren D. Martin, Salt Lake City, for plaintiff and respondent.

MAUGHAN, Justice:

[1] Before us is a judgment of the District Court declaring Chapter 9, Title 35, as enacted 1973, U.C.A.1953, unconstitutional. Based on the record before us, the trial court should have dismissed this action for declaratory judgment ex mero motu. It should have done so on the ground it lacked jurisdiction to render an advisory opinion. We reverse. No costs awarded.

Plaintiff merely alleged that he was employed and employing within the geographical confines of Utah and that he was a member of a class of persons with complaints similar to his. The alleged adverse actions of defendant consisted of the creation, administration, and enforcement of a legislative act. The allegations concerning the unconstitutionality of the act were all pleaded in the abstract. There were no concrete facts pleaded indicating any specific injury sustained or threatened to plaintiff personally. There were no allegations that plaintiff had sustained a particularized injury that set him apart from the public generally and would give him standing to challenge the constitutionality of the act.

[2][3][4] In Lyon v. Bateman,[FN1] this Court stated that while statutes authorizing courts to

render declaratory relief should be liberally construed, the courts must, nevertheless, operate within the constitutional and statutory powers and duties imposed upon them. The courts are not a forum for hearing academic contentions or rendering advisory opinions. To maintain an action for declaratory relief, plaintiff must show that the justiciable and jurisdictional elements requisite in ordinary actions are present, for a judgment can be rendered only in a real controversy between adverse parties.

FN1. 119 Utah 434, 439, 228 P.2d 818, 820 (1951).

. . . Generally, courts have held that the conditions which must exist before a declaratory judgment action can be maintained are: (1) a justiciable controversy; (2) the interests of the parties must be adverse; (3) the party seeking such relief must have a legally protectible interest in the controversy; and (4) the issues between the parties involved must be ripe for judicial determination.

To entertain an action for declaratory relief, there must be a justiciable controversy, for the courts do not give advisory opinions upon abstract questions.[FN2] The use of the term “rights, status and other legal relations” in the declaratory judgment statute (s 78-33-2, U.C.A.1953) relates to a justiciable controversy where there is an actual conflict between interested parties asserting adverse claims on an accrued state of facts as opposed to a hypothetical state of facts.[FN3]

FN2. 1 Anderson, Declaratory Judgments (2d Ed.), s 9, pp. 38, 44.

FN3. 1 Anderson, Declaratory Judgments (2d Ed.), 1959 Supp. s 9, p. 13.

***716** When it is ascertained that there is no jurisdiction in the court because of the absence of a justiciable controversy, then the court can go no further, and its immediate duty is to dismiss the action, and jurisdiction cannot be conferred by consent or any other act of the parties.

A Declaratory Judgment Statute cannot be so construed as to authorize the courts to deliver advisory opinions or pronounce judgments on abstract questions, but there must be the invariable justiciable controversy present in such cases.

The Declaratory Judgment Statute recognizes the constitutional limitations upon the courts to determine only cases and controversies.[FN4]

FN4. 1 Anderson, Declaratory Judgments (2d Ed.), s 9, pp. 49-50.

[5][6][7] The courts have no jurisdiction to render a declaratory judgment in the absence of a justiciable or actual controversy. A mere general contention between parties, which has not been formulated into a definite controversy, does not warrant declaratory relief. For an adjudication, concrete legal issues must be present not abstractions, as is required in other fields as well as declaratory judgments. “. . . Judicial adherence to the doctrine of separation of powers preserves the courts for the decision of issues between litigants capable of effective determination.” [FN5]

FN5. Id., s 16, pp. 65-66.

A justiciable controversy authorizing entry of a declaratory judgment is one wherein the plaintiff is possessed of a protectible interest at law or in equity and the right to a judgment, and the judgment, when pronounced, must be such as would give specific relief.[FN6]

FN6. Id., s 17, p. 67.

In order to obtain adjudication of an issue with respect to the validity of a statute in a declaratory action it is necessary that there be presented to the court concrete legal issues tendered in actual cases, and abstractions or the seeking of an advisory opinion or the presenting of a non-justiciable controversy, or the raising of a mere moot question will not enable a court, state or federal, to pass upon the constitutionality of statute.[FN7]

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FN7. Id., s 18, p. 68.

[8] A party seeking a declaration of the constitutionality of a statute must have a real interest therein as against his adversary, whose rights and contentions must be opposition to those of the plaintiff. A party to whom a statute is inapplicable cannot question its constitutionality by seeking a declaration of rights.[FN8]

FN8. Id., s 159, pp. 302-303.

[9] The general rule is applicable that a party having only such interest as the public generally cannot maintain an action. In order to pass upon the validity of a statute, the proceeding must be initiated by one whose special interest is affected, and it must be a civil or property right that is so affected.[FN9]

FN9. Id., s 162, pp. 313, 314.

[10] The necessity of alleging in the pleading a justiciable controversy is regarded as of such importance as to require the court to raise the question of its own motion, if the parties neglect or fail to do so.[FN10] A plaintiff may seek and obtain a declaration as to whether a statute is constitutional by averring in his pleading the grounds upon which he will be directly damaged in his person or property by its enforcement; by alleging facts indicating how he will be damaged by its enforcement; that defendant is enforcing such statute or has a duty or ability to enforce it; and the enforcement will impinge upon plaintiff's legal or constitutional rights. A complaint is insufficient which merely challenges the constitutionality of a statute, without in some way indicating that plaintiff will be affected by its operation or is subject to its terms and provisions.[FN11]

FN10. Id., s 258, pp. 605-606.

FN11. Id., s 291, p. 676.

***717** Did plaintiff's allegation that he was employed and employing constitute a sufficient basis to give him standing to challenge the constitutionality of the act?

. . . The law is that one who is regulated lacks standing unless he can show an interest that is adversely affected.[FN12]

FN12. Davis, Administrative Law of the Seventies, 1977 Supp., s 22.00-5, p. 177.

[11] To invoke judicial power to determine the validity of executive or legislative action, claimant must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of that action. It is insufficient to assert a general interest he shares in common with all members of the public, viz., a generalized grievance.[FN13]

FN13. United States v. Richardson, 418 U.S. 166, 177-180, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974).

To grant standing to a litigant, who cannot distinguish himself from all citizens, would be a significant inroad on the representative form of government, and cast the courts in the role of supervising the coordinate branches of government. It would convert the judiciary into an open forum for the resolution of political and ideological disputes about the performance of government.[FN14]

FN14. United States v. Richardson, note 13, supra, concurring opinion Justice Powell, 418 U.S. 188-192, 94 S.Ct. 2940.

Plaintiff alleged the act combined in one agency, legislative, executive, and judicial authority contrary to Article V, Sec. 1, Constitution of Utah. Specifically, he claimed this combination constituted a violation of the fundamental principles of free government, viz., the doctrine of separation of powers.

[12][13] In his allegations, plaintiff neither asserted a legally protectible interest in the subject matter of the action nor did he plead any facts in-

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dicating he would be directly affected by enforcement of the act. The wrong of which he complained was public in character, and his complaint disclosed no special injury affecting him differently from other citizens. He, therefore, had no standing to urge the unlawfulness of the governmental action. It is not the duty of this Court to sit in judgment upon the action of the legislative branch of government, except when a litigant claims to be adversely affected on a particular ground by a legislative act. [FN15]

FN15. Eastham v. Public Employees' Retirement Ass'n Bd., 89 N.M. 399, 553 P.2d 679 (1976); De Grief v. City of Seattle, 50 Wash.2d 1, 297 P.2d 940 (1956); Greer v. Lewiston Golf & Country Club, Inc., 81 Idaho 393, 342 P.2d 719 (1959); Bayly Manufacturing Co. v. Department of Employment, 155 Colo. 433, 395 P.2d 216 (1964); Patton v. Fortuna Corporation, 68 N.M. 40, 357 P.2d 1090 (1960); State v. Human Relations Research Foundation, 64 Wash.2d 262, 391 P.2d 513 (1964); Eacret v. Holmes, 215 Or. 121, 333 P.2d 741 (1958); 174 A.L.R. 549, Anno: Interest necessary to maintenance of declaratory determination of statute or ordinance, Secs. 2, p. 551 and 11, p. 564.

Plaintiff further alleged the act denied equal protection of the law, in that it conferred on the administrator authority to grant a variance, viz., he has discretion to determine whether the laws or rules shall apply to a particular person. In his complaint, plaintiff alleged the act was designed to circumvent the restrictions imposed upon governmental activity associated with criminal investigations and procedures by denominating the penalties for violations of the act as "civil assessments." Plaintiff asserted the act thus deprived an "accused" of a panoply of rights accorded in a criminal action, e. g., trial by jury, search and seizure only pursuant to a warrant, right of confrontation, proof beyond a reasonable doubt, and the right against self-incrimination. Plaintiff asserted the act deprived an accused of life, liberty, or property without due process of law.

[14][15][16][17] Plaintiff may assert only his own legal rights. He may not base his claim upon the legal rights of third parties. The denial of equal rights can be urged only by those who can show they belong to the alleged discriminated class. An asserted violation of due process can be urged only by those who claim an impairment of their ***718** rights in the application of the statute to them. Plaintiff's claims are presented as abstract propositions; he does not allege he has been denied these rights by enforcement of the act. Challenges such as these may only be urged by those whose rights are impaired by the contested legislation.[FN16]

FN16. Kelly v. Silver, 25 Or.App. 441, 549 P.2d 1134 (1976); State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967); American Metal Climax, Inc. v. Claimant of Butler, 188 Colo. 116, 532 P.2d 951 (1975); Budd v. Bishop, Wyo., 543 P.2d 368 (1975).

[18] Plaintiff alleged the act improperly delegated legislative power in violation of Article VI, Sec. 1, Constitution of Utah. He asserted the legislature did not establish sufficient standards to guide the commission in the exercise of its rule-making power; that the act permitted a federal agency to make rules for the State of Utah; and the discretionary authority granted in making civil assessments constituted a legislative function which could not be delegated. [FN17] He further alleged the grant of quasi-judicial powers to the Review Commission, was, in fact, a delegation of judicial authority in violation of Article VIII, Sec. 1, Constitution of Utah.

FN17. Tite v. State Tax Commission, 89 Utah 404, 416-418, 57 P.2d 734 (1936).

Section 35-9-6(6), provides that any person adversely affected by a standard issued by the commission may file a petition challenging its validity with the District Court for judicial review. Section

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35-9-11(1), provides for judicial review of any order, citation or decree heard by the commission in accordance with Secs. 35-1-19 through 35-1-40, U.C.A.1953. Section 35-1-34 provides for an action in the District Court to set aside, amend, or vacate any order of the commission, on the ground that the order is unreasonable or unlawful.

Where an appeal from an action of an administrative body is provided by statute, a remedy by way of declaratory judgment will be denied.[FN18] The proper procedure to challenge the statute and the administration thereof is by judicial review after final administrative action has been taken.[FN19]

FN18. 1 Anderson, Declaratory Judgments (2d Ed.) s 201, p. 418.

FN19. Colorado Department of Revenue v. District Court In And For County of Adams, 172 Colo. 144, 470 P.2d 864 (1970).

This extended opinion has attempted to illustrate the succinct statement in Cranston v. Thomson : [FN20]

FN20. Wyo., 530 P.2d 726, 730 (1975).

. . . Actually the requests presented by the three complaints were for advisory opinions on multifaceted matters, answers to which could scarcely fail to proliferate rather than resolve controversy.

WILKINS and HALL, JJ., concur.
ELLETT, Chief Justice: (concurring in the result).

There might be merit to the prevailing opinion if the trial judge had ruled that the respondent did not have standing to bring the action. Had he done so, the complaint could have been amended to show the right to bring the action. The allegations made were that the respondent was an employer in Utah and is subject to the OSHA Act which is being unlawfully administered and enforced; and that he is a member of a class of people who have a joint or common right and complaint against the appellants. In the prayer of the complaint, the respondent asked that all penalties heretofore imposed and all assessments made be refunded. While respondent in his complaint did not specifically state that he had been amerced or that agents of the appellants had trespassed on his property; nevertheless, counsel for respondent, in arguing the case before us, assured us that such was the fact; and the statement was not challenged or denied by counsel for appellants.

The appellants made no contention in their answer that respondent had no standing to bring the action, nor did the respondent, the appellants, or the amicus curiae even so much as advert to the issue upon which the prevailing opinion takes refuge. ***719** All parties desire us to inform them whether or not the OSHA Act is constitutional.

The lower court ruled that the act was unconstitutional in its entirety. The prevailing opinion reverses the case and states that the lower court should have dismissed the case ex mero motu. [FN1] This the court did not do.

FN1. On its own motion without request from either party.

We should explain why we reverse the holding of the trial court more fully than does the main opinion. The case should be remanded where the respondent could be permitted to amend to show that he has standing to maintain the action. That would also enable the appellants to know whether the act is good or bad. Although the holding of the main opinion is that the judgment is reversed, it appears from the reasons given therefor that it may simply be because of lack of standing and not because the act is constitutional. I, therefore, desire to explain my reasons for reversing the judgment.

This appeal is from a memorandum decision of a district court judge holding the Utah Occupational Safety and Health Act of 1973 to be unconstitutional. [FN2] Hereafter, unless otherwise noted, all references will be to Title 35, Chapter 9 of the Utah Code.

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FN2. Title 35, Chap. 9, U.C.A., 1953, adopted by Laws of Utah, 1973, Chap. 69.

One of the declared purposes of the act was to provide a coordinated state plan for implementation, establishment, and enforcement of occupational safety and health standards as effective as the Federal Williams-Steiger Occupational Safety and Health Act of 1970. In attempting to accomplish the stated purpose, the act sets out a statutory design that is almost identical to the federal act. Section 18(b) of OSHA, 29 U.S.C.A. s 667(b) (1975) allows states, under certain specified criteria:

. . . to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated . . . .

As the declaration of the Utah Legislature contained in Section 2(2) of the act, supra, indicates, the act was enacted so as to allow Utah to develop and enforce occupational safety and health standards as per Section 18(b) of OSHA, supra. It follows that if the act is virtually identical in terms of its administration and enforcement of occupational safety and health standards to OSHA, and OSHA does not violate the federal constitution, then the act likewise is not violative of the Utah State Constitution.

OSHA has been challenged on various constitutional grounds in a number of federal courts, including the United States Supreme Court. With one exception those challenges have been uniformly rejected.

In Atlas Roofing Co. v. OSHRC,[FN3] the Fifth Circuit Court of Appeals considered the issue as to whether or not the civil penalty of OSHA [FN4] was a penal sanction protected by the Sixth Amendment to the federal constitution. In holding that it was not a penalty, that court said:

FN3. 518 F.2d 990, 1011 (5th Cir. 1975).

FN4. See 17 OSHA, 29 U.S.C.A. s 666 (1975).

. . . The focus of the statute the control of job site safety practices and health conditions has a demonstrable and legitimate government concern. The fact that the civil enforcement sanctions are inherently disabilities does not alter the nature of the Congressional purpose. And finally the Congressional purpose carefully to establish both civil and criminal sanctions and distinguishable procedures for imposing and reviewing them eliminate any question of Congressional intent. As Judge Friendly puts it . . .

'When Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the courts have taken Congress at its word.'

***720** In Untermyer v. State Tax Commission, et al.,[FN5] our Court held that Article I, Sec. 7 of the Utah State Constitution was substantially the same as the Fifth and Fourteenth Amendments to the federal constitution, and that decisions of the U.S. Supreme Court on the "due process" clauses of the federal constitution would be highly persuasive as to the application of the due process clause of our own state constitution.[FN6]

FN5. 102 Utah 214, 129 P.2d 881 (1942).

FN6. See the following U.S. Supreme Court cases: U. S. v. Biswell, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) where an unannounced warrantless search of a locked storeroom under provisions of the Gun Control Act was held to be valid; Wyman, Commissioner of New York Department of Social Services v. James, 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971) wherein the U.S. Supreme Court held that a New York statute requiring a recipient of funds under the A.F.D.C. (Aid for Dependent Children) to permit agents of the commissioner to enter without war-

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rants and inspect the home, did not violate the proscription of the Fourth Amendment.

The Utah OSHA Act is summarized as follows:

(1) The act imposes the statutory duty upon employers to avoid maintaining unsafe or unhealthy working conditions and empowers the Industrial Commission, through the Administrator of the Division, to promulgate safety and health standards. Two remedies are provided that permit the Division, proceeding before the Occupational Safety and Health Review Commission, (a) to obtain abatement orders requiring the correction of unsafe working conditions, and (b) to impose civil penalties on any employer maintaining an unsafe working condition.

(2) Under the act, Division inspectors are authorized to conduct reasonable safety and health inspections of an employer's premises. (35-9-8(1)). If, upon a proper inspection a violation is discovered, the inspector may issue a citation to the employer fixing a reasonable time for abatement of such violation and proposing a civil assessment (35-9-9(1), 35-9-10(1)). Such proposed assessments may range from nothing for a nonserious violation, to not more than $1,000 for a serious violation up to a maximum of $10,000 for willful or repeated violations (35-9-21).

(3) If a cited employer desires to contest the assessment or abatement order, he may do so by notifying the Administrator of the Division within thirty days, in which event the abatement order is automatically stayed (35-9-10(2)).

(4) An evidentiary hearing is then held before a hearing examiner appointed by the Occupational Safety and Health Review Commission, (the "Review Commission") (35-9-12(6)). The Review Commission consists of three members, appointed for three-year terms, each of whom is appointed by the Governor with the consent of the Utah State Senate, and each of whom is selected upon the basis of his experience and competence in the field of occupational safety and health (35-9-12(1)). At the evidentiary hearing the burden is upon the Division to establish the elements of any alleged violation, the propriety of the proposed abatement order, and the appropriateness of the proposed penalty; and the hearing examiner is empowered to affirm, modify, or vacate any or all of these items. The hearing examiner's decision becomes the final order of the Review Commission unless a petition for review is filed with the Review Commission (35-9-12; 35-1-82.52 and 82.53).

(5) Final orders and decisions of the Review Commission are subject to a trial de novo in an appropriate Utah District Court and to review thereafter by the Utah Supreme Court (35-9-11(1); 35-1-34 through 35-1-36).

As is shown by the above-stated outline of the salient and relevant provisions contained in the act, the act provides that any employer served with a citation and proposed assessment have an opportunity to be heard in an administrative, adjudicatory hearing where the Division bears the responsibility and burden of showing a violation of the act. That hearing is conducted ***721** before a hearing examiner who is appointed by the Review Commission and who must conduct such as per the evidentiary standards of the Utah Code (35-1-88); and, further, is required to make findings of fact, conclusions of law, and a recommended order. In addition thereof, such hearing must be a hearing of record, which record must be transmitted as part of the hearing examiner's submission to the Review Commission as well as to the district court if the proceedings are carried that far (35-9-12(6) and 35-1-34).

As to the due process requirement, the act complies with constitutional provisions. The requirements of due process were set out in the case of Christiansen v. Harris [FN7] as follows:

FN7. 109 Utah 1, 6, 163 P.2d 314, 316 (1945).

. . . Many attempts have been made to further

define ‘due process' but they all resolve into the thought that a party shall have his day in court that is each party shall have the right to a hearing before a competent court, with the privilege of being heard and introducing evidence to establish his cause or his defense, after which comes judgment upon the record thus made. Says the standard definition: It ‘hears before it condemns, proceeds upon inquiry, and renders judgment only after trial.’ . . .

The trial court erred in holding that the act violated the due process clause of the constitution.

The trial court also held that the act authorized the Occupational Safety and Health Division to enact its own laws, to search without warrant, to instigate its own prosecutions for “believed” violations, and to conduct its own hearings and mete out punishments, all of which constituted a violation of the constitutional requirement of the separation of powers.

The act provides for the promulgation by the Commission of any national consensus standard, any adopted federal standard, or any adopted Utah standard unless such standard would not result in improved safety or health measures. The administrator, with the advice of the Advisory Council, may also promulgate rules and standards. Notice must be given to the public, and interested persons may submit written data or comments. Any employer may apply to the administrator for a variance from any such promulgated standard where hardship might result.

The granting of powers similar to the above has been held constitutional by this Court. In the case of Fry v. Utah Air Conservation Committee,[FN8] rules and regulations were promulgated and the Committee determined that there was a violation by Fry. It was there claimed that the constitutional requirements of due process of law and of delegation of legislative powers had been violated. This Court held that the act there did not violate any constitutional provisions.

FN8. Utah, 545 P.2d 495 (1975).

In the case of Wycoff v. P.S.C.,[FN9] this Court upheld an assessment of $18,500 as a penalty at the rate of $500 per day for 37 days' violation of the rules and regulations of the Commission, and in doing so held:

FN9. 13 Utah 2d 123, 369 P.2d 283 (1962).

There is no question but that in performing its multifarious duties in franchising and regulating public utilities the Commission is required to and does perform some functions of a judicial or quasi-judicial nature; nor that it is within the competence of the legislature to confer upon the Commission the power to do so and to enforce the law and its regulations made pursuant thereto by administrative procedures. It is well established that this includes the imposition of a monetary penalty for violation of law or lawful orders or regulations promulgated by the Commission within the scope of its administrative responsibility. . . .

The trial court also thought and held that the provision of ***722**Article I, Sec. 14 of the Constitution of Utah was violated by the act. That section reads:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; . . .

It is to be noted that the constitutional provision only protects against unreasonable searches. Section 8 of the act in question provides only for reasonable searches. The language is clear:

The division or its representatives upon presenting appropriate credentials to the owner, operator, or agent in charge, may enter without delay at reasonable times any workplace where work is performed by an employee of an employer; inspect and investigate during regular working hours and at other reasonable times in a reasonable manner, any

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workplace and all pertinent methods, operations, processes, conditions, structures, machines, apparatus, devices, equipment and materials therein, and to question privately any such employer, owner, operator, agent, or employee. (Emphasis added.)

The act itself proscribes unreasonable searches and, therefore, does not offend against the constitution.

Article XVI, Sec. 6, of our state constitution provides: ". . . the legislature shall pass laws to provide for the health and safety of employees in factories, smelters, and mines." Section 8 of that Article provides: "The legislature may, . . . provide for the . . . comfort, safety and general welfare of any and all employees. No provision of this Constitution shall be construed as a limitation upon the authority of the legislature to confer upon any commission now or hereafter created such power and authority as the legislature may deem requisite to carry out the provision of this section."

In 1917 our legislature enacted a statute [FN10] that gave broad powers and duties to the Industrial Commission, among which is the power to adopt standards and regulations and to enforce orders and take other action deemed necessary to protect life, health, safety, and welfare with regard to specific industries.

FN10. U.S.C., 1953, 35-1-16.

Human life is precious, and this state for over sixty years has undertaken to protect it, especially where employees are concerned. An employee works in conditions over which he has no control. The state, therefore, assumes the role of his protector. It is a proper police power that is exercised under the various acts passed pursuant to the constitutional mandate, and should be upheld unless clearly offensive.[FN11]

FN11. 16 C.J.S. Const. Law s 98.

There is a presumption that a statute or order of an administrative body acting pursuant to statutory authority, is constitutional in all cases; [FN12] and the presumption is greater where the interest of the state is involved than it is a case where only private interests are affected.[FN13]

FN12. Norville v. State, 98 Utah 170, 97 P.2d 937 (1940); 16 Am.Jur.2d, Const. Law, s 144.

FN13. 16 C.J.S. Const. Law s 99.

I would hold the Occupational Safety and Health Act to be constitutional in its entirety and, therefore, would reverse the judgment of the trial court. No costs should be awarded.

CROCKETT, J., concurs in the views expressed in the concurring opinion of ELLETT, C. J.

Utah 1978.
Baird v. State
574 P.2d 713, 1977-1978 O.S.H.D. (CCH) P 22,427

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Only the Westlaw citation is currently available.

United States District Court,
D. Utah,
Central Division.
Samson McGINNIS, Plaintiff,
v.
GMAC MORTGAGE CORPORATION, as successor in interest to Homecomings Financial, and Mortgage Electronic Registration Systems, Defendants.

No. 2:10–cv–00301–TC.
Aug. 27, 2010.

West KeySummary**Mortgages 266 209**

266 Mortgages
266IV Rights and Liabilities of Parties
266k209 k. Rights, Duties and Liabilities of Trustee in General. Most Cited Cases

Mortgages 266 216

266 Mortgages
266IV Rights and Liabilities of Parties
266k215 Actions for Damages
266k216 k. Between Parties to Mortgage or Their Privies. Most Cited Cases

Nominee for the lender possessed authority to appoint a trustee to foreclose on the security interest without possessing the note under Utah law. Borrower was therefore unable to sustain a fraud claim against the nominee under Utah law. Although borrower alleged that the nominee lacked the authority to foreclose, the deed of trust explicitly gave the nominee the right to act in the lender's behalf.

Harold H. Armstrong, Jeremy D. Eveland, Eveland & Associates PLLC, West Jordan, UT, for Plaintiff.

Peter J. Salmon, Pite Duncan LLP, San Diego, CA, for Defendants.

MEMORANDUM DECISION AND ORDER

TENA CAMPBELL, Chief District Judge.

***1** Samson McGinnis brings six causes of action based on an $817,500 mortgage he obtained on his residential property, alleging that Mortgage Electronic Registration Systems (MERS) does not have authority to foreclose on a Deed of Trust for his property and that he was not provided with proper disclosures under the Truth in Lending Act (TILA) at the time he closed on the loan. He also seeks to amend his complaint to add several more claims based on the same conduct alleged in the original complaint. Defendants GMAC Mortgage Corporation (GMAC) and MERS move to dismiss Mr. McGinnis' complaint, arguing that Mr. McGinnis has not stated a claim. They also argue that the court should not authorize Mr. McGinnis to file his amended complaint because it would be futile.

The court GRANTS Defendants' motion to dismiss and DENIES Plaintiff's motion to amend his complaint because such amendment would be futile.

BACKGROUND

Mr. McGinnis obtained a loan from Homecomings Financial for $817,500 secured by a property in Midway, Utah, on June 21, 2007, which he purchased that same day.[FN1] The Deed of Trust securing the note reads in relevant part:

FN1. Although Mr. McGinnis obtained the loan on the Midway property the same day he purchased the property, he maintains in his opposition brief that the loan was a refinance transaction covered by TILA's rescission provision. If Mr. McGinnis' loan was obtained to finance the acquisition of the property, the loan would not be subject to rescission under TILA. *See* 15 U.S.C. § 1635(a)(1). The parties have not addressed this issue.

Borrower understands and agrees that MERS

holds only legal title to the interest granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of the Lender including, but not limited to, releasing and canceling this Security Instrument.

Deed of Trust (attached as Ex. A to Def.'s Req. for Judicial Notice). Just over a year later, on July 18, 2009, James Woodall, the trustee appointed by MERS to conduct the foreclosure, recorded a Notice of Default against the Midway property. Mr. McGinnis does not claim that the foreclosure was improper because of an error on the part of the mortgage company concerning whether he made his payments. Rather, Mr. McGinnis maintains that Defendant MERS did not have authority to appoint a trustee because MERS was not the beneficiary to the Deed of Trust. Mr. McGinnis also contends that shortly after the Notice of Default was filed, he discovered that Defendants had failed to make proper disclosures under TILA, though he does not specify how the disclosures were not proper. On August 5, 2009, Mr. McGinnis provided MERS, Homecoming Financial, GMAC, and Mr. Woodall with a Notice of Rescission based on the alleged disclosure violations.

Based on these events, Mr. McGinnis has brought claims for quiet title, injunctive relief, fraud, and violation of TILA and the Home Mortgage Disclosure Act (HMDA). He also seeks to amend his complaint to add another fraud claim and claims for negligent misrepresentation, civil conspiracy, violation of the Utah Consumer Sales Practices Act (UCSPA), and fraudulent nondisclosure.

ANALYSIS

Standard of Review

***2** When reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted, the court must presume the truth of all well-pleaded facts in the complaint, but need not consider conclusory allegations. *Tal v. Hogan,* 453 F.3d 1244, 1252 (2006), cert. *denied,* 549 U.S. 1209, 127 S.Ct. 1334, 167 L.Ed.2d 81 (2007); *Mitchell v. King,* 537 F.2d 385, 386 (10th Cir.1976). Conclusory allegations are allegations that “do not allege the factual basis” for the claim. *Brown v. Zavaras,* 63 F.3d 967, 972 (10th Cir.1995). *See also Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir.1991) (“conclusory allegations *without supporting factual averments* are insufficient to state a claim on which relief can be based”) (emphasis added). The court is not bound by a complaint's legal conclusions, deductions and opinions couched as facts. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). And although all reasonable inferences must be drawn in the non-moving party's favor, *Tal,* 453 F.3d at 1252, a complaint will only survive a motion to dismiss if it contains “enough facts to state a claim to relief that is plausible on its face.” *Twombly,* 550 U.S. at 570, *quoted in Ridge at Red Hawk, LLC v. Schneider,* 493 F.3d 1174, 1177 (10th Cir.2007). Stating a claim under Rule 8 “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers ‘labels and conclusions' or ‘a formulaic recitation of the elements of a cause of action will not do.’ “ *Ashcroft v. Iqbal,* ––– U.S. ––––, ––––, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Twombly,* 550 U.S. at 555).

The court grants Defendants' motion to dismiss Mr. McGinnis' fraud claim because MERS has the authority to foreclose on Mr. McGinnis' note. Further, Mr. McGinnis' TILA damages claim is time-barred, and he has failed to provide the court with the factual basis for his claim that TILA entitles him to rescind his loan. The court also rejects Mr. McGinnis' claim under the Home Mortgage Disclosure Act because the HMDA does not provide for a private cause of action. Finally, the court denies Mr. McGinnis' motion to amend the com-

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plaint because such amendment would be futile.

MERS' Authority to Foreclose

Mr. McGinnis bases his fraud claim and part of his claims for quiet title and injunctive relief on his contention that MERS lacked the authority to foreclose. Mr. McGinnis contends that MERS could not appoint Mr. Woodall as trustee because MERS is merely a nominee of the lender and does not possess the note. This argument is not persuasive.

MERS is an electronic registry that tracks the servicing rights and ownership of mortgage loans. Language in many deeds of trust, including the one signed by Mr. McGinnis in this case, gives MERS the right to act in the lender's behalf. The Deed of Trust signed by Mr. McGinnis states, “MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument.” Mr. McGinnis contends that notwithstanding this language in the Deed of Trust, MERS does not have standing to appoint a trustee because it does not have ownership of the promissory note associated with the Deed of Trust. But courts have consistently held that this language in a Deed of Trust gives MERS the authority to foreclose in behalf of the lender and that MERS need not possess the note in order to appoint a trustee in behalf of the lender who does hold the note. *See, e.g., Rodeback v. Utah Fin.,* 1:09–cv–134, 2010 U.S. Dist. LEXIS 69821 *9–10 (D.Utah July 13, 2010); *Burnett v. Mortgage Elec. Registration Sys., Inc.,* 1:09–cv–69, 2009 U.S. Dist. LEXIS 100409 *10–11 (D.Utah October 27, 2009); *Mortgage Elec. Registration Sys., Inc. v. Azize,* 965 So.2d 151, 153–54 (Fl.Dist.2d Ct.App.2007); *Mortgage Elec. Reg. Sys., Inc. v. Ventura,* No. CV054003168S, 2006 Conn.Super. LEXIS 1154 *3–4 (Conn.Super.Ct. April 20, 2006). Moreover, Utah law on nonjudicial foreclosure contains no requirement that the beneficiary produce the actual note in order to authorize the trustee to foreclose on the property secured by the note. *See* Utah Code Ann. § 57–1–21 to –38.

***3** Mr. McGinnis cites *Landmark National Bank v. Kesler,* 289 Kan. 528, 216 P.3d 158 (Kan.2009), to support his argument that MERS lacks authority to appoint a trustee. But *Landmark National Bank* does not concern MERS' standing to foreclose, but rather whether MERS was an indispensable party who should have been allowed to intervene in a foreclosure action initiated by another lender. *Id.* at 161. Further, the *Landmark National Bank* case fails to recognize the agency relationship between MERS and the lender that is created by the language in the Deed of Trust designating it as beneficiary. *See Blau v. Am.'s Serv. Co.,* No. cv–08–773, 2009 U.S. Dist LEXIS 90632, *21–22 (D.Ariz. Sept. 29, 2009) (distinguishing Landmark Nat. Bank and holding that MERS had authority to transfer ownership of the Deed of Trust).

The court dismisses Mr. McGinnis' fraud claim and the portions of his claims for quiet title and injunctive relief that rely on the argument that MERS lacks authority to foreclose on the security interest.

Truth in Lending Act

Mr. McGinnis argues that he rescinded his loan under the rescission provision of the Truth in Lending Act (TILA) on August 5, 2009, because Homecomings Financial did not provide him with the proper disclosures under TILA. Mr. McGinnis claims that Defendants

> violated ... TILA by failing to make proper disclosures of finance charges, interest rates, fees, costs, penalties and other information required to be disclosed under TILA, ... failed to provide the proper disclosures at the time the loan was offered and signed by Plaintiff, ... failed to disclose the true interest rate, the true penalties, the full extent of finance charges, fees, costs and penalties under the loan, ... [and] failed to properly disclose the right of rescission.

(Compl.¶¶ 39–42.) Defendants counter that any claims for damages are time-barred by TILA's one-year statute of limitations and further that Mr. McGinnis did not properly rescind his loan because he could not tender the loan amount. Mr. McGinnis

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contends that the statute of limitations on his damages claim does not bar his claims because either he is entitled to rescind his loan or because the court should equitably toll the statute of limitations. He also takes the position that tender is not required to rescind a loan under TILA.

Statute of Limitations on TILA Claims

Any claim for violation of TILA must be brought "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). In the Tenth Circuit, the statute of limitations for TILA claims runs from the time the consumer credit transaction was consummated. *Stevens v. Rock Springs Nat. Bank,* 497 F.2d 307, 309 (10th Cir.1974) (holding that the failure to meet TILA disclosure requirements is not a continuing breach). Unless some legal basis exits for tolling the statute of limitations in this case, the time for Mr. McGinnis to file claims under TILA ran on June 21, 2008.

***4** Mr. McGinnis argues that the statute of limitations should not run because the lender has been involved in fraudulent, misleading, and deceptive practices that concealed the TILA violations and, for that reason, the statute of limitations should be tolled. But the complaint alleges only that disclosures were not made, not that Defendants actively concealed the discovery of the information that should have been contained in the disclosures.

Mr. McGinnis also argues that the statute of limitations on his TILA claims should be extended because he has three years to rescind his loan under § 1635. However, the rescission provision of TILA does not extend the one-year statute of limitations on claims for damages for TILA violations. *See* 15 U.S.C. § 1635; *Brown v. Nationscredit Fin. Servs. Corp.,* 349 F.Supp.2d 1134, 1137 (N.D.Ill.2005). Even if Mr. McGinnis is entitled to rescission under TILA, the statute of limitations governing his claims for violation of TILA have run.

Rescission under TILA

Congress enacted TILA in order "to assure a meaningful disclosure of credit terms so that the consumer [could] compare more readily the various credit terms available to him and avoid the uninformed uses of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a). Section 1635 allows consumers to rescind "any 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," so long as such rescission takes place within three days of the consummation of the transaction or the delivery of required material disclosures under TILA, whichever occurs later. 15 U.S.C. § 1635. If the lender never submits the required disclosures, the borrower's right to rescission expires three years after the consummation of the transaction. 15 U.S.C. § 1635(f).

In order for the borrower to have the right to rescind under TILA, the lender must fail to make a material disclosure; mere technical violations warrant damages only. *Taylor v. Domestic Remodeling, Inc.,* 97 F.3d 96, 99 (5th Cir.1996) (holding that the failure to disclose the right to rescind was material). A borrower who has not received the required disclosures may rescind the loan transaction by providing notification to the creditor. *Id.* § 1635(a). The creditor then has twenty days to return the security interest and fees to the borrower. *Id.* § 1635(b). After the creditor has returned the security interest to the borrower, the borrower must then make tender of the funds given under the agreement. *Id.* "The goal of rescission is to restore the status quo that existed prior to the parties' agreement." *Anderson v. Doms,* 2003 UT App 241, ¶ 11, 75 P.3d 925 (citations omitted); see also *Williams v. Homestake Mortgage Co.,* 968 F.2d 1137, 1140 (11th Cir.1992).

***5** TILA details the procedure for a borrower to rescind the loan, but allows the court to modify this procedure to maintain rescission's status as an equitable remedy. "Congress, through its legislative history, has made it quite clear that the courts, at any time during the rescission process, may impose

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equitable conditions to insure that the consumer meets his obligations after the creditor has performed his obligations as required by the act." *Williams,* 968 F.2d at 1142. "Because of the equitable nature of rescission, there is not one precise formula that applies to all rescission cases." *Anderson,* 2003 UT App, ¶ 11. Though several other circuits have required borrowers claiming rescission under TILA demonstrate their ability to return the borrowed funds to the lender, the Tenth Circuit has not yet considered the question. *Smith v. Argent Mortg. Co., LLC,* 331 Fed. Appx. 549, 557 n. 5 (10th Cir.2009); *see, e.g., Yamamoto v. Bank of N.Y.,* 329 F.3d 1167, 1171–73 (9th Cir.2003); *Williams,* 968 F.2d at 1140. Moreover, courts have generally waited until the summary judgment stage to determine whether a borrower has the ability to fulfill the tender requirement. *See Am. Mortgage Network, Inc. v. Shelton,* 486 F.3d 815, 821 (4th Cir.2007) (affirming summary judgment where borrower did not have the ability to tender); *Yamamoto,* 329 F.3d 1167; *Moore v. Wells Fargo Bank,* 597 F.Supp.2d 612, 616–17 (E.D.Va.2009) (denying motion to dismiss even though plaintiff had not established her ability to tender); *but see Sipe v. Countrywide Bank,* 690 F.Supp.2d 1141, 1150 (E.D.Cal.2010) (requiring plaintiff to allege ability to tender in the complaint in order to survive a motion to dismiss).

Defendants argue that *Grealish v. American Brokers Conduit,* No. 2:08–cv–765, 2009 U.S. Dist. LEXIS 84842, 2009 WL 2992570 (D.Utah Sept.16, 2009) supports their argument that Mr. McGinnis must plead ability to tender in order to survive on a motion to dismiss. But in *Grealish* the loan transaction was exempt from TILA, and the court considered only common-law rescission. *Id.* at *2; *see also Stokes v. Mountain Am. Fed. Credit Union,* No. 2:10–cv–27, 2010 U.S. Dist. LEXIS 67775 at *8–9 (July 8, 2010) (holding that borrower had no right to common-law rescission because he had not alleged the ability to return the loan proceeds). TILA modifies the common-law order of rescission by requiring the lender to return the property before the borrower must return the loaned funds. While the court may equitably require a borrower to prove the ability to tender before allowing the borrower to rescind, such a requirement is not part of § 1635 and not an appropriate consideration on a motion to dismiss.

In this case, Mr. McGinnis claims that he rescinded his loan after discovering that Defendants violated TILA by "fail[ing] to identify and disclose all facts relating to the loan and failing to disclose all finance charges to which the borrower will be obligated ... [,] fail[ing] to properly disclose how finance charges were computed ... [,][and] present[ing] the terms of the loan in a document which was not clear and concise and in a manner the borrower could comprehend." Complaint ¶ 17. Mr. McGinnis also alleges in his time-barred TILA cause of action that Defendants' disclosures were "improper," though he does not specify how these disclosures were improper. Although Mr. McGinnis may have a claim for rescission, the court cannot determine based on his pleading how Defendants failed to provide him the material disclosures required by TILA. Mr. McGinnis has not provided the court or Defendants with a "statement of the claim showing that the pleader is entitled to relief" as required by Rule 8 of the Federal Rules of Civil Procedure because he has failed to state the factual basis for his claim.

***6** Accordingly, the court grants Defendants' motion to dismiss Mr. McGinnis' TILA claims. Mr. McGinnis may file a motion to amend his complaint, including a proposed amended complaint on his rescission claim only so long as his amended complaint is filed by September 17, 2010, and complies with Rule 11 of the Federal Rules of Civil Procedure. Defendants may, of course, oppose the motion.

Home Mortgage Disclosure Act

Mr. McGinnis alleges that Defendants have failed to maintain proper records of the loan documentation as required by the Home Mortgage Disclosure Act, 12 U.S.C. § 2803(a) (HMDA). Defend-

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ants argue that the HMDA does not provide for private enforcement. Federal regulations state that HMDA is to be enforced by administrative agencies. 12 C.F.R. § 203.6; 12 U.S.C. § 2804. HMDA does not create a private cause of action. *See Stokes v. Mt. Am. Fed. Credit Union,* 2:10–cv–27, 2010 U.S. Dist. LEXIS 67775, *9 (July 8, 2010); *Routen v. Citi,* 2009 U.S. Dist. LEXIS 96575,*19 (N.D.Ill. Oct. 16, 2009). Accordingly, the court dismisses Mr. McGinnis's HMDA claim.

First Amended Complaint

Mr. McGinnis seeks to amend his complaint to add several causes of action. First, Mr. McGinnis seeks to bring a claim that Defendants violated the Utah Consumer Sales Practices Act (UCSPA). Specifically, he claims that Defendants failed to obtain financial documentation verifying Mr. McGinnis's ability to repay the loan, loaned him money they knew he could not afford to repay, and failed to disclose all facts and finance charges relating to the loan and how those charges were computed. Mr. McGinnis also argues that Defendants violated the UCSPA because they never possessed the original loan documents. Defendants argue that such an amendment would be futile because the UCSPA does not apply to this mortgage transaction. “The UCSPA, Utah Code Ann. §§ 13–11–1 to –23, prohibits deceptive or unconscionable acts and practices by a supplier in connection with a consumer transaction.” *Wade v. Jobe,* 818 P.2d 1006, 1013–14 (Utah 1991). But if a more specific law regulates the consumer transaction at issue, the UCSPA does not apply to that transaction. *Carlie v. Morgan,* 922 P.2d 1, 6 (Utah 1996). For instance, the Utah Supreme Court has declined to extend the UCSPA to residential lease transactions for conduct covered under the Utah Fit Premises Act. *Id.* In this case, Defendants argue that their conduct is governed by the more specific Utah High Cost Home Loan Act, Utah Code section 61–2d–101 to –113, and Mortgage Lending and Servicing Act, Utah Code section 70D–2–101. The court agrees.

Mr. McGinnis also seeks to add a negligent misrepresentation claim, but he does not state any specific misrepresentation upon which he relied. Mr. McGinnis next seeks to add a civil conspiracy claims based on MERS' lack of authority to foreclose, but the court has already rejected this argument. Finally, both the fraud claim based on TILA violations and the fraudulent nondisclosure concealment claims fail to plead the fraudulent behavior with particularity. Rule 9(b) states: “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” *Plastic Packaging Corp. v. Sun Chem. Corp.,* 136 F.Supp.2d 1201, 1203 (D.Kan.2001). To allege fraud, “the plaintiff must set out the ‘who, what, where, and when’ of the alleged fraud.” *Id.* Mr. McGinnis' claim does not give the specifics of the alleged fraud sufficient to put Defendants on notice. The court therefore denies Mr. McGiniss' motion to amend the complaint because it would be futile.

CONCLUSION

***7** For the foregoing reasons, the court GRANTS Defendants' motion to dismiss the complaint and DENIES Plaintiff's motion to file a first amended complaint. Consistent with the court's discussion of the TILA claims, Mr. McGinnis may file a motion to amend complaint with the court on the limited issue of rescission under TILA by September 17, 2010.

D.Utah,2010.
McGinnis v. GMAC Mortgage Corporation
Not Reported in F.Supp.2d, 2010 WL 3418204 (D.Utah)

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Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
D. Utah,
Central Division.
Gary L. RHODES, an individual, Plaintiff,
v.
AURORA LOAN SERVICES, a foreign limited liability company as successor in interest to GMAC Mortgage Corporation, and Mortgage Electronic Registration Systems, Defendants.

No. 2:10-cv-00230-TC.
Aug. 13, 2010.

Harold H. Armstrong, Jeremy D. Eveland, Eveland & Associates PLLC, West Jordan, UT, for Plaintiff.

Jennifer A. Brown, Chapman & Cutler, Salt Lake City, UT, for Defendants.

ORDER and MEMORANDUM DECISION
TENA CAMPBELL, Chief Judge.

***1** Gary L. Rhodes has brought this lawsuit against Aurora Loan Services and Mortgage Electronic Registration Systems, Inc. (MERS), alleging that they violated the law in connection with the origination and foreclosure proceedings on the note secured by Mr. Rhodes' residence. He maintains that MERS did not have authority to foreclose on the note and that Defendants violated various provisions of the Truth-in-Lending Act (TILA), 15 U.S.C. §§ 1601 to 1667. He further argues that he rescinded the loan pursuant to TILA .[FN1] Defendants move to dismiss his complaint.

FN1. Mr. Rhodes also brought claims under the Real Estate Settlement Procedures Act (RESPA) and the Home Mortgage Disclosure Act (HMDA), but informed the court at oral argument that he will not pursue these claims.

Because Mr. Rhodes' TILA claims are time-barred and MERS has the authority to foreclose on the note, the court GRANTS Defendants' motion to dismiss. The court DENIES Mr. Rhodes' motion for preliminary injunction as moot.

BACKGROUND

Mr. Rhodes refinanced the loan on his residence in October 2006, obtaining a $999,500 first mortgage and a $150,000 second mortgage with GMAC Mortgage Corporation.[FN2] On August 26, 2009, after Mr. Rhodes failed to make payments on his loan, James Woodall, the trustee appointed by MERS, recorded a notice of default on Mr. Rhodes' residence. That same day, Mr. Woodall rescinded the notice of default and filed a revised notice. In some of Mr. Rhodes' materials he claims that Mr. Woodall's rescission of the notice of default was Mr. Rhodes' OWN notice of rescission of the loan. But at oral argument, counsel for Mr. Rhodes acknowledged that Mr. Woodall's filing was not Mr. Rhodes' notice of rescission. According to Mr. Rhodes' counsel Mr. Rhodes sent a notice of rescission on November 10, 2009. Mr. Rhodes' counsel also explained that the deficiencies in the TILA disclosures claimed by Mr. Rhodes included an incorrect payment schedule and an improper notice of interest rate for an adjustable rate mortgage.

FN2. Mr. Rhodes originally brought suit against GMAC but has dismissed his complaint against GMAC with prejudice.

ANALYSIS

Standard of Review

When reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted, the court must presume the truth of all well-pleaded facts in the complaint, but need not consider conclusory allegations. *Tal v. Hogan,* 453

F.3d 1244, 1252 (2006), *cert. denied,* 549 U.S. 1209, 127 S.Ct. 1334, 167 L.Ed.2d 81 (2007); *Mitchell v. King,* 537 F.2d 385, 386 (10th Cir.1976) . Conclusory allegations are allegations that “do not allege the factual basis” for the claim. *Brown v. Zavaras,* 63 F.3d 967, 972 (10th Cir.1995). *See also Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir.1991) (“conclusory allegations *without supporting factual averments* are insufficient to state a claim on which relief can be based”) (emphasis added). The court is not bound by a complaint's legal conclusions, deductions and opinions couched as facts. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). And although all reasonable inferences must be drawn in the non-moving party's favor, *Tal,* 453 F.3d at 1252, a complaint will only survive a motion to dismiss if it contains “enough facts to state a claim to relief that is plausible on its face.” *Twombly,* 550 U.S. at 570, quoted in *Ridge at Red Hawk, LLC v. Schneider,* 493 F.3d 1174, 1177 (10th Cir.2007).

TILA Claims

***2** Both Mr. Rhodes' claim for violation of TILA and for rescission under TILA are time-barred. Any claim for violation of TILA must be brought “within one year from the date of the occurrence of the violation.” 15 U.S.C. § 1640(e). In the Tenth Circuit, the statute of limitations on TILA claims runs from the time the consumer credit transaction was consummated. *Stevens v. Rock Springs Nat. Bank,* 497 F.2d 307, 309 (10th Cir.1974) (holding that the failure to meet TILA disclosure requirements is not a continuing breach). Unless there is some legal basis for tolling the statute of limitations in this case, the time ran on Mr. Rhodes' TILA claims in October 2007.

Mr. Rhodes argues that the statute of limitations should be equitably tolled because the lender has been involved in fraudulent, misleading, and deceptive practices that concealed the TILA violations. But Mr. Rhodes alleges only that disclosures were not made, not that Defendants actively concealed the discovery of the information that should have been contained in the disclosures. Therefore, Mr. Rhodes has not demonstrated that equitable tolling of TILA is appropriate in this instance.

Mr. Rhodes also did not deliver his notice of rescission to the lender within the time specified by TILA. Section 1635 of TILA allows consumers to rescind “any 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,” so long as such rescission takes place within three days of the consummation of the transaction or the delivery of required disclosures under TILA, whichever occurs later. 15 U.S.C. § 1635. If the lender never submits the required disclosures, the borrower's right to rescission expires three years after the consummation of the transaction. 15 U .S.C. § 1635(f). Mr. Rhodes claims to have delivered a notice of rescission on November 10, 2009, more than three years after he consummated his loan transaction in October 2006. All of Mr. Rhodes' claims under TILA are time-barred.

Fraud

Mr. Rhodes contends that Defendants have committed fraud because they have not shown ownership of the note. Although MERS does not own the note, it is given authority to foreclose on the note by the note's owner through language in the trust deed. Courts have consistently held that MERS has the authority to foreclose in behalf of the lender and that MERS need not possess the note in order to appoint a trustee in behalf of the lender who does hold the note. *See, e.g., Rodeback v. Utah Fin.,* 1:09-cv-134, 2010 U.S. Dist. LEXIS 69821 * 9-10, 2010 WL 2757243 (D.Utah July 13, 2010); *Burnett v. Mortgage Elec. Registration Sys., Inc.,* 1:09-cv-69, 2009 U.S. Dist. LEXIS 100409 * 10-11, 2009 WL 3582294 (D.Utah October 27, 2009); *Mortgage Elec. Registration Sys., Inc. v. Azize,* 965 So.2d 151, 153-54 (Fl.Dist.2d Ct.App.2007); *Mortgage Elec. Reg. Sys., Inc. v. Ventura,* No. CV054003168S, 2006 Conn.Super. LEXIS 1154 * 3-4, 2006 WL 1230265

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(Conn.Super.Ct. April 20, 2006). In addition, Utah foreclosure law contains no requirement that the beneficiary produce the actual note in order to authorize the trustee to foreclose on the property secured by the note. *See* Utah Code Ann. § 57-1-21 to -38. Mr. Rhodes also claims that Defendants committed fraud by violating TILA. But, as discussed above, Mr. Rhodes' claims under TILA are time-barred. Therefore, the court dismisses his fraud claim.

CONCLUSION

***3** Mr. Rhodes' claims based on alleged TILA violations are time-barred because he bases his claims on a loan transaction that took place more than one year prior to when he filed his complaint and more than three years prior to when he claims to have delivered of a notice of rescission. Further, Mr. Rhodes' fraud claim based on MERS lack of authority to foreclose is not supported by the law. Accordingly, the court GRANTS Defendants' motion to dismiss.

D.Utah,2010.
Rhodes v. Aurora Loan Services
Slip Copy, 2010 WL 3219310 (D.Utah)

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Only the Westlaw citation is currently available.

United States District Court,
D. Utah,
Central Division.
Lucio ESTRADA, Plaintiff,
v.
AURORA LOAN SERVICES, LLC, Lehman Brothers Bank FSB, Defendants.

No. 2:10-CV-1009 TS.
Nov. 23, 2010.

Brian R. Barnhill, Osborne & Barnhill, Draper, UT, for Plaintiff.

Philip D. Dracht, Fabian & Clendenin, Salt Lake City, UT, for Defendants.

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND DENYING AS MOOT PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

TED STEWART, District Judge.

***1** This matter is before the Court on Defendants' Motion to Dismiss and Plaintiff's Motion for Temporary Restraining Order. For the reasons discussed below, the Court will grant Defendants' Motion to Dismiss, rendering Plaintiff's Motion for Temporary Restraining Order moot.

I. STATEMENT OF FACTS

The following facts are taken from Plaintiff's Complaint. Plaintiff purchased a home in West Valley City, Utah, on July 15, 1996. On or about March 19, 2007, Plaintiff obtained a first-position mortgage loan from Lehman Brothers Bank, FSB ("Lehman") in the amount of $151,200 with an adjustable interest rate.

At some later point, Plaintiff engaged in communications with Aurora Loan Services, LLC ("Aurora") as nominee for Lehman. In these conversations, Plaintiff was informed that any Notice of Default would be postponed until after Plaintiff "affirmed his willingness to provide funds, modify the Loan and/or redeem the Property, and otherwise make the Loan current in order to retain the Property." FN1 "Aurora informed Plaintiff that he would qualify for a mortgage modification due to financial hardship and the substantial decline in value of the Property, and would be able to retain the Property at a modified interest rate of two percent (2%)." FN2

FN1. Docket No. 2, Exhibit 1, ¶ 12.

FN2. *Id.* ¶ 13.

Plaintiff later contacted Aurora in order to determine the progress of the modification. Plaintiff was provided with modification documents that required an annual percentage rate of 8.6%, rather than the agreed 2%.

On or about July 19, 2010, Aurora recorded a Notice of Default. Plaintiff alleges that, throughout the communications with Lehman and Aurora he "remained ready, willing, and able to provide funds, modify the Loan, redeem the Property, or otherwise reinstate the Loan." FN3

FN3. *Id.* ¶ 16.

II. MOTION TO DISMISS STANDARD

In considering a motion to dismiss under Rule 12(b)(6), all well-pleaded factual allegations, as distinguished from conclusory allegations, are accepted as true and viewed in the light most favorable to Plaintiff as the nonmoving party. FN4 Plaintiff must provide "enough facts to state a claim to relief that is plausible on its face." FN5 All well-pleaded factual allegations in the amended complaint are accepted as true and viewed in the light most favorable to the nonmoving party. FN6 But, the court "need not accept conclusory allegations without supporting factual averments." FN7 "The

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court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." FN8 The Supreme Court has explained that a plaintiff must "nudge[ ][his] claims across the line from conceivable to plausible" in order to survive a motion to dismiss.FN9 Thus, the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims.FN10

FN4. *Ruiz v. McDonnell,* 299 F.3d 1173, 1181 (10th Cir.2002).

FN5. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 547 (2007) (dismissing complaint where Plaintiffs "have not nudged their claims across the line from conceivable to plausible").

FN6. *GFF Corp. v. Associated Wholesale Grocers, Inc.,* 130 F.3d 1381, 1384 (10th Cir.1997).

FN7. *Southern Disposal, Inc., v. Texas Waste,* 161 F.3d 1259, 1262 (10th Cir.1998); *Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir.1991).

FN8. *Miller v. Glanz,* 948 F.2d 1562, 1565 (10th Cir.1991).

FN9. *Id.*

FN10. *The Ridge at Red Hawk, LLC v. Schneider,* 493 F.3d 1174, 1177 (10th Cir.2007).

***2** The Supreme Court recently explained the standard set out in *Twombly* in *Ashcroft v. Iqbal.* FN11 In *Iqbal,* the Court reiterated that while Fed.R.Civ.P. 8 does not require detailed factual allegations, it requires "more than unadorned, the-defendant-unlawfully-harmed-me accusation[s]." FN12 "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' " FN13 "Nor does a complaint suffice if it tenders 'naked assertion[s]" devoid of 'further factual enhancement.' " FN14

FN11. 556 U.S. ----, 129 S.Ct. 1937 (2009).

FN12. *Id.* at 1949.

FN13. *Id.* (quoting *Twombly,* 550 U.S. at 555).

FN14. *Id.* (quoting *Twombly,* 550 U.S. at 557).

The Court in *Iqbal* stated:

Two working principles underlie our decision in *Twombly.* First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not show[n]-that the pleader is entitled to relief.

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can

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provide the framework of a complaint, they must be supported by factual allegations. When 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.[FN15]

FN15. *Id.* at 1949-50 (internal quotation marks and citations omitted).

III. DISCUSSION

Plaintiff alleges three causes of action in his Complaint: violation of the Truth in Lending Act ("TILA"); (2) breach of contract; and (3) promissory estoppel. These claims will be discussed below.

A. TILA

Plaintiff's first claim of relief alleges violations of TILA. Plaintiff seeks both damages and the ability to rescind the loan.

An action for damages under TILA must be filed "within one year from the date of the occurrence of the violation."[FN16] The statute of limitations for TILA claims runs from the time the consumer credit transaction was consummated.[FN17]

FN16. 15 U.S.C. § 1640(e).

FN17. *Stevens v. Rock Springs Nat'l Bank,* 497 F.2d 307, 309 (10th Cir.1974) (holding that the failure to meet TILA disclosure requirements is not a continuing breach).

As set forth above, Plaintiff entered into the loan transaction with Defendant Lehman on or about March 19, 2007. Thus, any claim for damages is barred by the one-year limitations period unless the statute of limitations has been equitably tolled.[FN18]

FN18. *Heil v. Wells Fargo Bank, N.A.,* 298 Fed. Appx. 703, 706 (10th Cir.2008).

***3** Counsel has argued that equitable tolling is appropriate here because Plaintiff did not discover the alleged violation until he had need to inspect the loan documents. However, there are no such facts alleged in the Complaint. Therefore, there is no basis for equitable tolling.

Plaintiff also seeks rescission under TILA. However, pursuant to 15 U.S.C. § 1635(f), a borrower's right to rescind expires three years after the date of the consummation of the transaction. The Supreme Court has made clear that the three year limitations period contained in 15 U.S.C. § 1635(f) is not a statute of limitations, but a statute of repose, meaning that the right is extinguished after the three-year period passes and is not subject to equitable tolling.[FN19] Thus, Plaintiff's rescission claim is similarly barred.

FN19. *Beach v. Ocwen Fed. Bank,* 523 U.S. 410, 419 (1998).

B. BREACH OF CONTRACT

Plaintiff's second cause of action is for breach of contract. Plaintiff alleges that "the parties entered into a contract under which Aurora would modify Plaintiff's Loan and/or allow Plaintiff to redeem the Property, postponing the foreclosure of the Property, and allow Plaintiff to retain the Property at an APR of 2%."[FN20] Plaintiff further alleges that Aurora and Lehman "breached their contract with Plaintiff by failing to deliver a modified Loan agreement with an APR of 2%, allowing time lapse within which a mortgage modification could be realized, and by recording a Notice of Default against the Property."[FN21] Plaintiff alleges that he has been damaged as a result of Defendants' breach.

FN20. Docket No. 2, Ex. 1 at ¶ 23.

FN21. *Id.* at ¶ 24.

It is fundamental that a meeting of the minds on the integral features of an agreement is essential to the formation of a contract. Thus, a binding contract exists where it can be shown that the

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parties had a meeting of the minds as to the integral features of [the] agreement and that the terms are sufficiently definite as to be capable of being enforced.[FN22]

FN22. *LD III, LLC v. BBRD, LC,* 231 P.3d 867, 872 (Utah Ct.App.2009) (quotation marks and citations omitted).

As set forth above, Plaintiff alleges that he contacted Aurora and was told that he would qualify for a loan modification and that he would be able to retain the property at a modified interest rate of 2%. Plaintiff does not allege, however, that he ever accepted this offer or made any efforts to consummate the transaction. Rather, the Complaint goes on to allege that he again contacted Aurora and was provided documentation requiring a 6.8% interest rate. These allegations reveal that there was no meeting of the minds on the integral features of any agreement between the parties. At best, the Complaint alleges preliminary negotiations between the parties. There is no allegation to show that Plaintiff ever accepted any offer from Defendants. Therefore, the Court finds that no contract exists.

C. PROMISSORY ESTOPPEL

Plaintiff's third cause of action alleges promissory estoppel. Plaintiff alleges that Defendants made a promise to him that he would qualify for a loan modification with a 2% interest rate and that Plaintiff would otherwise be able to retain the property. Plaintiff further alleges that he reasonably and detrimentally relied on this promise by defaulting on his loan and that his reliance was reasonable and foreseeable. Further, Plaintiff alleges that because he relied on this promise "injustice can only be prevented by enforcement of Aurora and [Lehman's] promises to allow for the modification of the Loan with an APR of 2%, and Plaintiff's retention of the Property."[FN23]

FN23. Docket No. 2, Ex. 1 at ¶ 29.

***4** Promissory estoppel requires a showing of the following: (1) the plaintiff acted with prudence and in reasonable reliance on a promise made by the defendant; (2) the defendant knew that the plaintiff had relied on the promise which the defendant should reasonably expect to induce action or forbearance on the part of the plaintiff or a third person; (3) the defendant was aware of all material facts; and (4) the plaintiff relied on the promise and the reliance resulted in a loss to the plaintiff.[FN24]

FN24. *Youngblood v. Auto-Owners Ins. Co.,* 158 P.3d 1088, 1092 (Utah 2007).

The lack of supporting allegations in Plaintiff's Complaint again defeats his claim. Plaintiff has not alleged reasonable reliance concerning the alleged 2% interest rate in light of the allegation that Defendants presented him with modification documents indicating an interest rate of 6.8%. Further, Plaintiff's Complaint contains no allegations that any reliance resulted in a loss to him. Therefore, Plaintiff fails to make out a claim for promissory estoppel.

IV. CONCLUSION

It is therefore

ORDERED that Defendants' Motion to Dismiss (Docket No. 4) is GRANTED. It is further

ORDERED that Plaintiff's Motion for Temporary Restraining Order (Docket No. 7) is DENIED AS MOOT.

The Clerk of the Court is directed to close this case forthwith.

D.Utah,2010.
Estrada v. Aurora Loan Services, LLC
Slip Copy, 2010 WL 4869093 (D.Utah)

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Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
D. Utah,
Central Division.
Deron BRUNSON, Plaintiff,
v.
AMERICAN HOME MORTGAGE SERVICING, Law Office of Woodall and Wasserman, and Aurora Loan Services, Defendants.

No. 2:09-CV-436 TS.
March 30, 2010.

Deron Brunson, Draper, UT, pro se.

George W. Pratt, Mark D. Tolman, Jones Waldo Holbrook & McDonough, Jennifer A. Brown, Chapman & Cutler, Salt Lake City, UT, Peter J. Salmon, Pite Duncan LLP, San Diego, CA, Justin D. Balser, Luke Sosnicki, Akerman Senterfitt LLP, Denver, CO, for Defendants.

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

TED STEWART, District Judge.

I. INTRODUCTION

***1** This matter is before the Court on three Motions to Dismiss the pro se Complaint. Each defendant moves to dismiss under Fed.R.Civ.P. 12(b)(6) for the failure to state claims upon which relief can be granted. For the reasons stated below, the Court will grant the Motions and dismiss the Complaint.

II. FACTUAL AND PROCEDURAL BACKGROUND

On April 23, 2009 Plaintiff Deron Brunson, acting pro se, filed his Complaint in state court. On May 12, 2009, Defendant American Home Mortgage (American Home) removed the case to this Court. On August 14, 2009, the Court denied Plaintiff's Motion to Remand the case.

In his Complaint, Plaintiff alleges that he obtained a loan secured by a deed of trust to purchase his primary residence (the Residence).[FN1] He alleges that the loan was subsequently assigned to Aurora Loan Services, LLC (Aurora) and that Defendant James Woodall (one of the Woodall Defendants) is the successor trustee on the Deed of Trust.

FN1. Docket No. 1-3 at ¶ 1 and 2.

He further alleges that he sent a Notice of Cancellation,[FN2] that among other things, purported to rescind the loan under TILA [FN3] and its Regulation Z,[FN4] because no rescission forms were provided as required by TILA. He alleges he requested such forms as well as other information. He alleges that despite the rescission, the Woodall Defendants and Aurora are involved in a non-judicial foreclosure of the Residence.

FN2. The Notice is attached as Exhibit C to the Complaint, Docket No. 1-6.

FN3. 15 U.S.C. § 1635(b).

FN4. *Id.* at §§ 226.15(d)(1) and 226.23(d)(1).

The Complaint brings the following claims. One claim of wrongful foreclosure against the Woodall Defendants and Aurora alleging that they violated Plaintiff's due process rights under the United States and Utah constitutions because the Deed of Trust and other loan documents provide for non-judicial foreclosure and also because Defendants are proceeding with the foreclosure despite knowledge of his Notice of Rescission. Two claims of negligence against American Home.[FN5] The first claim alleges that American Home created new money in violation of the United States Constitu-

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tion and also failed to provide information or respond to Plaintiff's Notice of Cancellation under the provisions of the Real Estate Settlement Procedures Act (RESPA).[FN6] The second negligence claim against American Home alleges it failed to provide Plaintiff with rescission forms at the time of loan origination as required under Truth in Lending Act (TILA).[FN7]

FN5. Two counts of negligence against American Home are listed under the First Cause of Action.

FN6. 12 U.S.C. §§ 2601-17.

FN7. 15 U.S.C. § 1501, et seq.

The third cause of action is for punitive damages against all Defendants. The claim for punitive damages against American Home alleges that, if it is found to have violated RESPA or TILA, it would have acted with gross negligence of duty. The claim for punitive damages against the Woodall Defendants and Aurora alleges that they are proceeding with foreclosure while ignoring the law and Plaintiff's Notice of Cancellation.

III. STANDARD FOR 12(b)(6) MOTIONS

Because Plaintiff is acting pro se, the Court construes his Complaint liberally, but does not "act as his advocate."[FN8] As explained by the Tenth Circuit:

FN8. *Gallagher v. Shelton,* 587 F.3d 1063, 1067 (10th Cir.2009).

> this rule means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements. "This court, however, will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf."[FN9]

FN9. *Smith v. United States,* 561 F.3d 1090, 1096 (10th Cir.2009) (quoting *Whitney v. New Mexico,* 113 F.3d 1170, 1173-74 (10th Cir .1997)).

***2** In considering a motion under Rule 12(b)(6), the Court assumes "the factual allegations are true and ask[s] whether it is plausible that the plaintiff is entitled to relief." In *Ashcroft v. Iqbal,*[FN10] the Supreme Court further explained its earlier *Twombly*[FN11] decision on "evaluating whether a complaint is sufficient to survive a motion to dismiss"[FN12] under Rule 12(b)(6):

FN10. --- U.S. ----, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

FN11. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

FN12. *Iqbal,* 129 S.Ct. at 1940.

> Two working principles underlie our decision in *Twombly.* First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.... Second, only a complaint that states a plausible claim for relief survives a motion to dismiss.[FN13]

FN13. *Id.* at 1949-50 (citations omitted).

> "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Conclusory allegations are not enough to withstand a motion to dismiss.[FN14]

FN14. *Gallagher,* at 106 (quoting *Iqbal,* 129 S.Ct. at 1949 (2009)).

> A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause

of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." [FN15]

FN15. *Iqbal,* 129 S.Ct. at 1948 (quoting *Twombly,* 550 U.S. at 555 and 557).

IV. AURORA LOAN SERVICES

Aurora moves to dismiss the claims against it for failure to state a claim under rule 12(b)(6). Aurora argues that there is no right under TILA to rescind a purchase money-money loan. The Court agrees.

TILA exempts "residential mortgage transactions" from § 1635.[FN16] A "residential mortgage transaction" is defined as "a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling." [FN17] Here, based on the factual assertions in Plaintiff's Amended Complaint, the Court finds that the transaction at issue is a residential mortgage transaction because the loan was obtained to finance the acquisition of Plaintiff's dwelling. Therefore, § 1635(a) is not applicable here. A number of courts, including this one, have reached this same conclusion.[FN18] Similarly, "[s]ince § 1635 by its clear language does not apply to residential mortgage transactions, the regulations on which Plaintiff relies do not apply." [FN19]

FN16. 15 U.S.C. § 1635(e)(1).

FN17. 15 U.S.C. § 1602(w).

FN18. *See Shelburne v. Academy Mortg. Corp.,* 2009 WL 3459869, *3 (D.Utah Oct.21, 2009); *Betancourt v. Countrywide Home Loans, Inc.,* 344 F.Supp.2d 1253, 1261 (D.Colo.2004).

FN19. *Barrow v. Countrywide Home Loans, Inc.,* 2009 WL 3418165 (D.Utah Oct.16, 2009).

Plaintiff argues that subsection (i)(1) of § 1635 provides that the right of rescission in foreclosure is "in addition to any other right of rescission." [FN20] However, as this Court has previously held, subsection (i)(1), like the rest of section 1635, does not apply to residential mortgage transactions. As subsection (e)(1) of section 1635 explains: "this section does not apply to residential mortgage transactions." Subsection (i)(1) of section 1635 relied upon by Plaintiff is indisputably a part of section 1635, and, therefore, does not cover the residential mortgage transaction at issue in this case. Instead, subsection (i)(1), like the rest of § 1635, applies to the type of consumer credit transactions where the security interest is acquired in any property used as the principal dwelling of the person to whom credit is extended, provided it is not a residential mortgage transaction or any of the other types of transactions specifically excluded from the coverage of the section.[FN21]

FN20. 15 U.S.C. § 1635(i)(1).

FN21. *See id.* at 1635(e) (exempting four types of transactions).

***3** Thus, Aurora is correct that, even accepting as true Plaintiff's allegations that he did not receive any notice of the right to rescind at the time of closing and that he sent a notice attempting to rescind the transaction, he is still not entitled to relief because the rights of rescission and disclosure relied upon by Plaintiff do not, as a matter of law, apply to the type of transaction alleged by Plaintiff. Therefore, he fails to state any claims against Aurora upon which relief can be granted.

Aurora also moves to dismiss Plaintiff's claims for wrongful foreclosure based on any violation of due process rights because a private non-judicial foreclosure sale does not constitute state action for purposes of the due process clauses of the Utah or United States constitutions. The Court agrees. [FN22] Further, Plaintiff's claims for wrongful foreclosure based on the conclusory statement that the deed of trust is void is based upon his claim of res-

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cission. As discussed above, rescission has no application to the transaction alleged in the present case.

FN22. *See Dirks v. Cornwell,* 754 P.2d 946, 951-52 (Utah App.1988) (holding that the state's recognizing the legal effect of the private contractual right (deed of trust) during nonjudicial foreclosure actions does not constitute state action for purposes of the due process clause).

Finally, the Court agrees with Aurora that the claim for punitive damages must fail because Plaintiff fails to state a claim for wrongful foreclosure, or any other claim upon which relief can be granted. Accordingly, the Court will grant Aurora's Motion to Dismiss.

V. WOODALL DEFENDANTS

All of the claims against the Woodall Defendants are premised on Plaintiff's theory that there is a wrongful foreclosure because he has rescinded the transaction and the deed of trust is void. The Woodall Defendants move to dismiss for the failure to state a claim upon which relief can be granted because nonjudicial foreclosure does not involve state action and, therefore, Plaintiff's claims have no merits.

Plaintiff argues that the co-defendants have admitted the facts alleged, including that the deed of trust is void. He further argues that due process is an important protection for citizens in the United States.

The Court finds that there are no such admissions of violations of due process or that the deed of trust is void. As stated in *Iqbal,* "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions by co-defendants." FN23 Thus, courts "are not bound to accept as true a legal conclusion couched as a factual allegation ." FN24 Plaintiff's statements in his Complaint asserting violations of due process rights and that the deed of trust is void for the failure to comply with rights under TILA or RESPA are just such nonbinding legal conclusions couched as factual allegations as discussed in *Iqbal.*

FN23. *Iqbal,* 129 S.Ct. at 1940.

FN24. *Id.*

As discussed above, the Court, as did the Defendants, must assume that the following factual allegations are true for the purposes of the Motions to Dismiss: that Plaintiff did not receive notice of rights to rescind at the time of the transaction; that Plaintiff has subsequently sent a notice of rescission; and that Aurora was aware that Plaintiff sent a Notice of rescission. However, as discussed above, because the Complaint alleges a transaction that is a residential real estate transaction, the TILA/RESPA rights asserted do not apply. Therefore, the Court agrees with the Woodall Defendants that all of the claims for wrongful foreclosure based on the effect of the Plaintiff's attempted assertion of such rights fail to state a claim upon which relief can be granted.

***4** For the reasons stated above, Plaintiff fails to state a claim for wrongful foreclosure based on a violation of due process or for punitive damages. Accordingly, the Court will grant the Woodall Defendants' Motion to Dismiss.

VI. AMERICAN HOME

American Home argues that the Rule 12(b)(6), not the Rule 8 standard applies. American Home argues that Plaintiff's letter does not constitute a "qualified written request" and therefore did not trigger any obligation under RESPA to respond. American Home also argues that the TILA claim that it did not provide him with forms fails because TILA is not applicable to a residential mortgage transaction. Next, American Home contends that Plaintiff's claim that it created new money fails to state a claim and the complaint does not bring a Fourteenth Amendment Due process claim as argued in Plaintiff's opposition.

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Plaintiff argues the standard should be Fed.R.Civ.P. 8's requirement of a short and plain statement. Plaintiff alleges the Rule 8 standard applies and that American Home has admitted his allegations by failing to respond to his Verified Complaint. He further argues that American Home violated RESPA when it failed to respond to his letter and that it did not provide him with notice of his right to rescind the loan under TILA.

As discussed above, the standard is under Rule 12(b)(6). American Home has not failed to respond to the Verified Complaint. Instead, it controverted the complaint by its timely Motion to Dismiss.

For the reasons stated above, TILA does not apply to a "residential mortgage transaction" and Plaintiff's claims under TILA fail. Plaintiff's claim regarding the allegation of creation of new money also fails to state a claim upon which relief can be granted.

Plaintiff's claim under RESPA involves a "Notice of Cancellation," discussed above. Also, as noted above, the Court must consider all of Plaintiff's well plead allegations as true for purposes of this motion. Plaintiff alleges that in October 2007, American Home transferred the servicing of his loan to defendant Aurora.[FN25] In April of 2009, Plaintiff sent American Home a documents titled "RE: NOTICE OF CANCELLATION" and "NOTICE OF POSSIBLE INTENT TO SUE."[FN26] A copy of the this Notice is attached to the Verified Complaint and incorporated by reference. Therefore, the Court may consider it without converting this to a motion for summary judgment.[FN27]

FN25. Verified Complaint at ¶ ¶ 13-15.

FN26. *Id.* at ¶ 18.

FN27. *Prager v. LaFaver,* 180 F.3d 1185, 1188-89 (10th Cir.1999).

RESPA requires that upon the receipt of a qualified written request, the servicer of a federally related mortgage loan must acknowledge receipt of the correspondence within twenty days, excluding weekends and holidays, and within sixty working days, must make appropriate corrections or investigate and provide the borrower with a written notification explaining why the servicer believes the account is correct. 12 U.S.C. § 2605(e)(1)(A) & (2); see also 24 C.F.R. § 3500.21(e). A "qualified written request" must be a written correspondence that "includes, or otherwise enables the servicer to identify, the name and account of the borrower; and includes a statement of the reasons for the belief of the borrower ... that the account is in error or provides sufficient detail to the servicer regarding other information sought ....“ § 2605(e)(1)(B). AGF does not dispute plaintiffs' assertion that it is a "servicer" of a "federally related mortgage loan," as defined by RESPA. 12 U.S.C. §§ 2605(i)(2) & 2602(1).[FN28]

FN28. *Harris v. American General Finance, Inc.,* 259 Fed.Appx. 107, 109-110 (10th Cir.2007). the Court finds this unpublished Order to be persuasive on the issue of what is a qualified written request.

***5** The Notice contains the account number. However, the Court finds that it is not a "qualified written request" for the following reasons. Its stated purpose is to "brief" American Home in preparation for bringing a lawsuit. It reads like a complaint. It makes demands for damages. It states that American Home "may choose to answer my questions, or hide behind their interpretation of the laws to avoid answering my questions."[FN29] It also states Plaintiff's position that American Home has already failed to answer the questions and is already in violation of § 2605(e)(b)(ii) & (e)(B). The Notice does provide a list of questions but requests the information for the following reason: "That I may have more substantial proof of your fraud in order to properly allege it in a lawsuit ..."[FN30] The list of questions do not ask about the amount of the account, or about American Home's servicing, but

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generally go to Plaintiff's theories that American Home somehow violated the law by transferring the account thereby creating new money. The Notice does not claim that the account is incorrect and does not request information about the servicing of the loan. Instead, it claims that American Home failed to tell him of its intention regarding the note (the alleged intention being his theory of the creation of new money), failed to comply with TILA, and committed fraud and violated RICO. The Court finds that the Notice is not a "qualified written request" because it does not provide sufficient detail to the servicer regarding information relating to American Home's servicing of the loan but instead relates to questions seeking support of Plaintiff's novel legal theories.

FN29. *Id.,* Ex. C at 3.

FN30. *Id.*

Further, 24 C.F.R. § 3500.21(e)(2)(ii), provides that a "written request does not constitute a qualified written request if [among other things] it is delivered to a servicer more than 1 year after ... the date of transfer of servicing." FN31 Plaintiff alleges in his Verified Complaint that he received the notice of the transfer of servicing from American Home to Aurora to be effective October 15, 2007 and that he did not send his Notice until February 13, 2009. Because the Notice was delivered to the servicer more than 1 year after the date of the transfer of servicing, it is not a "qualified written request."

FN31. 24 C.F.R. § 3500.21(2).

Because Plaintiff fails to state a claim for against American Home for which relief can be granted on his substantive claims, his claim for punitive damages must also be dismissed. Accordingly, the Court will grant American Home's Motion to Dismiss.

VII. MOTIONS TO STRIKE

Defendants moves to strike the unsigned default certificates and default judgements filed by Plaintiff and showing as lodged documents. It appears to the Court that these documents are all proposed orders and judgments submitted by Plaintiff. Because they are not signed by the Court, they are of no effect. The Court will deny the Motion to Strike and will instead disregard Docket Nos. 19, 20, 21, and 22 as proposed orders.

VIII. ORDER

***6** Based on the foregoing, it is

ORDERED that Defendant Aurora Home Services Motion to Dismiss (Docket No. 8) is GRANTED. It is further

ORDERED that Motion to Dismiss (Docket No. 15) filed by Defendants James Woodall and the Law Offices of Woodall and Wasserman, is GRANTED. It is further

ORDERED that Defendant American Home Mortgage Servicing's Motion to Dismiss (Docket No. 23) is GRANTED. It is further

ORDERED that the Motion to Strike (Docket No. 27) is DENIED but the lodged documents at Docket Nos. 19, 20, 21, and 22 shall be disregarded as proposed orders. The clerk of court is directed to close this case.

D.Utah,2010.
Brunson v. American Home Mortg. Servicing
Not Reported in F.Supp.2d, 2010 WL 1329711 (D.Utah)

END OF DOCUMENT

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Only the Westlaw citation is currently available.

United States District Court,
D. Utah,
Northern Division.
Jeffrey L. SHURTLIFF, Plaintiff,
v.
WELLS FARGO BANK, N.A. and Freddie Mac Corporation, Defendants.

No. 1:10-CV-165 TS.
Nov. 5, 2010.

Jeffrey L. Shurtliff, Ogden, UT, pro se.

James Delos Gardner, M. Lane Molen, Snell & Wilmer, Salt Lake City, UT, for Defendants.

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND DENYING OTHER MOTIONS AS MOOT

TED STEWART, District Judge.

***1** This matter is before the Court on a Motion to Dismiss filed by Defendants Wells Fargo Bank, N.A. ("Wells Fargo") and Federal Home Loan Mortgage Corporation, served as Freddie Mac Corporation (collectively "Defendants"), as well as a number of other Motions filed by both Plaintiff and Defendants. For the reasons discussed below, the Court will grant Defendants' Motion to Dismiss and deny the remaining Motions as moot.

I. STATEMENT OF FACTS

The following facts are taken from Plaintiff's Complaint. On or about April 25, 2008, Plaintiff obtained a loan for a home located in Ogden, Utah, secured by a Deed of Trust under which Defendant Wells Fargo is the named beneficiary. [FN1] On October 28, 2009, Plaintiff notified Defendants of possible future default on loan payments. At the time of this notification, Plaintiff was current with all of his payments.

FN1. Docket No. 8, Ex. A.

Plaintiff had a conversation with a Wells Fargo representative concerning the Home Affordable Modification Program ("HAMP"). [FN2] Plaintiff was told that he qualified for the program and was provided documentation relating to HAMP. [FN3] Plaintiff entered into a Trial Agreement under which he was required to make reduced payments of $1,068.40 for the months of December 2009 to February 2010. [FN4]

FN2. On October 8, 2008, President Bush signed into law the Emergency Economic Stabilization Act of 2008 ("EESA"). Section 109 of the Act required the Secretary of the Treasury to take certain measures in order to encourage and facilitate loan modifications. Part of the result was the Making Home Affordable Program, which includes HAMP. HAMP seeks to assist three to four million homeowners who have defaulted on their mortgages or who are in imminent risk of default by reducing monthly payments to sustainable levels. *Marks v. Bank of Am., N.A.,* 2010 WL 2572988, at *5 (D. Ariz. June 22, 2010).

FN3. Plaintiff attached the various documents he received in relation to the HAMP program to the Complaint he filed in state court. *See* Docket No. 13, Ex. 7.

FN4. *Id.*

The Trial Agreement signed by Plaintiff contained the following language:

> D. The Lender will hold the payments received during the Trial Period in a non-interest bearing account until they total an amount that is enough to pay my oldest delinquent monthly payment on my loan in full. If there is any remaining money after such payment is applied, such remaining funds will be held by the Lender and not posted

to my account until they total an amount that is enough to pay the next oldest delinquent monthly payment in full;

E. When the Lender accepts and posts a payment during the Trial Period it will be without prejudice to, and will not be deemed a waiver of: the acceleration of the loan or foreclosure action and related activities and shall not constitute a cure of my default under the Loan Documents unless such payments are sufficient to completely cure my entire default under the Loan Documents;

F. If prior to the Modification Effective Date, (i) the Lender does not provide me a fully executed copy of this Plan and the Modification Agreement; (ii) I have not made the Trial Period payments required ...; or (iii) the Lender determines that my representations ... are no longer true and correct, the Loan Documents will not be modified and this Plan will terminate. In this event, the Lender will have all of the rights and remedies provided by the Loan Documents, and any payment I make under this Plan shall be applied to amounts I owe under the Loan Documents and shall not be refunded to me; and

G. I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) I meet all of the conditions required for modification, (ii) I receive a fully executed copy of a Modification Agreement, and (iii) the Modification Effective Date has passed. I further understand and agree that the Lender will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Plan.... FN5

FN5. *Id.*

***2** The Trial Agreement further states:

That all terms and provision of the Loan Documents remain in full force and effect; nothing in this Plan shall be understood or construed to be a satisfaction or release in whole or in part of the obligations contained in the Loan Documents. The Lender and I will be bound by, and will comply with, all of the terms and provisions of the Loan Documents. FN6

FN6. *Id.*

Plaintiff made all of the required payments during the trial period. At the end of the trial period, Plaintiff alleges that he began to call Defendant Wells Fargo to inquire about when the modification would be complete. Plaintiff states that he was instructed to continue making the $1,068.40 payments. In his Complaint and his Objection to Defendants' Motion to Dismiss, Plaintiff details the conversations that he had with various Wells Fargo representatives. FN7 In these conversations, Plaintiff alleges that he was directed to continue making the $1,068.40 payment, that the modification was still being considered, and that there would be no foreclosure. Additionally, Plaintiff alleges that he inquired about the delinquent amount (the difference between his regular payments and the reduced payments) and was told that any delinquent amount would be put on the back of the loan.

FN7. *Id.* at 3-5; Docket No. 12 at 15.

On June 3, 2010, Plaintiff was informed that he had been turned down for a loan modification and that the delinquent balance was now due. Plaintiff alleges that Defendant intentionally extended the modification approval process in an effort to inflate the delinquent balance, knowing that Plaintiff would be unable to pay, in order to foreclose upon the property.

Plaintiff filed his Complaint in state court on September 10, 2010. In his Complaint, Plaintiff alleges causes of action under HAMP, breach of contract, unjust enrichment, and fraud. FN8 Defendants removed this action to this Court on September 30, 2010. FN9 Plaintiff is proceeding pro se and has

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filed a number of Motions, including: Request for Summary Judgment, Motion for Expedited Hearing, and a Motion for Temporary Restraining Order. Defendants have filed a Motion to Dismiss and a Rule 56(f) Motion. As the Motion to Dismiss resolves this matter, the Court need only discuss that Motion.

FN8. In various filings with the Court, Plaintiff has attempted to raise various claims, such as the Utah Consumer Sales Practices Act, false pretense, larceny by trick, and theft by deception. As these claims were not included in Plaintiff's Complaint, the Court will not discuss them.

FN9. Docket No. 2.

II. MOTION TO DISMISS STANDARD

In considering a motion to dismiss under Rule 12(b)(6), all well-pleaded factual allegations, as distinguished from conclusory allegations, are accepted as true and viewed in the light most favorable to Plaintiff as the nonmoving party.[FN10] Plaintiff must provide "enough facts to state a claim to relief that is plausible on its face."[FN11] All well-pleaded factual allegations in the amended complaint are accepted as true and viewed in the light most favorable to the nonmoving party.[FN12] But, the court "need not accept conclusory allegations without supporting factual averments."[FN13] "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted."[FN14] The Supreme Court has explained that a plaintiff must "nudge[ ][his] claims across the line from conceivable to plausible" in order to survive a motion to dismiss.[FN15] Thus, the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims.[FN16]

FN10. *Ruiz v. McDonnell,* 299 F.3d 1173, 1181 (10th Cir.2002).

FN11. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 547 (2007) (dismissing complaint where Plaintiffs "have not nudged their claims across the line from conceivable to plausible").

FN12. *GFF Corp. v. Associated Wholesale Grocers, Inc.,* 130 F.3d 1381, 1384 (10th Cir.1997).

FN13. *Southern Disposal, Inc., v. Texas Waste,* 161 F.3d 1259, 1262 (10th Cir.1998); *Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir.1991).

FN14. *Miller v. Glanz,* 948 F.2d 1562, 1565 (10th Cir.1991).

FN15. *Id.*

FN16. *The Ridge at Red Hawk, LLC v. Schneider,* 493 F.3d 1174, 1177 (10th Cir.2007).

***3** The Supreme Court recently explained the standard set out in *Twombly* in *Ashcroft v. Iqbal.*[FN17] In *Iqbal,* the Court reiterated that while Fed.R.Civ.P. 8 does not require detailed factual allegations, it requires "more than unadorned, the-defendant-unlawfully harmed-me accusation[s]."[FN18] "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' "[FN19] "Nor does a complaint suffice if it tenders 'naked assertion[s]" devoid of 'further factual enhancement.' "[FN20]

FN17. 556 U.S. ----, 129 S.Ct. 1937 (2009).

FN18. *Id.* at 1949.

FN19. *Id.* (quoting *Twombly,* 550 U.S. at 555).

FN20. *Id.* (quoting *Twombly,* 550 U.S. at 557).

The Court in *Iqbal* stated:

Two working principles underlie our decision in *Twombly.* First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not show[n]-that the pleader is entitled to relief.

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When 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.FN21

FN21. *Id.* at 1949-50 (internal quotation marks and citations omitted).

III. DISCUSSION

As stated, Plaintiff's Complaint alleges violations of HAMP, breach of contract, unjust enrichment, and fraud. Each of these claims will be discussed below.

A. HAMP

Plaintiff appears to argue that he was entitled to a loan modification under HAMP. However, as Defendants correctly point out, there is no private right of action under HAMP.FN22 In his Objection to Defendants' Motion to Dismiss, Plaintiff states that he "is not arguing that he is entitled to a loan modification," but "that he was defrauded throughout the transaction of the HAMP Loan product." FN23 The Court will discuss Plaintiff's fraud-related claims below. As there is no private right of action under HAMP, any claims that Plaintiff may bring under that program must be dismissed.

FN22. *See Marks,* 2010 WL 2572988, at *5-6.

FN23. Docket No. 12 at 8.

B. BREACH OF CONTRACT

Plaintiff next alleges that Defendants breached the verbal contract they made with Plaintiff. This claim is essentially a claim for a HAMP modification, which must fail for the same reason set forth above.FN24 Further, the Trial Agreement makes clear that the modification is subject to qualification and that the modification would not be made permanent until, among other things, Plaintiff received a fully executed copy of the Modification Agreement. FN25 Therefore, Plaintiff's breach of contract claim fails.

FN24. *Marks,* 2010 WL 2572988, at *5 ("Plaintiff's allegations regarding breach of contract are simply an attempt at enforcing a private right of action under HAMP.").

FN25. Docket No. 13, Ex. 7.

C. UNJUST ENRICHMENT

***4** Plaintiff also brings a claim for unjust enrichment. However, "[r]ecovery under [unjust enrichment] presupposes that no enforceable written

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or oral contract exists." FN26 A "prerequisite for recovery on an unjust enrichment theory is the absence of an enforceable contract governing the rights and obligations of the parties relating to the conduct at issue." FN27 As there is an enforceable contract governing the rights and obligations of the parties here, Plaintiff cannot proceed under a claim for unjust enrichment.

FN26. *Davies v. Olson,* 746 P.2d 264, 268 (Utah Ct.App.1987).

FN27. *Ashby v. Ashby,* 227 P.3d 246, 250 (Utah 2010).

D. FRAUD

The elements for a claim of fraud include:

> (1) a representation; (2) concerning a presently existing material fact; (3) which was false; (4) which the representer either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge on which to base such representation; (5) for the purpose or inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage. FN28

FN28. *Secor v. Knight,* 716 P.2d 790, 794 (Utah 1986) (citations omitted).

Plaintiff's claim must also meet the requirements of Fed.R.Civ.P. Rule 9(b). Rule 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." "Simply stated, a complaint must 'set for the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof.' FN29 "Rule 9(b) requires that a plaintiff set forth the who, what, when, where and how of the alleged fraud." FN30

FN29. *Schwartz v. Celestial Seasonings, Inc.,* 124 F.3d 1246, 1252 (10th Cir.1997) (quoting *Lawrence Nat'l Bank v. Edmonds (In re Edmonds),* 924 F.2d 176, 180 (10th Cir.1991)).

FN30. *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah,* 472 F.3d 702, 727 (10th Cir.2006) (quotation marks and citation omitted).

Defendants argue that Plaintiff cannot meet the showing of reasonable reliance because his fraud claims are in direct contradiction to the Trial Agreement that he signed. The Court agrees. The key provisions of the Trial Agreement are set forth above. As stated, the Trial Agreement makes clear that it is not a loan modification and that any modification would be contingent upon further approval. Further, the Trial Agreement makes clear how the payments received during the trial period will be used and that the lender retains its right to accelerate the loan and institute foreclosure proceedings. After it determined that Plaintiff did not qualify for a loan modification, Defendant Wells Fargo did exactly what it was permitted to do under the Trial Agreement and the original loan documents. Therefore, Plaintiff's fraud claim must fail.

IV. MOTION TO AMEND

Plaintiff seeks leave to amend if his Complaint is found to be deficient. "Dismissal of a pro se complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend." FN31 For substantially the same reasons set forth above, the Court finds that it would be futile to allow Plaintiff an opportunity to amend. Therefore, Plaintiff's request for leave to amend will be denied.

FN31. *Perkins v. Kan. Dept. of Corrections,* 165 F.3d 803, 806 (10th Cir.1999).

V. CONCLUSION

***5** It is therefore

ORDERED that Defendants' Motion to Dismiss

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(Docket No. 7) is GRANTED. It is further

ORDERED that the remaining motions (Docket Nos. 4, 5, 9, and 21) are DENIED AS MOOT.

The Clerk of the Court is directed to close this case forthwith.

D.Utah,2010.
Shurtliff v. Wells Fargo Bank, N.A.
Slip Copy, 2010 WL 4609307 (D.Utah)

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Only the Westlaw citation is currently available.

United States District Court,
D. Utah,
Central Division.
Jason ROGERS, Plaintiff,
v.
AMERICAN BROKERS CONDUIT, COUNTRYWIDE HOME LOANS, Citimortgage, Inc., Recontrust Company and Does I-X, Roes I-X, inclusive, Defendants.

No. 2:09-CV-715 TS.
Oct. 26, 2009.

West KeySummary**Mortgages 266 216**

266 Mortgages
266IV Rights and Liabilities of Parties
266k215 Actions for Damages
266k216 k. Between Parties to Mortgage or Their Privies. Most Cited Cases

A homeowner failed to state a claim of negligent misrepresentation against a mortgage company and its trustee. The homeowner made conclusory statements that the companies breached their duty in failing to provide information to the homeowner in a manner that he would understand, and that they failed to provide all the information necessary for the homeowner to make a complete and appropriate decision on the financial issues. However, the homeowner failed to set forth any of the material facts that were represented to him.

Jason Rogers, Salt Lake City, UT, pro se.

Philip D. Dracht, Robert J. Dale, Fabian & Clendenin, Paul M. Halliday, Jr., Stephen B. Watkins, Halliday & Watkins, Salt Lake City, UT, for Defendants.

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

TED STEWART, District Judge.

***1** This matter is before the Court on Defendant Countrywide Home Loans, Inc. ("Countrywide") and ReconTrust Company's ("ReconTrust") Motion to Dismiss, which is joined by Defendant CitiMortgage, Inc. ("CitiMortgage"). Plaintiff has not responded. For the reasons discussed below, the Court will grant the Motion.

I. STANDARD OF REVIEW

In considering a motion to dismiss under Rule 12(b)(6), all well-pleaded factual allegations, as distinguished from conclusory allegations, are accepted as true and viewed in the light most favorable to Plaintiff as the nonmoving party.[FN1] Plaintiff must provide "enough facts to state a claim to relief that is plausible on its face."[FN2] All well-pleaded factual allegations in the amended complaint are accepted as true and viewed in the light most favorable to the nonmoving party.[FN3] But, the court "need not accept conclusory allegations without supporting factual averments."[FN4] "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted."[FN5] The Supreme Court has explained that a plaintiff must "nudge[ ][his] claims across the line from conceivable to plausible" in order to survive a motion to dismiss.[FN6] Thus, the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims.[FN7]

FN1. *Ruiz v. McDonnell,* 299 F.3d 1173, 1181 (10th Cir.2002).

FN2. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 547, 127 S.Ct. 1955, 167 L.Ed.2d 929(2007) (dismissing complaint

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where Plaintiffs "have not nudged their claims across the line from conceivable to plausible").

FN3. *GFF Corp. v. Associated Wholesale Grocers, Inc.,* 130 F.3d 1381, 1384 (10th Cir.1997).

FN4. *Southern Disposal, Inc., v. Texas Waste,* 161 F.3d 1259, 1262 (10th Cir.1998); *Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir.1991).

FN5. *Miller v. Glanz,* 948 F.2d 1562, 1565 (10th Cir.1991).

FN6. *Id.*

FN7. *The Ridge at Red Hawk, LLC v. Schneider,* 493 F.3d 1174, 1177 (10th Cir.2007).

The Supreme Court recently explained the standard set out in *Twombly* in *Ashcroft v. Iqbal.* FN8 In *Iqbal,* the Court reiterated that while Fed.R.Civ.P. 8 does not require detailed factual allegations, it requires "more than unadorned, the-defendant-unlawfully harmed-me accusation[s]." FN9 "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' " FN10 "Nor does a complaint suffice if it tenders 'naked assertion[s]" devoid of 'further factual enhancement.' " FN11

FN8. 556 U.S. ----, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

FN9. *Id.* at 1949.

FN10. *Id.* (quoting *Twombly,* 550 U.S. at 555).

FN11. *Id.* (quoting *Twombly,* 550 U.S. at 557).

The Court in *Iqbal* stated:

Two working principles underlie our decision in *Twombly.* First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not show[n]-that the pleader is entitled to relief.

***2** In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When 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. FN12

FN12. *Id.* at 1949-50 (internal quotation marks and citations omitted)

II. FACTUAL BACKGROUND

The following facts are taken from Plaintiff's Complaint and are accepted as true for the purposes of this Motion.

Plaintiff obtained a loan from American Brokers Conduit ("ABC") to purchase a home located in Salt Lake City, Utah. This loan is evidenced by two promissory notes in the amounts of

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$116,700.00 and $262,300.00 and is secured by a deed of trust. ABC then sold these loans and ReconTrust was named as the trustee. Plaintiff defaulted on the loan and ReconTrust recorded a Notice of Default and Election to Sell notices. Plaintiff then filed this suit.

Plaintiff's Complaint names ABC, Countrywide, CitiMortgage, and ReconTrust. Plaintiff's Complaint contains the following causes of action: (1) suitability; (2) negligence; (3) negligence per se; (4) breach of fiduciary duty; (5) negligent misrepresentation; (6) intentional misrepresentation; (7) breach of the covenant of good faith and fair dealing; (8) wrongful foreclosure; and (9) unfair lending practices. Defendants Countrywide and ReconTrust, joined by CitiMortgage, now move to dismiss each of Plaintiff's causes of action.

III. DISCUSSION

The Court finds that Plaintiff's Complaint is largely devoid of details and is made up of the "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" FN13 rejected by the Supreme Court. Plaintiff's sole mention of Defendants Countrywide and CitiMortgage merely states that these entities claim "an interest in Plaintiff's property either as a loan, servicer, or Trustee or Beneficiary." FN14 The Complaint does not have any additional facts relating to these two parties.

FN13. *Id.* at 1949.

FN14. Docket No. 2, Ex. A, at ¶¶ 3(b), 3(c).

As for Defendant ReconTrust, Plaintiff states that it was "appointed the successor trustee by [Mortgage Electronic Registration Systems, Inc., a non-party] to conduct the foreclosure of the above-named real property." FN15 Plaintiff also alleges that Defendant ReconTrust "recorded the Notice of Default, and election to sell at auction notices, and has set a sale date for this auction." FN16

FN15. *Id.* at ¶ 4.

FN16. *Id.* at ¶ 11.

Plaintiff makes a number of broad allegations against no party in particular, including: (1) that "the terms of the loans as they progress through time were not explained to Plaintiff;" FN17 (2) the "loans were neither proper nor suitable for his/her condition and station in life;" FN18 (3) the "loans exceeded the reasonable expected value of the property at the time and in the foreseeable future based upon expected market changes;" FN19 and (4) the "loans were an attempt to acquire mortgage broker premiums, appraiser fees, lenders service fees, and to require to pay sub-prime loans." FN20

FN17. *Id.* at ¶ 12.

FN18. *Id.*

FN19. *Id.*

FN20. *Id.*

***3** The Court finds that these vague allegations do not comport with the pleading requirements under the Federal Rules of Civil Procedure. These are merely " 'naked assertion[s]' devoid of 'further factual enhancement.' " FN21 Those few facts against the Defendants seeking dismissal here do not nudge Plaintiff's claims across the line from conceivable to plausible. Therefore, they are subject to dismissal. That being said, the Court will discuss each of Plaintiff's causes of action below.

FN21. *Iqbal,* 129 S.Ct. at 1249 (quoting *Twombly,* 550 U.S. at 557).

A. SUITABILITY

Plaintiff's first claim is for "suitability." Plaintiff alleges that Defendants have "a professional duty and obligation to Plaintiff to ensure than [sic] only those loans were most suitable to his/her personal financial condition, the property at issue, and his/her financial well being, would be presented and offered to him/her." FN22 Plaintiff further alleges that "Defendants breached their professional duties and obligations by providing sub-prime loans

that were neither suitable nor appropriate for his/her personal financial condition and well being." FN23

FN22. Docket No. 2, Ex. A, at ¶ 13.

FN23. *Id.*

Plaintiff has provided no legal theory to support his claim for "suitability" and the Court can find none. Indeed, under Utah law, generally no fiduciary relationship exists between a bank and its customer or between a lender and a borrower. FN24 Even if such a duty existed, there are no allegations to show that Defendants Countrywide, ReconTrust, or CitiMortage were involved in the initial loan transaction. Therefore, Plaintiff's claim for "suitability" fails.

FN24. *State Bank of S. Utah v. Troy Hygro Sys., Inc.,* 894 P.2d 1270, 1275 (Utah Ct.App.1995); *First Sec. Bank of Utah N.A. v. Banberry Dev. Corp.,* 786 P.2d 1326, 1333 (Utah 1990).

B. NEGLIGENCE

In order to prevail on his negligence claim, Defendant must owe Plaintiff a duty. FN25 Plaintiff alleges that Defendants "owed a duty to Plaintiff to perform their professional services in a manner which placed Plaintiff's interests above the Defendants and to deal honestly, directly, and accurately with the Plaintiff, the documents, and each other." FN26 Plaintiff provides no basis for such a duty. As noted, under Utah law, generally there is no fiduciary relationship between a bank and its customer or between a lender and a borrower. As Plaintiff has failed to identify a duty owed to him by Defendants, his negligence claim fails.

FN25. *Webb v. Univ. of Utah,* 125 P.3d 906, 909 (Utah 2005).

FN26. Docket No. 2, Ex. A, at ¶ 14.

C. NEGLIGENCE PER SE

Plaintiff's negligence per se claim alleges that Defendants have violated a Nevada statute. However, Plaintiff has failed to explain why this Court should apply Nevada law. A federal court sitting in diversity must apply the law of the forum state, in this case Utah. FN27 Therefore, Plaintiff's negligence per se claim fails.

FN27. *Vitkus v. Beatrice Co.,* 127 F.3d 936, 941 (10th Cir.1997).

D. BREACH OF FIDUCIARY DUTY

Plaintiff's fourth cause of action alleges breach of fiduciary duty. As discussed above, under Utah law, there is generally no fiduciary duty between a lender and a borrower. A fiduciary relationship may be found " 'when one party, having gained the trust and confidence of another exercises extraordinary influence over the other party.' " FN28 "There is no invariable rule which determines the existence of a fiduciary relationship, but it is manifest in all the decisions that there must be not only confidence of the one in the other, but there must exist a certain inequality, dependence, weakness of age, of mental strength, business intelligence, knowledge of the facts involved, or other conditions, giving to one advantage over the other." FN29 Here, there are no allegations that would support a finding that a fiduciary relationship existed between Plaintiff and Defendants. Therefore, Plaintiff's fourth cause of action must fail.

FN28. *State Bank of S. Utah,* 894 P.2d at 1275 (quoting *Von Hake v. Thomas,* 705 P.2d 766, 769 (Utah 1985)).

FN29. *First Sec. Bank of Utah N.A.,* 786 P.2d at 1333 (citation omitted).

E. NEGLIGENT MISREPRESENTATION

***4** The tort of negligent misrepresentation "provides that a party injured by reasonable reliance upon a second party's careless or negligent misrepresentation of a material fact may recover damages resulting from that injury when the second party had a pecuniary interest in the transaction, was in a superior position to know the material

facts, and should have reasonably foreseen that the injured party was likely to rely upon the fact." FN30

FN30. *Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc.,* 713 P.2d 55, 59 (Utah 1986).

Plaintiff's Complaint alleges that "Defendants breached their duty and obligation to provide accurate, truthful and complete information by failing to provide the information to Plaintiff in a manner that he/she would understand with his/her limited understanding, education and training in these matters, and they failed to provide all the information necessary for Plaintiff to make a complete and appropriate decision on these financial issues, all of which caused his/her damage." FN31

FN31. Docket No. 2, Ex. A, at ¶ 26.

Other than these conclusory statements, Plaintiff's Complaint fails to set forth any of the material facts that were represented to him. Further, Defendants Countrywide, ReconTrust, and CitiMortgage are not alleged to have been involved at this stage of the lending process, so it is difficult to conceive how they could have made representations that were relied upon by Plaintiff.

F. INTENTIONAL MISREPRESENTATION

Utah law treats intentional misrepresentation as equivalent to a claim for fraud. FN32 The elements for a claim of fraud include:

FN32. *Kuhre v. Goodfellow,* 69 P.3d 286, 291 (Utah Ct.App.2003).

> (1) a representation; (2) concerning a presently existing material fact; (3) which was false; (4) which the representer either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge on which to base such representation; (5) for the purpose or inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage. FN33

FN33. *Secor v. Knight,* 716 P.2d 790, 794 (Utah 1986) (citations omitted).

Plaintiff's claim must also meet the requirements of Fed.R.Civ.P. Rule 9(b). Rule 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." "Simply stated, a complaint must 'set for the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof.' " FN34 "Rule 9(b) requires that a plaintiff set forth the who, what, when, where and how of the alleged fraud." FN35

FN34. *Schwartz v. Celestial Seasonings, Inc.,* 124 F.3d 1246, 1252 (10th Cir.1997) (quoting *Lawrence Nat'l Bank v. Edmonds (In re Edmonds),* 924 F.2d 176, 180 (10th Cir.1991)).

FN35. *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah,* 472 F.3d 702, 727 (10th Cir.2006) (quotation marks and citation omitted).

Plaintiff alleges that Defendants "had a duty to represent accurately, truthfully, and completely all the information to Plaintiff and in a manner that the Plaintiff actually understood the content of the information so that Plaintiff could make a responsible decision when deciding which loan to use to finance, and the advantages and disadvantages of the various types of loans." FN36 Plaintiff further alleges that Defendants "intentionally misrepresented the nature of the loans, that the Plaintiff needed a mortgage of sub-prime nature and that such a loan was in Plaintiff's benefit, and other intentional misrepresentations which Plaintiff relied upon in forming his/her decision regarding the loan transactions." FN37

FN36. Docket No. 2, Ex. A, at ¶ 30.

FN37. *Id.*

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***5** Plaintiff's Complaint falls short of the requirements of Rule 9(b). Plaintiff does not set out with specificity what representations were made, who made them, and when. Therefore, Plaintiff's claim for intentional misrepresentation fails.

G. BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

Plaintiff's seventh cause of action is for breach of the covenant of good faith and fair dealing. Plaintiff alleges that he had various oral and/or written agreements and each agreement "required that the Defendants deal fairly and in good faith with Plaintiff and not seek to take an undue advantage of Plaintiff in his/her weakened bargaining position and with his/her lesser knowledge, skill, education and ability regarding the loan transactions." FN38

FN38. *Id.* at ¶ 35.

Every contract is subject to an implied covenant of good faith.[FN39] Here, the contracts mentioned in the Complaint are the promissory notes and the deed of trust. Plaintiff's Complaint is completely devoid of any factual allegations which would indicate that Defendants Countrywide, ReconTrust, and CitiMortgage violated the covenant of good faith and fair dealing in relation to these contracts. Rather, Plaintiff's Complaint contains a mere recitation of the elements of a claim of breach of the covenant of good faith and fair dealing. This is not enough to survive a motion to dismiss. Therefore, Plaintiff's seventh cause of action fails.

FN39. *Brehany v. Nordstrom,* 812 P.2d 49, 66 (Utah 1991).

H. WRONGFUL FORECLOSURE

Plaintiff's eighth cause of action seeks to restrain wrongful foreclosure. It is unclear exactly what Plaintiff seeks in this claim. To the extent that Plaintiff is seeking injunctive relief, Plaintiff has not shown he is entitled to such relief because he cannot show that he has a substantial likelihood of success on the merits.[FN40] Therefore, this claims fails.

FN40. In order for Plaintiff to be entitled to a preliminary injunction, Plaintiff must show: (1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest. *General Motors Corp. v. Urban Gorilla, LLC,* 500 F.3d 1222, 1226 (10th Cir.2007).

I. UNFAIR LENDING PRACTICES

Plaintiff's ninth cause of action alleges that Defendants have engaged in unfair lending practices in violation of Nevada law. However, like his claim for negligence per se, Plaintiff has failed to show why this Court should apply Nevada law. As a result, Plaintiff's ninth cause of action fails.

IV. CONCLUSION

It is therefore

ORDERED that Defendants' Motion to Dismiss (Docket No. 4) and Defendant CitiMorgage's joinder therein (Docket No. 8) are GRANTED.

D.Utah,2009.
Rogers v. American Brokers Conduit Countrywide Home Loans
Not Reported in F.Supp.2d, 2009 WL 3584323 (D.Utah)

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H

Supreme Court of Utah.
Welden L. DAINES, Plaintiff and Appellant,
v.
Richard B. VINCENT and ASC Group, L.C., a Utah limited liability company, Defendants and Appellees.

No. 20060838.
July 29, 2008.

Background: Medical center manager who helped organize and develop a surgical center brought action against surgical center management limited liability company (LLC) and its chairman, alleging that under an oral agreement between the parties he was entitled to shares of the surgical center. After manager had presented his case in chief, the District Court, Third District, Salt Lake, Leslie A. Lewis, J., directed verdicts in favor of defendants. Manager appealed.

Holdings: The Supreme Court, Durham, C.J., held that:
(1) release agreement between parties was an integrated agreement;
(2) release agreement unambiguously released LLC from alleged oral contract;
(3) evidence was insufficient to show fraudulent inducement; and
(4) LLC chairman could not be personally liable.

Affirmed.

West Headnotes

[1] Appeal and Error 30 927(7)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k927 Dismissal, Nonsuit, Demurrer to Evidence, or Direction of Verdict
30k927(7) k. Effect of evidence and inferences therefrom on direction of verdict. Most Cited Cases

On appeal, an appellate court will sustain a directed verdict if after examining all evidence in a light most favorable to the non-moving party, there is no competent evidence that would support a verdict in the non-moving party's favor.

[2] Appeal and Error 30 970(2)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k970 Reception of Evidence
30k970(2) k. Rulings on admissibility of evidence in general. Most Cited Cases

On review of a trial court's exclusion of evidence, an appellate court grants the trial court broad discretion to admit or exclude evidence and will disturb its ruling only for abuse of discretion.

[3] Appeal and Error 30 1047(1)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)8 Reception of Evidence
30k1047 Rulings as to Evidence in General
30k1047(1) k. In general. Most Cited Cases

An appellate court will not reverse a trial court's ruling on evidence unless the ruling was beyond the limits of reasonability.

[4] Evidence 157 409

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument
157k409 k. Releases. Most Cited Cases

Evidence 157 448

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157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k448 k. Grounds for admission of extrinsic evidence. Most Cited Cases

Release agreement between surgical center management organization and medical center manager who helped organize and develop a surgical center, stating that the release encompassed and satisfied any prior agreements and discussions between the parties whether written or verbal, was an integrated agreement, and thus parol evidence concerning the agreement could only be considered to clarify ambiguous terms.

[5] Contracts 95 ⚷143(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(2) k. Existence of ambiguity. Most Cited Cases

A contractual term or provision is ambiguous if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies.

[6] Contracts 95 ⚷143(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(2) k. Existence of ambiguity. Most Cited Cases

In determining facial ambiguity of a contract, a finding of ambiguity after a review of relevant, extrinsic evidence is appropriate only when reasonably supported by the language of the contract.

[7] Contracts 95 ⚷143(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(2) k. Existence of ambiguity. Most Cited Cases

A party cannot make a successful claim of contractual ambiguity based on usage of a term that is not reasonable or is the product of forced or strained construction.

[8] Contracts 95 ⚷143(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(2) k. Existence of ambiguity. Most Cited Cases

Evidence 157 ⚷448

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k448 k. Grounds for admission of extrinsic evidence. Most Cited Cases

In determining facial ambiguity of a contract, a judge must first review relevant and credible extrinsic evidence offered to demonstrate that there is in fact an ambiguity, and after reviewing the evidence offered, a finding of ambiguity is justified only if the competing interpretations are reasonably supported by the language of the contract.

[9] Contracts 95 ⚷143(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General

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95k143(2) k. Existence of ambiguity. Most Cited Cases

There can be no ambiguity in a contract where evidence is offered in an attempt to obscure otherwise plain contractual terms.

[10] Evidence 157 ⚷448

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k448 k. Grounds for admission of extrinsic evidence. Most Cited Cases

Even though admission of extrinsic evidence is permitted to support a claim of ambiguity in contractual language, the claim must be plausible and reasonable in light of the language used.

[11] Release 331 ⚷33

331 Release
331II Construction and Operation
331k33 k. Release of specific indebtedness or liability in general. Most Cited Cases

Release agreement between surgical center management limited liability company (LLC) and medical center manager who helped organize and develop a surgical center, providing that manager released center or any of its members from any and all liabilities and or claims in connection with services provided for the organization, development and operation of the center and any services connected with the same, unambiguously released LLC from alleged oral contract under which manager claimed to be entitled to shares in the center; LLC was a "member" of the center, and alleged oral agreement was a claim in connection with services provided for the center.

[12] Fraud 184 ⚷58(1)

184 Fraud
184II Actions
184II(D) Evidence
184k58 Weight and Sufficiency
184k58(1) k. In general. Most Cited Cases

Evidence was insufficient to show that surgical center management limited liability company (LLC) or its chairman made a representation, as an element of fraudulent inducement, to medical center manager who helped organize and develop a surgical center that organization intended to transfer eight shares in center to manager.

[13] Fraud 184 ⚷3

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k2 Elements of Actual Fraud
184k3 k. In general. Most Cited Cases

Fraud 184 ⚷58(1)

184 Fraud
184II Actions
184II(D) Evidence
184k58 Weight and Sufficiency
184k58(1) k. In general. Most Cited Cases

To prevail on a claim of fraudulent inducement, a plaintiff must present clear and convincing evidence sufficient to establish: (1) that a representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, (5) for the purpose of inducing the other party to act upon it and (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to that party's injury and damage.

[14] Pleading 302 ⚷18

302 Pleading
302I Form and Allegations in General
302k18 k. Certainty, definiteness, and partic-

ularity. Most Cited Cases

The mere recitation by a plaintiff of the elements of fraud in a complaint does not satisfy the requirement that a party alleging fraud must state the circumstances constituting fraud with particularity. Rules Civ.Proc., Rule 9(b).

[15] Corporations and Business Organizations 101 3646

101 Corporations and Business Organizations
101XV Unincorporated Business Organizations
101XV(E) Limited Liability Companies
101k3643 Directors, Officers, and Agents; Non-Member Managers
101k3646 k. Rights, duties, and liabilities. Most Cited Cases

(Formerly 241Ek43 Limited Liability Companies)

Chairman of limited liability company (LLC) that managed surgical centers could not be personally liable under alleged oral contract, to medical center manager who helped organize and develop a surgical center; memorandum of understanding between parties and term sheets indicated that manager was dealing with LLC and not chairman personally, and alleged agreement came about as a renegotiation of the terms of compensation originally considered under the memorandum of understanding. West's U.C.A. § 48-2c-601.

[16] Evidence 157 129(5)

157 Evidence
157IV Admissibility in General
157IV(C) Similar Facts and Transactions
157k129 Relation to Issues in General
157k129(5) k. Similar wrongful acts. Most Cited Cases

Trial court order from unrelated case containing references relevant to defendant's character was not admissible in action for breach of contract and fraud as evidence in plaintiff's case in chief of defendant's prior bad acts, absent showing that order had a legitimate purpose other than to show that defendant acted in conformity with his prior bad acts. Rules of Evid., Rule 404(b).

[17] Appeal and Error 30 766

30 Appeal and Error
30XII Briefs
30k766 k. Defects, objections, and amendments. Most Cited Cases

An argument on appeal merely referencing submissions to the trial court is inadequate and does not provide sufficient legal reason for an appellate court to override the discretion of the trial court which had the ability to review the documentation on the issue.

[18] Constitutional Law 92 2314

92 Constitutional Law
92XIX Rights to Open Courts, Remedies, and Justice
92k2313 Conditions, Limitations, and Other Restrictions on Access and Remedies
92k2314 k. In general. Most Cited Cases

Trial 388 169

388 Trial
388VI Taking Case or Question from Jury
388VI(D) Direction of Verdict
388k167 Nature and Grounds
388k169 k. Verdict for defendant. Most Cited Cases

Trial 388 178

388 Trial
388VI Taking Case or Question from Jury
388VI(D) Direction of Verdict
388k178 k. Hearing and determination. Most Cited Cases

Medical center manager was not denied his constitutional right to a day in court by trial court's grant of directed verdicts in his action for fraud and breach of contract; trial court granted directed verdicts only after manager had presented his entire case in chief, and only after careful deliberation on manager's presentation and arguments on the mer-

its, and application of the appropriate law to each of manager's claims. Const. Art. 1, §§ 7, 11.

[19] Constitutional Law 92 2314

92 Constitutional Law
92XIX Rights to Open Courts, Remedies, and Justice
92k2313 Conditions, Limitations, and Other Restrictions on Access and Remedies
92k2314 k. In general. Most Cited Cases

The "merits" of a case, for purposes of determining whether a party was denied his constitutional right to a day in court, are the elements or grounds of a claim or defense. Const. Art. 1, §§ 7, 11.

[20] Costs 102 209

102 Costs
102IX Taxation
102k209 k. Determination of taxing officer. Most Cited Cases

Award of prevailing party costs to surgical center management organization and its chairman was appropriate in action for breach of contract and fraud by medical center manager, even though trial court failed to sign final order fixing the amount of costs, where it was clear from the judgment that trial court had awarded costs to defendants. Rules Civ.Proc., Rule 54.

***1271** Nick J. Colessides, John Martinez, Salt Lake City, for plaintiff.

Francis M. Wikstrom, Michael P. Petrogeorge, Salt Lake City, for defendants.

DURHAM, Chief Justice:

INTRODUCTION

¶ 1 This case comes to us on appeal from directed verdicts granted by the trial court. Welden Daines sued the Ambulatory Surgical Centers Group, L.C. (ASC) and Richard Vincent seeking to enforce an alleged oral agreement. After Daines presented his case-in-chief, the trial court granted directed verdicts against him effectively dismissing all of his claims. Central to the appeal before us is an agreement (Release) signed by Daines releasing West Valley Surgical Center (WVSC) or "any of its members," of which ASC is one, from "any and all claims in connection with services provided ... for the organization, development, and operation of an ambulatory surgical center." We are asked to determine whether this language is facially ambiguous and can reasonably support contrary interpretations. We conclude that it is not and affirm the trial court's holding that the language of the Release is not ambiguous as a matter of law.

¶ 2 Daines also challenges the trial court's directed verdict on his claim of fraud and his claim against Mr. Vincent personally. We affirm each of these directed verdicts. Daines also appeals the trial court's denial of his motion to admit a trial order from the case of *Lipscomb v. Vincent* (Lipscomb order) as part of his case-in-chief and to challenge Vincent's veracity as a witness. Findings of Fact, Conclusions of Law and Order, *Lipscomb v. Vincent,* No. 970600134-CV (Utah 3d Dist. Feb. 2, 2001).FN1 We affirm the trial court's decision to exclude the Lipscomb order as impermissible character evidence.

FN1. The Lipscomb order was entered in a different case in which Vincent was a defendant.

¶ 3 Finally, Daines argues that the trial court's directed verdicts denied him his day in court. We disagree. We also find that the trial court's award of costs to ASC and Vincent was appropriate and consistent with rule 54 of the Utah Rules of Civil Procedure.

BACKGROUND

¶ 4 Welden Daines is a retired CPA. During his career and into his retirement, he worked for several physicians as an accountant and medical center manager. In early 2000, one of his clients, Dr. Burrows, indicated that he and several other surgeons were interested in starting a surgical center. A surgical center is generally an outpatient surgical

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group co-owned by the surgeons involved. Surgical centers provide surgeons ***1272** with greater control over their working environment and an opportunity to enjoy higher profits from their work than typically experienced in a traditional relationship with a hospital.

¶ 5 ASC, now known as Nueterra Healthcare, is in the business of organizing, developing, and managing surgical centers. Vincent is the co-founder of ASC and was either a member or chairman of the board of ASC during the relevant period.

I. THE MEMORANDUM OF UNDERSTANDING

¶ 6 On September 22, 2000, Daines met with Vincent to discuss the possibility of organizing a new surgical center in West Valley City. Daines met Vincent through Bob Smith, a health care consultant who had worked with ASC. Daines prepared a Memorandum of Understanding (MOU) which he presented to Smith and Vincent. The MOU prepared by Daines indicated that Daines would give ASC a list of physicians from West Valley City in exchange for $150,000 plus expenses. Vincent and Smith signed the MOU on signature lines provided for them by Daines under the heading "ASC."

¶ 7 On September 27, 2000, Daines faxed a list of physicians to Vincent and Smith. That night, Daines arranged a meeting with Vincent, Smith, and several of the physicians on the list, including Dr. McCray and Dr. Burrows, whom Daines referred to as "the leaders." During the meeting, Vincent presented the physicians with an informational brochure detailing ASC's process of organizing, developing, and managing surgical centers. Based on the success of this first meeting, ASC began preparing feasibility studies and term sheets. [FN2] ASC presented the first set of term sheets to the doctors on November 21, 2000, proposing the formation of WVSC. Section 13 of the first set of term sheets, titled "Development Fees," included a provision for WVSC to pay Daines $150,000 "for the introduction of ASC to this project." Section 13 indicated that the fee would be paid for by WVSC.

FN2. A term sheet is "[a] document setting forth all information that is material to investors about the offering but is not disclosed in the accompanying prospectus or confirmation." *Black's Law Dictionary,* 1512 (8th ed.2004). A term sheet is also referred to as a "letter of intent." *Id.* In this case, the term sheets, which went through several revisions before being agreed to, represent the "items discussed between the participants" engaged in the establishment of WVSC. The term sheets in the present case include, inter alia, a "feasibility study for the creation of the surgical center," "ownership rights and privileges," and "the persons and entities who would be able to participate in the venture."

¶ 8 On November 22, 2000, a second set of term sheets was prepared with a change in the Development Fees provision for Daines. According to the November 22 term sheets, "Quantum Ventures, L.L.C., of which Mr. Welden Daines is a principal" was to receive a fee either "in the form of cash or equity in [WVSC]." No separate fee was provided for Daines individually. Like the fee provision for Daines in the November 21 term sheets, WVSC was liable for the "cash or equity" provision for Quantum Ventures in the November 22 term sheets.

II. THE FIRST ORAL AGREEMENT

¶ 9 Thereafter, Daines began actively negotiating with ASC on behalf of the surgeons. At some point after beginning negotiations with ASC, Daines told Dr. Burrows that he was "uncomfortable" because he felt that both ASC and the surgeons expected him to negotiate on their behalf. On December 13, 2000, while still negotiating with ASC on behalf of the surgeons, Daines met with Vincent. During this meeting, Daines claims that he entered into an oral agreement with Vincent to forego his $150,000 compensation under the MOU in exchange for 8 Class II shares of ownership in WVSC. [FN3]

FN3. The term sheets indicate that the ini-

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tial offering of 100 shares of ownership in WVSC would break down as follows: 20 Class II shares were reserved for ASC only, while 80 Class I shares would be made available to participating surgeons. Class II shares were to be sold initially for $8,500. This means that ASC would have had to pay only $68,000 to compensate Daines under the oral agreement, provided that such an arrangement were even possible under the proposed term sheets. Even though the initial value of the shares referenced in the oral agreement was worth a little more than a third of the value of the MOU, their current value is nearly $4 million. The oral agreement would have also given Daines a larger interest than any of the participating surgeons individually and would have cut ASC's ownership interest from twenty shares down to twelve.

***1273** ¶ 10 The term sheets following the December 13 meeting and oral agreement between Daines and Vincent did not include a provision for payment to Daines or Quantum Ventures. On January 4, 2001, Vincent made a note during a phone call with Daines that “Welden has torn up his prior agreement and is only working for them.” During subsequent negotiations of the term sheets, Daines sent an email to Vincent stating “nothing for me.”

III. REAL ESTATE DEVELOPMENT AND A SECOND ORAL AGREEMENT

¶ 11 In February 2001, the surgeons and ASC reached an agreement and formed WVSC. After the formation of WVSC, Daines and Smith began working together to develop several real estate properties for the new center. Daines testified that the surgeons asked him to be involved in the real estate development process. However, there is no indication that the surgeons, WVSC, or ASC made any contractual agreements with Daines for his services as a real estate developer. One of the sites Daines and Smith worked on was a site located in West Valley, and controlled by The Boyer Company (Boyer). Boyer had exclusive rights to develop that site (Boyer site). At some point during the development process, and at the request of Dr. Burrows, Boyer entered into an oral agreement with Daines promising him payment in connection with his work on the Boyer site if the site was selected. In September, 2001, the WVSC board selected the Boyer site as the location of the new surgical center. Following the site selection, Daines phoned Vincent on September 25, 2001 to inquire about the eight shares promised in the first oral agreement. Daines testified that Vincent responded by asking, “What eight shares?”

IV. THE RELEASE

¶ 12 On October 8, 2001, Daines sent a letter to Lynn Summerhays of Boyer requesting payment of $50,000, based on their oral agreement, for work done in connection with the development of the Boyer site. Summerhays responded with a letter substantiating the oral agreement, but indicated that the offer “came as a result of a request from Dr. Burrows” and that payment would follow the “rental commencement of the center.” Daines responded by sending a fax to Dr. Burrows on October 29, asking for help in obtaining payment from Boyer. On October 30, 2001, Dr. Burrows proposed to the WVSC board that Daines be paid immediately since his work was “pretty well complete.” The board determined that ASC would pay Daines $6,000 for his out-of-pocket expenses. Boyer would subsequently reimburse ASC for the $6,000 and pay the balance of the $50,000 to Daines when the lease was executed.

¶ 13 Two days after the board meeting, Daines faxed an invoice to “ASC West Valley Surgical Center” for $6,000, indicating that the balance of his fee for work performed for WVSC would be paid by Boyer once the surgical center was open. On December 10, Dr. McCray sent a letter to Daines with the Release, stating that a check had been made out to Daines for $6,000 and would be released when Daines signed and returned the Release.

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¶ 14 The Release states:

> We, Welden L. Daines and Robert Smith, do hereby conditionally release West Valley Surgical Center, LLC or any of its members from any and all liabilities and or claims in connection with services provided by us for the due diligence, acquisition of real estate, or any other services rendered to date for West Valley Surgical Center, or on behalf of its members, for the organization, development and operation of an ambulatory surgical center in the West Valley and any services connected with the same. This release encompasses and satisfies any prior agreements and discussions whether written or verbal by the West Valley Surgical Center, LLC or any of its members.
>
> This release shall be conditioned upon the receipt of $50,000 due and payable from the real estate developer of the West ***1274** Valley City Surgical Center. In addition, by signing below, we agree that any partial amounts paid against the $50,000 liability either by West Valley Surgical Center, LLC or by The Boyer Company, Developer of the Real Estate for the project for amounts owed us shall become unconditionally released by us upon confirmed receipt of said partial payments.

Daines and Smith signed and returned the Release on December 11, 2001. After receiving the Release, WVSC forwarded a $6,000 check to Daines.

¶ 15 On March 20, 2003, Boyer made out a check to "Daines Associates" for $50,000. Daines accepted the check and used a portion of it to pay Smith for his efforts. On April 23, 2003, Daines faxed Vincent another request for the eight shares discussed in the first oral agreement. Vincent denied Daines' request.

PROCEDURAL HISTORY

¶ 16 On May 8, 2003, Daines filed claims against ASC and Vincent for breach of contract, promissory estoppel, fraudulent inducement to contract, breach of implied covenant of good faith and fair dealing, negligent misrepresentation, unjust enrichment-quantum meruit, and specific performance.

¶ 17 Before trial, Daines made a motion to admit the Lipscomb order as part of his case-in-chief and to challenge Vincent's veracity. The Lipscomb order included comments on Vincent's character, including a reference to Vincent's "convenient lapses of memory" and his lack of reliability as a witness. The trial court rejected Daines' motion.

¶ 18 Following the presentation of Daines' case-in-chief, the trial court granted motions by ASC and Vincent for directed verdicts and dismissed all claims with prejudice. The first directed verdict dismissed all of Daines' fraud claims. The trial court found that Daines failed to satisfy most of the required elements to sustain a fraud claim. The second directed verdict dismissed Daines' claims against Vincent individually. The court held, based on the evidence presented, that "no reasonable jury could conclude that Vincent acted in any other way than as a representative of ASC." In the third directed verdict, the court held that the Release signed by Daines was "clear and unambiguous as a matter of law." As part of its analysis, the trial court assumed the existence of the alleged December 13, 2000 oral agreement between Vincent (acting on behalf of ASC) and Daines for eight shares in WVSC.[FN4] Assuming the existence of the oral agreement, the court held that by signing the Release, which "supersede[d] any and all other contracts, whether written or oral," Daines "gave up any right he may have had to pursue the claims asserted against ASC," including his right to claim eight shares in WVSC under the alleged oral agreement. Thus, the court found that it was not necessary to reach a determination as to the existence of the oral agreement since it would be covered under the unambiguous terms of the Release if it did exist, and therefore would not be binding.

FN4. Although assuming the existence of

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> an oral agreement, the trial court noted that it had "serious doubts" that a jury would in fact conclude that an oral contract had been formed and would be able to do so only by ignoring several pieces of evidence presented at trial.

¶ 19 Daines challenges the directed verdicts and the trial court's denial of his motion seeking admittance of the Lipscomb order. Daines also raises questions regarding an award of costs and sanctions based on the ripeness of the filing of this appeal. The trial court granted ASC and Vincent's directed verdict motions on August 22, 2006. ASC and Vincent served Daines a copy of a Memorandum of Costs on September 11, 2006. On October 11, 2006, the trial court entered final judgment and awarded costs in favor of ASC and Vincent. Before the trial court entered final judgment and awarded costs to ASC and Vincent, Daines filed this appeal on September 8th, 2006. After filing the appeal, Daines filed an objection with this court asserting that the trial court no longer had jurisdiction to make an award. In response, ASC and Vincent filed a motion with this court to dismiss for lack of jurisdiction as the trial court had not yet rendered a final judgment. Daines replied with a claim that the motion filed by ASC and Vincent was frivolous and requested sanctions. We deferred ruling on the motions until after we ruled on ***1275** the merits. We have jurisdiction over this case pursuant to Utah Code Section 78A-3-102(3)(j) (2008).

STANDARD OF REVIEW

[1] ¶ 20 We will sustain a directed verdict if after "examining all evidence in a light most favorable to the non-moving party, there is no competent evidence that would support a verdict in the non-moving party's favor." *Merino v. Albertsons, Inc.,* 1999 UT 14, ¶ 3, 975 P.2d 467.

[2][3] ¶ 21 With regard to our review of the exclusion of evidence, we grant a trial court broad discretion to admit or exclude evidence and will disturb its ruling only for abuse of discretion. *State v. Whittle,* 1999 UT 96, ¶ 20, 989 P.2d 52. Thus, we will not reverse a trial court's ruling on evidence unless the ruling "was beyond the limits of reasonability." *Jensen v. IHC Hosps., Inc.,* 2003 UT 51, ¶ 57, 82 P.3d 1076 (quoting *State v. Hamilton,* 827 P.2d 232, 239-40 (Utah 1992)).

ANALYSIS

I. DETERMINATION OF INTEGRATION

[4] ¶ 22 Viewing the evidence in a light most favorable to Daines, we agree with the trial court's finding that the Release is an integrated agreement. Consistent with our line of contract analysis cases, we first determine whether or not the Release constitutes an integrated agreement before considering whether the evidence offered by Daines supports a finding of facial ambiguity. *Hall v. Process Instruments & Control, Inc.,* 890 P.2d 1024, 1026, 1027 (Utah 1995), *overruled on other grounds by Tangren Family Trust v. Tangren,* 2008 UT 20, 182 P.3d 326. We have held that an integrated agreement is "a writing or writings constituting a final expression of one or more terms of an agreement." *Tangren Family Trust v. Tangren,* 2008 UT 20, ¶ 12, 182 P.3d 326 (quoting *Hall,* 890 P.2d at 1027). Additionally, we recently held in *Tangren* that "[e]xtrinsic evidence ... is not admissible on the question of integration where the contract at issue contains a clear integration clause." 2008 UT 20, ¶ 19, 182 P.3d 326. Thus, a contract is integrated if it contains a "clear integration clause." *Id.*

¶ 23 Daines argues that the Release is not integrated because it does not contain a "real integration clause" stating that the document covers the entire agreement between the parties. We disagree. The Release states: "This release encompasses and satisfies any prior agreements and discussions whether written or verbal by West Valley Surgical Center, LLC or any of its members." The language indicating that the Release "satisfies any prior agreements and discussions whether written or oral" satisfies the "clear integration clause" standard articulated in *Tangren.* Therefore, we affirm the trial court's conclusion that the Release constitutes an integrated agreement.

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II. DETERMINATION OF AMBIGUITY

¶ 24 Having found that the Release is integrated, we now turn to an analysis of ambiguity. This case gives us the opportunity to discuss the standard for determining contractual ambiguity. In *Ward v. Intermountain Farmers Ass'n,* 907 P.2d 264 (Utah 1995), we established a standard for determining ambiguity in two separate contexts: facial ambiguity and ambiguity with regard to intent. To the extent that our ruling in *Ward* has created confusion as to the proper relationship between relevant, extrinsic evidence reviewed by the judge in making a determination of facial ambiguity and the plain language within the "four corners" of the contract, we take this opportunity to clarify. After clarifying the *Ward* rule, we will apply the rule to the facts in the present case.

A. The Ward Rule

[5] ¶ 25 A contractual term or provision is ambiguous "if it is capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies.' " *WebBank v. Am. Gen. Annuity Serv. Corp.,* 2002 UT 88, ¶ 20, 54 P.3d 1139 (quoting *SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc.,* 2001 UT 54, ¶ 14, 28 P.3d 669). In *Ward,* we indicated that contractual ambiguity ***1276** can occur in two different contexts: (1) facial ambiguity with regard to the language of the contract and (2) ambiguity with regard to the intent of the contracting parties. 907 P.2d at 268. The first context presents a question of law to be determined by the judge. *WebBank,* 2002 UT 88, ¶ 22, 54 P.3d 1139. The second context presents a question of fact where, if the judge determines that the contract is facially ambiguous, "parol evidence of the parties' intentions should be admitted." *Winegar v. Froerer,* 813 P.2d 104, 108 (Utah 1991); *see also SME Indus., Inc.,* 2001 UT 54, ¶ 14, 28 P.3d 669. Thus, before permitting recourse to parol evidence, a court must make a determination of facial ambiguity. *Ward,* 907 P.2d at 268; *Winegar,* 813 P.2d at 108. Because the question of ambiguity begins with an analysis of facial ambiguity, we address *Ward's* articulation of the test for determining facial ambiguity.

¶ 26 In *Ward* we set forth a two-part standard for determining facial ambiguity. First, we indicated that "[w]hen determining whether a contract is ambiguous, any relevant evidence must be considered. Otherwise, the determination of ambiguity is inherently one-sided, namely, it is based solely on the 'extrinsic evidence of the judge's own linguistic education and experience.' " *Ward,* 907 P.2d at 268 (internal quotation marks omitted) (quoting *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.,* 69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641, 643 (1968)). Second, after a judge considers relevant and credible evidence of contrary interpretations, the judge must ensure that "the interpretations contended for are reasonably supported by the language of the contract." *Ward,* 907 P.2d at 268.

[6] ¶ 27 In articulating the *Ward* rule, we sought to establish a balanced, "better-reasoned" approach to an analysis of facial ambiguity that would allow judges to "consider the writing in the light of the surrounding circumstances." *Id.* However, we did not intend that a judge allow surrounding circumstances to create ambiguity where the language of a contract would not otherwise permit. In other words, our statement that "[r]ational interpretation requires at least a preliminary consideration of all credible evidence," *id.* (internal quotation marks omitted), does not create a preference for that evidence over the language of the contract. *See Saleh v. Farmers Ins. Exch.,* 2006 UT 20, ¶ 17, 133 P.3d 428 (stating that alternative interpretations of contractual language must be supported by the usual and natural meaning of the language used). Thus, under *Ward,* a finding of ambiguity after a review of relevant, extrinsic evidence is appropriate only when "reasonably supported by the language of the contract." *Ward,* 907 P.2d at 268.

¶ 28 Our holding in *Ward* demonstrates the proper application of the rule. In that case, we found ambiguity in the phrase "of safflower." *Id.* at

269. Ward contracted with Intermountain Farmers Association (IFA) to spray his safflower field with fertilizer and herbicide. *Id.* at 265. The sprayer used on Ward's field had previously been used to spray Velpar L, an herbicide strong enough to kill safflower. *Id.* The sprayer was not properly cleaned before it was used to spray Ward's field. *Id.* After his field was sprayed, a significant amount of Ward's safflower crop died. *Id.* In negotiating a settlement, IFA presented Ward with a release stating that upon receipt of payment for damages, Ward would "release and hold harmless Intermountain Farmers Association for any and all damages caused by the spraying of [Ward's] nineteen acres of safflower." *Id.* at 265-66. In his affidavit, Ward testified that he initially refused to sign the release because he was concerned about the lingering effects of the Velpar L on the field in which the safflower was planted and not just for the damage done to his safflower crop. *Id.* at 266. In his affidavit, Ward indicated that IFA told him "not to worry" and that he should "go ahead and plant beans in the field." *Id.* The next year, Ward's bean crop, planted in the same field, began to die. *Id.* IFA did not compensate Ward for the damages to his bean crop and Ward filed suit for breach of contract. *Id.* We concluded that the language of the agreement, specifically the phrase "of safflower," was susceptible to two interpretations: "Although the phrase 'of safflower' could be read to simply define the field, it could also be construed to specify the damage subject to release." *Id.* at 269. In ***1277** finding ambiguity in *Ward,* we considered the extrinsic evidence offered by Ward in order to view the "writing in light of the surrounding circumstances." *Id.* at 268. However, our analysis of the evidence offered by Ward was ultimately circumscribed by the language of the agreement-specifically by the phrase "of safflower." *Id.* at 269.

¶ 29 In addition to finding ambiguity in the express terms of a release, we have also found ambiguity in a contract taken as a whole, *WebBank,* 2002 UT 88, ¶¶ 27-29, 54 P.3d 1139 (remanding for the admission of parol evidence because we found "it [was] unclear from the language and provisions contained in the security agreement and promissory note whether [the parties] intended to effectuate a genuine secured transaction or whether they intended to create a sale or an assignment"); where there are missing terms in a contract, *Nielsen v. Gold's Gym,* 2003 UT 37, ¶ 14, 78 P.3d 600 (finding ambiguity because a contract was silent as to responsibility for key improvements significant to the agreement); and in the parties' course of conduct, *Peterson v. Sunrider Corp.,* 2002 UT 43, ¶¶ 22-23, 48 P.3d 918 (finding ambiguity in contractual terms because of a history of bonus payments even when express obligations articulated in the agreement had not been met). In *WebBank, Nielsen,* and *Sunrider Corp.,* contrary interpretations of the agreement were checked against the plain language of the contract. Thus, each time we found ambiguity, we found that the contrary interpretations were "reasonably supported by the language of the contract." *Ward,* 907 P.2d at 268.

[7] ¶ 30 Likewise, in cases where we have not found ambiguity, the language of the contract or release was not susceptible to "contrary, tenable interpretations." *WebBank,* 2002 UT 88, ¶ 27, 54 P.3d 1139 (quoting *SME Indus., Inc.,* 2001 UT 54, ¶ 15, 28 P.3d 669); *see also Saleh,* 2006 UT 20, ¶ 18, 133 P.3d 428 (finding no ambiguity because plaintiff's interpretation would effectively change a key term of the release); *Peterson v. Coca-Cola USA,* 2002 UT 42, ¶ 12, 48 P.3d 941 (finding "that the release [was] unambiguous because it [was] not 'capable of more than one reasonable interpretation' " (quoting *Winegar,* 813 P.2d at 108)). Since our articulation of the *Ward* rule, our consideration of extrinsic evidence offered to demonstrate ambiguity has been circumscribed by the requirement that the interpretations argued for must be "reasonably supported by the language of the contract." *Ward,* 907 P.2d at 268. Thus, a correct application of the *Ward* rule to determine what the writing means begins and ends with the language of the contract.[FN5]

FN5. While the *Ward* rule allows for the

admission of extrinsic evidence to uncover ambiguity, a finding of ambiguity will prove to be the exception and not the rule. Our holding in *Ward* provides for instances, though rare, where contractual terms are subject to alternative interpretations based on usage. For instance, to an American, the term "boot" refers to something you wear on your foot, but a person from Britain or New Zealand might refer to a "boot" as the storage area in the back of a car-what Americans would refer to as a "trunk." Likewise, in America, we get "braces" to straighten our teeth, whereas the British use them to hold up their pants. When contracting parties have a contrasting understanding of express terms due to usage, the *Ward* rule provides the court with the ability to "place itself in the same situation in which the parties found themselves at the time of contracting." *Ward,* 907 P.2d at 268 (internal quotation marks omitted). However, as stated above, any contended for interpretation must be "reasonably supported by the language of the contract." *Id.* More simply put, a party cannot make a successful claim of ambiguity based on usage of a term that is not reasonable or is the product of "forced or strained construction." *Saleh,* 2006 UT 20, ¶ 17, 133 P.3d 428 (internal quotation marks omitted).

[8][9][10] ¶ 31 As illustrated by our line of facial ambiguity cases, the two-part *Ward* rule requires that a judge first review relevant and credible extrinsic evidence offered to demonstrate that there is in fact an ambiguity. After reviewing the evidence offered, the *Ward* rule justifies a finding of ambiguity only if the competing interpretations are "reasonably supported by the language of the contract." *Ward,* 907 P.2d at 268. Conversely, there can be no ambiguity where evidence is offered in an attempt to obscure otherwise plain contractual terms. *See Saleh,* 2006 UT 20, ¶ 17, 133 P.3d 428 (stating that contractual language cannot be ambiguous because parties seek to "endow [it] with ***1278** a different interpretation according to [their] own interests" (citing *Alf v. State Farm Fire & Cas. Co.,* 850 P.2d 1272, 1274-75 (Utah 1993))). Thus, even though we permit admission of extrinsic evidence to support a claim of ambiguity in contractual language, the claim "must be plausible and reasonable in light of the language used." *First Am. Title Ins. Co. v. J.B. Ranch, Inc.,* 966 P.2d 834, 837 (Utah 1998).

¶ 32 We now apply the two parts of the *Ward* rule to the Release in the present case.

B. The Release Signed by Daines is Not Ambiguous as a Matter of Law

[11] ¶ 33 Applying the *Ward* rule and examining the evidence in a light most favorable to Daines, we affirm the trial court's directed verdict and find that the Release is unambiguous as a matter of law.

¶ 34 The plain language of the Release states that Daines will release "West Valley Surgical Center, LLC or any of its members from any and all liabilities and or claims in connection with services provided ... for the organization, development and operation of an ambulatory surgical center in the West Valley and any services connected with the same" in exchange for $50,000 to be paid by the real estate developer. Consistent with the first part of the *Ward* rule, we review extrinsic evidence offered by Daines in support of his claim of ambiguity. Daines offers evidence in the form of a series of documents and instruments written or executed in the days before he signed the Release. These include an invoice for $6,000 with a balance of $44,000 to be paid by Boyer, e-mails and letters regarding the second oral agreement, and the check for $6,000. Daines argues that this evidence indicates that when he signed the Release, he was considering only the amount due under the oral agreement with Boyer. Daines argues that the Release therefore did not cover any other obligations owed to him by WVSC or its members. Specifically,

Daines argues that the Release does not cover the oral agreement for eight shares in WVSC. Applying the second part of the *Ward* rule, we find that the language of the Release is not reasonably susceptible to Daines' interpretation. Under the terms of the Release, Daines agreed to release WVSC and "any of its members" from "any and all liabilities or claims in connection with services provided ... for the organization, development and operation of an ambulatory surgical center in the West Valley." The language of the Release establishes two hurdles which the evidence offered by Daines fails to clear.

¶ 35 First, the evidence offered by Daines fails to indicate how ASC is not a "member" of WVSC. Conversely, Daines stipulated that at the time he signed the Release, he knew that ASC was a member of WVSC. Additionally, the term sheets, with which Daines admits he was very familiar from the beginning of the process, make it clear that ASC operated from the understanding that it would be a member of WVSC as soon as it was formed. ASC's membership in WVSC was, at all times during the negotiations, a foregone conclusion. In other words, there was never a time in the entire process where ASC either was not a member of WVSC or was not operating under the assumption that it would become a member of WVSC as soon as it was formed.[FN6] To hold that ASC was not a member for the purposes of the Release would be to impose a meaning "not reasonably supported by the language" of the Release.[FN7] *Ward,* 907 P.2d at 268.

FN6. To the contrary, the evidence submitted by Daines supports the conclusion that the purpose of ASC's involvement in the transaction was to become a member of an LLC that would open a surgical center in West Valley. Once the surgical center was open, it is also clear that ASC would become the managing entity of the center. ASC's level of involvement was always a key part of the negotiation. It is also clear from the evidence that any "services rendered" by Daines to ASC, either before or after the formation of the board was connected to the "organization, development, and operation of [the] ambulatory surgical center."

FN7. Daines also argues that the Release is ambiguous because the term "members" is susceptible to "more than one reasonable interpretation." This argument turns on a theory offered by Daines that there is a distinction between the legal capacity of ASC operating in its pre-board member status and the legal capacity of ASC as a member of the WVSC Board. However, we cannot find in our case law any justification for recognizing a different legal capacity where, as in this case, the legal capacity of ASC as a member of the board was clearly a foundational element for all agreements between ASC and Daines. Moreover, the obligations of ASC to Daines before and after ASC became a member of WVSC arise from the same nexus: the organization and development of the surgical center. Therefore, the obligations are covered under the Release.

***1279** ¶ 36 Second, the evidence offered by Daines fails to demonstrate how the oral agreement for eight shares does not fall under the clause releasing ASC from "any and all liabilities or claims in connection with services provided ... for the organization, development and operation of an ambulatory surgical center in the West Valley." Daines admits that the oral agreement was made in substitution for the agreement covered by the MOU. The MOU states that Daines will provide ASC with a list of surgeons for the purpose of "building and operating a surgical center." The MOU and the subsequent oral agreement both fall under the plain language of the Release covering "any and all" claims in connection with the "organization, development and operation" of the surgical center. Daines' argument for ambiguity asks us to find that the phrase "any and all" somehow does not encom-

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pass his claim under the MOU or the oral agreement for the eight shares or that, conversely, his agreement to provide a list of surgeons for the purpose of "building and operating" a surgical center somehow does not fall under the phrase "organization, development and operation of an ambulatory surgical center." Applying the *Ward* rule and comparing Daines' proposed interpretation with the contractual terms, we find that Daines' argument is not reasonably supported by the language of the Release.

¶ 37 In accordance with the *Ward* rule, we affirm the trial court's directed verdict and find that the Release is unambiguous as a matter of law. As a result, we do not need to resort to the admission of parol evidence on the question of intent, because absent a finding of facial ambiguity, "the parties' intentions must be determined solely from the language of the contract." *Ward,* 907 P.2d at 268. Looking at the language of the contract releasing WVSC "or any of its members" from "any and all liabilities and or claims in connection with services provided" by Daines for the "organization, development, and operation" of the surgical center, we hold that Daines unambiguously released ASC from any claims he had against it, including his claim for the eight shares under the first oral agreement.

III. FRAUD

[12][13][14] ¶ 38 Daines also appeals the trial court's directed verdict on his fraud claim. To prevail on a claim of fraudulent inducement, Daines must present clear and convincing evidence sufficient to establish as follows:

> (1) that a representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, (5) for the purpose of inducing the other party to act upon it and (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to that party's injury and damage.

Armed Forces Ins. Exch. v. Harrison, 2003 UT 14, ¶ 16, 70 P.3d 35 (quoting *Gold Standard Inc. v. Getty Oil Co.,* 915 P.2d 1060, 1066-67 (Utah 1996)). Further, a party alleging fraud is required by rule 9(b) of the Utah Rules of Civil Procedure to state the circumstances constituting fraud "with particularity." Utah R. Civ. P. 9(b). Thus, "the mere recitation by a plaintiff of the elements of fraud in a complaint does not satisfy the particularity requirement." *Armed Forces,* 2003 UT 14, ¶ 16, 70 P.3d 35.

¶ 39 Considering the evidence in a light most favorable to Daines, we affirm the trial court's directed verdict on the fraud claim. The trial court held that there was "extremely thin" evidence of a representation made by Vincent regarding the eight shares therefore satisfying the first element of the fraud test. However, the court further found that Daines "has offered no evidence that ASC group had no present intent to transfer the eight shares to [Daines], or that the statement was knowingly ***1280** false or recklessly made." Rather than offer evidence satisfying the fraud standard in his appeal, Daines does little more than color the fraud elements with conjectural allegations based on his subjective experience of the transaction. We have held that, "mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient." *Franco v. Church of Jesus Christ of Latter-day Saints,* 2001 UT 25, ¶ 36, 21 P.3d 198. The evidence presented at trial, as noted by the trial court, failed to meet Daines' burden with respect to his fraud claim.

IV. VINCENT'S LIABILITY

[15] ¶ 40 Daines asks us to reverse the trial court's directed verdict in favor of Vincent on all claims against Vincent personally. Reviewing the evidence and testimony presented at trial in a light most favorable to Daines, we agree with the trial court's ruling that Daines failed to present competent evidence that Vincent was acting in anything other than a representative capacity for ASC in his

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dealings with Daines. ASC was, at all pertinent times for the purposes of this case, a Utah limited liability company. The Utah Revised Limited Liability Company Act indicates that "no organizer, member, manager, or employee of a company is personally liable ... for a debt, obligation, or liability of the company." Utah Code Ann. § 48-2c-601 (2007). Additionally, we have held that "where an agent has signed a contract in a personal capacity, that is, executed it in a manner clearly indicating that the liability is his alone ... he must fulfill." *Starley v. Deseret Foods Corp.,* 93 Utah 577, 74 P.2d 1221, 1223 (1938). It follows then that Vincent, as the chairman of ASC during negotiations with Daines, can be held personally liable for a signed contract only if he executed the contract "in a manner clearly indicating that the liability was his alone." *Id.*

¶ 41 We begin with an analysis of the MOU, which represents the starting point of any agreement that Daines had with ASC. Daines drafted the MOU and included a signature line for Vincent directly under the heading "ASC." Because the MOU expressly states that Vincent would sign on behalf of ASC, it is apparent that Daines recognized that he would be dealing with ASC through Vincent and not with Vincent in his individual capacity. The initial term sheets, which include compensation for Daines in accordance with the MOU, also indicate that Vincent was acting on behalf of ASC. The term sheets are also clear on the fact that any compensation that Daines would receive for his "introduction of ASC to [the] project" would come from WVSC once formed and not from Vincent personally. Furthermore, the agreement for eight shares, according to Daines, came about as a renegotiation of the terms of compensation originally considered under the MOU. Daines' testimony of the events of the renegotiation reflects his continued understanding that Vincent was acting on behalf of ASC on December 13, 2000. The pertinent section of Daines' testimony on direct examination reads:

Q: So what was Mr. Vincent's reaction to your conversation with him, to you telling him how uncomfortable you felt?

A: His reaction was, "Well, I think we can take care of this if you come on our side of the table and you get a share."

Even if we are to assume, in a light most favorable to Daines, that Vincent's first "we" is a reference to Vincent and Daines, it is apparent that Vincent's invitation to Daines to "come on our side of the table" is a reference to ASC's position in the negotiations. Daines' testimony confirms his original understanding that Vincent was acting on behalf of ASC during their negotiations. Therefore, we affirm the directed verdict of the trial court.

V. THE LIPSCOMB ORDER

[16] ¶ 42 Daines asks us to consider the trial court's denial of his motion to admit the Lipscomb order. Daines sought to admit the Lipscomb order for two purposes: (1) to impeach Vincent if he were to testify and (2) as evidence in Daines' case-in-chief. We will not consider the first argument because Vincent was not called as a witness.FN8 As to the ***1281** second argument, Daines concedes that the Lipscomb order constitutes character evidence; he sought its admission under the character evidence rule exception in Utah Rule of Evidence 404(b).

FN8. We recognize that Vincent may have been called as a witness by the defense had ASC and Vincent not prevailed on their motions for directed verdicts. However, admission of the Lipscomb order would not have aided Daines in his claim. Daines asked the court to admit the Lipscomb order as evidence demonstrating that Vincent has a history of making oral agreements and then subsequently denying them. As noted earlier, the trial court assumed the existence of the oral contract of December 13, 2000, in spite of the court's "serious doubts [as to] whether there is a reasonable basis in the evidence to support a finding

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that an enforceable oral contract was formed." Assuming the existence of the oral agreement, the trial court found that it would not be binding due to the all-inclusive nature of the Release. Consequently, allowing the Lipscomb order would not have aided Daines since the point he sought, an affirmation of the existence of the oral agreement, could not have overcome the unambiguous language of the Release. *See* discussion *supra* 33-37.

¶ 43 Under Utah Rule of Evidence 404(b), evidence of "crimes, wrongs or acts is not admissible to prove the character of a person." Utah R. Evid. 404(b). However, such evidence may be admissible for some other purpose such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* We have held that the list provided in rule 404(b) is not exhaustive and that evidence is admissible under rule 404(b) "so long as the evidence is offered for a legitimate purpose other than to show the defendant's propensity to commit the crime charged." *State v. Allen,* 2005 UT 11, ¶ 17, 108 P.3d 730. However, qualifying under rule 404(b) is not sufficient as to proffered character evidence. In *Allen,* we also held that meeting the rule 404(b) standard is only the first in a three-part test. *Id.* ¶ 16, 108 P.3d 730. Evidence offered under 404(b) must also meet the relevancy requirements of rule 402 and pass the prejudicial balancing test of rule 403. *Id.* However, we need not apply the last two steps of the *Allen* test because Daines' argument falters on the first step.

[17] ¶ 44 The Lipscomb order contains several references relevant to Vincent's character.[FN9] In his brief, Daines argues that the Lipscomb order should have been admitted as "evidence in chief of Vincent's prior bad acts." Daines' argument manifests a fundamental misunderstanding of rule 404(b). Rule 404(b) operates to prevent evidence of a defendant's prior bad acts from coming before a jury to "show conformity therewith," which appears to be the reason Daines wanted the Lipscomb order admitted. Daines' argument on this point is sufficient to affirm the trial court's denial. Further, Daines invites us to find "substantive grounds" for a reversal in his memorandum submitted to the trial court without further elaboration. As we have held before, an argument merely referencing submissions to the trial court is "inadequate and does not provide sufficient legal reason for us to override the discretion of the trial court which had the ability to ... review the documentation on this issue." *Jensen v. Sawyers,* 2005 UT 81, ¶ 134, 130 P.3d 325. Finally, we note that because the trial court assumed for purposes of its ruling that Vincent had orally agreed to the shares Daines claimed, Daines lost nothing by reason of the unavailability of the order.

FN9. The order notes that Vincent has "convenient lapses of memory" and that Vincent was "not a credible witness."

VI. DAINES' DAY IN COURT

[18] ¶ 45 Daines claims that he was denied his "day in court" by the trial court's directed verdicts. We disagree. In order to succeed in his claim, Daines must demonstrate that his claims have not been adjudicated on the merits. *See, e.g., Miller v. USAA Cas. Ins. Co.,* 2002 UT 6, ¶¶ 65-66, 44 P.3d 663. The record clearly indicates the opposite.

[19] ¶ 46 We have held that "a day in court means that each party shall be afforded the opportunity to present claims and defenses, and have them properly adjudicated on the merits according to the facts and the law." *Id.* ¶ 42, 44 P.3d 663 (footnote omitted). "The 'merits' of a case are 'the elements or grounds of a claim or defense.' " *Blue Skies Alliance v. Tex. Comm'n on Envtl. Quality,* 265 F.App'x 203, 207, 2008 WL 344750 (5th Cir.2008) (quoting *Black's* ***1282** *Law Dictionary* 1010 (8th ed.2004). With regard to a judgment on the merits, we have clarified our standard by stating that "a judgment on the merits may be made at any stage of the litigation, so long as the district court rendered judgment based upon a proper application of the relevant law to the facts of the case."[FN10]

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Miller, 2002 UT 6, ¶ 42 n. 6, 44 P.3d 663.

FN10. If the trial court had held in a pretrial summary judgment in accordance with *Ward* that the Release was unambiguous as a matter of law, Daines would still have had his day in court. As we stated previously, the elements of Daines' claim fail to meet the ambiguity standard we articulated in *Ward.* Therefore, the trial court could have correctly held that the presentation of extrinsic evidence to a jury on the question of ambiguity with regard to intent would not be appropriate under *Ward.*

¶ 47 Daines received rulings on the elements and grounds of his claim based on the trial court's proper application of the relevant law to the facts of the case. The directed verdicts were not rendered until after Daines presented his entire case to the court. It was not until after Daines indicated that he would not call any more witnesses that the court heard motions for directed verdicts by ASC and Vincent. The record indicates that the court carefully listened to the testimony and evidence during Daines' presentation. After Daines' presentation of evidence the court noted, “I don't think you've proven any malfeasance or anything by way of breach of contract on Mr. Vincent.” The trial court then allowed Daines the opportunity to address the court's concerns. While considering directed verdicts, the court carefully sought through the record to identify even a “scintilla of evidence that would support [Daines'] claim that could go to the jury.” It was only after the court's deliberation on Daines' presentation and arguments on the merits that it granted the directed verdicts based on application of the appropriate law to each of Daines' claims. The trial court's directed verdicts did not deny Daines his day in court. To the contrary, the record indicates that the trial court was careful to ensure it applied the appropriate law to the facts presented by Daines before rendering its judgment.

VII. AWARD OF COSTS

[20] ¶ 48 We conclude that the award of costs to ASC and Vincent is appropriate pursuant to rule 54 of the Utah Rules of Civil Procedure. Rule 54(d)(1) indicates that “costs shall be awarded as a matter of course to the prevailing party unless the court directs otherwise.” Utah R. Civ. P. 54(d)(1). The trial court's orders are clear that ASC and Vincent prevailed on their motions for directed verdicts.

¶ 49 We find also that ASC and Vincent timely complied with rule 54(d)(2)'s requirement in serving a copy of the memorandum of cost. The final appealable judgment awarding costs was entered by the trial court on October 11, 2006. ASC and Vincent had previously served a copy of the memorandum of costs to Daines, on September 11, 2006, and Daines signed for receipt of the memorandum on September 12, 2006. Even though it appears from the record that the trial court failed to sign the final order fixing the amount of costs, it is clear from the judgment that the trial court awarded costs to ASC and Vincent. Therefore we find that the award of costs in the amount of $3,842.11 to ASC and Vincent is appropriate as required by rule 54 of the Utah Rules of Civil Procedure.

CONCLUSION

¶ 50 In accordance with our recent ruling in *Tangren,* we affirm the trial court's finding that the Release signed by Daines was an integrated contract. We also affirm the trial court's finding in accordance with *Ward,* that the Release was unambiguous as a matter of law. Additionally, we affirm the trial court's directed verdicts on Daines' claims of fraud and against Vincent individually. We also affirm the trial court's denial of Daines' motion to admit the Lipscomb order. Further, we find that Daines had his day in court as his claims were adjudicated on the merits. Finally, in accordance with rule 54 of the Utah Rules of Civil Procedure, we affirm the award of costs in the amount of $3,842.11 to ASC and Vincent.

***1283** ---

¶ 51 Associate Chief Justice DURRANT, Justice WILKINS, Justice PARRISH, and Justice

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NEHRING concur in Chief Justice DURHAM's opinion.

Utah,2008.
Daines v. Vincent
190 P.3d 1269, 609 Utah Adv. Rep. 37, 2008 UT 51

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C

Supreme Court of Utah.
CERRITOS TRUCKING CO., a California corporation, and Cerritos Trucking Co., Donald E. Heimark, James B. Fleming and William L. Fariester dba Cerritos Associates, a partnership, Plaintiffs and Respondents,
v.
UTAH VENTURE NO. 1, William J. Lowenberg, Fern E. Lowenberg, and Utah Development Company, Inc., a Utah corporation, Defendants and Appellants.
UTAH DEVELOPMENT COMPANY, INC., a corporation and William J. Lowenberg, Cross-Plaintiffs and Appellants,
v.
BETTILYON REALTY COMPANY, a corporation, and Edmond O. Dunahoo, Cross-Defendants and Respondents.

No. 17185.
March 18, 1982.

Action was brought for specific performance of option to purchase realty, in which owner sought rescission as well as damages from plaintiff, a realty company and another on basis of alleged misrepresentation, mutual mistake and breach of fiduciary duty. The Third District Court, Salt Lake County, Peter F. Leary, J., granted directed verdict for plaintiffs and cross defendants, and defendants appealed. The Supreme Court, Howe, J., held that: (1) defendants could not avoid option on ground of deceit where there was no contention that representation that officers of a certain corporation would participate in purchase was not made with intention of being kept, regardless of any negligence in formulating that intention, and (2) realtor was not guilty of breach of fiduciary duty on ground that it failed to inform owners that corporation was interested in leasing where realtor had presented owner a verbal offer from the corporation to lease part of the building, which offer was rejected.

Affirmed and remanded.

West Headnotes

[1] Trial 388 ⚷168

388 Trial
388VI Taking Case or Question from Jury
388VI(D) Direction of Verdict
388k167 Nature and Grounds
388k168 k. In General. Most Cited Cases

Motion for directed verdict is a method of testing legal sufficiency of the evidence.

[2] Trial 388 ⚷178

388 Trial
388VI Taking Case or Question from Jury
388VI(D) Direction of Verdict
388k178 k. Hearing and Determination. Most Cited Cases

In deciding a motion for directed verdict all evidence must be considered in the light most favorable to the party against whom it is directed.

[3] Trial 388 ⚷178

388 Trial
388VI Taking Case or Question from Jury
388VI(D) Direction of Verdict
388k178 k. Hearing and Determination. Most Cited Cases

A case should not be taken from the jury by granting of a motion for directed verdict where there is any substantial dispute in the evidence.

[4] Appeal and Error 30 ⚷927(7)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k927 Dismissal, Nonsuit, Demurrer to Evidence, or Direction of Verdict
30k927(7) k. Effect of Evidence and

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Inferences Therefrom on Direction of Verdict. Most Cited Cases

Same rules as apply at trial level on a motion for a directed verdict are applied on appeal.

[5] Fraud 184 ⚷12

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k8 Fraudulent Representations
184k12 k. Existing Facts or Expectations or Promises. Most Cited Cases

A promise accompanied by present intention not to perform it, made for purpose of deceiving the promissee, thereby inducing him to act where otherwise he would not have done so and by virtue of which he parts with his money or property is actionable deceit.

[6] Vendor and Purchaser 400 ⚷18(1)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(1) k. Requisites and Validity. Most Cited Cases

Seller of realty could not avoid option agreement on ground that it was represented that officers of corporation which had attempted to lease the property would participate in the purchase and that but for such representation seller would not have granted the option where the evidence reflected nothing but good faith on the officers' part and it was not until several months later that the parent company disapproved of the plan for officer participation, leading to its abandonment, and representation was not actionable on ground of negligence in formulating it.

[7] Fraud 184 ⚷12

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k8 Fraudulent Representations
184k12 k. Existing Facts or Expectations or Promises. Most Cited Cases

Rule that if the promise is made in good faith when the contract is entered into there is no fraud though the promisor subsequently changes his mind and fails or refuses to perform obtains when the promisor's expression of intention to perform is made in good faith even though the promisor may have been negligent in assessing and weighing the various factors which influenced him in formulating that intention and the rule should not be extended further than a good-faith test.

[8] Brokers 65 ⚷19

65 Brokers
65IV Duties and Liability to Principal
65k19 k. Nature of Broker's Obligation. Most Cited Cases

Real estate broker, which building owner contacted to assist in finding tenant for warehouse, did not breach its fiduciary duty on ground that it did not inform buyer that a corporation, the officers of which were to participate in the purchase, was interested in leasing and that had owner known that corporation would lease without an option to purchase it would never have consented to the purchase option where broker had previously presented a verbal offer from the corporation to lease part of the building, which offer was rejected by owner, and owner was experienced in real estate matters.

[9] Appeal and Error 30 ⚷1061.4

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)16 Direction of Verdict
30k1061.4 k. In General. Most Cited Cases

Although in passing on a motion for directed verdict it is not proper for the trial judge to weigh evidence, that he did so did not result in prejudicial error and defendants were not entitled to succeed in any event. Rules Civ.Proc., Rule 61.

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[10] Appeal and Error 30 ⚷1026

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)1 In General
30k1025 Prejudice to Rights of Party as Ground of Review
30k1026 k. In General. Most Cited Cases

Reversal will not be had merely because there may have been error and reversal occurs only if error is such that there was a reasonable likelihood that, in its absence, there would have been a result more favorable to the complaining party. Rules Civ.Proc., Rule 61.

[11] Trial 388 ⚷178

388 Trial
388VI Taking Case or Question from Jury
388VI(D) Direction of Verdict
388k178 k. Hearing and Determination. Most Cited Cases

It is not improper for a trial court to enter findings and conclusions after granting motions for directed verdict, and findings or a memorandum are helpful on review and such practice is encouraged.

[12] Appeal and Error 30 ⚷719(1)

30 Appeal and Error
30XI Assignment of Errors
30k719 Necessity
30k719(1) k. In General. Most Cited Cases

Contention that plaintiffs, who sought specific performance of lease purchase option, were entitled to additional damages in specific performance action as result of order requiring them to continue to make full lease payments would not be considered on appeal as plaintiffs failed to perfect a cross appeal by preparing and filing a statement of points they intended to rely on. Rules Civ.Proc., Rule 74.

***609** Robert A. Peterson, Salt Lake City, for defendants and appellants.

Joseph C. Rust, Salt Lake City, for Dunahoo.

Gary A. Weston, Salt Lake City, for Bettilyon.

HOWE, Justice:

Plaintiffs Cerritos Trucking Co. and its successor in interest, Cerritos Associates, (Cerritos) brought this action for damages and for specific performance of an option to purchase real property. The defendants, William J. Lowenberg, Utah Venture No. 1, and Utah Development Company, Inc., sought rescission of the option, and damages from the plaintiffs and from the cross-defendants, Bettilyon Realty Company and ***610** Edmond O. Dunahoo, on the basis of alleged misrepresentation, mutual mistake and breach of fiduciary duty. The trial court granted motions by the plaintiffs and by the cross-defendants for a directed verdict. Defendants appeal.

In 1977 the defendant Lowenberg purchased a parcel of real estate located at the International Center near the Salt Lake City International Airport. [FN1] Thereafter he began constructing a warehouse on the property. As the warehouse was nearing completion, Lowenberg contacted several realtors to assist him in finding tenants. Among the realtors he contacted was Gerald Daughtrey of Bettilyon Realty Company.

FN1. Defendants Utah Venture No. 1 and Utah Development Company, Inc., are entities owned and controlled by defendant Lowenberg and each held legal title to the property at different times during the events of this action.

Fiber Sciences, a subsidiary of EDO, a publicly traded New York Corporation, had contacted Bettilyon Realty and requested help in locating warehouse space in Salt Lake City. Fiber Sciences was engaged in the manufacturing of water and waste tank systems for aircraft. In April of 1978 Bettilyon's representative, Gerald Daughtrey, showed the

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officers of Fiber Sciences the Lowenberg property along with other properties. Edmond O. Dunahoo, the president of Fiber Sciences and one of the cross-defendants herein, determined that the Lowenberg property was acceptable for their manufacturing and warehouse needs. When, however, the officers of Fiber Sciences presented a purchase proposal to the parent corporation, EDO, they were informed that Fiber Sciences should lease and not purchase. An offer to lease a portion of the warehouse was subsequently presented to Lowenberg by Fiber Sciences through Daughtrey. The offer was rejected by Lowenberg and no subsequent offers were made by Fiber Sciences.

Later that same month, Dunahoo met with Donald Heimark, an officer of Cerritos. Heimark became interested in purchasing the Lowenberg property for investment purposes with the possible participation in the purchase by some of the officers of Fiber Sciences in their individual capacities. Heimark was a personal friend of Dunahoo and a “handshake agreement” was entered whereby Cerritos would obtain a lease with an option to purchase, and the officers of Fiber Sciences would participate in the purchase and ownership of the property to an extent to be later determined.

Daughtrey then submitted to Lowenberg a written proposal on behalf of Cerritos for the lease of the warehouse with an option to purchase it. A verbal agreement was reached and Lowenberg instructed his attorney to draft the necessary documents. On April 28, 1978 Cerritos and Lowenberg executed the lease containing an option to purchase in favor of Cerritos. Shortly thereafter Cerritos sublet a portion of the warehouse to Fiber Sciences. Later, in the summer of 1978 EDO informed Dunahoo and the other officers of Fiber Sciences that they could not participate in the purchase of the property since it would present a conflict of interest which would require disclosure to EDO's shareholders.

Sometime in January of 1979 Lowenberg learned that neither Fiber Sciences nor any of its officers would be participating in the purchase of the warehouse. On February 28, 1979 Cerritos exercised its option to purchase the property and tendered payment for the property. Lowenberg refused to convey the property claiming that he had granted the option to Cerritos on a representation made to him by Daughtrey that some of the officers of Fiber Sciences would participate in the purchase thereof along with Cerritos. Lowenberg claimed that but for that representation, he would not have granted an option to sell the property. He maintained that he had agreed to sell at a lower price in an effort to curry future business favors from Fiber Sciences.

When Lowenberg refused to perform, plaintiffs brought this action to enforce the option and to recover damages amounting to the difference between Lowenberg's mortgage payment on the property and ***611** Cerritos' lease payment, which plaintiffs continued to tender after Lowenberg refused to honor the option. Lowenberg counterclaimed against the plaintiffs for a rescission of the option based on misrepresentation and cross-claimed against Bettilyon alleging that it and Dunahoo had breached fiduciary duties owing him.

After both parties had presented their evidence to a jury, Cerritos, Dunahoo and Bettilyon made motions for a directed verdict. The motions were granted and defendants' counterclaims and cross-claims were dismissed. Defendants appeal claiming that the trial judge erred in granting the motions for directed verdict since evidence was presented from which the jury could have found in their favor on their claims of misrepresentation and breach of duties of trust and confidence. Defendants also allege that the trial judge erred by applying the wrong legal standard to the motions for directed verdict and by signing findings of fact and conclusions of law subsequent to the granting of the motion.

[1][2][3][4] A motion for directed verdict is a method of testing the legal sufficiency of the evidence presented. This Court has often stated that in deciding a motion for a directed verdict all evid-

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ence must be considered by the trial court in the light most favorable to the party against whom it is directed. Kim v. Anderson, Utah, 610 P.2d 1270 (1980); Asay v. Rappleye, Utah, 593 P.2d 132 (1979). The case should not be taken from the jury by the granting of the motion where there is any substantial dispute in the evidence. Flynn v. W. P. Harlin Construction Co., 29 Utah 2d 327, 509 P.2d 356 (1973). On appeal we apply these same rules. See Kim, supra, and cases cited therein.

[5] Defendants claim that a representation was made to Lowenberg that it was presently intended and agreed upon by Cerritos and the officers of Fiber Sciences that they would jointly participate in the purchase of the property. Lowenberg maintains that this was a representation of a present state of mind, intention and agreement, that he relied upon it to his detriment and he should now be relieved from the option he granted to the plaintiffs. The jurisprudence of this state has long recognized as actionable deceit a promise accompanied by the present intention not to perform it, made for the purpose of deceiving the promissee, thereby inducing him to act where otherwise he would not have done so, and by virtue of which he parts with his money or property. Papanikolas v. Sampson, 73 Utah 404, 274 P. 856 (1929). In Hull v. Flinders, 83 Utah 158, 27 P.2d 56 (1933), we followed that rule, recognizing it to be the majority rule in this country. We quoted with approval the following from 12 R.C.L. 262:

> The rule is based on the theory that one who promises another to do something in the future as a condition or inducement to him to do anything, impliedly asserts a present intent to carry out his promise; that the intention to deceive is a condition of mind, which, when it exists, is as much a fact as is a condition of the body, notwithstanding that it is much more difficult to prove; and that, therefore, a misstatement of a man's mind is a misstatement of fact.

83 Utah at 163, 27 P.2d at 57. We again recognized the rule in Nielson v. Leamington Mines & Exploration Corp., 87 Utah 69, 48 P.2d 439 (1935); State v. Bruce, 1 Utah 2d 136, 262 P.2d 960 (1953); Berkeley Bank For Cooperatives v. Meibos, Utah, 607 P.2d 798 (1980). See also annotations on this subject at 51 A.L.R. 46, 68 A.L.R. 635, 91 A.L.R. 1295, 125 A.L.R. 879.

[6] The application of that rule avails the defendants nothing because they do not contend that when the representation was made to Lowenberg that the officers of Fiber Sciences would participate in the purchase of his property, those officers and Heimark had no intention of keeping that agreement. The evidence reflects nothing but good faith on their part and that it was not until several months after the option was granted that the parent company, EDO, disapproved of the plan of the officers to participate which led to its abandonment.

***612** [7] Defendants urge us to go further, however, and find the representation to be actionable because although it may have been their intention to participate, they were negligent in formulating that intention. They argue that the officers should have first obtained a legal opinion as to the propriety of their participating in the purchase, or in first clearing the transaction with the parent corporation before making the representation to Lowenberg. Defendants cite us to Ellis v. Hale, 13 Utah 2d 279, 373 P.2d 382 (1962); Jardine v. Brunswick Corp., 18 Utah 2d 378, 423 P.2d 659 (1967); Dugan v. Jones, Utah, 615 P.2d 1239 (1980) as authority for the rule that a representation negligently made may be actionable. In those cases, however, the representation which was allegedly negligently made was a representation as to a past or present fact. Defendants do not cite us to any case law or authority, and we are aware of none, wherein the law concerning negligent misrepresentations has been extended to fact situations involving the state of a person's mind. We stated in Hull v. Flinders, supra, that "if the promise is made in good faith when the contract is entered into, there is no fraud though the promissor subsequently changes his mind and fails or refuses to perform." 83 Utah at 163, 27 P.2d at 58.

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We think the same rule should obtain when the promissor's expression of intention to perform is made in good faith even though he may have been negligent in assessing and weighing the various factors which influenced him in formulating that intention. The rule should not be extended further than a good faith test. In view of the unquestioned status of the evidence that the officers of Fiber Sciences did possess at the time the representation was made a bona fide intention to participate in the purchase, there was no basis upon which the defendants could have prevailed on their claim for rescission and the directed verdict in favor of the plaintiffs was properly granted.

[8] The directed verdict on defendants' claim against Dunahoo was proper for the same reasons we have enunciated above with regard to defendants' counterclaim against plaintiffs. The directed verdict on defendants' claim against Bettilyon was also proper, but for a different reason. Defendants claim that there was a breach of duty owed by Bettilyon and Daughtrey to them because Daughtrey did not inform them that Fiber Sciences was interested in leasing the building. Defendants argue that had they known that Fiber Sciences would have been willing to have leased the building without an option to purchase it, they would have never consented to granting an option to the plaintiffs. It is unnecessary for us to here define the exact relationship between defendants and Bettilyon and the extent of any duty owing by Bettilyon to defendants. It is sufficient to observe that Daughtrey did present to Lowenberg a verbal offer from Fiber Sciences to lease part of the building. This offer was rejected by Lowenberg. This act certainly alerted Lowenberg as to Fiber Sciences' interest in leasing the property. Lowenberg had long years of experience in the real estate business, having been a licensed real estate broker in California for over thirty years. He was fully informed and aware of Fiber Sciences' interest in the property. In view of this, his claim against Bettilyon for failing to so inform him is groundless and the court properly directed a verdict against him on that claim.

Defendants next contend that the trial judge committed reversible error by applying the wrong legal standard to the motion for directed verdict, and by weighing the evidence instead of determining whether there was at least some evidence on each essential element of the case. To substantiate this claim, defendants point to the record where it is stated:

> The Court further finds that the defendant has failed in its burden of proof by a preponderance of the evidence as to the count or counts that the burden of proof is applicable, and has failed in its burden of proof by clear and convincing evidence as to the count or counts that the burden of proof is applicable.

***613** [9][10] Although in passing on a motion for directed verdict it is not proper for the trial court judge to weigh evidence, see cases cited above, that he did so in this case did not result in prejudicial error since the defendants were not entitled to succeed in any event. As heretofore pointed out, there was no evidence adduced by Lowenberg of an essential element of a case of misrepresentation. This Court will not reverse a trial court judgment merely because there may have been error; reversal occurs only if the error is such that there is a reasonable likelihood that, in its absence, there would have been a result more favorable to the complaining party. See Lee v. Mitchell Funeral Home Ambulance Service, Utah, 606 P.2d 259 (1980); Rule 61, Utah Rules of Civil Procedure.

[11] Defendants next allege that the trial judge erred by signing findings of fact and conclusions of law after granting plaintiffs' and cross-defendants' motions for directed verdict. Defendants suggest that the entering of findings and conclusions unfairly prejudices their case on appeal. In Smith v. Thornton, 23 Utah 2d 110, 458 P.2d 870 (1969), appellants argued that the trial judge erred by not entering findings and conclusions after having granted a motion for directed verdict in favor of the defendant. In that case we noted that:

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> Rule 52(a) of the Utah Rules of Civil Procedure relating to findings of fact and conclusions of law states that such are unnecessary on decisions on motions under Rules 12 or 56, 'or any other motion except as provided in Rule 41(b).' A motion for a directed verdict falls specifically under Rule 50, not Rule 41(b), thus on such motion the trial court need not enter findings and conclusions in granting such a motion. (Emphasis added.)

23 Utah 2d at 114, 458 P.2d at 872. Defendants have cited a case similar to Smith v. Thornton, supra. In O'Brien v. Westinghouse Electric Corp., (3rd Cir., 1960) 293 F.2d 1, appellants objected to findings and conclusions entered after a directed verdict was granted in favor of the defendant. The court ruled that no findings of fact were necessary. Neither the above mentioned case law nor our rules of procedure indicate that it is improper for a trial court to enter findings and conclusions if it wishes to do so. Findings or a memorandum decision are helpful to this Court when reviewing the direction of a verdict since it makes apparent the trial court's basis. The practice is encouraged.

[12] Plaintiffs contend that they are entitled to additional damages as the result of the trial court's order requiring them to continue to make the full lease payments to the defendants. Rule 74 of the Utah Rules of Civil Procedure precludes us from considering this request since the plaintiffs failed to perfect a cross appeal by preparing and filing a statement of the points they intended to rely upon. Plaintiffs also request that they be awarded attorney's fees incurred in defending this appeal. Since the option contract specifically provides for such fees, the case must be remanded to the trial court for a further finding and award of a reasonable amount. See Management Services Corp. v. Development Associates, Utah, 617 P.2d 406 (1980).

The judgment of the trial court is affirmed and the case is remanded to fix and award reasonable attorney's fees incurred by plaintiffs on appeal. Costs to plaintiffs and cross-defendants.

HALL, C. J., STEWART and OAKS, JJ., and JAMES S. SAWAYA, District Judge, concur.

Utah, 1982.
Cerritos Trucking Co. v. Utah Venture No. 1
645 P.2d 608

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Court of Appeals of Utah.
ANDALEX RESOURCES, INC., a Delaware corporation; and Amca Coal Leasing, Inc., a Delaware corporation; Malapai Resources Company, an Arizona corporation; Pacific Diversified Capital Company, a California corporation; New Albion Resources Company; and Mono Power Company, a California corporation, Plaintiffs and Appellees,
v.
Richard B. MYERS; Myers, Inc., a Kentucky corporation; and Myers & Company, a partnership consisting of Richard B. Myers, Betty Sue Myers, Cecelia Myers Baugh, Jane Myers Baggett, and Carolyn W. Hunt, Defendants and Appellants.

No. 920876–CA.
March 18, 1994.

Purchaser of coal leases brought action seeking declaratory judgment that “finder,” who brought purchaser and sellers of leases together, was not entitled to recover any compensation from purchaser. “Finder” filed counterclaim against purchaser for breach of contract and filed third-party complaint against sellers for breach of implied covenant of good faith and fair dealing. The District Court, Salt Lake County, J. Dennis Frederick, J., entered summary judgment for purchaser and sellers, and appeal was taken. The Court of Appeals, Jackson, J., held that: (1) broker licensing statutes barred “finder's” contract and quasi-contract claims for compensation; (2) “finder's” allegations failed to establish intent to deceive for purposes of his fraud claim against purchaser; and (3) sellers did not have express or implied duty to assure that purchaser compensated “finder” for purposes of “finder's” claim against sellers for breach of implied covenant of good faith and fair dealing.

Affirmed.

West Headnotes

[1] Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of ambiguity. Most Cited Cases

If language of statute is clear and unambiguous, Court of Appeals will not look beyond language of statute to make language conform to a purpose not expressed.

[2] Brokers 65 ⚷43(2)

65 Brokers
65V Compensation
65k43 Necessity of Contract in Writing
65k43(2) k. Under special statutes relating to brokers. Most Cited Cases

Broker licensing statutes barred contract and quasi-contract claims for compensation brought by “finder” who brought sellers of coal leases together with buyer; sale of coal leases constituted sale or exchange of real property within meaning of broker licensing statutes, language of alleged agreement and “finder's” own assertions showed that “finder” was to be compensated for bringing the parties together, and “finder” did not have broker's license. U.C.A.1953, 61–2–2(9)(d), (10), 61–2–18.

[3] Appeal and Error 30 ⚷959(1)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k959 Amended and Supplemental Pleadings
30k959(1) k. In general. Most Cited Cases

Denial of motion to amend counterclaim is within broad discretion of trial court and Court of Appeals will not disturb such ruling absent abuse of discretion.

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[4] Pleading 302 251

302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k242 Amendment of Declaration, Complaint, Petition, or Statement
302k251 k. Sufficiency of amendment. Most Cited Cases

Leave to file amended complaint should be denied when movant seeks to assert new claim that is illegally insufficient or futile. Rules Civ.Proc., Rule 15(a).

[5] Pleading 302 251

302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k242 Amendment of Declaration, Complaint, Petition, or Statement
302k251 k. Sufficiency of amendment. Most Cited Cases

“Finder's” claim that he and purchaser of coal leases had agreement to operate as partners in joint venture was legally insufficient and thus, “finder” was not entitled to amend his complaint to state new cause of action based on breach of alleged joint venture agreement; regardless of how “finder” characterized alleged agreement, substance of agreement was to compensate “finder” for his efforts in bringing purchaser and sellers of leases together and even if compensation under agreement allowed “finder” a share of the profits, nature of services provided by “finder” did not change. Rules Civ.Proc., Rule 15(a).

[6] Fraud 184 3

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k2 Elements of Actual Fraud
184k3 k. In general. Most Cited Cases

To establish fraud claim, plaintiff must show representation concerning presently existing fact which was false and which representor either knew to be false or made recklessly, knowing that he had insufficient knowledge upon which to base such representation, for purpose of inducing the other party to act upon it and the other party, acting reasonably and in ignorance of its falsity, did in fact rely upon it and was thereby induced to act to his injury and damage.

[7] Judgment 228 186

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k186 k. Hearing and determination. Most Cited Cases

In granting summary judgment motion, trial judge must consider each element of the claim under the appropriate standard of proof.

[8] Fraud 184 58(1)

184 Fraud
184II Actions
184II(D) Evidence
184k58 Weight and Sufficiency
184k58(1) k. In general. Most Cited Cases

Fraud claims must be proven by clear and convincing evidence.

[9] Fraud 184 12

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k8 Fraudulent Representations
184k12 k. Existing facts or expectations or promises. Most Cited Cases

Misrepresentation of intended future performance is not “presently existing fact” upon which claim for fraud can be based unless plaintiff can prove that representor, at time of representation, did not intend to perform promise and made representation for purpose of deceiving the promisee.

[10] Fraud 184 58(3)

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184 Fraud
184II Actions
184II(D) Evidence
184k58 Weight and Sufficiency
184k58(3) k. Intent. Most Cited Cases

While intent to deceive, for purposes of establishing fraud claim, may be inferred, intent to deceive must be established by more than doubtful, vague, speculative or inconclusive evidence.

[11] Fraud 184 ⚷12

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k8 Fraudulent Representations
184k12 k. Existing facts or expectations or promises. Most Cited Cases

Allegations by “finder,” who brought sellers of coal leases together with purchaser, were inadequate to establish that purchaser did not intend to compensate “finder” when purchaser allegedly promised to do so in order to establish “finder's” fraud claim, particularly in light of “finder's” own testimony that he did not think that purchaser “was attempting to deceive” him and that purchaser was “like he always was, straight up front.”

[12] Contracts 95 ⚷168

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k168 k. Terms implied as part of contract. Most Cited Cases

Covenant of good faith and fair dealing inheres in most, if not all, contractual relationships.

[13] Contracts 95 ⚷168

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k168 k. Terms implied as part of contract. Most Cited Cases

Under covenant of good faith and fair dealing, parties promise that they will not intentionally or purposely do anything that will destroy or injure other party's right to receive fruits of the contract.

[14] Contracts 95 ⚷168

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k168 k. Terms implied as part of contract. Most Cited Cases

To comply with obligation to perform contract in good faith, party's actions must be consistent with agreed common purpose and justified expectations of the other party and purpose, intentions and expectations of the parties should be determined by considering contract language and course of dealings between and conduct of the parties.

[15] Contracts 95 ⚷168

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k168 k. Terms implied as part of contract. Most Cited Cases

Covenant of good faith and fair dealing cannot be construed to establish new, independent rights or duties not agreed upon by the parties.

[16] Mines and Minerals 260 ⚷71

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(C) Leases, Licenses, and Contracts
260II(C)2 Construction and Operation of Mining Leases
260k71 k. Rights and liabilities as to third persons. Most Cited Cases

Sellers of coal leases did not have express or implied duty to assure that purchaser of leases compensated “finder,” who brought sellers and purchaser together, for purposes of finder's action against sellers for breach of implied covenant of good faith and fair dealing; correspondence between sellers and finder and course of dealings

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and conduct of the parties showed that finder did not have any justifiable expectation that sellers would insure that he would be compensated from purchaser.

***1043** Craig G. Adamson and Eric P. Lee, Salt Lake City, for defendants-appellants.

John A. Snow and Kathryn H. Snedaker, Salt Lake City, for plaintiffs-appellees.

Before DAVIS and JACKSON, JJ., and GARFF, FN1 Senior Judge.

FN1. Senior Judge Regnal W. Garff, acting pursuant to appointment under Utah Code Ann. § 78–3–24(10) (1992).

OPINION

JACKSON, Judge:

Richard B. Myers appeals the trial court's grant of appellees' motions for summary judgment and the denial of Myers' motion to amend his counterclaim. We affirm.

FACTS

Malapai Resources, Inc., Pacific Diversified Capital Company, and Mono Power Company (Power Companies) were joint owners of coal leases granted by the United States and the state of Utah. The leases concerned approximately 47,000 acres of property in Kane County, Utah. In early 1979, the Power Companies entered into an agreement with Myers & Co. and Richard B. Myers (Myers), providing that Myers would act as a "finder" for the Power Companies in locating a coal mining company to produce coal from the leases or finding a sublessee, assignee or purchaser of the leases. Pursuant to the agreement Myers was to be compensated by the operator, sublessee, assignee or purchaser of the leases, not by the Power Companies.

Myers located W.R. Grace & Company (Grace), and after some negotiations, Grace and Myers entered into an option agreement with Malapai and Pacific, granting Grace and Myers an option to acquire their interests in the leases. On July 12, 1981, Grace agreed to compensate Myers for "his efforts in bringing the parties together," providing Grace exercised the options.FN2

FN2. Myers characterizes this agreement as a joint venture agreement.

Grace allowed the options to expire because of the depressed coal market and Grace's inability to locate a financial partner willing to share the risk. Myers asserts that Malapai and Pacific assured him orally that they would still transfer their interests in the leases to Grace if it elected to proceed. ***1044** Myers contacted Andalex in 1982 and arranged for negotiations between Grace and Andalex regarding a joint venture for the development of the leases. In a meeting in August 1984, Myers asserts that Andalex orally agreed to compensate Myers by assuming the position of Grace under the agreement between Grace and Myers. Grace affirmed its decision not to purchase and develop the leases and Andalex began negotiating directly with the Power Companies for the purchase of the leases.

On September 10, 1985, Andalex entered into an agreement with the Power Companies to purchase the leases. Myers received no compensation from Andalex.

In July 1986, Andalex filed an action seeking a declaratory judgment that Myers was not entitled to recover any compensation from Andalex because such recovery was barred by the statute of frauds and the real estate broker licensing statutes.FN3 Myers filed an answer and counterclaim against Andalex claiming breach of contract, quantum meruit, fraud, and negligent misrepresentation. Myers then filed a third-party complaint against the Power Companies asserting breach of an obligation of good faith and fair dealing.FN4 In August 1991, Andalex filed a motion for partial summary judgment, which was granted by the trial court.

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FN3. In response to the complaint, Myers filed a motion to dismiss or stay the proceedings, seeking dismissal for lack of personal jurisdiction or, in the alternative, seeking a stay of the proceedings because of a pending Kentucky lawsuit involving identical parties and issues. The trial court denied the motion to dismiss and granted the motion to stay. The stay remained in effect until Myers filed his answer and counterclaim on July 22, 1988.

FN4. Pursuant to stipulation, the Power Companies were joined as plaintiffs with Andalex and the third-party complaint was deemed a counterclaim against the Power Companies.

On May 23, 1991, Myers filed a motion for leave to file an amended counterclaim against Andalex, which was denied by the trial court. The Power Companies filed a motion for summary judgment in April, 1993 and Andalex filed a second motion for summary judgment on Myers' remaining claims. Both were granted by the trial court.

ISSUES

Myers asserts the trial court improperly: (1) determined that Myers' breach of contract claims against Andalex should be dismissed because the Utah broker licensing laws barred his claim for compensation; (2) denied his motion to amend the counterclaim because the claim was also barred by Utah licensing laws; (3) dismissed his fraud claim against Andalex because Myers could not meet his burden of showing the intent element by clear and convincing evidence; and (4) dismissed his breach of the covenant of good faith and fair dealing claim against the Power Companies because the Power Companies did not have an express or implied obligation to assure that Andalex compensate Myers.

ANALYSIS

Contract and Quasi–Contract Claims

Myers claims that the trial court improperly determined that his contract claims for compensation were barred by Utah's broker licensing laws. An unlicensed person may not “bring or maintain an action in any court of this state” to receive compensation for services performed which are only authorized to be performed by a licensed principal broker. Utah Code Ann. § 61–2–18(1) (1993). A principal broker is defined as any person who, for valuable consideration or the expectation of consideration, “assists or directs [another] in the procurement of prospects for or the negotiation of” the sale or exchange of leaseholds involving real estate. Utah Code Ann. § 61–2–2(9), (10) (1993).

Myers implicitly agrees that the literal terms of these broker licensing statutes apply to his alleged agreement with Andalex and would bar his recovery of any compensation for his services. However, Myers asserts that the purpose of the statutes should prevail over their literal terms. Therefore, because the services he provided were not contemplated in the purpose of the licensing ***1045** statutes, they should not apply to him.[FN5]

FN5. Myers claims the purpose of the licensing provision is to protect “members of the public who rely on licensed real estate brokers and salesmen to perform tasks that require a high degree of honesty and integrity.” *See* *Global Recreation, Inc. v. Cedar Hills Dev. Co.,* 614 P.2d 155, 158 (Utah 1980). He alleges that because he did not “list” or advertise the real estate to the general public, but rather approached sophisticated contacts in the coal industry as a finder, his actions do not fall under the “purpose of the licensing provision.” Thus, he claims his actions should not be governed by the broker licensing statutes.

[1] We disagree with Myers' premise that the presumed purpose of a statute overrides its literal terms.[FN6] If the language of a statute is clear and unambiguous, we will not look beyond the language of the statute to make the language conform to a purpose not expressed. *West Valley City Corp. v. Salt Lake County,* 852 P.2d 1000, 1003 (Utah

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1993). Here, there is no ambiguity. The language of the applicable statutes provide that (1) if a party brings an action in a Utah court, (2) for compensation, (3) for acts resulting in the sale or exchange of real estate, (4) he or she must have the requisite broker license in order to recover the commission. Utah Code Ann. §§ 61–2–4, 61–2–18 (1993).

FN6. Even if we accept the argument that the purpose of the statute overrides the statute's unambiguous language, the services provided by Myers still fall within the purpose of the licensing statutes. The legislature clearly intended the licensing requirements to apply to “finders.” *See Diversified Gen. Corp. v. White Barn Golf Course, Inc.,* 584 P.2d 848, 849–50 (Utah 1978). Further, nothing suggests that “sophisticated” corporate entities such as Andalex should not be entitled to the same protections as the general public under the statute.

[2] In applying the unambiguous language of the statutes to the alleged agreement in our case, Myers' claims for breach of contract and quasi-contract are barred by the statutes. First, Myers clearly brought a counterclaim against Andalex in a Utah court. Second, the counterclaim sought compensation from Andalex. Third, the compensation was sought for acts performed by Myers that resulted in the sale or exchange of real property. The sale of the coal leases constitutes a sale or exchange of real property. Utah Code Ann. § 61–2–2(10) (1993) (“real estate” includes leaseholds and business opportunities involving real property); *Chase v. Morgan,* 9 Utah 2d 125, 339 P.2d 1019, 1021 (1959) (oil and gas leases are real estate). Further, the acts performed by Myers that led to the sale of the leases fall within the definition of “assists or directs in the procurement of prospects for or the negotiation of” the sale or exchange of leaseholds involving real estate. Utah Code Ann. § 61–2–2(9)(d), (10). The language of the alleged agreement and Myers' own assertions show that Myers was to be compensated for bringing the parties together or acting as a “finder.” FN7 The act of finding or locating a prospective buyer falls within the reach of the broker licensing statutes. *Diversified,* 584 P.2d at 849–50.

FN7. The language of the Grace agreement that Myers asserts Andalex agreed to perform states that Myers “has made officials of [Andalex] aware of the availability of these coal interests” and “[Andalex] wishes to compensate Myers for the information.” Moreover, Myers admits that he was to act as a “finder” and that the agreement was to compensate him “for his efforts in introducing Grace [or Andalex] to the opportunities presented by the coal leases.” In his pleadings, Myers characterizes the agreement as providing “for certain compensation for Mr. Myers as a result of his efforts in bringing the parties together.”

Finally, Myers did not have a Utah broker's license when he acted as a finder. Thus, the trial court properly determined that the Utah broker licensing statutes barred his contract and quasi-contract claims for compensation. FN8

FN8. In oral argument, counsel for Myers asserted that the broker licensing statutes do not apply in this situation because Myers did not have a sufficient “nexus” with Utah. However, Utah Code Ann. § 61–2–18 (1993) provides that a person cannot “bring or maintain an action *in any court of this state* for the recovery of a commission” unless he or she is a principal broker. (Emphasis added). Myers chose to bring a counterclaim in a court of this state. He is not a principal broker in Utah. Thus, he cannot recover the commission under this “nexus” theory.

Motion for Leave to Amend

[3] Myers also asserts that the trial court im-

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properly denied his motion to amend his ***1046** counterclaim. Myers was attempting to add a new cause of action based on breach of an alleged joint venture agreement between Myers and Andalex. The denial of a motion to amend a counterclaim is within the broad discretion of the trial court, and we will not disturb such a ruling absent an abuse of discretion. *Girard v. Appleby,* 660 P.2d 245, 248 (Utah 1983); *Mountain America Credit Union v. McClellan,* 854 P.2d 590, 592 (Utah App.), *cert. denied,* 862 P.2d 1356 (Utah 1993).

[4] Rule 15(a), Utah Rules of Civil Procedure, permits a party to amend a counterclaim with leave of the court, and "leave shall be freely given when justice so requires." *See Timm v. Dewsnup,* 851 P.2d 1178, 1182 (Utah 1993). However, leave to file an amended complaint should be denied when the moving party seeks to assert a new claim that is legally insufficient or futile. *See Kasco Services Corp. v. Benson,* 831 P.2d 86, 92–93 (Utah 1992); *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank,* 119 Idaho 171, 804 P.2d 900, 904 (1991).

[5] Myers asserts that the joint venture agreement with Andalex was merely a claim to share profits, not an agreement requiring services of a licensed broker. Regardless of how Myers characterizes the alleged agreement, the substance of the agreement was to compensate Myers for his efforts in bringing the parties together. The new legal theory that Myers and Andalex had an agreement to operate as partners in a joint venture, thus giving Myers a share of the profits, attempts to recharacterize the agreement merely by attaching a new label to the relationship. Even if the compensation under the agreement allowed Myers a share of the profits, the nature of the services provided by Myers did not change. Thus, for the reasons discussed in the previous section, this "new" claim is legally insufficient and the trial court did not abuse its discretion in denying the motion for leave to amend.

Fraud Claim

Myers alleges the trial court improperly dismissed his fraud claim against Andalex. Myers asserts in his counterclaim that Andalex fraudulently represented that it would compensate Myers in accordance with the terms of the alleged joint venture agreement between Grace and Myers. Myers argues that Robert Anderson, president of Andalex, promised to compensate Myers but had no intention of keeping his promise.

[6] Myers must show the following elements to establish his fraud claim:

> (1) a representation; (2) concerning a presently existing fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

Dugan v. Jones, 615 P.2d 1239, 1246 (Utah 1980).

[7][8] In granting a motion for summary judgment, a trial judge must consider each element of the claim under the appropriate standard of proof. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (a party must make a sufficient showing to establish the existence of all essential elements of a claim on which that party will bear the burden of proof at trial); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 254, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986) (a party must prove a claim with clear and convincing evidence at the summary judgment stage if that is the burden required at trial); *Robinson v. Intermountain Health Care,* 740 P.2d 262, 264 (Utah App.1987) (in evaluating whether summary judgment should be granted, we must take into consideration the eventual standard of proof for each element of the claim at trial on the merits). Fraud claims must be proven by clear and convincing evidence. *Applied Genetics, Int'l, Inc. v. First Affili-*

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ated Securities, Inc., 912 F.2d 1238, 1243 (10th Cir.1990) (clear and convincing standard must be considered in determining whether motion for summary judgment should be granted on fraud claim); *see* ***1047***Crookston v. Fire Ins. Exch.,* 817 P.2d 789, 800 (Utah 1991) (the elements of fraud must be proven by clear and convincing evidence); *Secor v. Knight,* 716 P.2d 790, 794 (Utah 1986); *Embassy Group v. Hatch,* 865 P.2d 1366, 1371 (Utah App.1993). Thus, Myers must be able to prove each element of fraud by clear and convincing evidence.

[9] A misrepresentation of intended future performance is not a "presently existing fact" upon which a claim for fraud can be based unless a plaintiff can prove that the representor, at the time of the representation, did not intend to perform the promise and made the representation for the purpose of deceiving the promisee. *See Cerritos Trucking Co. v. Utah Venture No. 1,* 645 P.2d 608, 611 (Utah 1982). The trial court found that even assuming Andalex promised to compensate Myers, Myers failed to demonstrate by clear and convincing evidence that Anderson did not intend to compensate Myers when he allegedly promised to do so.

The only evidence Myers presented concerning Anderson's intent is as follows: (1) Andalex has always denied that Anderson made a promise on its behalf to compensate Myers; (2) after being introduced to the project by Myers and working with Myers and Grace for many months, Andalex "suddenly excluded Grace and Myers from its negotiations with the Power Companies and eventually consummated its own agreement;" and (3) Keith Smith, a senior officer at Andalex never heard anything from Anderson regarding the promise and Smith would have heard of the promise had Anderson intended that Andalex would compensate Myers.

[10] Myers asserts that the intent to deceive may be inferred from the above circumstantial evidence. While the intent to deceive may be inferred, *Galloway v. AFCO Dev. Corp.,* 777 P.2d 506, 509 (Utah App.1989), it must be established by more than doubtful, vague, speculative or inconclusive evidence. *See Walker v. Carlson,* 740 P.2d 1372, 1374 (Utah App.1987).

[11] Myers' assertions, without more, are inadequate to establish by clear and convincing evidence that Anderson did not intend to perform the alleged promise at the time it was made or that the alleged misrepresentations were made for the purpose of deceiving Myers. Indeed, Myers' own testimony suggests that Anderson did not intend to deceive Myers regarding compensation. Mr. Myers stated: "I think the only thing that they did that was deceiving to us was to go around Grace prior to telling us that they were going to do it. I don't think Mr. Anderson was attempting to deceive us. He was just like he always was, straight upfront."

Accordingly, we affirm the trial court's dismissal of Myers' fraud claim because Myers has failed to demonstrate clear and convincing evidence that could support a verdict for him at trial.

Covenant of Good Faith and Fair Dealing Claim

Myers alleges the trial court improperly dismissed his claims against the Power Companies for breach of the constructive covenant of good faith and fair dealing. Specifically, Myers asserts that the agreement between Myers and the Power Companies required the Power Companies to insure that a purchaser of the leases compensate Myers. He maintains that the Power Companies breached their covenant to act in good faith by failing to "insist that Andalex properly compensate Myers for his work." Myers asserts that "their implied obligation was to only contract with Andalex if Andalex provided assurances, as Grace did, that Myers would be compensated."

[12][13][14][15] The covenant of good faith and fair dealing inheres in most, if not all, contractual relationships. *St. Benedict's Dev. v. St. Benedict's Hospital,* 811 P.2d 194, 199 (Utah 1991). Under this covenant, the parties promise that they will not intentionally or purposely do anything that will destroy or injure the other party's right to receive

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the fruits of the contract. *Id.* To comply with the obligation to perform a contract in good faith, the party's actions must be consistent with the agreed common purpose and justified expectations of the other party. *Id.* at 200; Restatement (Second) of Contracts § 205 comment a (1981). "The purpose, intentions, and expectations of the parties should be determined by considering the contract***1048** language *and* the course of dealings between and conduct of the parties." *St. Benedict's,* 811 P.2d at 200. However, the covenant of good faith and fair dealing cannot be construed to establish new, independent rights or duties not agreed upon by the parties. *Brehany v. Nordstrom, Inc.,* 812 P.2d 49, 55 (Utah 1991).

[16] In this case, the contract language, consisting of a collection of letter agreements, fails to establish that Myers had a justified expectation that the Power Companies would insure his compensation from Andalex. Myers states in his letter dated May 23, 1981, that "[m]y intent is to receive any compensation for sub-lease of coal from the producer of the coal." Further, the Power Companies' letter dated March 18, 1981 states:

> Insofar as compensation is concerned, you initially established in your May 23, 1979 letter to our group, that you would seek any compensation for your efforts from the purchaser, and we agreed to allow you to present qualified purchasers on that basis. It is not our desire to depart from that position in any way with respect to your continued activities.

Again, in a letter from Mono Power to Myers dated March 24, 1981, Mono stated: "It also follows that we are in agreement that any compensation to which you may be entitled for finding a buyer for Mono Powers' interest must be arranged with such buyer by you and not by us." Similarly, in a May 5, 1990 letter from Pacific Power to Myers, Pacific stated: "I would like to reiterate our agreement that any compensation to you for your efforts will have to be worked out between you and interested parties other than [Malapai], Mono Power, and [Pacific]." Additionally, Myers testified that the letters accurately reflected his understanding of his agreement with the Power Companies. The express language of the letters does not suggest the parties expected the Power Companies to see that Myers received compensation for his efforts.

The course of dealings also fails to establish that the Power Companies had a good faith obligation to insure that Myers be compensated. In fact, the course of dealings and conduct of the parties actually show that Myers did not have any such justifiable expectation. The Power Companies instructed Myers to contract with the sub-lessees directly in order to receive compensation. Accordingly, Myers entered into an elaborate compensation agreement with Grace. FN9 Myers should have entered into a similar written agreement with Andalex. He did not.

> FN9. Myers asserts that the compensation agreement between Grace and Myers came about at the insistence of the Power Companies. He claims this created a justified expectation that the Power Companies would insure compensation from Andalex. However, these assertions are not adequately supported by the record, and even if they were, would not be enough to create a justified expectation that the Power Companies would insure compensation.

Further, at a meeting on March 28, 1985, between the Power Companies and Andalex, in the presence of Myers and his attorney, Andalex made clear its understanding that it had no agreement to compensate Myers. Myers made no claim to the contrary at the meeting. The obligation of good faith and fair dealing does not create a new, independent duty upon Andalex to insure that Myers receive compensation when the parties had no such agreement and Myers had no justifiable expectation of such a duty. *See Brehany,* 812 P.2d at 55. Accordingly, we affirm the trial court's dismissal of Myers' breach of the covenant of good faith and fair dealing claim because the Power Companies did

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not have an express or implied duty to assure that Andalex compensate Myers.

CONCLUSION

The trial court properly granted summary judgment on Myers' contract claims for compensation because they were barred by Utah's broker licensing statutes. The trial court did not abuse its discretion in denying Myers' motion to amend his counterclaim because his "joint venture" claim was also ***1049** barred by the licensing statutes. Further, the trial court properly dismissed Myers' fraud claim because Myers could not meet his burden of showing the intent to defraud by clear and convincing evidence. The trial court also properly determined the Power Companies did not breach their covenant of good faith and fair dealing. Accordingly, we affirm.

DAVIS, J., and GARFF, Senior Judge, concur.

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