UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOHN L. WEISS, an individual; and GERALD WEBER, an individual, on behalf of himself, themselves, and all others similarly situated,

Plaintiffs,

vs.

NNN CAPITAL FUND I, LLC, a Delaware limited company, et al.,

Defendants.

CASE NO. 14-CV-02689-H (NLS)

ORDER:

(1) GRANTING BORROWER DEFENDANTS' MOTION TO DISMISS WITHOUT PREJUDICE; AND

(2) GRANTING BANK'S MOTION TO DISMISS WITHOUT PREJUDICE

[Doc. Nos. 61, 66]

On November 12, 2014, Defendants Cottonwood Capital Property Management, LLC, Cottonwood Capital Property Management II, LLC, and Daniel Shaeffer (collectively, "Cottonwood Defendants") removed case number 37-2014-00029739-CU-FR-CTL from the Superior Court of California for the County of San Diego to the United States District for the Southern District of California pursuant to the removal provisions of the Class Action Fairness Act. 28 U.S.C. § 1332(d). (Doc. No. 1.) On April 3, 2015, the Court granted the Cottonwood, Plantations, and Barberry Defendants'

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(collectively, "Borrower Defendants") motion for judgment on the pleadings.[1] (Doc. No. 45.) Plaintiffs John Weiss and Gerald Weber filed a first amended complaint on April 17, 2015. (Doc. No. 50.) On May 1, 2015, the Borrower Defendants filed a motion to dismiss Plaintiffs' first amended complaint. (Doc. No. 61.) Plaintiffs filed an opposition on June 1, 2015. (Doc. No. 71.) On June 8, 2015, the Borrower Defendants filed their reply. (Doc. No. 74.) On May 8, 2015, Defendant Western Alliance Bank ("Bank") filed a motion to dismiss the first amended complaint as to it. (Doc. No. 66.) On June 1, 2015, Plaintiffs filed an opposition. (Doc. No. 70.) On June 8, 2015, Defendant Bank filed a reply. (Doc. No. 73.) On June 8, 2015, the Court vacated the hearing scheduled for June 15, 2015. (Doc. No. 75.) For the reasons that follow, the Court grants the motions to dismiss without prejudice.

Background

Plaintiffs John Weiss and Gerald Weber ("Plaintiffs"), on behalf of themselves and also on behalf of others similarly situated, have filed individual claims and a purported class action complaint[2] against numerous defendants[3] alleging violations of California law. (Doc. No. 50.) On May 29, 2008, Plaintiff Weiss purchased 157.8947 limited liability membership interests issued by Defendant NNN Capital Fund I, LLC

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[1]The Plantations Defendants are Defendants Plantations at Haywood O, LLC, Plantations at Haywood M, LLC, Plantations at Haywood H, LLC, Plantations at Haywood, LLC, and Plantations at Haywood Member, LLC. The Barberry Defendants are 1600 Barberry Lane, LLC and 1600 Barberry Lane Owner, LLC.

[2]Plaintiffs' proposed class is "All persons who acquired Interests in the COMPANY in the time period April 23, 2008 through March 31, 2010 and remained members in March 2013 at the time the Amendment was effective." (Doc. No. 50, ¶98.)

[3]Specifically, NNN Capital Fund I, LLC, Scott Peters, Jeff Hanson, Andrea Biller, Francene LaPoint, Kevin Hull, NNN Realty Investors, LLC, Daymark Realty Advisors, Inc., Daymark Properties Realty, Inc., Todd A. Mikles, Etienne Locoh, Steven Kries, Cottonwood Capital Property Management, LLC, Cottonwood Capital Property Management II, LLC, Daniel Shaeffer, Sovereign Strategic Mortgage Fund, Sovereign Capital Management Group, Inc., Plantations at Haywood, LLC, Plantations at Haywood Manager, LLC, Plantations at Haywood Member, LLC, Plantations at Haywood Owner, LLC, Plantations at Haywood H, LLC, Plantations at Haywood M, LLC, Plantations at Haywood O, LLC, 1600 Barberry Lane, LLC, 1600 Barberry Lane Owner, LLC, Oak Park Office Center, LLC, Market Tower Partners, LLC, Sovereign Market Tower, Manager, LLC, De Real Estate Investment, and Does 1-100. Plaintiff also filed his original complaint against Torrey Pines Bank; the amended complaint substitutes Western Alliance Bank as a defendant.

(formerly Grubb & Ellis Capital Company I, LLC) ("NNN") for $157,894. (Doc. No. 50, ¶¶ 10, 13, 73.) Plaintiff Weber purchased 125 limited liability membership interests on May 21, 2008 for $125,000 and an additional 60 membership interests on November 12, 2008 for $60,000. (Id. at ¶¶ 11, 74.) The interests offering ran from April 23, 2008 through March 31, 2010, and raised $23,400,000. (Id. at ¶78.)

I. The Cottonwood, Plantations, and Barberry Defendants

According to the complaint, Defendant Cottonwood Capital Property Management, LLC ("CCP") managed the Plantations and Barberry properties between August 2011 and March 2013. (Id. at ¶32.) The complaint alleges that Daniel Shaeffer ("Shaeffer") is the Chief Executive Officer of CCP. (Id. at ¶35.) Plaintiffs allege that the CCP, Shaeffer, and Cottonwood Capital Property Management II, LLC ("CCP-2") are alter egos of each other. (Id. at ¶36.)

According to the complaint, Defendant Plantations at Haywood, LLC ("PH") was organized by members of NNN's investment committee to acquire an apartment complex in South Carolina. (Id. at ¶44.) The complaint alleges that PH received a $10,600,000 mezzanine loan from NNN in July through August of 2008. (Id.) The complaint also asserts that Defendants Plantations at Haywood Manager, LLC ("PH-Manager"), Plantations at Haywood Member, LLC ("PH-Member"), Plantations at Haywood Owner, LLC ("PH-Owner"), Plantations at Haywood H, LLC ("PH-H"), Plantations at Haywood M, LLC ("PH-M"), and Plantations at Haywood O, LLC ("PH-O") were created to reorganize PH's ownership of the South Carolina apartment complex. (Id. at ¶¶ 45-50.) Plaintiffs allege that the Plantations Defendants are alter egos of each other. (Id. at ¶51.)

According to the complaint, NNN's investment committee organized Defendant 1600 Barberry Lane, LLC ("BL") to acquire an apartment complex in Georgia on behalf of investors. (Id. at ¶53.) Plaintiffs claim that BL received a $9,700,000 mezzanine loan from NNN in August through September of 2008. (Id.) According to the complaint, 1600 Barberry Lane Owner, LLC ("BL-Owner") was created to reorganize

BL's ownership of the Georgia apartment complex. (Id. at ¶54.) Plaintiffs allege that all Plantations entities are alter egos of each other. (Id. at ¶55.)

Plaintiffs allege in a conclusory manner that, at all relevant times, the members of NNN's investment committee were in control of the Plantations and Barberry Defendants. (Id. at ¶¶ 115, 120.)

II. The Private Placement Memorandum and Agreements

According to the private placement memorandum (PPM), NNN was formed to provide mezzanine financing to entities that owned direct or indirect interests in real estate. (Doc. No. 50-1 at 13.) The PPM defined mezzanine loans as loans "not secured by the underlying real property, but by a pledge of the ownership interests of an entity that directly or indirectly owns the real property," and specified that "mezzanine loans are considered to involve a higher degree of risk than long-term senior mortgage lending secured by income-producing real property due to a variety of factors." (Id. at 17.) The PPM provided that NNN "may make unsecured loans to borrowers of investment programs sponsored by an affiliate of the Manager. Such loans will be evidenced by a promissory note and other loan documents, but [NNN] may not receive collateral to secure the loans." (Id.) According to the PPM, "[r]elated party lending will create numerous conflicts of interest among the Manager, the Company and their affiliates. The Manager has not developed, and does not expect to develop any formal process for resolving conflicts of interest." (Id.)

Attached to the PPM were NNN's operating and subscription agreements. (Doc. No. 50-1.) Investors (or their representative) had to sign the operating agreement, acknowledging and agreeing to its terms. (Id. at 94.) They also had to sign the subscription agreement and initial each page. (Id. at 102-04.) Paragraph 15.13 of the operating agreement, titled "Binding Arbitration," provides that "[a]ny controversy arising out of or related to this Agreement . . . or an investment in the Interests shall be settled by arbitration in Orange County, California." (Id. at 92.) Paragraph 12 of the subscription agreement similarly provides that "any dispute, controversy or other claim

arising under, out of or relating to this Agreement or any of the transactions contemplated hereby . . . shall be determined and settled in binding arbitration in the County of Orange, State of California[.]" (Id. at 103.)

III. The Securities Offering, Notes, and Amendment

According to the complaint, the PPM and scripted statements made at the time of the 2008 interests offering provided that NNN would make secured mezzanine loans to various entities, including the Plantations and Barberry Defendants. (Doc. No. 50, ¶82.) Plaintiffs allege that representations in the PPM were untrue and failed to include material facts necessary to make the PPM not misleading. (Id. at ¶113.) According to the complaint, the Barberry and Plantations Defendants knew that the PPM misrepresented certain facts, including the fact that NNN, NNNRI, and the members of NNN's investment committee would not require affiliates to pledge security or collateral for the mezzanine loans. (Id. at ¶¶ 113(b)-(d), 115, 118, 119.)

NNN made a $10,600,000 mezzanine loan to the Plantations Defendants in July through August of 2008 and a $9,700,000 loan to the Barberry Defendants in August through September of 2008. (Id. at ¶¶ 44, 53.) Plaintiffs allege that the Plantations and Barberry loan balances were $4,600,000 and $1,900,000, respectively, by February 11, 2011. (Id.)

Initially, NNN was set to expire and have its assets distributed on April 23, 2012, with two possible six-months extensions to extend its term to April 23, 2013. (Id. at ¶91.) But according to the complaint, market conditions deteriorated and the unsecured mezzanine loans were facing significant risk. (Id. at ¶120.) Plaintiffs allege that, in March 2013, they discovered that the Plantations and Barberry notes were unsecured, contrary to the information contained in the PPM. (Id. at ¶122.) In late 2012, Defendants Mikles, Locoh, and Kries began seeking an amendment to NNN's operating agreement. (Id. at ¶141.) Among other changes, the proposed amendment would extend the term of NNN and sell the Plantations and Barberry notes at a discount. (Id. at ¶143.) According to the complaint, Weiss requested more information about the status of the

Plantations and Barberry notes, and Mikles, Locoh, and Kries introduced him to Shaeffer. (Id. at ¶146.) Plaintiffs allege that Shaeffer told Weiss that the Plantations and Barberry notes were unsecured and that they had insufficient equity. (Id. at ¶148.) Plaintiffs also allege that Shaeffer's statements were false because there was sufficient equity and the notes were secured. (Id. at ¶149.) According to the complaint, the Cottonwood Defendants had reached an agreement to take over the Plantations and Barberry properties, but failed to disclose that fact to Weiss. (Id. at ¶150.)

Plaintiffs allege that millions of dollars have been on deposit with Defendant Western Alliance Bank ("Bank") or have passed through NNN's accounts and been wrongfully transferred to the Defendants. (Doc. No. 50 at ¶14.)

On May 8, 2015, the Court referred Plaintiffs Weiss and Weber's individual claims to contractual arbitration. (Doc. No. 67.) It stayed the case in its entirety except for the Bank's and Barberry, Cottonwood, and Plantations Defendants' pending motions to dismiss. (Id. at 19.)

Discussion

I. Legal Standards

A. Motion to Dismiss for Failure to State a Claim

A motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). A complaint generally must satisfy only the minimal notice pleading requirements of Federal Rule of Civil Procedure 8(a)(2) to evade dismissal under a Rule 12(b)(6) motion. Porter v. Jones, 319 F.3d 483, 494 (9th Cir. 2003). Rule 8(a)(2) requires that a pleading stating a claim for relief contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed R. Civ. P. 8(a)(2). "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 his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v.

Twombly, 550 U.S. 544, 555 (2007). In ruling on a motion to dismiss for failure to state a claim, the Court "accept[s] all factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005). But a complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557). "Factual allegations must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235–36 (3d ed. 2004)). "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.'" Hartmann v. Cal. Dept. of Corr. & Rehab., 707 F.3d 1114, 1122 (9th Cir. 2013) (quoting Iqbal, 556 U.S. at 678). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008).

B. California Corporations Code §§ 25401, 25501, 25504, and 25017

Section 25401 of the California Corporations Code makes it illegal "for any person, in connection with the offer, sale, or purchase of a security" to "[m]ake an untrue statement of material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading." Cal. Corp. Code § 25401(b); see also Goodman v. Kennedy, 18 Cal. 3d 335, 346 (1976) (dismissing case because plaintiff failed to allege that defendant made an untrue statement of material fact or omitted a material fact). To state a claim for securities fraud under Section 25401, a plaintiff must allege that "there was a sale or purchase of stock in California by fraudulent untrue statements or by omitting material facts that would by omission make the statements misleading." MTC Elec. Tech. Co., Ltd. v. Leung, 876 F. Supp. 1143, 1147 (C.D. Cal. 1995). Section 25017 defines a

"sale" as including "any exchange of securities and any change in the rights, preferences, privileges, or restrictions of or on outstanding securities." Cal. Corp. Code § 25017.

Under Section 25501, a violator of Section 25401 has primary liability to the purchaser of the securities. Id. § 25501; Moss v. Kroner, 197 Cal. App. 4th 860, 873 (2011). In addition, Section 25504 creates secondary, joint and several liability for a person who controls a violator or an employee who "materially aids in the act or transaction constituting the violation." Id. § 25504. To be liable for providing material aid, a person "must have materially aided *in the violation*" itself. Arei II Cases, 216 Cal. App. 4th 1004, 1015 (2013) (emphasis in original); see also Apollo Capital Fund LLC v. Roth Capital Partners, LLC, 158 Cal. App. 4th 226 (2007) (allegations that defendant "actively solicited investors" using offering documents he "knew contained false or misleading statements"). Secondary liability under Section 25504 "requires some sort of control person, employee, or agency relationship with the primary violator." Arei II, 216 Cal. App. 4th at 1015.

C. Fiduciary Duty and Constructive Fraud Under California Law

To establish a breach of fiduciary duty, a plaintiff must show "the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." Brown v. Cal. Pension Admins. & Consultants, Inc., 45 Cal. App. 4th 333, 347-48 (1996) (quoting Pierce v. Lyman, 1 Cal. App. 4th 1093, 1101 (1991)). "The absence of any one of these elements is fatal to the cause of action." Id. Absent special circumstances, a lender and a borrower do not have a fiduciary relationship. See Spencer v. DHI Mortg. Co., Ltd., 642 F. Supp. 2d 1153, 1162 (E.D. Cal. 2009); Oaks Mgmt. Corp. v. Superior Ct. of San Diego County, 145 Cal. App. 4th 453, 466 (2006) (special circumstances not present).

Constructive fraud consists of "any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another

even though the conduct is not otherwise fraudulent." Salahutdin v. Valley of Cal., Inc., 24 Cal. App. 4th 555, 562 (1994) (quoting 2 Miller & Starr, California Real Estate (2d ed. 1989) § 3:20, p. 120-219, fns. omitted). It "is a unique species of fraud applicable only to a fiduciary or confidential relationship." Id.

D. Fraud and Negligent Misrepresentation Under California Law

To allege fraud, a plaintiff must allege facts showing "(a) misrepresentation ...; (b) knowledge of falsity . . .; (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." Kearns v. Ford Motor Co., 567 F.3d 1120, 1126 (9th Cir. 2009) (quoting Engalla v. Permanente Med. Group, Inc., 15 Cal. 4th 951, 974 (Cal. 1997) (internal quotation marks omitted)); see also Cal. Civ. Code §§ 1572, 1709, 1710 (actual fraud and fraudulent deceit). To allege negligent misrepresentation, a plaintiff must show "'[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true', and '[t]he positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true.'" OCM Principal Opportunities Fund v. CIBC World Markets Corp., 157 Cal. App. 4th 835, 845 (2007) (quoting Small v. Fritz Cos., Inc., 30 Cal. 4th 167, 173 (2003)).

A failure to disclose material information can be an actionable misrepresentation. See Kovich v. Paseo Del Mar Homeowners' Assn., 41 Cal. App. 4th 863, 866 (1996). But nondisclosure gives rise to liability only when the defendant is under a duty to speak. Id. There are "four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts." LiMandri v. Judkins, 52 Cal. App. 4th 326, 336 (1997). The first circumstance requires the existence of a fiduciary relationship between the parties; the

remaining three circumstances require the parties to have engaged in a transaction. Hoffman v. 162 N. Wolfe LLC, 228 Cal. App. 4th 1178, 1187 (2014).

II. Borrower Defendants' Motion to Dismiss First Amended Complaint

A. First Claim Under Cal. Corp. Code §§ 25401, 25501, & 25504

Plaintiffs Weiss and Weber allege that the Barberry and Plantations Defendants violated Sections 25401, 25501, and 25504 of the California Corporations Code by making material misstatements or omissions in connection with the initial interests offering. (Doc. No. 50, ¶107.) According to the complaint, the Barberry and Plantations Defendants knew that their respective mezzanine loans were going to be unsecured, that NNN, NNNRI, and the investment committee had no intention of mitigating conflicts of interests with affiliates, and that NNN, NNNRI, and the investment committee would not engage in a risk-to-return or loan-to-value analysis. (Id. at ¶113.) According to Plaintiffs, the Barberry and Plantations aided and abetted NNN, NNNRI, and the investment committee's securities violations by taking the mezzanine loans despite knowing about supposed defects in the loan process. (Id. at ¶¶ 113, 115.) The Barberry and Plantations Defendants move to dismiss this claim as to them. (Doc. No. 61-1 at 9.)

Plaintiffs Weiss and Weber have failed to state a claim against the Barberry and Plantations Defendants in connection with the initial securities offering under Section 25401. Section 25501 creates a cause of action only against the "actual seller" of a security for violations of Section 25401. Apollo, 158 Cal. App. 4th at 254. Here, Plaintiffs do not allege facts showing that the Barberry and Plantations Defendants actually sold the membership interests or are directly liable for any securities violations during the interests offering. Cal. Corp. Code § 25501; Moss, 197 Cal. App. 4th at 873. Further, Plaintiffs have failed to plead facts sufficient to support an inference that the Barberry and Plantations Defendants controlled or materially aided a primary violator under Section 25504. Twombly, 550 U.S. at 555 ("Factual allegations must be enough

to raise a right to relief above the speculative level."). To plead control liability, Plaintiffs would need to allege that the Barberry and Plantations Defendants "had the power to control the general affairs of the entity primarily liable at the time the entity violated the securities laws" and "had the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in the primary liability." Hellum v. Breyer, 194 Cal. App. 4th 1300, 1317 (2011) (citations omitted). Instead, Plaintiffs reverse the relationship required under Hellum by raising conclusory allegations that the investment committee controlled the Plantations and Barberry Defendants. (Doc. No. 50, ¶¶ 115, 120.) Finally, Plaintiffs allege in conclusory fashion that the Plantations and Barberry Defendants materially aided in securities violations by taking the mezzanine loans despite knowing that the loans were unsecured and had terms unfavorable to Plaintiffs. (Id. at ¶129.) Plaintiffs fail to allege that the Plantations and Barberry Defendants had an employee or agency relationship with the primary violators, Arei II, 216 Cal. App. 4th at 1015, and thus fail to state a claim for aiding and abetting liability. Therefore, the Court grants the Plantations and Barberry Defendants' motion to dismiss Plaintiffs' claim as to them under Sections 25401, 25501, and 25504 of the California Corporations Code related to the initial securities offering.

B. Second Claim Under Cal. Corp. Code §§ 25401, 25501, 25504, & 25017

Plaintiffs allege that the Barberry, Plantations, and Cottonwood Defendants violated Sections 25401, 25501, 25504, and 25017 of the California Corporations Code by making material misstatements or omissions in connection with the April 2013 amendment to the securities offering. (Doc. No. 50, ¶148.) Plaintiffs allege that the Cottonwood Defendants are primarily liable as sellers of the amendment and as control persons. (Id. at ¶167.) Plaintiffs also allege that the Barberry and Plantations Defendants are liable as aiders and abettors. (Id. at ¶168.) The Cottonwood, Barberry,

and Plantations Defendants move to dismiss these claims. (Doc. No. 61-1 at 12.)

Plaintiffs first allege that the Cottonwood Defendants have primary liability under Section 25401 and 25501 as "sellers" of the amendment. (Doc. No. 50, ¶167.) But the complaint fails to allege that the Cottonwood Defendants actually "sold" the securities at the time of the amendment. See Apollo, 158 Cal. App. 4th at 254; Employers Ins. of Wausau, 871 F. Supp. at 387. Instead, the complaint alleges that the Cottonwood Defendants were property managers for the borrowers and that Shaeffer recommended the amendment as property manager. (Doc. No. 50, ¶¶ 32, 149, 150, 160.) Plaintiffs also allege that the Cottonwood Defendants are jointly and severally liable for violations of Section 25401 as "control persons" of a primary violator under Section 25504. (Id. at ¶159.) The complaint fails to provide facts supporting its allegation that the Cottonwood Defendants controlled a seller of the securities or the amendment. Hellum, 194 Cal. App. 4th at 1317.

The complaint next alleges that the Plantations and Barberry Defendants aided and abetted violations of Section 25401. Cal. Corp. Code § 25504. (Doc. No. 50, ¶167.) But Plaintiffs do not provide examples of how the Plantations and Barberry Defendants provided material assistance for any alleged violations of Section 25401. See Arei II, 216 Cal. App. 4th at 1015; Apollo, 158 Cal. App. 4th at 226 (example of material assistance include allegations that defendant "actively solicited investors" using offering documents he "knew contained false or misleading statements"). Nor do Plaintiffs allege facts supporting an inference that the Plantations or Barberry Defendants had an employee or agency relationship with a primary violator. Arei II, 216 Cal. App. 4th at 1015. Accordingly, the Court grants the Cottonwood, Plantations, and Barberry Defendants' motion to dismiss these claims as to them.

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C. Cal. Corp. Code § 25504.1

Plaintiffs allege that the Cottonwood Defendants violated Section 25504.1 of the California Corporations Code by making false and misleading statements with the intent to deceive in connection with the 2013 amendment. (Doc. No. 50, ¶176.) The Cottonwood Defendants move to dismiss. (Doc. No. 60-1 at 12.)

Plaintiffs' claim turns on their allegation that Shaeffer lied with an intent to deceive when he told Weiss that the Barberry and Plantations notes were unsecured and had insufficient equity. (Doc. No. 50, ¶¶ 148, 149.) But Plaintiffs' claims are contradicted by other parts of the first amended complaint. Most pertinently, Plaintiffs' first claim alleges that other defendants committed securities fraud in connection with the 2008 interests offering when they concealed their true intent not to secure the Plantations and Barberry notes. (Doc. No. 50, ¶¶ 113(b)-(d), 115, 118, 119.) Plaintiffs cannot have it both ways – either the Barberry and Plantations notes were secured, undermining their first allegation, or they were unsecured, negating the allegation that Shaeffer made a false statement. In any event, Plaintiffs have not stated a plausible claim on which relief can be granted, see Iqbal, 556 U.S. at 684; Twombly, 550 U.S. at 555; Fed. R. Civ. P. 9(b), and the Court grants the Cottonwood Defendants' motion to dismiss this claim as to them.

D. Breach of Fiduciary Duty and Constructive Fraud

Plaintiffs further allege that Shaeffer breached his fiduciary duty to Plaintiffs and committed constructive fraud. (Doc. No. 50, ¶¶ 180, 196.) Defendant Shaeffer moves to dismiss both claims as to him, arguing that he was not in a fiduciary relationship with Plaintiffs. (Doc. No. 60-1 at 16-18.)

To plead a cause of action for breach of fiduciary duty and constructive fraud, a plaintiff must first allege that he was in a fiduciary relationship with the defendant. Brown, 45 Cal. App. 4th at 347-48. Plaintiffs state in a conclusory fashion that they and Shaeffer have been in a fiduciary relationship since August 2011. (Doc. No. 50,

¶181.) But Plaintiffs also allege that Shaeffer and the Cottonwood Defendants were property managers for the Plantations and Barberry Defendants, who were borrowers from NNN. Based on the pleadings, Shaeffer owed no fiduciary duty to NNN, the lender. Spencer, 642 F. Supp. 2d at 1161; Nymark, 231 Cal. App. 3d at 1096.

Plaintiffs argue that they had a "confidential relationship" giving rise to a fiduciary duty with Shaeffer because he had superior influence in the relationship. (Doc. No. 71 at 22.) But the cases they cite involve a sexual relationship between a priest and parishioner, see Richelle L. v. Roman Catholic Archbishop, 106 Cal. App. 4th 247 (2003), and a sexual relationship between an attorney and a client, see Barbara A. v. John G., 145 Cal. App. 3d 369 (1983). These unequal relationships are legally distinct from the relationships found in financial transactions. Accordingly, the Court grants Defendants' motion to dismiss Plaintiffs' breach of fiduciary duty and constructive fraud claims.

E. Fraud, Negligent Misrepresentation, and Negligence Claims

Plaintiffs allege that the Plantations, Barberry, and Cottonwood Defendants made fraudulent and negligent misrepresentations in connection with the initial interests offering and the 2013 amendment. (Doc. No. 50, ¶¶ 204, 206, 232, 244.) The Plantations, Barberry, and Cottonwood Defendants move to dismiss the claims as to them. (Doc. No. 60-1 at 18.)

Misrepresentation is an essential element of fraud and negligent misrepresentation. See Kearns v. Ford Motor Co., 567 F.3d 1120, 1126 (9th Cir. 2009); 34A Cal. Jur. 3d Fraud and Deceit § 43. Plaintiffs raise conclusory allegations that the Barberry and Plantations Defendants concealed material information with respect to the initial interests offering and the 2013 amendment. (Doc. No. 50, ¶204.) But conclusory allegations, without more, do not state a claim. See Iqbal, 556 U.S. at 684; Twombly, 550 U.S. at 555. The Court therefore grants the Plantations and Barberry Defendants'

motion to dismiss Plaintiffs' fraud, negligent misrepresentation, and negligence claims as to them.

The complaint also fails to sufficiently allege that the Cottonwood Defendants engaged in fraud, negligent misrepresentation, or negligence. For example, Plaintiffs' assertion that Shaeffer lied about the status of the Plantations note is contradicted by their claims that NNN, NNNRI, and the investment committe defendants concealed their true intent not to secure the Plantations and Barberry notes. (Doc. No. 50, ¶¶ 113(b)-(d), 115, 118, 119.) Moreover, Plaintiffs have not sufficiently alleged that they were in a fiduciary relationship or had engaged in a transaction with the Cottonwood Defendants, as would be necessary to sustain a misrepresentation claim based on nondisclosure. See LiMandri, 52 Cal. App. 4th at 337; Twombly, 550 U.S. at 555 (conclusory allegations insufficient). The Court therefore grants the Cottonwood Defendants' motion to dismiss Plaintiffs' fraud, negligent misrepresentation, and negligence claims as to them.

F. Unfair Business Practices, Conversion, and Accounting

Plaintiffs claim that the Cottonwood, Barberry, and Plantations Defendants violated the California Business and Professions Code. (Doc. No. 50, ¶289.) Section 17200 of the Business and Professions Code prohibits "unlawful, unfair, or fraudulent business act[s]." Cal. Bus. & Prof. Code § 17200 et seq. For the reasons discussed above, Plaintiffs have not sufficiently alleged that the Cottonwood, Barberry or Plantations Defendants acted in an unlawful, unfair, or fraudulent manner. Plaintiffs' conclusory allegations that Defendants engaged in unfair business practices are not sufficiently specific to withstand a motion to dismiss. See Iqbal, 556 U.S. at 684; Twombly, 550 U.S. at 555. Therefore, the Court grants the Cottonwood, Barberry, and Plantations Defendants' motion to dismiss the unfair business practices claim as to them.

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Plaintiffs also allege that the Cottonwood, Barberry, and Plantations Defendants are liable for aiding and abetting a conversion of Plaintiffs' property. (Doc. No. 50, ¶223.) In addition, Plaintiffs assert a demand for accounting against the Cottonwood, Barberry, and Plantations Defendants. (Id. at ¶306.) Both claims are premised on the Defendants' alleged fraud, breach of fiduciary duties, and actionable misstatements. The Court has already granted the Cottonwood, Barberry, and Plantations Defendants' motion to dismiss these underlying claims. The Court therefore grants their motion to dismiss the conversion and accounting claims. See Jackson v. Fischer, 931 F. Supp. 2d 1049, 1069 (N.D. Cal. 2013) (under California law, the right to accounting is generally derivative of other claims).

III. Bank's Motion to Dismiss Declaratory Relief Claim

The Declaratory Judgment Act provides:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a).

The "actual controversy" requirement is the same as the "case or controversy" requirement of Article III. Am. States Ins. Co. v. Kearns, 15 F.3d 142, 143 (9th Cir. 1993). For the Declaratory Judgment Act to apply, the plaintiff must establish that the "facts alleged under all the circumstances show that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of declaratory judgment." Micron Tech., Inc. v. Mosaid Techs., Inc., 518 F.3d 897, 901 (Fed. Cir. 2008) (citing MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007)). If the lawsuit presents a case or controversy under Article III of the Constitution and fulfills statutory jurisdictional requirements, then the district court has discretion to entertain a request for declaratory relief. Gov't Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1223 (9th Cir. 1998).

Plaintiffs' sole claim against the Bank is a request for declaratory relief. Plaintiffs have not alleged facts showing an underlying controversy with the Bank, and the Declaratory Judgment Act is inapplicable. See, e.g., Welsh v. Am. Home Mortgage Assets, LLC, No. 4:13-CV-04750-CW, 2014 WL 4954144, at *9 (N.D. Cal. Sept. 30, 2014). The Court therefore grants the Bank's motion to dismiss the declaratory judgment claim as to the Bank.

Conclusion

For the reasons above, the Court grants the Borrower Defendants' motion to dismiss without prejudice. Additionally, the Court grants the Bank's motion to dismiss without prejudice.

IT IS SO ORDERED.

DATED: June 15, 2015

MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT