2013 WL 878449 (N.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, N.D. California.
San Francisco Division

Jay Ta-Chieh YEH, Plaintiff,

v.

BANK OF AMERICA, N.A., a business entity; Green Tree Servicing LLC a business entity, and Does 1 through 100, inclusive, Defendants.

No. 4:12-CV-05940-PJH.
January 16, 2013.

**Notice of Motion and Motion to Dismiss by Defendant Green Tree Servicing LLC; Memorandum of Points and Authorities in Support Thereof**

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**Filed concurrently with Request for Judicial Notice; [Proposed] Order**

**Date: February 27, 2013**

**Time: 9:00 a.m.**

**Crtrm: 3, 3rd Floor**

**Action Filed: October 18, 2012**

**Trial Date: None Set**

**TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that on February 27, 2013, at 9:00 a.m., in Courtroom 3 of the above-entitled court, defendant GREEN TREE SERVICING LLC ("Green Tree") will and hereby moves the Court for an order dismissing the first amended complaint of plaintiff JAY TA-CHIEH YEH ("Plaintiff" or "Yeh") pursuant to Fed. R. Civ. P., Rule 12(b)(6) on the grounds that the Complaint, and each and every cause of action asserted therein, fails to state a claim upon which relief can be granted.

This motion is based on this notice of motion and motion, the accompanying memorandum of points and authorities in support thereof, the concurrently filed request for judicial notice, all court documents already on file, any opposition filed by Plaintiff and any reply filed by Defendants in response, and any oral argument or other matters for which the court make take note.

DATED: January 16, 2013

Respectfully submitted,

SEVERSON & WERSON

A Professional Corporation

By: */s/ Thomas N. Abbott*

Thomas N. Abbott

Attorneys for Defendant GREEN TREE SERVICING

LLC

***STATEMENT OF ISSUES TO BE DECIDED***

Pursuant to Local Rule 7-4(a)(3), Green Tree sets forth the following statement of issues to be decided on its motion to dismiss the complaint:

1. Whether the first cause of action asserting breach of the implied covenant of good faith and fair dealing should be dismissed pursuant to FRCP 12(b)(6).

2. Whether the second cause of action asserting promissory estoppel should be dismissed pursuant to FRCP 12(b)(6).

3. Whether the third cause of action asserting wrongful foreclosure -- violation of California Civil Code § 2924 *et seq.* should be dismissed pursuant to FRCP 12(b)(6).

4. Whether the fourth cause of action asserting breach of contract should be dismissed pursuant to FRCP 12(b)(6).

5. Whether the fifth cause of action asserting reformation of contract should be dismissed pursuant to FRCP 12(b)(6).

6. Whether the sixth cause of action asserting invasion of privacy -- false light should be dismissed pursuant to FRCP 12(b)(6).

7. Whether the seventh cause of action asserting **elder financial abuse** should be dismissed pursuant to FRCP 12(b)(6).

8. Whether the eighth cause of action asserting negligent misrepresentation should be dismissed pursuant to FRCP 12(b)(6).

9. Whether the ninth cause of action asserting unfair competition -- violation of California Business & Professions Code section 17200 *et seq.* should be dismissed pursuant to FRCP 12(b)(6).

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***MEMORANDUM OF POINTS AND AUTHORITIES***

Defendant Green Tree Servicing LLC ("Green Tree") respectfully submits the following memorandum of points and authorities in support of its motion to dismiss the first amended complaint of plaintiff Jay Ta-Chieh Yeh ("Yeh" or "Plaintiff").

## I. INTRODUCTION

Plaintiff seeks to set aside a foreclosure and rewrite his loan agreements so that his nonpayment of monthly installments of principal and interest no longer constitute an event of default. Essentially, plaintiff seeks to avoid any responsibility for his promise to repay a refinance loan in the amount of $681,500. However, California law does not permit such egregious windfalls.

Yeh borrowed $681,500 to refinance existing debt secured by his home. As part of that transaction, plaintiff executed and delivered a Note and Deed of Trust. Ultimately, he grew dissatisfied with the terms of the loan and wanted a modification. Told that modifications were reserved for borrowers in dire **financial** circumstances, Yeh made a strategic decision to stop making his loan payments. He could have continued submitting payments as he promised when he signed his loan documents in November 2007. Unfortunately, he choose to "game the system" by strategically defaulting; that is: he could afford to make his payments but choose not to so he could potentially "qualify" for loan modification programs designed for borrowers in true **financial** distress. Yeh's plan--to feign **financial** distress to obtain more favorable repayment terms-- failed in its main purpose of obtaining a modification and the property ultimately sold at public auction.

Yeh alleges a series of claims based on a single allegation: that he was "told" that only accounts in default could qualify for loan modification. This is a fundamental flaw of the lawsuit. Yeh seeks monetary damages and equitable relief for his own act of strategic default. Beyond this fundamental flaw, Yeh's claims fail because he simply fails to allege facts constituting one or more of the essential elements of his alleged claims. This, no doubt, is a by-product of his sorely misguided lawsuit.

Nonetheless, Yeh fails to allege facts that raise his claims above the level of mere speculation. As such, Plaintiff does not state facts sufficient to survive a motion to dismiss.

Accordingly, Green Tree seeks an order dismissing this action.

## II. LEGAL STANDARD

A motion to dismiss tests the legal sufficiency of the claims alleged in the complaint. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). A claim is properly dismissed for: (1) lack of a cognizable legal theory, (2) absence of sufficient facts alleged under a cognizable legal theory, or (3) for seeking remedies to which a plaintiff is not entitled as a matter of law. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988); *King v. California*, 784 F.2d 910, 913 (9th Cir. 1986).

With respect to the second ground for dismissal, absence of sufficient facts, the Federal Rules of Civil Procedure require that a complaint include "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Co. v. Twombly*, 550 U.S. 544, 570 (2007). A plaintiff must plead sufficient facts "to provide the 'grounds' of her 'entitle[ment] to relief,' [which] requires more than labels and conclusions, and [for which] a formulaic recitation of the elements of a cause of action will not do." *Id*. at 555, citation omitted. Thus, a complaint cannot simply "le[ave] open the possibility that a plaintiff might later establish some 'set of undisclosed facts' to support recovery." *Id*. at 561-62 (citation omitted).

Moreover, contentions of law cannot serve in place of allegations of ultimate fact. "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although facts properly alleged must be construed in favor of the plaintiff, "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Associated Gen. Contractors v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998) (citation omitted). "[T]he court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg* at 754-55.

## III. STATEMENT OF FACTS

Yeh obtained a $681,500 loan from Bank of America in November 2007 (the "Loan"). *See* Complaint ¶ 11; FAC ¶ 8; RJN, Exh. A. Green Tree currently services the Loan. Yeh missed the payment of principal and interest that became due on December 1, 2010. *See* RJN, Exh. B at 2. By June 2011, Yeh's arrears exceeded $30,900. *Id*. at 1. As a result, non-judicial foreclosure commenced with the recording of a Notice of Default on June 16, 2011. *Ibid*.; Complaint ¶ 16. Although California's non-judicial foreclosure law only requires the lender to wait approximately three (3) months [1] before providing notice of the sale, defendants waited approximately five (5) months, recording the Notice of Trustee's Sale in October 2011. *See* RJN, Exh. C; Complaint ¶ 17. In the interim, according to the amended complaint, Green Tree reviewed Yeh for a modification that was ultimately denied because Yeh could afford to repay the Loan on the original terms. *See* FAC ¶¶ 10-11. Notwithstanding the additional time to cure, Yeh failed to cure the default [2] and as a result, the property sold at public auction on May 25, 2012. RJN, Exh. D; Complaint ¶ 18.

## IV. LEGAL ARGUMENT

### A. The First Cause Of Action Fails To State A Claim For Breach Of The Implied Covenant Of Good Faith And Fair Dealing And The Fourth Cause Of Action Does Not State A Claim For Breach Of Contract

Yeh's first cause of action asserts breach of the implied covenant of good faith and fair dealing. Complaint ¶¶ 20-33; FAC ¶¶ 15-22. His fourth cause of action alleges breach of contract. Complaint ¶¶ 51-56; FAC ¶¶ 37-40. Yeh contends that the only reason he defaulted was because he was told that only loans in default could qualify for loan modification programs. *See*

Complaint ¶¶ 25, 56; FAC ¶¶ 12, 39. Specifically, Yeh alleges that Defendants "interfered with his ability to perform on the loan" by tricking him into ceasing his payments. Complaint ¶ 21; FAC ¶ 16. Like his other claims, Yeh relies on Civil Code section 1511 to argue that his performance was "waived/excused". Complaint ¶ 53; FAC ¶¶ 18, 39.

The implied covenant is "a supplement to an existing contract [3] " and, as such, "it is universally recognized the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract." *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal.4th 342, 373 (1992). Thus, the implied covenant only requires that each party not do anything that will deprive the other parties thereto of the benefits of the contract. *Waller v. Truck Ins. Exch., Inc.*, 11 Cal.4th 1, 36 (1995). The covenant imposes on each party to a contract the duty to refrain from doing anything which would render performance of the contract *impossible*; it also imposes a duty to do everything that the contract presupposes that each party will do to accomplish its purpose. *April Enters., Inc. v. KTTV*, 147 Cal.App.3d 805, 816 (1983); *Harm v. Frasher*, 181 Cal.App.2d 405, 417 (1960).

**1. The Deed of Trust And Note Clearly State The Consequences Of Default**

As Yeh himself admits, the relevant contracts are the Note and Deed of Trust he executed to secure **financing**. Complaint ¶¶ 9, 22; FAC ¶¶ 17, 38. Those documents are unequivocal, if Yeh fails to pay the full amount due each month he is in default. *See* Complaint ¶ 59 and FAC ¶ 43 (each citing Adjustable Rate Note ¶ 7(B).) Yeh is suing here because Defendants have enforced this clause. But a cause of action for breach of the covenant of good faith and fair dealing does not lie against a lender simply for its enforcement of a loan according to its terms. *Price v. Wells Fargo Bank*, 213 Cal.App.3d 465, 478 (1989). The covenant "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Guz v. Bechtel Nat'l, Inc.*, 24 Cal.4th 317, 349-50 (2000). The covenant is implied to protect the express covenants of the contract, not to protect a general public policy interest that is not directly tied to the contract's purpose. *Racine, supra*, 11 Cal.App.4th at 1031; *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 690 (1988). The covenant of good faith and fair dealing is, by definition, an implied contract term; it has no relation to any outside statutory duties which may exist. *Smith v. City and County of San Francisco*, 225 Cal.App.3d 38, 49 (1990).

When Yeh entered into the Loan in 2007 he agreed to the consequences for breaching the terms of the Loan. "Reasonable diligence requires the reading of a contract before signing it." *Brookwood v. Bank of America*, 45 Cal.App.4th 1667, 1674 (1996) (citation omitted); *see also 24 Hour Fitness, Inc. v. Superior Court*, 66 Cal.App.4th 1199, 1215 (1998). One who signs a contract "is estopped from saying that its explicit provisions are contrary to his intentions or understanding." *Estate of Anderson*, 60 Cal.App.4th 436, 442 (1997) (citations omitted). Yeh cannot now claim that Green Tree breached the covenant of good faith and fair dealing because it enforced the Loan according to its terms.

**2. Yeh's Decision To Default Was His Own**

Second, Yeh fails to allege how Green Tree's actions caused the damages about which he now complains. Yeh alleges that Green Tree's liability stems from purported statements that it does not evaluate borrowers for loan modifications if they are current on their obligations. Complaint ¶¶ 13-14; FAC ¶¶ 11-12. A party is liable under the covenant, however, only for damages that are *caused* by its actions. *Quigley v. Pet, Inc.*, 162 Cal.App.3d 877, 887-88 (1984); *see also* Judicial Council Of California Civil Jury Instruction 2423. But the advisory statement by Green Tree on which Yeh claims to have relied did not present Yeh with a course of action he was *required* to take. Therefore it could not have caused the injury Yeh claims he has suffered. Presenting borrowers with an option that is available to them, the consequences of which are clearly spelled out in the parties' contact, is not sufficient to satisfy the causality element of this cause of action. *See, e.g., Lawrence v. Aurora Loan Services LLC*, 2010 WL 364276, *7 (E.D. Cal. 2010) ("plaintiffs invited the problems they face" when they "stopped making their loan payments to seek a loan modification"); *see also Davis v. Ford Motor Credit Co.*, 179 Cal.App.4th 581, 598 (2009) ("had [plaintiff] made his monthly payments timely . . . in accordance with his obligations under the contract" he could have avoided the alleged

injury caused by his lender's exercise of its remedies under the contract). Yeh's failure to allege facts to establish a plausible claim a separate ground for dismissal.

**3. Civil Code Section 1511 Does Not Apply As Yeh Contends**

Third, Yeh's contention that Civil Code section 1511 extinguished his obligation to make payments due under the Loan is an incorrect statement of law. He attempts to remedy the legal deficiencies of the claim by the contention that all payments due under the Note and Deed of Trust are excused when "Defendants induced Plaintiff not to make payments." Complaint ¶ 25; FAC ¶ 18 (each citing Cal. Civ. Code § 1511). This contention is without support in law. Plaintiff's Deed of Trust provides that "[a]ny forbearance by Lender in exercising any right or remedy . . . shall not be a waiver of or preclude the exercise of any right or remedy." RJN, Exh. A ¶ 12. As Yeh concedes, these contracts (the Note and Deed of Trust) define the rights and obligations of the parties. Complaint ¶ 9; FAC ¶ 8. Thus, Yeh's reliance on section 1511 is misguided.

Even without this express language, which clearly evidences that the lender is unwilling to waive its right to collect under the Loan, Civil Code section 1511 does not support Yeh's claim of waiver. The idea that an alleged oral representation could extinguish a signed and recorded legal obligation "would have the effect of permitting a party to a written contract to alter by parol his most solemnly executed written obligation, and thus violate the express inhibitions of sections 1625 and 1698" of the Civil Code. *Rottman v. Hevener*, 54 Cal.App. 474, 482 (1921). The statute of frauds, however, precludes an oral waiver in the case of deeds of trust. Any agreement attempting to modify the terms of a deed of trust or promissory note must be in writing. *Secrest v. Sec. Nat'l Mortgage Loan Trust 2002-2*, 167 Cal.App.4th 544, 555 (2008).

**B. The Second Cause Of Action Fails To State A Claim For Promissory Estoppel**

Yeh's second cause of action, for promissory estoppel, also fails to state a claim. A claim of promissory estoppel requires "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) his reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." *Laks v. Coast Fed. Sav. & Loan Ass'n*, 60 Cal.App.3d 885, 890 (1976); *Van Hook v. S. Cal. Waiters Alliance*, 158 Cal.App.2d 556, 570 (1958). Yeh fails to establish "a promise clear and unambiguous in its terms" or reasonable reliance thereon. *See* Complaint ¶¶ 34-41; *see also* FAC ¶¶ 23-30.

This claim too is based on the contention that Yeh was induced into stopping his loan payments. Complaint ¶ 36; FAC ¶ 25. Specifically, an employee of Green Tree purportedly told Yeh that "he had to stop making his [monthly payments] in order to qualify for the loan modification." Complaint ¶ 13. In the amended complaint, the allegation is now that Yeh was told that "in order to get a loan modification he would need to be late on his payments." FAC ¶ 10. Neither of these statements, however, are a promise, "clear and unambiguous in its terms," to modify the terms of the Loan. To the contrary, Yeh concedes no promise was made. At best, the alleged statements attributed to Green Tree concern a fact of numerous loan modification programs -- that they are reserved for borrowers in default as a consequence of events out of their control; not borrowers who *strategically default* to obtain more favorable terms of repayment such as Yeh.

In addition, Yeh fails to explain how his decision to default under the terms of the Note and Deed of Trust was reasonable and foreseeable. He contends he was told to stop making payments in April 2011; but, the Property did not sell at public auction until May 2012 -- more than one year later. Yeh could have tendered funds to cure the arrears up to five business days prior to the public auction in May 2012. *See* Cal. Civ. Code § 2924c(e). Once he was told his loan modification applications were denied (*see* Complaint 14; *see also* FAC ¶ 11), Yeh was not reasonable in deciding to continue his default, even if he ceased making payments strategically to qualify for modification programs reserved for borrowers in default.

**C. The Third Cause Of Action Fails To State A Claim Of Wrongful Foreclosure**

**1. Yeh Lacks Standing Due to His Failure to Tender Unambiguously**

Yeh's third cause of action, for wrongful foreclosure based on purported violations of Civil Code section 2924, *et seq.*, fails for lack of tender. "[G]enerally 'an action to set aside a trustee's sale for irregularities in sale notice or procedure should be accompanied by an offer to pay the full amount of the debt for which the property was security." *FPCI RE-HAB 01 v. E & G Invs., Ltd.*, 207 Cal.App.3d 1018, 1021 (1989). The California Court of Appeal recently reaffirmed the tender requirement in holding that a mere offer to tender is insufficient; a "full tender must be *made* to set aside a foreclosure sale . . ." *Stebley v. Litton Loan Servicing, LLP*, 202 Cal.App.4th 522, 525-26 (2011), rev. denied (Mar. 14, 2012). Because Yeh fails to make an unambiguous tender, his claim of wrongful foreclosure fails as a matter of law.

**2. No Waiver of Payment Provisions of Loan Documents**

Yeh also alleges the foreclosure proceedings are wrongful because he "was not in breach under the Deed of Trust" because he "was instructed to go late on their payments." Complaint ¶ 47; *see also* FAC ¶ 34. This allegation contradicts his own allegation that he "had an obligation to make monthly payments...." Complaint ¶ 22; FAC ¶ 20 ("Pursuant to Section 1 of the Deed of Trust securing Plaintiff's loan, Plaintiff was required to make full and timely payments to his Lender . . ."). It also distorts his earlier allegation that Defendants told him he would have to stop making the monthly "mortgage payments in order to qualify for a loan modification" (Complaint ¶ 13), rather than instructing him to breach the loan agreement.

Finally, and perhaps most importantly, Yeh's waiver allegation contradicts the express terms of the Deed of Trust that he admits he signed to secure the Loan: "Any forbearance by Lender in exercising any right or remedy... shall not be a waiver of or preclude the exercise of any right or remedy." *See* RJN Exh. N ¶ 12. Waiver of the payment terms in a written contract is not recognized absent a writing executed by the parties or new consideration. *Rottman, supra*, 54 Cal.App. at 482 (the time of payment as fixed by a written contract may not be suspended or extended by a subsequent unexecuted oral agreement in view of Civil Code § 1698).

**D. The Fifth Cause Of Action Does Not State A Claim For Reformation Of Contract**

In his fifth alleged cause of action, Yeh seeks to eliminate Section 7(B) of the Adjustable Rate Note that defines an event of default as the failure to make monthly payments. Complaint ¶¶ 57-61; FAC ¶¶ 41-45. Yeh's wishful thinking notwithstanding, this claim entirely lacks merit.

California Civil Code section 3399 provides that "[w]hen, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised" to express the true intention of the parties, so long as the revision does not prejudice rights acquired by third parties in good faith and for value. Cal. Civ. Code § 3399. Courts do not have the power to create a new contract, however, where there is no evidence the parties reached a mutual understanding on the essential terms. *Hess v. Ford Motor Co.*, 27 Cal.4th 516, 524 (2002).

The claim should be dismissed because there is no basis to conclude that the lender was mistaken about this term. Moreover, Yeh knew of this term when he signed the Note. If he did not read or understand the terms of the Note, he is to blame. Yeh has a duty to read the terms of the contract before signing. *Rosenfeld v. JPMorgan Chase Bank, N.A.*, 732 F.Supp.2d 952, 971 (N.D. Cal. 2010) (dismissing reformation claim and citing *Fields v. Blue Shield of California*, 163 Cal.App.3d 570, 578 (1985) and *Employee Painters' Trust v. J & B Finishes*, 77 F.3d 1188, 1192 (9th Cir. 1996)).

**E. The Sixth Cause Of Action For False Light Does Not State A Claim For Relief**

In his alleged sixth cause of action, Yeh contends that he was not really in default because he was purportedly told that only loans in default can qualify for modifications. Complaint ¶¶ 62-66; FAC ¶¶ 46-50. This claim lacks merit for several reasons.

Federal law expressly preempts state causes of action such as false light. *Pham v. Bank of Am., N.A.*, 2010 WL 3184263, *5 (N.D. Cal. 2010). Further, under federal law governing this claim, Yeh must show that the publication was made with knowledge that it was false and with reckless disregard for its truth. *Ibid.*; *see Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1168 (9th Cir. 2009) (held that state defamation claims such as false light subject to 15 U.S.C. § 1681h(e)). Yeh alleges no plausible facts to suggest that Green Tree acted improperly.

The claim also fails because Yeh was, in fact, in default. As he admits in his complaint, he *strategically defaulted* in an attempt to qualify for modification programs reserved for accounts already in default. That was Yeh's choice. As noted by the court in *Pham*, 15 U.S.C. § 1681 s-2(a) requires furnishers of credit information to provide accurate information to credit reporting agencies. *Pham* at *5. To the extent Yeh contends that Green Tree should be liable for credit reporting, he is misguided.

Similarly, California Civil Code section 2924(d)(1) provides that "[t]he mailing, publication, and delivery of notices as required by this section" "constitute privileged communications pursuant to Section 47." Notice of sale and default are required by sections 2924(a)(1) and (3); hence, giving those notices is privileged conduct under section 47. Reinforcing that conclusion, section 2924(d)(2) provides that "[p]erformance of the procedures set forth in this article" also "constitute privileged communications pursuant to Section 47."

The privilege under Civil Code section 47 "bars all tort causes of action except malicious prosecution." *Jacob B. v. County of Shasta*, 40 Cal.4th 948, 960 (2007). Under Civil Code Section 2924(d), the act on which the Plaintiffs base their false light claim is privileged under Section 47. Plaintiffs allege no facts raising any inference of malice. Accordingly, the false light cause of action states no claim on which relief may be granted.

**F. The Seventh Cause Of Action For Elder Financial Abuse Does Not State A Claim**

Relying on his claims of breach of the implied covenant of good faith and fair dealing, promissory estoppel, and wrongful foreclosure, Yeh contends that Green Tree should be liable for **financial elder abuse** under Welfare & Institutions Code § 15610. Complaint ¶¶ 67-73; FAC ¶¶ 51-57. Yeh's claim fails because the **Elder Abuse** Act (including § 15610.30) does not create an independent cause of action and he has not alleged any specific facts supporting his claim.

**1. The Elder Abuse Act Does Not Create An Independent Cause of Action**

The **Elder Abuse** Act, codified by Welfare and Institutions Code § 15600, *et seq.*, created enhanced protections for senior citizens--but not an independent cause of action. Numerous courts interpreting the **Elder Abuse** Act have held that it "provides for attorney fees, costs and punitive damages" as heightened remedies when the plaintiff proves by clear and convincing evidence that the defendant has committed some other tort. [4] But it does not create a standalone cause of action.

In a recent decision, *Perlin v. Fountain View Mgmt., Inc.*, 163 Cal.App.4th 657 (2008), one appellate court suggested that the Act may create a cause of action. But this case is unpersuasive. First, Perlin relies on Supreme Court dicta as "authority for the proposition that the Act creates an independent cause of action." *Perlin*, 163 Cal.App.4th at 666. But dicta, even from the Supreme Court, has no precedential value. *People v. Gregg*, 5 Cal.App.3d 502, 506 (1970) ("While the stare decisis doctrine requires us to adhere to the decisions of the Supreme Court, the doctrine does not apply to dictum.").

Second, cases holding that the **Elder Abuse** Act does not create an independent cause of action--like *Berkley*, *ARA Living*, and *Delaney*--are based on superior reasoning. The Court in *ARA Living* reviewed the entire legislative history of the **Elder Abuse** Act, and concluded that it "fell short of creating a cause of action." *ARA Living Ctrs-Pac., Inc. v. Superior Court*, 18 Cal.App.4th

1556, 1563 (1993). The analysis in *Perlin*, on the other hand, is not nearly as robust. In addition to relying on dicta, the *Perlin* court relied on cases that did not even consider whether the Act creates a stand-alone cause of action. "It is axiomatic, of course, that [such] cases are not authority for propositions not considered." *Alfredo A. v. Superior Court*, 6 Cal.4th 1212, 1249 (1994).

This Court should follow *Berkley*, *ARA Living*, and *Delaney* absent convincing evidence that the California Supreme Court would not. The dictum *Perlin* relies on is not dispositive, let alone well-reasoned. And as the California Supreme Court itself said, "[i]f the Legislature intends to create a private cause of action, we generally assume it will do so 'directly[,] ... in clear, understandable, unmistakable terms ...' " *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 44 Cal.3d 287, 294-295 (1988) (citation omitted).

Therefore, because the **Elder Abuse** Act was intended to create a mechanism for enhancing remedies, but not create an independent cause of action, the Court should sustain the demurrer to this cause of action without leave to amend.

**2. Yeh Has Not Pleaded Any Specific Facts Supporting His Claim for Financial Elder Abuse Under Section 15610.30**

Although Yeh does not plead his claim under any specific statute of the **Elder Abuse** Act, it is clear that he is relying on section 15610.30, which describes "**financial elder abuse**." Specifically, section 15610.30 defines "**financial elder abuse**" as the following:
(a) "**Financial abuse**" of an **elder** or dependent adult occurs when a person or entity does any of the following:

(1) Takes, secretes, appropriates, obtains, or retains real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.

(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.

(3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an **elder** or dependent adult by undue influence, as defined in Section 1575 of the Civil Code. (Welf. & Inst. Code § 15610.30.)

On its face, then, section 15610.30 requires that the alleged misconduct involve a "wrongful use," "intent to defraud" or "undue influence." But Yeh's only allegation, however, is that defendants "told" him to default. No details are alleged. Instead, Yeh provides only a conclusory, baseless allegation in an obvious attempt to foist the blame for his deliberate strategic default onto his lender and loan servicer.

**G. The Eighth Cause Of Action For Negligent Misrepresentation Is Fatally Non-Specific**

In his eighth cause of action, Yeh asserts negligent misrepresentation. Complaint ¶¶ 79-83; FAC ¶¶ 58-62. The essential elements of a cause of action for fraud are (1) a material representation or deceit that is false; (2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damages. *Philipson & Simon v. Gulsvig*, 154 Cal.App.4th 347, 363 (2007). Elements of negligent misrepresentation are the same without the scienter requirement. *Shamsian v. Atlantic Richfield Co.*, 107 Cal.App.4th 967, 983 (2003).

Rule 9(b) of the Federal Rules of Civil Procedure requires a party alleging fraud to state with particularity the circumstances constituting fraud. This particularity requirement applies to fraud claims based on State law as well. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003). And, "[i]t is well-established in the Ninth Circuit that both claims for fraud and

negligent misrepresentation must meet Rule 9(b)'s particularity requirements." *Rosal v. First Fed. Bank of California*, 671 F.Supp.2d 1111, 1127 (N.D. Cal. 2009) (citations and quotations omitted.)

"Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (quoting *Vess, supra*, 317 F.3d at 1106.) Fraud as to a corporate defendant requires Yeh to "allege the names of the persons who made the allegedly fraudulent misrepresentations, their authority to speak, what they said or wrote, and when it was said or written." *Rosal*, 671 F.Supp.2d at 1127, (citing *Lazar v. Super. Ct.*, 12 Cal.4th 631, 645 (1996).) Here, there are no specific factual averments as to the "who, what, when, where, and how" as required by Rule 9, and therefore, the cause of action is fatally non-specific. While Yeh identifies Erica Holderness as a "representative" of Green Tree, he fails to allege facts establishing her purported authority, or what exactly is meant by "representative."

**H. The Ninth Cause Of Action For Unfair Competition Fails**

Based on the allegations in claims one through nine, Yeah alleges that Green Tree violated Business & Professions Code § 17200. Complaint ¶¶ 84-95; FAC ¶¶ 63-74. This claim fails because it is based on fallacious predicates. For the reasons stated, *supra*, Yeh's UCL claim must fail because the antecedent claims lack merit. *See Krantz v. BT Visual Images, L.L.C.*, 89 Cal.App.4th 164, 178 (2001) (the viability of a section 17200 claim stands or falls with the antecedent substantive causes of action.)

## V. CONCLUSION

For the forgoing reasons, Green Tree seeks an order granting its motion to dismiss.

DATED: January 16, 2013

SEVERSON & WERSON

A Professional Corporation

By: */s/ Thomas N. Abbott*

Thomas N. Abbott

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LLC

Footnotes

1 *I. E. Assoc. v. Safeco Title Ins. Co.* 39 Cal.3d 281, 286 (1985) (citing Cal. Civ. Code § 2924c).

2 Yeh could have tendered funds up to five business days before the sale. *See* Cal. Civ. Code § 2924c, subd. (e).

3 *McClain v. Octagon Plaza, LLC*, 159 Cal.App.4th 784, 799 (2008); *Racine & Laramie, Ltd. v. Dep't of Parks & Rec.*, 11 Cal.App.4th 1026, 1031-1035 (1992).

4 *Berkley v. Dowds* 152 Cal.App.4th 518, 529 (2007); *Delaney v. Baker*, 20 Cal.4th 23 (1999) (discussing "heightened remedies" available under the Act when "a plaintiff proves by clear and convincing evidence that defendant is guilty of something more than negligence"); *see also Oshiro v. All Nations Mission Church*, 2008 WL 2082140, *8 (2008).