## PARTIES/ATTORNEYS

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| Plaintiff | Heidi De Mayo | Daniel Knight |
| Defendant | Alfred Oseguera | Adrian Andrade |

## TENTATIVE RULING

For the reasons discussed below, the demurrer is sustained. Plaintiff should be prepared to advise the court whether she has any additional facts that might cure the defects, as it is plaintiff's burden to show an amendment is possible. If amendment is permitted, plaintiff will be directed to file a "redlined" version of the amended complaint identifying all additions and deletions of material as an appendix to the amended complaint.

The court takes the motion to consolidate off calendar and directs the moving party to renotice the motion to consolidate for hearing once the pleading is resolved.

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This is an action for partition and damages. Plaintiff Heidi De Mayo filed her complaint on June 6, 2024, against defendants Alfred Oseguera, Benjamin Lerner, Guaranteed Rate, Inc. dba Certainty Home Lending and Flagstar Bank. The complaint alleges the following causes of action: (1) partition and injunction against Oseguera; (2) breach of promissory notes against Oseguera; (3) breach of fiduciary duty against Lerner, Flagstar, and Guaranteed Rate Inc.; (4) accounting against Oseguera; (5) professional negligence against Lerner, Flagstar, and Guaranteed Rate Inc.; (6) fraudulent concealment against Lerner, Flagstar, and Guaranteed Rate Inc.; and (7) disgorgement of profits against Oseguera. On November 6, 2024, the court sustained the demurrer of Flagstar as the third, fifth, and sixth causes of action of the complaint. Plaintiff's first amended complaint was filed on November 30, 2024, alleging: (1) partition and injunction against Oseguera; (2) breach of promissory notes against Oseguera; (3) breach of implied and actual contract against Flagstar and Lerner; (4) breach of fiduciary duty against Lerner and Flagstar; (5) accounting against Oseguera; (6) professional negligence against Lerner and Flagstar; (7) fraudulent concealment against Lerner, Flagstar, and Oseguera; (8) disgorgement of profits [Bus. & Prof. Code § 7031(b)] against Oseguera; and (9) ouster against Oseguera.[1]

[1] On August 19, 2024, Alfred Oseguera filed a cross-complaint against De Mayo in which he alleges that he and De Mayo entered into a business arrangement to purchase and reconstruct residential properties. De Mayo would

The FAC alleges that in June 2020, plaintiff owned property at 1148 Pino Solo Drive in Santa Maria without encumbrance. In July 2020, plaintiff discussed with defendant Lerner, who is employed by defendant Flagstar Bank, her business venture with defendant Oseguera, disclosing the fact she owned the Property free of encumbrances but that the ongoing improvements were becoming a burden on her cash flow. In August 2020, Lerner proposed a way for plaintiff to receive funds to cover the costs of improvements:

- Plaintiff would transfer a 1% interest in the Property to Oseguera, taking a deed of trust to secure a promissory note from Oseguera outlining his obligations thereunder;
- Oseguera would take a loan from Lerner and Flagstar in the form of a promissory note, which would be secured by a deed of trust in the Property signed by both plaintiff and Oseguera;
- the loan proceeds would be distributed partially to plaintiff to pay for costs already incurred; and
- on completion of the project, Oseguera would take a loan to buy plaintiff's 99 % interest in the Property and pay her the appreciation plus any remaining costs that Plaintiff had carried to that point.

In fact, the promissory note from Oseguera to plaintiff, which defendants were to prepare, never materialized. Instead, they encouraged plaintiff to simply take the deed of trust. Moreover, "Defendant Lerner and Flagstar in advising Plaintiff did not inform Plaintiff the consequences and ramifications and risks of co-tenancy to property wherein Plaintiff was a 99% owner and Defendant Oseguera was a 1% owner. For example, the right to occupy the land, collect rents, payment of mortgage note. Nor did Lerner and Flagstar in advising Plaintiff inform Plaintiff she would not have control of the loan even though her property was used as security. In fact, the advice given was the opposite that Plaintiff would have co-control of the property and security in the same along with being made aware of and have decision making power on the mortgage, all of which were and are false." (FAC, ¶ 23.)

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finance the properties and Oseguera would undertake reconstruction/repairs to resell the property for profit. In June 2020, De Mayo and Oseguera selected property located at 1148 Pinot Solo in Santa Maria with the intention that De Mayo would purchase the property for Oseguera to have a place to reside for himself and his daughters. Oseguera would have a one percent (1%) interest and De Mayo would have ninety-nine (99%) per cent interest in the property while Oseguera would perform all repairs and needed construction. De Mayo would then sell her 99% interest to Oseguera for $395,000, plus reimbursement of $20,000 advanced for renovations upon the close of his purchase. Oseguera alleges that the loan from Flagstar in the amount of $450,000 was his payment for De Mayo's interest in the property. He paid DeMayo the sum of $440,000. De Mayo refuses to convey her 99% interest to Oseguera. His cross-complaint alleges: (1) specific performance; (2) breach of contract; (3) breach of the covenant of good faith and fair dealing; and (4) breach of fiduciary duty. The court sustained DeMayo's demurrer to this complaint on December 18, 2024.

On August 6, 2020, plaintiff executed the grant deed conveying a 1% interest in the Property to Oseguera. On December 14, 2020, a deed of trust encumbering the Property in favor of Flagstar in the principal sum of $450,000.00 was recorded. The studio on the property was rented and Oseguera began renting the 3-bedroom house and collecting rents thereon. Plaintiff and Oseguera allegedly agreed that all rents would be used to pay the note secured by Flagstar.

Plaintiff continued to fund Oseguera's improvements to the Property, specifically the construction of an ADU. On July 27, 2021, Oseguera executed a promissory note in favor of plaintiff in the amount of $76,942.02. Oseguera subsequently damaged and misappropriated property belonging to plaintiff. On March 14, 2022, Oseguera agreed to pay plaintiff $20,000 by March 28, 2022 in settlement of that claim.

In May of 2023, Oseguera stopped making payments on the loan from Flagstar Bank, apparently converting the rent being generated by the property to his own use. On December 22, 2023, Flagstar initiated a nonjudicial foreclosure on the Property.[2] Plaintiff alleges that as the owner of 99% of the Property, she will incur the greater share of the costs of partition and is presumably exposed to the greater share of costs associated with foreclosure, should it be completed.

Defendants Flagstar and Lerner (defendants) demurrer to complaint. Opposition and reply have been filed.

*Legal Standards Applicable to Demurrer*

A demurrer tests the legal sufficiency of a complaint. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) Code of Civil Procedure §430.10(e) provides for a demurrer on the ground that a complaint fails to state a cause of action. A demurrer admits, provisionally for purposes of testing the pleading, all material facts properly pleaded. (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1247.)

*Lerner's Duty*

The SAC alleges that Lerner was licensed by the Department of Financial Protection and Innovation under the California Residential Mortgage Lending Act. (SAC ¶ 7.) It also alleges that "Defendant Lerner provided mortgage brokerage services as defined in Civil Code §2923.1 (b)(3) to Plaintiff." (SAC ¶ 64.) This allegation goes on to state: "Lerner obtained the loan from Flagstar, who he was employed by and was compensated therefor." (*Id.*) Defendants argue this raises an irreconcilable inconsistency in the pleading because of the differing duties imposed

[2] In a related action, *Flagstar Bank v. De Mayo* (24CV05188), Flagstar alleges there was a scrivener's error in the deed of trust and requests reformation. This presumably has prevented nonjudicial foreclosure to be completed.

on a mortgage broker compared to a mortgage lender. In short, "[a] mortgage broker has a fiduciary duty to a borrower. A mortgage lender does not." (*Smith v. Home Loan Funding, Inc.* (2011) 192 Cal.App.4th 1331, 1332; see also Civ. Code, § 2923.1("A mortgage broker providing mortgage brokerage services to a borrower is the fiduciary of the borrower, and any violation of the broker's fiduciary duties shall be a violation of the mortgage broker's license law.")

Defendants argue this inconsistency renders the complaint fatally uncertain. A demurrer for uncertainty will be sustained only where the complaint is so bad that defendant cannot reasonably respond—i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616; *A.J. Fistes Corp. v. GDL Best Contractors, Inc*. (2019) 38 Cal.App.5th 677, 695.) Here, defendants have identified the problem and seamlessly addressed it. The complaint is not fatally uncertain.

Here, to the extent the complaint alleges Lerner was acting as a broker, he owed no duty to De Mayo under the statutory scheme imposing a duty. The SAC alleges that De Mayo was not a borrower on the loan. (SAC ¶ 78.) Therefore, the mortgage broker's duty has no applicability to De Mayo. The court will thus consider the extent to which a duty is owed as a mortgage lender, below. It is this analysis that will implicate Flagstar. Flagstar is alleged to be vicariously liable for Lerner's conduct as his employer. (FAC, ¶ 64; see *Perez v. Van Groningen & Sons, Inc*. (1986) 41 Cal.3d 962, 967.) Absent this relationship, Flagstar has no liability because there are no allegations that it participated in any wrongdoing independent of Lerner's actions. (See CACI 3701.)

*3rd (Breach of Fiduciary Duty) Cause of Action*

This cause of action alleges that Lerner and Flagstar violated their duties "in that they had her transfer a 1% interest in the Subject Property to Defendant Oseguera, without explaining the consequences of such transfer or not obtaining certain agreements from Defendant Oseguera to protect Plaintiff as promised" and that "Lerner further violated his fiduciary duties to Plaintiff when he recommended Plaintiff reconvey her deed of trust securing the 1% owned by Defendant Oseguera rather than subordinate said deed of trust to the Flagstar DOT." (SAC ¶¶ 68-69.)

"The elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) its breach, and (3) damage proximately caused by that breach." (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1405.) " 'Whether a fiduciary duty exists is generally a question of law." (*Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889, 915.) Here, the issue is whether plaintiff has successfully pled a fiduciary relationship in this third amended complaint.

Fiduciary duties may be imposed by statute, such as the one between a mortgage broker and the client, discussed above. "Fiduciary duties are imposed by law in certain technical, legal relationships such as those between partners or joint venturers [citation], ... trustees and beneficiaries, principals and agents, and attorneys and clients [citation]." (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 416 disapproved on other grounds in *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1154.) "The investment adviser/client relationship is one such relationship, giving rise to a fiduciary duty as a matter of law." (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 140—fiduciary relationship imposed by law under Corporations Code definition of financial advisor.) Alternatively, a fiduciary duty under common law may arise "when one person enters into a confidential relationship with another." (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc., supra,* 83 Cal.App.4th at p. 417.) Before a person can be charged with a fiduciary obligation, he or she must knowingly undertake to act on behalf and for the benefit of another. (*Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315, 1338.)

Specific to this context, a mortgage lender generally does not have a fiduciary duty to the borrower. (*Smith v. Home Loan Funding, Inc.* (2011) 192 Cal.App.4th 1331, 1332.) "The relationship between a lending institution and its borrower–client is not fiduciary in nature." (*Nymark v. Hart Federal Savings & Loan Assoc.* (1991) 231 Cal.App.3d 1089, 1092, fn.1.) This is because a commercial lender is entitled to pursue its own economic interests in a loan transaction and this right is inconsistent with the obligations of a fiduciary which require that the fiduciary knowingly agree to subordinate its interests to act on behalf of and for the benefit of another. (*Id.*)

In a lender-borrower relationship, a special relationship can exist in certain circumstances, which may result in fiduciary obligations; however, the relationship must be beyond the scope of the traditional arm's length transaction. (*Barrett v. Bank of Am*. (1986) 183 Cal.App.3d 1362, 1369—"Confidential and fiduciary relations are in law, synonymous and may be said to exist whenever trust and confidence is reposed by one person in another.") For example, in *Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, the court found that there were "unique factual circumstances" which created a fiduciary relationship between a bank and borrowers. (*Id.* at p. 960.) The borrowers were elderly, vulnerable people. (*Ibid*.) Further, the bank's employee was given access to all the borrowers' financial information, gave the borrowers investment advice, managed their significant financial paperwork, and actually worked biweekly in their home. (*Ibid*.) A lender will owe a fiduciary duty to a borrower if it excessively controls or dominates the borrower. (*Pension Tr. Fund for Operating Engineers v. Fed. Ins. Co.* (9th Cir. 2002) 307 F.3d 944, 955.)

In her opposition, plaintiff directs the court specifically to several cases, all of which acknowledged the proposition that, where the lender's conduct or the specific circumstances of the transaction warrant a different conclusion, and exceptions exist to the general rule that the lender relationship is not fiduciary in nature. However, none found a duty under the facts presented. They thus have limited value here. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 207 (lender did not give plaintiff investment advice when its representatives told her not to make her April 2008 loan payment to be considered for a loan modification; this advice was directly related to the issue of loan modification and therefore fell within the scope of Downey Savings' conventional role as a lender of money); *Das v. Bank of America, N.A.* (2010) 186 Cal.App.4th 727, 741 (allegations regarding borrower's mental incapacity alone were insufficient to establish a claim for negligence or breach of fiduciary duty; there were no allegations that lender improperly persuaded borrower to borrow the funds, or that the loan contained unfair or disadvantageous terms); *Rufini v. CitiMortgage, Inc.* (2014) 227 Cal.App.4th 299, 312 (plaintiff's factual allegations did not show that lender's activities went beyond its conventional role as a mere lender of money and therefore did not establish the existence of a fiduciary duty.)

The *Ragland* court cites the case of *Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362 extensively. In that case, substantial evidence supported a finding that the lender bank had a fiduciary duty to the borrower sufficient to support a constructive trust theory when the bank informed the borrower that it was in default because of a poor asset-to-liability ratio; suggested that the borrower cure the default by bringing in new investors or through a merger or acquisition; advised the borrower that the merged entity would be responsible for the loan; and stated that the bank would release the personal guarantees issued by the borrower's principals, and the borrower complied with the lender's requests to the borrower's detriment. (*Id.* at pp. 1365–1366.) In fact, after the merger was completed, plaintiffs were not released from their guarantees, the loan was defaulted upon, and plaintiffs were sued. In particular, the evidence showed that at least one of the borrowers "perceived his relationship with [the bank representative] as very close and he relied on [his] financial advice implicitly" (*Id.* at p. 1369) and that the bank representative was concerned about the loan's impact on his career, thus establishing his personal stake in the merger. (*Id.* at p. 1370.)

Plaintiff's third amended complaint includes this new allegation: "By knowingly taking on the task of assisting Plaintiff with financial advice, Defendant Lerner entered into a fiduciary relationship. This was a confidential relationship since Plaintiff gave Defendant Lerner personal financial information under the impression that he had her best interests in mind. By not informing Plaintiff of the negative consequences of dividing her property interest and affirmatively advising that Plaintiff divide her property interest, Defendant Lerner used his confidential relationship with Plaintiff to gain a business advantage he would not otherwise

have had by putting her at ease with his advice that dividing her property interest was in her best interest even though Defendant knew or should have known that he would primarily benefit from the arrangement since he was then able to earn commission from the loan Defendant Oseguera was able to obtain with the new property interest." (SAC, ¶ 65.)

These allegations are insufficient. There are no facts alleged which establish "unique factual circumstances" such as those that existed in the *Brown* case. Plaintiff has not alleged she was had a particular vulnerability or there was otherwise the existence of a prior working relationship or the allocation of authority to manage her financial transactions, as was present in *Brown.* Nor are there factual allegations such as those found in *Barrett.* Although plaintiff alleges that she disclosed personal information to Lerner, there are no allegations that suggest the parties had a long or close working relationship, or that Lerner possessed the same kind of investment in the transaction of that described in *Barrett.* The fact that plaintiff gave Lerner personal information is entirely consistent with the domain of the usual money lender. There are no allegations that defendants exerted excessive control over plaintiff. The allegation that defendant benefited from the arrangement by earning commission on the loan does not rise to the level of investment shown in other cases. In the end, plaintiff has not alleged any facts that create more than a typical arm's length lending and servicing transaction.

Plaintiff's argument that she was left in a worse position than if Lerner had not advised her is insufficient to overcome this general rule: "The success of the [borrower's] investment is not a benefit of the loan agreement which the [lender] is under a duty to protect." (*Nymark, supra*, 231 Cal.App.3d at 1096.) As concluded above, plaintiff has failed to allege facts in support of such a claim.

The demurrer to this cause of action is sustained.

*5th (Professional Negligence) Cause of Action*

To state a cause of action for professional negligence, a party must show "(1) the duty of the professional to use such skill, prudence and diligence as other members of the profession commonly possess and exercise; (2) breach of that duty; (3) a causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional negligence." (*Giacometti v. Aulla, LLC* (2010) 187 Cal.App.4th 1133, 1137.) Case law, statutes, and secondary sources suggest that the scope of those held to a 'professional' standard of care—a standard of care similar to others in their profession, as opposed to that of a 'reasonable person'—is broad enough to encompass a wide range of specialized skills. As a general matter, '[t]hose undertaking to render expert services in the practice of a profession or trade are required to have and apply the skill, knowledge and competence ordinarily possessed by their fellow practitioners under similar

circumstances, and failure to do so subjects them to liability for negligence.' " (*LAOSD Asbestos Cases* (2016) 5 Cal.App.5th 1022, 1050.)

Here, plaintiff alleges that Lerner (and his employer by vicarious liability) had a duty to use such skill, prudence, and diligence as other members of his profession as a licensed mortgage broker. (SAC, ¶ 75.) Plaintiff further alleges: "This is specifically true whereas alleged above the relationship between Flagstar and Lerner and Plaintiff exceeded that of a typical borrower and lender relationship and instead transmuted into giving financial and investment advice, knowing that the advice would be relied on, and not otherwise admonishing Plaintiff that they were not acting in her best interest, despite giving her advice on how to proceed ostensibly to benefit her while at the same time placing her in a poorer position for the benefit of Flagstar and Lerner." (FAC, ¶ 76.)

This cause of action fails to the same extent the cause of action for breach of fiduciary duty fails. *Nymark* is again instructive. As a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money. (*Nymark*, *supra,* 231 Cal.App.3d at 1096.) Plaintiff's argument that she was left in a worse position than if Lerner had not advised her is insufficient to overcome this general rule: "The success of the [borrower's] investment is not a benefit of the loan agreement which the [lender] is under a duty to protect." (*Id.*) As concluded above, plaintiff has failed to allege facts in support of such a claim.

The demurrer to this cause of action is sustained.

*7th (Fraudulent Concealment) Cause of Action*

Plaintiff alleges that Lerner and Flagstar knowingly concealed and/or misrepresented the consequences of its loan requirements to Plaintiff. In order to state a claim for concealment (a form of deceit, which in turn is a subspecies of fraud), plaintiff must allege specific facts to support the following elements: (1) defendant concealed or suppressed a material fact; (2) defendant had a duty to disclose the fact to plaintiff; (3) defendant intentionally concealed or suppressed the fact with the intent to defraud plaintiff; (4) plaintiff was unaware of the fact and would not have acted as they did had they known of the concealed or suppressed fact; and (5) plaintiff was damaged as a result of the concealment. (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp*. (1992) 6 Cal.App.4th 603, 12–613; CACI No. 1901.) Every element of a fraud cause of action must be alleged both factually and specifically. (*Cooper v. Equity General Insurance* (1990) 219 Cal.App.3d 1252, 1262.)

"There are 'four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship

with the plaintiffs; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiffs; (3) when the defendant actively conceals a material fact from the plaintiffs; and (4) when the defendant makes partial representations but also suppresses some material facts.'" (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336 [citation omitted]; *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 310–311].)

Where, as here, a fiduciary relationship does not exist between the parties, only the latter three circumstances may apply. These three circumstances, however, "presuppose[ ] the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise." (*Bigler-Engler v. Breg, Inc., supra,* 7 Cal.App.5th at 311 at pp. 336–337.) "A duty to disclose facts arises only when the parties are in a relationship that gives rise to the duty, such as ' "seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual arrangement." ' " (*Shin v. Kong* (2000) 80 Cal.App.4th 498, 509, 95 Cal.Rptr.2d 304.)

A duty to disclose may arise as a result of a transaction between the parties. However, the transaction "must necessarily arise from direct dealings between the plaintiff and the defendant; it cannot arise between the defendant and the public at large." (*Bigler-Engler* at 312 [manufacturing defendant sold medical devices to the doctor defendant several years before the plaintiff rented one of the manufacture's devices from the doctor's office; manufacturing defendant had no contact with the plaintiff, did not know plaintiff was a potential user of their products or used the device, and did not derive any direct monetary benefit from the plaintiff's rental of the device].)

As the court has determined that Lerner had no duty for purposes of negligence and breach of fiduciary duty, the court similarly finds there was no duty here.

The demurrer to this cause of action is sustained.

*Leave to Amend*

It is not up to the judge to figure out how the complaint can be amended to state a cause of action. Rather, the burden is on plaintiff to show in what manner plaintiff can amend the complaint, and how that amendment will change the legal effect of the pleading. (*Goodman v. Kennedy* (1976) 18 C3d 335, 349; *Moore v. Centrelake Med. Group, Inc.* (2022) 83 CA5th 515, 537; *Medina v. Safe-Guard Products* (2008) 164 CA4th 105, 112, fn. 8 (citing text); *Shaeffer v. Califia Farms, LLC* (2020) 44 CA5th 1125, 1145—"onus" on plaintiff to show specific ways in which complaint can be amended, and denial of leave to amend affirmed where plaintiff "proffered no specific amendments to the trial court"; *Mohler v. County of Santa*

*Clara* (2023) 92 CA5th 418, 428—leave to amend properly denied where plaintiff failed to describe what additional facts she would plead to cure defect.) Here, plaintiff should be prepared to advise the court whether she has any additional facts that might cure the defects.

As a reminder, a pleading cannot be amended more than three times in response to a demurrer without plaintiff making "an offer to the trial court as to such additional facts to be pleaded [to show] that there is a reasonable possibility the defect can be cured to state a cause of action." (Code Civ. Proc. § 430.41, subd. (e)(1).) Here, the complaint has been amended twice in response to demurrer. (See 10/30/24 MO—court sustains demurrer with leave to amend; 2/19/25 MO—court sustains demurrer with leave to amend.)

If amendment is permitted, plaintiff will be directed to file a "redlined" version of the amended complaint identifying all additions and deletions of material as an appendix to the amended complaint.

The parties are instructed to appear at the hearing for oral argument. Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See Remote Appearance (Zoom) Information | Superior Court of California | County of Santa Barbara.)