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11 **UNITED STATES DISTRICT COURT**

12 **EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION**

14 LUIS CABRALES, on behalf of
himself and all others similarly situated,

15 Plaintiff,

16 v.

17 CASTLE & COOKE MORTGAGE,
18 LLC, a Delaware limited liability
company,

19 Defendant.

Case No. 1:14-CV-01138-JLT

**POINTS AND AUTHORITIES IN
SUPPORT OF CASTLE & COOKE
MORTGAGE, LLC'S MOTION TO
DISMISS THE SECOND, FOURTH
AND FIFTH CLAIMS FOR RELIEF
OF PLAINTIFF'S COMPLAINT**

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1 **I. INTRODUCTION**

2 This is a lawsuit over a mortgage loan. Plaintiff Luis Cabrales contends that
3 Castle & Cooke Mortgage improperly compensated its loan officers by giving them
4 bonuses for putting customers in “more expensive” loans. Plaintiff sued for
5 violation of the Truth-in-Lending Act (“TILA”), and Castle & Cooke does not
6 challenge this claim at the pleading stage. The merits of this claim, and whether it
7 can support a class action, are questions for another day.

8 Plaintiff, however, chose to pad the complaint with other causes of action that
9 simply do not apply here. These are the claims for: (1) violation of Section 8 of the
10 Real Estate Settlement Practices Act (“RESPA”), (2) unjust enrichment, and (3)
11 violation of California’s Unfair Competition Law (the “UCL”). These claims fail as
12 a matter of law.

13 Section 8 of RESPA prohibits lenders from paying referral fees and splitting
14 charges with persons who don’t actually perform services in connection with a loan.
15 But the statute does not prohibit charging fees that are “too high.” Here, plaintiff
16 alleges that Castle & Cooke improperly compensated its own loan officers for work
17 that they actually performed. Plaintiff does not allege that Castle & Cooke paid a
18 referral fee to anyone, nor that it split charges with persons who did no work.
19 Therefore, he cannot state a RESPA claim.

20 The unjust enrichment claim fails for a simple reason: Unjust enrichment is
21 an equitable claim, so plaintiff must allege that he lacks an adequate remedy at law.
22 Plaintiff does not and cannot allege this because he affirmatively asserts a legal
23 claim for violation of TILA. Thus, the unjust enrichment claim should be
24 dismissed.

25 The UCL claim fails for the same reason. The UCL provides for equitable
26 remedies only, and plaintiff cannot allege that he lacks an adequate legal remedy. In
27 addition, plaintiff cannot obtain an injunction or restitution. He alleges no ongoing
28

1 conduct that could be enjoined. And he cannot obtain restitution because he does
2 not allege that anything was taken from him that must be restored.

3 **II. PLAINTIFF CANNOT STATE A RESPA CLAIM**

4 The second cause of action purports to be for violation of Section 8 of
5 RESPA, 12 U.S.C. § 2607. The complaint, however, does not allege facts to
6 support such a violation.

7 Section 8 prohibits lenders from paying referral fees and splitting charges
8 with persons who don't actually perform services in connection with the loan. Here,
9 plaintiff alleges that Castle & Cooke improperly compensated its own loan officers
10 – by giving them bonuses for putting customers in more expensive loans. But
11 plaintiff does not allege any facts showing that Castle & Cooke paid a referral fee to
12 a third party, or that it split charges with persons who did no work. Therefore, he
13 cannot state a RESPA claim.

14 RESPA was designed to “increase the supply of information available to
15 mortgage consumers about the cost of home loans in advance of settlement, and to
16 eliminate abusive practices such as kickbacks, referral fees, and unearned fees.”

17 *Schuetz v. Banc One Mortg. Corp.*, 292 F.3d 1004, 1008 (9th Cir. 2002).

18 Specifically, Section 8 prohibits (1) kickback or referral fees, and (2) splitting
19 charges with persons who do not actually provide services. It provides:

20 (a) Business referrals

21 No person shall give and no person shall accept any fee, kickback, or
22 thing of value pursuant to any agreement or understanding, oral or
23 otherwise, that business incident to or a part of a real estate settlement
24 service involving a federally related mortgage loan shall be referred to
25 any person.

26 (b) Splitting charges

27 No person shall give and no person shall accept any portion, split, or
28 percentage of any charge made or received for the rendering of a real

1 estate settlement service in connection with a transaction involving a
2 federally related mortgage loan other than for services actually
3 performed.

4 12 U.S.C. § 2607.

5 Section 8, however, does *not* prohibit a lender from paying a fee to an
6 employee or agent who actually performs work on a loan.

7 Nothing in this section shall be construed as prohibiting (1) the
8 payment of a fee . . . (C) by a lender to its duly appointed agent for
9 services actually performed in the making of a loan, (2) the payment to
10 any person of a bona fide salary or compensation or other payment for
11 goods or facilities actually furnished or for services actually performed
12 . . .

13 *Id.*

14 Here, the Complaint parrots the words “referral fees and/or splits in charges”
15 (Complaint ¶ 30), but it alleges no facts to support these conclusions. The
16 complaint doesn’t say that Castle & Cooke paid a referral fee for anything or to
17 anyone in connection with plaintiff’s loan. Nor does it allege any facts suggesting
18 that Castle & Cooke paid anyone for services that weren’t actually provided. To the
19 contrary, plaintiff’s Complaint is about *how* Castle & Cooke’s loan officers were
20 paid for work that they *actually did* – allegedly being paid with bonuses for actually
21 putting people in more expensive loans. The Complaint is not about anyone being
22 paid for doing no work. Thus, plaintiff cannot state a RESPA claim.

23 Moreover, to the extent plaintiff is trying to allege that he was charged too
24 much money for his loan, that would still not give rise to a claim under RESPA.
25 The Ninth Circuit has definitively ruled that Section 8 of RESPA does not prohibit
26 overcharges:

27 The language of Section 8(b) prohibits only the practice of giving or
28 accepting money where no service whatsoever is performed in

1 exchange for that money: “No person shall give and no person shall
2 accept ... any charge made or received ... other than for services
3 actually *performed*.” 12 U.S.C. § 2607(b) (emphasis added). By
4 negative implication, Section 8(b) cannot be read to prohibit charging
5 fees, excessive or otherwise, when those fees are for services that were
6 actually performed. . .

7 We join our sister circuits in holding that the text of Section 8(b) is
8 unambiguous and does not extend to overcharges . . .

9 *Martinez v. Wells Fargo Home Mortgage, Inc.*, 598 F.3d 549, 553-54 (9th Cir.
10 2010) (italics original).

11 In short, plaintiff’s complaint is about how Castle & Cooke’s loan officers
12 were compensated for what they did. It isn’t about referral fees or fees paid for no
13 work. Consequently, plaintiff cannot state a claim under RESPA.

14 **III. THE UNJUST ENRICHMENT CLAIM FAILS BECAUSE PLAINTIFF**
15 **HAS A REMEDY AT LAW**

16 The fifth cause of action is for unjust enrichment under Utah law. It should
17 be dismissed because plaintiff does not and cannot plead that he lacks an adequate
18 legal remedy.

19 Unjust enrichment is an equitable remedy; therefore, it is only available if the
20 plaintiff lacks an adequate remedy at law. *Davencourt at Pilgrims Landing*
21 *Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 2009 UT 65, ¶ 55, 221
22 P.3d 234 (2009); *Am. Towers Owners Ass'n, Inc. v. CCI Mech., Inc.*, 930 P.2d 1182,
23 1193 (Utah 1996) (“if a legal remedy is available ... the law will not imply the
24 equitable remedy of unjust enrichment”), abrogated on other grounds by
25 *Davencourt*, 2009 UT 65 at ¶ 55; *Anapoell v. Am. Express Bus. Fin. Corp.*, 2007
26 WL 4270548 (D. Utah Nov. 30, 2007) (“Unjust enrichment is only available as an
27 equitable remedy where one does not exist at law”).
28

1 Moreover, when seeking an equitable remedy, such as unjust enrichment, a
 2 plaintiff “must affirmatively show a lack of an adequate remedy at law on the face
 3 of the pleading and from the evidence, and if a complaint on its face shows that
 4 adequate legal remedies exist, equitable remedies are not available.” *Ockey v.*
 5 *Lehmer*, 2008 UT 37, ¶ 44 n. 42, 189 P.3d 51, citing 27A Am. Jur. 2d Equity § 21
 6 (2008); *see also Thorpe v. Washington City*, 2010 UT App 297, 243 P.3d 500, 507
 7 (dismissing claim for unjust enrichment because the complaint “wholly fail[ed] to
 8 allege the lack of an adequate legal remedy”); *MediaNews Grp., Inc. v. McCarthey*,
 9 432 F. Supp. 2d 1213, 1238 (D. Utah 2006) *aff’d*, 494 F.3d 1254 (10th Cir. 2007)
 10 (“The McCartheys’ unjust enrichment claim against KTLLC and MNG fails as a
 11 matter of law. As noted above, a remedy at law is available”).

12 Here, plaintiff’s unjust enrichment claim fails because he does not and cannot
 13 allege the lack of an adequate legal remedy. To the contrary, plaintiff expressly
 14 alleges several legal causes of action – including violation of TILA, which Castle &
 15 Cooke does not challenge at the pleading stage. Therefore, the unjust enrichment
 16 claim should be dismissed.

17 **IV. THE FIFTH CLAIM FOR VIOLATION OF THE CALIFORNIA**
 18 **UNFAIR COMPETITION LAW FAILS AS A MATTER OF LAW**

19 The fifth cause of action is for violation of the California Business and
 20 Professions Code section 17200. That claim too is fatally flawed.

21 **A. Plaintiff Has an Adequate Legal Remedy**

22 Section 17200 is not “an all-purpose substitute for a tort or contract action.”
 23 *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 173 (2000); *accord*
 24 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1150-51 (2003).
 25 Rather, it provides for equitable relief only. *See Cel-Tech Communications, Inc. v.*
 26 *Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 179 (1999).

27 As in Utah, under California law an adequate legal remedy precludes a party
 28 from seeking equitable relief. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374,

1 381 (1992) (“It is a ‘basic doctrine of equity jurisprudence that courts of equity
2 should not act . . . when the moving party has an adequate remedy at law . . .”);
3 *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998) (“Injunctive relief is proper
4 only if monetary damages or other legal remedies will not compensate the plaintiffs
5 for their injuries”); accord *Knox v. Phoenix Leasing Inc.*, 29 Cal. App. 4th 1357,
6 1365 (1994); *E.A. Taliaferro v. Dorothy Taliaferro*, 144 Cal. App. 2d 109, 113
7 (1956).

8 This rule applies to Section 17200 claims. See *Prudential Home Mortgage*
9 *Co. v. Superior Court*, 66 Cal. App. 4th 1236, 1250 (1998) (holding that the legal
10 remedies available to the plaintiffs were adequate, “thus precluding equitable relief
11 under the Business and Professions Code”); see also *Redding v. St. Francis Med.*
12 *Ctr.*, 208 Cal. App. 3d 98, 107 (1989) (holding that the normal process of
13 determining availability of injunctive relief is employed under section 17200).

14 Here, as explained above, plaintiff does not and cannot allege the lack of an
15 adequate legal remedy. This is fatal to his Section 17200 claim.

16 **B. Plaintiff Cannot Seek Damages Under the Guise of Restitution**

17 A second reason why the fifth cause of action must be dismissed is that
18 plaintiff is not entitled to injunction or restitution – the only remedies available
19 under Section 17200. Plaintiff is not entitled to the former because he does not and
20 cannot allege that any violation of TILA or RESPA is ongoing. He is not entitled to
21 the latter because he seeks damages, which are not available under Section 17200.

22 The California Supreme Court clarified the meaning of restitution in *Korea*
23 *Supply Co.* There, the court held that “[t]he object of restitution is to restore the
24 status quo by returning to the plaintiff funds in which he or she has an ownership
25 interest.” *Korea Supply Co.*, 29 Cal. 4th at 1149. Thus, there is a fundamental
26 distinction between restitution, which is allowed, and damages, which are not. The
27 term “damages” describes “a payment made to compensate a party for injuries
28 suffered,” whereas “restitution” takes place when “[t]he defendant is asked to return

1 something he wrongfully received; he is not asked to compensate the plaintiff for
2 injury suffered as a result of his conduct.” *Jaffe v. Cranford Ins. Co.*, 168 Cal. App.
3 3d 930, 935 (1985).

4 *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 328 (1998) is instructive. In that
5 case, the plaintiffs brought a section 17200 claim seeking “disgorgement of all ‘ill-
6 gotten profits.’” The plaintiffs alleged that AT&T acted deceptively by selling
7 prepaid phone cards without revealing to the “consumer, prior to the purchase, that
8 calls made with those cards are, in fact, rounded up to the next higher minutes.” *Id.*
9 at 329. The trial court dismissed the complaint and the plaintiffs appealed.

10 On appeal, the *Day* court acknowledged that section 17203 “provides for the
11 ‘restoration’ of money or property acquired by means of unfair competition.” *Id.* at
12 338. The court explained, however, that the word ‘restore’ means “[t]o give back,
13 to make return or restitution of (anything previously taken away or lost).” *Id.* at
14 338-39. The court further explained that “the notion of restoring something to a
15 victim of unfair competition includes two separate components. The offending
16 party must have obtained something to which it was not entitled and the victim must
17 have given up something which he or she was entitled to keep.” *Id.* at 340
18 (emphasis added). This was not the case in *Day* because “once the [phone] cards
19 were purchased and used, the members of the public received exactly what they paid
20 for.” *Id.* at 339; *see also Baugh v. Columbia Broadcasting System, Inc.*, 828 F.
21 Supp. 745 (N.D. Cal. 1993).

22 Likewise, here, plaintiff purchased and received a mortgage loan. His
23 allegation that he received a “more expensive” loan does not transform his damages
24 claim into restitutionary relief. As aptly explained in *Baugh*, if redress for such
25 ordinary legal damages could be characterized by plaintiffs as “restitution,” then
26 “any damage claim could be converted into an argument for restitution.” *Baugh*,
27 828 F. Supp. at 757-58. “[Section] 17203 plainly did not intend such a result.” *Id.*
28 For this additional reason, the Section 17200 claim fails.

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 At the time of service, I was over 18 years of age and **not a party to this**
4 **action.** I am employed in the County of Los Angeles, State of California. My
5 business address is 333 South Hope Street, 43rd Floor, Los Angeles, CA 90071-
6 1422.

7 On October 27, 2014, I served true copies of the following document(s)
8 described as **POINTS AND AUTHORITIES IN SUPPORT OF CASTLE &**
9 **COOKE MORTGAGE, LLC'S MOTION TO DISMISS THE SECOND,**
10 **FOURTH AND FIFTH CLAIMS FOR RELIEF OF PLAINTIFF'S**
11 **COMPLAINT** on the interested parties in this action as follows:

12 James F. Clapp
13 Dostart Clapp & Coveney, LLP
14 4370 La Jolla Village Drive, Suite 970
15 San Diego. CA 92122

16 **BY MAIL:** I enclosed the document(s) in a sealed envelope or package
17 addressed to the persons at the addresses listed in the Service List and placed the
18 envelope for collection and mailing, following our ordinary business practices. I am
19 readily familiar with the firm's practice for collecting and processing
20 correspondence for mailing. On the same day that the correspondence is placed for
21 collection and mailing, it is deposited in the ordinary course of business with the
22 United States Postal Service, in a sealed envelope with postage fully prepaid.

23 **BY CM/ECF NOTICE OF ELECTRONIC FILING:** I electronically filed
24 the document(s) with the Clerk of the Court by using the CM/ECF system.
25 Participants in the case who are registered CM/ECF users will be served by
26 the CM/ECF system. Participants in the case who are not registered CM/ECF
27 users will be served by mail or by other means permitted by the court rules.

28 I declare under penalty of perjury under the laws of the United States of
America that the foregoing is true and correct and that I am employed in the office
of a member of the bar of this Court at whose direction the service was made.

Executed on October 27, 2014, at Los Angeles, California.

/s/ Angelique W. Smith
Angelique W. Smith