

F I L E D

Clerk of the Superior Court

DEC 04 2009

By: L. ARTHUR, Deputy

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Superior Court of the State of California
County of San Diego, North County Division

DEBRA IRENE KAR BLEILE, Plaintiff

Case No. 37-2008-00054426-CU-BT-NC

vs.

DECISION AFTER TRIAL

JERRY E. JAGEMAN, SCRIPPS
INVESTMENTS & LOANS, INC., Defendants.

On October 13, 14, 15 and 19, 2009, trial was conducted in this case. The trial was conducted in Dept. N-29, Judge Robert P. Dahlquist presiding. Plaintiff was present at the trial, and was represented by her counsel, Geoffrey J. Spreter. Defendant Jerry E. Jageman was present at the trial, and was represented by his counsel, Shawn D. Morris and Justin C. Evenson of Morris, Sullivan & Lemkul, LLP. Messrs. Morris and Evenson also represented defendant Scripps Investments & Loans, Inc. ("Scripps Investments").

At the trial, various claims were presented to a jury for decision. The claims included claims for fraud, breach of fiduciary duty and concealment against Scripps Investments, and claims for fraud, breach of fiduciary duty and concealment against Jageman. The jury

1 returned its Special Verdict on Oct. 19, 2009. The jury verdict was in favor of defendants on
2 all claims presented to the jury.

3 Plaintiff's complaint, filed May 16, 2008, contains two causes of action that were not
4 presented to the jury for decision. Those two causes of action are: the Second Cause of
5 Action for violation of California Business and Professions Code §17200 et seq., and the
6 Fifth Cause of Action for unjust enrichment. Plaintiff has requested that the Court grant relief
7 to plaintiff under these two causes of action.

8 After the jury verdict was returned, the parties submitted additional briefing concerning
9 the remaining two causes of action. The Court has read and considered the additional
10 briefing presented by the parties. The Court also heard oral argument at a hearing
11 conducted on Nov. 24, 2009. The Court is now prepared to render its decision on the two
12 remaining causes of action.

13
14 **THE SECOND CAUSE OF ACTION FOR VIOLATION OF BUSINESS & PROFESSIONS**
15 **CODE §17200 ET SEQ.**

16 Plaintiff Bleile's claim for violation of Business & Professions Code §17200, as alleged
17 in Bleile's complaint, was premised on allegations that (i) "Defendants procured monies from
18 Debra Bleile and others through fraudulent representations" (Complaint at ¶25); (ii)
19 Defendants had "undisclosed potential conflicts of interest with Bernie Gliberman and
20 others" (Complaint at ¶26); (iii) Defendants failed "to investigate whether plaintiff and others
21 were sophisticated investors; and (iii) Defendants failed "to complete its due diligence as to
22 both its investors and investments" (Complaint at ¶27).

23 In Bleile's Supplemental Trial Brief, filed Oct. 30, 2009, after the jury rendered its
24 verdict, however, Bleile narrowed her focus by arguing that Defendants' alleged violation of
25 Business & Professions Code §17200 is premised on "Defendants' business practices of
26 failing to disclose material risks and conflicts of interest prior to closing an investment."
27 (Supplemental Trial Brief at p. 4)

1 Business and Professions Code §17200 states: "As used in this chapter, unfair
2 competition shall mean and include any unlawful, unfair or fraudulent business act or practice
3 and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1
4 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions
5 Code."

6 Business and Professions Code §17204 provides that an action for unfair competition
7 may be brought by, among others, "a person who has suffered injury in fact and has lost
8 money or property as a result of the unfair competition."

9 Business and Professions Code §17200 et seq. is sometimes referred to as
10 California's "unfair competition law" or "UCL." Our Supreme Court has stated: "A UCL action
11 is equitable in nature; damages cannot be recovered. . . . Prevailing plaintiffs are generally
12 limited to injunctive relief and restitution. In the UCL context, an order for restitution is an
13 order compelling a UCL defendant to return money obtained through an unfair business
14 practice to those persons in interest from whom the property was taken, that is, to persons
15 who had an ownership interest in the property or those claiming through that person." *Cruz*
16 *v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 317 (internal quotation marks and
17 citations omitted).

18 The essential facts of this case are: Plaintiff Bleile was unhappy with the relatively
19 low, 3-4% rate of return on her funds held in a bank account. Based on a referral from a
20 friend, she approached Scripps Investments, a so-called "hard money" real estate lender,
21 and expressed an interest in investing approximately \$100,000 in order to obtain a higher
22 rate of return on her money. Bleile, who is a college graduate, was generally familiar with
23 loans secured by deeds of trust. She had such familiarity as a result of, among other things,
24 having worked in the past in her father's real estate brokerage office.

25 Bleile decided to invest her money in a fractional promissory note, with a 17% interest
26 rate of return, secured by a second deed of trust on a real estate development in Arizona.
27 She made her decision after consulting with her husband, who has an undergraduate degree
28 in economics and a Masters of Business Administration degree. Before making the

1 investment, Bleile and her husband were given an "Executive Summary" summarizing the
2 real estate development project in Arizona, the terms of the 17% promissory note and
3 information concerning the borrower.

4 Although Bleile characterized herself in her trial testimony as risk adverse, the
5 evidence at trial established that she had actual or constructive knowledge that an
6 investment in a fractional promissory note returning 17% interest, secured by a second deed
7 of trust on a real estate development project in Arizona, is significantly more risky than a
8 bank account which provides a 3-4% return on investment.

9 After Bleile wired her funds to Scripps Investments, Bleile was provided with additional
10 documentation, including a Note Sharing and Servicing Agreement and a questionnaire
11 concerning her status as an "accredited investor." Bleile completed those documents and
12 returned them to Scripps Investments. The evidence presented at trial did not establish that,
13 upon receipt of those additional documents, Bleile expressed to Scripps Investments or
14 Jageman any reservations about the investment or sought to stop the investment process.
15 The evidence established that Scripps Investments had a practice of allowing investors to
16 unwind an investment transaction in situations where investors made a request to do so
17 promptly after making an investment commitment.

18 Bleile received several months of interest payments on her fractional share of the
19 promissory note. However, the borrower eventually defaulted on the promissory note. The
20 holder of the first deed of trust foreclosed on the property, and the second deed of trust was
21 thereby lost.

22 As an aside, Jageman and Scripps Investments were also investors in this particular
23 real estate project. They also lost their investments.

24 The jury in this case returned a defense verdict on all claims submitted to the jury.
25 The jury found that there was no fraud or concealment committed by the defendants. The
26 jury found that Scripps Investments and Jageman breached a fiduciary duty owed to Bleile
27 but that the breach did not cause any harm to Bleile.

28

1 Looking at the totality of the evidence, and giving weight to the jury's findings, which
2 the Court considers to be advisory for purposes of adjudicating the equitable claims, the
3 Court is not persuaded that it should exercise its equitable powers to grant relief to Bleile in
4 this case. In particular, the Court finds that Bleile has failed to sustain her burden of
5 establishing: (i) the existence of unfair competition within the meaning of the UCL; (ii) that
6 Bleile is a person who has lost money or property as a result of any alleged unfair
7 competition; and (3) that the overall equities of this case warrant the imposition of an
8 equitable remedy in favor of Bleile and against Scripps Investments and/or Jageman.

9 As to the latter point, Bleile obtained the exact investment for which she bargained – a
10 fractional interest in a promissory note, with a 17% rate of return, secured by a second deed
11 of trust on a real estate development project in Arizona. The investment failed when the
12 borrower defaulted and the holder of the first deed of trust foreclosed on the Arizona
13 property, wiping out the second deed of trust. This was a risk inherent in the investment, not
14 a risk created by any action or inaction on the part of Scripps Investments and Jageman.

15
16 **THE FIFTH CAUSE OF ACTION FOR UNJUST ENRICHMENT**

17 Plaintiff Bleile's complaint for unjust enrichment asserts that: (1) "Defendant's
18 misconduct . . . constituted a breach of its duties under the common and securities laws of
19 the State of California" (Complaint, ¶42); (2) "Plaintiff's cause of action for unjust enrichment
20 applies when plaintiff has no adequate remedy at law. Plaintiff prays for rescission and
21 return of monies relinquished to Defendant by Plaintiff." (Complaint, ¶45)

22 As an initial matter, the Court notes that there appears to be some inconsistencies in
23 the appellate decisions concerning claims for unjust enrichment. Some cases indicate that
24 unjust enrichment is not a separate, cognizable cause of action but instead is a simply a legal
25 principle that is synonymous with the remedy of restitution. *E.g., Jogani v. Superior Court*
26 (2008) 165 Cal.App.4th 901, 911 ("[U]njust enrichment is not a cause of action. Rather, it is a
27 general principle underlying various doctrines and remedies, including quasi-contract.");
28 *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793 ("[T]here is no cause

1 of action in California for unjust enrichment. The phrase 'Unjust Enrichment' does not
2 describe a theory of recovery, but an effect: the result of a failure to make restitution under
3 circumstances where it is equitable to do so. Unjust enrichment is a general principle,
4 underlying various legal doctrines and remedies, rather than a remedy itself. It is
5 synonymous with restitution.").

6 Other cases treat unjust enrichment as a cognizable cause of action, with established
7 elements. *E.g., Peterson v. Celco Partnership* (2008) 164 Cal.App.4th 1583, 1593 ("The
8 elements of an unjust enrichment claim are the receipt of a benefit and the unjust retention of
9 the benefit at the expense of another.")

10 This Court need not attempt to reconcile these inconsistencies in the appellate case
11 law because assuming *arguendo* that unjust enrichment is a cognizable cause of action,
12 Plaintiff Bleile failed to sustain her burden of persuading the Court that she should recover
13 under such a cause of action.

14 The *Peterson* court set forth the following principles applicable to claims for unjust
15 enrichment: "The elements of an unjust enrichment claim are the receipt of a benefit and the
16 unjust retention of the benefit at the expense of another. Here, plaintiff received the benefit
17 of the bargain. The mere fact that a person benefits another is not of itself sufficient to
18 require the other to make restitution therefore. There is no equitable reason for invoking
19 restitution when the plaintiff gets the exchange which he expected." 164 Cal.App.4th at 1593
20 (internal quotation marks and citations omitted).

21 In this case, similar to the facts in *Peterson*, Plaintiff Bleile received the benefit which
22 she expected. Plaintiff Bleile intended to purchase a fractional interest in a promissory note,
23 secured by a second deed of trust pertaining to real estate project in Arizona. She in fact
24 was given a fractional interest in the promissory note and second deed of trust. She was
25 given exactly what she thought she was purchasing. In this case, there is no equitable
26 reason for invoking the remedy of restitution because Plaintiff Bleile received the exchange
27 which she expected.

1 Plaintiff Bleile's investment was lost when the borrower defaulted on the note and the
2 holder of the first deed of trust foreclosed on the property. The risks of these events were
3 inherent in the investment itself. They were an inherent part of the bargain. Hence, there
4 was no "unjust retention of [any] benefit at the expense of another." *Peterson, supra*, 164
5 Cal.App.4th at 1593.

6 Therefore, to the extent that the Court, sitting as a court of equity, may have discretion
7 to require Defendants to make restitution to Plaintiff Bleile under a theory of unjust
8 enrichment, the Court exercises its discretion to deny restitution to Plaintiff Bleile. Under the
9 totality of the circumstances of this case, the Court is not persuaded that it would be
10 equitable to require Defendants to make restitution to Plaintiff Bleile.

11
12 **CONCLUSION**

13 Therefore, the Court will enter a judgment indicating that Plaintiff Bleile shall have no
14 relief against Defendants under the Second and Fifth Causes of Action.

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16 * * * *

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18 The Court hereby requests that Defendants' counsel prepare a proposed form of
19 judgment for the entire case, reflecting the jury's verdict on the claims presented to the jury
20 and the Court's decision on the Second and Fifth Causes of Action.

21 The clerk is directed to give notice of this decision to all parties.

22 **IT IS SO ORDERED.**

23
24 DATED: Dec. 4, 2009

Robert P. Dahlquist
Robert P. Dahlquist
Judge of the Superior Court