

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES L. TURKLE TRUST,
individually and on behalf of all
others similarly situated,

Plaintiff,

v.

WELLS FARGO & COMPANY,

Defendant.

No. C 11-6494 CW

ORDER GRANTING
DEFENDANT'S MOTION
TO DISMISS
(Docket No. 26)

_____ /

Defendant Wells Fargo & Company moves to dismiss the
complaint filed by Plaintiff James L. Turkle Trust. Plaintiff
opposes Defendant's motion. Having considered the papers filed by
the parties and their oral arguments at the hearing, the Court
GRANTS Defendant's motion to dismiss.

United States District Court
For the Northern District of California

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BACKGROUND

The following facts are taken from Plaintiff's complaint and from certain documents submitted by Defendant, of which the Court takes judicial notice.¹

Trust preferred securities are a form of preferred stock commonly issued by bank holding companies since 1996 to increase their Tier I regulatory capital amount, in order to meet the Federal Reserve's capital adequacy guidelines. Compl. ¶¶ 16-17. These securities often have a high interest rate for investors. Id. at ¶ 18.

Plaintiff was a holder of Defendant's Capital Trust X 7.85% Trust Preferred Securities at the time of their redemption on October 3, 2011. Compl. ¶¶ 13, 29, 38. The Trust X securities were issued by Wachovia Corporation on November 21, 2007. Id. at

¹ Defendant requests that the Court take judicial notice of certain documents filed with the Securities and Exchange Commission (SEC), some of which are documents whose contents are alleged in the complaint. See Request for Judicial Notice (RJN). Plaintiff agrees that the Court may take judicial notice of Exhibits One through Eight, which are SEC filings that relate to the securities at issue in the instant case. "Public records, such as SEC filings, are properly the subject of judicial notice, and routinely considered in deciding a motion to dismiss in a securities case." In re Extreme Networks, Inc., 573 F. Supp. 2d 1228, 1232 (N.D. Cal. 2008) (citations omitted). See also Dreiling v. Am. Express Co., 458 F.3d 942, 946 (9th Cir. 2006) ("We review de novo a dismissal under Rule 12(b)(6) . . . and may consider documents referred to in the complaint or any matter subject to judicial notice, such as SEC filings.") (internal citations omitted). Accordingly, the Court GRANTS Defendant's request as to Exhibits One through Eight.

Plaintiff opposes Defendant's request for judicial notice of Exhibits Nine and Ten, which are SEC filings with excerpts from other banks' contracts. The Court finds these materials to be immaterial to the resolution of this motion and DENIES Defendant's request as to Exhibits Nine and Ten.

1 ¶ 19. Defendant subsequently merged with Wachovia and agreed to
2 assume all outstanding guarantee obligations of the securities.

3 Id. at ¶ 2.

4 The Trust X securities have several governing documents,
5 including the Trust Agreement, which was superseded by the Amended
6 and Restated Trust Agreement, and the Base Indenture, which was
7 amended and supplemented by the Fourth Supplemental Indenture.

8 See RJN, Exs. 1, 2, 5. The offering documents for the securities
9 included the Prospectus, which referred to provisions in both the
10 Indenture and the Trust Agreement. Prospectus, RJN, Ex. 3. The
11 parties agree that the Indenture is governed by New York law.

12 Mot. at 10; Opp. at 7 n.4. See Base Indenture, RJN, Ex. 1 at 23;
13 Fourth Supplemental Indenture, RJN, Ex. 5 at 340. The parties
14 also agree that the Trust Agreement is governed by Delaware law.
15 Mot. at 16 n.3; Opp. at 17 and n.8. See RJN, Ex. 2 at 147.

16 The trust documents gave Defendant the right to redeem all or
17 part of the outstanding securities at any time on or after
18 December 15, 2012, which Plaintiff refers to as the "optional
19 redemption date." Compl. ¶¶ 3, 22; Fourth Supplemental Indenture,
20 RJN, Ex. 5 at 330. The Indenture also gave Defendant the option
21 to redeem all, but not some, of the securities upon the occurrence
22 of a "capital treatment event." Compl. ¶ 23; Fourth Supplemental
23 Indenture, RJN, Ex. 5 at 330. See also Prospectus, RJN, Ex. 3 at
24 204, 254. A capital treatment event is defined in the Indenture
25 as

26 the reasonable determination by the Company that, as
27 result of the occurrence of any amendment to, or change
28 (including any announced prospective change) in, the
laws (or any rules or regulations thereunder) of the
United States or any political subdivision thereof or

1 therein, or as result of any official or administrative
2 pronouncement or action or judicial decision
3 interpreting or applying such laws, rules or
4 regulations, which amendment or change is effective or
5 which pronouncement, action or decision is announced on
6 or after the date of issuance of the Trust Preferred
7 Securities of a Wachovia Trust, there is more than an
8 insubstantial risk that the Company will not be entitled
9 to treat an amount equal to the aggregate Liquidation
10 Amount of such Trust Preferred Securities as 'tier 1
11 capital' (or the then equivalent thereof) for purposes
12 of the capital adequacy guidelines of the Federal
13 Reserve, as then in effect and applicable to the
14 Company.

15 Base Indenture, RJN, Ex. 1 at 12. See also Compl. ¶ 23;
16 Prospectus, RJN, Ex. 3 at 255. If a capital treatment event
17 occurs, Defendant is entitled to redeem the securities for their
18 face value of twenty-five dollars, plus any interest accrued to
19 the date of redemption. Compl. ¶ 24.

20 On July 21, 2010, the President signed into law the
21 Dodd-Frank Wall Street Reform and Consumer Protection Act,
22 including the Collins Amendment. Id. at ¶¶ 25-26. One provision
23 of the Collins Amendment was to disallow the treatment of trust
24 preferred securities as Tier I capital. Id. at ¶ 26. For trust
25 preferred securities issued before May 19, 2010 by large bank
26 holding companies, the new requirements will be phased in
27 incrementally from January 1, 2013 through January 1, 2016. Id.
28 Before January 1, 2013, bank holding companies will be allowed to
treat all of these outstanding trust preferred securities as Tier
I capital. Id. Until the end of the phase-in period on January
1, 2016, they will be allowed to treat at least some of the
securities as Tier I capital. Id. Notably, the phase-in period
of the new requirement would begin after the optional redemption
date for these securities passed on December 15, 2012. Id. at
¶ 29.

1 On September 1, 2011, Defendant announced that it would
2 redeem the Capital Trust X securities on October 3, 2011. Id. at
3 ¶ 27. Defendant stated that it "has determined that a Capital
4 Treatment Event occurred with the passage of the Dodd-Frank Wall
5 Street Reform and Consumer Protection Act." Form 8-K, RJN Ex. 7
6 at 418. At that time, Defendant reported that the principal
7 amount of the securities was \$837.5 million, at twenty-five
8 dollars per share, or 33.5 million shares. Id. On October 3,
9 2011, Defendant redeemed the outstanding securities. Compl. ¶ 29.

10 Plaintiff filed the instant action on December 20, 2011.
11 Docket No. 1. Plaintiff seeks to prosecute it on behalf of itself
12 and all holders of the Capital Trust X securities on October 3,
13 2011. Compl. ¶ 34. Plaintiff charges Defendant with breach of
14 contract and breach of the implied covenant of good faith and fair
15 dealing for redeeming the Capital Trust X securities on October 3,
16 2011, before Defendant's optional redemption date of December 15,
17 2012. Id. at ¶¶ 41-61. Plaintiff alleges that it and the class
18 members have been damaged in the amount of \$79.7 million, the
19 amount of dividend payments that 33.5 million shares would have
20 earned between October 3, 2011 and December 15, 2012. Id. at
21 ¶¶ 36, 50, 61.

22 On April 12, 2012, the Court issued an order granting
23 Defendant's motion to dismiss in a related case, Call v. Wells
24 Fargo & Co., Case No. 11-5215, 2012 U.S. Dist. LEXIS 51731 (N.D.
25 Cal.). In that case, the plaintiff, Daniel Call, brought claims
26 against Defendant arising from its redemption of other similar
27 securities, Defendant's Capital XIV 8.625% Enhanced Trust
28 Preferred Securities, simultaneously with the redemption of the

1 securities at issue in this action. Defendant's action in that
2 case was also based on its determination that the Dodd-Frank Act
3 constituted a capital treatment event. The parties agree that the
4 governing documents, including the capital treatment event clause,
5 for the securities at issue in Call are materially identical to
6 those for the securities here, and that the only relevant
7 difference is that Defendant's optional redemption date in Call
8 was September 15, 2013, after the start of the phase-in period for
9 the Dodd-Frank Act on January 1, 2013.

10 LEGAL STANDARD

11 A complaint must contain a "short and plain statement of the
12 claim showing that the pleader is entitled to relief." Fed. R.
13 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
14 state a claim, dismissal is appropriate only when the complaint
15 does not give the defendant fair notice of a legally cognizable
16 claim and the grounds on which it rests. Bell Atl. Corp. v.
17 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
18 complaint is sufficient to state a claim, the court will take all
19 material allegations as true and construe them in the light most
20 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
21 896, 898 (9th Cir. 1986). However, this principle is inapplicable
22 to legal conclusions; "threadbare recitals of the elements of a
23 cause of action, supported by mere conclusory statements," are not
24 taken as true. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009)
25 (citing Twombly, 550 U.S. at 555).

26 When granting a motion to dismiss, the court is generally
27 required to grant the plaintiff leave to amend, even if no request
28 to amend the pleading was made, unless amendment would be futile.

1 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
2 F.2d 242, 246-47 (9th Cir. 1990). In determining whether
3 amendment would be futile, the court examines whether the
4 complaint could be amended to cure the defect requiring dismissal
5 "without contradicting any of the allegations of [the] original
6 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
7 Cir. 1990).

8 DISCUSSION

9 Defendant argues that Plaintiff's complaint should be
10 dismissed, because it did not breach the contract as a matter of
11 law and because exercising contractual rights cannot be a breach
12 of the implied covenant of good faith and fair dealing. Defendant
13 also argues that Plaintiff lacks standing to sue.

14 I. Breach of Contract

15 The parties dispute whether Defendant could have reasonably
16 determined that the enactment of the Dodd-Frank Act constituted a
17 capital treatment event, even though it would not affect
18 Defendant's ability to treat any of the securities as Tier I
19 capital until after the optional redemption date had passed.

20 Defendant contends that the definition of a capital treatment
21 event in the Indenture does not limit such an event to those that
22 will actually go into effect before the optional redemption date.
23 Although Plaintiff agrees that the clause contains forward-looking
24 language and that Defendant may declare a capital treatment event
25 based on a change that will take effect in the future, it argues
26 that the clause cannot reasonably be read to include events that
27 will only occur after the optional redemption date, because such a
28 reading would not comport with the clear purpose of the clause in

1 the context of the agreement as a whole. Plaintiff asserts that,
2 in the alternative, the capital treatment event clause is
3 ambiguous, because it fails to state in definite and precise terms
4 when the threatened loss of Tier I status must occur to trigger
5 its effects.

6 New York law governs the application of the capital treatment
7 event clause, which is located in the Indenture. "Under New York
8 law, 'the fundamental, neutral precept of contract interpretation
9 is that agreements are construed in accord with the parties'
10 intent.'" Eternity Global Master Fund Ltd. v. Morgan Guar. Trust
11 Co., 375 F.3d 168, 177 (2d Cir. 2004) (quoting Greenfield v.
12 Philles Records, Inc., 98 N.Y.2d 562, 569 (2002)). "Typically,
13 the best evidence of intent is the contract itself; if an
14 agreement is 'complete, clear and unambiguous on its face[, it]
15 must be enforced according to the plain meaning of its terms.'" Id.
16 (quoting Greenfield, 98 N.Y.2d at 569) (formatting in
17 original).

18 "Ambiguity is determined by looking within the four corners
19 of the document, not to outside sources." Riverside S. Planning
20 Corp. v. CRP/Extell Riverside, L.P., 13 N.Y.3d 398, 404 (2009)
21 (quoting Kass v. Kass, 91 N.Y.2d 554, 566 (1998)). "The language
22 of a contract is not made ambiguous simply because the parties
23 urge different interpretations." Seiden Associates, Inc. v. ANC
24 Holdings, Inc., 959 F.2d 425, 428 (2d Cir. 1992). "Whether or not
25 a writing is ambiguous is a question of law to be resolved by the
26 courts." Eternity Global Master Fund Ltd., 375 F.3d at 178
27 (quoting W.W.W. Assoc., Inc. v. Giancontieri, 77 N.Y.2d 157, 162
28 (1990)).

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Plaintiff argues that the capital treatment event clause can be invoked only if the prospective change in the treatment of the securities as Tier I capital could be reasonably anticipated to have its effect before December 15, 2012. However, neither the plain language of the capital treatment event clause, nor the contract as a whole, contains such a temporal limitation. The definition of a capital treatment event does not refer to December 15, 2012 or the optional redemption date generally, or otherwise state that the event must take effect before any date.

Plaintiff argues that the trust documents "stress the interplay between the December 15, 2012 optional redemption date and the possibility of an earlier redemption based on the occurrence of certain events, such as a 'tax event' or 'capital treatment event.'" Opp. at 9. However, the reference to which it points reinforces that these are independent events and dates. In explaining the various points at which a redemption can occur, the documents use the conjunction "or" between the December 15, 2012 date and other events such as "tax event" or "capital treatment event," not the conjunction "and." Prospectus, RJN, Ex. 3 at 204 ("At Wachovia's option, the Trust Preferred securities may be redeemed at 100% of their liquidation amount on or after December 15, 2012 or after the occurrence of tax event, capital treatment event or investment company event as described herein . . ."); see also Fourth Supplemental Indenture, RJN, Ex. 5 at 330 (using "or"). In other places, the documents name these separately in lists, in different bullet points or numbers. See, e.g., Fourth

1 Supplemental Indenture, RJN, Ex. 5 at 338 (numbered list);
2 Prospectus, RJN, Ex. 3 at 254 (bulleted list).

3 Other parts of the documents demonstrate that Defendant,
4 which drafted them, knew how to include language that would limit
5 the time within which a capital treatment event must take place,
6 if such a limitation had been intended. In the Base Indenture, a
7 "tax event" was defined to mean

8 the receipt by Wachovia Trust of an opinion of counsel
9 experienced in such matters to the effect that as result
10 of any amendment to or change (including any announced
11 prospective change) in, the laws or any regulations
12 thereunder of the United States or any political
13 subdivision or taxing authority thereof or therein, or
14 as a result of any official administrative pronouncement
15 or judicial decision interpreting or applying such laws
16 or regulations, which amendment or change is effective
17 or which pronouncement or decision is announced on or
18 after the date of issuance of the Trust Preferred
19 Securities of such Wachovia Trust, there is more than an
20 insubstantial risk that (i) such Wachovia Trust is, or
21 will be within 90 days of the date of such Opinion of
Counsel, subject to U.S federal income tax with respect
to income received or accrued on the corresponding
series of Securities issued by the Company to such
Wachovia Trust, (ii) interest payable by the Company on
such corresponding series of Securities is not, or
within 90 days of the date of such Opinion of Counsel,
will not be, deductible by the Company in whole or in
part for U.S federal income tax purposes or (iii) such
Wachovia Trust is, or will be within 90 days of the date
of such Opinion of Counsel, subject to more than de
minimis amount of other taxes duties or other
governmental charges.

22 Base Indenture, RJN, Ex. 1 at 18 (emphasis added). In contrast,
23 the definition for capital treatment event used the future-looking
24 word "will" without a corresponding temporal limitation as to when
25 the change must take place.

26 In fact, a different temporal limitation that otherwise would
27 have applied to capital treatment events was removed deliberately
28 for these securities. The Base Indenture, section 11.7,

1 restricted Defendant to using the capital treatment event clause
2 "within 90 days following the occurrence of such" event. Base
3 Indenture, RJN, Ex. 1 at 67. The Fourth Supplemental Indenture
4 specifically provides that "Section 11.7 of the Indenture shall
5 not apply" to these securities. Fourth Supplemental Indenture,
6 RJN, Ex. 5 at 330.

7 Contrary to Plaintiff's suggestion, the fact that Defendant
8 omitted a temporal limitation in the definition for a capital
9 treatment event, without affirmatively stating that no such
10 limitation was intended, does not make the clause ambiguous. See,
11 e.g., Greenfield, 98 N.Y.2d at 573 (the "suggestion that the
12 failure of a contract to address certain categories of royalties
13 allows a court to look beyond the four corners of the document to
14 discern the parties' true intent conflicts with our established
15 precedent that silence does not equate to contractual ambiguity")
16 (citing Trustees of Freeholders & Commonalty of Town of
17 Southampton v. Jessup, 173 N.Y. 84, 90 (1903) ("an ambiguity never
18 arises out of what was not written at all, but only out of what
19 was written so blindly and imperfectly that its meaning is
20 doubtful")). This is especially true here, where a temporal
21 limitation was included in a similar clause but was omitted in
22 this one.

23 Plaintiff contends that the capital treatment event clause
24 should be read to allow redemption only if such an event has taken
25 effect before December 15, 2012, because after the optional
26 redemption date has passed, Defendant can redeem the securities
27 for any reason and does not need to rely on the occurrence of a
28 capital treatment event, rendering that clause superfluous.

1 Plaintiff states that this understanding would comport with the
2 purposes of the clause in relationship to the agreement as a
3 whole, by protecting the benefit of the bargain for putative class
4 members, who had purchased the securities with the understanding
5 that they would be able to receive a favorable interest rate at
6 least until December 15, 2012. However, the language of the
7 contract makes clear that this benefit was not absolute and was
8 instead contingent upon certain conditions, including that a
9 capital treatment event not occur and that, should one occur,
10 Defendant not exercise its right to redemption. Further, the
11 clear purpose of the forward-looking language in the capital
12 treatment event clause is to allow Defendant the flexibility to
13 redeem the securities before the prospective change affecting the
14 favorable treatment of those securities has actually taken effect,
15 in order to anticipate the change in a manner that it deems to
16 make good business sense and ensure adequate capitalization,
17 rather than requiring it to redeem the securities en masse at the
18 moment the change takes effect or on the optional redemption date,
19 if sooner. To require Defendant to wait until the optional
20 redemption date to redeem the securities, even though it knew
21 that, shortly thereafter, it would lose the ability to treat as
22 Tier I capital the liquidation amount of the securities, thus does
23 not comport with the purpose of this clause in relation to the
24 documents as a whole.

25 Further, under the definition of capital treatment event,
26 Defendant was required only to make a "reasonable determination"
27 that the triggering conditions had occurred; Defendant was not
28 required to be correct in its determination. Under the

1 allegations of the complaint, Defendant's determination was
2 reasonable, because the enactment of the Dodd-Frank Act into law
3 meant that Defendant would not be able to treat an amount of the
4 securities equal to the liquidation amount as Tier I capital.

5 Without reading a temporal limitation into the capital
6 treatment event clause, Plaintiff has failed to state a claim
7 against Defendant for breach of contract, and the Court GRANTS
8 Defendant's motion to dismiss this claim. Because no amendment
9 can cure these deficiencies without contradicting the terms of the
10 governing contracts, dismissal is without leave to amend.

11 II. Breach of Covenant of Good Faith and Fair Dealing

12 New York law implies a covenant of good faith and fair
13 dealing "pursuant to which neither party to a contract shall do
14 anything which has the effect of destroying or injuring the right
15 of the other party to receive the fruits of the contract."

16 Thyroff v. Nationwide Mut. Ins. Co., 460 F.3d 400, 407 (2d Cir.
17 2006) (citation omitted).

18 Defendant argues that Plaintiff's claim should be dismissed
19 because it attacks Defendant's exercise of an express provision of
20 the agreement. Plaintiff responds that investors "reasonably
21 understood" the capital treatment event clause "to be limited to
22 changes or proposed changes of law that threatened to use the
23 Capital X TruPS as Tier 1 capital prior to December 15, 2012."
24 Opp. at 14. However, the covenant "can only impose an obligation
25 consistent with other mutually agreed upon terms in the contract.
26 It does not add to the contract a substantive provision not
27 included by the parties." Broder v. Cablevision Sys. Corp., 418
28 F.3d 187, 198-99 (2d Cir. 2005) (citation omitted). As already

1 addressed above, Plaintiff's interpretation would add to the
2 contract an additional temporal limitation on the use of the
3 capital treatment event clause that is not otherwise included in
4 any of the document governing the securities.

5 Further, this claim is redundant of Plaintiff's breach of
6 contract claim and New York law does not recognize a separate
7 cause of action for breach of the implied covenant of good faith
8 and fair dealing when the claim is based on the same allegations
9 as a breach of contract claim. See Serdarevic v. Centex Homes,
10 LLC, 760 F. Supp. 2d 322, 334 (S.D.N.Y. 2010) ("A claim for breach
11 of the implied covenant [of good faith and fair dealing] will be
12 dismissed as redundant where the conduct allegedly violating the
13 implied covenant is also the predicate for breach of a covenant of
14 an express provision of the underlying contract.").

15 Accordingly, the Court GRANTS Defendant's motion to dismiss
16 Plaintiff's claim alleging breach of the covenant of good faith
17 and fair dealing. Because no amendment can cure these
18 deficiencies without contradicting the terms of the governing
19 documents for the securities, dismissal is without leave to amend.

20 Because the Court dismisses both of Plaintiff's claims, it
21 does not reach Defendant's argument that Plaintiff lacks standing
22 to bring these claims.

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CONCLUSION

For the reasons set forth above, the Court GRANTS Defendant's motion to dismiss (Docket No. 26).

The Clerk shall enter judgment and close the file. Defendant shall recover its costs from Plaintiff.

IT IS SO ORDERED.

Dated: 7/2/2012



CLAUDIA WILKEN
United States District Judge

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