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

ROBERT SULLIVAN; MARLENE SULLIVAN,	)	
	)	
Plaintiffs,	)	2:10-cv-00384-GEB-EFB
	)	
v.	)	<u>ORDER GRANTING AND DENYING IN</u>
	)	<u>PART DEFENDANT'S MOTION TO</u>
JP MORGAN CHASE BANK, NA, and	)	<u>DISMISS</u>
DOES 1 through 100, inclusive,	)	
	)	
Defendant.	)	
	)	

Defendant moves for dismissal of Plaintiffs' Complaint under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), arguing Plaintiffs have failed to allege sufficient facts to state viable claims. For the reasons stated below, the motion is granted and denied in part.

**I. LEGAL STANDARD**

A Rule 12(b)(6) dismissal motion tests the legal sufficiency of the claims alleged in the complaint. Novarro v. Black, 250 F.3d 729, 732 (9<sup>th</sup> Cir. 2001). A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). The complaint must "give the defendant fair notice of what the [plaintiff's] claim is and the grounds upon which relief rests . . . ." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

1 Dismissal of a claim under Rule 12(b)(6) is appropriate only  
2 where the complaint either 1) lacks a cognizable legal theory, or 2)  
3 lacks factual allegations sufficient to support a cognizable legal  
4 theory. Balistreri v. Pacific Police Dept., 901 F.2d 696, 699 (9<sup>th</sup> Cir.  
5 1988). To avoid dismissal, the plaintiff must allege "only enough facts  
6 to state a claim to relief that is plausible on its face." Twombly, 550  
7 U.S. at 547.

8 In deciding a Rule 12(b)(6) motion, the material allegations  
9 of the complaint are accepted as true and all reasonable inferences are  
10 drawn in favor of the plaintiff. See al-Kidd v. Ashcroft, 580 F.3d 949,  
11 956 (9<sup>th</sup> Cir. 2009). However, neither conclusory statements nor legal  
12 conclusions are entitled to a presumption of truth. See Ashcroft v.  
13 Iqbal, 129 S. Ct. 1937, 1949-50 (2009); Twombly, 550 U.S. at 555.

14 If a Rule 12(b)(6) motion is granted, the "district court  
15 should grant leave to amend even if no request to amend the pleadings is  
16 made, unless it determines that the pleading could not possibly be cured  
17 by the allegation of other facts." Lopez v. Smith, 203 F.3d 1122, 1127  
18 (9<sup>th</sup> Cir. 2000) (quoting Doe v. U.S., 58 F.3d 484, 497 (9<sup>th</sup> Cir. 1995)).

19 Defendant's motion includes a request that the Court take  
20 judicial notice of two Deeds of Trust recorded on December 3, 2007 with  
21 the Nevada County Recorder. (Defendant's Request for Judicial Notice  
22 ("RJN") Exs. 1-2.) Plaintiffs do not oppose Defendant's request.

23 "As a general rule, a district court may not consider any  
24 material beyond the pleadings in ruling on a Rule 12(b)(6) motion." Lee  
25 v. City of Los Angeles, 250 F.3d 668, 688 (9<sup>th</sup> Cir. 2001) (quotations  
26 and citation omitted). However, a court may consider matters properly  
27 subject to judicial notice. Swartz v. KPMG LLP, 476 F.3d 756, 763 (9<sup>th</sup>  
28 Cir. 2007). A matter may be judicially noticed if it is either

1 "generally known within the territorial jurisdiction of the trial court"  
2 or "capable of accurate and ready determination by resort to sources  
3 whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

4 Since the Deeds of Trust are publically recorded documents,  
5 they may be judicially noticed. See W. Fed. Sav. & Loan Ass'n v. Heflin  
6 Corp., 797 F. Supp. 790, 792 (1992) (taking judicial notice of documents  
7 in a county's public record, including deeds of trust). Therefore,  
8 Defendant's request that these documents be judicially noticed is  
9 granted.

### 10 III. BACKGROUND

11 Plaintiffs obtained two loans from Defendant around November  
12 of 2007, which were secured by their home in Grass Valley, California.  
13 (Compl. ¶¶ 6, 45.) The loans were memorialized in Promissory Notes  
14 secured by Deeds of Trust on the property. (Id. ¶ 45.) The Deeds of  
15 Trust identify Defendant as the lender. (RJN, Exs. 1-2.)

16 Plaintiffs allege Defendant directed them into unaffordable  
17 loans and subsequently misrepresented that permanent loan modifications  
18 would be made. (Id. ¶¶ 11-49.) Specifically, Plaintiffs allege Defendant  
19 represented that "the loan[s] were] the best loan[s] available on the  
20 market," procured the loans on "false information of plaintiff's  
21 income," over appraised the value of the property, and did not disclose  
22 "to plaintiffs their likely inability to make the monthly payments due  
23 on the loan[s]." (Id. ¶¶ 12.) Plaintiffs also allege when they  
24 approached Defendant to modify the terms of their loans to reduce their  
25 monthly payments, it "misrepresented... that a permanent loan  
26 modification would be put in place;" Plaintiffs' monthly payments were  
27 reduced for six months, but no permanent modification was made. (Id. ¶¶  
28 (Id. ¶¶ 18-20.)

1 **IV. DISCUSSION**

2 Plaintiffs allege ten claims against Defendant in their  
3 Complaint under federal and state law.

4 **1. Truth in Lending Act Claims**

5 Defendant argues Plaintiffs' Truth in Lending Act ("TILA")  
6 claims should be dismissed. Specifically, Defendant contends Plaintiffs'  
7 TILA damages claim is barred by the applicable one-year statute of  
8 limitations, and Plaintiffs' TILA rescission claim is defective because  
9 Plaintiffs failed to allege "the ability to tender or reinstate the  
10 subject loan transactions." (Def.'s Mot. to Dismiss ("Mot.") 2:8-9,  
11 2:22-23.) Plaintiffs counter their damages claim should not be dismissed  
12 because they have alleged sufficient facts to show the statute of  
13 limitations is equitably tolled. (Pls.' Opp'n to Mot. to Dismiss  
14 ("Opp'n") 2:17-25.) Plaintiffs also rejoin that their ability to  
15 "tender" is not an element required to be plead, and in the alternative,  
16 they have sufficiently alleged the tender element. (Opp'n 3:20-22.)

17 **a. TILA Damages Claim**

18 TILA "requires creditors to provide borrowers with clear and  
19 accurate disclosures of terms dealing with things like finance charges,  
20 annual percentage rates of interest, and the borrower's rights." Beach  
21 v. Ocwen Fed. Bank, 523 U.S. 410, 412 (1998) (citing 15 U.S.C. §§ 1631,  
22 1632, 1635, 1638)). Failure to satisfy TILA's disclosure requirements  
23 subjects a lender to "statutory and actual damages traceable to a  
24 lender's failure to make the requisite disclosures . . . ." Id. (citing  
25 15 U.S.C. § 1640(e)). TILA imposes a one-year statute of limitations  
26 within which a claim for damages "may be brought." 15 U.S.C. § 1640(e).  
27 "[A]s a general rule[, this] limitations period starts [to run] at the  
28 consummation of the transaction." King v. California, 784 F.2d 910, 915

1 (9th Cir. 1986). However, "the doctrine of equitable tolling may, in  
2 the appropriate circumstances, suspend the limitations period," such as  
3 when the borrower did not have reasonable opportunity to discover the  
4 alleged fraud or nondisclosures that form the basis of the plaintiff's  
5 TILA claim. Id.

6 "Because the applicability of [equitable tolling] often  
7 depends upon matters outside the pleadings, it is not generally amenable  
8 to resolution on a Rule 12(b)(6) motion." Supermail Cargo, Inc. v.  
9 U.S., 68 F.3d 1204, 1206 (9th Cir. 1995) (quotations and citation  
10 omitted). Nonetheless, when a plaintiff fails to allege any facts  
11 demonstrating the TILA violations alleged could not have been discovered  
12 by due diligence during the one-year statutory period, equitable tolling  
13 should not be applied and dismissal at the pleading stage is  
14 appropriate. See Meyer v. Ameriquest Mortg. Co., 342 F.3d 899, 902 (9th  
15 Cir. 2003) (dismissing TILA claim, despite request for equitable tolling,  
16 because plaintiff was in possession of all loan documents and did not  
17 allege any concealment or other conduct that would have prevented  
18 discovery of the alleged TILA violations during the one year limitations  
19 period).

20 Plaintiffs allege Defendant violated TILA as follows: by  
21 failing to give Plaintiffs "the mortgage documents," "disclosures," and  
22 "notices" "until after the settlement had taken place;" failing to group  
23 together and segregate the required disclosures; and "inflat[ing] the  
24 acceleration fees." (Compl. ¶ 65.) Further, Plaintiffs allege "the facts  
25 surrounding this loan transaction were purposefully hidden to prevent  
26 [them] from discovering the true nature of the transaction and the  
27 documents involved therein...." (Id. ¶ 43.) Plaintiffs also allege  
28 these TILA violations were "all discovered within the past year, such

1 that any applicable statute of limitations are extended or should be  
2 extended pursuant to the equitable tolling doctrine....” (Id. ¶ 49.)

3 Plaintiffs’ conclusory concealment allegations are  
4 insufficient to show the statute of limitations period is equitably  
5 tolled. The TILA violations about which Plaintiffs complain occurred at  
6 or prior to the closing of Plaintiffs’ loan transactions in November of  
7 2007, more than two years before the commencement of this action.  
8 Plaintiffs fail to allege what prevented them from discovering  
9 Defendant’s alleged TILA violations within the one year statutory  
10 period. See Ahmad v. World Savings Bank, No. CIV 2:09-520 GEB KJM, 2010  
11 WL 1854108, at \*2 (E.D. Cal. May 6, 2010) (citing Adams v. SCME Mortgage  
12 Bankers, Inc., No. CIV 1:09-201 LJO SMS, 2009 WL 1451715, at \*9 (E.D.  
13 Cal. May 22, 2009) (finding equitable tolling inapplicable since  
14 plaintiff failed to allege facts explaining how she was prevented from  
15 comparing her loan documents and disclosures with TILA statutory and  
16 regulatory requirements)). Therefore, Plaintiffs’ TILA damages claim is  
17 dismissed.

18 **b. TILA Rescission Claim**

19 Defendant’s motion to dismiss Plaintiffs’ TILA rescission  
20 claim is based on its argument that Plaintiffs have not alleged their  
21 ability to tender the property or its reasonable value, which Defendant  
22 alleges is required to state a TILA rescission claim. However, Defendant  
23 fails to provide binding authority to support its position that a  
24 plaintiff’s ability to tender must be alleged at the pleading stage.  
25 Therefore, Defendant’s motion to dismiss Plaintiffs’ TILA rescission  
26 claim is denied.

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1   **2.    The Rosenthal Act**

2           Defendant seeks dismissal of Plaintiffs' Rosenthal Fair Debt  
3 Collections Practices Act ("Rosenthal Act") claim, arguing mortgage  
4 loans are not debt under the Act, and Plaintiffs failed to allege which  
5 sections of the Act Defendant violated "beyond the boilerplate  
6 allegations asserted in support of this claim." (Mot. 4:11-12, 4:20-22.)

7           Plaintiffs' Rosenthal Act claim alleges only that "Defendants  
8 Aurora and Homecomings are debt collectors within the meaning of the  
9 Rosenthal Act." (Compl. ¶ 72.) However, these defendants are not named in  
10 the caption or elsewhere in the complaint. Since Plaintiffs did not  
11 allege the only named defendant is a "debt collector," the claim's  
12 sufficiency is not analyzed, and it is dismissed.

13   **3.    Negligence**

14           Defendant argues Plaintiffs' negligence claim should be  
15 dismissed because it is barred by the applicable statute of limitations,  
16 and Plaintiffs have not alleged facts showing that Defendant owed them  
17 a duty of care. (Mot. 5:4-5, 6:4-8.)

18       **a.    Duty of Care**

19           The elements of a negligence claim are, 1) defendant owed  
20 plaintiff a duty of care, 2) defendant breached that duty, 3) the breach  
21 was the proximate or legal cause of the resulting injury, and 4)  
22 plaintiff was damaged. Ladd v. County of San Mateo, 12 Cal.4th 913, 917  
23 (1996). The existence of a Defendant's legal duty is a question of law  
24 to be determined by the court. Kentucky Fried Chicken of California,  
25 Inc. v. Sup. Ct., 14 Cal.4th 814, 819 (1997).

26           Under California law, "as a general rule, a financial  
27 institution owes no duty of care to a borrower when the institution's  
28 involvement in the loan transaction does not exceed the scope of its

1 conventional role as a mere lender of money." Nymark v. Heart Fed. Sav.  
2 & Loan Ass'n, 231 Cal. App. 3d 1089, 1096 (1991). A duty of care can be  
3 imposed upon the lender, however, in certain circumstances, such as  
4 where "the lender's activities exceed those of a conventional lender."  
5 Osei v. Countrywide Home Loans, 2010 WL 727831, at \*6. "In California,  
6 the test for determining whether a financial institution owes a duty of  
7 care to a borrower-client 'involves the balancing of various factors,  
8 among which are [1] the extent to which the transaction was intended to  
9 affect the plaintiff, [2] the foreseeability of harm to him, [3] the  
10 degree of certainty that the plaintiff suffered injury, [4] the  
11 closeness of the connection between the defendant's conduct and the  
12 injury suffered, [5] the moral blame attached to the defendant's  
13 conduct, and [6] the policy of preventing future harm.'" Nymark, at 1098  
14 (quoting Connor v. Great Western Sav. & Loan Assn. 69 Cal.2d 850, 865  
15 (1968)).

16 Plaintiffs allege Defendant negligently directed them into a  
17 loan for which they "[were] not qualified . . . [and that was] not in  
18 [their] best interests based upon [their] income and the true value of  
19 the Property;" directed them "into a loan transaction that [they] may  
20 not have otherwise qualified for by industry standards, resulting in  
21 excessive fees... and payments in excess of [their] ability to pay;" and  
22 "failed to abide by TILA and RESPA laws." (Compl. ¶¶ 78-80.) Plaintiffs'  
23 negligence claim also incorporates all earlier allegations. (Compl. ¶  
24 76.)

25 Plaintiffs argue in their Opposition that a number of the  
26 incorporated allegations support a finding that Defendant owed them a  
27 duty of care. Specifically, Plaintiffs argue Defendant owed them a duty  
28 of care 1) not to falsify their income and over appraise the property



1 for the purpose of directing them into unfavorable loans, and 2) "not to  
2 misinform [them] about the loan modification process." (Opp'n 6:23-7:5,  
3 7:15-17.)

4 Plaintiffs have provided no authority to support their  
5 argument that lenders owe borrowers a duty of care not to misinform  
6 them about the loan modification process. Therefore, Plaintiffs'  
7 allegations that Defendant misrepresented to them that a permanent loan  
8 modification would be put into place are insufficient to form the basis  
9 of a negligence claim.

10 However, Defendant has not shown Plaintiffs' allegations that  
11 it falsified their income and the subject property's value during the  
12 loan application process fall within its traditional role as a money  
13 lender. Therefore, these allegations are sufficient to state a  
14 negligence claim. See Watkinson v. Mortgageit, Inc., No. 10-cv-327-IEG,  
15 2010 WL 2196083, at \*8-9 (S.D. Cal. June 1, 2010) (holding that  
16 overstating Plaintiff's income and the value of the property on the loan  
17 application knowing both to be false stated a negligence claim).

18 **b. Statute of Limitations**

19 Under California law, negligence claims have a two year  
20 statute of limitations. Cal. Code of Civ. Proc. § 355.1. Since the loans  
21 at issue were entered into in November of 2007, and Plaintiffs filed  
22 their Complaint in December of 2009, Defendant argues Plaintiffs'  
23 negligence claim is barred by the statute of limitations. (Mot. 5:9-10.)  
24 Plaintiffs respond, arguing their negligence claim did not "accrue" when  
25 the loan documents were signed. (Opp'n 5:21-22.)

26 The statute of limitations for Plaintiffs' negligence claim  
27 did not begin to run until the claim "accrued." Cal. Code Civ. Proc. §  
28 312. A claim "accrues" upon the occurrence of the claim's last essential

1 element. Norgart v. Upjohn Co., 21 Cal.4th 383, 397 (1999). "When  
2 damages are an element of a cause of action, the cause of action does  
3 not accrue until the damages have been sustained. Mere threat of future  
4 harm, not yet realized, is not enough." City of Vista v. Robert Thomas  
5 Securities, Inc., 84 Cal.App.4th 882, 886 (2000).

6 Plaintiffs' allegations support the inference that they did  
7 not experience any injury until they were unable to make their mortgage  
8 payments in the spring of 2009. (Compl. ¶¶ 18-20.) See Osei v.  
9 Countrywide Home Loans, 2010 WL 727831, at \*9 (holding similar  
10 allegations supported that the plaintiff's negligence claim did not  
11 "accrue" until plaintiff's loan payments exceeded his ability to pay).  
12 Therefore, Defendant has not shown that Plaintiffs' negligence claim is  
13 barred by the applicable statute of limitations.

14 For the stated reasons, Defendant's motion to dismiss  
15 Plaintiffs' negligence claim is granted and denied in part.

#### 16 **4. RESPA**

17 Defendant seeks dismissal of Plaintiffs' section 2605 Real  
18 Estate Settlement Procedures Act ("RESPA") claim, arguing Plaintiffs'  
19 "conclusory allegations... are wholly insufficient to put Defendants on  
20 notice as to what conduct forms the basis of the RESPA claim." (Mot.  
21 6:16-17.)

22 Plaintiffs allege the following in support of their RESPA  
23 claim: "Defendants violated RESPA at the time of the closing of the Loan  
24 subject to this Complaint by failing to correctly and accurately comply  
25 with one or more of the disclosure requirements provided therein."  
26 (Compl. ¶¶ 86-87.) This allegation is conclusory and does not identify  
27 what information, if any, Defendant failed to disclose or inaccurately  
28

1 disclosed. See Champlaie, 2009 WL 3429622, at \*17 (finding same  
2 allegations insufficient to state a section 2605 RESPA claim).

3 Defendant also argues Plaintiffs' RESPA claim should be  
4 dismissed since "Plaintiff fails to allege any damage" resulting from a  
5 purported RESPA violation. (Mot. 6:19.)

6 Plaintiffs must allege actual harm to plead a section 2605  
7 RESPA claim. Pok v. Am. Home Mortgage Servicing, Inc., No. CIV 2:09-2385  
8 WBS EFB, 2010 WL 476674, at \*5 (E.D. Cal. Feb. 3, 2010); see also Lal v.  
9 Am. Home Servicing, Inc., 680 F. Supp. 2d 1218, 1223 (E.D. Cal. 2010).  
10 Further, "[t]he loss alleged must be related to the RESPA violation  
11 itself....[A]llegations made under a separate cause of action are  
12 insufficient to sustain a RESPA claim for actual damage.... Nor does  
13 simply having to file suit suffice as a harm warranting actual damages."  
14 Lal, 680 F.Supp.2d at 1223.

15 Here, Plaintiffs allege "[a]s a result of Defendant's failure  
16 to comply with RESPA, Plaintiff has suffered and continues to suffer  
17 damages and costs of suit." (Compl. ¶ 88.) "Even under a liberal  
18 pleading standard for harm, this level of generality fails." Pok, 2010  
19 WL 476674, at \*5 (finding same allegation of harm insufficient to state  
20 a section 2605 claim for actual damages). Therefore, Plaintiffs' RESPA  
21 claim is dismissed.

## 22 **5. Breach of Fiduciary Duty**

23 Defendant seeks dismissal of Plaintiffs' breach of fiduciary  
24 duty claim, arguing a lender does not owe a fiduciary duty to a borrower  
25 under California law. (Mot. 7:11-14.)

26 In California, to state a claim for breach of fiduciary duty,  
27 a plaintiff must allege: (1) the existence of a fiduciary relationship;

28

1 (2) the breach of that relationship; and (3) damage proximately caused  
2 thereby. Roberts v. Lomanto, 112 Cal. App. 4th 1553, 1562 (2003).

3 Plaintiffs allege Defendant "is the lender of the loan which  
4 is the subject of this action." (Compl. ¶ 8.) "Absent special  
5 circumstances[,] . . . a loan transaction is [an] at arms-length  
6 [transaction] and there is no fiduciary relationship between the borrower  
7 and lender." Oaks Mgmt. Corp. v. Superior Court, 145 Cal. App. 4th 453,  
8 466 (2006). "A commercial lender is entitled to pursue its economic  
9 interest in a loan transaction. This right is inconsistent with the  
10 obligations of a fiduciary, which require that the fiduciary knowingly  
11 agree to subordinate its interests to act on behalf of and for the  
12 benefit of another." Gonzalez v. First Franklin Loan Services, No. 1:09-  
13 CV-00941 AWI-GSA, 2010 WL 144862, at \*13 (E.D. Cal. Jan. 11, 2010) (citing  
14 Nymark, 231 Cal.App.3d at 1093, n. 1).

15 Plaintiffs' allege in their fiduciary duty claim:

16 Defendants were agents for the Plaintiff by express  
17 and implied contract and by operation of law. [¶]  
18 Plaintiff[s] employed Defendant as [their] agents  
19 for the purpose of obtaining a loan for the  
Property. [¶] Defendants... owed a fiduciary duty  
to the Plaintiff to act primarily for [their]  
benefit...."

20 (Compl. ¶¶ 90, 92, 94.) These allegations are conclusory and insufficient  
21 to support the existence of a fiduciary relationship between Plaintiffs  
22 and Defendant. Therefore, Plaintiffs' breach of fiduciary duty claim is  
23 dismissed.

## 24 **6. Fraud**

25 Defendant seeks dismissal of Plaintiffs' fraud claim, arguing  
26 it fails to comply with Federal Rule of Civil Procedure 9(b) ("Rule  
27 9(b)")'s heightened pleading standard. (Mot. 9:1.)  
28

1 Under California law, the elements of a fraud claim are: (1)  
2 misrepresentation (including, false representation, concealment, or  
3 nondisclosure); (2) knowledge of falsity; (3) intent to induce reliance;  
4 (4) justifiable reliance; and (5) resulting damage. Engalla v. Permanente  
5 Medical Group, Inc., 15 Cal.4th 951, 974 (1997).

6 A claim for fraud in federal court must satisfy Rule 9(b)'s  
7 heightened pleading requirements. See Vess v. Ciba-Geigy Corp., 317 F.3d  
8 1097, 1103 (9th Cir. 2003). This rule provides that "[i]n alleging fraud  
9 or mistake, a party must state with particularity the circumstances  
10 constituting fraud or mistake." The required specificity includes the  
11 "time, place, and specific content of the false representations as well  
12 as the identities of the parties to the misrepresentations." Swartz v.  
13 KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (quoting Edwards v. Marin  
14 Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004)).

15 Plaintiffs' following allegations support their fraud claim:

16 The material representations made by Defendants in  
17 connection with the said loan were false. [¶]  
18 Defendants knew that these material representations  
19 were false when made, or these material  
20 representations were made with reckless disregard  
21 for the truth. Defendants intended that Plaintiff  
22 rely on these material representations. Plaintiff  
23 reasonably relied on said representations. [And a]s  
24 a result of Plaintiff['s] reliance, he was harmed  
25 and suffered damages....

26 (Compl. ¶¶ 103-107.)

27 These allegations are conclusory and do not provide the  
28 specificity required by Rule 9(b). Plaintiffs argue, however, that their  
29 fraud claim nonetheless satisfies Rule 9(b) because it incorporates all  
30 earlier allegations by reference, and that certain of these incorporated  
31 allegations satisfy Rule 9(b)'s requirements. (Opp'n 9:24-10:4.) Contrary  
32 to Plaintiffs' contention, the incorporated allegations are also

1 inadequate to allege fraud since they fail to identify the time, date,  
2 and place of the alleged misrepresentation(s) or the identity of who made  
3 them. Therefore, Plaintiffs' fraud claim is dismissed.

4 **7. California Business & Professions Code § 17200**

5 Defendant argues Plaintiffs' California Business and  
6 Professions Code section 17200 ("§ 17200") claim should be dismissed  
7 because Plaintiffs' allegations are conclusory, and Plaintiffs have not  
8 alleged they suffered "an injury in fact" and "lost either money or  
9 property" as a result of any § 17200 violation. (Mot. 9:19-9:21, 10:25-  
10 11:1.)

11 California's Unfair Competition Law, Cal. Bus. & Prof. Code §  
12 17200, prohibits "unlawful, unfair or fraudulent" business acts and  
13 practices. Because "unfair competition" is defined in the disjunctive,  
14 the statute establishes three separate types actionable conduct,  
15 prohibiting practices that are either "unfair," "unlawful," or  
16 "fraudulent." Cel-Tech Communic'ns, Inc. v. Los Angeles Cellular Tel.  
17 Co., 20 Cal. 4th 163, 180 (1999). "By proscribing 'any unlawful' business  
18 practice, section 17200 'borrows' violations of other laws and treats  
19 them as unlawful practices that the unfair competition law makes  
20 independently actionable." Id. (citation omitted).

21 To state a § 17200 claim, Plaintiff must allege he "suffered  
22 injury in fact and has lost money or property." Cal. Bus. & Prof. Code  
23 § 17204. A plaintiff suffers an "injury in fact" when he or she has "1)  
24 expended money due to the defendant's acts of unfair competition, 2) lost  
25 money or property; or 3) been denied money to which he or she has a  
26 cognizable claim." Hall v. Time Inc., 158 Cal.App.4th 847, 854 (2008).

27 Plaintiffs' only allegation specifying the conduct underlying  
28 the § 17200 claim is that "Plaintiff is informed and believes, that

1 Defendants' acts, as alleged herein, constitute unlawful, unfair, and/or  
2 fraudulent business practices, as defined in the California Business and  
3 Professions Code § 17200 et seq." (Compl. ¶ 111.)

4 This allegation sufficiently states a § 17200 claim for  
5 unlawful business practices since Defendant's dismissal motion is denied  
6 as to Plaintiffs' TILA rescission and negligence claims. Defendant has  
7 not shown that these claims do not provide "unlawful" predicate activity  
8 that may support Plaintiffs' § 17200 claim. Further, since Plaintiffs  
9 allege they have suffered monetary losses as a result of Defendant's  
10 unlawful conduct, including the expenditure of a down payment and ongoing  
11 loan payments, they have adequately alleged that they suffered an "injury  
12 in fact." (Compl. ¶¶ 37, 38, 40, 68 and p. 29:20-21.) Therefore,  
13 Defendant's motion to dismiss Plaintiffs' § 17200 claim is denied.

14 **8. Breach of Contract**

15 Defendant seeks dismissal of Plaintiffs' breach of contract  
16 claim, arguing "[t]hough Plaintiffs contend [the parties] entered into  
17 a written agreement, Plaintiffs fail to identify the agreement," allege  
18 its terms, or any facts which establish that Defendant breached "the  
19 purported agreement." (Mot. 11:12-16.)

20 In California, "[a] cause of action for breach of contract  
21 requires proof of the following elements: (1) existence of the contract;  
22 (2) plaintiff's performance or excuse for nonperformance; (3) defendant's  
23 breach; and (4) damages to plaintiff as a result of the breach." CDF  
24 Firefighters v. Maldonado, 158 Cal. App. 4th 1226, 1239 (2008).

25 Plaintiffs identify the Promissory Notes as the written  
26 agreements at issue in their opposition to the motion. (Opp'n 11:22-24.)  
27 Plaintiffs allege Defendant violated these agreements as follows:  
28

1 [B]y failing to exercise reasonable efforts and due  
2 diligence as promised resulting in Plaintiff  
3 entering into a loan that was not in his best  
4 interests. Defendants also breached their agreement  
5 with Plaintiff by committing the acts stated  
6 herein, including but not limited to failing to  
7 submit an accurate loan application, failing to  
8 supervise, failing to provide loan documents for  
9 Plaintiff['s] review prior to closing, and failing  
10 to explain the loan documents to the Plaintiff.

11 (Compl. ¶ 118.) However, Plaintiffs do not allege that the promissory  
12 notes imposed such obligations on Defendant. See Quintero Family Trust  
13 v. Onewest Bank F.S.B., No. 09-CV-1561-IEG (WVG), at \*13 (S.D. Cal. Jan.  
14 27, 2010) (citing Frances T. v. Vill. Green Owners Ass'n, 42 Cal.3d 490,  
15 512-513 (1986)) (dismissing breach of contract claim based upon Promissory  
16 Note and Deed of Trust where the plaintiffs did not allege which specific  
17 provisions in the agreements imposed the duties upon defendants alleged  
18 by plaintiff).

19 Plaintiffs also argue that Defendant's alleged oral  
20 misrepresentations that it would permanently modify their loans support  
21 their breach of contract claim. (Opp'n 11:24-25.) However, under the  
22 breach of contract claim, Plaintiff alleges only that the parties entered  
23 into a "written agreement." (Compl. ¶ 116.) Plaintiffs did not allege the  
24 existence of any oral agreement. Therefore, Plaintiffs' breach of  
25 contract claim is dismissed.

## 26 **9. Breach of Implied Covenant of Good Faith & Fair Dealing**

27 Defendant seeks dismissal of Plaintiffs' breach of the covenant  
28 of good faith and fair dealing claim, arguing Plaintiffs have not alleged  
a "special relationship" between the parties necessary to recover tort  
damages, and Plaintiffs failed to allege two of the requisite elements  
of this claim. (Mot. 12:13-14, 12:22-23, 12:27-28.) Plaintiffs respond



1 with the conclusory argument that "there is a special relationship  
2 between the parties." (Opp'n 12:21-24.)

3 "There is an implied covenant of good faith and fair dealing  
4 in every contract that neither party will do anything which will injure  
5 the right of the other to receive the benefits of the agreement."  
6 Comunale v. Traders & General Ins. Co., 50 Cal.2d 654, 658 (1958). The  
7 implied covenant "rests upon the existence of some specific contractual  
8 obligation. [It] is read into contracts in order to protect the express  
9 covenants or promises of the contract, not to protect some general public  
10 policy interest not directly tied to the contract's purpose." Racine  
11 Laramie, Ltd. v. Dept. of Parks & Recreation, 11 Cal.App.4th 1026, 1031  
12 (1992). The implied covenant "cannot impose substantive duties or limits  
13 on the contracting parties beyond those incorporated in the specific  
14 terms of [the parties'] agreement." McClain v. Octagon Plaza, LLC, 159  
15 Cal.App.4th 784, 799 (2008). Further, the implied covenant "does not  
16 require parties to negotiate in good faith prior to any agreement."  
17 McClain, 159 Cal. App. 4th at 799.

18 Since the implied covenant is based in contract, compensation  
19 for its breach is almost always limited to contractual remedies. Foley  
20 v. Interactive Data Corp., 47 Cal.3d 654, 684 (1988). Tort remedies are  
21 only available when "the parties are in a 'special relationship' with  
22 'fiduciary characteristics.'" Pension Trust Fund v. Federal Ins. Co.,  
23 307 F.3d 944, 955 (9th Cir. 2002) (applying California law) (citing Mitsui  
24 Mfrs. Bank v. Superior Court, 212 Cal. App. 3d 726, 730 (1989)). "A  
25 central test of whether a lender is subject to this tort is whether there  
26 is a fiduciary relationship in which the financial dependence or personal  
27 security by the damaged party has been entrusted to the other." Id.  
28 (quotations and citations omitted).

1 Plaintiffs allege in this claim that "a duty of good faith and  
2 fair dealing was implied by law into the contract at issue in this action  
3 at its inception." (Compl. ¶ 122.) Plaintiffs further allege Defendant  
4 breached this duty as follows:

- 5 a. By failing to pay at least as much in regards to  
6 Plaintiffs' interests as to Defendants' interests;
- 7 b. Failing to disclose to Plaintiff the true nature  
8 of the loan that is the subject of this action;
- 9 c. Failing to give Plaintiff the requisite notice  
and disclosures.

10 (Compl. ¶123.) However, Plaintiffs do not allege the terms of the  
11 contract(s) entered into between the parties or how Defendant's conduct  
12 frustrated any of its specific provisions. Further, Plaintiffs have not  
13 alleged facts supporting the existence of any "special relationship"  
14 between the parties, or that they "did all, or substantially all of the  
15 significant things that the contract required them to do." (Judicial  
16 Council of California Civil Jury Instruction No. 325, Dec. 15, 2009 ed.)  
17 Moreover, to the extent Plaintiffs' claim is based upon conduct occurring  
18 during pre-loan negotiations, the implied covenant does not apply.  
19 Therefore, Plaintiffs' claim for breach of the implied covenant of good  
20 faith and fair dealing is dismissed.

## 21 **10. Injunctive Relief**

22 Defendant seeks dismissal of Plaintiffs' claim for "injunctive  
23 relief," arguing Plaintiffs have failed to state a single cause of  
24 action, therefore they have not alleged that they will prevail on the  
25 merits at trial. (Mot. 13:9-12.)

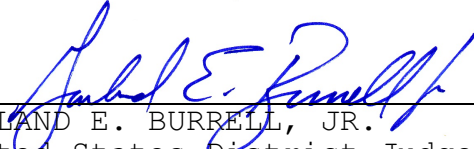
26 Under federal law, an injunction is a remedy, not a claim in  
27 and of itself. See Curtis v. Option One Mortg. Corp., No. 109-cv-1608 AWI  
28 SMS, 2010 WL 599816, at \*13 (E.D. Cal. Feb. 18, 2010) (citing Washington

1 Toxics Coalition v. Environmental Protection Agency, 413 F.3d 1024, 1034  
2 (9th Cir. 2005). Similarly, under California law, an injunction is a  
3 remedy, not a cause of action. Id. (citing Shamsian v. Atlantic Richfield  
4 Co., 107 Cal.App.4th 967, 985 (2003)). Therefore, Plaintiffs' purported  
5 "cause of action" for injunctive relief is dismissed.

6 **IV. CONCLUSION**

7 For the stated reasons, Defendant's motion to dismiss is  
8 granted and denied in part. Plaintiffs are granted ten (10) days from the  
9 date on which this order is filed to file a First-Amended Complaint.

10 Dated: June 29, 2010

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13 \_\_\_\_\_  
GARLAND E. BURRELL, JR.  
United States District Judge