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

JOSEPHINE HOUSE, by her	)	No. CV-F-08-1880 OWW/GSA
guardian ad litem, PUBLIC)	
GUARDIAN OF STANISLAUS	)	MEMORANDUM DECISION AND
COUNTY,	)	ORDER GRANTING IN PART WITH
	)	LEAVE TO AMEND AND DENYING
	)	IN PART DEFENDANTS CAL STATE
Plaintiff,	)	MORTGAGE CO., CAL STATE HOME
	)	LOANS, AND ALEXANDER GOMEZ'S
vs.	)	MOTION TO DISMISS FIRST
	)	AMENDED COMPLAINT (Doc. 25)
	)	AND DEFENDANT MURPHY
CAL STATE MORTGAGE CO.,	)	SABATINO'S MOTION TO DISMISS
et al.,	)	FIRST AMENDED COMPLAINT
	)	(Doc. 30)
)	
Defendants.)	
)	
)	

On December 5, 2008, Plaintiff Josephine House, by her guardian ad litem, Public Guardian of Stanislaus County, commenced this action. Plaintiff is proceeding pursuant to the First Amended Complaint (FAC) filed on February 9, 2009.

A. FIRST AMENDED COMPLAINT.

The FAC alleges that Plaintiff resided with her sister, Joan House, in a home in Turlock, California that they inherited from

1 their parents. Plaintiff is handicapped within the meaning of
2 the Fair Housing Act, 42 U.S.C. § 3602(h); is disabled within the
3 meaning of California Fair Employment and Housing Act (FEHA),
4 California Government Code § 12955.3; is a dependent adult within
5 the meaning of California Welfare & Institutions Code § 15610.23;
6 that her home is a dwelling under the Fair Housing Act, 42 U.S.C.
7 § 3602(B) and a housing accommodation under FEHA, Government Code
8 § 12927(d). Plaintiff is alleged, since 1998, to have been
9 unable to care for her property or transact business because of
10 her disability and has had physical or mental limitations that
11 restrict her ability to carry out normal activities or to protect
12 her rights.

13 Defendants include Alexander Gomez, a licensed real estate
14 broker and president, owner, operator and designated broker of
15 Defendants Cal State Home Loans and Cal State Mortgage Co., Inc.
16 The FAC alleges that each of these defendants is a creditor or
17 lender within the meaning of California Financial Code § 4970(g)
18 and Home Ownership and Equity Protection Act, 15 U.S.C. § 1639 *et*
19 *seq.*, Defendants also are Benjamin Capital, Inc., whose
20 designated officer-broker was Defendant Murray Sabatino, a real
21 estate broker licensed by the California Department of Real
22 Estate. Defendant Larry Menton is alleged to have been the
23 owner-operator of Benjamin Capital, Inc. who personally
24 participated in placing the loans at issue and acted as a broker
25 on behalf of Benjamin Capital and who received a commission,
26 along with Cal State, for each loan extended to Plaintiff.

1 Plaintiff is informed and believes that Defendant Menton was not
2 licensed as a broker by the Department of Real Estate at the time
3 the loans were made to Plaintiff.¹

4 The FAC alleges:

5 A. INTRODUCTION

6 14. Defendants individually and through their
7 agents, have engaged in a continuing pattern
8 or practice of unlawful conduct, including,
9 but not limited to:

10 a. Otherwise making unavailable a
11 dwelling because of disability;

12 b. Imposing discriminatory terms
13 and conditions in connection with
14 the provision of home loans because
15 of disability;

16 c. Discriminating in the provision
17 of real estate services because of
18 disability;

19 d. Charging and collecting
20 excessive and unlawful fees and
21 commission in connection with the
22 provision of home loans;

23 e. Charging excessive and unlawful
24 interest in connection with the
25 provision of home loans;

26 f. Failing or refusing to make
proper disclosures in connection
with the provision of home loans;

g. Breaching their fiduciary
duties; and,

h. Wrongfully depriving a dependent

¹Defaults have been entered against Defendants Benjamin Capital, Inc., and Larry Menton. Also named as a Defendant is Joan House because she is a co-owner of the Turlock home and an indispensable party. Plaintiff does not seek monetary damages against Joan House.

1 adult of property.

2 15. Each of these unlawful practices was
3 committed by each defendant, acting
4 individually or through his or its agents, as
5 part of a scheme to target, defraud, and
injure a poor, disabled, dependent person
whose dwelling had appreciated by stripping
her home of equity.

6 **B. JOSEPHINE HOUSE INHERITS HER PARENTS'
HOUSE AND GETS A MORTGAGE LOAN.**

7
8 16. Josephine House and her sister inherited
9 their parents' home, located at 2025
10 Zinfandel Lane in Turlock. The Turlock home
11 was and remains Plaintiff's only home.
Josephine House is poor because of her
disabilities. She receives only \$700 per
month in supplemental security income.

12 17. Plaintiff and her sister, after
13 inheriting the home, obtained a \$10,000
14 mortgage loan in order to renovate the
kitchen. The plaintiff and her sister were
unable to keep up the payments on that loan,
and by 2005, they faced foreclosure.

15 **C. BENJAMIN CAPITAL SETS UP AND CAL STATE
16 MAKES PREDATORY LOANS TO THE HOUSE SISTERS.**

17 18. An employee or agent of Benjamin Capital
18 arranged for the House sisters to obtain a
19 mortgage loan from Cal State in June, 2005.
Defendants took advantage of the Plaintiff's
disability and financial hardship by placing
her in a new, larger and more expensive
mortgage, even though they knew that
20 Plaintiff lacked the financial resources to
21 repay that loan.

22 19. The plaintiff and her sister obtained a
23 mortgage loan from Cal State on June 27,
24 2005. This closed-end loan was misrepresented
25 by the defendants as a home equity line of
26 credit and was predatory. It was a five-year,
interest-only loan, with a balloon payment
greater than the amount financed. The loan
amount financed was \$22,306.00, of which
\$11,182.76 was deducted to pay off the
outstanding mortgage and an additional

1 \$8,000.00 to pay off unsecured debt. The APR
2 was 20.995%. The finance charge was
3 \$25,863.78. The monthly, interest only
4 payments, were \$335.43, and ran from August
5 1, 2005, to July 1, 2010. The balloon payment
6 in the amount of \$28,379.41 would come due on
7 July 1, 2010. Defendants, as part of this
8 transaction, skimmed excessive, unearned and
9 unlawful fees, commissions and charges from
10 the loan proceeds.

11 20. Less than six months later, defendants
12 gave another even larger and more expensive
13 loan to the plaintiff and her sister. The
14 plaintiff and her sister obtained the current
15 mortgage loan from Cal State on December 7,
16 2005. This closed-end loan was misrepresented
17 as a home equity line of credit and is
18 predatory. It is a five-year, interest-only
19 loan, with a balloon payment greater than the
20 amount financed. The loan amount financed is
21 \$40,353.52, of which \$28,742.75 was deducted
22 to pay off the first Cal State mortgage loan.
23 The APR is 18.941%. The finance charge is
24 \$41,619.85. The monthly, interest-only
25 payments are \$549.19, and run from February
26 1, 2006, to January 1, 2011. The balloon
payment in the amount of \$49,571.16. comes
due on January 1, 2011. Defendants, as part
of this transaction, failed to provide the
plaintiff with proper notice of her right to
cancel the loan and skimmed unearned,
excessive and unlawful fees, commissions and
charges from the loan proceeds.

21. Each of these mortgage loans was
predatory, arranged by Benjamin Capital,
Inc., Larry Menton and/or Murphy Sabatino and
their agents, and extended by Cal State to
the plaintiff and her sister as part of
defendants' scheme to collect excessive and
unlawful fees, commissions and charges,
excessive and unlawful interest, and was
calculated to strip equity from the Turlock
home.

22. Defendants knew or should have known that
Josephine House was disabled, dependent,
restricted in her ability to carry out normal
activities or protect her rights, and
Defendants knew or should have known that the

1 plaintiff and her sister could not afford to
2 repay either of the Cal State loans and that
3 their conduct was likely to harm the
4 plaintiff. Defendants and/or their agents
5 made material misrepresentations to the
6 plaintiff, on and before July 1, 2005 and
7 December 15, 2005, the dates that each of
8 these loans closed, claiming that each of
9 these loans was in her best interest and that
10 the fees, commission, charges and interest
11 assessed were lawful. Josephine House
12 reasonably relied upon defendants' and their
13 agents' misrepresentations, and has suffered
14 injury as a result.

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D. THE COUNTY APPOINTS CONSERVATORS FOR THE HOUSE SISTERS.

23. The Superior Court for Stanislaus County appointed the County's Public Guardian as conservator for Josephine House, and a private conservator for Joan House, in January 2008.

E. HOUSE RESCINDS THE CAL STATE LOAN.

24. Josephine House rescinded the Cal State loans on November 21, 2008.

F. DEFENDANTS INJURED PLAINTIFF.

25. The plaintiff, because of defendants' unlawful acts or practices, has suffered from emotional distress, and attendant bodily injury, has suffered violation of her rights, loss of dignity, embarrassment and otherwise has sustained injury and harm. Plaintiff has also suffered economic losses due to defendants' predatory lending. Plaintiff accordingly is entitled to compensatory damages.

26. Defendants, in doing the acts of which plaintiff complains, acted with knowledge, intent, oppression, fraud and malice, and with wanton and conscious or reckless disregard of the federally and state protected rights of plaintiff. Plaintiff, accordingly, is entitled to punitive damages.

27. There now exists an actual controversy

1 between the parties regarding defendants'
2 duties under the federal and state lending
3 and fair housing laws. Plaintiff,
4 accordingly, is entitled to declaratory
5 relief.

6 28. Defendants, unless enjoined, will
7 continue to engage in the unlawful acts and
8 the pattern or practice of discrimination
9 described above. Plaintiff has no adequate
10 remedy at law. Plaintiff is now suffering and
11 will continue to suffer irreparable injury
12 from defendants' acts and their pattern or
13 practice of unlawful conduct and
14 discrimination against persons with
15 disabilities unless relief is provided by
16 this Court. Plaintiff, accordingly, is
17 entitled to injunctive relief.

18 The FAC alleges ten claims for relief:

19 First Claim for Relief - discriminatory
20 housing practices in violation of the Fair
21 Housing Act, 42 U.S.C. § 3601 (FHA);

22 Second Claim for Relief - unlawful practices
23 in violation of the Home Ownership and Equity
24 Protection Act of 1994, 15 U.S.C. § 1639 *et*
25 *seq.* (HOEPA);

26 Third Claim for Relief - unlawful practices
27 in violation of Real Estate Settlement
28 Procedures Act, 12 U.S.C. § 2601 *et seq.*
29 (RESPA);

30 Fourth Claim for Relief - unlawful practices
31 in violation of the Truth in Lending Act, 15
32 U.S.C. § 1601 *et seq.* (TILA);

33 Fifth Claim for Relief - unlawful practices
34 in violation of California Covered Loans Act,
35 California Financial Code § 4970 *et. seq.*
36 (CCLA);

37 Sixth Claim for Relief - discriminatory
38 housing practices in violation of FEHA,
39 California Government Code § 12955 *et seq.*
40 (FEHA);

41 Seventh Claim for Relief - Fraud;

1 Eighth Claim for Relief - breach of fiduciary
2 duty in violation of California Business and
3 Professions Code § 10176;

4 Ninth Claim for Relief - dependent person
5 abuse in violation of California Welfare and
6 Institutions Code §§ 15610 *et seq.* and 15657;

7 Tenth Claim for Relief - pattern or practice
8 of unlawful conduct in violation of
9 California Business and Professions Code §
10 17200.

11 The FAC prays for compensatory, statutory and punitive damages
12 according to proof. The FAC also prays for a judgment that:

13 2. Declares that defendants have violated
14 the provisions of the applicable federal and
15 state laws;

16 3. Enjoins all unlawful practices complained
17 about and imposes affirmative injunctive
18 relief requiring defendants, their partners,
19 agents, employees, assignees, and all persons
20 acting in concert or participating with them,
21 to take affirmative action to address the
22 effect of their unlawful and discriminatory
23 conduct;

24 4. Awards up to three times the amount of
25 actual damages to plaintiff against each
26 defendant pursuant to Civil Code § 3345.

The FAC also prays for attorneys' fees and costs and "all such
other relief as the Court deems just."

Defendants Gomez, Cal State Home Loans and Cal State
Mortgage Co., Inc., move to dismiss the FAC for failure to state
a claim upon which relief can be granted as barred by the
applicable statutes of limitation; that mortgage lenders do not
owe borrowers a fiduciary duty; and for failure to satisfy the
pleading requirements for fraud set forth in Rule 9(b), Federal
Rules of Civil Procedure. Defendant Sabatino moves to dismiss

1 the FAC as barred by the applicable statutes of limitation; for
2 failure to satisfy Rule 9(b); that the Fifth Claim for Relief
3 fails to allege facts sufficient to establish that the loan is a
4 "covered loan" under California Financial Code § 4970; that
5 Plaintiff failed to seek administrative relief pursuant to FEHA
6 as to the Sixth Claim for Relief and failed to establish that her
7 FEHA claim is based upon the requisite housing accommodations
8 governed by the California Government Code; and that the Eighth
9 Claim for breach of fiduciary duty under California Business and
10 Professions Code does not provide a private right of action. The
11 Cal State Defendants join Sabatino's motion to dismiss.

12 B. GOVERNING STANDARDS.

13 1. Motion to Dismiss - Rule 12(b)(6).

14 A motion to dismiss under Rule 12(b)(6) tests the
15 sufficiency of the complaint. *Novarro v. Black*, 250 F.3d 729,
16 732 (9th Cir.2001). Dismissal of a claim under Rule 12(b)(6) is
17 appropriate only where "it appears beyond doubt that the
18 plaintiff can prove no set of facts in support of his claim which
19 would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-
20 46 (1957). Dismissal is warranted under Rule 12(b)(6) where the
21 complaint lacks a cognizable legal theory or where the complaint
22 presents a cognizable legal theory yet fails to plead essential
23 facts under that theory. *Robertson v. Dean Witter Reynolds,*
24 *Inc.*, 749 F.2d 530, 534 (9th Cir.1984). In reviewing a motion to
25 dismiss under Rule 12(b)(6), the court must assume the truth of
26 all factual allegations and must construe all inferences from

1 them in the light most favorable to the nonmoving party.
2 *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir.2002). However,
3 legal conclusions need not be taken as true merely because they
4 are cast in the form of factual allegations. *Ileto v. Glock,*
5 *Inc.*, 349 F.3d 1191, 1200 (9th Cir.2003). "A district court
6 should grant a motion to dismiss if plaintiffs have not pled
7 'enough facts to state a claim to relief that is plausible on its
8 face.'" *Williams ex rel. Tabiu v. Gerber Products Co.*, 523 F.3d
9 934, 938 (9th Cir.2008), quoting *Bell Atlantic Corp. v. Twombly*,
10 550 U.S. 544, 570 (2007). "'Factual allegations must be enough
11 to raise a right to relief above the speculative level.'" *Id.*
12 "While a complaint attacked by a Rule 12(b)(6) motion to dismiss
13 does not need detailed factual allegations, a plaintiff's
14 obligation to provide the 'grounds' of his 'entitlement to
15 relief' requires more than labels and conclusions, and a
16 formulaic recitation of the elements of a cause of action will
17 not do." *Bell Atlantic, id.* at 555. A claim has facial
18 plausibility when the plaintiff pleads factual content that
19 allows the court to draw the reasonable inference that the
20 defendant is liable for the misconduct alleged. *Id.* at 556. The
21 plausibility standard is not akin to a "probability requirement,"
22 but it asks for more than a sheer possibility that a defendant
23 has acted unlawfully, *Id.* Where a complaint pleads facts that
24 are "merely consistent with" a defendant's liability, it "stops
25 short of the line between possibility and plausibility of
26 'entitlement to relief.'" *Id.* at 557. In *Ashcroft v. Iqbal*, _____

1 U.S. ___, 129 S.Ct. 1937 (2009), the Supreme Court explained:

2 Two working principles underlie our decision
3 in *Twombly*. First, the tenet that a court
4 must accept as true all of the allegations
5 contained in a complaint is inapplicable to
6 legal conclusions. Threadbare recitations fo
7 the elements of a cause of action, supported
8 by mere conclusory statements, do not suffice
9 ... Rule 8 marks a notable and generous
10 departure from the hyper-technical, code-
11 pleading regime of a prior era, but it does
12 not unlock the doors of discovery for a
13 plaintiff armed with nothing more than
14 conclusions. Second, only a complaint that
15 states a plausible claim for relief survives
16 a motion to dismiss ... Determining whether a
17 complaint states a plausible claim for relief
18 will ... be a context-specific task that
19 requires the reviewing court to draw on its
20 judicial experience and common sense ... But
21 where the well-pleaded facts do not permit
22 the court to infer more than the mere
23 possibility of misconduct, the complaint has
24 alleged - but it has not 'show[n]' - 'that
25 the pleader is entitled to relief.'

26 In keeping with these principles, a court
27 considering a motion to dismiss can choose to
28 begin by identifying pleadings that, because
29 they are no more than conclusions, are not
30 entitled to the assumption of truth. While
31 legal conclusions can provide the framework
32 of a complaint, they must be supported by
33 factual allegations. When there are well-
34 pleaded factual allegations, a court should
35 assume their veracity and then determine
36 whether they plausibly give rise to an
37 entitlement to relief.

38 Immunities and other affirmative defenses may be upheld on
39 a motion to dismiss only when they are established on the face of
40 the complaint. See *Morley v. Walker*, 175 F.3d 756, 759 (9th
41 Cir.1999); *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th
42 Cir. 1980) When ruling on a motion to dismiss, the court may
43 consider the facts alleged in the complaint, documents attached

1 to the complaint, documents relied upon but not attached to the
2 complaint when authenticity is not contested, and matters of
3 which the court takes judicial notice. *Parrino v. FHP, Inc*, 146
4 F.3d 699, 705-706 (9th Cir.1988).

5 2. Rule 9(b).

6 Rule 9(b) requires that, in all averments of fraud, the
7 circumstances constituting fraud be stated with particularity.
8 One of the purposes behind Rule 9(b)'s heightened pleading
9 requirement is to put defendants on notice of the specific
10 fraudulent conduct in order to enable them to adequately defend
11 against such allegations. See *In re Stac Elec. Litig.*, 89 F.3d
12 1399, 1405 (9th Cir.1996). Furthermore, Rule 9(b) serves "to
13 deter the filing of complaints as a pretext for the discovery of
14 unknown wrongs, to protect [defendants] from the harm that comes
15 from being subject to fraud charges, and to prohibit plaintiffs
16 from unilaterally imposing upon the court, the parties and
17 society enormous social and economic costs absent some factual
18 basis." *Id.*

19 Rule 9(b) requires that allegations of fraud be specific
20 enough to give defendants notice of the particular misconduct
21 which is alleged to constitute the fraud charged to that they can
22 defend against the charge and not just deny that they have done
23 anything wrong. *Celado Int'l., Ltd. v. Walt Disney Co.*, 347
24 F.Supp.2d 846, 855 (C.D.Cal.2004); see also *Neubronner v. Milkin*,
25 6 F.3d 666, 671 (9th Cir.1993). As a general rule, fraud
26 allegations must state "the time, place and specific content of

1 the false representations as well as the identities of the
2 parties to the misrepresentation." *Schreiber Distrib. v. Serv-*
3 *Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.1986). As
4 explained in *Neubronner v. Milken, supra*, 6 F.3d at 672:

5 This court has held that the general rule
6 that allegations of fraud based on
7 information and belief do not satisfy Rule
8 9(b) may be relaxed with respect to matters
9 within the opposing partys' knowledge. In
10 such situations, plaintiffs cannot be
11 expected to have personal knowledge of the
12 relevant facts ... However, this exception
13 does not nullify Rule 9(b); a plaintiff who
14 makes allegations on information and belief
15 must state the factual basis for the belief.

11 C. STATUTES OF LIMITATIONS.

12 Initially, Defendants moved to dismiss the HOEPA, RESPA,
13 TILA, and FEHA claims (Second, Third, Fourth, and Sixth Claims
14 for Relief) on the ground that they were barred by the one-year
15 statutes of limitations applicable to those claims, the FHA
16 (First Claim for Relief) as barred by the two-year statute of
17 limitations, and the CCLA and fraud claims (Fifth and Seventh
18 Claims for Relief) as barred by the three-year statute of
19 limitations applicable to those claims. Noting that the FAC
20 alleges that Plaintiff obtained the First Loan on June 27, 2005
21 and the Second Loan on December 7, 2005 and contending that
22 Plaintiff did not file this action until December 8, 2008,
23 Defendants argued that all of these claims for relief are time-
24 barred.

25 The docket initially showed that this action was commenced
26 on December 8, 2008. However, on May 7, 2009, after the motions

1 to dismiss had been filed, a Clerk's Notice of Docket Correction
2 was filed:

3 The Date Filed date for 1 Complaint and 2
4 Motion to Appoint Guardian Ad Litem has been
5 changed to reflect the actual date filed
6 date, 12/5/2008. Initial filing fee in this
7 matter tendered on 12/5/2008.

8 To the extent Defendants' motions to dismiss were based on the
9 December 8, 2008 filing date for the Complaint, the motions to
10 dismiss are DENIED.

11 Plaintiff argues that those claims for relief subject to a
12 three-year statute of limitations with respect to the December
13 2005 Loan are not time-barred because of the allegation in
14 Paragraph 22 of the FAC the December 2005 Loan closed on December
15 15, 2005.

16 Plaintiff acknowledges that the statute of limitations for
17 damages under HOEPA and TILA (Second and Fourth Claims for
18 Relief) is one-year. She asserts that the statute of limitations
19 for rescission under HOEPA and TILA is three years, 15 U.S.C. §
20 1635(f), and contends that Defendants' motions to dismiss fail to
21 acknowledge the rescission remedy available to Plaintiff.

22 Defendants reply that the FAC does not seek rescission of
23 the loans and refer to the only allegation in the FAC mentioning
24 rescission, i.e., Paragraph 24, where Plaintiff avers that she
25 "rescinded the Cal State loans on November 21, 2008."

26 The FAC does not seek rescission under HOEPA or TILA. There
is no claim for rescission in the FAC nor does the prayer for
relief seek rescission. If Plaintiff intends to seek rescission

1 under HOEPA or TILA, Plaintiff must amend to so allege.

2 Plaintiff argues that FHA, HOEPA, RESPA and TILA claims
3 (First, Second, Third, and Fourth Claims for Relief) are subject
4 to equitable tolling. See *King v. State of California*, 784 F.2d
5 910, 915 (9th Cir.1986), cert. denied, 484 U.S. 802
6 (1987) (equitable tolling available in a TILA action); *Brewer v.*
7 *IndyMac Bank*, 609 F.Supp.2d 1104, 1118 (E.D.Cal.2009) (equitable
8 tolling available in a RESPA action); *Matthews v. New Century*
9 *Mortg. Corp.*, 185 F.Supp.2d 874, 883 (S.D.Ohio 2002) (applying
10 equitable tolling to a FHA claim); *In re Community Bank of*
11 *Northern Virginia*, 418 F.3d 277, 305 (3rd Cir.2005) (equitable
12 tolling available to HOEPA claim). Plaintiff, noting that
13 equitable tolling has been applied where mental incompetence is
14 shown, see *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir.1999),²
15 refers to the allegations in Paragraph 4 of the FAC:

16 Josephine House, since at least 1998, has
17 been unable to care for her property or
18 transact business because of her disability.
19 Josephine House, at all times relevant to
20 this action, has had physical or mental
21 limitations that restrict her ability to
22 carry out normal activities or to protect her
23 rights.

24 Plaintiff also refers to the allegation in Paragraph 23 that the
25 Public Guardian was appointed as conservator for Plaintiff in
26

23 ²Plaintiff also cites *Brockamp v. United States*, 67 F.3d 260,
24 263 (9th Cir.1995), rev'd on other grounds, 519 U.S. 347 (1997) as
25 authority that mental incompetence constitutes a ground of
26 equitable tolling. However, the Supreme Court reversed the Ninth
Circuit, holding that the statutory limitations period on tax
refund claims does not authorize equitable tolling and was not
equitably tolled by a taxpayers' mental disabilities.

1 January 2008. These allegations, Plaintiff contends,
2 sufficiently plead equitable tolling of the applicable statutes
3 of limitations for the FHA, HOEPA, RESPA and TILA claims.

4 Defendants reply that these allegations do not sufficiently
5 allege equitable tolling based on mental incapacity. Defendants
6 cite *Robles v. Leppke*, 2007 WL 2462058 (E.D.Cal.2007), where
7 Judge Ishii, in adopting a recommendation of dismissal for
8 failure to state a claim, stated:

9 Equitable tolling may be applied when
10 extraordinary circumstances beyond a
11 plaintiff's control made it impossible to
12 file a claim on time. *Stoll v. Runyon*, 165
13 F.3d 1238, 1242 (9th Cir.1999). Mental
14 incapacity and the effect it has upon the
15 ability to file a lawsuit is an
16 'extraordinary circumstance' beyond a
17 plaintiff's control. *Id.* The objections'
18 allegations alone are insufficient to
19 establish a valid claim for equitable tolling
20 because they are vague and unsupported by any
21 medical diagnosis or other evidence showing
22 Plaintiff's mental or medical state during
23 the limitation period. See *Grant v.*
24 *McDonnell Douglas Corp.*, 163 F.3d 1136, 1138
25 (9th Cir.1998) (holding letter from
26 psychologist inadequate basis for equitable
tolling); *Stoll v. Runyon*, 165 F.3d 1238,
1242 (9th Cir.1999) (stating that equitable
tolling is proper where 'overwhelming
evidence' demonstrates that complainant was
completely disabled during the limitations
period.

Both *Grant* and *Stoll*, relied upon by Judge Ishii, involved
review of summary judgments, not the adequacy of pleading.

Defendants also cite *Miller v. Rosenker*, 578 F.Supp.2d 67
(D.D.C.2008), which did involve a motion to dismiss. However, in
that case, the plaintiff alleged that he suffered from severe

1 panic disorder and depression, which the District Court concluded
2 is not evidence of the type of "total incapacity" necessary to
3 warrant equitable tolling, *id.* at 72, and did not allege that he
4 had been adjudged incompetent or had a guardian appointed for
5 him. *Id.*

6 The Court finds that the FAC does not allege specific facts
7 from which it may be inferred that Plaintiff is entitled to
8 equitable tolling of the statutes of limitation based on mental
9 disability. No specific facts are alleged concerning the nature
10 of Plaintiff's mental disability or her status as a dependent
11 adult. The appointment of a conservator in January 2008,
12 outside the scope of the limitations period, fails to demonstrate
13 that Plaintiff is entitled to equitable tolling based on mental
14 incapacity at the time the loans were obtained.

15 Regardless of equitable tolling, Plaintiff further argues
16 that the HOEPA and TILA "rescission" claims (Second and Fourth
17 Claims for Relief) are not barred by the statute of limitations
18 because the loans were not consummated until January 2008, when
19 Plaintiff was appointed a conservator. Plaintiff refers to 15
20 U.S.C. § 1635(f): "An obligor's right of rescission shall expire
21 three years after the date of consummation of the transaction
22" Regulation Z, 12 C.F.R. § 226.2(a)(13), defines
23 "consummation" as "the time that a consumer becomes contractually
24 obligated on a credit transaction." As explained in *Jackson v.*
25 *Grant*, 890 F.2d 118, 120 (9th Cir.1989):

26 When a consumer 'becomes contractually

1 obligated' is, in turn, determined by looking
2 to state law:

3 1. *State law governs.* When a
4 contractual obligation on the
5 consumer's part is created is a
6 matter to be determined under
7 applicable law; Regulation Z does
8 not make this determination. A
9 contractual commitment agreement,
10 for example, that under applicable
11 law binds the consumer to the
12 credit terms would be consummation.
13 Consummation, however, does not
14 occur merely because the consumer
15 has made some financial investment
16 in the transaction ... unless, of
17 course, applicable law holds
18 otherwise.

19 12 C.F.R. Pt. 225, Supp.1 (Official Staff
20 Interpretations), Commentary 2(a)(13).

21 California Civil Code § 1550 sets forth the elements of a
22 contract:

23 It is essential to the existence of a
24 contract that there should be:

- 25 1. Parties capable of contracting;
- 26 2. Their consent;
- 27 3. A lawful object; and
- 28 4. A sufficient cause or consideration.

29 California Civil Code § 1556 provides that "[a]ll persons are
30 capable of contracting, except ... persons of unsound mind"

31 Plaintiff cites California Civil Code § 39:

32 (a) A ... contract of a person of unsound
33 mind, but not entirely without understanding,
34 made before the incapacity of the person has
35 been judicially determined, is subject to
36 rescission, as provided in Chapter 2
(commencing with Section 1688) of Title 5 of
Part 2 of Division 3.

1 (b) A rebuttable presumption affecting the
2 burden of proof that a person is of unsound
3 mind shall exist for purposes of this section
4 if the person is substantially unable to
5 manage his or her own financial resources or
6 resist fraud or undue influence. Substantial
7 inability may not be proved solely by
8 isolated incidents of negligence or
9 improvidence.

10 Plaintiff also cites California Civil Code § 1689(b)(7):

11 A party to a contract may rescind the
12 contract in the following cases:

13 ...

14 (7) Under the circumstances
15 provided for in Section[] 39

16 Relying on Paragraph 4 of the FAC, Plaintiff contends that
17 she has alleged sufficient facts to raise the presumption that
18 she lacked capacity to consummate the loans at the times they
19 were obtained for the purpose of her HOEPA and TILA claims.
20 Plaintiff argues that the "earliest date on which both loans were
21 consummated for these purposes was January 2008" and that
22 Defendants "cannot establish any statute of limitation bar to
23 Plaintiff's TILA and HOEPA claims."

24 Again, Defendants point out that the FAC does not allege any
25 claims for rescission. *See discussion supra.* Defendants further
26 argue that the FAC fails to allege facts that she was of "unsound
27 mind." Defendants contend:

28 There is only the claim that she had
29 'physical or mental limitations that restrict
30 her ability to carry out normal activities to
31 protect her rights.' ... This broad statement
32 lacks any reference to Ms. House's ability to
33 manage her finances, or her ability to resist
34 fraud or undue influence. As such, the Court

1 must speculate that Ms. House is entitled to
2 the rebuttable presumption, and speculation
is not permissible.

3 The FAC does not allege specific facts from which it may be
4 inferred that Plaintiff was incapable of entering into the loan
5 contracts in July and December 2005. No facts describing
6 Plaintiff's mental disability are alleged; the allegations that
7 Plaintiff was mentally disabled and is a dependent adult are
8 conclusory.

9 Plaintiff argues that Defendants' refusal to rescind
10 Plaintiff's loans constitutes an independent TILA violation.
11 Plaintiff refers to the allegation in Paragraph 24 of the FAC
12 that she rescinded the Cal State loans on November 21, 2008.
13 [Presumably, the TAC means that the Public Guardian rescinded the
14 loans]. Plaintiff cites *Miguel v. Country Funding Corp.*, 309
15 F.3d 1161, 1165 (9th Cir.2002) as holding that "[w]hen a creditor
16 refuses to cancel a loan after receiving timely notice of
17 rescission, the creditor violates TILA." See also *Brewer v.*
18 *IndyMac Bank, supra*, 609 F.Supp.2d at 1114:

19 Where a creditor refuses to cancel a loan
20 after receiving timely notice of rescission,
21 the creditor violates TILA ... Pursuant to 15
22 U.S.C. § 1640(e), the obligor has one year
from the date of refusal to file suit for
damages arising out of the failure to
rescind.

23 Plaintiff contends that "[i]t can be inferred from the complaint
24 that the Defendants failed to cancel the loans after Ms. House
25 rescinded them, therefore, the complaint alleges an independent
26 claim under 15 U.S.C. subdivision 1640(e)."

1 However, as Defendants reply, no where does the FAC allege
2 that Defendants refused to cancel the loans after Plaintiff
3 timely and properly rescinded them. If Plaintiff intends to
4 proceed with this claim, she must allege it.

5 Plaintiff argues that the statutes of limitations applicable
6 the supplemental state law claims are tolled pursuant to
7 California Code of Civil Procedure § 352(a).

8 Section 352(a) provides:

9 If a person entitled to bring an action ...
10 is, at the time the cause of action accrued
11 ... insane, the time of the disability is not
 part of the time limited for the commencement
 of the action.

12 Insanity, for purposes of Section 352, is defined as "'a
13 condition of mental derangement which renders the sufferer
14 incapable of caring for [her] property or transacting business,
15 or understanding the nature or effects of [her] acts.'" *DeRose v.*
16 *Carswell*, 196 Cal.App.3d 1011, 1027 (1987), quoting *Hsu v. Mt.*
17 *Zion Hospital*, 259 Cal.App.2d 562, 571 (1968). Plaintiff also
18 refers to California Welfare and Institutions Code § 15610.23(a):

19 'Dependent adult' means any person between
20 the ages of 18 and 64 years who resides in
21 this state and who has physical or mental
22 limitations that restrict his or her ability
23 to carry out normal activities or to protect
 his or her rights, including, but not limited
 to, persons who have physical or mental
 abilities that have diminished because of
 age.

24 Defendants reply that the allegations in Paragraph 4 are the
25 "quintessential example of legal conclusions 'cast in the form of
26 factual allegations.'"

1 Defendants are correct that no facts are alleged from which
2 it may be inferred that Plaintiff is "insane" within the meaning
3 of Section 352 or is a "dependent adult" within the meaning of
4 Section 15610.23(a).

5 Plaintiff argues her fraud claim (Seventh Claim for Relief)
6 is timely under the discovery rule.

7 Pursuant to California Code of Civil Procedure § 338(d), a
8 claim for relief on the ground of fraud "is not deemed to have
9 accrued until the discovery, by the aggrieved party, of the facts
10 constituting the fraud."

11 With regard to the December 2005 loan, Plaintiff refers to
12 the allegation in Paragraph 22 that "Defendants and/or their
13 agents made material misrepresentations to the plaintiff, on and
14 before July 1, 2005 and December 15, 2005, the dates that each of
15 these loans closed, claiming that each of these loans was in her
16 best interest and that the fees, commission, charges and interest
17 assessed were lawful." Plaintiff contends that Defendants'
18 contention that Plaintiff necessarily knew the terms of the
19 December 2005 loan at the time she obtained it and agreed to its
20 terms is unavailing:

21 Defendants cannot assume that Plaintiff must
22 have had knowledge of the loan terms when the
23 loans were entered into on 2005 [sic], solely
24 because the complaint filed on her behalf by
her guardian ad litem ... in 2008, recited
the loan terms.

25 Plaintiff argues that she is entitled to the delayed
26 discovery rule with respect to the July 2005 loan.

1 As explained in *General Bedding Corp. v. Echevarria*, 947
2 F.2d 1395, 1397 (9th Cir.1991):

3 Discovery, for purposes of § 388(4) [now §
4 388(d)], is not limited to actual knowledge:

5 The rule is that the plaintiff must
6 *plead and prove the facts* showing:
7 (a) Lack of knowledge. (b) Lack of
8 means of obtaining knowledge (in
9 the exercise of reasonable
10 diligence the facts could not have
11 been discovered at an earlier
12 date). (c) How and when he did
13 actually discover the fraud or
14 mistake. Under this rule
15 constructive and presumed notice or
16 knowledge are the equivalent to
17 knowledge. So, when the plaintiff
18 has notice or information of
19 circumstances to put a reasonable
20 person on inquiry, or has the
21 opportunity to obtain knowledge
22 from sources open to his
23 investigation (such as public
24 records or corporation books) the
25 statute begins to run.

26 ... Thus, plaintiff has discovered its claim
under § 338(4) [now § 388(d)], and the
statute begins to run, when it has actual or
constructive notice of its claims.

27 "A plaintiff whose complaint shows on its face that his claim
28 would be barred without the benefit of the discovery rule must
29 specifically plead facts to show (1) the time and manner of
30 discovery and (2) the inability to have made earlier discovery
31 despite reasonable diligence. The burden is on the plaintiff to
32 show diligence, and conclusory allegations will not withstand
33 demurrer.'" *E-Fab, Inc. v. Accountants, Inc. Services*, 153
34 Cal.App.4th 1308, 1319 (2007).

35 The FAC does not comply with these pleading requirements

1 with regard to the July 2005 loan. Plaintiff cites *Lee Myles*
2 *Associates Corp. v. Paul Rubke, Enterprises, Inc.*, 557 F.Supp.2d
3 1134, 1138 (S.D.Cal.2008), wherein the District Court ruled: "The
4 Complaint does not allege when Plaintiff discovered the alleged
5 fraud or when it could have discovered it. To the extent
6 Defendants contend the fraud claim is untimely, their motion to
7 dismiss is denied."

8 The District Court is not bound by a decision of another
9 District Court. The requirements for application of the
10 discovery rule in California are clear; Plaintiff must make the
11 requisite allegations.

12 Defendants' motion to dismiss the FAC as barred by the
13 statute of limitations is GRANTED WITH LEAVE TO AMEND.

14 D. COMPLIANCE WITH RULE 9(b).

15 Defendants move for dismissal of the fraud claim (Seventh
16 Claim for Relief) on the ground that the FAC does not comply with
17 the requirements of Rule 9(b).

18 The Seventh Claim for Relief, after incorporating all
19 preceding allegations, alleges:

20 42. Defendant Menton engaged in the
21 fraudulent acts and practices alleged above
22 and misrepresented the costs and nature of
the loans obtained by Plaintiff from Cal
State in July 2005 and December 2005.

23 43. Plaintiff is informed and believes that
24 defendant Gomez knowingly misrepresented,
25 and/or knowingly permitted, approved, or
26 ratified the misrepresentation of a close-end
loan as an open-end loan for both the July
2005 loan and December 2005 loan in order to
maximize fees, commissions, interest and

1 costs otherwise prohibited by law.

2 44. Cal State engaged in the fraudulent acts
3 and practices alleged above and knowingly
4 concealed the terms of the loans and the
5 costs associated with the loans obtained in
6 July 2005 and December 2005. Plaintiff is
7 informed and believes that Cal State
8 knowingly placed her into a loan they knew or
9 should have known she could not afford to
10 repay and knew or should have known that she
11 would face foreclosure. Defendants in so
12 doing collected excessive and unlawful fees,
13 commissions, interest and costs and stripped
14 equity from Plaintiff's home.

15 45. Plaintiff is informed and believes that
16 defendant Murphy Sabatino participated by
17 telephone, on or about November, 2005, in
18 making a loan to the plaintiff and
19 misrepresenting and/or concealing its terms.
20 Plaintiff is further informed and believes
21 that defendant Sabatino aided and abetted
22 defendant Menton in collecting and charging
23 commissions in violation of state law on both
24 of the loans extended by Cal State.

25 46. Defendants Menton and Cal State and
26 their agents knew or should have known that
Plaintiff was a dependent adult as described
above.

47. Each Defendant injured plaintiff by
committing fraud against her, a disabled
person, in violation of California Civil Code
§§ 1571, 1573, and 1575, among other
statutes.

Plaintiff, citing *Moore v. Kayport Package Express., Inc.*,
885 F.2d 531, 540 (9th Cir.1989), and *Swartz v. KPMG LLP*, 476
F.3d 756, 764 (9th Cir.2007), argues that exceptions to
application of Rule 9(b) have been recognized where it is unjust
to require the Plaintiff to plead the requisite facts.

In *Moore v. Kayport Package Express*, the Ninth Circuit
discussed the particularity requirements in allegations of

1 corporate fraud under Section 10(b) and Rule 10b-5. The
2 complaint alleged that defendants had fraudulently inflated the
3 market price of securities before plaintiffs bought them.
4 Defendants challenged the allegations because they were based on
5 information and belief, and failed to specify the conduct of each
6 defendant. The Ninth Circuit ruled:

7 In *Wool*, we explained that allegations of
8 fraud based on information and belief usually
9 do not satisfy the particularity requirements
10 under rule 9(b) ... However, the rule may be
11 relaxed as to matters within the opposing
12 party's knowledge. For example, in cases of
13 corporate fraud, plaintiffs will not have
14 personal knowledge of all of the underlying
15 facts ... 'In such cases, the particularity
16 requirement may be satisfied if the
17 allegations are accompanied by a statement of
18 the facts on which the belief is founded.'
19 ... Instances of corporate fraud may also
20 make it difficult to attribute particular
21 fraudulent conduct to each defendant as an
22 individual. To overcome such difficulties in
23 cases of corporate fraud, the allegations
24 should include the misrepresentations
25 themselves with particularity and, where
26 possible, the roles of the individual
defendants in the misrepresentations

18 In the present case, the prospectuses are not
19 specifically identified as to content, date,
20 or author. The complaint does not specify
21 which plaintiff received which prospectus, or
22 which plaintiff(s) made purchases through the
23 stockbroker defendants, or which securities
24 the investors allegedly purchased. The
25 investors' allegations do not adequately
26 state the facts on which their belief is
founded, and thus fail to satisfy even the
relaxed standard in *Wool* ... Moreover, unlike
the situation in *Wool*, the accountant, lawyer
and stockbroker defendants in this case are
not a narrowly defined group of corporate
officers or directors who are alleged to have
had day-to-day control over the fraudulent
entities or their finances.

1 In *Swartz v. KPMG LLP*, the Ninth Circuit ruled:

2 Swartz's original complaint included several
3 allegations detailing the time, place, and
4 content of representations made by KPMG and B
5 & W to Swartz. No one disputes that Swartz
6 satisfied his pleading burden with respect to
7 those defendants. Rather, Presidio and DB
8 claim that because the complaint failed to
9 specify any false representations *made by*
10 *them*, it failed the Rule 9(b) standard.
11 Swartz argues that since DB and Presidio
12 would be liable for the misrepresentations of
13 their co-conspirators, and since he plea a
14 conspiracy, the allegations concerning the
15 KPMG and B & W misrepresentations are
16 sufficient

17 First, there is no absolute requirement that
18 where several defendants are sued in
19 connection with an alleged fraudulent scheme,
20 the complaint must identify *false statements*
21 made by each and every defendant.

22 'Participation by each conspirator in every
23 detail in the execution of the conspiracy is
24 unnecessary to establish liability, for each
25 conspirator may be performing different tasks
26 to bring about the desired result.' ... On
the other hand, Rule 9(b) does not allow a
complaint to merely lump multiple defendants
together but 'require(s) plaintiffs to
differentiate their allegations when suing
more than one defendant ... and inform each
defendant separately of the allegations
surrounding his alleged participation in the
fraud.' ... In the context of a fraud suit
involving multiple defendants, a plaintiff
must, at a minimum, 'identif[y] the role of
[each] defendant [] in the alleged fraudulent
scheme.'

27 Relying on these cases, Plaintiff argues:

28 Defendants' argument that the Plaintiff, a
29 dependent adult, must recall the actual time
30 and place of each statement is indicative of
31 their persistent failure to acknowledge the
32 allegations of Plaintiff's mental disability.
33 It would be unjust to allow the Cal State
34 Defendants to use the same disability that
35 allowed them to take advantage of Ms. House
36

1 in the first place to also prevent her from
2 asserting a claim against them.

3 As Defendants reply, the cases upon which Plaintiff relies
4 do not constitute authority excusing Plaintiff from compliance
5 with the requirements of Rule 9(b). The requirements were
6 relaxed in very specific circumstances and did not excuse the
7 requirements in their entirety. While the FAC alleges that
8 Plaintiff is mentally disabled, no details of her disability are
9 given, other than that they are serious enough to justify the
10 appointment of a public conservator in January 2008. If
11 Plaintiff cannot remember when alleged misrepresentations were
12 made or who made them, Plaintiff cannot state a claim for relief
13 for fraud.

14 Plaintiff nonetheless argues that the FAC satisfies Rule
15 9(b)'s specificity requirements because the FAC alleges facts
16 specific enough to give Defendants notice of the particular
17 misconduct that is alleged to constitute the fraud. Plaintiff
18 argues that the failure of the FAC to allege the specific
19 statements made, when and where the statements were made, and by
20 whom should be disregarded:

21 First, it would require the Court to ignore a
22 critical fact in this case, i.e., that
23 Plaintiff is a dependent adult with limited
24 mental capacity ... Second, when multiple
25 defendants are involved in an alleged
26 fraudulent scheme there is no absolute
requirement that the Plaintiff must identify
false statements made by each and every
defendant.

The Cal State Defendants reply that the allegations of the

1 FAC do not pass muster:

2 Merely explaining that Cal State was the
3 lender in both transactions is insufficient,
4 where there are no allegations explaining the
5 misrepresentations that Cal State purportedly
6 made ... Ms. House does allege that Cal State
7 'knowingly concealed the terms of the loans
8 and the costs associated with the loans
9 obtained in July 2005 and December 2005[,]
10 but this statement fails to allege how Cal
11 State accomplished this alleged concealment.
12 What did Cal State tell Ms. House, who said
13 it, when did they say it, where did they saw
14 it, and how does it follow that the terms
15 were 'concealed' when they were disclosed to
16 Ms. House in writing? These are all details
17 that are necessary to state a claim for
18 fraud, but Ms. House has pled none of this
19 information

20 Ms. House's allegations related to Defendant
21 Alexander Gomez do not fill this void, for
22 numerous reasons. First, Plaintiff alleges
23 that Defendant Gomez misrepresented that the
24 loans were open-ended, but she does so on
25 information and belief ... [F]raud
26 allegations on information and belief are
only permissible where the information is
solely within the opposing party's knowledge
... If Defendant Gomez in fact made such a
statement to Plaintiff, then it is not solely
within Cal State's knowledge. As such,
Plaintiff's allegation on information and
belief does not suffice. Second, even if the
statements were appropriately pled as being
within Plaintiff's knowledge, they are
lacking the requisite information. They do
not specify when, where, or to whom Defendant
Gomez purportedly made the statements, nor do
they explain the falsity of the statements
... Plaintiff's Complaint [sic] asks the
Court to take it for granted that Cal State
had contact with Plaintiff and made
misrepresentations directly to her, but her
Complaint [sic] contains no facts which
support this.

27 The Cal State Defendants further reply that the FAC does not
28 explain each defendants' role in the allegedly fraudulent

1 conduct:

2 This omission is critical because, as the
3 lender, Cal State normally does not
4 communicate directly with the borrower.
5 Ordinarily, the borrower communicates only
6 with the mortgage broker. The only
7 allegations specific to the Cal State
8 Defendants fail to identify when, where, or
9 to whom the purported misrepresentations were
10 made ... This lack of specificity is most
11 likely the result of the fact that Ms. House
12 never communicated with Cal State, other than
13 through the written loan agreement.
14 Additionally, these allegations fail to
15 explain how a false misrepresentation
16 occurred when the true terms of the loans
17 were disclosed to Ms. House in writing ...
18 Plaintiff claims that '[i]t is not necessary
19 for Plaintiff to allege that the terms of the
20 loan documents were altered in order for
21 there to be a misrepresentation[,] but this
22 fact is fundamental to Plaintiff's claim
23 because it goes to the falsity requirement
24 ... How can there have been a false
25 representation if Ms. House agreed to the
26 terms of the loans and those terms did not
subsequently change? This omission renders
Plaintiff's claim incomplete.

16 The Cal State Defendants motion to dismiss the Seventh Claim
17 for Relief for failure to comply with Rule 9(b) is GRANTED WITH
18 LEAVE TO AMEND.

19 As to Defendant Sabatino, Plaintiff refers to the
20 allegations that Sabatino is a licensed real estate broker and
21 the designated officer-broker of Benjamin Capital and that
22 Benjamin Capital, Larry Menton and/or Sabatino arranged the loans
23 at issue, that Defendants, including Sabatino misrepresented that
24 the loans were in her best interest and that the fees,
25 commissions, charges and interest were lawful, and that Sabatino,
26 on information and belief, participated by telephone in November

1 2005 in making the loan for Plaintiff and misrepresenting and/or
2 concealing its terms. Plaintiff argues that these allegations
3 are sufficient to identify the circumstances of Sabatino's fraud
4 because Sabatino filed an Answer to the FAC.

5 Defendant Sabatino replies that, if the November 2005
6 telephone call actually occurred, Plaintiff is required to plead
7 the details of the phone call, i.e., what was said, what
8 purported representations were made, and why they were false. He
9 argues that the filing of the Answer generally denying
10 Plaintiff's allegations does not negate his motion to dismiss
11 based on non-compliance with Rule 9(b). Sabatino refers to Rule
12 15(a)(3), Federal Rules of Civil Procedure:

13 Unless the court orders otherwise, any
14 required response to an amended pleading must
15 be made within the time remaining to respond
16 to the original pleading or within 10 days
17 after service of the amended pleading,
18 whichever is later.

19 Sabatino cites *General Mills, Inc. v. Kraft Foods Global, Inc.*,
20 495 F.3d 1378, 1380-1381 (Fed.Cir.2007), which states that a
21 defendant facing a deadline to file an answer to the amended
22 pleading may do so without jeopardizing the right to file a
23 motion to dismiss.

24 Defendant Sabatino's motion to dismiss the Seventh Claim for
25 Relief for failure to comply with Rule 9(b) is GRANTED WITH LEAVE
26 TO AMEND.

Defendants further argue that the specificity requirements
of Rule 9(b) should apply to all of the claims for relief alleged

1 in the FAC. Defendants cite *Stickrath v. Globalstar, Inc.*, 527
2 F.Supp.2d 992, 997-998 (N.D.Cal.2007):

3 Fraud is not an essential element of either a
4 UCL or CLRA claim, but that does not mean
5 that heightened pleading never applies to
6 such claims. *Vess v. Ciba-Geigy Corp.*, 317
7 F.3d 1097, 1103 (9th Cir.2003). To the
8 contrary:

9 In cases where fraud is not a
10 necessary element of a claim, a
11 plaintiff may choose nonetheless to
12 allege in the complaint that the
13 defendant has engaged in fraudulent
14 conduct. In some cases, the
15 plaintiff may allege a unified
16 course of fraudulent conduct and
17 rely entirely on that course of
18 conduct as the basis of a claim.
19 In that event, the claim is said to
20 be 'grounded in fraud' or to 'sound
21 in fraud,' and the pleading of that
22 claim as a whole must satisfy the
23 particularity requirement of Rule
24 9(b)

25 In other cases, however, a
26 plaintiff may choose not to allege
a unified course of fraudulent
conduct in support of a claim, but
rather to allege some fraudulent
and some non-fraudulent conduct.
In such cases, only the allegations
of fraud are subject to Rule 9(b)'s
heightened pleading requirements.

27 *Id.* at 1103-04.

28 Plaintiffs thus correctly argue that Rule
29 9(b) does not necessarily apply to
30 allegations of non-fraudulent conduct.
31 However, they fail to persuade the Court that
32 their allegations are not based on a 'unified
33 course of fraudulent conduct.' *Id.* at 1103.
34 Plaintiffs allege that Defendants failed to
35 disclose material information about the
36 quality of its service and also made
affirmative misrepresentations about that
quality. The alleged omissions and

1 misrepresentations in this case therefore go
2 hand in hand, with all of the allegations
3 related to how Defendants advertised its
4 service. Accordingly, this Court concludes
5 that the heightened pleading requirements of
6 Rule 9(b) apply to Plaintiffs' claims in
7 their entirety.

8 Plaintiff argues that the FAC does not rely entirely on a
9 course of fraudulent conduct as the basis for her claims and,
10 therefore, she is not required to comply with Rule 9(b) as to any
11 claims for relief other than the Seventh Claim for Relief.

12 Plaintiff cites *Vess v. Ciby-Geigy, supra*, 317 F.3d at 1104,
13 where in cases where a plaintiff does not allege a unified course
14 of fraudulent conduct, the Ninth Circuit cited *Ross v. Bolton* 904
15 F.2d 819, 823 (2nd Cir.1990), that "[t]o require that non-fraud
16 allegations be stated with particularity merely because they
17 appear in a complaint alongside fraud averments ... serves no
18 similar reputational-preserving function, and would impose a
19 burden on plaintiffs not contemplated by the notice pleading
20 requirements of Rule 9(b)."

21 As Defendants reply, the ten claims for relief alleged in
22 the FAC are all premised on the same factual allegations:

23 Plaintiff points to no facts in her
24 Opposition which reveal a separate basis for
25 her non-fraud claims; this is because the
26 facts alleged by Plaintiff in her Complaint
27 [sic], which are incorporated into every
28 single claim, all revolve around the alleged
29 misrepresentations that were made by one or
30 all of the defendants ... In other words,
31 Plaintiff uses the same facts to support her
32 fraud claim that she uses for all her other
33 claims. Although Ms. House adds more
34 detailed allegations to her fraud claim that
35 do not exist in her general background, the

1 general facts still all turn on the
2 Defendants' purported misrepresentations, and
 therefore sound in fraud.

3 Defendants' motions to dismiss on this ground are GRANTED
4 WITH LEAVE TO AMEND.

5 E. FIFTH CLAIM FOR RELIEF - VIOLATION OF CCLA.

6 Defendants move to dismiss the Fifth Claim for Relief for
7 violation of California Covered Loans Act, California Financial
8 Code § 4970 *et seq.* on the ground that the FAC alleges no facts
9 establishing that the loan at issue is actually a "covered loan"
10 as defined by Section 4970(b):

11 'Covered loan' means a consumer loan in which
12 the original principal balance of the loan
13 does not exceed the most current conforming
14 loan limit for a single-family first mortgage
15 loan established by the Federal National
16 Mortgage Association in the case of a
17 mortgage or deed of trust, and where one of
18 the following conditions are met:

19 (1) For a mortgage or deed of
20 trust, the annual percentage rate at
21 consummation of the transaction will exceed
22 by more than eight percentage points the
23 yield on Treasury securities having
24 comparable periods of maturity on the 15th
25 day of the month immediately preceding the
26 month in which the application for the
 extension of credit is received by the
 creditor.

 (2) The total points and fees
 payable by the consumer at or before closing
 for a mortgage or deed of trust will exceed 6
 percent of the total loan amount.

 Defendants cite *Pottinger v. Accredited Home Lenders, Inc.*,
2009 WL 616445 (E.D.Cal.2009), which dismissed a claim for
violation of Section 4970 because Plaintiff alleged no facts

1 indicating that the loan qualified as "covered" under the
2 section. Defendants argue that there is no indication in the FAC
3 "what the actual points and fees were, what the conforming loan
4 limits for a single-family residence were at the time of the
5 loans, or what the Treasury yields were at the time of the
6 loans."

7 Plaintiff asserts that the FAC alleges facts from which it
8 may be inferred that the loans were "covered;"

9 Plaintiff's Complaint provides [Defendants]
10 with the dates, annual percentage rate and
11 the amounts financed of each loan (FAC ¶¶ 19,
12 20). The allegations in the complaint, read
13 with Subdivision 4790(b) ... establish that
14 the July and December loans meet the
15 statutory definition of covered loans because
16 they have annual percentage rates exceeding
17 eight percentage points of the yield on
18 Treasury Securities at the time relevant to
19 this action and the loans do not exceed the
20 conforming loan limit set by Fannie Mae.

21 Defendants' motion to dismiss the Fifth Claim for Relief is
22 GRANTED WITH LEAVE TO AMEND. Plaintiff must allege the specific
23 facts from which it may be inferred that the loans at issue were
24 "covered" loans within the meaning of the statute.

25 F. SIXTH CLAIM FOR RELIEF - VIOLATION OF FEHA.

26 Defendants move to dismiss the Sixth Claim for Relief for
discriminatory housing practices in violation of FEHA, California
Government Code §§ 12955 et seq. on various grounds.

1. Failure to Exhaust Administrative Remedies.

Defendants, citing *Rojo v. Kliger*, 52 Cal.3d 65, 83 (1990),
an employment discrimination case, move to dismiss the Sixth

1 Claim for Relief on the ground that Plaintiff has not alleged
2 exhaustion of administrative remedies.

3 However, as Plaintiff notes, Government Code § 12989.1
4 provides that an "aggrieved person" may commence a civil action
5 for discriminatory housing practice "whether or not a complaint
6 has been filed under this part and without regard to the status
7 of any complaint."

8 Defendants' motion to dismiss on this ground is DENIED.

9 2. Government Code § 12955(i).

10 Defendants move to dismiss the Sixth Claim for Relief to the
11 extent the FAC purports to state a claim for violation of Section
12 12955(i), making it unlawful:

13 For any person or other organization or
14 entity whose business involves real estate-
15 related transactions to discriminate against
16 any person in making available a transaction,
 or in the terms and conditions of a
 transaction, because of ... disability.

17 Defendants argue that the FAC contains no allegations that
18 Defendants discriminated against Plaintiff in the terms and
19 conditions of the Cal State loans based on her claimed protected
20 status: "The Cal State loans were in fact made available to
21 Plaintiff, and Plaintiff has not alleged that the terms were any
22 different because of her disabled status."

23 Plaintiff argues that Paragraphs 14 and 18-22 allege that
24 Defendants imposed discriminatory terms and conditions with the
25 provision of the loans and discriminated in the provision of real
26 estate services because of her disability. Plaintiff cites

1 *Matthews v. New Century Mortgage Corp.*, 185 F.Supp.2d 874, 885-
2 887 (S.D.Ohio 2002) and *Hargraves v. Capital City Mortgage Corp.*,
3 140 F.Supp.2d 7, 19-22 (D.D.C.2000), for the proposition that
4 making predatory loans with unfair terms and conditions targeted
5 at protected classes of persons violates the FHA. Plaintiff
6 cites California Government Code § 12955.6: "Nothing in this part
7 shall be construed to afford to the classes protected under this
8 part, fewer rights or remedies that the federal Fair Housing Act
9 Amendments Act of 1988 ... and its implementing regulations (24
10 C.F.R. 100.1 *et seq.*"

11 *Matthews* discussed a claim of "reverse redlining" in
12 violation of the FHA:

13 'Reverse redlining' is the situation in which
14 a lender unlawfully discriminates by
15 extending credit to a neighborhood or class
16 of people (typically living in the same
17 neighborhood) on terms less favorable than
18 would have been extended to people outside
19 the particular class at issue ... In like
20 fashion, the Plaintiffs in this case allege
21 that New Century violated the FHA by granting
22 them a loan on grossly unfair terms based on
23 their age, sex and marital status, and that
24 such terms would not have been extended to
25 credit applicants who were not elderly,
26 unmarried women.

... The elements of a reverse redlining claim
brought under the FHA, 42 U.S.C. § 3605, are
a variation of the elements that typically
must be shown for a claim of discrimination
under § 3605. A plaintiff invoking § 3605
must demonstrate the same factors that she
would have to demonstrate for a Title VII
claim. See *Babin*, 18 F.3d at 346 (finding
that the plaintiffs must show: (1) that they
were members of a protected class; (2) that
they attempted to engage in a 'real estate-
related transaction' with the defendant and

1 met all relevant qualifications for doing so;
2 (3) that defendant lender refused to transact
3 business with the plaintiffs despite their
4 qualifications; and (4) that the defendant
5 lender continued to engage in that type of
6 transaction with other parties with similar
7 qualifications).

8 To set forth a cognizable reverse redlining
9 claim under § 3605, essentially the same
10 elements must be established, except that the
11 plaintiff need not show that the lender
12 refused to transact business, but only that
13 the lender refused to transact business on
14 *fair terms*. Specifically, to establish a
15 *prima facie* case of discrimination in
16 violation of § 3605 based on reverse
17 redlining, the plaintiff must show: (1) that
18 she is a member of a protected class; (2)
19 that she applied for and was qualified for
20 loans; (3) that the loans were given on
21 grossly unfavorable terms; and (4) that the
22 lender continues to provide loans to other
23 applicants with similar qualifications, but
24 on significantly more favorable terms ... In
25 the alternative, if the plaintiff presents
26 direct evidence that the lender intentionally
targeted her for unfair loans on the basis of
sex and marital status, the plaintiff need
not also show that the lender makes loans on
more favorable terms to others. See
Hargraves, 140 F.Supp.2d at 20 (finding that
such a requirement would allow an injustice
to continue so long as it was visited
exclusively on one class of people).

19 This Court finds that the Plaintiffs have
20 alleged sufficient facts to survive the
21 motion to dismiss their claim under § 3605.
22 First, the Plaintiffs clearly are members of
23 a protected class. Second, they applied for
24 and were qualified for loans. Third, the
25 Plaintiffs have alleged that New Century gave
26 them their loans on grossly unfavorable
terms. Finally, while the Defendant is
correct that the Plaintiffs have not alleged
that other similarly situated people were
given loans on more favorable terms, the
Plaintiffs have nonetheless presented a
cognizable claim, as they allege and may be
able to show directly that New Century

1 intentionally targeted them for unfair loans
2 on the basis of their sex and marital status,
3 thus eliminating the necessity of proving the
4 fourth element of the *prima facie* case.

5 Although the FAC does not allege that Defendants provided
6 loans to other applicants with similar qualifications, but on
7 significantly more favorable terms, the FAC does allege in
8 Paragraph 15 that "[e]ach of these unlawful practices was
9 committed by each defendant ... as part of a scheme to target ...
10 a poor, disabled, dependent person whose dwelling had appreciated
11 by stripping her home of equity." There are no other specific,
12 factual allegations that Defendants targeted Plaintiff or others
13 for allegedly grossly unfair loans on the basis of disability,
14 e.g., whether Defendants contacted Plaintiff and others with
15 mental disabilities in order to make these loans.

16 Defendant Sabatino argues that he was the designated officer
17 for Benjamin Capital, the loan broker:

18 [M]ortgage brokers do not set the terms of
19 loans. Thus, to the extent any
20 discriminatory terms exist, those would have
21 been determined by Cal State, not defendant
22 Sabatino. Defendant Sabatino did not make
23 any loan with plaintiff.

24 Sabatino's argument ignores the conclusory allegations in
25 Paragraphs 10 and 11 that each defendant was the agent of the
26 other and that Defendants conspired to violated federal and state
27 laws. Because Rule 9 applies to conspiracy claims, heightened
28 specificity is required.

29 Sabatino replies by referring to Plaintiff's citation to
30 California Government Code § 12927(h)(2), contending that

1 Plaintiff made no reference to the statute applying to
2 refinancing loans. Section 12927(h) (2) provides:

3 'Real estate-related transactions' include
4 any of the following:

5 (1) The making or purchasing of
6 loans or providing other financial assistance
7 that is for the purpose of purchasing,
8 constructing, improving, repairing, or
9 maintaining a dwelling, or that is secured by
10 residential real estate.

11 (2) The selling, brokering, or
12 appraising of residential real property.

13 Sabatino cites no authority that FEHA does not apply to the
14 refinancing of residential real estate loans and the statute is
15 broad enough to cover such transactions.

16 Plaintiff further argues that the FAC states a claim for
17 violation of Sections 12955(g) and (k):

18 It shall be unlawful:

19 ...

20 (g) For any person to aid, abet, incite,
21 compel, or coerce the doing of any of the
22 acts or practices declared unlawful in this
23 section, or attempt to do so.

24 ...

25 (k) To otherwise make unavailable or deny a
26 dwelling based on discrimination because of
... disability

27 Plaintiff refers to the allegations in Paragraph 15 that
28 each of the unlawful practices alleged in Paragraph 14 "was
29 committed by each defendant, acting individually or through his
30 or its agents, as part of a scheme to target, defraud, and injure
31 a poor, disabled, dependent person whose dwelling had appreciated

1 by stripping her home of equity."

2 However, as Sabatino replies, the FAC fails to allege
3 specific facts from which it may be inferred that he aided or
4 abetted or conspired with the other defendants to violate FEHA.

5 With respect to Section 12955(k), Plaintiff, relying on
6 Paragraph 14, argues that the "loans arranged by Defendant
7 Sabatino, in concert with Defendants Benjamin Capital and Menton
8 and extended by the Cal State Defendants, imposed excessive and
9 illegal charges, fees and other terms and conditions that will
10 inevitably deprive Ms. House of her property."

11 Plaintiff's reliance on Section 12955(k) to state a claim is
12 without merit. Plaintiff owns her home; she refinanced a prior
13 \$10,000 dollar loan because she was facing foreclosure due to her
14 inability to pay that prior loan. Plaintiff cites no authority
15 and none has been located that her position is a valid
16 construction of Section 12955(k).

17 Defendants' motion to dismiss the Sixth Claim for Relief is
18 GRANTED WITH LEAVE TO AMEND.

19 G. EIGHTH CLAIM FOR BREACH OF FIDUCIARY DUTY.

20 1. Cal State Defendants.

21 The Cal State Defendants move to dismiss the Eighth Claim
22 for Relief for breach of fiduciary duty in violation of
23 California Business and Professions Code § 10176 on the ground
24 that these defendants did not owe Plaintiff a fiduciary duty as
25 lenders of the loans. See *Price v. Wells Fargo Bank*, 213
26 Cal.App.3d 465, 476 (1989):

1 It has long been regarded as 'axiomatic that
2 the relationship between a bank and its
3 depositor arising out of a general deposit is
4 that of a debtor and creditor.' ... 'A debt
5 is not a trust and there is not a fiduciary
6 relation between a debtor and creditor as
7 such.' ... The same principle should apply
8 with even greater clarity to the relationship
9 between a bank and its loan customers.

10 Plaintiff does not dispute this law. However, citing *inter*
11 *alia*, *Saunders v. Superior Court*, 27 Cal.App.4th 832, 846 (1994),
12 Plaintiff argues that the Cal State Defendants may be liable for
13 the claim of breach of fiduciary duty on the ground of aiding and
14 abetting.

15 *Saunders*, citing Rest.2d Torts, § 876, held that
16 "[l]iability may also be imposed on one who aids and abets the
17 commission of an intentional tort if the person (a) knows the
18 other's conduct constitutes a breach of duty and gives
19 substantial assistance or encouragement to the other to so act
20"

21 Plaintiff refers to the allegations in Paragraph 5 that
22 Defendant Gomez is a licensed real estate broker and contends
23 that, therefore, he is fully aware of the duty a real estate
24 broker owes to his or her client. Plaintiff also refers to the
25 allegations in Paragraph 12:

26 Plaintiff is informed and believes that each
defendant (except Joan House) knew that the
other defendants' conduct breached their duty
to plaintiff and each defendant gave
substantial assistance or encouragement to
the other defendants' conduct.

Plaintiff contends that she has pled sufficient facts alleging

1 that the Cal State Defendants were aware that Defendants
2 Sabatino, Benjamin Capital and its agent Menton owed a fiduciary
3 duty to the Plaintiff and that their conduct breached the duty
4 owed to Plaintiff. Plaintiff further refers to the allegations
5 in Paragraphs 19-21 of the FAC:

6 19. The plaintiff and her sister obtained a
7 mortgage loan from Cal State on June 27,
8 2005. This closed-end loan was misrepresented
9 by the defendants as a home equity line of
10 credit and was predatory. It was a five-year,
11 interest-only loan, with a balloon payment
12 greater than the amount financed. The loan
13 amount financed was \$22,306.00, of which
14 \$11,182.76 was deducted to pay off the
15 outstanding mortgage and an additional
16 \$8,000.00 to pay off unsecured debt. The APR
17 was 20.995%. The finance charge was
18 \$25,863.78. The monthly, interest only
19 payments, were \$335.43, and ran from August
20 1, 2005, to July 1, 2010. The balloon payment
21 in the amount of \$28,379.41 would come due on
22 July 1, 2010. Defendants, as part of this
23 transaction, skimmed excessive, unearned and
24 unlawful fees, commissions and charges from
25 the loan proceeds.

26 20. Less than six months later, defendants
gave another even larger and more expensive
loan to the plaintiff and her sister. The
plaintiff and her sister obtained the current
mortgage loan from Cal State on December 7,
2005. This closed-end loan was misrepresented
as a home equity line of credit and is
predatory. It is a five-year, interest-only
loan, with a balloon payment greater than the
amount financed. The loan amount financed is
\$40,353.52, of which \$28,742.75 was deducted
to pay off the first Cal State mortgage loan.
The APR is 18.941%. The finance charge is
\$41,619.85. The monthly, interest-only
payments are \$549.19, and run from February
1, 2006, to January 1, 2011. The balloon
payment in the amount of \$49,571.16. comes
due on January 1, 2011. Defendants, as part
of this transaction, failed to provide the
plaintiff with proper notice of her right to

1 cancel the loan and skimmed unearned,
2 excessive and unlawful fees, commissions and
charges from the loan proceeds.

3 21. Each of these mortgage loans was
4 predatory, arranged by Benjamin Capital,
5 Inc., Larry Menton and/or Murphy Sabatino and
6 their agents, and extended by Cal State to
7 the plaintiff and her sister as part of
8 defendants' scheme to collect excessive and
unlawful fees, commissions and charges,
9 excessive and unlawful interest, and was
10 calculated to strip equity from the Turlock
11 home.

12 Plaintiff argues that the Cal State Defendants provided
13 encouragement to the Broker Defendants in breaching their
14 fiduciary duty by providing excessive commissions for each loan
15 the brokers obtained from the Plaintiff.

16 Defendants reply that the FAC does not satisfy the
17 requirements set forth in *Twombly*:

18 This allegation does not explain how or why
19 Cal State was aware of the Broker Defendants'
20 fiduciary relationship with Ms. House, nor
21 does it provide any specific facts
22 substantiating Plaintiff's claim that Cal
23 State provided excessive commission [sic] to
24 the Broker Defendants. There are no amounts
25 listed to demonstrate whether the actual
26 commissions paid were substantial, or enough
to amount to 'encouragement.'

27 Paragraph 11 of the FAC alleges that Defendants conspired to
28 violate federal and state laws and that "[t]he fiduciary duty
29 owned by any one defendant to plaintiff therefore was owed by
30 each defendant to plaintiff."

31 As Defendants reply, a party, such as Cal State, will not be
32 held liable for conspiracy where the party could not be in
33 violation of the underlying act. In *Saunders*, the Rest. 2d

1 Torts, provides that liability may be imposed against an aider
2 and abettor of an intentional tort who "gives substantial
3 assistance to the other in accomplishing a tortious result and
4 *the person's own conduct, separately considered, constitutes a*
5 *breach of duty to the third person.*" [Emphasis added]. Although
6 Plaintiff does not rely on this basis for aider and abettor
7 liability, there are the allegations in Paragraph 11. Defendants
8 cite *Doctor's Co. v. Superior Court*, 49 Cal.3d 39, 47 (1989):

9 [T]he *Gruenberg-Wise* rule does not preclude
10 the subjection of agents to conspiracy
11 liability for conduct which the agents carry
12 out 'as individuals for their individual
13 advantage' and not solely on behalf of the
14 principal ... The limited nature of that rule
15 is also consistent with two cases ... In each
16 of those cases a plaintiff, defrauded by
17 means of one defendant's violation of a
18 fiduciary duty, was allowed to recover
19 against another defendant who, though not
20 subject to the fiduciary's duty, had
21 conspired in the fraud. Since the non-
22 fiduciary defendants had acted not simply as
23 agents or employees of the fiduciary
24 defendants but rather in furtherance of their
25 own financial gain, they could not have been
26 relieved from liability under the *Gruenberg-*
Wise rule.

19 Relying on Plaintiff's assertion in her opposition brief that the
20 Cal State Defendants "provided encouragement to the Broker
21 Defendants in breaching their fiduciary duty by providing
22 excessive commissions for each loan," Defendants argue that
23 Plaintiff's position "forecloses the possibility that Cal State
24 was acting for their own individual advantage, as this statement
25 explains that the Broker Defendants are the ones who obtained
26 excessive commissions, not Cal State."

1 The Cal State Defendants' motion to dismiss is GRANTED WITH
2 LEAVE TO AMEND.

3 2. Defendant Sabatino.

4 Defendant Sabatino moves to dismiss the Eighth Claim for
5 breach of fiduciary duty in violation of California Business and
6 Professions Code § 10176 on the ground that Section 10176 does
7 not provide a private right of action.

8 Business and Professions Code § 10176 provides:

9 The commissioner may, upon his or her own
10 motion, and shall, upon the verified
11 complaint in writing of any person,
12 investigate the actions of any person engaged
13 in the business or acting in the capacity of
14 a real estate licensee within this state, and
15 he or she may temporarily suspend or
16 permanently revoke a real estate license at
17 any time where the licensee, while a real
18 estate licensee, in performing or attempting
19 to perform any of the acts within the scope
20 of this chapter has been guilty of any of the
21 following: [list of prohibited actions or
22 omissions].

23 Defendant Sabatino cites, *inter alia*, *Walters v. Marler*, 83
24 Cal.App.3d 1 (1978). In *Walters*, Walters, the buyer of improved
25 real estate, retained Leseman, a real estate agent with Lampliter
26 Realty, whose broker of record was Proulx. After purchasing the
residence, Walters discovered that only a small portion of the
residence was located on the designated lot. Walters sued the
seller, the seller's broker and agent, and Lampliter, Leseman and
Proulx. Based on evidence that Proulx was the president of
Lampliter and its qualifying real estate broker and that Leseman
was a real estate broker employed by Lampliter, Walters contended

1 that, as the qualifying broker for Lampliter, Proulx was
2 individually liable for his negligence in the performance of his
3 duty to supervise. *Id.* at 35. The Court of Appeal rejected the
4 argument:

5 Despite this evidence of negligence on
6 Proulx' part, Proulx may not be held
7 individually liable to Walters for injuries
8 sustained as a result of Leseman's
9 misrepresentations. The noncontractual
10 rights and liabilities of a real estate
11 broker are governed and determined by the
12 general laws of agency ... In the instant
13 case, Leseman was undeniably an agent for
14 both Walters and Lampliter; however, he was
15 not an agent for Proulx. Any action by the
16 qualifying broker, Proulx, must be regarded
17 as an action by the corporation and not by
18 the broker as an individual. Thus, as an
19 agent of the corporation, Proulx owed a duty
20 to Lampliter to supervise the work of
21 Lampliter employees. Proulx may therefore be
22 liable to Lampliter in an action for
23 indemnification. However, Proulx owed no
24 duty to Walters to supervise Leseman's work;
25 he therefore may not be held personally
26 liable to Walters for Leseman's negligent
misrepresentation.

17 *Id.*

18 Plaintiff responds that Defendant's argument that California
19 does not recognize a private right of action directly against a
20 corporate officer-broker for alleged violations of Section 11076
21 is "misleading." Plaintiff cites *Wyatt v. Union Mortgage Co.*, 24
22 Cal.3d 773, 782 (1979):

23 A mortgage loan broker is customarily
24 retained by a borrower to act as the
25 borrower's agent in negotiating an acceptable
26 loan. All persons engaged in this business
in California are required to obtain real
estate licenses ... Thus, general principles
of agency (Civ. Code, §§ 2228 and 2322 ...)

1 combine with statutory duties created by the
2 Real Estate Law (see Bus. & Prof. Code, §
3 10176, subds. (a), (i)) to impose upon
4 mortgage loan brokers an obligation to make a
5 full and accurate disclosure of the terms of
6 a loan to borrowers and to act always in the
7 utmost good faith toward their principals.
8 'The law imposes on a real estate agent "the
9 same obligation of undivided service and
10 loyalty that it imposes on a trustee in favor
11 of his beneficiary.'"

12 Plaintiff refers to the allegations in Paragraph 6 that Defendant
13 Sabatino was the designated officer-broker of Defendant Benjamin
14 Capital, Inc. and in Paragraph 21 that the loans were "arranged
15 by Benjamin Capital, Inc., Larry Menton and/or Murphy Sabatino
16 and their agents." Plaintiff refers to allegations in Paragraphs
17 11-14 that Defendant Sabatino failed to provide full and accurate
18 disclosures of the loan terms and conspired to violate state and
19 federal laws. Plaintiff contends that she has alleged facts
20 sufficient to state a claim for breach of fiduciary duty based on
21 general principles of agency and violation of statutory duties
22 created by the Real Estate Law, that together allow for
23 individual private rights of action. Plaintiff contends that she
24 is not asserting a claim against Defendant Sabatino based solely
25 on his position as the designated officer-broker of Benjamin
26 Capital, Inc. or solely under Section 10176. Plaintiff asserts
that Defendant Sabatino is liable because he was the only
defendant licensed to act as the broker for the loans and,
referring to Paragraph 45, was personally involved in the
transactions. Plaintiff reiterates that the Eighth Claim for
Relief does not rest solely on a violation of Section 11076 and

1 will amend to reflect this if necessary.

2 Defendant Sabatino's motion to dismiss is GRANTED WITH LEAVE
3 TO AMEND. The Eighth Claim for Relief alleges that "[e]ach
4 Defendant injured plaintiff by breaching his or its fiduciary
5 duty in violation of California Business and Professions Code §
6 10176.

7 CONCLUSION

8 For the reasons stated:

9 1. Defendants' motions to dismiss are GRANTED IN PART WITH
10 LEAVE TO AMEND AND DENIED IN PART as set forth above:

11 a. Defendants' motion to dismiss the FAC as
12 barred by the statute of limitations is
granted with leave to amend;

13 b. Defendants' motion to dismiss the FAC for
14 noncompliance with Rule 9(b) is granted with
leave to amend;

15 c. Defendants' motion to dismiss the Fifth
16 Claim for Relief is granted with leave to
amend;

17 d. Defendants' motion to dismiss the Sixth
18 Claim for Relief is granted with leave to
amend;

19 e. Defendants' motion to dismiss the Eighth
20 Claim for Relief is granted with leave to
amend.

21 2. Plaintiff shall file a Second Amended Complaint in
22 accordance with the rulings in this Memorandum Opinion and Order
23 within twenty (20) days of its filing date.

24 IT IS SO ORDERED.

25 Dated: July 9, 2009

26 /s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE