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

STEVE LOPEZ AND CARMEN LOPEZ, Case No. 2:09-CV-01510-JAM-DAD
Plaintiffs, ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
v. MOTION TO DISMISS

WACHOVIA MORTGAGE, WORLD
SAVINGS BANK, COMSTOCK
MORTGAGE, DAVID MENDOZA, ADRIAN
DEL RIO, and Does 1 through 20
inclusive,
Defendants.

_____ /

This matter comes before the Court on Defendants Comstock Mortgage ("Comstock"), David Mendoza ("Mendoza") and Adrian Del Rio's ("Del Rio)(collectively "Defendants'") Motion to Dismiss Counts 4, 8, and 9 of Plaintiffs Steve Lopez and Carmen Lopez's (collectively "Plaintiffs')First Amended Complaint("FAC") for

1 failure to state a claim pursuant to Federal Rule of Civil
2 Procedure 12(b)(6). Plaintiffs oppose the motion.¹
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5 I. FACTUAL AND PROCEDURAL BACKGROUND

6 Plaintiffs obtained an adjustable rate mortgage loan to
7 finance their residential property located at 10398 Christo Way,
8 Elk Grove, CA ("subject property"). Defendants Mendoza and Del
9 Rio, employees of Defendant Comstock, solicited Plaintiffs and
10 acted as brokers to obtain a loan from World Savings in June
11 2006. The terms of the loan were memorialized in the promissory
12 Note which was secured by a Deed of Trust on the subject
13 property. At some point subsequent to closing, non-judicial
14 foreclosure proceedings were instituted.
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17 Plaintiffs allege that Defendants, acting as mortgage brokers,
18 misrepresented the terms of the loan and the costs of monthly
19 payments, made promises to Plaintiffs that they would get
20 Plaintiffs the best loan and would refinance if necessary, and
21 placed Plaintiffs in a adjustable rate loan despite Plaintiffs'
22 good credit score and request for a fixed rate 30 year loan, for
23 purposes of personal financial gain.
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28 ¹ This motion was determined to be suitable for decision without
oral argument. E.D. Cal. L.R. 78-230(h).

1 II. OPINION

2 A. Legal Standard

3 A party may move to dismiss an action for failure to state a
4 claim upon which relief can be granted pursuant to Federal Rule
5 of Civil Procedure 12(b)(6). In considering a motion to dismiss,
6 the court must accept the allegations in the complaint as true
7 and draw all reasonable inferences in favor of the plaintiff.
8 Sheuer v. Rhodes, 416 U.S. 232, 236 (1975), overruled on other
9 grounds by Davis v. Sherer, 468 U.S. 183 (1984); Cruz v. Beto,
10 405 U.S. 319, 322 (1972). Assertions that are mere "legal
11 conclusions," however, are not entitled to the assumption of
12 truth. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1950 (2009), citing
13 Bell Atl. Corp v. Twombly, 550 U.S. 544, 555 (2007). To survive
14 a motion to dismiss, a plaintiff needs to plead "enough facts to
15 state a claim to relief that is plausible on its face." Twombly,
16 550 U.S. at 570. Dismissal is appropriate where the plaintiff
17 fails to state a claim supportable by a cognizable legal theory.
18 Balistreri v. Pacifica Police Dep't, 901 F. 2d 696, 699 (9th
19 Cir. 1990).

20 Upon granting a motion to dismiss, a court has discretion to
21 allow leave to amend the complaint pursuant to Federal Rule of
22 Civil Procedure 15(a). "Absent prejudice, or a strong showing of
23 any [other relevant] factor[], there exists a presumption under
24 Rule 15(a) in favor of granting leave to amend." Eminence

1 Capital, L.L.C. v. Aspeon, Inc., 316 F. 3d 1048, 1052 (9th Cir.
2 2003). "Dismissal with prejudice and without leave to amend is
3 not appropriate unless it is clear . . . that the complaint
4 could not be saved by amendment." Id. Accordingly, a court
5 should grant leave to amend the Complaint unless the futility of
6 amendment warrants dismissing a claim with prejudice.
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10 1. Violation of Real Estate Settlement Procedures Act, Fourth
11 Cause of Action

12 Plaintiffs allege that Defendants violated the Real Estate
13 Settlement Procedures Act, ("RESPA"), 12 U.S.C. §2605 et seq.,
14 at the closing of the loan by, "failing to correctly and
15 accurately comply with disclosure requirements provided
16 therein." FAC ¶81. Plaintiffs do not specify what provision of
17 RESPA was allegedly violated nor do they allege facts regarding
18 what Defendants did to violate RESPA.
19

20 In the Opposition, Plaintiffs raise for the first time the
21 allegations that Defendants specifically violated RESPA section
22 2603, which requires lenders or their brokers to provide
23 borrowers an itemized list of charges, and that Defendants may
24 have received "kickbacks" or disproportionate referral fees in
25 violation of RESPA section 2607(a). The Court will not consider
26 these new allegations as they were not raised in the FAC. "The
27 focus of any Rule 12(b)(6) dismissal . . . is the complaint. This
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1 precludes the consideration of new allegations that may be
2 raised in plaintiff's opposition to a motion to dismiss brought
3 pursuant to Rule 12(b)(6)." Cordell v. Tilton, 515 F. Supp. 2d
4 1114, 1128 (S.D. Cal. 2007)(internal citations omitted).

5
6 Accordingly, as Plaintiffs' FAC fails to plead the RESPA cause
7 of action with, "enough facts to state a claim to relief that is
8 plausible on its face" Twombly, 550 U.S. at 570, the cause of
9 action is dismissed with leave to amend.
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11 12 2. Breach of Contract, Eighth Cause of Action

13 "To state a claim for breach of contract, a plaintiff must
14 allege the following essential elements: "(1) the existence of a
15 contract, (2) plaintiff's performance or excuse for
16 nonperformance, (3) defendant's breach, and (4) the resulting
17 damages to plaintiff." Westways World Travel v. AMR Corp., 182
18 F. Supp. 2d 952, 963 (C.D. Cal. 2001)(quoting Reichert v.
19 General Ins. Co. of America, 68 Cal. 2d 822, 830 (1968)).
20

21 Plaintiffs allege that, "Plaintiffs entered into an
22 agreement with Defendants . . . whereby Defendants promised to
23 provide the Plaintiffs with an affordable loan. Plaintiffs fully
24 performed their duties under the contract with Defendants . . .
25 " FAC ¶¶ 110-111. Plaintiffs further allege that Defendants
26 breached their agreement with Plaintiffs by failing to provide
27 Plaintiffs with an affordable loan, failing to obtain payment
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1 and interest rates as promised, failing to submit an accurate
2 loan application, failing to supervise, failing to provide loan
3 documents for Plaintiffs' review prior to closing, failing to
4 explain the loan documents to Plaintiffs, and failing to
5 refinance the mortgage as promised. FAC ¶112. Plaintiffs allege
6 that they have suffered various damages, to be proven at trial.
7 These allegations sufficiently plead the existence of a contract
8 for purposes of deciding a motion to dismiss under federal
9 pleading requirements.
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12 Defendants argue that if there was an oral agreement or
13 contract, an action for breach of contract would be time barred.
14 A district court may grant a motion to dismiss on statute of
15 limitations grounds "only if the assertions of the complaint,
16 read with the required liberality, would not permit the
17 plaintiff to prove that the statute was tolled." Morales v. City
18 of Los Angeles, 214 F. 3d 1151, 1153 (9th Cir. 2000) (quoting
19 TwoRivers v. Lewis, 174 F. 3d 987, 991 (9th Cir. 1999)).
20
21 "Generally, the applicability of equitable tolling depends on
22 matters outside the pleadings, so it is rarely appropriate to
23 grant a Rule 12(b)(6) motion to dismiss ... if equitable tolling
24 is at issue." Huynh v. Chase Manhattan Bank, 465 F. 3d 992,
25 1003-04 (9th Cir. 2006) (citing Supermail Cargo, Inc. v. United
26 States, 68 F. 3d 1204, 1206 (9th Cir. 1995)); see Cervantes v.
27 City of San Diego, 5 F. 3d 1273, 1276 (9th Cir. 1993) (providing
28

1 that the application of the equitable tolling "is not generally
2 amenable to resolution on a Rule 12(b)(6) motion").

3 Here, Plaintiffs incorporated by reference the allegation
4 that, "The misrepresentations and allegations stated herein were
5 all discovered within the past year such that any applicable
6 statutes of limitations are extended or should be extended
7 pursuant to the equitable tolling doctrine or other equitable
8 principles." FAC ¶47. Accordingly, the motion to dismiss the
9 breach of contract claim is DENIED.
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13 3. Breach of the Implied Covenant of Good Faith and Fair
14 Dealing, Ninth Cause of Action

15 "Generally, every contract imposes upon each party a duty
16 of good faith and fair dealing in its performance and its
17 enforcement." Pagtalunan v. Reunion Mortgage Inc., 2009 WL
18 961995, at *2 (N.D. Cal. April 8, 2009). Additionally, "The
19 covenant 'cannot impose substantive duties or limits on the
20 contracting parties beyond those incorporated in the specific
21 terms of their agreement.' Coyotzi v. Countrywide Financial
22 Corporation, 2009 W.L. 2985497, *7 (E.D. Cal. Sept. 16, 2009)
23 (quoting Agosta v. Astor, 120 Cal.App.4th 596, 607 (2004))
24 (internal citations omitted.)
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27 Plaintiffs bring this claim against the Defendants
28 Comstock, Mendoza and Del Rio who are parties to this motion, as

1 well as other defendants who are not parties to the instant
2 motion. Plaintiffs make broad allegations, fail to distinguish
3 which defendants took which actions that allegedly breached the
4 implied covenant of good faith and fair dealing, and refer to,
5 "the contract at issue in this action," FAC ¶116, without
6 specifying whether they are referring to a contract with
7 Defendants Comstock, Mendoza and Del Rio, or a contract with the
8 other defendants in the case.
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11 In their Opposition Plaintiffs allege, for the first time,
12 that they are basing this cause of action on the contract with
13 Defendants Comstock, Mendoza and Del Rio alleged in the previous
14 breach of contract claim, and that Defendants Comstock, Mendoza
15 and Del Rio breached the implied covenant of good faith and fair
16 dealing by engaging in self dealing. As previously explained, in
17 a 12(b)(6) motion to dismiss, the sufficiency of the pleadings
18 in the FAC are at issue, and the Court will not consider new
19 allegations raised in the Opposition. Accordingly, the cause of
20 action for breach of the implied covenant of good faith and fair
21 dealing is dismissed with leave to amend.
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24 25 III. ORDER

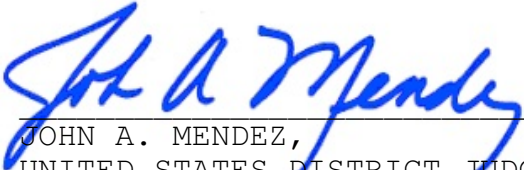
26 For the reasons set forth above, Defendants' motion to
27 dismiss is GRANTED WITHOUT PREJUDICE for the fourth and ninth
28 causes of action, and DENIED for the eighth cause of action.

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Plaintiffs shall have twenty (20) days from the date of this order to file a second amended complaint.

IT IS SO ORDERED.

Dated: October 14, 2009



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE