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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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ERIC HAWKINS and LYND  
HAWKINS,

Plaintiffs,

v.

Civ. No. S-10-1876 FCD/GGH

MEMORANDUM AND ORDER

FIRST HORIZON HOME LOANS, a  
Division of First Tennessee  
Bank N.A., successor in  
interest by merger to First  
Horizon Home Loan Corporation,  
a Tennessee Corporation; FORT  
KNOX LENDING, a California  
Business Entity Form Unknown,  
CALIFORNIA HOME AND MORTGAGE,  
a California Business Entity  
Form Unknown; JAMES JABOUT, an  
individual, LOANGUY.COM, a  
California corporation, and  
DOES 1-10,

Defendants.

\_\_\_\_\_ /

1  
2 This matter is before the court on defendant First Horizon  
3 Home Loans' ("Horizon")<sup>1</sup> motion to dismiss plaintiffs Eric and  
4 Lynda Hawkins' ("plaintiffs") complaint pursuant to Federal Rule  
5 of Civil Procedure ("FRCP") 12(b)(6).<sup>2</sup> Plaintiffs oppose the  
6 motion. For the reasons set forth below,<sup>3</sup> Horizon's motion is  
7 GRANTED.

8 **BACKGROUND**

9 Plaintiffs reside at 8256 Waterwell Way in Tracy, California  
10 (the "Property"). (Compl., filed July 16, 2010 [Docket # 1], ¶  
11 1.) In or around June 2006, plaintiffs contacted defendant James  
12 Jabout ("Jabout"), a friend of theirs and a mortgage broker  
13 employed by defendant California Home and Mortgage ("CH&M"),  
14 about obtaining a loan (the "Subject Loan" or "Construction  
15 Loan") to fund construction of a new home on their Property.  
16 (Id. ¶¶ 6, 16.) Plaintiffs claim the Construction Loan would  
17 convert to a "permanent mortgage loan" when construction on the  
18 Property was finished. (Id. ¶ 16.) Plaintiffs also claim that  
19 no interest would be charged during the construction period,  
20 i.e., interest charges would begin only after the loan converted  
21 into a permanent loan. (Id. ¶ 32; Decl. of K. Brian Matlock in  
22 Support of Compl., filed July 16, 2010 ["Matlock Decl."], Ex. D.)

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23  
24 <sup>1</sup> Horizon has merged into First Tennessee Bank National  
Association, N.A.

25 <sup>2</sup> Fort Knox Lending, California Home and Mortgage, James  
26 Jabout, and Loanguy.com are also named defendants in this action;  
however, Horizon is the only defendant who has appeared.

27 <sup>3</sup> Because oral argument will not be of material  
28 assistance, the court orders these matters submitted on the  
briefs. E.D. Cal. L.R. 230(g).

1           According to plaintiffs, Jabout initiated the loan  
2 application process without requesting documentation of income or  
3 other financial information. (Compl. ¶ 18.) They contend that  
4 Jabout, his employer CH&M, and Loanguy.com fabricated and  
5 inflated their financial information on the final loan  
6 application. (Id. ¶ 20.) Further, plaintiffs contend that  
7 Horizon is liable for the alleged fabrication because Horizon is  
8 in an agency relationship with all other defendants which ties  
9 them either in this single incident or in an overarching  
10 fraudulent course of conduct. (Id. ¶ 9.)

11           Finally, plaintiffs contend that during the loan process  
12 Horizon charged plaintiffs "numerous [j]unk fees" and failed to  
13 make certain mandatory disclosures. (Id. ¶¶ 75, 82, 89.)  
14 Specifically, as to the non-disclosures, plaintiffs allege that  
15 defendants failed to (1) "provide the required disclosures prior  
16 to consummation of the transactions"; (2) "submit to [p]laintiffs  
17 a consumer handbook on adjustable rate mortgages"; (3) "contain  
18 the statement 'You are not required to complete this agreement  
19 merely because you have received these disclosures or signed a  
20 loan application' on the Good Faith Estimate"; (4) "fully explain  
21 the terms of the Subject Loan and the second loan to [p]laintiffs  
22 in a meaningful way"; (5) "submit the required Good Faith  
23 Estimates of the disclosures within three days of [p]laintiffs'  
24 initial application" (6) "submit the Special Information Booklet  
25 to plaintiffs" (7) "disclose the current credit score of the  
26 consumer or the most recent score of the consumer that was  
27 previously calculated by the credit reporting agency for a  
28 purpose related to the extension of credit"; (8) "disclose a

1 range of possible credit scores under the model used"; (9)  
2 "disclose all of the key factors that adversely affected the  
3 credit score of the consumer in the model used"; (10) "disclose  
4 the date on which the credit score was created"; and (11)  
5 "disclose the name of the person or entity that provided the  
6 credit score or credit file upon which the credit score was  
7 created" in violation of the Fair and Accurate Credit Transaction  
8 Act ("FACTA"), the Real Estate Settlement and Procedures Act  
9 ("RESPA"), and the Truth in Lending Act ("TILA"). (Id. ¶¶ 73-  
10 92.)

11 At the end of the loan application process, plaintiffs state  
12 they received two loans: (1) the Construction Loan from Horizon  
13 memorialized by a Residential Construction Loan Agreement and  
14 other documents; and (2) a second loan from Horizon memorialized  
15 by a Deed of Trust and other documents. (Id. ¶¶ 26, 35; Matlock  
16 Decl., Exs. B-G.)

17 After receiving the loans, plaintiffs began building a home  
18 on the Property, drawing on the Subject Loan during the  
19 construction process. (Compl. ¶ 40.) They contend that during  
20 this time interest accrued notwithstanding the parties' agreement  
21 to the contrary. (Id.) Construction was completed in August  
22 2007. (Id. ¶ 41; Matlock Decl., Ex. H.) At this time,  
23 plaintiffs believed the Construction Loan would become a  
24 "permanent loan." (Compl. ¶¶ 41-42.) However, plaintiffs allege  
25 that Horizon refused to convert the Construction Loan. (Id. ¶  
26 43.)

27 Thereafter, plaintiffs allege that they continued making  
28 payments on the Subject Loan until their default in April 2008.

1 (Id. ¶ 44.) Following default, plaintiffs requested and obtained  
2 loan modification agreements from Horizon effective January 1,  
3 2009. (Id. ¶ 45; Matlock Decl., Ex. J.)

4 Approximately seven months later, in July 2009, plaintiffs  
5 filed for bankruptcy. (Compl. ¶ 49.) After the conclusion of  
6 plaintiffs' bankruptcy proceeding, Horizon instituted foreclosure  
7 proceedings. (Id. ¶ 51; Matlock Decl., Ex. T.) Horizon filed a  
8 first Notice of Default and Election to Sell in January 2010, and  
9 an amended one in April 2010. (Compl. ¶¶ 53, 54; Matlock Decl.,  
10 Exs. L, U, V.) No foreclosure sale has been noticed or  
11 scheduled. Plaintiffs filed this lawsuit on July 16, 2010.<sup>4</sup>

12 Plaintiffs bring forth sixteen causes of action: (1)  
13 violations of the Truth in Lending Act, 15 U.S.C., sections 1601  
14 *et seq.*; (2) violations of the Real Estate Settlement and  
15 Procedures Act, 12 U.S.C., sections 2601 *et seq.*; (3) violations  
16 of the Fair and Accurate Credit Transaction Act, 15 U.S.C.,  
17 sections 1681 *et seq.*; (4) common law intentional  
18 misrepresentation; (5) statutory fraud; (6) breach of written  
19 contract; (7) breach of fiduciary duty; (8) constructive fraud;  
20 (9) negligent lending; (10) unjust enrichment; (11) violations of  
21 the California Unfair Competition Law, California Business &  
22 Professions Code Sections 17200 *et seq.* ("UCL"); (12) contractual  
23 breach of good faith and fair dealing; (13) predatory lending  
24 practices; (14) violation of California Civil Code, section

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25  
26 <sup>4</sup> Plaintiffs subsequently filed a Motion for Preliminary  
27 Injunction on September 10, 2010. Horizon filed an Opposition on  
28 October 8, 2010, which was followed by plaintiffs' Reply on  
October 15, 2010. The court heard the matter on October 22, 2010  
and denied plaintiffs' Motion.



1           Nevertheless, the court "need not assume the truth of legal  
2 conclusions cast in the form of factual allegations." United  
3 States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th  
4 Cir. 1986). While Rule 8(a) does not require detailed factual  
5 allegations, "it demands more than an unadorned, the defendant-  
6 unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at 1949. A  
7 pleading is insufficient if it offers mere "labels and  
8 conclusions" or "a formulaic recitation of the elements of a  
9 cause of action." Twombly, 550 U.S. at 555; Iqbal, 129 S. Ct. at  
10 1950 ("Threadbare recitals of the elements of a cause of action,  
11 supported by mere conclusory statements, do not suffice.").  
12 Moreover, it is inappropriate to assume that the plaintiff "can  
13 prove facts which it has not alleged or that the defendants have  
14 violated the . . . laws in ways that have not been alleged."  
15 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council  
16 of Carpenters, 459 U.S. 519, 526 (1983).

17           Ultimately, the court may not dismiss a complaint in which  
18 the plaintiff has alleged "enough facts to state a claim to  
19 relief that is plausible on its face." Iqbal, 129 S. Ct. at 1949  
20 (citing Twombly, 550 U.S. at 570). Only where a plaintiff has  
21 failed to "nudge [his or her] claims across the line from  
22 conceivable to plausible," is the complaint properly dismissed.  
23 Id. at 1952. While the plausibility requirement is not akin to a  
24 probability requirement, it demands more than "a sheer  
25 possibility that a defendant has acted unlawfully." Id. at 1949.  
26 This plausibility inquiry is "a context-specific task that  
27 requires the reviewing court to draw on its judicial experience  
28 and common sense." Id. at 1950.

1 In ruling upon a motion to dismiss, the court may consider  
2 only the complaint, any exhibits thereto, and matters which may  
3 be judicially noticed pursuant to Federal Rule of Evidence 201.  
4 See Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir.  
5 1988); Isuzu Motors Ltd. v. Consumers Union of U.S., Inc., 12 F.  
6 Supp. 2d 1035, 1042 (C.D. Cal. 1998).

## 7 ANALYSIS

### 8 A. Violation of TILA

9 Plaintiffs' first cause of action asserts both a rescission  
10 and damage claim for alleged violations of the Truth in Lending  
11 Act ("TILA"), 15 U.S.C. § 1601 *et seq.* (Compl. ¶ 78.)  
12 Specifically, plaintiffs allege that defendants (1) "fail[ed] to  
13 provide the required disclosures prior to consummation of the  
14 transactions"; (2) "fail[ed] to submit to [p]laintiffs a consumer  
15 handbook on adjustable rate mortgages"; (3) "fail[ed] to contain  
16 the statement 'You are not required to complete this agreement  
17 merely because you have received these disclosures or signed a  
18 loan application' on the Good Faith Estimate"; (4) "fail[ed] to  
19 fully explain the terms of the Subject Loan and the second loan  
20 to [p]laintiffs in a meaningful way"; (5) "fail[ed] to submit the  
21 required Good Faith Estimates of the disclosures within three  
22 days of [p]laintiffs' initial application"; and (6) engaged in  
23 "predatory lending" by "extending credit[] to [p]laintiffs. . .  
24 without regard to [p]laintiffs' repayment ability." (Compl. ¶  
25 75; Pls.'s Opp.'n ["Opp.'n"], filed Oct. 20, 2010 [Docket #18],  
26 3-4.)

27 Defendant Horizon argues that plaintiffs' TILA claims are  
28 time barred. (Horizon's Motion to Dismiss ["MTD"], filed October



1 8, 2010 [Docket #15], 6-9). Plaintiffs respond that the  
2 statutory period has not expired based on equitable tolling  
3 and/or the continuing violation doctrine. (Opp.'n at 3-4.)

4 **1. Rescission**

5 Rescission claims under TILA "shall expire three years after  
6 the date of consummation of the transaction or upon the sale of  
7 the property, whichever occurs first." 15 U.S.C. § 1635(f).

8 Further, equitable tolling does not apply to rescission  
9 under this provision of TILA. If the borrower files his or her  
10 suit over three years from the date of a loan's consummation, a  
11 court is powerless to grant rescission. Miguel v. Country  
12 Funding Corp., 309 F.3d 1161, 1164 (9th Cir 2002) ("[S]ection  
13 1635(f) represents an 'absolute limitation on rescission actions'  
14 which bars any claims filed more than three years after the  
15 consummation of the transaction." (quoting King v. California,  
16 784 F.2d 910, 913 (9th Cir. 1986)); accord Beach v. Ocwen Fed.  
17 Bank, 523 U.S. 410, 412 (1998) ("[Section] 1635(f) completely  
18 extinguishes the right of rescission at the end of the 3-year  
19 period."). If a borrower exercises her right to rescind within  
20 the three-year limitation period, such action only entitles the  
21 borrower to damages, not rescission. Cazares v. Household Fin.  
22 Corp., No. CV 04-6887 DSF, 2005 U.S. Dist. LEXIS 39222, at \*24-25  
23 (C.D. Cal. 2005) (citing 15 U.S.C. § 1640(a); Belini v. Wash.  
24 Mut. Bank, FA, 412 F.3d 17 (1st Cir. 2005)).

25 In this case, plaintiffs allege they consummated the Subject  
26 Loan on or about September 11, 2006. (Compl. ¶ 26.) Plaintiffs  
27 did not bring the instant action until July 16, 2010;  
28 accordingly, more than three years has passed since the alleged

1 TILA violations. 15 U.S.C. § 1640(e). As such, Horizon's motion  
2 to dismiss plaintiffs' rescission claim under TILA is GRANTED  
3 without leave to amend.

4 **2. Damages**

5 TILA provides that a plaintiff can bring an action to  
6 recover damages "within one year from the date of the occurrence  
7 of the violation." 15 U.S.C. § 1640(e). As stated above,  
8 plaintiffs bring this action approximately four years after  
9 consummation of the loan; accordingly, their TILA claims are  
10 time-barred.

11 **a. Continuing Violation**

12 Plaintiffs argue that their claims are timely because  
13 defendants engaged in "predatory lending," which they assert is a  
14 continuing violation of TILA. However, the Ninth Circuit has  
15 expressly rejected the continuing violation theory as applied to  
16 claims for damages brought under TILA. King, 784 F.2d at 914.  
17 In King, the Ninth Circuit stated that the theory is  
18 "unrealistically open ended" and "exposes the lender to a  
19 prolonged and unforeseeable liability that Congress did not  
20 intend." Id. Accordingly, Horizon's motion to dismiss  
21 plaintiffs' predatory lending claim is GRANTED without leave to  
22 amend.

23 **b. Equitable Tolling**

24 Alternatively, plaintiffs argue that equitable tolling  
25 applies to extend the statute of limitations. (Compl. ¶ 77.)  
26 Specifically, plaintiffs claim they "had no reasonable  
27 opportunity to discover the . . . [alleged] violations until  
28

1 around August 2009"<sup>5</sup> because they relied on "their friends and  
2 business partners [to] act truthfully and in [p]laintiffs['] best  
3 interest" regarding the execution of the loans. (Compl. ¶¶ 39,  
4 77.) Consequently, plaintiffs state they were not provoked to  
5 inquire into the alleged violations until after the statutory  
6 period had passed. (Id. at 48.)

7 To establish excusable delay, a plaintiff must show  
8 "fraudulent conduct by the defendant resulting in concealment of  
9 the operative facts, the plaintiff's failure . . . to discover  
10 the operative facts that are the basis of [his/her] cause of  
11 action within the limitations period, and [his/her] due diligence  
12 . . . until discovery of those facts." Federal Election Com'n v.  
13 Williams, 104 F.3d 237, 240-41 (9th Cir. 1996)(emphasis added).  
14 Equitable tolling "focuses on whether there was excusable delay  
15 by the plaintiff," and "does not depend on any wrongful conduct  
16 by the defendant to prevent the plaintiff from suing." Santa  
17 Maria v. Pac. Bell, 202 F.3d 1170, 1178 (9th Cir. 2000).

18 The plaintiff must allege facts demonstrating that the TILA  
19 violations alleged could not have been discovered by due  
20 diligence *during the one-year statutory period*; otherwise,  
21 equitable tolling should not be applied and dismissal at the  
22 pleading stage is appropriate. Lingad v. Indymac Federal Bank,  
23 682 F. Supp. 2d 1142, 1147 (2010). "Such factual underpinnings  
24 are all the more important . . . since the vast majority of [a  
25 plaintiff's] alleged violations under TILA are violations that

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26  
27 <sup>5</sup> Inconsistently, plaintiffs' Opposition states the  
28 forensic audit was done "around November 2009." (Opp.'n at 3,  
4.) However, in this case, whether the audit was performed in  
August or November has no bearing on the court's decision.

1 are self-apparent at the consummation of the transaction.  
2 Cervantes v. Countrywide Home Loans, Inc., No. CV 09-517-PHX-JAT,  
3 2009 WL 3157160, \*\*13-14 (D. Ariz. Sept. 24, 2009).

4 Here, plaintiffs allegations are not sufficient to invoke  
5 equitable tolling. First, relying on a lender and assuming  
6 correctness of the loan documents does not excuse plaintiffs from  
7 conducting their own due diligence. See e.g. Nicholson v. First  
8 Franklin Financial Corp., No. 2:10-cv-00598-MCE-EFB, 2010 WL  
9 3505089, \*\*2-3 (E.D. Cal. Sept. 3, 2010)(finding a lack of due  
10 diligence because the plaintiff did not review her loan  
11 documents; instead, relying on her lenders and assuming that all  
12 the information was true and correct).

13 Second, although plaintiffs eventually performed some due  
14 diligence, it was not performed within the time allotted by TILA.  
15 Indeed, plaintiffs state they did not begin their inquiry into  
16 the alleged violations until August 2009, after the statute of  
17 limitations period had ended. See Kelley v. Countrywide Home  
18 Loans, No. CV F 09-1148 LJO DLB, 2009 WL 3489422, \*\*5-6 (E.D.  
19 Cal. Oct. 26, 2009) (finding that equitable tolling was not  
20 appropriate because the plaintiff had not shown anything which  
21 prevented him from comparing his loan documents and TILA's  
22 statutory and regulatory requirements within the statutory  
23 period); Martinez v. EMC Mortg. Corp., No. CV F 09-0813 LJO GSA,  
24 2009 WL 2043013, at \*7 (E.D. Cal. Jul. 13, 2009) (same).

25 Without facts regarding why the alleged violations were not,  
26 and could not have been, reasonably discovered until August 2009,  
27 the court cannot equitably toll the statute of limitations in  
28 this case. As such, defendant Horizon's motion to dismiss

1 plaintiffs' claim for damages for violations of TILA is GRANTED  
2 with leave to amend.

3 **B. RESPA**

4 Plaintiffs' second claim is for violations of the Real  
5 Estate Settlement and Procedures Act ("RESPA"), 12 U.S.C. 2601,  
6 *et seq.* Specifically, plaintiffs allege Horizon "failed to  
7 submit the Special Information Booklet to [p]laintiffs" in  
8 violation of RESPA § 2604 and Horizon "charged [plaintiffs]  
9 numerous [j]unk fees" constituting illegal kickbacks in violation  
10 of RESPA § 2607. (Compl. ¶ 82; Opp.'n at 6.) Horizon moves to  
11 dismiss these claims on the basis that (1) plaintiffs are not  
12 afforded a private right of action under § 2604; and (2)  
13 plaintiffs' § 2607 claim is time-barred. (MTD at 10.)  
14 Plaintiffs respond that their claims are valid and timely based  
15 upon the application of equitable tolling. (Opp.'n at 5-6.)

16 **1. 12 U.S.C. § 2604**

17 Numerous California district courts have concluded that no  
18 private right of action exists for violation of § 2604. See e.g.  
19 Bassett v. Ruggles, No. CV-F-09-528, 2010 WL 1525554, \*9 (E.D.  
20 Cal. Apr. 15, 2010) (finding § 2604 does not authorize a private  
21 remedy); Kerr v. American Home Mortg. Servicing, Inc., No.  
22 10-cv-1612 BEN, 2010 WL 3743879, \*1 (S.D. Cal. Sept. 23, 2010)  
23 ("Courts have consistently held. . . there is no private right of  
24 action for alleged RESPA disclosure violations during the loan  
25 origination process."); Paqtalunan v. Reunion Mortg. Inc., No.  
26 C-09-00162, 2009 WL 961995, \*3 (N.D. Cal. Apr. 8, 2009);  
27 Aqbabiaka v. HSBC Bank USA Nat'l Ass'n, No. C 09-05583, 2010 WL  
28 1609974, \*4 (N.D. Cal. Apr. 20, 2010) ("There is no private right

1 of action under RESPA for violations of Sections 2603 and  
2 2604."). Consistent with the district courts in California the  
3 court also holds that § 2604 does not provide plaintiffs with a  
4 private right of action. Accordingly, Horizon's motion to  
5 dismiss plaintiffs' RESPA § 2604 claim is GRANTED without leave  
6 to amend.

7 **2. 12 U.S.C. § 2607**

8 The statute of limitations for bringing a claim under RESPA  
9 § 2607 is one year. 12 U.S.C. § 2614. More than one year has  
10 passed since the alleged violations and, as set forth *supra*,  
11 plaintiffs do not plead facts sufficient to invoke equitable  
12 tolling. Thus, the Horizon's motion to dismiss plaintiffs' RESPA  
13 § 2607 claim is GRANTED with leave to amend.

14 **C. FACTA**

15 Plaintiffs' third claim for relief is based on Horizon's  
16 alleged violation of the Fair and Accurate Credit Transactions  
17 Act ("FACTA"), 15 U.S.C. § 1681, *et seq.* (Compl. ¶ 86-92.)  
18 Specifically, plaintiffs' allege defendants willfully "failed to  
19 provide [] disclosures [in violation of] Section 212(b) of  
20 [FACTA]." (Compl. ¶¶ 88, 90.) Horizon responds that plaintiffs'  
21 FACTA claim is time-barred and defectively plead. (MTD at 9.)

22 A plaintiff must bring a FACTA action within "2 years after  
23 the date of discovery by the plaintiff of the violation that is  
24 the basis for such liability." 15 U.S.C. § 1681p. "Under  
25 federal law a cause of action accrues when the plaintiff is aware  
26 of the wrong." Acri v. International Ass'n of Machinists &  
27 Aerospace Workers, 781 F.2d 1393, 1396 (1986). That is, "when  
28 the plaintiff 'knows or has reason to know of the injury which is

1 the basis of the action.'" Kemp v. Regents of University of  
2 Cal., No. C-09-4687 PJH, 2010 WL 2889224 (N.D. Cal. July 22,  
3 2010) (citing TwoRivers v. Lewis, 174 F.3d 987, 991-992 (9th Cir.  
4 1999); Trotter v. Int'l Longshoremen's & Warehousemen's Union,  
5 704 F.2d 1141, 1143 (9th Cir. 1983)).

6 Here, plaintiffs allege they did not receive the requisite  
7 disclosures when they executed the Subject Loan around September  
8 12, 2006. (Compl. ¶ 88-89.) Yet, they did not file the current  
9 action until July 16, 2010. Plaintiffs assert they were unable  
10 to ascertain the alleged non-disclosures until a forensic audit  
11 was completed on the loan document in August 2009. (Id. at 77.)  
12 However, plaintiffs' tolling rationale fails for the same reason  
13 their TILA and RESPA § 2607 tolling rationale fails: plaintiffs  
14 plead no facts explaining why they were prevented from  
15 discovering the alleged violations within the two year statutory  
16 period. See Kelley, 2009 WL 3489422 at \*\*5-6 (finding that  
17 equitable tolling was not appropriate because the plaintiff had  
18 not shown anything which prevented him from comparing his loan  
19 documents and the statutory and regulatory requirements within  
20 the statutory period). Accordingly, Horizon's motion to dismiss  
21 plaintiffs' FACTA claim is GRANTED with leave to amend.<sup>6</sup>

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23 <sup>6</sup> Because the court finds that plaintiffs' FACTA claim is  
24 time-barred it does not reach Horizon's second argument that the  
25 FACTA claim is deficiently plead. However, the court notes that  
26 at least one California district court has found that FACTA  
27 applies only to credit reporting agencies, and not mortgage  
28 lenders. See Kakoqui v. American Brokers Conduit, No. C 09-4841  
JF (HRL), 2010 WL 1265201, \*5 (N.D. Cal. Mar. 30, 2010)  
("Plaintiff misapprehends the nature of [FACTA] in reading the  
statute to require that lenders and brokers [must] make credit  
scoring information available to borrowers.") (internal  
quotations omitted).

1 **D. Fraud**

2 Plaintiffs' fourth, fifth, and eighth claims for relief are  
3 based on the alleged fraud of defendant Horizon. (Compl. ¶¶ 93-  
4 140, 160-164.) Specifically, plaintiffs bring their claims based  
5 on three alleged bad acts: defendants' (1) fraudulent  
6 overstatement of their income on loan documents ("income  
7 fabrication"); (2) misrepresentation of when interest charges  
8 would begin ("interest misrepresentation"); and (3) refusal to  
9 convert plaintiffs' Subject Loan to a permanent loan ("non-  
10 conversion"). (Id.) Horizon contends that (1) plaintiffs'  
11 claims are time-barred; (2) plaintiffs fail to meet the pleading  
12 standard of Rule 9(b); and (3) plaintiffs fail to link Horizon to  
13 any fraud. (MTD at 11-12; Horizon's Reply to Pls. Opposition,  
14 [Docket #21], filed October 29, 2010 ["Reply"], at 6-7.)

15 **1. Time-Bar**

16 A three year statute of limitations exists for fraud  
17 actions. CCP § 338(d). The accrual begins when the aggrieved  
18 party discovers the fraud or mistake. Id.

19 In this case, plaintiffs fail to plead facts that  
20 demonstrate this litigation was timely filed with respect to  
21 their claims of income fabrication and interest  
22 misrepresentation.<sup>7</sup> Rather, plaintiffs' exhibits demonstrate  
23 that the alleged fraud based upon income fabrication and interest  
24

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25 <sup>7</sup> Plaintiffs' non-conversion claim is not time-barred.  
26 The alleged conversion was meant to take place at the end of the  
27 construction period, August 9, 2007. (Compl. ¶¶ 41-42). A three  
28 year statute of limitations accorded plaintiffs until August 9,  
2010 to file a fraud claim based on the alleged non-conversion.  
By filing the current action on July 16, 2010, plaintiffs are  
within the statutory period.



1 misrepresentation could have been discovered within the statutory  
2 period. For example, the alleged income fabrication is listed in  
3 both the Allonge and the Uniform Underwriting and Transmittal  
4 Summary. (Matlock Decl., Ex. D, O.) Both of these documents are  
5 signed by plaintiffs in July and September 2006, respectively.  
6 As such, plaintiffs were on notice of the alleged fraud  
7 approximately four years ago, but failed to investigate or file  
8 an action.

9 As to the alleged interest misrepresentation, Horizon  
10 correctly points out that paragraph 2.A of the Allonge is  
11 captioned "Interest During the Construction Period," and it reads  
12 in pertinent part: "Borrower will pay interest only, based on a  
13 360-day year, on the amount advanced by the Note Holder at the  
14 rate of prime + 0% during the Construction Period of the loan, as  
15 such interest rate exists daily." (Id.) As stated above the  
16 Allonge was signed by plaintiffs in September 2006; accordingly,  
17 they were on notice of any alleged improper charges at that time.  
18 Moreover, by Exhibit S, plaintiffs received invoices with  
19 interest charges from Horizon as early as June 2007; yet,  
20 plaintiffs did not file this action until July 16, 2010. (Id. at  
21 Ex. S.) Accordingly, these fraud claims are time-bared.

## 22 **2. Failure to Meet Rule 9(b)'s Pleading Standard and** 23 **Failure to Connect Horizon to Alleged Fraud**

24 Under California law, the elements of common law fraud are  
25 "misrepresentation, knowledge of its falsity, intent to defraud,  
26 justifiable reliance, and resulting damages." Gil v. Bank of  
27 Am., Nat'l Ass'n, 138 Cal. App. 4th 1371, 1381 (2006). "[T]o  
28 establish a cause of action for fraud a plaintiff must plead and

1 prove in full, factually and specifically, all of the elements of  
2 the cause of action. Conrad v. Bank of America, 45 Cal. App. 4th  
3 133, 156 (1996). There must be a showing "that the defendant  
4 *intended* to induce the plaintiff to act to his detriment in  
5 reliance upon the false representation." Conrad v. Bank of  
6 America, 45 Cal. App. 4th 133, 156 (1996) (emphasis added).

7 Further, a court may dismiss a claim grounded in fraud when  
8 its allegations fail to satisfy Rule 9(b)'s heightened pleading  
9 requirements. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107  
10 (9th Cir. 2003). Therefore, the plaintiff "must state with  
11 particularity the circumstances constituting fraud." Fed. R.  
12 Civ. P. 9(b). In other words, the plaintiff must include "the  
13 who, what, when, where, and how" of the fraud. Id. at 1106  
14 (citations omitted).

15 Additionally, "Rule 9(b) does not allow a complaint to  
16 merely lump multiple defendants together but require[s]  
17 plaintiffs to differentiate their allegations when suing more  
18 than one defendant . . . and inform each defendant separately of  
19 the allegations surrounding his alleged participation in the  
20 fraud." Swartz v. KPMG LLP, 476 F.3d 756, 765-766 (9th Cir.  
21 2007). When asserting a fraud claim against a corporation, "the  
22 plaintiff's burden . . . is even greater. . . . The plaintiff  
23 must 'allege the names of the persons who made the allegedly  
24 fraudulent representations, their authority to speak, to whom  
25 they spoke, what they said or wrote, and when it was said or  
26 written.'" Lazar v. Superior Court, 12 Cal. 4th 631, 645 (1996)  
27 (quoting Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal. App.  
28 4th 153, 157 (1991)); see also Edejer v. DHI Mortgage Co., No. C

1 09-1302, 2009 WL 1684714, \*12 (N.D. Cal. June 12, 2009)  
2 (dismissing a fraud claim, *inter alia*, where the plaintiff did  
3 not allege any the names of the persons who made the allegedly  
4 fraudulent representations and their authority to speak);  
5 Akhavein v. Argent Mortgage Co., No. 5:09-cv-00634, 2009 WL  
6 2157522, \*4 (N.D. Cal. July 17, 2009).

7 In the present case, plaintiffs allege that “[d]efendants  
8 Jabout, LoanGuy.com and [CH&M] fabricated borrower’s [sic]  
9 financial information on the final loan application.” (Compl. ¶  
10 98). They assert defendant Horizon was aware of the fabricated  
11 financial information because (1) Horizon received the Uniform  
12 Underwriting and Transmittal Summary with a handwritten note  
13 stating that “[p]laintiffs’ income would have to be ‘stated’ to  
14 meet the required debt-to-income-ratio” (Compl. ¶ 99); and/or (2)  
15 Horizon is in an agency relationship with all other defendants,  
16 which ties them either in this single incident or in an  
17 overarching fraudulent course of conduct. (Id. ¶ 9.)

18 Plaintiffs’ allegations are insufficient to meet the  
19 heightened pleading standard of Rule 9(b). First, plaintiffs do  
20 not allege how the handwritten note demonstrates Horizon’s  
21 knowledge of alleged fraudulent activity. Plaintiffs do not  
22 allege that “income would have to be stated” is an indicator of  
23 fraudulent activity in the mortgage loan industry or that the  
24 phrase clearly indicates the income on the paperwork is  
25 fabricated. As such, standing alone, this allegation does not  
26 show how Horizon would have knowledge that the income on the loan  
27 documents was allegedly fabricated.

28 /////

1 Second, plaintiffs' assertion that Horizon is in an agency  
2 relationship with all other defendants is conclusory; plaintiffs  
3 do not allege any facts to show how Horizon authorized any other  
4 defendant to represent and/or bind it. Plaintiffs must allege  
5 such facts to sufficiently apprise defendants of the nature of  
6 the agency relationship. Cal. Civ. Code § 2295; J.L. v.  
7 Children's Institute, Inc., 177 Cal. App. 4th 388, 403-404  
8 (2009). Accordingly, plaintiffs fail to show how Horizon was  
9 connected to this fraudulent act.

10 Finally, plaintiffs fail to inform each specific defendant  
11 of the allegation surrounding its alleged participation in the  
12 fraud. In this case "defendants" includes several entities and  
13 an individual; however, contrary to what is required by Rule  
14 9(b), plaintiffs failed to allege which defendant, let alone  
15 which employee(s) at each entity-defendant, actually made the  
16 supposedly false representations.

17 Accordingly, defendant Horizon's motion to dismiss  
18 plaintiffs' claims for rescission and damages based on fraud are  
19 GRANTED with leave to amend.

20 **E. Breach of Contract**

21 Plaintiffs' sixth claim for relief is a breach of contract  
22 claim. (Compl. ¶¶ 141-149.) Plaintiffs allege that Horizon  
23 breached the loan contract(s) by (1) failing to convert the  
24 Subject Loan into "a permanent mortgage loan on the day the  
25 construction period end[ed]," and (2) "charging interest before  
26 the construction period ended." (Id. ¶¶ 143-144.)

27 "[T]o state a claim for breach of contract, the plaintiff  
28 must plead: 1) the existence of the contract; 2) plaintiff's

1 performance or excuse for nonperformance of the contract; 3)  
2 defendant's breach of the contract; and 4) resulting damages."  
3 Armstrong Petrol. Corp. v. Tri Valley Oil & Gas Co., 116 Cal.  
4 App. 4th 1375, 1391 n. 6 (2004). On a motion to dismiss, the  
5 court need not accept allegations as true if they are  
6 contradicted by documents before the court. Sprewell v. Golden  
7 State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). "[W]hen a  
8 written instrument is attached to the pleading and properly  
9 incorporated therein by reference, the court may examine the  
10 exhibit and treat the pleader's allegations of its legal effect  
11 as surplusage." Burnett v. Chimney Sweep, 123 Cal. App. 4th  
12 1057, 1064 (2004) (quoting Lumbermens Mut. Cas. Co. v. Vaughn,  
13 199 Cal. App. 3d 171, 178 (1988).)

14 Plaintiffs' allegation of breach by non-conversion of the  
15 Subject Loan fails because plaintiffs do not assert any facts or  
16 evidence explaining what the alleged breach entailed. Indeed,  
17 plaintiffs do not allege what changes in the loan were meant to  
18 take place after the conversion, but ultimately did not. As  
19 such, it is unclear what Horizon was supposedly obligated to do  
20 or what comprised the alleged breach. See Schnelke v. JPMorgan  
21 Chase Bank, No. 2:09-cv-03119, 2010 WL 2546100, \*3 (E.D. Cal.  
22 Jun. 23, 2010) (dismissing contract claim where plaintiff failed  
23 to allege where in his mortgage loan contract, or any contract,  
24 certain terms were memorialized); see also Logan v. Resmae Mortg.  
25 Corp., 2009 WL 5206716, \*4 (E.D. Cal. Dec. 24, 2009) (finding  
26 that the plaintiff's assertion of vague promises by the defendant  
27 were not sufficient to show the existence of a contract).

28 /////

1 Further, plaintiffs' non-conversion allegation is  
2 contradicted by both the terms of the contract and allegations of  
3 the complaint. According to plaintiffs' exhibits, the Subject  
4 Loan became a 30-year - i.e., "permanent" - loan at the end of  
5 the construction period. (See Matlock Decl., Ex. D) ("On the day  
6 after the Construction Period ends, the loan evidenced by this  
7 Note will be a permanent mortgage loan."). Further, in their  
8 complaint, plaintiffs themselves allege that the Subject Loan  
9 remained in place beyond the end of the construction period, and  
10 plaintiffs continued making payments on it until they defaulted  
11 in April 2008. (Compl. ¶ 44.)

12 Plaintiffs' assertion that Horizon breached the contract by  
13 charging interest is also contradicted by the plain terms of the  
14 contract.<sup>8</sup> Specifically, by paragraph 2.A of the Allonge which  
15 is captioned "Interest During the Construction Period," provides  
16 in pertinent part: "Borrower will pay interest only. . . at the  
17 rate of *prime* + 0% during the Construction Period of the loan . .  
18 . Borrower will make monthly interest payments by the 15th of  
19 each month for the amount billed by the Note Holder." (Matlock  
20 Decl., Ex D) (emphasis added.) Further, plaintiffs make no  
21 factual allegations to support an oral or written modification of  
22 this agreement. Accordingly, looking to the four corners of the  
23 contract, plaintiffs agreed to interest charges during the  
24 construction loan period.

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26 <sup>8</sup> In their Opposition, plaintiffs do not address or  
27 defend their claims that defendant Horizon wrongly charged  
28 interest during the construction period, despite Horizon's  
argument that the Allonge states interest would be charged during  
the construction period.

1 For these reasons, Horizon's motion to dismiss plaintiffs'  
2 breach of contract claim is GRANTED with leave to amend.

3 **F. Breach of Implied Covenant of Good Faith and Fair Dealing**

4 Plaintiffs' twelfth claim for relief asserts that defendants  
5 breached the implied covenant of good faith and fair dealing  
6 based on the same assertions listed under their breach of  
7 contract claim. (Compl. ¶¶ 143-44.)

8 "To establish a breach of an implied covenant of good faith  
9 and fair dealing, a plaintiff must establish the existence of a  
10 contractual obligation, along with conduct that frustrates the  
11 other party's rights to benefit from the contract." Fortaleza v.  
12 PNC Fin. Servs. Group, Inc., 642 F. Supp. 2d 1012, 1021-22 (N.D.  
13 Cal. 2009). Further, "a breach of the implied covenant of good  
14 faith and fair dealing involves something beyond breach of the  
15 contractual duty itself." Careau & Co. v. Security Pacific  
16 Business Credit, Inc., 222 Cal. App. 3d 1371, 1394 (1990). The  
17 "implied covenant of good faith and fair dealing is limited to  
18 assuring compliance with the express terms of the contract, and  
19 cannot be extended to create obligations not contemplated by the  
20 contract." Pasadena Live, LLC v. City of Pasadena, 114 Cal. App.  
21 4th 1089, 1093-1094 (2004).

22 To the extent this court has concluded that plaintiffs  
23 cannot show how defendant Horizon failed in any way to perform  
24 pursuant to the terms of the contract, and plaintiffs' loan  
25 documents indicate that interest was to be charged during the  
26 construction period, Horizon's motion to dismiss plaintiffs'  
27 claim for breach of the implied covenant of good faith and fair  
28 dealing is GRANTED with leave to amend.

1 **G. Breach of Fiduciary Duty, Negligent Lending, and**  
2 **Constructive Fraud**

3 In counts seven, eight, and nine, plaintiffs assert claims  
4 against Horizon for breach of fiduciary duty (Count 7),  
5 constructive fraud (Count 8) and negligent lending (Count 9).  
6 (Id. ¶¶ 150-178.) Specifically, plaintiffs allege that they  
7 "perceived their relationship with Jabout as very close and  
8 relied on Jabout's financial advice implicitly." (Opp.'n at 9.)  
9 Plaintiffs allege that Horizon's fiduciary duty arose because  
10 "[t]he relationship of a lender to a borrower is quasi-fiduciary  
11 when a lender (Defendant Horizon) takes on an advisory role  
12 through its agent (Defendant Jabout), and borrowers reasonably  
13 expect a lender not to wrongly apply payments, wrongly charge  
14 late fees, or falsely calculate monthly principal and interest  
15 amounts due." (Id. at 10.) Horizon moves to dismiss plaintiffs'  
16 seventh, eighth, and ninth claims on the basis that these claims  
17 can lie only against parties in relationships that give rise to  
18 special duties. (MTD at 15.)

19 **1. Fiduciary Duty**

20 To state a claim for breach of fiduciary duty, a plaintiff  
21 must show: (1) the existence of a fiduciary relationship; (2) the  
22 breach of that relationship; and (3) damage proximately caused by  
23 the breach. Roberts v. Lomanto, 112 Cal. App. 4th 1553, 1562  
24 (2003). However, "[a]bsent special circumstances. . . a loan  
25 transaction is [an] at arms-length [transaction] and there is no  
26 fiduciary relationship between the borrower and lender." Oaks  
27 Mgmt. Corp. v. Superior Court, 145 Cal. App. 4th 453, 466 (2006).  
28 "A commercial lender is entitled to pursue its economic interest



1 in a loan transaction. This right is inconsistent with the  
2 obligations of a fiduciary, which require that the fiduciary  
3 knowingly agree to subordinate its interests to act on behalf of  
4 and for the benefit of another." Gonzalez v. First Franklin Loan  
5 Services, No. 1:09-CV-00941 AWI-GSA, 2010 WL 144862, \*13 (E.D.  
6 Cal. Jan. 11, 2010). A lender, however, may be held vicariously  
7 liable for breach of fiduciary duty when a broker, who is an  
8 agent of the lender, breaches a fiduciary duty owed to the  
9 borrower. Id.

10 Plaintiffs claim that their "very close," "year-long"  
11 friendship with defendant Jabout created a special circumstance  
12 which caused Jabout's involvement in the loan transaction to  
13 exceeded the scope of the conventional role as a mere broker.  
14 (Compl. ¶ 17; Opp.'n at 9-10.) Further, plaintiffs allege that  
15 this special circumstance extends to Horizon as a result of an  
16 agency relationship that existed between Horizon and defendant  
17 Jabout. (Opp.'n at 9-10.) However, as explained *supra*,  
18 plaintiffs allege no facts to show how Horizon authorized Jabout  
19 to represent and/or bind it, which is necessary to set forth an  
20 agency relationship.<sup>9</sup> CCP § 2295; Children's Institute, Inc.,  
21 177 Cal. App. 4th at 403-04. Plaintiffs, therefore, have not  
22 demonstrated that Horizon owed plaintiffs a fiduciary duty which  
23 could give rise to a claim for breach of that duty. Accordingly,  
24 Horizon's motion to dismiss plaintiffs' breach of fiduciary duty  
25 claim GRANTED with leave to amend.

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26  
27 <sup>9</sup> Because plaintiffs' agency allegations are  
28 insufficient, the court does not reach the merits of plaintiffs'  
argument that a fiduciary duty was owed by defendant Jabout or  
any of the other defendants.

1           **2. Negligence and Constructive Fraud**

2           Claims for negligence and constructive fraud also require a  
3 duty of care element. "[T]he threshold element of a cause of  
4 action for negligence is the *existence of a duty* to use due care  
5 toward an interest of another." Glenn K. Jackson, Inc. v. Roe,  
6 273 F.3d 1192, 1196-1197 (9th Cir. 2001) (applying California  
7 law) (quotations and citations omitted)(emphasis added).  
8 Additionally, "[c]onstructive fraud is. . . applicable only to a  
9 *fiduciary* or confidential relationship." Assilzadeh v.  
10 California Federal Bank, 82 Cal. App. 4th 399, 415 (2000)  
11 (emphasis added).

12           Inasmuch as no fiduciary duty exists between a lender and a  
13 borrower and the court finds that plaintiffs have not  
14 sufficiently plead an agency relationship between Horizon and any  
15 of the other alleged duty-holding defendants, Horizon's motion to  
16 dismiss plaintiffs' claims for negligence and constructive fraud  
17 are GRANTED with leave to amend.

18           **H. California Civil Code § 1916.7 Claim**

19           Plaintiffs allege the "[S]ubject [L]oan is an adjustable  
20 rate loan within the meaning of CC [California Civil Code] §  
21 1916.7." (Compl. ¶ 220.) Further, plaintiffs claim they "did  
22 not receive a disclosure notice in the form prescribed by CC §  
23 1916.7(c)." (Id. ¶ 221.) Horizon asserts that the disclosures  
24 required by Section 1916.7 appear to be preempted in many  
25 circumstances by the federal Alternative Mortgage Transactions  
26 Parity Act of 1982 ("AMTPA"). (MTD at 16-17.)

27           The AMTPA provides in part that "[a]n alternative mortgage  
28 transaction may be made by a housing creditor in accordance with

1 this section, notwithstanding any State constitution, law, or  
2 regulation." 12 U.S.C. § 3803. "[T]he term 'alternative  
3 mortgage transaction' means a loan or credit sale secured by an  
4 interest in residential real property ... in which the interest  
5 rate or finance charge may be adjusted or renegotiated." 12  
6 U.S.C. § 3802(1)(A).

7 The Ninth Circuit has stated that AMTPA does not provide for  
8 complete preemption, but only of those state law terms that  
9 conflict with AMTPA's terms. Ansley v. Ameriquest Mortg. Co.,  
10 340 F.3d 858, 864 (9th Cir.2003); Quicken Loans, Inc. v. Wood,  
11 449 F.3d 944, 950 (9th Cir. 2006); accord National Home Equity  
12 Mortgage Association v. Face, 239 F.3d 633 (4th Cir. 2001); Black  
13 v. Financial Freedom Senior Funding Corp., 92 Cal. App. 4th 917,  
14 930 (Cal. App. 2001), cert. denied, 536 U.S. 959 (2002) ("the  
15 phrase 'any state constitution, law, or regulation' can be  
16 interpreted as implicitly limited to those that prohibit or  
17 impede alternative mortgage transactions or that conflict with  
18 [AMTPA's] federal regulations.").

19 The language of the statute provides that conflicting state  
20 laws governing alternative mortgage transactions are preempted  
21 where those transactions comply with relevant Office of Thrift  
22 Supervision<sup>10</sup> regulations. Hafiz v. Greenpoint Mortg. Funding,  
23 Inc., 652 F. Supp. 2d 1039, 1048 (N.D. Cal. 2009) (citing 12  
24 C.F.R. 560.35, 560.210, 226.19(b), 226.20(c)).) "Regulations  
25 have been issued with respect to [] four aspects of mortgage  
26

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27 <sup>10</sup> The Office of Thrift Supervision is a United States  
28 federal agency under the Department of the Treasury which creates  
regulations relating to AMTPA.

1 financing: Late charges; Prepayments; Adjustments to home loans;  
2 and *Disclosures for variable rate transactions.*" Ansley, 340  
3 F.3d at 863, n.1 (citing 12 C.F.R. §§ 560.33-560.35, 560.210,  
4 560.220) (emphasis added).) Accordingly, alternative,  
5 conflicting, or more rigorous state law disclosure requirements  
6 would conflict with AMTPA regulations. See Hafiz, 652 F. Supp.  
7 2d at 1048.

8 Here, plaintiffs have not asserted any facts regarding how  
9 the Section 1916.7 disclosure provisions harmonize with the  
10 relevant provisions of AMTPA, nor have plaintiffs responded to  
11 defendants' assertion that Section 1916.7 is preempted.  
12 Consequently, Horizon's motion to dismiss plaintiffs' Section  
13 1917.6 claim is GRANTED with leave to amend.

#### 14 **I. Unjust Enrichment**

15 Plaintiffs tenth claim for relief asserts that "Horizon and  
16 its agents, and Loanguy.com" were unjustly enriched by  
17 plaintiffs' monthly loan payments, fees, and interest because the  
18 contract was procured by fraud and because defendants breached  
19 the express terms of the contract making it unenforcable. (Compl.  
20 ¶ 179-186.) As a result, plaintiffs assert they have a claim for  
21 restitution. Horizon responds that "because [the unjust  
22 enrichment claim] is derivative of plaintiffs' other defective  
23 claims, it must fail with them." (MTD at 17.)

24 In order to establish a claim for unjust enrichment, a  
25 plaintiff must plead "receipt of a benefit and unjust retention  
26 of the benefit at the expense of another." Lectrodryer v.  
27 SeoulBank, 77 Cal. App. 4th 723, 726 (2000). Furthermore, the  
28 plaintiff must demonstrate that the defendant received the

1 benefit through mistake, fraud, coercion or request. Nibbi  
2 Bros., Inc. v. Home Fed. Sav. & Loan Ass'n, 205 Cal. App. 3d  
3 1415, 1422 (1988).

4 Alternatively, a court may grant restitution based on a  
5 "quasi-contract theory." McBride v. Boughton, 123 Cal. App. 4th  
6 379, 388 (2004). "Quasi-contractual" unjust enrichment is sought  
7 in order to avoid unjustly conferring a benefit upon a defendant  
8 where there is no valid contract. Id. However, under California  
9 law, a quasi-contract action does not lie "when an enforceable,  
10 binding agreement exists defining the rights of the parties."  
11 Paracor Fin. v. Gen. Elec. Capital Corp., 96 F.3d 1151, 1167 (9th  
12 Cir. 1996); Hedging Concepts, Inc. v. First Alliance Mortgage  
13 Co., 41 Cal. App. 4th 1410, 1419-1420 (1996).

14 Plaintiffs' unjust enrichment claim fails because, as the  
15 the court concluded *supra*, plaintiffs have insufficiently alleged  
16 fraud or breach of contract, and thus, fail to state that Horizon  
17 received and retained benefits and payments which they were not  
18 entitled to. Further, plaintiffs' alternative "quasi-contract"  
19 theory fails as well. Here, plaintiffs and defendants entered  
20 into the Subject Loan, and none of plaintiffs allegations support  
21 a claim that a valid contract did not exist between the parties.  
22 As such, plaintiffs do not allege sufficient facts to maintain a  
23 plausible claim for unjust enrichment.<sup>11</sup>

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24  
25 <sup>11</sup> In addition, most California courts agree that there is  
26 no cause of action for unjust enrichment. Walker v. Equity 1  
27 Lenders Group, 2009 WL 1364430, \*9 (S.D. Cal. 2009); Jogani v.  
28 Superior Court, 165 Cal. App. 4th 901, 911 (2008); Melchior v.  
New Line Productions, Inc., 106 Cal. App. 4th 779, 794 (2003)  
("Unjust enrichment is a general principle, underlying various  
legal doctrines and remedies, rather than a remedy itself.");  
Lauriedale Associates, Ltd. v. Wilson, 7 Cal. App. 4th 1439, 1448

1           Accordingly, Horizon's motion to dismiss plaintiffs' unjust  
2 enrichment claim is GRANTED with leave to amend.

3 **J. California Civil Code § 2923.6 claim**

4           Plaintiffs' fifteenth claim for relief is for violation of  
5 Section 2923.6. Specifically, plaintiffs claim that after they  
6 defaulted on their loan, Horizon was required to offer them a  
7 loan modification that was in their best interest and that  
8 Horizon failed to do this "when they offered and executed a so-  
9 called 'loan modification' in January 2009 with a two-year loan  
10 term and an excessive balloon payment in an amount of \$1,015,050,  
11 and then refused to offer a subsequent meaningful modification."  
12 (Compl. ¶ 234.) Defendant Horizon responds that no private right  
13 of action exists under Section 2923.6.

14           In California, "[n]either a private right of action nor  
15 actionable duty is discernable from section 2923.6 to defeat a  
16 claim based on its violation." Manabat v. Sierra Pacific Mortg.  
17 Co., Inc., No. CV F 10-1018 LJO JLT, 2010 WL 2574161, (E.D. Cal.  
18 Jun. 25, 2010). Indeed, "Section 2923.6 does not require a  
19 lender to enter into a loan modification to serve the parties'  
20 best interests." Id.; Zendejas v. GMAC Wholesale Mortg. Corp.,  
21 2010 WL 2490975, \*5 (E.D. Cal. Jun. 16, 2010) ("[Section 2923.6]  
22 in no way confers standing on a borrower to contest a breach of  
23 that duty. Other courts to consider this question have agreed  
24 unanimously.") (internal citations and quotations omitted);  
25 Alford v. Wachovia Bank/World Savings Bank, No. CV F 10-0091 LJO  
26 \_\_\_\_\_  
27 (1992) ("The phrase 'Unjust Enrichment' does not describe a  
28 theory of recovery, but an effect: the result of a failure to  
make restitution under circumstances where it is equitable to do  
so.").

1 SMS, 2010 WL 415260, \*10 (E.D. Cal. Jan. 26, 2010) (same);  
2 Pittman v. Barclays Capital Real Estate, Inc., No. 09 CV 0241,  
3 2009 WL 1108889, at \*3 (S.D. Cal. Apr. 24, 2009) (“[T]he cited  
4 statute clearly addresses this concern by creating a duty between  
5 a loan servicer and a loan pool member. The statute in no way  
6 confers standing on a borrower to contest a breach of that  
7 duty”); Farner v. Countrywide Home Loans, No. 08cv2193, 2009 WL  
8 189025, \*2 (S.D. Cal. Jan. 26, 2009) (same).

9 Because no private right of action exists, Horizon is  
10 entitled to dismissal of plaintiffs’ Section 2923.6 claim.  
11 Accordingly, Horizon’s motion to dismiss plaintiffs’ Section  
12 2923.6 claim is GRANTED without leave to amend.

13 **K. California Business & Professions Code § 17200**

14 In their eleventh claim for relief, plaintiffs allege that  
15 Horizon violated § 17200 of the California Business and  
16 Professions Code (“UCL”) by engaging in fraudulent business  
17 practices. (Compl. ¶¶ 189-202.)

18 UCL forbids acts of unfair competition, which includes “any  
19 unlawful, unfair or fraudulent business act or practice.” Id. §  
20 17200. UCL “incorporates other laws and treats violations of  
21 those laws as unlawful business practices independently  
22 actionable under state law.” Plascencia v. Lending 1st Mortgage,  
23 583 F. Supp. 2d 1090, 1098 (N.D. Cal. 2008); see also Farmers  
24 Ins. Exch. v. Superior Court, 2 Cal. 4th 377, 383 (1992).  
25 “California’s UCL has a broad scope that allows for ‘violations  
26 of other laws to be treated as unfair competition that is  
27 independently actionable’ while also ‘sweep[ing] within its scope  
28 acts and practices not specifically proscribed by any other

1 law.'" Hauk v. JP Morgan Chase Bank U.S.A., 552 F.3d 1114 (9th  
2 Cir. 2009) (internal citations omitted). "Violation of almost  
3 any federal, state, or local law may serve as the basis for a UCL  
4 claim." Plascencia, 583 F. Supp. 2d at 1098 (citing Saunders v.  
5 Superior Court, 27 Cal. App. 4th 832, 838-839 (1994)).

6 Plaintiffs' UCL claim is founded upon the same allegations  
7 as their fraud claim, and as set forth *supra*, plaintiffs'  
8 allegations are insufficient to state a claim for fraud against  
9 Horizon. Accordingly, Horizon's motion to dismiss plaintiffs'  
10 claim for violations of California Business & Professions Code §  
11 17200 is GRANTED with leave to amend.<sup>12</sup>

#### 12 CONCLUSION

13 For the foregoing reasons, defendant Horizon's motion to  
14 dismiss is GRANTED. Plaintiffs' TILA, rescission and continuing  
15 violation claims; RESPA § 2604 claim; Section 2923.6 claim; and  
16 predatory lending "claim" are dismissed without leave to amend.  
17 As to all other claims, plaintiffs are granted fifteen (15) days  
18 from the date of this order to file a second amended complaint in  
19 accordance with this order. Horizon is granted thirty (30) days  
20 from the date of service of plaintiffs' second amended complaint  
21 to file a response thereto.

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23 <sup>12</sup> Plaintiffs' thirteenth cause of action is a predatory  
24 lending practice "claim." Plaintiffs characterize "predatory  
25 lending practice" as "an umbrella term [used] to describe some of  
26 the other claims alleged in this action, such as claims under  
27 TILA, RESPA and California UCL." (Opp.'n at 13.) In other  
28 words, plaintiffs' thirteenth cause of action is not a cause of  
action at all; it simply restates Horizon's alleged violations of  
TILA, RESPA, and UCL. As already stated, plaintiffs fail to  
state a claim pursuant to these statutes; accordingly, Horizon's  
motion to dismiss plaintiffs' predatory lending practices "claim"  
is GRANTED without leave to amend.



IT IS SO ORDERED.

DATED: November 22, 2010



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FRANK C. DAMRELL, JR.  
United States District Judge

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