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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

DIANA MCMENEMY, an individual; and MICHAEL MCMENEMY, an individual,  
  
                        Plaintiffs,  
  
                        v.  
  
COLONIAL FIRST LENDING GROUP, INC., a Utah Corporation;  
COLONIAL FIRST BUSINESS DEVELOPMENT, LLC, a Utah Limited Liability Company;  
DEVIN JONES, an individual;  
FLAGSHIP FINANCIAL GROUP, LLC, and DOES 1 through 10,  
  
                        Defendants.

No. 2:14-cv-1482 JAM AC

**ORDER DENYING DEFENDANT FLAGSHIP'S MOTION FOR JUDGMENT ON THE PLEADINGS**

This matter is before the Court on Defendant Flagship Financial Group, LLC's ("Flagship") Motion for Judgment on the Pleadings (Doc. #75). Plaintiffs Michael and Diana McMenemy<sup>1</sup> ("Plaintiffs") oppose Flagship's motion (Doc. #86) and Flagship filed a reply (Doc. #89). For the following reasons, the motion

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<sup>1</sup> There is a discrepancy between the spelling of Plaintiffs' surname as it appears in the caption of this case, and as it appears in the FAC. For consistency's sake, it will be spelled as it appears in the caption.

1 is denied.<sup>2</sup>

2 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

3 Between June and August 2008, Defendants Colonial, Jones,  
4 and Colonial FBD "provided mortgage brokerage services to  
5 Plaintiffs . . . for the purpose of obtaining for Plaintiffs a  
6 purchase money loan" for 409 French Avenue, Grass Valley,  
7 California. First Amended Complaint ("FAC") ¶¶ 1, 9. Plaintiffs  
8 "expressly told Jones and Colonial that they could not afford a  
9 total monthly mortgage payment that exceeded approximately  
10 \$1,800[.]" FAC ¶ 10. Plaintiffs allege that, unbeknownst to  
11 them, "Colonial and Jones did not have the requisite license from  
12 the California Department of Real Estate to provide the Mortgage  
13 Services." FAC ¶ 11. Plaintiffs also allege that, unbeknownst  
14 to them, "Jones and Colonial divided the Mortgage Services into  
15 loan origination services . . . which Jones and Colonial  
16 proceeded to perform, and loan processing services . . . which  
17 Jones and Colonial contracted with Flagship to perform." FAC  
18 ¶ 12. Plaintiffs allege that Flagship helped Jones and Colonial  
19 conceal from Plaintiffs the fact that they were unlicensed. FAC  
20 ¶ 13. Moreover, "without disclosure to Plaintiffs, Jones,  
21 Colonial and Flagship arranged to have Flagship appear on the  
22 escrow documents as the Plaintiffs' mortgage broker, but for  
23 Colonial and Jones to actually perform the Loan Origination  
24 Services." FAC ¶ 15. Defendants Jones, Colonial, and Flagship  
25 shared the fees paid by Plaintiffs. FAC ¶ 15. Plaintiffs

26  
27 <sup>2</sup> This motion was determined to be suitable for decision without  
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was  
scheduled for March 25, 2015.

1 specifically allege that they "did not know, and did not have  
2 reason to know, about the conduct of Flagship [detailed above]  
3 until on or about January 5, 2012, when Plaintiffs took the  
4 deposition of Heather Hodge." FAC ¶ 16.

5 On February 4, 2014, Plaintiffs filed the Complaint against  
6 Flagship in Nevada County Superior Court. On February 18, 2014,  
7 Flagship removed the matter to this Court. On March 17, 2014,  
8 Plaintiffs filed the FAC, naming Jones, Colonial, and Colonial  
9 FBD as defendants along with Flagship. The FAC includes claims  
10 against Flagship for Fraud, Negligent Misrepresentation, Breach  
11 of Fiduciary Duty, Unfair Competition in violation of Cal.  
12 Business and Professions Code § 17200, and Conspiracy to Defraud.

## 13 II. OPINION

14 Flagship argues that Plaintiffs' claims against it must be  
15 dismissed for failure to comply with the applicable statute of  
16 limitations.<sup>3</sup> Mot. at 4. Plaintiffs respond that the statute of  
17 limitations did not begin to run until January 5, 2012, when they  
18 took the deposition of Heather Hodge. Opp. at 5. Plaintiffs  
19 contend that it was only during Ms. Hodge's deposition that they  
20 learned the true extent and nature of Flagship's relationship  
21 with the remaining Defendants, and the role that Flagship played  
22 in processing Plaintiffs' mortgage file. Opp. at 6. In its  
23 reply, Flagship maintains that the statute of limitations began  
24 to run when Plaintiffs' loan payments went up, because the

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25  
26 <sup>3</sup> Although Flagship originally cites the four-year statute of  
27 limitations for contract-based actions, Plaintiffs correctly  
28 assert that three-year statute of limitations for fraud-based  
actions applies to their claims. Flagship adopts this position in  
its reply brief.

1 circumstances would lead a reasonable person to inquire as to  
2 Flagship's involvement. Reply at 3. Flagship also argues that  
3 "Plaintiffs had knowledge or constructive knowledge of Flagship's  
4 involvement in their home purchase in 2008," based on documents  
5 which are not properly before the Court - an issue which is  
6 addressed below. Reply at 3.

7 Generally, an action may not be dismissed at the pleading  
8 stage based on the statute of limitations "unless it is clear  
9 from the face of the complaint that the statute has run and that  
10 no tolling is possible." Brocade Commc'ns Sys., Inc. v. A10  
11 Networks, Inc., 2011 WL 1044899, at \*3 (N.D. Cal. Mar. 23, 2011)  
12 (citing Conerly v. Westinghouse Electric Corp., 623 F.2d 117, 119  
13 (9th Cir. 1980)); see also Jablon v. Dean Witter & Co., 614 F.2d  
14 677, 682 (9th Cir. 1980) ("When a motion to dismiss is based on  
15 the running of a statute of limitations, it can be granted only  
16 if the assertions of the complaint, read with the required  
17 liberality, would not permit the plaintiff to prove that the  
18 statute was tolled."). Whether a plaintiff is entitled to  
19 tolling based on delayed discovery is usually a question of fact  
20 for the jury, unless the "uncontradicted facts are susceptible of  
21 only one legitimate inference." Kline v. Turner, 87 Cal. App.  
22 4th 1369, 1374, 105 Cal. Rptr. 2d 699 (2001)

23 To avail itself of delayed discovery tolling, a plaintiff  
24 must "plead facts to show (1) the time and manner of discovery  
25 and (2) the inability to have made an earlier discovery despite  
26 reasonable diligence." See E-Fab, Inc. v. Accountants, Inc.  
27 Servs., 153 Cal.App.4th 1308, 1320 (2007) (emphasis omitted); Rey  
28 v. OneWest Bank, FSB, 2013 WL 127839, at \*5 (E.D. Cal. Jan. 9,

1 2013). But a plaintiff's duty to diligently investigate is only  
2 triggered when the plaintiff "has reason to suspect an injury and  
3 some wrongful cause[.]" E-Fab, 153 Cal.App.4th at 1319. If a  
4 plaintiff fails to suspect such an injury because she relied on a  
5 misrepresentation, she may invoke the delayed discovery doctrine  
6 unless her reliance, "in light of [its] own information and  
7 intelligence, is preposterous and irrational." Broberg v.  
8 Guardian Life Ins. Co. of Am., 171 Cal.App.4th 912, 922-23 (2009)  
9 (citation and quotation marks omitted) (reversing dismissal where  
10 plaintiff relied on misrepresentations by defendant despite  
11 having access to a document that - had plaintiff read it - would  
12 have revealed the misrepresentations).

13 Here, Flagship's alleged fraudulent conduct occurred in  
14 2008. Plaintiffs did not file the Complaint, naming Flagship,  
15 until January 2014. As each of Plaintiff's claims against  
16 Flagship is grounded in fraud, the applicable statute of  
17 limitations is three years. Cal. Civ. Proc. Code § 338(d).  
18 Accordingly, Plaintiffs' claims against Flagship must be  
19 dismissed unless the Court determines that Plaintiffs are  
20 entitled to tolling based on delayed discovery "of the facts  
21 constituting the fraud." Cal. Civ. Proc. Code § 338(d).

22 In the FAC, Plaintiffs allege the following conduct by  
23 Flagship: (1) Flagship performed loan processing services for  
24 Jones and Colonial (FAC ¶ 12); (2) Flagship helped Jones and  
25 Colonial hide the fact that they were unlicensed from Plaintiffs  
26 (FAC ¶ 13); (3) Flagship knew that the monthly loan payments  
27 would eventually exceed Plaintiffs' ability to pay (FAC ¶ 14);  
28 and (4) Flagship, Jones, and Colonial divided between themselves

1 the mortgage brokerage, loan origination, and loan processing  
2 fees paid by Plaintiffs. Plaintiffs specifically allege that  
3 they "did not know, and did not have reason to know, about the  
4 conduct of Flagship [summarized above] until on or about January  
5 5, 2012, when Plaintiffs took the deposition of Heather Hodge."  
6 FAC ¶ 16.

7 As required under E-Fab v. Accountants, Plaintiffs have  
8 alleged "(1) the time and manner of discovery and (2) the  
9 inability to have made an earlier discovery despite reasonable  
10 diligence." E-Fab, 153 Cal.App.4th at 1320. Plaintiffs learned  
11 of Flagship's alleged misconduct on January 5, 2012, through the  
12 deposition testimony of Heather Hodge. They were unable to learn  
13 the information earlier because Defendants concealed that  
14 information. As noted above, a plaintiff's failure to learn of  
15 misconduct due to its reliance on a defendant's  
16 misrepresentations will only preclude the plaintiff's invocation  
17 of the delayed discovery doctrine if such reliance was, "in light  
18 of [its] own information and intelligence, . . . preposterous  
19 and irrational." Broberg v. Guardian Life Ins. Co. of Am., 171  
20 Cal.App.4th 912, 922-23 (2009). In this case, it cannot be said  
21 that Plaintiffs' reliance was "preposterous and irrational," as  
22 they had no reason to suspect any extensive involvement or  
23 misconduct by Flagship. Accordingly, for each of Plaintiffs'  
24 claims against Flagship, the statute of limitations was tolled  
25 until January 5, 2012, under the delayed discovery rule. As  
26 Plaintiffs filed the Complaint against Flagship in January 2014,  
27 the action was timely and the statute of limitations had not  
28 expired.

1           Flagship makes several arguments in opposition to  
2 Plaintiffs' invocation of the delayed discovery rule. First,  
3 Flagship argues that "Plaintiffs had knowledge or constructive  
4 knowledge of Flagship's involvement in their home purchase in  
5 2008 [because the] Uniform Residential Loan Application shows  
6 that Flagship interviewed the Plaintiffs" and because the  
7 "closing statement shows Flagship's Loan Origination fee, Credit  
8 report fee, Processing fee, Application fee, and Mortgage Broker  
9 fee." Reply at 3. This argument is based on documents which are  
10 not properly before the Court: in support of its motion, Flagship  
11 attached two documents which it claims are a loan application and  
12 a closing statement on Plaintiff's mortgage. Mot., Ex. A; Mot.,  
13 Ex. B. However, Flagship makes no request that the Court take  
14 judicial notice of these documents (nor are they the proper  
15 subjects of judicial notice, as they are not public records).  
16 The Court is limited to "the face of the complaint" and may not  
17 consider the extrinsic evidence submitted by Flagship. Brocade,  
18 2011 WL 1044899, at \*3. (Flagship's suggestion - made for the  
19 first time in its reply brief - that the Court should convert its  
20 motion into a motion for summary judgment, is not well-taken.)  
21 Moreover, even if the Court were to consider these documents, it  
22 is far from clear that they demonstrate that Plaintiffs were on  
23 constructive notice of Flagship's alleged wrongdoing: Plaintiffs  
24 allege fraudulent concealment by Flagship, not mere involvement  
25 in the processing of their loan. Regardless, the documents are  
26 not properly before the Court and this argument carries no  
27 weight.

28           Flagship also argues that the statute of limitations began

1 to run, at the latest, "in 2010, the year in which Plaintiffs  
2 allege their monthly payments first went up." Reply at 3. This  
3 argument shares the same flaw as the argument discussed above: it  
4 relies on a document not properly before the Court. To  
5 demonstrate that Plaintiffs' loan payments first increased in  
6 2010, Flagship cites an attachment to its reply brief, which  
7 purports to be a loan modification request submitted by  
8 Plaintiffs. Reply, Ex. A. As noted above, in evaluating this  
9 motion for judgment on the pleadings, the Court is limited to the  
10 face of the complaint, and Flagship does not argue that the Court  
11 can or should take judicial notice of this document. Moreover,  
12 even assuming that Plaintiffs became generally aware of fraud in  
13 2010, it does not follow that they became aware of *Flagship's*  
14 fraud in 2010. As alleged by Plaintiffs, they did not learn of  
15 the nature and extent of Flagship's involvement in the alleged  
16 fraud until taking the deposition of Heather Hodge in 2012.

17  
18 III. ORDER

19 For the reasons set forth above, the Court DENIES Flagship's  
20 Motion for Judgment on the Pleadings:

21 IT IS SO ORDERED.

22 Dated: April 14, 2015

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25 JOHN A. MENDEZ,  
26 UNITED STATES DISTRICT JUDGE  
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