

United States District Court
For the Northern District of California

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

WENCESLAO BOJORQUEZ,

No. C 09-03684 SI

Plaintiff,

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTIONS TO DISMISS**

v.

MARTHA GUTIERREZ, et al.,

Defendants.

Defendants Ocwen Loan Servicing, Specialized Loan Servicing, Martha Gutierrez, and Marin 1 Real Estate have filed motions to dismiss plaintiff’s first amended complaint. The Court took this matter under submission. Having considered the papers submitted, and for good cause shown, the Court hereby rules as follows.

BACKGROUND

Plaintiff filed this case on August 12, 2009, naming numerous defendants and alleging fourteen causes of action related to the purchase of real property in May 2005.¹ Shortly thereafter, various defendants filed motions to dismiss the complaint pursuant to Rule 12(b)(6), and plaintiff subsequently filed a First Amended Complaint (“FAC” or “amended complaint”) on December 16, 2009. In the matter now before the Court, defendants again move for dismissal pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted, and on the additional ground that some of plaintiff’s claims

¹ The action was dismissed as to four defendants and settlement negotiations are ongoing between plaintiff and defendant Litton Loan Servicing. Several defendants have not appeared and may not have been served.

1 are time-barred. The moving defendants are Martha Gutierrez, a licensed real estate agent employed
2 by Marin 1 Real Estate, Inc. (“Marin 1”); Ocwen Loan Servicing, LLC (“Ocwen”); and Specialized
3 Loan Servicing, LLC (“Specialized”). Ocwen and Specialized are referred to collectively in this order
4 as the “loan servicing defendants.”

5 This case arises out of events leading up to plaintiff’s purchase of a home in the spring of 2005,
6 and the eventual foreclosure and resale of that home in March 2008. Plaintiff alleges that he can neither
7 speak nor read English and is only marginally literate in Spanish, and alleges that all defendants are
8 aware of this fact. FAC ¶¶ 21, 22. Plaintiff dealt primarily with defendant Gutierrez, an agent of
9 defendant Marin 1 who often works with Spanish-speaking clients. *Id.* ¶¶ 3, 5, 24, 27-28. Plaintiff
10 alleges that Gutierrez never disclosed the existence of other entities involved in the transaction. *Id.* ¶
11 37. All oral communication with Gutierrez was in Spanish, but all documentation presented by
12 Gutierrez was written in English. *Id.* ¶¶ 36, 39, 44. Plaintiff alleges that he therefore relied on Gutierrez
13 to translate the terms of any documentation related to the transaction. *Id.* ¶¶ 103, 113, 132. Of the
14 fourteen causes of action alleged in his complaint, all but the first and the fourteenth are alleged against
15 Gutierrez. Plaintiff’s allegations concerning his interaction with Gutierrez are as follows.

16
17 **I. Allegations Against Defendants Gutierrez and Marin 1**

18 Plaintiff alleges that in early 2005 he was solicited by Gutierrez to purchase a home. *Id.* ¶ 27.
19 Initially, plaintiff dismissed the possibility of purchasing a home because he believed that “he lacked
20 money or credit to purchase any real property.” *Id.* However, with some persistence, Gutierrez
21 convinced plaintiff to at least consider purchasing a home. *Id.* ¶ 28 Gutierrez visited plaintiff’s
22 apartment in February 2005, and plaintiff provided her with financial information necessary to complete
23 loan applications on his behalf *Id.* When Gutierrez notified plaintiff that the loans had been approved
24 plaintiff refused to sign the documents because he doubted his ability to afford such a large purchase.
25 *Id.* ¶ 29. According to plaintiff, Gutierrez continued her attempts to persuade plaintiff that he could
26 afford a home, stating that he “would never pay much more than \$2000 per month” and that he could
27 rent rooms to tenants which Gutierrez would “personally provide . . . for at least \$1200 per month.” *Id.*
28 ¶30. Plaintiff again refused to sign the documents. *Id.*

1 Plaintiff alleges that Gutierrez continued to pressure him to change his mind by phoning him,
2 his roommate, and his daughter up to five times daily over the course of two weeks. *Id.* Plaintiff states
3 that he eventually “succumbed to that barrage” and signed the loan documents based upon Gutierrez’s
4 assurances that he was indeed in a financial position to purchase a home, that he would make money
5 on the transaction by renting out rooms in the house, and that she would help him find tenants. *Id.* ¶¶
6 30, 31, 42. According to plaintiff, Gutierrez also made statements which gave plaintiff the impression
7 that he was legally obligated to follow through with loans once they were approved, never explaining
8 that he could withdraw his application at any time. *Id.* ¶ 30, 31.

9 In March 2005, plaintiff made an offer on a house in Richmond, California, allegedly based upon
10 Gutierrez’s statement that it was a good value. *Id.* ¶ 32, 33. Despite a lack of competing offers, plaintiff
11 followed Gutierrez’s advice to offer \$16,000 above the asking price, which increased Gutierrez’s
12 commission by \$480. *Id.* ¶ 33. At that time, Gutierrez presented plaintiff with a purchase contract.
13 Plaintiff could not read the document because it was written in English, but he agreed to sign based upon
14 Gutierrez’s representations about its contents. *Id.* ¶ 36.

15 Plaintiff alleges that in April 2005, again reconsidering his decision to proceed, he contacted
16 Gutierrez to protest that he could not afford the property, but Gutierrez did not inform plaintiff that he
17 had no obligation to purchase the home without first obtaining financing on the terms specified in the
18 purchase contract. *Id.* ¶ 41-42. Rather, Gutierrez allegedly behaved in an “abusive and threatening”
19 manner whenever plaintiff attempted to tell her he did not wish to purchase the property. *Id.* ¶ 41.
20 Believing that he was obligated to follow through, plaintiff ultimately closed on the property on May
21 19, 2005 for a total purchase price of \$415,000 despite having a loan with terms different from those
22 specified in the purchase contract. *Id.* ¶¶ 41-43, 47.

23 To finalize the transaction, plaintiff met with Gutierrez and her husband, also a defendant in this
24 action, at Denny’s. Plaintiff alleges that he was presented with “a mountain of documents” to sign, the
25 contents of which were in English. *Id.* ¶ 42. Plaintiff alleges that the contents of the documents
26 presented to him were either misrepresented or not explained and that he paid various closing fees which
27 were not disclosed to him. *Id.* Plaintiff financed the house with two mortgages, the first for \$332,000,
28 and the second for \$83,000. *Id.* ¶ 50. Because plaintiff’s annual income was approximately \$26,000

1 and he had “no other assets of significant value,” plaintiff believes that defendants submitted false loan
2 applications on his behalf. *Id.* ¶ 38, 40.

3 Plaintiff alleges that, shortly after the closing, he received demands for mortgage payments and
4 a property tax bill in excess of \$4000, which he had never been informed he would have to pay. *Id.* ¶
5 59, 61, 62. Plaintiff made his monthly mortgage payments until June 1, 2007, when the increased
6 interest rate on the adjustable-rate mortgages increased his monthly demand from \$1591 to \$2420, and
7 then later to \$2628. *Id.* ¶ 62. Plaintiff defaulted on the payments and a notice of default was recorded
8 on the property on October 15, 2007. ¶ 65. The property was subsequently sold to another party in
9 March 2008. ¶ 67.

10 Plaintiff alleges that he did not learn of the true terms of the purchase agreement until at least
11 June 2007, when his monthly mortgage payment went up. *Id.* ¶ 63. Subsequently, in April 2008,
12 plaintiff sought the assistance of Legal Aid of Marin County. *Id.* ¶ 69. Plaintiff alleges that he still does
13 not know the specifics of any paperwork that was processed on his behalf by Gutierrez because he never
14 received copies. *Id.* ¶ 28, 44.

15
16 **II. Allegations against defendants other than Gutierrez and Marin 1**

17 Plaintiff further alleges that “at some time prior to 2005, Defendants Ownit, MERS, DocMagic,
18 Specialized, Ocwen, Litton, Countrywide, and DocMagic formed and commenced operating a joint
19 enterprise to sell mortgage-loan products to Spanish-speaking persons of foreign nationalities” using
20 only documentation in the English language. *Id.* ¶ 23. Plaintiff alleges that defendants formed this joint
21 enterprise with the aim of “conceal[ing] material mortgage terms of interest to borrowers” in order to
22 maximize the number of loans sold, regardless of whether the loans were procured by fraud or mistake.
23 *Id.* It is through this “Lending and Servicing Conspiracy” that plaintiff seeks to attach liability to all
24 named parties who participated in or had a stake in the purchase of or foreclosure on plaintiff’s home.

25
26 **LEGAL STANDARD**

27 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it
28 fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss,

1 the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
2 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires the plaintiff
3 to allege facts that add up to “more than a sheer possibility that a defendant has acted unlawfully.”
4 *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). While courts do not require “heightened fact pleading
5 of specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above the speculative
6 level.” *Twombly*, 550 U.S. at 544, 555. In deciding whether the plaintiff has stated a claim upon which
7 relief can be granted, the Court must assume all allegations are true and draw all reasonable inferences
8 in the plaintiff’s favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

9 If the Court dismisses the complaint, it must decide whether to grant leave to amend. The Ninth
10 Circuit has “repeatedly held that a district court should grant leave to amend even if no request to amend
11 the pleading was made, unless it determines that the pleading could not possibly be cured by the
12 allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal
13 quotation marks omitted). Dismissal on statute of limitations grounds should be granted “only if the
14 assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that
15 the statute was tolled.” *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980).

17 DISCUSSION

18 I. Claims as to Loan Servicers

19 Plaintiff alleges the following claims against moving defendants Ocwen and Specialized: federal
20 claims for violations of the Fair Housing Act (“FHA”) and Fair Credit Reporting Act (“FCRA”), and
21 state law claims for negligence and equitable rescission. Defendants move to dismiss the FHA claim
22 on the ground that it is time-barred and move to dismiss all claims asserted against them for failure to
23 state a claim.

24 A. FHA

25 The federal Fair Housing Act provides, “It shall be unlawful for any person or other entity whose
26 business includes engaging in residential real estate-related transactions to discriminate against any
27 person in making available such a transaction, or in the terms or conditions of such a transaction,
28

1 because of race, color, religion, sex, handicap, familial status, or national origin.” 42 U.S.C. § 3605.
2 Claims under the FHA are evaluated using a Title VII discrimination analysis. *Harris v. Itzhaki*, 183
3 F.3d 1043, 1051 (9th Cir. 1999). An FHA claim may be brought on either a disparate treatment or
4 disparate impact theory. *Id.* Plaintiff’s claim appears to be for disparate treatment. In order to assert
5 a disparate treatment claim under the FHA, plaintiff must establish that: “(1) plaintiff’s rights are
6 protected under the FHA; and (2) as a result of the defendant’s discriminatory conduct, plaintiff has
7 suffered a distinct and palpable injury.” *Id.*

8 Although plaintiff does not allege that he ever interacted with defendants Ocwen and
9 Specialized, he attempts to tie these defendants into his FHA claim by alleging that “[d]efendant
10 members of the Lending and Servicing Conspiracy conspired to discriminate against [plaintiff] on the
11 basis of his race and national origin in the terms, conditions, and privileges of the sale and financing of
12 the Property to him.” FAC ¶ 150. The conduct complained of includes, but is not limited to,
13 defendants’ having used plaintiff’s inability to speak English to deny him

14 actual disclosure of things required to be disclosed to him by TILA, RESPA, ECOA,
15 FCRA, . . . knowledge of the terms of the Purchase Contract; the First and Second
16 Mortgage . . . knowledge that the interest rate of the First Mortgage was variable . . . that
17 his payments would dramatically increase after two years. . . that he would be expected
18 to pay a finance charge for the First Mortgage . . . [and] Second Mortgage[] and . . .
19 knowledge that it was financially impossible for him to purchase the Property.

20 *Id.* ¶ 151. Defendants Ocwen and Specialized move to dismiss the FHA claim, contending that the
21 claim is time-barred and, in the alternative, that they are not alleged to be involved with the loan
22 organization and are therefore not subject to the FHA claim.

23 1. Timeliness

24 The statute of limitations for a FHA claim brought by a private party is two years. *See* 42 U.S.C.
25 § 3613(a)(1)(A). The statute begins to run upon “the occurrence or the termination of an alleged
26 discriminatory housing practice.” *Id.* Where an FHA plaintiff “challenges not just one incident of
27 conduct violative of the Act, but an unlawful practice that continues into the limitations period, the
28 complaint is timely when it is filed within [the statutory period, running from] the last asserted
occurrence of that practice.” *Garcia v. Brockway*, 526 F.3d 456, 462 (9th Cir. 2008) (quoting *Havens*

1 *Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982) (footnote omitted)).

2 Plaintiff contends that the statute has not run as to this claim because the last overt act under the
3 alleged conspiracy occurred within two years of the filing of his complaint. Specifically, plaintiff
4 contends that the loan servicing members of the alleged conspiracy sent notices to plaintiff in June and
5 August of 2007, and as such the conspiracy was ongoing until at least that time. Defendant Ocwen
6 correctly points out, however, that the allegations in the FAC only refer to a statement from June 2007,
7 more than two years before the filing of this action in August 2009. Even assuming that the alleged
8 conspiracy terminated as late as June 2007, the FHA claim is untimely and must therefore be dismissed
9 unless plaintiff can plead a basis for tolling the statute of limitations.

10 Plaintiff asserts that he is entitled to equitable tolling, advancing two explanations in support.
11 First, plaintiff asserts that he can neither speak nor read English, is marginally literate in Spanish, and
12 that defendants' failure to provide required disclosures in a manner which could have been understood
13 by plaintiff prevented him from discovering the facts giving rise to his claim until less than two years
14 before the filing of this action. Second, plaintiff asserts that he made diligent efforts to discover the
15 terms of the loan agreements in conversations with Gutierrez, and that he was entitled to rely upon
16 Gutierrez's representations during those conversations, thereby satisfying the diligence required of him
17 and entitling him to equitable tolling until he discovered the true terms of the agreement.

18 "Equitable tolling may be applied if, despite all due diligence, a plaintiff is unable to obtain vital
19 information bearing on the existence of his claim." *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1178 (9th
20 Cir. 2000). The doctrine of equitable tolling "focuses on a plaintiff's excusable ignorance and lack of
21 prejudice to the defendant." *Leong v. Potter*, 347 F.3d 1117, 1123 (9th Cir. 2003). Few cases outside
22 the habeas corpus context address whether lack of English proficiency or literacy in any language may
23 toll a statute of limitations. The few cases the Court was able to locate support plaintiff's contention
24 that equitable tolling is available when language or literacy issues prevent a plaintiff from learning the
25 factual basis for his claims. See *Galindo v. Financo Fin., Inc.*, No. 07-3991, 2008 U.S. Dist. LEXIS
26 82773, at *10-11 (N.D. Cal. Oct. 3, 2008) (tolling limitations period on Truth In Lending Act claim
27 based on plaintiff's inability to read at the time she signed the loan documents); *Gonzalez v. Ameriquest*
28 *Mortgage Co.*, No. 03-0405, 2004 U.S. Dist. LEXIS 22706 (N.D. Cal. June 3, 2004) (tolling limitations

1 period on Truth In Lending Act claim where mortgage broker provided documents only in English
2 despite knowing that plaintiff spoke only Spanish).

3 Defendants cite to *Barrow v. New Orleans S.S. Ass'n*, 932 F.2d 473, 478 (5th Cir. 1991) to assert
4 that plaintiff's illiteracy alone is not a basis for equitable tolling. In *Barrows*, however, the plaintiff's
5 allegation was that his illiteracy made him ignorant of his legal rights, and the court denied equitable
6 tolling on the ground that ignorance of one's legal rights is not an excuse for failing to timely file an
7 action. *Id.* at 478. Here, by contrast, plaintiff's allegation is that his illiteracy and lack of English
8 proficiency prevented him from discovering the factual basis for his claim. Plaintiff alleges that he was
9 forced to rely upon defendant Gutierrez's verbal representation of the contents and terms of the
10 documents at issue. In the Court's view, plaintiff has presented a colorable basis for equitable tolling.

11 After showing that his failure to discover the facts giving rise to his claim was due to "excusable
12 ignorance," however, a plaintiff must also show that he pursued his claim diligently. *Leong*, 347 F.3d
13 at 1123. Before the Court can determine whether plaintiff acted diligently, plaintiff must clarify the
14 relevant facts that led to his discovery of the alleged concealment and misrepresentation. In his
15 amended complaint and his opposition to defendants' motions to dismiss, plaintiff variously alludes to
16 discovering defendants' fraudulent concealment in 2007, 2008, and 2009 with no explanation of the
17 events surrounding his discovery. This ambiguity must be clarified, as the timing of plaintiff's
18 discovery is pivotal to the Court's assessment of plaintiff's entitlement to equitable tolling. Plaintiff
19 must provide more detail regarding his discovery of the misrepresented or concealed loan terms before
20 the Court can reach a decision on the statute of limitations issue related to the FHA and all other claims.

21 The Court will proceed to consider the merits of plaintiff's FHA claims against the loan
22 servicing defendants.

23 24 **2. FHA violation as to Loan Servicers**

25 Plaintiff has alleged that the loan servicers conspired to violate the FHA by targeting Spanish
26 speakers of Hispanic national origin and inducing them to enter into loan agreements through fraud or
27 mistake. FAC ¶ 23. As stated previously, the federal Fair Housing Act concerns discrimination in
28 real-estate transactions. *See* 42 U.S.C. § 3605. Here, plaintiff simply asserts in a conclusory fashion

1 that defendants “individually, and as a part of a joint enterprise for that purpose, intended to discriminate
2 against him on the basis of his foreign nationality and resulting inability to speak English.” FAC ¶ 153.
3 Plaintiff alleges no facts raising an inference that defendants’ conduct was motivated by any
4 discriminatory animus. Defendants’ motion to dismiss the FHA claim is therefore GRANTED with
5 leave to amend to allege facts supporting plaintiff’s theory of discrimination.

6
7 **B. FCRA**

8 Plaintiff initially attempted to state a claim under the Fair Credit Reporting Act, 15 U.S.C. §
9 1681, *et seq.* against defendants Ocwen and Specialized. In his opposition to these defendants’ motions
10 to dismiss, however, plaintiff expressly states that he does not oppose the dismissal of this claim.
11 Accordingly, the claim is DISMISSED without leave to amend as to defendants Ocwen and Specialized.

12
13 **C. Negligence**

14 In stating his claim for negligence against Ocwen and Specialized, plaintiff alleges that each had
15 “a duty to not knowingly inflict foreseeable harm upon plaintiff, and a duty not to conspire to
16 intentionally deprive non-English speaking mortgagees of their rights under TILA, RESPA, ECOA,
17 FRCA, FDCPA, and FHA.” FAC ¶ 170. Through the breach of that duty, plaintiff alleges injury
18 attributable to defendants in that he paid undisclosed fees and interest, that his credit rating was
19 damaged, and that he has paid real estate taxes in an amount exceeding \$6500. *Id.* ¶ 171. Defendants
20 move to dismiss this claim on two grounds: first, for failure to allege the required elements of a
21 negligence claim; and second, on the ground that the principle that banks do not owe a fiduciary duty
22 to their loan customers extends to loan servicers as well.

23 Under California law, the elements of an action for negligence are the existence of a duty, breach
24 of that duty, causation between the defendant’s act or omission and the plaintiff’s injuries, and damages.
25 *Merrill v. Navegar, Inc.*, 110 Cal. Rptr. 2d 370, 379 (Cal. Ct. App. 2001). “[P]arties to a contractual
26 relationship, such as a mortgagor and mortgagee, cannot bring a tort claim [for negligence] unless a
27 legal duty independent of the contract itself has been violated.” *Gaitan v. Mortgage Elec. Reg. Sys.*, No.
28 09-1009, 2009 U.S. Dist. LEXIS 97117, at *8 (C.D. Cal. Oct. 5, 2009) (citing *Freeman & Mills, Inc.*

1 v. *Belcher Oil Co.*, 11 Cal. 4th 85, 102-03 (1995)). “[A]s a general rule, a financial institution owes no
2 duty of care to a borrower when the institution’s involvement in the loan transaction does not exceed
3 the scope of its conventional role as a mere lender of money.” *Nymark v. Heart Fed. Sav. & Loan Ass’n*,
4 283 Cal. Rptr. 53, 56 (Cal. Ct. App. 1991).

5 Defendants cite to *Huerta v. Ocwen Loan Servicing, Inc.*, No. 09-5822, 2010 U.S. Dist. LEXIS
6 17970 (N.D. Cal. Mar. 1, 2010) to support their contention that the general rule applied to financial
7 institutions ordinarily applies to loan servicers as well. *See id.* at *4 (“It follows logically that a loan
8 servicer has no fiduciary duty to a borrower when its involvement in the transaction does not exceed the
9 scope of its conventional role as a loan servicer.”). The Court finds *Huerta* instructive. Here, as in
10 *Huerta*, plaintiff fails to allege how defendants Ocwen and Specialized exceeded the scope of their
11 conventional role as a loan servicers such that they assumed a fiduciary duty. Accordingly, plaintiff’s
12 claim for negligence is DISMISSED without leave to amend as to defendants Ocwen and Specialized.

13
14 **D. Equitable Rescission**

15 Plaintiff asserts an equitable rescission claim against all defendants. Plaintiff alleges that he is
16 “entitled to rescission of sale of the Property to him because it was accomplished by constructive fraud,
17 actual fraud, deceit, duress, and coercion, and against his expressed desires, and due to the failure of
18 Defendants to deliver to him the Property and mortgage loans on the terms he had been verbally and
19 otherwise promises.” FAC ¶ 108. In his opposition to defendants’ motion to dismiss plaintiff has
20 expressly stated that he does not oppose the dismissal of the rescission claim as to defendants Ocwen
21 and Specialized. Plaintiff’s claim is therefore DISMISSED without leave to amend.

22
23 **II. Claims as to Defendants Gutierrez and Marin 1**

24 Plaintiff asserts claims against defendants Gutierrez and Marin 1 under the Real Estate and
25 Settlement Act (“RESPA”), FRCA (as to Ma1rin 1 only), FHA, and California Civil Code § 1632, as
26 well as common law claims for constructive fraud, fraud, deceit, predatory lending, negligence,
27 negligence per se, breach of fiduciary duty, and equitable rescission.

28 Defendants Gutierrez and Marin 1 assert that all of plaintiff’s claims are time-barred. Plaintiff

1 does not contest the fact that the statutes ran on each of his claims before his complaint was filed, but
2 asserts that he is entitled to equitable tolling for the reasons previously discussed. For the reasons stated
3 above, plaintiff must clarify the timing and circumstances surrounding his discovery of the alleged
4 fraudulent concealment in order to be entitled to equitable tolling. The Court will address the merits
5 of each of plaintiff's claims below.

6
7 **A. RESPA**

8 Plaintiff alleges that defendant Gutierrez, working as an agent for Marin 1, was the only person
9 who ever communicated with the plaintiff regarding the financing and purchase of his home. As such,
10 plaintiff alleges that Gutierrez was required to make RESPA disclosures to him, and that her failure to
11 do so deprived him of the opportunity to negotiate the fees associated with the transaction. Defendants
12 move to dismiss the RESPA claim on the ground there is no private right of action for failure to provide
13 required disclosures under RESPA.

14 RESPA was enacted in part to provide more effective advance disclosure to home buyers of
15 settlement costs and to aid in the elimination of kickbacks or referral fees. *See* 12 U.S.C. § 2601.
16 Although plaintiff's complaint does not specify the sections of RESPA under which he brings suit, his
17 opposition brief states that he is alleging violations of 12 U.S.C. § 2607 and 24 C.F.R. §§ 3500.7,
18 3500.8, and 3500.10, for failure to disclose certain loan-related fees and failure to provide required
19 settlement disclosures in a manner that could have been understood by plaintiff. Citing *Bloom v.*
20 *Martin*, 865 F. Supp. 1377 (N.D. Cal. 1994), defendants assert that there is no private right of action for
21 failure to provide RESPA disclosures. However, *Bloom* clarifies that certain sections of RESPA do
22 allow for a private remedy. In *Bloom*, the court held that because some sections of RESPA, namely, 12
23 U.S.C. §§ 2607 and 2608, refer to relief including treble damages and attorneys' fees, the court could
24 infer a congressional intent to provide a private right of action. *Id.* at 1384. By the same logic, *Bloom*
25 found that 12 U.S.C. §§ 2603, 2604, and 2609, which do not include such remedies, do not provide a
26 private remedy. *Id.*

27 Here, plaintiff requests relief for a violation of 12 U.S.C. § 2607, which does provide a private
28 right of action as set forth in *Bloom*. Plaintiff's other RESPA claims, however, pertain to sections for

1 which there is no private right of action. Plaintiff seeks relief under 24 C.F.R. §§ 3500.7 and 3500.8.
2 These regulations state that violations thereof “shall be deemed to” be violations of 12 U.S.C. §§ 2604
3 and 2603, respectively. Both of the statutory sections referenced in the regulations provide no private
4 right of action. Plaintiff’s final RESPA claim, under 24 C.F.R. § 3500.10, does not correspond to a
5 violation of a RESPA section; in addition, the regulation does not refer to the types of relief discussed
6 in *Bloom*. Based upon the above reasoning, there is no private right of action for the alleged disclosure
7 violations under 24 C.F.R. §§ 3500.7, 3500.8, and 3500.10. Therefore, plaintiff is only permitted to
8 proceed in an action for punitive damages under 12 U.S.C. § 2607, and his remaining RESPA claims
9 must be DISMISSED with prejudice.

10
11 **B. California Civil Code § 1632**

12 Plaintiff alleges that defendants violated California Civil Code §1632 by failing to provide
13 plaintiff with Spanish-language versions of the loan documents either prior to or after plaintiff’s
14 execution of the agreement. FAC ¶ 93. Plaintiff requests rescission of the contract and a return of all
15 fees paid to defendants. Defendants Gutierrez and Marin 1 contend that California Civil Code Section
16 1632 does not require them to furnish real estate purchase contracts in Spanish.

17 The statute reads in relevant part:

18 (b) Any person engaged in a trade or business who negotiates primarily in Spanish,
19 Chinese, Tagalog, Vietnamese, or Korean, orally or in writing, in the course of
20 entering into any of the following, shall deliver to the other party to the contract
21 or agreement and prior to the execution thereof, a translation of the contract or
22 agreement in the language in which the contract or agreement was negotiated,
23 which includes a translation of every term and condition in that contract or
24 agreement:

25

26 (2) A loan or extension of credit secured other than by real property, or unsecured,
27 for use primarily for personal, family or household purposes.

28

(4) Notwithstanding paragraph (2), a loan or extension of credit for use primarily for
personal, family or household purposes where the loan or extension of credit is
subject to the provisions of Article 7 (commencing with Section 10240) of . . .
the Business and Professions Code[.]

Cal. Civ. Code § 1632.

Plaintiff properly points out that the agreements negotiated with defendants are precisely the type

1 covered by Section 1632(b). Although ordinarily the requirement to provide Spanish language
2 documents relates to a “loan or extension of credit secured other than by real property,” *id.* § 1632(b)(2),
3 plaintiff is correct that defendants fall within the exemption provided by Section 1632(b)(4), which
4 applies to certain loans secured by real property which are negotiated by real estate brokers. *See* Cal.
5 Bus. & Prof. Code § 10240. The complaint alleges that defendant Gutierrez was a real estate broker,
6 which is sufficient to show that the loan at issue falls within the exception stated in Section 1632(b)(4).
7 *See Ruiz v. Decision One Mortgage Co., LLC*, No. 06-2530, 2006 U.S. Dist. LEXIS 54571 (N.D. Cal.
8 July 25, 2006). Accordingly, defendants’ motion to dismiss plaintiff’s claim under California Civil
9 Code § 1632 is DENIED.

10
11 **C. Constructive Fraud, Fraud, Deceit**

12 Plaintiff brings claims for constructive, actual fraud, and deceit against Ms. Gutierrez and Marin

13 1. These claims arise out of the same transaction and the same failure to disclose that has been alleged
14 against defendants in the previous claims.

15 Under California law, the elements of common law fraud are “misrepresentation, knowledge of
16 its falsity, intent to defraud, justifiable reliance and resulting damage.” *Gil v. Bank of Am., N.A.*, 42 Cal.
17 Rptr. 3d 310, 317 (Cal Ct. App. 2006). Rule 9(b) of the Federal Rules of Civil Procedure requires a
18 party proceeding in federal court to “state with particularity the circumstances constituting fraud.” Fed.
19 R. Civ. P. 9(b); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003). When allegations
20 of fraud are made about multiple defendants, a plaintiff “must provide each and every defendant with
21 enough information to enable them to know what misrepresentations are attributable to them and what
22 fraudulent conduct they are charged with.” *Pegasus Holdings v. Veterinary Ctrs. of Am., Inc.*, 38 F.
23 Supp. 2d 1158, 1163 (C.D. Cal. 1998) (internal quotation marks and citation omitted).

24 Under California Civil Code § 1709, “One who willfully deceives another with intent to induce
25 him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.” The
26 term “deceit” is defined as follows:

- 27 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to
28 be true; 2. The assertion, as a fact, of that which is not true, by one who has no
reasonable ground for believing it to be true; 3. The suppression of a fact, by one who

1 is bound to disclose it, or who gives information of other facts which are likely to
2 mislead for want of communication of that fact; or, 4. A promise, made without any
intention of performing it.

3 *Id.* § 1710.

4 The Court finds that plaintiff has alleged with particularity the specific statements and actions
5 underlying his claims of fraud and deceit. Plaintiff has set forth a detailed chronology of his interaction
6 with defendant Gutierrez throughout the course of their obtaining the loan, putting defendants on notice
7 of the allegedly fraudulent and deceitful behavior. With respect to the fraud claims, defendants assert
8 that plaintiff has failed to allege justifiable reliance upon the statements made by Gutierrez. Plaintiff
9 has alleged, however, that Gutierrez was the sole party with whom plaintiff negotiated the terms of the
10 transaction, and that based on Gutierrez’s capacity as a licensed real estate broker and fiduciary to
11 plaintiff,² plaintiff was entitled to rely upon her representations. In the Court’s view, these allegations
12 are sufficient to plead justifiable reliance.

13 Accordingly, defendants’ motion to dismiss the claims for fraud and deceit is DENIED.

14
15 **D. Breach of Fiduciary Duty**

16 Plaintiff alleges that as persons providing brokerage services, soliciting lenders or otherwise
17 negotiating the First and Second Mortgage, defendants Gutierrez and Marin 1 were acting as fiduciaries
18 to him and as such they had a duty to protect plaintiff from unnecessary loss and to place plaintiff’s
19 interests over their own. FAC ¶¶ 182, 183. Plaintiff alleges that Gutierrez and Marin 1 arranged the
20 terms of the loan and made various promises to him throughout the negotiation of the transaction in
21 breach of their fiduciary duty. Defendants move to dismiss without citing any authority to counter
22 plaintiff’s legal argument.

23 Plaintiff’s claim of breach of fiduciary duty is based on allegations that defendant Gutierrez
24 made various misrepresentations to plaintiff, and thus is “grounded in fraud.” *Vess*, 317 F.3d at 1105.
25 Claims grounded in fraud are subject to the heightened pleading requirements of Rule 9(b), discussed
26 above, even if fraud is not an element of the claim. *Id.*; *Bacon ex rel Moroney v. Am. Int’l Group*, 415

27 _____
28 ² The following section of this order discusses plaintiff’s allegations regarding Gutierrez’s
fiduciary role.

1 F. Supp. 2d 1027, 1032 (N.D. Cal. 2006).

2 Defendants are only liable for breach of fiduciary duty if they owed a duty of care to plaintiff.
3 *See McCollum v. Friendly Hills Travel Ctr.*, 217 Cal. Rptr. 919, 922 (Cal. Ct. App. 1985). Plaintiff has
4 alleged that defendants Gutierrez and Marin 1 owed a fiduciary duty to him though their relationship
5 as a real estate broker and agent of plaintiff. *See* Cal. Fin. Code § 4979.5(a) (“A person who provides
6 brokerage services to a borrower in a covered loan transaction³ by soliciting lenders or otherwise
7 negotiating a consumer loan secured by real property, is the fiduciary of the consumer, and any violation
8 of the person’s fiduciary duties shall be a violation of this section.”). Plaintiff has alleged that
9 defendants breached that duty by engaging in fraudulent conduct. Plaintiff has stated the circumstances
10 allegedly constituting fraud with sufficient particularity, setting forth a detailed chronology of his
11 interaction with defendant Gutierrez. This is sufficient to give defendants notice of the particular
12 misconduct alleged so that they may defend against the charge. *See Semegen v. Weidner*, 780 F.2d 727,
13 731 (9th Cir. 1985). Therefore, the Court DENIES defendants’ motion to dismiss the breach of
14 fiduciary duty claim.

15
16 **E. Negligence and Negligence Per Se**

17 Defendants move to dismiss plaintiff’s claims for negligence and negligence per se for failure
18 to state facts sufficient to constitute a cause of action, as the facts are confusing and contradictory.
19 Plaintiff’s opposition only addresses the timeliness issue, stating that plaintiff is entitled to equitable
20 tolling for the negligence claims as well.

21 As stated above, under California law, the elements of an action for negligence are the existence
22 of a duty, breach of that duty, causation between the defendant’s act or omission and the plaintiff’s
23 injuries, and damages. *Merrill*, 110 Cal. Rptr. 2d at 379 (Cal. Ct. App. 2001). “[P]arties to a contractual
24 relationship, such as a mortgagor and mortgagee, cannot bring a tort claim [for negligence] unless a
25 legal duty independent of the contract itself has been violated.” *Gaitan*, 2009 U.S. Dist. LEXIS 97117,

26
27 ³ The term “covered loan” is defined as a loan “in which the original principal balance of the
28 loan does not exceed the most current conforming loan limit for a single-family first mortgage loan
established by the Federal National Mortgage Association” and certain other conditions are met. Cal.
Fin. Code § 4970(b). Defendants do not contest that the loan met this definition.

1 at *8.

2 As discussed above, plaintiff has adequately alleged that a fiduciary duty was owed to him by
3 defendants Gutierrez and Marin 1. Plaintiff alleges that defendants breached that duty by arranging the
4 execution of the purchase and loan documents in order to prevent plaintiff from knowing the terms of
5 the purchase, and by failing to inform him of the fees they were paying themselves and each other with
6 the financing they procured for him. FAC ¶¶ 165, 167. Plaintiff further alleges that as a result of that
7 breach he was injured financially. *Id.* ¶ 171. Because the Court finds these allegations sufficient to
8 allege a claim of negligence, defendants’ motion to dismiss the negligence claim is DENIED.

9 Plaintiff also alleges a claim for negligence per se premised upon the RESPA and California
10 Civil Code § 1632 violations. For the negligence per se doctrine to apply, the plaintiff must be one of
11 the class of persons for whose protection the regulation was adopted. *Galvez v. Frields*, 88 Cal. App.
12 4th 1410 (2001). As discussed above, plaintiff has alleged facts sufficient to establish that he is within
13 the class of persons meant to be protected by both RESPA and California Civil Code § 1632. Therefore,
14 the predicate allegations concerning his statutory claims are sufficient to support the negligence per se
15 claim. Accordingly, defendants’ motion to dismiss plaintiff’s negligence per se claim is DENIED.

16

17 **F. Predatory Lending**

18 Plaintiff brings a claim for “predatory lending” based upon the same factual allegations as his
19 other claims. Plaintiff does not provide the relevant state or federal law that supports this cause of
20 action, and the Court is not familiar with a statute governing predatory lending separate and distinct
21 from the specific claims already brought by plaintiff. As such, this claim is DISMISSED with leave to
22 amend.

23

24 **G. FCRA**

25 Plaintiff asserts a FCRA claim against Marin 1. As with his FCRA claim against Ocwen and
26 Specialized, plaintiff does not address this claim in his opposition. Therefore, Marin 1’s motion to
27 dismiss plaintiff’s FCRA claim is GRANTED without leave to amend.

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H. FHA


As previously discussed, plaintiff alleges an FHA claim against all defendants without differentiating how individual defendants are alleged to have violated the act. Although plaintiff has adequately alleged that defendants' conduct was fraudulent and in breach of various common law duties, plaintiff has not pled any facts giving rise to an inference that defendants' conduct was discriminatory. Defendants' motion to dismiss the FHA claims is GRANTED with leave to amend to allege facts tending to show that defendants acted in a discriminatory manner.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS in part and DENIES in part defendants' motions to dismiss. (Docket Nos. 35, 40, 46). Plaintiff is granted leave to amend some of his claims to cure the defects identified by the Court. Plaintiff's amended complaint must be filed no later than **April 9, 2010**.

IT IS SO ORDERED.

Dated: March 25, 2010



SUSAN ILLSTON
United States District Judge