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

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|------------------------------------|---|--------------------------|
| CATARINO MENDOZA, |) | Case No. C-10-5792 SC |
| |) | |
| Plaintiff, |) | ORDER GRANTING AIG'S |
| |) | <u>MOTION TO DISMISS</u> |
| v. |) | |
| |) | |
| WILMINGTON FINANCE, a business |) | |
| entity, form unknown; FIVE STAR |) | |
| INVESTMENT AND REALTY; NEW |) | |
| CENTURY, a business entity, form |) | |
| unknown; NORTH AMERICAN TITLE |) | |
| COMPANY, a business entity, form |) | |
| unknown; MORTGAGE ELECTRONIC |) | |
| REGISTRATION SYSTEMS, INC., a |) | |
| business entity, form unknown; and |) | |
| DOES 1 through 100, inclusive, |) | |
| |) | |
| Defendants. |) | |
| |) | |

I. INTRODUCTION

Plaintiff Catarino Mendoza ("Plaintiff") commenced this action on December 20, 2010, seeking damages and injunctive relief for claims arising out of a 2005 mortgage agreement. First Amended Complaint, ECF No. 7 ("FAC"). Now before the Court is a motion to dismiss Plaintiff's FAC brought by Defendant AIG Federal Savings Bank ("AIG"), formerly known as Wilmington Finance, a division of AIG Federal Savings Bank (named in Plaintiff's FAC as "Wilmington Finance"). ECF No. 22 ("Mot."). Plaintiff filed an Opposition, and AIG filed a Reply. ECF Nos. 27 ("Opp'n"), 28 ("Reply"). For

1 the following reasons, the Court GRANTS AIG's Motion, dismissing
2 all claims against AIG WITH PREJUDICE.

3
4 **II. BACKGROUND**

5 Plaintiff is a resident of San Bruno, California. FAC ¶ 1.
6 Around February 9, 2005, Plaintiff entered into two loan repayment
7 and security agreements with AIG. Id. ¶ 3. Under the loan,
8 Plaintiff borrowed \$584,000 to refinance his personal residence in
9 San Bruno. Id. ¶¶ 3, 4, 6. The terms of the loan included an
10 initial two-year fixed interest rate of 6.5 percent followed by an
11 adjustable rate based on the six-month LIBOR index plus 6.25
12 percent. Id. ¶ 4. Plaintiff states that the loan will eventually
13 adjust to 12.5 percent, bringing Plaintiff's monthly payment from
14 \$3,691.28 to \$6,232.79, which he characterizes as "extreme payment
15 shock." Id. ¶ 4.¹ In addition, the loan has a two-year prepayment
16 penalty requiring the borrower to pay six months' advance interest
17 if he or she makes a full prepayment or partial prepayment of more
18 than 20 percent of the original principal amount in any twelve-
19 month period. Id. ¶ 29.

20 Plaintiff alleges that Defendants designed the loan such that
21 negative amortization would occur, making foreclosure inevitable.
22 Id. ¶ 15. Plaintiff alleges that the loan was underwritten without
23 proper due diligence because Defendants failed to adequately verify
24 Plaintiff's income. Id. ¶ 32. The FAC also makes broad

25 _____
26 ¹ AIG vigorously disputes Plaintiff's characterization of the loan
27 as possessing a 12.5 percent rate after a two-year "teaser" rate,
28 arguing that the 12.5 percent rate represents the maximum possible
interest rate -- a rate reachable only if LIBOR soared to historic
highs. Reply at 1. As it must on a Federal Rule of Civil
Procedure 12(b)(6) motion, the Court assumes the truth of this and
other well-pleaded facts in Plaintiffs' FAC.

1 references to the "recent economic crisis," alleging that "[t]he
2 loan product sold to Plaintiff in this case was one of the types of
3 loans that have contributed to the recent economic crisis." Id. ¶¶
4 22, 23. Plaintiff alleges that a forensic audit of Plaintiff's
5 loan documents revealed legal violations in the handling and
6 processing of Plaintiff's loan, giving rise to a number of his
7 causes of action. Id. ¶ 37.

8 While Plaintiff does not claim to be unable to speak English,
9 he does state that English is not his primary language and that he
10 "does not have comprehensive English reading or writing skills" or
11 "an adequate command of the English language." FAC ¶ 31.

12 Plaintiff brings eighteen causes of action against AIG and
13 other Defendants: declaratory relief; injunctive relief; failure to
14 perfect interest in the deed of trust under California Commercial
15 Code § 9313 ("failure to perfect"); breach of California's covenant
16 of good faith and fair dealing ("bad faith"); violation of the
17 Truth in Lending Act, 15 U.S.C. § 1601 ("TILA"); violation of the
18 Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601-17
19 ("RESPA"); violation of California Civil Code §§ 1632,
20 1916.7(a)(4)(B), 1916.7(b)(2), 1918-21, and 2932.5; rescission;
21 fraud; unfair and deceptive acts and practices ("UDAP"); breach of
22 fiduciary duty; unconscionability; predatory lending under
23 California Business and Professions Code § 17200 ("UCL"); and quiet
24 title. See FAC.

25

26 **III. LEGAL STANDARD**

27 A motion to dismiss under Federal Rule of Civil Procedure
28 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.

1 Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based
2 on the lack of a cognizable legal theory or the absence of
3 sufficient facts alleged under a cognizable legal theory.
4 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
5 1990). "When there are well-pleaded factual allegations, a court
6 should assume their veracity and then determine whether they
7 plausibly give rise to an entitlement to relief." Ashcroft v.
8 Iqbal, 129 S. Ct. 1937, 1950 (2009). However, "the tenet that a
9 court must accept as true all of the allegations contained in a
10 complaint is inapplicable to legal conclusions. Threadbare
11 recitals of the elements of a cause of action, supported by mere
12 conclusory statements, do not suffice." Iqbal, 129 S. Ct. at 1950
13 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The
14 allegations made in a complaint must be both "sufficiently detailed
15 to give fair notice to the opposing party of the nature of the
16 claim so that the party may effectively defend against it" and
17 sufficiently plausible such that "it is not unfair to require the
18 opposing party to be subjected to the expense of discovery." Starr
19 v. Baca, 633 F.3d 1191, 1204 (9th Cir. 2011).

20

21 **IV. DISCUSSION**

22 Plaintiff and AIG agree that nine of the eighteen claims
23 brought against AIG should be dismissed. AIG argues that because
24 it assigned its interest in the loan by an assignment of mortgage
25 recorded on December 18, 2006, Plaintiff's claims seeking relief
26 from foreclosure and challenging the assignee's standing to pursue
27 foreclosure are inapplicable to AIG, and as a consequence,
28 Plaintiff's declaratory relief, injunctive relief, failure to

1 perfect, California Civil Code § 2932.5, and quiet title claims
2 against AIG fail as a matter of law. Mot. at 5-6. AIG also argues
3 that sections 1632, 1916.7(a)(4)(B), 1916.7(b)(2), and 1918-21 of
4 California Civil Code either lack a private right of action or are
5 preempted by federal law. Id. at 10-11. Plaintiff concedes both
6 points in his Opposition. Opp'n at 6. As such, the Court
7 DISMISSES these claims against AIG WITH PREJUDICE.

8 AIG argues that two of the remaining nine claims should be
9 dismissed because they are not causes of action: AIG asserts that
10 unconscionability is an affirmative defense to enforcement and
11 rescission is a remedy, and neither are stand-alone causes of
12 action separate from Plaintiff's other claims. Mot. at 12, 20.
13 Plaintiff does not seriously challenge these arguments, and the
14 Court agrees with AIG and DISMISSES Plaintiff's unconscionability
15 and rescission claims WITH PREJUDICE.

16 This leaves two federal causes of action -- TILA and RESPA --
17 and five state law claims -- bad faith, fraud, UDAP, UCL, and
18 breach of fiduciary duty. AIG argues that all of these claims are
19 time-barred by the applicable statutes of limitations, as they
20 accrued upon consummation of the loan agreement more than six years
21 ago. See Mot. at 6-20.²

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23 ² The statute of limitations for non-insurance bad faith claims is
24 four years. Cal. Code Civ. Proc. § 337(1). The statute of
25 limitations for TILA damages claims is one year. 15 U.S.C. §
26 1640(e). The statute of limitations for RESPA is one year "from
27 the date of the occurrence of the violation." 12 U.S.C. § 2614.
28 The statute of limitations for fraud is three years from the time
the plaintiff either discovers the facts giving rise to the fraud
or could have discovered such facts with reasonable diligence.
April Enters., Inc. v. KTTV, 147 Cal. App. 3d 805, 827-28 (Ct. App.
1983). The statute of limitations for UCL claims is four years.
Cal. Bus. & Prof. Code § 17208. The statute of limitations for
breach of fiduciary duty is four years from the breach or the time

1 Plaintiff does not dispute the fact that these claims are
2 time-barred, but asks the Court to apply the doctrine of equitable
3 tolling to these claims. Opp'n at 3. AIG counters that equitable
4 tolling is inappropriate. Reply at 1.

5 "Generally, the applicability of equitable tolling depends on
6 matters outside the pleadings, so it is rarely appropriate to grant
7 a Rule 12(b)(6) motion to dismiss (where review is limited to the
8 complaint) if equitable tolling is at issue." Huynh v. Chase
9 Manhattan Bank, 465 F.3d 992, 1003-04 (9th Cir. 2006). However, a
10 motion to dismiss based on the statute of limitations may be
11 granted "if the assertions of the complaint, read with the required
12 liberality, would not permit the plaintiff to prove that the
13 statute was tolled." Vernon v. Heckler, 811 F.2d 1274, 1278 (9th
14 Cir. 1987). "Equitable tolling may be applied if, despite all due
15 diligence, a plaintiff is unable to obtain vital information
16 bearing on the existence of his claim." Santa Maria v. Pacific
17 Bell, 202 F.3d 1170, 1178 (9th Cir. 2000).

18 The Supreme Court has held that TILA's rescission remedy is
19 completely extinguished at the end of the three-year period and not
20 subject to equitable tolling. Beach v. Ocwen Fed. Bank, 523 U.S.
21 410, 412-13 (1998). Therefore, to the extent Plaintiff seeks
22 rescission under TILA, his claim is barred.

23 A TILA claim for damages under 15 U.S.C. § 1640(e), however,
24 may be subject to equitable tolling, suspending the limitations
25 period "until the borrower discovers or had reasonable opportunity
26 to discover the fraud or nondisclosures that form the basis of the
27

28 where the plaintiff could discover through reasonable diligence the
facts concealed. Cal. Code Civ. Proc. § 343.

1 TILA action." King v. California, 784 F.2d. 910, 915 (9th Cir.
2 1986). AIG argues that because Plaintiff possessed "the
3 information needed to support his causes of action provided to him
4 at the time of the subject transaction [in 2005], and because he
5 did not pursue any alternative remedy within that period,"
6 equitable tolling should not be applied. Reply at 3. Plaintiff
7 does not dispute that he had the necessary loan documents to
8 discover the alleged TILA violation in 2005, but argues that
9 because English was not his "primary language," he was unaware of
10 the alleged TILA violations "until he hired an attorney and the
11 attorney conducted a loan audit." Opp'n at 3. Plaintiff argues
12 that refusing to equitably toll his claims would conflict with
13 TILA's purpose of assuring consumers receive meaningful disclosure
14 of credit provisions so that consumers can compare credit terms
15 available to them. Id. at 5.

16 Plaintiff cites no case law for his argument that AIG was
17 obligated to offer Plaintiff Spanish-language documentation to
18 comply with TILA. The Court finds this argument to be untenable.
19 Plaintiff does not claim that he asked for Spanish-language loan
20 documents or that the loan transaction was conducted in Spanish.
21 Rather, he claims that because he lacked an "adequate command" of
22 English, AIG's English-language disclosures did not satisfy TILA
23 and RESPA's requirements. If Plaintiff's argument were the law,
24 lending institutions would be required to inquire into the English
25 proficiency of each would-be borrower and make available loan
26 documents in a multitude of languages. Because the Court finds
27 Plaintiff's argument to fail as a matter of law, it DISMISSES WITH
28 PREJUDICE Plaintiff's TILA claim against AIG.

1 As for Plaintiff's RESPA claim, Plaintiff argues that failing
2 to equitably toll it would frustrate RESPA's purpose of ensuring
3 appropriate disclosure of settlement costs, arguing that "[t]he
4 disclosures are meaningless if the borrower cannot understand them,
5 and they are not given in a language he can understand." Opp'n at
6 5-6. AIG argues that it is not subject to equitable tolling
7 because it is subject to a three-year statute of repose. 12 U.S.C.
8 § 2614; Rivera v. BAC Home Loans Servs., L.P., 756 F. Supp. 2d
9 1193, 1199 (N.D. Cal. 2010). The Court agrees with AIG, and
10 DISMISSES Plaintiff's RESPA claim against AIG WITH PREJUDICE.

11 Regarding Plaintiff's state law causes of action, equitable
12 tolling "halts the running of the limitations period so long as the
13 plaintiff uses reasonable care and diligence in attempting to learn
14 the facts that would disclose the defendant's fraud or other
15 misconduct." Sagehorn v. Engle, 141 Cal. App. 4th 452, 460-61 (Ct.
16 App. 2006). "To establish that equitable tolling applies, a
17 plaintiff must prove the following elements: fraudulent conduct by
18 the defendant resulting in concealment of the operative facts,
19 failure of the plaintiff to discover the operative facts that are
20 the basis of its cause of action within the limitations period, and
21 due diligence by the plaintiff until discovery of those facts."
22 Id. (citation and internal quotation marks omitted).

23 Plaintiff's sole allegation of "fraudulent conduct resulting
24 in concealment" by AIG is that AIG failed to make required
25 disclosures "in a language that Plaintiff could reasonably
26 understand" constitutes "fraudulent conduct resulting in
27 concealment." Opp'n at 6. Plaintiff essentially argues that AIG
28 "concealed" information by offering information to Plaintiff in

1 English. The Court finds this argument fails as a matter of law.
2 Furthermore, Plaintiff failed to exercise due diligence by seeking
3 help from a person capable of understanding the loan documents
4 before he signed them. The Court thus finds that even when the FAC
5 is read liberally and the facts pleaded are assumed to be true,
6 Plaintiff cannot, as a matter of law, prove equitable tolling of
7 the respective statutes of limitations. Accordingly, the Court
8 DISMISSES, WITH PREJUDICE, the remaining causes of action brought
9 against AIG.

10

11 **V. CONCLUSION**

12 For the foregoing reasons, the Court GRANTS Defendant AIG
13 Federal Savings Bank's Motion to Dismiss. The Court DISMISSES,
14 WITH PREJUDICE, all causes of action brought against AIG in
15 Plaintiff Catarino Mendoza's First Amended Complaint.

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17 IT IS SO ORDERED.

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19 Dated: June 6, 2011

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UNITED STATES DISTRICT JUDGE

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