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5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
7

8 LISA POULSEN,

No. C -12-02306 EDL

9 Plaintiff,

**ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS WITH LEAVE  
TO AMEND**

10 v.

11 STERLING SAVINGS BANK, et al.,

12 Defendants.  
13 \_\_\_\_\_/

14 Plaintiff alleges that Defendants Sterling Savings Bank, David Poulson, and Clement  
15 Carinelli deceived her into making four real estate loan guaranties. Plaintiff's complaint contains  
16 nine claims against Defendant Sterling Savings Bank ("Defendant"): (1) declaratory and injunction  
17 relief; (2) Financial Elder Abuse; (3) violation of California Business and Professions Code section  
18 17200; (4) breach of duty; (5) violation of the Consumer Legal Remedies Act, California Civil Code  
19 section 1750; (6) fraud; (7) misrepresentation; (8) breach of covenant of good faith and fair dealing;  
20 and (9) rescission of contract. Defendant has filed a motion to dismiss, arguing that Plaintiff lacks  
21 standing to bring this action, that Plaintiff lacks the capacity to sue, and that Plaintiff has failed to  
22 state any claims. Defendants Poulson and Carinelli have not been served (First Am. Compl. (FAC)  
23 ¶ 9) and are in bankruptcy.

24 On August 21, 2012, the Court held a hearing on Defendant's Motion to Dismiss. For the  
25 reasons stated at the hearing and in this Order, Defendant's Motion is granted with leave to amend  
26 some claims.

27 **Legal Standard**

28 A complaint will survive a motion to dismiss if it contains "sufficient factual matter . . . to  
'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)

1 (citing Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007)). The reviewing court’s  
2 “inquiry is limited to the allegations in the complaint, which are accepted as true and construed in  
3 the light most favorable to the plaintiff.” Lazy Y Ranch LTD v. Behrens, 546 F.3d 580, 588 (9th  
4 Cir. 2008).

5 A court need not, however, accept as true the complaint’s “legal conclusions.” Iqbal, 129 S.  
6 Ct. at 1949. “While legal conclusions can provide the framework of a complaint, they must be  
7 supported by factual allegations.” Id. at 1950. Thus, a reviewing court may begin “by identifying  
8 pleadings that, because they are no more than conclusions, are not entitled to the assumption of  
9 truth.” Id.

10 Courts must then determine whether the factual allegations in the complaint “plausibly give  
11 rise to an entitlement of relief.” Id. Though the plausibility inquiry “is not akin to a probability  
12 requirement,” a complaint will not survive a motion to dismiss if its factual allegations “do not  
13 permit the court to infer more than the mere possibility of misconduct . . . .” Id. at 1949 (internal  
14 quotation marks omitted) & 1950. That is to say, plaintiffs must “nudge[] their claims across the  
15 line from conceivable to plausible.” Twombly, 550 U.S. at 570.

## 16 Discussion

### 17 1. *Respondeat Superior liability*

18 An overarching legal issue in this case is whether Defendant can be liable for Carinelli’s  
19 alleged conduct. As stated at the hearing, Defendant’s liability for Carinelli’s conduct rests, if at all,  
20 on the doctrine of *respondeat superior*. See Martinez v. Hagopian, 182 Cal.App.3d 1223, 1227  
21 (1986) (“Under the *respondeat superior* doctrine, an employer’s liability extends to torts of an  
22 employee committed within the scope of his employment. This includes willful and malicious torts  
23 as well as negligence. . . . The determination as to whether an employee committed a tort during the  
24 course of his employment turns on whether ‘1) the act performed was either required or ‘incident to  
25 his duties’ [citation], or 2) the employee’s misconduct could be reasonably foreseen by the employer  
26 in any event [citations].”) (internal citations omitted). Whether or not Defendant is liable based on  
27 *respondeat superior* cannot be determined on a motion to dismiss, and may well involve factual  
28 issues as to reasonable foreseeability. Thus, the Court gave Plaintiff leave to amend the complaint

1 to allege *respondeat superior* liability.

2 **2. The Court is not persuaded by Defendant’s argument that Plaintiff lacks capacity to**  
3 **sue**

4 An individual’s capacity to sue is determined by the law of the individual’s state. Fed. R.  
5 Civ. P. 17(b). In California, the test for incompetence is whether an individual “has the capacity to  
6 understand the nature and consequences of the proceeding and is able to assist counsel in preparing  
7 the case.” In re A.C., 166 Cal.App.4th 146, 157 (2008) (discussing incompetence in context of  
8 juvenile dependency case); see also In re Rains, 428 F.3d 893 (9th Cir. 2005) (stating that the test  
9 under California law for whether party had capacity to enter into contract is whether he understood  
10 the nature, purpose and effect of what he did).

11 Defendant argues that Plaintiff’s lack of capacity appears on the face of the complaint and so  
12 her action should be dismissed. See Hershel Cal. Fruit Prods. Co. v. Hunt Foods, 119 F. Supp. 603,  
13 607 (S.D. Cal. 1954) (“The issue of capacity to sue may be raised by motion to dismiss where the  
14 defect appears on the face of the complaint.”). Plaintiff alleges that: “As early as the year 1993 and  
15 thereafter, because of Plaintiff’s age and diagnosis of mental and physical deterioration, including  
16 the possibility that she may have been experiencing the early onset of Alzheimer’s disease, Plaintiff  
17 planned to ‘retire’ from the active conduct of Plaintiff’s personal and Sutter-owned real estate  
18 investments.” FAC ¶ 11. Plaintiff also alleges that “she failed to appreciate the extent of her  
19 increasing physical and mental limitations. . . .” FAC ¶ 12. Plaintiff alleges that had  
20 Sonoma/Sterling representatives met with her “at any time after 1994,” they would have been aware  
21 of her “compromised mental processing and decision-making abilities.” FAC ¶ 30. Plaintiff also  
22 alleges that: “With respect to the transactions that provide the basis of the underlying claims of  
23 Sterling against Plaintiff [in the related case], Plaintiff lacked the capacity, informed consent and  
24 information necessary” to be bound by the guaranties. FAC ¶ 36. However, Plaintiff also alleges  
25 that she has been treated and has recovered her faculties. FAC ¶ 20. Viewing the allegations in the  
26 light most favorable to Plaintiff, the Court cannot conclude from the face of the complaint that  
27 Plaintiff lacks the capacity to bring this action.

28 **3. Defendant’s argument that Plaintiff lacks standing is well-taken**

Defendant argues that Plaintiff lacks standing to assert the first, third, fourth, fifth, sixth,

1 seventh, eighth and ninth claims because these claims are premised on allegations that Sutter was  
2 induced to obtain loans from Sonoma/Sterling to purchase properties, and each loan was made to  
3 Sutter, not Plaintiff. An individual who is not a party to the promissory notes and deeds of trust  
4 lacks standing to set them aside. See Bleavins v. Demarest, 196 Cal.App.4th 1533, 1542 (2011)  
5 (“First, Bleavins lacks standing to assert any claim concerning the contractual relationship between  
6 Allstate and the Dannenbaums, including whether the Dannenbaums were entitled to a defense,  
7 because he is not a party to the insurance policy. ‘Someone who is not a party to [a] contract has no  
8 standing to [challenge the performance of] the contract or to recover extra-contract damages for  
9 wrongful [payment] of benefits to the contracting party.’”) (internal citations and quotation marks  
10 omitted). Accordingly, as stated at the hearing, Plaintiff lacks standing to assert these claims, and  
11 Defendant’s Motion to Dismiss is granted with leave to amend (except for the fifth claim for  
12 violation of the Consumer Legal Remedies Act as discussed below). In an amended complaint,  
13 Plaintiff must take care to allege claims separately against each Defendant.

14 **4. Plaintiff’s second claim for financial elder abuse is dismissed with leave to amend**

15 Financial elder abuse occurs when a person or entity “[t]akes, secretes, appropriates, or retains  
16 real or personal property of an elder ... to a wrongful use or intent to defraud, or both.” Cal. Welf. &  
17 Inst. Code § 15610.30; see also Sonoma Foods, Inc. v. Sonoma Cheese Factory, LLC, 634 F. Supp.  
18 2d 1009, 1023 (N.D. Cal. 2007) (granting motion to dismiss claim for financial elder abuse because  
19 the alleged taking of property (trademarks) was of someone other than the elder person); Giordano  
20 v. Wachovia Mortgage, FSB, 2011 WL 1130523, at \*3 (N.D. Cal. Mar. 25, 2011) (granting motion  
21 to dismiss claim for financial elder abuse where a bank allegedly made misrepresentations and  
22 concealed facts relating to the interest rate of a loan to induce the plaintiffs to enter into the loan).  
23 “A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained  
24 property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates,  
25 obtains, or retains the property and the person or entity knew or should have known that this conduct  
26 is likely to be harmful to the elder or dependent adult.” Cal. Welf. & Inst. Code § 15610.30(b).

27 Plaintiff argues that the financial elder abuse claim is based on the theory that Defendant has  
28 “retained” Plaintiff’s personal guaranty for a wrongful use, citing Teselle v. McLoughlin, 173

1 Cal.App.4th 156, 174 (2009). The complaint, however, does not limit the elder abuse claim to just  
2 retention of the guaranty. Further, in Teselle, “wrongful use” for purposes of elder abuse is defined  
3 as “taking . . . or retaining property in bad faith.” Teselle, 173 Cal.App.4th at 174. But the court  
4 also went on to say that “bad faith occurs where the person or entity knew or should have known  
5 that the elder had the right to have the property transferred or made readily available to the elder or  
6 to his representative.” Id. Plaintiff has not alleged her right to the return of the personal guaranty.

7 In addition, Plaintiff’s elder abuse claim may be time-barred. The statute of limitations for  
8 the elder abuse claim is four years. Cal. Welf. & Inst. Code § 15657.7. The last loan transaction at  
9 issue in this case was signed in February 2007, more than five years before this action was filed in  
10 April 2012. Plaintiff argues that the statute of limitations should be tolled based on her mental  
11 condition, but the complaint does not contain sufficient allegations for the Court to determine  
12 whether tolling applies. See Brockamp v. United States, 67 F.3d 260 (9th Cir. 1995) (“We have  
13 held, however, that where ‘extraordinary circumstances beyond plaintiffs’ control [make] it  
14 impossible to file the claims on time,’ equitable tolling applies. . . . Principles of equity mandate that  
15 when mental incompetence precludes a person from asserting his rights during the proper time  
16 period, he should not be precluded from later seeking redress for his injuries.”) (internal citations  
17 omitted).

18 Accordingly, as discussed in more detail at the hearing, Plaintiff’s elder abuse claim is  
19 dismissed for failure to state a claim and as time-barred. The Court grants Plaintiff leave to amend  
20 this claim.

21 **5. Plaintiff’s third claim for violation of California Business and Professions Code section**  
22 **17200 is dismissed with leave to amend**

23 California Business and Professions Code section 17200, et seq., prohibits “any unlawful,  
24 unfair or fraudulent business act or practice.” To prove fraud under section 17200, it is necessary to  
25 show that members of the public are likely to be deceived. Sonoma Foods, 634 F. Supp. 2d at 1022.  
26 This cause of action is derivative of some other illegal conduct or fraud committed by a defendant,  
27 and a plaintiff must state with reasonable particularity the facts supporting the statutory elements of  
28 the violation.” Lomboy v. SCME Mortgage Brokers, 2009 WL 1457738, at \*6 (N.D. Cal. May 26,  
2009) (internal citation omitted). Further, when charging fraud against a business entity, the

1 pleading requirements are more strict:

2       The requirement of specificity in a fraud action against a corporation requires the  
3       plaintiff to allege the names of the persons who made the allegedly fraudulent  
4       representations, their authority to speak, to whom they spoke, what they said or  
5       wrote, and when it was said or written.

6       Tarmann v. State Farm Mutual Auto Ins. Co., 2 Cal.App.4th 153, 157 (1991). Here, there are no  
7       allegations that Plaintiff met or communicated with Defendant, and Plaintiff does not allege any  
8       misrepresentation made by Defendant. Plaintiff may be basing this claim on appraisals obtained by  
9       Defendant to decide whether to make the loans, but a lender does not owe a duty to a borrower for  
10       such appraisals. Nymark v. Heart Federal Savings & Loan Ass'n, 2131 Cal.App.3d 1089, 1100  
11       (1991). Thus, Plaintiff has not stated a claim for fraud under section 17200.

12       Under section 17200, an act is "unfair" if the act "threatens an incipient violation of a  
13       [competition law], or violates the policy or spirit of one of those laws because its effects are  
14       comparable to or the same as a violation of the law." Cal-Tech Communications, Inc. v. Los  
15       Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187 (1999). To the extent that Plaintiff is alleging unfair  
16       business practices under section 17200, Plaintiff has not alleged any business practices of  
17       Defendant, and admits that she had no contact with the bank. FAC ¶¶ 18, 30. Further, the  
18       documents show that Defendant contracted with Sutter, not Plaintiff. Thus, Plaintiff has not stated a  
19       claim for unfair business practices under section 17200.

20       Third, an unlawful business practice is an "act or practice, committed pursuant to business  
21       activity, that is at the same time forbidden by law." Bernardo v. Planned Parenthood Federation of  
22       America, 115 Cal.App.4th 322, 351 (2004). Plaintiff has not alleged any conduct by Defendant that  
23       is forbidden by law. Instead, Plaintiff's allegations are that her son committed wrongful acts, and  
24       there are no allegations that Defendant knew of the alleged misconduct. In fact, Plaintiff states that  
25       she never met with the lender and that her son had an obligation to inform Defendant of Plaintiff's  
26       mental limitations. Thus, Plaintiff has not stated a claim for unlawful business practices under  
27       section 17200. Defendant's motion to dismiss Plaintiff's claim under section 17200 is granted with  
28       leave to amend.

**6. Plaintiff's fourth claim for breach of duty and eighth claim for breach of covenant of  
good faith and fair dealing are dismissed with leave to amend**

1 Under California law, a lender does not owe a duty of care to a borrower. See Prelas v.  
2 GMAC Mortgage LLC, 187 Cal.App.4th 429, 436 (“A commercial lender pursues its own economic  
3 interests in lending money. A lender ‘owes no duty of care to the [borrowers] in approving their  
4 loan.’ A lender is under no duty ‘to determine the borrower's ability to repay the loan.... The  
5 lender's efforts to determine the creditworthiness and ability to repay by a borrower are for the  
6 lender's protection, not the borrower's.’”) (internal citations omitted); Price v. Wells Fargo Bank,  
7 213 Cal.App.3d 465, 476 (1989) (“It has long been regarded as ‘axiomatic that the relationship  
8 between a bank and its depositor arising out of a general deposit is that of a debtor and creditor.’ ‘A  
9 debt is not a trust and there is not a fiduciary relation between debtor and creditor as such.’ The  
10 same principle should apply with even greater clarity to the relationship between a bank and its loan  
11 customers.’”) (internal citations omitted).

12 Further, a lender does not have a duty to a borrower to assess the risks of an investment and  
13 is not liable for the failure of those investments. See Wagner v. Benson, 101 Cal.App.3d 27, 34-35  
14 (1980) (“The success of the Wagners' investment is not a benefit of the loan agreement which the  
15 Bank is under a duty to protect. . . . As to the negligence claim, the Wagners allege they suffered  
16 substantial foreseeable harm from the Bank's negligence in loaning money to them, as inexperienced  
17 investors, for a risky venture over which the Bank exercised influence and control. However, the  
18 Bank owes no duty of care to the Wagners in approving their loan.”). Thus, Defendant was under no  
19 duty to Sutter, much less to Plaintiff, for the success of the investments. Therefore, the fourth claim  
20 is dismissed with leave to amend.

21 Similarly, the eighth claim is also dismissed with leave to amend. The covenant of good  
22 faith and fair dealing cannot be used to create obligations that are not contemplated in the contract  
23 (here, the loan documents or the guaranties). See Keen v. Am. Home Mortg. Servicing Inc., 664 F.  
24 Supp. 2d 1086, 1101 (E.D. Cal. 2009) (“Furthermore, ‘a breach of the implied covenant of good  
25 faith and fair dealing involves something beyond breach of the contractual duty itself.’ The ‘implied  
26 covenant of good faith and fair dealing is limited to assuring compliance with the express terms of  
27 the contract, and cannot be extended to create obligations not contemplated by the contract.’”)  
28 (internal citations omitted). Plaintiff does not allege that the covenant of good faith and fair dealing

1 was breached with respect to any of the terms of the guaranties and nothing in the guaranties puts  
2 the burden on the lender to ensure the success of Sutter’s investments. Further, Defendant does not  
3 owe any duty to Plaintiff or to Sutter with regard to the appraisals.

4 At the hearing, Plaintiff’s counsel stated that he could provide legal authority for his  
5 argument that a mortgage broker such as Carinelli had a fiduciary duty to Plaintiff, which could  
6 support a finding of Defendant’s liability through *respondeat superior*. If Plaintiff has such  
7 authority, he must provide it to Defendant and the Court with his amended complaint.

8 **7. Plaintiff’s fifth claim for violation of the Consumer Legal Remedies Act is dismissed**  
9 **without leave to amend**

10 The Consumer Legal Remedies Act (“CLRA”) applies to any contract “undertaken by any  
11 person in a transaction intended to result or which results in the sale or lease of goods or services to  
12 any consumer.” Cal. Civ.Code § 1770(a). Section 1761(d) defines “consumer” to mean “an  
13 individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or  
14 household purposes.” Cal. Civ.Code § 1761(d). Accordingly, the CLRA does not apply to  
15 commercial or government contracts, or to contracts formed by nonprofit organizations and other  
16 non-commercial groups. See Cal. Grocers Ass’n v. Bank of Am., 22 Cal.App.4th 205, 27 Cal.Rptr.2d  
17 396, 404 (1994) (holding that trade group is not “consumer” of services for personal, family, or  
18 household purposes as defined within CLRA). Further, the CLRA does not apply to loans or the  
19 ancillary services provided in the making of a loan. See Consumer Solutions REO, LLC v. Hillery,  
20 658 F. Supp. 2d 1002, 1016-17 (N.D. Cal. 2009) (“Fairbanks v. Superior Court, 46 Cal.4th 56, 92  
21 Cal.Rptr.3d 279, 205 P.3d 201 (2009)], thus indicates that loans are intangible goods and that  
22 ancillary services provided in the sale of intangible goods do not bring these goods within the  
23 coverage of the CLRA.”).

24 It is undisputed that the loans at issue in this case are commercial loans. See, e.g., FAC ¶ 69  
25 (“On or about February 9, 2007, Plaintiff and Defendant Sterling entered into a written contract  
26 whereby Defendant agreed to loan to Sutter, guaranteed by Plaintiff \$1,300,000 for the purchase of  
27 certain commercial real property.”). Thus, Plaintiff cannot state a claim for violation of the CLRA,  
28 even if the claim is brought by Sutter. This claim is dismissed without leave to amend.

**8. Plaintiff’s sixth claim for fraud and seventh claim for misrepresentation are dismissed**



1           **with leave to amend**

2           The general rule for liability for fraud by concealment is that “even if material facts are  
3 known to one party and not the other, failure to disclose those facts is not actionable fraud unless  
4 there is some fiduciary or confidential relationship giving rise to a duty to disclose.” Kovich v.  
5 Paseo Del Mar Homeowners’ Ass’n, 41 Cal.App.4th 863, 866 (1996). As described above, there is  
6 no fiduciary duty between a lender and a borrower, or a third party guarantor. Perlas, 187  
7 Cal.App.4th at 436. However:

8           . . . active concealment of facts and mere nondisclosure of facts may under certain  
9 circumstances be actionable without such a relationship. For example, a duty to  
10 disclose may arise without a confidential or fiduciary relationship where the  
11 defendant, a real estate agent or broker, alone has knowledge of material facts which  
12 are not accessible to the plaintiff, a buyer of real property.

13           Kovich, 41 Cal.App.4th at 866 (internal citations omitted). Plaintiff has not alleged that a duty as  
14 described in Kovich arose here. This case is not between a real estate broker and a buyer; Plaintiff is  
15 a third party guarantor, and is not a party to the contract with the bank. Further, Plaintiff alleges that  
16 she never met with the lender. Thus, Plaintiff has not alleged that Defendant had a duty to her.

17           To establish a cause of action for fraudulent misrepresentation, Plaintiff must plead and  
18 prove four elements: (1) a knowingly false representation by Defendant; (2) an intent to deceive or  
19 induce reliance; (3) justifiable reliance by Plaintiffs; and (4) resulting damages. Gutierrez v. Wells  
20 Fargo Bank, 2009 WL 322915, at \*4 (N.D. Cal. Feb. 9, 2009) (citing Service by Medallion, Inc. v.  
21 Clorox Co., 44 Cal.App.4th 1807, 1816 (1996)). Rule 9(b) requires that “[i]n all averments of fraud  
22 or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”  
23 Fed.R.Civ.P. 9(b); Vess v. Ciba-Geigy, Inc., 317 F.3d 1097, 1106 (9th Cir.2003) (“Rule 9(b)  
24 demands that, when averments of fraud are made, the circumstances constituting the alleged fraud  
25 “be ‘specific enough to give defendants notice of the particular misconduct ... so that they can defend  
26 against the charge and not just deny that they have done anything wrong.’ ” Averments of fraud must  
27 be accompanied by “the who, what, when, where, and how” of the misconduct charged.”) (internal  
28 citations omitted).

          Plaintiff has alleged in her complaint that she was closed off from all dealings with the  
lender because of her son’s conduct, and that she never met with the bank. FAC ¶¶ 18-19. Thus,

1 Plaintiff cannot allege any representations made by Defendant. Plaintiff’s vague allegations as to  
2 misrepresentations made by all Defendants (FAC ¶ 75) are insufficient to satisfy the pleading  
3 standard for fraud. See Keen v. American Mortg. Servicing Inc., 664 F. Supp. 2d 1086, 1098-99  
4 (E.D. Cal. 2009) (“Furthermore, ‘Rule 9(b) does not allow a complaint to merely lump multiple  
5 defendants together but require[s] plaintiffs to differentiate their allegations when suing more than  
6 one defendant ... and inform each defendant separately of the allegations surrounding his alleged  
7 participation in the fraud.’”) (internal citation omitted). No where does Plaintiff allege a  
8 representation made by the bank to her.

9 Further, even if Plaintiff could allege a misrepresentation, she has not alleged justifiable  
10 reliance. Plaintiff specifically states in the complaint that she “voluntarily relinquished” control of  
11 Sutter to David (FAC ¶¶ 12, 20) and that she received “little, if any, information about her  
12 investments from David. . . .” (FAC ¶ 19). She alleges that after David took control, she “had no  
13 knowledge of any accounts or business transactions and no ability to monitor them” (FAC ¶ 36).

14 As stated at the hearing, these claims are dismissed with leave to amend.

15 **9. Plaintiff rescission claim is dismissed with leave to amend**

16 It is not clear from the complaint whether Plaintiff seeks to rescind the loan agreements or  
17 the loan guaranties. Since Plaintiff is not a party to the loan agreements, she may not rescind those  
18 contracts. Even if she was able to rescind the loan agreements, she would need to allege tender of  
19 the amount of the loan, which she has not done. See Cal. Civil Code § 1691 (“Subject to Section  
20 1693, to effect a rescission a party to the contract must, promptly upon discovering the facts which  
21 entitle him to rescind if he is free from duress, menace, undue influence or disability and is aware of  
22 his right to rescind: (a) Give notice of rescission to the party as to whom he rescinds; and (b) Restore  
23 to the other party everything of value which he has received from him under the contract or offer to  
24 restore the same upon condition that the other party do likewise, unless the latter is unable or  
25 positively refuses to do so.”); Burgess, 44 Cal.App.2d at 816 (“In case of a person not entirely  
26 without understanding, a suit for a rescission may be brought, or the contract may be rescinded by  
27 the act of the party himself. But in accordance with the general rules, he must restore everything of  
28 value received, or offer to do so.”); see also Das v. WMC Mortgage Corp., 831 F. Supp. 2d 1147,


1 1162 (N.D. Cal. 2011) (“Thus, to state a valid claim for rescission, Plaintiffs ‘must at least allege  
2 that [they] ha[ve] offered to tender to support a claim for equitable rescission under section 1691.’”)  
3 (internal citation omitted). Therefore, Plaintiff’s rescission claim is dismissed with leave to amend.

4 **Conclusion**

5 As stated at the hearing and in this Order, Defendant’s Motion to Dismiss is granted with  
6 leave to amend as described above. Any amended complaint shall be filed no later than September  
7 20, 2012. Plaintiff shall inform Defendant and the Court promptly of the ruling by the bankruptcy  
8 court on the motions for relief filed by Plaintiff on August 21, 2012.

9 IT IS SO ORDERED.

10 Dated: August 22, 2012

  
\_\_\_\_\_  
ELIZABETH D. LAPORTE  
United States Magistrate Judge