

1 in March 2006.²

2 Plaintiffs allege that Countrywide and Loan Ex falsified the loan documents and failed
3 to make proper disclosures in connection with the loans. They also allege that Countrywide
4 failed to comply with the Making Home Affordable Refinance program by failing to modify the
5 terms of their loan.

6 Plaintiffs' home was sold in a foreclosure sale in January 2009. Before the
7 foreclosure, Plaintiffs were never offered options to avoid it or modify their loan.

8 Plaintiffs hired a lawyer in the summer of 2009, and it was not until then that they
9 discovered the numerous purported violations in the loan application, loan modification
10 requests, and foreclosure process, among other things.

11 Plaintiffs allege seven causes of action: (1) intentional misrepresentation, (2) breach
12 of fiduciary duty, (3) violations of the Truth in Lending Act ("TILA"), (4) violation of the Real
13 Estate Settlement Procedures Act ("RESPA"), (5) violation of California Civil Code § 1632,
14 (6) breach of contract, and (7) violation of California Business and Professions Code § 17200
15 et seq.

17 II. LEGAL STANDARD

18 Under Federal Rule of Civil Procedure 8(a)(2), the plaintiff is required only to set forth
19 a "short and plain statement of the claim showing that the pleader is entitled to relief," and
20 "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."
21 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When reviewing a motion to
22 dismiss, the allegations of material fact in plaintiff's complaint are taken as true and
23 construed in the light most favorable to the plaintiff. See *Parks Sch. of Bus., Inc. v.*
24 *Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). But only factual allegations must be
25 accepted as true—not legal conclusions. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).
26 "Threadbare recitals of the elements of a cause of action, supported by mere conclusory

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28 ² The Court notes that the loan application attached to Defendants' Motion to Dismiss is dated December 2005. For purposes of the Motion to Dismiss, the Court uses the date stated in the First Amended Complaint.

1 statements, do not suffice.” *Id.* Although detailed factual allegations are not required, the
2 factual allegations ”must be enough to raise a right to relief above the speculative level.”
3 *Twombly*, 550 U.S. at 555. Furthermore, “only a complaint that states a plausible claim for
4 relief survives a motion to dismiss.” *Iqbal*, 129 S. Ct. at 1949.

5 In ruling on a motion to dismiss, a court may take judicial notice of matters of public
6 record that are not subject to reasonable dispute. *Lee v. City of Los Angeles*, 250 F.3d 668,
7 689 (9th Cir. 2001).

8 9 III. DISCUSSION

10 11 A. Intentional Misrepresentation

12 The elements of an intentional misrepresentation claim are (1) a misrepresentation;
13 (2) knowledge of its falsity; (3) intent to induce reliance; (4) justifiable reliance; and (5)
14 resulting damage. *Anderson v. Deloitte & Touche*, 56 Cal. App. 4th 1468, 1474 (1997). The
15 statute of limitations for intentional misrepresentation, a form of fraud, is three years, starting
16 on the date of discovery by the aggrieved party. Cal. Civ. Proc. Code § 338(d). The
17 aggrieved party is deemed to have discovered the fraud when it has reason to suspect it has
18 been defrauded. *See Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 807 (2005).

19 Here, Plaintiffs failed to plead the elements of intentional misrepresentation. Plaintiffs
20 allege that Defendants misrepresented Plaintiffs’ income on the loan application. But
21 Plaintiffs cannot plead reasonable reliance on income figures written by Defendants because
22 Plaintiffs knew or should have known their actual income. Moreover, Plaintiffs had an
23 opportunity to review the loan application, as evidenced by their initials on each page of the
24 loan application, including the page stating their income. Plaintiffs signed the application,
25 and they cannot now claim to have relied on misrepresentations contained within it. *See*
26 *Brown v. Wells Fargo Bank, N.A.*, 168 Cal. App. 4th 938, 958–59 (2008) (no reasonable
27 reliance where aggrieved party had reasonable opportunity to discover terms of contract).

28 Plaintiffs’ claim is also time barred. According to the First Amended Complaint

1 (“FAC”), they signed the loan documents in March 2006. Their claim accrued when they
2 signed the documents because they should have discovered the fraud when they initialed
3 each page and signed the loan application. See *Fox*, 35 Cal. 4th at 807. They filed suit in
4 August 2009, beyond the three-year statute of limitations for fraud. Additionally, Plaintiffs
5 have not alleged facts sufficient to toll the accrual of their claim.

6 Plaintiffs also argue that they could not have discovered the fraud because they speak
7 Spanish. But Plaintiffs do not allege they cannot understand English, only that their primary
8 language is Spanish. Even if they could not understand English, however, “it is generally
9 unreasonable . . . to neglect to read a written agreement before signing.” *Rosenthal v. Great*
10 *W. Fin. Sec. Corp.*, 14 Cal. 4th 394, 424 (1996).

11 For these reasons, the Court **DISMISSES without prejudice** Plaintiffs’ claim for
12 intentional misrepresentation as against all Defendants.

13 14 **B. Breach of Fiduciary Duty**

15 Plaintiff asserts a breach of fiduciary duty claim against Loan Ex only. Loan Ex has
16 not appeared in this action and the other Defendants have not moved to dismiss this claim.
17 Thus, this claim survives.

18 19 **C. TILA Claim**

20 Any action for damages under the Truth in Lending Act (“TILA”), 15 U.S.C. § 1601 *et*
21 *seq.*, must be brought within one year of the loan execution. 15 U.S.C. § 1640(e); see *King*
22 *v. California*, 784 F.2d 910, 915 (9th Cir. 1986). Here, Plaintiffs executed the loan
23 documents in March 2006. They filed this suit in August 2009, well beyond the one-year
24 limitations period. Additionally, although courts may equitably toll TILA claims “in certain
25 circumstances” such as fraudulent concealment, *King v. State of California*, 784 F.2d 910,
26 914–15 (9th Cir. 1986), Plaintiffs have not alleged any facts justifying equitable tolling.

27 Plaintiffs also seek rescission of the loan under TILA. Rescission actions under TILA
28 have a three-year limitations period if there are defects in the notice of right to cancel. 15

1 U.S.C. § 1635(f). Plaintiffs filed their action beyond the three-year period. Additionally, the
2 right of rescission “does not apply to – a residential mortgage transaction.” 15 U.S.C. §
3 1635(e)(1). And a residential mortgage transaction is defined as a “transaction in which a
4 mortgage [or] deed of trust . . . is created or retained against the consumer’s dwelling to
5 finance the acquisition or initial construction of such dwelling.” 15 U.S.C. § 1602(w). Here,
6 Plaintiffs allege they received the loans at issue in connection with the purchase of their
7 home. Thus, even if Plaintiffs filed their suit in time, TILA does not give them a right of
8 rescission.

9 Lastly, Recontrust is not a proper Defendant in the TILA claim because, according to
10 the loan documents, it merely acted as trustee under the deed of trust. There are no factual
11 allegations that Recontrust was involved in the loan application process or contributed to the
12 TILA violations in any way.

13 The Court therefore **DISMISSES without prejudice** Plaintiffs’ claim for TILA violations
14 as against all Defendants.

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16 **D. RESPA Claim**

17 RESPA claims must be brought within at most three years of the date the violation
18 occurred. 12 U.S.C. § 2614. Some RESPA claims must be brought within one year. *Id.*
19 Like the TILA claims, Plaintiffs filed suit beyond the three-year limitations period and they
20 have not alleged facts justifying tolling.

21 Plaintiffs also fail to plead facts supporting their allegation that Defendants received
22 improper fees and kickbacks in connection with the origination of the loan. They merely
23 recite the statutory language of RESPA without asserting any facts supporting their
24 conclusory allegations. Their conclusory allegations are insufficient to state a claim. See
25 *Iqbal*, 129 S. Ct. at 1949.

26 For these reasons, the Court **DISMISSES without prejudice** Plaintiffs’ claim for
27 RESPA violations as against all Defendants.

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E. California Civil Code § 1632

Defendants have not moved to dismiss this claim so this claim survives.

F. Breach of Contract

Plaintiffs allege that Countrywide entered into a Servicer Participation Agreement for the Home Affordable Modification Program (“HAMP Contract”) with Fannie Mae, and that they were third-party beneficiaries under it. Plaintiffs allege that they were entitled to a loan modification under the terms of the HAMP Contract but they never received one, and Countrywide therefore breached the HAMP Contract.

The Court has reviewed the HAMP Contract and finds no provisions requiring Countrywide to modify loans like Plaintiffs. *Cf. Aleem v. Bank of America*, No. EDCV 09-018122010, WL 532330, at * 4 (C.D. Cal. Feb. 9, 2010) (“There is no express or implied right to sue fund recipients, however, under . . . HAMP.”). Nor do Plaintiffs cite law requiring Countrywide to modify their loan.

Moreover, Plaintiffs allege that “[i]f a borrower under a loan serviced or owned by COUNTRYWIDE seeks modification,” the HAMP Contract requires Countrywide to modify it if the borrower is eligible. But Plaintiffs fail to allege that they ever sought or requested a loan modification from Defendants. They merely allege that Defendants never gave them one. Thus, even if Countrywide had an obligation to modify their loan upon request, Country is not liable for breach because Plaintiffs never requested a modification.

For these reasons, the Court **DISMISSES without prejudice** Plaintiffs’ breach of contract claim.

G. California Business and Professions Code § 17200 et seq.

Section 17200 of the California Business and Professions Code “borrows’ violations of other laws and treats” them as unlawful business practices “independently actionable under section 17200.” *Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 383 (1992).

1 "Violation of almost any federal, state, or local law may serve as the basis for a[n] [unfair
2 competition] claim." *Plascencia v. Lending 1st Mortg.*, 583 F. Supp. 2d 1090, 1098 (N.D. Cal.
3 2008) (citing *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838–39 (1994)). Because
4 a § 17200 claim may be based on violations of other laws, and because some claims remain
5 against the Defendants, the Court declines to dismiss this cause of action at this time.

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IV. CONCLUSION

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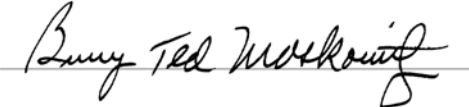
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For the foregoing reasons, the Court **GRANTS in part** and **DENIES in part** the Motion to Dismiss [Doc. 11]. The Court **GRANTS** the Ex-Parte Motion for Leave [Doc. 14] because the Court finds good cause for Plaintiffs' failure to file its opposition on time. The Court has also considered Defendants' reply brief in connection with this order.

Plaintiffs shall have twenty-one days to file a Second Amended Complaint, if any, that cures the deficiencies described herein.

IT IS SO ORDERED.

DATED: May 10, 2010


Honorable Barry Ted Moskowitz
United States District Judge