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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SEAN PARK, MICHELLE PARK,

Plaintiffs,

vs.

WELLS FARGO BANK HOME
MORTGAGE; FIDELITY NATIONAL
TITLE INSURANCE COMPANY; FIRST
AMERICAN TITLE INSURANCE
COMPANY aka FIRST AMERICAN
LOANSTAR SERVICES, LLC; BANK OF
AMERICA, N.A.; OLD REPUBLIC TITLE
COMPANY; COUNTRYWIDE BANK,
FSB; BANK OF AMERICA HOME LOANS
SERVICING, LP; MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS; RECONTRUST COMPANY,
N.A.; LSI TITLE COMPANY; DOES 1-100.

Defendants.

CASE NO. 10CV1737 JLS (WMC)

**ORDER: (1) GRANTING
DEFENDANT WELLS FARGO'S
MOTION TO DISMISS; (2)
GRANTING DEFENDANT
COUNTRYWIDE'S MOTION TO
DISMISS; (3) DENYING
PLAINTIFFS' MOTION TO FILE
SURREPLY; AND (4) DENYING
EX PARTE APPLICATION FOR
TEMPORARY RESTRAINING
ORDER**

(Doc. Nos. 34, 35, 65, & 69.)

Presently before the Court are three motions and an ex parte application for temporary restraining order. Two motions are to dismiss Plaintiffs' first amended complaint. The first is brought by Wells Fargo Bank, N.A., Bank of America, N.A., and Mortgage Electronic Registration Systems (MERS). (Doc. No. 34 (Wells Fargo Mot.)) The second is brought by Bank of America, N.A., in its capacity as successor to Countrywide Bank, N.A. (Doc. No. 35 (Countrywide Mot.)) LSI Title Co. has joined Countrywide's motion. (See Doc. No. 51 (Joinder).) The third motion is Plaintiffs' ex parte motion for leave to file a surreply. (Doc. No.

1 65 (Surreply Mot.)).

2 After consideration, the Court **GRANTS WITH PREJUDICE** the motion to dismiss
3 affecting LSI Title Co. and Bank of America, N.A. in its capacity as successor to Countrywide
4 Bank, N.A. The Court **GRANTS WITHOUT PREJUDICE** the motion affecting Wells Fargo,
5 Bank of America, and MERS. The Court also **DENIES** Plaintiffs' ex parte motion to file a
6 surreply. Additional briefing on the motions to dismiss is unnecessary. And finally, having
7 dismissed Plaintiffs' first amended complaint, the ex parte application for temporary restraining
8 order depending on it is **DENIED AS MOOT**.

9 **BACKGROUND**

10 This action arises out of a loan that Plaintiffs obtained from Wells Fargo Bank. (Doc. No.
11 32 (FAC) ¶ 3.) Plaintiffs obtained the loan on November 4, 2005, to refinance real property that
12 they owned in La Mesa, CA. (*Id.* ¶¶ 3, 57.) Plaintiffs also secured a home equity line of credit
13 from Countrywide in 2007. (Countrywide Mot. at 1.) Foreclosure proceedings were commenced
14 in 2009 after Plaintiffs stopped making payments on the loan. (Wells Fargo Mot. at 1.)

15 Plaintiffs filed a complaint in this Court on August 19, 2010. (Doc. No. 1 (Compl.))
16 Defendants filed motions to dismiss. (Doc. Nos. 23, 25, & 28.) The Court granted the motions,
17 giving Plaintiffs leave to amend. (Doc. No. 31 (Order).)

18 Plaintiffs then filed an amended complaint (FAC), asserting fifteen causes of action: (1)
19 violation of Truth-in-Lending Act (TILA), 15 U.S.C. § 1601; (2) violation of Rosenthal Fair Debt
20 Collections Practice Act, Cal. Civ. Code § 1788; (3) violation of Fair Debt Collection Practice Act
21 (FDCPA), 15 U.S.C. § 1692; (4) wrongful disclosure; (5) violation of Real Estate Settlement
22 Procedures Act (RESPA), 12 U.S.C. § 2605; (6) breach of fiduciary duty; (7) fraud (intentional
23 misrepresentation); (8) fraud (negligent misrepresentation); (9) unfair competition under Cal. Bus.
24 & Prof. Code § 17200; (10) breach of contract; (11) breach of implied covenant of good fair and
25 fair dealing; (12) violation of Cal. Civ. Code § 2923.5; (13) violation of Home Ownership and
26 Equity Protection Act (HOEPA), 15 U.S.C. § 1639; (14) rescission; (15) accounting. (FAC.) This
27 complaint is the subject of Defendants' present motions.

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2 **LEGAL STANDARD**

3 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the defense that
4 the complaint “fail[s] to state a claim upon which relief can be granted,” generally referred to as a
5 motion to dismiss. The Court evaluates whether a complaint states a cognizable legal theory and
6 sufficient facts in light of Federal Rule of Civil Procedure 8(a), which requires a “short and plain
7 statement of the claim showing that the pleader is entitled to relief.” Although Rule 8 “does not
8 require ‘detailed factual allegations,’ . . . it [does] demand[] more than an unadorned, the-
9 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, — U.S. —, 129 S. Ct. 1937,
10 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a
11 plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than
12 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
13 *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Nor does a
14 complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*,
15 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 557).

16 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
17 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*,
18 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible if the facts
19 pleaded “allow[] the court to draw the reasonable inference that the defendant is liable for the
20 misconduct alleged.” *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556). That is not to
21 say that the claim must be probable, but there must be “more than a sheer possibility that a
22 defendant has acted unlawfully.” *Id.* Facts “‘merely consistent with’ a defendant’s liability” fall
23 short of a plausible entitlement to relief. *Id.* (quoting *Twombly*, 550 U.S. at 557). Further, the
24 Court need not accept as true “legal conclusions” contained in the complaint. *Id.* This review
25 requires context-specific analysis involving the Court’s “judicial experience and common sense.”
26 *Id.* at 1950 (citation omitted). “[W]here the well-pleaded facts do not permit the court to infer
27 more than the mere possibility of misconduct, the complaint has alleged—but it has not
28 ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.*

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2 **ANALYSIS**

3 At the outset, the Court must determine whom Plaintiffs are suing. Nominally, Plaintiffs
4 assert claims “against all Defendants.” (*See generally* FAC.) Substantively, however, Plaintiffs’
5 claims do not extend that far. Plaintiffs’ asserted causes of action concern only the loan secured in
6 2005. Countrywide and LSI were involved in the home equity line of credit that Plaintiffs
7 obtained in 2007. (Countrywide Mot. at 2–3; Joinder at 2.) As a result, Plaintiffs cannot state
8 claims against Countrywide and LSI. The Court therefore **GRANTS** those parties’ motion to
9 dismiss and **DISMISSES WITH PREJUDICE** Plaintiffs’ first amended complaint as to those
10 parties. In the analysis that follows, the Court tests the sufficiency of the claims as against Wells
11 Fargo, Bank of America, and MERS, all of whom were parties to the 2005 loan.

12 **1. TILA and HOEPA**

13 Under TILA and HOEPA, a borrower may rescind a loan or recover damages if the lender
14 fails to disclose certain terms at closing. 15 U.S.C. §§ 1635, 1640. Actions for rescission and
15 damages are subject to respective three- and one-year limitations periods, which begin when the
16 parties consummate the loan. *Id.* §§ 1635(a), 1640(e). The limitations period for rescission claims
17 is absolute; the period for damages claims is not.¹ Thus, as to claims for damages, equitable
18 tolling may apply to “suspend the limitations period until the borrower discovers or ha[s]
19 reasonable opportunity to discover the fraud or non-disclosures that form the basis of the TILA [or
20 HOEPA] action.” *King v. California*, 784 F.2d 910, 915 (9th Cir. 1986).

21 In this case, the parties consummated the loan on November 4, 2005. (FAC ¶ 3.) Plaintiffs
22 did not file their lawsuit until August 2010, at which time the three- and one-year limitations
23 periods had lapsed. (*Id.*) Thus, Plaintiffs’ rescission claim is time-barred. The damages claim is
24 also time-barred unless equitable tolling applies.

25 At the pleading stage, a plaintiff seeking the benefit of equitable tolling must allege facts
26 sufficient to demonstrate that he could not have “discovered the alleged violations by exercising

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28 ¹ *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 411–12 (1998); *see also Miguel v. Country
Funding Corp.*, 309 F.3d 1161, 1164 (9th Cir. 2002); *Taylor v. Money Store*, 42 Fed. App’x 932, 933
(9th Cir. 2002).

1 reasonable diligence.” *Copeland v. Lehman Bros. Bank, F.S.B.*, 2011 WL 9503, at *6 (S.D. Cal.
2 Jan. 3, 2011); *accord Meyer v. Ameriquest Mortg. Co.*, 342 F.3d 899, 902 (9th Cir. 2003). In this
3 case, Plaintiffs insist the limitations period should be tolled until August 11, 2010, because only
4 then did Defendants “provide[] Plaintiffs with copies of their original loan documents.” (FAC
5 ¶ 41.) But this allegation only solves part of the equation; it establishes the time and manner of
6 discovery, but it does not answer why Plaintiffs could not have discovered the violations at an
7 earlier time. Without more, Plaintiffs have not adequately pleaded equitable tolling.

8 **2. FDCPA**

9 Plaintiffs allege several violations of the FDCPA. (*See* FAC ¶¶ 10, 146, 149–50.) But
10 absent from the FAC is any allegation that Defendants are “debt collectors” within the meaning of
11 the statute. *See* 15 U.S.C. § 1692a. Plaintiffs’ bald allegation that Defendants unlawfully
12 collected debt is insufficient on its own because it does not explain away § 1692a(6), which states
13 that the term “debt collector” does not include “any person collecting . . . any debt owed . . . to the
14 extent such activity . . . concerns a debt which was originated by such person.” *Id.* §
15 1692a(6)(F)(ii). As the originating lender of the refinance of the property, Defendant Wells Fargo
16 falls under that statutory exception. Accordingly, Plaintiffs fail to state a claim under the FDCPA.

17 **3. RESPA**

18 Plaintiffs allege that Defendants violated RESPA by (1) not complying with disclosure
19 requirements at closing and (2) not responding to a qualified written request (QWR). (FAC
20 ¶¶ 164–165.) As alleged, these claims fail.

21 The first allegation is time-barred unless equitable tolling applies. It also fails in substance
22 because RESPA does not provide Plaintiffs with a private right of action for disclosure violations.
23 *See Park v. Wachovia Mortg., F.S.B.*, 2011 WL 98408, at *8 (S.D. Cal. Jan. 12, 2011); *Bloom v.*
24 *Martin*, 865 F. Supp. 1377, 1384 (N.D. Cal. 1994).

25 Although the second allegation—the failure to respond to the QWR—is not time-barred, it
26 fails because Plaintiffs have not adequately pleaded actual, statutory, or legal damages. As to
27 actual damages, Plaintiffs have ignored the pleading requirement that a borrower attempting to
28 state a claim for actual damages must allege pecuniary loss. *See Molina v. Wash. Mut. Bank*, 2010

1 WL 431439, at *7 (S.D. Cal. Jan. 29, 2010). As to statutory damages, Plaintiffs have not provided
2 any facts in support of their allegation that Defendants engaged in a pattern of noncompliance with
3 RESPA. *See* 12 U.S.C. § 2605(f); *see also Lal v. Am. Home Serv., Inc.*, 680 F. Supp. 2d 1218,
4 1223 (E.D. Cal. 2010). And as to legal damages, Plaintiffs’ allegation that they have incurred
5 “costs of suit” is insufficient on its own because “[i]f such were the case, every RESPA suit would
6 inherently have a claim for damages built in.” *Lal*, 680 F. Supp. 2d at 1223. More is needed
7 before Plaintiffs can state a valid claim under RESPA.

8 **4. State Claims**

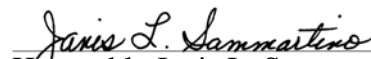
9 Having dismissed the claims underlying this Court’s original jurisdiction, *see* FAC at 30,
10 33, 37, 49, the Court declines to exercise supplemental jurisdiction over the remaining state law
11 claims. 28 U.S.C. § 1367(c).

12 **CONCLUSION**

13 Before the Court are two motions to dismiss, an ex parte motion for leave to file a surreply,
14 and an ex parte application for temporary restraining order. The Court **GRANTS** LSI Title Co.
15 and Bank of America, N.A.’s (in its capacity as successor to Countrywide Bank, N.A.) motion to
16 dismiss. (Doc. No. 35.) Plaintiffs’ first amended complaint is **DISMISSED WITH PREJUDICE**
17 as to those defendants. The Court **GRANTS** the other motion to dismiss and **DISMISSES**
18 **WITHOUT PREJUDICE** the first amended complaint as to Wells Fargo, Bank of America, and
19 MERS. (Doc. No. 34.) In resolving both motions, the Court did not consider anything beyond the
20 pleadings. Plaintiffs’ motion to file a surreply is **DENIED AS MOOT**. (Doc. No. 65.) And
21 finally, having granted the motions to dismiss, the ex parte application for temporary restraining
22 order depending on the FAC is **DENIED AS MOOT**. (Doc. No. 69.)

23 **IT IS SO ORDERED.**

24
25 DATED: March 30, 2011

26 
27 Honorable Janis L. Sammartino
28 United States District Judge