

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

POSTED ON WEBSITE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

In re)	Case No. 13-14675-B-7
Jerry Harry Kutumian,)	
Debtor.)	
<hr/>		
Apolonio Camacho. et. al.,)	Adversary Proc. No. 13-1112
Plaintiffs,)	DC No. KDG-4
v.)	
Jerry Harry Kutumian,)	
Defendant.)	
<hr/>		

ORDER DISMISSING THIRD AMENDED COMPLAINT

Connie M. Parker, Esq., of Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, LLP, appeared on behalf of the debtor/defendant, Jerry Harry Kutumian.

George A. Gonzalez, Esq., of the Law Offices of Golub & Associates, PLC, appeared on behalf of the plaintiffs, Apolonio Camacho, et al.

Before the court is a motion (the "Motion"), filed by the debtor/defendant, Jerry Harry Kutumian (the "Debtor"), to dismiss with prejudice the third amended complaint filed by plaintiffs, Apolonio Camacho, et al. (the "Plaintiffs") to determine the dischargeability of a debt for alleged fraud under 11 U.S.C. § 523(a)(2)(A). For the reasons set forth below, the Motion will be granted.

1 **The Pleadings.** The relevant pleadings which the court must
2 consider are set forth in the Plaintiff’s third amended complaint which was
3 filed on May 1, 2014 (Doc. No. 50; the “Complaint”). The procedural
4 background and relevant factual allegations in the Complaint are
5 summarized in the Debtor’s motion to dismiss (Doc. No 58), a copy of
6 which is attached hereto as Exhibit “A” and incorporated herein by
7 reference the “Debtor’s Motion”. The Debtor also filed a brief in response
8 to the Plaintiffs’ opposition (Doc. No. 66), a copy of which is attached
9 hereto as Exhibit “B,” and incorporated herein by reference the “Reply
10 Brief.”

11 In summary, the Plaintiffs each purchased a home from Hye
12 Development Company, LLC, an entity associated with the Debtor,
13 sometime between March 2006 and April 2008. In July 2010, the Plaintiffs
14 filed a civil action against Hye Development seeking damages for alleged
15 latent construction defects (the “State Court Action”). All of the claims
16 pled in the State Court Action related to construction defects in the homes.
17 None of the claims pled in the State Court Action would be
18 nondischargeable under applicable bankruptcy law if the State Court Action
19 had been prosecuted to a final judgment against the Debtor.¹

20 In April 2011, the Plaintiffs joined the Debtor in the State Court
21 Action as a “doe” defendant pursuant to Cal.Code Civ.P. § 474. The
22 pleading in the State Court Action was not amended to include any new
23 claims against the Debtor. In this adversary proceeding, the Plaintiffs now
24 contend that they were induced to purchase their homes based in part on

25
26 ¹Fresno County Superior Court Case No. 10 CE CG 02493 pleads claims
27 for (1) strict liability, (2) Negligence, (3) Nuisance, (4) Breach of Warranty, (5)
28 Negligent Failure to Disclose, (6) Negligent Misrepresentation, and (7) Negligent
Infliction of Emotional Distress (*See* Debtor’s Request for Judicial Notice,
Exhibit “A”, Doc. No. 15).

1 false oral promises that the homes would be covered by a one year warranty
2 against construction defects. None of the claims in the State Court Action
3 related to the “fraudulent” representation or breach of an oral warranty.

4 The Debtor again moves to dismiss the Complaint under Federal
5 Rule of Civil Procedure 12(b)(6) (made applicable to this adversary
6 proceeding by Federal Rule of Bankruptcy Procedure 7012), and the
7 pleading standard established by the Supreme Court in *Bell Atl. Corp. v.*
8 *Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and
9 subsequently in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173
10 L.Ed.2d 868 (2009). The Debtor contends that the Complaint does not
11 allege facts sufficient to lead the court to conclude that the Plaintiffs have a
12 plausible and enforceable *prima facie* claim against the Debtor. Unless the
13 Plaintiffs hold enforceable claims against the Debtor based on the alleged
14 oral warranties, there is nothing to except from the discharge.

15 **Dischargeability Based on Fraud Under 11 U.S.C. § 523(a)(2)(A).**

16 The Debtor contends that the Complaint does not plead the fraud claim with
17 sufficient particularity to comply with Fed.R.Civ.P. 9(b) (made applicable
18 to this adversary proceeding by Fed.R.Bank.P. 7009). Based on the
19 analysis set forth in Parts III A and B of the Debtor’s Motion (Exhibit “A”
20 at 8-10) and Part II A of the Reply Brief (Exhibit “B” at 2-5), the court
21 agrees. The Debtor’s analysis of this issue is comprehensive, and the court
22 incorporates that analysis in support of this decision.

23 **The Statute of Limitations.** As an alternate theory for dismissal,

24 the Debtor contends that the Plaintiff’s new fraud claims are barred by
25 California’s three-year statute of limitations. (Cal.Code Civ.P. § 338.)
26 Again, for the reasons set forth in Part III B of the Debtor’s Motion (Exhibit
27 “A” at 10-12), and Part II B of the Debtor’s Reply (Exhibit “B” at 5-9), the
28 court agrees.

1 All of the causes of action in the State Court Action are based on
2 hidden construction defects and the alleged failure to disclose known
3 construction defects. The court is not persuaded that the State Court Action
4 pleads a claim against the defendants based on alleged warranty promises
5 made at the inception of the home purchases. Neither is the court persuaded
6 that the Plaintiff's belated joinder of the Debtor in the State Court Action
7 related back to the filing of the original complaint. The Debtor's point
8 raised in the Reply Brief is well taken; if the Plaintiffs can plead with
9 particularity (in their fraud claims) what the Debtor promised as early as
10 2006 with regard to home warranties, then they were *not truly ignorant of*
11 *the Debtor's identity* and participation in the alleged fraud in 2010 when
12 they filed the State Court Action.² Accordingly, the "relation back" rule
13 does not apply to the Debtor who was not made a party to the State Court
14 Action until 2011, after the "fraud" statute of limitations had expired.

15 It is well established that the expiration of a state statute of
16 limitations for a fraud claim does not prejudice a subsequent action in the
17 bankruptcy court to determine the dischargeability of the claim if the
18 creditor already has a *valid judgment* for the debt upon which the fraud
19 claim is based. The timeliness of the dischargeability action is determined
20 by the bankruptcy rules. *Lee-Benner v. Gergely ((n re Gergely)*, 110 F.3d
21 1448, 1453 (9th Cir. 1997). Here, the Plaintiffs do not have a valid
22 judgment for the breach of alleged warranty contracts made in conjunction
23 with Plaintiffs' purchase of the homes. Indeed, the State Court Action
24 makes no mention of any such warranty contracts.

25 ///

27 ²California Code of Civil Procedure § 474 allows the joinder of a "doe"
28 defendant "when the plaintiff is ignorant of the name of a defendant" at the time
the complaint is originally filed.

1 The Plaintiffs point to the Debtor’s failure to raise the statute of
2 limitations as an affirmative defense after he was joined to the State Court
3 Action in 2011. However, the statute of limitations in California for
4 liability based on latent defects in the construction of real property is ten
5 years after substantial completion of the development or improvement.
6 Cal.CodeCiv.P. § 337.15. Based on the pleadings and claims stated in the
7 State Court Action, the Debtor had no reason to raise the limitation’s
8 defense. If the Plaintiffs were to now attempt to amend the State Court
9 Action to add a common law fraud claim based on warranty promises made
10 between 2006 and 2008, the statute of limitations under Cal.CodeCiv.P.
11 § 338 would surely be an issue.

12 **Dismissal with Prejudice.** Federal Rule of Civil Rule 15(a)(2),
13 incorporated by FRBP 7015, permits amendment of the Complaint only
14 with the Debtor’s consent or leave of the court. Such leave to amend
15 “should freely” be given “when justice so requires.” *Id.* However,
16 “liberality in granting leave to amend is subject to several limitations.”
17 *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1987).
18 For example, where amendment would cause the defendant undue
19 prejudice, would be futile, or create undue delay, leave need not be granted.
20 This is especially true where the complaint has been previously amended.

21 The question here is whether the Plaintiffs should be given a further
22 opportunity to plead a claim that plausibly fits within the boundaries of
23 11 U.S.C. § 523(a)(2)(A). The Debtor has already prepared and filed two
24 motions to dismiss. The court has already dismissed this adversary
25 proceeding three times, twice *sua sponte*, and instructed Plaintiffs’ counsel
26 of the need for more facts to deal with the issues raised in support of the
27 prior two dismissals. The court is not persuaded that the Plaintiffs can
28 plead any additional facts to overcome the defects discussed in the

1 Dismissal Motion. Further amendment would prejudice the Debtor and
2 cause undue delay. The Complaint will therefore be dismissed without
3 leave to amend.

4 Dated: September 16, 2014

5
6 /s/ W. Richard Lee
7 W. Richard Lee
8 United States Bankruptcy Judge
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

13
HAGOP T. BEDOYAN, CSB NO. 131285
CONNIE M. PARKER, CSB NO. 254484
KLEIN, DENATALE, GOLDNER,
COOPER, ROSENLIEB & KIMBALL, LLP
5260 N. Palm Avenue, Suite 201
Fresno, California 93704
Telephone: (559) 438-4374
Facsimile: (559) 432-1847
Email: hbedoyan@kleinlaw.com; cparker@kleinlaw.com

Attorneys for Debtor and Defendant

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION**

<p>JERRY HARRY KUTUMIAN, Debtor.</p>	<p>Case No.: 13-14675-B-7</p>
<p>CHARLES ADAMS, et. al., Plaintiffs, v. JERRY HARRY KUTUMIAN, Defendant.</p>	<p>Adv. Proc. No.: 13-01112-B KDG-4 Date: June 26, 2014 Time: 10:30 a.m. Place: United States Bankruptcy Court, Courtroom 12, Fifth Floor, 2500 Tulare Street, Fresno, California Judge: Hon. W. Richard Lee</p>

**DEFENDANT JERRY HARRY KUTUMIAN'S
MOTION TO DISMISS (FRCP 9(b), 12(b)(6))**

I. Introduction

Plaintiffs¹ are contingent, unliquidated creditors pursuant to a construction defect action they commenced in Fresno County Superior Court on July 14, 2010. The plaintiffs purchased residential homes from non-debtor Hye Development Company, LLC. On July 14, 2010, the plaintiffs filed a construction defect suit in Fresno County Superior Court alleging (1) strict liability; (2) negligence; (3) nuisance; (4) breach of warranty; (5) negligent failure to disclose;

¹ This adversary proceeding was initially commenced by 41 named plaintiffs.

Exhibit "A"

1 (6) negligent misrepresentation; and (7) negligent infliction of emotional distress, against Hye
2 Development Company, LLC, the debtor herein, Jerry Harry Kutumian (hereinafter
3 “Kutumian) and others. The case was close to three years old, and no trial had been set, by the
4 time Kutumian filed for bankruptcy relief. (See Request for Judicial Notice filed and served
5 concurrently herewith.)

6 Kutumian is a licensed contractor and former member of non-debtor Hye Company
7 Development, LLC. Kutumian filed for relief under Chapter 7 of the Bankruptcy Code on July
8 3, 2013. The plaintiffs filed their initial non-dischargeability complaint against Kutumian on
9 October 11, 2013, claiming theories under Bankruptcy Code sections §§ 727(a)(3); 727(a)(5)
10 and 523(a)(2)(A).

11 The bankruptcy court dismissed plaintiffs’ section 727 claims. Thereafter, the
12 bankruptcy court dismissed the adversary proceeding as to 33 of the originally named plaintiffs.
13 Currently eight plaintiffs remain in this adversary proceeding pursuant to the third amended
14 complaint.²

15 Similar to the defects in the initial, first-amended and second-amended complaint, the
16 remaining plaintiffs failed to pled a cause of action under Bankruptcy Code section
17 523(a)(2)(A). Also, they failed to plead the fraud component of their section 523(a)(2)(A)
18 claim with particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure.
19 Finally, as identified by the court during two status conferences, plaintiffs’ fraud-related claims
20 are time-barred.

21 For these reasons, to be further addressed below, the court should dismiss the third
22 amended complaint, with prejudice, and without leave to amend.

23 **II. Procedural Background.**

24 The remaining eight plaintiffs are owners of five Orange Cove homes, all located within
25 a planned residential development known as “Summit Ranch.” (Third Amended Complaint ¶s
26 7 – 11.) The plaintiffs purchased their Summit Ranch homes from non-party, Hye

27 _____
28 ² The current plaintiffs are Apolonio Camacho, Martin Camacho, Guadalupe Costilla, Lisa Deaver Johnson,
Fernando Martinez, Maria Martinez, Alejandro Mendoza and Catalina Mendoza. Combined, these eight plaintiffs
allegedly own five residential properties at issue.

1 Development Company, LLC. (See Third Amended Complaint ¶ 5.)

2 Plaintiffs initially filed suit against Hye Development Company, LLC, et. al., for:
3 (1) strict liability; (2) negligence; (3) nuisance; (4) breach of warranty; (5) negligent failure to
4 disclose; (6) negligent misrepresentation; and (7) negligent infliction of emotional distress,
5 allegedly related to their purchase of residential homes from Hye Development, LLC. (See
6 Request for Judicial Notice ¶ 2.a, Exhibit H.)³

7 **A. Apolonio Camacho and Martin Camacho**

8 According to public records from the Fresno County Recorder's Office, Hye
9 Development Company, LLC, granted a Summit Ranch home to Plaintiffs by Grant Deed dated
10 April 3, 2008, to the following grantees: Apolonio Camacho and Raquel R. Camacho, husband
11 and wife and Martin U. Camacho, an unmarried man all as joint tenants.⁴ (See Request for
12 Judicial ¶ 1.a, Exhibit A.) The grant deed was recorded on April 10, 2008. (*Id.*) Plaintiffs
13 alleged that escrow closed on or around April 10, 2008. (Third Amended Complaint ¶ 29.)

14 The plaintiffs allege that at some unspecified time, in the weeks leading up to the close
15 of escrow, and supposedly at a location not identified in the third amended complaint, Apolonio
16 Camacho and/or Martin Camacho⁵ spoke in Spanish to a person of an unknown name, who was
17 allegedly acting as a representative of Hye Development Company, LLC and/or Barrington
18 Homes, Inc., as opposed to Kutumian. (Third Amended Complaint ¶s 5 – 6, 30.) There are no
19 facts describing this unnamed person and/or what he/she said in the Spanish language and/or
20 the English translation therefrom.

21 According to the third amended complaint, an unnamed person represented to Apolonio
22 Camacho and/or Martin Camacho that there was a warranty [by an specified warrantor] for one
23 year from close of escrow where “the Kutumian entities,” i.e., non-debtors Hye Development
24 Company, LLC and/or Barrington Homes, Inc., would repair problems or defects associated
25 with the construction of the home. (Third Amended Complaint ¶s 5 – 6, 31.) Plaintiffs’

26
27 ³ Plaintiffs’ counsel George Gonzalez represented to the bankruptcy court during the May 8, 2014 status
conference that the plaintiffs pled fraud against Kutumian in their state court lawsuit.

28 ⁴ Only Apolonio Camacho and Martin Camacho are plaintiffs in this adversary proceeding.

⁵ Plaintiffs do not specify which Camacho the representations were allegedly made to.

1 complaint fails to identify what repairs or defects are covered by the alleged warranty.

2 Plaintiffs claim that Apolonio Camacho and/or Martin Camacho spoke again with an
3 unnamed person who purportedly translated from Spanish to English something Kutumian
4 allegedly said during a walk-through inspection of their Summit Ranch home. (Third Amended
5 Complaint ¶ 32.) Without identifying what the unidentified person said in Spanish, Plaintiffs
6 allege Kutumian (who did not speak to Plaintiffs) informed Plaintiffs that all problems reported
7 within the first year of ownership would be repaired under warranty. (*Id.*)

8 Plaintiff goes on to allege that someone [unidentified] made “superficial repairs.”
9 (Third Amended Complaint ¶ 34.) Plaintiffs allege that *after* they purchased their Summit
10 Ranch home, “Lupe,” [i.e., not Kutumian] told Apolonio Camacho and/or Martin Camacho that
11 if issues still existed after the 11th month of ownership the “Kutumian entities,” would repair
12 the problems with their homes under warranty.” (Third Amended Complaint ¶ 34.)

13 Paragraph 35 of the Third Amended Complaint provides further ambiguity about the
14 alleged representations, alleging they were made on at least three unspecified occasions
15 including, “before and during the purchase about warranty coverage as well as representation
16 made in the first year after close of escrow....”

17 **B. Guadalupe Costilla**

18 According to public records from the Fresno County Recorder’s Office, Hye
19 Development Company, LLC, granted a Summit Ranch home to Plaintiff Guadalupe Costilla,
20 by Grant Deed dated March 7, 2006. (Request for Judicial Notice ¶ 1.b, Exhibit B.) The deed
21 was recorded on October 25, 2006. (*Id.*) Plaintiff claims escrow closed on or around October
22 25, 2006. (Third Amended Complaint ¶ 40.)

23 Plaintiff alleges that at an unspecified time and location, “[i]n the weeks leading up to
24 the close of escrow,” Kutumian represented there was a one year warranty where the
25 “Kutumian entities,” i.e., non-debtors Hye Development Company, LLC and/or Barrington
26 Homes, Inc., would repair problems or defects associated with the construction of the home.
27 (Third Amended Complaint ¶ 43.) Plaintiff’s complaint fails to identify what repairs or defects
28 are covered by the alleged warranty.

1 Allegedly, a “superficial repair,” was made by an unidentified party and Plaintiff was
2 advised by non-debtor “Lupe” and/or Kutumian, at an unspecified time and unspecified
3 location, that if any issues still existed after the 11th month of ownership, the “Kutumian
4 entities,” would repair the problems under warranty. (Third Amended Complaint ¶ 45.)

5 As with the other plaintiffs, paragraph 46 of the third amended complaint adds
6 uncertainly as to when the unspecific representations were allegedly made. In general terms,
7 Plaintiff alleges Kutumian made, “personal [unspecified] representations ... before and during
8 the purchase about warranty coverage as well as representation made in the first year after close
9 of escrow”

10 Paragraph 47 adds uncertainty as to who allegedly made the representation(s). Plaintiff
11 claims the unspecified representations were made allegedly by Kutumian or through his
12 unnamed agent, unnamed representative and/or unnamed employee.

13 **C. Lisa Deaver Johnson**

14 According to public records from the Fresno County Recorder’s Office, Hye
15 Development Company, LLC, granted a Summit Ranch home to Plaintiff by Grant Deed dated
16 March 6, 2006 and recorded on October 5, 2006. (Request for Judicial Notice ¶ 1.c, Exhibit C.)
17 Plaintiff alleged in her third amended complaint that escrow closed on or around October 6,
18 2006. (Third Amended Complaint ¶ 51.)

19 Plaintiff alleged that at some unspecified time and location, “[i]n the weeks leading up
20 to the close of escrow,” Kutumian represented the purchase included a warranty for one year
21 where the “Kutumian entities,” would repair [unspecified] problems or defects associated with
22 the construction of the home.” (Third Amended Complaint ¶ 53.)

23 Plaintiff alleged that an unidentified party made a “superficial repair. (Third Amended
24 Complaint ¶ 55.) Plaintiff alleged that on an unspecified date and unspecified location, non-
25 debtor, “Vaughn” and/or Kutumian informed Plaintiff, “these other [unspecified] problems
26 were ‘normal’ and if any issues still existed after the 11th month of ownership, *the Kutumian*
27 *entities* would [repair] the problems under the [unspecific] warranty.” (Third Amended
28 Complaint ¶ 55, italics added.)

1 Paragraph 56 provides no clarity about what representations were made by whom and
2 when. Plaintiff alleges generally that representations were made “before and during the
3 purchase” and “in the first year after close of escrow....” (Third Amended Complaint ¶ 56.)
4 Paragraph 57 is ambiguous about who made the representations suggesting that representations
5 were made directly by Kutumian or through his unidentified agent, identified representative
6 and/or unidentified employee.

7 **D. Fernando Martinez and Maria Martinez**

8 According to public records from the Fresno County Recorder’s Office, Hye
9 Development Company, LLC, granted a Summit Ranch home to “Fernando Martinez and
10 Maria Guadalupe Aguirre Gutierrez, husband and wife” on October 25, 2007. (Request for
11 Judicial Notice ¶ 1.d, Exhibit D.) The deed was recorded on October 26, 2007. (*Id.*) Plaintiffs
12 allege escrow closed on or around October 26, 2007. (Third Amended Complaint ¶ 61.)

13 Plaintiffs allege that they spoke not to Kutumian, but to Sylvia Muniz, in Spanish.
14 (Third Amended Complaint ¶ 62.) Plaintiff do not allege when they spoke to Ms. Muniz or
15 where. Plaintiffs allege Ms. Muniz is allegedly a representative of Hye Development
16 Company, LLC and/or Barrington Homes, Inc., as opposed to Kutumian. (*Id.*) Plaintiff do not
17 identify what Ms. Muniz told them.

18 Per the complaint, someone supposedly represented there was a one-year warranty by
19 an unspecified warrantor, “where *the Kutumian entities* would repair [unspecified] problems or
20 [unspecified defects] associated with the construction of the home.” (Third Amended
21 Complaint ¶ 63, italics added.)

22 According to the complaint, at an unspecified date around the close of escrow, an
23 unidentified person/Spanish-translator generally represented that all problems reported within
24 the first year of ownership would be repaired under warranty. (Third Amended Complaint ¶
25 64.) Then on another unspecified date and unspecified location, “Lupe,” [not Kutumian],
26 informed one of the plaintiffs, “if any issues still existed after the 11th month of ownership, *the*
27 *Kutumian entities* would [repair] the problems under warranty.” (Third Amended Complaint ¶
28 66, italics added.)

1 **E. Alejandro Mendoza and Catalina Mendoza**

2 According to public records from the Fresno County Recorder's Office, Hye
3 Development Company, LLC, granted a Summit Ranch home to Plaintiffs by Grant Deed dated
4 April 27, 2006. (Request for Judicial Notice ¶ 1.e, Exhibit E.) The deed was recorded on
5 November 30, 2006. (*Id.*) Plaintiffs allege escrow closed on or around November 30, 2006.
6 (Third Amended Complaint ¶ 72.) Plaintiffs leave out the fact that they no longer own the
7 Summit Ranch home, having lost it to a foreclosure sale noticed for November 10, 2010.
8 (Request for Judicial Notice ¶s 1.f-1.g, Exhibits F - G.)

9 Plaintiffs allege that at an unspecified date and unspecified location, in the weeks
10 leading up to the close of escrow, Kutumian had a general discussion about a warranty to
11 Alejandro Mendoza and/or Catalina Mendoza. (Third Amended Complaint ¶ 73.) The
12 plaintiffs do not allege any facts for which they contend Kutumian made personal
13 representations about the warranty. (See Third Amended Complaint ¶ 74.) The plaintiffs
14 allege Kutumian represented that the Kutumian entities, as opposed to Kutumian, would repair
15 unspecified problems or defects associated with the construction of the home. (*Id.*)

16 Plaintiffs allege that at an unspecified time during the 12 months following the close of
17 escrow, non-debtor Lupe and/or Kutumian informed Alejandro Mendoza and/or Catalina
18 Mendoza that their problems were normal and if any issues still existed after the 11th month of
19 ownership, the "Kutumian entities" would repair problems under warranty. (Third Amended
20 Complaint ¶ 76.)

21 Paragraphs 77 and 78 of the complaint is unclear as to what representations were made,
22 when they were made, where they were made and to who. The plaintiffs allege that Alejandro
23 Mendoza and/or Catalina Mendoza relied on Kutumian's "personal representations made
24 before and during the purchase ... as well as representation made during the first year after
25 close of escrow..... (Third Amended Complaint ¶ 77.) The plaintiffs allege the representations
26 were made by Kutumian or through his unidentified agent, unidentified representative and/or
27 or unidentified employee. (Third Amended Complaint ¶ 78.)

28 / / /

1 **III. Law and Argument.**

2 **A. Plaintiffs Failed to State Claims Upon Which Relief Can Be Granted.**

3 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure (made applicable by FRBP
4 7012), a defendant may move to dismiss a complaint which fails to state a claim for relief.
5 Dismissal under Rule 12(b)(6) is proper, “where there is no cognizable legal theory or an
6 absence of sufficient facts alleged to support a cognizable legal theory.” (*Navarro v. Block*,
7 250 F.3d 729, 732 (9th Cir.2001).)

8 For purposes of a motion to dismiss under Rule 12(b)(6), the court must accept all
9 factual allegations pleaded in the complaint as true and must construe these allegations and all
10 reasonable inferences from them in favor of the non-moving party. (*Cahill v. Liberty Mut. Ins.*
11 *Co.*, 80 F.3d 336, 337–38 (9th Cir.1996).) However, the court need not accept as true
12 conclusory legal allegations cast in the form of factual allegations. (*W. Mining Council v. Watt*,
13 643 F.2d 618, 624 (9th Cir.1981).)

14 In addition to looking at the facts alleged in the complaint, the court may also consider a
15 limited set of documents without converting the motion to dismiss into a motion for summary
16 judgment; these include (1) documents attached as exhibits, (2) documents incorporated by
17 reference in the complaint, and (3) matters which the court may take judicial notice. (*United*
18 *States v. Ritchie*, 342 F.3d 903, 907-908 (9th Cir.2003).

19 Pursuant to Rule 201(b) of the Federal Rules of Evidence, a court may take judicial
20 notice of matters of public record without converting a motion to dismiss into a motion for
21 summary judgment, as long as the noticed facts are not subject to reasonable dispute. (*Peel v.*
22 *Brooks Amer. Mortg. Corp.*, 788 F. Supp. 2d 1149, 1157 (C.D. Cal. 2011).) Facts contained in
23 the public record are appropriate subjects of judicial notice. (*Id.* at p. 1158.)

24 Kutumian asks the court take judicial notice of public records from the Fresno County
25 Recorder’s Office and Fresno County Superior Court regarding the plaintiffs’ ownership of the
26 Summit Ranch homes at issue and their claims in the state court action. These public records
27 provide the court with additional procedural background and information about the plaintiffs’
28 claims.

1 **B. Plaintiffs Failed to Plead a Claim Under 11 U.S.C. § 523(a)(2)(A) and Failed to**
2 **Set Forth Fraud Allegations with Particularity.**

3 Under section 523(a)(2)(A), an individual debtor shall not be entitled to discharge
4 from any debt, “for money, property, services, or an extension, renewal, or refinancing of
5 credit, to the extent obtained by ... false pretenses, a false representation, or actual fraud, other
6 than a statement respecting the debtor’s or an insider’s financial condition.”

7 When fraud is alleged, Rule 9(b) of the Federal Rules of Civil Procedure requires the
8 plaintiff state with particularity the circumstances constituting the fraud. “Rule 9(b) demands
9 that the circumstances constituting the alleged fraud ‘be specific enough to give defendants
10 notice of the particular misconduct ... so that they can defend against the charge and not just
11 deny that they have done anything wrong.’” (*Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124
12 (9th Cir. 2009).) “Averments of fraud must be accompanied by ‘the who, what, when, where,
13 and how’ of the misconduct charged.” (*Id.* at p. 1124.)

14 To sufficiently state allegations of fraud with particularity, a plaintiff must include a
15 description of the time, place, and specific content of the false representations, as well as the
16 identifies of the parties to the misrepresentations. (FRCP 9(b); *Peel v. Brooks Amer. Mortg.*
17 *Corp., supra*, 788 F. Supp. 2d at pp. 1159 – 1160.)

18 Additionally, to the extent the plaintiffs attempt to claim there was fraud by the debtors’
19 agents, the plaintiffs need to plead more than a principal agent-relationship between the agent
20 and the debtor. (See, *In re Huh*, 506 B.R. 257, 271 – 272 (9th Cir. B.A.P. 2014).) The creditor
21 must show that the debtor knew, or should have known, of the agent’s fraud. (*Id.* at p. 272.)

22 Plaintiffs’ allegations are nonsensical in that Plaintiffs did not plead any privity between
23 Kutumian and Plaintiffs. Plaintiffs aver they purchased their homes from Hye Development
24 Company, LLC, not Kutumian. Plaintiffs failed to plead the, “who, what, when, where and
25 how,” particulars of the alleged fraud. Plaintiffs also failed to allege that Kutumian received
26 any money or other property from the plaintiffs. According to the complaint, the purchase
27 money was paid into escrow and Hye Company Development, LLC was the seller/prior owner.
28

1 The plaintiffs failed to identify with particularity the represented terms of the warranty
2 but made general allegations. The plaintiffs failed to identify that Kutumian knew the
3 representations were allegedly false when made. The plaintiffs failed to identify what
4 representations were made in Spanish and whether these representations were accurate
5 translations of what Kutumian allegedly said. The plaintiffs failed to identify whether
6 Kutumian knew or intended that agents make false representations to the plaintiffs. Also the
7 complaint is unclear as to whether any representations by Kutumian were as an agent of Hye
8 Development Company, LLC, Barrington Homes, Inc. or some other non-debtor party.

9 Based on Plaintiffs' allegations, some repair work was done during the alleged warranty
10 period, which contradicts any inference that representations about warranties or repairs were
11 false when made. Any reliance by Plaintiffs to the representations is not adequately pled.
12 Plaintiffs suggest that representations were made post-escrow closing so they would not have
13 relied on representations in placing purchase money into the escrow accounts for the purchases
14 of the Summit Ranch homes from non-debtor Hye Development Company, LLC. These are
15 just some of multiple reasons that Plaintiffs failed to plead a cause of action under section
16 523(a)(2)(A).

17 **C. Plaintiffs Claims for Fraud are Time-Barred.**

18 Plaintiffs attempt to suggest that Kutumian obtained purchase money for the Summit
19 Ranch homes (even though he was not the seller and there was an escrow account) by
20 intentional fraud. No claim for fraud was ever made against Kutumian in the Fresno County
21 Superior Court action commenced in July 2010.

22 There is a three-year statute of limitations for an action for relief on the ground of fraud.
23 (Cal. Code of Civ. Proc. § 338(d).) This three-year period starts when the plaintiff has
24 information which would put a reasonable person on inquiry of the fraud. (*In re Countrywide*
25 *Financial Corp. Mortgage-Backed Securities Litigation*, 834 F. Supp. 2d 949, 960-961 (C.D.
26 Cal. 2012).) The statute may begin to run before a person has actual knowledge of the fraud or
27 all of the underlying details of the alleged fraud. (*Id.*)

28 / / /

1 A plaintiff is on inquiry notice if the plaintiff, “at least suspects a factual basis, as
2 opposed to a legal theory, for [the elements of the cause of action], even if [it] lacks knowledge
3 thereof – when, simply put, [it] at least suspects that someone has done something wrong to
4 [it], wrong being used, not in any technical sense, but in accordance with its lay
5 understanding.” (*In re Countrywide Financial Corp. Mortgage-Backed Securities Litigation*,
6 *supra*, 834 F. Supp. 2d at p. 961.)

7 If a plaintiff seeks to toll the three-year statute of limitations for fraud until the
8 plaintiff’s actual discovery of the fraud, the plaintiff must affirmatively excuse his failure to
9 discover the fraud within the three years after it took place, by establishing facts showing that
10 he was not negligent in failing to make the discovery sooner and that he had no actual or
11 presumptive knowledge of facts sufficient to put him on inquiry. (*Sun ‘Sand, Inc. v. United*
12 *California Bank*, 21 Cal.3d 671, 701-702 (Cal. 1978).)

13 In this case, the plaintiffs attempt to allege there were fraudulent representations about
14 repairs under warranty that were to expire a year from the close of escrow. Escrow for the
15 Camacho plaintiffs closed on or around April 10, 2008. (Third Amended Complaint ¶ 29.)
16 Plaintiffs would have known by the date of expiration, i.e., April 9, 2009, if not sooner, if
17 representations about repairs during the one-year warranty period were false. Three years from
18 April 9, 2009 falls on April 8, 2012. The Camacho plaintiffs did not commence this adversary
19 proceeding until October 11, 2013. No claim for intentional fraud is made in the state court
20 complaint filed on July 14, 2010. Plaintiffs Apolonio Camacho and Martin Camacho’s
21 adversary proceeding is barred by the statute of limitations.

22 Escrow for plaintiff Guadalupe Costilla closed on or around October 24, 2006. (Third
23 Amended Complaint ¶ 40.) Plaintiff Costilla would have known by the date of expiration, i.e.,
24 October 23, 2007, if not sooner, if representations about repairs during the one-year warranty
25 period were false. Three years from October 23, 2007 falls on October 22, 2010. The Costilla
26 plaintiff did not commence this adversary proceeding until October 11, 2013. No claim for
27 intentional fraud is made in the state court complaint filed on July 14, 2010. Plaintiff Costilla’s
28 adversary proceeding is barred by the statute of limitations.

1 Escrow for Plaintiff Johnson closed on or around October 6, 2006. (Third Amended
2 Complaint ¶ 51.) Plaintiff Johnson would have known by the date of expiration, i.e., October 5,
3 2007, if not sooner, if representations about repairs during the one-year warranty period were
4 false. Three years from October 5, 2007 falls on October 4, 2010. The Johnson plaintiff did
5 not commence this adversary proceeding until October 11, 2013. No claim for intentional
6 fraud is made in the state court complaint filed on July 14, 2010. Plaintiff Johnson's adversary
7 proceeding is barred by the statute of limitations.

8 Escrow for the Martinez plaintiffs closed on or around October 26, 2007. (Third
9 Amended Complaint ¶ 61.) The Martinez plaintiffs would have known by the date of
10 expiration, i.e., October 25, 2008, if not sooner, if representations about repairs during the one-
11 year warranty period were false. Three years from October 25, 2008 falls on October 24, 2011.
12 The Martinez plaintiffs did not commence this adversary proceeding until October 11, 2013.
13 No claim for intentional fraud is made in the state court complaint filed on July 14, 2010. The
14 Martinez plaintiffs adversary proceeding is barred by the statute of limitations.

15 Escrow for the Mendoza plaintiffs closed on or around November 30, 2006. (Third
16 Amended Complaint ¶ 72.) The Mendoza plaintiffs would have known by the date of
17 expiration, i.e., November 29, 2007, if not sooner, if representations about repairs during the
18 one-year warranty period were false. Three years from November 29, 2007 falls on November
19 28, 2010. The Mendoza plaintiffs did not commence this adversary proceeding until October
20 11, 2013. No claim for intentional fraud is made in the state court complaint filed on July 14,
21 2010. The Mendoza plaintiffs adversary proceeding is barred by the statute of limitations.

22 **D. The Mendoza Plaintiffs Lack Standing.**

23 "In general, the person possessing the right sued upon by reason of the substantive law
24 is the real party in interest." (*Powers v. Ashton*, 45 Cal.App.3d 783, 788 (Cal. 1975).) In this
25 case, it is unclear that the Mendoza plaintiffs have standing since their interests in the Summit
26 Ranch home was foreclosed upon. Further, it appears that a non-party financed the purchase of
27 home and that non-party foreclosed on the property. It is unclear what money was obtained
28 from the Mendoza plaintiffs for purposes of Bankruptcy Code section 523(a)(2)(A).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

E. The Court Should Dismiss Without Leave to Amend.

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. (FRCP 15(a)(2), incorporated by FRBP 7015.) However, the court should deny leave to amend when it, “determines that the pleading could not possibly be cured by the allegation of other facts.” (*Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir.2000).)

Plaintiffs are unable to cure their defective complaint and have had four opportunities to file a valid complaint. The ongoing passage of time is not going to foster pleading with particularity. Plaintiffs would have met this pleading standard by now if they were able to truthfully plead fraud against Kutumian. Further, the adversary proceeding is time-barred based on the averments in the third-amended complaint and judicially-noticed public records. Kutumian’s right to a fresh start should not be delayed further by plaintiffs’ frivolous tactics and the court should deny further leave to amend.

IV. Conclusion.

Wherefore, Kutumian prays: (1) the third amended complaint and adversary proceeding be dismissed with prejudice; (2) judgment be entered in favor of Kutumian; (3) Kutumian be awarded his costs and (4) for all other relief deemed just and proper.

Date: May 13, 2014

KLEIN, DENATALE, GOLDNER,
COOPER, ROSENLIEB & KIMBALL, LLP

By: Connie M. Parker
HAGOP T. BEDOYAN
CONNIE M. PARKER
Attorneys for Debtor/Defendant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

10
HAGOP T. BEDOYAN, CSB NO. 131285
CONNIE M. PARKER, CSB NO. 254484
KLEIN, DENATALE, GOLDNER,
COOPER, ROSENLIEB & KIMBALL, LLP
5260 N. Palm Avenue, Suite 201
Fresno, California 93704
Telephone: (559) 438-4374
Facsimile: (559) 432-1847
Email: hbedoyan@kleinlaw.com; cparker@kleinlaw.com
Attorneys for Debtor and Defendant

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION**

JERRY HARRY KUTUMIAN,
Debtor.

Case No.: 13-14675-B-7

CHARLES ADAMS, et. al.,
Plaintiffs,

Adv. Proc. No.: 13-01112-B

v.

KDG-4

JERRY HARRY KUTUMIAN,
Defendant.

Date: June 26, 2014
Time: 10:30 a.m.
Place: United States Bankruptcy Court,
Courtroom 12, Fifth Floor, 2500 Tulare Street,
Fresno, California
Judge: Hon. W. Richard Lee

**DEFENDANT JERRY HARRY KUTUMIAN'S REPLY TO PLAINTIFFS'
OPPOSITION TO MOTION TO DISMISS (FRCP 9(b), 12(b)(6))**

Defendant Jerry Harry Kutumian's ("Kutumian") submits this reply to Plaintiffs' opposition to his motion to dismiss Plaintiffs' third amended complaint.

I. Introduction

Plaintiffs' opposition fails to establish that their third amended complaint meets the pleading standard of Rule 9(b). In their opposition, the plaintiffs aver that the Camacho and Costilla plaintiffs pled sufficient facts, but do not vouch for the remaining claims by the Johnson, Martinez and Mendoza plaintiffs.

///

Exhibit "B"

1 Plaintiffs contend that their 11 U.S.C. § 523(a)(2)(A) fraud claims are timely under
2 California's three-year statute of limitations because Plaintiffs "established a debt," pre-
3 petition, as addressed in *Resolution Trust Corp. v. McKendry (In re McKendry)*, 40 F.3d 331
4 (10th Cir. 1994). However, even under Plaintiffs' application of the *McKendry* rule, many, if
5 not all, of the plaintiffs failed to establish a debt within the three-year limitations period. As
6 will be explained in this reply, Plaintiffs' April 13, 2011, substitution of Kutumian as a
7 fictitously named "Doe" defendant in the state court litigation does not "relate-back" to the July
8 14, 2010 filing of the state court complaint. For the reasons set forth below and in the moving
9 documents, the court should grant Kutumian's motion to dismiss.

9 **II. Argument**

10 **A. Plaintiffs Have Not Met the Rule 9(b) Pleading with Particularity** 11 **Requirement.**

11 The bankruptcy court has explained the requirements for a creditor to plead an 11
12 U.S.C. §523(a)(2)(A) claim:

13 Under Federal Rule 9, as applied to adversary proceedings
14 by Bankruptcy Rule 7009, the complaint must state the
15 circumstances of the fraud with particularity. This entails
16 identifying "(1) the precise statements, documents or
17 misrepresentations made; (2) the time and place of and
18 persons responsible for the statement; (3) the content and
19 manner in which the statements misled the plaintiff; and
20 (4) what the Defendants gained by the alleged fraud."
21 [Citation.]. The plaintiffs must identify the precise
22 statements—oral or written or both—alleged to be false.
23 If the statements were written, the plaintiffs should identify
24 the document(s) containing the statement; if oral, identify
when and where the statements were made. Either way,
the plaintiffs should describe the false statements and how
the statements misled them, and the plaintiffs should specify
what the debtor gained as a result of the fraud. The plaintiffs
must allege justifiable reliance on the statements, and the
reliance must occur *before* any transaction. If the plaintiffs
allege the debtor falsely misrepresented multiple times over
a series of transactions, leading to multiple instances of
reliance, the plaintiffs should repeat the process set out above
for each instance.

(*In re Smith*, 489 B.R. 875, 911 (Bankr. M.D. Ga. 2013),
italics in original.)

1 Unspecific averments of fraud that do not meet the particularity standard of Rule 9(b)
2 should be disregarded or stripped from the claim for failure to satisfy the rule. (*Sanford v.*
3 *MemberWorks, Inc.*, 625 F.3d 550, 558 (9th Cir. 2010).) “To satisfy Rule 9(b), a pleading must
4 identify ‘the who, what, when, where, and how of the misconduct charged,’ as well as ‘what is
5 false or misleading about [the purportedly fraudulent] statement, and why it is false.’”
6 (*Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1055 (9th Cir.
2011).)

7 The complaint must: (1) specify the fraudulent representations; (2) aver the
8 representations were fraudulent when made; (3) identify the speaker; (4) state when and where
9 the statements were made; and (5) state the manner in which the representations were false and
10 misleading. (*Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th
Cir. 1991).)

11 Not only must the pleader state the time, place and specific content of the false
12 representations, she must provide the identities of the parties to the misrepresentation. (*Moore*
13 *v. Kayport Package Exp., Inc.*, 885 F. 2d 531, 541 (9th Cir. 1989).) The pleader cannot lump
14 parties together to dodge this pleading standard. (*Id.*) The pleader cannot avoid specifying the
15 “time” of the misrepresentation by pleading a general time period. (*Id.*)

16 **1. Apolonio and Martin Camacho.**

17 Plaintiffs contend they specified who made the fraudulent representations in
18 paragraphs 30 through 32 of the complaint, but the allegations do not identify anyone by name
19 but rather, “a Kutumian entities representative,” and an unnamed Spanish-speaking agent.
20 These paragraphs omit who the unidentified agent/representative spoke to: i.e., Apolonio
Camacho, Martin Camacho or both.

21 Plaintiffs contend they identified what the representations were in paragraphs 30 and 31
22 of the complaint, but failed to describe the specific content of the representations, let alone who
23 made them. The content of the warranty is not specified other than it has a one-year term. The
plaintiffs pled that someone told Apolonio and/or Martin Camacho the procedures for

1 requesting repairs, but did not plead what those represented procedures were. These
2 paragraphs shed no light on the specific content of the purported representations.

3 The Camachos contend they pleaded when the fraud occurred, but in actuality, they
4 generalize this to some unspecified time in the weeks leading up to the close of escrow, and
5 sometime later. (Third Amended Complaint ¶s 30, 35.)

6 In their Opposition, the plaintiffs aver they identified where the representations where
7 made, i.e., during a walk-through inspection at 219 N. 4th St., but in paragraph 35 of the
8 complaint, the Camachos suggest that representations were made at times other than during the
9 walk-through inspection, rendering the locations of the representations, and how they were
10 made, unclear.

11 The Camachos failed to plead with particularity any facts suggesting an agency
12 relationship between Kutumian and whoever communicated the representations. Also, there
13 are no facts pleaded that support any scienter. It is unclear what Kutumian allegedly knew to
14 be false and when he had that knowledge. The plaintiffs failed to identify how they relied on
15 the alleged misrepresentations or what damages they caused. The Camachos failed to plead a
16 claim under 11 U.S.C. § 523(a)(2)(A) because their fraud allegations are too amorphous.

17 **2. Guadalupe Costilla.**

18 Like the other plaintiffs, Costilla failed to identify the content of the representation(s)
19 made by Kutumian. The complaint fails to identify what Kutumian actually said or
20 communicated. (Third Amended Complaint ¶ 43.) The complaint does not provide when
21 Kutumian spoke to Costilla, but generalizes this as the weeks leading up to the close of escrow.
22 (Third Amended Complaint ¶ 42.) Paragraph 47 of the third amended complaint adds
23 confusion as to whether Kutumian actually made any representations to Costilla, and suggests
24 the purported representations were made by an unidentified agent or employee, not Kutumian.

The complaint fails to identify where Kutumian spoke to Costilla and how, i.e., in
person, by telephone, etc. In her opposition, the plaintiff suggests paragraphs 42 and 43
provide the location of the representations, but no location is identified.

1 The third amended complaint does not identify what representation was false and what
2 Kutumian knew when the representation was made. Plaintiff contends representations were
3 made by an agent or employee of Kutumian, but no facts regarding this agency are pled with
4 particularity.

5 **3. Remaining Plaintiffs.**

6 In their opposition, the Plaintiffs do not raise any argument that they pled fraud with
7 particularity in regard to the Johnson, Martinez and Mendoza plaintiffs, despite the deficiencies
8 expressed in Kutumian's motion. The plaintiffs waived any argument that their third amended
9 complaint complies with Rule 9(b).

10 **4. Fraud by Agency Must be Pled with Particularity under Rule 9(b).**

11 "[W]here a plaintiff alleges that a defendant is liable for fraud under an agency theory,
12 Rule 9(b) requires that the existence of the agency relationship be pled with particularity.
13 [Citation.] The plaintiff must allege that the agent or apparent agent holds power to alter the
14 legal relations between the principal and third persons, and between the principal and the agent;
15 that the agent is a fiduciary with respect to matters within the scope of the agency; and that the
16 principal has the right to control the conduct of the agent with respect to matters entrusted to
17 him." (*Jackson v. Fischer*, 931 F. Supp. 2d 1049, 1061 (N.D. Cal. 2013).)

18 In their opposition, the plaintiffs claim they do not have to plead the agency relationship
19 under 9(b), but cited no authority that supports this. Also, if they unable to plead that
20 Kutumian knew of and authorized fraudulent statements by his alleged agents, then the
21 plaintiffs have no claim for fraud against Kutumian and never should have filed this adversary
22 proceeding.

23 **B. A Claim Must Be Made Within the Applicable Statute of Limitations Period 24 for the Debt to be Established Pre-Petition.**

25 According to the 10th Circuit decision, *Resolution Trust Corporation v. McKendry*,
26 *supra*, 40 F.3d at p. 337, there are two distinct limitations periods that govern
27 nondischargeability proceedings: (1) the establishment of the debt itself, which is governed by

1 the state law limitation period; and (2) the timeliness of the filing of the nondischargeability
2 action, which is governed by bankruptcy procedural rules.

3 In addressing the first limitations period, the court in *McKendry* explained, “if suit is not
4 brought within the time period allotted under state law, the debt cannot be established.” (See
5 also *Banks. v. Gill Distribution Centers, Inc. (In re Banks)* 263 F.3d 862, 868 (9th Cir. 2001),
6 agreeing with *McKendry* that establishment of the debt itself is subject to the applicable state
7 statute of limitations.)

8 Plaintiffs rely on the *McKendry* decision in arguing that they timely presented a debt
9 pre-petition, even though their pre-petition complaint did not claim intentional fraud against
10 Kutumian. Applying *McKendry* to the facts here provides an inequitable result. The plaintiffs
11 never pled intentional fraud against Kutumian before filing this non-dischargeability action.
12 They should not be able to resurrect an intentional tort-dependent claim, barred under the
13 California three-year statute of limitations, here. (See *United States v. Taylor (In re Taylor)*,
14 137 B.R. 925, 929 (Bkrcty. S.D. Ind. 1991).)

15 While Plaintiffs’ limitations argument is compatible with *McKendry*, it also triggers
16 more issues about the timeliness of this nondischargeability action. In their Opposition,
17 Plaintiffs correctly pointed out that their state court action, filed on July 14, 2010, originally
18 named only Hye Development Company, LLC. (See Opposition, p. 2:11-12.) Kutumian was
19 named as a “Doe” defendant on April 13, 2011. (*Id.*) Plaintiffs aver they added Kutumian on
20 April 13, 2011, pursuant to Code of Civil Procedure section 474. (See Opposition, p. 8:17 –
21 21.)

22 According to California Code of Civil Procedure section 474:

23 Where the plaintiff is *ignorant of the name of a*
24 *defendant*, he must state that fact in the complaint ...
and such defendant may be designated in any
pleading or proceeding by any name, and when his
true name is discovered, the pleading or proceeding
must be amended accordingly” (italics added.)

///

1 According to California law, “The general rule is that an amended complaint that adds a
2 new defendant does not relate back to the date of filing the original complaint and the statute of
3 limitations applies as of the date the amended complaint is filed, not the date the original
4 complaint is filed.” (*Woo v. Superior Court*, 75 Cal.App. 4th 169, 176 (1999).) “A recognized
5 exception to the general rule is the substitution under section 474 of a new defendant for a
6 fictitious Doe defendant named in the original complaint as to whom a cause of action was
7 stated in the original complaint. [Citations.] If the requirements of section 474 are satisfied,
8 the amended complaint substituting a new defendant for a fictitious Doe defendant filed after
9 the statute of limitations has expired is deemed filed as of the date the original complaint was
10 filed.” (*Id.*)

11 For a plaintiff to apply the section 474 relation-back doctrine, the plaintiff must meet
12 the procedural requirement by having the new defendant in an amended complaint substituted
13 for an existing fictitious Doe defendant named in the original complaint. (*Woo v. Superior*
14 *Court, supra*, 75 Cal.App. 4th at p. 176.) As the court explained in *Woo v. Superior Court*,
15 there are also substantive requirements to take advantage of Code of Civil Procedure section
16 474:

17 A further and non-procedural requirement for
18 application of the section 474 relation-back
19 doctrine is that [the plaintiff] must have been
20 genuinely ignorant of [the new defendant’s]
21 identity at the time she filed her original complaint.
22 [Citation.] The omission of the defendant’s
23 identify in the original complaint must be real
24 and not merely a subterfuge for avoiding the
requirements of section 474. [Citations.]
Furthermore, if the identity ignorance
requirement of Section 474 is not met, a new
defendant may not be added after the statute of
limitations has expired even if the new defendant
cannot establish prejudice resulting from the delay.

(*Woo v. Superior Court, supra*, 75 Cal.App.4th at p. 177.)

22 “The requirement of good faith ignorance of the true name of a fictitiously designated
23 defendant set forth in Code of Civil Procedure section 474 is designed to promote the policies
24 supporting the statute of limitations.” (*McGee Street Productions v. Workers’ Comp. Appeals*

1 *Bd.* (2003) 108 Cal.App.4th 717, 725, plaintiff cannot “relate-back” when she knew identity of
2 newly named defendant.)

3 Here, if the court takes the allegations in the third amended complaint as true as
4 required for purposes of a motion to dismiss, it is obvious that Plaintiffs knew Kutumian’s
5 identity when they filed their original state court complaint on July 14, 2010. In their third
6 amended complaint, all of the eight plaintiffs claim they detrimentally relied on representations
7 that Kutumian personally made to them before July 14, 2010. Therefore, the plaintiffs knew
8 Kutumian’s identity when they filed the original complaint, and Code of Civil Procedure
section 474 is inapplicable.

9 According to paragraph 32 of the third amended complaint, the Camacho plaintiffs
10 allegedly met with Kutumian around the close of escrow, on or around April 10, 2008, and
11 Kutumian allegedly made misrepresentations about warranties. In paragraph 42, *et. seq.*, of the
12 third amended complaint, Plaintiff Costilla alleges that she spoke with Kutumian personally
13 about warranties, in the weeks leading up to October 25, 2006 close of escrow. Plaintiff
14 Costilla alleged that she continued to communicate with Kutumian personally in the 12 months
following the close of escrow.

15 In paragraphs 51 through 53 of the third amended complaint, the Johnson plaintiff
16 alleged that during the weeks leading up to the October 6, 2006, close of escrow, Ms. Johnson
17 spoke to Kutumian personally. Ms. Johnson alleged that in the 12 months following the close
18 of escrow, she reported various problems associated with the home directly to Kutumian
personally. (Third Amended Complaint ¶ 54.)

19 The Martinez plaintiffs allege in paragraphs 61, *et. seq.*, of the complaint that one of the
20 plaintiffs met personally with Kutumian about the warranty. In paragraph 73 of the complaint,
21 the Mendoza plaintiffs allege one of them spoke to Kutumian personally about the home. The
22 Mendoza plaintiffs contend they reported various problems associated with the home directly to
Kutumian personally. (Third Amended Complaint ¶s 75, 79.)

23 / / /

1 Even if some of the plaintiffs temporarily forgot Kutumian's identity when they filed
2 the original complaint, they had a duty to review readily available information that discloses
3 the defendant's identity to invoke the Code of Civil Procedure section 474 relation-back
4 doctrine. Otherwise, the plaintiff is using Code of Civil Procedure section 474 in bad faith.
5 (*Woo v. Superior Court, supra*, 75 Cal.App.4th 180.) As Kutumian signed the recorded grant
6 deeds for the Summit Ranch homes to Plaintiffs, they had readily available information that
7 would have refreshed their recollection of Kutumian's identity.

8 In the present matter, most, if not all, of Plaintiffs' fraud claims against Kutumian
9 expired before Plaintiffs' April 13, 2011 amendment, adding Kutumian to the state court
10 complaint as a "Doe" defendant. At best, the April 13, 2011 amendment would have only been
11 timely as to the Camacho and Martinez plaintiffs, assuming that the Camacho and Martinez
12 plaintiffs were actually or reasonably ignorant of Kutumian's alleged fraud until the alleged
13 one-year warranties expired. Therefore, even under the "establishment of debt" standard
14 provided by *McKendry*, at least half of the plaintiffs' claims were non-established debts,
15 barred by the three-year statute of limitations for fraud.

16 **C. Further Leave to Amend Should Be Denied.**

17 Leave to amend should be denied where an amendment would be futile. (*Thinket Ink*
18 *Information Resources, Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1062 (9th Cir. 2004).)
19 Plaintiffs have had the opportunity to amend their complaint several times, but remain unable
20 to plead a fraud claim as required by Rule 9(b). Each amendment has been wrought with
21 generalized and ambiguous allegations, which supports that the plaintiffs are not able to plead a
22 claim for 11 U.S.C. § 523(a)(2)(A).

23 Plaintiffs tacitly admit in their opposition that they are unable to plead facts establishing
24 scienter or a principal agency relationship between Kutumian and the third parties who
allegedly made representations to Plaintiffs. Finally, the statute of limitations has expired as to
at least four of the plaintiffs, even under the creditor-friendly, "debt-establishment" standard
provided in *McKendry*.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Plaintiffs offered no explanation on how they would effectively amend their complaint a fifth time. The Rule 9(b) problem has been prevalent in each complaint Plaintiffs have filed in this case. Rather than provide Plaintiffs' a fifth opportunity to amend, the court should grant this motion to dismiss without leave.

III. Conclusion

Wherefore, Kutumian respectfully prays that the third amended complaint be dismissed without leave to amend, judgment be entered against all plaintiffs and in favor of Kutumian, and for all further relief deemed just and proper.

Date: June 19, 2014

KLEIN, DENATALE, GOLDNER,
COOPER, ROSENLIEB & KIMBALL, LLP

By: Connie M. Parker
HAGOP T. BEDOYAN
CONNIE M. PARKER
Attorneys for Debtor/Defendant