

**GARY LOHSE and HANNEKE LOHSE, Plaintiffs,**  
**v.**  
**DEUTSCHE BANK TRUST COMPANY AMERICAS AS TRUSTEE  
FOR RESIDENTIAL ACCREDIT LOANS, INC. PASS THROUGH  
CERTIFICATES 2006-Q03; NATIONSTAR MORTGAGE, LLC; and  
DOES 1 through 10, inclusive, Defendants.**

[Civ. No. 2:15-2623 WBS KJN.](#)

**United States District Court, E.D. California.**

April 4, 2016.

**MEMORANDUM AND ORDER RE: MOTION TO DISMISS**

WILLIAM B. SHUBB, District Judge.

Plaintiffs Gary Lohse and Hanneke Lohse brought this action against defendants Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. ("Deutsche Bank") and Nationstar Mortgage, LLC ("Nationstar"), arising out of defendants' allegedly wrongful conduct related to a mortgage loan. The matter is now before the court on defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim upon which relief can be granted. (Mot. (Docket No. 6).)

Prior to filing this action, plaintiffs had brought three separate lawsuits based upon the mortgage at issue here.<sup>[1]</sup> First, in 2011, plaintiffs sued their mortgage loan servicer at the time, Aurora Bank FSB and its subsidiary, Aurora Loan Services, LLC (collectively, "Aurora"). See [Newhouse v. Aurora Bank FSB, 915 F. Supp. 2d 1159, 1161 \(E.D. Cal. 2013\) \(Mueller, J.\)](#). The complaint in that case was filed in Sacramento County Superior Court and the action was subsequently removed to this district on the basis of diversity jurisdiction. *Id.* at 1161-62. Plaintiffs in that case alleged that during the origination of the 2006 Mortgage, they were deceived into believing they were entering a traditional, arms-length, lender-borrower relationship, when in fact their loan was immediately bundled, packaged, and sold to investors. *Id.* at 1162.

Plaintiffs brought claims against Aurora for (1) rescission of the Mortgage based on plaintiffs' mistaken belief they were entering into a traditional

mortgage agreement, (2) negligence in loan origination, and (3) misrepresentation related to their request for a modification of the Mortgage in 2009. See *id.* at 1165-68. The court dismissed plaintiffs' first two claims with prejudice because they were preempted by the Home Owners Loan Act of 1933, and it granted plaintiffs leave to amend their misrepresentation claim to satisfy the heightened pleading standard under Rule 9(b). See *id.* Plaintiffs subsequently dismissed their action against Aurora with prejudice. *Newhouse v. Aurora Bank FSB*, Civ. No. 2:12-223 KJM KJN, 2013 WL 2449536 (E.D. Cal. June 5, 2013) (ECF Nos. 93, 96).

Second, in February 2014, plaintiffs filed an action in the Northern District of California against Nationstar, one of the defendants here, and Aztec Foreclosure Corporation ("Aztec"). See *Lohse v. Nationstar Mortgage*, Civ. No. 3:14-514 JCS, 2014 WL 5358966, at \*1 (N.D. Cal. Oct. 20, 2014). Plaintiffs alleged that Nationstar took over the servicing of their Mortgage on behalf of Deutsche Bank in 2012 after plaintiffs had defaulted on the payments. *Id.* at \*1-2. Nationstar allegedly retained Aztec to foreclose on the real property that secured the Mortgage. *Id.*

Plaintiffs brought claims against Nationstar under the federal Fair Debt Collection Practices Act and Rosenthal Fair Debt Collection Practices Act, alleging Nationstar failed to notify consumer reporting agencies that plaintiffs disputed their debt under the Mortgage. *Id.* at \*2, \*8. Plaintiffs ultimately settled those claims and dismissed their action against Nationstar and Aztec with prejudice. See *id.* at \*1 n.1; *Lohse*, 2014 WL 5358966 (N.D. Cal. Feb. 13, 2015) (ECF No. 69) (Order Granting Stipulation of Dismissal with Prejudice).

Third, plaintiffs filed a separate lawsuit in February 2014 in the Solano County Superior Court against Nationstar, Deutsche Bank, Aztec, and MERS, arising out of the real property that secured the Mortgage. See *Lohse v. Nationstar Mortgage, LLC*, Civ. No. FCS043010 (Cal. Sup. Ct. filed Feb. 6, 2014).<sup>[2]</sup> The Superior Court granted the defendants' demurrer and entered judgment dismissing plaintiffs' action with prejudice. See *id.* (June 16, 2014 Judgment of Dismissal). Plaintiffs appealed the judgment and that appeal is presently pending before the Court of Appeal of California, First Appellate District. See *Lohse v. Nationstar Mortgage, LLC*, Civ. No. A142814 (Cal. Ct. App. filed Aug. 19, 2014).

Finally, in December 2015, plaintiffs brought the present action against Nationstar and Deutsche Bank. (Compl. (Docket No. 1).) Plaintiffs allege that during the origination of their Mortgage, they were not provided proper notices of their right to rescind within three business days as required by the Truth in Lending Act ("TILA"), 15 U.S.C. § 1635(a). (Id. ¶ 4.) According to plaintiffs, after discovering alleged fraud in connection with the origination of their Mortgage, plaintiffs sent written notice to Nationstar on August 21, 2015 rescinding the Mortgage transaction. (Id. ¶¶ 4-6, Ex. A, Ex. B at 2.) Plaintiffs' letter to Nationstar asserted that the 2006 promissory note and Deed of Trust were void because plaintiffs' signatures were fraudulently obtained and because plaintiffs did not receive proper disclosures under TILA at the time of origination. (See id.)

Plaintiffs allege in this action that defendants violated TILA section 1635(b) by failing to cancel the Mortgage and return the real property and all money paid by plaintiffs within twenty days after receiving plaintiffs' notice to rescind. (Id. ¶¶ 7, 11-12.) On that basis, plaintiffs seek a declaratory judgment that (1) the 2006 Mortgage transaction is void as a matter of law; (2) all documents recorded against the real property that secured the Mortgage are void; and (3) plaintiffs hold title to the subject property as sole owners unencumbered by any claim by defendants. (Id. ¶ 12.)

## **DISCUSSION**

TILA aims to "avoid the uninformed use of credit." 15 U.S.C. § 1601(a). The Act "has the broad purpose of promoting the informed use of credit by assuring meaningful disclosure of credit terms to consumers." [Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 559 \(1980\)](#) (internal quotation marks omitted). TILA "requires creditors to provide borrowers with clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and the borrower's rights." [Beach v. Ocwen Fed. Bank, 523 U.S. 410, 412, \(1998\)](#).

"Failure to satisfy the Act subjects a lender to criminal penalties for noncompliance, as well as to statutory and actual damages traceable to a lender's failure to make the requisite disclosures." Id. (citations omitted). "To effectuate TILA's purpose, a court must construe the Act's provisions liberally in favor of the consumer and require absolute compliance by creditors." [Hauk v. JP Morgan Chase Bank USA, 552 F.3d 1114, 1118 \(9th Cir. 2009\)](#) (internal quotation marks omitted); see [Jackson v. Grant, 890](#)

[F.2d 118, 120 \(9th Cir. 1989\)](#) ("Even technical or minor violations of the TILA impose liability on the creditor.").

## 1. Timeliness of TILA Rescission

For the following reasons, plaintiffs' claim for rescission of their Mortgage under TILA is time-barred. (See Mot. at 1-2.) Plaintiffs allege that their August 21, 2015 notice of rescission that was sent to Nationstar properly rescinded their 2006 Mortgage pursuant to TILA section 1635. (Compl. ¶¶ 10-12.) Section 1635 provides borrowers an unconditional right to rescind certain loans "until midnight of the third business day following the consummation of the transaction or the delivery of the [requisite disclosures under TILA], whichever is later, by notifying the creditor" of their intention to rescind. 15 U.S.C. § 1635(a). Creditors are required to notify borrowers of this right to rescind and to supply them with the forms necessary to exercise that right. *Id.*; 12 C.F.R. § 226.23(b)(1) (listing the form and content of the disclosures required to satisfy notice of the right to rescind).

**Under section 1635, "if a lender never makes the required disclosures, the `right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever comes first.'" [Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790, 792 \(2015\)](#) (quoting 15 U.S.C. § 1635(f)); see also 12 C.F.R. § 226.23(a)(3) ("If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation."). Section "1635(f) completely extinguishes the right of rescission at the end of the 3-year period." [Beach, 523 U.S. at 412](#); see [Miguel v. Country Funding Corp., 309 F.3d 1161, 1164 \(9th Cir. 2002\)](#) ("[S]ection 1635(f) represents an `absolute limitation on rescission actions' which bars any claims filed more than three years after the consummation of the transaction." (citation omitted)).**

In order to have effectively rescinded their Mortgage under TILA section 1635, therefore, plaintiffs were required to invoke their right to rescind within the statutory three-year period after consummation of the Mortgage. "Consummation means the time that a consumer becomes contractually obligated on a credit transaction." 12 C.F.R. § 226.2(a)(13). Plaintiffs do not dispute that they consummated the Mortgage before February 8, 2006, the date they executed the Deed of Trust. (DOT at 15; see Compl. ¶ 1.) Consequently, even assuming that defendants did not provide the requisite

disclosures, plaintiffs' right to rescind the Mortgage expired, at the latest, on February 8, 2009.

Plaintiffs here sent their rescission letter to Nationstar on August 21, 2015, well outside the three-year limitations period. (Compl. ¶ 4, Ex. A.) As a result, their notice to rescind was untimely by more than six years, and their rescission claim under TILA is therefore time-barred. [Jesinoski, 135 S. Ct. at 792](#) ("**[There is] no federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f) has run.**" (citation omitted)); [Miguel, 309 F.3d at 1164-65](#) ("Because [plaintiff] did not attempt to rescind against the proper entity within the three-year limitation period, her right to rescind expired.").

Plaintiffs also point to no authority for their contention that defendants' failure to respond to their August 21, 2015 rescission letter within twenty days resulted in a waiver of their right to contest plaintiffs' rescission under TILA. (See Compl. ¶ 7; Opp'n at 4 (Docket No. 10).) **Contrary to plaintiffs' assertions, TILA does not impose an obligation on the lender to bring a lawsuit against the borrower within twenty days where the borrower provides the notice of rescission outside the three-year statutory period.** [Miguel, 309 F.3d at 1165](#); see also [Yamamoto v. Bank of New York, 329 F.3d 1167, 1172 \(9th Cir. 2003\)](#) (**holding that neither TILA nor its implementing regulations establish "that a borrower's mere assertion of the right of rescission has the automatic effect of voiding the contract"**).

The Ninth Circuit has further ruled that TILA "§ 1635(f) is a three-year statute of repose, requiring dismissal of a claim for rescission brought more than three years after the consummation of the loan secured by the first trust deed, regardless of when the borrower sends notice of rescission." [McOmie-Gray v. Bank of Am. Home Loans, 667 F.3d 1325, 1329 \(9th Cir. 2012\)](#). Section 1635(f)'s three-year period is thus not subject to equitable tolling. *Id.* at 1329-30; [Miguel, 309 F.3d at 1164-65](#); see [Balam-Chuc v. Mukasey, 547 F.3d 1044, 1048-50 \(9th Cir. 2008\)](#) (**explaining that unlike a statute of limitations, a statute of repose is not subject to equitable tolling**).

## 2. Declaratory Relief

Because plaintiffs' complaint does not state a cognizable claim under TILA, it likewise fails to state a claim for declarative relief pursuant to the

Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201 et seq. (Compl. ¶ 8.) It is well recognized that "where a plaintiff has alleged a substantive cause of action, a declaratory relief claim should not be used as a superfluous 'second cause of action for the determination of identical issues' subsumed within the first." [Jensen v. Quality Loan Serv. Corp., 702 F. Supp. 2d 1183, 1189 \(E.D. Cal. 2010\) \(Wanger, J.\)](#) (citation omitted); see also [United States v. Washington, 759 F.2d 1353, 1356-1357 \(9th Cir. 1985\)](#) ("Declaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties."). Plaintiffs' Complaint does not suggest that their declaratory judgment claim would entitle them to any relief beyond what they request pursuant to their substantive TILA rescission claim.

### **3. State Law Claims**

Plaintiffs seek to bring state law claims for quiet title, cancellation of instrument, and fraud. (See Compl. ¶¶ 4-6, 12.) Plaintiffs do not assert that jurisdiction is proper under diversity of citizenship, and the Complaint does not contain facts sufficient to establish that diversity jurisdiction exists here. Accordingly, because the court dismisses the only claim over which it may have had original jurisdiction, pursuant to 28 U.S.C. § 1367(c)(3), the court declines to exercise supplemental jurisdiction over those state law claims.

### **4. Leave to Amend**

The decision to grant leave to amend the pleadings is within the sound discretion of the district court. See [DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 185 \(9th Cir. 1987\)](#). When granting a defendant's motion to dismiss, the court need not give the plaintiff leave to amend the complaint if it "determines that the pleading could not possibly be cured by the allegation of other facts." [Lopez v. Smith, 203 F.3d 1122, 1127 \(9th Cir. 2000\) \(en banc\)](#) (citation omitted). In other words, leave to amend need not be granted when amendment would be futile. [Gompper v. VISX, Inc., 298 F.3d 893, 898 \(9th Cir. 2002\)](#). Here, the court cannot perceive how plaintiffs could amend their complaint to state a timely claim under TILA.

IT IS THEREFORE ORDERED that defendants Deutsche Bank Trust Company Americas as Trustee for Residential Accredited Loans, Inc. and

Nationstar Mortgage, LLC's motion to dismiss (Docket No. 6) be, and the same hereby is, GRANTED, without leave to amend.

[1] The court takes judicial notice of the filings in those actions. See [United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 \(9th Cir. 1992\)](#) (stating that a federal court may take judicial notice of records and "proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue").

[2] The court takes judicial notice of the docket entries in case number FCS043010 on the Solano County Superior Court's website because they are matters of public record whose accuracy cannot reasonably be questioned. E.g., [Borneo, 971 F.2d at 248](#) (taking judicial notice of a final judgment entered in California court); see also Fed. R. Evid. 401(c)(2) (judicial notice required "if a party requests it and the court is supplied with the necessary information"); (Mot. at 1 n.1).