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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CECILIA GONZALEZ,  
  
Plaintiff,  
  
v.  
  
HOMEQ SERVICING, *et al*,  
  
Defendants.

1:09-CV-00951-OWW-SMS  
  
MEMORANDUM DECISION ON  
DEFENDANT BARCLAYS CAPITAL  
REAL ESTATE, INC DBA HOMEQ  
SERVICING'S MOTION TO  
DISMISS (Doc. 12)

I. INTRODUCTION

Before the court for decision is Defendant Barclays Capital Real Estate, Inc. dba Homeq Servicing's ("Homeq") motion to dismiss Plaintiff's First Amended Complaint ("FAC") for failure to state a claim. Plaintiff Cecilia Gonzalez did not oppose the motion. Defendant Homeq's motion to dismiss was submitted on the papers pursuant to Local Rule 78-230(c), (h).

II. BACKGROUND

This case involves a dispute between Plaintiff Cecilia Gonzalez and Defendant Homeq over the mortgage loan obtained by Plaintiff on property located at 1691 North Bridge Street, Visalia, California.<sup>1</sup> Plaintiff subsequently defaulted on the loan and the

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<sup>1</sup> Plaintiff's deed of trust securing the loan was recorded on August 26, 2005 in the Official Records of Tulare County,

1 non-judicial foreclosure process was initiated.<sup>2</sup>

2 The disputed loan was brokered and financed by one or more  
3 undisclosed financial entities. Defendant Homeq serviced the loan  
4 and Plaintiff does not allege that Homeq originated or brokered the  
5 loan.<sup>3</sup>

6 Plaintiff's suit primarily challenges the disclosures - or  
7 lack thereof - that were provided with the loan. In particular,  
8 Plaintiff alleges that certain documents related to the loan "were  
9 not provided to [her] despite her insistence and continued requests  
10 for copies of such."<sup>4</sup> (FAC ¶ 14.) Plaintiff also alleges that she  
11 was "induced into this transaction without the proper opportunity  
12 to evaluate the costs and implications thereof, and in a form and  
13 manner required by applicable statute and regulation [sic]." (Id.  
14 ¶ 21.) With respect to Defendant Homeq, the FAC provides:

15 Defendant Homeq ratified this transaction with an  
16 improper, ineffective, and unlawful omission of  
17 material disclosures as that term is defined under 15  
18 U.S.C. § 1602(u); Reg. Z § 226.23(a) (3) n. 48.

18 (Id. ¶ 23.)

19  
20 California. (FAC ¶ 75.)

21 <sup>2</sup> Homeq, a loan servicing company, is a dba of Barclays  
22 Capital Real Estate, Inc., which is a Delaware corporation with its  
23 principal place of business in New York. (Doc. 1, ¶ 11.)

24 <sup>3</sup> It appears that Defendant Mortgage Electronic Registration  
25 Systems, Inc. ("MERS") is the beneficiary under Plaintiff's Deed of  
26 Trust. Plaintiff, however, did not serve Defendant MERS with  
27 notice of this litigation. (Doc. 1, ¶ 4.)

28 <sup>4</sup> Specifically, Plaintiff alleges that "failure to accurately  
and effectively disclose a Truth in Lending Disclosure Statement  
[...] is a failure to provide a material disclosure under 15 U.S.C.  
§ 1602(u); Reg. Z § 226.23(a) (3) n. 48." (FAC ¶ 22.)

1 On May 11, 2009, Plaintiff filed the instant action in the  
2 Superior Court of California, County of Tulare, alleging six causes  
3 of action: (1) Violation of California Civil Code § 2923.6; (2)  
4 Fraud; (3) Reformation; (4) Injunctive Relief; (5) Declaratory  
5 Relief; and (6) Quiet Title. (Doc. 1, Exh. 1.)

6 On July 22, 2009, this case was removed on the basis of  
7 federal question jurisdiction. The notice of removal asserts that  
8 Plaintiff's action is founded on claims arising under federal laws,  
9 including the Federal Real Estate Settlement Procedures Act,  
10 ("RESPA"), 12 U.S.C. § 2607, et seq. Alternatively, the notice  
11 provides that removal is proper because "this is a civil action  
12 between citizens of different states and the matter in controversy  
13 likely exceeds the sum of \$75,000." (Doc. 1, ¶ 9.)

14 Plaintiff filed her FAC on June 6, 2009, alleging five causes  
15 of action: (1) Violation of the Truth in Lending Act ("TILA"), 15  
16 U.S.C. § 1635(a) - Rescission; (2) Violation of the TILA -  
17 Statutory Damages; (3) Violation of the Fair Debt Collection  
18 Practices Act ("FDCPA"), 15 U.S.C. §§ 1692, et seq.; (4) Violation  
19 of California Business & Professions Code § 17200; and (5)  
20 Violation of California Civil Code § 2923.6. (Doc. 9.)

21 Defendant filed this motion on September 4, 2009. Defendant  
22 Homeq asserts that Plaintiff's suit should be dismissed with  
23 prejudice because the type of claims alleged are targeted at the  
24 original lender - which was not Homeq. In any event, Homeq claims  
25 that Plaintiff is not entitled to rescind the loan agreement and  
26 has no basis to pursue claims under federal or state law.

27 Plaintiff did not oppose Defendant's motion to dismiss.  
28

1 III. LEGAL STANDARD

2 Under Federal Rule of Civil Procedure 12(b)(6), a motion to  
3 dismiss can be made and granted when the complaint fails "to state  
4 a claim upon which relief can be granted." Dismissal under Rule  
5 12(b)(6) is appropriate where the complaint lacks a cognizable  
6 legal theory or sufficient facts to support a cognizable legal  
7 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699  
8 (9th Cir. 1990).

9 To sufficiently state a claim for relief and survive a  
10 12(b)(6) motion, a complaint "does not need detailed factual  
11 allegations" but the "[f]actual allegations must be enough to raise  
12 a right to relief above the speculative level." *Bell Atl. Corp. v.*  
13 *Twombly*, 550 U.S. 544, 555 (2007). Mere "labels and conclusions"  
14 or a "formulaic recitation of the elements of a cause of action  
15 will not do." *Id.* Rather, there must be "enough facts to state a  
16 claim to relief that is plausible on its face." *Id.* at 570. In  
17 other words, "[t]o survive a motion to dismiss, a complaint must  
18 contain sufficient factual matter, accepted as true, to state a  
19 claim to relief that is plausible on its face." *Ashcroft v. Iqbal*,  
20 --- U.S. ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009)  
21 (internal quotation marks omitted). "The plausibility standard is  
22 not akin to a probability requirement, but it asks for more than a  
23 sheer possibility that a defendant has acted unlawfully. Where a  
24 complaint pleads facts that are merely consistent with a  
25 defendant's liability, it stops short of the line between  
26 possibility and plausibility of entitlement to relief." *Id.*  
27 (internal citation and quotation marks omitted).

28 In deciding whether to grant a motion to dismiss, the court

1 must accept as true all "well-pleaded factual allegations." *Iqbal*,  
2 129 S.Ct. at 1950. A court is not, however, "required to accept as  
3 true allegations that are merely conclusory, unwarranted deductions  
4 of fact, or unreasonable inferences." *Sprewell v. Golden State*  
5 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); see, e.g., *Doe I v.*  
6 *Wal-Mart Stores, Inc.*, --- F.3d ----, 2009 WL 1978730, at \*3 (9th  
7 Cir. July 10, 2009) ("Plaintiffs' general statement that Wal-Mart  
8 exercised control over their day-to-day employment is a conclusion,  
9 not a factual allegation stated with any specificity. We need not  
10 accept Plaintiffs' unwarranted conclusion in reviewing a motion to  
11 dismiss.").

12 The Ninth Circuit has summarized the governing standard, in  
13 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint  
14 to survive a motion to dismiss, the non-conclusory factual content,  
15 and reasonable inferences from that content, must be plausibly  
16 suggestive of a claim entitling the plaintiff to relief." *Moss v.*  
17 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal  
18 quotation marks omitted).

#### 19 20 IV. DISCUSSION

##### 21 A. Federal Claims (Counts I-III)

##### 22 1. Rescission Under TILA (Count I)

23 In her first cause of action, Plaintiff alleges that she is  
24 entitled to rescind the loan because Defendants failed to provide  
25 necessary loan disclosure documents, inducing her entry into a loan  
26 transaction "without the proper opportunity to evaluate the costs  
27 and implications thereof." (FAC ¶ 21.) Specifically, Plaintiff  
28 alleges that Defendants did not "accurately and effectively

1 disclose a Truth in Lending Disclosure Statement [which  
2 constitutes] a failure to provide material disclosure[s] [under  
3 TILA]." (Id. ¶ 22.) According to Plaintiff, these deficiencies  
4 entitle her to rescind the loan under the TILA framework.<sup>5</sup>

5 Defendant moves to dismiss Plaintiff's first cause of action  
6 on grounds that the claim for rescission is time-barred and that  
7 Plaintiff failed to allege that she can or will tender the  
8 borrowed funds back to the lender, as required by 15 U.S.C. §  
9 1635(b).

10 Generally, TILA provides that borrowers have until midnight of  
11 the third business day following the consummation of a loan  
12 transaction to rescind the transaction. 15 U.S.C. § 1635(a). A  
13 borrower's right of rescission is extended from three days to three  
14 years if the lender (1) fails to provide notice of the borrower's  
15 right of rescission or (2) fails to make a material disclosure.<sup>6</sup>  
16 See *Reagen v. Aurora Loan Servs.*, No. 1:09-CV-00839-OWW-DLB, 2009  
17 WL 3789997, at \*16 (E.D. Cal. Nov. 10, 2009) (citing 12 C.F.R. §  
18 226.23(a)(3)). Specifically, § 1635(f) of TILA provides:

19 An obligor's right of rescission shall expire three  
20

21 <sup>5</sup> Under TILA, a plaintiff may sue for damages and/or  
22 rescission. Each remedy has its own statute of limitations. For  
23 a claim for damages, a consumer has one year from the date of  
24 consummation of the transaction to bring suit. See 15 U.S.C. §  
25 1640(e); *King v. California*, 784 F.2d 910, 915 (9th Cir. 1986).  
26 For a claim for rescission, a consumer has only three days  
27 following consummation to cancel the transaction, unless the  
28 borrower's right of rescission is extended from three days to three  
years. See *id.* § 1635(a).

<sup>6</sup> In this case, Plaintiff contends that her original lender -  
not Homeq - failed to provide adequate loan disclosures, entitling  
her to the extended three-year statute of limitations for  
rescission of the loan.

1 years after the date of consummation of the  
2 transaction or upon the sale of the property,  
3 whichever occurs first, notwithstanding the fact that  
4 the information and forms required under this section  
5 or any other disclosures required under this part have  
6 not been delivered to the obligor.

7 15 U.S.C. § 1635 (f).

8 Here, the date of the violation is the date the loan closed,  
9 or August 17, 2005. Plaintiff's claim for rescission under TILA,  
10 which was filed in state court on May 11, 2009, exceeds the statute  
11 of limitations by eight months, and is time-barred. No facts are  
12 alleged in the FAC which would support tolling the statute of  
13 limitations and Plaintiff did not oppose Defendant's motion. Since  
14 Plaintiff did not commence litigation by August 17, 2008 - and has  
15 not pled facts giving rise to an equitable tolling argument - her  
16 rescission claim is time-barred.

17 TILA also requires a plaintiff to allege that the plaintiff  
18 can or will tender the borrowed funds back to the lender. See  
19 *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1171 (9th Cir. 2003)  
20 ("rescission should be conditioned on repayment of the amounts  
21 advanced by the lender."); see also *Am. Mortgage Network v.*  
22 *Shelton*, 486 F.3d 815, 821 (4th Cir. 2007) ("The equitable goal of  
23 rescission under TILA is to restore the parties to the status quo  
24 ante.") (citations omitted). Here, the FAC does not contain  
25 allegations that Plaintiff attempted to tender, or is capable of  
26 tendering, the value of the property pursuant to the rescission  
27 framework established by TILA. Nor does Plaintiff allege that such  
28 equitable circumstances exist that conditioning rescission on any  
tender would be inappropriate. As Plaintiff has not alleged that  
she has made such an offer or contemplates making such an offer,

1 her rescission claim fails.

2 Plaintiff's rescission claim is time-barred under the  
3 applicable limitations period. No facts have been pled which could  
4 give rise to an argument that the statute of limitations has been  
5 equitably tolled. The FAC also alleges that Homeq is the servicer  
6 on the loan, (FAC ¶ 18), and servicers are not treated as owners or  
7 assignees who would be liable for disclosure violations under TILA.  
8 15 U.S.C. § 1641(f).

9 Plaintiff's TILA rescission claim is DISMISSED WITH PREJUDICE  
10 against Defendant Homeq.

11  
12 2. Damages Under TILA (Count II)

13 Plaintiff's FAC also advances a claim for statutory damages  
14 under TILA. The grounds for Plaintiff's second claim are identical  
15 to her first cause of action for rescission, i.e., that she is  
16 entitled to relief based on her original lender's inadequate and  
17 incomplete disclosures. Defendant argues that Plaintiff's second  
18 cause of action is time-barred under the applicable one-year  
19 limitations period. Defendant is correct.

20 Plaintiff's request for damages under TILA is subject to a one  
21 year statute of limitations, typically running from the date of the  
22 loan execution. 15 U.S.C. § 1640(e). Plaintiff's loan was  
23 executed on August 17, 2005, and this action was filed on May 11,  
24 2009. Applying § 1640(e) to Plaintiff's facts, the right to  
25 damages expired on August 17, 2006, one year after the closing of  
26 the loan. There are no facts alleged in the FAC which would  
27 support tolling the statute of limitations. For these reasons,  
28 Plaintiff's claim against Defendant Homeq for statutory damages

1 under TILA is DISMISSED WITHOUT PREJUDICE.

2 It is apparent that any amendment to Plaintiff's TILA claims  
3 would be futile. Both of Plaintiff's TILA claims are time-barred,  
4 and Plaintiff has failed to allege any entitlement to equitable  
5 tolling. Plaintiff has also not alleged that she can tender or  
6 contemplates tendering the amount she borrowed to state a  
7 rescission claim. Plaintiff's TILA claims against Defendant Homeq  
8 are DISMISSED WITH PREJUDICE.

9  
10 3. FDCPA (Claim III)

11 Plaintiff's third cause of action is for violation of the  
12 federal FDCPA. (FAC ¶ 48-50.) Plaintiff alleges that Defendant  
13 Homeq is a "debt collector" in that it "attempted to collect a  
14 purported debt and specifically threaten [sic] imminent legal  
15 proceedings." (Id. ¶ 25.) Plaintiff further alleges that  
16 "Defendants [] violated the FDCPA by [failing] to provide  
17 validation notice under 15 U.S.C. § 1692e(11) [...] us[ing] false  
18 or misleading representations or deceptive means to collect or  
19 attempt to collect a debt [and] us[ing] unfair or unconscionable  
20 means to collect or attempt to collect a debt." (Id. ¶ 49.) The  
21 FAC appears to allege that Defendant Homeq engaged in abusive debt  
22 collection practices in violation of federal laws regulating debt  
23 collection. In this context, however, the FAC's third claim fails  
24 because Plaintiff has neither pled any facts suggesting that Homeq  
25 engaged in unlawful debt collection practices nor indicated how  
26 Homeq qualifies as a "debt collector" under the FDCPA.

27 Although the FAC alleges that Defendant used "unfair or  
28 unconscionable means to collect a debt," these are conclusions of

1 law. Plaintiff has not alleged one fact concerning the frequency,  
2 timing, or methods of Defendant's debt collection practices. The  
3 only debt collection "fact" asserted against Defendant is that  
4 "Defendant Homeq has attempted to collect a purported debt and  
5 specifically threaten[ed] imminent legal proceedings," which is not  
6 indicative of improper debt collection practices under the FDCPA.  
7 In addition, the FAC's allegations that Defendant used "deceptive  
8 means" to collect a debt are conclusory and severely  
9 underdeveloped. There is not one fact to indicate how or in what  
10 matter Defendant Homeq regularly engaged in the challenged  
11 practice.

12 It also appears that Defendant is not a "debt collector" under  
13 the FDCPA. The FDCPA regulates only "debt collectors." See 15  
14 U.S.C. §§ 1692(e)-(f). "Debt collector" is defined as "any person  
15 who uses any instrumentality of interstate commerce or the mails in  
16 any business the principal purpose of which is the collection of  
17 any debts, or who regularly collects or attempts to collect,  
18 directly or indirectly, debts owed or due or asserted to be owed or  
19 due another." *Id.* § 1692a(6). "Debt Collector" does not include  
20 persons who collect debt "to the extent such activity ... (ii)  
21 concerns a debt which was originated by such person; [or] (iii)  
22 concerns a debt which was not in default at the time it was  
23 obtained by such person ...." *Id.* § 1692a(6)(F). The FDCPA's  
24 definition of debt collector "does not include the consumer's  
25 creditors, a mortgage servicing company, or any assignee of the  
26 debt, so long as the debt was not in default at the time it was  
27 assigned." *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th  
28 Cir. 1985); see also *Mansour v. Cal-Western Reconveyance Corp.*,

1 618 F. Supp. 2d 1178, 1182 (D. Ariz. 2009) (granting motion to  
2 dismiss in favor of servicer because it was not a debt collector);  
3 *Nera v. Am. Home Mortgage Servicing, Inc.*, No. C-09-2025-RMW, 2009  
4 WL 2423109 at \*4 (N.D. Cal. Aug.5, 2009) (holding that mortgagors  
5 and servicing companies are not debt collectors and granting motion  
6 to dismiss because the "conclusory allegation" that "defendant is  
7 a 'debt collector'" is "not sufficient to support an [FDCPA]  
8 claim"). Here, nothing in the complaint suggests that Defendant  
9 Homeq is a "debt collector" under the FDCPA. Plaintiff's  
10 allegations do not trigger the FDCPA.

11 A claim is plausible only "when the plaintiff pleads factual  
12 content that allows the court to draw the reasonable inference that  
13 the defendant is liable for the misconduct alleged." *Iqbal*, 129  
14 S.Ct. 1937, 1949 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S.  
15 544, 570.). The complaint's third cause of action for violation of  
16 the FDCPA does not meet this burden. The FAC's third claim states  
17 no cognizable claim and is DISMISSED WITH PREJUDICE.

18  
19 B. State Law Claims (Counts IV-V)

20 1. California Business & Professions Code § 17200

21 California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof.  
22 Code §§ 17200 et seq., prohibits "any unlawful, unfair or  
23 fraudulent business act or practice." *Cel-Tech Communic'ns, Inc.*  
24 *v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). "By  
25 proscribing 'any unlawful' business practice, section 17200  
26 'borrows' violations of other laws and treats them as unlawful  
27 practices that the unfair competition law makes independently  
28 actionable." *Id.* (citation omitted); *Farmers Ins. Exch. v.*

1 *Superior Court*, 2 Cal. 4th 377, 383 (1992). In other words, a  
2 "defendant cannot be liable under § 17200 for committing unlawful  
3 business practices without having violated another law." *Ingles v.*  
4 *Westwood One Broadcasting Servs., Inc.*, 129 Cal. App. 4th 1050,  
5 1060 (2005) (internal quotations omitted).

6 Plaintiff alleges that Defendant Homeq violated the UCL  
7 because: (1) "The business acts and practices of [] Defendants  
8 [...] constitute 'unfair' business practices under the UCL in that  
9 said acts and practices offend public policy and are substantially  
10 injurious to the Plaintiff and all consumers;" and (2) "Defendants  
11 processed and ratified this Transaction [...] and failed to deliver  
12 material disclosures under TILA, failed to comply with the contract  
13 between the parties [and] and failed to comply with statutory good  
14 faith and fair dealing." (FAC ¶ 60-62.)

15 Defendant Homeq argues that Plaintiff's UCL claim is precluded  
16 because it is predicated on TILA and FDCPA claims that are barred  
17 by the statute of limitations. Alternatively, Homeq argues that  
18 Plaintiff has not pled her UCL claim with the requisite  
19 particularity required by Rule 9(b).

20 Defendant's argument are well-taken. First, to the extent  
21 that Plaintiff's UCL claims are predicated on TILA and FDCPA, they  
22 are preempted. See *Silvas v. E\*Trade Mortg. Corp.*, 514 F.3d 1001,  
23 1007 n.3 (9th Cir. 2008) (Plaintiff cannot enforce a time-barred  
24 TILA claim through the UCL because such an action would constitute  
25 "an attempt to enforce a state regulation in an area expressly  
26 preempted by federal law."); *Distor v. U.S. Bank NA*, No. C-  
27 09-02086-SI, 2009 WL 3429700 at \*8 (N.D. Cal. October 22, 2009)  
28 ("Because the FDCPA claim is not well pled, since neither defendant

1 appears to be a 'debt collector' within the meaning of the statute,  
2 the FDCPA claim cannot serve as the underlying violation for  
3 plaintiff's 'unlawful acts' UCL claim."); *Adams v. SCME Mortg.*  
4 *Bankers, Inc.*, 2009 WL 1451715 \*11 (E.D. Cal. May 22, 2009)  
5 (holding that if a TILA claim is time barred, a "UCL claim based on  
6 TILA violations likewise fails."); *Reyes v. Downey Savings and*  
7 *Loan Ass'n*, 541 F. Supp. 2d 1108, 1115 (C.D. Cal. 2008) (citing  
8 *Silvas* for proposition that UCL claim is preempted by TILA if the  
9 underlying TILA violation is time barred).

10 Plaintiff's UCL claims are also deficient because they do not  
11 meet Rule 9(b)'s heightened pleading standard. Rule 9(b) requires  
12 a party to "state with particularity the circumstances constituting  
13 fraud." A court may dismiss a claim grounded in fraud when its  
14 allegations fail to satisfy Rule 9(b)'s heightened pleading  
15 requirements. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107  
16 (9th Cir. 2003) A pleading is sufficient under Rule 9(b) if it  
17 identifies the circumstances constituting fraud so that the  
18 defendant can prepare an adequate answer from the allegations."  
19 *Neubronner v. Milken*, 6 F.3d 666, 671-672 (9th Cir.1993)

20 The complaint's factual development is severely lacking and  
21 fails to satisfy Rule 9(b)'s "who, what, when, where and how"  
22 requirements as to Defendant Homeq. The allegation that Defendant  
23 Homeq was aware that the loans contained a misleading clause also  
24 lacks factual support - Plaintiff has not pointed to a misleading  
25 clause. Plaintiff's allegation that the loan originator "failed to  
26 make accurate representations and/or failed to provide material  
27 information about the Transaction" is a more viable basis for a UCL  
28 claim, but it is not clear how Defendant Homeq - only a loan

1 servicer after Plaintiff had already entered into it - is liable  
2 for such conduct. There is no vicarious liability under the UCL.  
3 *See Perfect 10, Inc. v. Visa Intern. Serv. Ass'n*, 494 F.3d 788,  
4 808-809 (9th Cir. 2007) ("an unfair practices claim under section  
5 17200 cannot be predicated on vicarious liability .... A  
6 defendant's liability must be based on his personal participation  
7 in the unlawful practices."). The relevant allegations supporting  
8 Plaintiff's UCL claim are conclusory and fall short of meeting the  
9 particularity requirements for pleading fraud under Federal Rule of  
10 Civil Procedure 9(b).

11 The UCL claim's deficiencies are so severe to suggest no  
12 potential improvement from an attempt to amend. The fourth cause  
13 of action is DISMISSED against Defendant Homeq WITH PREJUDICE.  
14

## 15 2. California Civil Code § 2923.52

16 Plaintiff's fifth cause of action is under the California  
17 Foreclosure Prevention Act, Cal. Civ. Code § 2923.52 *et seq.*, which  
18 postpones the notice of sale under a deed of trust for certain  
19 loans for 90 days. This law was passed in February 2009, and  
20 stated that it "shall become operative 14 days after the issuance  
21 of regulations" that provide an exemption filing option. *Id.* §  
22 2923.52(4)(b). The California Department of Corporations issued  
23 the required regulations on June 1, 2009 (Cal. Code Regs. tit. 10,  
24 § 3 (June 1, 2009)), so § 2923.52 became operative on June 15,  
25 2009. The Notice of Sale that forms the basis of Plaintiff's §  
26 2923.52 claim was effected on April 13, 2009. (FAC ¶ 77.) Because  
27 the Notice of Trustee's Sale was issued two months before the  
28 California Foreclosure Prevention Act became operative, Plaintiff

1 has failed to state a claim. See *Pantoja v. Countrywide Home*  
2 *Loans, Inc.*, No. C-09-01615-JW, 2009 WL 2423703 at \*6 (N.D. Cal.  
3 July 9, 2009) ("California Civil Code provisions are not  
4 retroactive unless so declared. Cal. Civ. Code § 3. Section  
5 2923.52 does not contain any retroactivity declarations.").  
6 Plaintiff's fifth cause of action is DISMISSED WITH PREJUDICE.

7  
8 **VI. CONCLUSION**

9 For the reasons stated:

10 (1) Plaintiff's first cause of action for rescission under  
11 TILA is time-barred and DISMISSED WITH PREJUDICE.

12 (2) Plaintiff's second cause of action for damages under TILA  
13 is time-barred and DISMISSED WITH PREJUDICE.

14 (3) Plaintiff's third cause of action under FDCPA is  
15 incognizable and DISMISSED WITH PREJUDICE.

16 (4) Plaintiff's fourth cause of action for a violation of  
17 California Business & Professions Code § 17200 is DISMISSED WITH  
18 PREJUDICE.

19 (5) Plaintiff's fifth cause of action for a violation of  
20 California Civil Code § 2923.52 is DISMISSED WITH PREJUDICE.

21 Defendant Homeq shall submit a form of order consistent with,  
22 and within five (5) days following electronic service of, this  
23 memorandum decision.

24  
25 IT IS SO ORDERED.

26 **Dated: January 14, 2010**

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE