

28 of their property. Doc. 1, *Phillips v. Fremont Investment Loan*, No. 09-2585-GMS (D. Ariz.,

1 2009). Plaintiffs voluntarily dismissed that action on June 18, 2010. Doc. 50, *Id.*

Plaintiffs filed this action on August 17, 2010. The complaint contains four counts:
intentional misrepresentation, consumer fraud, accounting, and quiet title.

4 Defendants have filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal
5 Rules of Civil Procedure. Doc. 4. The motion is fully briefed. Docs. 8, 9. For reasons
6 stated below, the motion will be granted.¹

7 I. Counts One and Two: Intentional Misrepresentation and Consumer Fraud.

8 While it is generally true that dismissal on statute of limitations grounds should not be 9 granted on a Rule 12(b)(6) motion, it may be granted where the untimeliness of the claim is 10 apparent on the face of the complaint. *Jablan v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th 11 Cir. 1980). The face of the complaint in this case makes clear that the intentional 12 misrepresentation and consumer fraud claims are barred by the applicable statutes of 13 limitations.

A claim for intentional misrepresentation must be brought within three years after the
statute of limitations begins to run. A.R.S. § 12-543. The statute of limitations for
intentional misrepresentation begins to run "when the plaintiff knew or by reasonable
diligence should have known of the misrepresentation." *Bank of the W. v. Estate of Leo*, 231
F.R.D. 386, 390 (2005); *see also Coronado Dev. Corp. v. Super. Court*, 139 Ariz. 350, 352,
678 P.2d 535, 537 (App. 1984).

A claim brought under the Arizona Consumer Fraud Act, A.R.S. § 44-1522, must be
brought within one year after the statute of limitations begins to run. *See* A.R.S. §12-541 (5)
2003. The statute of limitations begins to run "when the defrauded party discovers or with
reasonable diligence could have discovered the fraud." *Alaface v. Nat'l Inv. Co.*, 181 Ariz.
586, 892 P.2d 1375, 1379 (App. 1994) (quoting *Mister Donut of Am., Inc. V. Harris*, 150
Ariz. 321, 723 P.2d 670, 672 (1986)).

26

¹Plaintiffs' request for oral argument is denied because the issues have been fully briefed and oral argument will not aid the Court's decision. *See* Fed. R. Civ. P. 78(b); *Partridge v. Reich*, 141 F.3d 920,926 (9th Cir. 1998).

Plaintiffs signed the loan documents on September 21, 2006. The three-year statute of
 limitations period for the intentional misrepresentation claim therefore expired on September
 22, 2009. The one-year statute of limitations period for the consumer fraud claim expired
 on September 22, 2007. Plaintiffs did not bring their intentional misrepresentation and
 consumer fraud claims until June of 2010, long after both periods expired.

Plaintiffs contend that the statute of limitations did not begin running until April 16, 6 7 2010 when they received a forensic review of their loan documents. Doc. 1-1 at 7, \P 40. 8 They state that they "were in no position to discover the aforementioned concealed and/or false information until a forensic review of their loan documents was conducted," and the 9 10 statute of limitations therefore did not begin running when they signed the loan documents 11 on September 21, 2006. Id. Plaintiffs later specifically allege, however, that "the defects 12 are on the face of the loan documents and documents are missing that indicate that 13 concealment has taken place." Doc. 1-1 at 8, ¶41. Because Plaintiffs admit that the alleged 14 concealment was apparent from the face of the loan documents, they reasonably should have known of the alleged misrepresentation and fraud on September 21, 2006. Therefore, the 15 16 statute of limitations period began running on that date and has expired for both claims. 17 Count one and count two will be dismissed as time barred.

18 **II.**

28

I. Count Three: Accounting.

19 "The burden of showing that an accounting is necessary is on the party requesting the accounting." Assoc. Fin. Co. v. Walters, 12 Ariz. App. 369, 375, 470 P.2d 689. Defendants 20 21 correctly argue that Plaintiffs have failed to establish any status relationship between the 22 parties that would justify an accounting. Further, accounting is an equitable remedy and 23 Plaintiffs have not proved any independent legal claim against MERS or Deutsche Bank. 24 Because the counts on which this claim depends – counts one and two – have been dismissed, 25 count three will also be dismissed for failure to state a claim upon which relief can be 26 granted.

27 **III. Count Four: Quiet Title.**

Plaintiffs argue that the defendants MERS and Deutsche Bank have no standing to

claim a valid interest in their property. Doc. 1-1 at 11, ¶ 58. Additionally, Plaintiffs argue
that Deutsche Bank "has failed to provide or record a valid assignment of either the
promissory note or deed of trust." Doc. 1-1 at 12, ¶ 58. This "show me the note" argument
has been uniformly rejected by Arizona district courts. *See Dumesnil v. Bank of Am.*, N.A.,
No. 10-0243, 2010 WL 1408889 (D. Ariz., 2010) (citing cases). Therefore, count four will
also be dismissed for failure to state a claim upon which relief can be granted.

7 **IV.** Leave to Amend.

8 Plaintiffs request leave to amend to cure any deficiencies in the complaint. Doc. 8 at 9 11. The Court recognizes that leave to amend should be freely given when justice so 10 requires. Fed. R. Civ. P. 15(a)(2). It is clear from the face of the amended complaint, 11 however, that Plaintiffs' claims for intentional misrepresentation and consumer fraud are time 12 barred. Plaintiffs have not shown, and it does not otherwise appear to the Court, that any 13 amendment could change that fact. Additionally, as explained above, the accounting claim 14 is not an independent cause of action, and relies on counts one and two, which are time 15 barred. Finally, the "show me the note" claim has been universally rejected by Arizona 16 district courts and cannot be cured through amendment. The Court will therefore deny leave 17 to amend as futile. See *Leadsinger, Inc. V. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 18 2008) (affirming denial of leave to amend where the complaint could not be saved by any 19 amendment); Ahlmeyer v. Nev. Sys. of Higher Educ., 555 F.3d 1051, 1055 (9th Cir. 2009) 20 ("futility of amendment alone can justify denial of a motion [to amend]").²

21

IT IS ORDERED:

- The motion to dismiss the amended complaint filed by Defendants Mortgage
 Electronic Registration Systems, Inc. and Deutsche Bank National Trust
 Company (Doc. 4) is granted.
- 25
- 2. Plaintiffs' request for leave to amend is **denied**.
- 26

 ²Defendants' request for an award of fees and costs based on the dismissal of this action is denied without prejudice. Defendants may file a proper request for attorney's fees pursuant to Local Rule of Civil Procedure 54.2.

