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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Michael Grady; Jennifer Grady,

No. CV 11-2060-PHX-JAT

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Plaintiffs,

ORDER

11

vs.

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Bank of Elmwood; Elmwood Financial Corporation; Jonathan Levin; Sarah Levin,

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Defendants.

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Tri City National Bank,

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Counterclaimant,

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vs.

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Michael Grady and Jennifer Grady,

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Counterdefendant.

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The Federal Deposit Insurance Corporation as Receiver for Bank of Elmwood,

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Intervenor.

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I. Background

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This case arises from Plaintiffs attempt to avoid a foreclosure on their residence. The residence was sold via a Trustee sale on October 25, 2012. *Grady v. Tri City National Bank*, CV 11-2507-PHX-JAT (D. Ariz. May 13, 2013). Doc. 25 at 2. Tri City National Bank purchased the residence at the Trustee Sale. Plaintiffs are still in possession of the residence.

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1 Tri City National Bank is taking action in state court to evict Plaintiffs from the residence.

2 On April 4, 2012, this Court denied Plaintiffs leave to amend their complaint to add
3 a TILA rescission claim against Tri City National Bank. Doc. 47. In that Order, the Court
4 denied leave to amend on futility grounds. *Id.* Plaintiffs moved to reconsider. Doc. 50. The
5 Court denied reconsideration. Doc. 54. Plaintiffs again moved to reconsider. Doc. 70. The
6 Court denied reconsideration. Doc. 80. Plaintiffs again moved to reconsider. Doc. 98. The
7 Court again denied reconsideration. Doc. 102.

8 As a result of the denial of leave to amend, Tri City National Bank was dismissed as
9 a party to this case. Doc. 122. No judgment was entered pursuant to Federal Rule of Civil
10 Procedural 54(b). Further, the Court denied Plaintiffs' request for Rule 54(b) "certification."
11 Doc. 102 at 5.

12 On June 18, 2014, Plaintiffs filed a notice that they had settled all remaining claims
13 with all remaining parties. Doc. 196. As a result, the Court dismissed this entire case on July
14 1, 2014. Doc. 200. This settlement did not include Tri City National Bank because it was not
15 a "party" at the time of settlement.

16 Plaintiffs assert that on October 16, 2014, the state court judge issued an order for the
17 issuance of a "writ of restitution" which would give Tri City National Bank "possession" of
18 the property. Doc. 214 at 5, 13. On October 20, 2014, Plaintiffs moved this Court for an
19 injunction pending appeal. Doc. 214. In their proposed order they seek to have this Court
20 order that: "Appellee Tri City National Bank, NA shall not enforce a writ of restitution that
21 has issued or will be issued by the Maricopa County Superior Court at case number CV 12-
22 016990 and shall not evict Appellants from or otherwise gain possession of real property
23 located at 5624 East Sanna Street, Paradise Valley, Arizona 85253." Doc. 215 at 2.

24 As the above discussion indicates, the injunction sought in this case under Federal
25 Rule of Appellate Procedure 8 is against Tri City National Bank. As further discussed above,
26 because the Court denied leave to amend the complaint to add a claim against Tri City
27 National Bank, Tri City National Bank is not a party to this case. Doc. 122.

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1 **II. Status of Tri City National Bank**

2 Notwithstanding the denial of leave to amend to add Tri City National Bank as a
3 Defendant, Tri City National Bank’s status is not perfectly clear. Specifically, on August 5,
4 2010, Tri City National Bank (as the holder of the note on Plaintiffs’ residence following the
5 original holder going through FDIC receivership and the FDIC transferring this note to Tri
6 City National Bank) moved to intervene in this case in state court prior to removal. Doc. 214
7 at 3. The State court granted that motion and also allowed the FDIC to intervene *Id.* The
8 FDIC then removed this case to federal court.

9 After Tri City National Bank intervened in this case, Plaintiffs sent their TILA
10 rescission letter that gave rise to the cause of action that Plaintiffs attempted to amend their
11 complaint to add against Tri City Nation Bank. *Id.* Tri City National Bank opposed the
12 motion to amend on futility grounds; and, as stated above, this Court denied the motion.

13 Nonetheless, the record reflected that Tri City National Bank still had a
14 “counterclaim” pending; and Plaintiffs’ moved for a temporary restraining order and
15 preliminary injunction based on their affirmative defenses to the counterclaim. Doc. 142.
16 This Court ordered briefing on whether an intervenor who was never added as a defendant
17 could have a counterclaim. Tri City National Bank conceded it could not. Doc. 197 at 12-
18 14. Accordingly, the counterclaim was deemed not to be pending, and the Court denied
19 Plaintiffs’ request for injunctive relief based on affirmative defenses to the counterclaim. *Id.*
20 at 16-18 (explaining Tri City National Bank’s status).¹

21
22 ¹ Specifically, this Court stated on the record:

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24 Well, as I said, I carefully considered the papers, and while I understand
25 that you and your clients feel frustrated at this juncture, obviously I don't need
26 to lecture any lawyer about the notion that this Court cannot simply provide
27 a forum to unravel things or a forum to do things which are otherwise
precluded procedurally or substantively, and as I said at the outset, there are
not just serious but there are pivotal procedural issues here.

28 As this case stands, TCNB was granted intervenor status by the state

1 The Court has been unsuccessful in locating any cases discussing whether a “party”
2 who successfully moves to intervene as a Defendant, but then successfully opposes a motion
3 to amend to add said “party” as a Defendant, is subject to an injunction under Federal Rule
4 of Appellate Procedure 8(a) during the pendency of the appeal challenging the denial of leave
5 to amend.

6 In its response at Doc. 221, Tri City National Bank argues that for purposes of an
7 injunction, it is not a “party” over which this Court has jurisdiction. Citing *Scott v. Donald*,
8 165 U.S. 107, 117 (1897), Tri City National Bank notes that this Court generally cannot
9 enjoin persons or entities who are not parties to the suit. At this point, Tri City National
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12 court on May 14, 2010, according to my research. The state court did not
13 define the scope of that status other than to say TCNB was not substituted in
14 place of the Bank of Elmwood, and upon this Court's review of the record the
15 only logical conclusion seems to be that TCNB was granted intervenor status
16 as an intervenor defendant to plaintiff's first amended complaint.

17 That status was granted by the state court because TCNB had an interest
18 in the property that could be affected by plaintiff's lawsuit but not because any
19 affirmative claims had been asserted against TCNB by plaintiffs.

20 Given, then, TCNB's status as an intervenor defendant when this Court
21 dismissed TCNB as a defendant to the second amended complaint, and that's
22 reflected in Docket 122, TCNB's intervenor defendant status also ended.

23 Thus, either as a result of TCNB's failure to answer the second amended
24 complaint and reassert its counterclaims or as a result of TCNB's dismissal or
25 both, TCNB's counterclaims were dismissed from this action.

26 Therefore, plaintiff's answer to the counterclaims is a nullity because
27 no counterclaims are pending, and plaintiff's pending request for preliminary
28 injunction is premised solely on plaintiff's affirmative defenses to the
counterclaims. Because the answer and affirmative defenses are a nullity,
plaintiff's motion for preliminary injunction, which is Docket 142, premised
on those affirmative defenses, is denied.

Doc. 197 at 16-17.

1 Bank is not a party to this suit.² This Court agrees with Tri City National Bank that because
2 Tri City National Bank is not a party, it is not subject to this Court's injunctive powers.
3 Accordingly, Plaintiffs' motion for injunction pending appeal is denied for this reason.
4 However, because of Tri City National Bank's previous "intervenor" status, the Court will
5 alternatively consider the merits of Plaintiffs' motion.

6 **III. Injunction Pending Appeal**

7 **A. Legal Standard**

8 As discussed above, Plaintiffs seek an injunction to prevent Tri City National Bank
9 from pursuing a writ of restitution to gain possession of Plaintiffs' residence. Plaintiffs
10 (without citation) argue the test for granting an injunction pending appeal is: 1) Plaintiffs
11 have a strong probability of success on the merits; 2) Plaintiffs will suffer irreparable injury
12 if an injunction is not granted; 3) the balance of hardships tips sharply in Plaintiff's favor;
13 and 4) public policy favors an injunction. Doc. 214 at 5-15. Tri City National Bank argues
14 that the test for granting a stay pending appeal is: 1) whether the applicant has made a strong
15 showing of likelihood of success on the merits; 2) whether applicant will be irreparably
16 harmed without a stay; 3) whether the stay will substantially injure other parties interested
17 in the proceeding; and 4) the public interest. Doc. 220 at 9. Because Plaintiffs cite nothing,
18 the Court will not rely on Plaintiffs' test. Because Tri City National Bank cites the test for
19 a stay, but Plaintiffs seek an injunction, the Court will not use Tri City National Bank's test.

20 In *Digital Comm. Network, Inc. v. AB Cellular Holdings LLC*, 1999 WL 1044234, *3
21 (C.D. CA 1999) the Court discussed the test for an injunction pending appeal under Federal
22 Rule of Appellate Procedure 8. Specifically the Court stated:

23 In *Warm Springs Dam Task Force v. Gribble*, 566 F.2d 549 (9th
24 Cir.1977), the Ninth Circuit stated the factors to be considered in considering
25 an application for an injunction pending appeal as follows: (1) have the
26 movants established a strong likelihood of success on the merits?, (2) does the
27 balance of irreparable harm favor the movants?, (3) does the public interest
28 favor granting the injunction? 566 F.2d at 551.

² In CV 12-2507-PHX-JAT, Plaintiffs voluntarily dismissed a case they brought directly against Tri City National Bank.

1 *Id.* Notably, the Court in *Digital Comm. Network* rejected the sliding scale test advanced by
2 Plaintiffs in this case and adopted much of the test advanced by Defendant because the test
3 for a stay is “largely co-extensive” with the test for an injunction. *Id.* at 3-4.

4 **B. Argument**

5 **1. Strong Likelihood of Success on the Merits**

6 Plaintiffs argue that an injunction is appropriate because this Court’s order denying
7 Plaintiffs leave to amend is likely wrong following the Ninth Circuit Court of Appeals
8 decision in *Merritt v. Countrywide*, 759 F.3d 1023 (9th Cir. 2014). As a preliminary matter,
9 the Court notes that *Merritt* was decided in July 2014. Therefore, the Court is not certain this
10 motion (filed in October 2014) is timely in light of when this alleged “change in the law”
11 arose.

12 Nonetheless, Plaintiffs allege that in *Merritt*, the Court of Appeals determined that
13 a plaintiff did not have to allege tender to survive a 12(b)(6) motion to dismiss a TILA
14 rescission claim. Plaintiffs therefore conclude that this Court erred in denying them leave
15 to amend to add a TILA rescission claim on the basis that they did not allege tender.

16 In the Order of August 6, 2012, this Court discussed the tender requirement of a TILA
17 rescission claim at length. Doc 80 at 8-12. Ultimately, this Court determined that because
18 Plaintiffs could not allege tender, they could not state a claim. *Id.* However, Plaintiffs are
19 correct that in *Merritt*, the Court of Appeals held that Plaintiffs are not required to allege
20 tender to state a TILA rescission claim. 759 F.3d at 1031. Nonetheless, *Yamamoto v. Bank*
21 *of New York*, 329 F.3d 1167, 1171-73 (9th Cir. 2003), remains good law that, after discovery,
22 to prevail on a TILA rescission claim, the borrower must be able to repay the loan.
23 Specifically, the Court stated,

24 [I]t cannot be that the security interest vanishes immediately upon the giving
25 of notice [of rescission]. Otherwise, a borrower could get out from under a
26 secured loan simply by claiming TILA violations, whether or not the lender
27 had actually committed any. Rather, . . . the security interested ‘becomes void’
only when the consumer ‘rescinds’ the transaction. In a contested case, this
happens when the right to rescind is determined in the borrower’s favor.

28 *Id.* at 1172.

1 In this contested case, Plaintiffs have never claimed a current ability to repay the loan.
2 This allegation is not present even in this latest application for an injunction. Thus, even
3 though post-*Merritt* a TILA rescission claim does not require an allegation of tender to state
4 a claim, to prevail on the merits of a TILA rescission claim, Plaintiffs must show the ability
5 to tender. Therefore, even if this Court erred in not allowing leave to amend under the law
6 articulated in *Merritt*, Plaintiff still are not likely to succeed on the merits of this case because
7 they have not shown they will ultimately prevail under *Yamamoto*.

8 Plaintiffs only argument regarding tender in the currently pending motion for an
9 injunction is as follows:

10 Plaintiffs again sought leave, pursuant to Federal Rules of Civil Procedure
11 54(b) and 15(a)(2), to file a Proposed Third Amended Complaint, also seeking
12 to enjoin TCNB and to enforce the rescission, more adequately describing the
13 rescission default and tender sequence, and even pleading tender though [*sic*]
14 offsets (see *Merritt* at Page 15; see also *Pierro v. Spiegel Development*, No.
15 10-55968 (9th Cir. 2011) [footnote omitted]).

16 Doc. 214 at 4. Plaintiffs offer no citation to where in this Court’s record this argument can
17 be found. Further, Plaintiffs offer no substantive argument in the currently pending motion
18 on their theory of “tender through offsets.” Nonetheless, this Court has reviewed the entire
19 record and located Plaintiffs’ proposed Third Amended Complaint at Doc. 71-1. Plaintiffs’
20 proposed TILA claim is at pages 37-40 and does not mention tender. However, in Plaintiffs’
21 request for declaratory judgment at pages 42-43, Plaintiffs make various ambiguous
22 statements regarding tender.³

23 Plaintiffs never say in their moving papers they can or will tender. Further Plaintiffs
24 never say what offset they allege applies nor offer any dollar amount of this unspecified
25 offset. All Plaintiffs argued on summary judgment regarding tender was “Plaintiffs have
26 always acknowledged the obligation to return the loan proceeds, with reservations,
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28 ³ Notably, some of Plaintiffs citations for these facts in their proposed Third Amended Complaint are their previously filed **summary judgment motion**; the very stage of the case under which *Yamamoto* held it was appropriate to consider an ability to tender. Even at summary judgment, Plaintiff could not show an ability to tender.

1 specifically plaintiffs right of set off and recoupment which are afforded to plaintiffs pursuant
2 to the Federal Truth-In-Lending Act.” Doc. 71-1 at 42. Even taking this statement from a
3 summary judgment motion and recasting it as an allegation that must be taken as true in a
4 complaint, Plaintiffs never allege an ability to tender nor that the “right of set off” will equal
5 the loan obligation.

6 At oral argument, Plaintiffs offered further theories of how they may be able to meet
7 the tender requirement. First, they argue that lost business opportunities from the original
8 loan not funding as they had intended caused them significant monetary damages. Plaintiffs
9 further argue that those damages, once recovered, could be used to offset the amount they
10 owe on the note as part or all of their tender. However, as this Court has held repeatedly, any
11 such claims against Bank of Elmwood, as of today, are extinguished. Specifically, any
12 claims against Bank of Elmwood are barred by FIRREA and did not pass through to Tri City
13 National Bank following the FDIC transferring the note. Doc. 80 at 4-8. Finally, Plaintiffs
14 have settled with all other Defendants. Doc. 200. Therefore, for purposes of considering a
15 likelihood of success on the merit for the injunction as of today, there is no outstanding
16 possibility of offset apparent to the Court from these claimed loss business damages.
17 Moreover, as the Court indicated at oral argument, the Court finds any such hypothetical
18 potential damages to be too speculative to show an ability to tender for purposes of Plaintiffs
19 being likely to ultimately succeed on the merits.

20 Second, at oral argument, Plaintiffs suggested that they could use the home itself as
21 the collateral to tender. Specifically, Plaintiffs argued that the home is currently valued at
22 \$1,900,000.00 (which Defendants do not dispute). Plaintiffs further argued that if Tri City
23 National Bank would return title to the home to Plaintiffs and release all security interests
24 against the home, Plaintiffs could use the home as collateral to obtain the money to tender
25 the amount previously borrowed (1,700,000.00 (Doc. 29 at 2)) to Tri City National Bank.

26 First, the Court finds this argument to again be too speculative to rise to the level of
27 likelihood of success on the merits. Plaintiffs have offered no evidence other than the
28 argument of their counsel that they could qualify for a loan that is more than 89% of the

1 value of the property and/or that they have the income necessary to qualify for such a large
2 loan.

3 Second, as to the sequencing of rescission, while Plaintiffs are adamant that Tri City
4 National Bank must “perform first” by unwinding the loan and releasing any security interest
5 on the property, the Court finds nothing in *Merritt* that suggests that thereafter Plaintiffs can
6 perform at their leisure. Thus, even if Tri City National Bank must perform first, the Court
7 finds nothing that says Plaintiffs duty to perform is not immediate; in other words, that
8 Plaintiffs would have 30 to 60 days after Tri City National Bank’s performance to (assuming
9 they can) close a loan against the property.

10 Thus, based on the failure of Plaintiffs to allege any concrete information regarding
11 how they could ever meet the tender requirement recognized in *Yamamoto*, the Court finds
12 Plaintiffs are not likely to succeed on the merits.

13 **2. Irreparable Harm**

14 Next, the balance of irreparable harms does not favor Plaintiffs. Plaintiffs have lived
15 in a \$1,900,000.00 home (Doc. 221) since December 2008 without making any rent or
16 mortgage payments (Doc. 29 at 10). Further, this Court returned the bond posted in state
17 court to Plaintiffs. Doc. 213. Finally, Plaintiffs have not alleged any intention to pay the
18 note such that they would be allowed to ultimately retain the property under *Yamamoto*.
19 Therefore, the eviction appears to be only a matter of “when” not “whether” and given that
20 Plaintiffs have had the benefit of the home without payment since December 2008, no
21 equities favor them.

22 Additionally, Plaintiffs final tender argument cuts against their irreparable harm
23 argument. Plaintiffs’ argument that they will be irreparably harmed without an injunction
24 is that this piece of real property is unique and irreplaceable. At oral argument, Plaintiffs
25 argued that they could succeed on the merits because, once the house is returned to them free
26 and clear, they could sell it and use the proceeds to tender. However, if Plaintiffs’ intent is
27 to sell the property immediately to tender to Tri City National Bank, Plaintiffs are not
28 irreparably harmed if Tri City National Bank sells the property and pays itself because in

1 either scenario Plaintiffs would not retain this unique property.

2 **3. Public Interest**

3 Finally, the Court should consider the public interest. Having considered the parties'
4 arguments, the Court does not find the public interest favors either party in this case.

5 **4. Conclusion under *Gribble***

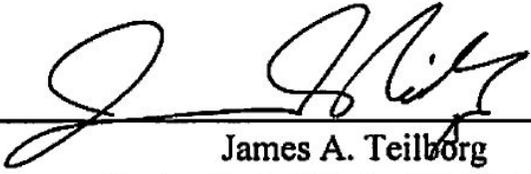
6 Based on the foregoing, the Court finds Plaintiffs have failed to meet the test for an
7 injunction pending appeal on the merits. Accordingly, for this alternative reason, the motion
8 is denied.⁴

9 **IV. Conclusion**

10 Based on the foregoing,

11 **IT IS ORDERED** that Plaintiffs' motion for injunction pending appeal (Doc. 214)
12 is denied.

13 DATED this 30th day of October, 2014.

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17 _____
18 James A. Teilborg
19 Senior United States District Judge
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25 _____
26 ⁴ Tri City National Bank, citing 15 U.S.C. § 1635(f) and *Meyer v. Ameriquest Mortg.*
27 *Co.*, 342 F.3d 899 (9th Cir. 2003), alternatively argued that any TILA right of rescission was
28 extinguished when the property was sold. Because the Court has determined that Plaintiffs
have not meet their burden of establishing that they are entitled to an injunction for the
reasons discussed above, the Court has not considered this alternative argument.