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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

ANTONIO DEL VALLE AND ELSIE)
DEL VALLE,)
)
Plaintiffs,)
vs.)
)
MORTGAGE BANK OF CALIFORNIA,)
et al.,)
)
Defendants.)

No. CV-F-09-1316 OWW/DLB
MEMORANDUM DECISION AND
ORDER DENYING DEFENDANT'S
MOTION TO DISMISS AS TO
CERTAIN CLAIMS, GRANTING
DEFENDANT'S MOTION TO
DISMISS WITH PREJUDICE AS TO
CERTAIN CLAIMS AND WITH
LEAVE TO AMEND AS TO CERTAIN
CLAIMS (Doc. 8), DENYING
DEFENDANT'S MOTION TO
EXPUNGE LIS PENDENS AND
AWARD COSTS AND ATTORNEY'S
FEES WITHOUT PREJUDICE (Doc.
11), AND DIRECTING
PLAINTIFFS TO FILE FIRST
AMENDED COMPLAINT WITHIN 20
DAYS

Before the Court is the motion to dismiss and the motion to
expunge lis pendens and for an award of costs and attorney's fees
filed by Defendant JPMorgan Chase Bank, National Association, as
purchaser of the loans and other assets of Washington Mutual
Bank, FA, from the Federal Deposit Insurance Corporation, acting

1 as Receiver for Washington Mutual Bank and pursuant to its
2 authority under the Federal Deposit Insurance Act, 12 U.S.C. §
3 1821(D), erroneously sued individually as JPMorgan Chase Bank and
4 Washington Mutual Bank.

5 A. MOTION TO DISMISS.

6 1. Governing Standards.

7 "A district court should grant a motion to dismiss if
8 plaintiffs have not pled 'enough facts to state a claim to relief
9 that is plausible on its face.'" *Williams ex rel. Tabiu v. Gerber*
10 *Products Co.*, 523 F.3d 934, 938 (9th Cir.2008), quoting *Bell*
11 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "'Factual
12 allegations must be enough to raise a right to relief above the
13 speculative level.'" *Id.* "While a complaint attacked by a Rule
14 12(b) (6) motion to dismiss does not need detailed factual
15 allegations, a plaintiff's obligation to provide the 'grounds' of
16 his 'entitlement to relief' requires more than labels and
17 conclusions, and a formulaic recitation of the elements of a
18 cause of action will not do." *Bell Atlantic, id.* at 555. A
19 claim has facial plausibility when the plaintiff pleads factual
20 content that allows the court to draw the reasonable inference
21 that the defendant is liable for the misconduct alleged. *Id.* at
22 556. The plausibility standard is not akin to a "probability
23 requirement," but it asks for more than a sheer possibility that
24 a defendant has acted unlawfully, *Id.* Where a complaint pleads
25 facts that are "merely consistent with" a defendant's liability,
26 it "stops short of the line between possibility and plausibility

1 of 'entitlement to relief.'" *Id.* at 557. In *Ashcroft v. Iqbal*,
2 ___ U.S. ___, 129 S.Ct. 1937 (2009), the Supreme Court explained:

3 Two working principles underlie our decision
4 in *Twombly*. First, the tenet that a court
5 must accept as true all of the allegations
6 contained in a complaint is inapplicable to
7 legal conclusions. Threadbare recitations of
8 the elements of a cause of action, supported
9 by mere conclusory statements, do not suffice
10 ... Rule 8 marks a notable and generous
11 departure from the hyper-technical, code-
12 pleading regime of a prior era, but it does
13 not unlock the doors of discovery for a
14 plaintiff armed with nothing more than
15 conclusions. Second, only a complaint that
16 states a plausible claim for relief survives
17 a motion to dismiss ... Determining whether a
18 complaint states a plausible claim for relief
19 will ... be a context-specific task that
20 requires the reviewing court to draw on its
21 judicial experience and common sense ... But
22 where the well-pleaded facts do not permit
23 the court to infer more than the mere
24 possibility of misconduct, the complaint has
25 alleged - but it has not 'show[n]' - 'that
26 the pleader is entitled to relief.'

In keeping with these principles, a court
considering a motion to dismiss can choose to
begin by identifying pleadings that, because
they are no more than conclusions, are not
entitled to the assumption of truth. While
legal conclusions can provide the framework
of a complaint, they must be supported by
factual allegations. When there are well-
pleaded factual allegations, a court should
assume their veracity and then determine
whether they plausibly give rise to an
entitlement to relief.

Immunities and other affirmative defenses may be upheld on a
motion to dismiss only when they are established on the face of
the complaint. See *Morley v. Walker*, 175 F.3d 756, 759 (9th
Cir.1999); *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th
Cir. 1980) When ruling on a motion to dismiss, the court may

1 consider the facts alleged in the complaint, documents attached
2 to the complaint, documents relied upon but not attached to the
3 complaint when authenticity is not contested, and matters of
4 which the court takes judicial notice. *Parrino v. FHP, Inc*, 146
5 F.3d 699, 705-706 (9th Cir.1988).

6 2. First Claim for Relief for Rescission under TILA
7 and Regulation Z and Second Claim for Relief for Violations of
8 TILA.

9 Chase Bank moves to dismiss these claims for relief on
10 various grounds.

11 a. Creditor.

12 Chase Bank asserts that Plaintiffs cannot state a claim
13 against it for violation of the Truth in Lending Act (TILA) or
14 Regulation Z because the Complaint does not allege facts from
15 which it may be inferred that Chase Bank is a "creditor" subject
16 to the requirements of TILA or Regulation Z.

17 15 U.S.C. § 1602(f) provides that "[t]he term 'creditor'
18 refers only to a person who both (1) regularly extends, whether
19 in connection with loans, sales of property or services, or
20 otherwise, consumer credit which is payable by agreement in more
21 than four installments or for which the payment of a finance
22 charge is or may be required, and (2) is the person to whom the
23 debt arising from the consumer credit transaction is initially
24 payable on the face of the evidence of indebtedness or, if there
25 is no such evidence of indebtedness, by agreement." 12 C.F.R. §
26 226.2(17) (Regulation Z) provides:

1 *Creditor* means: (i) A person (A) who
2 regularly extends consumer credit that is
3 subject to a finance charge or is payable by
4 written agreement in more than 4 installments
5 (not including a down payment), and (B) to
6 whom the obligation is initially payable,
7 either on the face of the note or contract,
8 or by agreement when there is no note or
9 contract.

10 To be a "creditor" within the meaning of TILA, both prongs must
11 be satisfied. *In re Patchell*, 336 B.R. 1, 8-9
12 (Bankr.D.Mass.2005).

13 As Plaintiffs respond, Chase Bank is a "creditor" because it
14 is the assignee to Washington Mutual. See 15 U.S.C. § 1641(c):
15 "Any consumer who has the right to rescind a transaction under
16 section 1635 of this title may rescind the transaction as against
17 any assignee of the obligation."

18 Defendant's motion to dismiss the First and Second Claims
19 for Relief on this ground is DENIED.

20 b. Statute of Limitations.

21 Chase Bank moves to dismiss these claims for relief as
22 barred by the one-year statute of limitations set forth in 15
23 U.S.C. § 1640(e): "Any action under this section may be brought
24 ... within one year from the date of the occurrence of the
25 violation." See *Meyer v. Ameriquest Mortg. Co.*, 342 F.3d 899,
26 902 (9th Cir.2003):

 There is some debate on whether the period of
 limitations commences on the date the credit
 contract is executed, see *Wachtel v. West*,
 476 F.2d 1062, 1065 (6th Cir.1973), or at the
 time the plaintiff discovered, or should have
 discovered, the acts constituting the
 violation, see *NLRB v. Don Burgess*

1 *Construction Corp.*, 596 F.2d 378, 382 (9th
2 Cir.1979). But we need not decide this
3 question here, because even under the more
4 expansive *Don Burgess* rule, the one-year
5 period has run. See *Katz v. Bank of*
6 *California*, 640 F.2d 1024, 1025 (9th
7 Cir.1981).

8 The failure to make the required disclosures
9 occurred, if at all, at the time the loan
10 documents were signed. The Meyers were in
11 full possession of all information relevant
12 to the discovery of a TILA violation and a §
13 1640(a) damages claim on the day the loan
14 papers were signed. The Meyers have produced
15 no evidence of undisclosed credit terms, or
16 of fraudulent concealment or other action on
17 the part of Ameriquest that prevented the
18 Meyers from discovering their claim.

19 Here, the Note and Deed of Trust are dated June 16, 2007.

20 Plaintiffs did not file this action until July 24, 2009.

21 Therefore, Chase Bank argues, Plaintiffs' claims for damages for
22 violation of TILA and Regulation Z are time-barred.

23 At the hearing, Plaintiffs conceded that these claims for
24 damages relief under TILA are time-barred by the one-year statute
25 of limitations and cannot be resurrected by the doctrine of
26 equitable tolling.

 Defendant's motion to dismiss the First and Second Claims
for Relief for damages relief under TILA is GRANTED WITH
PREJUDICE.

c. Ability to Tender.

 Chase Bank moves to dismiss these claims for relief because
Plaintiffs have not alleged the ability to tender the balance on
the Note.

 Chase Bank cites, *inter alia*, *Yamamoto v. Bank of New York*,

1 329 F.3d 1167 (9th Cir.2003), *cert. denied*, 540 U.S. 1149 (2004).
2 In *Yamamoto*, a TILA rescission case, the Ninth Circuit held that
3 the trial court has discretion to reorder the sequence of
4 rescission events to assure performance, including by dismissing
5 a case, where it was clear that the plaintiff lacked the ability
6 to effectuate rescission. 329 F.3d at 1173. In *Yamamoto*, the
7 borrowers testified that they could not fulfill TILA's tender
8 requirement. The district court gave them 60 days before
9 dismissing their rescission claim in an attempt to do so. When
10 the borrowers were unable to provide evidence that they could
11 tender the proceeds, the district court granted summary judgment
12 in favor of the lender. The Ninth Circuit affirmed:

13 Tampon argues that the district court could
14 not deny her rescission for failure to pay
15 back loan proceeds without first determining
16 whether TILA was violated, and without
17 recognizing that TILA and Federal Reserve
18 Board Regulation Z implementing it, 12 C.F.R.
19 § 226.23(d), automatically voided BNY's
20 security interest in her property once she
21 exercised her right to rescind. She posits
22 that language added in 1981 to Regulation Z
23 indicates that a court has no discretion to
24 change the substantive provisions of the Act,
25 which is what she contends the court did when
26 it required tender prematurely

27 TILA was enacted in 1968 'to assure a
28 meaningful disclosure of credit terms to that
29 the consumer will be able to compare more
30 readily the various credit terms available to
31 him and avoid the uninformed use of credit.'
32 15 U.S.C. § 1601(a). If required disclosures
33 are not made, the consumer may rescind. See
34 15 U.S.C. § 1635(a). Section 1635(b) governs
35 the return of money or property when a
36 borrower exercises the right to rescind. It
37 provides that the borrower is not liable for
38 any finance or other charge, and that any

1 security interest becomes void upon such a
2 rescission. The statute adopts a sequence of
3 rescission and tender that must be followed
4 unless the court orders otherwise: within
5 twenty days of receiving a notice of
6 rescission, the creditor is to return any
7 money or property and reflect termination of
8 the security interest; when the creditor has
9 met these obligations, the borrower is to
10 tender the property.

11 Section 226.23 of Regulation Z implements §
12 1635(b). It tracks the statute and states:

13 (d) Effects of rescission.

14 (1) When a consumer rescinds a
15 transaction, the security interest
16 giving rise to the right of
17 rescission becomes void and the
18 consumer shall not be liable for
19 any amount, including any finance
20 charge.

21 (2) Within 20 calendar days after
22 receipt of a notice of rescission,
23 the creditor shall return any money
24 or property that has been given to
25 anyone in connection with the
26 transaction and shall take any
action necessary to reflect the
termination of the security
interest.

(3) If the creditor has delivered
any money or property, the consumer
may retain possession until the
creditor has met its obligation
under paragraph (d) (2) of this
section. When the creditor has
complied with that paragraph, the
consumer shall tender the money or
property to the creditor

(4) The procedures outlined in
paragraphs (d) (2) and (3) of this
section may be modified by court
order.

12 C.F.R. § 226.23.

1 TILA's provision permitting a court to modify
2 procedures was added in 1980 as part of the
3 Truth in Lending Simplification and Reform
4 Act ... These changes followed in the wake of
5 decisions by this court and others which held
6 that the statute need not be interpreted
7 literally as always requiring the creditor to
8 remove its security interest prior to the
9 borrower's tender of proceeds.

10 *Id.* at 1169-1171. Yamamoto cited *Palmer v. Wilson*, 502 F.2d 860,
11 862-863 (9th Cir.1974):

12 Since *Palmer* we have recognized that in
13 applying TILA, 'a trial judge ha[s] the
14 discretion to condition rescission on tender
15 by the borrower of the property he has
16 received from the lender.' ... As we
17 explained, whether a decree of rescission
18 should be conditional depends upon 'the
19 equities present in a particular case, as
20 well as consideration of the legislative
21 policy of full disclosure that underlies the
22 Truth in Lending Act and the remedial-penal
23 nature of the private enforcement provisions
24 of the Act.' ... Indeed, in *LaGrone* we held
25 that rescission *should be* conditioned on
26 repayment of the amounts advanced by the
27 lender ... We noted that the TILA violations
28 there were not egregious (failure to disclose
29 an acceleration clause and amount financed in
30 the broker's statement, and to delineate
31 additional data from mandatory data), and
32 that the equities favored the creditor who
33 would otherwise have been left in an
34 unsecured position in the borrower's
35 intervening bankruptcy

36 *Id.* at 1171. Yamamoto cited *Semar v. Platte Valley Federal*
37 *Savings & Loan Association*, 791 F.2d 699, 705-706 (9th Cir.1986),
38 that the courts have no discretion to alter TILA's substantive
39 provisions:

40 Trying to fit within *Semar*, Tampon argues
41 that subsection (d)(4) of Regulation Z is a
42 substantive provision that does not allow for
43 modification of (d)(1) - the subsection that

1 provides for automatic voiding of BNY's
2 security interest upon rescission - because
3 (d)(4) only permits a court to order
4 modification of the procedures set out in
5 subsections (d)(2) and (d)(3). While it is
6 true that (d)(4) confers discretion to modify
7 (d)(2) and (d)(3), not (d)(1), the argument
8 only goes so far as it begs the question of
9 when a transaction is 'rescinded.' For
10 Tampon to prevail, rescission must be
11 accomplished automatically upon her decision
12 to rescind, communicated by a notice of
13 rescission, without regard to whether the law
14 permits her to rescind on the grounds
15 asserted. We believe this makes no sense
16 when, as here, the lender contests the ground
17 upon which the borrower rescinds.

18 If BNY had acquiesced in Tampon's notice of
19 rescission, then the transaction would have
20 been rescinded automatically, thereby causing
21 the security interest to become void and
22 triggering the sequence of events laid out in
23 subsections (d)(2) and (d)(3). But here, BNY
24 contested the notice and produced evidence
25 sufficient to create a triable issue of fact
26 about compliance with TILA's disclosure
requirements. In these circumstances, it
cannot be that the security interest vanishes
immediately upon the giving of notice.
Otherwise, a borrower could get out from
under a secured loan simply by *claiming* TILA
violations, whether or not the lender has
actually committed any. Rather, under the
statute and the regulation, the security
interest '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.

...

Thus, a court may impose conditions on
rescission that assure that the borrower
meets her obligations once the creditor has
performed its obligations. Our precedent is
consistent with the statutory and regulatory
regime of leaving courts free to exercise
equitable discretion to modify rescission
procedures. This also comports with

1 congressional intent that 'the courts, at any
2 time during the rescission process, may
3 impose equitable conditions to insure that
4 the consumer meets his obligations after the
5 creditor has performed his obligations as
6 required by the act.'

7
8 As rescission under § 1635(b) is an on-going
9 process consisting of a number of steps,
10 there is no reason why a court that may alter
11 the sequence of procedures after deciding
12 that rescission is warranted, may not do so
13 before deciding that rescission is warranted
14 when it finds that, assuming grounds for
15 rescission exist, rescission still could not
16 be enforced because the borrower cannot
17 comply with the borrower's rescission
18 obligations no matter what. Such a decision
19 lies within the court's equitable discretion,
20 taking into consideration all the
21 circumstances including the nature of the
22 violations and the borrower's ability to
23 repay the proceeds. If, as was the case
24 here, it is clear from the evidence that the
25 borrower lacks capacity to pay back what she
26 has received (less interest, finance charges,
etc.), the court does not lack discretion to
do before trial what it could do after.

Whether the call is correct must be
determined on a case-by-case basis, in light
of the record adduced. Here, for example, at
oral argument Tampon pressed upon us the
possibility that borrowers could refinance or
sell the property between the time a court
grants rescission and when pay back is
required, yet to do so they must have an
order in hand. We express no opinion on
this, for there is nothing at all to this
effect in the record. We simply decide that
in the circumstances of this case, the court
did not lack discretion to modify the
sequence of rescission events to assure that
Tampon could repay the loan proceeds before
going through the empty (and expensive)
exercise of a trial on the merits.

Id. at 1171-1173. See also *Ing Bank v. Korn*, 2009 WL 1455488 at
*1 (W.D.Wash.2009) (granting defendant's motion to dismiss TILA

1 rescission claim in reliance on citation to *Yamamoto* discussion
2 of judicial discretion to condition rescission on tender); *Boles*
3 *v. Merscorp, Inc.*, 2009 WL 650631 at *1 (C.D.Cal.2009) (denying
4 plaintiff's motion for reconsideration of its prior order to
5 plaintiff because, in the absence of a demonstrated ability to
6 tender, plaintiff has not demonstrated a likelihood of success on
7 the merits of its TILA claim); *Garza v. American Home Mortg.*,
8 2009 WL 188604 at *5 (E.D.Cal.2009) (observing that *Yamamoto* held
9 that a court may require borrowers to prove the ability to repay
10 a loan to plead rescission, and granting defendant's motion to
11 dismiss TILA rescission claim in light of complaint's failure to
12 allege ability to tender, since "[r]escission is an empty remedy
13 without [plaintiff]'s ability to pay back what she has
14 received."); *Alcaraz v. Wachovia Mortg., FSB*, 2009 WL 160308 at *
15 4 (E.D.Cal.2009) (refusing to dismiss plaintiff's rescission
16 claims under TILA even though the complaint failed to allege the
17 ability to tender because the court was troubled by the assertion
18 of a factual issue to defeat plaintiff's rescission claim);
19 *American Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 821 (4th
20 Cir.2007) (affirming grant of summary judgment in favor of
21 defendant on plaintiffs' TILA claims because "[o]nce the trial
22 judge ... determined that [plaintiffs] were unable to tender the
23 loan proceeds, the remedy of unconditional rescission was
24 inappropriate."); *but see Ing Bank v. Ahn*, 2009 WL 2083965 at * 2
25 (N.D.Cal.2009) :

26 Yet *Yamamoto* did not hold that a district

1 court must, as a matter of law, dismiss a
2 case if the ability to tender is not pleaded.
3 Rather, all of these cases indicate that it
4 is within the trial court's discretion to
5 choose to dismiss where the court concludes
6 that the party seeking rescission is
7 incapable of performance.

8 Plaintiffs refer to Exhibit 8 to the Complaint, a letter to
9 Washington Mutual Bank from Plaintiffs' counsel, dated December
10 11, 2008:

11 I represent the Consumer concerning the loan
12 transaction which they entered into with
13 Washington Mutual Bank on June 13, 2007. I
14 have been authorized by my client to rescind
15 this transaction and hereby exercise that
16 right pursuant to the Federal Truth in
17 Lending Act, 15 U.S.C. § 1635, Regulation Z §
18 226.23. In addition, the Consumer reserves
19 all rights to raise additional or alternative
20 grounds for rescission under state or federal
21 law.

22 The Truth in Lending disclosure statement
23 received by my clients was defective in a
24 number of ways. As a result, my clients'
25 right of rescission has been extended for
26 three years from the date of the transaction.
See 15 U.S.C. 1635(f). The material defects
include but are not limited to the following:

(a) The broker's fee was not
included in the finance charge.

(b) As a result of the failure to
include the broker's fee in the
finance charge, the prepaid finance
charge and finance charge are
understated and the APR is also
understated.

(c) The disclosed payments do not
equal the total of payments.

(d) Loan Origination Fee.

(e) Settlement Charges.

1 My clients wish to keep their home. They
2 would like to discuss tender arrangements for
3 the amount due (the amount financed less all
4 loan charges and costs associated with the
5 loan and all payments made to date) with you
6 once you have effected rescission. Please
7 provide me with an itemization of the loan
8 disbursements, the loan charges, the current
9 principal balance, and all payments received
10 from my client [sic], so that we may
11 determine the exact amount needed for tender.

12 The security interest held by Washington
13 Mutual Bank is void upon mailing of this
14 notice. See 15 U.S.C. § 1635; Regulation Z §
15 226.23. Pursuant to Regulation Z, you have
16 twenty days after receipt of this notice of
17 rescission to return to my clients all monies
18 paid and to take all action necessary or
19 appropriate to reflect termination of the
20 security interest.

21 We are prepared to discuss a tender
22 obligation, should it arise, and satisfactory
23 ways in which my clients may meet this
24 obligation. Please be advised that if you do
25 not cancel the security interest and return
26 all consideration paid by our client within
20 days of receipt of this letter, you will
be responsible for actual and statutory
damages pursuant to 15 U.S.C. § 1640(a).

17 However, neither in this letter or in the Complaint do Plaintiffs
18 represent they have the ability to tender the loan amount, less
19 costs, fees and payments. The prayer for relief in the Complaint
20 states:

21 10. Order that, if Defendants fail to
22 further respond lawfully to Plaintiffs'
23 notice of rescission, Plaintiffs have no duty
24 to tender, but in the alternative, if tender
25 is required, determine the amount of the
26 tender obligation in light of Plaintiffs'
claims, and order Defendants to accept tender
on reasonable terms over a period of time.

Plaintiffs, noting the discretion in *Yamamoto*, contend:

1 [I]n the case at bar, Plaintiffs cannot
2 tender an exact and definite amount since
3 Defendant unfairly failed to provide them
4 'with an itemization of the loan
5 disbursements, the loan charges, the current
6 principal balance, and all payments received
7 ... so that we may determine the exact amount
8 needed for tender' despite Plaintiffs'
9 unequivocal and clear demand. Because of the
10 detrimental act of Defendant JP Morgan,
11 Plaintiffs are deemed to have substantially
12 complied with the offer to tender.

13 Plaintiffs are missing the point; the issue is whether, if
14 the alleged violations of TILA are assumed to be true, do
15 Plaintiffs have the ability to tender the amount due on the loan
16 (less finance charges paid, etc.). It is certainly inferable
17 from Exhibit 8 and the prayer in the Complaint that Plaintiffs do
18 not have that ability. Plaintiffs cite no authority that their
19 tender can be "on reasonable terms over a period of time." See
20 *American Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 821 (4th
21 Cir.2007):

22 The equitable goal of rescission under TILA
23 is to restore the parties to the 'status quo
24 ante.' ... Clearly, it was not the intent of
25 Congress to reduce the mortgage company to an
26 unsecured creditor or to simply permit the
debtor to indefinitely extend the loan
without interest.

27 Defendants' motion to dismiss the First and Second Claims
28 for Relief is GRANTED WITH LEAVE TO AMEND. Plaintiffs shall
29 plead facts from which it may be ascertained, consistent with
30 Rule 11, Federal Rules of Civil Procedure, that they have the
31 present ability to tender the loan payments.

32 3. Third Claim for Relief for Violations of the Real

1 Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 et
2 seq.; Fourth Claim for Relief for Violation of the Fair
3 Debt Collection Practices Act ("FDCPA"); Fifth Claim for Relief
4 for Violation of California Business and Professions Code § 17200
5 et seq.

6 Pursuant to Plaintiffs' concession at the hearing, the
7 Third, Fourth and Fifth Claims for Relief are DISMISSED WITH
8 PREJUDICE.

9 4. Sixth Claim for Relief for Quiet Title.

10 Chase Bank moves to dismiss the Sixth Claim for Relief for
11 quiet title.

12 "To state a claim for quiet title, plaintiff must include
13 the following in her complaint: '(a) A description of the
14 property that is the subject of the action; (b) The title of the
15 plaintiff as to which a determination under this chapter is
16 sought and the basis of the title; (c) The adverse claims to the
17 title of the plaintiff against which a determination is sought;
18 (d) The date as of which the determination is sought; (e) A
19 prayer for the determination of the title of the plaintiff
20 against the adverse claims.'" *Wong v. First Magnus Fin. Corp.*,
21 2009 WL 2580353 at *4 (N.D.Cal.2009), citing California Code of
22 Civil Procedure § 761.020. As explained in *Gaitan v. Mortgage*
23 *Electronic Registration Systems*, 2009 WL 3244729 at *12
24 (C.D.Cal.2009):

25 A basic requirement of an action to quiet
26 title is an allegation that plaintiffs 'are
the rightful owners of the property, i.e.,

1 that they have satisfied their obligations
2 under the Deed of Trust.' *Kelley v. Mortgage*
3 *Elec. Reg. Sys., Inc. . . .*, 2009 WL 2475703,
4 at *7 (N.D.Cal. Aug.12, 2009). '[A]
5 mortgagor cannot quiet his title against the
6 mortgagee without paying the debt secured.'
7 *Watson v. MTC Financial, Inc. . . .*, 2009 WL
8 2151782 (E.D.Cal.Jul.17,2009), quoting
9 *Shimpones v. Stickney*, 219 Cal.637, 649
10 (1934).

11 Here, Plaintiffs do not allege that they have paid the loan
12 or tendered the unpaid amount of the loan to Defendants.

13 Defendant's motion to dismiss the Sixth Claim for Relief is
14 GRANTED WITH LEAVE TO AMEND. Plaintiffs shall plead facts from
15 which it may be ascertained, consistent with Rule 11, Federal
16 Rules of Civil Procedure, that they have the present ability to
17 tender the loan payments.

18 **B. MOTION TO EXPUNGE LIS PENDENS AND AWARD OF COSTS AND**
19 **ATTORNEYS' FEES.**

20 Chase Bank moves to expunge the lis pendens recorded by
21 Plaintiffs on the property.

22 California Code of Civil Procedure § 405.30 provides:

23 At any time after notice of pendency of
24 action has been recorded, any party . . . may
25 apply to the court in which the action is
26 pending to expunge the notice . . . Evidence or
27 declarations may be filed with the motion to
28 expunge the notice. The court may permit
29 evidence to be received in the form of oral
30 testimony, and may make any orders it deems
31 just to provide for discovery by any party
32 affected by a motion to expunge the notice.
33 The claimant shall have the burden of proof
34 under Sections 405.31 and 405.32.

35 California Code of Civil Procedure § 405.31 provides:

36 In proceedings under this chapter, the court

1 shall order the notice expunged if the court
2 finds that the pleading on which the notice
3 is based does not contain a real property
4 claim. The court shall not order an
5 undertaking to be given as a condition of
6 expunging the notice where the court finds
7 the pleading does not contain a real property
8 claim.

9 The Code Comment to Section 405.31 states:

10 1. This section concerns pleading. Prior
11 law became confused because of failure of the
12 courts to distinguish between allegations
13 (pleadings) and evidence. This section
14 concerns judicial examination of allegations
15 only. Judicial examination of factual
16 evidence is separately governed by CCP
17 405.32.

18 2. This section preserves and clarifies
19 existing law. Existing law is clear that a
20 lis pendens may not be maintained of record
21 if the pleadings filed to support the lis
22 pendens does not state a claim which affects
23 title or right to possession. This section
24 similarly mandates expungement if the
25 pleading does not contain a real property
26 claim. The analysis required by this section
is analogous to, but more limited than, the
analysis undertaken by a court on a demurrer.
Rather than analyzing whether the pleading
states any claim at all, as on a general
demurrer, the court must undertake the more
limited analysis of whether the pleading
states a real property claim.

A "real property claim" is defined in California Code of Civil
Procedure § 405.4 as "the cause or causes of action in a pleading
which would, if meritorious, affect (a) title to, or the right to
possession of, specific real property or (b) the use of an
easement identified in the pleading, other than an easement
obtained pursuant to statute by any regulated public utility."

As explained in *BGJ Associates, LLC v. Superior Court*, 75

1 Cal.App.4th 952, 967 (1999):

2 The statute provides no further definition of
3 'affect ... title to, or the right to
4 possession of,' specific real property, nor
5 has case law provided any abstract definition
6 ... Case law has determined that certain
7 types of actions clearly do, or clearly do
8 not, affect title or possession. ... At one
9 extreme, '[a] buyer's action for specific
10 performance of a real property purchase and
11 sale agreement is a classic example of an
12 action in which a lis pendens is both
13 appropriate and necessary.' ... At the other
14 extreme, an action for money only, even if it
15 relates in some way to specific real
16 property, will not support a lis pendens.

17 Chase Bank argues that the Complaint does not assert a real
18 property claim sufficient under the law to support the recording
19 of a lis pendens:

20 PLAINTIFFS used the Lis Pendens as a strong-
21 arm tactic to attempt to manufacture a
22 monetary damage claim. California courts
23 have repeatedly disapproved of the use of Lis
24 Pendens for this purpose. Instead, courts
25 have found real property claims, and thus
26 properly-recorded Lis Pendens, in cases
involving the fraudulent transfer of
property, cases where the prospective
purchasers did not obtain a contract for sale
of a property, and similar cases where the
plaintiff asserts the right to maintain title
to or possession of the property. This case
is very different.

The essence of PLAINTIFFS's Complaint is that
Defendants had no right to initiate or carry
out the nonjudicial foreclosure process and
that Defendants have no legal rights
associated with the Subject Property.
However, as discussed in JPMORGAN's Motion to
Dismiss, PLAINTIFFS not only have little
likelihood of success on the merits, but have
failed to state any cause of action for which
relief may be granted.

26 Because Chase Bank relies on Section 405.31, the only issue

1 to be resolved in this motion is whether the Complaint contains a
2 "real property claim." 5 Miller & Starr, Cal. Real Estate (3rd
3 ed.) § 11:150, lists actions involving a "real property claim,"
4 including:

5 (1) An action for specific performance of a
6 contract for the sale of real property where
7 the claimant seeks to acquire the title to
8 the property.

9 (2) An action to rescind a contract for the
10 purchase or sale of real property.

11 (3) An action to cancel a deed or other
12 instrument affecting the rights of ownership
13 or possession of real property.

14 (4) An action to set aside a fraudulent
15 conveyance or conveyance as a fraud on
16 creditors, at least where the action is
17 brought for the recovery of specific real
18 property transferred in fraud of creditors.

19 (5) An action to enforce a lien on real
20 property, including an action to foreclose a
21 deed of trust or mortgage by judicial
22 proceedings

23 (6) Any action involving a right to
24 possession of real property, including an
25 action to cancel or enforce a lease, for
26 unlawful detainer, or for ejectment.

A lis pendens must be recorded in an action to quiet title to
real property. *Id.* Here, the Complaint contains a claim for
quiet title; therefore, it appears that the lis pendens is
mandatory.

Because leave to amend has been granted with respect to
Plaintiffs' TILA rescission claim and quiet title claim,
resolution of the motion to expunge lis pendens is DENIED WITHOUT
PREJUDICE. If Plaintiffs fail to timely file a First Amended

1 Complaint, Defendant's motion will be granted. If Plaintiffs
2 file a timely First Amended Complaint, Defendant may, if
3 appropriate, re-notice the motion to expunge lis pendens for
4 hearing.

5
6 CONCLUSION

7 For the reasons stated:

8 1. Defendant's motion to dismiss is DENIED IN PART, GRANTED
9 IN PART WITH PREJUDICE, AND GRANTED IN PART WITH LEAVE TO AMEND.

10 2. Plaintiffs shall file a First Amended Complaint pursuant
11 to the rulings made herein within twenty (20) calendar days of
12 electronic service of this Memorandum Decision and Order.
13 Failure to timely comply will result in the dismissal of this
14 action and expungement of Plaintiffs' lis pendens on the subject
15 property.

16 IT IS SO ORDERED.

17 Dated: November 10, 2009

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE