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

STEVE LOPEZ and CARMEN LOPEZ, Case No. 2:09-CV-01510-JAM-DAD
Plaintiffs, ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS
v.

WACHOVIA MORTGAGE; WORLD SAVINGS BANK; COMSTOCK MORTGAGE; DAVID MENDOZA; ADRIAN DEL RIO and DOES 1-20 inclusive,
Defendants.

_____ /

This matter comes before the Court on Defendant Wachovia Mortgage's, formerly known as World Savings Bank, ("Defendant's") Motion to Dismiss Plaintiffs' Steve Lopez and Carmen Lopez' ("Plaintiffs'") First Amended Complaint ("FAC"), for failure to state a claim pursuant to Federal Rule of Civil Procedure

1 12(b)(6). Plaintiffs oppose the motion.¹ Defendant also brings a
2 Motion to Strike Portions of the FAC, pursuant to Federal Rule
3 of Civil Procedure 12(f), which Plaintiffs oppose. Both
4 Plaintiffs and Defendant request the court take judicial notice
5 of certain documents related to the loan transaction. Plaintiffs
6 dispute Defendant's request for judicial notice of one document.
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10 I. FACTUAL AND PROCEDURAL BACKGROUND

11 In June 2006, Plaintiffs obtained an adjustable rate
12 mortgage loan to refinance their residential property located at
13 10398 Christo Way, Elk Grove, CA ("subject property"). The terms
14 of the loan were memorialized in the promissory Note which was
15 secured by a Deed of Trust on the subject property. The lender
16 was World Savings Bank, renamed and now known as Wachovia.
17 Plaintiffs allege that they did not receive required
18 disclosures, that disclosures were not clear, and that the
19 mortgage brokers (not parties to this motion), misled them
20 regarding the terms of the loan.
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22 Plaintiffs defaulted on the loan in February 2009.
23 Accordingly, in March 2009, Defendant notified Plaintiffs of its
24 intent to foreclose. In April 2009, Plaintiffs sent Defendant a
25 Qualified Written Request ("QWR") under the Real Estate
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28 ¹This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 78-230(h).

1 Settlement Procedures Act, ("RESPA"), 12 U.S.C. §2605 et seq.,
2 including a demand to rescind the loan under a provision of the
3 Truth in Lending Act, ("TILA"), 15 U.S.C. §1601, et seq.
4 Plaintiffs bring the present lawsuit alleging violations of
5 state and federal law.
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7 On October 15, 2009 the Court granted in part and denied in
8 part a Motion to Dismiss the FAC filed by Wachovia Mortgage's
9 co-defendants in this action. (Docket #39) In response to the
10 Court's Order, Plaintiffs filed a Second Amended Complaint.
11 (Docket #40) For the reasons set forth below, Plaintiffs are
12 ordered to file a Third Amended Complaint within twenty (20)
13 days of the date of this Order.
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15 II. OPINION

16 A. Legal Standard

17 A party may move to dismiss an action for failure to state a
18 claim upon which relief can be granted pursuant to Federal Rule
19 of Civil Procedure 12(b)(6). In considering a motion to dismiss,
20 the court must accept the allegations in the complaint as true
21 and draw all reasonable inferences in favor of the plaintiff.
22 Sheuer v. Rhodes, 416 U.S. 232, 236 (1975), overruled on other
23 grounds by Davis v. Sherer, 468 U.S. 183 (1984); Cruz v. Beto,
24 405 U.S. 319, 322 (1972). Assertions that are mere "legal
25 conclusions," however, are not entitled to the assumption of
26 truth. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1950 (2009), citing
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1 Bell Atl. Corp v. Twombly, 550 U.S. 544, 555 (2007). To survive
2 a motion to dismiss, a plaintiff needs to plead "enough facts to
3 state a claim to relief that is plausible on its face." Twombly,
4 550 U.S. at 570. Dismissal is appropriate where the plaintiff
5 fails to state a claim supportable by a cognizable legal theory.
6 Balistreri v. Pacifica Police Dep't, 901 F. 2d 696, 699 (9th
7 Cir. 1990).

9 Upon granting a motion to dismiss, a court has discretion to
10 allow leave to amend the complaint pursuant to Federal Rule of
11 Civil Procedure 15(a). "Absent prejudice, or a strong showing of
12 any [other relevant] factor[], there exists a presumption under
13 Rule 15(a) in favor of granting leave to amend." Eminence
14 Capital, L.L.C. v. Aspeon, Inc., 316 F. 3d 1048, 1052 (9th Cir.
15 2003). "Dismissal with prejudice and without leave to amend is
16 not appropriate unless it is clear . . . that the complaint
17 could not be saved by amendment." Id. Accordingly, a court
18 should grant leave to amend the Complaint unless the futility of
19 amendment warrants dismissing a claim with prejudice.

22 In general, a court may not consider materials other than the
23 facts alleged in the complaint when ruling on a motion to
24 dismiss. Anderson v. Angelone, 86, F. 3d 932, 934 (9th Cir.
25 1996). The court may, however, consider additional materials if
26 the plaintiff has alleged their existence in the complaint and
27 their authenticity is not disputed. See Branch v. Tunnell, 14 F.
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1 3d 449, 454 (9th Cir. 1994), overruled on other grounds by
2 Galbraith v. County of Santa Clara, 307 F. 3d 1119 (9th Cir.
3 2002). Here, Plaintiffs referenced various loan documents in the
4 FAC, which are included in Plaintiffs' and Defendant's requests
5 for judicial notice. Plaintiffs dispute the authenticity of one
6 document in Defendant's request for judicial notice. (Request
7 for Judicial Notice, Ex. E) Accordingly, the Court has
8 considered all of the documents except Defendant's Exhibit E.
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12 B. Federal Causes of Action

13 1. Violation of the Truth in Lending Act, First Cause of Action

14 Plaintiffs allege that Defendant violated the Truth in
15 Lending Act, ("TILA"), 15 U.S.C. §1601 et seq., and seek damages
16 and rescission. Defendant's alleged violations include failing
17 to provide required disclosure, failing to make required
18 disclosure clearly and conspicuously in writing, failing to
19 timely deliver to Plaintiffs required notices, placing terms
20 prohibited by TILA into the transaction, and failing to disclose
21 all finance charge details.
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24 An action for damages under TILA must be brought within one
25 year of the violation. 8 U.S.C. §1640(e). A TILA violation
26 occurs on "the date of consummation of the transaction," King v.
27 California, 784 F. 2d 910, 915 (9th Cir. 1986), and
28 "consummation" means "the time that a consumer becomes

1 contractually obligated on a credit transaction." 12 C.F.R.
2 §226(a)(13). Accordingly, Defendant argues that the claim for
3 damages is time barred. The doctrine of equitable tolling,
4 however, may "suspend the limitations period until the borrower
5 discovers or had reasonable opportunity to discover the fraud or
6 nondisclosures that form the basis of the TILA action." King,
7 784 F. 2d at 915.

9 Here, Plaintiffs consummated their loan in June 2006, but
10 their complaint was not filed until May 25, 2009, well over a
11 year after the consummation of the transaction. The FAC alleges
12 that "The misrepresentations and allegations stated herein were
13 all discovered within the past year such that any applicable
14 statutes of limitations are extended or should be extended
15 pursuant to the equitable tolling doctrine or other equitable
16 principles." FAC ¶47. Beyond this conclusory statement, the FAC
17 does not contain any relevant dates or similar information to
18 provide a basis from which to allege equitable tolling. See also
19 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) ("Threadbare
20 recitals of the elements of a cause of action, supported by mere
21 conclusory statements, do not suffice"). Accordingly,
22 Plaintiffs' TILA claim for damages is dismissed, with leave to
23 amend.

24 Plaintiffs also bring a claim for rescission under TILA.
25 Plaintiffs contends that as a result of Defendant's failure to
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1 provide the required disclosures, Plaintiffs have a continuing
2 right to rescind the loan under TILA. Defendant argues that
3 Plaintiffs' claim for rescission should be dismissed because
4 Plaintiffs do not allege their ability to tender the full amount
5 of the loan.
6

7 The Ninth Circuit has held that rescission under TILA
8 "should be conditioned on repayment of the amounts advanced by
9 the lender." Keen v. American Home Mortgage Servicing Inc. et
10 al., 2009 WL 3380454 at *4 (E.D. Cal. Oct. 21, 2009) (quoting
11 Yamamoto v. Bank of N.Y., 329 F. 3d 1167, 1170 (9th Cir. 2003)).
12 Additionally, the Ninth Circuit has explained that prior to
13 ordering rescission based on a lender's alleged TILA violations,
14 a court may require borrowers to prove ability to repay loan
15 proceeds, and "there is no reason why a court that may alter the
16 sequence of procedures after deciding that rescission is
17 warranted, may not do so before deciding that rescission is
18 warranted. . . the court does not lack discretion to do before
19 trial what it could do after." Garza v. American Home Mortgage,
20 2009 WL 188604 at *4(E.D. Cal. Jan. 27, 2009)(quoting Yamamoto,
21 329 F. 3d at 1173).
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25 The court in Keen noted that a number of California
26 district courts have required plaintiffs to plead facts
27 demonstrating ability to tender the loan principal in order to
28 withstand a 12(b)(6) motion to dismiss and proceed with a claim

1 for rescission under TILA. Id. at *4-5. (Citing Garza, 2009 WL
2 188604; Serrano v. Sec. Nat'l Mortg Co., 2009 U.S. Dist. LEXIS
3 71725 (S.D. Cal. Aug. 14, 2009); Pesayco v. World Say Inc., 2009
4 U.S. Dist. LEXIS 73299 (C.D. Cal. July 29, 2009).

5
6 Here, Plaintiffs' claim under TILA for rescission fails
7 because the FAC contains no allegations that Plaintiffs are able
8 to tender the full amount of the loan principal. Accordingly,
9 Plaintiffs' claim for rescission under TILA is dismissed, with
10 leave to amend.
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13 2. Violation of the Real Estate Settlement Procedures Act,
14 Fourth Cause of Action

15 Plaintiffs allege that Defendant violated RESPA, 12 U.S.C.
16 §2605 et seq., by failing to make correct disclosure
17 requirements, failing to respond to Plaintiffs' QWR, and
18 "engaging in a pattern or practice of non-compliance with the
19 requirements of the mortgage servicer provisions as set forth in
20 12 U.S.C. §2605." FAC 83. Defendant argues that Plaintiffs
21 failed to state a claim under RESPA because the FAC did not
22 specify what provision of RESPA was violated. In the Opposition,
23 Plaintiffs allege violation of section 2605(e)(2), (failure to
24 respond to the QWR), violation of 2607 (receiving kickbacks) and
25 violation of 2603(b) (failure to provide an itemized list of
26 charges before closing).
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1 There is no private right of action for violations of
2 §2603(b). "RESPA provides for a private right of action for
3 claims brought under sections 2605, 2507 and 2608 only."
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5 Brittain v. Indymac Bank, FSB, 2009 WL 2997394 at *2 (N.D. Cal.
6 Sept. 16, 2009). Neither sections 2605, 2607 or 2608 pertain to
7 disclosure requirements at closing, and courts have refused to
8 infer a private right of action under other sections of RESPA.
9 Id. Accordingly, Defendant's motion to dismiss with respect to
10 the section 2603(b) claim is GRANTED WITH PREJUDICE.
11

12 Additionally, the Court will not consider the new
13 allegations raised in the Opposition regarding kickbacks in
14 violation of §2607. "The focus of any Rule 12(b)(6) dismissal. .
15 . is the complaint. This precludes the consideration of new
16 allegations that may be raised in plaintiff's opposition to a
17 motion to dismiss brought pursuant to Rule 12(b)(6)." Cordell v.
18 Tilton, 515 F. Supp. 2d 1114, 1128 (S.D. Cal. 2007)(internal
19 citations omitted).
20

21 However, Plaintiffs have stated a claim for violation of
22 section 2605(e)(2), and allege damages resulting from this
23 violation. 12 U.S.C. §2614 provides a three year statute of
24 limitations for violations of §2605. The alleged violation
25 occurred following Plaintiff's April 2009 QWR, thus the action
26 is not time barred. Accordingly, Defendant's motion to dismiss
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1 Plaintiffs' claim for violation of RESPA section 2605(e)(2) and
2 damages is DENIED.

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5 C. State Law Claims

6 1. Second, Third, Fifth, Sixth, Seventh, Eighth and Ninth Causes
7 of Action

8 Plaintiffs bring seven state law claims: Violation of
9 California Rosenthal Act, Negligence, Breach of Fiduciary Duty,
10 Fraud, Violation of California Business & Professions Code
11 §17200, et seq., Breach of Contract and Breach of Implied
12 Covenant of Good Faith and Fair Dealing. Defendant is a
13 federally regulated savings bank, subject to the regulations of
14 the Office of Thrift Supervision ("OTS") and operated under the
15 laws of the Home Owner's Loan Act, 12 U.S.C. §1461, et seq.
16 ("HOLA"). Therefore, Defendant argues that all of Plaintiffs'
17 state law claims are preempted by HOLA.

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20 Through HOLA, Congress gave the OTS broad authority to
21 issue regulations governing federal savings associations. 12
22 U.S.C. §1464. Furthermore, 12 C.F.R. §560.2 sets forth
23 regulations governing OTS preemption. Section 560.2(a) states
24 that "OTS hereby occupies the entire field of lending regulation
25 for federal savings associations...". Section 560.2(b) lists
26 the numerous areas of state law that are preempted, including
27 all state laws that impose requirements on federal savings banks
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1 regarding terms of credit, interest rates, amortization,
2 payments due, loan-related fees, disclosures and advertising,
3 and the processing, origination, and servicing of mortgages.
4 Additionally, section 560.2(c) provides that state contract,
5 commercial, real property and tort law are not preempted, "to
6 the extent that they only incidentally affect the lending
7 operations of federal savings associations or are otherwise
8 consistent with the purposes [of the regulations]." Although it
9 is generally presumed that Congress does not intend to preempt
10 state law absent a clear manifestation of intent to the
11 contrary, that presumption is not applicable to the field of
12 lending regulation of federal savings associations. Naulty v.
13 Greenpoint Mortgage Funding, Inc., 2009 WL 2870620 at *3 (N.D.
14 Cal. Sept. 3, 2009)(citing Silvas v. E*Trade Mortgage Corp., 514
15 F. 3d 1001,1004 (9th Cir. 2008)).

19 OTS set out a three step process for determining preemption
20 under HOLA. "When analyzing the status of state laws under
21 §560.2, the first step will be to determine whether the type of
22 law in question is listed in paragraph (b). If so, the analysis
23 will end there; the law is preempted. If the law is not covered
24 by paragraph (b), the next question is whether the law affects
25 lending. If it does, then, in accordance with paragraph (a), the
26 presumption arises that the law is preempted. This presumption
27 can be reversed only if the law can clearly be shown to fit
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1 within the confined of paragraph (c). For these purposes,
2 paragraph (c) is intended to be interpreted narrowly. Any doubt
3 should be resolved in favor of preemption." OTS, Final Rule, 61
4 Fed. Reg. 50951, 50966-67 (Sept. 30, 1996). This agency
5 interpretation of its own regulation is controlling. Silvas 514
6 F. 3d at 1005 (internal citations omitted).

8 Applying this three step test to Plaintiffs' state law
9 claims, all seven claims are preempted by HOLA because each
10 cause of action is based upon allegations pertaining to
11 Defendant's lending operations. Plaintiffs make allegations
12 regarding the terms of credit provided by Defendant, disclosures
13 that were or were not provided by Defendant, Defendants'
14 underwriting standards, and Defendant's marketing and servicing
15 of the loans. "These activities are matters committed by
16 Congress to regulation by a federal agency." Naulty 2009 WL
17 2870620 at *4 (holding that state law claims for negligence,
18 breach of contract, breach of fiduciary duty, fraud, and breach
19 of the state deceptive advertising and unfair business practice
20 laws were preempted by HOLA). Accordingly, the Court dismisses
21 with prejudice the second, third, fifth, sixth, seventh, eighth
22 and ninth state law causes of action.
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1 D. Motion to Strike

2 Defendant's Motion to Strike argues that the Court should strike
3 references to punitive damages, emotional distress damages and
4 attorney's fees contained in the FAC. Nearly all of the
5 paragraphs that Defendant moves to strike pertain to the state
6 law causes of action which the Court has dismissed with
7 prejudice as preempted by HOLA. Accordingly, the Defendant's
8 Motion to Strike is moot with respect to striking paragraphs 68,
9 92, 95, 103, 114, 120, and 121 of the FAC. Additionally,
10 Defendant moves to strike Paragraph 62 of the FAC(alleging
11 willful, malicious and outrageous conduct with respect to TILA)
12 and Prayer for Relief paragraph 7, requesting exemplary damages.
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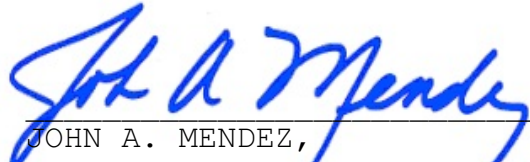
15 "Rule 12(f) provides in pertinent part that the Court may
16 order stricken from any pleading any insufficient defense or any
17 redundant, immaterial, impertinent, or scandalous matter. . .
18 Motions to strike are disfavored and infrequently granted. A
19 motion to strike should not be granted unless it is clear that
20 the matter to be stricken could have no possible bearing on the
21 subject matter of the litigation. . . A motion to strike may be
22 used to strike any part of the prayer for relief when the
23 recovery sought is unavailable as a matter of law." Bassett v.
24 Ruggles et al., 2009 WL 2982895 at *24(E.D. Cal. Sept. 14,
25 2009)(internal citations omitted).
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- 1 • Defendant's Motion to Strike is dismissed as moot with
2 respect to striking FAC paragraphs 68, 92, 95, 103, 114,
3 120, and 121. With respect to striking FAC paragraph 62 and
4 prayer for relief paragraph 7, the Motion to Strike is
5 DENIED.
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8 Plaintiffs shall have twenty (20) days from the date of this
9 order to file a Third Amended Complaint.
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12 IT IS SO ORDERED.

13 Dated: November 19, 2009

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16 JOHN A. MENDEZ,
17 UNITED STATES DISTRICT JUDGE
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