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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

GLORIA LEONARES,

NO. CIV. S-10-2012 LKK/KJM

Plaintiff,

v.

O R D E R

WELLS FARGO BANK, N.A.;  
WESTERN RECONVEYANCE  
CORPORATION; and  
DOES 1 to 100, inclusive,

Defendants.

\_\_\_\_\_ /

Plaintiff Gloria Leonares brings an action seeking damages, injunctive relief, and rescission of the trustee sale of the home she now occupies. Defendant Wells Fargo Bank moves to dismiss her claims. For the reasons discussed below, the court dismisses plaintiff's federal claim and orders the parties to show cause as to why her remaining claims should not be remanded to state court.

**I. BACKGROUND**

**A. Factual Background**

Plaintiff Gloria Leonares ("Leonares") occupies a property at

1 5421 Zinfandel Lane in Vallejo, CA, with her family. Leonares  
2 purchased this home in 2001 with an adjustable rate mortgage.  
3 Defendant Wells Fargo Bank ("Wells Fargo") is the successor in  
4 interest to World Savings, the bank from which Leonares secured her  
5 mortgage. Defendant Cal Western Reconveyance Corporation ("Cal  
6 Western"), is a corporation which apparently oversaw a recent  
7 foreclosure sale of the property on behalf of Wells Fargo. At some  
8 point, the exact time of which is not clear to the court, Leonares  
9 attempted to refinance and was told that she could not qualify for  
10 refinancing because she had recently filed for bankruptcy.<sup>1</sup>  
11 According to plaintiff, her loan consultant, Petur Thordarson  
12 ("Thordarson") of the Atlantic Bancorp of America, offered to help  
13 Leonares refinance her loan by using his personal credit. The plan  
14 Thordarson proposed involved transferring ownership of the home to  
15 Thordarson by quitclaim, the purchase of which Thordarson would  
16 secure through a new loan. After this transaction, Thordarson would  
17 quitclaim all his interest back to Leonares. The transfer was not  
18 executed as planned. Leonares apparently regained title to her home  
19 only after she filed suit against Thordarson in February 2007 and  
20 received an order to that effect from the Solano County Superior  
21 Court.<sup>2</sup>

22 The loan secured by Thordarson for this second transaction was  
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24 <sup>1</sup>It is not clear from plaintiff's amended complaint, whether  
25 the bankruptcy filing occurred in 2002 or 2003. See Compl., Doc.  
26 No. 17 at 3 and 6 (Oct. 26, 2010).

<sup>2</sup>Documentation of this order was not submitted.

1 for \$700,000. The plaintiff asserts that this amount is larger than  
2 the value of the property, which was purchased by Leonares  
3 "probably" at the top of its value for less than \$350,000 in 2001.  
4 Compl., Doc. No. 17 at 4 (Oct. 26, 2010). Plaintiff alleges that  
5 Thordarson personally took \$164,000 of the proceeds of the loan  
6 that were due to Leonares. Id.

7 According to plaintiff, Leonares made timely mortgage payments  
8 from July 2005 until March 2008. In March 2008, Wells Fargo Bank  
9 stopped accepting payments from Leonares because she was not a  
10 party to the loan transaction. Mot. Doc. No. 18 at 2 (Nov. 1,  
11 2010). The loan went into default, and it appears that a  
12 foreclosure sale occurred sometime in 2010. Mot. Doc. No. 18 at  
13 2 (Nov. 1, 2010). Since that time, Wells Fargo initiated an  
14 unlawful detainer action in Solano County Court to remove Leonares  
15 from the property. Request for Judicial Notice, Doc. No. 19 ex.3  
16 at 18 (Nov. 1, 2010).

17 **B. Procedural Background**

18 In March 2010, Leonares brought suit against Wells Fargo and  
19 Cal Western<sup>3</sup> in Solano County Superior Court, alleging violations  
20 of 12 U.S.C. § 2601, *et seq.* (the Real Estate Settlement Procedures  
21 Act or "RESPA"), negligence, and negligent misrepresentation.  
22 Leonares sought postponement or rescission of the foreclosure sale  
23 and compensatory and punitive damages. On July 28, 2010, Wells  
24 removed the action to this court on the basis that the RESPA claim

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25 <sup>3</sup> Cal Western has not appeared in this case. It appears that  
26 plaintiff has not served Cal Western.

1 raises a federal question. Notice of Removal, Doc. No. 1 at 1 (July  
2 28, 2010). On October 26, 2010, Leonares filed an amended  
3 complaint, including the following claims for relief: (1)  
4 injunction of the trustee sale of her home, (2) rescission of the  
5 trustee sale, (3) equitable lien on the property, (4) wrongful  
6 foreclosure, (5) negligent misrepresentation, (6) breach of  
7 fiduciary duty, (7) request for an accounting (8) breach of  
8 contract and the covenant of good faith, (9) promissory estoppel,  
9 and (10) violations of Cal. Bus. & Prof. Code § 17200 *et seq.* FAC,  
10 Doc. No. 17 (Oct. 26, 2010). On November 1, 2010 Wells filed a  
11 motion to dismiss the First Amended Complaint, asserting that  
12 Leonares' claim is not plausible, that Wells has no duty to  
13 Leonares, that her claims are barred by statutes of limitations,  
14 and that the requested injunction is prohibited by the anti-  
15 injunction act.

16 **II. STANDARD FOR A FED. R. CIV. P. 12(B)(6) MOTION TO DISMISS**

17 A Fed. R. Civ. P. 12(b)(6) motion challenges a complaint's  
18 compliance with the pleading requirements provided by the Federal  
19 Rules. Under Federal Rule of Civil Procedure 8(a)(2), a pleading  
20 must contain a "short and plain statement of the claim showing that  
21 the pleader is entitled to relief." The complaint must give  
22 defendant "fair notice of what the claim is and the grounds upon  
23 which it rests." Bell Atlantic v. Twombly, 550 U.S. 544, 555  
24 (2007) (internal quotation and modification omitted).

25 To meet this requirement, the complaint must be supported by  
26 factual allegations. Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S.

1 Ct. 1937, 1950 (2009). "While legal conclusions can provide the  
2 framework of a complaint," neither legal conclusions nor conclusory  
3 statements are themselves sufficient, and such statements are not  
4 entitled to a presumption of truth. Id. at 1949-50. Iqbal and  
5 Twombly therefore prescribe a two step process for evaluation of  
6 motions to dismiss. The court first identifies the non-conclusory  
7 factual allegations, and the court then determines whether these  
8 allegations, taken as true and construed in the light most  
9 favorable to the plaintiff, "plausibly give rise to an entitlement  
10 to relief." Id.; Erickson v. Pardus, 551 U.S. 89 (2007).

11 "Plausibility," as it is used in Twombly and Iqbal, does not  
12 refer to the likelihood that a pleader will succeed in proving the  
13 allegations. Instead, it refers to whether the non-conclusory  
14 factual allegations, when assumed to be true, "allow[] the court  
15 to draw the reasonable inference that the defendant is liable for  
16 the misconduct alleged." Iqbal, 129 S.Ct. at 1949. "The  
17 plausibility standard is not akin to a 'probability requirement,'  
18 but it asks for more than a sheer possibility that a defendant has  
19 acted unlawfully." Id. (quoting Twombly, 550 U.S. at 557). A  
20 complaint may fail to show a right to relief either by lacking a  
21 cognizable legal theory or by lacking sufficient facts alleged  
22 under a cognizable legal theory. Balistreri v. Pacifica Police  
23 Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

### 24 **III. ANALYSIS**

25 Plaintiff brings an enumerated claim for violation of RESPA  
26 and relies upon such violation as the partial basis for her

1 wrongful foreclosure claim and negligent misrepresentation  
2 claim. Specifically, she bases these claims, in whole or in  
3 part, upon the contention that misrepresentations were made in  
4 her HUD-1 settlement statement which violate "the very substance  
5 of RESPA." FAC, Doc. No. 17, at 14. While plaintiff does not  
6 cite a specific provision of RESPA or provide statutory  
7 language, the only applicable section of the statute is 12  
8 U.S.C. § 2603, which describes the uniform settlement statement  
9 owed to the borrower prior to settlement of a mortgage loan.

10 RESPA creates several private causes of action, but it does  
11 not create one for violation of this section. See 12 U.S.C. §§  
12 2605(f), 2607(d), 2608(b) (expressly creating private causes of  
13 action); see also 12 U.S.C. § 2614 (describing statute of  
14 limitations for only §§ 2605, 2607, and 2608). Based on the  
15 absence of explicit language establishing a private right of  
16 action for violations of § 2603, federal courts in California  
17 have consistently determined that violation of the section does  
18 not support a private cause of action. See Lingad v. Indymac  
19 Fed. Bank, 682 F. Supp. 2d 1142, 1151 (E.D. Cal. 2010); Saldate  
20 v. Wilshire Credit Corp., 711 F. Supp. 2d 1126, 1133 (E.D. Cal.  
21 2010); Alan v. Greenpoint Mortgage Funding, 730 F. Supp. 2d  
22 1071, 1076 (N.D. Cal. 2010); Lopez v. Wachovia Mortgage, No.  
23 2:09-CV-01510-JAM-DAD, 2009 WL 4505919 at \*4 (E.D. Cal. Nov. 20,  
24 2009). Congressional intent is dispositive of the existence of a  
25 private right of action. Stupy v. U.S. Postal Serv., 951 F.2d  
26 1079, 1082 (9th Cir. 1991). Here, the court agrees with its

1 sister courts' conclusion that § 2603 cannot support a private  
2 right of action. Thus, plaintiff's specifically enumerated RESPA  
3 claim is dismissed.<sup>4</sup>

4 When determining whether an a state law cause of action  
5 arises under federal law for purposes of federal subject matter  
6 jurisdiction, courts must determine whether Congress intended to  
7 provide "a private federal remedy for violations of the statute  
8 it enacted." Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804,  
9 811 (1986). To determine such intent, courts consider four  
10 factors: "(1) [whether] the plaintiffs are . . . part of the  
11 class for whose special benefit the statute was passed; (2)  
12 [whether] the indicia of legislative intent reveal[s a]  
13 congressional purpose to provide a private cause of action; (3)  
14 [whether] a federal cause of action would not further the  
15 underlying purposes of the legislative scheme; and (4) [whether  
16 the plaintiff's] cause of action is a subject traditionally  
17 relegated to state law." Id. at 810-11. Here, plaintiff premises

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19 <sup>4</sup> Even if Congress had created a private right of action for  
20 misrepresentations in the HUD-1, plaintiff's claim is clearly time-  
21 barred. The statute of limitations to bring claims for violation  
22 of RESPA is either one year or three years from the date on which  
23 the violation is alleged to have occurred depending on the  
24 subsection of the statute a plaintiff claims has been violated. 12  
25 U.S.C. § 2614. Assuming, without deciding, that plaintiff is  
26 entitled to equitable tolling until she became aware of  
Thordarson's allegedly fraudulent misrepresentations on the HUD-1,  
it is clear that she is not entitled to such tolling after she  
brought her case in state law for title resulting from Thordarson's  
conduct. Plaintiff alleges that her title lawsuit was filed in  
February 2007; she filed her original complaint in this action on  
March 22, 2010 in state court. Thus, even if Congress had created  
a private right of action for plaintiff's claims under RESPA, they  
would be untimely under the Act.

1 her state law claims of wrongful foreclosure and negligent  
2 misrepresentation, in part, on a violation of § 2603.<sup>5</sup> Both  
3 claims are traditionally subject to California law. Congress  
4 explicitly did not create a private right of action under §  
5 2603, but did do so for other sections of the statute. In so  
6 doing, Congress has expressed an intent not to create a private  
7 cause of action for violation of this section. Thus, plaintiff's  
8 references to RESPA in her wrongful foreclosure and negligent  
9 misrepresentation claims do not support federal jurisdiction in  
10 this case.


#### 11 IV. CONCLUSION

12 For the foregoing reasons, the court orders as follows:

- 13 (1) Plaintiff's claim for violation of RESPA is DISMISSED  
14 WITH PREJUDICE.
- 15 (2) It appears that this case subsequently presents no  
16 federal question. If that is the case, the court will  
17 decline to exercise supplemental jurisdiction over the  
18 remaining claims under California law. 28 U.S.C.  
19 1367(c)(3). The parties are therefore ORDERED TO SHOW  
20 CAUSE within seven days of the issuance of this order  
21 why this case should not be dismissed for lack of  
22 subject matter jurisdiction.

23 IT IS SO ORDERED.

24 DATED: April 7, 2011.

  
LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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26 <sup>5</sup> The other bases of these claims do not sound in federal law.



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