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

RONALD ROSE,

Plaintiff,

CIV. NO. S-10-3250 FCD GGH PS

vs.

AMERICAN HOME MORTGAGE
SERVICING, INC., et al.,

Defendants.

ORDER AND
FINDINGS AND RECOMMENDATIONS

Plaintiff is proceeding pro se in this action, referred to the undersigned pursuant to Local Rule 72-302(c)(21). Presently before the court is defendant American Home Mortgage Servicing, Inc.'s ("AHMSI") motion to dismiss, filed December 9, 2010.¹ Plaintiff filed an opposition after a show cause order was issued. Having reviewed the papers in support of and in opposition to the motion, the undersigned now issues the following order and findings and recommendations.

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¹ The matter was vacated from the February 10, 2011 calendar after it was determined that oral argument was unnecessary.

1 BACKGROUND

2 This foreclosure action was removed from state court to this court on December 6,
3 2010, by defendant AHMSI.² The complaint alleges that defendants have failed to produce a
4 proof of claim that they are allowed to enforce the note under the FDCPA (15 U.S.C. § 1692),
5 TILA (15 U.S.C. § 1611), RESPA (26 U.S.C. § 2605), 18 U.S.C. § 1701, and California’s
6 Uniform Commercial Code. Plaintiff seeks declaratory relief and rescission. Defendant AHMSI
7 moves to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

8 This matter was originally scheduled for hearing on February 10, 2011; however,
9 after plaintiff failed to oppose the motion or file a statement of non-opposition, this court issued
10 an order to show cause why sanctions should not be imposed for this failure.

11 Plaintiff responded to the order to show cause with a satisfactory explanation, and
12 requested further time to obtain counsel and file an opposition. That request was granted and on
13 March 28, 2011, plaintiff filed an opposition. Therefore, the order to show cause will be
14 discharged and sanctions will not be imposed.

15 DISCUSSION

16 I. Legal Standard for Motion to Dismiss

17 In order to survive dismissal for failure to state a claim pursuant to Rule 12(b)(6),
18 a complaint must contain more than a “formulaic recitation of the elements of a cause of action”;
19 it must contain factual allegations sufficient to “raise a right to relief above the speculative
20 level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1965 (2007). “The
21 pleading must contain something more...than...a statement of facts that merely creates a suspicion
22 [of] a legally cognizable right of action.” Id., quoting 5 C. Wright & A. Miller, Federal Practice
23 and Procedure § 1216, pp. 235-236 (3d ed. 2004). “[A] complaint must contain sufficient factual
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25 ² It appears from the record that co-defendant Option One Mortgage, now known as Sand
26 Canyon Corporation, has not been served and has not made an appearance in this case.

1 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal,
2 ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570, 127 S.Ct. 1955).
3 “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to
4 draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id.

5 In considering a motion to dismiss, the court must accept as true the allegations of
6 the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740, 96 S.
7 Ct. 1848, 1850 (1976), construe the pleading in the light most favorable to the party opposing the
8 motion and resolve all doubts in the pleader’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421,
9 89 S. Ct. 1843, 1849, reh’g denied, 396 U.S. 869, 90 S. Ct. 35 (1969). The court will “‘presume
10 that general allegations embrace those specific facts that are necessary to support the claim.’”
11 National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 256, 114 S.Ct. 798, 803
12 (1994), quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137 (1992).
13 Moreover, pro se pleadings are held to a less stringent standard than those drafted by lawyers.
14 Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 596 (1972).

15 The court may consider facts established by exhibits attached to the complaint.
16 Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). The court may also
17 consider facts which may be judicially noticed, Mullis v. United States Bankruptcy Ct., 828 F.2d
18 1385, 1388 (9th Cir. 1987); and matters of public record, including pleadings, orders, and other
19 papers filed with the court, Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1282 (9th Cir.
20 1986). The court need not accept legal conclusions “cast in the form of factual allegations.”
21 Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

22 A pro se litigant is entitled to notice of the deficiencies in the complaint and an
23 opportunity to amend, unless the complaint’s deficiencies could not be cured by amendment. See
24 Noll v. Carlson, 809 F. 2d 1446, 1448 (9th Cir. 1987).

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1 II. Analysis

2 AHMSI asserts two grounds for dismissal, that defendants are not required to
3 “hold the note” prior to initiating foreclosure, and that plaintiff is unable to tender the amount of
4 the debt to cure the loan’s default. Although AHMSI removed this action to federal court, its
5 motion to dismiss is based exclusively on California law.

6 A. California Commercial Code

7 Plaintiff relies on the discredited theory that the holder of the note must be
8 identified before nonjudicial foreclosure can take place in California. Plaintiff disputes the
9 authority of defendant AHMSI, the loan servicing agent for U.S. Bank, which was assigned as a
10 trustee by Sand Canyon Corporation, fka Option One Mortgage, to initiate the nonjudicial
11 foreclosure proceedings against plaintiff’s home without actual possession of the original
12 promissory note. This contention is meritless. See Champlaine v. BAC Home Loans Servicing,
13 LP, 706 F.Supp.2d 1029 (E.D. Cal. 2009) (in nonjudicial foreclosure under California law,
14 production or possession of the promissory note is not required). Essentially, “California Civil
15 Code sections 2924-29241 establish an exhaustive set of requirements for non-judicial
16 foreclosure, and that production of the note is not one of these requirements.” Id. at 1048.

17 B. Ability to Tender

18 AHMSI next contends that plaintiff has not tendered the amount due which is a
19 condition precedent to an action seeking to set aside or cancel a foreclosure sale. AHMSI has
20 cited only California case law in support, but argues that the tender requirement is applicable to
21 the entire complaint. Defendant cites no federal authority to support dismissal of the FDCPA,
22 TILA or RESPA claims on this basis.³

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25 ³ Further, although defendant also cited 18 U.S.C. §2701 as a basis for removal to federal
26 court, defendant makes no argument to dismiss this claim.

1 Of the federal claims, only the TILA claim requires a tender to be valid for
2 rescission purposes. The Ninth Circuit has held that rescission under TILA “*should* be
3 conditioned on repayment of the amounts advanced by the lender.” Yamamoto v. Bank of N.Y.,
4 329 F. 3d 1167, 1170 (9th Cir. 2003) (emphasis in original). District courts in this circuit have
5 dismissed rescission claims under TILA at the pleading stage based upon the plaintiff’s failure to
6 allege an ability to tender loan proceeds. See, e.g., Garza v. Am. Home Mortgage, 2009 WL
7 188604 at *5(E.D. Cal. 2009) (stating that “rescission is an empty remedy without [the
8 borrower’s] ability to pay back what she has received”); Ibarra v. Plaza Home Mortgage, 2009
9 WL 2901637 at *8 (S.D. Cal. 2009); Ing Bank v. Korn, 2009 WL 1455488 at *1 (W.D. Wash.
10 2009). In this case, plaintiff has failed to allege any facts relating to his ability to tender the loan
11 proceeds, or that he in fact ever tendered the loan proceeds.

12 For this reason, any claim for rescission under TILA must be dismissed.

13 C. Remaining Federal Claims

14 AHMSI has not addressed the FDCPA or RESPA claims, or the claim under 18
15 U.S.C. §2701. Therefore, the motion to dismiss will be granted only on the grounds raised by
16 this defendant. Defendant shall file an answer to these remaining claims.⁴

17 CONCLUSION

18 Accordingly, IT IS ORDERED that: the order to show cause, filed February 7,
19 2011, is discharged.

20 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

- 21 1. Defendant AHMSI's motion to dismiss (Dkt. no. 5) be granted;
22 2. The state law claims be dismissed;
23 3. The TILA claim be dismissed;

24 _____
25 ⁴ Defendant is informed that all claims subject to dismissal should be addressed in one
26 motion.

1 4. Defendant be directed to file an answer to the remaining federal claims within
2 28 days of an order adopting these findings and recommendations.

3 These findings and recommendations are submitted to the United States District
4 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
5 fourteen (14) days after being served with these findings and recommendations, any party may
6 file written objections with the court and serve a copy on all parties. Such a document should be
7 captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the
8 objections shall be served and filed within fourteen (14) days after service of the objections. The
9 parties are advised that failure to file objections within the specified time may waive the right to
10 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

11 DATED: 05/24/2011

/s/ Gregory G. Hollows

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GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

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