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

ANTHONY GUEBARA,

Plaintiff,

No. CIV 2:11-cv-0427-MCE-JFM (PS)

vs.

SAXON MORTGAGE, et al.,

Defendants.

FINDINGS & RECOMMENDATIONS

On April 28, 2011, the court held a hearing on defendant Saxon Mortgage’s (“Saxon’s”) motion to dismiss. Plaintiff appear in pro per. Joshua M. Bryan appeared for Saxon. Upon review of the motion and the documents in support and opposition, and good cause appearing therefor, THE COURT MAKES THE FOLLOWING FINDINGS:

FACTUAL AND PROCEDURAL BACKGROUND

On August 8, 2006, plaintiff obtained a mortgage secured by real property located in Stockton, CA (“the Property”). It is unclear from which entity plaintiff obtained the mortgage: he initially alleges that he obtained it from Saxon, see Compl. ¶ 7, but later alleges that he obtained it through Decision One Mortgage (not a defendant in this action), id. ¶ 32. Liberally construed (and partially based on statements contained in plaintiff’s opposition), it appears that plaintiff obtained a mortgage through Decision One Mortgage and attempted to obtain a loan

1 modification through Saxon. Plaintiff does not state the time period during which he attempted  
2 to obtain a loan modification.

3 On March 24, 2009, plaintiff received a notice of default and notice of intent to  
4 foreclosure.

5 On September 17, 2010, plaintiff filed a complaint in the San Joaquin County  
6 Superior Court against Saxon, Quality Loan Service and Doe Defendants I-X for (1) declaratory  
7 relief; (2) injunctive relief; (3) damages under the Truth in Lending Act (“TILA”), 15 U.S.C.  
8 §§ 1601 *et seq.*, and the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. §§ 2601 *et*  
9 *seq.*; (3) reformation of contract; (4) quiet title; and, alternatively, (5) to set aside wrongful  
10 foreclosure proceedings.

11 Plaintiff’s complaint is premised on claims of securities fraud. He alleges that his  
12 because his mortgage has been illegally bundled, sold and resold by defendants numerous times,  
13 none of the defendants own the title to the Property and, as such, none have the legal right to  
14 initiate foreclosure proceedings on the Property.

15 On February 15, 2011, Saxon removed this action in light of plaintiff’s TILA and  
16 RESPA claims. On February 22, 2011, Saxon filed a motion to dismiss and a motion to strike.  
17 On March 29, 2011, plaintiff filed an opposition to both motions. Saxon has not filed a reply.

#### 18 STANDARDS

19 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal  
20 sufficiency of the complaint. N. Star Int’l v. Ariz. Corp. Comm’n, 720 F.2d 578, 581 (9th Cir.  
21 1983). “Dismissal can be based on the lack of a cognizable legal theory or the absence of  
22 sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica Police Dep’t, 901  
23 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege “enough facts to state a claim to  
24 relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct.  
25 1955, 1974 (2007). Thus, a defendant’s Rule 12(b)(6) motion challenges the court’s ability to  
26 grant any relief on the plaintiff’s claims, even if the plaintiff’s allegations are true.

1 In determining whether a complaint states a claim on which relief may be granted,  
2 the court accepts as true the allegations in the complaint and construes the allegations in the light  
3 most favorable to the plaintiff. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Love v.  
4 United States, 915 F.2d 1242, 1245 (9th Cir. 1989).

5 The court is permitted to consider material properly submitted as part of the  
6 complaint, documents not physically attached to the complaint if their authenticity is not  
7 contested and the complaint necessarily relies on them, and matters of public record. Lee v. City  
8 of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001). Matters of public record include  
9 pleadings and other papers filed with a court. Mack v. South Bay Beer Distributors, 798 F.2d  
10 1279, 1282 (9th Cir. 1986). The court need not accept as true conclusory allegations,  
11 unreasonable inferences, or unwarranted deductions of fact. Western Mining Council v. Watt,  
12 643 F.2d 618, 624 (9th Cir. 1981).

## 13 DISCUSSION

14 Saxon seeks dismissal of plaintiff's complaint on numerous grounds. The court,  
15 however, will address only those arguments as they relate to plaintiff's federal claims brought  
16 pursuant to TILA, 15 U.S.C. §§ 1601 *et seq.*, and RESPA, 12 U.S.C. §§ 2601 *et seq.* Saxon  
17 argues that plaintiff's TILA claim is barred by the statute of limitations. Saxon also argues that  
18 plaintiff's RESPA claim is untimely and/or the allegations are inapplicable to it because it was  
19 not the originator of the loan.

### 20 A. Federal Claims

#### 21 1. TILA

22 A plaintiff may bring an action for damages, rescission or both under TILA. Here,  
23 plaintiff speaks only generally of TILA disclosure violations without specifying a remedy.  
24 Nonetheless, were plaintiff to pursue either damages or rescission, the TILA claim is barred by  
25 the statute of limitations and, thus, should be dismissed with prejudice.

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1 a. Damages

2 An action for damages under TILA must be brought within one year of the  
3 violation. 8 U.S.C. § 1640(e). A TILA violation occurs on “the date of consummation of the  
4 transaction,” King v. California, 784 F.2d 910, 915 (9th Cir. 1986), and “consummation” means  
5 “the time that a consumer becomes contractually obligated on a credit transaction.” 12 C.F.R. §  
6 226(a)(13). Accordingly, defendants argue that the claim for damages is time-barred. The  
7 doctrine of equitable tolling, however, may “suspend the limitations period until the borrower  
8 discovers or had reasonable opportunity to discover the fraud or nondisclosures that form the  
9 basis of the TILA action.” King, 784 F.2d at 915.

10 The complaint alleges that the loan was obtained on August 8, 2006, making  
11 August 8, 2007 the deadline for commencing a TILA damages action. The current suit was not  
12 filed until September 17, 2010. Although Ninth Circuit has held that equitable tolling for  
13 damages may be appropriate “in certain circumstances,” plaintiff has not alleged any facts that  
14 would justify tolling in this case. King, 874 F.2d at 915; see also Meyer v. Ameriquest Mtg. Co.,  
15 342 F.3d 899, 902 (9th Cir. 2003) (dismissing equitable tolling of TILA claim because plaintiff  
16 did not allege any actions that would have prevented discovery of alleged TILA violations and  
17 was in full possession of all loan documents).

18 b. Rescission

19 Rescission claims “shall expire three years after the date of the consummation of  
20 the transaction or upon the sale of the property, whichever occurs first,” 15 U.S.C. § 1635(f).  
21 Where the creditor fails to provide to the consumer a notice of right to rescind and all material  
22 disclosures, TILA implementation Regulation Z provides that “the right to rescind shall expire  
23 three years after consummation, upon transfer of all of the consumer’s interest in the property, or  
24 upon sale of the property, whichever occurs first.” 12 C.F.R. § 226.23.

25 Again, the complaint alleges that the loan transaction was consummated on  
26 August 8, 2006, making August 8, 2009 the deadline for commencing a TILA rescission claim.

1 This action was filed beyond the three-year time period. There are no facts to justify equitable  
2 tolling.

3 2. RESPA

4 Saxon also seeks dismissal of plaintiff's RESPA claim on the ground that it is  
5 inapplicable to Saxon and/or barred by the statute of limitations. In this claim, plaintiff contends  
6 Saxon violated RESPA's provision prohibiting illegal kickbacks. See 12 U.S.C. § 2607.

7 Plaintiff asserts that when Saxon allegedly sold plaintiff's mortgage, it received back-end fees,  
8 which Saxon did not disclose pursuant to RESPA.

9 a. Applicability of RESPA to Saxon

10 Saxon first argues that because a violation of 12 U.S.C. § 2607 necessarily implies  
11 that it must have occurred prior to or in the process of closing plaintiff's mortgage, Saxon cannot  
12 be held liable because it did not originate plaintiff's loan.

13 Congress enacted RESPA to control real estate settlement costs by "insur[ing] that  
14 consumers throughout the Nation are provided with greater and more timely information on the  
15 nature and costs of the settlement process and are protected from unnecessarily high settlement  
16 charges caused by certain abusive practices that have developed in some areas of the country." 12  
17 U.S.C. § 2601(a). To effectuate these objectives, RESPA requires advance disclosure of  
18 settlement costs, the elimination of kickbacks or referral fees, and a reduction of the amount that  
19 buyers are required to place in escrow accounts for taxes and insurance. Id. § 2601(b).

20 Plaintiff alleges violation of Section 8 of RESPA which sets forth the  
21 anti-kickback provision. This section applies only to settlement services and prohibits kickbacks  
22 which are "incident to or a part of a real estate settlement service..." Id. § 2607(a). Section 8  
23 also prohibits fee splitting "of any charge made or received for the rendering of a real estate  
24 settlement service." 26 U.S.C. § 2607(b).

25 In order to state a claim under RESPA, plaintiff must establish that the alleged  
26 back-end fees at issue constitute charges rendered at or in relation to settlement. See Eisenberg

1 v. Comfed Mortgage Co. Inc., 629 F. Supp. 1157, 1159 (D. Mass.1986) (granting summary  
2 judgment for defendant after finding that a mortgage origination fee was not a “settlement  
3 service” within the purview of RESPA). Settlement services are those services necessary to  
4 close the loan (i.e., close escrow). According to HUD, “[s]ettlement means the process of  
5 executing legally binding documents regarding a lien on property that is subject to a federally  
6 related mortgage loan. This process may be called ‘closing’ or ‘escrow’ in different  
7 jurisdictions.” 24 C.F.R. § 3500.2.

8           Where the fees or charges at issue are imposed after settlement, RESPA is  
9 inapplicable. For example, in Greenwald v. First Fed. Sav. & Loan Ass'n, 446 F.Supp. 620, 625  
10 (D. Mass. 1978), aff'd, 591 F.2d 417 (1st Cir. 1979), the district court found that RESPA was  
11 inapplicable to the banks’ payment of interest on escrow deposits. The court explained that such  
12 payments were “obviously” not part of settlement as defined under RESPA because they “can  
13 continue long after closing of the mortgage transaction during the entire life of the mortgage, ...”  
14 Id.; see also Adamson v. Alliance Mortgage Co., 861 F.2d 63, 65-66 (4th Cir. 1988) (finding that  
15 under the Truth in Lending Act disclosure requirements, fees charged at the end of the loan need  
16 not be disclosed), overruled on other grounds by Busby v. Crown Supply, Inc., 896 F.2d 833 (4th  
17 Cir. 1990).

18           Here, plaintiff alleges Saxon received back-end fees when it resold plaintiff’s  
19 mortgage. Since Saxon’s alleged receipt of back-end fees obtained through the purported  
20 reselling of plaintiff’s mortgage was not an event that occurred prior to or at settlement, the fees  
21 are not “incurred” at the time of settlement services and, thus, are not protected by RESPA.

22           b.     Statute of Limitations

23           Alternatively, Saxon argues that plaintiff’s RESPA claim is barred by the statute  
24 of limitations. RESPA imposes either a one-year or a three-year statute of limitations depending  
25 on the violation alleged. 12 U.S.C. § 2614 (proscribing a one-year statute of limitations for  
26 violations of Sections 2607 and 2608 and a three-year statute of limitations for violations of

1 Section 2605). Because plaintiff's RESPA claim can only arise out of the loan origination,  
2 which occurred more than three years before plaintiff filed the instant action, plaintiff's claim is  
3 barred by the statute of limitations. As discussed above, plaintiff is not entitled to equitable  
4 tolling because he has failed to allege specific facts showing why he could not bring his suit  
5 within the limitations period.

6 Plaintiff counters that the statute of limitations should run when Saxon allegedly  
7 sold plaintiff's loan. This argument fails. Not only is it an incorrect understanding of the law,  
8 but there is also no legal support for this proposition. For the reasons discussed, RESPA's  
9 applicability in the scenario at issue concluded once "settlement" was reached.

10 Accordingly, plaintiff's RESPA claim should also be dismissed with prejudice.

11 B. State Law Claims

12 Because plaintiff's complaint does not – and, indeed, cannot – state a valid cause  
13 of action arising under either TILA or RESPA, the court lacks subject matter jurisdiction over the  
14 remaining claims.

15 Accordingly, IT IS HEREBY RECOMMENDED that

- 16 1. Defendant's motion to dismiss be granted; and
- 17 2. This action be dismissed.

18 These findings and recommendations are submitted to the United States District  
19 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
20 days after being served with these findings and recommendations, any party may file written  
21 objections with the court and serve a copy on all parties. Such a document should be captioned  
22 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the  
23 objections shall be filed and served within fourteen days after service of the objections. The

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1 parties are advised that failure to file objections within the specified time may waive the right to  
2 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: May 2, 2011.

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6 UNITED STATES MAGISTRATE JUDGE

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