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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DIANE C. MCDONNELL and)
JERRY D. FREY,)
Plaintiff,)
v.)
BANK OF AMERICA, et al.)
Defendants.)

No. CIV S- 12-0096 KJM EFB

ORDER

Currently pending before the court is a motion to dismiss filed by defendants Bank of America and Recontrust Company (collectively, defendants). The court submitted the matter on the papers and now GRANTS the motion to dismiss.

I. Background

On December 6, 2011, plaintiffs filed a complaint in Calaveras County Superior Court, alleging violations of the Truth in Lending Act (TILA), 15 U.S.C. § 1601, *et seq.*; the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601, *et seq.*; the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691; and the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x, all stemming from the acquisition of and foreclosure on 5691 McCauley Road, Valley Springs, California. ECF No. 1-1.

1 Defendants removed the case to this court on January 12, 2012 and on January 25,
2 2012, filed the instant motion to dismiss. ECF No. 7. In their reply, plaintiffs acknowledged the
3 shortcomings of their complaint but argued they should be given leave to amend so they could
4 overcome the deficiencies of the claims as pleaded. ECF No. 10. Defendants did not file a
5 reply.

6 II. Analysis

7 Federal Rule of Civil Procedure 15(a)(2) states “[t]he court should freely give
8 leave [to amend its pleading] when justice so requires” and the Ninth Circuit has “stressed Rule
9 15’s policy of favoring amendments.” *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149,
10 1160 (9th Cir. 1989). “In exercising its discretion [regarding granting or denying leave to
11 amend] ‘a court must be guided by the underlying purpose of Rule 15 -- to facilitate decision on
12 the merits rather than on the pleadings or technicalities.’” *DCD Programs, Ltd. v. Leighton*, 833
13 F.2d 183, 186 (9th Cir. 1987) (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir.
14 1981)). However, “the liberality in granting leave to amend is subject to several limitations.
15 Leave need not be granted where the amendment of the complaint would cause the opposing
16 party undue prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue
17 delay.” *Ascon Properties*, 866 F.2d at 1160 (internal citations omitted). In addition, a court
18 should look to whether the plaintiff has previously amended the complaint.” *Id.* at 1161 (quoting
19 *Leighton*, 833 F.2d at 186 n.3).

20 Defendants allege that they are not the proper defendants, as they were not
21 involved with the origination of the loan and because Recontrust was merely the trustee under
22 the Deed of Trust. They also argue that plaintiffs’ TILA, RESPA, and ECOA claims are time-
23 barred. As noted, plaintiffs argue they will be able to tie the defendants to the loan origination
24 and plead sufficient facts to show they may be entitled to equitable tolling.

25 Judicial resources are best preserved by allowing plaintiffs to amend the
26 complaint to allege facts germane to a resolutions of the issues raised by the pleadings before the

1 court resolves defendants' motion. Plaintiff's counsel is directed to review the defense motion to
2 dismiss, and to meet and confer with defense counsel, before filing a second amended complaint.
3 With any amended complaint, counsel shall file a one page certification that he has complied
4 with this meet and confer directive.

5 Plaintiff is granted twenty-one days from the date of this order to file an amended
6 complaint with the required certification. Defendants' motion is denied without prejudice.

7 IT IS SO ORDERED.

8 DATED: September 27, 2012.

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12 UNITED STATES DISTRICT JUDGE
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