

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

\*\*E-Filed 6/8/2010\*\*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

ERIN S. PEARCE,

Plaintiff,

v.

BANK OF AMERICA HOME LOANS f/k/a  
COUNTRYWIDE HOME LOANS, INC.,

Defendant.

Case Number C 09-3988 JF

ORDER<sup>1</sup> GRANTING MOTION TO  
DISMISS WITH LEAVE TO AMEND

[re: document no. 11]

Defendant moves to dismiss the instant action for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The Court has considered the moving and responding papers and the oral argument of counsel presented at the hearing on May 28, 2010. For the reasons discussed below, the motion will be granted, with leave to amend.

**I. BACKGROUND**

This action arises out of a residential mortgage transaction. Plaintiff's principal residence is located at 925 Brookside Way, Felton, California ("the Property"). (First Am. Compl. ("FAC") ¶ 4.) On May 20, 2005, Plaintiff obtained a loan secured by the Property from Santa

---

<sup>1</sup> This disposition is not designated for publication in the official reports.

1 Cruz Mortgage Company (“Santa Cruz”). (FAC ¶ 15.) The proceeds were used to pay in full  
2 pre-existing loans from Washington Mutual Bank and Homecomings Financial. (FAC ¶¶ 15, 16,  
3 18.) Plaintiff alleges that, in violation of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1601 *et*  
4 *seq.*, Santa Cruz failed to provide her with two completed copies of the Notice of Right to Cancel  
5 the loan (“NRC”). (FAC ¶¶ 17, 26.) Plaintiff claims that instead she was provided with two  
6 unsigned NRCs that did not indicate “the date of the transaction nor the last day on which  
7 Plaintiff could exercise her right to rescind the Loan.” (FAC ¶ 17.) Plaintiff alleges that Santa  
8 Cruz’s interest in the loan was assigned to Defendant Countrywide Home Loans, Inc.  
9 (“Countrywide” or “Defendant”). (FAC ¶ 20.)

10 Plaintiff alleges that she tendered a notice of rescission to Countrywide on March 21,  
11 2008, and that Countrywide refused to rescind the loan. (FAC ¶ 22.) Plaintiff filed this action in  
12 state court on August 28, 2009, seeking judicial rescission of the loan. Following removal to this  
13 Court, Defendant moved to dismiss the complaint. On February 23, 2010, the Court granted  
14 Countrywide’s motion to dismiss with leave to amend. Plaintiff filed the FAC on March 11,  
15 2010, and Countrywide filed the instant motion to dismiss on March 25, 2010.

## 16 II. DISCUSSION

### 17 A. Legal Standard

18 A motion to dismiss is proper under Rule 12(b)(1) where the Court lacks jurisdiction over  
19 the subject matter of the complaint. Fed. R. Civ. P. 12(b)(1). The court presumes a lack of  
20 subject matter jurisdiction until the plaintiff meets her burden establishing subject matter  
21 jurisdiction. Fed. R. Civ. P. 12(b)(1); *see Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S.  
22 375, 378 (1994). The non-moving party must support its allegations with competent proof of  
23 jurisdictional facts when a party moves for dismissal under Rule 12(b)(1). *See Thomson v.*  
24 *Gaskill*, 315 U.S. 442, 446 (1942).

25 When granting a motion to dismiss under Rule 12, a court must grant leave to amend  
26 unless it is clear that the complaint’s deficiencies cannot be cured by amendment. *Lucas v. Dep’t*  
27 *of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995). When amendment would be futile, however,  
28 dismissal may be ordered with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

1 **B. Rescission Under TILA**

2 Plaintiff asserts a single federal claim for rescission under TILA based on Defendant’s  
3 alleged failure to provide her with completed NRCs. (FAC ¶ 17; *see* 15 U.S.C. § 1635; 12  
4 C.F.R. § 226.23 (“Regulation Z”).) Section 1635(f) states that the “right of rescission shall  
5 expire three years after the date of consummation of the transaction or upon the sale of the  
6 property, whichever occurs first.” 15 U.S.C. § 1635(f). Defendant argues that Plaintiff’s TILA  
7 claim is barred by this three-year statute of repose because the loan was consummated in May  
8 2005, but Plaintiff did not commence the instant action until August 2009. It relies upon the  
9 Supreme Court’s holding in *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), that TILA  
10 “permits no federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f)  
11 has run.” *Beach*, 523 U.S. at 419. Defendant also relies on the Ninth Circuit’s ruling in *Miguel*  
12 *v. Country Funding Corporation*, 309 F.3d 1161 (9th Cir. 2002). In that case, the court, relying  
13 on *Beach*, held that “§ 1635(f) is a statute of repose, depriving the courts of subject matter  
14 jurisdiction when a § 1635 claim is brought outside the three-year limitation period.” *Miguel*,  
15 309 F.3d at 1164.

16 Plaintiff agrees with Defendant that Section 1635(f) is a statute of repose, but she  
17 contends that the relevant act for the purpose of the statute is a plaintiff’s rescission demand, not  
18 the filing of a lawsuit seeking rescission. Accordingly, Plaintiff maintains that Section 1635(f)  
19 does not bar the present action because she demanded rescission of the loan by letter on March  
20 21, 2008. She argues that *Beach*’s conclusion that “[t]he subsection says nothing in terms of  
21 bringing an action but instead provides that the ‘right of rescission [under the Act] shall expire’  
22 at the end of the time period,” *Beach*, 523 U.S. at 417 (emphasis added), supports her reading of  
23 1635(f). Plaintiff also claims that this reading of the statute of repose is consistent with Section  
24 1635(a), which provides that a borrower “shall have the right to rescind the transaction . . . by  
25 notifying the creditor, in accordance with the regulations of the [Federal Reserve] Board, of his  
26 intention to do so.” 15 U.S.C. § 1635(a). The governing regulations provide that “[t]o exercise  
27 the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or  
28 other means of written communication.” 12 C.F.R. § 226.23.

1 Plaintiff further contends that despite its broad statement with respect to subject matter  
2 jurisdiction and claims under Section 1635(f), “the court in *Miguel* was only considering whether  
3 or not the three-year period expired when no rescission demand had been sent to the creditor  
4 within that period.” (Pl.’s Opp’n 5.) She argues that *Miguel* “expressly noted” that a rescission  
5 demand is sufficient to satisfy the statute, quoting the following language:

6 Miguel argues that she should have been allotted an additional year in which to  
7 file suit after the expiration of the three-year period afforded by the statute. **While**  
8 **Miguel is correct that 15 U.S.C. § 1640(e) provides the borrower one year**  
9 **from the refusal of cancellation to file suit**, that is not the issue before us.  
Rather the issue is whether her cancellation was effective even though it was not  
received by the Bank—the creditor—within the three-year statute of repose.

10 *Miguel*, 309 F.3d at 1165 (emphasis added by Plaintiff); see Pl.’s Opp’n 5.

11 The plaintiff in *Miguel* did not notify the appropriate creditor of her rescission within the  
12 statutory period before filing suit against it after the period ended. *Miguel*, 309 F.3d at 1165  
13 (“[T]he issue is whether her cancellation was effective even though it was not received by the  
14 Bank-the creditor-within the three-year statute of repose. We hold that it was not. While the  
15 Bank’s servicing agent, Countrywide, received notice of cancellation within the relevant  
16 three-year period, no authority supports the proposition that notice to Countrywide should suffice  
17 for notice to the Bank.”). Plaintiff and Defendant disagree over the relevance of this fact as it  
18 relates to *Miguel*’s statement with respect to Section 1635(f) and subject matter jurisdiction.

19 The federal courts that have addressed this issue, including several district courts in the  
20 Ninth Circuit, have failed to reach a consensus. Some courts accept Defendant’s position that  
21 notification within the statutory period is irrelevant if the plaintiff does not initiate a lawsuit  
22 within the period. For example, in *Sam v. American Home Mortgage Servicing*, No. CIV.  
23 S-09-2177 LKK/KJM, 2010 WL 761228 (E.D. Cal. Mar. 3, 2010), the court dismissed the  
24 plaintiffs’ TILA claim for rescission despite their allegation that they had sent notice of  
25 rescission within the statutory period, reasoning that “sending a ‘notice of rescission within the  
26 three year period is irrelevant’ to whether plaintiffs filed a claim seeking rescission. (citation  
27 omitted) Rather, plaintiff must file a complaint seeking rescission before the statute of repose  
28 expires.” *Sam*, 2010 WL 761228, at \*2; see also, e.g., *Gates v. Wachovia Mortg., FSB*, No.

1 2:09-cv-02464-FCD/EFB, 2010 WL 902818, at \*4 (E.D. Cal. Feb. 19, 2010) (“[I]f the borrower  
2 files his or her suit over three years from the date of a loan’s consummation, a court is powerless  
3 to grant rescission. (citations omitted) . . . If a borrower exercises her right to rescind within the  
4 three-year limitation period, such action only entitles the borrower to damages, not rescission.”  
5 (citations omitted)); *Falcocchia v. Saxon Mortg., Inc.*, — F. Supp. 2d —, 2010 WL 582059 (E.D.  
6 Cal. Feb. 12, 2010) (granting the defendant’s motion to dismiss the plaintiffs’ TILA rescission  
7 claim where “plaintiffs did not file a claim seeking rescission within the three year period, this  
8 period cannot be tolled, and plaintiffs’ allegation that they sent a notice of rescission within the  
9 three year period is irrelevant”).

10 Other courts have reached the opposite conclusion. For example, in *Santos v.*  
11 *Countrywide Home Loans*, No. 1:09-CV-00912-AWI-SM, 2009 WL 2500710 (E.D. Cal. Aug.  
12 14, 2009), the court, after acknowledging the lack of consensus on the issue, observed:

13 The question before the Ninth Circuit in *Miguel* was not whether a  
14 plaintiff who had timely given notice could file suit outside the three year  
15 limitations period, but rather whether a plaintiff who had not timely given notice  
16 to the correct Defendant could substitute said Defendant outside the three year  
17 limitations period. *Miguel* is therefore not controlling on the issue before the  
18 court. The court finds that if Plaintiff—the borrower—had provided notice prior to  
19 the end of the limitations period on December 21, 2008, and Defendant—the  
20 creditor—did not properly respond to that notice, Plaintiff could file suit after the  
21 end of the three year period of repose but within the one year limitations period  
22 borrowed from Section 1640.

19 *Santos*, 2009 WL 2500710, at \*5; see also *Johnson v. Mortgage Elec. Registration Sys.*, 252 Fed.  
20 Appx. 293, 294 (11th Cir. 2007) (*per curiam*) (acknowledging that “[a] borrower can trigger  
21 rescission ‘solely by notifying the creditor within set time limits of [her] intent to rescind’  
22 (citation omitted), but affirming grant of summary judgment where notification was sent “exactly  
23 three years and six months after the closing of [the plaintiff’s] loan”); *Scherzer v. Homestar*  
24 *Mortg. Servs.*, Civil Action No. 07-5040, 2010 WL 1947042, at \*11 (E.D. Pa. May 7, 2010)  
25 (“[N]either the statute nor the regulation requires the filing of suit within the time period, and  
26 neither differentiates between the notice required to invoke rescission within the three-day or the  
27 three-year period. Accordingly, if written notice is sufficient to rescind within three days, it is  
28 sufficient to rescind within three years if, in fact, the three-year period is applicable. I . . .

1 conclude that written notice within the three year period is sufficient to timely exercise the right  
2 to rescind.”).

3 This Court finds the second line of cases more persuasive than the first in that they are  
4 more consistent with the statutory language and the Supreme Court’s interpretation of the statute  
5 in *Beach*. As Plaintiff and the cases she cites recognize, both the language of the statute and  
6 *Beach*’s interpretation of that language suggest strongly that the statute of repose applies to the  
7 right of rescission under TILA and not the filing of a lawsuit. *See* 15 U.S.C. 1635(f) (“An  
8 obligor’s *right of rescission shall expire* three years after the date of consummation of the  
9 transaction or upon the sale of the property . . . ) (emphasis added); *Beach*, 523 U.S. at 417  
10 (“[Section 1635(f)] *talks not of a suit’s commencement but of a right’s duration*, which it  
11 addresses in terms so straightforward as to render any limitation on the time for seeking a remedy  
12 superfluous.” (emphasis added)). Moreover, the court in *Miguel* implied, without deciding, that  
13 the plaintiff’s demand for rescission would have satisfied the statute of repose had it been made  
14 on the correct defendant. *Miguel*, 309 F.3d at 1165 (“[T]he issue is whether [the plaintiff’s]  
15 cancellation was effective even though it was not received by the Bank—the creditor—within the  
16 three-year statute of repose. We hold that it was not. While the Bank’s servicing agent,  
17 Countrywide, received notice of cancellation within the relevant three-year period, no authority  
18 supports the proposition that notice to Countrywide should suffice for notice to the Bank.”).

19 Even accepting that Plaintiff’s demand was sufficient to satisfy 1635(f), the Court must  
20 still determine whether the instant suit was timely filed. All of the courts that have determined  
21 that notice is sufficient to satisfy the statute of repose also have found that the plaintiff must  
22 bring the claim within one year of the creditor’s denial or failure to respond. *See, e.g., Johnson*  
23 *v. Long Beach Mortg. Loan Trust 2001-4*, 451 F. Supp. 2d 16, 40 (D.D.C. 2006) (“If the  
24 borrower exercises her right of rescission during this extended period, the creditor’s denial of  
25 rescission or its failure to properly respond to the rescission within 20 days after receipt of notice  
26 gives rise to a potential violation under TILA and commences the running of TILA’s one year  
27 statute of limitations.”); *Sherzer*, 2010 WL 1947042, at \*11 (“The question then becomes how  
28 long the debtor has after sending the notice of rescission to file suit. . . . Several courts to have

1 confronted this issue, guided by the statute of limitations for filing a claim for damages arising  
2 from the failure to rescind, have adopted a one-year statute of limitations.”). Here, Plaintiff  
3 alleges that she notified Countrywide of her rescission on March 21, 2008, and that Countrywide  
4 has failed to rescind. (FAC ¶¶ 22, 29-32.) It is undisputed that this action was not commenced  
5 until August 29, 2009. Accordingly, absent tolling, Plaintiff’s rescission claim became untimely  
6 sometime in the spring of 2009, well before she filed suit at the end of August.

7 Plaintiff alleges that Countrywide “agreed, in writing, to toll the statute of limitations  
8 with respect to her Truth-in-Lending Act claims. The agreement to toll the statute of limitation  
9 expired on August 30, 2009.” (FAC ¶ 23.) However, even assuming that the letter, submitted to  
10 the Court by Defendants, constitutes a valid tolling agreement, that letter does not establish the  
11 timeliness of Plaintiff’s TILA claim for rescission. The allegations in the complaint together  
12 with the letter agreement establish at most that the statute of limitations was tolled from July 1,  
13 2009, the date of the letter, until August 30, 2009.

14 Plaintiff’s counsel represented to the Court at oral argument that the July 1 letter  
15 agreement was merely the latest in a series of successive tolling agreements between the parties  
16 that began in the spring of 2009. To the extent that these agreements would render the August  
17 2009 filing of the suit timely, Plaintiff shall have leave to amend to allege their existence with  
18 specificity.

19 **III. ORDER**

20 The motion to dismiss is GRANTED, WITH LEAVE TO AMEND. Any amended  
21 pleading must be filed within twenty (20) days of the date of this order.

22  
23 DATED: June 8, 2010

24   
25 JEREMY FOGEL  
26 United States District Judge