

1 **I. BACKGROUND**

2 The Carneros, a married couple, filed the instant action on October 1, 2009, alleging
3 federal and state law claims arising out of the refinancing of their home located at 1558
4 Minnesota Avenue, San Jose, California. Federal subject matter jurisdiction appears to be based
5 on the existence of a federal question, specifically, the Carneros’ claim for violation of the Truth
6 in Lending Act (“TILA”), 15 U.S.C. § 1601 *et seq.* The Court dismissed the complaint and first
7 amended complaint (“FAC”) for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). The
8 Carneros filed the operative SAC on August 23, 2010.

9 **II. LEGAL STANDARD**

10 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for
11 failure to state a claim upon which relief may be granted. “Dismissal can be based on the lack of
12 a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
13 theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). For purposes of
14 evaluating a motion to dismiss, the court “must presume all factual allegations of the complaint
15 to be true and draw all reasonable inferences in favor of the nonmoving party.” *Usher v. City of*
16 *Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

17 However, mere conclusions couched as factual allegations are not sufficient to state a
18 cause of action. *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *see also McGlinchy v. Shell Chem.*
19 *Co.*, 845 F.2d 802, 810 (9th Cir. 1988). The complaint must plead “enough facts to state a claim
20 to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A
21 claim is plausible on its face “when the plaintiff pleads factual content that allows the court to
22 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*
23 *v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Thus, “for a complaint to survive a motion to dismiss, the
24 non-conclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly
25 suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962,
26 969 (9th Cir. 2009).

27 **III. DISCUSSION**

28 In its order dismissing the FAC, the Court concluded that the FAC was so lengthy and

1 disjointed that the Court was “is at a loss to understand which loan is at issue and what each
2 defendant is alleged to have done with that loan – in short, what happened.” Order of July 22,
3 2010 p. 3. The Court also noted that the FAC improperly referred the reader to the original
4 complaint for background or clarification on some points in violation of Civil Local Rule 10-1
5 (providing that “[a]ny party filing or moving to file an amended pleading must reproduce the
6 entire proposed pleading and may not incorporate any part of a prior pleading by reference”). *Id.*
7 Because it could not make any meaningful assessment of the Carneros’ claims as presented in the
8 FAC, the Court dismissed the FAC with leave to amend. *Id.* The Court suggested strongly that
9 any amended complaint be limited to approximately ten or twelve pages consistent with Federal
10 Rule of Civil Procedure 8, which directs a plaintiff to set forth “a short and plain statement of the
11 claim,” Fed. R. Civ. P. 8(a)(2), and requires that “[e]ach allegation must be simple, concise, and
12 direct,” Fed. R. Civ. P. 8(d)(1). The Court noted that “[i]t would be helpful to the Court if the
13 Carneros were to describe the circumstances surrounding the loan at issue in simple,
14 straightforward language. The Carneros’ numerous general allegations regarding the mortgage
15 industry are not useful and add nothing to their claims.” *Id.* The Court went on to state that:
16 “[i]t is important that the Carneros explain precisely what role each defendant played in the loan
17 transaction at issue, and how each defendant’s actions violated particular provisions of TILA.”
18 *Id.* at p. 4. The Court cautioned that “[i]f the Carneros once again fail to allege a viable federal
19 claim, the Court will dismiss this action without leave to amend.” *Id.*

20 The SAC omits all of the Carneros’ previously pled state law claims, instead setting forth
21 a single claim for violation of TILA. This claim again suffers from numerous deficiencies. For
22 example, the only allegation asserted with respect to Defendant Real Time is as follows:

23 II.12. Real Time committed the following violations related to the rescission of
24 the second loan:

25 II.12.1. Violations of Regulation Z 226.32(e) failed to do research about the
26 second loan being rescinded by Plaintiffs on April 23, 2009, see Exhibit A.

27 SAC p. 11. As Real Time points out in its motion, there is no Regulation “Z 226.32(e),” and this
28 conclusory allegation is inadequate to state any kind of claim. The Carneros did not file
opposition to Real Time’s motion. Accordingly, their claims against Real Time will be

1 dismissed without leave to amend.

2 With respect to the JPMorgan defendants, the loans about which the Carneros complain
3 were originated in June 2007. *See* SAC p. 5; JPMorgan’s Req. For Jud. Notice Exhs. 1-2.
4 Accordingly, it appears from the face of the SAC that the Carneros’ claims for damages under
5 TILA are barred by TILA’s one-year statute of limitations. *See* 15 U.S.C. § 1640(e). Ordinarily,
6 the one-year limitations period begins to run when the transaction underlying the violation is
7 “consummated.” *King v. California*, 784 F.2d 910, 915 (9th Cir. 1986). However, “the doctrine
8 of equitable tolling may, in the appropriate circumstances, suspend the limitations period until
9 the borrower discovers or had reasonable opportunity to discover the fraud or nondisclosures that
10 form the basis of the TILA action.” *King*, 784 F.2d at 915. The district court must evaluate a
11 request for equitable tolling to determine if application of the one-year limitations period “would
12 be unjust or frustrate the purpose of the Act.” *Id.* The Carneros have failed to allege facts giving
13 rise to equitable tolling in any of their three pleadings.

14 The Carneros’ claims for rescission under TILA have been extinguished because it
15 appears that the property has been sold. *See* 15 U.S.C. § 1635(f) (right of rescission is
16 extinguished by sale of the property). Moreover, the Carneros have failed to allege that they have
17 the present or future ability to tender all of the loan proceeds. *See Powell v. Residential Mortg.*
18 *Capital*, C 09-4928 JF (PVT), 2010 WL 2133011, at *4-5 (N.D. Cal. May 24, 2010) (explaining
19 this Court’s rationale for requiring a plaintiff to allege an ability to tender before permitting the
20 plaintiff to pursue a TILA rescission claim).

21 Because the Carneros have failed to allege a viable claim² despite having had several
22 opportunities to do so, their claims against the moving defendants will be dismissed without
23 leave to amend and with prejudice. In addition to the moving defendants, the Carneros sue
24 National Default Servicing Corporation, Randy Miguel, Chicago Title Company, and Bear
25 Stearns Residential Mortgage Corporation. There is no indication in the record that service of

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27 ² Defendants raise numerous additional grounds for dismissal in their motions, all of
28 which appear to be well-taken. However, the Court need not reach these arguments in light of its
disposition of the motions on the grounds discussed above.

1 process has been effected with respect to any of these additional defendants.³ Accordingly, the
2 Carneros' claims against these defendants will be dismissed without prejudice for failure to
3 prosecute.

4 **IV. ORDER**

- 5 (1) Defendants' motions to dismiss are GRANTED WITHOUT LEAVE TO
6 AMEND;
- 7 (2) All claims against the moving defendants are DISMISSED WITH PREJUDICE;
- 8 (3) All claims against the remaining defendants are DISMISSED WITHOUT
9 PREJUDICE; and
- 10 (4) The Clerk of the Court shall close the file.

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14 DATED: November 22, 2010

15 
16 JEREMY FOGEL
17 United States District Judge

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26 ³ Although the record does not contain a proof of service of the summons and complaint
27 upon it, Defendant National Default Servicing Corporation filed a Declaration Of Nonmonetary
28 Status pursuant to California Civil Code § 2924. The Carneros apparently interpreted the
Declaration as a motion to dismiss, and filed opposition to it. Neither the allegations of the SAC
nor the assertions made in the Carneros' brief suggest that the Carneros would be able to state a
viable federal claim against Defendant National Default Servicing Corporation.

1 Copies of Order served on:

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