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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

JOSE R CARNERO, ET AL.,

Plaintiffs,

v.

ELK GROVE FINANCIAL, LLC, et al.,

Defendants.

Case No. 16-cv-03606-BLF

**ORDER GRANTING MOTIONS TO  
DISMISS AND DENYING MOTION TO  
STAY FORECLOSURE**

Plaintiffs Jose and Marta Carnero (the “Carneros”) filed this action in June 2016 alleging causes of action based on violations of the Truth in Lending Act, quiet title, and other claims. Compl., ECF 1; First Am. Compl. (“FAC”), ECF 25. Before the Court are motions to dismiss filed separately by Defendant Elk Grove Financial, LLC (“Elk Grove”) and Defendant Special Default Services, Inc. (“SDS”). ECF 28, 38, 49, 56. The Carneros have also filed a noticed motion to stay a foreclosure sale. ECF 57. Pursuant to Civ. L.R. 7-1(b), the Court finds the parties’ motions suitable for submission without oral argument and hereby VACATES the hearings scheduled for June 8 and September 7, 2017. For reasons set forth below, the Court GRANTS Defendants’ motions and DENIES the Carneros’ motion.

**I. BACKGROUND**

In 2007, the Carneros obtained a mortgage loan from non-party Bear Stearns Residential Mortgage Company which was secured by a deed of trust on a property located at 1558 Minnesota Avenue, San Jose, CA 95125 (the “Property”). Deed of Trust (“DOT”), Ex. A to FAC, ECF 25-1; FAC 6. The Carneros allege that at the time of financing, an associate named Randy Miguel made promises on the amount of monthly mortgage payments and did not provide any disclosures prior to the signing of loan documents. *Id.* at 6-17.

1           The deed of trust ultimately was assigned to Elk Grove, and Elk Grove substituted SDS as  
2 the trustee. Assignments of Deed of Trust, Exs. 2-4 to FAC, ECF 25-2; Substitution of Trustee,  
3 Ex. 5 to FAC, ECF 25-2. On February 29, 2016, SDS recorded a Notice of Default and Election  
4 to Sell under Deed of Trust, stating that the Carneros were approximately \$87,000 in arrears on  
5 their mortgage. Notice of Default, Ex. 6 to FAC, ECF 25-2.

6           On March 30, 2016, the Carneros sent SDS a Notice of Rescission, purporting to rescind  
7 the 2007 mortgage loan transaction. Notice of Rescission, Ex. 10 to FAC, ECF 25-3. They filed  
8 this action on June 27, 2016 against Elk Grove and SDS, as well as the loan servicer, Land Home  
9 Financial Services. Compl., ECF 1. The Carneros also filed an application for a temporary  
10 restraining order (“TRO”) seeking to enjoin the nonjudicial foreclosure sale, which had been  
11 scheduled for July 6, 2016. TRO Appl., ECF 6; Notice of Trustee’s Sale, Ex. 14 to FAC, ECF 25-  
12 5. This Court denied the TRO application, concluding that diversity jurisdiction did not lie; the  
13 Carneros’ only substantive federal claim, asserted under the Truth in Lending Act (“TILA”), was  
14 inadequate; and there was no basis for the Court to exercise supplemental jurisdiction over the  
15 remaining state law claims absent a viable federal claim. *See* Order Denying Plaintiffs’ Appl. for  
16 TRO, ECF 13.

17           The Carneros nonetheless staved off foreclosure by filing a Chapter 7 bankruptcy petition  
18 on July 5, 2016, the day before the scheduled sale. *See* Ch. 7 Petition, Dkt. No. 1, No. 16-br-  
19 51967-SLJ (Bankr. N.D. Cal. 2016). They filed a notice of the automatic bankruptcy stay in this  
20 action on July 11, 2016. Notice of Stay of Proceedings, ECF 17. The bankruptcy was discharged  
21 on October 12, 2016, and the foreclosure sale was rescheduled for November 28, 2016. Discharge  
22 of Debtor and Final Decree, Dkt. No. 20, No. 16-br-51967-SLJ; Second TRO Appl. 6, ECF 31.  
23 The bankruptcy case was reopened on November 17, 2016 for the purpose of permitting the  
24 Carneros to file an adversary proceeding to determine the dischargeability of student loan debts.  
25 Order Granting Motion to Reopen Case, Dkt. No. 26, No. 16-br-51967-SLJ. The Carneros once  
26 again sought a TRO to enjoin the foreclosure sale and requested a notice of lis pendens on  
27 November 21, 2016, both of which the Court subsequently denied. ECF 36.

28           On October 7, 2016, the Carneros filed the operative first amended complaint (“FAC”),

1 again alleging a single substantive federal claim under TILA and numerous state law claims.  
2 FAC. SDS moved to dismiss the FAC and served its motion papers on the Carneros via overnight  
3 mail on November 4, 2016. SDS Mot., ECF 28. Elk Grove separately filed a motion to dismiss  
4 the FAC and also served its motion papers on the Carneros via overnight mail on November 23,  
5 2016. EG Mot., ECF 38. However, the Carneros stated in a letter to the Court filed on January 5,  
6 2017, that they had not received the motions to dismiss, thus no opposition was filed. ECF 45.  
7 SDS then re-noticed its motion to dismiss on January 26, 2017, ECF 49, and Elk Grove re-noticed  
8 its motion on March 1, 2017, ECF 56. The Carneros then filed an opposition to SDS's re-noticed  
9 motion to dismiss but did not oppose Elk Grove's re-noticed motion to dismiss. Opp'n, ECF 52.  
10 The Court has considered the Carneros' opposition in relation to both motions to dismiss. On  
11 March 21, 2017, the Carneros filed a noticed motion to stay foreclosure, allegedly scheduled for  
12 March 22, 2017. ECF 57.

13 **II. LEGAL STANDARD**

14 "A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a  
15 claim upon which relief can be granted 'tests the legal sufficiency of a claim.'" *Conservation*  
16 *Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d  
17 729, 732 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts  
18 as true all well-pled factual allegations and construes them in the light most favorable to the  
19 plaintiff. *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). However, the  
20 Court need not "accept as true allegations that contradict matters properly subject to judicial  
21 notice" or "allegations that are merely conclusory, unwarranted deductions of fact, or  
22 unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)  
23 (internal quotation marks and citations omitted). While a complaint need not contain detailed  
24 factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to  
25 relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*  
26 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when it "allows the  
27 court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*  
28

1 **III. DISCUSSION**

2 Before turning to the merits of these arguments, the Court addresses SDS and Elk Grove’s  
3 requests for judicial notice.

4 **A. Judicial Notice**

5 SDS has requested judicial notice of seven documents, attached to the request as Exhibits  
6 A through G: (A) Deed of Trust (“DOT”); (B) Assignment of DOT from Mortgage Electronic  
7 Registration System, Inc. to Bayview Loan Servicing, LLC recorded on May 21, 2012; (C)  
8 Assignment of Mortgage/DOT from Bayview Loan Servicing, LLC to Bucks Financial V, LLC  
9 recorded on April 10, 2014; (D) Assignment of Mortgage/DOT from Bucks Financial V, LLC to  
10 Elk Grove Financial, LLC recorded on January 20, 2016; (E) Substitution of Trustee recorded on  
11 February 29, 2016, in which Elk Grove substituted SDS as trustee; (F) Notice of Default recorded  
12 on February 29, 2016; and (G) Notice of Trustee’s Sale recorded on June 7, 2016. SDS RJN, ECF  
13 49-1. Elk Grove has requested judicial notice of the same seven documents as those attached to  
14 SDS’s request for judicial notice. EG RJN, ECF 56-1.

15 Judicial notice is appropriate with respect to Exhibits A to F for the purpose of the pending  
16 motions to dismiss because their “contents are alleged in [the] complaint and whose authenticity  
17 no party questions.” *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005); Exs. 1-6 to FAC.  
18 Judicial notice is also appropriate with respect to all the exhibits because they are documents  
19 publicly filed with the Santa Clara County Recorder. *See Mir v. Little Co. of Mary Hosp.*, 844  
20 F.2d 646, 649 (9th Cir. 1988) (court may take judicial notice of matters of public record).

21 The Carneros have neither opposed the request for judicial notice nor disputed the  
22 authenticity of the documents. The request for judicial notice is GRANTED with respect to all the  
23 exhibits attached to the requests of SDS and Elk Grove.

24 **B. First Claim of Violations of Truth in Lending Act (“TILA”)**

25 SDS argues that this claim fails because SDS is merely a trustee in this matter and was  
26 never assigned an interest in the Property. SDS Mot. 8. Elk Grove contends that the TILA claim  
27 is time-barred because the loan originated in June 2007. EG Mot., 7-8. The Carneros counter that  
28 because of fraudulent concealment, the limitations period was tolled. Opp’n 9.

1 Congress passed TILA “to help consumers avoid the uninformed use of credit, and to  
2 protect the consumer against inaccurate and unfair credit billing.” *Jesinoski v. Countrywide Home*  
3 *Loans, Inc.*, 135 S. Ct. 790, 791-92 (2015) (internal quotation marks and citation omitted). In  
4 furtherance of these goals, TILA grants borrowers the unconditional right to rescind certain types  
5 of loans within three days. *Id.* at 792. After three days, borrowers may rescind the loan only if the  
6 lender failed to satisfy TILA’s disclosure requirements. *Id.* “But this conditional right to rescind  
7 does not last forever.” *Id.* “Even if a lender *never* makes the required disclosures, the right of  
8 rescission shall expire three years after the date of consummation of the transaction or upon the  
9 sale of the property, whichever comes first.” *Id.*

10 The Court finds this claim to be time-barred. The Carneros allege in their FAC, as they did  
11 in their original complaint, that a Bear Stearns associate named “Randy Miguel” did not provide  
12 any disclosures to them at the time they secured a loan from Bear Stearns in 2007 and that they  
13 rescinded their 2007 loan in 2016.<sup>1</sup> FAC 6-7; Compl. 6. In its two prior orders denying the  
14 Carneros’ first and second TRO applications, the Court concluded that the Carneros were unlikely  
15 to succeed on the merits of their TILA claim because the allegations showed that the TILA claim  
16 was absolutely time-barred. See Orders Denying Plaintiffs’ Appls. for TRO, ECF 13, 36. The  
17 Court concludes here for the third time that any TILA claim based upon the alleged 2016  
18 rescission of the 2007 loan is time-barred. *Jesinoski*, 135 S. Ct. at 792 (holding that there is “no  
19 federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f) has run.”).

20 The Carneros attempt to plead around the three-year statute of repose by asserting a claim  
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22 <sup>1</sup> The Court observes that the FAC makes passing reference to earlier purported rescissions on  
23 April 23 and June 18, 2009. FAC 8. However, the TILA claim does not appear to be based on  
24 those earlier purported rescissions, and the FAC does not provide sufficient facts to allege  
25 plausibly that the earlier purported rescissions were valid. Moreover, the Carneros had already  
26 brought TILA claims for both rescission and damages in a prior suit in this Court based on these  
27 two purported rescissions. *Carnero v. EMC Mortg. Corp.*, No. 09-4696-JF, 2010 WL 4916418, at  
28 \*2 (N.D. Cal. Nov. 22, 2010); *Carnero v. EMC Mortg. Corp.*, No. 09-4696-JF, Dkt. No. 39, at 2  
(N.D. Cal. filed Aug. 23, 2010). In that suit, the Court determined that the claims were not viable  
and dismissed them. *Carnero*, 2010 WL 4916418, at \*2. Accordingly, any TILA claims based on  
these 2009 rescissions would be successive and barred by res judicata. *W. Radio Servs. Co. v.*  
*Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997).

1 for money damages under TILA in addition to a claim for rescission, and by claiming equitable  
2 tolling. FAC 7-8. A claim for money damages for a TILA violation must be brought “within one  
3 year from the date of the occurrence of the violation.” 15 U.S.C. § 1640(e). Arguing that  
4 equitable tolling applies to their claims for money damages under TILA, the Carneros appear to  
5 have reproduced verbatim excerpts of a district court opinion in their opposition. Opp’n 7-8  
6 (citing *Ward v. Branch Banking & Trust Co.*, No. 13-01968, 2014 WL 2707768, at \*12 (D. Md.  
7 June 13, 2014)). In *Ward*, the court held that the “doctrine of fraudulent concealment can toll the  
8 statute of limitations for monetary damages claims under TILA.” *Id.* However, the FAC provides  
9 no factual allegations demonstrating fraudulent concealment that could toll the damages claim  
10 under TILA. First, as noted, the entities who allegedly violated TILA’s notice requirements are  
11 not parties to this suit. Second, the Carneros’ reliance on the fifth cause of action for fraud in an  
12 attempt to plead fraudulent concealment is to no avail. Opp’n 9; FAC 16. For example, the  
13 Carneros allege that “Robert G. Hall is a Robosigner” on the DOT assignments, that signatures do  
14 not match among the notice of default and the substitution of trustee documents, that the loan  
15 number is not set forth in the assignment or notice of default, and that Defendants violated  
16 California’s Homeowner’s Bill of Rights. FAC 19-20. These allegations do not demonstrate any  
17 TILA violations, let alone how Defendants had concealed the purported TILA violations. Third,  
18 while the allegations relating to Randy Miguel’s failure to make adequate disclosure with respect  
19 to loan financing might suggest a TILA violation, the FAC provides no allegations showing how  
20 any failure to disclose was fraudulently concealed. FAC 6. Further, the allegations regarding  
21 Randy Miguel’s supposed failure to make the disclosure was also alleged in the complaint of a  
22 prior case filed in 2009 adjudicated by this Court, which is also a suit initiated by the Carneros.  
23 *Carnero v. EMC Mortg. Corp.*, No. 09-4696-JF, 2010 WL 4916418 (N.D. Cal. Nov. 22, 2010).  
24 As such, the Carneros had discovered their claims arising from the purported failure of Randy  
25 Miguel at least as early as 2009.

26 Accordingly, the Court concludes that the Carneros have not plausibly pled their TILA  
27 claim, or how the TILA claim could be equitably tolled. Because the TILA claim is time-barred,  
28 this claim is dismissed and the Court need not address SDS’s arguments concerning its privileged

1 conduct as a trustee.

2 **C. Second Claim of Declaratory Relief**

3 As did the original complaint, the FAC alleges a claim for declaratory judgment. SDS and  
4 Elk Grove argue that this claim fails because “[a] claim for declaratory relief is unnecessary where  
5 an adequate remedy exists under some other cause of action,” such as quiet title and wrongful  
6 foreclosure causes of action. EG Mot. 9-10; SDS Mot. 9 (citing *Mangindin v. Washington Mut.  
7 Bank*, 637 F. Supp. 2d 700, 707 (N.D. Cal. 2009)).

8 Although it is unclear the ground upon which this claim is based, this claim could be  
9 construed as asserted under the federal Declaratory Judgment Act. First, the Court notes that  
10 “[i]njunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must  
11 exist before injunctive relief may be granted.” *Rockridge Trust v. Wells Fargo, N.A.*, 985 F. Supp.  
12 2d 1110, 1167 (N.D. Cal. 2013) (citations omitted). Second, even assuming that the claim is  
13 asserted under federal law, the Declaratory Judgment Act does not confer federal jurisdiction.  
14 *Countrywide Home Loans, Inc., v. Mortg. Guar. Ins. Corp.*, 642 F.3d 849, 853 (9th Cir. 2011).  
15 Federal jurisdiction must exist independently of the Declaratory Judgment Act. *Id.*

16 **D. State Law Claims**

17 Given that the TILA claim is the only substantive federal claim and the FAC fails to  
18 plausibly allege facts in support of the claim, the Court declines to exercise supplemental  
19 jurisdiction over the Carneros’ remaining state law claims. *See Sanford v. MemberWorks, Inc.*,  
20 625 F.3d 550, 561 (9th Cir. 2010). The Court therefore does not consider the viability of the  
21 Carneros’ state law claims. The Court notes, however, that the state law claims suffer from the  
22 same types of defects as the TILA claim, in that they lack facts adequate to make out plausible  
23 claims against the named Defendants.

24 **E. Motion to Stay Foreclosure Sale**

25 The Carneros also move for a stay of foreclosure sale, as well as “a stay of all further  
26 proceeding in or arising out of this action.” Stay Mot. 5, ECF 57. As discussed above, however,  
27 the Carneros have failed to make out a viable federal claim and absent a viable federal claim the  
28 Court declines to exercise supplemental jurisdiction over their state law claims. Further, the

1 motion to stay foreclosure provides no new facts separate from the FAC or the prior TRO  
2 applications. Without an operative complaint and for the same reasons the Carneros' TRO  
3 applications were denied, the Court DENIES the Carneros' motion to stay foreclosure.

4 **F. Leave to Amend**

5 In deciding whether to grant leave to amend, the Court must consider the factors set forth  
6 by the Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962), and discussed at length by the  
7 Ninth Circuit in *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048 (9th Cir. 2009). A district  
8 court ordinarily must grant leave to amend unless one or more of the *Foman* factors is present: (1)  
9 undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by  
10 amendment, (4) undue prejudice to the opposing party, and (5) futility of amendment. *Eminence*  
11 *Capital*, 316 F.3d at 1052. “[I]t is the consideration of prejudice to the opposing party that carries  
12 the greatest weight.” *Id.* However a strong showing with respect to one of the other factors may  
13 warrant denial of leave to amend. *Id.*

14 Prior to this case, the Carneros had a series of filings in state, federal, and bankruptcy  
15 courts, and many of the state and federal court filings involved the same properties. *Compare*  
16 *Carnero v. Washington Mut.*, No. 09-5330-JF, 2010 WL 4916419 (N.D. Cal. Nov. 22, 2010) *with*  
17 *Carnero v. Fed. Home Loan Mortg. Corp.*, No. 11-1029-WHA, 2012 WL 195408 (N.D. Cal. Jan.  
18 23, 2012) (concerning a property located at 5645 Blossom Avenue, San Jose, CA 95123); *see e.g.*,  
19 *Carnero v. EMC Mortg. Corp.*, No. 09-4696-JF, 2010 WL 4916418 (N.D. Cal. Nov. 22, 2010)  
20 (concerning the Property in this action). The Carneros further admit that the trustee has already  
21 postponed sale of the Property ten times. Stay Mot. 3. In this action, the Carneros had also  
22 delayed two motion hearings, claiming that they had not received the motion papers served by  
23 SDS and Elk Grove. The representation, however, is not consistent with the proofs of service  
24 demonstrating that the Carneros were served by overnight mail. While the Carneros' conduct in  
25 this and other actions is suggestive of undue delay and bad faith, the record before the Court is  
26 insufficient to draw the ultimate conclusion of undue delay, bad faith, or dilatory motive.

27 Undue prejudice to the opposing parties may also apply because of the repeated delays of  
28 foreclosure sale and of adjudication of this case may be attributed to the Carneros. Nonetheless,

1 the complaint has given Defendants a notice of the asserted claims and the Court’s decision on  
2 whether to grant leave to amend does not depend on the factor of undue prejudice. The Court,  
3 however, finds that the remaining factors – repeated failure to cure deficiencies by amendments  
4 previously allowed, and futility of the amendment – to be dispositive.

5 As evidence of a repeated failure to cure the deficiencies, the Carneros have had  
6 opportunities for substantive amendments to no avail to address the issue that their TILA claim is  
7 time-barred. The deficiencies of their TILA claim were identified in several of this Court’s prior  
8 orders including an order denying the application to proceed in forma pauperis, and two orders  
9 denying the TRO applications. But the FAC fails to remedy them.

10 The Court further finds that any amendment would be futile. “[A] proposed amendment is  
11 futile only if no set of facts can be proved under the amendment to the pleadings that would  
12 constitute a valid and sufficient claim or defense.” *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209,  
13 214 (9th Cir. 1988). The Ninth Circuit has alternatively stated that the test of whether amendment  
14 would be futile is “identical to the one used when considering the sufficiency of a pleading  
15 challenged under Rule 12(b)(6).” *Id.*; see *Utterkar v. Ebix, Inc.*, No. 14-02250-LHK, 2015 WL  
16 5027986, at \*8 (N.D. Cal. Aug. 25, 2015).

17 First, just like the original complaint, most of the allegations in the FAC relate to third  
18 parties and do not concern the named Defendants. Second, the TILA cause of action is time-  
19 barred and neither the FAC nor the argument presented in the opposition demonstrates that either  
20 TILA claim can be allowed through sufficient pleading of equitable tolling. Further, the  
21 undisputed facts acknowledged by the Carneros and confirmed by the judicially noticed  
22 documents establish that no TILA claims can be viable. In opposition to SDS’s motion to dismiss,  
23 the Carneros request leave of Court to amend the TILA claim and also to add references to a loan  
24 modification agreement. Opp’n 11; Ex. 1 to Opp’n. However, the TILA disclosure requirements  
25 do not apply to loan modification agreements. *Perez v. Wells Fargo Bank, N.A.*, No. 11-02279-  
26 JCS, 2011 WL 3809808, at \*13 (N.D. Cal. Aug. 29, 2011) (citing *Norton-Griffiths v. Wells Fargo*  
27 *Home Mortg.*, 2011 WL 61609, at \* 5-7 (D.Vt. Jan.4, 2011)). Given that the Carneros proffer no  
28 other facts or legal bases that could remedy the deficiencies, leave to amend would be futile.

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**IV. ORDER**

The motions to dismiss the First Amended Complaint filed by SDS and Elk Grove are GRANTED with respect to the First Claim of TILA violation. The Court declines to exercise supplemental jurisdiction over the remaining claims. The First Amended Complaint is DISMISSED as to SDS and Elk Grove for lack of federal jurisdiction without leave to amend.

The Carneros' motion to stay foreclosure proceeding is also DENIED.

**IT IS SO ORDERED.**

Dated: April 6, 2017

  
BETH LABSON FREEMAN  
United States District Judge