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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JOSE WENDE,	)	Civil No. 10cv205-L(BLM)
	)	
Plaintiff,	)	<b>ORDER GRANTING MOTION TO</b>
	)	<b>DISMISS WITH LEAVE TO AMEND</b>
v.	)	
	)	
COUNTRYWIDE HOME LOANS, INC.,	)	
<i>et al.</i> ,	)	
	)	
Defendants.	)	

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In this mortgage foreclosure action Defendants Countrywide Home Loans, Inc., BAC Home Loans Servicing , LP and Bank of America, N.A.<sup>1</sup> (collectively “Moving Defendants”) filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff filed an opposition. For the reasons which follow, the motion is **GRANTED WITH LEAVE TO AMEND.**

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<sup>1</sup> The motion was filed by “Bank of America, N.A. (erroneously sued as ‘Countrywide Bank, N.A.’).” Bank of America, N.A. (“Bank of America”) is not a named party and therefore cannot file documents in this case. Civ. Loc. Rule 5.1(h) (“Except as provided in the federal rules, or by leave of court, no document will be filed in any case by any person not a party thereto.”). The motion was accepted for filing because it was also filed in behalf of two named Defendants. If Bank of America intends to file papers in this case, it must comply with Federal Rules of Civil Procedure 25(c) or any other applicable Federal Rule of Civil Procedure providing for joinder or substitution of parties.

1 According to the operative first amended complaint (“Compl.”), Plaintiff owns a property  
2 located at 528 Bayona Loop in Chula Vista, California (“Property”). On May 10, 2006 Plaintiff  
3 refinanced the Property with Defendant Countrywide Home Loans, Inc. (“Countrywide”), by  
4 signing a note and deed of trust. On June 19, 2006 Plaintiff borrowed more funds from  
5 Defendant Countrywide Bank, N.A. (“Bank”), by signing another note and deed and trust. Both  
6 loans were secured by the Property. Subsequently, Plaintiff fell behind on his payments and  
7 attempted unsuccessfully to modify the loans. Some of the Defendants commenced foreclosure  
8 proceedings against the Property.

9 On October 29, 2009 Plaintiff filed a complaint in State court to resist the foreclosure  
10 proceedings. Defendants removed the action to this court based on federal question jurisdiction  
11 under 28 U.S.C. Section 1331.

12 Plaintiff subsequently filed the operative first amended complaint. (“Compl.”) He claims  
13 that the terms of the two loans were not as promised, that he did not receive proper disclosures,  
14 that the loans were improperly serviced, and that Defendants engaged in loan modification  
15 proceedings in bad faith. He asserted causes of action for violation of the Real Estate Settlement  
16 Procedures Act, 12 U.S.C. § 2601 *et seq.* (“RESPA”), Truth in Lending Act, 15 U.S.C. § 1601 *et*  
17 *seq.* (“TILA”), Fair Debt Collection Practice Act, 15 U.S.C. § 1692 *et seq.* (“FDCPA”),  
18 Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code § 1788 *et seq.*, California Civil  
19 Code Section 1632, California Business and Professions Code § 17200 *et seq.*, negligent  
20 misrepresentation, fraud, rescission, quasi contract, determination of validity of lien, conspiracy  
21 and aiding and abetting. He requested damages and rescission among other remedies.

22 The Moving Defendants filed a motion to dismiss for failure to state a claim upon which  
23 relief can be granted. A Rule 12(b)(6) motion tests the sufficiency of the complaint. *Navarro v.*  
24 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). “While a complaint attacked by a Rule 12(b)(6)  
25 motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide  
26 the grounds of his entitlement to relief requires more than labels and conclusions, and a  
27 formulaic recitation of the elements of a cause of action will not do. Factual allegations must be  
28 enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550

1 U.S. 544, 555 (2007) (internal quotation marks, brackets and citations omitted). In reviewing a  
2 motion to dismiss under Rule 12(b)(6), the court must assume the truth of all factual allegations  
3 and must construe them in the light most favorable to the nonmoving party. *Cahill v. Liberty*  
4 *Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). Legal conclusions need not be taken as true  
5 merely because they are cast in the form of factual allegations. *Roberts v. Corrothers*, 812 F.2d  
6 1173, 1177 (9th Cir. 1987); *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).  
7 Similarly, “conclusory allegations of law and unwarranted inferences are not sufficient to defeat  
8 a motion to dismiss.” *Pareto v. Fed. Deposit Ins. Corp.*, 139 F.3d 696, 699 (9th Cir. 1998).

9       The Moving Defendants argue that the first cause of action for RESPA violations should  
10 be dismissed because it is alleged with insufficient particularity. Plaintiff alleged that on July  
11 22, 2009 he sent a qualified written request pursuant to 12 U.S.C. Section 2605 to Bank of  
12 America Home Loans and that Defendants “failed to adequately respond” to it. (Compl. at 9-  
13 10.)

14       Plaintiff did not allege sufficient facts in support his RESPA claim to meet the notice  
15 pleading requirements of Rule 8(a) of Federal Rules of Civil Procedure. Although Rule 8 does  
16 not require that the complaint include all facts necessary to carry the plaintiff’s burden, it must  
17 allege plausible grounds to infer the existence of a claim for relief. *Al-Kidd v. Ashcroft*, 580  
18 F.3d 949, 977 (9th Cir. 2009). This calls for enough facts to raise a reasonable expectation that  
19 discovery will reveal evidence to prove that claim. *Id.*

20       The first amended complaint falls short of this requirement. Section 2605(e), which  
21 imposes a duty to respond to certain borrower inquiries, applies to loan servicers. 12 U.S.C.  
22 § 2605(e). Plaintiff did not allege that Bank of America Home Loans was a loan servicer on  
23 either one of the two loans. Moreover, Plaintiff did not name Bank of America Home Loans as a  
24 defendant. Furthermore, the duty applies only to certain types of borrower requests which  
25 comply with the requirements of section 2605(e)(1)(B). Plaintiff did not allege any facts which  
26 could support an inference that his letter was a qualified written request under RESPA, and does  
27 not even state whether the request referred to his first or second loan. Last, Plaintiff did not  
28 allege what he requested Bank of America Home Loans to do or provide, what response he

1 received, or in which respect the response failed to comply with section 2605(e)(2). The  
2 conclusory allegation that Defendants “failed to adequately respond” is insufficient to allege a  
3 RESPA violation.

4 In the first cause of action Plaintiff also alleged that “[Countrywide, Bank], their  
5 predecessors and other Defendants were required to give Plaintiff notice of transfer” as required  
6 by section 2605(d) and that he was improperly imposed a late fee within 60 days of transfer in  
7 violation of section 2605(d). (Compl. at 10.) Plaintiff did not include, however, any allegation  
8 to indicate that he did not receive the requisite notice.

9 Based on the foregoing, Plaintiff did not allege sufficient facts to state a claim for  
10 violation of 12 U.S.C. Sections 2605(d) or (e). The Moving Defendants’ motion to dismiss the  
11 first cause of action for RESPA violations is **GRANTED**.

12 Next, the Moving Defendants contend that the second cause of action for TILA violations  
13 is time barred. Plaintiff asserted this claim based on alleged failures to provide him with  
14 disclosures and a notice of right to cancel. (Compl. at 10-11; *see also id.* at 20.) He requested  
15 damages and rescission.

16 The statute of limitations for damage claims under TILA is “one year from the date of the  
17 occurrence of the violation.” 15 U.S.C. § 1640(e). “[T]he limitations period in Section 1640(e)  
18 runs from the date of consummation of the transaction . . .” *King v. California*, 784 F.2d 910,  
19 915 (9th Cir. 1986). Both loans were consummated more than three years prior to Plaintiff’s  
20 filing of the initial complaint. (*See* Compl. at 3.) Accordingly, the statute of limitations for  
21 damages expired long before the filing. Although Plaintiff correctly notes that the statute of  
22 limitations may be subject to equitable tolling, *see King*, 784 F.2d at 915, he did not allege any  
23 facts in support of tolling in this case. (*See* Compl. at 10-11.)

24 “A motion to dismiss based on the running of the statute of limitations period may be  
25 granted only ‘if the assertions of the complaint, read with the required liberality, would not  
26 permit the plaintiff to prove the statute was tolled.’” *Supermail Cargo, Inc. v. United States*, 68  
27 F.3d 1204, 1206-07 (9th Cir. 1995), quoting *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682  
28 (9th Cir. 1980). The untimeliness must appear beyond doubt on the face of the complaint before

1 a claim will be dismissed as time-barred. *See Supermail Cargo*, 68 F.3d at 1206-07.

2 Because the expiration of the statute of limitations appears on the face of the complaint  
3 and because Plaintiff did not allege any facts in support of equitable tolling, his TILA claim for  
4 damages is dismissed as time-barred.

5 The Moving Defendants also argue that Plaintiff cannot state a claim for rescission under  
6 TILA. A borrower's right to rescind expires after three-years. 15 U.S.C. § 1635(f). The three-  
7 year period commences with the "consummation of the transaction." *Id.* When it expires, the  
8 right to rescind is completely extinguished and the court lacks jurisdiction over the claim.

9 *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1164 (9th Cir. 2002). Because Plaintiff filed  
10 this action more than three years after he entered into the loan transactions, he no longer has the  
11 right to seek rescission under TILA.

12 Based on the foregoing, Plaintiff's TILA claim is time-barred. The Moving Defendants'  
13 motion to dismiss the second cause of action is therefore **GRANTED**.

14 The Moving Defendants also maintain that Plaintiff's third cause of action for FDCPA  
15 violations should be dismissed because they are not debt collectors. Plaintiff alleged that  
16 Defendants violated the FDCPA when they entered into loan modification negotiations with  
17 him, although they knew that he could not comply with the terms, and when they instructed him  
18 to stop making mortgage payments in order to be eligible for loan modification, only to later use  
19 the lack of payments in furtherance of their foreclosure efforts. (Compl. at 11-12.)

20 The FDCPA applies to debt collectors. *See* 15 U.S.C. § 1692; *see also id.* §§ 1692e &  
21 1692f. A debt collector is "any person who uses any instrumentality of interstate commerce or  
22 the mails in any business the principal purpose of which is the collection of any debts, or who  
23 regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be  
24 owed or due another." *Id.* § 1692a(6). Excluded from the definition are creditors and their  
25 employees who collect debts on behalf of the creditor. *Id.* § 1692a(6)(a). Included in the  
26 definition is "any creditor who, in the process of collecting his own debts, uses any name other  
27 than his own which would indicate that a third person is collecting or attempting to collect such  
28 debts." *Id.* § 1692a(6). Plaintiff did not allege any facts to support an inference that any

1 Defendant was a debt collector as defined in the FDCPA, including that any Defendant acted in  
2 a way which would lead Plaintiff to believe that it was a third party collecting a debt for a  
3 creditor. Accordingly, the Moving Defendants' motion to dismiss the third cause of action for  
4 FDCPA violations is **GRANTED**.

5 Based on the foregoing, the Moving Defendants' motion is granted with respect to all the  
6 federal claims alleged in the first amended complaint. Having dismissed these claims, the court  
7 must next consider whether Plaintiff should be granted leave to amend. *See Schreiber Distrib.*  
8 *Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 2004). Rule 15 advises the  
9 court that leave to amend shall be freely given when justice so requires. Fed. R. Civ. P. 15(a).  
10 "This policy is to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*,  
11 316 F.3d 1048, 1051 (9th Cir. 2003) (internal quotation marks and citation omitted).

12 In the absence of any apparent or declared reason -- such as undue delay, bad faith  
13 or dilatory motive on the part of the movant, repeated failure to cure deficiencies  
14 by amendments previously allowed, undue prejudice to the opposing party by  
virtue of allowance of the amendment, futility of amendment, etc. -- the leave  
sought should, as the rules require, be "freely given."

15 *Foman v. Davis*, 371 U.S. 178, 182 (1962). Dismissal with prejudice and without leave to  
16 amend is not appropriate unless it is clear that the complaint could not be saved by amendment.  
17 *Id.* Because it appears that Plaintiff may potentially be able to amend the federal claims, the  
18 first, second and third causes of action are **DISMISSED WITH LEAVE TO AMEND**.

19 Because all federal claims are dismissed and none remain in this action, the court declines  
20 to exercise supplemental jurisdiction over the remaining state law claims. 28 U.S.C. § 1367(c).  
21 They are **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction.  
22 Should Plaintiff choose to file a second amended complaint, he may re-allege his state law  
23 claims.

24 Finally, the court notes that Plaintiff repeatedly fails to comply with the legibility  
25 requirements set forth in the local rules. Civ. Loc. Rule 5.1(a). Counsel is advised that any  
26 further failure to comply with the Local Rules, Electronic Case Filing Administrative Policies  
27 and Procedures Manual, or order of the court may lead to sanctions pursuant to Civil Local Rule  
28 83.1 or Federal Rule of Civil Procedure 41(b).

1 Accordingly, it is hereby **ORDERED** as follows:


2 1. The Moving Defendants' motion to dismiss is **GRANTED WITH LEAVE TO**  
3 **AMEND.**

4 2. No later than **April 4, 2011** Plaintiff must file and serve either an amended complaint  
5 in compliance with this order, or a notice of election not to file an amended complaint. Failure  
6 to comply with this order will result in dismissal of the action pursuant to Federal Rule of Civil  
7 Procedure 41(b).

8 3. Defendants' response to the amended complaint, if any, must be filed and served  
9 within the time set forth in Federal Rule of Civil Procedure 15(a)(3).

10 **IT IS SO ORDERED.**

11  
12 DATED: March 21, 2011

13   
14 M. James Lorenz  
United States District Court Judge

15 COPY TO:

16 HON. BARBARA L. MAJOR  
UNITED STATES MAGISTRATE JUDGE

17 ALL PARTIES/COUNSEL  
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