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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

RODNEY L. HINRICHSEN and
DEBORAH A. HINRICHSEN,

Plaintiffs,

v.

BANK OF AMERICA, N.A. ET
AL.,

Defendants.

Case No. 17-cv-0219 DMS (RBB)

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS’ MOTIONS TO
DISMISS**

Pending before the Court are Defendants Bank of America, N.A. (“BofA”) and MTC Financial, Inc. dba Trustee Corps (“MTC”)’s motions to dismiss Plaintiffs Rodney L. Hinrichsen and Deborah A. Hinrichsen’s Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs filed an opposition, and Defendants filed replies. For the reasons set forth below, Defendants’ motions to dismiss are granted in part and denied in part.

**I.
BACKGROUND**

This lawsuit arises out of Defendants’ attempt to foreclose on Plaintiffs’ home through an allegedly void promissory note and deed of trust. Plaintiffs allege they refinanced their home by executing a promissory note in the amount of \$310,000,

1 secured by a deed of trust in favor of the original lender, MLD Mortgage, Inc.
2 (“MLD”). (Compl. ¶ 8; Request for Judicial Notice (“RJN”), Ex. A.)
3 Approximately two years after obtaining the loan, Plaintiffs exercised their right of
4 rescission under the Truth in Lending Act (“TILA”), 15 U.S.C. § 1635(a) & (f), and
5 sent a letter to MLD purporting to rescind the loan on grounds that MLD failed to
6 make material disclosures in the loan transaction. (Compl. ¶¶ 8–9.) Plaintiffs allege
7 the deed of trust and promissory note became void upon exercising their right of
8 rescission under TILA, 15 U.S.C. § 1635(b). (*Id.* ¶ 10.) MLD never contested the
9 rescission, and a deed of reconveyance was recorded, fully reconveying the property
10 to Plaintiffs. (Compl. ¶ 11; RJN, Ex. B.)

11 Thereafter, Defendant BofA acquired the loan, discovered the reconveyance
12 of the property to Plaintiffs, and recorded a rescission of reconveyance, stating the
13 deed of reconveyance had been recorded due to inadvertence and mistake, and “[t]he
14 obligation under the Note secured by the Deed of Trust was not and is not satisfied.”
15 (RJN, Ex. D.) Later, Defendant MTC substituted in as trustee and recorded a notice
16 of default and election to sell under deed of trust. (*Id.*, Ex. F.) The notice of default
17 reflects a default amount of \$111,288.61. (*Id.*) A notice of trustee’s sale was
18 recorded on January 30, 2017. (*Id.*, Ex. G.)

19 In an effort to stop that sale, Plaintiffs filed the instant complaint against BofA
20 and MTC, alleging the following five claims: (1) violations of the Fair Debt
21 Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692e & 1692f(6), (2) violation
22 of the Rosenthal Fair Debt Collection Practices Act (“RFDCPA”), Cal. Civ. Code
23 § 1788.17, (3) violation of California Civil Code § 2924(a)(6), (4) violation of
24 California Civil Code § 2924.17(a) & (b), and (5) cancellation of instruments.

25 MTC requests the Court to take judicial notice of the following documents:
26 (1) deed of trust recorded on December 28, 2009 (“Exhibit A”), (2) substitution of
27 trustee and reconveyance of property recorded on February 21, 2012 (“Exhibit B”),
28 (3) assignment of deed of trust recorded on April 10, 2013 (“Exhibit C”), (4)

1 rescission of reconveyance recorded on June 22, 2015 (“Exhibit D”), (5) substitution
2 of trustee recorded on October 25, 2016 (“Exhibit E”), (6) notice of default and
3 election to sell under deed of trust recorded on October 25, 2016 (“Exhibit F”), and
4 (7) notice of trustee’s sale recorded on January 30, 2017 (“Exhibit G”). Plaintiff
5 does not oppose MTC’s request for judicial notice. The Court takes judicial notice
6 of the documents pursuant to Federal Rule of Evidence 201(b).¹

7 **II.**

8 **MOTION TO DISMISS**

9 BofA moves to dismiss all claims. First, BofA argues the debt collection
10 claims fail as a matter of law because it did not engage in “debt collection” within
11 the meaning of the statutes. Second, it asserts the claims for violations of California
12 Civil Code §§ 2924 and 2924.17 fail because these statutes do not allow a right of
13 action prior to foreclosure. Third, BofA contends Plaintiffs have failed to allege
14 adequate facts to support their claim for cancellation of instruments. MTC also
15 moves to dismiss all claims on many of the same grounds.

16 To determine whether dismissal under Rule 12(b)(6) of the Federal Rules of
17 Civil Procedure is proper, the Court must accept as true Plaintiffs’ nonconclusory
18 factual allegations, construe all reasonable inferences in favor of Plaintiffs, and
19 consider in that light whether the facts are sufficient to state a claim for relief that is
20 plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

21 **A. Debt Collection Claims**

22 **1. FDCPA Claim Under § 1692e**

23 The FDCPA prohibits debt collectors from engaging in abusive, deceptive,
24 and unfair practices in the collection of consumer debts. 15 U.S.C. § 1692. To state
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26
27 ¹ Section 201(b) provides for judicial notice of facts that are “not subject to
28 reasonable dispute because it: (1) is generally known within the trial court's
territorial jurisdiction; or (2) can be accurately and readily determined from sources
whose accuracy cannot reasonably be questioned.”

1 a claim under the FDPCA, a plaintiff must allege the following: “(1) the plaintiff has
2 been the object of collection activity arising from a consumer debt, (2) the defendant
3 attempting to collect the debt qualifies as a debt collector under the FDCPA, and (3)
4 the defendant has engaged in a prohibited act or has failed to perform a requirement
5 imposed by the FDCPA.” *Miner v. Baker*, No. 15-CV-2765-JAH (RBB), 2016 WL
6 6804440, at *2 (S.D. Cal. Aug. 26, 2016) (citation omitted). Specifically, under
7 § 1692e, a debt collector “may not use any false, deceptive, or misleading
8 representation or means in connection with the collection of any debt.” Here,
9 Plaintiffs allege Defendants violated § 1692e by falsely representing the character
10 and legal status of the debt and threatening to conduct a trustee’s sale based on a
11 void deed of trust.

12 Defendants correctly argue they are not engaged in “debt collection” as
13 contemplated by § 1692e of the FDCPA. The Ninth Circuit in *Ho v. ReconTrust*
14 *Co.*, 840 F.3d 618, 621 (9th Cir. 2016), held that “actions taken to facilitate a non-
15 judicial foreclosure, such as sending the notice of default and notice of sale, are not
16 attempts to collect ‘debt’ as that term is defined by the FDCPA.” The Court reasoned
17 that “[t]he object of a nonjudicial foreclosure is to retake and resell the security, not
18 to collect money[.]” *Id.* Thus, “debt collection” under the FDCPA—save for one
19 provision in the FDCPA discussed below—refers “only to the collection of a money
20 debt.” *Dowers v. Nationstar Mortgage, LLC*, 852 F.3d 964, 970 (9th Cir. 2017).

21 The complaint does not allege Defendants engaged in any debt collection-
22 related activity. Rather, the complaint focuses solely on Defendants’ alleged
23 wrongful enforcement of a void deed of trust, a security interest. Accordingly,
24 Defendants’ motions to dismiss the FDCPA claim under § 1692e are granted.

25 **2. FDCPA Claim Under § 1692f(6)**

26 Unlike § 1692e, the definition of debt collector under § 1692f(6) “include[s]
27 a person enforcing a security interest.” *Dowers*, 852 F.3d at 971 (citing 15 U.S.C.
28 § 1692a(6)). Section 1692f(6) regulates more than just the collection of a money

1 debt. It prohibits taking nonjudicial action to recover real property as collateral if
2 there is not an enforceable security interest. 15 U.S.C. § 1692f(6).² Because
3 “Section 1692f(6) regulates nonjudicial foreclosure activity,” Defendants cannot
4 escape liability on grounds that non-judicial foreclosure is not debt collection under
5 the FDCPA. *Dowers*, 852 F.3d at 971. Further, a trustee can be a debt collector
6 under § 1692f(6). *Mashiri v. Epsten Grinnell & Howell*, 845 F.3d 984, 990 (9th Cir.
7 2017) (holding, “where an entity is engaged solely in the enforcement of a security
8 interest and not in debt collection, like the trustee ..., it is subject only to § 1692f(6)
9 rather than the full scope of the FDCPA.”).³

10 Here, Plaintiffs allege Defendants threatened to take non-judicial foreclosure
11 action to dispossess Plaintiffs of their property based upon a void note and deed of
12 trust. (*See* Compl. ¶ 26) (Defendants violated § 1692f(6) by “threatening to take ...
13 non-judicial action to effect dispossession or disablement of property with no right
14 to claim the property as collateral through an enforceable security interest since the
15 note and deed of trust are void[.]”). The question becomes whether Plaintiffs have
16 alleged sufficient facts to show that Defendants’ security interest is void and confers
17 “no present right to possession of the property[.]” thus rendering Defendants’
18 attempt to foreclose violative of § 1692f(6).

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21 ² Section 1692f(6) prohibits a debt collector from using unfair or unconscionable
22 means to collect or attempt to collect a debt by “[t]aking or threatening to take any
23 nonjudicial action to effect dispossession or disablement of property if ... there is no
24 present right to possession of the property claimed as collateral through an
enforceable security interest.” 15 U.S.C. § 1692f(6)(A).

25 ³ MTC also argues that because it is a “foreclosure trustee,” California’s litigation
26 privilege, Cal. Civ. Code §§ 47 and 2924(d), applies and bars the FDCPA claim. “A
27 state litigation privilege, however, does not defeat a federal cause of action.” *Selby*
28 *v. Bank of Am., Inc.*, 2010 WL 4347629, at *2 n.1 (S.D. Cal., October 27, 2010)
(citing *Pardi v. Kaiser Found. Hosp.*, 389 F.3d 840, 851 (9th Cir. 2004); *see also*
Truong v. Mountain Peaks Fin. Servs., Inc., No. 3:12-CV-01681-WQH, 2013 WL
485763, at *7 (S.D. Cal. Feb. 5, 2013) (similar).

1 Defendants argue the note and deed of trust are not void, therefore they have
2 an enforceable security interest and right to possession of Plaintiffs' property.
3 Plaintiffs argue the note and deed of trust are void, as they properly rescinded the
4 loan under TILA. Plaintiffs' position finds support in the plain language of TILA
5 and the Supreme Court's decision in *Jesinoski v. Countrywide Home Loans, Inc.*,
6 135 S. Ct. 790 (2015).

7 Congress enacted TILA to protect borrowers by ensuring full "disclosure of
8 credit terms so that the consumer will be able to compare more readily the various
9 credit terms available to him and avoid the uninformed use of credit[.]" *Hauk v. JP*
10 *Morgan Chase Bank USA*, 552 F.3d 1114, 1118 (9th Cir. 2009) (quoting 15 U.S.C.
11 § 1601). Accordingly, TILA provides special rescission rights to borrowers for
12 certain loans secured by a borrower's principal dwelling. 15 U.S.C. § 1635(a). "To
13 effectuate TILA's purpose, a court must construe 'the Act's provisions liberally in
14 favor of the consumer' and require absolute compliance by creditors." *Hauk*, 552
15 F.3d at 1118 (citation omitted).

16 TILA's "buyer's remorse" provision, *Semar v. Platte Valley Fed. Sav. & Loan*
17 *Ass'n*, 791 F.2d 699, 701 (9th Cir. 1986), grants buyers the right to rescind within
18 three days of either consummation of the loan transaction or delivery of certain
19 information and rescission forms, whichever is later. 15 U.S.C. § 1635(a). This is
20 an "unconditional" right to rescind for three days. *Jesinoski*, 135 S. Ct. at 792. After
21 three days have passed, borrowers may rescind only if the lender failed to satisfy
22 TILA's disclosure requirements. *Id.* This right of rescission is "conditional"—
23 premised on the lenders failure to meet disclosure requirements—and must be
24 exercised within "three years after the date of consummation of the transaction or
25 upon the sale of the property, whichever comes first." *Id.* (citing 15 U.S.C.
26 § 1635(f)).

27 To exercise the conditional right of rescission under TILA, a borrower need
28 only notify the creditor of his intention to rescind (and do so within three years of

1 consummating the loan transaction). *Jesinoski*, 135 S. Ct at 792. Section 1635(a)
2 states unequivocally that a borrower “shall have the right to rescind ... by notifying
3 the creditor ... of his intention to do so[.]” This “language leaves no doubt that
4 rescission is effected when the borrower notifies the creditor of his intention to
5 rescind.” *Jesinoski*, 135 S. Ct. at 792. The borrower need not take any further action
6 to perfect rescission. *Id.* (holding, “the statute does not also require him to sue within
7 three years[.]” or take any other action). Driving home the point, the Supreme Court
8 declared:

9 “The clear import of § 1635(a) is that a borrower need only provide
10 written notice to a lender in order to exercise his right to rescind. ...[¶]
11 The Jesinoskis mailed [Countrywide] written notice of their intention to
12 rescind within three years of their loan’s consummation. ...[T]his is all
13 that a borrower must do in order to exercise the right to rescind under the
14 Act.”

15 *Jesinoski*, 135 S. Ct. at 793.

16 Once a borrower exercises his or her right of rescission, it is incumbent upon
17 the lender to act. “When an obligor exercises his right to rescind ... any security
18 interest given by the obligor ... becomes void upon such a rescission.” 15 U.S.C.
19 § 1635(b). Faced with notice of rescission, the lender can unwind the loan by
20 returning the borrower’s down payment and taking any other action necessary “to
21 reflect the termination of any security interest created under the transaction.” *Id.*
22 The borrower then would be required to “tender the property to the creditor[.]” *Id.*
23 Alternatively, the lender can sue and contest the borrower’s right to rescind. *See*
24 *Paatalo v. JPMorgan Chase Bank*, 146 F. Supp. 3d 1239 (D. Or. 2015) (discussing
25 rescission under TILA, *Jesinoski*, and lender’s options); *but see Pauson v. Bayview*
26 *Loan Servicing, LLC*, No. C15-5612-RBL, 2016 WL 4528469 (W.D. Wash. Aug.
27 30, 2016) (exercise of conditional right of rescission under TILA does not
28

1 automatically void loan).⁴

2 As noted, a lender may file suit and challenge the borrower’s right to rescind
3 under TILA on a number of grounds. The loan, for example, may not be of a kind
4 contemplated by TILA, as the Act excludes certain loan transactions. *See* 15 U.S.C.
5 § 1635(e)(1)–(4) (specifying “[e]xempted transactions”). The right of rescission
6 does not apply to a residential mortgage to finance the initial acquisition of a home.
7 *Id.* §§ 1635(e)(1) & 1602(x); *see Merritt v. Countrywide Fin. Corp.*, 759 F.3d 1023,
8 1029 n.7 (9th Cir. 2014) (“TILA does not apply to residential mortgages used to
9 finance the initial acquisition or construction of a dwelling.”) Nor does TILA apply
10 to a refinancing “(with no new advances) of the principal balance then due and any
11 accrued and unpaid finance charges of an existing extension of credit by the same
12 creditor[.]” 15 U.S.C. § 1635(e)(2).⁵ The borrower’s conditional right of rescission
13 also could be challenged on grounds that all required disclosures were provided by
14 the lender or that notice of rescission was not mailed within three years of loan
15 consummation. The lender, however, must act to preserve its rights. “[A] timely
16 notice of rescission automatically renders the security interest void under section
17 1635(b) where the creditor acquiesces in the rescission or ignores it.” *U.S. Bank*
18 *N.A. v. Naifeh*, 1 Cal. App. 5th 767, 779 (Cal. Ct. App. 2016), *review denied* (Nov.
19 9, 2016) (discussing *Jesinoski* and rescission under TILA).

20 *Naifeh* pointed out that the lender could contest the notice of rescission and
21 ask the court to alter the procedure otherwise dictated by TILA:

22 “[O]nce the creditor contests the notice of rescission, the court may alter
23 the procedure otherwise dictated by the TILA, determine whether there
24 were inadequate disclosures that would extend the rescission period to
25 three years, and decide whether equity compels a requirement that the

26 ⁴ This Court respectfully declines to follow *Pauson* as it strays from *Jesinoski* and the
27 plain language of TILA.

28 ⁵ Regulation Z provides for rescission of a refinance of a residential mortgage by a
creditor *other than* the original creditor. *See* Regulation Z § 226.23(f); Commentary
to § 226.23(f).

1 borrower tender the loan proceeds before the lender returns the amounts
2 paid and releases its security interest. ... [¶] [T]he plain language of the
3 statute compels the conclusion that a court is empowered to facilitate
equity in implementing a rescission under the TILA.”

4 1 Cal. App. 5th at 781 (quoting 15 U.S.C. § 1635(b) (“The procedures prescribed by
5 this subsection shall apply except when otherwise ordered by a court.”)).

6 Here, BofA does not contend TILA’s right of rescission does not apply to
7 Plaintiffs’ refinance loan. BofA also does not contend MLD took any action to
8 defend its interests after receiving Plaintiffs’ notice of rescission. Rather, BofA’s
9 principal argument is that Plaintiffs cannot state a claim under TILA, as any such
10 claim would be time barred. But Plaintiffs are not alleging a TILA claim against
11 MLD (or BofA), nor do they need to. Rather, Plaintiffs are arguing BofA’s security
12 interest in the property was void as of the date of the notice of rescission, which
13 means MLD had no interest in the property to transfer to BofA. Stated differently,
14 Plaintiffs contend they properly rescinded the loan with MLD under TILA’s
15 rescission provisions, and having done so, the promissory note and deed of trust
16 assigned to BofA by MLD are void and unenforceable. Thus, any argument that a
17 TILA claim would be time barred is irrelevant.

18 Plaintiffs have alleged they gave notice of rescission within three years of
19 consummation of the loan transaction with MLD. (Compl. ¶¶ 8–9). They have
20 alleged MLD failed to make disclosures required by law. (*Id.* ¶ 9) (“On 01/17/12
21 plaintiffs rescinded their loan transaction by sending their notice in writing by U.S.
22 mail addressed to MLD ... under TILA 15 U.S.C. § 1635(f) because material
23 disclosures including the Regulation Z—Truth in Lending Statement and required
24 notices of right to cancel were not delivered as mandated by law.”) They have also
25 alleged MLD neither took steps to unwind the loan under § 1635(b), nor filed suit to
26 challenge the rescission. (Compl. ¶ 11.) Plaintiffs have therefore stated a claim
27 under § 1692f(6), as they have adequately alleged that the underlying deed of trust
28 is void and Defendants took nonjudicial action to recover real property as collateral

1 without an enforceable security interest. Defendants’ motions to dismiss the FDCPA
2 claim under § 1692f(6) are therefore denied.⁶

3 **3. RFDCPA Claim**

4 Similar to the FDCPA, the RFDCPA was enacted to “prohibit debt collectors
5 from engaging in unfair or deceptive acts or practices in the collection of consumer
6 debts.” Cal. Civ. Code § 1788.1. The RFDCPA “mimics or incorporates by
7 reference the FDCPA’s requirements ... and makes available the FDCPA’s remedies
8 for violations.” *Riggs v. Prober & Raphael*, 681 F.3d 1097, 1100 (9th Cir. 2012).
9 The RFDCPA provides that “every debt collector collecting or attempting to collect
10 a consumer debt shall comply with the provisions of Sections 1692b to 1692j.” Cal.
11 Civ. Code § 1788.17. Therefore, the RFDCPA requires compliance with the
12 FDCPA, and a debt collector that violates the FDCPA also violates the RFDCPA.
13 *See* Cal. Civ. Code § 1788.17; *Crockett v. Rash Curtis & Assocs.*, 929 F. Supp. 2d
14 1030, 1033 (N.D. Cal. 2013) (“a claim for violation of Rosenthal Act Section
15 1788.17 simply requires showing that a defendant violated any of several provisions
16 of the FDCPA.”). Plaintiffs’ RFDCPA claims are based on the same allegations as
17 the FDCPA claims. Because Plaintiffs have failed to state a claim under § 1692e of
18 the FDCPA, their claim under the RFDCPA also fails. *See Bourgeois v. Ocwen*
19 *Loan Servicing, LLC*, No. 15CV1655-GPC (BLM), 2016 WL 245526, at *12 (S.D.
20 Cal. Jan. 21, 2016) (dismissing RFDCPA claim because the plaintiff failed to
21 properly plead a FDCPA claim).

22 However, because Plaintiffs have stated a claim under § 1692f(6) of the
23 FDCPA, that aspect of their claim under the RFDCPA would survive, but only if
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25 ⁶ The Court’s ruling only provides that Plaintiffs have stated a claim sufficient to
26 defeat a motion to dismiss. The Court does not address at this stage of the
27 proceedings the merits of Plaintiffs’ claims, or any defenses or counterclaims that
28 Defendants might pursue with respect to the security interest or underlying debt.

1 Defendants are “debt collectors” under the RFDCPA. Unlike the definition of debt
2 collector under the FDCPA, the RFDCPA’s definition does not include a person
3 enforcing a security interest. *See Pflueger v. Auto Fin. Grp., Inc.*, No. CV-97-9499
4 CAS(CTX), 1999 WL 33740813, at *6 (C.D. Cal. Apr. 26, 1999) (“Although the
5 definition of ‘debt’ in the California FDCPA differs slightly from the definition in
6 the federal FDCPA, the enforcement of security interests does not fall within the
7 scope of ‘debt collection’ as defined in the Act.”); Cal. Civ. Code § 1788.2(c)
8 (defining debt collector). As noted, nothing in the complaint suggests Defendants
9 are engaged in the business of collecting money debt.

10 In addition, Plaintiffs cannot state a claim against MTC because “California
11 expressly exempts trustees of deeds of trust from liability under the Rosenthal Act.”
12 *Ho*, 840 F.3d at 623 n.8 (citing Cal. Civ. Code § 2924(b). “The California legislature
13 clearly views such trustees as materially different from debt collectors.” *Id.*
14 Defendants’ motions to dismiss the RFDCPA claim are therefore granted.

15 **B. California Civil Code § 2924(a)(6)**

16 Defendants move to dismiss the § 2924(a)(6) claim on the ground that there
17 is no private right of action before foreclosure.⁷ California’s non-judicial
18 foreclosure statutes, Cal. Civ. Code §§ 2924–2924k, “provide a comprehensive
19 framework for the regulation of a nonjudicial foreclosure sale pursuant to a power
20 of sale contained in a deed of trust.” *Gomes v. Countrywide Home Loans, Inc.*, 192
21 Cal. App. 4th 1149, 1154 (Cal. Ct. App. 2011) (citation omitted). The California
22 legislature authorized a private right of action to enjoin a non-judicial trustee’s sale
23 where a lender violates any one of nine specified statutory provisions. Cal. Civ.
24 Code §§ 2924.12(a)(1) & 2924.19(a)(1). The legislature, however, “did not provide
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26 ⁷ MTC also argues the §§ 2924 and 2924.17 claims should be dismissed because
27 they are barred by the litigation privilege under California Civil Code §§ 47 &
28 2924(b) &(d). Because these claims are dismissed for reasons stated in this Order,
the Court declines to address this argument.

1 for injunctive relief for a violation of section 2924(a)(6)[.]” *Lucioni v. Bank of Am.,*
2 *N.A.*, 3 Cal. App. 5th 150, 158 (Cal. Ct. App. 2016) (“under the text of the [statutes],
3 a foreclosure may be enjoined due to a material violation of the statutory provisions
4 that the Legislature has chosen to list, but not due to a violation of unlisted
5 provisions.”). Section 2924 is not one of the nine sections identified in
6 §§ 2924.12(a)(1) and 2924.19(a)(1). Because the legislature deliberately chose to
7 authorize injunctive relief only for particular violations it identified, but not for a
8 violation of § 2924(a)(6), there is no private right of action for injunctive relief or
9 any other relief under § 2924(a)(6). *In re Bryce C.*, 12 Cal. 4th 226, 231 (Cal. 1995)
10 (“Generally, the expression of some things in a statute implies the exclusion of others
11 not expressed.”) (citation omitted). Defendants’ motion to dismiss the § 2924(a)(6)
12 claim are granted.

13 **C. California Civil Code § 2924.17(a) & (b)**

14 Defendants move to dismiss the § 2924.17 claim for the same reasons they
15 assert against the § 2924 claim. While the California legislature has provided a right
16 of action under § 2924.17, the only pre-foreclosure relief provided under the statute
17 is for injunctive relief. Cal. Civ. Code § 2924.12(a)(1) & (2). A borrower may
18 recover “actual economic damages” resulting from a material violation of § 2924.17
19 only “[a]fter a trustee’s deed upon sale has been recorded[.]” *Id.* § 2924.12(b).

20 Plaintiffs do not seek injunctive relief for violation of § 2924.17. Rather,
21 Plaintiffs seek only statutory damages pursuant to § 2924.12(b). Plaintiffs, however,
22 have not alleged a trustee’s deed upon sale has been recorded or that a foreclosure
23 sale has taken place. Because Plaintiffs are pursuing the § 2924.17 claim before
24 foreclosure, only injunctive relief is available. *See Rae v. Bank of Am., N.A.*, No.
25 CV 16-8932 PA (SSX), 2017 WL 447306, at *4 (C.D. Cal. Feb. 1, 2017) (“Only
26 when a trustee’s deed upon sale has been recorded may a borrower seek economic
27 damages for a violation of Civil Code section 2924.17.”). Accordingly, Defendants’
28 motions to dismiss the § 2924.17 claim are granted.

1 **D. Cancellation of Instruments**

2 Finally, Defendants move to dismiss the claim for cancellation of instruments,
3 arguing it is based on a conclusory assertion that the loan is void, and Plaintiffs have
4 failed to plead tender, a necessary prerequisite to cancellation. California Civil Code
5 § 3412 provides for the cancellation of a written instrument when there is
6 “reasonable apprehension that if left outstanding it may cause serious injury to a
7 person against whom it is void or voidable.” Pursuant to this statute, a court “can
8 order cancellation of an invalid written instrument that is void or voidable.” *Sato v.*
9 *U.S. Bank Trust N.A. for Volt NPL IX Asset Holdings Trust*, No.
10 CV1308469MMMMRWX, 2014 WL 12589665, at *15 (C.D. Cal. July 14, 2014)
11 (citing *Compass Bank v. Petersen*, 886 F. Supp. 2d 1186, 1194 (C.D. Cal. 2012)).

12 To state a claim for cancellation of instrument, ““plaintiff[s] must show that
13 [they] will be injured or prejudiced if the instrument is not cancelled, and that such
14 instrument is void or voidable.”” *D’Oleire v. Select Portfolio Serv., Inc.*, No.
15 316CV02520GPCNLS, 2016 WL 7188289, at *9 (S.D. Cal. Dec. 12, 2016) (quoting
16 *Zendejas v. GMAC Wholesale Mortg. Corp.*, No. 10cv184 OWW, GSA, 2010 WL
17 2629899, at *7 (E.D. Cal. June 29, 2010)). A plaintiff must provide facts, “not mere
18 conclusions, showing the apparent invalidity of the instrument designated, and point
19 out the reason for asserting that it is actually invalid.” *Ephraim v. Metro. Trust Co.*
20 *of Cal.*, 28 Cal. 2d 824, 833 (Cal. Ct. App. 1946). For the reasons discussed above,
21 Plaintiffs have stated a plausible claim for cancellation of instruments. Having
22 alleged timely rescission of the underlying note and deed of trust with MLD under
23 TILA’s statutory scheme, they have stated sufficient facts to show BofA’s assigned
24 note and deed of trust are void and that they will be prejudiced if such instruments
25 are not cancelled. Further, Plaintiffs need not tender the loan proceeds to BofA to
26 effect rescission or preserve such a right. *Jesinoski*, 135 S. Ct. at 793 (TILA
27 “disclaims the common-law condition precedent to rescission at law that the
28 borrower tender the proceeds received under the transaction.”) (citing 15 U.S.C.

1 § 1635(b)).⁸

2 **III.**

3 **CONCLUSION**

4 Defendants' motions to dismiss are granted in part and denied in part.⁹
5 Specifically, Defendants' motions to dismiss the first cause of action under FDCPA
6 § 1692(e), second cause of action under the RFDCPA, and third cause of action
7 under California Civil Code § 2924(a)(6) are granted without leave to amend.
8 Defendants' motions to dismiss the first cause of action under FDCPA § 1692f(6),
9 and fifth cause of action for cancellation of instruments are denied. Defendants'
10 motions to dismiss the fourth cause of action under California Civil Code § 2924.17
11 are granted with leave to amend. If Plaintiffs elect to file a First Amended
12 Complaint, they must do so by May 23, 2017.

13 **IT IS SO ORDERED.**

14 Dated: May 9, 2017



15 Hon. Dana M. Sabraw
16 United States District Judge

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25 ⁸ Section 1635(b) provides: "Upon the performance of the creditor's obligations
26 under this section, the obligor shall tender the property to the creditor." In other
27 words, the borrower need not tender until the creditor first performs. 15 U.S.C.
28 § 1635(b).

⁹ Plaintiffs' Request for Notice of Lis Pendens is denied. *See* California Code of
Civ. Proc. §§ 405.21 & 405.4 (authorizing lis pendens for real property claims not
present here).