

1 THE HONORABLE THOMAS S. ZILLY

2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 FOR THE WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 LESTER H. PATTERSON and MERILEE G.
11 PATTERSON, and the marital community
12 comprised thereof,

13 Plaintiffs,

14 vs.

15 BANK OF AMERICA (as successor to
16 Countrywide Home Loans, a mortgage
17 lender),

18 Defendant.

No. C11-155Z

ORDER

19
20 THIS MATTER comes before the Court on defendant Bank of America's
21 ("BofA") motion to dismiss, docket no. 6. Having reviewed the papers filed in support
22 of, and opposition to, BofA's motion, the Court GRANTS the motion.

23 **I. BACKGROUND**

24 Plaintiffs Lester H. Patterson and Merilee G. Patterson (collectively the
25 "Pattersons") own the real property located at 1108 South 296th Place, Federal Way,
26

1 Washington, 98003 (the “Property”). Compl. at ¶ 2, docket no. 1. On January 8,
2 2008, the Pattersons refinanced their existing mortgage on the Property with two new
3 loans from BofA.¹ *Id.* at ¶¶ 6-7. The Pattersons borrowed \$341,000.00 on the first
4 loan and \$15,000.00 on the second loan. *Id.* at ¶ 6. The loans were secured by two
5 deeds of trust on the Property, which were also executed on January 8, 2008. *Id.* at
6 ¶ 8.

8 On November 1, 2010, the Pattersons obtained a forensic loan analysis that
9 purportedly showed that BofA failed to provide all of the disclosures mandated by the
10 Truth in Lending Act (“TILA”) in connection with the refinancing. *Id.* at ¶¶ 23-30,
11 33-35, 37. On November 5, 2010, the Pattersons sent BofA two rescission notices
12 pursuant to TILA. *Id.* at ¶ 39. In the notices, the Pattersons demanded that BofA
13 rescind the loans, release its security interest in the Property, and return the closing
14 costs paid by the Pattersons.² M. Patterson Decl., Exs. 4-5, docket no. 10. In
15
16
17

18
19 ¹ BofA is the successor-in-interest to Countrywide Home Loans (“Countrywide”). *Id.*
20 at ¶ 4. For purposes of the present motion, the Court refers to BofA and Countrywide
collectively as “BofA.”

21 ² The Court takes judicial notice of documents attached as exhibits to the declaration
22 of Merilee Patterson, docket no. 10, including the rescission letters sent by the
23 Pattersons to BofA. See *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025,
24 1030-31 (9th Cir. 2008) (holding that the court “may generally consider only
25 allegations contained in the pleadings, exhibits attached to the complaint, and matters
26 properly subject to judicial notice . . .” when ruling on a motion to dismiss) (internal
quotation and citation omitted); see also *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th
Cir. 1995) (holding that courts may consider documents outside the pleadings in
connection with a motion to dismiss if the documents are referenced in the complaint).

1 exchange, the Pattersons offered to tender the Property to BofA by way of a quitclaim
2 deed. Id.

3
4 BofA did not comply with the Pattersons' demands. Compl. at ¶ 45, docket
5 no. 1. Instead, on December 10, 2010, BofA sent the Pattersons a letter, rejecting their
6 rescission claim. Id. at ¶ 52. The Pattersons filed the present lawsuit on January 27,
7 2011. See id.

8 **II. DISCUSSION**

9
10 All of the Pattersons' claims arise out of two events: (1) the alleged failure by
11 BofA to provide the Pattersons with proper disclosures at closing;³ and (2) BofA's
12 allegedly wrongful refusal to rescind the loans in November 2010.⁴

13 **A. Standard of Review**

14 To survive a motion to dismiss, a complaint must contain sufficient factual
15 matter, accepted as true, to state a claim for relief that is plausible on its face. Ashcroft
16 v. Iqbal, 129 S. Ct. 1937, 1949 (2009). A claim has facial plausibility when the
17 plaintiff pleads factual content that allows the court to draw the reasonable inference
18

19
20 ³ The Pattersons allege that the failure to provide disclosures entitles them to relief on
21 their claims for breach of contract (First Cause of Action), violation of the Real Estate
22 Settlement Procedures Act ("RESPA")(Second Cause of Action), violation of TILA
23 (Third Cause of Action), declaratory judgment (Fourth Cause of Action), violation of
the Equal Credit Opportunity Act ("ECOA") (Eighth Cause of Action), and fraud
(Ninth Cause of Action).

24 ⁴ The Pattersons allege that BofA's refusal to rescind entitles them to relief on their
25 claims for quiet title (Fifth Cause of Action), slander of title (Sixth Cause of Action),
26 violation of the Fair Debt Collection Practices Act ("FDCPA") (Seventh Cause of
Action), and violation of Washington's Consumer Protection Act ("CPA") (Tenth
Cause of Action).

1 that the defendant is liable for the misconduct alleged. Id. The plaintiff is obligated to
2 provide grounds for his entitlement to relief that amount to more than labels and
3 conclusions or a formulaic recitation of the elements of a cause of action. Bell Atl.
4 Corp. v. Twombly, 550 U.S. 544, 545 (2007). If the Court dismisses the complaint, or
5 portions thereof, it must consider whether to grant leave to amend. Lopez v. Smith,
6 203 F.3d 1122, 1130 (9th Cir. 2000).

8 **B. The Pattersons' Withdrawn Claims are Dismissed**

9 The Court DISMISSES the following claims with prejudice because the
10 Pattersons have voluntarily withdrawn them, see Resp. at 6-7, 13, docket no. 8, in
11 response to BofA's motion to dismiss: breach of contract (First Cause of Action),
12 RESPA (Second Cause of Action), slander of title (Sixth Cause of Action), FDCPA
13 (Seventh Cause of Action), ECOA (Eighth Cause of Action), and fraud (Ninth Cause
14 of Action).

16 **C. The Pattersons' TILA Claim is Dismissed**

17 BofA argues that the Pattersons' TILA claims are barred by TILA's statute of
18 repose, or alternatively, by the Pattersons' failure to tender the proceeds of the loans in
19 connection with the rescission notices.

20 1. The Pattersons' Rescission Claim is Barred by TILA's Three-
21 Year Statute of Repose

22 Under TILA, if a lender fails to make certain disclosures to a borrower, the
23 borrower has a right to rescind the loan within three days. 15 U.S.C. § 1635(a); 12
24 C.F.R. § 226.23(a)(3). If the lender fails to provide the borrower with two copies of
25
26

1 the notice of right to rescind, in the form set forth in 12 C.F.R. § 226.23(b), the
2 borrower's right to rescind is extended to three years.⁵ 12 C.F.R. § 226.23(a)(3); see
3 also 15 U.S.C. § 1635(f) ("An obligor's right of rescission shall expire three years
4 after the date of consummation of the transaction."). The three-year period set forth in
5 the statute has been construed as a statute of repose. Miguel v. Country Funding
6 Corp., 309 F.3d 1161, 1164 (9th Cir. 2002). Accordingly, courts lack subject matter
7 jurisdiction when a section 1635 TILA claim is brought outside the three-year period
8 of repose, which represents an "absolute limitation on rescission actions." Id.

9
10
11 The Pattersons consummated the loan transaction with BofA on January 8,
12 2008, but failed to bring their claim for rescission in this Court until January 27, 2011,
13 more than three years later. The Pattersons contend that their rescission claim is not
14 barred because they sent the rescission notices to BofA in November 2010, less than
15 three years after consummating the loan transaction.
16

17
18 ⁵ BofA contends that the Pattersons received the notice of right to rescind, and
19 therefore, they were obligated to rescind the transaction within three days, not three
20 years. 15 U.S.C. § 1635(a); 12 C.F.R. § 226.23(a)(3). In support of this contention,
21 BofA submits copies of the notices of right to rescind, signed by the Pattersons. See
22 Downs Decl., Exs. C-D, docket no. 7. The notices are outside the pleadings, and
23 cannot be considered by the Court in determining BofA's motion to dismiss unless the
24 Court construes the motion as a motion for summary judgment. Fed. R. Civ. P. 12(d).
25 Moreover, even if the notices were properly before the Court for consideration, a
26 signed notice of rescission creates only a rebuttable presumption of delivery of the
required disclosures. 15 U.S.C. § 1635(c). The Pattersons submit evidence that BofA
delivered blank notices, rather than the required completed disclosures. M. Patterson
Decl., Exs. 2-3, docket no. 10. Thus, even if the Court were to construe BofA's
motion as a motion for summary judgment, the blank notices are sufficient to generate
a genuine issue of material fact about the delivery of the notices that would preclude
entry of judgment in favor of BofA.

1 However, a borrower’s rescission notice does not automatically invalidate a
2 lender’s security interest. Yamamoto v. Bank of New York, 329 F.3d 1167, 1172 (9th
3 Cir. 2003). Rather, under the statute and regulation, the security interest becomes void
4 only when the consumer “rescinds” the transaction. Id. “In a contested case, this
5 happens when the right to rescind is determined in the borrower’s favor.” Id.
6 (emphasis added). For this reason, the Ninth Circuit has held that the failure to bring a
7 lawsuit to enforce a section 1635 rescission claim within three years results in an
8 “absolute limitation on rescission actions.” Miguel, 309 F.3d at 1164.

9
10
11 Accordingly, as this is a contested case, the Pattersons did not “rescind” the
12 loans until they brought an action to enforce their rights. See id.; see also 12 C.F.R.
13 pt. 226, Supp. 1 at 484 (2007) (“Where a consumer’s right to rescind is contested by a
14 creditor, a court would normally determine whether the consumer has a right to
15 rescind.”). The Pattersons’ failure to do so within TILA’s three-year period of repose
16 is an absolute limitation on their TILA rescission claim.⁶

17
18 2. In the Alternative, the Pattersons’ TILA Rescission Claim is also
19 Barred by their Failure to Tender

20 If the borrower sends a timely notice of rescission to the lender, TILA and its
21 supporting regulations provide that the lender’s security interest becomes void, and the
22 lender is obligated to take all necessary steps to invalidate the security interest and
23 return the borrower’s closing costs within twenty days. 12 C.F.R. § 226.23(d). The
24 borrower is then obligated to tender the proceeds of the loan back to the lender. Id.

25
26 ⁶ The Pattersons’ damages claim is also barred by TILA’s one-year limitations period
on damages claims. See 15 U.S.C. § 1640(e).

1 However, the sequence of rescission set forth in the statute and governing regulations
2 “need not be interpreted literally as always requiring the creditor to remove its security
3 interest prior to the borrower’s tender of proceeds.” Yamamoto, 329 F.3d at 1171. To
4 the contrary, “the trial judge has discretion to condition rescission on tender by the
5 borrower of the property he had received from the lender.” Id.

7 The Pattersons argue Yamamoto does not require tender, and that there is a split
8 among district courts as to whether it is proper for a district court to require a plaintiff
9 to allege the ability to tender at the pleading stage. However, all of the courts in this
10 district that have addressed the issue, including this Court, have concluded that it is
11 proper for the district court to dismiss a TILA claim if the plaintiff has not alleged a
12 present ability to tender the proceeds of the loan back to the lender. See ING Bank,
13 FSB v. Korn, 2009 WL 1455488 at *1 (W.D. Wash. 2009) (Zilly, J.); Abarquez v.
14 Onewest Bank, FSB, 2011 WL 1459458 (W.D. Wash. 2011) (Lasnik, J); McGinley v.
15 Am. Home Mortg. Serv., 2010 WL 4065826 (W.D. Wash. 2010) (Bryan, J.); Galyean
16 v. Onewest Bank, FSB, 2010 WL 5138396 (W.D. Wash. 2010) (Pechman, J).

19 Moreover, the Ninth Circuit has held that “rescission should be conditioned on
20 repayment of the amounts advanced by the lender.” Yamamoto, 329 F.3d at 1171
21 (emphasis in original) (citing LaGrone v. Johnson, 534 F.2d 1360, 1362 (9th Cir.
22 1976)).⁷

25 ⁷ Even one of the cases cited by the Pattersons holds that dismissal of the complaint is
26 warranted where the plaintiffs have not alleged the ability to tender the proceeds of the
loan back to the lender. Avina v. BNC Mortg., 2009 WL 5215751 (N.D. Cal. 2009).

1 In the alternative, the Pattersons contend that they satisfied TILA's tender
2 requirement by offering to turn over the Property to BofA in lieu of cash. The
3 Pattersons argue that TILA permits tender of alternative property when return of the
4 original property would be impractical or inequitable. See 15 U.S.C. § 1635(b). The
5 Pattersons rely heavily on two cases⁸ in support of their contention that a borrower
6 may tender alternative property: Shepeard v. Quality Siding & Window Factory, 730
7 F. Supp. 1295 (D. Del. 1990); Mayfield v. Vanguard Sav. & Loan Ass'n, 710 F. Supp.
8 143 (E.D. Pa. 1989). In Shepeard, however, instead of money, the lender provided the
9 plaintiff with construction siding, which was subsequently installed on the plaintiff's
10 home. Shepeard, 730 F. Supp. at 1307. As it would be impracticable to remove and
11 return the siding, the court permitted the plaintiff to tender the reasonable value of the
12 siding in lieu of the siding itself. Id. In Mayfield, the court did not permit the plaintiff
13 to tender alternative property; rather, it simply altered the timing of the repayment
14 terms. Mayfield, 710 F. Supp. at 149. These cases do not apply here, where the
15 Pattersons seek to tender real property in lieu of cash. The Pattersons provide no
16 authority for their contention that substitution of real property in lieu of the cash
17 advanced by BofA is appropriate. Conversely, the supplement to TILA's regulations
18 indicates that, where the lender advances money, the borrower must tender back cash,
19
20
21
22

23
24 ⁸ The Pattersons also cite to a number of other cases, but fail to provide proper
25 citations, or copies of the cases for the Court's review. See Resp. at 10-12, docket
26 no. 8. Accordingly, the Court cannot confirm whether the authorities stand for the
propositions for which they are cited. As none of the cases appear to be controlling
authority, the Court has not reviewed or considered them.

1 rather than alternative forms of property. 12 C.F.R. pt. 226, Supp. 1 at 484 (2007)
2 (noting that in contrast to repayment for the delivery of lumber or fixtures, “money
3 already given to the consumer must be tendered at the creditor’s place of business.”)
4 (emphasis in original).⁹ Accordingly, in the alternative, the Pattersons’ TILA
5 rescission claim is also barred by the Pattersons’ failure to allege the ability to tender,
6 and the Court GRANTS BofA’s motion to dismiss that claim.
7

8 Generally, dismissal without prejudice is the appropriate result for failure to
9 allege tender. See e.g., ING Bank, FSB, 2009 WL 1455488 at *1. However, even if
10 the Pattersons were to now send out proper rescission notices that offer to tender the
11 loan proceeds back to BofA, any rescission would be barred by TILA’s three-year
12 statute of repose. As a result, the Pattersons cannot allege timely, proper tender, and
13 the deficiencies in the complaint cannot be cured by amendment. Accordingly, the
14 Court DISMISSES the Pattersons’ TILA claims (Third Cause of Action) with
15 prejudice. Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc., 806 F.2d 1393,
16 1401 (9th Cir. 2004) (holding that leave to amend should be denied if the court
17 determines that “allegations of other facts consistent with the challenged pleading
18 could not possibly cure the deficiency.”).
19
20
21
22
23
24

25 ⁹ Moreover, even if the Pattersons could tender alternative property, the Pattersons do
26 not allege that the value of the Property is reasonably equivalent to the money that was
advanced by BofA.

