No. 15-17188

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KEVIN J. KEEN, TAMRA E. KEEN,
CURT CONYERS, KELLY E. CONYERS,
individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,
v.
JPMORGAN CHASE BANK N.A.,
a national banking association,
Defendant-Appellee.

On Appeal from the United States District Court
Northern District of California, No. 3:15-cv-01806-WHO
The Honorable William H. Orrick, III

APPELLEE'S RESPONSE TO APPELLANTS' MOTION FOR COURT TO DETERMINE ITS OWN SUBJECT MATTER JURISDICTION AND APPELLEE'S CROSS-MOTION TO DISMISS APPEAL

Jonathan S. Massey
MASSEY & GAIL LLP
1325 G St., N.W., Suite 500
Washington, D.C. 20005
(202) 652-4511
jmassey@masseygail.com
Counsel for Appellee

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Counsel for Defendant-Appellee JPMorgan Chase Bank, N.A., states the following:

JPMorgan Chase Bank, N.A. is a wholly-owned subsidiary of JPMorgan Chase & Co., which is a publicly-traded company. No publicly-held corporation owns 10% or more of JPMorgan Chase & Co.'s stock.

By: /s/ Jonathan S. Massey

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APPELLEE'S RESPONSE TO APPELLANTS' MOTION FOR COURT TO DETERMINE ITS OWN SUBJECT MATTER JURISDICTION AND APPELLEE'S CROSS-MOTION TO DISMISS APPEAL

I. Introduction

Plaintiffs-Appellants ("Plaintiffs") have filed a motion requesting that the Court determine its own subject-matter jurisdiction following the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). Without adopting or advocating a legal position, Plaintiffs ask this Court to opine whether they have established a sufficiently "concrete" injury to satisfy the injury-in-fact requirement of Article III standing under *Spokeo*. Plaintiffs tell this Court that they do not take a position on the implications of *Spokeo*, yet tellingly they have continued to prosecute their appeal in this Court and have declined to dismiss it under Rule 42.

Defendant-Appellee JPMorgan Chase Bank, N.A. ("Chase") submits that this Court should dismiss this appeal and deny Plaintiffs' motion without responding to Plaintiffs' request that the Court opine as to the application of *Spokeo* in this case. This Court need not reach the *Spokeo* issue raised by Plaintiffs, because there is an even more fundamental defect in their appeal: Plaintiffs' claim is moot. Following the District Court's dismissal of the complaint, Plaintiffs voluntarily paid off the mortgage loan that was the subject of their purported claim. Plaintiffs can no longer present a live case-or-controversy (if they ever could), and their appeal should be dismissed as moot, with no need to address whether they have standing under *Spokeo*. Accordingly, Chase hereby moves for dismissal of the appeal in this case.[1]

Further, because Plaintiffs' own actions have led to the absence of a genuine Article III controversy, the District Court's judgment should not be vacated. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994) (party not entitled to vacatur where its own actions led to mootness on appeal).

II. Statement Of The Case

This case is a putative class action in which Plaintiffs purport to assert a claim for statutory damages under the federal Truth in Lending Act, 15 U.S.C. § 1640(a) ("TILA") against Chase. Plaintiffs previously were four co-borrowers on a 30-year, fixed-rate Chase mortgage loan specifying an annual interest rate of 5.125%, a monthly payment of $1,105.94, and a Finance Charge (a specialized term under TILA) of $195,104.49. After the District Court dismissed their claim, Plaintiffs paid off the loan but nonetheless have continued to pursue this appeal.[2]

A. The Nature Of Plaintiffs' Claim.

Plaintiffs' complaint alleged that the Finance Charge listed in a disclosure statement they received from Chase in connection with their loan (known as a "TILA

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[1] Chase will submit a separate Appellee's brief under the briefing schedule in the usual course, raising additional arguments for affirming the District Court's judgment and explaining why Plaintiffs' appeal lacks merit.

[2] Notably, Plaintiffs filed their opening brief in this Court on May 4, 2016, without disclosing that they had paid off their loan in December 2015.

disclosure statement") would have been understated if the charge (inexplicably) had been re-calculated using a method for computing interest that Chase was *not* using. In the words of the District Court (Orrick, J.), Plaintiffs "accuse Chase of violating TILA by failing to disclose to them the finance charge they would hypothetically incur if Chase were to apply a particular method of calculating interest on their loan. They do not allege that Chase has applied this method or that it intends to do so. Nor do they allege that the method Chase actually uses is improper, or that Chase's disclosures regarding the finance charge plaintiffs will incur under this method are inaccurate or otherwise deficient." District Court's Order of Oct. 10, 2016 at 1 ("Dismissal Order") (attached at Exhibit A hereto). Plaintiffs purport to represent a putative class, but no class has been certified in this case.

The District Court explained that "Plaintiffs' theory of liability is somewhat complicated and is not very well explained in the" First Amended Complaint, *id.* at 2, but it involves differences among three potential methods for calculating interest on loans: the so-called "365/365" method, the "360/360" method, and the "365/360" method. *See American Timber & Trading Co. v. First National Bank of Oregon*, 511 F.2d 980, 982 n.1 (9th Cir. 1973). Under the 365/365 method, the yearly interest rate is divided by 365, producing a daily interest rate which is then multiplied by the number of applicable calendar days. *Id.* Months of different lengths thus produce different interest charges. *Id.* The 360/360 method is similar except that each month is assumed to have exactly 30 days, meaning that the yearly interest rate is divided by 360 instead of 365. *Id.* Each month thus produces the same interest charge, regardless of its number of calendar days. *Id.* The 365/360 method is a hybrid of the other two. Under this method, the yearly interest rate is divided by 360, producing a daily interest rate which is then multiplied by the number of applicable calendar days, without assuming that each month has exactly 30 days. *Id.* While the 365/365 method and 360/360 method produce overall interest charges that are "exactly the same," the 365/360 method produces a greater overall interest charge. *Id*.

The District Court found that, "[u]nder the terms of the note at issue here, plaintiffs must pay $1,105.94 per month, irrespective of the number of days in the month. This indicates that Chase is using the 360/360 method to calculate interest . . . ." Dismissal Order at 3. The Court noted that "Plaintiffs do not claim that Chase's use of the 360/360 method is improper, or that its disclosures regarding the finance charge that plaintiffs will incur under that method are inaccurate or otherwise deficient. Rather, plaintiffs allege that *if Chase were to apply the 365/360 method*, then their finance charge would be 'not less than $202,779.44,' significantly higher than the $195,104.49 that was disclosed to them." *Id.* at 3 (emphasis in original).

The District Court explained that "Plaintiffs do *not* allege that Chase has applied the 365/360 method, or that it intends to do so (or ever intended to do so) at any time in the future. To the contrary, plaintiffs specifically allege that Chase has stated that it 'would *never* enforce' the loan in this manner." *Id*. (citation omitted; emphasis added). Nevertheless, "plaintiffs contend that Chase was required under TILA to disclose the finance charge they would incur under the 365/360 method. This is the only claim for relief in the [First Amended Complaint]." *Id.* at 3-4.

Plaintiffs' reference to "Chase's undisputed failure to include $7,600+ in a finance charge" (Plaintiffs' Motion at 2) is inaccurate and misleading.[3] Chase did *not* fail to disclose anything. Rather, it is undisputed that Chase properly disclosed the Finance Charge as computed by the only method of interest calculation to which Plaintiffs *were ever actually subject* over the course of their loan. Indeed (as discussed in Part II-C, *infra*), in December 2015, Plaintiffs paid their mortgage in full in accordance with its disclosed terms, unequivocally demonstrating that Plaintiffs' hypothetical claim was in fact fanciful and false.

B. The District Court's Decision.

The District Court properly dismissed the complaint for failure to state a claim, explaining that "TILA did not require Chase to disclose to plaintiffs the finance charge they would incur under an interest calculation method that, according to plaintiffs' allegations, Chase does *not* use and does *not* intend to use." Dismissal

[3] Plaintiffs have offered other figures for the alleged understatement. In their initial complaint, they asserted the understatement was $8,084.51. ER397, 437. In briefs, they offered the number $8,776.42. ER267, 274.

Order at 1 (emphasis added). The Court opined that "this issue is sufficiently ripe to provide subject matter jurisdiction," *id.* at 5, and t held that "disclosure of the effects of applying the 365/360 method is required only where the creditor *actually applies* that method." *Id.* at 6 (emphasis added).

The District Court noted that the text, implementing regulations of TILA, and the statutory purposes all foreclosed Plaintiffs' claim. *Id.* at 5-9. For example, the Court explained that borrowers would hardly be aided by disclosures of methods of interest calculation that were *not* being applied to them:

> Plaintiffs fail to articulate how *inundating* borrowers with *arcane* information regarding an interest calculation method that is *not applied* to them, and that will *not* foreseeably be applied to them, would reflect an appropriate accommodation between "the conflicting demands for completeness and for simplicity" that TILA seeks to balance.
>
> *Id.* at 8 (emphasis added).

The Court also noted that Plaintiffs' claim was even "odder" because Plaintiffs conceded that TILA did *not* require disclosure of the method of interest calculation *actually being applied* – making it impossible to fathom why the statute should be construed to require disclosure of a hypothetical method *not being applied*:

> [O]ne of the odder aspects of plaintiffs' claim [is] they seek to establish a rule that would effectively require creditors to disclose detailed information regarding an interest calculation method that the creditors *do not* apply, yet they concede that creditors are *not* required to disclose the interest calculation method that they *do* apply.

Id. at 8 (emphasis in original). Accordingly, the District Court dismissed Plaintiffs' complaint. Plaintiffs moved for reconsideration, which the District Court denied by Order of October 30, 2015. *See* Exhibit B, at 2 (reaffirming that TILA does not require "a creditor to disclose the effects of applying the 365/360 method to calculate interest . . . where the creditor does not in fact apply or intend to apply that method to the loan at issue").

C. Plaintiffs Pay Off Their Loan After The District Court's Decision.

The Chase mortgage loan that purported to form the basis for Plaintiffs' hypothetical TILA claim has been paid off. Plaintiffs acknowledge that in December 2015 they paid off their Chase mortgage at their own initiative and refinanced with another lender, which "is not Chase or any assign of Chase." Declaration of Kevin Keen dated June 2, 2016 ("Keen Decl.") at ¶¶ 3, 5 (CA9 Dkt. Entry 23-2, attached to Plaintiffs' Motion).

The payoff amount for Plaintiffs' loan with Chase did not include the (supposed) additional $7,600 Finance Charge that Plaintiffs cite in their complaint and motion. Nor did it reflect the imagined Finance Charge of $202,799.44 that Plaintiffs allege would be the product of a 365/360 method of interest calculation. In fact, Plaintiffs do not contend that the payoff amount for their loan reflected a 365/360 method of interest calculation at all; indeed, Plaintiffs declare that the amount Chase asked them to remit in order to pay off their loan was $175 *less* than the 365/360 method would have provided. Keen Decl. (CA9 Dkt. Entry 23-2) at ¶¶ 6-7.

In other words, it is now clear that the Finance Charge disclosed by Chase in the TILA disclosure statement was entirely accurate. Plaintiffs paid off their Chase mortgage in full and in accordance with its disclosed terms. It is beyond dispute that, from the beginning of the loan until the end, Plaintiffs were never subject to the 365/360 method of interest calculation. Plaintiffs' alleged fears that they would face a lender demand of $7,600 based on the 365/360 method of computing interest, or that they would face a final "balloon payment" demand of that amount based on the 365/360 method, never came to pass. Those fears have evaporated.

Indeed, the loan records show that, far from facing a request from Chase for a final "balloon payment" at the end of the loan, Plaintiffs *received a refund of $1,167.47 from Chase* for escrow payments. *See* Declaration of Jonathan Massey dated June 13, 2016 ("Massey Decl."), ¶¶ 2-3 (attached as Exhibit C hereto). Chase also sent Plaintiffs a payoff letter confirming that they had satisfied the obligations of their loan and that Chase was releasing the lien on the property: "Congratulations on paying off your mortgage." *Id.* at ¶ 4. "We'll send the lien release documents to your county recorder's office. You can use this letter to confirm that *your mortgage has been paid off* until the release is recorded." *Id.* (emphasis added).

Plaintiffs themselves state they have "obtain[ed] a formal reconveyance of the deed of trust evidencing the previous mortgage loan." Keen Decl. (CA9 Dkt. Entry 23-2) ¶ 6. Plaintiffs no longer have a loan with Chase for the property at issue, and the deed of trust has been reconveyed.

III. Argument

A. Plaintiffs Voluntarily Have Mooted Their Claim On Appeal.

It "is not enough that a dispute was very much alive when suit was filed"; the "parties must continue to have a personal stake in the outcome of the lawsuit" to prevent the case from becoming moot. *Lewis v. Continental Bank Corp*., 494 U.S. 472, 477–78 (1990) (internal quotation marks omitted). If a case becomes moot on appeal, this Court must dismiss the appeal. *E.g.*, *GTE California, Inc. v. Federal Communications Comm'n*, 39 F.3d 940, 945 (9th Cir. 1994).

Plaintiffs' pay-off of their loan in December 2015 shows that there is no longer any live controversy in this case (if there ever was). The pay-off further shows that Plaintiffs' loan did not contain the additional phantom $7,600 Finance Charge that Plaintiffs surmised, nor did it carry the supposed total Finance Charge of $202,799.44 that Plaintiffs hypothesized. The pay-off confirms that, from the beginning of the loan until the end, Plaintiffs were never subject to the 365/360 method of interest calculation they claim to fear. There can be no dispute that Chase accurately disclosed the Finance Charge under the only method of interest calculation that Plaintiffs ever actually experienced during the course of their loan. Plaintiffs no longer hold a mortgage loan with Chase for the property in question, and there is no possibility that they will ever face a request for repayment from Chase based on the 365/360 method of interest calculation.

Plaintiffs' claim has always rested on the implausible assertion that, at some unspecified future time, they might face a demand for additional payments under their loan, if a 365/360 method of interest calculation were inexplicably applied to them. For example, Plaintiffs' Opening Brief on Appeal in this Court asserted that, under a 365/360 method of interest calculation under the loan, Chase *in the year 2044* might request a "$7,600+ balloon payment that would become separately due . . . at the end of borrowers' loan term." AOB 12 n.4.

Plaintiffs' loan payoff in December 2015 disproves these fanciful scenarios. Rather than speculating about what might happen in 2044, we can now determine what actually *did happen* when Plaintiffs paid off their loan in December 2015: they acknowledge that they were not subject to the 365/360 method of interest calculation, nor were they asked to make a "balloon payment." In fact, they *received a refund of $1,167.47 from Chase* – a fact Plaintiffs omitted from Mr. Keen's declaration.

Plaintiffs' decision to pay off their loan means that this Court need not pass on the District Court's interpretation of TILA in order to dispose of this appeal.

Plaintiffs no longer hold a mortgage from Chase. It was paid off in accordance with its disclosed terms. Plaintiffs cannot credibly allege that they will ever be subject to a 365/360 method of interest calculation under a loan which is now paid off, and they can no longer claim a surprise balloon payment will materialize. Accordingly, Plaintiffs' appeal should be dismissed as moot.

B. Plaintiffs' Efforts To Salvage Their Appeal Are Unavailing.

1. Plaintiffs' Latest Far-Fetched Hypothesis – That A Different Lender Might Seek An Additional $175 From Them – Is Wholly Speculative And Unsubstantiated.

In a futile, last-ditch effort to salvage their claim and appeal, Plaintiffs now appear to suggest for the first time that some unidentified lender (besides Chase) might (at some unspecified future date) appear on the scene and argue that it is entitled to an additional $175 from Plaintiffs under their (now paid off) Chase loan based on the 365/360 method of interest calculation. *See* Plaintiffs' Motion at 6-7; Keen Decl. ¶ 7. The $175 figure (and corresponding theory) was not mentioned in Plaintiffs' complaint, in any of their lower court papers, in either of the District Court's decisions, or even in Plaintiffs' opening appellate brief. Such a far-fetched, eleventh-hour suggestion is inadequate to meet Plaintiffs' burden of showing the presence of a live case.

First, a wholly speculative future "controversy" cannot save *this* case from mootness. *See Feldman v. Bomar*, 518 F.3d 637, 643 (9th Cir. 2008) (moot case cannot be saved by alleged future harm that is "so remote and speculative that there is no tangible prejudice to the existing interests of the parties") (internal quotation marks omitted). Plaintiffs have paid off their loan with Chase in full, have received documentation attesting to that fact, and no longer have a mortgage with Chase (the sole defendant in this action). If in the future an unknown third party ever appeared to demand a payment of $175 under the (paid off) Chase loan, Plaintiffs would have ample opportunity to contest that demand at the relevant time – for example, to insist that the loan has already been paid off and fully satisfied. Plaintiffs' hypothetical (and frankly bizarre) scenario cannot save *this case* from mootness.

Next, Plaintiffs cannot credibly allege that a "phantom" lender might be able to claim an interest in their previous mortgage loan with Chase, and indeed the facts negate any such suggestion. Chase (and not some other lender) supplied the loan payoff documentation in December 2015 at Plaintiffs' request. Chase, and no one else, issued Plaintiffs a refund of $1,167.47. Nor has any phantom lender stepped forward in the intervening months, despite the lien release and reconveyance of the deed of trust (which would surely motivate any potential creditor to assert its rights). In short, there is nothing to show that some other lender might seek to recover an extra $175 from Plaintiffs under their former loan with Chase.

Plaintiffs point to the statement of Chase's counsel regarding the securitization of mortgage loans in general. (2 ER 50:14-15 ("these are all securitized loans that are sold”)). But that statement does not help Plaintiffs. If Plaintiffs’ loan were securitized (which they have never shown), it would simply mean that the proceeds from their loan pay-off were distributed to the trust holding a portfolio of pooled mortgages.[4] Such a distribution would not help Plaintiffs’ argument in the slightest. In any event, Plaintiffs have waived any new (and unsubstantiated) theory that securitization could somehow permit a third party to impose a 365/360 method of interest calculation under the prior, paid-off Chase loan, because they never raised it in the District Court. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010) (“[A]n issue will generally be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it.”) (internal quotation marks omitted).

2. Plaintiffs’ Post-Dismissal Voluntary Tender Of $175 Cannot Create A Justiciable Dispute.

Mr. Keen’s declaration states: “I hereby tender full payment of this $175+ to present holder.” Keen Decl. ¶ 8. But Chase, the only defendant in this case, is not asking for that sum (and nor is anyone else). A voluntary tender is a self-imposed cost that cannot confer standing or create a justiciable controversy. *See Clapper v. Amnesty Intern. USA*, 133 S. Ct. 1138, 1152 (2013) (“self-inflicted injuries”

[4] “[M]ortgage-backed securities work in the following manner: Mortgages are collected into a trust, mortgage payments are sent to that trust, then pooled, and then paid out to the holders of the securities.” *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 386 (5th Cir. 2010).

insufficient to create standing); *Mendia v. Garcia*, 768 F.3d 1009, 1013 n.1 (9th Cir. 2014) ("self-inflicted injury" inadequate under *Clapper*). That Plaintiffs purport to tender an amount that has never been demanded, or even alleged, at this stage of the litigation is telling.

C. This Court Need Not Reach The *Spokeo* Question Raised By Plaintiffs.

Plaintiffs purport not to take a position on the implications of *Spokeo* for this case, but they nonetheless ask this Court to render an opinion on the issue. In view of the mootness of Plaintiffs' claim, there is no reason for this Court to indulge Plaintiffs' request.[5] There is no need to reach the *Spokeo* question posed by Plaintiffs in order to dismiss this appeal as moot.[6]

This case is a particularly poor vehicle to address *Spokeo* because Plaintiffs' pay-off of their loan fundamentally changes the posture of their claim. Plaintiffs no longer hold an active loan with Chase under which they could even conceivably assert any kind of informational injury. Plaintiffs seek disclosures with respect to a loan they have already paid off. There is no longer any risk (even under Plaintiffs'

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[5] Chase's Appellee's Brief will demonstrate that the District Court's judgment may be affirmed on other grounds as well, including Plaintiffs' failure to establish a cognizable TILA violation on the merits.

[6] Chase reserves its rights to address *Spokeo* in more detail, should the Court request further briefing or should Plaintiffs or another party take a position on the issue.

theory) that they might be subject to the 365/360 method of interest calculation, or face an additional "$7,600+" Finance Charge or "balloon payment" they allege.

Further, Plaintiffs themselves told the District Court that their complaint "does not claim they (or the putative class) has [*sic*] ever suffered *any actual injury-in-fact* because of what defendant bank did wrong here." Dist. Ct. Dkt. 36, at 2 (emphasis added). Even in this Court, Plaintiffs acknowledge the "tangible concrete *harmlessness* of any technical violation" of TILA. Plaintiffs' Motion at 2 n.2.

There is no need to decide the *Spokeo* question.

D. The District Court's Judgment Should Not Be Vacated.

This Court should dismiss the appeal but should not vacate the District Court's judgment. The Supreme Court has instructed that vacatur is an "equitable" device and that a party seeking it must demonstrate "equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25, 26 (1994). The Court explained that decisions regarding vacatur "must also take account of the public interest. 'Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.'" *Id.* (citation omitted).

These principles demonstrate that vacatur would be inappropriate in this case. First, Plaintiffs themselves mooted their claim by voluntarily paying off their loan in December 2015 at their own initiative. The Supreme Court opined in *U.S. Bancorp* that "[t]he principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." 513 U.S. at 24. Because Plaintiffs themselves caused the mootness of their claim, they are not entitled to vacatur. *See Marshack v. Helvetica Capital Funding LLC*, 495 F. App'x 808, 810 (9th Cir. 2012) ("[T]he key question is whether 'the live case was resolved by the strategic decision of the appealing party rather than mere happenstance.'") (quoting *ACLU of Nevada v. Masto*, 670 F.3d 1046, 1066 (9th Cir. 2012)); *United States v. Payton*, 593 F.3d 881, 885 (9th Cir. 2010) ("Mootness caused by the unilateral action of a losing party is ordinarily not a ground for vacatur of the decision establishing the loss."); *Cammermeyer v. Perry*, 97 F.3d 1235, 1239 (9th Cir. 1996) (denying defendants' request for vacatur because "it was defendants who rendered this case moot").

Second, Plaintiffs are not entitled to vacatur under principles of equity because they are engaging in forum-shopping. Having brought their case in federal court and lost, Plaintiffs now aver that they will refile their claims against Chase in California state court (though they continue to hedge their bets by prosecuting this appeal). *See* Plaintiffs' Motion at 3. Plaintiffs amended their complaint once and declined the District Court's offer to amend again. *See* Dismissal Order at 9 ("[P]laintiffs' counsel stated that plaintiffs' claims are 'written up the right way,' and that plaintiffs did not seek leave to amend if I dismissed the FAC"). Further, Plaintiffs unsuccessfully moved for reconsideration in the District Court. *See* Exhibit B. Plaintiffs have been given every opportunity to raise their claims multiple times, and they have made a series of strategic choices, such as continuing to prosecute their appeal without disclosing that they had paid off their loan).

Plaintiffs should not be permitted yet another bite at the TILA apple for their meritless claims. The Supreme Court has explained that vacatur turns on equitable principles: "The denial of vacatur is merely one application of the principle that '[a] suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.'" *U.S. Bancorp*, 513 U.S. at 25 (citation omitted); *see also Dilley v. Gunn*, 64 F.3d 1365, 1370 (9th Cir. 1995) ("*U.S. Bancorp* makes clear that the touchstone of vacatur is equity."). Plaintiffs' litigation tactics, which have resulted in a waste of judicial resources, should not be rewarded with vacatur.

IV. Conclusion

The Appeal in this case should be dismissed. The District Court's judgment should not be vacated.

Respectfully submitted,

/s/ *Jonathan S. Massey*

Jonathan S. Massey
MASSEY & GAIL LLP
1325 G St., N.W., Suite 500
Washington, D.C. 20005
(202) 652-4511
jmassey@masseygail.com
Counsel for Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(1)(E), I certify that this brief has been prepared in a proportionally-spaced typeface, 14-point Times New Roman, and complies with the 20-page limitation of Rule 27(d)(2).

/s/ *Jonathan S. Massey*

CERTIFICATE OF SERVICE

I certify that on this 13th day of June, 2016, I electronically filed the foregoing with the Court using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ *Jonathan S. Massey*

EXHIBIT A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KEVIN J. KEEN, et al.,

Plaintiffs,

v.

JPMORGAN CHASE BANK, N.A.,

Defendant.

Case No. 15-cv-01806-WHO

ORDER ON MOTION TO DISMISS

Re: Dkt. No. 35

INTRODUCTION

This is a putative class action asserting a single claim for relief under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq*. Plaintiffs Kevin Keen, Tamra Keen, Curt Conyers, and Kelly Conyers (collectively, "plaintiffs") are co-borrowers on a mortgage loan from defendant JPMorgan Chase Bank, N.A. ("Chase"). They accuse Chase of violating TILA by failing to disclose to them the finance charge they would hypothetically incur if Chase were to apply a particular method of calculating interest on their loan. They do not allege that Chase has applied this method or that it intends to do so. Nor do they allege that the method Chase actually uses is improper, or that Chase's disclosures regarding the finance charge plaintiffs will incur under this method are inaccurate or otherwise deficient. Chase moves to dismiss for lack of subject matter jurisdiction and for failure to state a claim.

Because I find that TILA did not require Chase to disclose to plaintiffs the finance charge they would incur under an interest calculation method that, according to plaintiffs' allegations, Chase does not use and does not intend to use, the motion to dismiss is GRANTED.

United States District Court
Northern District of California

BACKGROUND

Plaintiffs are co-borrowers on a $203,115.00 promissory note dated November 25, 2014. First Amended Complaint ¶ 5 (Dkt. No. 30) ("FAC"). The note is secured by a deed of trust on a property in Turlock, California. *Id.* The note identifies Chase as the lender and states that interest will be paid at a yearly rate of 5.125 percent. *Id.* ¶¶ 5-6.

Plaintiffs attach copies of the note and deed of trust to the FAC. The note provides in part:

> I will make my monthly payments on the 1st day of each month beginning on January 1, 2015. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this note . . . If, on December 1, 2044, I still owe amounts under this note I will pay those amounts in full on that date . . . My monthly payment will be in the amount of U.S. $ 1,105.94.

FAC Ex. 1 (Dkt. No. 30).

The deed of trust similarly provides in part:

> The note states that Borrower owes Lender two hundred three thousand one hundred-fifteen and 00/100 dollars (U.S. $203,115.00) plus interest. Borrower has promised to pay this debt in regular periodic payments and to pay the debt in full not later than December 1, 2044.

FAC Ex. 2 (Dkt. No. 30).

Plaintiffs also attach to the FAC a copy of the TILA disclosure statement that Chase allegedly provided to them. In line with the note and deed of trust, the disclosure statement explains that the yearly interest rate on the loan is 5.125 percent, the monthly payment amount is $1,105.94, and the finance charge is $195,104.49. *See* FAC Ex. 5 (Dkt. No. 30).

TILA requires a creditor in a consumer credit transaction to disclose the finance charge to the borrower. *See* 15 U.S.C. § 1638(a)(3). Under 12 C.F.R. § 1026.18(d)(1)(i),

> [i]n a transaction secured by real property or a dwelling, the disclosed finance charge . . . shall be treated as accurate if the amount disclosed as the finance charge . . . is understated by no more than $100.

12 C.F.R. § 1026.18(d)(1)(i).[1] Plaintiffs allege that Chase failed to comply with this requirement, making Chase liable for statutory damages under 15 U.S.C. § 1640(a). *See* FAC ¶¶ 22-23.

[1] 12 C.F.R. § 1026.18(d)(1)(i), as well as 12 C.F.R. § 1026.17(c)(3), discussed in detail below, are part of Regulation Z, 12 C.F.R. § 1026.1 *et seq.*, which was "promulgated by the Board of

Plaintiffs' theory of liability is somewhat complicated and is not very well explained in the FAC, although their opposition brief helps flesh out their reasoning. As background information, there are three different methods generally used to calculate interest on loans: the 365/365 method, the 360/360 method, and the 365/360 method. *See Am. Timber & Trading Co. v. First Nat. Bank of Oregon*, 511 F.2d 980, 982 n.1 (9th Cir. 1973). Under the 365/365 method, the yearly interest rate is divided by 365, producing a daily interest rate which is then multiplied by the number of applicable calendar days. *Id.* Months of different lengths thus produce different interest charges. *Id.* The 360/360 method is similar except that each month is assumed to have exactly 30 days, meaning that the yearly interest rate is divided by 360 instead of 365. *Id.* Each month thus produces the same interest charge, regardless of its number of calendar days. *Id.* The 365/360 method is a hybrid of the other two. Under this method, the yearly interest rate is divided by 360, producing a daily interest rate which is then multiplied by the number of applicable calendar days, without assuming that each month has exactly 30 days. *Id.* While the 365/365 method and 360/360 method produce overall interest charges that are "exactly the same," the 365/360 method produces a greater overall interest charge. *Id.*

Under the terms of the note at issue here, plaintiffs must pay $1,105.94 per month, irrespective of the number of days in the month. This indicates that Chase is using the 360/360 method to calculate interest (although plaintiffs do not specifically identify in the FAC what method Chase is using). Plaintiffs do not claim that Chase's use of the 360/360 method is improper, or that its disclosures regarding the finance charge that plaintiffs will incur under that method are inaccurate or otherwise deficient. Rather, plaintiffs allege that *if Chase were to apply the 365/360 method*, then their finance charge would be "not less than $202,779.44," significantly higher than the $195,104.49 that was disclosed to them. *See, e.g.*, FAC ¶¶ 7-9. Plaintiffs do not allege that Chase has applied the 365/360 method, or that it intends to do so (or ever intended to do so) at any time in the future. To the contrary, plaintiffs specifically allege that Chase has stated that it "would never enforce" the loan in this manner. *Id.* ¶ 14. Nevertheless, plaintiffs contend

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Governors of the Federal Reserve System . . . pursuant to its authority under [TILA]," *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 197 (2011).

that Chase was required under TILA to disclose the finance charge they would incur under the 365/360 method. This is the only claim for relief in the FAC. *See* FAC ¶¶ 22-23.

Plaintiffs filed their original complaint on April 21, 2015 and their FAC on July 14, 2015. Dkt. Nos. 1, 30. They bring the TILA claim on behalf of themselves and on behalf of a putative class of California residents who obtained Fannie-Mae-approved residential mortgage loans from Chase. *See* FAC ¶ 16. Chase moved to dismiss on August 28, 2015. Dkt. No. 35 ("Mot."). I heard argument from the parties on October 14, 2015. Dkt. No. 40.[2]

LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), in order to "give the defendant fair notice of what the claim is and the grounds upon which it rests," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and alterations omitted).

A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). While a complaint "need not contain detailed factual allegations" to survive a Rule 12(b)(6) motion, "it must plead enough facts to state a claim to relief that is plausible on its face." *Cousins v. Lockyer*, 568 F.3d 1063, 1067-68 (9th Cir. 2009) (internal quotation marks and citations omitted). A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

In considering whether a claim satisfies this standard, the court must "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marines Ins. Co.*, 519 F.3d 1025, 1031) (9th Cir.

[2] Plaintiffs' unopposed request for judicial notice of various documents filed in other cases pending in this district and in the United States Supreme Court is GRANTED. *See* Dkt. No. 37.

2008). However, "conclusory allegations of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6) dismissal." *Cousins*, 568 F.3d at 1067 (internal quotation marks omitted). "[I]t is within [the court's] wheelhouse to reject, as implausible, allegations that are too speculative to warrant further factual development." *Dahlia v. Rodriguez*, 735 F.3d 1060, 1076 (9th Cir. 2013).

DISCUSSION

Chase makes two arguments in support of dismissal. It argues (1) that plaintiffs' claim is not sufficiently ripe to qualify as a justiciable case or controversy, Mot. at 11-13; Reply at 4-8 (Dkt. No. 38); and (2) that the claim fails on the merits, because TILA did not require Chase to disclose to plaintiffs the finance charge they would hypothetically incur under the 365/360 method in the event that Chase were to apply it, Mot. at 13-19; Reply at 8-14. While I am satisfied that this issue is sufficiently ripe to provide subject matter jurisdiction, I agree with Chase that plaintiffs' claim fails on the merits.

Plaintiffs' theory of liability rests on the Federal Reserve Board official staff interpretation of 12 C.F.R. § 1026.17(c)(3).[3] Section 1026.17(c)(3) itself provides in relevant part that, "in making calculations and disclosures," a creditor "may disregard the effects of," among other things, "[t]hat months have different numbers of days" and "[t]he occurrence of leap year[s]." *Id.* The official staff interpretation of section 1026.17(c)(3), titled "Minor Variations," explains that the section "allows creditors to disregard certain factors in calculating and making disclosures." 12 C.F.R. Pt. 226, Supp. I, Subpart C, Paragraph 17(c)(3). Thus,

> [c]reditors may base their disclosures on calculation tools that assume that all months have an equal number of days, even if their practice is to take account of the variations in months for purposes of collecting interest. For example, a creditor may use a calculation tool based on a 360-day year, when it in fact collects interest by applying a factor of 1/365 of the annual rate to 365 days. This rule does not, however, authorize creditors to ignore, for disclosure purposes, the effects of applying 1/360 of an annual rate to 365 days.

[3] "[D]eference is especially appropriate in the process of interpreting [TILA] and Regulation Z. Unless demonstrably irrational, Federal Reserve Board staff opinions construing [TILA or Regulation Z] should be dispositive." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980).

Id.

Plaintiffs focus on the final sentence of the interpretation. They argue that the sentence demonstrates that under TILA, a creditor must always disclose the effects of applying the 365/360 method, irrespective of whether the creditor actually uses that method to calculate interest on the loan at issue. *See* Opp. at 2-3 (Dkt. No. 35). Plaintiffs cite no case or other authority that has read the final sentence of the interpretation, section 1026.17(c)(3) itself, or any other portion of Regulation Z or TILA in this way.

Chase responds that the interpretation's final sentence indicates that disclosure of the effects of applying the 365/360 method is required only where the creditor actually applies that method. *See* Reply at 8-10. Chase focuses on the interpretation's use of the phrases, "even if their practice is . . . " and "when it in fact collects interest by applying . . . " *See id.* According to Chase, these references to creditors' actual practices – as opposed to their hypothetical or possible ones – indicate that the disclosure requirement described by the interpretation's final sentence is limited to circumstances where the creditor's actual practice is to use the 365/360 method.

Chase has the better of these arguments. I agree with Chase that, read in context, the interpretation's final sentence is best understood as referring only to circumstances where the creditor's actual practice (or, perhaps, its actual intent) is to use the 365/360 method. This understanding conforms not only with the language of the interpretation as a whole, but also with the Federal Deposit Insurance Corporation ("FDIC")'s and the Office of the Comptroller of the Currency ("OCC")'s commentaries on Regulation Z. Both the FDIC's "Compliance Examination Manual" and the OCC's "Comptroller's Handbook" use the following language to explain section 1026.17(c)(3):

> Confusion often arises over whether to use the 360-day or 365-day year in computing interest . . . Regulation Z does not require the use of one method of interest computation in preference to another (although state law may). It does, however, permit financial institutions to disregard the fact that months have different numbers of days when calculating and making disclosures. This means financial institutions may base their disclosures on calculation tools that assume all months have an equal number of days, even if their practice is to take account of the variations in months to collect interest.

> For example, a financial institution may calculate disclosures using a financial calculator based on a 360-day year with 30-day months, when, in fact, it collects interest by applying a factor of 1/365 of the annual interest rate to actual days.
>
> Disclosure violations may occur, however, *when a financial institution applies a daily interest factor based on a 360-day year to the actual number of days between payments. In those situations*, the financial institution must disclose the higher values of the finance charge, the [annual percentage rate], and the payment schedule resulting from this practice.

FDIC Compliance Examination Manual, Truth in Lending Act at V-1.19 (May 2015) available at www.fdic.gov/regulations/compliance/manual/5/V-1.1.pdf (last visited October 15, 2015) (emphasis added); OCC Comptroller's Handbook, Consumer Compliance, Truth in Lending Act at p.30 (Dec. 2014) available at www.occ.gov/publications/publications-by-type/comptrollers handbook/truth-in-lending-handbook.pdf (last visited October 15, 2015) (emphasis added). These publications, like the Federal Reserve Board official staff interpretation of section 1026.17(c)(3), indicate that the obligation to disclose the effects of applying the 365/360 method arises only "[i]n those situations" where the creditor actually applies it.

Plaintiffs' position would also conflict with section 1026.17(c)(3) itself. As stated above, the section provides that, "in making calculations and disclosures," creditors "may disregard the effects of," among other things, "[t]hat months have different numbers of days" and "[t]he occurrence of leap year[s]." 12 C.F.R. § 1026.17(c)(3). If creditors were always required to disclose the effects of applying the 365/360 method, however, they would not be able to disregard this information. To the contrary, they would consistently have to provide a disclosure explaining that the extra five days (or six days, in leap years) included in the interest calculation under the 365/360 method would result in greater costs for the borrower. Creditors would be required to provide such a disclosure even where they did not use the 365/360 method and did not intend to do so. It is not clear when, if ever, they would be able to disregard the effects of different months having different numbers of days, or of leap years.

Moreover, for a disclosure of the effects of applying the 365/360 method to make sense to borrowers (in situations where that method was merely a hypothetical possibility and not the method actually applied by the creditor) the disclosure would presumably need to include an explanation of how the 365/360 method functions in comparison to the method actually applied. This would presumably require creditors to disclose and explain not only the 365/360 method, but also whatever method they actually used. As plaintiffs themselves point out in the FAC, however, TILA does not require creditors to disclose their "particular method for computing interest." *See* FAC ¶ 10; *see also Haynes v. Homeq Servicing Corp.*, No. 04-cv-01081, 2006 WL 2167375, at *7-14 (M.D. Tenn. Aug. 1, 2006) (dismissing TILA cause of action predicated on creditor's nondisclosure of its particular method of computing interest; stating that "[TILA's] purpose is not served by requiring lenders to make disclosures, such as the one at issue, that will make no difference in the overall cost of credit in most situations"). This highlights one of the odder aspects of plaintiffs' claim: they seek to establish a rule that would effectively require creditors to disclose detailed information regarding an interest calculation method that the creditors *do not apply*, yet they concede that creditors are *not* required to disclose the interest calculation method that they *do* apply.

Finally, I am not persuaded that the disclosure requirement plaintiffs seek to impose would serve TILA's purpose of "assuring meaningful disclosure of credit terms to consumers." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559 (1980). As the Supreme Court has explained, "[m]eaningful disclosure does not mean more disclosure. Rather, it describes a balance between competing considerations of complete disclosure and the need to avoid informational overload." *Id.* at 568 (internal emphasis and alterations omitted); *accord Household Credit Servs. Inc. v. Pfennig*, 541 U.S. 232, 243 (2004). Plaintiffs fail to articulate how inundating borrowers with arcane information regarding an interest calculation method that is not applied to them, and that will not foreseeably be applied to them, would reflect an appropriate accommodation between "the conflicting demands for completeness and for simplicity" that TILA seeks to balance. *Milhollin*, 444 U.S. at 569. I agree with Chase that, in all likelihood, it would not.

Plaintiffs' counterarguments are not convincing. In their opposition brief, they point to another portion of Regulation Z, 12 C.F.R. § 1026.17(c)(1), which provides that TILA disclosures "shall reflect the terms of the legal obligation between the parties." 12 C.F.R. § 1026.17(c)(1).

Given that section 1026.17(c)(1) is followed by the far more specific and on point section 1026.17(c)(3), which the staff of the Federal Reserve Board has interpreted as described above, section 1026.17(c)(1) does not provide a compelling reason for imposing the 365/360 method disclosure requirement urged by plaintiffs.

Plaintiffs also cite to *F.T.C. v. AMG Servs. Inc.*, 29 F. Supp. 3d 1338 (D. Nev. 2014), for the proposition that under TILA, a creditor "must assume the worst that could happen under the ambiguous terms of the . . . note for the purposes of calculating the finance charge." Opp. at 20. But that case, unlike this one, involved disclosures that were found to be ambiguous and misleading in light of the defendants' actual practices, not its hypothetical or possible ones. Under the terms of the payday loans at issue in that case, "if a borrower of a $300.00 loan . . . fail[ed] to successfully opt out of the [automatic] renewal plan" – the terms of which were "scattered throughout the dense text below the TILA box" – then "his or her total payments would actually total $975.00 rather than the $390.00 shown in the TILA box." 29 F. Supp. 3d at 1345. "While borrowers technically ha[d] the ability to decline enrollment in the automatic renewal plan, the mechanism for declining enrollment [was] controlled by the defendants through a convoluted email and hyperlink procedure." *Id.* The district court found that "the terms in the [loans] regarding the automatic renewal plan were likely to mislead because they implied in the prominent TILA box that only one finance charge would be incurred while the fine print created a process under which multiple finance charges would be automatically incurred unless borrowers [took] affirmative action." *Id.* at 1354-55. In other words, the TILA disclosures at issue failed to clearly and conspicuously disclose the actual terms of the loans and the actual finance charges the borrowers could be expected to incur (and, indeed, in many instances had incurred). *See id.* at 1346. That is not the situation here.

CONCLUSION

For the foregoing reasons, the FAC "lacks a cognizable legal theory" and must be dismissed. *Mendiondo*, 521 F.3d at 1104. Chase's motion to dismiss is GRANTED.

At oral argument, plaintiffs' counsel stated that plaintiffs' claims are "written up the right way," and that plaintiffs did not seek leave to amend if I dismissed the FAC. Therefore, I find that further amendment would be futile and DISMISS the FAC WITHOUT LEAVE TO AMEND. The Clerk shall enter judgment in Chase's favor and close the file.

IT IS SO ORDERED.

Dated: October 16, 2015

WILLIAM H. ORRICK
United States District Judge

United States District Court
Northern District of California

EXHIBIT B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KEVIN J. KEEN, et al.,
Plaintiffs,
v.
JPMORGAN CHASE BANK, N.A.,
Defendant.

Case No. 15-cv-01806-WHO

ORDER DENYING MOTION FOR RECONSIDERATION

Re: Dkt. No. 45

On October 16, 2015, I issued an order granting defendant JPMorgan Chase Bank, N.A. ("Chase")'s motion to dismiss for failure to state a claim and dismissing plaintiffs' first amended complaint without leave to amend. Dkt. No. 43 ("Dismissal Order"). On October 19, 2015, plaintiffs filed a motion for reconsideration, arguing that the Dismissal Order constituted clear error. Dkt. No. 45 ("Mot.").

Reconsideration under Federal Rule of Civil Procedure 59(e) is appropriate if the district court "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). "There may also be other, highly unusual, circumstances warranting reconsideration." *Id.* Rule 59(e) "offers an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (internal quotation marks omitted). Accordingly, the rule may not be used to raise evidence or argument for the first time that "could reasonably have been raised earlier in the litigation." *Id.*

Reconsideration is not warranted here. Plaintiffs contend that "the main reason" the Dismissal Order constituted clear error is that it failed to account for the following statement from the official interpretation of 12 C.F.R. § 1026.17(c)(1): "If the consumer and creditor informally agree to a modification of the legal obligation, the modification should not be reflected in the disclosures unless it rises to the level of a change in the terms of the legal obligation." 12 C.F.R. Pt. 1026, Supp. I, Part 2, Subpart C, Paragraph 17(c)(1). Plaintiffs cited this same statement in their brief in opposition to Chase's motion to dismiss, *see* Dkt. No. 36 at 10, and their reliance on the statement is no more persuasive now than it was then.

They argue that in light of the statement, "the mere fact that [Chase] possibly somehow 'informally agree[d]' . . . to never use the 365/360 method still provides no defense to [the] present claim that [Chase] nonetheless always had to make TILA disclosures based on the 365/360 method." Mot. at 2-3. This argument misconstrues the Dismissal Order. I did not hold that plaintiffs' claim fails because Chase "'informally agree[d]'. . . to never use the 365/360 method." Rather, I held that the claim fails because plaintiffs had not identified any authority requiring Chase to disclose the finance charge they would hypothetically incur under the 365/360 method in the event that Chase were to apply it, where there was no allegation that Chase either applied the 365/360 method or intended to apply it. *See* Dismissal Order at 1, 5-10. That plaintiffs specifically alleged that Chase had stated that it "would never enforce" their loan in this manner did not help their case. But that allegation was far from dispositive. The official interpretation of 12 C.F.R. § 1026.17(c)(1) does not transform plaintiffs' theory into a viable claim for relief.

Plaintiffs express concern that the Dismissal Order establishes a general "who-actually-does-what-to-whom" defense for TILA defendants. *See* Mot. at 4. It is hard to see how this is the case. Plaintiffs forget that they specifically conceded in their first amended complaint that TILA does not require creditors to disclose their "particular method for computing interest," Dkt. No. 30 ¶ 10, and that under 12 C.F.R. § 1026.17(c)(3), "in making calculations and disclosures," a creditor "may disregard the effects of," among other things, "[t]hat months have different numbers of days" and "[t]he occurrence of leap year[s]," 12 C.F.R. § 1026.17(c)(3). Plaintiffs' theory is based on the notion that there is an exception to these general rules that requires a creditor to disclose the effects of applying the 365/360 method to calculate interest, even where the creditor does not in fact apply or intend to apply that method to the loan at issue. The Dismissal Order merely recognizes that neither the official interpretation of 12 C.F.R. § 1026.17(c)(3) – which plaintiffs previously described as the "foundation-stone of the first amended complaint," Dkt. No. 36 at 2 – nor any other authority cited by plaintiffs supports such an exception.

Plaintiffs correctly point out that the authority to issue official interpretations of Regulation Z is now vested in the Consumer Financial Protection Bureau ("CFPB"), not in the Federal Reserve Board as I stated in the Dismissal Order. *See* Mot. at 2 n.3; *see also Fridman v. NYCB Mortgage Co. LLC*, 780 F.3d 773, 776-77 (7th Cir. 2015); *Robinson v. Carport Sales & Leasing Inc.*, No. 14-cv-01358, 2015 WL 224655, at *3 n.2 (M.D. Fla. Jan. 15, 2015). But that mistake is not a reason to reconsider the Dismissal Order. The CFPB adopted the Federal Reserve Board official interpretations "in wholesale form, minus a few technical changes," *Fridman*, 780 F.3d at 776, and the CFPB official interpretation of 12 C.F.R. § 1026.17(c)(3) remains word-for-word identical to the analogous Federal Reserve Board official interpretation, *compare* 12 C.F.R. Pt. 226, Supp. I, Subpart C, Paragraph 17(c)(3) *with* 12 C.F.R. Pt. 1026, Supp. I, Part 2, Subpart C, Paragraph 17(c)(3). As I stated in the Dismissal Order, "read in context, th[at] interpretation's final sentence is best understood as referring only to circumstances where the creditor's actual practice (or, perhaps, its actual intent) is to use the 365/360 method." Dismissal Order at 6.

Plaintiffs' other arguments in support of reconsideration, including those in their reply brief filed on October 29, 2015, Dkt. No. 48, also fail to establish clear error or other grounds for reconsidering the Dismissal Order. Their motion is DENIED.

IT IS SO ORDERED.

Dated: October 30, 2015

WILLIAM H. ORRICK
United States District Judge

United States District Court
Northern District of California

EXHIBIT C

No. 15-17188

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KEVIN J. KEEN, TAMRA E. KEEN,
CURT CONYERS, KELLY E. CONYERS,
individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,
v.

JPMORGAN CHASE BANK NA,
a national banking association,
Defendant-Appellee.

On Appeal from the United States District Court
Northern District of California, No. 3:15-cv-01806-WHO
The Honorable William H. Orrick, III

DECLARATION OF JONATHAN S. MASSEY

Jonathan S. Massey
MASSEY & GAIL LLP
1325 G St., N.W., Suite 500
Washington, D.C. 20005
(202) 652-4511
jmassey@masseygail.com
Counsel for Appellee

DECLARATION OF JONATHAN S. MASSEY

1. I am an attorney admitted to the Bar of this Court representing Defendant-Appellee JPMorgan Chase Bank, N.A. ("Chase") in this action. I declare under penalty of perjury under the laws of the United States of America that the following is true and correct to the best of my knowledge and belief.

2. Attached as Exhibit 1 hereto is a true and correct copy of Chase's business records showing the Customer Account Activity Statement for Plaintiffs' loan from December 2015 to the present. The records show payments received by Chase on or about December 28, 2015 and zero principal balance thereafter. Entries on December 31, 2015 state: "Escrow refund." The amounts indicated are \$1,167.28 and \$0.19, for a total of \$1,167.47.

3. Attached as Exhibit 2 hereto is a true and correct copy of a check from Chase's business records showing a payment to Plaintiffs of \$1,167.47. The reverse side shows an endorsement and deposit.

4. Attached as Exhibit 3 hereto is a true and correct copy of a letter sent by Chase to Plaintiffs dated December 29, 2015. The letter states: "Congratulations on paying off your mortgage." "We'll send the lien release documents to your county recorder's office. You can use this letter to confirm that your mortgage has been paid off until the release is recorded."

Further declarant sayeth not.

Dated: June 13, 2016

Jon S Massey

Jonathan S. Massey

EXHIBIT 1

REQ BY SEM

CUSTOMER ACCOUNT ACTIVITY STATEMENT

DATE 06/13/16
PAGE 1

KEVIN J KEEN
TAMRA E KEEN
CURT CONYERS
[redacted]

LOAN NUMBER: [redacted]

****

------------------------- CURRENT ACCOUNT INFORMATION -------------------------

DATE PAYMENT DUE	TOTAL PAYMENT AMOUNT	PRINCIPAL & INTEREST PAYMENT	LOAN INTEREST RATE	CURRENT PRINCIPAL BALANCE	ESCROW BALANCE
01-01-16	1,105.94	0.00	5.12500	0.00	0.00
2ND MORTGAGE:		0.00	0.00000	0.00	

****

ACTIVITY FOR PERIOD 12/01/15 - 06/11/16

PROCESS DATE | DUE DATE | TRANSACTION CODE | TRANSACTION DESCRIPTION | EFFECTIVE DATE OF TRANSACTION

TRANSACTION AMOUNT | PRIN. PAID/ BALANCE | INTEREST | ESCROW PAID/ BALANCE | ------------OTHER------------ AMOUNT | CODE/DESCRIPTION

12-31-15 00-00 307 ESCROW REFUND
0.19- 0.00 0.00 0.19-
0.00 NEW PRINCIPAL/ESCROW BALANCES

12-31-15 01-16 160 INTEREST ON ESCROW DEPOSIT
0.19 0.00 0.00 0.19
0.19 NEW PRINCIPAL/ESCROW BALANCES

12-31-15 00-00 307 ESCROW REFUND
1,167.28- 0.00 0.00 1167.28-
0.00 NEW PRINCIPAL/ESCROW BALANCES

12-28-15 01-16 183
95.78 0.00 95.78 0.00

12-28-15 01-16 181
1,568.01 199,643.84 756.87 1167.28 199,999.98-
0.00 1167.28 NEW PRINCIPAL/ESCROW BALANCES

12-28-15 01-16 173 PAYMENT
99,999.99 0.00 0.00 0.00 99,999.99

12-28-15 01-16 173 PAYMENT
99,999.99 0.00 0.00 0.00 99,999.99

12-28-15 01-16 173 PAYMENT
37.00 0.00 0.00 0.00 37.00 4 RECORDING FEE

12-15-15 01-16 175 PRINCIPAL PAYMENT
44.06 44.06 0.00 0.00
199,643.84 NEW PRINCIPAL/ESCROW BALANCES

REQ BY SEM

CUSTOMER ACCOUNT ACTIVITY STATEMENT

DATE 06/13/16
PAGE 2

KEVIN J KEEN
LOAN NUMBER: [redacted]

ACTIVITY FOR PERIOD 12/01/15 - 06/11/16

PROCESS DATE	DUE DATE	TRANSACTION CODE	TRANSACTION DESCRIPTION			EFFECTIVE DATE OF TRANSACTION
TRANSACTION AMOUNT	PRIN. PAID/ BALANCE	INTEREST	ESCROW PAID/ BALANCE	OTHER AMOUNT	OTHER CODE/DESCRIPTION	
12-15-15	12-15	173	PAYMENT			
1,105.94	252.03	853.91	0.00			
	199,687.90				NEW PRINCIPAL/ESCROW BALANCES	

EXHIBIT 2

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J.P. Morgan ACCESS®

Whitney J. Hamilton [EDT] | Mobile Setup | Too

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HOME | REPORTS ▾ | CHECKS | More Services ▾

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CHECK DETAILS

Back

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JPMorgan Chase Bank, N.A.
Disbursement Clearing
For Various Mortgagors
3415 Vision Drive
Columbus, OH 43219

CHASE

JPMorgan Chase Bank, N.A.
Syracuse, NY

50-937-213

No. 8000079269

Date 1/29/2016

Void After 180 Days

AMOUNT $1,167.47

Pay Exactly 1,167.47

One Thousand One Hundred Sixty Seven Dollars and Forty Seven Cents

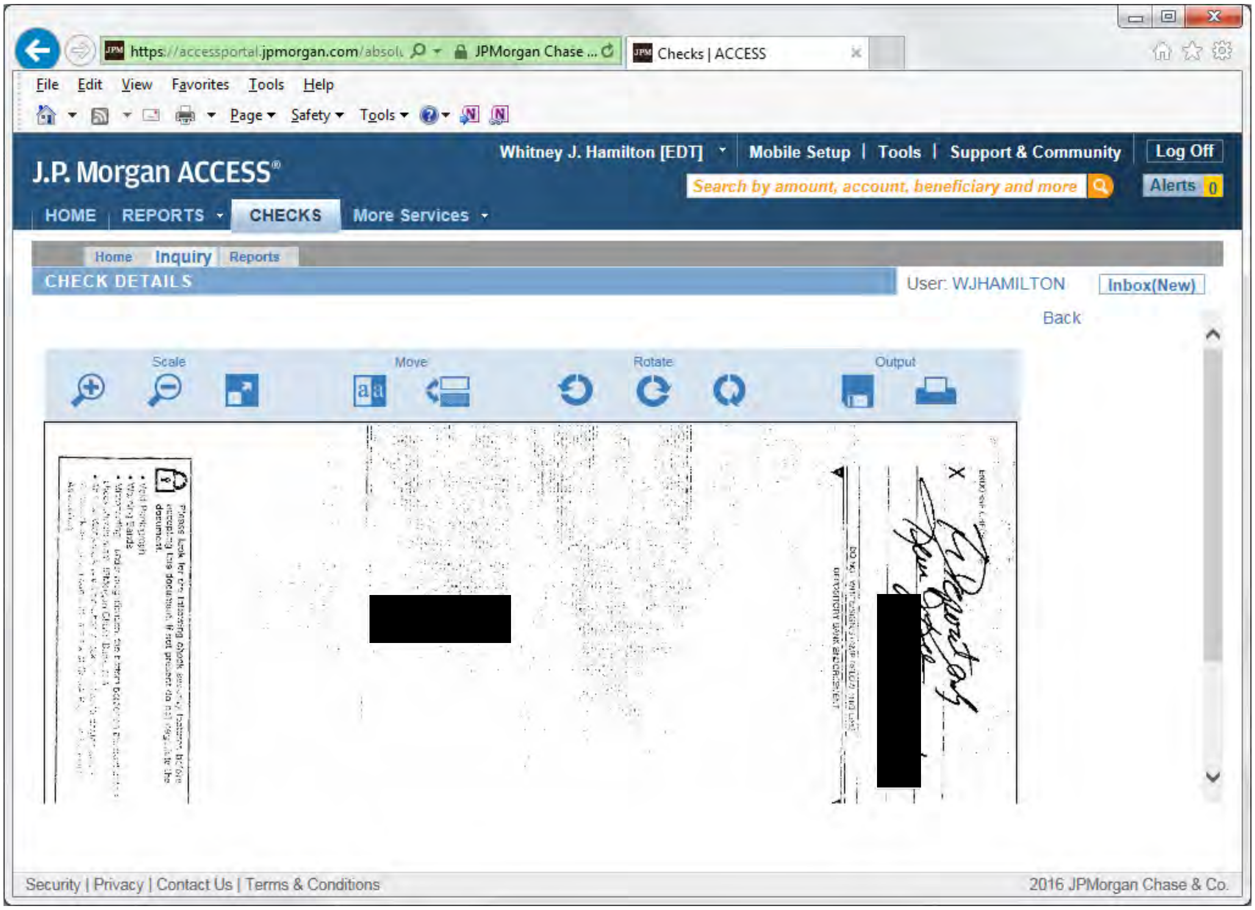
PAY TO THE ORDER OF KEVIN KEEN AND TAMRA KEEN [redacted]

AUTHORIZED SIGNATURE

[redacted]

Check/Serial#:8000079269 Account#: [redacted] Amount: 1,167.47

Check/ Issue Sequence Posted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J.P. Morgan ACCESS®
Whitney J. Hamilton [EDT]
Mobile Setup | Tools | Support & Community
Log Off
Search by amount, account, beneficiary and more
Alerts 0
HOME REPORTS CHECKS More Services
Home Inquiry Reports
CHECK DETAILS
User: WJHAMILTON
Inbox(New)
Back
Scale
Move
Rotate
Output
Security | Privacy | Contact Us | Terms & Conditions
2016 JPMorgan Chase & Co.

EXHIBIT 3

Chase
P.O. Box 183222
Columbus, OH 43218-3222

CHASE

December 29, 2015

004824 1 of 1 NSP0VYG - ZA 000000000000 CC789
Kevin J Keen
Tamra E Keen
Curt Conyers
[redacted]

Congratulations on paying off your mortgage

Account: [redacted]
Property Address: [redacted]

Dear Kevin J Keen, Tamra E Keen and Curt Conyers

Here's what you need to know about the payoff of your loan:

Overage Check
If we received more than we needed to pay off the loan, or if there's a positive escrow balance after payoff, we'll send a check to your mailing address above. You should receive the check no more than 10 days after paying off your mortgage.

Lien Release
We'll send the lien release documents to your county recorder's office. You can use this letter to confirm that your mortgage has been paid off until the release is recorded. Please contact your county recorder's office if you have any questions or want a copy of the lien release documents.

Escrow Account
If your mortgage had an escrow account, you're now responsible for paying your taxes, insurance, and/or other assessments, unless you have a new mortgage with an escrow account. Please ask your insurance agent and taxing authority to send all future bills to you.

Tax Statement
We'll send you your annual tax and interest statements, such as IRS Form 1098 (Mortgage Interest Statement), in January, if required by IRS regulations. Contact your tax advisor if you have questions about how this affects your tax return.

Relationship Pricing Discounts
If your mortgage contributed to any relationship pricing discounts with Chase, it will no longer be included in any relationship discount calculations.

If you have any questions, please call us at one of the numbers below.

Sincerely,

Chase
1-800-848-9136
1-800-582-0542 TTY
www.chase.com

Esta comunicaciÕn contiene informaciÕn importante acerca de la cuenta. Si tiene alguna pregunta o necesita ayuda para traducirla, comuníquese con nosotros llamando al 1-800-848-9136.

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