

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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5	ROBERT BARABINO,	)
6		)
7	Plaintiff,	) 2:09-cv-00086-GEB-KJM
8	v.	) <u>ORDER</u> *
9		)
10	CITIZENS AUTOMOBILE FINANCE, INC.,	)
11	a corporation; JP MORGAN CHASE	)
12	BANK, a corporation; and DOES ONE	)
13	THROUGH TWENTY,	)
14		)
15	Defendants.	)
16		)

Plaintiff Robert Barabino moves to lift the stay imposed in this action, arguing "the grounds [for] the contingencies upon which this Court ordered a stay have been met" since this action was stayed because it was related to an earlier filed action in this district assigned to another judge. Plaintiff contends there is no longer justification for the stay because a stipulated judgment has been entered in the other action against the Seller Defendant, and the remaining Defendants filed for bankruptcy protection. (Pl. ['s] Mot. at 1.) Defendant JP Morgan Chase Bank ("JP Morgan") opposes the motion, but argues if the stay is lifted, JP Morgan and Citizens Automobile Finance, Inc.'s ("Citizens") Federal Rule of Civil Procedure ("Rule") 12(b)(6) motions to dismiss filed in January 2009, should be granted since Plaintiff's claims are barred by applicable statute of limitations. (Def. ['s] Mot. at 2.) For the reasons that

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\* This matter was determined to be suitable for decision without oral argument. E.D. Cal. R. 78-230(h).

1 follow, Plaintiff's motion to lift the stay will be granted and the  
2 referenced fully briefed dismissal motions are considered.

3 On November 3, 2004, Plaintiff filed the earlier action  
4 ("Barabino I") against Dan Gamel, Inc., Fleetwood Enterprises, and  
5 Fleetwood Motor Homes of Pennsylvania, Inc., which is assigned to  
6 another judge in this district; that judge declined to relate Barabino  
7 I to the instant action ("Barabino II"). Plaintiff conceded that the  
8 claims filed in Barabino II should have been filed in Barabino I at  
9 the February 23, 2009 hearing scheduled in Barabino II on the above  
10 referenced dismissal motions. At that hearing, Plaintiff's counsel  
11 stated he filed Barabino II (which was removed from state court)  
12 because he did not think the Barabino I judge would have authorized  
13 him to amend his complaint in Barabino I to allege the allegations  
14 contained in Barabino II. Barabino II was filed November 28, 2008  
15 against JP Morgan and Citizens (collectively "Defendants").

16 Plaintiff alleges in Barabino II, under the Federal Trade  
17 Commission Holder Rule, 16 C.F.R. § 433.2, that Defendants as "holders  
18 of the consumer credit contract [, were] subject to all claims and  
19 defenses which the debtor could assert against the seller of goods or  
20 services obtained . . . ." (Compl. ¶ 16.) Plaintiff alleges that  
21 Defendants in Barabino II are subject to the same claims Plaintiff  
22 alleged against Dan Gamel, Inc., (the "Seller Defendant") in Barabino  
23 I because they are holders of the Retail Sales Installment Contract  
24 and are assignees of the Seller Defendant's rights under the Contract.  
25 (Pl. [ 's] Opp'n 7:13-14.)

26 On February 26, 2009, an Order issued in Barabino II denying  
27 each Defendant's dismissal motion without prejudice since it was  
28 evident that the claims in Barabino II should have been filed in

1 Barabino I and Plaintiff had no right to litigate Barabino II while  
2 Barabino I was still pending. (February 26, 2009 Order; relying on  
3 Adams v. California Dep't of Health Services, 487 F.3d 686, 688 (2007)  
4 ("Plaintiffs generally have no right to maintain two separate actions  
5 involving the same subject matter at the same time in the same  
6 [federal] court . . . .") .) Therefore, Barabino II was stayed pending  
7 resolution of Barabino I. (Id. at 5:13.)

8 The parties agree the claims against the Seller Defendant in  
9 Barabino I have resulted in a judgment in favor of Plaintiff. But JP  
10 Morgan contends Barabino I is still pending because Plaintiff has not  
11 complied with an order issued in Barabino I concerning the remaining  
12 Barabino I Defendants that filed for bankruptcy protection. In light  
13 of the status of Barabino I, the stay is lifted. Therefore, the  
14 Barabino II dismissal motions will be considered as requested.

15 Defendants argue Barabino II should be dismissed because  
16 Plaintiff's claims under the Song-Beverly Consumer Warranty Act, Cal.  
17 Civ. Code § 1790 et seq., the Magnuson-Moss Warranty Act, 15 U.S.C.  
18 §§ 2301-2312, the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code  
19 § 1750 et seq., and his common law fraud claim, are barred by the  
20 applicable statute of limitations. (JP Morgan ['s] Mot. to Dismiss at  
21 2; Citizens ['] Mot. to Dismiss at 2.) Plaintiff counters since he  
22 timely filed claims against the Seller Defendant in Barabino I, the  
23 Defendants in Barabino II are liable for allegations Plaintiff  
24 asserted against the seller in Barabino I, since the Barabino II  
25 Defendants are assignees of the credit contract that Plaintiff alleged  
26 in Barabino I should be rescinded. (Pl. ['s] Opp'n to JP Morgan ['s]  
27 Mot. to Dismiss at 8; Pl. ['s] Opp'n to Citizens ['] Mot. to Dismiss  
28 at 7.) The essence of Plaintiff's argument is that when he filed the

1 Barabino I case, that filing tolled the statute of limitations period  
2 for the claims in Barabino II. Specifically, Plaintiff relies on the  
3 Federal Trade Commission ("FTC") Holder Rule as his support for this  
4 argument, contending since the Barabino II Defendants are holders of  
5 the credit contract, a contract Plaintiff sought to have rescinded in  
6 Barabino I, the filing of Barabino I tolled all claims against the  
7 Barabino II Defendants. Plaintiff's reliance on the FTC's Holder Rule  
8 for his statute of limitations tolling argument is misplaced, as the  
9 FTC guidelines reveal:

10 [T]he Rule does not create new rights or defenses.  
11 The words 'Claims and Defenses' [in the Rule] . . .  
12 are not given any special definition by the [FTC].  
13 The phrase simply incorporates those things which,  
14 as a matter of other applicable law, constitute  
15 legally sufficient claims and defenses in a sales  
16 transaction. Appropriate statutes, decisions, and  
17 rules in each jurisdiction will control, and the  
18 pertinent rules of law and equity, including . . .  
19 statutes of limitations, will continue to apply.

20 Preservation of Consumers' Claims and Defenses, 40 Fed. Reg. 20,023-  
21 024 (May 14, 1976) (to be codified at 16 C.F.R. pt. 433). Therefore,  
22 the FTC Holder Rule does not toll any statute of limitations period  
23 applicable to a claim in Barabino II.

24 Defendants seek dismissal of Plaintiff's claims under the  
25 Song Beverly Consumer Warranty Act and the Magnuson-Moss Warranty Act,  
26 arguing each claim is barred by a four year statute of limitations  
27 period. (JP Morgan ['s] Mot. to Dismiss at 2; Citizens ['] Mot. to  
28 Dismiss at 2.) Since both Acts do not contain their own statute of  
limitations, "the court must borrow a limitation period from an  
analogous state limitations period." Lampf, Pleva, Lipkind, Prupis &  
Petigrow v. Gilbertson, 501 U.S. 350, 355 (1991). California Uniform  
Commercial Code § 2725 provides the most analogous statute of

1 limitations. Section 2725 prescribes "an action for breach of any  
2 contract for sale must be commenced within four years after the cause  
3 of action has accrued . . . [, which occurs] when the breach occurs,  
4 regardless of the aggrieved party's lack of knowledge of the breach."  
5 Since Plaintiff's claims under these Acts are based on a breach of  
6 warranty involved with Plaintiff's purchase of a recreational vehicle  
7 from the Seller Defendant in Barabino I, both Acts are governed by the  
8 four year limitations period in § 2725. Jensen v. BMW of North Am.,  
9 35 Cal. App. 4th 112, 132 (1995) (stating "[a]n action for damages  
10 under the [Song Beverly Consumer Warranty] Act is governed by the four  
11 year limitations period . . . [under] § 2725."); Mendelson v. Country  
12 Coach, Inc., 2007 U.S. Dist. LEXIS 96148 (C.D. Cal. 2007) (stating  
13 California applies the four year limitations period under § 2725 for  
14 claims brought under the Magnuson-Moss Warranty Act). Defendants  
15 argue since the breach of warranty about which Plaintiff complains in  
16 Barabino I is alleged to have occurred no later than November 3, 2004,  
17 the date on which Barabino I was filed, these claims alleged in  
18 Barabino II are barred by the four year statute of limitations period  
19 because Plaintiff waited until November 26, 2008 to file Barabino II.  
20 Defendants are correct. Therefore, this portion of each Defendant's  
21 motion to dismiss is granted.


22 Defendants also seek dismissal of Plaintiff's CLRA claim,  
23 arguing it is barred by the Act's three year statute of limitations  
24 prescribed in Cal. Civ. Code § 1783. (JP Morgan ['s] Mot. to Dismiss  
25 at 5; Citizens ['] Mot. to Dismiss at 2.) Section 1783 states "[a]ny  
26 action brought under the specific provisions of § 1770 shall be  
27 commenced not more than three years from the date of the commission of  
28 such method, act or practice." Plaintiff admits in paragraph 10 in

1 the Barabino II complaint that he filed the same CLRA claim against  
2 the Seller Defendant in Barabino I that he filed against the  
3 Defendants in Barabino II. This reveals Plaintiff had knowledge of  
4 the commission of the CLRA claim no later than November 3, 2004, the  
5 date on which Barabino I was filed. Therefore, the three year  
6 limitations period ran on November 3, 2007, more than one year before  
7 Plaintiff filed Barabino II, making this claim untimely. Accordingly,  
8 this portion of each Defendant's motion to dismiss is granted.

9 Finally, Defendants seek dismissal of Plaintiff's common-law  
10 fraud claim, arguing Cal. Code of Civ. Proc. § 338(d)'s three year  
11 statute of limitations bars this claim. (Mot. to Dismiss at 5;  
12 Citizens ['] Mot. to Dismiss at 2.) Section § 338(d) provides that a  
13 fraud claim accrues when the aggrieved party discovers facts  
14 constituting the fraud. See Cal. Code of Civ. Proc. § 338(d).  
15 Plaintiff admits in paragraph 10 in the Barabino II complaint that he  
16 filed the same fraud claim against the Seller Defendant in Barabino I  
17 that he filed against the Defendants in Barabino II. This reveals  
18 Plaintiff's discovery of the fraud and thus the accruing of the  
19 statute of limitations, occurred no later than November 3, 2004, the  
20 filing date of Barabino I. Having waited more than three years after  
21 discovering the fraud to file Barabino II on November 26, 2008, this  
22 portion of each Defendant's motion to dismiss is granted.

23 Since all claims have been dismissed, the Clerk of the Court  
24 shall enter judgment in favor of each Defendant and against Plaintiff.

25 Dated: August 11, 2009

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GARLAND E. BURRELL, JR.  
United States District Judge

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