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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

10 SAMUEL MAXWELL,

11 Plaintiff,

12 v.

13 UNION FIDELITY MORTGAGE, INC.,
14 ERIN REILLY, RANDOLPH MARTIN,
15 MORTGAGEIT, INC., AND DOES 1-20,
16 INCLUSIVE,

17 Defendants.

1:08-cv-001329 OWW SMS

MEMORANDUM DECISION AND
ORDER ON DEFENDANT
MORTGAGEIT, INC.'S MOTION TO
DISMISS, MOTION FOR A MORE
DEFINITE STATEMENT, AND
MOTION TO STRIKE (DOCS. 9
AND 10)

18 I. INTRODUCTION.

19 Plaintiff Samuel Maxwell's ("Maxwell") complaint arises out
20 of a home mortgage refinance transaction he contends he entered
21 into with Defendants Union Fidelity Mortgage, Inc., Erin Reilly,
22 and Randolph Martin ("Union Defendants") in June 2007 for
23 approximately \$358,000. The loan was subsequently purchased by
24 Defendant MortgageIT, Inc. ("MortgageIT"). Plaintiff alleges
25 Defendants failed to disclose and knowingly misrepresented key
26 terms of the loan, including the interest rate and finance
27 charges, in violation of the federal Truth in Lending Act
28 ("TILA"), 15 U.S.C. § 1601 et seq., and California's unfair

1 competition law ("UCL"), codified at California Business and
2 Professions Code § 17200 et seq. He also alleges state common
3 law supplemental claims solely against the Union Defendants:
4 breach of fiduciary duty, fraud, and financial abuse of an elder.

5 Before the court for decision are Defendant MortgageIT's
6 motion to dismiss, motion for a more definite statement, and
7 motion to strike. Defendant moves to dismiss Plaintiff's TILA
8 claim pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that the
9 complaint contains only general allegations that are insufficient
10 to state a TILA violation. In the alternative, Defendant moves
11 for a more definite statement pursuant to Fed. R. Civ. P. 12(e).
12 Defendant also moves to dismiss the UCL claim pursuant to Fed. R.
13 Civ. P. 12(b)(6). Finally, MortgageIT moves to strike
14 Plaintiff's TILA claim for rescission pursuant to Fed. R. Civ. P.
15 12(f) on the ground that Plaintiff has failed to first notify the
16 lender of his intent to rescind as required under the TILA.

17 18 II. FACTUAL AND PROCEDURAL BACKGROUND.

19 In June 2007, Plaintiff entered into a written loan contract
20 with Union Fidelity Mortgage, Inc. for \$358,000 secured by
21 Plaintiff's home in Fresno, California. Plaintiff alleges the
22 Union Defendants failed to make disclosures required under the
23 TILA, failed to provide Plaintiff with copies of the required
24 disclosures, and misrepresented the terms of the loan, including
25 the interest rate, finance charges, and total amount financed.
26 Plaintiff asserts that the Union Defendants falsely represented
27 that the loan would be in his best interests, that the payments
28 would be affordable for him, and that he would be better off

1 financially as a result. Instead, Plaintiff contends the loan
2 caused him financial detriment and was beyond his ability to pay,
3 putting him in danger of losing his house and causing him
4 considerable emotional distress.

5 Plaintiff filed his complaint in the Superior Court of
6 California, County of Fresno, on May 6, 2008. (Doc. 5-2.)
7 Defendant MortgageIT was served on August 5, 2008 and removed the
8 action to federal court on September 5, 2008. (Doc. 5.) On
9 September 11, 2008, Defendant MortgageIT filed a motion to
10 dismiss under Fed. R. Civ. P. 12(b)(6), a motion for a more
11 definite statement pursuant to Fed. R. Civ. P. 12(e), and a
12 motion to strike pursuant to Fed. R. Civ. P. 12(f). (Docs. 9 &
13 10.) Plaintiff filed oppositions to all the motions on November
14 7, 2008. (Docs. 13 & 14.) MortgageIT filed its reply briefs on
15 November 17, 2008. (Docs. 15 & 16.)

16
17 III. LEGAL STANDARD.

18 A. Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6).

19 A motion to dismiss under Rule 12(b)(6) tests the legal
20 sufficiency of the complaint. *Novarro v. Black*, 250 F.3d 729,
21 732 (9th Cir. 2001). While a complaint attacked by a Rule
22 12(b)(6) motion to dismiss does not need detailed factual
23 allegations, it is required to contain "more than labels and
24 conclusions, and a formulaic recitation of the elements of a
25 cause of action will not do. Factual allegations must be enough
26 to raise a right to relief above the speculative level, on the
27 assumption that all the allegations in the complaint are true
28 (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550

1 U.S. 544, 127 S.Ct. 1955, 1964-65 (2007); see also *Gilligan v.*
2 *Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (issue is not
3 whether plaintiff will ultimately prevail, but whether claimant
4 is entitled to offer evidence to support the claim). Dismissal
5 is warranted under Rule 12(b)(6) where the complaint lacks a
6 cognizable legal theory or where the complaint presents a
7 cognizable legal theory yet fails to plead essential facts under
8 that theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d
9 530, 534 (9th Cir. 1984). In deciding a motion to dismiss, the
10 court accepts as true all material factual allegations in the
11 complaint and construes them in the light most favorable to the
12 plaintiff. See *Newman v. Sathyavaglswaran*, 287 F.3d 786, 788
13 (9th Cir. 2002).

14 The court need not accept as true allegations that
15 contradict facts which may be judicially noticed. See *Mullis v.*
16 *United States Bankruptcy Ct.*, 828 F.2d 1385, 1388 (9th Cir.
17 1987). For example, matters of public record may be considered,
18 including pleadings, orders, and other papers filed with the
19 court or records of administrative bodies, see *Mack v. South Bay*
20 *Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986),
21 while conclusions of law, conclusory allegations, unreasonable
22 inferences, or unwarranted deductions of fact need not be
23 accepted. See *Sprewell v. Golden State Warriors*, 266 F.3d 979,
24 988 (9th Cir. 2001); see also *Branch v. Tunnell*, 14 F.3d 449, 453
25 (9th Cir. 1994) ("[A] document is not 'outside' the complaint if
26 the complaint specifically refers to the document and if its
27 authenticity is not questioned."). Allegations in the complaint
28 may be disregarded if contradicted by facts established by

1 exhibits attached to the complaint. *Sprewell*, 266 F.3d at 988.
2 Thus when ruling on a motion to dismiss, the court may consider
3 facts alleged in the complaint, documents attached to the
4 complaint, documents relied upon but not attached to the
5 complaint when authenticity is not contested, and matters of
6 which the court may take judicial notice. *Parrino v. FHP, Inc.*,
7 146 F.3d 699, 705-06 (9th Cir. 1988).

8
9 B. Motion for a More Definite Statement Pursuant to Fed. R.
10 Civ. P. 12(e).

11 Federal Rule of Civil Procedure 12(e) provides:

12 A party may move for a more definite statement of a
13 pleading to which a responsive pleading is allowed but
14 which is so vague or ambiguous that the party cannot
15 reasonably prepare a response. The motion must be made
16 before filing a responsive pleading and must point out
17 the defects complained of and the details desired. If
18 the court orders a more definite statement and the
19 order is not obeyed within 10 days after notice of the
20 order or within the time the court sets, the court may
21 strike the pleading or issue any other appropriate
22 order.

23 A Rule 12(e) motion for a more definite statement must be
24 considered in light of the liberal pleading standards of Rule
25 8(a) in federal court. See *Bureerong v. Uvawas*, 922 F.Supp.
26 1450, 1461 (C.D. Cal. 1996) (citing *Sagan v. Apple Computer,*
27 *Inc.*, 874 F.Supp. 1072, 1077 (C.D. Cal. 1994)) ("Motions for a
28 more definite statement are viewed with disfavor and are rarely
granted because of the minimal pleading requirements of the
Federal Rules."). Under the liberal pleading standards,
"pleadings in the federal courts are only required to fairly
notify the opposing party of the nature of the claim." *A.G.*
Edwards & Sons, Inc. v. Smith, 736 F.Supp. 1030, 1032 (D. Ariz.

1 1989) .

2 A Rule 12(e) motion is proper only if the complaint is so
3 indefinite that the defendant cannot ascertain the nature of the
4 claim being asserted, meaning the complaint is so vague that the
5 defendant cannot begin to frame a response. See *Famolare, Inc.*
6 *v. Edison Bros. Stores, Inc.*, 525 F.Supp. 940, 949 (E.D. Cal.
7 1981); *Boxall v. Sequoia Union High Sch. Dist.*, 464 F.Supp. 1104,
8 1114 (N.D. Cal. 1979). The motion must be denied if the
9 complaint is specific enough to notify defendant of the substance
10 of the claim being asserted. *San Bernardino Pub. Employees Ass'n*
11 *v. Stout*, 946 F.Supp. 790, 804 (C.D. Cal. 1996) ("A motion for a
12 more definite statement is used to attack unintelligibility, not
13 mere lack of detail, and a complaint is sufficient if it is
14 specific enough to apprise the defendant of the substance of the
15 claim asserted against him or her."). The motion should be
16 denied if the detail sought by a motion for more definite
17 statement is obtainable through discovery. *Davison v. Santa*
18 *Barbara High Sch. Dist.*, 48 F.Supp.2d 1225, 1228 (C.D. Cal.
19 1998) .

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21 C. Motion to Strike Pursuant to Fed. R. Civ. P. 12(f) .

22 Rule 12(f) provides that "redundant, immaterial,
23 impertinent, or scandalous matter" may be stricken from any
24 pleading. Fed. R. Civ. P. 12(f). A motion to strike is limited
25 to pleadings. *Sidney-Vinstei n v. A.H. Robins Co.*, 697 F.2d 880,
26 885 (9th Cir. 1983). Motions to strike are disfavored and
27 infrequently granted. *Pease & Curren Refining, Inc. v.*
28 *Spectrolab, Inc.*, 744 F.Supp. 945, 947 (C.D. Cal. 1990) ,

1 *abrogated on other grounds by Stanton Road Assocs. v. Lohrey*
2 *Enters.*, 984 F.2d 1015 (9th Cir. 1993). Such motions should be
3 granted only where it can be shown that none of the evidence in
4 support of the allegation is admissible. *Id.*

5
6 IV. DISCUSSION.

7 A. Motion to Dismiss the TILA Claim, Or Alternatively, Motion
8 for a More Definite Statement.

9 1. Overview of the TILA

10 The purpose of the TILA is to protect consumers by providing
11 them with accurate information when they shop for credit. See
12 *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219-20 (1981).
13 Specifically, the TILA was enacted to "assure a meaningful
14 disclosure of credit terms so that the consumer will be able to
15 compare more readily the various credit terms available to him
16 and avoid the uninformed use of credit, and to protect the
17 consumer against inaccurate and unfair credit billing and credit
18 card practices." 15 U.S.C. § 1601(a). The Act requires creditors
19 to make "clear and accurate disclosures of terms dealing with
20 things like finance charges, annual percentage rates of interest,
21 and the borrower's rights." *Beach v. Ocwen Fed. Bank*, 523 U.S.
22 410, 412 (1998). If the creditor fails to do so, it can be held
23 liable for criminal penalties, see 15 U.S.C. § 1611, and
24 statutory and actual damages (including a statutory penalty of
25 twice the finance charge), see 15 U.S.C. § 1640(a). *Beach*, 523
26 U.S. at 412. For certain loan transactions - those involving
27 security interests in a debtor's primary residence - the debtor
28 can also demand that the creditor rescind the mortgage if certain

1 material disclosures are not made. See 15 U.S.C. § 1635(a).

2 The TILA "reflects a transition in congressional policy from
3 a philosophy of 'Let the buyer beware' to one of 'Let the seller
4 disclose.'" *Mourning v. Family Publications Serv., Inc.*, 411
5 U.S. 356, 377 (1973). Congress "delegated expansive authority to
6 the Federal Reserve Board to elaborate and expand the legal
7 framework governing commerce in credit" and the Board has
8 exercised its authority by promulgating Regulation Z, set forth
9 at 12 C.F.R. § 226 et seq. *Ford Motor Credit Co. v. Milhollin*,
10 444 U.S. 555, 559-60 (1980).

11 2. Plaintiff's TILA Allegations

12 Defendant argues that the complaint contains only general
13 allegations with respect to the TILA claim and that it fails to
14 identify the specific disclosures Defendants failed to make or
15 explain how Defendants' conduct violated the TILA.
16

17 In his complaint, Plaintiff alleges that the Union
18 Defendants told him he would receive an interest rate of 1% for
19 five years, that the loan would save him \$12,900 per year, and
20 that the loan was affordable for him. (Doc. 5-2, Complaint at
21 ¶10.) He asserts that the loan "included charges that were not
22 disclosed to Plaintiff, had an interest rate significantly higher
23 than the rate which he was promised, was and is actually beyond
24 Plaintiff's means to pay, which was hidden from him by their
25 misleading statements and misrepresentations as to the amounts he
26 would need to pay under the loan." (*Id.* at ¶11.) He also
27 asserts that MortgageIT purchased the loan while the deficiencies
28 and falsity of the "disclosures were readily apparent on the face

1 of the loan documents." (*Id.* at ¶12.)

2 In his First Cause of Action, Plaintiff alleges:

3 Defendants violated the provisions of the Federal Truth
4 in Lending Act and Regulation Z under that Act in
5 relation to the above described transaction by failing
6 to make required disclosures, including but not limited
7 to disclosures related to the finance charges, charging
8 excessive fees, entering into the contract without a
9 good faith belief that Plaintiff could make the
10 required payments, and Defendants also violated the
11 Federal Truth in Lending Act and Regulation Z by
12 failing to provide Plaintiff with copies of the
13 required disclosures and committing other acts
14 according to proof. Said violations are apparent on
15 the face of the loan documents. Among other things,
16 the truth in lending disclosure statement stated that
17 the interest rate was only 2.321% and that the total
18 finance charges would be less than \$190,000.00. In
19 reality, the interest rate on the loan was
20 approximately 9.9% and the finance charges to be paid
21 are actually several hundred thousand dollars more than
22 the amount disclosed.

23 (Doc. 5-2, Complaint at ¶16.)

24 Under the TILA, the material terms that must be disclosed by
25 the creditor include the finance charge, the annual percentage
26 rate, the amount financed, an itemization of the amount financed,
27 the total payments, among others. 15 U.S.C. § 1638(a); 12 C.F.R.
28 § 226.18. Regulation Z requires that these disclosures must
properly "reflect the terms of the legal obligation between the
parties." 12 C.F.R. § 226.17(c)(1). In other words, TILA
disclosures must be accurate. *Beach*, 523 U.S. at 412
("Accordingly, the [Truth in Lending] Act requires creditors to
provide borrowers with *clear and accurate disclosures* of terms
dealing with things like finance charges, annual percentage rates
of interest, and the borrower's rights.") (emphasis added); see
Goldman v. First Nat'l Bank of Chicago, 532 F.2d 10, 22 (7th Cir.

1 1976) ("Congress clearly sought to compel accurate
2 disclosure..."); *In re Cox*, 114 B.R. 165, 168 (Bankr. C.D. Ill.
3 1990) ("A meaningful disclosure cannot be one which is
4 inaccurate.").

5 Plaintiff has alleged that the interest rate listed in the
6 truth in lending disclosure statement was inaccurate, as was the
7 finance charge total. He asserts that the interest rate and
8 finance charges he actually incurred under the loan were much
9 higher than those listed in the disclosure statement. In
10 addition, Plaintiff contends the Defendants inaccurately
11 disclosed the total payment amount due under the loan. He also
12 claims other charges were not disclosed to him and that Union
13 failed to provide him copies of the required disclosures as
14 mandated by the TILA.

15 Federal Rule of Civil Procedure 8(a) requires that a
16 pleading set forth a short and plain statement of the claim
17 showing that the pleader is entitled to relief. Under this rule,
18 a pleading must give fair notice and state the elements of the
19 claim plainly and succinctly. *Jones v. Cmty. Redevelopment*
20 *Agency*, 733 F.2d 646, 649 (9th Cir. 1984). MortgageIT argues
21 that Plaintiff's complaint fails to include specific allegations
22 and descriptions as to Defendants' allegedly unlawful acts, but
23 the law does not require that TILA claims be stated with
24 particularity. A review of Ninth Circuit authority did not
25 reveal any caselaw imposing the specificity requirements of Fed.
26 R. Civ. P. 9(b) with respect to TILA claims.

27 Allegations of inaccurate disclosures under the TILA are
28

1 sufficient to survive a motion to dismiss. See *Staley v.*
2 *Americorp Credit Corp.*, 164 F.Supp.2d 578, 583 (D. Md. 2001)
3 (allegations of inaccurate finance charges and APR sufficient to
4 state a claim for relief); *Swanagan v. Al Piemonte Ford Sales,*
5 *Inc.*, No. 94 C 4070, 1995 WL 493480, at *4 (N.D. Ill. August 15,
6 1995). Plaintiff has alleged the disclosures with respect to
7 finance charges, total payment amount, and interest rate were
8 inaccurate, and that the proper notices were not provided to him
9 by the lender. He details the specific percentage rate that was
10 disclosed to him and what he alleges was the actual effective
11 rate. Plaintiff's allegations give fair notice to Defendants of
12 his claim and provide sufficient detail to allow Defendants to
13 respond to the claim. Moreover, the facts as alleged are not "so
14 vague or ambiguous that the party cannot reasonably prepare a
15 response." See Fed. R. Civ. P. 12(e). If Plaintiff has
16 additional claims under the TILA and fails to disclose them in
17 discovery, they will be barred.

18 Accordingly, Defendant's motion to dismiss the TILA claim is
19 DENIED. Defendant's motion for a more definite statement is also
20 DENIED.

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23 B. Motion to Dismiss the UCL Claim.

24 The UCL prohibits "unfair competition," which is defined as
25 including "any unlawful, unfair or fraudulent business act or
26 practice and unfair, deceptive, untrue or misleading advertising
27 and any act prohibited by [California's false advertising law]."
28 Cal. Bus. & Prof. Code § 17200. The purpose of the UCL is "to

1 protect both consumers and competitors by promoting fair
2 competition in commercial markets for goods and services." *Kasky*
3 *v. Nike, Inc.*, 27 Cal.4th 939, 949 (2002). The scope of the UCL
4 is broad. The UCL covers "anything that can properly be called a
5 business practice and that at the same time is forbidden by law."
6 *Cel-Tech Communications, Inc. v. L.A. Cellular Tel. Co.*, 20
7 Cal.4th 163, 180 (1999). It "borrows" violations from other laws
8 by making them independently actionable as unfair competitive
9 practices. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th
10 1134, 1143 (2003). Additionally, "a practice may be deemed
11 unfair even if not specifically proscribed by some other law."
12 *Cel-Tech*, 20 Cal.4th at 180. Because the UCL "is written in the
13 disjunctive, it establishes three varieties of unfair competition
14 - acts or practices which are unlawful, or unfair, or
15 fraudulent." *Id.* The state legislature "intended by this
16 sweeping language to permit tribunals to enjoin on-going wrongful
17 business conduct in whatever context such activity might occur."
18 *Barquis v. Merchants Collection Ass'n*, 7 Cal.3d 94, 111 (1972).

19 Plaintiff states in his complaint that the "actions alleged
20 herein undertaken by defendants constituted unlawful, unfair and
21 fraudulent business acts or practices and portions of that
22 conduct was based on unfair, deceptive and misleading advertising
23 and/or promotional materials." (Doc. 5-2, Complaint at ¶38.)
24 First, Defendant argues that Plaintiff's failure to plead his UCL
25 claim with reasonable particularity supports dismissal of the
26 claim, citing *Khoury v. Maly's of California, Inc.*, 14
27 Cal.App.4th 612 (1993). In *Khoury*, a California appeals court
28

1 upheld dismissal of a UCL claim where the complaint failed "to
2 describe with any reasonable particularity the facts supporting
3 violation." 14 Cal.App.4th at 619. The complaint summarily
4 alleged, "Defendants breached this statute by refusing to sell
5 [products] to plaintiff, for the purpose of ruining and
6 interfering with his beauty and supply business, with the effect
7 of misleading plaintiff's customers." *Id.* The appeals court
8 reasoned that the facts asserted did not "explain the manner of
9 misleading appellant's customers. The complaint does not
10 describe the manner in which respondent's practice is
11 'unlawful.'" *Id.* (citations omitted).

12 The instant complaint is unlike that dismissed in *Khoury*.
13 Plaintiff explains the manner in which he was allegedly misled,
14 stating that the interest rate, finance charges, and other
15 charges under the loan were misrepresented to him and
16 inaccurately disclosed. Moreover, he asserts that Defendants'
17 actions and practices were unlawful under TILA and state common
18 law. Plaintiff's UCL claim is sufficiently detailed that
19 dismissal is not proper on this ground.

20 Next, Defendant argues that because Plaintiff's factual
21 allegations are insufficient to state a TILA claim, the UCL claim
22 also fails because it is a derivative claim that requires
23 violation of some other law. Because the TILA claim should be
24 dismissed, according to Defendant, the UCL claim should also be
25 dismissed. As an initial matter, Defendant's position ignores
26 the other common law claims Plaintiff alleges, which are not the
27 subject of the motion to dismiss. Even if the TILA claim did not
28

1 survive, these remaining claims could form the basis of a
2 derivative UCL claim and thus dismissal on this ground is
3 premature. Moreover, as detailed above, Plaintiff's allegations
4 that Defendants made inaccurate disclosures under the TILA are
5 sufficient to state a claim for relief under the TILA.
6 Accordingly, Plaintiff's TILA claim and state common law claims
7 for breach of fiduciary duty, fraud, and financial abuse of an
8 elder allege unlawful practices which form the predicate for a
9 UCL claim. Defendant's motion to dismiss Plaintiff's UCL claim
10 is DENIED.

11
12 C. Motion to Strike.

13 To seek rescission under the TILA, a plaintiff must notify
14 the creditor of his or her intent to rescind in writing and
15 provide the creditor an opportunity to respond prior to filing a
16 lawsuit. The TILA notice requirements provide:

17 [t]he obligor shall have the right to rescind the
18 transaction until midnight of the third business day
19 following the consummation of the transaction or the
20 delivery of the information and rescission forms
21 required under this section together with a statement
22 containing the material disclosures required under this
23 subchapter, whichever is later, by notifying the
24 creditor, in accordance with regulations of the Board,
25 of his intention to do so. The creditor shall clearly
26 and conspicuously disclose, in accordance with
27 regulations of the Board, to any obligor in a
28 transaction subject to this section the rights of the
obligor under this section...Within 20 days after
receipt of a notice of rescission, the creditor shall
return to the obligor any money or property given as
earnest money, downpayment, or otherwise, and shall
take any action necessary or appropriate to reflect the
termination of any security interest created under the
transaction.

15 U.S.C. §§ 1635(a)-(b). The TILA's implementing regulations

1 specify how a plaintiff gives notice:

2 To exercise the right to rescind, the consumer shall
3 notify the creditor of the rescission by mail, telegram
4 or other means of written communication. Notice is
5 considered given when mailed, when filed for
6 telegraphic transmission or, if sent by other means,
7 when delivered to the creditor's designated place of
8 business.

9 12 C.F.R. § 226.23(a) (2) .

10 The First Circuit succinctly summarized the rescission
11 process:

12 The rescission process is intended to be private, with
13 the creditor and debtor working out the logistics of a
14 given rescission. Not all debtors who suspect (or know)
15 that they have been subjected to a TILA violation will
16 choose to rescind, in large part because rescission
17 entails the return of loan proceeds to the creditor.
18 If, however, a debtor elects to rescind, the mechanics
19 of rescission are uncomplicated: the debtor notifies
20 the creditor in writing of his or her desire to
21 rescind, and the creditor must respond to that election
22 within twenty days. During this response period, the
23 creditor may comply with the request, resist rescission
24 entirely, or agree to rescission while seeking
25 equitable modifications. Should disagreements ensue or
26 problems arise, either party may repair to a federal
27 court.

28 *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 421-422
(1st Cir. 2007).

Plaintiff alleges as to his rescission claim in the First
Cause of Action: "In addition, Plaintiff is entitled to rescind
the loan transaction if he so opts." (Doc. 5-2, Complaint at
¶19.) In his prayer for relief as to the TILA claim, he prays
"[f]or a judicial declaration that the loan transaction is
rescinded if Plaintiff so opts." (*Id.* at page 9, line 27.)

Defendant argues this language should be stricken from the

1 complaint because Plaintiff has not notified the creditor of his
2 intent to rescind as required under the TILA. Plaintiff does not
3 dispute this lack of notice. Instead, he asserts, "Plaintiff is
4 not seeking rescission at this time, but, as alleged, he is
5 entitled to do so." (Doc. 14, Opposition at 2.) The TILA
6 provides a three-year window "after the date of consummation of
7 the transaction" for a consumer to exercise the right to rescind.
8 15 U.S.C. § 1635(f). Plaintiff argues that the rescission claim
9 should not be stricken as he is within this three-year window and
10 may choose to seek rescission at some future date.

11 Plaintiff cannot set forth a "tentative claim" for
12 rescission under the TILA, which requires formal notice, to
13 retain an "option" to seek rescission at some undetermined date
14 in the future. Should Plaintiff decide to seek rescission, he
15 may seek leave to file an amended complaint. Because Plaintiff
16 states that he does not seek rescission under the TILA at this
17 time, the language in his complaint related to rescission is
18 "immaterial" and is properly stricken.

19 Defendant's motion to strike is GRANTED. Plaintiff's claim
20 for rescission under the TILA set forth in his complaint at
21 Paragraph 19 and Page 9, Line 27 is STRICKEN.
22
23

24 V. CONCLUSION.

25 For the foregoing reasons, Defendant MortgageIT's:

- 26 1) motion to dismiss Plaintiff's TILA and UCL claims is DENIED;
27 2) motion for a more definite statement is DENIED;
28

1 3) motion to strike is GRANTED.

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4 IT IS SO ORDERED.

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6 Dated: February 18, 2009

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE